Alliance for Justice

A National Association of Organizations Working for Equal Justice

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STATEMENT OF THE
ALLIANCE FOR JUSTICE

ON THE
NOMINATION OF

CLARENCE THOMAS
TO THE SUPREME COURT
OF THE UNITED STATES

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INTRODUCTION

The Alliance for Justice, a national association of public interest legal organizations, opposes the nomination of Judge Clarence Thomas to the United States Supreme Court. Judge Thomas' extensive record as chairman of the Equal Employment Opportunity Commission and his writings and speeches demonstrate a stubborn unwillingness to enforce federal law consistent with Congressional intent and a judicial philosophy that threatens to undermine Constitutional protections.

In February 1990, the Alliance issued a detailed report raising questions about Judge Thomas' nomination to the U.S. Court of Appeals for the D.C. Circuit. The report reviewed and analyzed Judge Thomas' tenure at the EEOC and concluded that he had promoted positions that weakened the agency's enforcement of federal anti-discrimination laws. Judge Thomas' brief tenure on the Court of Appeals has done nothing to alleviate our concerns. We urge the United States Senate to reject this nomination and send a message to the President to nominate an individual who will bring moderation to a run-amok Supreme Court bent on overturning, not interpreting, existing law.

CONSTITUTIONAL INTERPRETATION - OUT OF THE MAINSTREAM

Just 43 years old, Judge Thomas, if confirmed, will likely be a powerful and influential voice on the Supreme Court for decades. Unfortunately, his writings, speeches, and public comments portray a Constitutional philosophy that is dangerously out of the mainstream.

In his writings and speeches, Judge Thomas displays an inclination toward an extremely restrictive philosophy. For

example, he has severely criticized Griswold v. Connecticut, which upheld the rights of a married couple to use birth control and recognized the constitutional right to privacy. He has also mocked the Supreme Court's use of the Fourteenth Amendment's due process and equal protection clauses as "extremely creative. . . . The Court has used them to make itself the national school board, parole board, health commission, and elections commissioner, among other titles." (1988 Speech to Wake Forest University). Such a view shows no recognition of the vital barrier the 14th Amendment imposes to protect the disadvantaged from unlawful government action.

Judge Thomas also displays a strong adherence toward "natural law" theory, which he says stems from a belief in "the laws of nature and of nature's God." (Speech to the Pacific Research Institute). He has used the natural law theory to repudiate the reasoning in Brown v. Board of Education, which struck down the "separate but equal" doctrine. More startling, however, are his comments on natural law and a women's Constitutional right to choose. His views on choice were telegraphed when he praised an article proclaiming that a fetus has a Constitutional right to life as a "splendid example of applying natural law." (1987 Speech to Heritage Foundation). This comment indicates more than just a likely vote to overturn Roe. It implies that Judge Thomas believes the Constitution actually forbids abortion. Under this reading, states would not be free to enact laws protecting a woman's right to choose.

Judge Thomas' views on economic liberties also illustrate a Constitutional vision out of the mainstream. He describes economic liberties as "protected as much as any other [Constitutional] rights." The economic rights doctrine was routinely invoked from 1905 to the mid-1930s by the Lochner-era Court to strike down legislation setting limits on work hours and minimum wages, barring child labor and protecting the right of workers to organize. However, the doctrine has been discredited for decades. Will Judge Thomas, in the name of natural law, revive the economic rights doctrine, at least in some form, and strike down laws designed to protect the environment, eradicate discrimination, or enhance worker health and safety? Some of his writings point to an affirmative answer.

Finally, Judge Thomas has hinted at a predisposition for judicial activism reminiscent of that of former Judge Robert Bork. In a 1987 speech at the Cato Institute, he showed signs that he would willingly overturn Supreme Court precedent on Constitutional issues. In criticizing Johnson v. Transportation Agency of Santa Clara County (1986), which upheld an employer's right to establish a gender-conscious affirmative action policy, he commended "Justice Scalia's dissent, which I hope will provide guidance for lower courts and a possible majority in future decisions."

LACK OF COMPASSION

Many have argued that Judge Thomas' background and life experience have provided him with a sensitivity and insight to the concerns of the poor and disadvantaged in our society. They believe that Judge Thomas will therefore bring diversity to the Court that would otherwise be lacking with the departure of Justice Marshall. Unfortunately, while his life experience is inspirational to all Americans, his record displays an

animosity to views different from his own and a disregard for the needs of others.

For example, Judge Thomas repeatedly attacks the leaders of the civil rights community and denigrates their contributions to the fight for equality. He has stated that "[a]ll too often, the players in [the civil rights] arena intentionally distort and misinform. The tendency is to exploit issues rather than solve problems." (1986 Speech at the North Carolina Affirmative Action/EEO Conference). He has also commented:

> "[A]s long as the convenient and unflattering history of this country can be trotted out to support so-called progressive policies, politicians who thrive on creating miseries that can only be solved by them and government and civil rights groups who are adept at the art of generating self-perpetuating social ills, will continue to beat back the voices of reason."

(1986 Speech to Associated Industries of Cleveland).

His indifference towards his sister's plight underscores the concerns about his regard for the needs of others. A single parent, his sister worked two minimum wage jobs while an aunt took care of her children. When the aunt became ill and could no longer take care of herself or the children, Judge Thomas' sister had to quit her jobs and resort to governmental assistance. She is currently back in the workforce, and no longer on such assistance. However, Judge Thomas publicly depicted his sister as lacking initiative and so dependent on welfare that she "gets mad when the mailman is late with her welfare check." (Washington Post, December 16, 1980). He added that "[w]hat's worse is that now her kids feel entitled to the check, too. They have no motivation for doing better or getting out of that situation." This, too, is a distortion. Her oldest son recently served in the Persian Gulf War, and her other son is a carpenter. One of her daughters was recently laid off from her job in a bakery, and the youngest daughter is still in school. (Los Angeles Times, July 5, 1991).

LACK OF RESPECT FOR THE RULE OF LAW

Judge Thomas' tenure as chairman of the EEOC was marked by strife and confrontation with Congress and an overall disdain for the nation's civil rights laws. As chairman, he imposed his personal views of anti-discrimination on the agency, contrary to the will of Congress, the overwhelming weight of Title VII case law, and the traditions of the agency itself.

Congress created the EEOC with the mission to eradicate prejudice and inequality of opportunity in the workplace. Established under Title VII of the historic, bipartisan Civil Rights Act of 1964, the EEOC was intended to be the advocate for workers against biased employers. As the agency matured, its enforcement powers and mandate were strengthened by both Congress and the executive branch. By the late 1970s, the EEOC was the lead agency in coordinating all federal equal employment policies and procedures.

As chairman, Judge Thomas took numerous positions which weakened the EEOC's commitment to enforcement of the law and proved inimical to the rights of workers. For example, in several cases under the Age

Discrimination in Employment Act (ADEA) -- intended by Congress to outlaw discrimination against older workers -- Judge Thomas urged the Commission to side with employers, or not to litigate on behalf of victims, despite overwhelming evidence of discrimination. He proposed regulatory measures under the ADEA that limited the scope of its protections. In addition, the agency allowed possibly over 13,000 age discrimination complaints to lapse by failing to investigate them before the two-year time limit ran out for filing suit in federal court. Congress bailed him out by extending the time limit for such cases. However, Judge Thomas still failed to act responsibly to correct the problem. He allowed several thousand more ADEA complaints to expire, again requiring Congress to intervene.

In addition, Judge Thomas effectively dismantled the agency's systemic litigation operations, a component of EEOC litigation to combat broad, institutional patterns and practices of discrimination. In an agency reorganization, he split the systemic unit among several divisions, which resulted in the unit's loss of independence and power. In March 1985, a bipartisan group of forty-three members of the House of Representatives wrote that a retreat from systemic litigation "would be in direct contradiction of the original intent of Congress" in passage of the 1964 Civil Rights Act and the 1972 amendments and would result in the agency losing important tools of enforcement.

Judge Thomas also sought to dilute EEOC rules that were the collaborative product of five federal agencies. The rules, known as the Uniform Guidelines on Employee Selection Procedures, bar employers from using hiring practices that effectively hinder the employment of qualified women and minorities. He often stated that the rules subverted the intent of Title VII, even though they were consistently supported by Congress. Judge Thomas dropped his plans after House members criticized them.

In the area of affirmative action to remedy past discrimination, Judge Thomas abandoned the agency's longstanding policy of encouraging the use of goals and timetables for hiring qualified women and minorities, despite approval of their use by Congress and all of the courts of appeals addressing the issue. Only when the Supreme Court issued three decisions upholding the policy did Judge Thomas reluctantly agree to reinstate it. However, he continued to send contrary messages to victims and to the business community by publicly and repeatedly criticizing affirmative action. Finally, Judge Thomas abdicated all responsibility for enforcing the EEO laws in the federal government, the nation's largest employer, by issuing an order that shifted the responsibility to agency heads, some of whom, such as then-Attorney General Ed Meese, balked at complying with federal sector affirmative action plans.

Judge Thomas' lack of respect for the rule of law was such that in June 1989, the Leadership Council of Aging Organizations sent a letter to President Bush questioning Thomas' qualifications for a federal judgeship. It stated that "people cannot properly take an oath to enforce certain laws and, once in office, work consistently to undermine them." In addition, fourteen chairs and high-ranking members of committees in the House of Representatives with oversight responsibility for the EEOC wrote to the U.S. Senate in July 1989 that Judge Thomas' "questionable enforcement record frustrates the intent and purpose" of Title VII of the 1964

Civil Rights Act and that he had "demonstrated an overall disdain for the rule of law."

HOSTILITY TOWARDS CONGRESS

Concerns about Judge Thomas' open-mindedness are compounded by his contempt for the role of Congress as it has evolved over 200 hundred years. Almost from the start of his tenure at the EEOC, Thomas attacked members of Congress. Instead of seeking to work with Congress and the public, Thomas created a climate completely counterproductive to forging new approaches to eliminating employment discrimination.

The nominee's hostility towards Congress is starkly reflected in his writings and speeches. In a 1988 speech at Wake Forest University, Thomas accused Congress of being "an enormous obstacle to the positive enforcement of civil rights laws that protect individual freedom." Thomas stated that Congress is actually run by subcommittee members and zealous staff members who, "in obscure meetings, . . . browbeat, threaten and harass agency heads to follow their lead." He adds that Congress no longer stands for a deliberative body which legislates for the common good or public interest.

In a 1989 law review article, Judge Thomas condemned Congress for examining potential abuses of power by the executive branch, stating that the legislature is "out of control" and that "numerous congressional investigations in recent years . . . seem little more than attempts to embarrass the White House." (Harvard Journal of Law & Public Policy, vol. 12, no. 1.)

Judge Thomas' disrespect for the rule of law and hostility towards Congress raises serious questions about his understanding of the separation of powers and his qualifications to interpret statutory laws. On the Court, Judge Thomas will be called upon to revisit precedents and decide many issues involving legislative intent on numerous federal statutes protecting the environment, consumers, public health and safety, and civil rights. His EEOC record and writings and speeches indicate that he is likely to bring his own personal views to bear on those issues, rather than a loyalty to the law.

CONCLUSION: THE NEED FOR MODERATION

For the American people to have faith in the Supreme Court, the Court must be perceived as a balanced, open-minded institution. With the departure of Justice Marshall and the nomination of Judge Thomas, the American people face the prospect of a monolithic Court dominated by conservative philosophy lasting well into the twenty-first century. That prospect must not materialize. It is time for the Senate to draw the line and insist that the Court reflect the rich texture and complexity of American society itself.

Contrary to public announcements, both the Reagan and Bush Administrations have sought to appoint judges intent on making law rather than interpreting it. Their success thus far was illustrated by the 1990 term, which revealed a Court all too eager to abandon prior precedent in order to advance the Reagan-Bush conservative platform.

The Court's deferential philosophy presents a grave danger to the rights upon which Americans have come to rely. The judiciary is the only branch of government able to ensure that the liberties of all Americans are protected, including those who do not always have a voice in shaping the policies of Congress and the executive branch. The Court must be more than a compliant, politicized arm of the executive branch. By insisting that the President appoint an individual who will bring moderation to the Court, the Senate can ensure that the Court will remain independent and will reflect the diversity of viewpoints representative of American society.

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Please note: Consumers Union, National Wildlife Federation, and Natural Resources Defense Council do not take positions on judicial nominations.