TESTIMONY
of
DR. JAMES J. BISHOP
BEFORE THE
SENATE JUDICIARY COMMITTEE
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Chairman Biden, Members of the Judiciary Committee and particularly my own Senator Metzenbaum, thank you for allowing me to testify today on the nomination of Judge Clarence Thomas. I am James Bishop. I am here on behalf of Americans for Democratic Action where I am privileged to serve as Chair of the National Executive Committee.

ADA is the nation's premier liberal, multi-issue public policy organization. Founded in 1947, ADA is dedicated to promoting a liberal agenda that is socially conscious and economically just. During our history we have been active participants in numerous battles where the individual rights and liberties of Americans were at stake. We have carefully reviewed past judicial nominations, opposing some, supporting others. Always, the guiding principle in our deliberations has been that our nation's judicial system is the last bulwark of individual freedom: it must protect the rights of those least able to protect themselves against the swings of political or ideological extremism. We have applied this principle in our considerations of this historic nomination and in our executive committee's unanimous decision to oppose Judge Thomas' elevation to the Supreme Court.

Scores of individuals and organizations have testified about their concerns regarding this nomination. ADA shares many of these

same concerns addressed so eloquently by groups representing women, people of color, the elderly, the disabled and America's workers. In my testimony today, however, I will confine my own remarks to three specific considerations that ADA believes should guide this Committee's deliberations.

First, reasoned and principled discharge of the Senate's constitutional "advise and consent" role requires rigorous application of a confirmation standard that legitimately takes into account, among other things, a nominee's ideology.

Second, and related to the first, in determining whether Judge Thomas would faithfully and fairly discharge his duty of constitutional and statutory interpretation, his entire record at the Office of Civil Rights and the EEOC -- as well as his writings and other activities -- not only should, but must be considered. That record demonstrates that Judge Thomas does not satisfy the standard for confirmation that this Committee must apply.

Finally, Judge Thomas' frequent strident and hostile public pronouncements regarding various civil rights and social justice issues and programs reflect a genuine insensitivity and indifference on his part to the plight of individuals who have not been as fortunate as he in their attempts to overcome barriers of discrimination, poverty and intolerance. There is simply no basis for concluding, on this record, that Judge Thomas can be counted on to champion the rights of the disadvantaged and disenfranchised, many of whom did not even have the family or institutional support that was so important to his development.

The Senate's Advise and Consent Role and the Confirmation Standard. The Constitution envisions that the Senate will play a meaningful and constructive role in the confirmation process. Contrary to the arguments of some, the Senate's role is not limited to assuring only that a nominee be technically qualified. Rather, because of the federal judiciary's role in our tripartite system of governance and the life tenure that federal judges enjoy, the Senate's "advise and consent" function is co-equal with the President's nominating role. The Senate is not simply a rubber stamp but represents the people and must protect the people's interest. Therefore, the Senate must exercise this "advise and consent" role in a manner designed to preclude an ideological stranglehold on the Court.

The insulation which the Constitution accords Supreme Court Justices was designed to ensure that the Court discharge its function without regard to the political extremism that all too easily can prevail in the other, elected branches of government. Similarly, the Court's preeminent role as guarantor of the Bill of Rights -- those protections that safeguard individual liberties against majority rule -- underscores the framers' intent that the Court not become captive to shifting poles of ideological extremism.

To ensure fidelity to this constitutional design, the Senate cannot properly exercise its role without regard to a nominee's ideological stance on significant issues of constitutional moment. And it must be especially vigilant in performing its advise and

consent role where, as here, the President has nominated an individual, primarily because of his ideology, to sit on a Court that Senator Specter and others have characterized as "revisionist".

The Senate must not lightly discharge its "advise and consent" function simply because of this nominee's apparent confirmation conversion. Good preparation, advice of others, and a demeanor that is adopted for a hearing are not enough. His writings and actions--before he knew a judicial appointment was in the wings--provide a far more reliable basis on which the Senate must judge his fitness to serve on the Court.

At the outset of these hearings, a majority of the members of this Committee expressed serious concerns about Judge Thomas. Those doubts appear still to exist. In fact, several members have referred to Judge Thomas as an enigma. Doubts as serious as these must be resolved in favor of the interests and needs of the entire country, not simply those of the nominee or the Executive Branch. The Senate has an obligation <u>not</u> to confirm a nominee if it is <u>not fully satisfied</u> that that individual belongs on the Supreme Court.

In this regard, an essential part of your consideration must be the evaluation of Judge Thomas by his peers at the American Bar Association. Their "qualified" rating represents an unacceptable low in the standards one should expect in a candidate for the nation's highest court. No current U.S. Supreme Court Justice has ever gotten a single "not qualified" vote let alone the two that

Judge Thomas received. In fact, no current Justice has failed to get at least a majority of "highly qualified" ratings from ABA evaluation committee members. The weakness of the ABA endorsement must carry considerable weight in your consideration.

Judge Thomas' Conduct During His EEOC Tenure Must Be Considered in Measuring His Fitness for the Court. Throughout his five days of testimony, Judge Thomas steadfastly attempted to run away from the public record he created during his tenure as EEOC Chair. Repeatedly, he contended that many of his more pointed and abhorrent public pronouncements were "throw-away" lines, comments designed to invite debate, or were merely the philosophic musings of a policy-maker. He asked the Committee to excuse and ignore this record on the ground that when he created it, he was a member of the executive branch, and he contended that these strident and categorical ideological pronouncements have not followed him into the judicial arena.

The Committee should reject Judge Thomas' sweeping request that he start with a clean slate for two reasons. First, it invites an essentially standardless review of his fitness to receive life tenure on the nation's highest and most important court. Never has a Supreme Court nominee asked the Senate and the American people to overlook so much. Supreme Court nominees come before this Committee with long, often distinguished public records, created in a variety of forums. It is precisely those records that the Committee must look to in determining a nominee's fitness for the Court. For Judge Thomas and his supporters to

suggest that a lesser standard applies to him would make a mockery of the confirmation process. But even were Judge Thomas correct in contending that his record should be ignored, the remaining "record" on which he then can be judged is simply too slim to permit his confirmation.

Second, Judge Thomas' efforts to nullify of his past public statements ignores the fact that, in his role as EEOC Chair, he was not a mere policy-maker. He was, first and foremost, the nation's chief civil rights law enforcement officer, sworn to uphold and enforce the host of anti-discrimination laws the EEOC administers. Both the Supreme Court and Congress have recognized that eradication of discrimination is the highest national priority; both have recognized the EEOC as the preeminent federal authority in securing this national objective.

But, Judge Thomas was not merely a law enforcement officer. In his capacity as Commissioner and EEOC Chair, he was also a quasi-judicial official. Indeed, while he was Chair, the EEOC consistently and successfully argued in a number of lawsuits that the EEOC is a quasi-judicial agency and, as such, its proceedings are entitled to various of the common law protections that prevail in judicial actions.

As a law enforcement official and quasi-judicial officer, Judge Thomas engaged in a number of actions of questionable propriety, which certainly raise questions regarding his suitability for the Supreme Court.

Judge Thomas improperly expressed opinions on matters that

were pending or likely to arise before the Commission for consideration. Indeed, his willingness to do so there is in marked contrast to his reserve in these proceedings.

For example, early in his tenure as EEOC Chair, Judge Thomas publicly criticized a pending major systemic Title VII lawsuit that the EEOC was then litigating against Sears Roebuck and Co. In his comments, he disparaged EEOC's reliance on statistical evidence to prove its claims, despite the Supreme Court's repeated admonition that such evidence is relevant, probative and, in some cases, decisive. So damaging were his remarks to the agency's litigation that the defense lawyers attempted (albeit unsuccessfully) to compel his testimony at trial.

Later, in 1986, Judge Thomas was a keynote presenter at a labor law seminar sponsored by a private law firm representing Xerox Corporation in an age discrimination suit then pending before the Commission. Though that action involved private plaintiffs, the EEOC was simultaneously investigating a parallel classwide charge based on essentially the same conduct that gave rise to the private suit. During this speech, Judge Thomas discussed -- apparently at defense counsel's express request -- whether the disparate impact theory applies to claims under the Age Discrimination in Employment Act. Despite unanimous favorable precedent in the courts of appeals and the EEOC's own regulations endorsing application of the theory to ADEA claims, Judge Thomas ventured his opinion that the theory does not apply to age discrimination cases. Significantly, that statement was not only

at odds with the EEOC's own published position in its regulations and its earlier litigation, but it also prejudged an issue that, in fact, came before the Commission a scant year later, when staff recommended suit against Xerox. The Commission rejected the staff recommendation. The Supreme Court is likely to revisit the disparate impact issue -- which applies to Title VII as well as the ADEA -- and the role of statistical data in litigation.

On at least three occasions during his Department of Education and EEOC tenure, federal district judges took Judge Thomas to task for his failure to discharge his duties consistent with the requirements imposed by law. In 1982, in the ongoing Adams v. Bell Title VI proceedings, Judge Thomas candidly admitted that, as head of the Education Department's Office of Civil Rights (OCR), he was violating the Court's order regarding processing of civil rights cases. Based in part on these admissions, the Adams judge found OCR in violation of the court's order in many important respects.

One year later, after his appointment as EEOC Chair, Judge Thomas was again the object of criticism by a federal judge. In Quinn v. Thomas, the court struck down the attempted cross-country transfer of a longtime EEOC manager who had been critical of Thomas. The judge found Thomas' action arbitrary, capricious and unlawful and concluded it had been taken as punishment for the employee's exercise of his First Amendment rights.

Finally, in 1987, Judge Harold Greene, a well respected jurist on the District Court for the District of Columbia, openly castigated the EEOC for its failure, under Thomas, to move forward

in revising admittedly unlawful ADEA regulations that permitted age discrimination in the accrual of pension benefits. Openly expressing his skepticism of the EEOC's candor in its professed commitment to move forward, Judge Greene characterized the agency's conduct as "at best slothful, at worst deceptive to the public ..." He went on to note that, "[T]here are not likely to be many cases in which an agency conclude[s] again and again over a long period of time ... that its published interpretation ... is wrong, yet ... consistently fail(s), on one pretext or another, to rectify the error." (AARP v. EEOC, 43 FEP Cases 120, 128.)

Judge Thomas frequently and repeatedly expressed his disdain of Congress, and, in particular, its exercise of its oversight mandate both in his speeches and as Chair of the EEOC. In a speech delivered at Creighton University, Judge Thomas referred to the GAO as the "lapdog of Congress." As became clear, however, intense scrutiny of Judge Thomas' EEOC administration was essential. Repeatedly, Congress found he was attempting to effect major policy changes at the EEOC, often simply by refusing to enforce statutory provisions with which he did not personally agree; or by prohibiting staff from securing remedies traditionally available under Title VII; or by illegally disciplining employees who had the temerity publicly to criticize him and the direction in which he sought to move the agency.

The record of EEOC oversight also reflects a lack of forthrightness on Judge Thomas' part, as when, for example, he failed to provide in a timely manner to the Senate Special

Committee on Aging adequate and accurate data on the numbers of ADEA charges in which the statutes of limitations had expired without the EEOC's having acted to protect the rights of complainants. Moreover, on several occasions, Congress was required to enact legislation to override the refusal of then-Chair Thomas to carry out Congressional intent in enforcing anti-discrimination measures.

It bears remembering that, during his EEOC tenure, Judge Thomas' response to the legitimate concerns raised by Congress regarding his stewardship of the EEOC was to castigate legislators as "run amok" majorities. And it bears stressing that the contemptuous attitude Judge Thomas bore toward the Congress while at the EEOC could well affect his deliberation on questions of statutory intent and the scope of Congressional power if he is elevated to the Supreme Court.

In this regard, the Committee must not forget that the Supreme Court interprets statutes as frequently, or perhaps even more often, than it addresses constitutional questions. The Constitution is not self-executing. Its promise often becomes a reality only when Congress legislates and the Court accords a broad scope to these enactments. This is especially true in the area of civil rights, with the Civil Rights Act of 1964 serving as the single most important vehicle through which the Constitution's equal protection guarantees have been advanced. Judge Thomas' tenure at the EEOC, where he was responsible for enforcing the cornerstone of that Act as well as numerous other anti-

discrimination measures, is thus the only gauge this Committee has to measure his fidelity to Constitution and the laws implementing it. As such, the Committee simply cannot ignore this record, but instead must conclude, based on it, that this nomination should be rejected.

Confirmation of Judge Thomas Will Not Safeguard or Advance Individual Rights and Freedoms. As many witnesses forcefully have recounted, Judge Thomas has expressed frequently views that raise genuine doubt about his capacity for sensitivity, objectivity and compassion, and the degree to which he would bring those instincts to bear in resolving difficult questions of constitutional and statutory interpretation. I will not belabor the many areas that are of grave concern to ADA members. But we would be remiss were we not to state publicly our profound misgivings about the position Judge Thomas has staked out on the issue of affirmative action. Moreover, we believe that Judge Thomas' antipathy to affirmative action reflects more than simply an opposing viewpoint on a difficult question about which reasonable people can -- and do -- disagree.

As an aside, let me say that I -- like Judge Thomas and, I suspect, all of us -- have been shaped by my own experiences. I, too, am an African American who grew up in the segregated South and suffered the anger, shame and sense of powerlessness of seeing my parents denigrated. However, the sum total of my experience and, more importantly, of others less fortunate than I in overcoming this history of oppression, has led me to positions

diametrically opposed to those Judge Thomas has espoused.

Affirmative action programs have been an underpinning of our flawed society's attempts to correct its shameful history of discrimination against racial minorities and women. The simple truth is, without affirmative action, many of us, including Judge Thomas, would not be where we are today. That is not to say that our qualifications are not comparable to those of white co-workers, or that we received unwarranted preferential treatment. It is simply to acknowledge a stark reality: to overcome centuries of discrimination and oppression requires, in many instances, not only that institutions stop discriminating; it requires, as well, that they take affirmative measures to assure inclusiveness where exclusion was previously the norm.

Sadly, despite great strides, the need for affirmative action persists. Only last year, for example, the Urban Institute undertook a major employment discrimination "testing" project, designed to determine whether individual employers treated similarly situated African American and white job applicants the same or differently in the hiring process. In a significant percentage of cases, the study found that, even after carefully controlling for all legitimate factors (e.g., experience and education), African American candidates fared less well than their white counterparts. Just this year, the Older Women's League found that, despite twenty-five years of anti-discrimination efforts designed to open job and educational opportunities for women and to end pay discrimination, the workforce patterns and experiences

of the vast majority of younger women are virtually identical to those of their older counterparts. Clearly, the need for affirmative action in employment has not vanished.

As an educator, scientist and activist, I have personally witnessed the need for affirmative action programs, including one with which I am intimately involved. That program is designed to attract economically disadvantaged, minority and other under-represented youth to higher education. Daily, I see the need for such outreach and "special" programs. Daily, I see that -- despite Brown v. Board of Education (whose reasoning Thomas has criticized) and its progeny (which Judge Thomas rejects) -- minority students in this country are still all too often the victims of inferior educational opportunities. Daily, I see that they suffer economic hardship that is rooted in past and present discriminatory practices. Daily, I must recognize how far we have come but, unfortunately, how far we still have to go.

Judge Thomas has recently indicated that he sees a need for affirmative action in education and that such programs are appropriate. But, unlike Judge Thomas, I see no principled distinction between the propriety or need for affirmative action in education and its appropriateness in the employment context. Indeed, for many of Judge Thomas' immediate peers who grew up in Pin Point or other southern communities or, for that matter, in much of the nation, theirs was a history of segregated, and often inadequate, public education. Recognition of the ongoing effects of such educational deprivations was one of the reasons the Burger

Supreme Court, held, in Griggs v. Duke Power Co. (another decision Judge Thomas eschews), that Title VII bans employment practices that have an arbitrarily exclusionary effect on minorities and women.

As former Justice Powell later noted for a unanimous Court, in McDonnell Douglas v. Green, "Griggs was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." Judge Thomas' recent conversion to or acceptance of a belief in affirmative action in education -- under pressure from Senator Specter -- simply does not go far enough in recognizing the need for affirmative action in other arenas as well, to remedy this long history of exclusion and deprivation.

Unlike Judge Thomas, I and the Americans of Democratic Action deeply believe that without Brown, without its progeny, and without other affirmative action programs, minorities and women in this nation would be the victims of even greater discrimination than that with which they still contend today.

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As I have already stated, we have carefully reviewed Judge Thomas' record. We have also listened attentively to his testimony before this Committee. Candidly, Judge Thomas' testimony raises even more concerns for us now than we had at the time of our initial unanimous vote to oppose him. His eagerness to distance

himself from his past rhetoric and actions on issues of crucial concern to all Americans leaves many of us deeply troubled and uncertain about his judicial philosophy and temperament.

Among of the questions this Committee must answer before coming to a conclusion is which Clarence Thomas it is being asked to confirm? Is it the Clarence Thomas who addressed the Cato Institute and the Heritage Foundation and presided over the EEOC? Or is it the Clarence Thomas who last week seemed to recant many of his past statements, striking most observers as being considerably more moderate?

Particularly troubling is Judge Thomas' attempt to make a virtue of his backtracking, revisionism and lack of candor by saying, "When one becomes a member of the Judiciary, it is important for one to stop accumulating personal viewpoints." The real Clarence Thomas seems far more likely to be the one who forthrightly stated in a 1984 speech at his alma mater, Holy Cross College, "I do have opinions on virtually all issues."

To those who say that Judge Thomas' background demonstrates the real possibility for growth and compassion, we submit that the best test is to understand the direction of his growth during his adult life, i.e., the last decade and particularly his articles, speeches, writings and other actions during his second term with EEOC.

Measured against this standard, we believe that the Committee has no choice but to reject Judge Thomas' nomination. The Committee has rightly subjected Judge Thomas' entire public record

to intense scrutiny. And that record -- Judge Thomas' numerous speeches and writings; his frequent virulent attacks on Congress, the courts and federal judges; his intolerance of viewpoints that differ from his; his expressed admiration for extremist causes and their proponents; his apparent disdain for the nation's civil rights leaders; and his seeming contempt for those not as fortunate as he in overcoming the barriers of his childhood -- all bespeak an ideological extremism that ill suits a nominee for the Supreme Court. Equally significant, his confirmation would serve primarily to solidify a block of such extremism on the Court and assure its perpetuation for decades to come. The Senate would be abrogating the exercise of its advise and consent function were it to allow this to occur.

For identification purposes only, James Bishop is Special Assistant to the Provost at the Ohio State University.