STATEMENT OF A PANEL CONSISTING OF SHARON McPAHIL, NATIONAL BAR ASSOCIATION; ADJOA AIYETORO, NATIONAL CONFERENCE OF BLACK LAWYERS; WILLIAM HOU, NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION; LESLIE SEYMORE, NATIONAL BLACK POLICE ASSOCIATION; DANIEL SCHULDER, NATIONAL COUNCIL OF SENIOR CITIZENS; NAIDA AXFORD, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; AND REV. BERNARD TAYLOR, BLACK EXPO CHICAGO

Ms. McPAHIL. Thank you.

Chairman Biden, Senator Thurmond, members of the Senate Judiciary Committee, I was going to say good afternoon, but good evening. My name is Sharon McPahil. I am president of the National Bar Association—a small correction, not the Detroit Chapter, of the National Bar Association. We have approximately 73 chapters.

The CHAIRMAN. You are president of the entire——

Ms. McPAHIL. I am the national president, yes.

The CHAIRMAN. I have had the pleasure to speak to the National Bar. It is quite an organization, and I apologize. I didn't realize—we are going to fire three staff persons for that. All kidding aside, I apologize.

Ms. McPAHIL. No problem. Thank you.

I am also a division chief in the Wayne County Prosecutors Office, in Detroit, MI.

I am pleased to have this opportunity to come before you in my first appearance before this committee as president of the NBA. I have only been president for approximately 3 weeks. I appear before you today on behalf of the National Bar to give voice to the views and opinions of our members with regard to the nomination of Judge Clarence Thomas to the U.S. Supreme Court.

The National Bar Association is the oldest and largest minority bar association. We were founded in 1925, and we consist of a network of approximately 14,000 African-American lawyers, jurists, scholars and students. We have affiliate chapters throughout the United States and in the Virgin Islands.

Our purpose, among other things, is to advance the science of jurisprudence, to uphold the honor of the legal profession, to promote social intercourse among the members of the bar, and to protect the civil and political rights of all citizens of the United States.

My term as president commenced August 10, 1991. On August 5, after 7 hours of deliberation, the National Bar Association voted by a very narrow margin to oppose the confirmation of Judge Thomas. Our delegates voted 45 percent in opposition to the nomination, 44 percent in support of the nomination, and 11 percent to remain neutral on his possible confirmation.

As you can imagine, it was very difficult for us to make a decision about Judge Thomas. Never before in my memory has an issue so troubled the association. As a group, we are always pleased when one of our members is recognized for his achievements, and we are especially pleased when one is given this unique opportunity to serve in one of the most powerful positions in this Nation.

We are also cognizant of our responsibility to objectively assess and present our views on the conformation of a Supreme Court

nominee, who will have the ability to opine on matters that will touch the lives of all Americans.

Our analysis required us to be mindful of the impact that Judge Thomas' philosophy might have on his ability to protect the interests of all Americans, particularly the disenfranchised, the poor, and those who might otherwise not have a voice on the Supreme Court. The decision was made even more difficult, because Clarence Thomas is a member of our association.

As we searched for consensus on this issue, there was unanimity in our view that this confirmation hearing is also about the countless African-American people and other minorities who live in substandard conditions, it is about the homeless, the crack babies and the pregnant women who may not have a right to hear of their options regarding their reproductive rights.

Finally, it is about those minorities in the United States who look around every day and have to know that they don't matter to some of the Justices who sit on the Supreme Court, who have never had to face the obstacles that someone like Clarence Thomas encounters on a daily basis.

It is clear to the members of the National Bar Association that equal opportunity is not the reality of this land, despite the plethora of court decisions and statutes to the contrary. From unskilled jobs to the vice presidencies in major corporate America, we are both under and unrepresented.

Many delegates at our convention noted that the daily indignities that we suffer, as African-American attorneys, are pervasive, and, thus, you can be assured that the problems of African-Americans with less formal education and less affluence are even greater.

Much like the problem that an African-American person in a suit has in hailing a taxi, America's well-suited minorities every day confront the subjective bias of white America. Given that sensitivity, many of our delegates believed that when a person of color is nominated, that fact alone is reason to support him.

As our delegates debated this issue, it became clear that many thought that the views articulated by Judge Thomas were contrary to the traditional dogma of civil rights organizations. Some believe that the National Bar, as a matter of integrity, in light of its history of being at the forefront of the civil rights struggle, was duty-bound to oppose him. It is in this context that the National Bar Association was so closely divided in its vote to oppose the confirmation of Judge Thomas.

The subliminal message of most of those who spoke during the debate is not as conflicted. We pray that he will hear his grandparents' whispers, if confirmed, and his mother's voice as he struggles to balance the twin debts of gratitude to those who afforded him the opportunity to be considered for this honor, this appointment to the Supreme Court, and to those who brought him here.

Thank you.

The CHAIRMAN. Thank you very much, Ms. McPahil.

Your organization is, in fact, one of the premier organizations of the country, and it must have been very difficult.

Ms. MCPAHIL. It was.

The CHAIRMAN. But we thank you for being here.

Pronounce the name again for me?

Ms. AIYETORO. Ms. Aiyetoro.
The CHAIRMAN. Ms. Aiyetoro, please.

STATEMENT OF ADJOA AIYETORO

Ms. AIYETORO. Thank you, Chairman Biden.

Chairman Biden and members of the Judiciary Committee, thank you for allowing the National Conference of Black Lawyers, through me as the director, to present this testimony before the committee.

The National Conference of Black Lawyers is an organization of lawyers, judges, legal workers, and law students that was formed in 1968, specifically for the purpose of advocating for the rights of black people specifically, and people of color, the poor and the disadvantaged generally.

The organization has participated on all levels of advocacy, including litigation and public education. You have our written testimony.

The CHAIRMAN. And it will be placed in the record, the entire testimony.

Ms. AIYETORO. Thank you very much.

Our testimony discusses our position more fully than I will be able to do in the 5 minutes allotted. I would like to briefly address two main issues, however, in opposition to Judge Thomas' nomination.

First, it is important that the significance of the nominee's race to this process be explicitly in the record. We are disturbed that the assessment of this candidate may be less strenuous by those who view themselves as antiracist, because he is a black person who, like many other black people in his age group or who came before him, have risen to occupational levels that far exceed those of their parents and even their siblings.

We are disturbed that those who have adopted in deed, if not in words, the philosophy of white supremacy are embracing him, because his blackness serves to mislead many in assessing his record, a record which demonstrates, in large part, a disdain for the very remedies he utilized to advance, when applied to persons of color other than himself.

Those who are confused, well-meaning of all races, hold onto the hope not supported in his record, but somehow, if confirmed to the Supreme Court, he will support the law it is now for people of color, women and those in the fringes of society. They hope for a miracle.

We urge you to determine whether and how you are using this candidate's race and to decide to refuse to confirm, based on a record that demonstrates support for lawlessness and behavior that is below the standard to be demanded of a Supreme Court Justice.

It is true that the National Conference of Black Lawyers find a number of Judge Thomas' views to be in direct contradiction with the positions of this organization. We know you know this, because we have outlined some of those differences in our written submission. But his views also reflect a character that is below the standards this body should demand, a man who, despite the law of the land, refused to act to protect the rights of groups for whom he had

responsibility; a man who ignored codified ethical requirements and withheld information about the relationship between himself and the family of the principal shareholders in a lawsuit potentially costing them more than $10 million; a man who sat on the advisory board of the Lincoln Review and attended a reception of the South African Ambassador, yet indicates to this committee that he did not know of any position in support of apartheid by the leadership of the review, and he himself did not support apartheid; a man who retracted position after position that he took prior to his nomination and urged you to look at only his and other nominees' comments as a judge, since they would be less effusive; a man who humiliated his sister and family, but now flaunts the sister, indicating her character is stronger than his.

This nomination is an insult to not only black people, not only the tradition of high integrity and character set by Thurgood Marshall, but to the ideals of the Constitution and the Constitutional Convention, that those who sit on the Highest Court will be those with whom we can look with pride and respect, although we may not always agree with them.

We cannot look with pride and respect at Clarence Thomas, but only with fear and trepidation, at how will continue to trample the rights of people of color, the disadvantaged and women, not in conformity to the law, but in disdain for it and their collective rights. We urge you to refuse to confirm.

Thank you.

[The prepared statement of Ms. Aiyetoro follows:]

TESTIMONY CONCERNING THE NOMINATION OF
JUDGE CLARENCE THOMAS,
UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA,
TO THE SUPREME COURT OF THE UNITED STATES
BEFORE THE
SENATE COMMITTEE ON THE JUDICIARY

Presented by:
Adjoa A. Aiyetoro
National Director
National Conference of Black Lawyers

Chairperson Biden and Members of the Judiciary Committee, the National Conference of Black Lawyers appreciates the opportunity to testify before you on the nomination of Clarence Thomas as Associate Justice of the Supreme Court. We urge you to refuse to confirm Judge Thomas' nomination.

The National Conference of Black Lawyers (NCBL), founded in 1968, is a national organization composed of Black judges, law professors, lawyers, law students and legal workers. The organization was formed to advocate for economic, social and political justice for people of color generally, and Black people specifically. It provides legal assistance to communities of color and develops educational forums to increase awareness of the numerous issues that affect communities of color. It seeks to rid the American legal system of racism and introduce law students to alternative legal careers which advance social change.

The NCBL believes that it is extremely important to confirm a person of African descent to serve on this country's highest court.[1] However, of greater importance to NCBL and its members is the confirmation of a candidate whose record demonstrates a clear respect for the law combined with a compassion to securing political, economic and social justice for the millions of people

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[1] In nominating Judge Thomas, President Bush attempted to deceive the American public by stating that, "[t]he fact that he is black and a minority had nothing to do with this." Indeed, Judge Thomas has been nominated to fill the seat left vacant by the retirement of Justice Thurgood Marshall, the 96th Supreme Court Justice and the only person of African descent to serve on the Supreme Court in its 202-year history. This nomination also comes on the heels of President Bush's veto of a Civil Rights Bill, while at the same time he says he supports civil rights. The fact that Judge Thomas is of African descent, thus, can hardly be a coincidence.

in this country excluded from the "American dream." Judge Thomas' record demonstrates none of these aspirations. Clarence Thomas scoffs at the legal values essential to maintaining the hard-won rights to social, economic and political justice for people of color, women, the disabled, the elderly, children and other historically disadvantaged groups. There are any number of lawyers and judges of African descent who have demonstrated respect for these values. Judge Thomas' record[2] indicates that he is not one of those persons and for this reason he should not be confirmed. Indeed, his record consistently reveals disrespect for the law and for the rights of individuals and groups guaranteed by law. For this reason, NCBL is testifying today in opposition to Judge Thomas' confirmation as an Associate Justice of the Supreme Court of the United States.

Mr. Chairman, President Bush's nomination of Judge Thomas to fill the seat vacated by Justice Marshall is an insult not only to people of color and women but to the legacy of Justice Marshall. His lackluster career supports our conclusion that the nomination of Judge Thomas is meant to confuse and manipulate those who firmly believe there should be a person of African descent on this Court while solidifying a conservative majority. For over 50 years Justice Marshall has been a champion of the constitutional, civil

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[2] Our opposition to Judge Thomas' confirmation as an Associate Justice of the Supreme Court rests on Judge Thomas' record as Assistant Secretary for Civil Rights at the Department of Education, his eight-year tenure as Chair of the Equal Employment Opportunities Commission (EEOC), his decisions as an appellate judge of the Court of Appeals for the District of Columbia and Judge Thomas' writings and speeches.

and human rights of people of color, women, the elderly and differently-abled people in this country. Although Justice Marshall's nomination to the Supreme Court was opposed in 1967 by some members of this body because of his race, he was, unlike Judge Thomas, eminently qualified for service on the Supreme Court.[3] But for the efforts of Justice Marshall, the NAACP and the NAACP LDF, many, if not most of the Black lawyers in this country, including Clarence Thomas, would not have graduated from law school - not because we were unqualified, but because of the barriers, many of which were governmentally imposed, that barred our admission.[4]

As Professor Derrick Bell of Harvard University stated in discussing Judge Thomas' qualifications to serve on the Supreme Court, "[e]ven had Bush limited his selection pool to Black judges on the federal courts of appeals, there are at least a half dozen other Black judges whose accomplishments, both on the bench and

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[3] Prior to his appointment to the Supreme Court, Justice Marshall was a private attorney in Baltimore, Maryland; chief counsel to the National Association for the Advancement of Colored People (NAACP); head of the NAACP Legal Defense Fund; an Appellate Justice of the United States Court of Appeals for the Second Circuit; and, Solicitor General of the United States.

During his over 22-year tenure with the NAACP and NAACP Legal Defense Fund, Justice Marshall argued 34 cases before the Supreme Court and won 29. Among Justice Marshall's string of victories, in addition to Brown v. Board of Education, was Sweat v. Painter, decided four years prior to Brown, holding the educational opportunities offered Black and Caucasian law students by the State of Texas violated the 14th Amendment and directing Texas to admit Herman Sweat into the University of Texas.

[4] See generally, Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality (1975).

before becoming federal judges, put those of Thomas to shame."[5]

Mr. Thomas, prior to his appointment to the Court of Appeals in 1990, had very little litigation experience, functioning more in administrative and legislative capacities. Indeed, he owes virtually all of his employment experiences to his relationship to Senator John Danforth. Upon graduation from law school in 1974, Mr. Thomas served as an Assistant Attorney General for the State of Missouri for less than three years. From January 1977 to August 1979, Mr. Thomas was an attorney in the Law Department of the Monsanto Company in Missouri. Thereafter, from August 1979 to May 1981, Mr. Thomas was a Legislative Assistant to Senator Danforth of Missouri.

In 1981, Mr. Thomas was appointed by then-President Reagan to become Assistant Secretary for Civil Rights in the Department of Education, a position he initially declined because, in his own words "my career was not in civil rights and I had no intention of moving into this area." In 1982, Mr. Thomas was appointed Chair of the EEOC, a position he held until his confirmation to the Court of Appeals in 1990. But even if one ignores his lack of litigation experience, his administrative record and his speeches and writings underscore his departure from the rule of law.

[5] D. Bell, "The Choice of Thomas Insults Blacks," New York Newsday, July 10, 1991, pp. 79-90.

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JUDGE THOMAS' RECORD AT THE DEPARTMENT OF EDUCATION

The Office of Civil Rights of the Department of Education (OCR) is responsible for insuring that educational institutions do not discriminate on the basis of race, sex, handicap and age. The OCR is responsible for enforcing Title VII of the Civil Rights Act and Title IX of the Educational Amendments of 1973.

As Assistant Secretary of Civil Rights at the Department of Education, Mr. Thomas, notwithstanding his professed admiration and support of Black colleges, adopted positions that made it far easier for the states to avoid their responsibility of ensuring equality among all state financed educational institutions. When Judge Thomas took office as Assistant Secretary, the Department had been under court order since the early 1970s to implement desegregation and to enhance Black colleges to make up for their historical neglect by many southern governments.[6] The court order made clear that institutions which receive federal funds must do more than just adopt non-discriminatory policies but also must take affirmative steps, including elimination of duplicate programs as well as enhancement of Black colleges.[7]

During Thomas' first months at the agency, he began to undermine enforcement of this court order by accepting state plans

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[6] See, Adams v. Bell, 711 F.2d 161, 187 (D.C. Cir. 1983), cert. denied, 465 U.S. 1021, 104 S.Ct. 1272, 79 L.Ed.2d 678 (1984); Adams v. Califano, 430 F. Supp. 118 (D.D.C. 1977); Adams v. Weinberger, 391 F. Supp. 269 (D.D.C. 1975); Adams v. Richardson, 351 F. Supp. 636 (D.D.C. 1974); aff'd. 480 F.2d 1159 (D.C. Cir. 1973).

[7] See Adams v. Bell, 711 F. 2d 161 (1983).

which gave the states free reign to control desegregation efforts. In accepting these higher education plans, the OCR waived established guidelines that had the force of law. The positions taken by the OCR under Thomas' leadership led to increased budget reductions, admission constraints and other barriers that had a negative effect on Black institutions of higher learning.

In effect, Mr. Thomas, while Assistant Secretary for Civil Rights, deliberately disobeyed a court order. He substituted his own personal views for the court order, even though, as he admitted in federal court, the beneficiaries under the civil rights laws would have been helped by compliance with the court order.

JUDGE THOMAS' RECORD AS CHAIR OF THE EQUAL EMPLOYMENT OPPORTUNITIES COMMISSION

Mr. Chairman, Judge Thomas' record as chair of the Equal Employment Opportunities Commission alone warrants the rejection of his nomination. As you are aware, the EEOC is responsible for the enforcement of Title VII of the Civil Rights Act of 1964 which prohibits discrimination in employment based on race, color, religion, sex or national origin; the Equal Pay Act, the Age Discrimination in Employment Act, and Section 501 of the Rehabilitation Act, which prohibits discrimination on the basis of handicap by federal agencies. The EEOC is also responsible for coordinating all equal employment programs in the federal work place.

During Mr. Thomas' eight-year tenure as Chair of the EEOC, "[t]he EEOC effectively lost the role as lead agency conferred to it by the historic Civil Rights Reorganization Act of 1978, not

because of any change in the law but by abdication to the Justice Department."[8] Specifically, during Mr. Thomas' administration, the backlog of cases rose from 31,500 in 1983 to 46,000 in 1989; while the number of class action suits filed by the EEOC actually decreased from 218 in fiscal year 1980 to 129 in 1989. The number of Equal Pay Act cases filed by the EEOC also declined under his leadership. In 1980, 50 Equal Pay Act cases were filed. After Thomas assumed leadership, there were nine cases in 1984; in FY 1985, ten; in FY 1986, twelve; in FY 1988, five, and in FY 1989, seven cases.

Although Judge Thomas attempted to justify the reduction in class action cases by claiming that the agency was placing greater emphasis on individual complainants, this was far from the truth. In fact, the EEOC under Thomas' leadership saw a sharp decline in the rate of remedies for individual claimants: settlement rates plunged from 32.1 percent in 1980 to 13.9 percent in fiscal year 1989. A 1988 review by the General Accounting Office of the investigations of charges that had been closed with "no cause" determinations by six EEOC district offices and five states found that 41 to 82 percent of the charges closed by the EEOC offices were not fully investigated, and 40 to 87 percent of those closed by the state agencies had not been fully investigated.[9] Moreover,

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[8] Eleanor Holmes Norton's comments appeared in 62 Tulane Law Review, 601, 703 (1988).

[9] U.S. General Accounting Office, Equal Employment Opportunity: EEOC and State Agencies Did Not Fully Investigate Discrimination Charges 3 (1988).

according to Professor Herbert Hill, who for more than a quarter of a century was the National Labor Director of the NAACP, during Judge Thomas' tenure at the EEOC, "over 90 percent of all litigation filed under Title VII" was initiated and conducted by the private bar.[10]

Further, in 1984 and again in 1985, without either a basis in the prevailing case law or consultation with the various federal agencies and interested parties, Judge Thomas unilaterally proposed significant changes in the Uniform Guidelines on Employee Selection Procedures. The Guidelines, adopted in 1978, were jointly drafted and issued by the Department of Justice, the Department of Labor, the Civil Service Commission (later renamed the Office of Personnel Management) and the EEOC, with the solicited input of civil rights groups. The purpose of the Guidelines is to provide employers and others with a statement of the prevailing law on all selection practices used to make employment decisions, including application forms, educational requirements and standardized tests.[11]

At the time, the Guidelines were based on Griggs v. Duke Power Co.,[12] a unanimous Supreme Court decision and the-then leading Supreme Court decision on employment tests. Under Griggs, employment tests or selection criteria that have a disparate impact

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[10] Hearings on the Nomination of Clarence Thomas to the U.S. Court of Appeals for the District of Columbia Before the Senate Committee on the Judiciary, 101st Cong., 2nd Sess, at p. 59 (Letter from Professor Herbert Hill to Clarence Thomas, dated May 29, 1987).

[11] 29 C.F.R. 1607.1 (1991).

[12] 401 U.S. 424 (1971).

on people of color and women are prohibited unless the criteria are shown to be job-related. Although recent Supreme Court decisions have shifted the burden of proving job-relatedness from the employer to the plaintiff, the rule established by Griggs - that statistical evidence may be used to demonstrate disparate impact - remains intact.[13]

Judge Thomas, as the EEOC Chair, attacked the Guidelines because in his view they encouraged "too much reliance on statistical disparities evidence of employment discrimination."[14]

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[13] See Wards Cove Packing Co. v. Antonio, 109 S.Ct. 2115 (1989).

[14] "Changes Needed in Federal Rules on Discrimination," New York Times, December 3, 1984, at A1. In a March, 1985 speech to Cascade Employers Association Thomas stated:

> We have permitted sociological and demographic realities to be manipulated to the point of surreality convenient legal theories such as adverse impact...we have locked amorphous, complex, and sometimes unexplainable social phenomena into legal theories that sound good to the public, please lawyers, fit legal precedents, but make no sense. If I have my way, we will have the legal theories conform to reality as opposed to reality being made to conform to legal theories.

Speech to Cascade Employers Association, p. 18 (March 13, 1985).

In another speech in August, 1985, Thomas, attacking what he believed was the rationale of the Guidelines and Griggs, said:

> The premise underlying [the Guidelines] is that but for unlawful discrimination by an employer, there would not be variations in the rates of hire or promotion of people of different races, sexes, or national origins...[The Guidelines] also see[m] to assume inherent inferiority of blacks, Hispanics, other minorities, and women by suggesting that they should not be held to the same standards as other people, even if those standards are race-and sex-neutral. Operating from these premises, [the Guidelines] ma[e] determinations of discrimination on the basis of a mechanical statistical rule that has no relationship to the plain meaning of the term 'discrimination.'

Reprinted in Oversight Hearing on EEOC's Proposed Modification of Enforcement Regulations before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor 99th

In the same December 1984 interview with the New York Times, Mr. Thomas went so far as to criticize the merits of his own agency's then-pending lawsuit against Sears, although it was consistent with the theory of the Guidelines, stating that it "relies almost exclusively on statistics." Through these machinations, Thomas attempted to make proof of discrimination insurmountably difficult, with total disregard for current law.

Judge Thomas' unilateral attempt to revise the Uniform Guidelines was not the only instance in which his actions while at the EEOC demonstrated a lack of respect for the law and the rights of victims of discrimination. Since 1979, the EEOC had on its books regulations concerning affirmative action, adopted after notice and comment pursuant to the Administrative Procedure Act, providing it with the authority to grant immunity under Title VII. These regulations authorized employers to take affirmative action, including goals and timetables to improve employment opportunities for people of color and women. The "overview" of these regulations published at the time of their adoption states:

> It is the Commission's interpretation that the appropriate voluntary affirmative action, or affirmative action pursuant to an administrative or judicial requirement, does not constitute unlawful discrimination in violation of the Act.[15]

Judge Thomas, who has variously attacked affirmative action programs as creating "a narcotic of dependency" and "social

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Cong., 1st Sess., 27-28 (1985).

[15] EEOC Guidelines on Affirmative Action, 44 Fed. Reg. 4422, Jan. 19, 1979, codified as 29 CAR 1608 (1989 edition).

engineering," disapproved of the Affirmative Action Guidelines and, thus, sought to evade them. In the fall of 1985, the EEOC Acting General Counsel, with Judge Thomas' support, ordered EEOC regional attorneys not to include goals and timetables in settlement proposals or other actions in which the EEOC had intervened. In addition, the Acting General Counsel ordered the EEOC legal staff not to seek enforcement of goals and timetables in existing consent decrees. Here again Judge Thomas' action demonstrated both disrespect for the law and indifference to the rights of victims of discrimination.

Although Judge Thomas attempted to justify his rejection of the use of goals and timetables on the basis of Firefighters v. Stotts,[16] his actions were legally and procedurally indefensible, as Professor Alfred Blumrosen pointed out in opposing Thomas' nomination to the Court of Appeals:

> If Chairman Thomas' view was that the use of goals and timetables was illegal after Stotts the proper course of administrative action was to suspend those sections of the Affirmative Action Guidelines which authorized their use. The Administrative Procedure Act permits an agency to act promptly in issuing or revising a rule when it finds for "good cause" that "notice and public procedures are impracticable, unnecessary, or contrary to the public interest." This would have allowed public notice of the EEOC's position, would have been based on a formal legal opinion which could then have been considered by the concerned community. But Chairman Thomas had a preference for private decisionmaking, rather than public participation.[17]

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[16] 467 U.S. 561 (1981).

[17]. Hearings on the Nomination of Clarence Thomas to the U.S. Court of Appeals for the District of Columbia Before the Senate Committee on the Judiciary, 101st Cong., 2nd Sess, at p. 94 (Statement of Professor Alfred W. Blumrosen).

Finally, in one of the most controversial and outrageous incidents of his eight-year tenure at the EEOC, the EEOC allowed more than 13,000 Age Discrimination in Employment (ADEA) claims to lapse by failing to act within the prescribed time limits, thereby compromising the discrimination claims of thousands of older workers, who comprise more than one-third of the national work force. Ultimately, Congress had to pass special legislation to reinstate the rights of those older workers whose claims the EEOC had failed to act on.

As thirteen members of the House of Representatives with oversight responsibilities for the EEOC expressed to President Bush in a letter concerning Mr. Thomas' nomination to the Court of Appeals: "during Mr. Thomas' administration, the Commission . . . adopted policies involving pension accrual, supervised waivers, apprenticeship exclusions and early incentive plans inimical to ADEA's purpose - to encourage the employment of qualified older workers." In a series of cases involving precisely the kinds of early retirement plans the ADEA was designed to prohibit, the EEOC sided with the employer. In Lusardi v. Xerox Corp, for example, the EEOC declined to assist over 100 older workers who were faced with an early retirement program and could not join a class action suit because of a class cutoff date. The EEOC refused to assist the workers even though the EEOC staff had found substantial reason to believe that there was a company policy of targeting older, higher paid employees for termination. In Paolillo v. Dresser Industries.

Inc.,[16] the EEOC, after the plaintiffs prevailed on appeal, filed an amicus brief in support of the employer's request for a modification of the decision. Specifically, the Commission argued that the plaintiffs should have been forced to meet a higher standard for showing coercion and that the plaintiffs should have to carry the burden of proof on the question of voluntariness.

NCBL is particularly outraged by Judge Thomas' treatment of the discrimination complaints of elderly workers because, as members of this Committee well know, people of African descent are disproportionately represented among the ranks of the unemployed and underemployed and consequently often have to work longer than white workers.

JUDGE THOMAS' RECORD AS AN APPELLATE JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Last year, when President Bush nominated Mr. Thomas for the Court of Appeals, his nomination was opposed by various civil rights and civil liberties organizations and individuals because of his record at the EEOC and his otherwise slender legal experience. In the less than two years since his appointment to the Court of Appeals Judge Thomas has authored 20 opinions, most of them in the area of criminal law and procedure and, in all but one, he ruled against the defendant.

People of color and the poor are disproportionately represented as defendants in the criminal court. Judge Thomas' lack of sensitivity to them as a group, evidenced by his record in

[16] 821 F. 2d 81 (2nd Cir. 1987).

the Court of Appeals, combined with his record at the EEOC and OCR, lead the NCBL to the opinion that his confirmation to the Supreme Court would serve only to continue to eviscerate the hard-won criminal procedural rights that once protected defendants from governmental misconduct.

Judge Thomas appears to be particularly insensitive to the prejudice that may result from the joinder of offenses or of defendants and the admission of prior convictions and acts. In one case, for example, Judge Thomas affirmed the conviction of a defendant who had requested and been denied a severance of his trial, even though the attorney of one of his co-defendant's had called him to testify, knowing he would refuse to do so, undermining his constitutional rights against self-incrimination.[19] In another case, United States v. Rogers,[20] Judge Thomas authored the opinion for the Court upholding a defendant's conviction over his arguments that the district court had improperly admitted evidence of his prior conviction and past ownership of a beeper. The elevation to Supreme Court of Judge Thomas will certainly add an additional vote to the increasingly conservative trend in the Court in the area of criminal procedure, which this past term overturned five of its own recent cases.

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[19] United States v. Harrison; United States v. Black; United States v. Butler, 932 F. 2d 65 (1991).

[20] 918 F. 2d 207 (D.C. Cir. 1990).

As a member of the Court of Appeals, Judge Thomas has also demonstrated undue deference to federal agencies that suggests, in particular, a disregard for the rights of workers and environmental protection issues. In one case Judge Thomas rejected a union challenge to a Labor Department decision permitting a mine owner in Alabama, in violation of federal health and safety regulations, to use a high-voltage electrical cable within 150 feet of a working mineface over arguments by the union that use of such cables increased miners' exposure to dust and methane, created ventilation problems and made escape from the mines more difficult.[21]

In another case, Citizens Against Burlington v. Busby,[22] a group of Ohio citizens who live near the Toledo airport and who use a park and campground near the airport challenged the Federal Aviation Administration's (FAA) decision to allow expansion of the airport. The Ohio citizens urged that expansion of alternative airports where less environmental damage might occur be considered by the FAA in its environmental impact statement. The law requires consideration of "reasonable alternatives" in environmental impact statements. Writing for the majority, Judge Thomas ruled against the citizens and accepted the FAA's reasoning that the only alternative needed to be considered was the goal of improving the Toledo economy. Judge Thomas' lack of sensitivity to the rights of criminal defendants and apparent deference to federal agencies,

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[21] International Union, United Mineworkers of America v. Federal Mine Safety and Health Administration, 931 F.2d 908 (D.C. Cir. 1991).

[22] (D.C. Cir. LEXIS 12035 1991)

however, are not the only reasons for our concern over his record at the Court of Appeals. We are also troubled by Judge Thomas' lack sensitivity to the obligation of all judges, federal and state, to maintain the integrity of the judicial process by steadfast vigilance to the highest standard of ethical conduct. In September 1990, in an apparent violation of the standards for judicial conduct, Judge Thomas participated in and authored the opinion for the Court in Alpo Petfoods Inc. v. Ralston Purina Company,[23] reducing a $10.4 million damage claim against Ralston Purina Company, a corporation owned in large part by the family of Judge Thomas' personal friend and political mentor, Senator John Danforth. Judge Thomas neither disclosed his relationship to Senator Danforth or disqualified himself as required by federal law.[24]

JUDGE THOMAS' WRITINGS AND SPEECHES

We are also troubled by Judge Thomas' legal and judicial philosophies expressed in his writings and speeches. In his writings and speeches, Judge Thomas has demonstrated a disturbing disdain for the members of the legislative branch and criticized a number of important Supreme Court decisions. Judge Thomas has written: "As Lt. Col. Oliver North made it perfectly clear last

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[23] 913 F.2d 958 (D.C. Cir. 1990).

[24] See 28 U.S.C. 455a; 28 U.S.C. 455e.

summer, it is Congress that is out of control."[25] In a discussion of the increasing role of the courts, Judge Thomas stated: "Not that there is a great deal of principle in Congress itself. What can one expect of a Congress that would pass the ethnic set-aside the court upheld in Fullilove v. Klutznick," the 1980 ruling establishing congressional power to enact minority set-aside programs.[26]

In addition to Fullilove, Judge Thomas has attacked the Court's decisions in United Steel Workers v. Weber,[27] Local 28 of the Sheet Metal Workers' International Association v. EEOC,[28] and Johnson v. Transportation Agency, Santa Clara County [29] as "egregious" examples of "creative interpretations of equal protection and legislative intent."[30] In the same article, Judge Thomas, in a frightening display of ignorance of the importance of the Fifth Amendment due process and equal protection guarantees to the millions of people who reside outside the fifty states, in the District of Columbia, Puerto Rico, the Virgin Islands, Guam and

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[25] C. Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment, " 12 Harvard Journal of Law and Public Policy 63.

[26] 448 U.S. 448 (1980).

[27] 443 U.S. 193 (1979).

[28] 478 U.S. 421 (1986).

[29] 478 U.S. 421 (1986).

[30] Thomas, "Civil Rights as principle Verus Civil Rights as an Interest," in Assessing the Reagan Years 391, 396 (D. Boaz, ed. 1988).

elsewhere, stated "[a]ny equal protection component of the Fifth Amendment due process is irrelevant."[31]

Additionally, Judge Thomas has repeatedly expressed support for the long discredited doctrine of "natural law." According to Professor Lawrence Tribe, Thomas is the first Supreme Court nominee in 50 years to "maintain that natural law should be readily consulted in constitutional interpretation."[32] As one Supreme Court justice wrote in dissenting from the Court's natural rights analysis in a 1798 probate case: "The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject. . . ."[33] The last time the Supreme Court applied the natural law doctrine some 80 years ago, the Court held that the Constitution protects such economic rights as the "liberty" of employers to conduct business free of health and safety regulations and minimum wage laws.[34]

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[31] See e.g. Bolling v. Sharpe, 347 U.S. 497 (1954) (holding segregation of public schools in the District of Columbia violative of the Due Process Clause of the Fifth Amendment).

[32] Lawrence H. Tribe, "Natural Law and the Nominee," New York Times, July 15, 1991.

[33] Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (Iredell, J. dissenting).

[34] See, e.g., Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (denying a woman a license to practice law because "...civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destines of men and woman...") Muller v. Oregon, 208 U.S. 412 (1908) (upholding a statute that limited the number of hours women could work because "healthy mothers are essential to vigorous offspring, [and] the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race).

If Judge Thomas is appointed to the Supreme Court, his views with respect to natural law may have a drastic consequence. In a 1987 speech to the Heritage Foundation, for example, Judge Thomas praised as "a splendid example of applying natural law" an article that argued not only for the overruling of Roe v. Wade,[35] but for the recognition of an "inalienable right to life of the child-about-to-be-born (a person)." Judge Thomas has also criticized the majority and concurring opinions in Griswold v. State of Connecticut,[36] a decision that gave married couples the right to purchase birth control.

NCBL and its members are deeply concerned by the Supreme Court's possible reversal of Roe v. Wade because women of color and poor women were overwhelmingly overrepresented among the women who died, were left sterile or suffered other serious medical complications as a result of illegal abortions prior to the Court's decision in Roe. In 1972, prior to Roe, women of color represented 64% of the deaths associated with illegal abortion,[37] and they would be similarly endangered upon Roe's reversal.

Overturning Roe will also leave women even more vulnerable to the recent trend in criminal prosecution for prenatal conduct. This strategy punishes women rather than providing them with necessary health care. It has been wielded disproportionately

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[35] 410 U.S. 113 (1973)

[36] 381 U.S. 479 (1965).

[37] Cates & Rochat, Illegal Abortions in the United States: 1972-1974, 9 Fam. Plan. Persp. 86, 87 (1976).

against women of color.[38] Despite equal rates of drug and alcohol use across race and class, women of color amd low-income women have been found to be ten times more likely to be reported for prenatal conduct.[39] Low income women and women of color are disproportionately subject to such prosecution because their only access to health care is through public facilities where drug testing of pregnant women is also routine.

Finally, NCBL is deeply troubled by both Thomas's apparent support for the current South African government and his lending of the prestige of his office to efforts supporting the racist regime in South Africa. For the past ten years Mr. Thomas has served has a member of the Editorial Advisory Board of the Lincoln Review, the quarterly publication of the Lincoln Institute for Research and Education, founded by J. A. Parker, who is a paid agent of the racist government of South Africa and who has been described as Thomas' political mentor.[40] Mr. Parker and one of the two contributing editors of the Lincoln Review, William A. Keyes, among other things, are the founders of the International Public

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[38] See, e.g., Johnson v. Florida, No. 89-1765 (Fla. Dist. Ct. App. April 18, 1991); Michigan v. Hardy, No. 128458 (Mich. Ct. App. April 1, 1991); Commonwealth v. Pelligrini, No. 87970, slip op. (Mass. Sup. Ct. Oct. 15, 1990).

[39] Chasnoff, Landress & Barrett, "The Prevalence of Illicit Drug or Alcohol Use During Pregnancies & Discrepancies in Mandatory Reporting in Pinellas County, Florida" 322 New England Journal of Medicine 1202 (1990); Kolata, New York Times, July 20, 1990 at A13; and Winslow, Wall Street Journal, April 27, 1990.

[40]. See e.g., Russ Bellant, "The Thomas connection has white South African angle," National Catholic Review, August 2, 1991; Herb Boyd, "Clarence Thomas and his right-wing bedfellows," Amsterdam News, August 31, 1991.

Affairs Consultants, Inc. (IPAC), a lobbying firm incorporated in Virginia in 1985 and registered with the Justice Department under the Foreign Agents Registration Act as an agent of Pretoria. According to the September 10, 1987 filings for IPAC, one of the IPAC's activities listed as "Political Propaganda" was a reception held for the South African Ambassador. Mr. Thomas is listed as attending as EEOC Commissioner.

Our serious concerns about this nominee are not assuaged by Judge Thomas' attempts, in the last few days, to downplay his extreme views, his loyalty to which he has manifested through years of action, writing and speeches. His sudden inconsistency and professed sensitivity neither negate the deeds of the past nor inspire confidence in his ability or sincerity in the future to uphold and apply the law and to act to ensure that the rights of the disadvantaged in this country are protected.

CONCLUSION

Mr. Chairman, after a careful review of Mr. Thomas' record, summarized herein, we ask that the Committee refuse to confirm Mr. Thomas.

The CHAIRMAN. Thank you very much, Ms. Aiyetoro, for a very straightforward and direct statement. We appreciate it.

Ms. AIYETORO. Thank you.

The CHAIRMAN. Mr. Hou.

STATEMENT OF WILLIAM HOU

Mr. HOU. Thank you, Mr. Chairman, members of the committee.

The National Asian Pacific-American Bar Association, NAPABA, with several thousand members, is the national organization of Asian Pacific-American Attorneys. NAPABA represents the professional concerns of its membership, and promotes the interests of the fastest growing minority group in this country, the Asian Pacific-American community.

NAPABA encourages the nomination of minority candidates to the Supreme Court and believes that, once confirmed, such Justices, with a perspective that may otherwise be absent, can play a vital role in the deliberations of the court.

However, while Judge Thomas' background is appealing, it is not, in and of itself, a sufficient basis to support his nomination. Indeed, NAPABA, after careful review and deliberation of Judge Thomas' record, opposes his nomination to the Supreme Court for the reasons set forth in the written statement which we have submitted to the committee.

The CHAIRMAN. Which will be placed in the record, as well. All of your statements will be placed in the record in full—all of your written statements, if that is what you desire.

Mr. HOU. Yes, it is. Thank you, Mr. Chairman.

My testimony today will focus on two aspects of Judge Thomas' views that are especially disturbing from an Asian Pacific-American perspective.

The first is the potentially troubling ramifications of Judge Thomas' flirtation with natural law principles as a basis for judicial decisions. In particular, Judge Thomas readily cites Justice Harlan's dissent in *Plessy* v. *Ferguson* as "one of our best examples of natural rights or higher law jurisprudence."

In his dissent, which is often credited for the concept of a colorblind constitution, Justice Harlan, nonetheless, referred, with tacit approval, to racist Chinese Exclusion Acts, writing—

> There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race.

Moreover, 2 years later, in *United States* v. *Wong Kim Ark*, Justice Harlan opposed the majority's decision to permit a man of Chinese descent who was born in this country to re-enter the United States upon his return from a visit to China. The dissent, joined by Justice Harlan, described the Chinese as, "of a distinct race and religion, apparently incapable of assimilating with our own people, who might endanger good order, and be injurious to the public interests."

Fortunately, Justice Harlan's position excluding Chinese from this great country did not prevail.

Not only am I, as an American of Chinese ancestry, honored to testify at these proceedings but, on a more personal note, I am

grateful, as my parents, both of whom were born in China, did not meet until after coming to America.

NAPABA does not mean to suggest that Judge Thomas condones Justice Harlan's views regarding the Chinese. Indeed, Judge Thomas has, himself, characterized Justice Harlan's comments as inappropriate. Nonetheless, such remarks vividly illustrate that the singling out of an ethnic group for unequal and unjust treatment is not necessarily inconsistent with the natural law analysis praised by Judge Thomas, raising serious questions about his nomination.

NAPABA's second concern is Judge Thomas' portrayal of Asian Pacific-Americans as a minority group whose accomplishments justify opposition to affirmative action. Specifically, Judge Thomas has asserted that because Asian Pacific-Americans have "substantially greater family incomes than whites," they have "transcended the ravages caused even by harsh legal and social discrimination."

He has also stated that Asian Pacific-Americans should not be the beneficiaries of affirmative action, because they are "overrepresented." NAPABA categorically rejects Judge Thomas' assertions which are inaccurate and misleading generalizations of the Asian Pacific-American experience.

For instance, among the Filipino, Asian, Indian, and Vietnamese communities, average family incomes are only a fraction of the average for caucasian families. Moreover, a crucial contributing factor to the incomes enjoyed by Chinese-, Japanese-, and Korean-American families, is simply the fact that more family members work than in other households.

Further, Asian Pacific-Americans are not overrepresented. In a recent study which reaffirmed the existence of the glass ceiling phenomenon, whereby qualified minority candidates are not promoted to senior management positions, the U.S. Commission on Civil Rights concluded that United States born Asian Pacific-American men are "less likely to be in managerial positions than whites with comparable skills and characteristics."

In embracing stereotypes and cliches, that is the "model-minority" myth, Judge Thomas displays insensitivity to the very real difficulties confronting Asian Pacific-Americans. Moreover, it is believed that Asian Pacific-Americans are not appropriate candidates for remedies such as affirmative action raises significant concerns, should Judge Thomas be called upon to adjudicate a discrimination claim brought by members of our community.

For the foregoing reasons, the National Asian Pacific-American Bar Association opposes Judge Thomas' nomination to the Supreme Court of the United States.

Thank you.

[The prepared statement of Mr. Hou follows:]

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STATEMENT OF THE NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION REGARDING THE NOMINATION OF THE HONORABLE CLARENCE THOMAS TO THE SUPREME COURT OF THE UNITED STATES

Contact: William C. Hou, Esq.
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INTRODUCTION

The National Asian Pacific American Bar Association ("NAPABA"), after careful review and long, painstaking discussion, analysis and deliberation, opposes the nomination of the Honorable Clarence Thomas to the Supreme Court of the United States.

NAPABA is the national organization of Asian Pacific American attorneys, with thousands of members throughout the country. NAPABA represents the professional concerns of its members and promotes the interests of the fastest-growing minority group in the country -- the Asian Pacific American community. NAPABA has achieved recognition as an important source of leadership and resource, and acts as a national voice and effective advocate, for Asian Pacific American attorneys and their communities.

NAPABA's activities include: addressing the legal needs of Asian Pacific Americans; advocating equal opportunity in education and in the workplace; combating anti-Asian violence and other hate crimes; participating in the legislative process; monitoring judicial appointments; promoting Asian Pacific American political leadership; participating in the preparation of amicus briefs; presenting programs of particular interest to Asian Pacific American attorneys; and working in coalition with people of all colors in the legal profession and in communities at large.

NAPABA supports the nomination of minority candidates to the Supreme Court and believes that, once confirmed, such Justices, who possess a perspective that may otherwise be absent, can play a vital role in the deliberations of the Court. Judge Thomas undoubtedly has experienced poverty and felt keenly the sting of discrimination. It is also clear that Judge Thomas' diligence and hard work enabled him to succeed when given the opportunity as a result of affirmative action programs.

The compelling nature of his life story, however, is not in and of itself a sufficient basis to support his nomination.

Evaluating Judge Thomas' suitability for lifelong tenure on the Supreme Court poses certain difficulties. Because Judge Thomas was only recently appointed to the U.S. Court of Appeals, his judicial record, the traditional primary source for evaluating a Supreme Court nominee, does not provide adequate information to evaluate his nomination. However, Judge Thomas has in other contexts spoken and written on topics such as affirmative action, employment discrimination, race, and judicial philosophy.

Based upon Judge Thomas' record, NAPABA has concluded that he should not be confirmed. First, the examples of "natural law" which Judge Thomas has advocated as appropriate for construing the Constitution have disturbing implications. Second, his inaccurate characterization of the Asian Pacific American community in his attempts to justify opposition to affirmative action are a cause of concern. Finally, his views on employment discrimination are contrary to previously well-settled law.

In addition to the aforementioned areas of particular interest from an Asian Pacific American perspective, there are a number of other factors, such as Judge Thomas' record while he served at the Office of Civil Rights of the Department of Education and as Chairman of the Equal Employment Opportunity Commission, which were also considered by NAPABA. Our concerns about that record have been aptly presented at these proceedings by other witnesses opposing Judge Thomas' nomination and therefore will not be repeated herein.

ANALYSIS

A. Judge Thomas' advocacy of "natural law" has troubling ramifications.

Judge Thomas has, in numerous articles and speeches, advocated the application of "natural law" concepts in construing the Constitution. His flirtation with natural law principles as a basis for judicial decisions has troubling ramifications, as can be readily seen from examining several Supreme Court cases mentioning or involving Asian Pacific Americans.

For instance, Judge Thomas has repeatedly praised as "one of our best examples of natural rights or higher law jurisprudence" Justice Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537 (1896), a Supreme Court case which espoused the "separate but equal" doctrine and upheld a Louisiana law requiring railroad companies to segregate their passenger cars based on race. Although Justice Harlan rejected the "separate but equal" doctrine in his dissent which is often cited for the concept of a "color-blind" Constitution, he nonetheless referred, with tacit approval, to the racist

Chinese Exclusion Acts: "There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race." 163 U.S. at 561.

Moreover, two years after Plessy, the Supreme Court held in United States v. Wong Kim Ark, 169 U.S. 649 (1898), that pursuant to the plain language of the Fourteenth Amendment, any person born in the United States, under its jurisdiction, is a citizen. Thus, a man of Chinese descent who was born in this country was allowed to re-enter the United States following a visit to China. Significantly, Justice Harlan joined the dissent in arguing for his exclusion. In its analysis, the dissent quoted favorably from another case, Fong Yue Ting v. United States, 149 U.S. 698 (1893), describing the Chinese as "of a distinct race and religion . . . apparently incapable of assimilating with our people . . . [who] . . . might endanger good order, and be injurious to the public interests. . . ." 169 U.S. at 731. The Wong Kim Ark dissent then proclaimed: "It is not to be admitted that the children of persons so situated become citizens by the accident of birth." Id. at 731-732.

While NAPABA does not mean to suggest that Judge Thomas condones Justice Harlan's views regarding the Chinese, it is clear that Judge Thomas is fully aware of Justice Harlan's remarks in the Plessy dissent. Indeed, Judge Thomas, in an article defending Justice Harlan's analysis, has himself admitted that Justice Harlan's views on the Chinese are "opprobrious." Thomas, *Toward a "Plain Reading" of the Constitution -- the Declaration of Independence in Constitutional Interpretation*, 30 Howard L.J. No. 4 at 993 (1987). Nonetheless, Harlan's dissent in the Plessy and Wong Kim Ark cases vividly illustrate that the singling out of an ethnic group for unequal and unjust treatment is not necessarily inconsistent with the natural law analysis praised by Judge Thomas. That such overt racism is so readily evident -- in a context selected by Judge Thomas himself -- reflects poorly on the desirability of the theory and raises serious questions about the suitability of a Supreme Court candidate who has often commented favorably on the application of such natural law principles to judicial decisions.

B. Judge Thomas inaccurately portrays the Asian Pacific American experience in his attempt to justify opposition to affirmative action.

Judge Thomas has portrayed Asian Pacific Americans as a minority group whose accomplishments justify opposition to affirmative action as a remedy for discrimination. "Thomas Lowell and the Heritage of Lincoln: Ethnicity and Individual Freedom," 8 Lincoln Review 7 (1988). Specifically, Judge Thomas asserts that because Asian Pacific Americans have "substantially greater family incomes than whites", they have "transcended the ravages caused even by harsh legal and social discrimination". Id. at 15. He goes on to state that Asian Pacific Americans are "overrepresented" in areas

such as employment opportunities and hence, are not deserving beneficiaries of affirmative action as a remedy for discrimination. Id. at 16. NAPABA categorically rejects Judge Thomas' conclusions.

Judge Thomas' assertions are inaccurate and misleading generalizations of the Asian Pacific American experience. For example, with respect to family income, Judge Thomas fails to recognize the struggles of various ethnic groups which comprise the Asian Pacific American community. Had Judge Thomas investigated further, he would have found that among the Filipino American, Asian Indian American and Vietnamese American communities, average family incomes are only a fraction of the incomes of comparable Caucasian families. U.S. Commission on Civil Rights, The Economic Status of Americans of Asian Descent, 1988 at 8. Moreover, a crucial contributing factor to the incomes enjoyed by Chinese American, Japanese American and Korean American families is simply the fact that more family members work than in the average household. Id. at 9. Other Asian Pacific American households are larger than average so that when family incomes are adjusted on a per capita basis, the relative economic status of such Asian Pacific American families falls substantially. Id. Unfortunately, Judge Thomas is evidently content to accept the stereotypes and myths that continue to plague the Asian Pacific American community.

Further, NAPABA disagrees with Judge Thomas' belief that Asian Pacific Americans are overrepresented. In a 1988 study which reaffirmed the existence of the "glass-ceiling" phenomenon whereby qualified minority candidates are not promoted to senior management positions, the U.S. Commission on Civil Rights noted that U.S.-born Asian Pacific American men are "less likely to be in managerial positions than are whites with comparable skills and characteristics". Id. at 13. In embracing stereotypes and cliches (that is, the "model-minority" myth), Judge Thomas fails to recognize the very real difficulties and barriers confronting Asian Pacific Americans. Moreover, his belief that Asian Pacific Americans are not appropriate candidates for remedies such as affirmative action raises significant concerns should Judge Thomas be called upon to adjudicate a discrimination claim brought by Asian Pacific Americans.

C. Judge Thomas' views on employment discrimination are in opposition to well-settled law.

Judge Thomas has made numerous statements and has taken actions while at the Office of Civil Rights of the Department of Education and as Chairman of the Equal Employment Opportunity Commission that bring into serious question both his commitment to effective remedies to discrimination as well as his adherence to well established legal principles. In particular, Judge Thomas has repeatedly stated that statistical evidence is much overused in employment discrimination cases. Yet, statistical evidence is often extremely important in both proving and remedying employment discrimination.

One type of claim which relies extensively on statistics is known as an "adverse impact" case. Restricting the use of statistics as a method of proof would essentially eliminate the ability to prove such cases, to the significant detriment of Asian Pacific Americans. For example, Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), involved alleged discrimination against Filipino American cannery workers that was manifested by the segregation of those workers into inferior jobs and living conditions. As a result of the severe limitations place on the use of statistics to demonstrate the segregation, it was not possible for those Filipino American workers to obtain relief.

Second, even in "disparate treatment" cases, statistics often are used to buttress a discrimination claim. For example, if an Asian Pacific American believes that he or she was not promoted to a managerial position because of discrimination (i.e., the "glass ceiling"), an important element of proving the existence of discrimination would likely include evidence that the employer has consistently passed over other qualified Asian Pacific Americans (i.e., statistical evidence).

In addition to making it significantly harder for those who have been discriminated against to prove their cases, Judge Thomas' views on goals and timetables would severely limit a victim's remedies. Because Judge Thomas, in his writings and speeches, has indicated his opposition to the use of goals and timetables against even proven and persistent discriminators, his views are contrary to recent Supreme Court decisions which have endorsed the use of goals and timetables when the defendant has discriminated against the protected group in the past. See, e.g., United States v. Paradise, 480 U.S. 149 (1987); Firefighters v. Cleveland, 478 U.S. 501 (1986); Local 28 Sheet Metal Workers Internat'l v. EEOC, 478 U.S. 421 (1986). Criticizing these well-settled decisions, Judge Thomas, in his capacity as EEOC Chairman, opposed "race conscious" relief distributing opportunities on the basis of race or gender.

CONCLUSION

NAPABA's opposition is the result of a careful review of Judge Thomas' record as a public official, his writing and his speeches.

Judge Thomas' documented advocacy of the application of "natural law" principles to judicial decisions has disturbing ramifications and raises serious doubts about his suitability to serve as a member of the highest court in this country.

NAPABA is also concerned by Judge Thomas' attempts to use the Asian Pacific American community as a basis to justify opposition to affirmative action. Not only are such attempts inaccurate and contrary to established facts, but Judge Thomas' apparent readiness to embrace racial stereotypes and cliches is disturbing and raises significant concerns should Judge Thomas be called upon to adjudicate a discrimination claim brought by Asian Pacific Americans.

Finally, the evidence is clear that Judge Thomas' opposition to using statistical evidence to prove discrimination, and his narrow view of appropriate remedies once discrimination is established, would impair severely an employment discrimination victim's ability to prove a discrimination case and to be made whole.

For the foregoing reasons, the National Asian Pacific American Bar Association opposes the nomination of the Honorable Clarence Thomas to the Supreme Court of the United States and urges that he not be confirmed by the United States Senate.

The CHAIRMAN. Thank you, and thank you for being under the time.

Ms. Seymore.

STATEMENT OF LESLIE SEYMORE

Ms. SEYMORE. Thank you, Mr. Chairman and members of the committee.

The testimony being presented today is in opposition to the nomination of Clarence Thomas to the position of Associate Justice of the U.S. Supreme Court.

In this time in the history of our country's judicial process, all citizens must be very concerned about the nomination of Judge Thomas. The following testimony is presented on behalf of the National Black Police Association, an advocacy organization which represents over 140 chapters of African-American police officers, nationally.

In our recent annual conference, of which two-thirds of our member chapters were present, the issue of President Bush's nomination of Clarence Thomas as an Associate Justice was discussed. After a careful presentation of the facts and materials surrounding Judge Thomas' record and career as a public official, the National Black Police Association voted to oppose his nomination.

Our purpose here today is to reiterate and reaffirm our opposition to the nomination of Clarence Thomas to the U.S. Supreme Court for the following reasons.

Clarence Thomas is opposed to affirmative action and other remedies for racial discrimination. He has repeatedly stated that any race-conscious remedy is no good. However, the courts have repeatedly provided such relief to minorities and women in order to address racial disparities in areas such as employment, education and housing. Surely, as African-Americans in our Nation's police departments, the use of affirmative action and other remedies for racial discrimination has provided us with the opportunity to make our communities and neighborhoods safe from crime and violence.

Since our beginning in 1972, the number of African-American officers has grown from less than 20,000 to over 48,000 today. In spite of Clarence Thomas' leadership as Chairman of the EEOC, there has been a 100 percent increase in the number of African-American police officers in the past 20 years.

After Judge Thomas' appointment as head of the EEOC, and the implementation of changes in its procedures, we have fewer African-Americans and women employed in police departments today than 10 years ago. Without affirmative action and other remedies, America would be a very different place. Access to opportunity is a key constitutional right, which cannot be compromised.

Bruce Wright, in his book "Black Robes, White Justice," had the following to say about minority progress.

> Many blacks in the criminal justice system and in unrelated professions are bitterly amused by the white cry of "preferential treatment," "quotas," "affirmative action," and "reverse discrimination." These terms wage intellectual and ideological warfare against minority progress. Groups have surfaced demanding "white power," as though the locus of power has ever been with the blacks. The American Revolution stands as a precedent for how much white victims of oppression accept before they rebel. It is thus that the oppressed, when liberated, become the oppressors.

During his brief period of service on the U.S. Court of Appeals of the District of Columbia, Judge Thomas has repeatedly ruled against the accused in the face of alleged police or prosecutorial excesses. A court with Clarence Thomas serving as an Associate Justice could permit more American citizens to be abused and incarcerated.

To illustrate this point, in March 1991, the U.S. Supreme Court voted five to four to allow confessions obtained in violation of a defendant's consitutional rights. Chief Justice William H. Rehnquist's opinion states there may be other evidence of guilt that the use of an involuntary confession could be considered harmless error. The issue of "harmless error" analysis has been urged by the Bush administration.

Following on the heels of that decision was another ruling concerning the detaining of suspects. The Court ruled that suspects arrested without a warrant generally may be jailed for as long as 48 hours before a judge determines the validity of the arrest. By a five to four margin, the court ruled that "prompt" generally means 48 hours.

These two rulings have far-reaching implications. Some might argue these rulings are indeed needed to address the increasing crime rate, delays in the court system, and overcrowded jails. Nonetheless, can we afford to relinquish our basic constitutional rights in the process?

Based on the testimony we have heard from Judge Thomas during these hearings, there is little to indicate any resistance he may have toward continuing the increased power of police and other police agencies—an increase in power which ultimately may lead to a police state in our own country.

The precedent set by the Court's recent rulings is frightening. As African-American police officers, we totally reject the notion that his behavior is necessary to increase the quality of life and the absence of crime in our community.

Lastly, we disagree with those individuals who argue Clarence Thomas is an important role model for young African-Americans. In the past week we have been inundated with recollections of Judge Thomas' humble beginnings. I do not wish to refute nor negate the significance of his background or personal experiences, however, this committee should not allow itself to become entangled in the bitter-sweet musings of his hardships, for the hardships of Clarence Thomas are no greater nor harder than those of the average hardships of numerous African-American males his age or older.

President Bush's nomination of Clarence Thomas has created an illusion of a progressive, fair-minded administration. Yet, the irony is that this nomination is an attempt to a satisfy a quota—a remedy which Clarence Thomas opposes. It is fair to say that the majority of African-Americans are proud to see one of their own achieve success. However, tokenism cannot be a factor in selecting the next Supreme Court Justice. The hard questions of Judge Thomas' philosophy and future direction as an Associate Justice has not been adequately addressed by this committee.

In conclusion, let me end with the following quote by Edwin Markham: "One of the tragedies of life is that once a deed is done, the consequences are beyond our control."

Thank you.

[The prepared statement of Ms. Seymore follows:]

STATEMENT OF

LESLIE J. SEYMORE

VICE CHAIRPERSON, NATIONAL BLACK POLICE ASSOCIATION

SEPTEMBER 18, 1991

SENATE JUDICIARY COMMITTEE

CONFIRMATION HEARING OF CLARENCE THOMAS

TO U.S. SUPREME COURT

Thank you Mr. Chairman and members of the Committee. The testimony being presented today is in opposition to the nomination of Clarence Thomas to the position of Associate Justice of the United States Supreme Court. At this time in the history of our country's judicial process, all citizens must be very concerned about the nomination of Judge Thomas.

The following testimony is presented on behalf of the National Black Police Association (NBPA), an advocacy organization which represents over 140 chapters of African American police officers nationally. At our recent Annual Conference, of which two-thirds (2/3) of our member chapters were present, the issue of President Bush's nomination of Clarence Thomas as an Associate Justice was discussed. After a careful presentation of the facts and materials surrounding Judge Thomas' record and career as a public official, the National Black Police Association voted to oppose his nomination.

Our purpose here today is to reiterate and reaffirm our opposition to the nomination of Clarence Thomas to the U.S. Supreme Court for the following reasons:

AFFIRMATIVE ACTION

Clarence Thomas is opposed to affirmative action and other remedies for racial discrimination. He has repeatedly stated that "any race-conscious remedy" is no good. However, the courts have

repeatedly provided such relief to minorities and women in order to address racial disparities in areas such as employment, education and housing.

Surely, as African Americans in our nation's police department, the use of affirmative action and other remedies for racial discrimination has provided us with the opportunity to make our communities and neighborhoods safe from crime and violence. Since our beginning in 1972, the number of African American officers has grown from less than 20,000 to over 48,000 today. In spite of Clarence Thomas' leadership as Chairman of the EEOC, there has been a one-hundred (100%) percent increase in the number of African American police officers in the past twenty years.

After Judge Thomas' appointment as head of the EEOC and the implementation of changes in its procedures, we have fewer African Americans and women employed in police departments today than ten (10) years ago. Without affirmative action and other remedies, America would be a very different place. Access to opportunity is a key constitutional right which cannot be compromised.

Bruce Wright, in his book Black Robes, White Justice had the following to say about minority progress. "Many blacks in the criminal justice system and in unrelated professions are bitterly

amused by the white cry of 'preferential treatment,' 'quotas,' 'affirmative action,' and 'reverse discrimination'. These terms wage intellectual and ideological war-fare against minority progress. Groups have surfaced demanding 'white power', as though the locus of power had ever been with the blacks. The American Revolution stands as precedent for how much white victims of oppression accept before they rebel. It is thus that the oppressed when liberated become the oppressors."

CONSTITUTIONAL RIGHTS AND INDIVIDUAL PROTECTION

During his brief period of service on the U.S. Court of Appeals of the District of Columbia, Judge Thomas has repeatedly ruled against the accused in the face of alleged police or prosecutorial excesses. A court with Clarence Thomas serving as an Associate Justice could permit more American citizens to be abused and incarcerated.

To illustrate this point, in March 1991, the U.S. Supreme Court voted 5 to 4 to allow confessions obtained in violation of a defendant's constitutional rights. Chief Justice William H. Rehnquist's opinion states there may be other evidence of guilt that the use of an involuntary confession could be considered "harmless error". The issue of "harmless error" analysis had been

urged by the Bush Administration. Following on the heels of that decision was another ruling concerning the detaining of suspects.

The Court ruled that suspects arrested, without a warrant, generally may be jailed for as long as 48 hours, before a judge determines the validity of the arrest. By a 5 to 4 margin, the court ruled that "prompt" generally means within 48 hours.

These two rulings have far reaching implications. Some might argue these rulings are indeed needed to address the increasing crime rate, delays in the court system, and overcrowded jails. Nonetheless, can we afford to relinquish our basic constitutional rights in the process? Based on the testimony we have heard from Judge Thomas during these hearings, there is little to indicate any resistance he may have towards continuing the increased power of police and other police agencies. An increase in power which ultimately may lead to a "police state" in our own country.

The precedent set by the Court's recent rulings is frightening. As African American police officers, we totally reject the notion that this behavior is necessary to increase the quality of life and the absence of crime in our community.

Lastly, we disagree with those individuals who argue that

Clarence Thomas is an important role model for young African Americans. In the past week, we have been inundated with recollections of Judge Thomas' "humble beginnings". I do not wish to refute nor negate the significance of his background nor personal experiences. However, this Committee should not allow itself to become entangled in the "bitter-sweet musings" of his hardships; for the hardships of Clarence Thomas are no greater nor harder than those of the average hardships of numerous African American males his age or older.

President Bush's nomination of Clarence Thomas has created an illusion of a progressive, fair-minded administration. Yet, the irony is that this nomination is an attempt to satisfy a "quota" -- a remedy which Clarence Thomas opposes. It is fair to say that the majority of African Americans are proud to see "one of their own" achieve success. However, tokenism cannot be a factor in selecting the next Supreme Court Justice. The hard questions of Judge Thomas' philosophy and future direction as an Associate Justice has not been adequately addressed by this Committee.

In conclusion, let me end with the following quote by Edwin Markham, "one of the tragedies of life is that once a deed is done, the consequences are beyond our control".

Senator SIMON [presiding]. Mr. Schulder.

STATEMENT OF DANIEL SCHULDER

Mr. SCHULDER. Thank you, Senator, and in behalf of the National Council of Senior Citizens, and our 5 million members, and 5,000 local clubs and State councils, I thank this committee for this opportunity to comment on the nomination of Judge Clarence Thomas to the Supreme Court.

As an advocacy organization, we support public and private activities and policies which advance the rights and needs of older persons, their families, and their communities. Over the past three decades we have placed ourselves at the side of workers, women, minorities, persons with disabilities, young people, and senior citizens, in their struggle for economic and social justice, and for full and effective civil rights.

Since its enactment in 1967, our organization has supported the Age Discrimination in Employment Act's expansion of rights and protections for working people, and its public policy objective to encourage older persons to continue to work and earn, and to contribute to the economies of their families and their communities.

We believe that Judge Thomas' record as Chairman of the Equal Employment Opportunity Commission marks him as a man whose official actions served to diminish the rights of older workers under the ADEA—the Age Discrimination in Employment Act. We believe that instead of creating a climate in which employers knew that discriminatory actions against older workers would be met with swift and sure sanctions and penalties, he sent signals that told employers that it was permissible to discriminate against older workers in pension, apprenticeship, early retirement and in exit incentive programs.

Under his administration as Chairman of EEOC for 8 years, thousands of older workers lost their rights to sue for relief against discriminatory practices, by allowing charges to lapse, or to be summarily closed without full, or any, investigation in many cases.

Over a period of years, his EEOC policies resulted in bipartisan congressional criticism, leading to numerous congressional interventions to protect the rights of workers, and to ensure that the clear language and intent of ADEA was enforced.

Mr. Chairman, we believe that allegations of Judge Thomas' misconduct in administering ADEA are well documented by committees and organs of this Congress, including the Senate and House Committees on Aging, the House Government Operations Committee, the Senate Committee on Labor and Human Resources, the General Accounting Office, and the frequent actions of the full Congress in changing and reversing policies and practices of the Thomas-led EEOC.

His record as Chairman provides the best material description of his philosophy of law, his responsiveness to the intent of the Congress, his concern for the rights of average persons facing economic hardships, and his adherence to consistent principles of justice and equity.

I should point out that his job—his position—as Chairman of EEOC was his longest public or private job.

Finally, Mr. Chairman, we trust that this committee can acknowledge that the corrosive influence of age discrimination ranks with racism, sexism and religious and ethnic bigotry in its effects on individuals and on the larger society and economy. Both racism and ageism assault the core human dignity of their victims.

That is why we have striven to fight the persistence of age stereotyping that remains a pervasive and virulent aspect of this Nation's labor market and that is why we find Judge Thomas' failures to administer the ADEA fairly so profoundly distressing.

During Judge Thomas' tenure as chair, the EEOC caused thousands of older workers to lose their rights and relief under ADEA by its failure to investigate in a timely fashion charges of job discrimination.

We are not aware of any similar level of nonfeasance involving title VII or the Equal Pay Act. Older workers, as a class, in our view, were at the bottom of the Thomas EEOC priority system.

This committee and other committees of this Congress have already explored this issue at great length. The General Accounting Office in 1988 also offered to this Congress a review of, and a study of the lapsed charges.

I think these documents show that senior members of EEO staff strove to inform Judge Thomas of this problem and he refused to listen, he refused to change the procedures. And this led, of course, to the issuance of a subpoena by the Senate Committee on Aging in 1988 and only then did Judge Thomas begin to come clean with the real story of the 15,000 persons whose charges lapsed under his chairmanship.

There are other issues where we feel that Judge Thomas failed to protect the rights of older persons. He supported rules that allowed employers to stop paying into the pension accounts of workers who exercised their ADEA right to work beyond the age of 65. Such workers lost millions of dollars in pension benefits until the Congress, itself, overruled the EEOC on this matter in 1986.

He failed to prohibit the practices of many employers who demanded that older workers waive their ADEA rights in exchange for early retirement benefits in often coercive circumstances. The Congress was forced to repeatedly overrule the EEOC position and finally prohibited this practice in 1990. And he fails to include apprenticeship programs under the purview of ADEA despite the clear language of the act.

In other cases, such as *Lusardi* v. *Xerox*, *Cipriano* v. *Board of Education*, and *Paolillo* v. *Dresser Industries* we find Judge Thomas consistently overruling his own staff in EEOC and taking positions either not to issue complaints, and in fact, to move on the side of employers in court cases.

In summary, Mr. Chairman, responsible persons cannot properly take an oath to enforce certain laws, and once in office work consistently to undermine those very laws. We believe that Judge Thomas' tenure at EEOC demonstrates a consistent and dangerous bias against the interests of older persons in the work force through unwarranted interpretation of law and precedent.

He repeatedly defied the clear instructions of the Congress and required an unprecedented degree of bipartisan congressional oversight and corrective intervention. We further believe that Judge

Thomas consistently interpreted the ADEA from the vantage point of employers contesting the claims of workers seeking fair treatment rather than from the point of neutrality.

Mr. Chairman, the Supreme Court must remain, in the long-term, the Nation's symbol of fairness and justice. Judge Thomas' placement on that Court will surely not buttress that symbolic position in the hearts and hopes of the American people.

Thank you.

[Additional material and the prepared statement of Mr. Schulder follow:]

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Eugene Glover
Silver Spring, MD

Executive Director
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Testimony of Daniel J. Schulder

Director of Legislation

National Council of Senior Citizens

Before the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

on the Nomination

of Judge Clarence Thomas

to the

Supreme Court of the United States

Thursday, September 19, 1991

1961 - 1991: Thirty Years of Advocacy for America's Elderly

First Vice President, Dr Mary C Mulvey, Providence, Rhode Island Second Vice President, George J Kourpias, Washington, DC
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Secretary-Treasurer, Jack Turner, Detroit, Michigan General Counsel, Robert J Mozer, New York

In behalf of the National Council of Senior Citizens and our five million members and five thousand local clubs and State Councils, I thank this Committee for this opportunity to state our views regarding the nomination of Judge Clarence Thomas to the position of Associate Justice of the Supreme Court.

As an advocacy organization, we support public and private activities and policies which advance the rights and needs of older persons, their families and their communities. Over the past three decades we have placed ourselves at the side of workers, women, minorities, persons with disabilities, young people and senior citizens in their struggles for economic and social justice and for full and effective civil rights.

Many of our members continue to work and to remain active in trade unions and other work-related organizations. All of our members support the right of citizens to continue to work beyond normal retirement age for as long as they desire or for as long as they must to meet economic needs. We have therefore been enthusiastic supporters of programs designed to assist such older workers and to protect their rights in the workplace.

Since its enactment in 1967, NCSC has supported the Age Discrimination in Employment Act's expansion of rights and protections for working people and its public policy objective to encourage older Americans to continue to work and earn. We agreed

in 1967 with the findings of the Secretary of Labor's report to the Congress urging passage of the ADEA which found that:

1) Many employers adopted specific age limits in those states that did not have age discrimination prohibitions even though many other employers were able to operate successfully in the absence of these limits;

2) In the aggregate, the age limits had a marked effect on the employment of older workers;

3) Although age discrimination rarely was based on the sort of animus motivating other forms of discrimination (e.g., racial, religious, union), age discrimination was based on stereotypes unsupported by objective fact and was often defended on grounds different from its actual causes;

4) The available empirical evidence demonstrated that arbitrary age limits were in fact generally unfounded and that, overall, the performance of older workers was at least as good as that of younger workers;

5) Arbitrary age discrimination was profoundly harmful in at least two ways: It deprived the national economy of the productive labor of millions of individuals and imposed on the U.S. Treasury substantially increased costs in unemployment insurance and Social Security benefits and, it inflicted economic and psychological injury to those workers who were deprived of employment because of age discrimination.

In turn, the Acts' preamble makes it clear that the statute is to be used to encourage the employment of older workers and to provide the machinery to insure that such workers are treated equally and fairly in the terms, conditions, benefits and privileges of such employment.

We believe that Judge Thomas' record as Chairman of the Equal Employment Opportunity Commission marks him as a man whose official actions served to diminish the rights of older workers under the ADEA. We believed that instead of creating a climate in which employers know that discriminatory actions against older workers would be met with swift and sure sanctions and penalties, he sent signals which told employers that it was permissible to discriminate against older workers in pension plans, apprenticeship programs, early retirement programs and in exit incentive programs. Under his administration as Chair of EEOC for eight years, thousands of older workers lost their rights to sue for relief against discriminatory practices by allowing charges to lapse without any or full investigation.

Over a period of years, Judge Thomas' policies resulted in bipartisan Congressional criticism and conflict leading to numerous Congressional interventions to protect the rights of workers and to insure that the clear language and intent of ADEA was enforced.

We believe that a fair reading of Judge Thomas' full record as EEOC Chair does not define him as a person fully committed to the principles of equal justice and independent enforcement of the laws.

Further, we believe that allegations of Judge Thomas' misconduct in administering ADEA are well documented by Committees of the Congress including the Senate Special Committee on Aging, the House Select Committee on Aging, the House Government Operations Committee, the Senate Committee on Labor and Human Resources, the General Accounting Office and the actions of

the full Congress in changing and reversing policies and actions of the Thomas-led EEOC.

We believe that the Committee should thoroughly review these hearings and reports prior to final judgment on Judge Thomas' qualifications for the Supreme Court. To not do so would be a serious abdication of the Judiciary Committee's solemn responsibility to fully explore his qualifications and record. We should note that his position as Chair of the EEOC was his longest public or private job. His record as Chair provides the best material description of his philosophy of law, his responsiveness to the intent of the Congress, his concern for the rights of average persons facing economic hardship and his adherence to consistent principles of justice and equity. We believe that a review of the EEOC record alone will be sufficient to present evidence of his lack of qualifications for the Court.

Finally, Mr. Chairman, we believe that it is critical that this Committee acknowledge that the corrosive influences of age discrimination rank with racism, sexism and religious and ethnic bigotry in its effects on individuals and on the larger society and economy. Both racism and ageism assault the core human dignity of victims. If, in this current recession, you can't find work because you are Black or because you are age 55, the results are the same. You are diminished and spiritually disabled. You are found wanting and vulnerable because of factors beyond your control or desire. That is why NCSC has striven to fight the persistence of age stereotyping that remains a pervasive and virulent aspect of this nation's labor market. That is why we find Judge Thomas' failures to administer the ADEA fairly so

profoundly distressing and deserving of this public call for rejection of his nomination.

Lapsing of ADEA Complaints

During Judge Thomas' tenure as Chair, the EEOC caused thousands of older workers to lose their rights and relief under ADEA by its failure to investigate, in a timely fashion, charges of job discrimination. We are not aware of any similar level of nonfeasance involving Title VII or the EPA. Older workers, as a class, were at the bottom of the Thomas-EEOC priority system.

This issue was extensively explored by this Committee at the February, 1990 hearing on Judge Thomas' nomination to the Court of Appeals. The reports of the Senate Special Committee on Aging, under Senator John Melcher in the 100th Congress, provides documentation on the matter of EEOC treatment of ADEA charges including refusals to investigate and the closing of thousands of additional charges not fully investigated. The study by the GAO (GAO/HRD-89-11, October, 1988) provides conclusive evidence of attempts of senior EEOC staff to move Judge Thomas to act on the crisis of unprocessed ADEA charges. He not only refused to reform the EEOC machinery to provide full justice for ADEA complainants, but he also clearly attempted to mislead the Congress regarding the extent of the lapsed charges and the premature closing of charges. As the record shows, it took a bipartisan vote of the Senate Aging Committee authorizing a subpoena to force Judge Thomas to begin to tell the truth about the extent of the scandal affecting upwards of 15,000 persons. Even at his Court of Appeals hearing before this Committee (see attachments--letters of AARP & NCOA to Judiciary Committee), Judge Thomas continued to dissemble and to try to shift blame to state agencies and others.

This public record demonstrates that Judge Thomas was unable or unwilling to assure equitable and complete treatment of older workers' complaints by the EEOC during his tenure. It is not arguably a case of faulty computers or records systems.

The Senate Aging Committee and GAO reports nail the responsibility to Judge Thomas' EEOC desk. That failure translates to a deliberate decision to distort the Congressional intent that older workers were to be provided the full protection of the law. There is no other warranted conclusion.

Pension Benefit Accruals

In 1979, when the Department of Labor was administering the enforcement of ADEA, a DOL interpretive bulletin was issued allowing employers with pension plans to stop pension benefit accruals to the accounts of persons working beyond the "normal" retirement age. Thus, the pension benefits of persons working beyond the normal retirement age were effectively frozen--a strong incentive to leave work.

In 1984, EEOC appropriately voted to rescind the policy. In 1985, the EEOC Commissioners approved implementing regulations. However, in 1986, after consultation with the White House, the EEOC reversed itself and let the pension freeze stand. A subsequent court action against EEOC forced a rescinding of the DOL rule, but an order to EEOC to issue rules governing continued pension accrual was reversed on appeal.

The Congress resolved the matter under PL 99-509 (OBRA-1986) requiring employers to continue accrual of benefits under certain conditions. Senator Charles Grassley was author of the Amendment. After months of EEOC and IRS conflict, the final rule governing accrual was issued effective early 1989.

However, the continual shifting of EEOC positions and the conflicts with IRS effectively delayed implementation of the new statute. The net result caused uncertainties regarding the pension rights of many workers.

There have been estimates that the workers affected by EEOC's refusal to rescind the clearly illegal DOC interpretative bulletin are losing $450 million annually. During this period (1979-1988) the EEOC prevented older workers from bringing private suits to give them full pension credits. Employers who claimed to be acting on the basis of government regulation could not be held liable under the existing EEOC rules.

It was only the intense pressures generated by aging groups and the bipartisan insistence of Members of the Congress that finally resolved the matter belatedly in favor of tens of thousands of older workers whose loses were substantial nevertheless.

Unsupervised Waivers of ADEA Rights

The ADEA utilizes the enforcement standards (by incorporation) of the Fair Labor Standards Act under which an employer seeking a worker's waiver of rights or settlement of claims under the ADEA must first secure permission of EEOC or a court. With such protection, older workers can preserve rights to sue under ADEA in situations where employers use undue pressures toward early retirement or additional termination benefits. The forcing out of older workers in the face of company down-sizing is probably the most pervasive form of employment age discrimination after refusal to hire because of age.

In 1985, Thomas proposed sweeping new regulations which would have permitted unsupervised ADEA waivers and which would have

shielded employers from ADEA suits even if it could be shown later that layoffs or early-out arrangements were subterfuges for replacement by younger workers.

This proposal was made in the face of clear ADEA language prohibiting such waivers and with wide-scale acknowledgement of the potential abuse of such waivers. EEOC issued its rule in 1987 after extensive negative comment by the Congress and aging groups.

It is clear that the Congress realized the extent of this Thomas error when it unanimously suspended the rule for fiscal years 1988, 1989 and 1990. Finally, through the Older Workers' Benefit Protection Act (Pub. L. 101-433) the Congress repealed the EEOC rule. Among the Members actively supporting the repeal was Senator Dan Quayle (R-Iowa).

Unfortunately, during this entire period while the full Congress took concerted actions to suspend the rule, EEOC, under Judge Thomas' direction, refused to consider suits involving unsupervised waivers. Such workers thus lost their rights to reinstatement or other compensation.

Other Issues

In 1987, Thomas and the Commission abstained from one of the most important age discrimination cases since passage of the Age Act. In Lusardi v. Xerox Corporation, the company laid off 1,300 employees by offering them benefits upon early retirement. The layoff affected a significant portion of the company's older workers, who filed a private class action in federal court. However, many others were not part of the private lawsuit and sought assistance from the EEOC.

EEOC investigators found substantial evidence that Xerox had engaged in a corporate policy to target its older, higher-paid

workers for termination and to hire younger, lower-paid workers to replace them. According to the older workers, they had accepted the early retirement plan because they were told that otherwise they would be terminated without benefits through a reduction-in-force.

Thomas met with the Commission in closed session to determine whether to file suit against the company. During the meeting, Thomas essentially approved of the company's practice, observing, "This is a standard practice in industry. I don't know why Xerox is the only one we are after." He brushed aside arguments that the threat of a reduction-in-force constituted coercion, saying, "I think it constitutes reality." In addition, Thomas ignored the fact that the early retirement benefits were less than the amount which would have been received if the worker had retired at age 65.

In another case, Thomas not only declined to defend the older worker but also took the employer's side. In Cipriano v. Board of Education, the school board offered early retirement incentives to employees aged 55 to 60, but not to those over age 60. The EEOC general counsel drafted a brief contending that the Board had violated the Age Act and that the early retirement plan was structured to discourage older workers from remaining employed past age 60.

Thomas and another Commissioner believed that the plan was lawful and that forcing the employer to offer equal benefits to older workers would impose too heavy a cost on the employer. The Commission ordered another attorney to rewrite the brief, taking the employer's side.

Older workers representing themselves in Paolillo v. Dresser Industries, Inc., 821 F.2d 81 (2d Cir. 1987), succeeded in

convincing the court that their employer had coerced them into accepting early retirement. However, the EEOC subsequently filed a brief siding with the corporate employer, requesting a modification of the court's opinion that would essentially weaken the Age Act.

Beyond these landmark cases displaying Thomas' anti-older worker biases, the Committee should note the EEOC record regarding the application of disparate impact procedures to ADEA cases. While the ADEA, at Section 1625.7(d), clearly authorizes the use of disparate impact factors in considering complaints, Judge Thomas consistently refused, as EEOC Chairman, to apply disparate impact analysis to such claims. This application of personal theory to EEOC/ADEA procedures considerably weakened EEOC's abilities to pursue class action strategies in behalf of older workers. This position was held despite nearly unanimous decisions of Federal appellate courts applying disparate impact analysis to ADEA charges.

Additionally, despite the lack of any exclusionary language in ADEA, Thomas refused to apply ADEA to apprenticeship training programs. Although the Commission in 1984 voted to rescind an earlier DOL rule excluding such programs from ADEA, EEOC declined to ever issue rules to assure ADEA coverage. In fact, in 1987, EEOC reversed itself and voted again to exclude apprenticeships from ADEA coverage.

Summary

Responsible persons cannot properly take an oath to enforce certain laws and, once in office, work consistently to undermine them. We believe that Judge Thomas' tenure at EEOC demonstrates a consistent and dangerous bias against the interests of older

persons in the workforce through unwarranted interpretation of law and precedent. We believe that he failed to administer ADEA in an effective manner and that this resulted in the loss of the rights of thousands of persons whose ADEA claims lapsed. We believe that Judge Thomas repeatedly defied the clear will and instructions of the Congress and required an unprecedented degree of bipartisan Congressional oversight and corrective intervention. We further believe that Judge Thomas consistently interpreted the ADEA from the vantage point of employers contesting the claims of workers for fair treatment.

Because of this record, we question his respect for the rule of law and for his honesty in dealing with the Congress in regard to fundamental rights of citizens. The Supreme Court must remain, in the long term, the ultimate symbol of fairness and justice. Judge Thomas' placement on the Court will not buttress that symbolic position in the hearts and hopes of the American people.

The National Council on the Aging, Inc.

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February 15, 1990

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The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Chairman Biden:

We are appalled over misleading statements made by EEOC Chairman Clarence Thomas at his confirmation hearing regarding his agency's failure to enforce the federal Age Discrimination in Employment Act for thousands of older Americans.

The Committee confronted Chairman Thomas with evidence that close to 2,000 new age discrimination victims have lost their right to file suit in court because of the failure to process their claims within the two-year statute of limitations. We emphasize that these are new lapses, which have been discovered since the passage of the Age Discrimination Claims Assistance Act in April of 1988. That Act extended protection to thousands of complaintants whose ADEA charges were mishandled and neglected by EEOC prior to 1988 and under Mr. Thomas' administration.

The bulk of these complaints were filed with state and local fair employment practices agencies which have contracts with the EEOC to investigate complaints filed under federal anti-discrimination laws. Chairman Thomas and the Commissioners approve every such contract.

Several times during the hearing, Mr. Thomas attempted to shift blame for both past and current lapsed ADEA charges away from him. He stated that an ADEA charge filed with a FEPA is actually filed under state law, which is false. According to the agency's own guidelines, an ADEA charge may be filed with a state-sponsored agency and

A nonprofit agency working to improve the lives of Older Americans

may be accompanied by related claims under state law, but it remains a federal claim and invokes the protection of the federal law.

Mr. Thomas also implied that the EEOC's responsibility for an ADEA charge filed with a FEPA begins only when the FEPA returns the charge for contract credit within 18 months of the date of violation. That is also erroneous. As its rules make clear, the EEOC is required to docket, monitor and review every federal charge handled by the FEPAs. Upon the initial filing, the charges are entered into EEOC's national database, and the FEPA investigations are supposedly monitored by the EEOC's field offices.

It is simply amazing that Mr. Thomas proffers these excuses for failure to enforce the law. There is no question that the EEOC retains ultimate responsibility for FEPA-processed ADEA charges. Contrary to what Mr.Thomas may have the Committee believe, the EEOC cannot contract away the ADEA rights of older Americans. The FEPAs act directly as agents of the EEOC in processing federal charges.

We have witnessed Mr. Thomas's capacity for evasion before Congressional committees on other occasions, and we believe that he is being less than candid with the Judiciary Committee about the extent of his agency's responsibility for the newly lapsed ADEA charges. During the same hearings, he misrepresented the facts to Senator Heflin regarding the number of charges lapsing in prior years. He stated that only 900 had lapsed, when his own agency reported to the Senate Aging Committee that possibly 13,000 charges had lapsed. (The actual number is unknown because of the agency's prior policy of destroying files six months after closure.)

We believe that it would be a serious mistake to place on the federal bench an official who has repeatedly shown a disregard of the law and a willingness to mislead the Committee on important points of fact. On behalf of older workers and those who wish to preserve and advance their rights under law, we urge you not to confirm this nominee.

Sincerely,

Daniel J. Schulder
Senior Public Policy Associate

February 16, 1990

The Honorable Joseph Biden, Chairman

The Honorable Strom Thurmond

Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman, Senator Thurmond and Members of the Committee:

The American Association of Retired Persons (AARP) requests that this letter be made part of the record of the confirmation hearings on the nomination of Clarence Thomas to the U.S. Court of Appeals. The purpose of this letter is to correct inaccurate statements made by Mr. Thomas at his confirmation hearing on February 6, 1990, and to express AARP's serious concern about his commitment to enforcing the law without regard to his personal wishes.

Mr. Thomas's testimony reveals a fundamental lack of understanding of both the laws he has been charged with enforcing for the past eight years and the regulations and procedures of the agency he has chaired. Taken as a whole, Mr. Thomas's testimony exhibits the same disregard for the rights of older workers that we have seen during his tenure at the EEOC.

The areas of Mr. Thomas's testimony that evidence these problems include:

- His incorrect assumption that the loss of federal civil rights due to agency inaction can be excused by the existence of a similar state law.

- His refusal to accept responsibility for, and his misstatements regarding, the EEOC's continued failure to process on a timely basis charges under the Age Discrimination in Employment Act (ADEA). As a result, thousands of older workers have lost their rights under the law.

- His misstatements of the case law to erroneously justify EEOC's rules on unsupervised ADEA waivers.

American Association of Retired Persons 1909 K Street, N W , Washington, D C 20049 (202) 872-4700

Louise D Crooks *President* Horace B Deets *Executive Director*

The Honorable Joseph Biden
The Honorable Strom Thurmond
Committee on the Judiciary
page 2

- His misstatements regarding the EEOC's obligation to rescind admittedly illegal regulations that permitted employers to deny older workers full and fair pension benefits.

The inaccuracies in Mr. Thomas's testimony are discussed in more detail below.

1. Mr. Thomas's Testimony on Lapsed Federal ADEA Charges Processed by FEPAs.

AARP was shocked to learn at the February 6, 1990, confirmation hearing that the EEOC has continued to forfeit the rights of thousands of older workers by failing to process charges brought under the ADEA within the required two year statute of limitations.

Even more disturbing is Mr. Thomas's assumption that the lapsing of federal ADEA claims is not a problem for victims of age discrimination because they retain similar state law claims. This is a remarkable -- and incorrect -- view of federal law for someone who has been charged with enforcing fundamental federal rights and who has been nominated to become a federal appeals court judge.

When the problem of lapsed charges was initially discovered in 1987 by the Senate Special Committee on Aging, Mr. Thomas personally committed himself to resolving a situation that he called "totally inexcusable." Apparently, he has made little effort to do so. Even more disturbing, Mr. Thomas now seeks to avoid responsibility for the EEOC's continued malfeasance by divorcing himself and the EEOC from the actions of the state and local agencies that processed these charges on behalf of the Commission.

In his testimony, Mr. Thomas acknowledged that for the period from April 6, 1988 to July 27, 1989, more than 1500 charges of age discrimination were not processed by the agency within the ADEA's two year statute of limitations. It is unclear whether the charging parties received notice of this problem. The older workers who filed these charges have lost their right to pursue their claims in federal court under federal

law.[1]

When asked to explain this situation, Mr. Thomas asserted that the overwhelming majority of the lapsed charges were handled by fair employment practice agencies (FEPAs), which are state and local agencies under contract with EEOC. He asserted that the lapsing of charges by FEPAs is not significant because the state and local agencies only handle claims filed under state law, not federal law, and the state claims are not subject to the two year statute of limitations. Mr. Thomas insisted repeatedly that these were "state claims," not federal claims. He stated that the EEOC is not involved or responsible for ADEA charges filed with FEPAs until and unless the FEPA investigates and reports the charge to the EEOC within 18 months of the discriminatory act.

Mr. Thomas is incorrect on every point. As he must -- or should -- know:

- A state law claim in no way substitutes for federal rights, and in no way diminishes the EEOC's obligation to vigorously protect older workers under the ADEA.

- The EEOC contracts with the FEPAs to receive and investigate federal ADEA charges as the EEOC's agent. These charges remain subject to the ADEA's two year statute of limitations for filing a lawsuit;

- The EEOC is informed of every federal charge filed with a FEPA at the time the charge is filed;

- The EEOC remains responsible for ensuring that the federal charges are investigated in a timely and thorough manner, and for monitoring the work of the FEPAs;

As discussed below, federal law, the EEOC's regulations, the terms of its worksharing agreements with the FEPAs, and EEOC

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[1] Because these charges lapsed after April 6, 1988, they are not covered by the Age Discrimination Claims Assistance Act, passed by Congress to restore, for 18 months, the rights of certain older workers who had lost their claims due to the EEOC's previous failure to meet the two year statute of limitations.

documents establish these basic principles. Mr. Thomas's testimony was not only misleading, but revealed an astonishing lack of understanding of, and concern for, the protection of older workers' rights under the law.

A. A state law claim in no way substitutes for federal rights, and in no way diminishes the EEOC's obligation to vigorously protect older workers under the ADEA.

Perhaps the most astonishing aspect of Mr. Thomas's testimony is his assumption that state claims are an adequate substitute for the loss of federal rights. He belittled the problem of thousands of lapsed federal ADEA charges by noting that a complaining party retains a state law claim if the federal charge is lost.

The existence of a state law claim in no way excuses the EEOC's failure to protect older workers' rights under the ADEA. Congress enacted the ADEA in order to provide older workers with a <u>federal</u> cause of action in <u>federal</u> court. A state law claim -- no matter how beneficial to the charging party -- is no substitute for the federal right.

It is also untrue that state laws provide comparable rights and relief to the federal law. In fact, state laws often provide more <u>limited</u> relief to older workers for age discrimination than the ADEA. For example, the ADEA permits a private right of action 60 days after a charge is filed, jury trials, liquidated damages, and attorney's fees to a prevailing plaintiff. In contrast, some state laws provide:

- <u>New York:</u> If an older worker pursues an age discrimination charge with the New York FEPA, the older worker <u>loses</u> his or her private right of action to pursue the state claim in state court. The worker is limited solely to the state administrative process, which may take as many as seven years to complete and which is only subject to a deferential standard of judicial review. There is no right to a jury trial, no right to attorney's fees and no right to liquidated damages.

- <u>Maryland:</u> Older workers have <u>no</u> private right of action to bring a claim of age discrimination in court, but are limited to the state administrative process, which is subject to deferential judicial

The Honorable Joseph Biden
The Honorable Strom Thurmond
Committee on the Judiciary
page 5

> review. Neither attorney's fees nor liquidated damages are awarded.

An older worker's rights under the ADEA should not and must not depend upon whether the charge was filed with the EEOC directly or with a FEPA designated as the EEOC's agent. Nonetheless, that is precisely what appears to have happened during Mr. Thomas's tenure as EEOC Chairman.

B. FEPAs handle federal claims as EEOC's agent.

In his testimony, Mr. Thomas repeatedly asserted that, "The cases filed with the state agencies are filed under state law." Each time he was asked whether federal charges are filed with FEPAs, he responded by restating, "They are filing them under state statute." As Mr. Thomas must or should know, this is incorrect.

The EEOC certifies state and local agencies to become FEPAs after reviewing analogous state laws on age (as well as race, sex, national origin and religious) discrimination, and investigation, conciliation and prosecution procedures. The EEOC and the FEPAs then enter into annual "worksharing" agreements, which designate state and local agencies as the EEOC's agent for the receipt and investigation of federal charges. (In most instances the complaining party has also filed a state law charge based on the same facts, which the FEPA will investigate in any event.) The sole purpose of the EEOC-FEPA relationship is to allow state and local agencies to receive and investigate federal claims.

Title 29 C.F.R. part 1626 of the EEOC's regulations on the ADEA defines the parameters of this relationship. Section 1626.10(a) explicitly provides that the EEOC may "engage the services of [FEPAs] in processing charges assuring the safeguards of the federal rights of aggrieved persons," (emphasis supplied).

The worksharing agreements reiterate this point. For example, the current agreement between the EEOC and the Maryland Commission on Human Relations makes clear that the EEOC has jurisdiction over ADEA charges, and that the "EEOC by this Agreement designates and establishes the FEPA as a limited agent of EEOC for the purpose of receiving charges on behalf of EEOC . . ."

The handling of federal claims by FEPAs in no way modifies or

The Honorable Joseph Biden
The Honorable Strom Thurmond
Committee on the Judiciary
page 6

tolls the ADEA two year statute of limitations, irrespective of a state law's more generous statute of limitations. Regardless of which agency initially receives and investigates the federal charge, an ADEA claim must be filed in court within two years of the discriminatory act or the federal cause of action is forever lost.[2]

C. The EEOC is notified of every ADEA charge filed with a FEPA at the time the charge is filed.

In his testimony, Mr. Thomas implied that the EEOC may not know about the charges handled by FEPAs and, therefore, cannot be held responsible for the lapsing of those claims. He stated that charges not reported to the EEOC within 18 months are outside the scope of the worksharing agreement and, therefore, are not the obligation or responsibility of the EEOC. ("[I]f a state agency receives a charge and that charge is not to us by 18 months from the date of violation, that charge is not under contract with EEOC. We have to have that charge in time to process under our statute.")

Mr. Thomas is again incorrect. The EEOC is notified of all ADEA charges <u>at the time they are filed with the FEPA</u>. The EEOC cannot claim ignorance about these charges, nor use this as an excuse for failing to exercise its responsibility to insure that the charges are processed in a timely manner.

The worksharing agreement permits an older worker to file his or her federal age discrimination charge with either the EEOC or a FEPA. If the latter course is followed, <u>the FEPA notifies the EEOC by sending a copy of the charge to the relevant EEOC district office.</u> In fact, the worksharing agreements expressly require <u>the FEPA to advise the EEOC of the charge within ten days</u> of its receipt. Furthermore, the FEPA may also enter the federal charge into the national

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[2] The FEPAs sole function with respect to the federal charges is to receive the charge and conduct an administrative investigation. When it reaches a determination of cause or no cause, it reports its finding to the EEOC. The FEPA's finding is then subject to EEOC review, during which it receives "substantial weight." To pursue litigation, the EEOC uses the same procedures as when the charge was initially investigated by one of its district offices. For example, the Office of General Counsel must review the charge and determine whether or not to recommend litigation.

computer data base -- providing a second means of notification to the EEOC.

The EEOC, therefore, has the requisite knowledge for monitoring the FEPAs' processing of federal claims and for ensuring that the two year statute of limitations does not lapse. The 18-month period for processing by the FEPA is simply the baseline by which the FEPA's work is judged for purposes of payment.[3] It does not obviate the EEOC's responsibility to enforce the ADEA -- and to insure that its agent, the FEPA, enforces the ADEA. Indeed, a FEPA that repeatedly exceeds the 18-month baseline can be reviewed for nonfeasance and possible decertification.

D. The EEOC is responsible for ensuring that federal charges handled by FEPAs are processed in a timely manner.

Contrary to Mr. Thomas's testimony,[4] the EEOC retains jurisdiction over all federal charges filed with a FEPA. The EEOC retains the responsibility and obligation to ensure that all federal claims handled by FEPAs are processed within the two year statute of limitations.

The EEOC's regulations at 29 CFR parts 1626.10(a),(c) make clear that the worksharing agreements not only do not relieve the Commission of its responsibilities with regard to ADEA charges filed with a FEPA, but in fact obligate the Commission to monitor the FEPAs and "promptly process charges which the state agency does not pursue." Obviously, these regulations contradict Mr. Thomas's repeated statements that EEOC's responsibilities extend only to charges reported by FEPAs to the EEOC within 18 months.

The worksharing agreements also make clear the EEOC's continued responsibility with regard to the federal claims.

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[3] FEPAs are paid by the EEOC for investigating federal charges only if the FEPA reports ifs findings within 18 months. This deadline is an acknowledgement, by the EEOC, that the federal charges must be handled in a timely fashion.

[4] In his testimony, Mr. Thomas repeated said, "We do not supervise state and local FEPAs. . . . [I]f a state agency receives a charge and that charge is not to us by 18 months . . . that charge is not under contract with EEOC."

The Honorable Joseph Biden
The Honorable Strom Thurmond
Committee on the Judiciary
page 8

See e.g., Paragraph 1e: "It is understood that this Agreement does not in any way reduce the jurisdiction conferred upon either party to this Agreement, or limit the rights and obligations of the respective parties." (Emphasis supplied). Even more explicit is the section entitled "Timely Processing of ADEA Charges." This section establishes the EEOC's right to review any ADEA charge handled by the FEPA, and to take over the investigation of that charge when over one year has passed from the date of the alleged violation.[5]

EEOC internal documents also reveal that, contrary to Mr. Thomas's repeated assertions that the EEOC does not "supervise" or "regulate" the FEPAs processing of federal claims, the Commission holds itself responsible for monitoring the FEPAs and ultimately for the federal charges they handle. For example, a "Field Trip Report," resulting from a review by EEOC headquarters of the Miami District Office, states that the EEOC district office must be able to monitor federal charges handled by FEPAs "to ensure that charging party rights are not eroded by the running of the statute of limitations."[6] Similarly, a March 14, 1988 memorandum from EEOC's Director of Field Management Programs (West) to the Director of the Office of Program Operations, expresses concern over the EEOC Chicago district office's monitoring of ADEA charges handled by the Illinois Civil Rights Commission (a FEPA).[7]

It is deeply troubling to us that after eight years as Chairman, and only two years since he pledged to solve the problem of unprocessed ADEA cases, Mr. Thomas is unaware of the most fundamental aspects of the EEOC's relationship with its agents, the FEPAs, and unwilling to accept responsibility for the repeated failure of the FEPAs -- and hence the EEOC -- to adequately protect the rights of older workers under the ADEA. His (incorrect) insistence that the EEOC does not

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[5] In addition, paragraph 8 of the worksharing agreements establishes that if the FEPA determines it does not have the resources to pursue a federal charge, it must notify the Commission.

[6] Field Trip Report, Field Management Programs - East, EEOC Miami District Office (August 8-12, 1988).

[7] See Hearing before the Special Committee on Aging, 100th Cong., 2d Sess. (June 23, 24, 1988) at 966.

The Honorable Joseph Biden
The Honorable Strom Thurmond
Committee on the Judiciary
page 9

"supervise" or "regulate" the FEPAs may in fact highlight the cause of this continuing problem: the EEOC under Mr. Thomas has made no effort to insure that the FEPAs are fulfilling the terms of their worksharing agreements by processing ADEA charges in a timely and thorough manner.

2. Mr. Thomas's Testimony Regarding Unsupervised Waivers.

At the February 6, 1990 confirmation hearing, Mr. Thomas was asked to explain the legal basis for the EEOC's rule permitting unsupervised ADEA waivers, given Supreme Court case law that invalidates such waivers. Rather than answer this question, Mr. Thomas repeatedly stated that EEOC's General Counsel had recommended adopting the regulations. When pressed, Mr. Thomas cited a series of lower court decisions permitting unsupervised waivers in limited circumstances.[8]

The appellate court cases cited by Mr. Thomas provide little if any support for the rules issued by the EEOC and subsequently suspended by Congress. First, none of these cases had been decided when the EEOC first proposed its regulations in October 1985. Indeed, the only decision on point prohibited unsupervised waivers.[9] Second, only two of the cases had been decided before the rules were issued in final form in July 1987 and, in both these cases, the courts relied at least in part upon the Commission's proposed rules

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[8] In Lorillard v. Pons, 434 U.S. 575 (1978), the Supreme Court expressly held that the ADEA incorporates the enforcement provisions of the Fair Labor Standards Act, and the case law interpreting those provisions. The Supreme Court has held that section 16(c) of the Fair Labor Standards Act, which is incorporated into the ADEA, invalidates unsupervised waivers. See Brooklyn Bridge v. O'Neill, 324 U.S. 697 (1945). The rules published by the EEOC -- and subsequently suspended by Congress -- contradict these cases.

[9] Runyan v. National Cash Register, No. 83-3862 (6th Cir. April 22, 1985) (rev'd en banc 1986).

The Honorable Joseph Biden
The Honorable Strom Thurmond
Committee on the Judiciary
page 10

and/or an EEOC brief in reaching their decisions.[10]

Third, the two courts carefully and specifically limited their decisions to waivers obtained in settlement of a bona fide factual dispute.[11] The EEOC's rules are not similarly limited, but would permit waivers in all circumstances.

When asked to explain this discrepancy, Mr. Thomas twice misstated the case law by asserting "no court has limited unsupervised waivers to bona fide factual disputes that I know of." Mr. Thomas is wrong. In fact, in Runyan v. National Cash Register, 737 F.2d 1039 (6th Cir 1986, en banc) -- the case upon which the EEOC placed primary reliance when issuing its final rule -- the Sixth Circuit explicitly stated that its holding was limited to waivers of bona fide factual disputes.[12] In Borman v. AT&T Communications, Inc., 875 F.2d 399, 404 (2d Cir. 1989), the court also held that the case involved a bona fide factual dispute. The other appellate decisions cited by Mr. Thomas are similarly limited by their facts, their holdings, or are simply inapplicable to the issue.[13]

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[10] See Runyan v. National Cash Register, 787 F.2d 1039, 1045 (6th Cir. 1986, en banc); EEOC v. Cosmair, Inc., 821 F.2d 1085, 1091 (5th Cir. 1987).

[11] Runyan, 787 F.2d at 1044; Cosmair, 821 F.2d at 1091 (specifically adopting the reasoning of Runyan).

[12] The Runyan court noted, "The dispute is not over legal issues such as the ADEA's coverage or its applicability. Rather, the parties contest factual issues concerning the motivation and intent behind National Cash Register's decision to discharge Runyan. Accordingly, we hold that an unsupervised release of a claim in a bona fide factual dispute of this type under these circumstances is not invalid." 787 F.2d at 1044.

[13] See Shaheen v. B.F. Goodrich Co., 873 F.2d 105, 106 (6th Cir. 1989); Cirillo v. ARCO Chemical Co., 862 F.2d 448, 450 (3d Cir. 1988). In addition, other appellate decisions permitting unsupervised waivers also are limited, by their facts, to a bona fide factual dispute. See e.g. Cosmair, supra; Coventry v. U.S. Steel Corp., 856 F.2d 514, 516-17 (3rd Cir. 1988).

A fifth case cited by Mr. Thomas, Nicholson v. CPC International Inc., 877 F.2d 221 (3d Cir. 1989), does not involve an unsupervised

The Honorable Joseph Biden
The Honorable Strom Thurmond
Committee on the Judiciary
page 11

Mr. Thomas's refusal to be guided by Supreme Court case law and his misstatements of the facts and decisions in the lower court cases cast serious doubt upon his ability or commitment to enforcement of the law regardless of his own personal preferences and interpretations. As many of the Senators indicated in the questions to Mr. Thomas, it is imperative that a federal judge be willing to accept and enforce the law as passed by Congress, and interpreted by the Supreme Court, notwithstanding personal disagreement with the law or its interpretation.

3. Mr. Thomas's Testimony Regarding Pension Benefit Accrual.

Mr. Thomas's testimony at his confirmation hearing paints an inaccurate picture of the EEOC's actions and authority with respect to the issue of nondiscriminatory pension benefit accruals and contributions for older workers. Specifically, Mr. Thomas mischaracterized the law and the EEOC's conduct with regard to its refusal to rescind an admittedly illegal Interpretive Bulletin (IB) that permitted employers to freeze the pension accounts of persons who worked past age 65.

Mr. Thomas testified that in order to rescind the IB, the EEOC had to comply with the formal procedures of rulemaking, including inter-agency coordination, a regulatory impact analysis and OMB approval. According to Mr. Thomas, these rulemaking requirements and the actions of other agencies prevented the EEOC from either rescinding the IB or issuing new regulations requiring post-65 pension benefit accrual. ("In essence, what happened to the pension accrual rulemaking was it was bogged down in the coordination process . . . we had to engage in rulemaking . . ." Rescission "is a major rulemaking . . . we could not simply withdraw the IB.")

This is incorrect and, in our view, misleading. As noted by both Senator Metzenbaum and Mr. Thomas at the hearing, the EEOC's Acting Legal Counsel at the time advised Mr. Thomas that the EEOC could rescind the IB without running afoul of rulemaking requirements. Moreover, even if formal rulemaking were required, there were interim steps available to the

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waiver of ADEA rights.

Commission to alleviate the considerable harm caused to, and cost imposed upon, older workers by allowing the admittedly illegal IB to remain in effect.[14]

A. EEOC's Acting Legal Counsel advised Chairman Thomas that rescission of the IB did not require formal rulemaking.

The Office of Legal Counsel is responsible for all rulemaking within the EEOC. As documented in a contemporaneous memorandum, the Acting Legal Counsel advised Mr. Thomas that the Commission did not need to engage in formal rulemaking procedures to rescind the IB. Under Executive Order 12291, only if the proposed agency action is estimated to have an annual effect on the economy of $100 millon or more is it designated a major rule requiring a regulatory impact analysis and submission to OMB. The Acting Legal Counsel determined that rescission of the IB would not have the required economic impact and thus the formal requirements of Executive Order 12291 did not apply.[15]

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[14] In June 1984, the EEOC voted to rescind the IB, finding that it violated the ADEA. In March 1985, the EEOC reaffirmed its decision. However, at no time did the EEOC actually take the required steps to rescind the admittedly illegal IB or publish replacement regulations for notice and comment. It did not rescind the IB until subject to court order.

The EEOC's refusal to rescind the IB also prevented older workers from asserting their rights in court. Under the ADEA, an employer who relies upon a written agency action may have a "good faith" defense to a charge of discrimination if he demonstrates reliance upon the IB -- even if the challenged conduct is discriminatory and the agency action is subsequently found invalid.

[15] The Acting Legal Counsel's position is supported by the fact that rescission of the IB would not require employers to take any action, nor would it release employers from any obligation.

Although studies showed that older workers suffered a loss of approximately $450 million in annual pension benefits due to the illegal practice of freezing pension accounts at age 65, regardless of whether the worker continued to work the cost to employers of

The Honorable Joseph Biden
The Honorable Strom Thurmond
Committee on the Judiciary
page 13

In his testimony, Mr. Thomas stated that he believed his Acting Legal Counsel to be wrong. He stated that he obtained a "second opinion" which reached the opposite conclusion. Mr. Thomas failed, however, to identify who gave the second opinion and when -- or why -- it was solicited.[16]

Mr. Thomas's willingness to follow or not follow the advice of counsel seems arbitrary, at best. For example, Mr. Thomas's rejection of his Legal Counsel's advice in this regard must be contrasted with his repeated reliance upon the advice of the (Acting) General Counsel and the Legal Counsel with regard to regulations on unsupervised ADEA waivers (see discussion above). At the confirmation hearing, when asked for the legal basis for the EEOC's regulations on unsupervised waivers, Mr. Thomas emphasized again and again that EEOC's General Counsel initiated the controversial regulations and that the regulations had the support of the Legal Counsel. There appears to be no reason for his reliance upon counsel's advice in one instance and his rejection of it in the other.

B. The EEOC could have taken action short of rulemaking to protect the rights of older workers to fair and nondiscriminatory pension benefits.

Mr. Thomas also failed to acknowledge that even if full rulemaking procedures were required for the rescission of the illegal IB, the EEOC had the authority to provide interim relief to older workers. The EEOC had the authority to issue an opinion letter stating that it would no longer recognize the IB as a good faith defense available to an employer charged with discrimination in pension benefits. The EEOC, however, not only failed to do this, but also repeatedly

<u>continuing pension contributions and accruals beyond normal retirement age was minimal at most.</u> Comm. Pub. No. 97-323; An Analysis of the Costs of Pension Accrual After Age 65 (A. Rappaport, W. Mercer), U.S. House of Representatives, Select Committee on Aging, 97th Cong., 2d Sess (May 1982).

[16] Indeed, Mr. Thomas stated that "we have gotten a second opinion after the document request," which would be January-February 1990. This, of course, means that the "second opinion" could not have formed the basis for his decision four and five years ago.

The Honorable Joseph Biden
The Honorable Strom Thurmond
Committee on the Judiciary
page 14

dismissed charges filed by older workers who were denied post-65 pension benefit accrual even after the Commission determined that this practice was illegal.

The EEOC has previously issued opinion letters interpreting the requirements of the ADEA, thereby establishing agency policy prior to or outside the "informal" rulemaking process. For example, in December 1983, it approved for publication an opinion letter explaining an employer's obligation to rehire retired employees under the ADEA.[17]

C. The Inter-agency Coordination process was completed by the time the EEOC voted to rescind the old regulations and issue the new ones in March 1985.

The EEOC had been examining the IB and the issue of pension benefit accrual since it first assumed jurisdiction over the ADEA in 1979. In 1983, it issued an Advanced Notice of Proposed Rulemaking and in June 1984 it voted to rescind the IB and instructed staff to prepare new rules. In March 1985, the EEOC voted again to issue the new rules. The issue had been discussed repeatedly with other agencies and departments during this entire period. The inter-agency coordination process was certainly complete when the Commission was sued, in June 1986, to rescind the IB and issue the new regulations.

Mr. Thomas has once again attempted to evade responsibility for his failure to protect older workers' rights under the ADEA by imposing blame upon another party. In this instance,

as in the case of the lapsed charges, the blame must rest squarely with the Commission and Mr. Thomas.

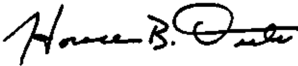
In any hearing, there will always be some unintentional misstatements of fact or law. Here, however, the misstatements throughout Mr. Thomas's testimony cannot be excused as uninformed. The issues discussed above, and in

[17] EEOC Opinion Letter on Obligation to Rehire Retired Employees under Age Discrimination in Employment Act, (approved December 13, 1983), No. 60, published by The Bureau of National Affairs, Jan. 1984.

our previous letter to Chairman Biden and Senator Thurmond (of January 26, 1990), have consistently and publicly been before the Congress and the EEOC and involve basic operating procedures of the Commission.

During Mr. Thomas's tenure as Chairman, Congress has repeatedly been forced to step in to overrule or substantially modify the EEOC's actions and conduct with regard to its enforcement of the ADEA. What is most disturbing to AARP, and we hope would be of greatest concern to the members of the Judiciary Committee, is that Mr. Thomas's testimony and record reveal not only a failure to enforce the law as passed by Congress, but, at best, a lack of concern for the working Americans protected by the Age Discrimination in Employment Act. The record of the hearing, and Mr. Thomas's record as EEOC Chairman bring into question whether he will act differently as a federal judge.

Very truly yours,



Horace B. Deets

The CHAIRMAN. Thank you.
Ms. Axford.

STATEMENT OF NAIDA AXFORD

Ms. AXFORD. Thank you.

Mr. Chairman, members of the committee, thank you for this privilege. I would like to address three points—the obstacles that individual employees have to getting their jobs done, earning a living, and pursuing happiness.

The concern that the American public must have about this committee's inability to receive straight answers from this candidate and the necessity for an open forum for discussion of issues, issues that will be in the employment area, critical issues to the life and liberty of American workers.

Our membership of the National Employment Lawyers Association—we call ourselves NELA—is made up of lawyers who represent the people who are hurt when employment laws are violated. The people that we talk to call us, come to see us, seek out legal advice, and legal counsel because they are confused, disoriented, anxious, nervous, depressed, they are losing weight, they have difficulty sleeping, they are unable to concentrate, they have lost their jobs, they have lost their will and they need help.

We have to send them to the Equal Employment Opportunity Commission in order to have certain laws enforced and I believe that our lawyers are in a prime position to tell you what happens to those people when they go to an agency that does not administer the law, as you, the Congress has created it.

The laws protecting our clients include the title VII, the Age Discrimination and Employment Act, pension laws, OSHA, wage and hour regulations and a variety of issues that are probably going to be addressed by the future Court. There are fundamental employment rights that we consider basic—a safe work place, the right to organize, the retention of fundamental rights so that our clients, your constituents do not have to exchange their liberties and their freedoms for a day's wage.

We would like to have our clients have a Supreme Court that will enforce employment contracts and role expectations in a work place. The civil rights that have been discussed by members coming before this panel may be in jeopardy. And employees are now, with the kind of technology that we face, looking at potential unreasonable encroachments on privacy.

To me, as an employment lawyer representing individual employees, I can liken this situation to those of any American worker. As you can see, Justice Thomas is in an interview process for a job, and just like our employees and anyone who goes for a job, there has been an employment application filled out and filed with the Senate. That employment application lists all of his jobs, all of his information about where he lives, et cetera, just like any American worker.

But unlike any American worker, the employment evaluations that come before a job interview are, in this case, recorded in the annals of many of the congressional reports. And as was noted by one of the people who testified this morning, Judge Thomas ap-

peared before committees 56 times, reporting about controversial, highly critical efforts about his experience before the Equal Employment Opportunity Commission role of leadership.

I urge you to take a look at his job performance. The President has recommended a candidate to you. He has filed his application and now you are in the interview process. You have talked with him and you are looking at the people who make recommendations to you, those of us who can come. I urge you to ask yourself, in this interview process, who is in charge here?

If an applicant came to any other employer and said that they would not answer questions, it would be extremely disturbing to the potential employer. I think the American public is very disturbed. Your constituents deserve some more answers.

We all have common enemies. Those of you who support this candidate, those of us who do not support this candidate—those enemies are fatigue, pressing matters, rush, urgency, competing priorities, family and personal needs. And there are even greater enemies—lack of faith in the legal process, suspicion of Government, and one another, and fear of being harmed.

But we are family and this is a Government of balance and separation of powers. We are governed by a system which recognizes, tolerates and encourages diversity of ideology. Uniformity of thought is the antipathy of our independent minds.

Please let us know, there are many issues likely to be addressed by this Court—privacy rights, dress codes, sexual harassment, disabilities, limitations of damage awards—many, many issues in the employment setting.

But it is not about agreeing with this judge's views. We have a right to know, your constituents have a right to know. The process already exists. I implore you to slow down, take stock, take your time, it is a big decision. This man will have this job for 40 years or more perhaps. Only the hand of God can remove him from his position.

I urge you, ask him more questions, bring him back, make him tell us, make him tell your constituents. Sirs, this has been a deeply moving experience to see the civil rights community bitterly divided on this issue. You need to bring him back, make him answer the questions. And we hope and pray, many of us on this panel, that he will change our minds.

Thank you.

[The prepared statement of Ms. Axford follows:]

NATIONAL
EMPLOYMENT
LAWYERS
ASSOCIATION
(Advocates for Employee Rights)

TESTIMONY OF NAIDA B. AXFORD IN OPPOSITION TO THE APPOINTMENT OF JUDGE CLARENCE THOMAS TO THE UNITED STATES SUPREME COURT

The next appointee to the Supreme Court will play a pivotal role in determining whether a half century of law establishing the rights of employees to be protected against arbitrary and discriminatory employment practices will be rescinded. As Justice Thurgood Marshall warned in his final dissenting opinion, the Court's current majority has launched a "far-reaching assault upon this court's precedents" and the majority has "sent a clear signal that essentially all decisions implementing the personal liberties protected by the Bill of Rights and the Fourteenth Amendment are open to re-examination."[1] It is therefore critical that the person nominated to

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[1]Payne v. Tennessee, 59 U.S.L.W. 4814 (New. S. June 25, 1991) (No. 90-5721)

assume the seat vacated by Justice Marshall be committed to a judicial philosophy which values the established rights of employees to be free from discriminatory treatment.

The National Employment Lawyers Association ("NELA") believes that Judge Clarence Thomas is clearly not the best person for the position. NELA is a non-profit professional organization comprised of over 1,000 lawyers in 48 states and the District of Columbia who represent employees in work related matters. As a group, NELA attorneys have represented hundreds of thousands of individuals seeking equal job opportunities. It is one of the few organizations dedicated to protecting the rights of all employees who rely on the courts for protection to be free from discrimination and wrongful discharge. We are, therefore, deeply concerned about Judge Thomas' lack of commitment to the constitutional and statutory rights of employees previously established by the United States Supreme Court.

In the coming years, the Supreme Court will be called upon to rule on a myriad of employee rights issues. Over the last two years, the Supreme Court substantially cut back on protection afforded the American working population against employment

discrimination.[2] However, many issues are left open. For example, there will be major cases raising the question of whether employees can be coerced into waiving their federally protected civil rights in order to obtain a job. At its last session the court held that victims of age discrimination can prospectively waive their rights to statutory protection under the Age Discrimination Act (ADEA). There have already been attempts to expand that to permit waivers of rights established by Congress under Title VII and under § 1981 and § 1983 of the Civil Rights Act, and ultimately the Supreme Court will be called upon to act. Another issue of significance will be the reach of the Supreme Court's decision in Patterson. There is now a split in the circuit courts as to whether Patterson reaches termination cases. The Court, in the future, will be called upon to rule on that issue. At this critical point in the history of the Court it is, in our view, crucial that the person appointed have a fair and open mind to the issues that will be presented.

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[2]Wards Cove Packing Company v. Atonio, 109 S.Ct. 2115 (1989). Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989). Lorance v. AT&T Technologies Inc., 109 S.Ct. 2261 (1989). Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989); Martin v. Wilkes, 109 S.Ct. 2180 (1989); Gilford v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991)

Judge Thomas' prior record, particularly his eight year tenure as Chair of the United States Equal Employment Opportunity Commission ("EEOC"), demonstrates clearly his hostility toward the protective legislation previously passed and interpreted by the Supreme Court. As chief enforcer of the federal civil rights statutes, he undermined the effective implementation of those laws, because of his personal disagreement with Supreme Court interpretation of his statutory mandate. The following is a brief summary of Judge Thomas' record which NELA believes demonstrates a judicial philosophy unsuited to elevation to the highest court of the land.

QUALIFICATIONS FOR THE JOB

There have been only 105 Supreme Court Justices since the establishment of the court. Elevation to that prestigious and powerful position is reserved for those persons who have a demonstrated record of significant national public service, legal scholarship or judicial experience. Judge Thomas' brief public career lacks these essential qualifications.[3] Judge

[3]Indeed at the time of his nomination to the Circuit Court of Appeals for the District of Columbia, the ABA merely found Judge Thomas "qualified" and denied him the higher ranking of "highly qualified" for that lower court position. When faced with his nomination to the Supreme Court, the ABA again rated him only "qualified" and overall gave him lower ratings than Judge Bork. A nominee who is not found most qualified for the position of Court

Thomas has extremely limited judicial experience, having served only about 17 months on the Court of Appeals for the District of Columbia. During that time, he has written only 17 opinions, all of which were opinions in non-controversial cases in which the decision of the court was unanimous.

His only other significant legal experience was as Chair of the United States Equal Employment Opportunity Commission from 1982 through 1990. As will be discussed more fully below, the Agency under his administration refused to enforce the civil rights laws under its jurisdiction as those laws were interpreted by the Supreme Court. Judge Thomas simply does not have the broad range of experience that would qualify him for the highest judicial appointment. Nor has he demonstrated respect for Constitutional principles and established legal precedents to qualify him for this esteemed position.

CHAIRMANSHIP OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The EEOC is the agency established to enforce federal laws forbidding employment discrimination based on race, sex, national origin, age, and religion. During his administration, Mr. Thomas demonstrated an unwillingness to enforce those laws

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of Appeals Judge can certainly not be viewed as the most qualified candidate for the United States Supreme Court.

vigorously. Among his more egregious failings was allowing 13,000 age discrimination claims to lapse and at the same time trying to hide those facts from the United States Congress.

Further, Judge Thomas routinely criticized and complained about the oversight committee of Congress charged with monitoring the work of the EEOC. When first asked by the Senate's Special Committee on the Aging about the number of ADEA[4] cases whose statute of limitations had lapsed, Mr. Thomas reported that only 78 such cases existed. He complained that the Senate Committee staffers were subpoenaing volumes of records and that this was an expense to the EEOC.[5] However, only after constant probing, including the use of subpoenas to obtain EEOC records, was it revealed that over 13,000 such lapsed cases existed.[6] It took special legislation of Congress to restore the rights of those workers whose claims the EEOC under the stewardship of Clarence Thomas, had allowed to lapse.

[4]Age Discrimination in Employment Act, 29 U.S.C. §621 et seq.

[5]Speech before the Federalist Society, University of Virginia, March 5, 1988 at page 13.

[6]Letter to the President by 14 Members of Congress, July 17, 1989; United States Senate, Committee on the Judiciary, Nomination Hearing for Clarence Thomas to be a Judge on the United States Court of Appeals for the District of Columbia, February 6, 1990 at 90.

Former EEOC Chair Thomas was also responsible for the forfeiture of over $450 million dollars in lost benefits to older workers because of the EEOC's refusal to enforce the ADEA. Despite his stated commitment to rescind EEOC interpretive guidelines which had improperly held that employers were not required to make pension contributions on behalf of workers over the age of 65, Mr. Thomas issued no rescission order.[7] It was only when Congress stepped in, after four long years, that an amendment to the ADEA was passed requiring such pension contributions. In fact, EEOC did not correct its regulations until it was ordered to do so by the United States Federal Court. As United States District Court Judge Harold Green stated in finding against EEOC, the agency "has at best been slothful, at worse deceptive to the public, in the discharge of its responsibilities."[8]

A critical issue that will be facing the Supreme Court in the future is to what extent, if at all, can employees be forced to waive their rights to protection under the federal equal employment statutes. NELA is extremely concerned that employees, in their need to preserve their job, will be coerced

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[7] AARP v. EEOC, 655 F. Supp. 228, (D.D.C., 1987) Aff'd in part, rev'd in part, on other grounds, 823 F.2nd 600 (D.C. Circuit 1987)

[8] Id at 229

into waiving their most valuable statutory and constitutional rights in order to work. Judge Thomas, as Chair of the EEOC, has indicated his lack of willingness to protect workers against such coercion. The EEOC, under Judge Thomas' leadership, promulgated regulations which allowed employees to obtain waivers of rights under ADEA from employees without the supervision of the EEOC. Again Congress had to step in and suspend those regulations starting in fiscal year 1988. Again in a continuing pattern of arrogance and hostility toward Congress, the EEOC refused to withdraw or modify the lax waiver guidelines. Judge Thomas' willingness to undermine the protection afforded by ADEA to all the workers cast grave doubt on his commitment to enforce these laws.

The EEOC, under Mr. Thomas' stewardship refused to follow or actually undermined clear mandates of the Supreme Court and thereby denied claimants' remedies to which they were entitled. In Griggs v. Duke Power.[9] The Supreme Court established the disparate impact test for proving discrimination. Under this theory a member of the protected group could establish a prima facie case of discrimination by demonstrating that an employment practice disproportionately affected members of the protected class. Proof of intent was

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[9] 401 U.S. 424 (1971)

not required. Mr. Thomas disagreed with that Supreme Court precedent and, therefore, not only failed to pursue litigation where appropriate, but sought to change EEOC regulations which were established pursuant to Griggs.[10]

Moreover, Judge Thomas has been less than candid with the Senate regarding his preconceived position on Griggs. Senator Spector extensively questioned the nominee on Griggs pointing out that Congress had let Griggs stand for 18 years, thus showing Congress' view that its intent was being carried out. Judge Thomas said that 18 years was a long time and it was a factor to take into account in determining congressional intent thus implying his agreement with Senator Spector. He failed to explain why, if he believed Griggs reflected congressional intent, he sought to undermine it through Executive regulations that were contrary to Congress' position.

Further, although the courts, including the Supreme Court, had established very clearly under Griggs and United States v. Teamsters[11] that statistical disparities could establish evidence of

[10]"Changes Needed in Federal Rules on Discrimination," N.Y. Times, December 3, 1984 at A1, "EEOC Chairman Questions Job Bias Guidelines," Assoc. Press, December 5, 1984

[11] 431 U.S. 324 (1977)

discrimination, Judge Thomas criticized the use of statistics and in 1985 disbanded the EEOC Division responsible for bringing nationwide pattern and practice charges against major companies.[12]

Judge Thomas' hostility to affirmative action, particularly the use of goals and timetables in appropriate circumstances, is well documented and not denied.[13] As chair of the EEOC, he interjected his personal views on that subject and allowed those views to compromise the activities of the EEOC. The use of goals and timetables to remedy past discrimination was a well established legal remedy upheld by the United States Supreme Court on any number of occasions.[14] Nonetheless, as a consequence of his personal opinion, Judge Thomas did not exercise the EEOC's oversight authority to enforce public sector affirmative action requirements under Section 717 of Title VII. Judge

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[12] See BNA Daily Labor Reporter, February 19, 1985 Mixed Motives Attributed to EEOC's Disbanding of Systemic Programs Office, at page A-9

[13] Hearing Before the Committee on Labor and Human Resources of the United States Senate, 97 Cong. 2d Sess. 16 (March 31, 1982)

[14] United States Steel Workers v. Weber, 443 U.S.193 (1979) Fullilove v. Klutznick, 448 U.S. 448 (1980), Johnson v. Transportation Agency of Santa Clara County, 480 U.S. 616 (1987)

Thomas persistently voiced his strong opposition with the Supreme Court's approach insisting that the use of goals and timetables "turns the law against employment discrimination on its head".[15]

Judge Thomas also thwarted the prosecution of class actions. Discrimination claims, by their very nature, are class claims "as the evil sought to be ended is discrimination on the basis of a class characteristic, i.e., race, sex, religion, or national origin."[16] Class actions, are a major weapon in the arsenal of civil rights protection for minorities and women. Indeed, recognizing the class nature of discrimination claims, Congress empowered the EEOC to initiate "pattern and practice" claims of discrimination against employers[17].

The benefit of class claims is that they allow the government or private litigants to attack basic practices and policies which directly or effectively preclude women, Blacks, Hispanics and other minorities from obtaining employment opportunities within a given

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[15] Thomas, "Affirmative Action Goals and Timetables," 5 Yale L. and Pol. R. 402 at 403, note N.3 (1987)

[16] Bowe v. Colgate Palmolive Company, 416 F. 2nd 711, 719 (7th Circuit 1969). See General Tel. Company v. Falcon, 457 U.S. 147 (1982).

[17] Initially the United States Department of Justice was given the litigation power which was transferred to the EEOC in the 1972 amendments.

company. The class action/pattern and practice case can economically and more quickly reach issues that no individual litigant could resolve. For example, in one of the more major cases upholding a pattern and practice class action brought by the United States government, the trucking industry, which completely excluded Blacks and other minorities from the higher paying truck driver positions was on mass opened up to those groups by the successful resolution in United States v. Teamsters. If that had been simply an individual case then, if that individual could have even afforded to bring on a lawsuit, he would, at best, been able to obtain one single position among thousands for himself. Each individual teamster would have to come forward and raise his own complaint which would mean that the industry could continue to be foreclosed to a sizeable number of Blacks for many years.

Another major example of the economy and effectiveness of the class action/pattern and practice suit is the recent $66 million dollar settlement in the case of EEOC v. AT&T, 78 Civ 3951 U.S.D.C. for the Northern District of Illinois, Eastern Division. In that case, the company had discriminated against pregnant women by requiring them to take unpaid leaves at the end of their six months of pregnancy while

denying them full seniority credit while on pregnancy leave and denying them job guarantees after child birth. There were 13,000 identifiable victims of discrimination who were made whole by this settlement. There is no possibility that those 13,000 victims would have successfully pursued individual claims given the expense and time consumption of Federal litigation.

Although the class action pattern and practice suits have proven to be one of the major tools for successful elimination of discriminatory treatment, Judge Thomas has scorned its use. While EEOC filed a total of 218 class actions in fiscal year 1980, under Judge Thomas' chairmanship, only 129 such actions were filed in 1989.[18] Moreover, in 1985, while chair of the EEOC, Judge Thomas disbanded the EEOC division responsible for bringing national pattern and practice charges.[19]

Judge Thomas' reluctance to use the class action mechanism provided for in the statute or to rely on statistical evidence as approved by the United States Supreme Court deprived victims of discrimination the full panoply of government support committed by the

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[18] Women Employed Institute, EEOC Enforcement Statistics (1991)

[19] See Mixed Motives Attributed to EEOC's Disbanding of Systemic Programs Office, Daily Lab. Rep. (BNA) at A-9 February 19, 1985]

Congress of the United States. Congress specifically recognized the value of the class action/pattern and practice mechanism in adopting the law. The Supreme Court recognized these principles. Yet the person primarily responsible for enforcing the law allowed his personal opinions on these issues to thwart congressional intent. By limiting EEOC's class actions, he effectively denied thousands or possibly tens of thousands of victims of discrimination effective relief under the statute.

Judge Thomas' stated rationale for his opposition to the use of class action lawsuits and to the use of remedial goals and timetables is that the law protects rights of individuals, not groups. It was his announced position that acts of discrimination must be individually proven and dealt with.

However, under his administration, individual victims were unable to receive any remedial relief as were class members. Indeed, the lack of effective investigative and litigation techniques at the EEOC under Clarence Thomas required special investigation on three separate occasions by the Government Accounting Office.[20] The GAO severely criticized the

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[20] Information on the Atlanta and Seattle EEOC District Office (GAO/HRD-86-63FS, Feb. 1986); EEOC Birmingham Office Closed Discrimination Claims Without Full Investigations (GAO/HRD-87-81, July 1987; Equal Employment Opportunity EEOC and State Agencies Did Not Fully Investigate Discrimination Charges (GAO/HRD-89-11).

EEOC's case handling and investigative methods. In its 1988 report on the EEOC, the GAO further found that during the five year period, fiscal years 1983-1987, the rate of EEOC cause determinations ranged from a mere 2.6 percent to a mere 3.9 percent[21]. Thus, as the GAO found, at no time from 1983 to 1987 did the EEOC find merit or cause to more than 4% of its charge filings. Such results from an agency with an approximate budget of 180 million dollars are mediocre indeed.

The EEOC's litigation statistics are equally dismal. Although the Agency had 50,110 new employment discrimination charges filed in 1986, the total number of cases that the EEOC actually filed in Court in 1986 was a mere 526 cases.[22] Thus, in only slightly more than 1% of its charges, did the EEOC engage in any litigation whatsoever on behalf of employment discrimination victims.

Statistics for the year 1986 are not an anomaly but merely one example of the astonishingly ineffective role of the EEOC under Chairman Thomas in the enforcement of its mandate. One need only contrast the record of the EEOC under Clarence Thomas

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[21] Equal Employment Opportunity EEOC and State Agencies Did Not Fully Investigate Discrimination Charges (GAO/HRD-89-11).

[22] Employee Rights Litigation: Pleading and Practice, Goodman, J. Editor, (Matthew Bender, 1981) § 13.18 p. 13-60 fn 4

with the record of the National Labor Relations Board (NLRB), a sister federal labor relations agency which had a similar workload and a similar task to place such failure in context. The NLRB received 41,639 cases in FY 1986.[23] In contrast to a reasonable cause finding of less than 4% at the EEOC, the NLRB had a reasonable cause finding of 33.7 percent of charges filed in that same year.

Moreover, the settlement rates plunged at the EEOC under Clarence Thomas. In fiscal year 1980, prior to Chairman Thomas, 32.1% of the cases were settled whereas in fiscal year 1989 under the helm of Chairman Thomas only 13.9% of the cases were settled. This astonishingly low settlement rate at the EEOC is to be contrasted with the settlement rates at the NLRB for the years 1985 through 1989 which ranged from 91.1 percent to 94.4 percent.[24] Clearly, these mediocre EEOC statistics reflect a record of non-performance. They further reflect the experience of NELA's member attorneys who hear the legitimate complaints of EEOC

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[23] EEOC Office of Program Operations, Annual Report, FY 1986, Appendix 3, EEOC Receipts by Statue for Title VII, for FY 1982 through FY 1986.

[24] Office of the General Counsel (NLRB), Summary of Operations Reports (For Respective Fiscal Years 1985, 1986, 1987, 1988 and 1989).

Charging Parties. The EEOC, under Chairman Thomas, simply did not meet its mandate in serving the Charging Parties who have sought its assistance in ending employment discrimination.

Judge Thomas' tenure at the EEOC was thus marked by hostility to the Agency's mandate, as then defined by the Supreme Court. While he was undoubtedly free to hold his own opinions about the EEOC's enabling statute and Supreme Court caselaw, his acceptance of a position in which he was charged with the enforcement of a statute with which he did not agree, and his refusal to enforce the law as authoritatively construed, raises troublesome questions about his commitment to the legal and judicial process.

CONCLUSION

Over 75% of the workforce is not represented by unions and has no protection other than that afforded by statute as interpreted by the courts. Congress has expanded the protection of those workers to assure that equal employment opportunities are established for all Americans. It is the Supreme Court's duty to safeguard those rights as established by Congress. Judge Thomas' record as the chief legal enforcer of the rights established by Congress, as interpreted by the court, raises gave doubt about his commitment to equal employment opportunity. He has withdrawn

support from those workers most vulnerable to the coercion of arbitrary and unfair employers. His record indicates a readiness to overturn established protections and that he would impose his own personal philosophy in disregard of long established legal principles. We, therefore, urge that the Senate this nomination.

The CHAIRMAN. Thank you.
Reverend Taylor.

STATEMENT OF REV. BERNARD TAYLOR

Reverend TAYLOR. My name is Rev. Bernard Taylor and I am chairman of the Black Expo of Chicago, an Illinois-based corporation involved in a host of activities to support the development of black business enterprises, including an annual exhibit that brings together black-owned businesses of all types to display their products to black consumers.

The most recent of these was held this past July in which over 400 businesses exhibited to hundreds of thousands of consumers.

I am also an ordained minister in the African Methodist Episcopal Church, the oldest black church denomination in America, a church that was organized because of discrimination. I also serve as assistant pastor, Grant Memorial AME Church in Chicago.

I am a graduate of Roosevelt University with a BA degree in sociology and the Chicago Theological Seminary with an MA in theology. Senators, I am here in opposition to the nomination of Judge Clarence Thomas to the U.S. Supreme Court.

Clarence Thomas' personal history is not unique. Most African-Americans who have grown up in this country have experienced poverty, disrespect and hostility by whites who have called our women, girls; our men, boys; and niggers and worse. African-Americans have been victimized by vicious expressions of racism. We can identify with and are still pained by the descriptions of Judge Thomas on last week.

The notion of self-help and self-reliance are not concepts that are foreign to African-Americans. Booker T. Washington, the founder of Tuskeegee Institute wrote extensively on the need of self-help, which others have called passive resistance.

On the contrary, W.E.B. DuBois, professor at Atlanta University wrote for the need for progression through via the talented tenth paving the way for the rest of the race. We contend that a blend of these views must carry the day. While we need self-help we also need access to the avenues that will prepare our talented tenth and others to provide guidance to our people.

It is undisputed that self-help alone will not propel disadvantaged people into the mainstream of American society. No person who presently enjoys the position of power or authority has attained that position without assistance—be it governmental or otherwise. And that type of assistance has been and remains necessary if persons are to succeed in our society.

Judge Clarence Thomas, a man who has received some theological training, should be able to demonstrate human compassion, yet, we see him condemning those who would take advantage of well-earned benefits of Government. African-Americans are, and have been long-standing and faithful taxpayers and deserve to participate in every existing governmental benefit.

Affirmative action is an attempt to bring numbers of unrepresented groups into the mainstream of American life who have traditionally suffered discrimination and racism as a group.

Three of our past presidents recognized that African-Americans were severely discriminated against and signed executive orders to ease this situation. President Roosevelt's Executive Order 8802 ordered defense contractors to practice nondiscrimination in the awarding of contracts. President Kennedy's Executive Order 10925 provides contract termination as a penalty for noncompliance with equal employment practices. And President Johnson issued Executive Order 11246 which established the Office of Federal Contract Compliance within the Department of Labor.

These Executive orders were issued because of discrimination in employment and the awarding of contracts. But Judge Thomas has stated that he believes that affirmative action creates dependency. And he has made several references to that kind of affirmative action, alluding to quotas.

As Chairman of the EEOC, Thomas should have recognized quotas have never been part of the statutory affirmative action. Affirmative action with its timetables and goals has offered security for the status quo and potential benefit for others through attrition. The benefits of affirmative action are not hand-outs, but well-deserved rewards for the labors of ourselves and our forbearers.

In 1989, the *Richmond* decision and other Court rulings damaged affirmative action. When the courts ruled that race-based affirmative action was unconstitutional, the courts seemed to favor individual rights over group rights in the area of adjudication of discrimination claims.

African-American people need someone on the Court who is sensitive to the fact that they have been discriminated against as a group, and not just individually. By being in opposition to providing full affirmative action rights to African-Americans and others, Judge Thomas is contributing to the decline of affirmative action. He espouses self-help instead of affirmative action.

When a people are being denied, self-help at best is inadequate to affirmative action. Judge Thomas claims no agenda. But I would like to tell him that his agenda should be included in being a champion for those who have been systematically discriminated against. We need someone on the Supreme Courts who understands that African-Americans have been discriminated as a group. We need a voice on the Court who will be a champion for those who have been locked out of our society. Someone who is fully aware that his agenda should be inclusion of all citizens of these United States.

We say no to Clarence Thomas.

The CHAIRMAN. Thank you very much, Reverend.

[The prepared statement of Rev. Bernard Taylor follows:]

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My name is Rev. Bernard Taylor, and I am Chairman of Black Expo Chicago, an Illinois-based corporation involved in a host of activities to support the development of black business enterprises including an annual exposition that brings together black-owned businesses of all types to display their products to black consumers. The most recent of these was held this past July in which over 400 businesses exhibited to hundreds of thousands of consumers.

I am also an ordained minister in the African Methodist Episcopal church, the oldest Black church denomination in America, a church that was organized because of discrimination; and serve as associate pastor at Grant Memorial AME church.

I am a graduate of Roosevelt University with a B.A. degree in sociology and Psychology and Chicago Theological Seminary with a M.A. in Theology.

Senators, I am here in opposition to the nomination of Judge Clarence Thomas to the United States Supreme Court.

PERSONAL HISTORY

I. Clarence Thomas' personal history is NOT REMARKABLE Most African-Americans who have grown up in this country have experienced poverty, whites who have disrespected our elders, family members who have been and remain in in what is now known as the "underclass", and been personally affronted with the most virulent and vicious expressions of racism. We can identify with, and are still pained by the descriptions punctuated by Thomas' muffled sobs during the Confirmation Hearings. Most African-Americans have been or have known parents or grandparents or other relatives who have been disrespectfully addressed and treated. e.g (called boy, girl, nigger, or worse). Thomas' Pin Point Georgia experience is very familiar to most African-Americans, one we can readily identify with.

The notions of self-help and self-reliance are not concepts that are foreign to African-Americans. In fact, Booker T.

Washington, the founder of Tuskegee Institute,, wrote extensively on the need for passive resistance and self-help.

On the contrary, W.E.B. DuBois wrote of the need for progression via the talented tenth paving the way for the rest of the race.

We contend that a blend of those views must carry the day. While we need self-help, we also need access to the avenues that will prepare our "talented tenth" to provide guidance to our people. It is undisputed that self-help alone will not propel disadvantaged persons into the mainstream of American society. No person who presently enjoys a position of power or authority has attained that position without assistance, be it governmental or otherwise. That type of assistance has been and remains necessary if persons are to succeed in this society.

Judge Clarence Thomas, who has been a beneficiary of seminary training should be able to demonstrate human compassion. Yet, we see him denigrating those who would take advantage of the well-earned largesse of government.

African-Americans are and have been long-standing and faithful taxpayers, and deserve to participate in every existing governmental benefit. The benefits of Affirmative Action are not handouts, but, rather the well-deserved

fruits of the labors of ourselves and our predecessors, borne of scores of years of efforts toward achievement.

Those commentators who marvel at how Thomas overcame such obstacles should recognize that his experiences are neither unique nor unusual. Many of us can identify with the challenging, humilating treatment and difficult circumstances faced by persons who are minority and, as a result, disadvantaged.

INCONSISTENCIES

II. Thomas' inconsistencies abound. Clarence Thomas claims to have "NO AGENDA" in seeking the role of Justice of the United States Supreme Court. He further and frequently asserts the difference in the role of Justice and his former role as spokesperson for the Administration as a reason why his earlier statements, speeches and writings should be disregarded or given a limited amount of credence. In fact, he frankly disavows many of the statements he previously made.

Yet, Judge Thomas has not, in his years of public service conducted himself as one who can think clearly for himself. His record demonstrates that he will not only carry out the intentions of, but will actually parrot the views of those to whom he appears to be beholden. Few can forget Ronald

Reagan's repeated references to totalitanarianism. Predictably, Thomas' speech to various groups reflected Reagan's baseless verbiage, offering none of the substance which would be expected of a legal scholar.

III. Judge Thomas has made several references to "that type of Affirmative Action", alluding to quotas. He has further stated that he was never a beneficiary of "that type of Affirmative Action". As Chairman of EEOC, Thomas should have recognized that quotas have never been a part of statutory Affirmative Action..Affirmative Action , with its attendant goals and timetables, provided both a security interest for present beneficiaries of the status quo, and an expectancy interest for potential future beneficiaries of Affirmative Action. The expectancy interest provided by goals and timetables simply represents Affirmative Action (or limited replacement) by attrition. Such a scheme is gradual and, based on current projections, represents a recognition of the future composition of the relevant work force.

Thomas represents that he favors indivdual rights over group rights in the area of adjudication of discrimination claims. He says this in 1991 when he is, and most informed members of the public are aware that the Court, in 1989, severely curtailed the rights of both groups and individuals in adjudication of cases related to discrimination.

The Clarence Thomas who has presented himself to the public for the past ten years should not be appointed to the United States Supreme Court.

The CHAIRMAN. Let me begin the questioning with you, Ms. Aiyetoro, if I may. How do you account for the fact that Judge Thomas in most of his writings and speeches fails to directly confront and say forthrightly what you think he believes, which is that he is opposed to choice, he—was supportive, or at least insensitive to the situation in South Africa, and so on? How do you account for that?

Ms. AIYETORO. I don't, Senator Biden. I am not sure why he doesn't say more specifically than he does in his speeches his position on the issue of choice for women and the issue of South Africa. I would assume that you would have to ask him about——

The CHAIRMAN. I did.

Ms. AIYETORO. I know. I guess one answer that I would have, which is an answer that someone gave you on an earlier panel, is that most of the times when he was making his speeches, the speeches that I am familiar with, he was speaking on a particular topic, and so many of these things were not specifically related to it.

I guess the other answer I would give you is that despite whether or not he has specifically said his position on South Africa or choice or other issues that I was always raised by the adage that by your deeds you will be known. And I think we have to look at not just the words and speeches but his conduct.

I believe that his conduct and things that he has adopted, in speeches as well as being on the advisory board of the Lincoln Review, those kinds of things indicate something about him that I think that we have to, you know, as lawyers, as human beings, we draw implications that are rebuttal presumptions, I would assume.

The CHAIRMAN. Thank you.

Ms. McPahil, are you at liberty to tell us not how who voted, but since your organization has such wide respect and it was such a close vote—it reminds me of that old joke, you know. The board of directors voted 5 to 4 to send you a get well card. You know, that kind of thing. I mean it was awfully close.

Was there any single defining issue that split the vote? I mean did it break down in any specific way? Were people saying, well, we will give him a chance, we will give him the benefit of the doubt, or we disagree with him because he believed one thing on affirmative action and another on something else? Do you understand what I am trying to get at? What did you all debate?

Ms. MCPAHIL. Well, we debated primarily his views on affirmative action and his record at the EEOC. The vote, and I am at liberty to tell you—it is public knowledge, we announced it afterwards. So you have a full picture of it, our Judicial Selection Committee came in with a 6-to-5 vote against him. Our board voted 23 to 21 to reject the Judicial Selection Committee, which is essentially a vote for him. Our delegates on the floor then voted 124 to support him, 128 to oppose him, and 31 to take no position whatsoever.

The CHAIRMAN. My goodness.

Ms. MCPAHIL. So there were four votes that opposed those between—you know, those who wanted to support him outright and those who wanted to oppose him outright.

The CHAIRMAN. Ms. Seymore, one of the startling figures—at least I find it startling—is that there are fewer police officers or

black, women and men alike, today than there were 10 years ago. More than 20 years ago, but fewer than 10 years ago.

Can you shed any light on why you think that is the case?

Ms. SEYMORE. Well, in larger departments, say, for instance, Washington, DC, 10 years ago the minority participation here was 36 percent. It is now up to 86 percent. But there are hundreds of departments throughout the country that do not have those numbers. Say, for instance, a department who had 800 minorities 10 years ago are down to 400 minorities. Or a department who had 12 females 10 years ago who today have none.

So because of the disparity in the sizes of police departments, that is why the numbers show lower today than 10 years ago.

The CHAIRMAN. Ms. Aiyetoro, we heard testimony—you testified very eloquently to your view of Judge Thomas', at a minimum, insensitivity, at a maximum, as I understood your testimony, support of the South African Government. It is somewhere in between I guess you view it.

We heard testimony from two members of the board of Holy Cross University, one a former Federal judge of some reputation and repute out of the third circuit, and the other the president of the university, saying that Judge Thomas argued—I forget the adjective they used—but vociferously, or argued strenuously for disinvestment.

I think—let me ask my staff to make sure I am correct on this. Well before his nomination to the court, either court, I believe—the court he now sits on or the Supreme Court.

How do you square that with what was obviously the facts as you cite them, and they were the facts—how do you square the two things?

Ms. AIYETORO. Senator Biden, it is my understanding from the review of the materials about Judge Thomas that there was a period in his life in which he was more of an activist for the rights of people of color, as well as human rights or civil rights in general. That was a period of time, it is my understanding from the record, when he was at Holy Cross, and he was instrumental in forming the Black Student Union.

I think that what we see in his history is what we see in many of us, perhaps, or are familiar with someone like Judge Thomas who when he is in college for whatever reasons they get involved in the history of the moment. We have to realize that Judge Thomas, much like I—I am 3 years his senior, but much like I——

The CHAIRMAN. Three years his senior?

Ms. AIYETORO. Yes, I am.

The CHAIRMAN. I don't believe it.

Ms. AIYETORO. We came up in a time in college years where the civil rights movement was out there. The civil rights movement was on the front pages, and many of us got involved that never had been involved before.

The CHAIRMAN. I may have misled you a little bit. The testimony, the explicit testimony was not while he was a student, but several years ago. I think 3 or 4 years ago, when he was a member of the board of directors.

Maybe my friend from Illinois can shed some light on that.

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Senator SIMON. Yes. This was just within, I think it was 2 or 3 years ago. And if I can just complicate the question even more, if my colleague will let me.

The CHAIRMAN. Surely.

Senator SIMON. At Holy Cross he said we should disinvest, but here in Washington he was opposing sanctions.

The CHAIRMAN. Well, that was my point.

Ms. AIYETORO. OK.

The CHAIRMAN. Ms. Aiyetoro indicated that.

Senator SIMON. Yes.

The CHAIRMAN. She recited the fact that in Washington here and both with regard to his actions, his comments and his references to people to whom he looked for guidance represented a view that was at least benign about apartheid.

And what I am trying to get at is at the same time he was, and I have no reason to doubt Judge Gibbons, a man of incredible honor, nor the president of the university, he was at board meetings, using their characterization, strenuously arguing that his alma mater should disinvest from—I am paraphrasing, but I think he talked about an immoral and abominable practice.

So I wonder if you factor that in. I am just trying to understand how you view it. I am having trouble figuring it out. I am wondering what your view is.

Ms. AIYETORO. Well, I have trouble figuring it out. I mean the only thing that I can say to you, Senator Biden, is that this I think, on the one hand, could either clarify or further complicate your deliberation. It seems to me if you have someone that is, as we would call it, saying two things, speaking out of both sides of his or her mouth, then I think that we have a serious problem.

From what we know in terms of the public view, I knew more about what he did in Washington, and I am concerned that a person—if indeed he even had the views, that even causes me to have more concern. Because at least I feel like if I am dealing with a person who is straight along the line has a position in support of the apartheid government I may disagree, and I do strongly disagree, just to make it clear, but I would at least say that this person is consistent.

To have someone who today is telling us that he is not—he is in support of the apartheid government, but yesterday is lobbying against that government, I would have serious pause for concern about that person.

The CHAIRMAN. I thank you. My time is up. I yield to my colleague from South Carolina.

Senator THURMOND. Mr. Chairman, I just want to take this opportunity to welcome you all here. It is nice of you to come and show your interest in this hearing. You have expressed yourself. And there have been others who have taken different views and some who have taken your view, but we are glad to have you here.

Mr. Chairman, I would ask unanimous consent that a letter addressed to you, dated September 17, 1991, from Thomas Adams Duckenfield, a lawyer here in Washington, be placed in the record.

The CHAIRMAN. Without objection.

Senator THURMOND. If it has not been placed. You haven't placed it in, have you?

The CHAIRMAN. I have not. I don't think I have.

Senator THURMOND. I will just read the first paragraph:

DEAR SENATOR BIDEN. As a former president of the National Bar Association, I share with you my wholehearted support for the confirmation of Judge Clarence Thomas as an Associate Justice of the Supreme Court of the United States.

I won't bother to read the rest of it. I will just put it in the record.

The CHAIRMAN. Without objection.

[The letter follows:]

THOMAS ADAMS DUCKENFIELD, ESQUIRE
7215 SIXTEENTH STREET, N.W.
WASHINGTON, D.C. 20012
TELEPHONE (202) 829-9305

September 17, 1991

The Honorable Joseph Biden
Chairman
Senate Judiciary Committee
Office of the United States Senate
Room 224
Dirsken Office Building
Washington, DC

RE: Confirmation of Judge Clarence Thomas as an Associate Justice of the U.S. Supreme Court

Dear Senator Biden:

As a former President of the National Bar Association, I share with you my wholehearted support for the confirmation of Judge Clarence Thomas as an Associate Justice of the Supreme Court of the United States.

Your committee, over the last week, has conducted its confirmation hearings for Judge Thomas' appointment to the Supreme Court. The world has been poised for the drama that has been unfolding. The hearings have been a real education in the modern politics of judicial appointments. For certain they have been an unforgettable lesson on the constitution and jurisprudence. We are indeed hopeful that if there are no disqualifying factors in existence and that his legal credentials remain as impeccable as they are, the committee will recommend Judge Clarence Thomas to the full Senate for confirmation. So far, I have not seen anything that would disqualify Judge Thomas. This is a view that is shared by many, many Americans. He is well qualified to assume the awesome responsibility of a Justice on the Supreme Court of the United States.

We are not unmindful of many subsisting questions that loom on the horizon raised by various and sundry individuals and groups as to why the nominee should not be confirmed. Fortunately, we have heard them all and find them devoid of any substance. We admit that the individuals and groups themselves are substantive, but the questions posed by them are not. At best they all articulate subconscious fears of the unknown based on their dislike for the sponsors of our nominee and/or their intellectual inertia to a new agenda for Civil Rights. As was spoken in the gospels: "Can there be any good thing out of Nazareth?... Come and see."

Unfounded fears abound in the minds and hearts of many highly intelligent people. All manner of paranoid imaginations are conjured up. None of those fears is justified in fact. Nothing suggests that Judge Thomas, if allowed to become Justice Thomas, would not take a legal and scholarly approach to any matter up for decision based on the facts and law as applied to that particular case in the context of the constitution. He will bring a commitment to fairness, openness and justice to the deliberations before the U.S. Supreme Court.

Under the Constitution of the United States, the Advice and Consent of the Senate are a must before this nominee or any nominee is confirmed to assume the public office to which he or she has been appointed. We are well aware that the Senate sacredly guards the authority and

scrutinizes nominees with the utmost care. During the course of the hearings, you have, I believe, sought to carry out your constitutional mandate in a responsible and fair manner.

The great furor over Judge Clarence Thomas's nomination to the Supreme Court of the United States centers around the fact that the "civil rights" issues are no longer in the forefront of American politics. This fact or turn of events did not come into being because of Clarence Thomas, one way or the other. In Harold Cruse's book, "Plural But Equal,"[1] page 385, he expresses the matter thusly:

> "Civil rights justice for all intents and purposes of the United States Constitution have been won; there are no more frontiers to conquer; no horizons in view that are not mirages that vanish over the hill of the next court decision on the meaning of equal protection."

This fact creates an exasperating situation for the agenda in the traditional Black Establishment. In the whole of the "Eighties," they have literally been trying to "reinvent the wheel" so far as Civil Rights justice is concerned. And yet, there are other durable and legitimate options and approaches for the cause of justice and equality. For them, there is no other course of action to follow. Frederick Douglas called it "delirium of enthusiasm with the inability to distinguish between the "see and real." As Douglas further said: "The pen is often mightier than the sword and the settled habits of a nation mightier than a statute."

Senator Biden, as Chairman of the Judiciary Committee, and to your fellow committee members, the most noble thing you could do to bring "Black Americans" into the mainstream of American life, is to recommend Judge Clarence Thomas for confirmation to the Supreme Court. Such is beneficial for all Americans, particularly minorities. Unfortunately, a substantial measure of astute individuals have demonstrated a confused and misdirected consciousness which remains detached from the body politic in America. Do for us and them what these individuals are incapable of doing for themselves, for your decision will wed to generations to come a proper relationship for those whose ancestry bore the burden of labor in the foundation of this democracy.

Very truly yours,

[1]William Murrow, New York, 1987.

Senator THURMOND. He held the same position, I believe, Ms. McPahil, as you hold now; is that correct?

Ms. MCPAHIL. No, Senator, it is not correct.

Senator THURMOND. He was president. You are president now.

Ms. MCPAHIL. Yes. With all due respect—oh, you mean he had the same—yes, he held——

The CHAIRMAN. At one time he did.

Ms. MCPAHIL. He was in the position.

Senator THURMOND. Yes, of the National Bar Association.

Ms. MCPAHIL. But let me make clear for the record that only one person may speak for the National Bar Association and that is its current president.

Senator THURMOND. You are the president now of the National Bar Association, aren't you?

Ms. MCPAHIL. Yes, sir.

Senator THURMOND. Well, he was the president evidently several years ago.

Ms. MCPAHIL. Several years ago.

Senator THURMOND. So I just want to place that in showing there is a division in your association as to how you stand on this matter.

Ms. MCPAHIL. Yes, sir. Mr. Duckenfield is certainly free to express his opinion as a private citizen, but not as a representative of the National Bar Association.

The CHAIRMAN. I don't believe he purports to speak for the National Bar.

Ms. MCPAHIL. Thank you.

Senator THURMOND. The hour is late, and I have no questions. Thank you very much.

The CHAIRMAN. Thank you.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

If I could get real fast answers from each of you on this: Ms. McPahil has told about the National Bar Association and the division there, if I may ask each of your—Reverend Taylor, I don't know if you are speaking for your organization or not.

Reverend TAYLOR. Yes.

Senator SIMON. Was this a close vote, an easy vote, marginal in the authorization for you, Ms. Aiyetoro?

Ms. AIYETORO. Senator Simon, I have to answer it this way: It was a very difficult vote, because we had to deliberate and some of the questions I raised were questions to you all, we had to raise for ourselves, the importance of him being a black man, but our board voted unanimously to oppose.

Senator SIMON. OK. Mr. Hou.

Mr. HOU. Senator Simon, I think for the NAPABA's position, what had happened is that each of the local Asian bar associations that comprise NAPABA engaged in extensive debate and discussion at the local level, from there moved up to a regional level, and then ultimately up to the national board level, where the final vote was taken.

During the process, I think, as an organization, we did a very thorough review of all of Judge Thomas' decisions, his record at EEOC, at DOE, and through that process we also talked to various people who knew Judge Thomas in various capacities, and as a

result of that entire process, we ended up voting to oppose. I think it was a pretty thorough discussion, but the actual vote I don't believe was that very close.

Senator SIMON. OK. If I can ask the rest of you to be a little more brief, because I am trying to get a couple more questions in here.

Ms. Seymore.

Ms. SEYMORE. The annual conference of the National Black Police Association, our general assembly instructed the national board of directors to make a decision on the Clarence Thomas nomination, and it was a close vote.

Senator SIMON. Mr. Schulder.

Mr. SCHULDER. No, it was not a close vote. Our organization opposed his nomination to the court of appeals and it was easy to oppose this nomination.

Senator SIMON. Ms. Axford.

Ms. AXFORD. Ours was not a close vote, either. There were only several people who were not willing to oppose, and the central issues had to do with the future issues that were coming up, particularly waiver of constitutional and statutory rights, and our major concerns about his opposition to class actions.

Senator SIMON. Reverend Taylor.

Reverend TAYLOR. The majority of our organization voted against Clarence Thomas.

Senator SIMON. Was it a close vote?

Reverend TAYLOR. No, no.

Senator SIMON. OK. Mr. Hou. We have had how many witnesses, Mr. Chairman, or will have?

The CHAIRMAN. We are getting close to 90 when we finish—I am sorry, through today we will have had about 60 witnesses so far.

Senator SIMON. Sixty witnesses, and to my knowledge, you are the only Asian-American who will be testifying; is that correct?

The CHAIRMAN. I think that is true. I don't know that.

Senator SIMON. Are there any other Asian-American organizations that have taken a stand in this, do you know?

Mr. HOU. I am aware that the Organization of Chinese-Americans, which is a national organization, has taken a stand to oppose the nomination. I am also aware that Chinese for Affirmative Action, which has a long history as a civil rights organization, voted to oppose him.

Senator SIMON. Mr. Schulder, on page 9 of your testimony, you have something here that I don't believe I have read before, and it gets to the whole question of whether Judge Thomas sides on the side of privilege or with people who have great need. It talks about a closed session, where he is speaking. What is your source for this closed session?

Mr. SCHULDER. The transcript of closed sessions are made available to the public, they are public documents and that is the source of this, and what it does show is that Judge Thomas, indeed, was speaking from the vantage point of employers, rather than the workers in the Xerox case.

Senator SIMON. I thank you.

In connection with your testimony, I notice you have attached a very strong statement from the AARP, too, that ought to be entered in the record, if it has not been.

The CHAIRMAN. Without objection.

Senator SIMON. I thank you all, particularly Reverend Taylor, and we thank you all for sitting so long before you get a chance to testify.

The CHAIRMAN. Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman.

Thank you for your understanding of our agenda today and the time we take, regardless of what members of the panel may think. We have taken a great deal of time with this issue, because of the sensitivity of the chairman and the ranking member, and that is the way we do our business. I think that is quite evident.

You know, I was interested in the National Bar Association and the closeness of the vote. Was that a public vote? I mean did people stand and put their hand up, or was it a closed ballot?

Ms. MCPAHIL. Well, the session was closed, but it was by ballot.

Senator SIMPSON. Secret ballot.

Ms. MCPAHIL. People did stand and speak for and against, so you knew pretty much who was for him and against him, but it was a secret ballot and the session was closed to the press.

Senator SIMPSON. If it was not a secret ballot, I only ask you if this is the case, how did you vote?

Ms. MCPAHIL. How did I vote?

Senator SIMPSON. Yes.

Ms. MCPAHIL. Well, Senator, I considered that I might be asked that question and it troubled me, because I am here as the president of the National Bar Association and, as its president, I must represent its vote. Were I to respond to that question, then I suppose, if pressed, I might, there would be at least half of the members of my organization who would be very disturbed about that, so I would appreciate not being asked to respond to it, but I would, if you insist.

Senator SIMPSON. I understand that fully. We will end that, but we won't quit here now.

I wanted to ask Ms. Aiyetoro: You say some pretty tough things, pretty harsh about Judge Thomas. For example, "President Bush's nomination of Judge Thomas to fill the seat vacated by Justice Marshall is an insult, not only to people of color and women, but to the legacy of Justice Marshall." That is pretty tough stuff, in my mind. You make it all sound that all people of color and women find Judge Thomas' nomination an insult. It is difficult for me to see how you purport to speak for 58 percent of the black Americans that, in a September 16, 1991, ABC opinion poll found supporting Judge Thomas and his elevation to the Supreme Court.

Your testimony also refers to the *Griggs* v. *Duke Power*. That case held that plaintiffs may prevail in a title VII discrimination suit, if they show that an employer's facially neutral employment practices were causing significant statistical disparity in their workplaces. You note the certain EEOC guidelines that attempt to inform employers about how this case applies to them, and then you say, "Judge Thomas, as the EEOC Chair, attacked the guidelines, because, in his view, they encourage too much reliance on

statistical disparities as evidence of employment discrimination," and then you claim, "Thomas attempted to make proof of discrimination insurmountably difficult, with total disregard for current law."

I respectfully say that I think that you have misread current law. Current law does not allow a disparate impact suit to be based on statistics alone. It requires that plaintiffs demonstrate how certain employment practices cause the statistical disparity.

In fact, even in our colleague's civil rights bill of last year, Senator Kennedy, about which I have very strong concerns, he stated the following: "The mere existence of a statistical imbalance in an employer's work force, on account of race, color, religion, sex or national origin is not alone sufficient to establish a prima facie case of disparate impact violation."

Are you then telling us that Judge Thomas is wrong, that statistics alone are sufficient to establish that type of impact violation? Is that what you are saying?

Mr. AIYETORO. No, Senator Simpson, that is not what we are saying. I would like to respond, if I can, to several of the statements that you made. First of all, we don't purport to speak for all black Americans. Our statement that the nomination of Judge Thomas is an insult to the people of color, as well as to the legacy of Thurgood Marshall, is that our assessment of what has happened to black Americans and African-Americans in this country is one that there is a need for someone who at least understands and supports remedies that will go to actually eradicating racism and the results of racism in the society.

It is our view, based on our review of the materials and Judge Thomas' position on a number of things that Judge Thomas, even though he has the background of being a black man raised in a situation of not as many resources as many others, is a person that has turned his back on the very remedies that our organization feels are essential, and it is not simply our organization, but any number of organizations who speak not simply for African-Americans, but people of color and women, so that we would not purport to do so.

As to the polls that you spoke about, one of the things that we have found, as we have talked to people about Judge Thomas' nomination, is that many people who were polled are really people who don't know about his record. I realize that, for many persons, it is hard to understand that, in fact, when a black man is appointed, even though, as Senator Biden said earlier, there was as certain number of people who reserved their position, that for many people, when they have not heard the full record, will support.

We have found, when we speak to people and talk to them about the record, they indeed either question whether we should support Judge Thomas or, in fact, go the other way. The margins are not that great.

The last thing, in terms of the issue of statistics, I am also a litigator and I do civil rights and constitutional law. What we are not saying is that Judge Thomas said that you can't totally rely on statistics, but Judge Thomas did not even want to utilize statistics at all in title VII cases. It is, of course, part of title VII proof, part of the statute itself is the statistical evidence is very much a part of

the case. That is not 14th amendment law, in many ways, but for title VII it is.

When we criticize *Griggs*, at the time Thomas criticized *Griggs*, that was the law, so he indeed criticized and did not support the law as it existed at the time and that is the point we were making in our testimony.

Senator SIMPSON. Mr. Chairman, I just had one other question, if I might ask it.

The CHAIRMAN. Go ahead.

Senator SIMPSON. I would ask Ms. Axford, your organization criticized Judge Thomas for having only 17 months experience on the U.S. Court of Appeals for the District of Columbia. Have you, or have you, Ms. Aiyetoro, have you read his decisions while on the circuit court that he serves on?

Ms. AIYETORO. Yes, I have read some of them. I am not sure if I have read every single one of them. I have read a summary of every one. I have read some of them page to page.

Senator SIMPSON. Have you read the criminal decisions that he has given?

Ms. AIYETORO. I have read some of them. I have read summaries of all of them.

Senator SIMPSON. Are you aware that in the criminal decisions, and other on the panel have spoken to those, that there is not a single dissent in those criminal decisions, and Judge Ginsburg, Judge Pat Wald, and Judge Abner Mikva all unanimously supported Judge Thomas' opinions in that arena? Are you aware of that?

Ms. AIYETORO. That is not my understanding. In some of the——

Senator SIMPSON. It is the truth. It is not just an understanding. On the criminal cases, that is the way it is, so I think it is important——

Ms. AXFORD. Senator Simpson, before you——

Senator SIMPSON. Yes?

Ms. AXFORD. I have read the decisions and I am curious about what the relevance of that is to his performance and the questions before you today.

Senator SIMPSON. Well, I do not have time to ask those questions. I believe it was Mr. Schulder who said something about the criminal—one of you in your testimony spoke of the criminal cases and how they were not appropriate or they were not sensitive enough, and so and so. I am saying it must be so, that Judge Ginsburg and Judge Wald and Judge Mikva are not sensitive, either, because they supported totally his position. That I guess is what I am saying.

Ms. AXFORD. I don't know where you are getting the characterization.

Senator SIMPSON. You don't have to worry. Let me ask you a question. Then you can have rebuttal, if you wish. I will stick around all night.

You criticize Judge Thomas for a lack of experience, and yet he has had 17 months of experience on the U.S. Circuit Court of Appeals for the District of Columbia. I believe that is your statement.

Ms. AXFORD. Well, that is not totally correct. Not lack of experience, but inadequate experience, considering the position for which he is being considered.

Senator SIMPSON. OK. And can you tell me how much experience Earl Warren spent on the bench before being appointed Chief Justice?

Ms. AXFORD. No.

Senator SIMPSON. None. How much time did Justice William O. Douglas spend on the bench before being appointed to the Supreme Court?

Ms. AXFORD. I don't know.

Senator SIMPSON. None. How much time did the great liberal Justice Hugo Black spend on the bench before attaining the Supreme Court?

Ms. AXFORD. I don't know.

Senator SIMPSON. None. How about Felix Frankfurter? None. Justice Louis Brandeis, none, who first wrote about privacy rights, that I believe in just as strongly as I think Judge Thomas does.

I really find it hard to believe that your organization would have opposed those remarkable people. I really take it then, and I have the sense, especially hearing your testimony personally, that your opposition based on this issue of judicial experience is directed only at conservatives, and when it comes to liberals prior experience really is quite irrelevant. That is a—if that is true. Is that true?

Ms. AXFORD. No. In fact, I think you are making quite a leap of reasoning in order to make that conclusion. I am also concerned about you singling out one of the factors that we have mentioned; that is, what we consider to be not enough experience on the court, and comparing it with some of the fine jurists, conservative or liberal.

I appreciate your opportunity for me to be able to give you rebuttal on those issues, and I think that when you take a look at the general experience of all of those jurists, and you take a look at Judge Thomas' experience as it pertains to employment law, and my focus is truly in the area of employment law, we are deeply, deeply troubled by what he has said about employment law, about the impact on employment law.

And I would like to stay this evening and debate employment law, privacy issues, disability matters, seniority systems, limitation of damage awards, arbitration clauses, job performance issues, workplace restrictions—many, many issues related and the Supreme Court decisions as it relate to it. But, in deference to the others here, I don't think you and I will be able to do that.

Senator SIMPSON. Oh, but it would be fun if we could do that.

Well, I appreciate that. Those are serious issues to you and you speak with power when you speak of them. And, unfortunately, or fortunately, depending on your point of view, that is what everybody does here. So, if everybody just got the answer out of him or her, whoever would be before us, as to only the things that they were just terribly gut-hard interested in, we would never get anything done in here. Absolutely nothing, especially on the issue of abortion. The Miranda rights.

Go look at Thurgood Marshall and how beautifully he blunted Senator Eastland, how beautifully he blunted Senator Erwin as they kept asking, "What are you going to do with Miranda when you get on the Court?" And he said, "I will not answer that question." Nor should this man answer this question.

Those are areas of controversy, discord. There is no reason for him to answer it, and he won't answer it. And neither did Judge Thurgood Marshall answer it in a question that was just exactly as controversial.

Ms. AXFORD. Senator, how do you perceive the role of this committee vis-a-vis the advice-and-consent function? And how far do you think you can go to ask a candidate to answer a question?

For instance, I am a litigator also, and when there is a witness on the stand or, I imagine, in Judge Thomas' courtroom, how far would someone get if a witness doesn't answer the question?

Senator SIMPSON. Let me share with you, Ms. Axford, that no one even asked anybody anything for 100 years in this Senate. Nothing was asked of these nominees, not one single thing. In fact, one of them sat outside the door and tapped, like it was a secret session, and finally he said, "Do you want to see me or not?" and they said, "No, we don't." One of them was asked eight questions.

We have done this because I guess the people must like it. We respond to the people. We are representatives of the people. But let's understand what this process is.

Ms. AXFORD. But this process when Rutledge was being considered there were 5 months of debates in the press, and certainly the Pony Express may have had to have brought record of those, or the telegraph or whatever the technology was. But thank the Lord, we are making progress. There are Americans, millions across the Nation, who are watching this legal process with the same interest as they watch as "LA Law." And this is an important function to the legal system.

Senator SIMPSON. I would respectfully say that that is the way we lawyers look at the world, but it is not really the way the American public looks at the world because our job is one singular thing: To find out the character, the integrity, the honesty, the quality of this man. That is what our job is to find out. Not his philosophy.

In fact, under the American Bar Association rulings of qualified and well-qualified and all the rest, that is all we are seeking, and that is our job to seek too. That same thing.

The CHAIRMAN. Ms. Axford, I think he has answered your question. I think he is dead wrong, but he has answered your question. [Laughter.]

And so, rather than litigate this thing——

Senator SIMPSON. Well, we find some lapse of judgment in our chairman.

Ms. AXFORD. May I respond to one thing that he said, so that there is not a misunderstanding in my position on the record as the position of my organization?

The CHAIRMAN. Surely. You are just going to encourage the man now.

Senator SIMPSON. No, I won't. I won't. I won't. I promise. I have been very good. I think I have.

The CHAIRMAN. You have. You have. You have.

Senator SIMPSON. Thank you.

Ms. AXFORD. If you hear me as saying this is a matter of philosophy, I need to clarify. I don't think it is a matter of philosophy. It is a matter of concern about credibility. It is a matter of inconsist-

ency. And, in the courtroom when there is an inconsistency, and when there are witnesses that come up behind a chief witness and there is such inconsistency, and I think he said this, and someone else thinks he said that, then it is time to find out really what is thought.

And the philosophies of the jurists are going to be different, and I think that people on either side of the issue have to gain by clarity. I am concerned about the potential of executive branch influence preventing the purity, the truth, and the clarity of this man's thinking.

The CHAIRMAN. Thank you very much. I would point out for the record that the reason we didn't use to ask questions is they use to just summarily vote against nominees based on their philosophy. I am one who thinks philosophy always has been taken into account. The more the President takes it into account, the more the Senate historically has taken it into account. When he doesn't, the Senate doesn't. When he does, the Senate does.

And I might point out just for the record—I can help the Senator—Earl Warren, he asked about Earl Warren, was Governor of the State of California for 10 years. He was a Vice Presidential nominee in the Republican Party. He was a district attorney, and he had a distinguished legal career.

Justice Felix Frankfurter was assistant attorney for New York.

Senator SIMPSON. Well, Mr. Chairman, I really don't need that rehabilitation. I was talking about the issue of judicial experience. I know what those men did. I will take judicial notice of that.

The CHAIRMAN. Right.

Senator SIMPSON. I don't know what is appropriate about that. I was responding to the issue of judicial experience, and that is only what I was responding to.

The CHAIRMAN. I misunderstood you. Because the men you named, with the exception of Warren, were the most distinguished lawyers in America at the time they were nominated. The most distinguished lawyers in America by everyone's account.

Senator SIMPSON. Let the record show that I would concur with that, and let the record also show that none of them had one whit of legal judicial experience.

The CHAIRMAN. Now, having said all that, let me yield to—no, I am not going to yield to you——

Senator SIMON. I thought you were going to skip Senator Specter.

The CHAIRMAN. No, I wasn't going to skip him. You are looking out for him, and I appreciate that. I was looking to see if Senator Kohl had come in. He has not. I yield to my friend from Pennsylvania. The hour is getting late, and the Senator from Wyoming and I probably—we are good friends, and this isn't getting us anywhere.

Senator SPECTER. Ms. Axford, I agree with you that there are many people, I don't know if there are millions, who are watching this hearing at this moment. But had any chosen to watch you and Senator Simpson, it would have been better than "LA Law" for that last exchange. [Laughter.]

And, by the time we get to midnight, which is not too far away, this hearing could even become livelier.

Let me pursue for just one moment, Ms. Aiyetoro, the question of the decisions, and I don't want to place too much emphasis on it. But the case that you cite in your brief, *United States* v. *Rogers*, or that you cite in your statement, was a case with Judge Wald and Judge Ginsberg, who I think it fair to say are, at the minimum, not conservative or right-wing judges. And it involved a case where the prosecution offered some evidence of a prior conviction in a paper which was not objected to by the defense. And the court went into some detail explaining that it was a tactical decision, and in that context it could not be assigned as error.

And, as I read the case, I saw no problem with his decision. It was not suggestive of something conservative or right wing or extreme. I wondered if you had had a chance to see *United States* v. *Lopez*, which was not an opinion by Judge Thomas, but one where he was on the panel and one where I questioned him, because this was very much on the other side of the fence. This involved a sentencing and the Uniform Code prohibits taking into consideration socioeconomic factors.

And the U.S. attorney said that to take into account Mr. Lopez's background, his family, his home life, his dual—his approach from both Hispanic and a U.S. point of view, and Judge Thomas joined the court in allowing that to come in over the objection of the prosecuting attorney, which suggests some expansiveness.

So that I think that Judge Thomas' record shows some balance there. And his testimony was, in response to the question on activist, was the Warren court activist in giving defendants rights, he supported the Warren court. There is nothing in his writings that I know of, and I believe I have read all of this writings, that say anything to the contrary.

What I would ask you on the issue of qualification is how you would weigh the views you have expressed with the testimony of Prof. Drew Days who, although not in favor of Judge Thomas, said that he had the intellectual and educational qualifications, and Judge John Gibbons, formerly Chief Judge of the third circuit, who knew him as a member of the Holy Cross board and knew him for years, and Judge Gibbons, again, is not a conservative judge, he said he was well qualified, and Dean Calabrese of the Yale Law School who said he was at least as well-qualified as recent nominees.

How would you assess those evaluations compared to your own.

Ms. AIYETORO. I would first like to point out our concern with the criminal cases because the points you started off with was questioning the position on the criminal cases.

The concern that we have is not whether or not he agrees or disagrees with the other Justices on his panel. The concern we have is that of all the criminal cases that he has had the responsibility to write the decision, in all but one, in our understanding, or research, he has supported the Government's position. The Government's position that whittles down some of the rights of the defendant, and that is our concern.

We, I think, say, or I will say today if we don't, that clearly even though he has been on the bench 17–18 months he has not ruled on enough decisions to make a strong definite position on where he is

as a Justice, but it appears that he is leaning—in all but one he supports the Government, and that is our concern.

Senator SPECTER. Well, by supporting the Government's position that doesn't necessarily mean he is wrong. If it is *United States* v. *Rogers*, which you cite, I don't conclude that he was wrong there.

Beyond supporting the Government's position, are you contending that he was wrong in doing so?

Ms. AIYETORO. We think, Senator Specter, that because of the fact that the criminal arena now, the criminal justice arena now is disproportionately dèaling with people of color that it is important that procedural due process rights of the defendants get supported to the *n*th degree, to make sure that we are not convicting people who are not guilty and sending people to prison who are.

It seems to me, not that I disagree with this specific opinion, but the point that we were attempting to make is that even though Judge Thomas may have said, and he has said in several of the criminal defense opinions that he has authored, that indeed it was a problem, indeed the Government was wrong. But he finds harmless error.

And it is our opinion that we have to go further. We can't just say harmless error when you are looking a national prison statistic that almost 50 percent of the people that are incarcerated in this country are black and more than 50 percent are people of color.

And that is not to say that we think that he should go the other way and never uphold the Government, but that we feel that there has to be—that the harmless error issue becomes more and more problematic when you are looking at the kind of criminal justice system we have now. So that is our position.

The other point that I believe you asked me was whether or not—how I would view his intellectual capability, and you named other persons who had said that he was intellectually qualified. Our opposition to him is not based on whether or not he has the intellectual capability to be a judge. Not many people go and graduate from Yale who don't have the intellectual capacity to qualify to be a judge. We are not taking the position that he is unqualified because of that.

We are opposing him because of his record; because of his record in all of his public office that appears to undermine the right of people of color, women, and the disenfranchised. We take that position.

We take the position also, as I said in my oral testimony, that his testimony and his record also indicate someone that is not really 100 percent aboveboard in many ways, and we've given examples of that. For those reasons, we oppose him. Not because he is not smart enough. Not because he didn't go to law school. Not because of anything else, even though we think that he doesn't have the kind of stellar background that many other justices have.

Senator SPECTER. One final brief question, if I may, Mr. Chairman.

The CHAIRMAN. Yes.

Senator SPECTER. Reverend Taylor, you said in your statement that Judge Thomas has not, in his years of public service, conducted himself as one who can think clearly for himself. Did you see

his testimony or any part of his testimony during his 4 days before this committee?

Reverend TAYLOR. Yes.

Senator SPECTER. And after seeing that, you think he cannot think clearly for himself?

Reverend TAYLOR. Well, his past issue has been to mimic the administration points of view, and I think he was doing that in the hearing by evading questions that were put before him.

Senator SPECTER. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. I wish all the witnesses would stop inflating the Senator from Pennsylvania's ego by suggesting that you have to be smart to have graduated from Yale Law School. The last panel said something complimentary about him. From now on, the Chair rules, no more complimentary comments about the Senator from Pennsylvania.

Senator SPECTER. Yale has done very well at these hearings.

The CHAIRMAN. In a sense that it's been present, it has. Now with that, I thank the panel very, very much.

Mr. SCHULDER. Mr. Chairman, before we leave, could I enter into the record the statement of two older persons, Ray Albano and Georgiana Jungels, who came here—one from Seattle, one from Buffalo—to give testimony on ADEA treatment of their work and were unable to testify? They've asked me to ask you to submit it for the record.

The CHAIRMAN. Without objection, it will be submitted for the record.

Mr. SCHULDER. Thank you.

[The statements of Mr. Albano and Ms. Jungels follow:]

Statement of Ray Albano
on the Nomination of Judge Clarence Thomas
To the U.S. Supreme Court

Senate Judiciary Committee
September 19, 1991

My name is Ray Albano. I'm 60 years old, and I live in Seattle, Washington. I would describe myself as politically conservative. I have never voted for a Democrat for President, and the only Democrat I ever did vote for was Scoop Jackson. I have served as leader of the 21st District Republicans in Snohomish County, and as a Lynwood City Council member.

Seven years ago, I became the victim of age discrimination. What happened to me at the EEOC under the direction of Clarence Thomas is why I oppose his nomination to the U.S. Supreme Court. The EEOC did all it could to not help me. That agency did everything possible not to enforce the very law that it was charged with enforcing. in fact, the EEOC let the statute of limitations run on my claim, and it is only because of a special act of Congress and my own persistent efforts that I have gotten anywhere. And I know that my experience was not unique.

From 1973 to 1985, I worked as a sales representative for a major corporation. In 1983, I found out that the company had a plan to force out its older workers. Their plan became very real to me when I was denied a promotion. I was the most qualified candidate for the job, and the person selected was not even 25 years old. I asked to be

considered for another position, but was told that this was not a possibility either. I was told that both jobs were "young men's jobs."

I have degenerative arthritis, and in 1984 I had my hip replaced. For about two weeks, I was in the hospital, and I was on medical leave from October 1984 until January 1985. During this time, my employer expected me to carry a full workload. In fact, the day after I was released to return to work, my supervisor put me on probation, citing poor work performance. He also moved several of my key accounts and reduced my commissions. He told me that I would now have to call on retail stores, and I would have to help build displays for these stores. This meant carrying and lifting heavy cases -- work that was very painful and difficult for me because of my surgery. I was told that I had to do it -- I had no choice -- if I wanted to keep my job. I was so scared and upset that I would go home at night and cry. I couldn't afford to lose my job, and I tried to do the best I could, but every day, my supervisor would find something else wrong with my performance. Finally, I decided that I had no choice but to file an age discrimination charge.

I went to the EEOC in February 1985. I told them about the promotions I had been denied and why I believed it was because of my age. I told them about the company's plan to fire older workers. I told them about my surgery and the pressures placed on me during my medical leave. I told them about being placed on probation and my commissions being reduced the day after I came back to work. I told them that I had been given a job assignment that I found almost physically impossible to do, and that I

had a doctor's letter confirming this. I told them that I believed that my employer was harassing me to make me quit my job.

Despite all this, all the EEOC would do is put a claim of a denied promotion in the charge. They told me that I would be assigned an investigator and I could tell the investigator about all the harassment. I tried to discuss it further, but got nowhere. I was told to sign the complaint as it was drafted, so I did.

In late February 1985, I tried to discuss the harassment with the EEOC investigator. In fact, conditions at work had gotten worse. I was told, however, that I could not amend my claim.

Finally, all the abuse at work took its toll. I couldn't handle it any more -- either physically or emotionally -- and so I left my job on March 1, 1985. A few weeks later, I called the EEOC to tell them what had happened. I again asked if the charge should be amended to reflect the harassment. I was told that was not necessary.

Altogether, I had about 14 conversations with the EEOC. I had to initiate every call; they never contacted me. In many of these conversations, I tried to discuss the harassment and whether I needed to amend my complaint. Each time I was told no. I never received anything in writing from the EEOC telling me what was happening with my case. Finally, in February 1987, the EEOC told me that they were not going to do anything about my charge, and that it was too late to file suit.

I didn't do anything after that, because I thought there was nothing I could do. Then, I heard on the news that Congress had extended the statute of limitations for Age Discrimination claims. So, I found a lawyer, who filed suit for me in federal court. I lost. One of the reasons was that the statute of limitations had run.

I appealed my case to the Ninth Circuit Court of Appeals, where I finally won. On August 30, 1990, the court ruled that my suit could go forward. Finally, I have a trial date set for next April. The Ninth Circuit ruled that I had done all that could reasonably be expected to protect my rights, and that the EEOC had been at fault.

I flew here from Seattle because I think I have an important story to tell. I know that what happened to me at the EEOC was not isolated or unique. In fact, one of the EEOC case workers told me that they were simply following policy from Headquarters. They had received memos from Washington, D.C. telling them to get rid of their cases as fast as they could. And I was one of the many victims. As head of the EEOC, Clarence Thomas tried to gut the very law he was charged with enforcing. His record makes me question his respect for established law that may be at odds with his personal beliefs. I am here to oppose his confirmation to the U.S. Supreme Court.

Statement of GEORGIANA JUNGELS
on the Confirmation of Judge Clarence Thomas
to the U.S. Supreme Court

Senate Judiciary Commitee
September 19, 1991

My name is Georgiana Jungels. I have worked for over 30 years as a teacher, and since 1974 I have been a professor at the State University of New York.

I am here to describe my experience with the EEOC under the "leadership" of Clarence Thomas and the personal toll it took on me. I'm a college professor. I've worked for a long time. I've learned how to combine a career and four children. I've learned a few things. But a person can't work 7 days a week. A person cannot and should not have to constantly monitor a public agency to make sure it does its job. When I filed my complaint with the EEOC, I believed that this agency would do what it is supposed to do -- help victims of employment discrimination. It did not. From the very beginning, my case was mishandled.

In February, 1985, I filed an age and sex discrimination claim against my employer with the EEOC. My employer had eliminated my position as director of a graduate studies program. However, four months later, this position was "recreated" and filled with a male. Later, it was filled with a younger woman. The very first letter I received from EEOC was addressed to "Miss Jordan." I don't know who that is, but clearly that is not me. I notified the Buffalo office of the error, and they sent me a corrected letter. In that letter, the EEOC stated that the initial investigation would be

done by the New York State Division of Human Rights, and that I would be hearing from this agency in the near future. Ten months went by and I did not hear a thing. So I called the regional director of the New York Division of Human Rights. He told me that what the EEOC had told me was totally incorrect. He told me that, in fact, EEOC had asked the Division of Human Rights to waive their right for initial investigation so that the EEOC could do it themselves.

At that point, I called the director of the EEOC local office in Buffalo. I asked him three very simple questions. One, what had been done to date; two, what was going to be done; and three, when would it be done? I was told that my case was "under investigation," and there was nothing further they could tell me. At the same time, I got correspondence from them with incorrect charge numbers. I wrote back with the correct information.

Every time I called, the EEOC Buffalo office told me that my case was under investigation. Each time, I asked for a clear plan of action. At the point when there was only four months remaining before the end of the statute of limitations, I asked what they were going to do. At this point, I asked both Senator D'Amato's office and Senator Moynihan's office for some assistance.

The Senators contacted the EEOC on my behalf, and I think they were as shocked as I was by the response. Basically, in the entire eighteen months, nothing had been done. For example, the EEOC had requested some information from my employer, but then did nothing at all with it. And their only response was to ask for my forgiveness.

I continued to contact the EEOC. I continued to ask for information. They told me that they had misplaced my file. Did I have a copy of the original charge? I Xeroxed the original charge. I forwarded it to them, and I asked if I could look at my file to make sure nothing else was misplaced. And I was told that I was not allowed to do that. To date, I do not know whether or not the thousands of pages I have submitted to the EEOC Buffalo office are, in fact, in my file, or if they, too, have been misplaced.

Eleven days before the statute of limitations was to run, I met with the director of the local regional EEOC office. I was told: "You must go into court yourself. There's nothing we can do on your behalf. You don't need a letter. You just go do that yourself, or you will have given up your right to equal protection under the law." I asked for a response to the same questions I had been asking for 2 1/2 years: "What have you done; what will you be doing; and when will you be doing it?" And I was told that it was the policy of the EEOC not to respond to such questions in writing.

On the very last day before the statute of limitations was to run, I went down the U.S. District Court in Buffalo, New York. With considerable assistance from the Clerk of the Court, I tried to fill out the necessary papers to file a complaint. I sent a copy of what I had filed to the director of the EEOC Buffalo office. Monday morning -- the very next working day -- he called me. He said, "You have filed the wrong form." I said, "Pardon me. I filed the form that I was advised to file by the District Court Clerk." He said, "I think it's the wrong form." I said, "Well, thank you for calling me and bringing this to my attention. I will call the Clerk."

And so I spoke with the Clerk -- who, I must add, had spent an hour and a half

reading through a book that was an inch and a half thick in order to advise me appropriately on how to file my complaint. He told me that the forms I had used were the only ones they had. He told me not to worry. If the Judge finds an error in the form, he would advise me and it would be corrected.

I believe that the EEOC's repeated delays and failure to act on my behalf sent a very clear message to my employer. That message was: "Do as you please." And my employer listened. During this time, I was assigned the highest workload of any faculty member in the entire state university system. While on sick leave for a physical injury, my employer sent me letter after letter and made phone call after phone call to me at home, demanding that I respond immediately. I reported all of this to the EEOC, and they did nothing.

When I returned to work, the harassment escalated. I was even disciplined for questioning my employer's treatment of me! I filed a retaliation charge with the EEOC. Four months later, with apparently no investigation, the EEOC dismissed this charge.

What I want to underscore is that instead of acting as my advocate, the EEOC functioned as an obstacle. Instead of removing the prejudice in my workplace, the EEOC sanctioned it. While mine is a single story, it has been multiplied thousands of times. When I heard that President Bush had nominated Judge Thomas to the Supreme Court, I couldn't believe it. And now I'm here to question why the U.S. Senate would confirm someone who failed to follow the very law he was charged with enforcing.

The CHAIRMAN. Now our last, but clearly not least, panel. We've combined two panels. After consultation with Senator Thurmond we've combined the two panels. Our next panel, which is the 10th panel today and the 12th panel. Each of these witnesses is testifying in support of Judge Thomas' nomination.

They are Ed Hayes, attorney for Baker & Hostetler here in Washington DC, who is here on behalf of the Council of 100. And David Zwiebel—I hope I am pronouncing it correctly—who is general counsel and director of government affairs at Agudath Israel. And John Palmer, president and chief executive officer of EPD Enterprises; the largest food service management operator in the four states of Kansas, Missouri, Iowa, and Nebraska. And J.C. Alvarez, who is vice president of River North Distributing in Chicago, IL. Ms. Alvarez worked with Judge Thomas while he was on Senator Danforth's staff and while he was at the Department of Education, as well as when he headed EEOC.

Welcome, all. Why don't you begin your testimony in the order in which you've been called.

Excuse me, the Senator from Alabama.

Senator HEFLIN. There are some witnesses that I know from my State that were unable to come that were on the witness list. I assume that the statements of any witnesses who were on the witness list can be admitted into the record.

The CHAIRMAN. Yes, they will be. They'll all be admitted.

[The prepared statements referred to follow:]

Remarks by United States District Court Senior Judge Jack E. Tanner Before the United States Senate Judiciary Committee Upon the Nomination of Judge Clarence Thomas To Be An Associate Justice of the Supreme Court of the United Sates.

I was born in Tacoma, Washington, and I have lived there all of my life. I came from a family where my father was involved with the immigration of longshoremen and seamen on the Pacific Cost of this country. My father was a personal friend of Harry Bridges, the longtime leader of the Waterfront workers. I was a baseball player, and I thought good enough to play professional baseball except for the color line.

I became a member of the longshoremen union in Tacoma just before I went into the Army in World War II. I, of course, was a member of an all Black unit with white officers. We were known as one of those "Jim Crow" units in the armed forces of the United States. But, it was because of my experience in the army that caused me to go to law school. I went to law school under the GI Bill.

After law school I went into private practice. I represented anyone and everyone, including Blacks, Mexicans, Indians, and Orientals. I became a branch president of the NAACP, then an area President, then I served for seven years on the Board of Directors of the NAACP. I marched in the South, North, East and West in the civil rights demonstrations. I knew personally at the time all of the giants of the civil rights movement. I was a personal friend

of Medgar Evers before he was slain in Mississippi. I represented Indians in the State of Washington before the Supreme Court of the United States as to their treaty fishing rights.

I am a life member of the NAACP. I am a life member of the National Bar Association, and I am a member of the Judicial Council of the NBA as well as a Past Chairman of the council. I was one of the founders of the National Conference of Black Lawyers. I have received awards and recognition from all of these groups for outstanding contributions to the struggle for civil and human rights as well as for scholarship and justice in the federal courts. I have received recognition and awards from the National Association of Women Judges,and from the National Association of Blacks in the criminal justice system. I was honored by the members of the Federal Bar Association of the Western District of Washington for my contribution to fair play and justice in the Federal court.

I defer to no one as to the understanding and contribution to the ongoing struggle of men and women of all colors for civil rights and human dignity.

I think that I should say here that recently I have been appearing as a speaker at several grade schools in the State of Washington. The schools where I attended contained students of all

colors and backgrounds. I was amazed at the reactions to me when I appeared in my black robe. Their reactions and the responses of their parents was the most satisfying experience that I have had while on the Federal bench, and I am now in my fourteenth year of service.

My father was and I was, before I became a judge, active in Democratic politics.

I am here because of the most intense, unprecedented and harsh opposition, in the history of this country, to a nominee to the Supreme Court of the United States. The attacks have now also shifted to members of the Senate. There is no logic or reason for the attacks, whether from the right or the left. They are emotional attacks, based solely upon passion and prejudice, neither of which has any relevance to the qualifications or fitness of the nominee. I am most concerned with the concept of fairness and justice, which are the very foundation of our system of jurisprudence. These remarks that I am making are my own and do not purport to represent the view of any other person or organization.

I am also concerned because, I, too, appeared before this Committee under somewhat similar circumstances. I was the first Black person West of Chicago and North of San Francisco ever nominated as an Article III Judge. I was nominated by Senator

Warren G. Magnuson, the Chairman of the Senate Appropriations Committee. He formerly was, as several of you will recall, Chairman of the Commerce Committee, the committee where Civil Rights Legislation in the 1960's originated.

My nomination was immediately opposed by certain factions in the State of Washington. The opposition was led by a local newspaper. Senator Henry M. Jackson, concerned about the nature of the attack against my nomination, appeared at a news conference in Seattle and denounced the attack. Senator Jackson said that the attack against me was "only because he is Black" . . . "that, if Tanner was white, there would be no opposition to his nomination. . ." I think that I should say here that not one member of the Senate voted against my nomination.

As you know, Senators Jackson and Magnuson were both lifelong Democrats and ardent supporters of Civil Rights and human dignity for all. Both of them would know and understand why the President appointed Judge Thomas, and they would also understand that the President would not have nominated him if he was not qualified and fit to be an Associate Justice of the Supreme Court of the United States. There never has been a President of the United States who ever appointed a Black person to high judicial office or any other high office, when the person appointed was not qualified to do the job. That doesn't happen in America.

Several organizations have announced opposition to the Thomas nomination for a variety of specious reasons. He doesn't understand and appreciate the Black Experience, or his views on Civil Rights are inconsistent to Hispanics; he holds views dangerous to the rights important to Hispanics; he would undermine equal opportunity; he would oppose abortions for women. They say that he is opposed to quotas and affirmative action although he owes his own status to that policy; and, he is bent on, and espouses, a radical philosophy; that he doesn't like Jews, or labor organizations; that he is indifferent to the concerns of the elderly people; that he favors Catholicism over other religious faiths; that he does not fully understand the legal merits of issues; that he would sabotage the very laws he is supposed to enforce; and, that constitutional and statutory rights that Americans have enjoyed for years would be obliterated by a single stroke of his pen. It is also feared that he will apply "natural law" to deprive untold numbers of Americans of their life, liberty and property. The great debate among legal and political philosophers goes on and on. It means different things to different people. If you believe in either judicial activism or judicial restraint, right or left, then take your choice. One's viewpoint probably depends upon whose ox is getting gored.

The race to denounce the nominee has reached also a "lynch mob" atmosphere. The objective and goal of the opponents of the nominee is obvious, and that is to convince the Senate of the

United States that the nominee is not fit politically and ideologically to be an Associate Supreme Court Justice. There are, perhaps, some who are acting in good faith in opposing Thomas' nomination, but, at least, they are confused. They seem to believe that America is now at long last color blind, but the facts and reality are to the contrary.

The opponents of Judge Thomas' nomination are concerned that he might do this, or he might do that, or his confirmation will lead to some ideological shift in the Supreme Court, or that he is somehow outside the mainstream of legal thinking in this country, just because they do not agree with his sense of values or judicial philosophy, whatever it is that might be. Judge Thomas has sat, as a member of the United States Court of Appeals for the District of Columbia, for 19 months now, and his judicial philosophy is still uncertain and unknown. Yet, about 96% of the cases decided by that court are final decisions. What is certain and known about Judge Thomas is that he is independent and can't be put into a category. He is just where he should be. Speculation and hysteria, as to what the nominee might do, should not disqualify him from the Supreme Court. After all, no other nominee has ever been disqualified for such reasons. Judge Thomas understands, very well, the rule of law.

Let me take just a moment to explain to the members of the committee why I maintain that the opposition to the nominee is ill-

conceived and ill-advised. Most, if not all, of the opponents to Clarence Thomas' nomination appear to base their opposition upon what he might do to destroy or blunt a particular cause or program that they are interested in at the moment. They have been referred to at times as "special interests."

Where were those opposition leaders when former President Reagan nominated Chief Justice William Rehnquist? Where was the opposition when President Reagan nominated Justice Sandra Day O'Connor, or when Reagan nominated Justice Antonin Scalia? Where were they when President Bush nominated Justice Tony Kennedy and Justice David Souter? For the most part, they were silent, or at best offered only token opposition. But, the National Association for the Advancement of Colored People (NAACP), one of those groups opposing the current nominee, vigorously endorsed Justice Tony Kennedy and accepted him with open arms. Surely these organizations do not believe that their cause will fare any better under Justices Rehnquist, O'Connor, Scalia, Kennedy and Souter. Most were Appellate Court Judges, and all were nominated by a Republican President.

I realize, of course, that there is one obvious difference between Thomas and the previous nominees to the United States Supreme Court.

In my opinion, these groups are saying, and I include all those groups opposing Thomas' nomination, that we just do not trust Judge Thomas because he is a Black man. Support for this position comes from the prevalent view in America, and it is caused by the ravages and comes from the vestiges of slavery and the infamous Black codes which followed. The coloreds, (or Negroes, Blacks or African - Americans if you will) could not be trusted with responsibilities and obligations that affected the armed forces, judicial, political, social and educational institutions of America. They could not be trusted to fight in the many wars of this country, although they did, and with courage and valor, and so it stood to reason that they could not be trusted with the life, liberty and property of white Americans.

In 1948 President Truman issued an executive order eliminating segregation in the armed forces of the United States. That order was the best thing that happened to the descendants of slaves since the Emancipation Proclamation. By that order Truman, in effect, acknowledged that Black members of the armed services could be entrusted with the security of America against all foreign powers. In 1949 President Truman appointed, for the first time in the history of the United States, the first Article III Black judge. He appointed William Hastie to the Third Circuit Court of Appeals. In 1955 the Supreme Court of the United States handed down the opinion of Brown v. Board of Education, the greatest decision ever handed down by the Supreme Court at any time in our history.

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Thurgood Marshall was rewarded for his great victory in that case when President Lyndon Johnson nominated him to the Supreme Court of the United States. Once again, it had been recognized by the country that the Black man could be trusted.

Despite these significant strides toward equality, it was not until 1969 that a Republican President ever appointed an Article III Black judge. But, Richard Nixon did not make appointments of any Black to the Supreme Court, or to any of the United States Courts of Appeal.

In 1991, the United States went to war in the Middle East. The chairman of the Joint Chiefs of Staff of the Armed Forces of the United States was one Colin Powell, then a four-star general and a Black man as well. President Bush, as Commander - In - Chief of the Armed Forces, trusted the integrity, loyalty, training and experience of General Powell. He was, in fact, entrusting the security of the United States to a Black man. History will show that trust was well placed. It is my judgement that history will repeat itself, and one day show that President Bush, the first Republican President to ever do so, was right in entrusting to a Black man, the job of safeguarding the life, liberty and property of all Americans, by nominating Judge Clarence Thomas to the Supreme Court of the United States.

It defies logic and reason to say that since a Republican President has discovered, in 1991, another qualified Black man, that he should be rejected because he is Black. I would challenge and reject the suggestion by anyone, that America and the Supreme Court of the United States should be denied, for any reason, the Black Experience in America in 1991, or in any other time as long as America exists as a free nation. Just because a President appoints a person who has the same political philosophy that he has, it does not follow that the person nominated is not qualified or fit to sit on the Supreme Court.

Judge Thomas is just as well qualified to become an associate justice of the Supreme Court as were the 102 white males, 1 Black male and 1 white woman who have heretofore come before this body for advice and consent. In fact, because he has had the Black experience, he is better qualified than all but 2 members of the Supreme Court.

Neither the proponents nor the opponents of Judge Thomas' nomination seem to acknowledge, perhaps, the most important consideration, at this time in our history, that qualifies a person to sit on the Supreme Court. That most important qualification seems to be the nominee's ethnic and religious background. It just didn't happen that Antonin Scalia was the most qualified person when he was selected for the Supreme Court. He just happened to be

the most qualified person of Italian descent. It just didn't happen that Sandra Day O'Connor was the most qualified person when she was selected. She was, however, the most qualified female at the time. Tony Kennedy just happened to be of the Roman Catholic faith, and presumptively opposed to abortions. David Souter is somewhat of a mystery, but an educated guess would place him squarely in support of the President's political agenda.

This Committee can believe the President of the United States when he says that, "Judge Thomas is the best man for the job." Just because he happens to be a Black man does not disqualify him nor should it by any test or criteria. It has only happened twice, in our history, that a Black man has been nominated. It is highly doubtful that any of us in this room will see it happen again.

It is my judgement that there are a great number of Americans out there, and, yes, there are people throughout the world, who are watching this great drama unfold. It is also my judgement that the great majority of those Americans, white, black, brown, yellow and red, and of all religions and faiths, want to see Judge Clarence Thomas sitting as an Associate Justice on the Supreme Court of the United States. They want to see fair play and justice done to this man. They want to be able to point to this man and say to their children that they too can aspire to the highest court in the land; that they too can expect fairness and justice; and that they too can put their hopes and dreams in America where the rule of the

law, and not of man, reigns supreme.

In conclusion, let me just say, that despite the vicious, unwarranted and unprecedented attacks upon the nominee, he still stands tall. He has exhibited more than just plain character while under fire. This Black man has exhibited sheer guts and willpower, above and beyond the call of duty to his country. He has displayed courage and valor, in the face of the bitter criticism and abuse heaped upon him. Such valor and courage, in the time of war, is rewarded in the Armed Services of the United States, by an award of the Congressional Medal of Honor. What could be a greater test of character than that displayed by the nominee.

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**STATEMENT OF REPRESENTATIVE ALVIN HOLMES,
A MEMBER OF THE ALABAMA HOUSE OF REPRESENTATIVES,
BEFORE THE JUDICIARY COMMITTEE OF THE
UNITED STATES SENATE
SEPTEMBER 19, 1991**

Mr. Chairman and Members of the Committee,

I express my appreciation to each of you for allowing this statement to enter the records of the Judiciary Committee of the proceedings of Judge Clarence Thomas' nomination to the United States Supreme Court.

First of all, Judge Clarence Thomas talks about his childhood as if he is the only black person who suffered racist insults. The fact of the matter is that every black American in the south withstood indignities of segregation and "Jim Crow." Each of us can share a story of humiliation during the U.S. apartheid in the deep south.

It is very unfortunate that Judge Clarence Thomas attempts to lift his experience above that of others in the black community and it should be insulting to the committee that Judge Thomas has used such pandering tactics to ingratiate himself with the committee.

What is different about Judge Clarence Thomas and the majority of the black community in the deep south is that thousands upon thousands of black people marched, demonstrated, went to jail, were brutally beaten and, unfortunately, there were some who gave their lives standing up for their dignity until the walls of segregation and humiliation came tumbling down.

If Judge Thomas was so insulted during his childhood by the indignities of segregation, then where was he during the sit-ins, the freedom rides, the confrontation with Bull Conner in Birmingham, the confrontation in Albany, Georgia, the marching in Mississippi, the Selma to Montgomery march, the great march on Washington for jobs, and the march in Memphis, Tennessee? Judge Thomas was not among the multitude, yet he criticizes black people in masses and civil rights organizations that chipped, and continue to chip, away at the scourge of

Page 2
September 19, 1991

discrimination so that our constitution can be a living document for all Americans. Obviously, he was not concerned about the freedom of blacks because he never participated in any civil rights movements in the country to my knowledge. Instead, Judge Thomas criticized black civil rights leaders as "bitching and moaning all the time."

In regards to affirmative action, the southern states have a long history of denying black people equal employment opportunities. If it were not for various laws, rules and regulations concerning affirmative action to give the blacks an equal chance, much would be left missing.

In the long history of most states in the nation, if it were not for different rules and laws dealing with set-aside programs and affirmative action, blacks would not have the opportunity to participate in the economic prosperity of this nation.

Further, Judge Thomas has taken a strong position against United States Supreme Court decisions dealing with the rights of poor and disadvantaged people. Judge Thomas states that he was once poor and now, since becoming successful, he, in my opinion, has turned his back on the poor and the disadvantaged of this country. There exists no positive record, to my knowledge, that Judge Thomas put forth any efforts to help the poor, the discriminated, the destitute, the old, and the black people of this nation.

I feel that, once on the Supreme Court, Judge Thomas will lead the Court on all civil rights matters. That his voice will be used to permit extreme discrimination to re-emerge. Moreover, if Judge Thomas is approved for the Supreme Court, in my opinion, it will send the wrong message to young black Americans that the way to be successful in life is to criticize the civil rights movement and civil rights leaders of this country and cater to the extreme conservative elements of this country that have always taken the position against the quality and freedom of black people.

Mr. Chairman and members of the Committee, thank you for allowing this testimony to enter into the records of your proceedings.

Please vote against Judge Thomas' confirmation.

Rep. Alvin Holmes
State Representative and Chairman
of the Affirmative Action Committee
of the Alabama Legislative Black Caucus

NACDL

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REPORT ON THE NOMINATION OF
JUDGE CLARENCE THOMAS
TO BECOME AN ASSOCIATE JUSTICE
OF THE U.S. SUPREME COURT

**Adopted unanimously by the NACDL Board of Directors
August 17, 1991.**

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Report on the Nomination of Judge Clarence Thomas to Become an Associate Justice of the Supreme Court of the United States

On July 1, 1991, President George Bush nominated Clarence Thomas, a Judge of the United States Court of Appeals for the District of Columbia Circuit, to fill the vacancy on the Supreme Court of the United States created by the resignation of Associate Justice Thurgood Marshall. The NACDL opposes the nomination of Judge Thomas to serve on the Supreme Court.

1. Why NACDL Cannot Support the Nomination of Judge Clarence Thomas to the Supreme Court. Certainly, NACDL cannot affirmatively endorse this nomination. While Judge Thomas appears to have the intellect, temperament and legal ability to serve on the High Court, he has not clearly demonstrated a professional commitment to the ideals of individual liberty and justice for which the Association stands, particularly with respect to the rights of the criminally accused. Since becoming a lawyer, Judge Thomas has apparently never represented a private individual, much less an accused criminal. Nor has he otherwise shown particular concern for enforcing the rights of the individual against assertions of state power. It is not nearly enough that his appointment would help somewhat to restore the loss of critical diversity of personal background and life experience among Members of the Court occasioned by the resignation of Justice Marshall.

Except for two years as an in-house attorney for the Monsanto chemical company, Judge Thomas has always chosen to work for the state or federal government; his earliest responsibilities with the office of the Missouri Attorney General upon graduating from Yale Law School in 1974 involved arguing criminal appeals for the state. (To our knowledge, he has never either tried a case or presided over a trial as a judge.) As discussed in the reports of leading civil rights groups, his tenure as Chair of the EEOC raises serious questions about his devotion to the law and legal process, especially as regards the system of checks and balances among the three branches of the federal government. Judge Clarence Thomas does not merit an affirmative endorsement from the NACDL.

2. Why NACDL Opposes the Nomination of Judge Thomas. The NACDL opposes the nomination of Judge Clarence Thomas to become an Associate Justice of the Supreme Court for three reasons: lack of commitment to certain basic but threatened principles of criminal justice, a dubious sense of judicial ethics, and adherence to an unusual and dangerously ill-defined jurisprudential philosophy.

a. Lack of Commitment to Equal Justice and Due Process.

The first reason that NACDL should oppose Judge Thomas's nomination is that he has not demonstrated a commitment to certain basic principles of equal justice and due process for which this Association stands. Not the least of these is the Constitutionally-mandated role of the defense attorney in ensuring fairness in criminal cases. Nor is it certain that he accepts the exclusionary rule as a necessary means of enforcing of Fourth, Fifth and Sixth Amendment rights, or that he would demand the most scrupulous fairness in the administration of capital punishment if the death penalty is not to be abolished (as NACDL would prefer). (If Judge Thomas opposes the death penalty, as does his mentor Senator Danforth, or believes in strict limits on its application, he has never said so publicly.) Finally, we do not know whether he supports the vital role of the federal courts, exercising their constitutionally-mandated habeas corpus power, to review the fundamental fairness of criminal judgments that have been upheld in state court.

Judge Thomas has had little or nothing to say publicly about any of these most critical issues, nor are we aware of any privately-expressed opinions. His views on other civil rights and civil liberties questions, while not directly applicable in the context of defendants' rights, may provide some guidance. In addition, his support for the exercise of executive power and disdain for that of Congress and the judiciary, as noted below, strongly suggest that he would take unsatisfactory positions on these issues. Because his views are not known with certainty, however, NACDL urges the Senate to inquire closely during the confirmation process into Judge Thomas's views on basic principles of equal justice and due process, as they pertain to the rights of the accused.

b. Lack of Ethical Sensitivity as a Judge. Attorneys who have argued criminal appeals before Judge Thomas find him to be intelligent, courteous, attentive and well-prepared on the bench. We do not fault him on any of these grounds. Nevertheless, his failure to recuse himself when his impartiality could reasonably be questioned does raise a serious concern about his ethical judgment and ability to separate personal bias from official judicial responsibility.

Most troubling is Judge Thomas's record on the Oliver North case. Judge Thomas publicly praised Col. North in several 1987 and 1988 speeches and in a 1989 article. One speech lauded North for having done "a most effective job of exposing congressional irresponsibility." Remarks at Wake Forest Univ., April 18, 1988, at 21 (referring to him familiarly as "Ollie North"). Nevertheless, despite holding strong personal views in support of this defendant, Judge Thomas did not disqualify himself from voting on North's appeal. Specifically, Judge Thomas participated in the vote to deny rehearing in banc in United States v. North, 920 F.2d 940, 959 (1990), the decision which overturned North's

convictions for endeavoring to obstruct Congress (and other charges). Since by his own public admission Judge Thomas had an extrajudicial bias in favor of a party, it is beyond peradventure that he should not have voted in the Oliver North case. Two other members of the D.C. Circuit (Judges Mikva and Edwards) declined for reasons of their own to participate in that vote.

Also of concern to the committee is Judge Thomas's failure to recuse himself in Alpo Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958 (D.C.Cir. 1990). In that case, he wrote the opinion overturning a large damage award against a company owned by members of Danforth family, and of which his close friend and mentor, Senator Danforth, is an heir. Again, it seems apparent that Judge Thomas's impartiality in that situation could reasonably be questioned, requiring him to disqualify himself.

c. Dangerous "Natural Law" Philosophy. Like Robert Bork before him, Judge Thomas has an unusual jurisprudential view of the Constitution, but it is not Bork's "originalist," pro-government, anti-libertarian view. Thomas has consistently endorsed a "natural rights" theory of the Constitution, suggesting that the Constitution should be interpreted according to an extra-legal standard of right and wrong that humans can deduce from a study of "human nature," revealing the "laws of Nature and of Nature's God." Judge Thomas states that the "revolutionary meaning" of America is the basing of its government "on a universal truth, the truth of human equality." 30 Howard L.J. 691, 697 (1987). NACDL recognizes that this philosophy was indeed shared by those who signed the Declaration of Independence and by many who framed the Constitution as well. It was invoked by some of the abolitionists, such as Frederick Douglass, who argued that nothing in the original Constitution endorsed slavery; indeed, Judge Thomas has drawn on that tradition in support of his view that Brown v. Board of Education was decided the right way for the wrong reasons. (In the same essay, he also relies on the Rev. Martin Luther King, Jr., Attorney General Edwin Meese III, President Ronald Reagan, St. Thomas Aquinas, and Tom Paine, all within two paragraphs.)

Curiously coupled with Thomas's "natural law" argument is an expressed disdain for the right of privacy, as applied in Griswold v. Connecticut and Roe v. Wade, on the basis that privacy is not explicitly identified in the text of the Bill of Rights. The Ninth Amendment declares that such unenumerated rights exist and are to be protected. Failure to recognize that the right of privacy extends beyond the confines of the First, Fourth and Fifth Amendments leads inexorably to overcriminalization and abuse of state power. NACDL must not forget that the laws challenged in Griswold and Roe carried criminal penalties.

If we knew that "human equality" were the only "universal truth" that Judge Thomas finds behind (or above) the Constitu-

tion, and if we were confident that he is deeply committed to applying this truth to women's lives as completely as to men's, we might be less uneasy with this "natural law" philosophy. But Eighteenth and Nineteenth Century ideas of "human nature" spell indifference to the problem of poverty, and personal and professional oppression for women in today's world. The Supreme Court explicitly invoked "nature herself" and "the law of the Creator" to hold in 1873 that a woman could be refused the right to practice law. Moreover, many traditional views of human nature are fundamentally punitive and unforgiving, and have profound implications for criminal law which are contrary to NACDL's understanding of the "liberty" which is protected by the Constitution. Judge Thomas has not clarified whether the view of "human nature" that he believes to lie behind the Constitution is an unchanging one, nor which one it is.

Likewise, whose appreciation of "nature's God" informs Judge Thomas's "natural law"? We fully support the command of Article VI of the Constitution that "no religious test shall ever be required as a qualification to any office or public trust under the United States," and we codemn any suggestion that a nominee's religious opinions, as such, could be disqualifying. But this is because we believe that the Constitution invites a broad diversity of religious and nonreligious opinions in government. When a judicial nominee states that an understanding of "God's law" should inform Constitutional decisionmaking, however, it becomes incumbent on him to reveal what that understanding is. Judge Thomas's failure to make this clear in any of his dozen speeches and eight published articles advancing a "natural law" interpretation of the Constitution suggests that he may draw on an assertion of what is "natural" merely to justify a personal, political or philosophical agenda.

Judge Thomas believes that the "task of those involved in securing the freedom of all Americans is to turn policy toward reason rather than sentiment, toward justice rather than sensitivity, toward freedom rather than dependence--in other words, toward the spirit of the Founding.... The first principles of equality and liberty should inspire our political and constitutional thinking." 30 Howard L.J. at 699, 703. Some of these words NACDL could wholeheartedly endorse. Yet they do not seem to mean the same to Judge Thomas as to us: "Such a principled jurisprudence would pose a major alternative to ... esoteric hermeneutics rationalizing expansive powers for the government, especially the judiciary." Id. (emphasis added). Our principal concern, of course, is with that final twist. Who will check prosecutors' and politicians' "ration≈al≈i≈z[ation of] expansive powers for the [executive branch of the] government," to be used against the criminally accused, if not "the judiciary" in its interpretation and application of the Constitution, especially the Bill of Rights? NACDL believes that a powerful and independent judiciary, devoted to even-handed enforcement of the "first

principles of equality and liberty," is essential for "securing the freedom of all Americans." We also believe that "justice" is not an alternative to "sensitivity"; without sensitivity there can be no justice.

Judge Thomas, who has served on the D.C. Circuit less then a year and a half and was not previously a judge, is the author of only seven published opinions on appeals of criminal convictions, all in drug cases. (He has participated in another ten or so decisions that resulted in published opinions by other judges, and about 20 unpublished affirmances, in some of which he wrote unpublished memorandum opinions. He does not appear ever to have concurred separately or dissented in a criminal case, which may indicate a relative lack of interest in the subject.) The opinions on their face are thoroughly researched, lucidly written, and temperate in tone. None breaks new ground, either for the government or for the defense. In these cases, Judge Thomas explained the affirmance of convictions over claims involving, for example, asserted evidentiary insufficiency, sever=ance, denial of continuance, search and seizure, and definitions of terms in the Sentencing Guidelines; in other words, the routine issues seen in federal criminal appeals. As a Supreme Court Justice, however, he would face far more difficult issues, and would have far more freedom from the strictures of established precedent (if he were inclined to exercise such freedom) than as a Circuit Judge.

A handful of Judge Thomas's opinions do show a gratifying independence from prosecutorial argument. In United States v. Long, 905 F.2d 1572 (1990), he overturned a conviction for "using" a firearm in connection with a drug offense, where the unloaded gun was found between the cushions of a sofa. It might seem easy to say that this evidence was insufficient, but a jury had convicted, and a judge had upheld that verdict and imposed the mandatory five year sentence. The truth is that many if not most appellate judges today would have affirmed, perhaps without publishing an opinion; the concept of "using" a firearm has been diluted to meaninglessness in several other circuits. Obviously alluding to that fact, Judge Thomas wrote, "As an appellate court, we owe tremendous deference to a jury verdict; we must consider the evidence in the light most favorable to the government.... We do not, however, fulfill our duty through rote incantation of these principles followed by summary affirmance." 905 F.2d at 1576. In the same case, Judge Thomas's opinion goes out of its way to salvage the appellate rights of a defendant whose lawyer filed the required notice one day late, rejecting the prosecutor's plea to dismiss the appeal outright.

In United States v. Rogers, 918 F.2d 207, 212 (1990), while upholding the admission of "prior bad acts" evidence, Judge Thomas's opinion rejects the argument that the defense attorney's acquiescence in a cautionary instruction had waived any objection

to the admission of the questionable evidence. The opinion explicitly and accurately recognizes the legitimate tactical decisions a defense attorney must make in the midst of trial when an objection to prejudicial evidence has been overruled. And in United States v. Barry (Farrakhan and Stallings v. U.S.), 1990 WestLaw 104925 (1990), Judge Thomas participated in issuing an unsigned order requiring a trial judge to consider the First and Fifth Amendment rights of controversial, allegedly psychologically "intimidating" supporters of a criminal defendant to attend his trial.

These few commendable decisions, however, are greatly outnumbered by those of Judge Thomas's rulings which brush off troubling appeals. Especially disturbing are the opinions which demonstrate a cold indifference to the realities of the criminal justice system's harsh, discriminatory impact on the poor and uneducated. In United States v. Jordan, 920 F.2d 1039 (unpublished decision, available on WestLaw), Judge Thomas joined an unsigned opinion in which a defendant was denied a two-point reduction under the federal sentencing guidelines, costing him an additional 2½ years in prison, because his inability to raise the required bail to secure his release before trial prevented him from fulfilling an offer to cooperate with the authorities. Viewing the case as if the defendant were claiming some benefit on account of his poverty, the court invoked against him a Sentencing Commission rule that "one's socio-economic status 'is not relevant in the determination of a sentence.'"

Similarly, in United States v. Poston, 902 F.2d 90, 99-100 (1990), Judge Thomas's opinion passes without comment the transparent, self-contradictory lies of the arresting officers about whether promises of benefit were given to the father of a youthful arrestee and instead parses like the words of a business contract the father's testimonial recollection of what was said to him at the stationhouse. The result is an icy justification of the prosecutor's later refusal to give the defendant the benefit of a good word at sentencing so as to relieve him from an otherwise mandatory five year prison sentence for knowingly giving a ride to a drug dealer. If the Jordan and Poston cases illustrate what Judge Thomas means by "justice [without] sensitivity," NACDL must demur.

Conclusion. As discussed, Judge Thomas's record reveals several points worthy of favorable comment. Nevertheless, NACDL opposes the nomination of Judge Thomas for three basic reasons: his lack of demonstrated commitment to equal justice and due process, his failure to recognize the need for recusal where his impartiality is open to question, and his adherence to a philosophy of constitutional interpretation and judicial action which is outside the mainstream of contemporary thought and leads to unacceptable departures from the duty of the courts to enforce fundamental rights.

In addition, we are very concerned that Judge Thomas's views on the enforcement of civil rights laws, as expressed in both word and deed during his tenure as chair of the EEOC, bode ill for his willingness to enforce civil liberties, including those of the criminally accused. We hold in highest regard the expertise of such sister organizations in the broader civil rights and civil liberties community as the NAACP, the Leadership Conference on Civil Rights, the National Conference of Black Lawyers, the Congressional Black Caucus, the Alliance for Justice, the National Abortion Rights Action League, the Women's Legal Defense Fund, the National Organization for Women, AFSCME, and others which have publicly announced their opposition to this nomination. We are concerned that his unique legal philosophy and his laissez-faire attitude toward civil rights point to an approach to criminal law which is very punitive, rigid and unforgiving, and ultimately extremely dangerous to individual liberties.

As this report notes, there are several areas in which Judge Thomas's views are not yet entirely clear, and where we hope the Senate Judiciary Committee will press for more definite answers before considering confirmation. The record already available however, requires that NACDL oppose the nomination of Judge Clarence Thomas to become an Associate Justice of the Supreme Court of the United States.

Members of the Committee:
Peter Goldberger, Chair, Philadelphia, PA
Samuel J. Buffone, Washington, DC
Nina Ginsberg, Alexandria, VA
Prof. William W. Greenhalgh, Washington, DC
William B. Moffitt, Alexandria, VA
William H. Murphy, Jr., Baltimore, MD
Prof. Charles J. Ogletree, Cambridge, MA
Alan Ellis, Mill Valley, CA, President of NACDL, *ex officio*

THE FUND FOR THE
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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

September 20, 1991

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 the Supreme Court

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.

NATIONAL DISTRICT ATTORNEYS ASSOCIATION
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TESTIMONY

OF

HONORABLE THOMAS J. CHARRON
DISTRICT ATTORNEY
COBB JUDICIAL CIRCUIT (MARIETTA), GEORGIA
AND
PRESIDENT
NATIONAL DISTRICT ATTORNEYS ASSOCIATION

BEFORE THE

SENATE JUDICIARY COMMITTEE

CONCERNING

THE APPOINTMENT OF JUDGE CLARENCE THOMAS TO THE SUPREME COURT

ON

SEPTEMBER 17, 1991

September 17, 1991

Mr. Chairman, members of the Committee, I appreciate the opportunity to testify here today in support of President Bush's nomination of Judge Clarence Thomas to the U. S. Supreme Court.

I am Thomas J. Charron, elected district attorney of the Cobb Judicial Circuit which includes Marietta, Georgia. I am also the President of the National District Attorneys Association.

Judge Clarence Thomas has participated in more than 150 cases since joining the D.C. Circuit Court of Appeals and is the author of 17 majority opinions; he has authored 2 dissents and 2 concurrences. Seven of the 17 majority opinions related to drug convictions. Judge Thomas' criminal law opinions reflect scholarship, an appropriate adherence to the rule of law, and judicial restraint.

But these hearings have not focused on Judge Thomas' criminal law rulings or even his extrajudicial statements relative to the criminal law. Other issues are paramount. Political issues, religious issues, ethical issues, and moral issues. In the context of Judge Thomas' confirmation hearing, "safe streets" is not foremost in the minds of members of this Committee nor, frankly, foremost in the minds of the public at large. But, I offer a word on the subject, nevertheless:

As a D.C. Circuit judge, Clarence Thomas has demonstrated a great concern for the safety of an innocent public. He has closely followed the federal rules of evidence and criminal procedure as enacted by the Congress of the United States. He has given great deference to the fact-finding process of the lower court, leaving to the jury its proper role in assessing the sufficiency of the evidence. He has avoided basing conclusions on personal moral preferences rather than legal reasoning. He abhors the applicaton of judicial fiat to achieve ends that are political and properly left to legislative bodies. We can ask no more than this. If he has conducted himself in this fashion as a judge on the D.C. Circuit Court of Appeals I think we can assume that he will continue to do so as a member of the Supreme Court.

The Committee has delved quite extensively into Judge Thomas' "natural law" philosophy. He has stated that his foray into this murky and esoteric area was for the primary purpose of showing the fundamental injustice of discrimination, an attempt to plumb "the philosopy of the founders of our country and the drafters of our Constitution." Judge Thomas is an honorable man and I am satisfied with his repeated assurances that "natural law" should not be used in constitutional adjudication; that his use of that concept calls for judicial restraint and does not permit a judge to insert his own notion of right and wrong into a case or on that basis strike down legislation passed by Congress. This is important to all of us since Judge Thomas' pre-emminent task as a Supreme Court justice will be constitutional and statutory interpretation.

Relative to the interpretation of statutes passed by Congress, we can, I believe, gain some insight by looking to Judge Thomas' ruling in Otis Elevator v. Sectertary of Labor in which he

looked closely at the legislative history of the act and declared his belief in the principle that "a statute should be construed so that effect is given to all its provisions." Although this is only one case, the position taken in that case certainly indicates that he would give great weight to Congressional intent.

We believe that Judge Thomas, as a member of the Supreme Court, will be a staunch protecter of individual rights guaranteed by our Constitution, faithfully protecting the progress so hard won by minorities.

Judge Thomas is an unpretentious and intellectually honest man who has chosen a philosophical path which requires independence, courage, and commitment to advancing the fundamental and constitutional rights of all Americans. He will make a great Supreme Court Justice and we urge this Committee and the Senate to confirm his nomination to the Court with as little delay as possible.

Opposition to the Nomination of Clarence Thomas to the United States Supreme Court

Testimony Submitted to the Senate Judiciary Committee

September 19, 1991

by

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I am Anne Bryant, executive director of the American Association of University Women (AAUW). It is a privilege to testify on behalf of AAUW's 135,000 members: women and men who are committed to equity and education for women and girls.

On behalf of our membership, I urge the Judiciary Committee to reject Clarence Thomas' nomination to the United States Supreme Court. In his testimony before this Committee, Judge Thomas has suggested that statements he made and views he expressed prior to 1990 are not necessarily positions he would hold as a Supreme Court Justice. AAUW believes that the Senate has a responsibility to consider the public record of a Supreme Court nominee in assessing a nomination. We believe that Judge Thomas' record as chair of the Equal Employment Opportunity Commission and his tenure as Assistant Secretary for Civil Rights in the Education Department raise grave concerns about his commitment to equal opportunity and provide examples of his failure to enforce federal law.

AAUW opposes Clarence Thomas' nomination for five reasons.

First, we believe that in his positions at the EEOC and the Department of Education, Judge Thomas showed a blatant disregard for the law of the land. As Chair of the EEOC, he allowed more than 13,000 age discrimination complaints to lapse by failing to investigate them within the legal time limit. Congress had to pass the Age Discrimination Claims Assistance Act to assist those

individuals whose complaints of age discrimination had been ignored by the EEOC.

Although Judge Thomas served in the Education Department's Office of Civil Rights for less than a year, a similar pattern of failure to enforce the law was present there. In 1981, the Women's Equity Action League filed suit against the Department charging improper enforcement of Title IX of the Education Amendments of 1972. In 1982, a District Court judge ruled that the Department was both misinterpreting the Title IX regulations and providing inadequate remedies when a Title IX violation was determined.

This pattern of failure to enforce the law casts grave doubts on Judge Thomas' judicial temperament. We are particularly disturbed that he has been unwilling to enforce key federal laws intended to guarantee individual rights in employment and education.

Second, AAUW opposes Judge Thomas' nomination because of his record of vocal opposition to efforts to ensure equal opportunity in the workplace. While heading the EEOC, he undermined the effectiveness and credibility of the agency by publicly expressing his personal opposition to affirmative action programs, even those ordered as remedies following a finding of discrimination.

Judge Thomas was also vocal about his opposition to Title VII class action suits, despite Congress' mandate that his agency

initiate such cases. His negative comments about a class action suit filed by the EEOC against Sears led attorneys to explore calling him as a defense witness. By calling into question the validity of lawsuits involving claims of disparate impact, Judge Thomas contravened both the intent of Congress in passing Title VII and the Supreme Court's ruling in the 1971 Griggs case.

In 1985, the EEOC ruled that federal law does not require equal pay for jobs of comparable value, and the agency stopped investigating complaints involving pay equity claims. This ruling contradicted the Supreme Court's 1981 decision in the Gunther case. Again, Judge Thomas directed EEOC activities based on his own beliefs, rather than abiding by relevant federal law.

Third, AAUW is distressed by Judge Thomas' apparent hostility to the constitutional right to privacy as outlined in Griswold v. Connecticut. In an article published by the Cato Institute in Assessing the Reagan Years, Judge Thomas stated that the unenumerated rights specified in the Ninth Amendment were not intended to be cited by the Supreme Court in overturning laws.

By stating his opposition to the constitutional basis of the fundamental right to privacy, Judge Thomas has given evidence of his willingness to restrict individual liberties, including the right to reproductive choice.

Fourth, Judge Thomas' support of a "natural law" concept is deeply disturbing to AAUW. In speeches and articles, Thomas has

56-271 O—93——36

maintained that judges should be guided by a "natural law" philosophy, the belief that the "inalienable rights" cited in the Declaration of Independence are a higher authority than the U.S. Constitution.

Thomas has said he believes in the existence of moral norms derived from "nature's god," and that those norms can be used to critique and even invalidate civil law. Thomas' statements about "natural law" raise serious doubts about his commitment to maintain separation of church and state.

Finally, AAUW believes that the Judiciary Committee should not confirm Clarence Thomas' nomination to the Supreme Court because of the critical need for judicial balance on the most important court in our nation. The recent appointments of Anthony Kennedy, Antonin Scalia, and David Souter solidified a strong conservative shift in the Supreme Court. With the resignation of Justice Thurgood Marshall, the Court swung dangerously out of balance.

Confirmation of Clarence Thomas, a probable sixth conservative vote on the Court, threatens to unleash the sweeping change we have glimpsed in the Rehnquist Court. Replacing Justice Marshall with a judicial conservative like Clarence Thomas will effectively eliminate the Supreme Court as an instrument for ensuring continued progress and protection of individual rights for decades to come.

The American Association of University Women believes that the Senate has a responsibility to ensure an ideologically balanced Supreme Court and must, therefore, defeat the Thomas nomination.

On behalf of AAUW, I thank you for the opportunity to testify.

National Organization for Women, Inc.

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TESTIMONY OF
MOLLY YARD
President, National Organization for Women,

Before the Judiciary Committee
of the United States Senate

regarding the

Confirmation of Clarence Thomas

September 20, 1991

My name is Molly Yard. I am the president of the National Organization for Women. I am pleased to be here today to testify regarding the nomination of Clarence Thomas to the United States Supreme Court.

You may be aware that I am recovering from a stroke that I suffered several months ago. I am still working on physical and speech therapy. Despite that, I was absolutely determined to present this testimony. I felt that I must make yet one more appeal to you to stand up for the rights of women and other oppressed groups.

NOW is adamantly opposed to the nomination of Clarence Thomas. Mr. Thomas has demonstrated none of the qualities necessary for a member of this nation's highest court. While a Supreme Court Justice must be compassionate, Mr. Thomas has shown scorn for the oppressed. While a Justice must have respect for the law, Mr. Thomas has demonstrated a willingness to promote his conservative personal agenda in defiance of the law of the land. While a Justice should be forthright, Mr. Thomas has been evasive. Clarence Thomas has simply not shown himself to be worthy of a seat on the Supreme Court.

Mr. Thomas seems to be doing his best to imitate the Teflon candidacy of David Souter. Perhaps he feels that a blank slate is an unimpeachable one. Yet

how can the good of this country possibly be served by a man who has spent weeks backing away from his own record?

Perhaps the most blatant example of Mr. Thomas' attempt to rewrite history is his claim that we should not take seriously his public praise for Louis Lehrman's antiabortion polemic. Mr. Thomas now would have us believe that he did not agree with the piece but was only citing to it to gain the support of his conservative audience. Frankly, I don't believe that story and neither should you. But even if I did, Mr. Thomas' defense -- that he says things that he doesn't believe in order to win an audience -- does not inspire confidence in the statements he has made before this committee and certainly does not make me secure that he will be a strong and zealous guardian of our constitutional rights. Similarly, even if we were to accept Mr. Thomas' astonishing claim that he has never given much thought to Roe v. Wade, this lack of interest in one of the crucial civil rights issues of the last 20 years would show Mr. Thomas to be so disengaged from modern legal and social debate as to disqualify him from sitting on the Supreme Court.

In fact, Clarence Thomas is not the enigma he would like to be. Both his words and his actions show him to be cold and callous. Mr. Thomas compiled a record

of neglect at the EEOC, particularly with regard to women's rights. This man insulted women who have suffered discrimination in employment by calling their legitimate complaints "clichés." He said that women avoid professions like the practice of medicine because it interferes with our roles as wives and mothers. This type of medieval claptrap would doom any politician running for electoral office. How, then, can it be considered acceptable for a Supreme Court nominee?

It is always easy to cut through people's pretensions by looking at how they treat their families. Many saints have been unmasked as sinners in the privacy of their homes. Clarence Thomas used his own sister, Emma Mae Martin, as an example to denigrate people on welfare. Yet Mr. Thomas' sister overcame a life of poverty to graduate high school and enter the workforce. After she was deserted by her husband, she supported her young children by working at two minimum wage jobs. She was indeed on welfare during a period when she was forced to leave her jobs to take care of her (and Mr. Thomas') aunt, who had had a stroke. She now works as a cook on a shift that starts at 3 o'clock in the morning. As is too often the case, it appears that in Mr. Thomas' family the male child was given the opportunity to get a college

education and a professional career, while the girl accepted the responsibility of caring for the family. To me, Emma Mae Martin sounds like a brave, strong woman, committed to her family and fighting to do the best she can. Yet Clarence Thomas sees her as dishonorable.

Mr. Thomas' cruel remarks would be bad enough when said of a total stranger. That he would use his own sister as the butt of such an insult is shocking. Mr. Thomas has been nominated for a position that requires, above all, sensitivity and concern about all those who come before the courts seeking justice. Rather than demonstrating those qualities, he has instead shown himself to be cynical and cold.

This nomination is particularly poignant for me because of the man that Clarence Thomas has been nominated to replace. Had Thurgood Marshall never spent one day on the bench, his brilliant career as an activist civil rights lawyer would have guaranteed him a place in history and in the hearts of all people who believe in equality and justice. Yet Thurgood Marshall went on to champion the rights of the oppressed from the Supreme Court, tirelessly fighting to uphold the very principles that Clarence Thomas sees as outmoded or unnecessary. While nothing can extinguish the light that Thurgood Marshall

lit, it would be sad to replace him with a man who is committed to dousing the torch that Justice Marshall carried so proudly.

It has become increasingly difficult to come here on each succeeding Supreme Court nomination and beg for women's lives, only to have our pleas ignored. We urged you, in the strongest terms, to understand that the confirmation of Justices Kennedy and Scalia would lead inevitably to the erosion of women's right to safe, legal abortion. Those predictions proved true two years ago as the court severely undercut Roe v. Wade in the Webster case, and went on a year later in the Akron and Hodgson decisions to take away the rights of young women to control their bodies. We warned that David Souter, silent though he was on many significant issues, would be yet another conservative, anti-abortion vote. As we feared, Justice Souter was an instrumental part of the majority last term, when the Court took the incredible step of holding that women had no right to be informed by their physicians and other medical personnel of even the fact that abortion exists.

Senators, many of you and your colleagues in the House have spent time in recent sessions trying to restore the civil rights that the Court has undercut,

fighting to reverse the gag rule that the Court has upheld, and working to guarantee the right to abortion that the Court has imperiled. Yet had you held fast against the unsuitable nominees put before you by the Reagan-Bush administration, these efforts would not have been necessary. Your constitutional role is not to be a rubber stamp for the President. Instead, you must look into your hearts and judge what is best for this country before you advise and consent on nominations. It is not just your prerogative but your duty to protect the fundamental constitutional rights of all of the people. How can you in good conscience consent to an increasingly unbalanced court that represents one judicial philosophy, a philosophy that ignores the needs of the majority of this country?

The conservative tide has swept over the Supreme Court. With each Reagan-Bush nominee that the Senate confirms, you entrench still more firmly a Supreme Court that is at best indifferent and at worst hostile to the rights of women, people of color, lesbians and gays, the handicapped, the elderly, the poor -- all those who most need protection from the nation's highest court. You still have some ability to stem that tide, to give the dispossessed and disenfranchised a faint glimmer of

hope that someone cares about them, that the entire government of the United States is not a cynical enterprise run by the privileged for the privileged. I urge you, once again, to stand up for equality, for justice, and for compassion. Vote against the confirmation of Clarence Thomas.