Alliance for Justice

A National Association of Organizations Working for Equal Justice

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TESTIMONY ON THE NOMINATION OF CLARENCE THOMAS TO THE SUPREME COURT

The Alliance for Justice appreciates the opportunity to present testimony on the nomination of Judge Clarence Thomas to the United States Supreme Court. The Alliance is a national association of public interest legal organizations representing minorities, women, labor, children, consumers, the environment, and the poor.

The federal courts historically have played a critical role in leveling the playing field for the underrepresented and disadvantaged in our society. Because of our belief that the courts are central to the struggle for equality and fairness in society, the Alliance launched its Judicial Selection Project in 1985. The cornerstone of the project is an extensive review of each federal judicial nominee's competency, integrity, and commitment to equal justice.

The Alliance opposes the nomination of Clarence Thomas to the Supreme Court. In a statement released July 29, 1991 (see attached), the Alliance concluded that Judge Thomas' extensive record as head of the Equal Employment Opportunity Commission and his writings and speeches demonstrated a stubborn unwillingness to enforce federal law consistent with Congressional intent and a judicial philosophy that threatens to undermine constitutional protections. After closely following Judge Thomas' testimony before the Senate Judiciary Committee, the Alliance remains firmly convinced that the nominee's views pose a threat to individual rights and liberties.

At his confirmation hearings, Judge Thomas adopted a strategy to disavow past statements that were either controversial or inflammatory. In doing so, he was asking the Senate to disregard his prior positions in evaluating his fitness for the Supreme Court. It should categorically reject that request. President Bush nominated Judge Thomas for the Court precisely because of his record as an outspoken partisan for conservative causes. He should not be allowed to disown that record now.

SUMMARY OF JUDGE THOMAS' RECORD

Before he was appointed to the District of Columbia Circuit, Judge Thomas compiled an extensive record. As summarized more fully in the attached opposition statement, that record displays a defiance of the rule of law and an excessively narrow role for the courts in protecting individual rights and civil liberties.

Judge Thomas' tenure as chairman of the EEOC was marked by an overall disdain for the nation's civil rights laws. As chairman, he imposed his personal views of anti-discrimination on the agency--contrary to the will of Congress, the overwhelming weight of Title VII case law, and the traditions of the agency itself. He took numerous positions that weakened the EEOC's commitment to enforcement of the law and proved inimical to the rights of workers.

In addition, before his nomination, Judge Thomas consistently advocated a very limited, at times radical, role for the courts. He passionately spoke of natural law and economic rights. He lamented the "willfulness . . . of run-amok judges" and criticized numerous civil rights precedents, labeling them "rather creative interpretations of equal protection and legislative intent . . ." (Speech before the Cato Institute, October 2, 1987, at 7). Prior to the hearings, he did not speak of evolving constitutional standards. Rather, he scorned "the nihilism" of Oliver Wendell Holmes, rejected the judicial philosophy of William Brennan, and praised the opinions of Justice Scalia.

CREDIBILITY

Judge Thomas' testimony before the Senate Judiciary Committee exacerbated the Alliance's concerns about his record and his fitness for the Supreme Court. Riddled with contradictions, disavowals, and evasions, it lacked both candor and credibility.

Contradictions: Judge Thomas' contradictions are most starkly indicated in his comments on natural law. Before confirmation, Judge Thomas wrote that "[t]he higher-law background of the American Constitution, whether explicitly invoked or not, provides the only firm basis for a just, wise and constitutional decision." "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 Harvard Journal of Law and Public Policy 63, 68 (1989) (emphasis in original). However, in the very first round of questioning before the Committee, Judge Thomas stated "I don't see a role for the use of natural law in constitutional adjudication."

(September 10, 1991, Tr. at 137).

If Judge Thomas had changed his mind about the role of natural law in constitutional adjudication, he had ample opportunity during the hearings to say so and explain the reasons. Instead, he blatantly and inexplicably contradicted prior, unequivocal statements. Only after much prodding by Chairman Biden did Judge Thomas finally admit that natural law does impact the adjudication of cases, "[t]o the extent that the Framers believed." (September 12, 1991, Tr. at 43-44). By that time, his inconsistencies had inescapably clouded any understanding of his judicial philosophy.

Disavowals: Some of Judge Thomas' remarks during his testimony can be categorized only as outright disavowals of past positions. A glaring example of this is his comment about Johnson v. Santa Clara County Transportation Agency, which upheld an employer's voluntary affirmative action plan designed to bring more females into traditionally and overwhelmingly male-dominated positions. Judge Thomas, while he was Chairman of the EEOC, harshly criticized the Supreme Court decision, praising instead Justice Scalia's dissent. Of the dissent, he stated "I hope [it] will provide guidance for lower courts and a possible majority in future decisions." (Speech before the Cato Institute, April 23, 1987, at 20-21). When Senator Kennedy asked him why he was urging lower courts to follow the dissent, Judge Thomas replied that "in using the word 'guidance,' I suggested . . . we look at the opposite side of the argument." (September 12, 1991, Tr. at 80). Dubious at best, that explanation shows no recognition of the message the statement was sending to judges.

Evasions: The right to privacy and the Supreme Court's role in preserving it has been a burning public issue in this country for the past decade. Yet, on no issue was Judge Thomas more evasive. He quickly stated his belief in a right to marital privacy, which he had to do in order to pass even minimum scrutiny by the Committee. However, marital privacy is the only privacy right that Judge Thomas unequivocally recognized as constitutional. He flatly refused to comment on Roe v. Wade, the landmark case recognizing a woman's fundamental right to choose to terminate her pregnancy. He even said he did not have a personal opinion on Roe. (September 11, 1991, Tr. at 105-106).

Moreover, the evasiveness of Judge Thomas' testimony on personal privacy went beyond Roe. He painstakingly circumvented Chairman Biden's questions about the fundamental right to privacy of single persons. Even when Chairman Biden pulled from him a "yes" to the question of whether he believed the Constitution protects a single individual's right to privacy in the area of procreation, Judge Thomas felt compelled to add "I have expressed on what I base that, and I would leave it at that." (September 13, 1991, Tr. at 120). At a minimum, this is not the kind of

answer that instills confidence about Judge Thomas' views of the right to privacy outside the marital relationship.

Finally, Judge Thomas avoided questions on the controversial White House Working Group on the Family report, which criticized as "fatally flawed" a number of Supreme Court right to privacy cases, including Roe. Although Judge Thomas was the highest ranking Reagan Administration official on the Working Group, he said he never read the report and did not realize it contained criticism of numerous privacy cases. He gave a similar explanation in avoiding questions about Lewis Lehrman's anti-abortion article. His explanation -- that he had not reviewed the article in preparation for his testimony, despite the highly publicized controversy it generated after his nomination -- implies willful evasion. More importantly, it trivializes an issue that is of primary concern to the American public.

In an attempt to explain the inconsistencies in his testimony, Judge Thomas stated that his past statements and positions were taken as a policymaker, not as a judge, and therefore should be discounted. He implied that they were of little relevance to the question of what judicial philosophy he will bring to the Supreme Court. That is utterly untenable. A person cannot -- and should not -- shed his personal philosophy when he or she dons a black robe. Personal philosophy is the most relevant evidence of judicial philosophy. Judge Thomas' failure to recognize the inseparable link between the two only casts further doubt on his fitness for the Court.

THE NEED FOR MODERATION

The departure of Justice Thurgood Marshall from the Supreme Court represents a pivotal point in the history of the Supreme Court. Led by Chief Justice Rehnquist, the Supreme Court has embarked on a brazen course to overturn significant constitutional protections with which it ideologically disagrees. It was disturbing and ironic that as Justice Marshall was bringing his Court tenure to a close, Chief Justice Rehnquist was "send[ing] a clear signal that essentially all decisions implementing the personal liberties protected by the Bill of Rights and the Fourteenth Amendment are open to reexamination." (Marshall, J., dissenting in Payne v. Tennessee).

The Court's present course makes it imperative that the Senate halt the ideological court-packing plan of the Reagan/Bush Administrations. The Senate should insist on a nominee who will bring moderation to an increasingly monolithic Court out of step with the American people. Judge Thomas is not that nominee.

CONCLUSION

Justice Thurgood Marshall brought to the Supreme Court an extraordinary sensitivity and insight to the plight of those suffering injustice. Conversely, Judge Thomas has displayed a disrespect for the law and an indifference to the very individuals he was entrusted to protect. An individual who throughout his career overlooked the most vulnerable in our society and openly flouted the law presents too great a risk of reversing this country's progress towards equality and justice. Given the current course of the Court, which has declared open season on standing precedents, the country cannot afford to give Judge Thomas the benefit of the doubt on his longstanding, but recently disavowed, record.