



COALITION OF BLACK TRADE UNIONISTS

EXECUTIVE COMMITTEE:

WILLIAM LUCY, *President*
Secy-Treas. AFBCME, AFL-CIO
CLEVELAND ROBINSON, *Executive Vice President*
Secy-Treas. District 66, UAW, AFL-CIO
WILLIE BAKER, *First Vice President*
Vice President, UPDW, AFL-CIO
CONNIE BRYANT, *Second Vice President*
Vice President, CWA, AFL-CIO
WILLIAM SIMONS, *Treasurer*
President, Local 6, AFT, AFL-CIO
ERNEST LONDON, *Secretary*
Vice President, UAW, AFL-CIO
ROBERT SIMPSON, *Corr. Secretary*
President, Local 743
Warehouse & Mail Order Empl Union
IBT, AFL-CIO

Administrative Office

P.O. Box 73120
Washington, D.C. 20056-3120
(202) 429-1203

**TESTIMONY OF
WILLIAM LUCY, PRESIDENT
COALITION OF BLACK TRADE UNIONISTS
ON
THE NOMINATION OF JUDGE CLARENCE THOMAS
TO THE U.S. SUPREME COURT
BEFORE THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY**

SEPTEMBER 19, 1991



Mr. Chairman and distinguished members of the Senate Judiciary Committee, I am William Lucy, President of the Coalition of Black Trade Unionists (CBTU) and Secretary-Treasurer of the American Federation of State, County, and Municipal Employees (AFSCME). I am extremely pleased to have this opportunity to come before you today to share my thoughts on the nomination of Judge Clarence Thomas to the U.S. Supreme Court.

I am here representing the views of the Coalition of Black Trade Unionists. The CBTU represents the views of concerned workers, but particularly Black workers. We decided to oppose this nomination for a number of reasons. Most importantly, we believe that as a Supreme Court Justice, Judge Thomas would not act in the best interest of the working men and women in this country, particularly Black workers. His questionable public record as an official at the Department of Education and as Chairman of the Equal Employment Opportunity Commission (EEOC), his limited judicial qualifications, his numerous writings and speeches, indeed his entire professional background, leave us with uneasy feelings about what his confirmation could mean for the men and women we represent. Moreover, we believe that the content of his character is of grave importance – not the color of his skin or the numerous barriers he has overcome to reach his current status in life. All of this is of little consequence in determining his qualifications to sit on the Supreme Court.

Once we take a closer, more objective look into the public record of Judge Clarence Thomas, which Mr. Chairman, you spent the better part of last week doing, we must now ask ourselves what he actually accomplished as an official at the

Department of Education and the EEOC. I believe an examination of his public record and indeed his testimony last week reveal that he did not carry out his agencies' mandates. Instead Judge Thomas ran the Office of Civil Rights (OCR) at the Department of Education and the EEOC, based on his own opinions and philosophy, not on prevailing law. If we find that my belief is true, that his public record is so unsatisfactory, then we have to ask ourselves, "why are we, in effect, rewarding him for poor performance and why are we even considering this man for a seat on the Supreme Court?" Judge Thomas must be held accountable for what I believe is an unsavory record.

Judge Thomas went to the OCR in May of 1981. At the OCR Judge Thomas was charged with enforcing laws barring discrimination in education. It was his responsibility to enforce the laws that require institutions receiving federal funds to refrain from discriminating on the basis of race, sex or disability. Before Judge Thomas' arrival civil rights groups had successfully filed a court suit, Adams v. Bell against the Department (then HEW), resulting in a settlement requiring the OCR to investigate complaints, conduct compliance reviews and initiate enforcement action in accordance with specific time frames. This settlement set the atmosphere in which the OCR was mandated to operate.

Judge Thomas did not follow the terms of the settlement and admitted that he was violating the court-ordered requirements for processing civil rights cases. A hearing was held to investigate Judge Thomas' failure to comply with the court

order. When the judge asked Judge Thomas: .

"...But you're going ahead and violating those time frames; isn't that true? You're violating them in compliance reviews on all occasions, practically, and you're violating them on complaints most of the time, or half the time; isn't that true?"

Judge Thomas responded:

That's right.

Judge asked:

So aren't you, in effect substituting your judgment as to what the policy should be for what the court order requires? The court order requires you to comply with this 90-day period; isn't that true?"

Judge Thomas responded:

That's right..."

Ultimately, a federal judge cited that the OCR was guilty of misinterpreting and inadequately enforcing Title IX, the statute which prohibits gender discrimination in federally-funded education programs and institutions. Judge Thomas' tenure at the OCR resulted in students being assigned to classes for the mentally retarded because of their race or national origin, a suspension of the processing of improper job discrimination complaints against the handicapped by universities and, long delays in

the handling of discrimination complaints.

Judge Thomas brought his own perception of the law and established policy with him to the EEOC. It was Judge Thomas' responsibility at the EEOC to enforce federal laws that prohibit employment discrimination on the basis of sex, race, national origin, religion, and age. Judge Thomas, however, ran the EEOC based on his own opinions and philosophy and not on the prevailing law. He ignored the authority given the EEOC to vigorously attack widespread institutional patterns and practices of discrimination in the workplace. Instead, he eliminated or attempted to eliminate from the Commission proven mechanisms for enforcing federal antidiscrimination law.

Particularly troubling about Judge Thomas' tenure at the EEOC is his attempt to weaken the Uniform Guidelines on Employee Selection Procedures which are based on a unanimous decision by the Supreme Court in *Griggs v. Duke Power Company* in 1971. These guidelines were designed to help employers comply with federal antidiscrimination laws when implementing tests for the purposes of hiring and promotions. *Griggs* prohibits the use of employment criteria that have a disparate impact on women and minority workers or applicants unless the criteria are proven to be job-related. *Griggs* has played a critical role in removing barriers that have historically limited job opportunities for women and minorities. Fortunately, criticism by certain Members of Congress prevented Judge Thomas from weakening the guidelines.

Judge Thomas criticized the EEOC's reliance on class action litigation and severely weakened the litigation unit at the EEOC specifically created to address systematic discrimination in the workplace. He reduced the number of attorney's assigned to this unit by half. And, he eliminated the system for identifying systemic cases. In 1980, before Judge Thomas arrived at the EEOC, the Commission filed 218 class action suits. In 1989, Judge Thomas' last year at the EEOC, the Commission filed only 129 class action suits. Judge Thomas wrote in the *Yale Law and Public Policy Review* in 1987, in an article "Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!" that "emphasis on 'systemic' suits led the Commission (prior to his appointment) to overlook many individuals who came before their offices to file charges and seek assistance."

Unfortunately, Judge Thomas also relaxed its enforcement of individual cases at the EEOC. Under Judge Thomas individuals were unlikely to receive any type of remedy to their claims. In fact, in 1980 settlement rates were over 30 percent while in 1989, under Judge Thomas, settlement rates were down to 14 percent. Cases were inadequately investigated and the number of cases where the claimant received no remedy at all doubled. A 1988 General Accounting Office study found that this change in the Commission's success rate was due to cases not being fully investigated. Basically, people were denied their rights under the law to have discrimination claims adequately investigated.

Judge Thomas has also repeatedly questioned the effectiveness of affirmative action policies. He used his position at the EEOC to dismantle affirmative action programs which had proven to be effective and which helped to protect the rights of women and minorities from discriminatory practices in the workplace.

The use of goals and timetables for the training, hiring, and assigning or promoting of qualified women and minorities was an important aspect of the EEOC affirmative action program. In 1984, Judge Thomas announced that the EEOC would discontinue its use of goals and timetables. He did so in spite of substantial evidence that goals and timetables had benefitted women and minorities and in spite of several Supreme Court decisions upholding the use of goals and timetables. During his reconfirmation hearings as EEOC chair, Judge Thomas promised to discontinue his attack on goals and timetables. He returned to the EEOC and continued his attack on the Commission's affirmative action policies including goals and timetables. Judge Thomas wrote in a publication titled *"Assessing the Reagan Years,"* in 1988, that "I am confident it can be shown, and some of my staff are now working on this question, that blacks at any level, especially white collar employees, have simply not benefitted from affirmative action policies as they have developed."

Judge Thomas' record shows that although he had sworn to uphold the prevailing laws against employment discrimination, he continued to write and give speeches showing his opposition to affirmative action. Judge Thomas also continued to criticize important Supreme Court decisions dealing with combatting discrimination in the workplace.

United Steel Workers v. Weber (1979) is a particularly important decision because it encourages and allows employers to take voluntary action to correct past discriminatory practices without employees or the government entering into litigation. Judge Thomas in five speeches in 1982 and 1983 supported the decision in Weber. Then in a speech in 1987 to the Cato Institute, Judge Thomas announced that he disagreed with the Court's findings in Weber. Judge Thomas flipped-flopped on one of the most important Supreme Court decisions dealing with discrimination in the workplace.

In Fullilove v. Klutznick (1980) the court held that Congress had a constitutional right to correct past discrimination by passing appropriate legislation. The case dealt with a set-aside program enacted by Congress to alleviate historic discrimination against minorities in the construction industries. The Court found that Congress' response was appropriate in enacting the set-aside program in response to proven charges that minority businesses had historically been denied contracting opportunities because of unfair procurement practices. Judge Thomas criticized the decision in a paper titled Assessing the Reagan Years in 1988 by saying:

"the Court reinterpreted civil rights laws to create schemes of racial preference where none was ever contemplated."

Judge Thomas also criticized Johnson v. Transportation Agency, Santa Clara County (1987), where the Supreme Court upheld Santa Clara County's voluntary affirmative action program which was implemented to correct historic underrepresentation by women in certain well paying jobs. The Court said that the county's plan to consider gender and ethnicity when choosing among qualified candidates was acceptable when these groups were underrepresented. Judge Thomas wrote in a New York Times article titled, "Anger and Elation at Ruling on Affirmative Action,":

"It's just social engineering, and we ought to see it for what it is. I don't think the ends justify the means, and we're standing the principle of nondiscrimination on its head -- it's simple as that -- and we're standing the legislative history of Title VII on its head."

In Local 28, Sheet Metal Workers v. EEOC (1986), the court held that race conscious remedies such as goals and timetables may be used to correct intentional racial discrimination. The case involved flagrant and long-standing intentional discrimination against Black workers as well as a disregard of federal court orders. Early in 1987, Judge Thomas appeared to agree with the decision. Later that year Judge Thomas grouped Sheetmetal Workers with Weber and subsequent cases all together saying that they were all mistaken applications of Title VII. Judge Thomas later wrote in a 1987 law review article,

"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...I think that preferential hiring on the basis of race or gender will increase racial divisiveness, disempower women and minorities by fostering the notion that they are permanently disabled and in need of handouts, and delay the day when skin color and gender are truly the least important things about a person in the employment context."

Judge Thomas also brought a strong and inappropriate pro-business bias to his role as Chairman of the EEOC. When elderly employees of the Clorox Corporation came before the EEOC because they were being fired and replaced with younger, lower paid workers, Judge Thomas refused to investigate their complaints. He said, "This is a standard practice in industry." It may have been standard practice in industry, but EEOC regulations clearly state that economic necessity is not a legal justification for such a practice. Judge Thomas, therefore, chose to ignore the Commission's own regulations while placing his opinions before the law.

The elderly suffered many undo hardships under Judge Thomas at the EEOC. He sat on over 13,000 age discrimination cases until Congress found it necessary to rescue these victims of age discrimination. The EEOC, under Judge Thomas, also failed to rescind regulations that allowed employers to stop making pension contributions for workers over the age of 65. Congress stepped in to pass a law

specifically requiring employers to make pension contributions for employees over age 65. The EEOC continued its insensitivity towards older workers by failing to issue the regulations after Congress passed remedial legislation.

Judge Thomas' record shows a deep insensitivity towards the rights of the elderly in the workplace. He failed to enforce federal age discrimination laws while taking positions even in defiance of the Congress, which went against the economic interests of older workers.

We must take a close look at Judge Thomas' personal opinions when examining his policy decisions. His opinions on women are particularly insightful when reviewing his policies towards women at the OCR and the EEOC. Judge Thomas embraced an analysis of working women, written by a right wing academic, that denies the existence of sex discrimination and rejects the notion that such discrimination plays a part in women working in lower paying, lower status jobs. This analysis suggested that women were in jobs of lower pay and lower status than men because they made decisions about employment in order to accommodate their roles as wives and mothers, and, further, that any inequities which exist between men and women in the workforce are due to women's behavior -- opting for jobs which allow them more flexibility. The analysis went on to say that Black women did better in the work force than white women, a notion which is totally incorrect. Judge Thomas told readers of the November 1987 issue of *Reason Magazine* that, "I consider the author

of this concept not only an intellectual mentor, but my salvation as far as thinking through these issues." Judge Thomas went on to say in the *Lincoln Review* in 1988 that the above-mentioned analysis on working women is:

"...a useful concise discussion of discrimination faced by women. We will not attempt to summarize it except to note that by analyzing all the statistics and examining the role of marriage on wage-earning for both men and women, the author presents a much-needed antidote to cliches about women's earnings and professional status."

Mr. Chairman, women in our society today, most women, and Black women particularly, work out of necessity, not because they are exercising an option. Judge Thomas apparently is not aware of this fact. I am alarmed that someone who believes that gender discrimination does not exist may sit on the Supreme Court and judge sex discrimination cases which may come before the Court.

It is from this point of reference, or perhaps this lack of understanding about a fundamental aspect of the lives of working women, which we must view Judge Thomas' disturbing public record on women in the workplace. The EEOC, under Judge Thomas' leadership, rejected the concept of "pay equity" eliminating the hopes of many women in seeking comparable pay with their male counterparts. Major labor unions took Judge Thomas to task in an effort to remedy discrimination based on sex.

His failure to investigate large numbers of complaints alleging gender-based wage discrimination in violation of the Equal Pay Act and Title VII of the 1964 Civil Rights Act, prolonged the exploitation of millions of working women.

Judge Thomas' actions were particularly harmful to women of color, particularly Black women, who are often crowded in the lower paying, female dominated jobs. Federal civil rights laws provide the necessary means for addressing this inequity. The EEOC, under Judge Thomas, did not adequately enforce the applicable laws. In fact, wage discrimination complaints were mishandled and many were not investigated at all.

As a representative of working men and women of this country, particularly Black working men and women, I am extremely disturbed by Judge Thomas' record with regards to fair employment and equal opportunity for women, the elderly and racial and ethnic minorities. The thought that government should not intervene on behalf of all working people does not reflect the true story of the labor movement in this country.

Judge Thomas' record shows us that he does not have a commitment to equal justice under the law and he does not endorse equal employment opportunities. I do not see anything in his record that convinces me that Judge Thomas should be confirmed to sit on the U.S. Supreme Court -- not his ABA rating, not his performance

at the Department of Education, and certainly not at the EEOC. I reject Judge Thomas' assertion that we should not judge him on his record, a record that has damaged the lives of so many people who were victims of discrimination. I, therefore, urge the members of the Committee to reject the nomination of Judge Clarence Thomas to the U.S. Supreme Court.

Thank you.