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ALFRED W BLUMROSEN
Thomas A Cowan Professor of Law

September 24, 1991

The Honorable Joseph Biden, Jr.
U.S. Senate
Washington, DC 20510

Dear Senator Biden:

I am enclosing two copies of my testimony concerning Judge Thomas Nominations, what I filed last week, for your use. It makes one major point which I do not believe was noted by the witnesses. I hope you will personally review it.

Sincerely,

Alfred Blumrosen
Professor of Law

AB:rpc

Enclosures

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TESTIMONY OF

ALFRED W. BLUMROSEN

THOMAS A COWAN PROFESSOR OF LAW

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SEPTEMBER, 1991

BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

CONCERNING THE NOMINATION OF CLARENCE THOMAS

TO THE SUPREME COURT OF THE UNITED STATES

My name is Alfred W. Blumrosen. I am the Thomas A. Cowan Professor of Law, Rutgers Law School, Newark New Jersey. My field is employment discrimination law. I have served every federal administration during the period of 1965-1980, while a bi-partisan Equal Employment Opportunity Program was developed and implemented. In the Johnson administration, from 1965-1967, I was Chief of Conciliations for the Equal Employment Opportunity Commission. During that time I organized the conciliation process under Title VII. In 1968, I was a Special Attorney in the Civil Rights Division of the Department of Justice. During the Nixon-Ford administration, I served as consultant to the Assistant Secretary of Labor for Employment Standards, Arthur Fletcher, conducted a research program to improve state fair employment practice agency performance and organized a conference at Rutgers Law School on the first ten years of Title VII in 1975 with the support of the EEOC. During the Carter administration, I was a consultant to EEOC Chair Norton. I assisted in the reorganization of the EEOC, the development of new procedures, and the development of Guidelines on Affirmative Action. I was the EEOC's representative to the committee which developed the Uniform Guidelines on Employee Selection Procedures-1978.

Both of these Guidelines are still in force.

I have lectured and written extensively in the EEO field. Several of my articles have been cited by the Supreme Court. I have litigated concerning EEO matters on behalf of the Federal government, and on behalf of workers, unions and employers.

I appeared before you last year, questioning the qualification of Judge Thomas to serve on the Court of Appeals. My concern was that, as Chair of the EEOC, he had privately directed his acting general counsel to disregard the agency's own guidelines on Affirmative Action. I was concerned that Chair Thomas, as a judge, would be likely to permit agencies to disregard their own rules, because he had done so. Agencies must comply with their own regulations, or change them through appropriate procedures, if there is to be effective oversight of their activities. This is a fundamental rule of administrative law. I will not repeat the details of my analysis. I have attached a copy for your convenience. It is important to your consideration of his nomination to the Supreme Court. Today, however, I wish to make a different point.

Your task is to assess how Judge Thomas will respond if confirmed, to the most important issues which will come

before the Supreme Court during the next generation. Let me state what one of these issue is, and how I think Judge Thomas will respond to it.

At stake is the basic economic and social configuration of American society. Will the outrageous concentration of wealth and income which took place during the 1980's be preserved and perpetuated-- or will the principle of an expanding middle class be restored as the basic organizing structure of the nation?

The massive--and obscene-- concentration of wealth and income during the Reagan era has been eloquently documented by the leading conservative political theorist Kevin Phillips, in The Politics of Rich and Poor: Wealth and the American Electorate in the Reagan Aftermath. (Random House, 1990). Even Mr. Phillips is disgusted with the decline from what he views as the realistic assertion of conservative values in the 70's, into the swamp of greed and glitz of the 1980's.[1]

Legislation which favors the poor and lower middle classes cannot now be enacted. President Bush has used his veto on these matters so as to avoid the majority rule

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1. Phillips, 154-209.

principle. A two-thirds vote is now required to pass civil rights, family leave, workers rights or unemployment compensation legislation. So long as his supporters command 1/3 of the votes in the Senate, the will of the Congress is disregarded.

But the people will ultimately refuse to support a society so crudely operated for the benefit of the rich, and will insist that we reinvigorate the principle of an expanding middle class, in part so that the poor may realistically look forward to a better future. The people will either replace the President, or elect more senators who share their vision. When either event happens, legislation will be passed to revive and expand the middle class. This will be done partly at the expense of the very rich--probably by increased taxation of income and wealth--and partly through other measures which will enhance the ability of the less wealthy to influence social and economic matters.

These laws will then be challenged in the last legal bastion in which the rich will seek to preserve their positions--the Supreme Court. The Court will be asked to declare these new acts unconstitutional, or to interpret

them so narrowly that the obligations which Congress intends to impose will be minimized.

The older technique which the Court once used to protect the wealthy-- declaring that the constitution protects the advantage which wealth gives--is now out of fashion. Less than 100 years ago the Court said that due process prohibits a legislature from altering the economic relations between rich and poor.[2] There are some who would have the court return to that view. But the more recent history suggests that the Court will take a different tack.

The newer method of frustrating the will of Congress was tested by the Supreme Court with great success in 1989 in cases involving the Civil Rights to equal employment opportunity of minorities, women and older workers.[3] That technique is to interpret legislation in a narrow and technical way so as to frustrate the legislative will. These decisions are then defended as "merely technical" or

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2. Coppage v. Kansas, 236 U.S. 1 (1915).

3. See Blumrosen, The 1989 Supreme Court Rulings Concerning Employment Discrimination and Affirmative Action: A Minefield for Employers and a Goldmine for Their Lawyers, 15 Employee Relations Law Jour. 175 (1989).

on the grounds that Congress was not clear enough about its intention. The Court adopted the narrowest view of the law, and ignored both precedent and legislative history. The citizenry did not get exercised about "technical" decisions, and the Presidential veto of the 1990 Civil Rights Act, done under the banner of opposing "quotas," was sustained in the Senate. The media never asked the President what he meant by that term. The net result is that the impact of the equal employment laws has been reduced, in a manner inconsistent with its original interpretation.

This is a methodology which the Court will use to preserve the new structure of wealth and influence.[4] It is more subtle, more difficult to address than a blunt holding that laws are unconstitutional.

When laws which try to revive the middle class, and open opportunities for the poor come before the Supreme Court, how will Judge Thomas react? Does he have deep

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4. For an example in 1991, see Litton Financial Printing v. NLRB, 111 S. Ct. 2215 (1991) in which the Court rejected, 5-4, the presumption of arbitrability of disputes under a collective bargaining agreement which has been built into Labor Law over the last thirty years.

sympathy for the poor and disadvantaged because he struggled with poverty and discrimination himself? Or has he so far identified himself with the interests of the wealthy that he will join the Court in frustrating the efforts of Congress to restore the American dream of an expanding middle class?

Let us look at his record as Chair of the EEOC to help answer this question. This record does not demonstrate sympathy for the disadvantaged.[5] The EEOC was established by Congress in the 1964 Civil Rights Act to conciliate claims of employment discrimination where there was "reasonable cause" to credit those claims. Judge Thomas reduced by half the chances for a minority or woman to secure assistance from the EEOC in settling their discrimination claims. In FY 1981 and 1982, EEOC settled 35,000 of the 88,000 claims filed, for $ 133.6 million dollars. In FY 1987 and 88, after Judge Thomas had been

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5. He surrendered the government wide policy-making function of the EEOC, created in President Carter's executive order and reorganization plan, to William Reynolds, Assistant Attorney General for Civil Rights, who was a staunch advocate of restricting the scope of civil rights law--without any overt objection, or insistence on formalizing the loss of influence by the EEOC. Reynolds then conducted the Reagan program to narrow the bi partisan program of the previous 15 years.

managing the EEOC for several years, it settled 12,800 of the 90,000 claims filed, for a total of $72 million dollars. In those two years alone, his agency refused to assist 23,000 people and saved employers 61 million dollars. In short, after Judge Thomas took over the EEOC, it settled one third of the number of claims for half the amount of money in that two year period. Between 1983 and 1988 he withheld such relief from 80,000 people.[6]

The EEOC's own statistics tell the story.[7] The chances that a minority or female complainant would be helped by EEOC conciliation if they brought a claim to the EEOC declined from 40% in 1980-81 to 20% in 1987-88. Two out of five such claims filed in 1980 and 1981 were conciliated with benefits to the complainants. By the time Judge Thomas' term was nearly over, that figure was down to one out of five, and the amounts recovered were reduced by 61 million dollars.[8] This is the most telling

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[6]. See appendix, note 1, infra.

[7]. The appendix to this paper contains a summary of those statistics.

[8]Source: EEOC Annual Reports, 1980-1988. These figures cannot be explained by extrinsic circumstances. The proportion of Age Discrimination claims settled did not change during the period, and the settlement rates for race and sex cases in the state agencies were higher than

point in connection with the question of where his sympathies lie.

Race and sex cases are more likely to involve poor and lower middle class people--minorities and women-- than are age discrimination cases.[9] Age discrimination cases are more likely to involve middle class and sometimes even upper income class white males. [10] The chances that a person bringing an age discrimination claim would be benefited by EEOC conciliations remained constant during his term, in contrast to these race and sex cases,. It was 20% in 1980 and 20% in 1988. (This is not to say that those concerned about age discrimination were happy with his work. They speak for themselves.) This reduction in assistance to women and minorities who

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EEOC. See note to appendix, infra.

9. The average settlement of a race, sex, national origin or religion case was $3,763 in 1981-82, and $5,639 in 1987-88. See appendix.

10. Discharge cases constituted nearly 50% of all claims filed with the EEOC in 1988. EEOC Ann. Rep. 1988, p. 20. Age discrimination claimants are apt to be discharged from higher paying jobs than are Race/sex discrimination claimants, so their monetary losses will be greater. The average settlement in an age case in 1981-82 was $15,398 and in 1987-88 was 19,422.

claimed discrimination was caused by policy changes adopted by the EEOC.[11]

The technique by which this was accomplished was procedural. Technical changes were made in EEOC regulations in 1984 which gave more deference to employer arguments. Congress had decreed that the EEOC should try to settle discrimination claims if it found "reasonable cause" to believe there had been discrimination. Judge Thomas' EEOC in 1984 redefined "reasonable cause" to mean only those cases where it thought the complainant would win in court. Thus it denied conciliation efforts to the thousands who had reasonable grounds to complain. That is a much stricter standards than had previously been used, and resulted in the denial of EEOC conciliation assistance to thousands of complainants who would have received it in earlier years.[12] The technique used by Judge Thomas at

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11. The reduction settlements in sex and race discrimination matters by the EEOC did not take place with resepct to age discrimination claims, nor with claims filed with state fair employment agencies. See Appendix, note 2. Therefore the statistics cannot be explained on the basis of increased hostility of employers to settling discrimination claims in general. The EEOC conducted training programs to assure that agency personnel would follow the more restrictive procedures. See, e.g., EEOC Annual Report for 1986-1988, p. 5.

12. Congress did not intend that EEOC conciliate only

the EEOC is the very same techniques that the Supreme Court used in 1989 to narrow the scope of the Equal Employment Opportunity Laws.[13] From this history, it is clear that Judge Thomas will not be sympathetic to Congressional efforts to aid the poor and middle class.

Judge Thomas held the Chairmanship of the EEOC for seven years. The net effect of his performance in that job has been to reduce the chances that minorities or women would get the assistance of the EEOC in trying to settle their claims of discrimination. A person with that record should not be placed on the Supreme Court.

Finally, there is his position concerning affirmative action. He personally benefited from the helping hands given him by the Nuns, Holy Cross, Yale Law School and

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where complainants would win in court. The basis for conciliation in the statute in "reasonable cause" to believe there was discrimination, not proof by a preponderence of the evidence, which is the standard used in court. The EEOC is not a court, and does not have the power to hold adjudicatory hearings.

13. Compare the judicial technique for narrowing the scope of the equal employment laws in Wards Cove Packing Co. V. Atonio, 109 S. Ct. 2115 (1989) with the narrowing of the definition of "reasonable cause" by the EEOC during the Thomas administration.

Sen. Danforth, while he developed his talents and abilities. I applaud all of those efforts. They demonstrate how affirmative action should work. Affirmative action seeks to counter the lasting legacy of discrimination--the tendency to ignore or underestimate the talents of minorities and women. Affirmative action does seek out those minorities and women with talent and ability, and tries to further their development. Decisions as to who to choose from among the large pool of qualified persons, have traditionally been made using race or sex stereotypes. "Goals" are a mechanism to assure that these talented and able women and minorities are in fact sought out, and that the employer does not simply give lip service to the idea of equality. It is a fine tribute to all of those institutions and individuals--and to the work which Judge Thomas has done-- that his career has brought him to this hearing room.

Judge Thomas does not buy this analysis. He appears to believe that people "make it" alone, based on hard work and talent. In this, of course, he is in fundamental error. Demonstrating abilities or talent by hard work is necessary, but it only gets you into the pool from which

those who will be advanced are identified. None of us have "made it on our own." All of us--all of you and myself--have had helping hands along the way. Judge Thomas was assisted by such programs to develop and demonstrate his abilities. But he does not believe that affirmative action is a part of the way the world works. He wishes to believe in a world in which people "make it on their own." As a consequence, he is likely to be tough on the poor, because they did not work hard enough to get out of poverty, and to look skeptically at programs designed to open middle class opportunities.

You may test this thesis by asking his views on the merits of Wards Cove Packing Co. V. Atonio, Patterson v. McLean Credit Union, Lorance v. AT & T, Martin v. Wilks, Price Waterhouse v. Hopkins and Betts v. Ohio, the 1989 cases in which the Supreme Court cut back on the scope of the Civil Rights Acts. In these cases, and others, the Court said it would ignore what Senators and Congressmen write in reports, and what they say in the floor debates on legislation, and even what its predecessors have said. Where does he stand on the question of taking legislative

history, including committee reports and legislative debate into account? Restricting the use of these materials is a fundamental element of the new Supreme Court technique. The "new" Supreme Court will ignore what Congress said and did in the course of developing legislation. This is the way the Court will try to mutilate efforts of Congress to help the poor and middle classes. Judge Thomas has already demonstrated that he can interpret a statute so as to reduce the help it will give to workers. That is what he did when he reinterpreted the concept of "reasonable cause" under Title VII. On this record, he is likely to join the group on the court who are hostile to Congressional efforts to restore the middle class and give hope to the poor.

Of course, it is appropriate for the Senate to inquire into his views on any issue which is likely to come before the Court. The Court is a policy making body, operating within a loose framework of the Constitution and statutes. The Senate is entitled to examine the policy views of nominees. That is different from asking a prospective justice to decide whether A or B should win a particular law suit. These policy issues concerning

constitutional and statutory interpretation are the lifeblood of the work of the court, and any effort to evade discussion of them should result in rejection of the nominee.

Unless his answers convince you that he will honor the judgment of Congress, not only as found in the so called "plain meaning" of the words, but in the sense of the will of the majority derived from all appropriate and relevant sources, his record of lack of sympathy for the poor should lead you to reject his nomination.

APPENDIX

STATISTICS FROM EEOC ANNUAL REPORTS, 1980-1988

	CHARGES FILED	SETTLEMENTS #	%	Average	Total (000)
1981-82					
Race, sex, Natl. origin, Religion	88,747	35,512	40	$3,763	$133,667
Age	17,308	3,847	22	15,398	59,238
1983-84					
Race, sex etc.	97,640	27,328	27	6,104	167,782
Age	26,193	4,534	17	9,652	43,762
1985-86					
Race, sex etc.	102,613	14,219	13.8	6,773	96,303
Age	26,543	3,340	12.5	11,812	39,451
1987-88					
Race, sex etc.	90,480	12,820	14.2	5,639	72,294
Age	23,081	3,387	14.7	19,422	65,784

NOTE 1. The settlement rate for 1981-82 in race, sex, national origin and religion cases was 40%. Between 1983 and 1988, EEOC received 290,663 complaints concerning these types of discrimination. If it had settled 40% of those cases, it would have settled 116,265. In fact, it settled 29,777, or 86,488 fewer than it would have resolved under the earlier standards. This is the basis for the estimate that the Thomas administration at EEOC denied settlement assistance to 80,000 people.

NOTE 2: in 1985-86, State Fair Employment Practice Agencies settled 26% of the race, sex, national origin and religion cases which came before them, and 16% of the age discrimination cases. In 1987-88, the state agencies

settled 22% of the race, etc. cases and 20 % of the age cases. The settlement rates in the race, sex, etc. cases for the state agencies were higher than the settlement rates for similar cases at the EEOC.