

President
Eugene Glover
Silver Spring, MD



National Council of Senior Citizens

Executive Director
Lawrence T. Smedley
Washington, DC

1331 F Street, N.W. • Washington, DC 20004-1171 • (202) 347-8800 • FAX (202) 624-9595

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

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

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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 losses 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 Lugardi 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

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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

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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.