TESTIMONY OF JUDITH L. LICHTMAN
President, Women's Legal Defense Fund
before the United States Senate
Committee on the Judiciary
September 17, 1991

Chairman Biden and Members of the Committee, my name is Judith L. Lichtman. As President of the Women's Legal Defense Fund, I am pleased to have this opportunity to testify before you on the nomination of Judge Clarence Thomas to the Supreme Court.

This nomination comes at a time when women, especially women of color who face double discrimination based on both gender and race, are ever more vulnerable to invidious discrimination that threatens their economic security and personal freedom. With a Supreme Court that appears poised to roll back the law's most basic protections of equality and individual liberty, the next Justice will help determine the outcome of cases that carry enormous meaning for our lives far into the 21st century.

The Supreme Court's impact on women's lives is made clear in Johnson v. Transportation Agency, Santa Clara County,[1] where the Court upheld women's access to equal employment opportunity. That case centered around the promotion of Diane Joyce to the position of county road dispatcher -- a position never before held by a woman. In fact, no woman had ever held any of the county's 238 skilled positions. As part of a voluntary effort to bring qualified women into its skilled workforce, the county promoted Ms. Joyce, the only woman in a pool of seven persons

[1] 480 U.S. 616 (1987).

judged qualified on the basis of experience and an oral interview. A male candidate who had scored 75 to her 73 in a subjective oral interview filed suit. When the Court upheld the county's plan to expand equal employment opportunity to qualified women and people of color, it demonstrated its power to extend -- or deny -- such opportunity.[2]

Because the Court exerts life-shaping force on millions of Americans, the record of each and every nominee must be carefully examined. Despite Judge Thomas' impressive personal achievements, his record reveals an extensive pattern of disregard for principles of fundamental importance to women and their families. As we have documented in our report, Endangered Liberties: What Judge Thomas' Record Portends for Women, Judge Thomas' record suggests that the prism through which he views the legal claims of women is clouded by an ideology that misinterprets, restricts, or ignores legal principles of the greatest importance. We ask that this report be included in the record of these confirmation hearings.

---

[2] Judge Thomas harshly criticized the Court's decision as "social engineering" and urged lower courts to look to Justice Scalia's dissent for guidance. "Anger and Elation at Ruling at Affirmative Action," N.Y. Times, March 29, 1987, at D1, col. 1; Thomas, Speech before the Cato Institute, April 23, 1987, at 20-21. In fact, the county's program appears remarkably similar to the program under which Judge Thomas was admitted to Yale Law School. Both involved the consideration of race and/or gender in choosing among qualified applicants competing for a limited number of openings; both operated within the framework of federal anti-discrimination law (Title VII, which bars race- and sex-based discrimination in employment, and Title VI, which prohibits race-based discrimination by programs receiving federal funds, such as educational institutions).

Judge Thomas' record alone leaves us unwilling to entrust our constitutional future to his care; five days of his testimony during these hearings has done nothing to allay our concerns. Indeed, Judge Thomas' efforts to distance himself from his record of the past 10 years as a public figure suggests either that he believes that this record is not relevant to the Senate's inquiry or that he believes he cannot be held to his words and writings because he did not mean them or did not read them. He has refused to discuss the issue of constitutional protection of reproductive choice, despite his willingess to discuss other pressing constitutional questions. And, when he has responded to questions of critical importance to women -- such as constitutional protections against sex discrimination -- his answers have provided little reassurance.

Judge Thomas has attempted to retreat from his record during these confirmation hearings.

Throughout his 10 years as a public official, Judge Thomas has delivered speeches, written articles, and signed onto reports discussing issues of the greatest concern to women, in particular women of color, and their families. Despite Judge Thomas' attempts to distance himself from this record throughout these hearings, we submit that this record can not be so easily dismissed.

In numerous speeches and articles, Judge Thomas has reiterated his support for a "higher law" or "natural rights"

theory of constitutional law. He maintained in 1988, for example, that

> [H]igher law is the only alternative to the willfulness of both run-amok majorities and run-amok judges. . . . The higher law background of the American Constitution, whether explicitly invoked or not, provides the only firm basis for a just, wise, and constitutional decision.[3]

Judge Thomas now says that his numerous references to natural law theory were not intended to suggest that he believed that it should be used as a form of constitutional analysis, and that he sees no "role for the use of natural law in constitutional adjudication."[4] Rather he dismisses his extensive writings and speeches as nothing more than the musings of a "part-time political theorist."[5]

Another example of Judge Thomas' efforts to retreat from his record concerns his 1987 praise for an article by Lewis Lehrman as "a splendid example of applying natural law." The article urged that Roe v. Wade was incorrectly decided and that the

---

[3] Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 Harvard Journal of Law & Public Policy 63, 64, 68 (1988) (emphasis in original). Our concerns about natural law jurisprudence are premised on the possibility that cases will be decided on the basis of judges' personal beliefs and intuitions -- beliefs that Judge Thomas was often unwilling to discuss during these hearings.

[4] Transcript of Proceedings on the Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court before the Senate Committee on the Judiciary (hereinafter "Transcript"), 9/10/91 p.m. at 137.

[5] Transcript, 9/11/91 p.m. at 135.

Constitution affirmatively protects the "right to life."[6] During these hearings Judge Thomas sought to distance himself from the Lehrman article by explaining that he praised it only to win over his audience of conservatives[7] -- not because he actually believed what he was saying about it.[8]

Judge Thomas' comments on his authorship of a 1986 report offer still another example of his attempted retreat from his record during these confirmation hearings. Judge Thomas served on the 1986 White House Working Group on the Family, which produced a report sharply critical of Roe v. Wade and other Supreme Court decisions protecting the right of privacy, including the right of unmarried individuals to buy and use contraceptives.[9] Although his name appears on the report as

---

[6] Address by Clarence Thomas, "Why Blacks Should Look to Conservative Policies," The Heritage Foundation (June 18, 1987) at 9, praising Lehrman, "The Declaration of Independence and the Right to Life: One Leads Unmistakably From the Other," The American Spectator 21-23 (April, 1987).

[7] "My interest [in citing the Lehrman article] was a very single-minded interest, Senator, and that was in trying to convince a conservative audience in the Lew Lehrman Auditorium of the Heritage Foundation, with a concept that Lew Lehrman adopted, to make my point, and it was an important point to me." Transcript, 9/10/91 p.m. at 198.

[8] "[A]t no time did I adopt or endorse the substance of the article itself." Transcript, 9/11/91 p.m. at 95.

[9] A Report to the President from the White House Working Group on the Family, The Family: Preserving America's Future, December 1986, at 11-12.

one of its authors, he now testifies that he never read the controversial portions of the report at any time.[10]

At other times in these hearings, Judge Thomas has argued that his record as a public figure is now largely irrelevant to this inquiry to his fitness for the Supreme Court.[11] It should be of great concern to members of this Committee and to the American public that the White House wants us to look favorably on the personal background of Judge Thomas, while dismissing or discounting his actions and statements during 10 years as a public official. If confirmed, Judge Thomas will bring the entire range of his experiences and beliefs to bear on his deliberations in the Court. The Senate should not accept his attempt to pick and choose for these confirmation hearings which portions of his record are relevant for consideration in evaluating his fitness for the Court.

---

[10] "The Chairman: You haven't to this moment read that report?

Judge Thomas: To this day, I have not read that report. I read the sections on low-income families."

Transcript, 9/10/91 p.m. at 154-55.

[11] E.g., as Judge Thomas advised Senator Kohl, "I think that you have to weigh or discount to the best of your abilities or your judgment speeches that were made outside of the judiciary when one has a different role, for example a person who's a law professor, a person who's in the executive branch. But I think it would be important to look closely at a speech that I made as a judge." Transcript, 9/13/91 p.m.

Judge Thomas refused to respond to critical questions on the consitutional right to privacy, including a woman's right to choose whether to terminate or continue her pregnancy.

Judge Thomas asks this Committee, the Senate, and the American public to support his nomination while refusing to provide assurances that he will protect our rights if elevated to the Court. Nowhere is this more clear than in Judge Thomas' refusal to respond to questions about his views on the constitutional right of privacy. What is at stake here is not mere theoretical principle -- the lives, health, and livelihoods of millions of women and their families hang in the balance.

Judge Thomas professes to have an open mind on the constitutional protection afforded the right to terminate a pregnancy.[12] But in the years before this nomination, he expressed opinions critical of Roe v. Wade and other Supreme Court decisions involving the right of privacy.[13] Indeed, as discussed above, Judge Thomas endorsed an anti-choice diatribe

---

[12] See e.g., Transcript, 9/11/91 p.m. at 105:
"Senator Leahy: Let me ask you this. Have you made any decision in your own mind whether you feel Roe v. Wade was properly decided or not, without stating what that decision is?
Judge Thomas: I have not made, Senator, a decision one way or another with respect to that important decision."

[13] See Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 Harvard Journal of Law & Public Policy 63, n.2 (1989); Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," Assessing the Reagan Years 391, 399 (D. Boaz, ed. 1988); A Report to the President from the White House Working Group on the Family, The Family: Preserving America's Future, December 1986). For a discussion of Judge Thomas' stated views on Roe v. Wade and the right to privacy, see Endangered Liberties: What Judge Thomas' Record Portends for Women, a Report by the Women's Legal Defense Fund (July 30, 1991).

that concluded that the fetus has a "God-given" "inalienable right to life."[14]

Now, despite that record, Judge Thomas asks this Committee to believe not only that he has an open mind about the right to choose, but that he actually has no opinion on the issue. In response to questions from Senator Leahy, Judge Thomas stated that in the 18 years since Roe v. Wade was decided, he has never debated the case or formed an opinion about what he even acknowledged is "one of the more important" and "one of the more highly publicized and debated cases."[15] Judge Thomas' professed lack of opinion -- particularly when viewed in the context of his record -- strains credulity.

In refusing to answer questions about Roe, Judge Thomas hid behind the mantle of judicial impartiality.[16] This tactic blurs the distinction between prejudging a specific case involving specific facts that may come before the Court, and commenting on the constitutional standards applicable generally in cases of that type. Indeed, Judge Thomas' testimony on other cases that present issues that will come before the Court shows that his

---

[14] Address by Clarence Thomas, "Why Blacks Should Look to Conservative Policies," The Heritage Foundation (June 18, 1987) at 9, praising Lehrman, "The Declaration of Independence and the Right to Life: One Leads Unmistakably From the Other," The American Spectator 21-23 (April, 1987).

[15] Transcript, 9/11/91 p.m. at 103-106.

[16] See e.g., Transcript, 9/10/91 p.m. at 149: "I do not think that at this time that I could maintain my impartiality as a member of the judiciary and comment on that specific case [Roe v. Wade]."

professed concerns about impartiality were selectively applied.[17] In adopting this strategy of selective silence, Judge Thomas assumes that the Committee will not view his failure to respond to questions on privacy and choice as significant.

Would the Senate Judiciary Committee confirm a Supreme Court nominee who trumpets his or her open-mindedness on the issue of whether segregated schools violate the Fourteenth Amendment's guarantee of equal protection? Of course not. The idea of confirming a nominee who does not firmly support such a sacrosanct legal principle is unthinkable.

The fundamental principles articulated in Roe are as critical as those spelled out in Brown. A woman's ability to enjoy all other personal liberties guaranteed by the Constitution hinges upon her freedom to make personal decisions about procreation. This Committee should reject any nominee who fails to affirm the right to choose just as it should, and would, reject a nominee who failed to affirm the constitutional principles enunciated in Brown. As Chief Justice Rehnquist recognized in 1959, in the wake of the Brown decision, "what could have been more important to the Senate [in 1957] than Mr. Justice Whittaker's views on equal protection and due process? ...The only way for the Senate to learn of these sympathies is to

---

[17] E.g., Transcript, 9/10/91 p.m. at 162 (death penalty appeals); 9/10/91 p.m. at 163-64 (Payne v. Tennessee and victim impact statements); 9/10/91 p.m. at 164 (federal sentencing guidelines); 9/10/91 p.m. at 168-69 (exclusionary rule); 9/10/91 p.m. at 171 (free exercise clause); 9/12/91 a.m. at 15-16 (establishment clause).

'inquire of men on their way to the Supreme Court something of their views on these questions.'"[18]

To the extent that Judge Thomas responded to questions on constitutional equal protection theory, his answers provided inadequate assurances of his commitment to strike down invidious sex-based discrimination.

In refusing to answer any questions on abortion or constitutional protections of reproductive freedom -- while responding to other questions about unsettled areas of the law -- Judge Thomas has abandoned candor and consistency. This creates a double standard that works against any commitment to protections of women's freedom and equality. At the same time, Judge Thomas would have us believe that he has isolated reproductive choice as the only area of critical importance to women about which he was not forthcoming. Such is not the case.

For example, Judge Thomas' discussion of equal protection analysis failed to provide adequate assurances of his commitment to the Constitution's most basic protections against sex discrimination: the equal protection clause of the Fourteenth Amendment. This is the primary constitutional source of equality for women; the Supreme Court has consistently used it to strike down sex-based distinctions in the law that are based on "archaic and stereotypic notions."[19]

---

[18] Rehnquist, "The Making of a Supreme Court Justice," Harvard Law Record, October 8, 1959, at 10.

[19] Mississippi University for Women v. Hogan, 458 U.S. 718, 742 (1982).



56-271 O—93——13

Judge Thomas appeared at first blush to offer satisfactory assurances that he supports the Court's equal protection analysis of constitutional claims of sex discrimination. For example, Judge Thomas told Senator DeConcini: "I have no reason and had no reason to question or disagree with the three-tier approach"[20] and "I do accept this structure of the three-tier test."[21]

Upon careful review, though, his claims fall short of a commitment to apply a rigorous level of scrutiny to sex-based distinctions in the law. As he told Senator DeConcini later in the hearings,

> I think that it's important that when I don't know where I stand on something or I haven't reviewed it in detail, that it's best for me to -- to take a step back and say 'I have no reason to disagree with it' rather than saying 'I adopt it as mine.'[22]

This makes clear that, absent explicit assurances, Judge Thomas' testimony on equal protection analysis cannot be construed as an actual commitment to apply such analysis to constitutional claims. Without such a commitment, women are left vulnerable to invidious sex discrimination.[23]

---

[20] Transcript, 9/11/91 a.m. at 59.

[21] Id. at 60.

[22] Transcript, 9/13/91 p.m. at 60.

[23] With the departure of Justice Marshall, only four sitting Justices (Justices Blackmun, O'Connor, Stevens, and White) are on record as applying heightened scrutiny analysis to constitutional claims of sex discrimination. Chief Justice Rehnquist has generally been hostile to heightened scrutiny. E.g., Mississippi University for Women v. Hogan, 458 U.S. 718, 742 (1982) (Powell, J., and Rehnquist, J., dissenting); Craig v.

Nor did Judge Thomas provide any assurances that he would apply equal protection analysis free of stereotypic notions about women that too often work to limit their lives and opportunities. As Justice O'Connor has made clear, the Court must apply its test "free of fixed notions concerning the roles and abilities of males and females," and must reject classifications that "reflect[] archaic and stereotypic notions."[24] For example, the Court rejected such stereotypes in striking down statutes that provided Aid to Families with Dependent Children to families when the father became unemployed, but not when the mother lost her job[25] -- a statute based on the stereotype that the wages of fathers, but not mothers, are essential to families' economic security.

Judge Thomas' responses in no way made clear that he is willing or able to ferret out and reject such stereotypes when reflected in the law. For example, in 1988 Judge Thomas lauded academic Thomas Sowell's analysis of working women as "a much-needed antidote to cliches about women's earnings and

---

Boren, 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting) (both arguing that gender-based classifications need only pass under "rational basis" scrutiny). Justices Scalia, Kennedy, and Souter have not yet addressed any sex-based equal protection challenge, so their positions remain unknown.

[24] Mississippi University for Women v. Hogan, 458 U.S. 718, 742 (1982).

[25] Califano v. Westcott, 443 U.S. 76 (1979).

professional status."[26] Yet Sowell's commentary is riddled with just the sort of stereotypes that the Court has consistently rejected as constitutionally repugnant. For example, Sowell wrote that

> What are called 'traditional' women's jobs are often jobs which meet other specific requirements that make sense to women -- slow obsolescence rates, adjustable hours, and less demand for physical strength are just a few examples. Where particular jobs are especially attractive to particular groups, those jobs are likely to have their pay held down by the competition of many applicants.[27]

During these hearings Judge Thomas attempted to downplay his praise for Sowell's analysis of working women, suggesting that he did not necessarily adopt or agree with all of Sowell's conclusions.[28] Yet in a 1987 interview, Judge Thomas referred to Sowell as "not only an intellectual mentor but my salvation"[29] when discussing discrimination issues. Judge Thomas also failed to identify the "cliches" to which Mr. Sowell's commentary -- which concludes that sex-based inequities in pay and career advancement stem from women's own choices and behavior -- provided an "antidote."

Nor was Judge Thomas willing to refute during these hearings Mr. Sowell's unqualified assertion that "women are typically not

---

[26] Thomas, "Thomas Sowell and the Heritage of Lincoln: Ethnicity and Individual Freedom," Lincoln Review, vol. 8, no. 2 at 15-16 (Winter 1988).

[27] Sowell, Civil Rights: Reality or Rhetoric? (1984) at 107-08.

[28] Transcript, 9/10/91 p.m. at 192-94; 9/11/91 a.m. at 66.

[29] "Clarence Thomas," Reason (November 1987) at 30.

educated as often in such highly paid fields as mathematics, science, and engineering, nor attracted to physically taxing and well-paid fields such as construction work, lumberjacking, coal-mining, and the like."[30]

Judge Thomas' failure to recognize and reject dangerous stereotyping statements casts serious doubts about his commitment to apply equal protection analysis free of fixed notions about women's roles and abilities, as the Court's constitutional jurisprudence requires.

Conclusion

Judge Thomas' record casts grave doubt about his commitment to affirm and support fundamental principles of equal employment opportunity, constitutional protections against gender discrimination, and reproductive freedom. This record should not be ignored -- instead, it must be part of this Committee's determination of his fitness to serve on the Supreme Court.

Judge Thomas' responses to this Committee have failed to assuage our concerns. He has endeavored to distance himself during these five days of testimony from statements and positions he has articulated during the past 10 years as a public figure. He has refused to respond to questions on women's fundamental right to reproductive choice on grounds of judicial impartiality,

---

[30] Sowell, Civil Rights at 92. Indeed, Judge Thomas remarked only that "I can't say whether or not women are attracted or not attracted to those areas. I think that is a normative comment there." Transcript, 9/11/91 a.m. at 65-66.

although he failed to invoke the same doctrine in responding to inquiries involving other pressing constitutional issues. And his reponses to questions on constitutional protections against gender discrimination failed to provide adequate assurance of his commitment to strike down invidious sex-based discrimination.

The Court's vigilance is needed now more than ever, as gender- and race-based discrimination still tarnish the American dream. The stakes are too high to entrust our constitutional future to any nominee who does not demonstrate unwavering commitment to the law's essential guarantees of individual rights and liberties. Judge Thomas' testimony reaffirms our opposition to his confirmation. Either he is running from his record, which strains credulity, or he has not carefully thought through critical issues carrying enormous significance for the lives of Americans. Either way, Judge Thomas should not be confirmed.