THE FUND FOR THE
FEMINIST
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1600 Wilson Blvd., #704, Arlington, VA 22209
(703) 522-2214

Testimony of

Eleanor Cutri Smeal

President, The Fund for the Feminist Majority

Before the Senate Committee on the Judiciary

on the Nomination of Clarence Thomas

for Associate Justice of the Supreme Court

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I am Eleanor Cutri Smeal, President of the Fund for the Feminist Majority, and I come before this Committee to express strong and unequivocal opposition to the nomination of Clarence Thomas as an Associate Justice for the United States Supreme Court. My testimony was prepared with the assistance of Erwin Chemerinsky, distinguished professor of constitutional law at the University of Southern California.

The Fund for the Feminist Majority in its very name raises the conscience of the nation that today in national public opinion polls a majority of women identify as feminists and a majority of men identify as supporters of the women's movement. The Fund for the Feminist Majority specializes in programs to empower women and to achieve equality for women in all walks of life.

During part of the period Clarence Thomas served in the government, first at the Office of Civil Rights and then as Chair of the Equal Employment Opportunity Commission (EEOC), I was President of the National Organization for Women. Over the past decade, Judge Thomas repeatedly expressed his views in numerous law review articles, speeches, and essays in newspapers. I carefully have reviewed his words and acts. And as a leader of the pre-eminent women's rights organization during his presence in government, I have done more than reviewed his words and acts. I have witnessed the devastating impact of his philosophy in action on the efforts to curb discrimination.

There is nothing in his record, performance, or writings -- not a shred of evidence -- that indicates any willingness to protect civil liberties or civil rights for women. Quite the contrary, his record is chilling; for the past decade, he has expressed the views of the farthest right fringe of the Republican Party.

Although I believe that Clarence Thomas poses a threat to constitutional rights in many areas, my testimony will focus on women's rights. At the outset, it is important to emphasize that the rights of more than half of the population must not be dismissed as merely the concerns of a special interest group. I hope that every member of this Committee, Democrat and Republican, liberal and conservative, agrees that an individual who is hostile to women's rights under the Constitution has no place on the United States Supreme Court. A person should not be confirmed for the Supreme Court unless he or she evidences commitment to certain basic constitutional values; reproductive privacy and gender equality must be among them.

Four years ago, this Committee rightly rejected Robert Bork for a seat on the Supreme Court because of his views, especially on privacy and gender discrimination. Clarence Thomas expresses almost identical opinions and frequently has aligned himself with Bork's judicial philosophy. In fact, Thomas' performance as Chair of the EEOC makes his hostility to civil rights even clearer and less abstract.

My testimony will focus on two areas of vital importance to women: reproductive privacy and employment discrimination. Clarence Thomas' views and performance on these issues make him unacceptable for a position on the Supreme Court which ultimately is responsible for protecting the civil rights of women and men.

A person is unsuitable for the Supreme Court unless he or she expresses a commitment to basic constitutional freedoms. Reproductive privacy is one of these guarantees. Indeed, reproductive freedoms are not simply one right among many. No civil liberty touches more people on a daily basis or more profoundly affects human lives than access to contraceptives and safe, legal abortions. Virtually all people -- at one time or another -- will use contraceptives. Studies show that forty-six percent of all women will have an abortion at some point in their lives. Without constitutional protection of reproductive freedom, women will die and suffer from unwanted pregnancies and illegal abortions.

Senators, each of you knows that the next person you confirm for the Supreme Court will be the decisive vote on reproductive freedoms for decades to come. Thus, a key question -- perhaps the crucial question: will Clarence Thomas follow precedents such as Griswold v. Connecticut, Eisenstadt v. Baird, and Roe v. Wade which establish the right of each person to choose whether to exercise fertility control?

Clarence Thomas' writings leave no doubt as to his views. In fact, no nominee for the Supreme Court -- not even Robert Bork -- has so consistently expressed opposition to reproductive freedoms as Clarence Thomas. In notes for a speech, titled "Notes on Original Intent," Clarence Thomas wrote: "Restricting birth control devices or information, and allowing, restricting, or (as Senator Kennedy put it) requiring abortions are all matters for a legislature to decide; judges should refrain from 'imposing their values' on public policy." (Undated manuscript, p. 2).

Thomas specifically discussed Griswold v. Connecticut and Roe v. Wade in a footnote in a law review article. (Thomas, "The Higher Law Background of the Privileges and Immunities Clause of the Fourteenth

Amendment," 12 Harvard Journal of Law and Public Policy 63, 63 n. 2 (1989)). After stating the holdings in Griswold and Roe, Thomas wrote: "I elaborate on my misgivings about activist use of the Ninth Amendment in [a chapter of a book published by the Cato Institute.]" In this chapter, Thomas defended Robert Bork's view that reproductive privacy is not worthy of constitutional protection. Thomas called Griswold an "invention" and argued that it is inappropriate for the Supreme Court to protect rights that are not expressly enumerated in the Constitution. (Thomas, "Civil Rights as Principle, Versus Civil Rights as an Interest," in Assessing the Reagan Years 398-99 (D. Boaz ed. 1988)).

Thomas' restrictive views about reproductive freedom were also reflected in the conclusions of a White House Working Group on the Family, of which Thomas was a member. The report sharply criticizes Roe v. Wade and several other Court rulings on privacy as "fatally flawed" decisions that should be "corrected" either by constitutional amendment or through the appointment of new judges and their confirmation to the Court." White House Working Group on the Family, The Family Preserving America's Future 12 (1986). The report also calls for the overruling of such basic decisions as Eisenstadt v. Baird, which held that every person has the right to purchase and use contraceptives; Moore v. City of East Cleveland, which held that a city cannot use a zoning ordinance to keep a grandmother from living with her grandchildren; and Planned Parenthood v. Danforth, which held that a state may not condition a married woman's abortion on permission from her husband.

There is nothing -- not a paragraph, not a sentence, not a word -- in Thomas' writings that indicates a willingness to protect reproductive freedoms and women's lives. To the contrary, Thomas may well be the first

Justice in American history even willing to prohibit states from allowing abortions. As you know, Clarence Thomas gave a speech in which he praised an article written by Lewis Lehrman as "a splendid example of natural law reasoning." Thomas, "Why Black Conservatives Should Look to Conservative Policies," Speech to the Heritage Foundation, June 18, 1987.

The central thesis of Lehrman's essay is that fetuses are human lives entitled to protection, from the moment of conception, by the Declaration of Independence and the Constitution. (Lehrman, "The Declaration of Independence and the Right to Life," American Spectator 21 (April 1987)). Lehrman called Roe a "spurious right born exclusively of judicial supremacy" and "a coup against the Constitution." Lehrman maintained that human life under the Declaration of Independence and the Constitution starts "at the very beginning of the child-to-be."

It is imperative to realize that Lehrman's views, endorsed by Thomas as "splendid," would justify more than overruling Roe v. Wade. Lehrman's argument is that the Constitution should protect fetuses from the moment of conception. From this perspective, abortion would be constitutionally prohibited. States would not even have the authority that existed before 1973 to allow abortion in their jurisdiction.

Simply stated, it is difficult to imagine a nominee with a more documented record of hostility to a basic civil liberty than Clarence Thomas' opposition to reproductive freedom. If a nominee for the Supreme Court expressed an unwillingness to protect freedom of speech, would not each and every one of you vote against confirmation? If a nominee expressed an unwillingness to safeguard free exercise of religion, would not each and every one of you vote against confirmation? Right now you are considering a nominee who has expressed an unwillingness to protect privacy. Surely,

if the word "liberty" in the Constitution means anything it must include privacy and the right of each person to choose whether to have a child.

This is not just about a legal abstraction. It is about women's lives. The confirmation of Clarence Thomas almost surely would create a majority on the Court to overrule Roe and condemn thousands of women to death and suffering. Because he has expressed unqualified hostility to a basic constitutional freedom, Clarence Thomas should be denied confirmation to the Supreme Court.

Independently, Clarence Thomas' views and record on the crucial issue of employment discrimination make him unsuitable for a seat on the high Court. Women in this society continue to face serious discriminatory treatment in the workplace. If a man and a woman hold the same job, the woman earns, on the average, 68 cents of each dollar paid to a man. Countless jobs remain closed to women. In many businesses and industries, discrimination against women remains the norm not the exception.

Clarence Thomas was Chair of the Equal Employment Opportunity Commission, the federal agency responsible for enforcing the laws protecting women from discrimination in the workplace. I ask you, when in Thomas' almost eight years at the agency, did he use his position to condemn discrimination against women and to fight in any meaningful way for gender equality in the workplace? As you read through Thomas' numerous speeches and articles, it is telling that he virtually never even mentions the civil rights of women.

The Equal Employment Opportunity Commission had a dismal record under Clarence Thomas' leadership in fighting discrimination. A study by the Women Employed Institute found that under Thomas'

leadership, 54 percent of all cases were found to lack cause, compared with 28.5 percent under the Carter EEOC in fiscal year 1980. The study also found that less than 14 percent of all new EEOC cases resulted in some type of settlement under Thomas, compared to settlements in 32 percent of the cases at the beginning of the Reagan administration. And these statistics do not even reflect the fact that Thomas' EEOC allowed 13,000 age discrimination claims, many by women, to lapse.

Thomas repeatedly has expressed hostility to the use of statistical evidence to prove employment discrimination. In Griggs v. Duke Power Company, in 1971, the Supreme Court held that evidence of disparate impact against women or racial minorities establishes a prima facie case of discrimination. Because it is so difficult to prove that an employer acted with a discriminatory intent, statistical proof is the basic and essential way of establishing a violation of Title VII of the 1964 Civil Rights Act.

But Clarence Thomas has strongly criticized allowing statistical evidence to prove discrimination. He stated that "we have, unfortunately, permitted sociological and demographic realities to be manipulated to the point of surreality by convenient legal theories such as 'adverse impact' and 'prima facie cases.'" Thomas, "The Equal Employment Opportunity Commission: Reflections on a New Philosophy," 15 Stetson Law Review 31, 35-6 (1985). Thomas, thus, would go even further than the current Supreme Court in preventing the use of statistical evidence to prove discrimination. The effect of Thomas' position would be effectively to drastically lessen Title VII's ban on employment discrimination.

In fact, as Chair of the EEOC, Thomas proposed to eliminate the use of statistical evidence to prove discrimination by the federal government. The Uniform Guidelines on Employee Selection Procedures were adopted in

1978 by the EEOC, the Department of Justice, the Labor Department and the Civil Service Commission. The Uniform Guidelines follow Griggs and allow statistical proof of employment discrimination. Thomas as Chair of the EEOC sought to revise these guidelines to eliminate such statistical evidence. If Thomas' position prevails on the Supreme Court, the fight against gender discrimination in employment would be immeasurably damaged.

Likewise, Thomas repeatedly has opposed the use of hiring timetables and goals which are an essential to gender equality in the workplace. The Supreme Court, in cases such as United Steel Workers v. Weber and Local 28 of the Sheet Metal Workers' International Association v. EEOC, approved hiring timetables and goals to remedy workplace inequality. But Thomas has strongly criticized these decisions. Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," at 395-96. In fact, in Fall 1985, the acting general counsel of the EEOC, under Thomas' leadership, ordered regional counsel not to enforce goals or timetables in consent decrees, nor to seek them in the future.

Countless other examples exist of the failure of Thomas' EEOC to enforce Title VII and other laws protecting women from discrimination. It must be emphasized that Thomas was not simply an employee in the agency; he was the Chair. He was not simply following preset policies; he was the architect of the Reagan Administration's effort to lessen civil rights protections. As Chair, he was charged with working to end discrimination against women. But he did nothing constructive in this regard.

At the very least, his poor performance at the EEOC should disqualify him for a "promotion" to the Supreme Court. Moreover, his documented

record of hostility to protecting the civil rights of women and minorities make him a grave threat to equal justice if he is confirmed.

Senators, I ask you to look past all of the rhetoric on both sides and focus on simple questions. Is there any place in Clarence Thomas' record where he has ever supported constitutional protection of reproductive freedoms? Is there anything in Clarence Thomas' record as Chair of EEOC to indicate that he would be a force for advancing civil rights and women's rights on the Supreme Court? Can you point to any evidence -- any speech, any article, any judicial opinion -- where Clarence Thomas has expressed a meaningful commitment to reproductive privacy or civil rights for women?

The rights of millions of women rest on this nomination. I urge you to vote against Clarence Thomas' confirmation.