STATEMENT OF JOHN J. GIBBONS

September 17, 1991

I am here to urge favorable action on the nomination of Clarence Thomas to be an Associate Justice of the Supreme Court. Presently, I am the Richard J. Hughes Professor of Constitutional Law at Seton Hall University Law School. I am also Special Counsel at Crummy, Del Deo, Dolan, Griffinger & Vecchione in Newark, New Jersey, supervising that firm's Gibbons Fellowship Program in Public Interest and Constitutional Law. Until January 15, 1990, I was Chief Judge of the Third Circuit, and I served as a Judge of the United States Court of Appeals for that Circuit for twenty years. Until September 6 last, I was Vice-Chairman of the Board of Trustees of Holy Cross College, and it was in that capacity that I came to know and respect Clarence Thomas. As you know, he still serves as a member of that Board.

Because of our mutual interest in the law, we have on a number of occasions informally discussed issues of constitutional law. Such informal discussions among friends of subjects of mutual interest are frequently more revealing of underlying personal attitudes than are more formal pronouncements in speeches or papers. From them, I was left with the clear impression that Judge Thomas is intellectually gifted, a rigorous thinker, but open-minded, non-doctrinaire and receptive to persuasion. He is, I am convinced, anything but the rigid, inflexible conservative that some have charged him with being.

The most puzzling charge made against him is that Judge Thomas will be unsympathetic to human rights claims. One experience I shared with him serves to illustrate the contrary. On September 14, 1985 I presided at a meeting of the Holy Cross Board of Trustees which took up the issue of divestiture by the College of investments in companies doing business in South Africa. The choice was between complete divesture on the one hand, and on the other, divestiture only of those companies which did not adhere to the so-called Sullivan Principles governing company treatment of employees and others. Strong, and on the whole quite reasonable, arguments were put forth by Board members in favor of the latter position. Some Board members had connections with companies which, they were convinced, were doing a great deal to improve the lot of black South Africans.

When Clarence Thomas' turn came to speak, he eloquently, but with reason more than passion, urged the Board to opt for total divestiture. His reasons are relevant, I think, to this Committee's inquiry. He insisted that every person had a pre-political right to be treated as of equal worth, and that any regime which by law refused to recognize that right was so illegitimate that it should be replaced. He urged that while the actions of private institutional investors might not bring South Africa to its knees, those actions would put pressure on the government of the United States to try to do so.

As I said, the choice between the Sullivan Principles and total divestiture was in 1985, one over which reasonable people could differ. Largely because of Clarence Thomas' reasoned articulation of a human rights position, the Board was persuaded to opt for total divestiture. As you know, many other institutions opted for the Sullivan Principles, or for no divestiture policy at all.

This incident occurred long before Clarence Thomas was under consideration for the Supreme Court, or even the Court of Appeals. Thus, his philosophical position on the existence of pre-political human rights which governments should recognize was well thought out long before the question of his judicial philosophy was an issue. It was no surprise to me, therefore, that in other forums he articulated a similar philosophical position.

There is, of course, a difference between political philosophy and jurisprudence. It is entirely conceivable that one may recognize the injustice of inequality and at the same time insist, as legal positivists do, that judges may not resort to philosophical notions of justice to go beyond the text of a law external to themselves. Judge Bork, for example, is an articulate spokesman for the legal positivist position who unquestionably personally abhors many instances of injustice about which, he thinks, judges are powerless. In his answer to Senator Biden's question on Tuesday last, about a

constitutional right of privacy, Judge Thomas, on the other hand, acknowledged the legitimacy of the Supreme Court's recognition of that non-textual human right.

The recognition by the Supreme Court, in interpreting the Constitution, of non-textual pre-political human rights, as you in the political branch of government are so well aware, poses for a democracy the majoritarian dilemma: when should the court exercise the awesome power to set aside laws enacted by popularly elected legislators? No one better articulated the dilemma than the late Alexander Bickel. He also articulated the most significant restraint upon life-tenured Supreme Court Justices; namely, their dedication to the Court's scholarly tradition of deciding great matters of principle only with careful craftsmanship after meticulous scholarship and adversarial development of the competing arguments. One aspect of that scholarly tradition is the Court's self-imposed limitation on its law-pronouncing function; its unwillingness to answer legal questions except when necessary to the pronouncement of judgments. Judge Thomas' refusal to state in advance how he would vote on any specific legal issue likely to come before the Court is entirely consistent with the Court's traditions of craftsmanship and scholarship. It is, I suggest, unwise for Senators to press prospective nominees for answers to such specific questions, for they thereby seek to have the nominees violate the best safeguard that we have against

so-called judicial activism. Watching the proceedings of this Committee, it occurred to me that had a Senator from Mississippi, for example, interrogated Governor Warren about how he intended to vote on the then-pending school desegration appeals as vigorously as Judge Thomas has been interrogated on the issue which currently preoccupies some Committee members, I don't know how he would have responded. If, however, he <u>had</u> answered such questions, no matter how he answered them, he would have compounded the difficulties the Court faced in resolving that then-controversial issue.

Whatever else a Supreme Court nominee or any other judicial nominee should bring to the bench, one essential commitment must be that decisions on legal issues will be made only upon careful reflection after completion of the adversarial process. That is why many thoughtful students of the judicial process were alarmed about rumors that federal judicial nominees were at one stage several years ago being screened by the Justice Department on the basis of a litmus test on specific issues. It doesn't really matter whose litmus test is being applied. Asking for a prior commitment on any legal issue likely to come before the Court is wrong, and giving such a commitment in order to obtain confirmation would be even more wrong.

Certainly, however, it is perfectly proper for the Senate to inquire whether a nominee possesses those qualities of

intellect and temperament which suggest that he will be dedicated in his career to the Court's traditions of scholarship and craftsmanship. In this respect the best evidence is the ~~seventeen~~ published opinions Judge Thomas has written as a Judge of the Court of Appeals. I have read ~~all~~ of them, and they are in this respect quite reassuring. They show an appropriate reliance on precedent, a fine appreciation of the deference the Courts owe to administrative agencies, a reading of federal statutes which shows proper acknowledgment of the primacy of the legislative process, and a respectful treatment of the arguments advanced even by the losing parties. One opinion that I particularly liked was United States v. Long, 905 F.2d, 1572 (D.C.Cir. 1990), in which, reversing a conviction for using a firearm during and in relation to drug trafficking, Judge Thomas declined the invitation of the Department of Justice to adopt an open-ended interpretation of the statutory language which would have facilitated convictions under Section 924(c)(1) of Title 18. Certainly this is not the opinion of a "knee jerk" conservative likely to be swayed by appeals to law and order, even here in the District of Columbia. My guess is that with respect to the rights of criminal defendants, his addition to the Court may result in a net improvement of its jurisprudence. I wouldn't ask him, however, and he shouldn't tell me.

Summarizing, I urge you to confirm Judge Thomas' nomination because my personal experience with him and my critical examination of his admittedly limited work as a judge convince me that he has the intellect, the temperament, the flexibility, the dedication to judicial craftsmanship, and the potential for growth to make a distinguished contribution to the Court's work over a long period of time.