STATEMENT BY

THE CENTER FOR LAW AND SOCIAL JUSTICE

OF MEDGAR EVERS COLLEGE

ON THE NOMINATION OF

JUDGE CLARENCE THOMAS TO THE SUPREME COURT

Presented to the

United States Senate Judiciary Committee

Honorable Joseph Biden, Chair

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The Center for Law and Social Justice (CLSJ) at Medgar Evers College, CUNY, strongly opposes the nomination of Judge Clarence Thomas to the United States Supreme Court. CLSJ is a legal research and advocacy institution which conducts litigation and public policy projects on matters involving pressing civil and human rights issues. CLSJ is opposed to Thomas's nomination because 1) he is blatantly unqualified to hold the position, 2) he is incapable of separating his political views from jurisprudential precedent, and 3) his nomination is an affront to all who have struggled and continue to struggle for realization of the democratic ideals on which this country is supposed to be based. For these reasons, which are more fully explored below, we urge the Senate Judiciary Committee to reject Clarence Thomas as a candidate for the United States Supreme Court.

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QUALIFICATIONS

Although Judge Thomas may be qualified to serve as a Supreme Court justice in the view of President George Bush, his nomination represents a cunning plan to place a lifetime appointee with a black face on the high court whose primary qualifications are his race and an apparent oath of fealty to an anti -civil rights, affirmative action, and abortion rights agenda. Long after Mr. Bush is gone from office, America, especially Black America, will feel the devastating diminution of civil and individual rights which Judge Clarence Thomas will affect, if confirmed.

Clarence Thomas is a product of Catholic elementary and secondary schools. He attended St. Benedict the Moor, an all-Black grammar school run by white nuns, one of whom still refers to the students she taught as "nigger children."[1] These early years impacted greatly upon Thomas's development, instilling both a strong affinity for the work ethic espoused by the nuns, and the negative stereotype of Blacks as niggers. Self-hatred and the resultant desire not to be identified by his race would become an obsession for him and a recurring theme throughout his life.

For example, he took great pains to avoid being identified as a Black student while at Yale Law School, sitting in the back of classes and opting to take courses such as tax and business law that he felt would in no way invoke issues related to race. Upon graduation from Yale, he intentionally avoided contact with any work that would associate him with

racial issues. He even went so far as to tell an interviewer that accepting a job at an agency that focused on civil rights, such as the EEOC, would irreparably ruin his career.[2] Needless to say, Thomas was able overcome his disdain for race issues when it proved advantageous to his career: rejecting an offer to join the White House policy staff handling energy and environmental issues and four months later accepting a position as head of the Office of Civil Rights in the Department of Education. Ten months later, in 1981, President Reagan named him chair of the Equal Employment Opportunity Commission, the same agency he predicted would ruin his career.

Thomas's attitudinal shifts, which suggest opportunism, are also evidenced by his sharp change from a liberal Democrat to a conservative Republican. Note that he was a registered Democrat, having voted for George McGovern in 1972, but switched to the Republican party shortly after accepting a position with then Missouri Attorney General, John Danforth in 1974. One wonders if Thomas would have switched so quickly had he received prestigious law firm offers like so many of his classmates? Or if the Missouri Attorney General had been a Democrat? It appears that Thomas was as eager to please those who seemed to accept him as he was eager to distance himself from Blacks. In essence, Judge Thomas seems to be an individual who has longed to be accepted by whites on their terms and in their institutions. He seems to feel ashamed by the discrimination and racism Black Americans have experienced, much as an abused child experiences anger and shame for their parents' abusive behavior.

While at the EEOC, he acted as an anchorless ideologue, sitting on thousands of lawsuits and rejecting goals and timetables while publicly stating that his reservations were

"purely personal."[3] These practices serve as predictors of future performance and foreshadow what could be a four decade tragedy on the Supreme Court.

Judge Thomas's record on the federal bench is not much better. He has served for just over a year and has written 20 opinions that do little to distinguish him with respect to legal philosophy or judicial skills. If confirmed, Judge Thomas would have less legal experience than all but one other Justice and would have less actual judicial experience than all who have preceded him on the Supreme Court.[4] By his own admission, he does not have an "individual, well-thought-out constitutional philosophy" and has told colleagues that he wished that this nomination had come five years from now.[5] The American Bar Association gave him its lowest acceptable rating and two members rated him as "unqualified."[6] He obviously lacks the necessary qualifications, particularly when compared with other Black jurists. For example, Amalya Kearse, a noted litigator, a former partner in a major Wall Street law firm, and a long-standing member of the Republican Party, has been a federal appellate judge for over a decade. Similarly, Judge Harry Edwards, who sits on the same circuit as Thomas, is a former professor at Harvard and Michigan Law Schools, has published several books on the law, and has also sat on the bench for nearly a decade. There are others, but the main difference between Thomas and these jurists, aside from their superior qualifications, is his vociferous opposition to civil rights and affirmative action. These factors not only disqualify him, but also make him a dangerous choice for the Supreme Court because they demonstrate a lack of judicial sensitivity to those classes traditionally protected by the Constitution.

LEGAL PHILOSOPHY

The political views of a candidate for the Supreme Court are relevant only to the extent that those views influence the candidate's legal philosophy and thereby reveal the degree to which the candidate, if confirmed, will engage in judicial activism. In reviewing Judge Thomas's record, it is clear that his political ideology is his legal philosophy. It is also clear that his ideology often contravenes established constitutional law.

For example, Judge Thomas has asserted repeatedly his belief in a natural rights or natural law basis for individual rights. According to Judge Thomas, "...the thesis of natural law is that human nature provides the key to how men ought to live their lives....[o]ur political way of life is by the laws of nature, of nature's God, and of course presupposes the existence of God, the moral ruler of the universe, and a rule right and wrong, of just and unjust, binding upon man, preceding all institutions of human society and of government." [7] These fundamental rights of nature are derived, according to Thomas, from the Declaration of Independence which proclaims the existence of "inalienable rights" such as life and liberty.

Judge Thomas's natural rights philosophy is an outright rejection of positivism which declares that the law is only what is set forth in the Constitution, statutes, or court decisions. Positivism has been the basis of our legal system for at least the last century. Yet, as Judge Thomas would have it, there exists some, as yet, undefined body of rights which nature has bestowed upon humans, and, to which, even the United States Constitution must defer. Who determines what these rights are and their scope? Apparently, they are whatever Judge

Thomas says that they are. Not surprisingly, this has caused concern among many legal scholars and among those who fear that a woman's constitutional right to choose abortion will be viewed by Thomas as inconsistent with his natural rights theory.

Unfortunately, those fears are not unfounded. Judge Thomas has been quoted praising an article authored by Lewis Lehrman who argued that natural law mandated that abortion be outlawed.[8] Lehrman proclaimed that fetuses have a God-given inalienable right to life which supersedes a women's constitutional right to privacy as articulated by the Supreme Court in Roe v. Wade.[9] Thomas found Lehrman's article to be "a splendid example of applying natural law" with no criticism of the fact that it contravened established constitutional law.[10] That Judge Thomas opposes abortion is obvious, but, irrelevant. More important is his inability to set aside his personal views in the face of constitutional mandates. Yet, this is precisely what a jurist, particularly a Supreme Court jurist is required to do as an integral part of the position. S/he must uphold the law as established by the Constitution, statutes and judicial precedents. To ignore constitutional protections whenever one's politics differ, is wholly inappropriate behavior for a Supreme Court justice. In articulating his natural law philosophy, Thomas demonstrates his contempt for legal precedents and his unworthiness to sit on this country's highest court.

Thomas's contempt for the law is evidenced also by his conduct while chairperson of the Equal Employment Opportunity Commission (EEOC) during 1982-1989. During his tenure, the EEOC intentionally failed to pursue class based discrimination cases.[11] On Thomas's order, regional EEOC attorneys failed to include goals and timetables in case settlements, and failed to enforce the goals and timetables established in existing settlement

decrees.[12] This dereliction of duty attitude which the agency adopted under Thomas directly mirrored Thomas's political views on affirmative action. Thomas has been quoted as saying that he is "unalterably opposed to programs that force or even cajole people to hire a certain percentage of minorities."[13] In his view, affirmative action programs breed dependence and stigma. Apparently believing his personal views to be above the law, Thomas ignored statutory and judicial precedent authorizing the use of goals and timetables as remedial measures for proven class based discrimination. Indeed, so blatant was his refusal to uphold and enforce the law, that it prompted five members of Congress to openly protest, stating that the "Commission is forfeiting the most effective tool to combat centuries of discrimination."[14]

It took the urging of Congress and no less than three Supreme Court decisions upholding the use of affirmative remedies, to induce Thomas to agree to change the Comission's policy back to pursuing class based discrimination.[15] During the eight years of Thomas's reign at the EEOC, the backlog of cases rose from 31,500 to 46,000.[16] The number of cases closed due to inadequate investigation rose 30 percent[17]. But, the worst representation provided by the EEOC undeniably was that given to age discrimination claims. The EEOC was not merely reluctant to bring these claims, but openly hostile, allowing 13,000 such claims to perish due to lapsed statutes of limitation[18]. Thomas was forced to admit responsibility for this atrocity in testimony before Congress on the abominable performance of the EEOC. Yet, even his admission was tainted since Thomas, on two occasions, told Congress that the number of stale age discrimination cases was only 78 or a few hundred[19]. If Thomas is unafraid to place his politics above the law while in a position from which

dismissal or removal is relatively easy, then is there any reason to expect that he would not do the same or worse as a Supreme Court justice who serves a life tenure? Ethical questions about Thomas's judicial demeanor have already surfaced despite his short tenure on the federal bench.

For example, recently, Judge Thomas ruled that Ralston-Purina did not have to pay a $10.4 million fine or attorney fees imposed for false health benefit claims it made about its Puppy Chow products[20]. Senator John Danforth owns at least $7.5 million in Ralston-Purina stock, a company founded by his grandfather, and his brothers are on the board and control almost 5% of its shares[21]. Judge Thomas and Senator Danforth are close friends. Indeed, Sen. Danforth hired Thomas in 1974 as an assistant attorney general while Danforth was attorney general, and again in 1979, Danforth hired Thomas as his legislative assistant. Sen. Danforth actively aided Thomas's nomination to the federal appeals court, and upon request of President Bush, is personally guiding Thomas through the present confirmation hearings. It would seem if for no other reason than good judgment, that Judge Thomas would have recused himself from ruling on a case which so deeply involves Sen. Danforth and his family. But, good judgment aside, judicial ethics require a judge to disqualify himself or herself from a case whenever the mere appearance of impartiality might be questioned. In this instance Judge Thomas not only failed to recuse himself, but he also wrote the opinion which threw out the fine against Ralston-Purina. Once again Thomas's disdain for the law reveals itself. Clearly, this is not appropriate behavior for any judge, and it would be most abhorrent in a Supreme Court justice.

POLITICAL IMPLICATIONS

It is no surprise that President Bush has nominated a conservative judge to replace Justice Thurgood Marshall on the Supreme Court. Indeed, Bush only follows in the footsteps of past presidents by offering someone who is like-minded to himself. Rather, what makes the nomination of Clarence Thomas so distasteful, is the fact that it is actually insulting to Blacks. Thomas's concept of the self-help doctrine not only denies his personal reality of benefitting from the civil rights movement and affirmative action policies, but also denies the societal reality in which Blacks die disproportionately more than whites, receive far inferior educational training, and generally suffer from the ills of poverty to a greater degree than whites.[22]

Moreover, Thomas's nomination is insulting because it constitutes a bastardization of affirmative action. Affirmative action regarding race is supposed to mean that employers, educators, etc., may consider race as a positive factor in their hiring and admission practices. Such policies are necessary to overcome centuries of discrimination during which Blacks and other people of color and women have been shut out from jobs and schools. Affirmative action has not meant, as its opponents would claim, that race is the only factor to be considered to the exclusion of other qualifying criteria. Yet, both opponents and proponents of affirmative action must declare that Judge Thomas's nomination is nothing more than a perversion of that policy. Since Judge Thomas lacks sufficient qualifications to be a Supreme Court justice, there can be no other reason for his nomination but the fact that he is Black.

Judge Thomas's role on the Supreme Court would be to give legitimacy to attitudes, beliefs, and ideals that absolve anyone other than Blacks of responsibility for the current state

of that community. He would be the point person on all issues concerning race and, if past performance is any predictor of future performance, would not fail to deliver opinions that resonate primarily in the conservative community. If there were any chance that Judge Thomas would do anything other than what Senator Danforth and other conservatives in this country expect, he would not be before the Senate Judiciary Committee today, and he would not currently be on the federal bench. Thomas's identification with and desire for acceptance from whites assures us that he will eagerly adopt whatever stance or opinion will make that acceptance a reality.

CONCLUSION

If Judge Thomas is confirmed, he could well be a jurist shaping laws that will affect the lives of our grandchildren. His nomination represents a reward for a lifetime of faithful service to those who have advanced his career, rather than the ideals of the offices for which he was chosen. His role will be to hold back the civil and human rights tide as America's complexion rapidly darkens in the coming century. Judge Thomas is contemptuous of those who would taint his accomplishments with their inability to do all he has done. He has limited judicial experience and legal scholarship and ironically represents what white conservatives fear most about affirmative action: a Black person who obtained a position over more qualified whites solely because of his race.

Judge Thomas's prior legal experience and political ideology are outstanding only to the extent that they so vividly demonstrate his unworthiness to sit on this country's highest court. CLSJ strongly encourages the Senate Judiciary Committee members to question Judge

Thomas vigorously concerning his ability to uphold the Constitution given his failure to do so while chair at the EEOC, his willingness to acknowledge the appropriateness of class based remedies for proven systemic discrimination, and his understanding of how the natural law thesis relates to the Constitution and the rights and protections which derive from it. It is our belief that after a thorough investigation into these matters, the only possible conclusion is that Judge Thomas's nomination should be rejected.

ENDNOTES

1. *NY Newsday*, July 2, 1991. Bush picks Supreme Court Nominee.

2. "The crowning Thomas affair", *US News and World Report*, September 16, 1991, p. 30.

3. "Supreme Mystery," *Newsweek*, September 16, 1991, p. 30.

4. *Albany Times Union*, "Experience isn't Thomas's strength. July 14, 1991.

5. "The crowning Thomas affair," *US News and World Report*, September 16, 1991, p. 25.

6. *Ibid.*

7. Juan Williams, " A Question of Fairness," *Atlantic Monthly*, February 1987, p. 79.

8. Judge Clarence Thomas, "Why Black Americans Should Look to Conservative Policies," a speech given to the Heritage Foundation on June 18, 1987.

9. Lewis E. Lehrman, "The Declaration of Independence and the Right to life," *The American Spectator*, April 1987, p. 22.

10. Statement of the Alliance for Justice on the Nomination of Clarence Thomas to the U.S. Court of Appeals for the District of Columbia (hereafter Alliance for Justice), February, 16, 1990, p. 4.

11. *Ibid.*

12. *Time*, July 25, 1991, p. 19.

13. Alliance for Justice, p. 4.

14. *Ibid.*

15. *Ibid*, p 2.

16. Juan Williams, " A Question of Fairness," *Atlantic Monthly*, February 1987, p. 79.

17. *Ibid.*

18. Alliance for Justice, p. 2.

19. *Ibid.*

20. Alpo Pet Food, Inc. v. Ralston-Purina Co., 913 Fed 958 (C.A. D.C. 1990).

21. *Daily Challenge*, July 23, 1991, p. 3.

22. Gerald Jaynes and Robin M. Williams, Jr. ed., *A Common Destiny: Blacks and American Society*, Committee on the Status of Black Americans, National Research Council, Commission on Behavioral and Social Sciences and Education, National Academy Press, 1989.