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August 29, 1991

Senator Joseph Biden
Chairperson
Senate Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Dear Senator Biden:

The Instituto Puertorriqueño de Derechos Civiles (Puerto Rican Institute for Civil Rights) is a non-profit Puerto Rico-based civil and human rights organization which conducts litigation in federal and local courts. We respectfully request that the attached position paper, "Opposition to the Nomination of Judge Clarence Thomas to the Supreme Court of the United States," be entered into the record during the upcoming hearings in September.

For your information I am also enclosing a statement we presented before the Energy Committee of the Congress in June of 1989 concerning the proposed plebiscite vote. The introduction of this statement will give you a better idea of who we are and what we do.

We would appreciate, at your earliest convenience, confirmation of your having received the attached position paper and also of its inclusion into the official record. Thank you for your time and consideration.

Sincerely,

Ralph Rivera
General Coordinator

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OPPOSITION TO THE NOMINATION
OF JUDGE CLARENCE THOMAS
TO THE SUPREME COURT OF THE UNITED STATES

22 July 1991

"Trabajando porque tus derechos se respeten"

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INTRODUCTION

As an organization formed to defend, preserve and expand civil rights and liberties in Puerto Rico, the Puerto Rican Institute of Civil Rights (Instituto Puertorriqueño de Derechos Civiles) opposes the nomination of Judge Clarence Thomas to the Supreme Court of the United States.

For the Puerto Rican people, the selection of a U.S. Supreme Court Justice is of considerable importance. Over two million Puerto Ricans reside in the United States, of which close to 34% live below the poverty level. Although U.S. citizens, Puerto Ricans are often the victims of widespread and deeply rooted discrimination and are in particular need of a Supreme Court that will be responsive to their plight.

The U.S. judicial system arrived with the U.S. naval invasion of 1898. And like the Navy, it also has never left. Indeed, the U.S. court system has played a crucial role in the island's history. Of its different branches, the Grand Jury in particular has been used as an instrument of repression against Puerto Rico's independence movement. Because we continue to be subjected to the U.S. Constitution and its laws, we are subject to the decisions of the U.S. Supreme Court, the final arbiter of these doctrines. The following outlines our position regarding Judge Clarence Thomas' nomination to the U.S. Supreme Court.

Choosing a judge for the highest court of the United States requires in depth investigation as to his/her ability to uphold the United States Constitution and laws and should not be based solely upon the nominee's race or political philosophy. We find that the nominee falls far below the necessary qualifications for such a position. Unfortunately, our investigation shows that Judge Clarence Thomas will carry out his political goals, goals which often contravene with the preservation and expansion of civil rights, despite his sworn duty to uphold the U.S. Constitution and laws.

Our research has confirmed our fears that Judge Clarence Thomas is not qualified to serve in the United States Supreme Court. First, because of his extremely short service on the bench, 15 months in the Washington D.C. Court of Appeals and no federal district court service nor even state court service, we must base most of our analysis of his ability to uphold the law on his eight years as Chair of the Equal Employment Opportunity Commission (EEOC), as well as his various speeches and publications. Upon careful analysis of this record, we find that Judge Thomas did not understand or decided to ignore laws which he was employed to carry out as Chairman of the EEOC, behavior which is unfit for the highest court of the United States.

Second, Judge Thomas has shown himself capable of evading the law which does not fit his political philosophy. His political speeches and actions, or often the lack of the latter, show an insensitivity to the Constitutional rights of those who would come before him. We see no evidence that he will not continue to do the same as a Supreme Court Justice, and thus fail to uphold the civil rights of those seeking judicial redress and the millions affected by such decisions.

After some background information on Judge Thomas, we will first discuss his employment record and why such practices signal that he is not qualified to serve as a Supreme Court Justice. Second, we will examine his speeches and political philosophy which his record shows he will allow to interfere with his interpretations and rulings of the law, to the detriment of the Constitutional rights of not only those who come before the Supreme Court, but the millions of others affected by such precedent.

Biographical and Employment Background

Clarence Thomas grew up in Georgia under state-enforced segregation: "I was raised to survive under the totalitarianism of segregation, not only without the active assistance of government but with its active opposition". He graduated from Holy Cross College in 1970 and received his J.D. from Yale Law

School in 1974. He served as assistant attorney general in Missouri for the then attorney general John Danforth, specializing in tax and finance matters. In 1977 he began working for the chemical company Monsanto. He went to Washington D.C. in 1979 to work for U.S. Senator Danforth as his aide on energy and environmental matters. In 1981, President Reagan appointed Mr. Thomas to head the Department of Education's civil rights division. A year later President Reagan named him to chair the Equal Employment Opportunity Commission (EEOC), where he served for two terms.

In October 1989, President Bush nominated Mr. Thomas to the Court of Appeals for the District of Columbia. Despite his mediocre rating of "qualified" from the ABA judicial screening committee, the expression of serious concerns or outright opposition from the Alliance for Justice, the American Way, the American Association of Retired Persons, the National Council on Aging, the House Congressional Black Caucus, the Chair of the Senate Committee on Aging, the Chair of the House Judiciary Subcommittee on Civil and Constitutional Rights, the Chair of the House Select Committee on Aging and various civil rights organizations, he was confirmed in February 1990 where he has been serving until the present. His judicial history spans a mere 15 months, during which he has written 19 opinions, fewer than any other judge on that court.

CLARENCE THOMAS' RECORD

Normally in evaluating a nominee for the highest court of the United States one extensively reviews the judicial record of the nominee. To the extent possible, we have done so, but as stated above, it is brief and thus tells us very little. Therefore, we focus most of our analysis on his record as chair of the EEOC.

Clarence Thomas' Record as EEOC Chair

The most significant and revealing part of Clarence Thomas' record is his 1982 - 1990 tenure as chair of the EEOC. His record is marked with problems, at times so severe as to require Congressional and judicial action to remedy.

The EEOC is responsible for enforcing various federal statutes guaranteeing equal employment opportunity including Title VII, the Equal Pay Act, the Age Discrimination in Employment Act, Section 501 of the Rehabilitation Act of 1973 (prohibiting discrimination on the basis of handicap), Section 717 of Title VII of the Civil Rights Act (covering equal employment opportunity for federal employees) and the Fair Labor Standards Act Amendments of 1974 (which prohibit age discrimination in federal employment)[1].

In addition, the EEOC is responsible for "leadership and coordination to the efforts of Federal departments and agencies to endorse all Federal statutes, Executive orders, regulations and policies which require equal employment opportunity[2]*. In other words, the EEOC is the lead agency for coordinating all Federal EEO programs.*

Despite the EEOC's necessarily affirmative role in upholding the rights of workers who are victims of discrimination while insuring that such claims are valid, Thomas allowed the EEOC to lose its effectiveness as such a law enforcement agency. A letter from the American Way to Senator Joseph Biden, chair of the Senate Judiciary Committee, stated the following, regarding Thomas' nomination to

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[1]*Govan and Taylor, One Nation, Indivisible, Report of the Citizens' Commission of Civil Rights, August 1989.*

[2]Order No. 12,067 §1-201 (June 30, 1978). Despite this order, Thomas gave in to White House pressures when there was a conflict. *The Civil Rights Commission noted this misunderstanding. "The EEOC's coordination role under executive order 12067 has been far less significant than was intended" See U.S. Commission on Civil Rights Clearinghouse Report, Federal Enforcement of Equal Employment Requirements 10 (1987).*

the D.C. Circuit Court of Appeals:

> *Thomas has attempted, through regulatory or administrative policies, to weaken the very anti-discrimination laws that he was sworn to uphold. In short, Mr. Thomas' service at the EEOC raises serious questions concerning his respect for the law, a respect that is a sine qua non for a federal judge".*

In fact, in one instance it was necessary for the court to order the EEOC to carry out its obligations under the Age Discrimination in Employment Act (ADEA) to require employers to make pension contributions for the benefit of those of their employees who continue to work past "normal" retirement age. American Association of Retired Persons v. EEOC, 655 F.Supp. 228 (D.D C. 1987). In holding that the EEOC unreasonably delayed in carrying out its duties, Judge H. Greene stated the following.

> *Although it is among the Commissions duties under law to eradicate discrimination in the workplace and to protect older worker's against discrimination, that agency has at best been slothful, at worst deceptive to the public, in the discharge of these responsibilities. These Commission derelictions are estimated to affect hundreds of thousands of older Americans, and to cost these individuals in lost pension benefits as much as $450 million every year[3]. Id at 229.*

What is distressing is that this is the very organization formed to protect the rights of such plaintiffs. Noting this, Judge Greene remarked.

> *It is worth recalling in this connection that the government agency which has engaged in these tactics detrimental to workers over 65 is not one, such as the Department of Commerce, which might perhaps legitimately have an outlook favorable to business interests, but, sadly, a commission created by the Civil Rights Act of 1964, charged by law with the eradication of discrimination in the workplace on the basis of age, race, national origin, sex and religion, one of whose responsibilities is thus to protect the older worker. Id at 240-241.*

The following details how, under Thomas, the EEOC substantially lost its effectiveness in opposing discrimination in the workplace despite the United States Constitution, case-law and statutorily-mandated-action contrary to Thomas' policies.

> *1) Thomas misunderstood or blatantly ignored the law he was employed to uphold for eights years.*

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[3]*The EEOC conceded that its delay in implementing rules on pensions for older workers may cost such workers $450 million per year in benefits. Id at 229 n.2.*

2) Thomas failed to perform the EEOC's statutorily - mandated responsibilities regarding federal anti-discrimination plans[4].

3) Despite prevailing case-law to the contrary, Thomas attempted to weaken federal employee selection guidelines[5].

4) Thomas failed to follow Supreme Court precedent in seeking remedies for victims of employment discrimination[6].

5) Under Thomas, the EEOC also failed to support the civil rights of women in the workplace.

6) Thomas not only failed to enforce the Age Discrimination in Employment Act, he frequently took positions opposing the rights of elderly workers[7].

7) Thomas evidenced further disrespect for the law in his evasiveness towards Congress and retaliatory actions towards employees who aided Congress.

1) Thomas Misunderstood or Blatantly Ignored the Law He was to Uphold for Eight Years.

In the confirmation hearings to place Thomas on the bench in the D.C. Circuit Court of Appeals, Senator Metzenbaum emphasized the following.

> *I am not here saying that Mr. Thomas should not be confirmed because thousands of age discrimination charges lapsed between 1984 and 1988, which required Congress to enact legislation to restore the rights of older workers. And I am not here because he failed to act with respect to the 1,500 subsequent cases that lapsed after [Congress passed special legislation to remedy the EEOC wrong], I am here today because I believe that Mr. Thomas' answers to me in committee prove conclusively that he does not know the law he was responsible for administering for the last 8 years. 136 Cong. Rec. S2013, S2016.*

Federal law provides that charges filed with the State agencies which have work-sharing agreements with the EEOC are regarded as charges filed under both State and Federal law. Regarding charges filed with the Fair Employment Practice Agencies (FEPAs), Mr. Thomas stated that the "the charges filed with the State agencies are filed under state law and, to our knowledge, none of these State laws have statutes of limitation. So there cannot, by definition, be lapses in those agencies".

Senator Metzenbaum noted three disturbing points from Thomas' remarks. First, that "he did not understand for 8 years that these were Federal rights, not State rights; and that they were paying the State agencies to handle the claims of individuals under the Federal law" Id at S2016.

Second, Federal law provides that the EEOC may enter into agreements with state or local fair

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[4] *See American Way Action Fund letter of 1 February 1990 to Senator Joseph Biden, Jr. Chair of the Senate Judiciary Committee.*

[5] *Id*

[6] *Id*

[7] *Id*

employment practices agencies...and may engage the services of such agencies in processing charges assuring the safeguard of the federal rights of aggrieved persons. 29 CFR 1626.10 (a). Yet Mr. Thomas did not know that older workers lose their right to pursue Federal age discrimination claims when State agencies fail to act in a timely manner. As Senator Metzenbaum pointed out, we only have to look at the special Congressional law passed to remedy such inaction to note that Thomas was wrong in stating that "there cannot be lapses in the State agencies". Third, Mr. Thomas stated that the "EEOC does not supervise or regulate State agencies", thus supposedly absolving the EEOC of responsibility for the many lapsed claims. He was unaware of his own regulations stating that the EEOC in fact has the legal responsibility to ensure that these State agencies precess Federal age discrimination charges in a timely manner. (29 CFR 1626.10).

As Senator Metzenbaum noted, "if he did not understand that elementary idea...that law...what will he understand when he reads complicated briefs that come before him..."[8]. At best, Thomas misunderstood the laws regulating his work for eight years, at worst he was pursuing a political agenda of his own. Neither is fitting for a justice of the U.S. Supreme Court.

2) Thomas failed to perform the EEOC's statutorily - mandated responsibilities regarding federal anti-discrimination plans.

Thomas' lack of enforcement of the law reduced the power of the EEOC. Title VII, section 717 makes the EEOC responsible for enforcing the adoption of effective anti-discrimination programs. Thomas claimed the EEOC lacked enforcement powers when several federal agencies repeatedly refused to comply, yet he did not support a Congressional proposal to expand the EEOC's power to obtain such anti-discrimination plans.

Further weakening the EEOC's power, in 1987 the Commission issued a Management Directive (714) which shifted the primary responsibility for anti-discrimination plans to the heads of each individual agency.

Thomas' failure to carry out the EEOC's Title VII duties to collect and evaluate anti-discrimination plans from federal agencies substantially weakened the EEOC's ability to eradicate discrimination in the workplace and again raises questions about Thomas' ability to abide by law contrary to his political beliefs.

3) Despite prevailing case-law to the contrary, Thomas attempted to weaken federal employee selection guidelines.

The Uniform Guidelines provide employers, employees and all other interested parties with a description of the law on selection practices for employment decisions such as educational requirements, application forms and standardized tests. The Guidelines are used so that an employer may not use selection criteria which have an "adverse impact" on the hiring or promotion of women and people of color unless the criteria are proven to be job-related. They represent a statement of the prevailing law to the courts. Although there had been no change in the controlling law[9], Thomas stated in an interview that changing the Uniform Guidelines was the "number one item on my agenda" in order to de-emphasize the use of statistical evidence to demonstrate disparate impact.

Leading Members of Congress noted that Thomas lacked a proper understanding of Title VII, its purpose, policy and case law. The Lawyers' Committee on Civil Rights testified the following.

> *Efforts by the current leadership of the EEOC to change [the Uniform Guidelines] are based solely*

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[8] *136 Cong. Rec. S2013, S2017*

[9] *See Wards Cove Packing Co. v Antonio, 109 S.Ct. 2115 (1989)*

on the extreme personal views of its highest officials, without regard to any practical consideration and without regard to the commands of the law.

Thomas eventually backed down. Attempts such as this lead us and many others to question Thomas' respect for established law.

4) Thomas failed to follow Supreme Court precedent in seeking remedies for victims of employment discrimination (lack of enforcement of affirmative action laws).

Although the EEOC's own guidelines on affirmative action sanction the use of goals and timetables[10], in 1986 the EEOC announced that it would no longer seek to include goals and timetables in the consent decrees that it negotiated with employers. During his reconfirmation hearings in the Senate, after severe criticism and pressure from civil rights organizations and Congress, Thomas promised to withdraw the policy.

Thomas stated in the Regulatory Program of the United States that the use of goals and timetables was a "fundamentally flawed approach to enforcement of the anti-discrimination statutes". Leading Members of Congress objected to the EEOC's unilateral decision not to seek certain legally permissible remedies for victims of discrimination with its policy of no goals and timetables. Thomas responded to the House Education and Labor Subcommittee that he believed the Stotts decision prohibited the use of goals and timetables in all circumstances, Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (though he earlier had written to Congress that the "Stotts decision does not require the EEOC to reconsider its stated policies with respect to the availability of numerical goals and similar forms of affirmative, prospective relief in Title VII cases"). Yet the Supreme Court held that goals and timetables could be included among remedies for employment discrimination in appropriate circumstances[11].

Interestingly enough, at his reappointment confirmation hearings, Thomas acknowledged the Supreme Court reaffirmation that goals and timetables are appropriate remedies and promised to seek all appropriate remedies in his future work. Yet once again, Thomas renewed his lack of support for goals and timetables when he joined Attorney General Meese and Assistant Attorney General Reynolds in seeking to have President Reagan abrogate the executive order requiring federal contractors to have minority hiring goals and timetables. Bipartisan opposition, from a list including the Secretary of State, Secretary of Labor, Secretary of Transportation, 69 Senators and 180 House Members, caused the Administration to give up changing the law.

As part of such a policy contrary to affirmative action, Thomas focused on one-to-one cases in an effort to shift from what he called an "emphasis...on obtaining broad remedies for a theoretical group that had not filed charges". As a result he was criticized for "new procedural issuances [which] have focused on one-to-one cases that have virtually no impact on the phenomenon of discrimination"[12]

Such a lack of enforcement and further attempts to change affirmative action laws supported by Supreme Court precedent raise serious questions as to Thomas' ability to respect established law which may conflict with his personal political agenda.

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[10] *Guidelines designed to protect employers who voluntarily take affirmative action measures received protection from charges of "reverse discrimination" under the EEOC Guidelines on Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, as amended, 29 CFR 1608 (1988).*

[11] *See Wygant v. Jackson Board of Education, 476 U.S. 267 (1986); Local 28 of the Sheet Metal Workers' International Association v. EEOC, 478 U.S. 421 (1986); and Local Number 93, International Association of Firefighters v. City of Cleveland, 478 U.S. 501 (1986).*

[12] *See EEOC Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination, 25 Daily Lab. Rep. (BNA) at E1 (Feb. 6, 1985).*

5) Under Thomas, the EEOC failed to support the civil rights of women in the workplace.

The EEOC frequently filed briefs contrary to the rights of those the Commission was formed to protect in sexual harassment and pregnancy discrimination cases. In Miller v. Aluminum Company of America, 679 F.Supp. 495 (W.D. Pa.), aff'd mem., No. 88-3099 (3d Cir. 1988), the EEOC's brief stated that 'favoritism toward a female employee because of a consensual romantic relationship with a male supervisor is not sex discrimination within the meaning of Title VII. Yet 29 C.F.C. § 1604.11(g) states that where employment opportunities or benefits are granted because of an individual's submission to the employer's advances or request for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity benefit.

Regarding pregnancy discrimination, in California Federal Savings and Loan v. Guerra, 479 U.S. 272, 107 S.Ct. 683 (1987), the EEOC said that a California law providing unpaid leave for up to four months for employees disabled by pregnancy, but not other disabilities, violated Title VII. Yet the Court upheld the California law with the support of women's legal groups.

6) Thomas Failed to Enforce Age Discrimination Laws and EEOC Opposition to Elderly Workers' Rights.

The EEOC's handling of age discrimination cases was one of the most controversial areas of Thomas' tenure. The controversy was not limited to severe criticism from members of relevant Congressional committees who often found it necessary to have Thomas defend his policies and criticism from senior citizens groups, at different occasions, Congressional legislation and court orders were necessary to correct EEOC action or lack thereof. A letter from the House of Representatives' Judiciary Committee to President Bush stated the following.

> *As members of [the] Congressional Committees with oversight responsibilities for the EEOC, we believe Mr. Thomas has developed policy directives and enforcement strategies which have undermined the effectiveness of the Age Discrimination in Employment Act (ADEA) and Title VII.*

In 1987 and 1988, the EEOC allowed more that 13,000 ADEA claimants to lose their right to bring their cause of action in federal court by not taking action within the two year statute of limitations, adversely affecting thousands of older workers. As a result, Congress ultimately passes legislation to reinstate the rights of those older workers. At the congressional hearings on Clarence Thomas' nomination to the D.C. Circuit Court of Appeals, Senator Metzenbaum noted that even since the special law was enacted to take care of the cases upon which the EEOC failed to act, another 1,700 age discrimination charges filed with the Federal agency and the State agencies under contract to the EEOC, which were not covered by the law passed in 1988, had not been processed within the necessary 2-year statute of limitations and were thus lost claims in federal court. Senator Pryor, chairman of the Aging Committee also has spoken on the floor on the recurring problem of inaction by the EEOC and State agencies and the serious consequences to the individuals who lost their Federal rights to sue for age discrimination.

Not only did Thomas allow such losses to elderly workers, the EEOC adopted positions that contradict the letter and spirit of the Age Discrimination in Employment Act (ADEA). Often the EEOC sided with the employer in cases involving early retirement plans with programs that coerce older workers into taking early retirement, plans the ADEA was formed to prohibit. For example, in Paolillo v. Dresser Industries Inc., 821 F.2d 81 (2d Cir. 1987), the EEOC filed an amicus brief in support of the employer to request a modification of the decision, after the plaintiffs had prevailed. The EEOC supported a higher standard for demonstrating coercion and argued that plaintiffs should carry the burden of proof regarding voluntariness.

Also in opposition to elderly workers interest was EEOC regulatory policy. For example, prior to 1987 an employer had to receive EEOC approval in order to ask an employee to waive ADEA. In 1987 the EEOC issued a rule permitting waivers that were knowing or voluntary without EEOC approval, shifting the burden of proof of showing coercion to the employee and destroying the barriers to waiving ADEA rights. That is, the effectiveness of the ADEA was weakened. As a result of severe objection by senior citizens groups, Congress placed riders on the 1988, 1989 and 1990 EEOC appropriations to prevent implementation of the rule, yet Thomas continued to state that EEOC supervision of waivers was unduly burdensome for the EEOC, employer and employee.

The American Way stated the following in its letter regarding Thomas' D.C. Circuit confirmation hearings to Senator Joseph Biden, Chair of the Judiciary Committee:

> *Mr. Thomas' record has been marked by an unwillingness to vigorously enforce the laws protecting older workers...[c]onstant Congressional vigilance and prodding has been necessary to ensure that the EEOC fulfills even its most basic obligations under the ADEA.*

Equally disturbing was Mr. Thomas' response to Congress, which was evasive as to how many age discrimination claims were lost.

7) Thomas was Evasive to Congress and Retaliated Against EEOC Employees Who Aided Congress.

In Congress' investigation of the lapsing of age discrimination cases problem, it called upon Thomas to reveal how many cases had lapsed due to the lack of EEOC action. First Thomas responded that 78 cases had lapsed. He later revised that figure to approximately 900, then 1608, then over 7,500, and finally over 13,000. Simultaneously, he refused to provide Congress with the necessary documents for its independent determination. As a result, the Senate Aging Committee had to subpoena certain EEOC records to get a full accounting of the lapsed cases.

In addition, after talking to the press and Congress about the EEOC's failure to process backlogged age discrimination cases, Lynn Bruner, a district director in the EEOC's St. Louis office, received an unsatisfactory performance review in 1988 criticizing her for talking "to the press on a national and volatile issue" and that her quotations "present the chairman in a negative light". The Office of the Special Counsel commenced investigating whether Thomas' plans to demote Bruner constituted retaliation (which, as the Chair of the House Judiciary Subcommittee on Civil and Constitutional Rights and Chair of the House Select Committee on Aging stated would be a violation of federal law). Less than a month before President Bush announced Thomas' nomination to the Court of Appeals, Thomas sent her a memo that although he believed no EEOC officials had treated her unfairly, he was dropping plans to demote her[13].

Another example is that of Frank Quinn, director of the Los Angeles office. Thomas attempted to transfer Quinn to Birmingham two months prior to his retirement because Quinn had allegedly made statements to the press critical of agency policy. Quinn filed court action claiming retaliation and successfully prevented the transfer.

Judge Thomas' Record on the Bench

We hesitate to read too much into such a small record. We note only his possible desire to

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[13]*The Reporters Committee for Freedom of the Press (including members from the Wall Street Journal, Los Angeles Times, Washington Post, Walter Cronkite, Peter Jennings, Tom Brokaw, and more) took special note of the demotion proposal in its report to the editor of 3 July 1991.*

combat crime at the expense of privacy rights by ruling in favor of questionable searches and seizures, as well as warrantless searches, and his tendency to rule against environmental concerns. Both are areas of great concern to the Institute. The fact that his record is so brief is also of great concern since clearly there are other much more well qualified and experienced judges currently on the bench whom President Bush would find agreeable. Nonetheless, politics, rather than judicial experience, seems to be the primary criterion for Bush nominees.

Criminal Law and Procedure

Judge Thomas held the following in United States v. Halliman, 923 F.2d 873 (1991): 1) Exigent circumstances justified the warrantless search of a hotel room even though police officers were informed about the suspect's use of the room before leaving the police station to go to the hotel, and had obtained a warrant to search three other rooms which the suspect had rented. 2) Officers had an 'independent source' for the drugs and other evidence seized so that defendant's invalid consent was not fatal to admissibility; and 3) Even though drugs found in the hotel room were admissible only against one of the two defendants, the district court did not err in refusing to sever their trials.

In United States v. Harrison; Unites States v. Black; United States v. Butler, 931 F.2d 65 (1991), Judge Thomas rejected defendant Butler's argument that there was insufficient evidence to convict him of using or carrying a firearm during a drug crime. Even though the only firearms confiscated were on the persons of the other two defendants, Butler had constructive possession of a gun because he could have either easily obtained a gun or instructed the others to use one.

Environmental Law

In Citizens Against Burlington v. Federal Aviation Administration, 1991 U.S. App. LEXIS 12036 (June 14, 1991), an alliance of individuals living near the airport contended that the FAA violated several environmental statutes in failing to consider the alternative sites. Judge Thomas rejected this argument, finding that the FAA's action was not arbitrary and capricious under the applicable statutes even though it did not consider the feasibility of alternative sites. In Judge Buckley's dissent-in-part, he stated that the FAA had "sidestepped its obligations" to prepare a detailed statement on alternative courses of action.

In Cross-Sound Ferry Services, Inc. v. Interstate Commerce Commission, F.2d, 1991 WL 73244 (May 10, 1991), the court upheld the Interstate Commerce Commission's decisions that the transportation service in question was a "ferry service" and thus exempt from the Commission's jurisdiction. Judge Thomas concurred in the decision but dissented on the issue of Cross-Sound's standing. He held that Cross-Sound could not challenge the Commission's decision under either the National Environmental Protection Act (NEPA) nor the Coastal Zone Management Act (CZMA). Yet the majority stated it had "serious doubts" about Judge Thomas' interpretation of the national transportation policy which led to Judge Thomas' legal conclusion on standing.

Because Thomas allows his political philosophy to interfere with his upholding of the law, we must also carefully examine these views.

THOMAS' SPEECHES AND POLITICAL PHILOSOPHY: THOMAS' RECORD REVEALS THAT HE OFTEN IS NOT WILLING TO UPHOLD THE CONSTITUTION AND ESTABLISHED LAW WHICH IS CONTRARY TO HIS BELIEFS

Thomas' lack of enforcement of the law which he was to uphold and blatant opposition to the rights of those he was to protect reflect his political philosophy as clearly expressed in his speeches and interviews. Time and again, Thomas' record demonstrates his ability to ignore law contrary to his beliefs. Willfully or not, Thomas has consistently applied the Constitution and laws of the United States in a

manner detrimental to civil rights. We believe he will continue this practice to the detriment of the civil rights of those who come before the Supreme Court and the millions of others adversely affected.

The Fundamental Right to Privacy

Shortly after President Bush announced the nomination of Judge Clarence Thomas to the U.S. Supreme Court, the National Abortion Rights Action League (NARAL) and Catholics for a Free Choice separately stated their opposition. NARAL stated that the Senate has an obligation to uphold the U.S. Constitution and thus must "refuse to confirm Judge Thomas unless he explicitly repudiates the positions he has taken against the right to privacy and affirmatively states his support for the principles protected in Griswold and Roe[14].

In his June 18th, 1987 speech to The Heritage Foundation, Thomas specifically praised Lewis Lehrman's essay on "the Declaration of Independence and the Right to Life" as a "splendid example of applying natural law". Lehrman's essay referred to Roe v. Wade as "a spurious right born exclusively of judicial supremacy without a single trace of lawful authority, implicit or explicit, in the actual text or history of the Constitution itself". Thomas' agreement with such an essay reveals that he blatantly fails to recognize the Constitutional right to privacy. How far he would let his view of "natural law" cloud his ability to uphold the Constitution, we shall regret discovering through the tyranny it will place on individual rights.

Affirmative Action

Besides his direct action at the EEOC contravening affirmative action, Thomas has made numerous comments clearly stating his opposition to affirmative action. Apparently tired of the criticism for his anti-affirmative action policies, he stated "I am tired of the rhetoric - the rhetoric about quotas and about affirmative action. It is a supreme waste of time. It precludes more positive and enlightened discussion, and it is no longer relevant[15]". He even compared affirmative action to South African apartheid:

> *those who insist on arguing that the principal of equal opportunity...means preferences for certain groups have relinquished their roles as moral and ethical leaders in this area. I bristle at the thought, for example, that it is morally proper to protect against minority racial preferences in South Africa while arguing for such preferences here[16].*

He stated in his speech to the Heritage Foundation on "Why Black Americans Should Look to Conservative Policies" that under the Reagan Administration, "we began to argue consistently against affirmative action. We attacked welfare and the welfare mentality. These are positions with which I agree", and in the same speech he stated that he had "lived the American dream; and that I was attempting to secure this dream for all Americans". Clearly Thomas has worked extremely hard against poor odds. But can Thomas really believe affirmative action did not help him overcome some of the discriminatorily placed obstacles he faced, such as his entrance into Yale Law School? Does he not regard this nomination as a quota fulfillment?

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[14] *Griswold v. Connecticut protected the right to use contraception. Roe v. Wade protected the fundamental right to choose.*

[15] *"The Equal Employment Opportunity Commission: Reflections on a New Philosophy," Stetson Law Review, Volume XV, nr. 1, 1985, pp 34.*

[16] *Id*

In this same speech, he referred to the state-enforced segregation, under which he was raised, as not only a lack of government support, but the complete opposite, governmental opposition to his and other's exercising of their individual rights. To this we strongly agree; clearly such repressive practices constituted governmental opposition. Yet his actions against the elderly and affirmative action constitute government opposition to the rights of individuals in another form.

It seems that Thomas' personal success has blinded him to the needs of others. Though he was raised under institutionalized racism and class discrimination, he stated the following in the same speech about his household:

> *[it] was strong, stable, and conservative...[t]hose who attempt to capture the daily counseling, oversight, common sense and vision of my grandparents in a governmental program are engaging in sheer folly. Government cannot develop individual responsibility, but it certainly can refrain from preventing or hindering the development of this responsibility.*

He even stated the following:

> *I, for one, do not see how the government can be compassionate, only people can be compassionate and then only with their own money, their own property and their own effort, not that of others.*

Does Thomas believe those living without such a sturdy family life, or perhaps living in an abusive family should not receive government assistance? Will his tendency to ignore the Constitution and laws of the U.S. which are contrary to his political philosophy prevent him from protecting these people's rights?

Lulann McGriff, president of the San Francisco, California branch of the NAACP stated this concern clearly:

> *It serves us no good for someone to come from a humble background and not understand how he got where he is - through the blood, sweat and tears of other Afro Americans.*

In the same speech to the Heritage Foundation, Thomas stated "equality of rights, not of possessions or entitlements, offered the opportunity to be free, and self-governing". What does such a right mean when not supported by the means to enjoy that right, when not supported by a Supreme Court of the United States that will protect these rights?

CONCLUSION

Even more than his minimal judicial service, Judge Clarence Thomas' record of EEOC leadership shows he is not qualified to rule in the Supreme Court of the United States. This is evidenced by his undermining of the effectiveness of the law he was to uphold for eight years, his failure to carry out statutorily - mandated responsibilities, his attempts to weaken employee selection guidelines used to prevent adverse impact, his failure to follow Supreme Court precedent, his opposition to the civil rights of women, his disastrous record regarding the rights of elderly workers, his evasiveness to Congress and his retaliatory actions.

Numerous civil rights groups have raised serious doubts about his ability to serve and numerous

groups actively oppose his nomination. In a press release dated July 7, 1991, the League of United Latin American Citizens (LULAC), the oldest and largest Hispanic organization in the United States, stated the following.

> *[Thomas] has shown by word and by deed to be*
> *insensitive to the issues of concern to Hispanics*
> *such as affirmative action, equal employment opportunity,*
> *and civil rights protection.*

Because of his decisions ignoring laws contrary to his beliefs, persistently demonstrated as the EEOC chair, we see no evidence that Thomas will not continue to let such insensitivity to civil rights obstruct his reading of the United States Constitution and laws.

While we look forward to the day when the Supreme Court is representative of the people whom it serves, we must bear in mind Thurgood Marshall's comment regarding his successor, that we must beware of "a black snake as well as a white snake - they both bite". Both by word and deed, Thomas has shown his disregard for the struggles and often bloody sacrifices which have resulted in the civil rights advances of the last century.

We Puerto Ricans have been and will continue to be a part of that struggle and will therefore oppose Judge Clarence Thomas, or any other United States Supreme Court nominee, who puts at risk the ideals and values we treasure most.