STATE OF NEW YORK
DEPARTMENT OF LAW
120 BROADWAY
NEW YORK, N.Y. 10271

ROBERT ABRAMS
ATTORNEY GENERAL

September 23, 1991

Senator Joseph R. Biden, Jr.
Chairman of the Senate Judiciary Committee
United States Senate
Russell Senate Office Building
Room 221
Washington, D.C. 20510

Dear Senator Biden:

I write to urge that the Judiciary Committee of the United States Senate, and the Senate as a whole, vote against the confirmation of Judge Clarence Thomas to be an Associate Justice of the Supreme Court. While I believe that there are several grounds for rejection, my principal reason for urging that course is that Judge Thomas's confirmation could weaken the right to privacy enjoyed by all Americans and destroy the fundamental right of every woman to choose whether or not to terminate her pregnancy.

The continued vitality of the right to choose is a basic concern of millions of women and men in this nation. It is also one of my longstanding concerns. During my tenure as New York's Attorney General, my office has filed briefs in the Supreme Court in many of the important abortion cases of the last decade. When such important rights are at stake, the Senate has the constitutional obligation carefully to weigh the President's nominee. And when confirmation threatens to undermine our cherished liberties, the Senate must withhold its consent.

Eighteen years ago, a seven-member majority of the Supreme Court concluded in Roe v. Wade that the Constitution protects a woman's right to terminate her pregnancy. It was a purely legal determination of bipartisan justices appointed by Presidents Roosevelt, Eisenhower, Johnson, and Nixon. That decision was in the best tradition of American constitutional jurisprudence: a truly independent judiciary, acting free of political influence, building incrementally on a line of cases stretching back over eighty years. Indeed, even Justice Rehnquist's dissent praised the majority opinion for its "wealth

of legal scholarship."[1] It is well to remember the words of the seven-member majority, which recognized that its task was "to resolve the issue by constitutional measurement, free of emotion and of predilection."[2]

The opponents of choice have turned the legal issue of fundamental rights into a political battle, and have made the question of where a Supreme Court nominee stands on this issue a litmus test for appointment.[3] The unfortunate politicization of this legal issue of fundamental rights makes it necessary for this Committee to scrutinize closely a nominee's views.

The right to privacy, to be let alone, is a cherished liberty, and it is not of recent origin. For decades, majorities of the Supreme Court have agreed that it creates a zone of personal decision-making free from government encroachment in the areas of marriage, child rearing and education, family relationships, procreation, and contraception. As the Roe Court stated, the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[4] Like the right to speak, to worship, to face one's accuser, or to be judged by a jury of one's peers, that right is fundamental. The majority in Roe held that only a compelling state interest can justify its infringement.

We should remember that abortion was not illegal when the Constitution was adopted. Laws prohibiting abortion did not come into vogue until the 19th Century. Roe v. Wade ended a period of harsh regulation by the states, which had devastating effects on the lives and health of women. After Roe, a state could no longer use its criminal laws to command a woman to carry to term a pregnancy, or force her to seek out in desperation the services of back-alley quacks and butchers. And while no legal issue has engendered more debate in the last two decades, a majority of the justices who have served since Roe have thus far declined to abandon its principles. With the Supreme Court appointments of the last two administrations, however, the fate of Roe now hangs in the balance.

Judge Thomas has declined to reveal to this committee whether he considers the right to choose a fundamental right and

---

[1] Roe v. Wade, 410 U.S. 113, 171 (1973) (Rehnquist, J. dissenting).

[2] Id., 410 U.S. at 116.

[3] Since 1980, the Republican Party platform has contained a plank supporting the appointment of judges who would oppose the precepts of Roe.

[4] 410 U.S. at 153.

has refused even to discuss his views on the constitutional analysis in Roe, a now eighteen-year old precedent. In contrast, he has not shown the same reticence when asked to discuss other constitutional matters which will likely be considered by the Supreme Court in the coming years, including controversial issues involving freedom of religion, the participation of crime victims in criminal sentencing proceedings, protection against sex discrimination, the imposition of the death penalty, and the right of habeas corpus. Judge Thomas's carefully orchestrated decision to remain mute on the critical question of whether a woman has a fundamental right to choose means that his written record must be examined to shed light on how he would treat that right on the Supreme Court. Here, however, Judge Thomas has also tried to elude the committee's concerns entirely. He has, in effect, asked the committee to disregard his written views on the right to privacy, including the entire corpus of his writings and speeches expressing his legal philosophy that natural or higher law should guide constitutional adjudication. He has asserted to this Committee that the views he expressed in the past about natural law were mere political theorizing and that he would not resort to his natural law ideas in deciding constitutional cases.

Judge Thomas's speeches and writings call those assertions into question. Those writings specifically commend Supreme Court opinions which relied on natural law, and criticize others which did not. Judge Thomas has said, "The higher law background of the American Constitution, whether explicitly appealed to or not, provides the only firm basis for a just, wise and constitutional decision."[5] Only two years ago he wrote in the Harvard Journal of Law & Public Policy that "without recourse to higher law, we abandon our best defense of judicial review" and that "higher law is the only alternative to the willfulness of run-amok majorities and run-amok judges."[6] The public domain contains not merely one Thomas article or speech urging conservatives to embrace higher law jurisprudence, but at least a half-dozen.[7]

---

[5] Speech to Harvard Federalist Society (April 7, 1988) at 5.

[6] Thomas, The Higher Law Background of the Privileges and Immunities Clause of the Fourteenth Amendment, 12 Harv. J. of Law and Public Pol. 63, 64 (1989) ["Higher Law"].

[7] See also, Thomas, Civil Rights as a Principle Versus Civil Rights as an Interest, in Assessing the Reagan Years (D. Boaz, ed. 1988) ["Civil Rights as an Interest"]; Thomas, Toward a "Plain Reading" of the Constitution - The Declaration of Independence in Constitutional Interpretation, 30 Howard L. J. 983 (1987); Thomas, Notes on Original Intent; Thomas, Why Black Americans Should Look to Conservative Policies, 119 Heritage Lectures (June 18, 1987); Thomas, How to Talk About Civil Rights: Keep it Principled and

Judge Thomas's views about how to interpret the Constitution radically conflict with modern constitutional doctrine. He resurrects a natural law theory of constitutional interpretation that slipped into disrepute a half-century ago. Central to his approach is the desire to limit the courts' ability to recognize or vindicate personal rights. In one article, Judge Thomas warns against the "maximization of rights", admonishing that the Supreme Court might strike down a law that violates a personal right, or that Congress might use its power to protect a recognized right.[8] At the same time, he would enhance protections given to the economic "rights" of businesses and property owners and, in the process, undermine health and safety legislation which has protected our citizens for fifty years.[9]

The personal right Thomas has singled out most for attack is the right to privacy. He has expressed his "misgivings"[10] about the majority and concurring opinions in the Griswold case, which protects the right to use contraception, and, in an article appealing to conservatives to use natural law, described Roe v. Wade as the case "provoking the most protest from conservatives."[11]

Not long ago Judge Thomas made a speech to the Heritage Foundation praising an article written by Lewis Lehrman.[12] That article, as the committee knows, contends in an elaborate analysis that natural law accords an unborn fetus an inalienable right to life, a conclusion that would not merely permit state prohibition of abortion, but require it. Judge Thomas called it "a splendid example of applying natural law". Judge Thomas now claims that his description of the Lehrman article as "splendid" was not an endorsement, but merely a "throw-away line" intended to win over his conservative audience to a general natural law approach to

---

Positive (Keynote Address Celebrating the Foundation of the Pacific Research Institute's Civil Rights Task Force, August 4, 1988).

[8] Civil Rights as an Interest, at 399.

[9] Thomas, Address for Pacific Research Institute (August 10, 1987); Thomas, Thomas Sowell and the Heritage of Lincoln: Ethnicity and Individual Freedom, 8 Lincoln Review 7 (1988).

[10] Civil Rights as an Interest, at 398-99; Higher Law, at 63 n.2.

[11] Id.

[12] Lehrman, The Declaration of Independence and the Right to Life: One Leads Unmistakably from the Other, The American Spectator 21, 23 (April 1987).

civil rights.[13] But the speech did not refer casually to the article; it praised the very contents of the essay, which Judge Thomas described as the "meaning of the right to life." Moreover, the analysis in the Lehrman article, which identifies the Declaration of Independence as the source for a natural law theory of constitutional interpretation, is nearly identical to the analysis of natural law in several of Judge Thomas's writings and speeches.

In fact, the essay is strikingly similar to some of the writings of Professor Harry V. Jaffa of Claremont Institute's Center for the Study of the Natural Law, who appears to be a source for both Judge Thomas' and Mr. Lehrman's views on natural rights jurisprudence.[14] As the Committee may know, two of Professor Jaffa's former students are credited for their assistance in preparing Judge Thomas' articles expounding his natural law interpretation of the Constitution. Like Judge Thomas and Mr. Lehrman, Professor Jaffa finds in the Declaration of Independence the source for his species of natural law jurisprudence, and like Mr. Lehrman, he concludes that natural law contains a command to bar abortion.[15] These views of the Constitution are far more extreme than those of any modern justice or nominee.

The right to privacy and the particular right of a woman to control her bodily destiny are central concerns of this nomination. In his testimony, Judge Thomas sought to distance himself from his past statements about those rights. But, if Judge Thomas disavows what he said so recently and if he also declines to answer the committee's questions on such critical issues, what is the record that the Senate can review to determine whether he merits appointment to the highest court in the land? I respectfully urge this distinguished committee to withhold its

---

[13] Transcript of Hearings on Nomination of Clarence Thomas to be an Associate Justice of the Supreme Court before the Committee on the Judiciary of the United States Senate (September 10, 1991) at 196-97.

[14] See Thomas, Speech at Harvard Federalist Society Meeting, at 3; Higher Law, at 64; Lehrman, On Jaffa, Lincoln, Marshall and Original Intent, 10 U. Puget Sound L. Rev. 343 (1987).

[15] Jaffa, Judicial Conscience and Natural Rights: A Reply to Professor Ledewitz, 11 U. Puget Sound L. Rev. 219, 231 (1988).

consent to Judge Thomas' nomination, for the conclusion is inescapable that his confirmation would put the fundamental rights of Americans, and especially of women, in grave jeopardy.

Respectfully,

ROBERT ABRAMS