Congressional Black Caucus
Congress of the United States
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STATEMENT OF THE CONGRESSIONAL BLACK CAUCUS
ON THE NOMINATION OF JUDGE CLARENCE THOMAS
AS AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

September 19, 1991

Introduction

It is a special pleasure to testify before our friends and colleagues on the Senate Judiciary Committee. Representatives of the Congressional Black Caucus have testified at Supreme Court confirmation hearings before, and we truly appreciate this opportunity to once again express our views on a vitally important nomination.

Although as Members of the Congressional Black Caucus we represent substantial numbers of African Americans, as Members of Congress we also represent whites, Hispanics, Asians, Native Americans, older Americans, people with disabilities, and Americans of every stripe. It is on behalf of all Americans that we oppose the nomination of Judge Clarence Thomas for a seat on the United States Supreme Court.

Our members have been chief sponsors of every piece of legislation touching on civil rights and liberties, women's rights, and equal opportunity for a quarter of a century. A large number of our members serve on the House Education and Labor Committee and several others serve on the Judiciary Committee, the two committees which have the major responsibility for overseeing the agencies and laws Judge Thomas was responsible for.

Judge Thomas has testified before Congressional committees 56 times (55 published; 1 unpublished). Yet this extraordinary number of appearances is not reflective of a long tenure in public service or governmental office, and very few of his appearances were routine.

In fact, most of those appearances stemmed from controversies in which he was involved and reflected the exasperation of House Committees with his administration of the law. The publication of an unusual number of General Accounting Office (GAO) reports, most of them highly critical of the nominee's administration of the laws under his jurisdiction, underscore this view.

After carefully examining the Thomas record, we have concluded that during his government service Judge Thomas failed to carry out his constitutional obligation to his oath of office

to enforce the laws of the land. Moreover, Judge Thomas exhibited a pervasive disrespect for Congress and the legislative process. It is our belief that his disregard for legal precedent and the rule of law undermines his privilege to a seat on the Supreme Court.

The Supreme Court belongs to all Americans. More than any other, it is the institution that curbs excesses by other government bodies, that safeguards the rights and liberities of every citizen, and that serves as a unifying force, enabling our nation to survive as a constitutional democracy longer than any other.

Beyond this tie that all citizens have to the Supreme Court, however, the Court has a special significance to African Americans. Throughout our nation's history, the actions of the Supreme Court have had a powerful influence on the lives of African Americans -- for better or worse. During the 19th century, the Supreme Court first decided that African slaves were property with no rights that a white man was bound to respect. Then, after the Civil War, the Supreme Court helped bring an end to Reconstruction, with decisions that gutted original civil rights laws and imposed the judicial invention of "separate but equal."

In contrast, in the latter half of the 20th century, the Supreme Court's interpretations of the Constitution have provided African Americans with long overdue freedom. The Supreme Court's decision in Brown v. Board of Education and subsequent civil rights cases helped rid the nation of the scourge of "Jim Crow". These decisions created conditions in which African Americans could improve their economic, social, and political status. Without the Supreme Court, it is doubtful that most Members of the Congressional Black Caucus would be in Congress, that General Colin Powell would be Chairman of the Joint Chiefs of Staff, or that Judge Clarence Thomas would be a nominee to the Supreme Court.

No one individual is more responsible for the Supreme Court's contemporary role as the guardian for equal rights than Justice Thurgood Marshall. First as an advocate and then as a distinguished jurist, Justice Marshall is responsible for most of the great equal protection decisions of the past 40 years and for the legacy of opportunity that we are struggling to make tangible for millions of Americans. The nation's debt to Justice Marshall is enormous and can never be repaid.

The nominee before you has been offered by President George Bush as a worthy successor to Justice Marshall. As an African American and as someone who overcame humble beginnings, we are told, Judge Thomas will understand the needs of those who face similar struggles. Even if these claims were not made on Judge Thomas' behalf, it is inevitable that Judge Thomas will be assessed as Justice Marshall's successor.

Regrettably, when we examine the nominee's record -- not only his proformance as a government official -- but his writings, speeches, and remarks over the past decade, it is clear that Judge Thomas is not a worthy successor to Justice Marshall. Our differences with the nominee do not stem merely from reasonable and understandable differences over particular cases or remedies. Rather, Judge Thomas repudiates the fundamental role of the Supreme Court as guardian of our Constitutional freedoms and rejects the legacy of Justice Marshall.

On behalf of 25 of the 26 members of the Congressional Black Caucus, we respectfully urge you to reject the nomination of the Judge Clarence Thomas.

CONGRESSIONAL BLACK CAUCUS STATEMENT

I. The Nominee's Failures to Enforce the Law and his Contempt for the Legislative Process

A. Failures at the EEOC

Two years ago, 14 members of the House of Representatives, including 12 chairs of committees having jurisdiction over the EEOC and five members of the Black Caucus, wrote to President Bush asking that Thomas not be nominated to the Court of Appeals.

After reviewing the record, the writers of the letter said that Thomas had "resisted Congressional oversight and been less than candid with legislators about agency enforcement policies." They concluded that he had demonstrated an "overall disdain for the rule of law and that his record as "EEOC Chair sends a clear message to those who have suffered job discrimination that he is insensitive to the injustice they have experienced."

These were harsh conclusions, but they are based on a well-documented record, including the following:

- As Chair of the EEOC, Thomas persistently refused to use the mechanisms provided by law after Congress earmarked funds specifically for this type of enforcement and threatened to cut the budget for the office of the Chair and members of the EEOC. In 1985, 40 members of Congress wrote to Thomas expressing "grave concern" over EEOC's failure to pursue class action cases.[1] This refusal to use the one mechanism that has been essential to the elimination of discrimination flows directly from Judge Thomas's personal view that "group remedies" are inappropriate.

- Also underlying Thomas's refusal to pursue systemic cases was his opposition to the employee selection guidelines. These guidelines were the bases for the Supreme Court's unanimous decision in Griggs v. Duke Power Company in 1971 holding that employer practices that had a disparate impact violated Title VII unless justified by business necessity. The guidelines and Griggs were the bases of great progress in equal job opportunity in the 1970s. When Thomas was thwarted in his effort to repeal the guidelines, he simply refused to enforce them, leaving EEOC to file only the kinds of cases "that employers write off as the cost of doing business."[2]

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[1] See The Washington Post, July 9, 1985, p. A1.

[2] See interview with Michael Middleton, St. Louis Post Dispatch, February 26, 1989, p. 1B.

- Despite a Supreme Court decision specifically endorsing goals and timetables and the failure of a Meese-Thomas effort to repeal the Executive Order authorizing such remedies, Thomas declared in 1986 that EEOC had abandoned the remedy and would no longer approve settlements involving the use of such goals.[3]

- Through indifferent and negligent administration, Thomas allowed some 13,000 claims under the Age Discrimination in Employment Act to lapse without action, requiring special legislation by Congress to restore individual rights.[4]

- As Chairman, Thomas also failed to enforce the age discrimination law in dealing with the obligations of employers to make pension contributions for workers over the age of 65. Thomas dragged his feet, allowing employers to freeze the pension accounts of people who worked beyond the age of 65, even after Congress had clarified the law and a federal court had held that EEOC delays were "entirely unjustified and unlawful, at worst deceptive to the public."[5] Thomas only backed down after further Congressional pressure and objections from the IRS.

- During his years at the EEOC, Thomas failed to challenge gender-based wage discrimination, embracing an analysis by Thomas Sowell that asserts that women prefer jobs that pay less and that black women fare better in the labor force than white women.[6]

B. Failures at the Department of Education

The nominee's record as a lawless administrator at the EEOC is of a piece with his defaults in his previous post - as director of the Office of Civil Rights in the Department of Education.

There, he made startling admissions at a 1982 hearing in federal district court concerning charges that his office had violated court-ordered requirements for processing civil rights cases.

> Q: And aren't you in effect -- But you're going ahead and violating those time frames; isn't that true? You're violating them in compliance reviews on all occasions, practically, and you're violating them on complaints most of the time, or half the time; isn't that true?
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> A: That's right.

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[3] The Washington Post, July 24, 1986.

[4] See letter from Rep. Edmund Roybal, Chair, House Select Committee on Aging, to Senators Biden and Thurmond, July 16, 1991.

[5] AARP v. EEOC, 655 F. Supp. 228, 229 (D.D.C.), aff'd in part, rev'd in part on other grounds, 823 F2d 600 (D.D.C. 1987).

[6] See Report of the Womens' Legal Defense Fund, pp. 40-42; Thomas "Thomas Sowell and the Heritage of Lincoln; Ethnicity and Individual Freedom," 8 Lincoln Review no. 2 at 15-16. (Winter 1988).

Q: So aren't you, in effect, substituting your judgement as to what the policy should be for what the court order requires? The court order requires you to comply with this 90 day period; isn't that true?

A: That's right.

Q: And meanwhile, you are violating a court order rather grievously, aren't you?

A: Yes.[7]

Following the hearing, Judge Pratt concluded that while there had been some problems in past administrations with compliance, the difference between David Tatel (Thomas's predecessor) and Thomas "is the difference between day and night."[8] Judge Pratt found that the court's order had "been violated in many important respects" and that under Thomas, the view was that "we will carry out [civil rights statutes] in our own way and according to our own schedule."[9] This episode is hardly comforting when we consider that a justice must himself respect and follow the law.

C. The Nominee's Disrespect for the Legislative Process

The failures by Judge Thomas to enforce the civil rights laws he was responsible for administering have been matched by unprecedented expressions of hostility toward Congress for scrutinizing and criticizing his agency's performance.

For example, in its effort to deal with the lapsed complaints under the Age Discrimination Act, Congress was continually frustrated by misrepresentations made by Thomas about the severity of the problem, leading the Senate Special Committee on the Aging to find that:

> "The EEOC misled the Congress and the public on the extent to which ADEA charges had been permitted to exceed the statute of limitations."[10]

Yet, the moral drawn by the nominee from this episode, in which the rights of older people were restored only through painstaking investigation and corrective action by Congress, was that Congress was at fault. He said:

> "My agency will be virtually shut down by a

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[7] Transcript of hearing in WEAL and Adams v. Bell, Civ. Action 3095-70 (D.D.C. March 12, 1982) at 48, 51.

[8] Adams transcript, March 15, 1982.

[9] Id.

[10] Report of the Senate Special Committee on Aging (unpublished), 100th Congress, 2d Sess., 1988, pp. 36-37. Senator Pryor, the current Chairman of the Committee, has made it clear that the misrepresentations were those of Clarence Thomas, stating that "I was dismayed to learn about several erroneous statements made by Chairman Thomas... Those statements are certainly misleading..." Cong. Rec. S 1542 (daily ed. Feb. 22, 1990).

> willful Committee staffer who has succeeded in getting a Senate Committee to subpoena volumes of EEOC records... Thus a single, unelected official can disrupt civil rights enforcement --- and all in the name of protecting rights."[11]

This hostile, unresponsive treatment of any Congressional criticism of his performance was repeated by Mr. Thomas on many occasions. In 1988, the General Accounting Office issued an audit report in response to a request from now retired Congressman Augustus Hawkins, then Chairman of the House Committee on Education and Labor, to look into EEOC's record of investigating and settling complaints. The GAO report set out facts showing a mounting backlog, delays in investigation and a decrease in the average amounts of settlements.[12]

Thomas's reply was to cast doubts on the independence and integrity of the GAO, complaining that the report was a "hatchet job" and adding that:

> "It's a shame Congress can use GAO as a lap dog to come up with anything it wants..."[13]

On other occasions, the nominee has offered the following opinions of Congress and the legislative process:

- Congress has "proven to be an enormous obstacle to the positive enforcement of civil rights laws that protect individual freedom."[14]
- "Congress is no longer primarily a deliberative or even a law making body."[15]
- As EEOC Chair, he was "defiant in the face of some petty despots in Congress."[16]

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[11] Speech to the Federalist Society at the University of Virginia, March 5, 1988, p. 13.

[12] GAO Report HRO-89-11 (October 1988).

[13] The Los Angeles Times, October, 11, 1988.

[14] Speech to the Federalist Society at Harvard University, April 7, 1988, p. 13.

[15] Speech at Brandeis University, April 8, 1988, p. 4.

[16] Speech at Harvard University, supra note 14 at p. 13.

- A committee request for semi-annual reports on the EEOC's work was an "intrusion into the deliberations of an administrative agency."[17]

- "As Ollie North made perfectly clear last summer it is Congress that is out of control." [emphasis in original][18]

Our concern is not that Thomas engaged in spirited discussions in public or with members of Congress. We are all accustomed to the rough and tumble of legislative and political debates and we can take it as well as dish it out.

Rather, something of more fundamental importance is at stake here. Faced on many occasions with facts indicating that his agency was not enforcing the law, Clarence Thomas chose neither to promise improved performance nor to engage in a substantive discussion of the legislative and administrative issues. He elected, rather, to challenge the legitimacy of the legislative process and the good faith of those who are a part of it.

Even without more, the Thomas record of disdain for law should be viewed as a disqualifying factor in his quest for a seat on the Supreme Court. His actions and utterances should also set off alarm bells in this Committee about what may be expected of Judge Thomas should he be confirmed. We will discuss these concerns more fully later in this testimony.

II. The Nominee's Repudiation of the Role of the Supreme Court as Guardian of Constitutional Rights and Liberties

Supporters of Clarence Thomas's nomination seek to portray opponents as people who disagree with the nominee about "busing" and "quotas." This caricature of the opposition is both crude and inaccurate. An examination of the nominee's writings and speeches makes it abundantly clear that he quarrels not just with a few decisions or remedies but with the great body of equal protection jurisprudence that has made progress possible in the latter half of the 20th century.

A. The Nominee's Attack on Court Interpretation of the Voting Rights Act. In 1988, Judge Thomas assailed Supreme Court decisions applying the Voting Rights Act, with the following words:

"The Voting Rights Act of 1965 certainly was

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[17] Speech at Harvard University, supra note 14 at p. 13.

[18] Speech to the Federalist Society at the University of Virginia, March 5, 1988, p. 13.

> crucial legislation. It has transformed the policies of the South. Unfortunately, many of the Court's decisions in the area of voting rights have presupposed that blacks, whites, Hispanics, and other ethnic groups will inevitably vote in blocs. Instead of looking at the right to vote as an individual right, the Court has regarded the right as protected when the individual's racial or ethnic group has sufficient clout."[19]

Elsewhere, the nominee has attacked the 1982 amendments to section 2 of the Voting Rights Act on which the court decisions were based as "unacceptable".[20]

The decisions referred to by Judge Thomas presumably are White v. Register, 412 U.S. 755 (1971) and Thornburg v. Gingles, 478 U.S. 30 (1986). The latter decision implemented the 1982 amendments to section 2, which prohibits election laws and practices with a racially discriminatory effect. The most important application of this prohibition is to forbid schemes that dilute minority voting strength. As the NAACP Legal Defense Fund has written:

> "Judge Thomas's criticism of section 2 and the related Supreme Court cases reflects a fundamental misunderstanding of the law. Neither section 2 nor those decisions, assume that whites or minorities vote in racial blocs; in a section 2 case like Gingles the burden is on the plaintiff to adduce evidence proving that racial bloc voting does occur in the jurisdiction at issue. Where that, in fact is the case, the individual's right to vote as well can be rendered meaningless by a system which assures that the candidate supported by black voters has no chance whatsoever of actually being elected."[21]

In 1981 and 1982 we in the Black Caucus worked with many members of this Committee to craft amendments to the Voting Rights Act that would provide a meaningful opportunity for minority citizens to elect candidates of their choosing. At the same time we specifically eschewed in the statute any notion of "proportional representation" or "group rights."

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[19] Speech at the Tocqueville Forum, April 18, 1988, p. 17.

[20] Speech to the Heritage Foundation, June 15, 1987, p. 10; Speech at Suffolk University, Boston, March 30, 1988, p. 17.

[21] NAACP Legal Defense Fund, "An Analysis of the Views of Clarence Thomas," August 13, 1991, p. 5.

Our work is surely not beyond criticism, but for the nominee to caricature both the statute and the Court's interpretation of it as he has, betrays both his failure to understand the issues and his persistent rejection of the role of the judiciary in protecting rights established by the Constitution or the Congress.

B. Equal Employment Opportunity and Affirmative Action

For more than a decade, the Supreme Court has struggled to balance fairly the interests involved in affirmative action cases. While recognizing a need to go beyond formalistic declarations of good intentions by employers, the Court has sought to assure that the interests of already-employed white workers were not "unduly trammeled" by affirmative action policies. While recognizing that race-conscious remedies ordinarily must be based on the need to overcome a history of past racial discrimination or exclusion, the Court has recognized the utility of voluntary agreements that avoid contentious litigation about liability.

Thoughtful observers on all sides of the issue have not been reluctant to criticize the Court for "going too far" or "not going far enough" on a given matter, but their criticism has been tempered by an appreciation of the complexity of the issues, the need to discern legislative intent that is not always evident and the need to be fair and equitable.

That is what one might have expected of Clarence Thomas, given his position at the EEOC and presumed expertise. Instead, Mr. Thomas has approached affirmative action issues with an elephant gun, using overblown rhetoric instead of careful analysis. His attack on affirmative action remedies has been across-the-board and all-encompassing. Unlike some proponents of judicial restraint, he gives no deference to the will of the majority as expressed in Congressional legislation (Fullilove),[22] nor would he permit private employers to act voluntarily to remedy their past practices (Weber and Johnson).[23] And he would restrain the authority of courts to order race-conscious remedies even in the most aggravated cases of discrimination. (Sheet Metal)[24]

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[22] Fullilove v. Klutznick, 448 U.S. 448 (1980).

[23] United Steelworkers v. Weber, 443 U.S. 193 (1979); Johnson v. Transportation Agency, 480 U.S. 616 (1987).

[24] See, e.g. Local 28 Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986).

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The intemperate language used by the nominee in his attacks is instructive. The Weber case involved a voluntary effort to deal with the long-standing exclusion of black workers from the steel industry, and Johnson a voluntary effort to deal with entrenched patterns of gender discrimination in county government.

Yet in Mr. Thomas's lexicon, the facts did not matter. Weber was "the egregious example"[25] of Court misinterpretation of legislative intent. Johnson was "just social engineering and we ought to see it for what it is."[26]

Most disconcerting, if one expects a Supreme Court justice to be committed to the rule of law and to give weight to the doctrine of Stare Decisis, is the nominee's statement that he hoped that the dissent in Johnson:

> "will provide guidance for lower courts and a possible majority in future decisions."[27]

As for the Fullilove decision, upholding Congress's effort to provide a remedy for the long-standing exclusion of minorities from opportunities to become government contractors, Thomas said:

> "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 law the Court upheld in Fullilove v. Klutznick."[28]

Concerning the Griggs decision, Thomas declared:

> "We have permitted sociological and demographic realities to be manipulated to the point of surreality by convenient legal theories such as

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[25] Speech to Cato Institute, October 2, 1987, p. 7.

[26] The New York Times, March 29, 1987, p. 1.

[27] Cato Speech, supra note 25 at pp. 20-22.

[28] Thomas, "Civil Rights as a Principle versus Civil Rights as an Interest," Assessing the Reagan Years (CATO Instit. 1988) at p. 391, 396.

adverse impact."[29]

His reference of course was to a decision not grounded in abstract theory, but in a practical recognition that minorities would have an opportunity for economic advancement only if barriers to employment that were not related to ability to do the job were removed. This Committee knows as well as we do that the progress that black workers have made in becoming police officers, firefighters, skilled construction workers, and over-the-road truckers, to name but a few, is due to the liberating effects of the Griggs decision that Clarence Thomas scorns.

The blunderbuss approach that the nominee has taken to equal employment and affirmative action decisions and his failure to make fundamental distinctions, created serious problems. After the Supreme Court's 1984 decision in the Stotts case holding that white workers with seniority could not be laid off before less senior minority workers in order to protect an affirmative action plan, Thomas argued that the decision had to be applied to invalidate affirmative action in hiring and promotions as well.[30] He was forced to abandon this transparent rationale when the Court upheld the use of goals and timetables[31] and then reverted to an explanation based on his "personal disagreement" with the Supreme Court's approach.[32]

C. Equal Educational Opportunity. The nominee has challenged the reasoning of the seminal case of Brown v. Board of Education; but far more important, he has criticized as a "disastrous series of cases" the Supreme Court rulings that gave real content to the Brown decision.[33] One decision he has singled out for criticism is Green v. County School Board of New Kent County. In that case, the Court held unanimously that "freedom of choice" plans under which children remained segregated unless black

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[29] Speech to Cascade Employers Association, March 13, 1985, p. 18.

[30] Firefighters v. Stotts, 467 U.S. 561 (1984); Washington Post editorial, "Goals and Timetables and the EEOC," (July 25, 1986).

[31] See, e.g. Local No. 93, Firefighters v. Cleveland, 478 U.S. 501 (1986).

[32] Thomas, "Principle v. Interest," supra note 28 at 397.

[33] Thomas "Principle v. Interest," supra, note 33 at 393.

parents and children risked the consequences of requesting transfer, were inadequate unless actual desegregation occurred.

Thomas complained that Green went too far because it "not only ended segregation but required school integration."[34] In that criticism, offered in 1988, he echoed the views of two other judges, Parker and Haynesworth, who took the position that the Brown case implied no affirmative obligations, but only a duty to cease formal segregation. Those judges (both of whom were rejected at different times by the Senate for a seat on the Supreme Court) spoke many years ago before the Supreme Court had addressed the question of remedy.

Judge Thomas's criticism should be clearly understood. It is not an attack on busing, for in the Green case, desegregation would have brought less busing not more since children were being bused for purposes of segregation. Rather, the Thomas view is that the demands of the Fourteenth Amendment should be considered satisfied by a formal disavowal of segregation, even if no desegregation actually follows. To do more, apparently, would be to validate the idea that separate is inherently unequal, a premise that Thomas disputes.

If the view that Judge Thomas urged in the 1980s had prevailed earlier, Brown might have become little more than a formal exercise and millions of children, who like Mr. Thomas grew up black and poor in the South, would never have had an opportunity to escape the yoke of segregation. This is not a vision that black Members of Congress can accept in a Supreme Court justice.

D. The Nominee's Disdain for the Role of Courts in Protecting the Poor and Disadvantaged. In 1986, Mr. Thomas joined in a report of the White House Working Group on the Family. The report condemned a series of Supreme Court decision as having "crippled the potential of public policy to enforce familial obligations, demand family responsibility, protect family rights or enhance family identity."[35] Among the decisions condemned was that in Moore v. City of East Cleveland.[36] In that decision, the Court overturned the jail sentence of the grandmother who had been prosecuted and jailed for refusing to evict the 10

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[34] Id.

[35] The Family: Preserving America's Future (1986).

[36] 431 U.S. 494 (1977).

year-old grandson for whom she had cared since infancy, when his mother had died. The city insisted that because he shared his grandmother's home with a cousin, the 10 year-old was an "illegal occupant." The presence of two grandchildren in her household violated a local ordinance, which limited the definition of a family to exclude "cousins."

According to the White House Task Force in which Clarence Thomas participated, and whose report he signed, the Court was wrong to interfere with Ms. Moore's eviction and jailing by declaring the eviction unconstitutional. The Report accused the Supreme Court of improperly intruding on the right of the municipality "to define 'family' in a traditional way" in zoning for single-family occupancy. The Report denounces the Moore case as among the Supreme Court decisions that question whether "the family... retains any constitutional standing."[37]

It is clear from Justice Powell's decision in Moore that the opposite is the case -- that the decision is based on the special constitutional status of the family. Indeed, as Justice Brennan noted in a concurring opinion, the ordinance if upheld would have had a devastating impact on many black families.[38]

The emphasis now being placed on the nominee's life story as one of his qualifications for the Court makes his view of the Moore case especially ironic. Having been raised by his grandfather, he nevertheless joined a report that would have resulted in the rending of many extended families. From the evidence it appears that his ideological opposition to the role of the courts in protecting rights and liberties overrides concern about the tragic consequences that may flow from such a commitment. Whatever the reason, the nominee's position on the Moore case should give pause to anyone who believes that once on the Court, Thomas's own experience will make him sensitive to the plight of minorities and the poor.

III. The Impact of the Nominee's Philosophy and Approach on the Public Interest

What emerges from an examination of the nominee's career is a disturbing pattern of disdain for law, disrespect for the legislative process under which he was required to function during his tenure in government, and a sweeping repudiation of

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[37] The Family, supra note 35 at p. 11.

[38] 431, U.S. 494, 508-10, (Brennan J. concurring).

the role of federal courts in protecting the rights and liberties of people from the dangers of government excess.

There are other aspects of Mr. Thomas's judicial philosophy that may bear scrutiny, but we are speaking here of threshold concerns that are of fundamental importance. If a nominee's approach to his judicial duties is not grounded in an understanding and respect for the historic and constitutional roles of the major institutions of government, it is of little consequence whether he styles himself a believer in natural law or of some other theory of rights. He will simply lack the understanding of constitutional processes and the commitment to equality before the law that are central to the job of a justice of the Supreme Court.

These are not abstract matters; they have implications for all of us. Over the course of the last decade, on at least a dozen occasions, we in the Congress have been called upon to correct through legislation the Supreme Court's misinterpretations of civil rights statutes that the Congress had previously enacted. In all of these cases the Court had so narrowly construed the law that rights or remedies we believed we had set out in the legislation were denied by a majority of the justices. In almost all of these cases the legislative effort to restore rights was successful.

But as you know well, these legislative struggles have not been without cost. Each time the issue has arisen we in the Congress and in the nation have been compelled to fight battles that most thought had been settled years ago. The legislative struggles have been attended by a rise in racial tensions and doubt about the nation's continuing commitment to equality of opportunity.

We are engaged in such an effort now with the Civil Rights Act of 1991, designed to restore the rule of Griggs V. Duke Power Company and to undo the harm to equal job opportunity done by several Supreme Court decisions. This has been a bipartisan effort and in 1990 more than 60 percent of the members of each House supported legislation to repair the harm caused by the Supreme Court's decisions. There are differences, of course, among us, but if there is one area of agreement in the Congress it is that once we do enact a law we want the Supreme Court to pay careful attention to the words used in that law, to the legislative intent reflected in our committee reports and to the national commitment to equality of opportunity that gave rise to our action. The Thomas record while in government requires a vote of no confidence that Clarence Thomas as a Supreme Court justice will follow the legislative intent reflected in the laws we enact.

In the first place, we know that Judge Thomas has expressed

strong disagreement with provisions of the Voting Rights Act and with Title VII as interpreted in the Griggs case. Perhaps more important, we know that the nominee has frequently expressed open contempt for the legislative process (speaking on more than one occasion of "run-amok majorities" and a "Congress that is out of control") [39] and that he felt free as an administrator to refuse to enforce laws with which he personally disagreed. What confidence then can we as legislators have that as a Justice he will interpret the laws as the Congress has written them?

Our point should be clearly understood. It will not take a William Brennan or a Thurgood Marshall to meet the needs that are expressed here. Jurists such as Felix Frankfurter and John Harlan, the younger pursued with some consistency a philosophy of "judicial restraint," gave deference to legislative intent even when they disagreed with what the legislatures wished to accomplish. George Bush and his predecessor told us often that they wanted judges who would "adjudicate" not "legislate," but they have persistently nominated people to the Court who were prepared to upset longstanding interpretations of statutory law. From the record, it appears clear that confirmation of Clarence Thomas would continue the trend toward a Court that feels free to act as a super-legislative body in the area of civil rights and in other spheres as well.

The Nation already is paying a heavy price in conflict and disunity from the confrontations that the Court's new majority has provoked with Congress. In considering this nomination, we suggest that confirmation of this nominee may well exacerbate that trend.

IV. CONCLUSION

Finally, Mr. Chairman, as colleagues and friends we ought to be able to speak frankly to one another.

In this hearing you are considering a nominee with a personal history of overcoming poverty and discrimination, one that reflects a classical pattern in our communities, without of course, the opportunities and fruits of success Clarence Thomas has experienced. Despite that history, it is abundantly clear that the nominee lacks a demonstrated commitment to equal justice and an understanding of the role of courts in protecting rights and liberties.

He is a person of limited legal experience and his record in the public offices that provide the bulk of that experience has

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[39] See, e.g., Thomas, "The Higher Law Background and the Privileges and Immunities Clause of the Fourteenth Amendment," Harvard Journal of Law and Policy, p. 63, 64, 69.

been given low marks by those who are most familiar with it. Members of both Houses of Congress who monitor the agencies that the nominee has headed have had to act on a regular basis to repair his defaults in performance and the damage those defaults have done to the lives of citizens whose rights he was sworn to protect. Federal courts that have examined the performance of the nominee at the Office of Civil Rights and the EEOC have found his actions to be contrary to law. Leading members of Congress have questioned the nominee's candor and a federal judge found that the Commission under Thomas's direction "has been no more candid with this Court than with Senate committees and the public."[40]

In other words, those responsible officials who know the nominee's work best have found it grievously wanting. These assessments are the antithesis of the kinds of recommendations one would expect to accompany the nomination of a candidate with a distinguished record of public service.

The record is made worse by the nominee's confrontational style in his writings and speeches, and by his failure to demonstrate a real understanding of the role of major institutions in our society.

Given all this, why should the question of confirmation be a close one? If it is, it is only because questions of race continue to cloud the judgment of otherwise sensible American citizens. The hope of the nominee's supporters as one commentator has said is that "the Senate will judge him less harshly than a white candidate with equally poor qualifications."

Members of this Committee know as well as members of the Caucus that such a judgement would be a perversion of the ideal of affirmative action, that it would ill-serve the needs of the millions of citizens of all races that we have been elected to represent and that it would not promote the larger interest of the nation both in equal justice and domestic tranquillity.

The best way to serve these great purposes would be for the Committee to reject this nomination and to ask the President to send another name to the Senate.

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[40] AARP v. EEOC, supra note 5, at 238.