STATEMENT

OF

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Before

the

SENATE JUDICIARY COMMITTEE

ON THE NOMINATION OF

CLARENCE THOMAS TO THE SUPREME COURT

SEPTEMBER 17, 1991

Mr. Chairman, my name is Drew S. Days, III. I am a Professor of Law at Yale University. I want to thank you and the other members of the Committee for affording me an opportunity to appear before you this morning during your consideration of the nomination of Judge Clarence Thomas to become the next Associate Justice of the United States Supreme Court. I can assure you that I respect the solemn responsibility that the Senate must discharge in its constitutional "advise and consent" role and that I offer my testimony in that spirit.

I was struck and, I must say moved, by the common theme of many of your eloquent opening remarks when these hearings got underway a week ago about your visions of the place of the Supreme Court in our system of government. You spoke of the Court's duty "to administer justice,"[1] of the need for its members to be "able guardians of rights,"[2] of its function as "a people's court" dealing "with real people, their rights, duties, property, and most importantly their liberty."[3] You expressed your concern that it be "the champion of the less fortunate,"[4]

standing "against any ill winds that blow as [a] haven[] of refuge" for the "weak or helpless or outnumbered."[5]

There have been Supreme Courts during my lifetime that have lived up to the visions you painted. But we have lost in the last two years from the Court Justices Brennan and Marshall, two true guardians of our rights, two justices who understood their responsibility to be part of a "people's court", part of a haven of refuge for the weak and helpless and outnumbered. It will be some time before we are able to assess fully their invaluable contributions to the Court, our society, and to the lives of all of us. Of course, their majority opinions helped define and reinforce many of the rights we as Americans cherish today. But, even in dissent, their voices appealed to our very best instincts. And I have no doubt they were often successful, through the formal and informal workings of the Court, in opening the eyes of less perceptive and sensitive justices to the realities of life for the least fortunate among us.

With the departure of Justices Brennan and Marshall, the

Court and the Country deserve a new Associate Justice capable of serving as a staunch defender of rights secured by the Constitution and laws of the United States. Political realities being what they are, however, I am not so naive as to expect that the next member of the Court will have views identical to those of those two recently-retired justices or be inclined to vote as they might on every issue. But I do think that the American people are entitled to have a man or woman appointed to fill the vacancy left by Justice Marshall who shares the vision of the Supreme Court's role that several of you expressed at the opening session and that most of our fellow citizens embrace.

The Administration would like to persuade us that Judge Clarence Thomas is that person. But I, for one, have seem little in Judge Thomas' government service, writings and speeches, or, indeed, in his testimony during the past week before this Committee to convince me that he would be a champion for those who turn to the Court for protection or that he has the capacity or inclination to make it a kinder and gentler institution than

it is today.

To perform those tasks, a justice has to be have a sense of history. Judge Thomas has urged this committee and the American People to disregard his writings and speeches as philosophical ramblings or forays into political theory and to focus on who and what he is today.[6] I find that very hard to do, however, since I have had almost no personal contact with Judge Thomas. Moreover, I have been unable to glean very much from his opinions on the Court of Appeals for the District of Columbia Circuit since they address largely routine administrative and criminal law issues.

What one finds in Judge Thomas' writings, among other things, is a glaring lack of any historical perspective. He and other "Black Conservatives" have gained some public sympathy in recent years by contending that they have been ostracized by liberal blacks and the "civil rights establishment" Because they had the courage to speak out, to challenge the prevail orthodoxy.

I, for one, welcome challenges to orthodoxy, in civil rights

or elsewhere. But what I have difficulty accepting challenges from people who demonstrate a woeful ignorance of history. Judge Thomas' articles and speeches fall into that category. They certainly have attracted widespread attention in recent years akin to that enjoyed by the perennial "man bites dog" stories. But when Judge Thomas attacks affirmative action, or school desegregation or efforts to ensure minorities a meaningful role in the political process, it is evident that he lacks a basic understanding of the civil rights struggle in America.

One would not gather from reading his articles or speeches, for example, that administrative agencies and courts adopted affirmative action "goals and timetables" as a response to what, in many instances, were years of resistance by employers or unions to the opening up of employment opportunities to minorities and women[7]. My point is not to argue here the wisdom of goals and timetables but rather to make the point that it is difficult to take seriously proposals for change from a person like Judge Thomas who treats a highly complex subject

rhetorically and superficially for want of any sense of historical context.

In several of his articles Judge Thomas offers his own rewriting of the Supreme Court's 1954 opinion in Brown v. Board of Education [8] striking down state-imposed segregation in public educations. He then goes on to argue that had the Court approached the issue of school desegregation his way, the country might not still be engaged in a debate over how to eradicate the vestiges of previously dual systems. His recitation and analysis seem devoid of any sense of the difficult legal campaign waged to overturn the "separate but equal" doctrine[9] And it does not show an awareness of the degree to which school desegregation doctrine after Brown was an understandable response to organized, often massive, resistance to even minimal changes in all-white, all-black assignment patterns for over a quarter century.[10] I make these observations not to suggest that further debate over what we do about segregated education in America in the 1990s is unwarranted or that the old approaches may not need to yield to

new ones. But I seriously doubt that it can be a constructive one on Judge Thomas' terms.

Judge Thomas has also found fault with Congress' and the Supreme Court's efforts to ensure minority voting rights.[11] Yet his criticisms sit unembarrassed on the page by any apparent comprehension of the lives and the limbs that courageous citizens offered up to vicious racists so that the promises of the Fifteenth Amendment might be realized.[12] One searches the pages of his articles for any recognition of how Southern registrars effectively frustrated the Justice Department voting rights enforcement litigation program in the early 1960s.[13] They make no mention of these and other stories of resistance to effective minority exercise of the franchise that caused the Congress to pass the Voting Right of 1965 and to extend its operation by large margins in 1970, 1975 and, most recently, in 1982.[14] Meaningful conversations have been going on for several years among informed blacks, Hispanics, and whites about whether well-established approaches to voting rights issues are any longer in

the best interest of racial minorities or of the society at large.[15] That Judge Thomas was not invited to join can be explained rather simply: he had nothing to bring to the table.

It might be argued that Judge Thomas really is aware of the history I have described but simply decided to avoid any reference to it in his articles for reasons known only to himself. Even if that is true, I am left, nevertheless, with the question of why someone like Judge Thomas would address such important legal and political without giving them the due considerations they clearly deserved.

II.

Judge Thomas has suggested during his testimony over the past week that the speeches and articles to which I refer were examples of what he did as a member of the Executive Branch, as a political operative, but do not offer any real insights into what he is like as a judge.[16] Strictly speaking, he was that. However, I think that his self-characterization in this respect is revealing. For it lacks a sense of the special role he was

expected to play in the Executive Branch both as an Assistant Secretary for Civil Rights in the Department of Education and as Chairman of the Equal Employment Opportunity Commissions E.E.O.C. As the members of this committee are all well-aware, Congress created the posts Judge Thomas occupied because it felt that issues of discrimination in eduction and employment deserved the attention of a senior-level official and that protecting the interests of those likely to suffer unfair treatment in those respects should be a full-time rather than part-time endeavor.

Yet Judge Thomas, as Assistant Secretary at the Education Department, argued, for example, against extending the protection of Title IX, which prohibits sex discrimination by educational institutions receiving federal funds to cover employment discrimination against women teachers.[17] His position was rejected by the Assistant Attorney General for Civil Rights and the Solicitor General in the Department of Justice and, ultimately, by a unanimous Supreme Court.[18]

As Chairman of the E.E.O.C., Judge Thomas set his sights on

abolishing the agency's reliance on statistical evidence of employment discrimination, despite the Supreme Court's approval of such proof, because he questioned what he understood to be the basic premise involved. He believed that this evidentiary technique relied on the conviction that workforces should reflect, in the absence of discrimination, the proportion of racial minorities and women in the population at large. He thought that this was absurd and he was right.

His only problem was that the case law he criticized claimed no such thing. It did acknowledge that statistical disparities between groups reasonably alike in overall qualifications for the jobs in question would be some evidence of discrimination. But it also clearly left employers free to introduce evidence supporting a non-discriminatory explanation for such disparities.[19]

Given his misunderstanding of this doctrine, however, Judge Thomas felt unconstrained in praising a book critical of statistical claims about sex discrimination as "a much needed

antidote for cliches about women's earnings and professional status."[20] He stated elsewhere on this same point:

> It could be . . . that blacks and women are generally unprepared to do certain kinds of work by their own choice. It could be that blacks choose not to study chemical engineering and the women choose to have babies instead of going on to medical school.[21]

In sum, Judge Thomas was of the view that minority and female plaintiffs, despite the well-established fact of race and sex discrimination, should bear the burden of negating every other explanation for employment disparities in order to prevail.

Moreover, Judge Thomas' frequent expressions of disagreement with Supreme Court decisions in the employment and affirmative action fields undoubtedly had a destabilizing impact upon the E.E.O.C.'s enforcement program. He even went so far as to commend publicly the dissent in an affirmative action case as "guidance for lower courts and a possible majority in future decisions."[22] Of course, government employees like Judge

Thomas do not forsake their First Amendment rights to speak out on important issues of the day. However, his commentaries on Supreme Court doctrine, one day expressing E.E.O.C. policy, the next his own personal views, must have been difficult for the agency's several thousand employees spread across the country to comprehend readily.

Overall, Judge Thomas' record as a civil rights enforcer in the Reagan and Bush administrations seems more the subject of lengthy explanations and apologies, as in the case of the thousands of lapsed age discrimination claims, rather than the object of general praise for jobs well done. And, for all his talk[23] about the need for stronger sanctions in employment discrimination cases, there is no evidence that he took systematic steps to persuade Congress to provide them.[24] The strong picture that emerges suggests that Judge Thomas had his opportunity to guard the rights of people who looked to his agencies to help them and he did not measure up to the task.

III.

Judge Thomas' and the Administration's response to these disquieting features of his world view and civil rights enforcement record is that his humble beginnings are an assurance that he will be quick to rise to the defense of those looking to the Supreme Court to vindicate their rights. In my estimation, Judge Thomas' impressive story of his journey from poverty to prominence is not assurance enough.

END NOTES

1. Nomination of Clarence Thomas To be Associate Justice of the Supreme Court: Hearings Before the Senate Comm. on the Judicary, 102 Cong., 1st Sess., Sept. 10, 1991, at 14 (remarks of Sen. Thurmond) [hereinafter Hearings].

2. Hearings, Sept. 10, 1991, at 37 (remarks of Sen. Leahy).

3. Hearings, Sept. 10, 1991, at 65 (remarks of Sen. Heflin).

4. Hearings, Sept. 10, 1991, at 78 (remarks of Sen. Simon).

5. Hearings, Sept. 10, 1991, at 87 (remarks of Sen. Kohl).

6. Hearings, Sept. 12, 1991, at 17-18 (colloquy between Judge Thomas and Sen. Kohl).

7. Clarence Thomas, Civil Rights as a Principle Versus Civil Rights as an Interest, in **Assessing the Reagan Years** 391, 395-96. (David Boaz ed. 1988)

8. Clarence Thomas, Toward a "Plain Reading" of the Constitution -- The Declaration of Independence in Constitutional Interpretation, 30 How. L.J. 691, 699-703 (1987).

9. **Richard Kluger, Simple Justice** (1975).

10. Griffin v. County School Bd., 377 U.S. 218 (1964).

11. Clarence Thomas, Speech at the Tocqueville Forum, Wake Forest Univ. 8, 17 (Apr. 18, 1988).

12. **David Garrow, Protest at Selma** (1978).

13. South Carolina v. Katzenbach, 383 U.S. 301 (1966)

14. Laughlin McDonald, The 1982 Extension of Section 5 of the Voting Rights Act of 1965: The Continued Need for Preclearance, 51 Tenn. L. Rev. 1 (1983).

15. Lani Guinier, the Triump of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 Mich. L. Rev. 1077 (1991).

16. Hearings, Sept. 13, 1991, at 17 (testimony of Judge Thomas).

17. Peter Brown, UPI (July 13, 1981); BNA Daily Labor Report at A-5 (Aug. 5, 1981) reprinting Terrel Bell letter of July 27, 1981).

18. North Haven v. Bell, 456 U.S. 512 (1982).

19. Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).

20. Clarence Thomas, Thomas Sowell and the Heritage of Lincoln: Ethnicity and Individual Freedom, Lincoln Rev., Winter 1988, at 15.

21. Juan Williams, A Question of Fairness, Atlantic Monthly, 1987, at 10 (NEXIS pagination).

22. Clarence Thomas, Speech to the Cato Institute 20-21 (Apr. 23, 1987).

23. Clarence Thomas, Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough! 5 Yale L. & Pol. Rev. 401, 408-411, 1987).

24. Hearings, Sept. 13, 1991, at 49-50 (testimony of Judge Thomas).