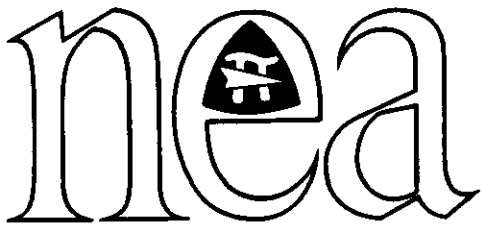

LEGISLATIVE INFORMATION
STATEMENT
OF THE
NATIONAL EDUCATION ASSOCIATION
ON
THE NOMINATION OF CLARENCE THOMAS
TO THE U.S. SUPREME COURT

PRESENTED TO THE
JUDICIARY COMMITTEE
OF THE
U.S. SENATE

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Clarence Thomas: An Appraisal

Overview

The United States Supreme Court has a profound impact on the quality of public education and the lives of America's educators. Fundamental constitutional principles, as spelled out by the Court, have helped shape the open academic inquiry and broad rights of access that have made free, universal, public education a central element in our nation's success.

The National Education Association has a longstanding commitment to these values. We have worked to maintain and expand free speech, preserve religious liberty through separation of church and state, and protect the human and civil rights of all Americans.

The nomination of Judge Clarence Thomas to the U.S. Supreme Court causes NEA members grave concern. His reliance on a concept of "natural law" opens the doors to radical shifts in interpretations of the U.S. Constitution. His avowed support for tuition tax credits and vouchers indicates a willingness to undermine the constitutional separation of church and state. His antipathy to group remedies to compensate for prior discrimination could undo substantial progress made over the past half century in the area of civil rights. His disparaging views of a constitutional right to privacy could lead to a marked preference for the rights of the State over the rights of individuals.

Based on his abysmal record as chair of the Equal Employment Opportunity Commission, NEA opposed Thomas's nomination to the U.S. Court of Appeals for the District of Columbia in 1990. His record, his writings, and his rulings offer no basis to reverse that opposition. Therefore, NEA opposes the nomination of Judge Clarence Thomas to the Supreme Court.

Disdain for the Rule of Law

In July 1989, 14 key Congressional committee chairs and members who had long experience working with him as EEOC chair, wrote to President Bush urging him not to nominate Thomas to the U.S. Court of Appeals, concluding that he has "an overall disdain for the rule of law."

Thomas has exhibited that disdain time and again throughout his career. Thomas demonstrated a contempt for Congressional authority in his tenure at the EEOC, both in his defiance of its oversight and his praise of Oliver North -- who also claimed a higher authority than the law. Noted Thomas in a 1987 speech before the Cato Institute: "as Ollie North made it perfectly clear last summer, it is Congress that is out of control."

Thomas showed blatant disregard for judicial authority while at the Department of Education's Office of Civil Rights, as NEA knows through first-hand experience.

NEA was one of the parties to litigation, WEAL and Adams v. Bell, in which various organizations sued the federal government over its failure to process civil rights complaints against educational institutions in a timely fashion. Initiated in 1970, the lawsuit charged that the Department of Health, Education, and Welfare engaged in a "deliberate policy of nonenforcement" of Title VI, which prohibits racial discrimination. The suit was later expanded to include challenges to the nonenforcement of discrimination on the basis of gender (Title IX) and disability (section 504) and to add the Departments of Education and Labor as defendants.

In 1977, the Carter Administration settled the lawsuit by agreeing to a consent order that established specific timelines for processing civil rights complaints. In 1982, while Thomas was head of the Department of Education's Office of Civil Rights, the Reagan Administration asked the court to vacate the order.

At a hearing conducted to investigate the Department of Education's failure to meet the court-established timelines in processing and enforcing discrimination claims, Thomas was asked, "So aren't you, in effect, substituting your judgment as to what the policy should be for what the court order requires?" Thomas answered, "That's right."

Even the Reagan Justice Department, which had sought to vacate the order, took steps to urge Thomas to expedite processing of discrimination claims, and yet he took no action to rectify the situation.

Age Discrimination

In 1988, the Government Accounting Office found that from one-half to four-fifths of all discrimination charges filed with the Equal Employment Opportunity Commission or state and local agencies were closed without full investigations. Thomas first attempted to blame one of the regional offices, then complained of insufficient funds, and finally dismissed the GAO report as a "hatchet job."

But the most blatant example of Thomas's insensitivity to equal rights protection is his conduct, while at EEOC, on age discrimination claims. Thomas allowed more than 13,000 age discrimination claims to lapse because of foot-dragging on investigation. Even after Congress took action to extend the statute of limitations, EEOC allowed those timelines to expire.

Thomas's conduct during Congressional investigation into the matter raises questions about his judgment and candor. In a hearing held in 1987 before the Senate Special Committee on Aging, Thomas first reported that 78 age discrimination cases had lapsed, even though the EEOC's own information

revealed that more than 1,000 cases had lapsed. Eventually, the Senate Aging Committee subpoenaed EEOC's records to find that 13,000 cases had been allowed to expire.

In a number of age discrimination cases on early retirement plans that were, in fact, programs designed to coerce older workers into taking early retirement, EEOC sided with the employer. In 1987, EEOC issued new rules that shifted the burden of showing coercion to the employee and allowed employees to waive rights under the Age Discrimination in Employment Act without supervision by the EEOC.

The National Council on Aging, in its statement opposing Thomas's nomination to the Court of Appeals, stated "people cannot properly take an oath to enforce certain laws and, once in office, work consistently to undermine them."

Experience

Having served as an appellate judge since only February 1990, Thomas's experience as a judge is extremely limited. More than half his professional career has been as chair of the Equal Employment Opportunities Commission (EEOC), where his tenure was marked by laxity of enforcement and blatant disregard for statutory and regulatory law.

Thomas's other experience includes a stint as assistant attorney general in Missouri where he handled tax and finance matters. He worked for the Monsanto chemical company in St. Louis for two years. In 1979, Thomas moved to Washington, D.C., to serve as an aide to Sen. John Danforth (R-MO) on energy and environmental matters. He joined the Reagan Administration in 1981 as assistant secretary of the U.S. Department of Education's civil rights division. Shortly thereafter, he was named chair of the EEOC where he served for eight years. In 1990, he was nominated and confirmed as a judge on the U.S. Court of Appeals for the District of Columbia.

On August 28, the American Bar Association, by a vote of 13-2, determined Thomas "qualified" for the Supreme Court. Virtually all Supreme Court nominees have been determined "well qualified," the highest ABA ranking; the two dissenting votes for Thomas's nomination deemed him "not qualified."

As longtime Supreme Court observer and former Solicitor General Erwin Griswold has stated: "This is a time when (President) Bush should have come up with a first-class lawyer, of wide reputation and broad experience, whether white, black, male or female. And that, it seems to me obvious, he did not do."

Affirmative Action

Judge Thomas has expressed the strongest disapproval of any kind of group remedies to discrimination, in particular affirmative action goals and timetables adopted by public or private employers. As EEOC chair, he was in a

unique position to implement goals and timetables to remedy previous discrimination. Instead, Thomas prevented the adoption of these necessary steps.

Thomas argued that goals and timetables had been rendered unlawful by the 1984 Supreme Court decision in Firefighters v. Stotts, 467 U.S. 561 (1984). In 1985, he ordered EEOC regional attorneys not to seek such remedies in proposed settlements. However, after the Supreme Court ruled in 1986 that such remedies were lawful, and when pressed by members of the Senate at his reconfirmation hearings, Thomas promised to reinstate the policy.

Thomas's views on affirmative action are articulated in a 1987 article in the Yale Law and Policy Review where he advocates pursuing individual discrimination cases that seek as a remedy hiring, reinstatement, back pay, and/or fines and other penalties for discriminatory employers as an alternative to affirmative action goals. In the article he states, "I continue to believe that distributing opportunities on the basis of race or gender, whoever the beneficiaries, turns the law against employment discrimination on its head."

Moreover, Thomas attempted to revise the Uniform Guidelines on Employee Selection Procedures, which had been in use since 1978 to help employers comply with federal antidiscrimination laws. Thomas was not successful in efforts to dismantle the Guidelines -- against resistance of employers, the civil rights community, and even the Reagan Administration -- but he continued to discourage EEOC enforcement of them.

Employers, the Congress, and federal courts, including the Supreme Court, have maintained that affirmative action goals are still an effective means of addressing the employment discrimination. While individual discrimination cases must be advanced, employment discrimination remains far too pervasive an element of American society to be pursued solely on a case-by-case basis.

Church and State

Thomas has given strong indication that he does not hold with a strict definition of the First Amendment requirement for a separation of church and state. Speaking before the Heritage Foundation in 1985, Thomas said, "My mother says that when they took God out of the schools, the schools went to hell. She may be right. Religion is certainly a source of positive values, and we need as many positive values in the schools as we can get."

In various writings, Thomas has bemoaned the absence of a religious element in education and in the law. Any person who characterizes the Supreme Court ruling on prayer and religious instruction in public schools as "taking God out of the schools" is likely to look favorably on efforts to restore sectarian elements in public education.

Moreover, Thomas has expressed support for tuition tax credits and school vouchers that would provide unconstitutional public funding of religious instruction and worship. In a 1980 profile in the Washington Post, Thomas expressed support for vouchers and was quoted as saying that he sends his son to a private school because "the public schools don't educate people -- they teach them they can get by without working." In a 1984 interview in the Washington Times, Thomas was asked his opinion on President Reagan's tuition tax credit proposals. Thomas said, "I think it's excellent...They can send their kids to a parochial school for several hundred dollars a year and they can get a tax break of a few hundred bucks. Take it!"

In other words, Thomas has not hesitated to assert that public funding of sectarian schools would be legal under the Constitution.

Privacy Rights

For many years, Thomas has held that the Supreme Court "invented" the right to privacy in Griswold v. Connecticut through a misleading interpretation of the Ninth Amendment ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

Perhaps his strongest statement against reproductive freedom itself was an endorsement of the argument advanced by Lewis Lehrman in an 1987 article published in the American Spectator. Lehrman asserted that because the Declaration of Independence assures the right to life, abortion must be constitutionally prohibited.

Said Thomas, speaking before the Heritage Foundation, "Lewis Lehrman's recent essay...on the Declaration of Independence and the meaning of the right to life is a splendid example of applying natural law."

"Natural Law"

It has been 80 years since natural law--universal moral principles that are external to the text of the Constitution--was relied on as an authority by the Supreme Court. It was cited as an argument supporting the economic rights of employers to be free of minimum wage laws and health and safety regulations. In 1873, the Court denied women the right to practice law on the grounds that the "paramount destiny and mission of woman is to fulfill the noble and benign offices of wife and mother. That is the law of the Creator." (Bradwell v. Illinois, 83 U.S. 130 (1873))

Thomas has argued in speeches and articles for a return to the authority of natural law. In a speech before the Heritage Foundation in 1987, Thomas stated, "The need to reexamine nature law is as current as last month's issue of Time on ethics. Yet it is more venerable than St. Thomas Aquinas. It both transcends and underlies time and place, race and custom. And, until recently, it has been an integral part of the American political tradition."

On the other hand, according to Professor Laurence Tribe of Harvard Law School, "The philosophy that fundamental liberties are to be implied from one's personal reading of religious sources and the Declaration of Independence represents a departure from both liberal and conservative thought that has characterized the past half-century."

The value of living with the rule of law, a Western tradition going back to King Hammurabi, circa 1750 B.C., is that the law is there for all to know. Individuals should be guided by high moral principles, but a pluralistic society cannot allow a particular religious doctrine to supplant or supersede democratically established law.

The Doctrine of Stare Decisis

Over the past 20 terms, the Court overruled 33 of its earlier constitutional decisions -- an average of 1.65 per term. In the 1990-91 term, the Court overruled five precedents. Thurgood Marshall warned the nation, just hours before his retirement, "The implications of this radical new exception to the doctrine of *stare decisis* are staggering. The majority today sends a clear signal that scores of established constitutional liberties are now ripe for consideration."

Many court observers have noted that the Rehnquist Court will not hesitate to reexamine the validity of earlier precedent. Indeed, recent Supreme Court decisions indicate a willingness to "legislate from the bench," particularly in the area of criminal law. Many fear that dramatic changes are possible in other areas such as abortion, school prayer, affirmative action and free speech.

Throughout his career, Thomas has given indications that he would be a willing participant in efforts to overrule a broad array of critical decisions affecting every aspect of our national life. Conservatism, in judicial terms, describes a tendency to favor the rights of the state over the rights of individuals and to refrain from acting on matters that are properly the province of legislative bodies.

According to that standard, recent actions on the Court to overrule precedents and to invite litigation that will address particular issues, such as rules of evidence, abortion rights, and church-state issues, could be described as more radical than conservative. Until now, the activist elements of the Court, particularly Chief Justice William Rehnquist and Justice Antonin Scalia, have had to moderate some of their ruling in order to gain a 5-4 or 6-3 ruling. With Thomas on the bench, Rehnquist and Scalia would have greater leeway to make dramatic reversals of established law, and go much further than they might with a more moderate justice.

Separation of Powers

The Constitution invests the Congress with the power "To make all laws which shall be necessary and proper..." And yet, with an activist Court and a

trend on the Court to ignore legislative intent, the protections established by the separation of powers is sharply eroded.

In Thomas's short time in the federal judiciary, he has rejected the use of speeches, committee reports, and other materials that would illuminate legislative intent, relying instead on the Administration's interpretation as the final authority. He has criticized the Congressional investigations into the EEOC handling of age discrimination complaints as "overreaching" and praised Oliver North, who violated laws prohibiting U.S. aid to Nicaraguan contras, saying that "North did a most effective job of exposing congressional irresponsibility."

This tendency to undermine Congressional authority is disturbing in itself, but it is also inconsistent with Thomas's stated adherence to the principle of "original intent," which interprets the Constitution on the basis of other writings by the framers, i.e. their legislative intent.

Conclusion

The Thomas nomination comes at a critical juncture in the direction of the Supreme Court. No one expected President Bush to nominate an individual with the stature or views of Thurgood Marshall. And, admittedly, a solid Reagan-Bush appointed conservative majority on the Court has already demonstrated its willingness and ability to change the direction of the Court -- and the nation.

The issue before the Senate in the nomination of Clarence Thomas is what liberty will the Rehnquist Court feel it has to overturn cases dealing with such essential issues as whether public school teachers are entitled to due process in termination decisions or whether school employees can be fired for engaging in free speech activities -- such as criticizing the school administration, joining a union, or belonging to a particular political party. Other questions are equally pressing: can states spend grossly disproportionate amounts to educate children in different school districts within a state? Can the government subsidize religious worship and instruction in sectarian schools?

Thomas's views on these questions raise serious doubts as to whether he can be an impartial jurist and give primacy to stated law, rather than his personal views. He has supported abolition of the minimum wage, claiming that it is "too high for black teenagers." He led efforts at the EEOC to rule that federal law does not require employers to give men and women equal pay for different jobs of comparable worth, and agreed with the assertion of Thomas Sowell that women tend to choose lower paying jobs. His advocacy of a case-by-case approach to addressing employment discrimination is similar to the "all deliberate speed" that has kept school integration a goal, rather than a reality, for almost 40 years.

The President has appointment power, but the framers of the Constitution gave the Senate confirmation power for a reason. The Senate should exercise its authority to preserve a balance on the Court and vote against the confirmation of Judge Thomas.