ORAL STATEMENT

Professor Christopher Edley, Jr.
Harvard Law School

before the

Senate Committee on the Judiciary

Hearings on the Nomination of Judge Clarence Thomas
to be Associate Justice of the Supreme Court

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Thank you Mr. Chairman.

In summary, my central point is this: The Constitution forces the executive and legislative branches to share responsibility for picking justices, and thereby share influence over the course of Constitutional history.

In taking the measure of the nominee, you should look to the whole record, and recognize that good character and unimpeached integrity did not prevent *Dred Scott*, or *Plessy*, or *Lochner*.

In the final analysis, it is not the character of this man that must be at issue, but the character of his record. Yet the heart of the Administration's affirmative case is Judge Thomas' personal story and character, in hopes, perhaps, that this strategy will undergird his credibility and present an image strikingly more attractive than the piles of speeches and abstractions.

But that voluminous written record raises many grave concerns, to which the nominee offers one of three responses:

- First: "Although what I said may sound extreme, I was really trying to make a far less controversial point." Repeated so often, this lacks credibility.

- Second: "That was the position I took as a policy official in the executive branch; as a judge, I do not make policy." This argument is wrong, misconceiving the role of the Supreme Court and the process of judging.

- Third: "I have an open mind on that subject." When applied to fundamental matters, this is almost *disqualifying*. A well-qualified nominee should at least be able to suggest, however tentatively, the framework for his or her analysis. How else can you discern someone's constitutional vision--the key question before you?

You have his documents to analyze, and you have his credibility to assess. But here is what I believe you are left with in two of the more critical dimensions: civil rights and the separation of powers.

First, in civil rights, the close questioning did not demonstrate that the nominee's views fall within the broad bipartisan consensus. If Judge Thomas joins the Court that gutted *Griggs* in a fit of activism, what grounds are there for confidence that he will dissent from further judicial activism of the same sort--judicial activism to reverse those statutory and constitutional holdings he attacked so forcefully over the years?

The second critical dimension is broader. Judge Thomas, on his record, is certainly an unlikely *Congressional* pick for referee or partner in the separation of powers structure.

Why so? The pattern of intemperate remarks (Senator Metzenbaum replayed some of them), the repeated clashes with oversight committees, the cramped and even distorted reading of Title VII and of judicial precedents (Senators Specter and Kennedy explored these)--the pattern is compelling.

The fair prediction, I believe, is that Justice Thomas would tilt strongly toward the executive, defer to narrow agency interpretations of statutes, lean against generous interpretations of regulatory laws (including civil rights measures), and probably be uncharitable in appraising the rationality of statutes challenged under the due process clause or under section 5.

The Court's referee role is more critical than ever. We seem ever more ambitious about what we want to accomplish collectively, through one or another level of government. And

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divided government--White House and Congress led by different political parties--spawns conflicts, which the courts often must resolve. These separation of powers tensions are implicit almost everywhere, but statutory interpretation, with an agency arguably hostile to congressional will, is the most common setting.

Let me be plain. When you choose to confirm or reject a nominee you influence the Supreme Court's jurisprudential view of statutory interpretation and the role of the executive. You influence, perhaps profoundly, the balance of power.

You must guess whether the man who sat before you has the same philosophy of governance as the man who served two presidents, who was insensed about oversight, who praised Colonel North's performance, and who attacked the Chief Justice's opinion in *Morrison v. Olson*.

If the philosophy of governance that prevails in these halls differs from that prevailing on the High Court, then you in the Congress must prepare for a protracted guerrilla war over interpretation of your legislation--a war you are ill-suited to fight.

Rust v. Sullivan, the abortion gag-rule case, shows the danger of a world where, even if Congress has passed the law, executive agencies can distort it, the Supreme Court can misinterpret it, and when Congress tries to clarify it's own intent, the President can veto it.

We have seen the same thing in civil rights, again and again.

How many more examples will there be, Mr. Chairman? You are not powerless in this. The *opportunity and power* to shape our Constitutional history are not the President's alone.

The design of the Framers seeks to balance factions and ensure that no branch has ideological domination over the others. With that in mind, the lax and deferential standard for confirmation proposed by some makes little sense. Can it be that the greatest danger to the Separation of Powers is not the abuse of executive power, or an overreaching judiciary, but the unwillingness of the Congress--in this instance the Senate--to wield its power?

And your power includes this confirmation process. It is not for the nominee or the White House to design. Mr. Chairman, *this Committee* will decide whether there is to be, as you put it, a "Thomas standard." You will choose whether to reward a process that favors evasion over candor,

conversion over consistency, platitudes over analysis, political scripts over constitutional debate, and selective memory over substantive command.

I believe you will choose well. I hope this has been helpful.