STATEMENT OF

PROFESSOR SYLVIA A. LAW

OPPOSING THE CONFIRMATION OF

JUDGE CLARENCE THOMAS AS

ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

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I am Sylvia A. Law. For 18 years I have been Professor of Law at NYU and Co-Director of the Arthur Garfield Hays Civil Liberties Program. I am President Elect of the Society of American Law Teachers.

Prior to his nomination to the Supreme Court, Judge Thomas expressed strong views opposing the fundamental right to choose abortion. Most dramatic was his assertion four years ago that Lewis Lehrman's analysis of "the meaning of the right to life is a splendid example of applying natural law." That endorsement of the assertion that the fetus is a human being, entitled to full constitutional protection, and that Roe v. Wade led to a "holocaust," is a more extreme position on abortion than has ever been taken by any Supreme Court Justice in our history, or by any nominee, including Robert Bork.

Judge Thomas's praise of the view that natural law requires an interpretation of the Constitution that would criminalize abortion under virtually all circumstances is not an isolated example. Two years ago, in the Harvard Journal of Law and Public Policy, he characterized Roe v. Wade as "the current case provoking most protest," from conservatives, like himself. Judge Thomas then advocated the use of natural law in interpreting the Constitution, as an alternative to "judicial activism" and the recognition of unenumerated rights.

These comments were not made in an off-the-cuff "political" speech. They were published in an academic/legal journal of Harvard University. We who publish in these journals can attest that the editors scrutinize each idea, word and comma, to assure that the author has expressed ideas with precision.

Judge Thomas's prior statements on reproductive freedom distinguish him from Justices Souter and Kennedy. He has staked out a position on these issues that is extremist -- far outside the mainstream of conservative American political and judicial thought. His prior statements demand explanation.

During these hearings many of you questioned Judge Thomas on reproductive freedom. You gave him the opportunity to assure us that he is not, in the words Senator Heflin used in rejecting Robert Bork, "an extremist who would use his position on the

Court to advance a far-right, radical, judicial agenda." After a week of hearings we do not know anything new about how Judge Thomas approaches the core question of women's right to control their bodies, free from state interference. Indeed, Judge Thomas's answers were deeply disturbing and raised new problems, including concerns about his sense of judicial responsibility and his credibility.

Judge Thomas sought to justify his refusal to answer your questions about his views on reproductive freedom, saying that "to take a position would undermine my ability to be impartial."

By contrast, on many issues he expressed concrete substantive views. He offered a detailed analysis of the constitutional law of exclusionary rules and warrants. He endorsed the Court's current standards of Establishment Clause jurisprudence, even though a case challenging that standard is currently pending before the Court. He addressed the wisdom and constitutionality of mandatory sentencing guidelines. He endorsed a three-tiered approach to equal protection analysis. I could go on. Each of these positions is controversial. Each involves issues that are or will be before the Supreme Court. On each he was prepared to provide concrete, detailed views.

Judge Thomas sought to distance himself from his prior extremist statements about reproductive freedom by denying knowledge of

them. He said he had "only skimmed" the Lehrman article before pronouncing it a "splendid" example of natural law protecting fetal life. Since his nomination, his endorsement of the Lehrman article has been a centerpiece of public debate and concern. But, Judge Thomas testified that he did not even reread it in his ten weeks of preparation for the confirmation hearings. He testified that he never read the 1986 Report of the Working Group on the Family, calling for the overruling of Roe, even though he had signed the Report. Perhaps most astonishingly, despite his frequent criticism of Roe, Judge Thomas insisted that he had no personal memory of ever having discussed the case, and had no personal opinion about the Court's ruling in Roe. He said,"Senator, your question to me was did I debate the contents of Roe v. Wade, the outcome in Roe v. Wade, do I have this day an opinion, a personal opinion on the outcome in Roe v. Wade; and my answer to you is that I do not."

These statements, if credited, reflect serious irresponsibility and insensitivity. Integrity -- consistent truth-telling even when it is uncomfortable -- is an essential quality in a judge. There can be no question that integrity is an appropriate litmus test for a Supreme Court Justice. But if we believe what Judge Thomas has said during these hearings, we must then question whether he is sufficiently responsible to serve on the High Court. Why should we assume that he will bother to read the briefs of parties, or prior precedent, if he doesn't even

reexamine his own words when they generate enormous protest and concern? How can he criticize a landmark decision guaranteeing women their most basic rights without having formulated an approach to the issue?

"Judicial impartiality" did not prevent Judge Thomas from asserting views on many important and controversial issues. But it did prevent him from repudiating, or even discussing, his recent assertions that natural law gives the fetus rights superior to any woman's right to make decisions about her own body and life. When asked how, as a judge, he would address the question whether the fetus was entitled to full constitutional protection, he asserted that he would look to precedent but that he "knew no cases addressing that specific question." It was as though Roe v. Wade, which did address that issue, did not exist. Judge Thomas's selective responsiveness and memory has to be disturbing to women and to this Committee.

Judge Thomas did recognize that the Constitution protects some forms of unenumerated privacies and personal liberties, particularly "marital privacy" in relation to contraception. In response to persistent questioning by Senator Biden, Judge Thomas reluctantly approved Eisenstadt's holding that unmarried people have a right to access to contraception. But he repeatedly returned to characterizing Eisenstadt as an equal protection decision, and to the right to "marital privacy." Clearly, this

provides no reassurance that he would recognize a fundamental right of a woman to choose abortion. Indeed, Judge Thomas steadfastly refused to acknowledge that the Constitution's protection of liberty or privacy gives any right to women seeking abortions. This is a position more radical than that of Chief Justice Rehnquist or Justices O'Connor, who have recognized some form of liberty or privacy interest for women seeking abortions.

No one is asking Judge Thomas to indicate how he would decide a particular case. Last Thursday Senator Hatch asserted that once one recognized that women possess a fundamental right, "you are on the way to deciding most of the cases" involving reproductive choice. With respect, this is not true. The development of a standard requires evaluation of the interest asserted by the woman, the countervailing state interests, and definition of a constitutional criteria for balancing these conflicting claims. Even people who agree upon a standard, often disagree on its application to particular facts and cases. And thought about the standard evolves over time. Rather we ask whether he repudiates prior statements suggesting that he would give no weight to women's claims of reproductive liberty and privacy, or would attach an absolute value to the protection of the fetus. We ask that he answer the same types of questions concerning the fundamental right to choose that he had no difficulty answering concerning other constitutional issues.

On the constitutional issues that matter most to women -- reproductive freedom -- he stonewalled you, and the American people. A week ago his prior statements and writings created a presumption that he was an extremist -- an ideologue. He had a burden to overcome on reproductive freedom. He failed to do so.

On a practical level let me address the argument that confirmation of Clarence Thomas would not matter to reproductive choice because there are already five Justices on the Court willing to overrule Roe v. Wade. This may be true. But many difficult issues remain. Can states ban abortions when the woman's life is in danger? Can they ban abortion advertising? Can they prohibit women from traveling to states where abortion remains legal? Will statutes enacted by Congress be interpreted in a way that is hostile to women's reproductive freedom? The lack of a majority opinion in the Webster case demonstrates tension -- give and take -- among the current Justices. Adding a Justice with an extreme anti-choice view will influence that balance and move the Court even further to the extreme ideological right.

The Constitution assigns you the solemn responsibility to "advise and consent." That responsibility is at the core of the Constitution's separation of powers among the three branches of government.

Over the years this Committee has developed a "common law" of confirmation. Last week some of you made comparisons among this nominee, Judge Bork, and Justices Kennedy and Souter. To allow practical politics to justify approval of a nominee who does not meet your developing standards of integrity, responsibility and commitment to core values of liberty and equality, would disregard your constitutional duty.

Reproductive choice is a basic, fundamental right that is of singular importance to women. It is entirely appropriate for the Senate to insist that a nominee offer a reasoned framework for addressing this fundamental right, and to refuse to confirm a nominee who is not forthright in discussing this core issue.