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DEAN

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The Honorable Arlen Specter
United States Senate
Committee on the Judiciary
Washington, DC 20510-6275

Via FAX: 202-224-1893.

Dear Arlen,

It has taken me more time than I would have hoped to get the information about affirmative action plans at Yale Law School at the time Judge Clarence Thomas was admitted. The reason for this is that I was not then Dean and I did not wish to go merely on my recollection as a faculty member. After talking to the then Dean, the Associate Dean in charge of Admissions at the time, etc., I think I can be pretty confident of what I am writing you.

First, a bit of history. Affirmative action both in its sense of looking widely and more deeply and in its sense of some possible preferential treatment has deep roots at this Law School. In the 1880's Francis Wayland, the first Dean of the Yale Law School, wrote Samuel Clemens (Mark Twain) to ask him for scholarship money specifically for a black student, because the student was holding down two jobs while going to law school to pay his way. Clemens sent the money and wrote that he would not have given money to white students, but in view of the way blacks had been treated and were still treated, it was an appropriate thing to do. (This is apropos of the current debate about scholarships designated for particular groups.) The student who received that scholarship went on to win one of the first desegregation cases, a housing case, out of Maryland. And it was in his office, I believe, that Thurgood Marshall first started practicing law.

By the time Clarence Thomas applied, the number and quality of black applicants to the Yale Law School had increased greatly. In part for that reason, a few years before his application, the faculty voted to create a more formal structure than the casual "affirmative action" approach, that had been in place earlier. The program that was put in was essentially a "set aside" program. Up to 10% of the places in the entering class were set aside for members of minority groups. The members of these groups would compete with each other for these places. A minimum standard was also applied, and a rather interesting one.

Before this program was put into effect members of minority groups were pretty much automatically accepted if it was thought that they could do the work well. The increasing size, quality of the applicant pool, and availability of places at other law schools, which had earlier not been as open to minority students as Yale, led to a different "minimum standard." Students would now be admitted only if it was believed that they were of such ability as to make it a distinct advantage for them to come to Yale Law School as against any other law school. In other words, while, before, anyone who would do well here was likely to be admitted, even if he or she might get as much or more from another school, at the time Judge Thomas was admitted the standard was to accept only those of such quality that coming to this School was a clear benefit.

As to Judge Thomas himself, I cannot say whether he would have been admitted apart from this program. This is because admissions among people of top ability are always highly subjective and so, unless I could speak to those who actually read his files (some of whom are dead), I could not give an answer to the question. Frankly, even if I could, I would not. It has long been the policy of the Law School not to divulge information with respect to admission of particular students. Our policy, I believe, is now required as a matter of law by the Buckley Amendment.

Not many years after this program was put in effect, it started to fall of its own weight. The quality and numbers of minority applicants continued to increase at such a rate that a "set aside" program seemed unnecessary and undesirable. By the time the Bakke case (which held similar programs invalid) came along, our "set aside" program was well on its way to being abandoned. Today all applicants are considered as part of one pool and I believe that our minority students are the equal of, or superior to, the whole student body in any other law school. Whether some faculty readers give advantage to individual applicants because they are members of minorities, is impossible to say. But the same is true as to any number of other possible characteristics for admission. There is one large pool and every member of the faculty reads files and applies to them his or her subjective judgment. Each file is read by three different faculty readers and this, too, tends to mitigate the effect of any one reader's enthusiasms.

I hope this is of help to you as you begin what undoubtedly will be a very interesting set of hearings.

Best always,