The Honorable Joseph R. Biden, Jr.
The Honorable Strom Thurmond
Senate Judiciary Committee
Washington, D.C. 20510

Dear Senators Biden and Thurmond:

As law school deans, teachers of law, and citizens vitally interested in constitutional and civil rights, we are writing to express our serious concerns about the nomination of Clarence Thomas to be an Associate Justice of the United States Supreme Court. Judge Thomas, in our view, lacks the experience, the commitment to fundamental constitutional rights and liberties, and the respect for law which are necessary prerequisites for elevation to this important position.

A decision to oppose confirmation of a nominee to the Supreme Court is never an easy one to reach. Judge Thomas has a compelling personal history of overcoming poverty and discrimination. He is only the second member of a racial minority group ever to be nominated to the Supreme Court, an institution where diversity of membership is significant. These factors, however, cannot qualify him for a lifetime seat on the most important Court in the land in light of the serious problems evident in his record and his philosophy.

Former Solicitor General Erwin Griswold recently commented that in replacing Thurgood Marshall on the Court, the President "should have come up with a first-class lawyer, of wide reputation and experience," but "that, it seems to me obvious, he did not do." Dean Griswold noted that Judge Thomas "has no breadth of experience at all." Indeed, Judge Thomas has been on the Court of Appeals for only 18 months. He does not have extensive experience as a practicing lawyer in the federal courts, where he has never argued a case, or as a legal scholar who has researched and taught concerning constitutional and legal issues. Prior to his appointment to the court, Judge Thomas' experience consisted almost exclusively of serving as director of the Office for Civil Rights (OCR) of the Department of Education and the Equal Employment Opportunity Commission (EEOC). Far from supporting his qualifications for the Court, however, that experience raises troubling concerns about his commitment to the rule of law and to civil rights protections for all Americans.

For example, while at OCR during 1981-82, Judge Thomas admitted in federal court that he was violating "rather grievously" a court order governing the processing of civil rights cases. At EEOC, he allowed over 13,000 age discrimination cases to lapse by failing to act on complaints filed with the agency. A federal court found in 1987 that his failure to act with respect to pension rights of older Americans was "entirely unjustified and unlawful" and "at worst deceptive to the public." Also at EEOC, he sought to abandon affirmative remedies for job discrimination that had been provided by Congress and upheld by

the courts, first by claiming that the change was dictated by the Supreme Court's decision in the Stotts case and then, when that claim was demonstrated to be erroneous, by stating his "personal disagreement" with such remedies. Indeed, fourteen members of Congress, including 12 chairs of committees with oversight responsibility over EEOC, concluded in 1989 that Judge Thomas'"questionable enforcement record" at EEOC "frustrates the intent and purpose" of Congressional civil rights legislation and that he had demonstrated an "overall disdain for the rule of law."

In a series of articles and speeches over the past decade, moreover, Judge Thomas has expressed a deep hostility towards key Supreme Court precedents protecting fundamental individual rights and upholding Congressional authority in our constitutional system. At the same time, he has espoused a judicial philosophy based on "natural law" that provides no reliable anchor for constitutional adjudication and that could result in dramatic reversals of important Court precedents.

One important manifestation of the nominee's hostility towards fundamental rights has been his sharp criticism of a series of Court decisions implementing the school desegregation requirements of the Supreme Court's landmark decision in Brown v. Board of Education and of other Court decisions upholding the use of race-conscious remedies where necessary to remedy job bias and its effects. He has attacked a number of such precedents not simply as wrong, but as "egregious" or "disastrous." Indeed, he has specifically urged the overruling of the Court's decision in Johnson v. Transportation Agency, commenting that he hoped that the dissent in the case would "provide guidance for the lower courts and a possible majority in future decisions."

With respect to the right of privacy, Judge Thomas has criticized the Court's landmark decision in Griswold v. Connecticut, in which the Court struck down a Connecticut law banning the sale of contraceptives. In particular, he has attacked opinions in Griswold which relied upon the Ninth Amendment as a basis for the right of privacy, claiming that the decision represented the improper "invention" of the Ninth Amendment which would "likely become an additional weapon for the enemies of freedom."

At the same time that he has attacked the use of the Ninth Amendment as a basis for recognizing unenumerated rights implicit in the Constitution, however, Judge Thomas has espoused a "natural law" philosophy which claims that there are fixed objective truths derivable from higher law that somehow override the Constitution or other written law. The dangers of such a philosophy were illustrated during the Lochner era over 50 years ago, when a majority of the Supreme Court used it to invalidate minimum wage laws and health and safety regulations and to uphold such practices as excluding women from the practice of law. Since that time, courts and scholars have thoroughly repudiated this

brand of constitutional decision-making.

Unfortunately, Judge Thomas' writings suggest that his "natural law" views are much more than simply abstract philosophy. He has asserted that the Supreme Court is justified in overturning the decisions of "run-amok majorities" as long as it adheres to natural law. Judge Thomas strongly endorsed an article that condemned Roe v. Wade on grounds that natural law requires the outlawing of abortion, calling the article a "splendid example of applying natural law." He co-authored a 1986 report that not only sharply criticized Roe, but also attacked other Court decisions protecting privacy rights by invalidating laws which forbade unmarried people from using contraceptives and prohibited a grandmother from living in extended family fashion with her son and grandsons. The report specifically noted that such "fatally flawed" decisions could be "corrected" by "the appointment of new judges and their confirmation by the Senate."

Our concerns about Judge Thomas are strongly reinforced by the persistent and vehement attack on legislative authority in his speeches and writings. Recently, he assailed the Supreme Court's near-unanimous decision upholding the authority of Congress to appoint special prosecutors to investigate charges of serious misconduct by executive branch officials. Judge Thomas claimed that Justice Rehnquist's opinion for the Court "failed not only conservatives but all Americans." Similarly, he has severely criticized Court precedent in Fullilove v. Klutznick upholding Congressional authority to enact legislation to remedy past discrimination. These views correspond all too closely with his harsh criticism and personal failure to cooperate with Congress in its execution of its oversight responsibilities over the EEOC, indicating a clear lack of respect for the legislative branch. For a potential Supreme Court justice charged with faithfully interpreting Congressional legislation and determining Congress' authority in our constitutional system, such views and actions are extremely troubling.

We do not contend that there are no respectable arguments to be mustered for some of the positions that Judge Thomas defends. Overall, however, his clear hostility to judicial protection for fundamental constitutional and civil rights and to Congressional authority is extremely troubling. This is particularly true with respect to the current Court, on which several members have already expressed interest in overruling prior Court precedents protecting individual liberty and mounting what Justice Marshall, in his final dissent on the Court, called a "far-reaching assault" on the Bill of Rights. Based on his record and his clearly expressed philosophy and beliefs, we are concerned that Judge Thomas would join in such a dangerous attack on our rights and liberties.

We urge you and the other members of the Senate to examine closely the record on Judge Thomas, particularly the findings of

federal judges and Congressional committee chairs concerning how the nominee has performed his responsibilities. If you and other Senators conclude, as we have, that the nominee lacks the experience, the commitment to fundamental constitutional values, and the respect for the rule of law necessary, we urge you to fulfill your constitutional responsibility to withhold the consent of the Senate to the nomination.

Sincerely yours,

CONSTITUTIONAL LAW PROFESSORS AND LAW SCHOOL DEANS IN OPPOSITION TO THE THOMAS NOMINATION:

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Frank Askin	Professor	Rutgers Univ.
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* Indicates visiting professorship at second school listed.