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ABANET ABA 461

September 14, 1991

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D. C. 20510-6275

Re: The Honorable Clarence Thomas

Dear Mr. Chairman:

This letter is submitted in response to the invitation from the Senate Committee on the Judiciary to the Standing Committee on Federal Judiciary of the American Bar Association (the "Committee") to present its report regarding the nomination of the Honorable Clarence Thomas to be an Associate Justice of the Supreme Court of the United States.

The Committee's evaluation of Clarence Thomas is based on its investigation of his professional qualifications, that is, of his integrity, judicial temperament and professional competence.

THE PROCESS

The Committee investigation began on July 3, 1991, and ended on August 19, 1991. On two different occasions, Judge Thomas was personally interviewed by members of the Committee.

Committee members interviewed over 1,000 persons throughout the United States, including well over

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75 state and over 300 federal judges, 28 federal magistrate judges, and 29 federal bankruptcy judges. The interviews included present and former members of the Supreme Court of the United States, members of federal courts of appeals, members of the federal district courts, members of state courts, including those before whom Judge Thomas appeared as a practicing lawyer, and, in particular, Judge Thomas' colleagues from the United States Court of Appeals for the District of Columbia Circuit.

Committee members questioned approximately 300 practicing lawyers throughout the United States with special emphasis on those who had occasion to appear before Judge Thomas and those who worked with Judge Thomas during his tenure in the Office of the Attorney General of the State of Missouri, his employment in the Office of General Counsel of Monsanto and the office of United States Senator John Danforth, and his service as Assistant Secretary of Education, and later as Chair of the Equal Employment Opportunities Commission.

Committee members additionally inquired of over 150 deans and faculty members of law schools throughout the United States, including some 12 professors at the law school which Judge Thomas attended, as well as constitutional and Supreme Court scholars.

At the request of this committee, all of Judge Thomas' opinions were reviewed by:

1. A Reading Committee chaired by Rex E. Lee, former Solicitor General of the United States and presently President of Brigham Young University;
2. A Reading Committee chaired by Professor Ronald Allen of the Northwestern School of Law in Chicago; and
3. A Reading Committee composed of professors from Duke University School of Law.¹

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1. Members of these three Reading Committees who participated are listed in Exhibit A to this letter.

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The results of the reviews of the Reading Committees were independently analyzed and evaluated by each member of the Committee. In addition, each member of the Committee independently selected and read opinions of Judge Thomas. This Committee also had the benefit of a thorough and recent investigation of Judge Thomas for appointment to the United States Court of Appeals for the District of Columbia. The present Supreme Court investigation, while built on the base of the earlier work, was substantially expanded and included further review of Judge Thomas' professional qualifications, including an analysis of his performance while a sitting appellate judge.

While the same factors considered with respect to the lower Federal courts are relevant to an appointment to the Supreme Court of the United States, this Committee's Supreme Court investigations are based upon the premise that the Supreme Court requires a person with exceptional professional qualifications. The significance, range and complexity of the issues considered by the Supreme Court require a person of outstanding ability. Such exceptional ability is further demanded by the Supreme Court's extraordinarily heavy docket.

Because of the foregoing, the ratings employed by the Committee for Supreme Court nominees have higher thresholds. The evaluation of "Qualified" for one of the lower federal courts means that the prospective nominee meets very high standards with respect to integrity, judicial temperament and professional competence and that the Committee believes that the nominee will be able to perform satisfactorily. To meet the committee's "Qualified" rating for the Supreme Court is more demanding. The nominee must have outstanding legal ability and wide experience and meet the highest standards of integrity, judicial temperament and professional competence.

Finally, consistent with the Committee's long-standing policy, the Committee did not undertake any examination or consideration of Judge Thomas' political ideology or his views on any issues that might come before the Supreme Court.

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EVALUATION

Integrity

Virtually all comments on Judge Thomas' integrity, character and general reputation were highly favorable. Many people who know Judge Thomas remarked, as did one United States Court of Appeals judge, that he is a "good, caring human being." Those who have observed Judge Thomas characterize his integrity in extremely positive terms: He is viewed as an "honest and straight-forward person, always putting his cards on the table". One litigator, not known for effusiveness, put it this way: "Judge Thomas has great personal integrity. He is at ease with himself and others. He has great self discipline and a strong personal value system. He is a very good person. I have implicit trust in him. He would not do anything he did not think was right." Several judges who have sat with him and have had the opportunity for close observation regard Judge Thomas "as a man of the utmost integrity" who has "moral courage." Indeed, several appellate judges, when addressing the subject of Judge Thomas' qualifications advised the Committee they could only "speak in terms of superlatives." Descriptive terms such as "honest" and "totally open-minded" appear during the interviews.

While no one questioned Judge Thomas' personal integrity, a few interviewees expressed disagreement with Judge Thomas' interpretation of equal employment laws at the EEOC and his adherence to existing court orders, suggesting that those differences raised doubts as to his professional integrity. The Committee investigated these concerns and is satisfied that the disagreement over the interpretation of the law reflects an honest and reasonable difference of opinion. Those who have worked with Judge Thomas stated emphatically to the Committee that he "wanted to do what the law required him to do" and that "[w]hen he thought goals and timetables were required by the law he stood up to those who opposed them."

The Committee, therefore, concludes that Judge Thomas possesses integrity, character and general reputation of the highest order.

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Judicial Temperament

While serving the Court of Appeals, Judge Thomas has consistently been fair and open-minded in his dealings with his fellow judges and with attorneys appearing before him. He has been patient in his questioning of counsel and his questions are focused and to the point. Judge Thomas has been described as deliberate, thoughtful, "business-like, judicious and quiet." Some of his colleagues on the United States Court of Appeals note that he "listens as well as talks" and "has displayed remarkable equanimity in handling his oral arguments." He has also evidenced the capacity to reach a decision efficiently and to defend that decision politely but firmly. A Reading Committee characterized one of Judge Thomas' dissents as one of his "strongest opinions where with civility and deftness of reasoning," he took issue with the majority's position. He is described as an "excellent colleague" who is extraordinarily conscientious and works long hours. The Committee became aware of certain charges concerning Judge Thomas' management as EEOC Chair in which his conduct was characterized as being allegedly "retaliatory." The Committee's investigation revealed these allegations arose from disputed facts and perceptions and involved matters that were in the realm of management discretion. The Committee is satisfied that existing evidence of Clarence Thomas' appropriate conduct and suitable temperament as a judge is much more relevant and persuasive than these few allegations of intemperate conduct. The Committee concludes that Judge Thomas possesses a highly suitable temperament for judicial service.

Professional Competence

To make an assessment of Judge Thomas' professional competence, the Committee sought to measure his intellectual strength, the breadth and depth of his legal knowledge, his analytical skill and his ability to communicate clearly and rationally. The assessment of these considerations produced the only significant differences within the Committee.

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Judge Thomas' professional experience to date has not been as extensive or as consistently challenging as that of others who might have been available for appointment to the Supreme Court. Nevertheless, the substantial majority of the Committee concluded that Judge Thomas meets the Committee's "Qualified" standard.

Particularly persuasive to the substantial majority has been Judge Thomas' performance on the Court of Appeals. There, he has demonstrated intellect, analytical ability and writing skills that are well within the zone of competence for those rated "Qualified" for the Court.

The Reading Committees support the majority of this Committee in their evaluation of Judge Thomas' legal opinions. Thus, as noted by the one of the Reading Committees:

"His writing is direct, clear and carries the hallmarks of competent appellate craftsmanship. His opinions, as another member of the committee has noted, 'reveal that he is certainly intelligent, as well as diligent and thorough in his approach to deciding cases.' His work evidences broad analytical skill and open-mindedness. Several of Judge Thomas' opinions (discussed above) contain clear indications that he will perform competently when given further opportunities to consider cases of real complexity and import."

Another Committee stated that:

"A consensus * * * emerged, but we were somewhat diffident in expressing it confidently because * * * [e]ighteen opinions over a little more than a year is not enough to give one * * * certain insight * * * [.] In brief, Judge

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Thomas' writings reflect a highly intelligent man, well versed in the technical skills of the law. His opinions are carefully and systematically reasoned, clearly articulated, respectful of the record (so far as we can tell), fair in consideration of opposing arguments, extensively supported by citations to authority, and demonstrate no obvious bias in decision. * * *

In sum, we were collectively quite impressed with Judge Thomas' opinions. We found only one opinion to criticize, and many to praise."

The last Reading Committee's comments were equally supportive:

"In conclusion, our review committee found that Clarence Thomas has performed capably as a judge on the U.S. Court of Appeals. He has shown no evidence of judicial bias. His opinions have been, by and large if not without exception, well reasoned and well written. We cannot speculate on the basis of the materials we have reviewed how Judge Thomas, if confirmed, would function under the different demands placed upon a Supreme Court justice. Our review of his work to date suggests that his analytic and communicative capabilities would be adequate to that job."

Additionally, during oral argument and deliberation, Judge Thomas has been well prepared, attentive, and focused on the issues necessary for decision while being sensitive to broader policy considerations, and has challenged attorneys and fellow judges with questions that were thoughtful and useful. The Committee finds his opinions to be clear, direct and thorough. The results have been fair and understandable to litigants. Further buttressing these

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favorable conclusions is a wide set of life and professional experiences. These experiences suggest a special capacity for personal growth and professional wisdom.

On the other hand, Judge Thomas' background as a trial and appellate lawyer has been limited to relatively brief experience gained immediately upon his entry into the profession, and very little of his experience as a practitioner was in the federal court system. His several articles in legal journals have little analysis, are not particularly well formed, and, in part, rely upon an undefined reference to "natural law." Reading Committee representatives and others found these articles to be "disappointing" in presentation, content and scholarship. Our Committee noted, however, that in an interview with Committee members, Judge Thomas rejected "natural law" as a basis for judicial decision making.

The substantial majority of the Committee believes that these limitations are overcome and outweighed by Judge Thomas' brief but highly satisfactory performance on the Court of Appeals. The Committee minority of two, on the other hand, is of the view that Judge Thomas is "Not Qualified" for the Supreme Court. They conclude that Judge Thomas does not have the depth or breadth of professional experience sufficient to place him at the top of the legal profession, as is required by the Committee's criteria for appointment to the Supreme Court of the United States. This minority believes that Judge Thomas' track record in the profession does not demonstrate exceptional or outstanding ability. They further believe that the hope or expectation that such ability will be demonstrated in the future is insufficient in the absence of a prior and extended history of exceptional work in the profession.

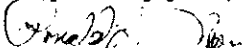
CONCLUSION

Based on all of the information available to it, the substantial majority of the Committee is of the view that Judge Thomas is "Qualified" for appointment to the Supreme Court of the United States. A minority of two rated Judge Thomas "Not Qualified". There was one recusal.

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The Committee will review its report at the conclusion of the hearings and notify you if any circumstances have developed that require modification of these views. On behalf of our Committee, we wish to thank the members of the Judiciary Committee for their invitation to participate in the confirmation hearings on the nomination of the Honorable Clarence Thomas to the Supreme Court of the United States.

Respectfully yours,



Ronald L. Olson
Chair

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September 17, 1991

The Honorable Joseph R. Biden, Jr.
Chairman
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224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Re: The Honorable Clarence Thomas

Dear Mr. Chairman:

Pursuant to the request of Senator Heflin during our testimony yesterday, we enclose a list of non-judicial articles written by Judge Thomas which were considered by the ABA's Reading Committees.

Sincerely yours,

Robert P. Watkins

RPW:keu

Enclosure

BY HAND

Attachment to Sept. 17, 1991 letter to
the Hon. Joseph R. Biden, Jr., Chairman
Committee on the Judiciary

NON-JUDICIAL ARTICLES WRITTEN BY THE HON. CLARENCE THOMAS:

Thomas, The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment, 12 Harv. J. of L. & Pub. Pol. 63 (1989)

Thomas, Toward a "Plain Reading" of the Constitution -- The Declaration of Independence in Constitutional Interpretation, 30 How. L. J. 983 (1987)

Thomas, Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!, 5 Yale L. & Pol. Rev. 402 (1987)

Thomas, The Equal Employment Opportunity Commission: Reflections on a New Philosophy, 15 Stetson L. Rev. 27 (1985)

Thomas, Pay Equity and Comparable Worth, 34 Labor L. J. 3 (1983)

Thomas, Current Litigation Trends and Goals at the EEOC, 34 Labor L. J. 208 (1983)

Why Black Americans Should Look to Conservative Policies. The Heritage Lecture, June 18, 1987

Civil Rights as a Principle Versus Civil Rights as an Interest, from ASSESSING THE REGAN YEARS (D. Boaz ed. 1988)