bellion on the committee, and I am not suggesting you should value my chairmanship, it would be helpful to me that you not make me look bad, in light of Simon's chairing of this committee.

All kidding aside, your entire statements will be placed in the record. We have a number of questions for you, so to the extent you can come close to keeping the limit, I would appreciate it.

Has the panel determined how they would like to proceed? Congressman, why don't you begin first, and we will work our way across, that is how we will do it.

STATEMENT OF A PANEL CONSISTING OF JOHN H. BUCHANAN, JR., POLICY CHAIR, PEOPLE FOR THE AMERICAN WAY; JULIUS CHAMBERS, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.; JOSEPH L. RAUH, JR., LEADERSHIP CONFERENCE ON CIVIL RIGHTS; ANTONIA HERNANDEZ, ON BEHALF OF THE MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATION FUND AND THE ALLIANCE FOR JUSTICE; AND WILLIAM LUCY, COALITION OF BLACK TRADE UNIONISTS

Mr. BUCHANAN. Thank you, Mr. Chairman.

First, People for the American Way Action Fund has additional material we would like to submit for the record.

The CHAIRMAN. Without objection, it will be placed in the record.

Mr. BUCHANAN. Mr. Chairman and Senator Thurmond, it is neither easy or pleasant to come before this committee to testify against the nomination of Clarence Thomas. We do not take this step lightly. In fact, the People for the American Way Action Fund has only once before opposed a Supreme Court nominee.

Like Judge Thomas, I grew up in the Deep South in the bad old days of segregation, discrimination and white supremacy. My profound empathy and identification with black Americans is the reason I became a civil rights activist, as a Representative of Birmingham, AL, in the U.S. Congress. For 16 years, I served as a Representative to many families like Judge Thomas' and have served and do serve as a pastor to black Americans. I am keenly aware of the experience he shares with generations of African-Americans, and I understand the burden they have carried and the road they have traveled.

But in evaluating this nomination to the Supreme Court, the committee knows it must look beyond background and character, for character alone does not tell us what type of a Justice Clarence Thomas would make. Indeed, Mr. Chairman, I would submit that character is a threshold requirement for such a nomination, something that should be a granted and a given. We agree that it is vital to examine Clarence Thomas' record as a public official. That is what the People for the American Way Action Fund did, after Judge Thomas was nominated—reading every speech he made available and every article he had authored, and examining his service at the Office of Civil Rights and the EEOC.

After that searching and thorough process, we concluded that Judge Thomas' record reveals hostility to numerous Supreme Court precedents involving individual liberties and civil rights. In short, Mr. Chairman, Judge Thomas' troubled tenure in the executive branch, his obvious animosity toward Congress, and his oft-ex-

pressed, strongly held views on the vital constitutional issues that will come before the Court suggest that he would join forces with those Justices who would substitute their own judgments for the written law and who willingly disregard legislative directives.

I wish I could say his testimony before this committee had convinced us we were wrong. But nothing in Judge Thomas' 5 days of testimony led us to believe that we had made a mistake. In fact, the testimony only added to our concerns.

As a former Member of Congress, I know that one who aspires to high public office cannot simply disavow his or her prior actions and prior statements. Yet, that is precisely what Judge Thomas did for 5 days. He offered one excuse and evasion after another:

He had not read the document or he did not agree with statements he explicitly endorsed; or he did not mean what he said, it was only rhetoric designed to appeal to his audience; or he had no opinion on, indeed he had never thought about or discussed it; or he was only acting as an advocate for the administration and he would leave what he said in speech after speech in that capacity at the door of his chambers.

Sometimes, Judge Thomas asked the committee to ignore the plain meaning of his statements and writings, especially in the area of natural law. In other instances, Judge Thomas simply stonewalled on matters of great importance to the committee and the country, most notably a woman's right to choose.

Simply stated, Judge Thomas refused to engage in a dialog about his past record or even his view of the Constitution.

It is the Senate's constitutional responsibility to exercise meaningful advice and consent, a role coequal to that of the President. We agree with Senator Thurmond's statement in 1968 at another Supreme Court nomination hearing, when he said: "To contend that we must merely satisfy ourselves that the nominee is a good lawyer and a man of good character is to hold to a very narrow view of the role of the Senate, a view that neither the Constitution itself nor history and precedent have prescribed."

Judge Thomas' disavowals, equivocations, denials and stonewalling are no doubt part of a strategy to advance the nominee's chances for confirmation.

It is not just the liberals who have been concerned about this. One conservative activist said she wished he would be more specific and not try to ride the fence on these issues. Another said it is irritating that the White House strategists apparently feel he has got to go to such lengths to deny that he has a position comparable to the one that the President openly defended during his campaign.

Mr. Chairman, you mentioned the Souter standard might now become the Thomas standard. I would suggest it is the Bush standard, because the real question here is how far the White House will go in seeking to derail the Senate's constitutional obligation of advice and consent.

Whether the committee votes to put a liberal or a moderate or a conservative on the Court, at the very least you should be able to determine which it is you are getting. You should not have to take it on faith alone.

The question the members of this committee must ask is: Am I confident this nominee will protect American's fundamental liber-

ties. That question could not be answered in the affirmative before Judge Thomas' testimony. I would say we have heard in these hearings nothing that would overcome the worrisome aspects of his public record, and I think those questions remain.

It is our deepest hope, therefore, Mr. Chairman, the Senate will not approve this nomination and the erosion of the Court's historic role in protecting individual rights and liberties that it represents.

Thank you.

[The material referred to follows:]

PEOPLE FOR THE AMERICAN WAY ACTION FUND

Defending Constitutional Liberties

CLARENCE THOMAS: THEN AND NOW

In his first three days of testimony before the Senate Judiciary Committee this week, Judge Clarence Thomas repeatedly contradicted his previous record. Much of the discussion of those contradictions has focused on his testimony concerning Natural Law and its role in constitutional adjudication. Those contradictions are extremely significant, but the nominee has also contradicted himself on a variety of other issues.

The following quotations contrast Clarence Thomas's sworn testimony to the Senate Judiciary Committee with his previous record.

Natural Law and Its Use in Constitutional Adjudication

Then -- Clarence Thomas repeatedly advocated a "jurisprudence" grounded in "the Founders' notions of natural rights." (Notes on Original Intent) He argued that "without recourse to higher law, we abandon our best defense of judicial review" and that "higher law is the only alternative to the willfulness of both run-amok majorities and run-amok judges." ("The Higher Law Background of the Privileges and Immunities Clause," (hereinafter "Higher Law") Harvard Journal of Law and Public Policy, vol.12, no. 1, Winter 1989 at 63-64).

Now -- Clarence Thomas claims that "I don't see a role for the use of natural law in constitutional adjudication. My interest in exploring natural law and natural rights was purely in the context of political theory." (Hearings before the Senate Judiciary Committee on Clarence Thomas to become an Associate Justice of the Supreme Court (hereinafter "Hearings"), Sep. 10, 1991 at 137). Later, in the hearings Thomas offered a somewhat different view, stating that "there is no independent appeal to Natural Law," but "what one does is one appeals to the Drafters' view of what they were doing, and they believe in Natural Law." (Hearings, September 12 at 41.)

Opinion Concerning Roe v. Wade

Then -- In a critique of so-called judicial activism, Clarence Thomas wrote that the "current case provoking the most protest from conservatives is Roe v. Wade." (Higher Law at 63 n. 2.) Thomas wrote in a black newspaper that there was "tremendous overlap of the conservative Republican agenda and Black beliefs on abortion" and other issues. ("How Republicans Can Win Blacks, Chicago Defender, Feb. 21, 1987)

2000 M Street NW
Suite 400
Washington DC 20036

202 467 4999
202 293 2672 / Fax

Now -- Clarence Thomas told the Committee that "I cannot remember personally engaging" in any discussion about Roe v. Wade and "I do not" have a "personal opinion on the outcome in Roe v. Wade." (Hearings, Sep. 11, 1991 at 104-05)

White House Working Group on the Family

Then -- Clarence Thomas was the highest Administration official who served on the White House Working Group on the Family, which issued a report sharply criticizing as "fatally flawed" a series of decisions protecting the right to privacy, including Roe v. Wade. The Report notes that such decisions could be "corrected" either by constitutional amendment or by "the appointment of new judges and their confirmation by the Senate." (White House Working Group on the Family Report to the President, December 2, 1986 at 12)

Now -- Clarence Thomas claimed that "To this day, I have not read that report" and that he does not necessarily agree with several of its criticisms of privacy decisions (Hearings, Sep. 10, 1991 at 155,156-7).

Endorsement of Lewis Lehrman's Anti-abortion Article

Then -- Clarence Thomas called Lewis Lehrman's article, entitled "The Declaration of Independence and the Right to Life: One Leads Unmistakably to the Other," a "splendid example of applying natural law to the right to life." (Speech before the Heritage Foundation, June 18, 1987 at 22)

Now -- Clarence Thomas says that he "did not endorse the article," does not agree with it, and was attempting to use it simply to "convince my audience" concerning his views of civil rights. He testified that "I do not believe that Mr. Lehrman's application of natural law is appropriate." (Hearings, Sep. 10, 1991 at 195-7; Hearings, Sep. 11, 1991 at 97)

Views on the Ninth Amendment

Then -- Clarence Thomas criticized the "invention" and "activist judicial use of the Ninth Amendment," and wrote that the Ninth Amendment "will likely become an additional weapon for the enemies of freedom." ("Civil Rights as Principle versus Civil Rights as Interest," in D. Boaz, ed., Assessing the Reagan Years, Spring 1987 at 398-9; "Higher Law" at 63 n.2)

Now -- Clarence Thomas testified that "I think that the only concern I have expressed with the respect to the Ninth Amendment, Senator, has been a generic

one" that a judge "who is adjudicating under those open-ended provisions tether his or her rulings to something other than his or her personal point of view." (Hearings, Sep. 11, 1991 at 110)

Participation in Lincoln Review

Then -- Clarence Thomas served for ten years on the Editorial Advisory Board of the Far Right Lincoln Review and published three articles in the journal. It was the only scholarly publication with which Thomas was affiliated. (The three articles were "With Liberty...For All," Lincoln Review, Winter - Spring 1982 at 41; "Remembering an Island of Hope in an Era of Despair, Lincoln Review, Spring 1986 at 53; "Thomas Sowell and the Heritage of Lincoln," Lincoln Review, Winter 1987/88 at 7.)

Now -- Clarence Thomas said, "the role of a member of the advisory board was purely honorary. There were no meetings. There was no review of literature. There were no communications. There was no selection of material that was included in the journal. Indeed, I don't think that I have read a copy of the Lincoln Review in two or three years." (Hearings, Sep. 11, 1991 at 175)

Jay Parker and South Africa

Then -- At an EEOC staff meeting in 1986, Clarence Thomas discussed for 45 minutes the representation of South Africa by his friend Jay Parker, according to former Thomas aides. (Newsday, Sep. 12, 1991) In 1987, according to Foreign Agents Registration Act records, Thomas attended a dinner for the South African ambassador which Parker helped to arrange. (IPAC filings under the Foreign Agent Registration Act, Sep. 10, 1987; Newsday July 16, 1991).

Now -- Thomas testified that "I was not aware, again, of the representation of South Africa itself" by Jay Parker. (Hearings, Sep. 11, 1991 at 174)

Level of Protection for Economic Rights

Then -- Clarence Thomas argued, "What we need to emphasize is that the entire Constitution is a Bill of Rights; and economic rights are protected as much as any other rights." (Speech to the American Bar Association, Aug. 11, 1987 at 10)

Now -- Clarence Thomas claimed, "There is also a reference to property in our Constitution. That does not necessarily mean that in constitutional adjudication that the protection would be at the same level that we protect other rights. Nor

did I suggest that in constitutional adjudication that would happen. But it certainly does deserve some protection." (Hearings, Sep. 10, 1991 at 144)

Views on Discrimination against Women in the Work Place

Then -- Clarence Thomas argued that "the disparity in hiring figures between men and women" in cases like the Sears case could "be due to cultural differences between men and women, educational levels, commuting patterns, and other previous events." (Juan Williams, "A Question of Fairness," Atlantic Monthly, February 1987 at 81, quoting Williams.) Thomas praised an article by Thomas Sowell, that argued that historic pay and job inequities between men and women were due largely to women's personal choices, as a "useful, concise discussion" which "presents a much-needed antidote to cliches about women's earnings and professional status." ("Thomas Sowell and the Heritage of Lincoln, Lincoln Review, Winter 1987/88 at 15-16)

Now -- Clarence Thomas maintains that "I did not indicate that, first of all, I agreed with [Sowell's] conclusions" and that "my only point in discussing statistics is that I don't think any of us can say that we have all the answers as to why there are statistical disparities." (Hearings, Sep. 10, 1991 at 189,193)

Violations of Age Discrimination Law

Then -- Thomas stated that "I am of the opinion that there are many technical violations of the Age Discrimination in Employment Act that, for practical and economic reasons, make sense. Older workers cost employers more than younger workers. Employee benefits are linked to longevity and salary." (ABA Banking Journal 9/85 at 120)

Now -- Clarence Thomas claimed that "I have never condoned violations of the Age Discrimination in Employment Act," although "it would make sense to an employer to think that, well, this approach is okay." (9/12 at 110,112).

Violation of Court Order while at Office of Civil Rights

Then -- While head of the Office for Civil Rights at the Department of Education, Thomas admitted in federal court that he was violating "grievously" a court order concerning OCR handling of civil rights cases. The court concluded that "the order has been violated in many important respects and we are not at all convinced that these violations will be taken care of and eventually eliminated without the coercive power of the court." (Adams v. Bell, 3/12/82 Tr. at 61 &

3/15/82 Findings at 3)

Now -- Clarence Thomas testified that "we did everything we could to comply" with the court order and that the court recognized that "we were doing all we could" and "that it was impossible for us to comply with it." (9/12 at 161)

Run-amok Judges

Then -- Clarence Thomas wrote that "higher law is the only alternative to the willfulness of both run-amok majorities and run-amok judges." ("The Higher Law Background of the Privileges and Immunities Clause," Harvard Journal of Law and Public Policy, vol. 12, no. 1, Winter 1989 at 63-64)

Now -- In response to Senator Kennedy's question of whether the nominee could identify any run-amok judges, Thomas said: "Senator, I thought about it when I looked at that language again, and I couldn't name any particular judge." (Sept. 13 P. 145)

Views on Oliver Wendell Holmes

Then -- Clarence Thomas stated that "If anything unites the jurisprudence of the left and the right today, it is the nihilism of Holmes." Quoting Walter Berns, a leading natural law advocate, and Robert Faulkner, Thomas said of Holmes: "No man who ever sat on the Supreme Court was less inclined and so poorly equipped to be a statesman or to teach . . . what a people needs to govern itself well," and "what [John] Marshall had raised Holmes sought to destroy." Speech to Pacific Research Institute, August 4, 1988 p.13.

Now -- Clarence Thomas characterized Homes as "a great judge." He stated that "we might disagree here and there" but that "he is a giant in our judicial system." September 13 P. 145.

The Nomination of Robert Bork

Then -- Clarence Thomas stated that "Judge Bork is no extremist of any kind. If anything, he is an extreme moderate." (Speech to Pacific Research Institute Aug. 10, 1987 p. 16). According to Thomas, it "reflected disgracefully on the whole nomination process that Judge Bork is not now Justice Bork." (Speech to Cato Institute Oct. 2, 1987 p. 2) Thomas referred to the "spectacle of Senator Biden, following the defeat of the Bork nomination, crowing about his belief that his rights were inalienable and came from God." (Speech to Pacific Research

Institute Aug. 4,1988 p.12)

Now -- Clarence Thomas testified that "I do not think that this committee and did not say that this committee engaged in" improper characterizations or conduct with respect to the Bork nomination, but "my view was that Judge Bork was qualified as to his temperament, as to his competence, and certainly qualified as to his overall abilities." (Sept. 13 P. 103,104)

Statements about Oliver North and Congress

Then -- Clarence Thomas stated that "I thought that Ollie North did a most effective job of exposing Congressional irresponsibility. He forced their hand, and revealed the extent to which their public persona is a fake." (Speech at Wake Forest, April 18,1988 p.21). He commented "As Ollie North made perfectly clear last summer, it is Congress that is out of control." (Speech at Univ. of Virginia March 5, 1988 p.13) (emphasis in original) According to Thomas, North's testimony showed that the defense of limited government "is still possible," and the Iran-Contra committee "beat an ignominious retreat before Colonel North's attack on it, and by extension all of Congress." (Speech to Cato Institute, Oct. 2, 1987 p.13)

Now -- Clarence Thomas testified that "I do not think that I condoned" improper conduct by North. "I think myself, like many others, that in that highly charged political environment that Col. North took the advantage to himself and used that environment to his advantage, rather than succumbing to it." (Sept. 13 P.92)

Obligations of government and compassion

Then -- Clarence Thomas stated that "I, for one, don't see how the government can be compassionate. Only people can be compassionate and then only with their own money, their own property and their own efforts, not that of others." (Speech at California State Univ. April 25, 1988 p.22) He advocated changes "affecting our governance in all areas," including not only "racial preference schemes, and welfare and housing policy, but so-called middle class welfare programs as well", under which government "would return to limited government." (Speech at Wake Forest Univ. April 18,1988 at 25-6)

Now -- Clarence Thomas testified that government "has an obligation" and "as a community, as people who live in an organized society, we have an obligation as a people to make sure that other people are not left out." (Sept. 13 P.86)

56-271 O--93----26

JUDGE CLARENCE THOMAS:

Contempt For Congress

2000 M Street NW
Suite 400
Washington DC 20036

202 467 4999
202 293 2672 / Fax

INTRODUCTION

In recent years, Supreme Court decisions narrowly interpreting congressional legislation and legislative authority have posed increasing problems for Congress and the nation. A series of Court decisions according a cramped construction to federal civil rights laws has led to divisive and difficult battles over legislation to correct the Court rulings.[1] This year in Rust v. Sullivan,[2] the Court deferred to a controversial agency interpretation of a federal family planning law imposing an abortion "gag rule." The decision produced outcries in Congress and both houses have approved legislation to prevent its implementation, which President Bush has threatened to veto.[3] Recently, the Court upheld by only a narrow 5-4 vote the authority of Congress to pass remedial legislation to counteract prior discrimination.[4] As a result, the views of any Court nominee concerning Congress and congressional authority are critical for the Senate to examine.

Article I of the U.S. Constitution established Congress as the legislative branch of government vested with appropriate powers. Among its mandates is the authority to make all laws necessary for the functioning of government.[5] To carry out its constitutional duty, Congress must be able to monitor the effectiveness of congressionally created entities.

The record reveals, however, that one of the central concerns about Clarence

---

[1] See H.R.1 (1991) (Civil Rights Act of 1991).

[2] 111 S.Ct. 1759 (1991).

[3] See S.323, H.R.392 (1991).

[4] See Metro Broadcasting v. FCC, 110 S.Ct. 2997 (1990).

[5] Art. 1, sec. 8, cl. 18. "To make all Laws which shall be necessary and proper for carrying into Execution the foregoin Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Thomas is his attitude toward Congress and its authority. Throughout his professional career, Thomas has avoided accountability to congressional committees; he has been uncooperative and hostile when forced to confront Congress' necessary oversight responsibilities; and he has disparaged Congress' authority and praised those who disregard that authority. Before Thomas was nominated to the U.S. Court of Appeals for the D.C. Circuit, 14 members of the House of Representatives took the extraordinary step of writing to President Bush urging him not to nominate Thomas precisely because of his "overall disdain for the rule of law."[6] All of the members who signed the letter either chaired or were senior members of congressional committees with responsibility for oversight of the EEOC.[7]

A brief review of Thomas' quotes about Congress, all of which are examined in further detail in this report, is revealing. According to Thomas:

- Congress has "proven to be an enormous obstacle to the positive enforcement of civil rights laws."
- "Congress is no longer primarily a deliberative or even a law-making body."
- As EEOC chair, he was "defiant in the face of some petty despots in Congress."
- The General Accounting Office is the "lapdog of Congress."
- "As Ollie North made perfecly clear last summer, it is Congress that is out of control."
- "Under the guise of exercising oversight functions," a

[6] Letter from 14 members of the House of Representatives to President Bush, July 17, 1989.

[7] The signatories of the letter were: Don Edwards, Edward Roybal, Cardiss Collins, Charles Hayes, Barney Frank, Tom Lantos, Pat Williams, William Clay, Gerry Sikorski, Augustus Hawkins, Matthew Martinez, Dale Kildee, Patricia Schroeder and John Conyers.

congressional staffer "seeks to implement the program of the American Association of Retired Persons."

- o "Democratic Subcommittee and Committee Chairmen mircromanage agencies and departments."
- o An oversight request for semi-annual reports on the EEOC's work was an "intrusion into the deliberations of an administrative agency."
- o "Ollie North did a most effective job of exposing congressional irresponsibility" and "revealed the extent to which their public persona is a fake."
- o A Supreme Court decision by Chief Justice Rehnquist upholding Congress' authority to appoint special prosecutors "failed not only conservatives but all Americans."
- o "There is little deliberation and even less wisdom in the manner in which the legislative branch conducts its business."

Thomas' consistent contempt for Congress, its processes, its mandates and its constitutional role indicates an impatience with democratic ideals ill-suited to a nominee for the U.S. Supreme Court. His past actions and statements indicate that if Thomas is confirmed for the Supreme Court, he is likely to heighten the conflict between the Court and Congress and contribute to undermining legislative authority.

A CASE STUDY: CLARENCE THOMAS AND CONGRESSIONAL OVERSIGHT OF "LAPSED CASES" BY EEOC

An egregious example of Clarence Thomas' resistance to legislative oversight came during a congressional inquiry into EEOC enforcement of the Age Discrimination in Employment Act (ADEA). Thomas' hostile and uncooperative behavior during a

legitimate congressional inquiry raises serious questions about his fitness for a seat on the nation's highest court.

The EEOC is responsible for implementation of the ADEA and ensuring that seniors are not discriminated against in matters of employment. After a person who thinks he or she has been the victim of age discrimination files a claim with EEOC, there is a two-year statute of limitations within which EEOC must act or the claim will lapse. In 1988, in response to concerns raised by seniors and other, the Senate Special Committee on Aging investigated EEOC's enforcement of the ADEA.

According to a finding by the Committee on Aging, "The EEOC misled the Congress and the public on the extent to which ADEA charges had been permitted to exceed the statute of limitations."[8] The Committee report provides a revealing comparison of what then-Chairman Thomas knew and what he stated to the Committee at a public hearing.

Acting on reports that large numbers of cases were exceeding the statute of limitations, the Committee on Aging requested figures on the number of lapsed cases from EEOC on September 3, 1987. EEOC conducted a telephone survey of regional offices and learned that before the end of the month over 1,500 cases would exceed the statute of limitations. At the hearing, Thomas elected to reduce that figure by 95 percent and reported that only 70 cases had lapsed.[9]

In response to a request for further data by the Senate Committee Thomas

---

[8] Unpublished report of the Senate Special Committee on Aging, 100th Cong., 2d Sess., 1988, p. 36.

[9] Id. at 37.

balked, saying "we do not routinely keep statistics in forms that are of no use to us."[10] He was completely oblivious to the need for others, specifically Congress, to be able to monitor EEOC's progress and effectiveness, and said nothing to Congress about the data already in EEOC's possession responsive to the Committee's requests.

Over the next three months the Committee continued its efforts to obtain information on lapsed cases from EEOC. Thomas refused, leading the Chair of the Committee to write an unusually harsh letter to EEOC: "Your unnecessary delay in supplying us with information is an unwarranted withholding of information from the Senate."[11] On December 23, 1987 EEOC reported a total of only 78 lapsed cases.

Only after news reports put the number at nearly 900, did Thomas acknowledge that approximately 900 cases had exceeded the statute of limitations. In the face of continuing reports of more lapsed cases, the Committee issued a subpoena demanding more exact information by March 11, 1988. EEOC responded to the subpoena by claiming that 779 ADEA charges had exceeded the statute of limitations between 1984 and 1987 with 350 of them lapsing in 1987. Two weeks later Thomas received an internal report that the actual figure was 1,200 for 1987 alone. But the ballooning number of lapsed charges did not end there.

To ensure that claimants would not necessarily lose their rights due to EEOC's neglect, Congress passed the Age Discrimination Claims Assistance Act of 1988, extending the statute of limitations for some lapsed cases. In November 1988, over one

---

[10] Id. at 38.

[11] Id. at 39-40.

year after the Committee's original request, EEOC submitted a report mandated under the new law, which stated that as many as 8,800 cases may have exceeded the statute of limitations between 1984 and 1987 -- more than ten times the number that EEOC had reported under subpoena.[12] Eventually EEOC admitted mailing notices of expiration to more than 13,000 seniors whose claims had been allowed to lapse.[13]

Senator David Pryor, the current Chair of the Committee on Aging, summed up the results of Thomas' disregard of congressional authority.

> I was dismayed to learn about several erroneous statements made by Chairman Thomas...These statements are certainly misleading, and raise serious questions about the nominee's appropriateness for the Federal bench.
>
> [T]here should be little dispute that thousands of ADEA claimants have unfairly and unacceptably lost their rights during Chairman Thomas' 8-year tenure. We all agree that the massive lapses of ADEA charges prior to 1988 should have never happened. Likewise, we must recognize the tragedy and irony that even as Congress was acting to restore the rights of those who lose [sic] claims during that period, hundreds more cases were lapsing.[14]

Thomas nonetheless harshly criticized Congress' oversight efforts, particularly the Committee on Aging. "My agency will be virtually shut down by a willful Committee staffer who has succeeded in getting a Senate Committee to subpoena volumes of EEOC records...Thus, a single unelected individual can disrupt civil rights enforcement -- and all

---

[12] Id. at 44.

[13] Cong. Rec. S1542 (daily ed. February 22, 1990) (statement of Sen. Pryor).

[14] Id. at S1542-43.

in the name of protecting rights."[15] In a later speech, he further derided the motives and integrity of the staff member. "Under the guise of exercising oversight functions, the staffer seeks to implement the program of the American Association of Retired Persons, AARP."[16] Thomas seems unconcerned that had it not been for the Senate Committee's diligent actions in determining the number of lapsed ADEA charges, no remedial legislation would have been enacted and thousands of claimants would have lost their rights forever due to his agency's neglect. It therefore seems odd that he would conclude that Congress has "proven to be an enormous obstacle to the positive enforcement of civil rights laws that protect individual freedom."[17]

Thomas' open hostility to Congress' legitimate role shows a disturbing disregard for the system of constitutional checks and balances and for Congress' oversight authority.

THOMAS' SPEECHES AND PUBLIC STATEMENTS ON CONGRESS AND CONGRESSIONAL AUTHORITY

Further instances of Thomas' disparaging references to Congress checker his writings and speeches. For example, in a speech on the role of Congress in the

---

[15] Speech to The Federalist Society at the University of Virginia, March 5, 1988, p. 13. Similar statements were also made in other forums. See also speech to The Tocqueville Forum at Wake Forest University, April 18, 1988, p. 22.

[16] Prepared text for speech to The Federalist Society at Harvard University, April 7, 1988, p. 13, not delivered.

[17] Wake Forest University speech at 20.

formation of public policy, he said that "it may surprise some but Congress is no longer primarily a deliberative or even a law-making body...[T]here is little deliberation and even less wisdom in the manner in which the legislative branch conducts its business."[18]

The theme of this speech was that Congress has generally abdicated its responsibility to formulate readily understandable legislation, and that it instead enacts overly broad laws, the interpretation of which is left to the bureaucracy. Despite the view that Congress takes a hands-off approach Thomas nonetheless charges that "Democratic Subcommittee and Committee Chairmen micromanage agencies and departments."[19] Worse still, according to Thomas, is that such a process puts tremendous power in the hands of Subcommittee chairs, who "direct and administer bureaucracies in a manner compatible with their own interests."[20] This point of view is apparently responsible for his characterization of members of Congress as "petty despots."[21]

Clearly in Thomas' eyes Congress cannot win. If it passes a statute that is insufficiently detailed, it is because members "prefer to remain in the shadows on controversial issues."[22] But if Congress acts to check the improper implementation of a statute by an executive agency, it is engaging in "selective intervention" and creating a

---

[18] Speech to the Gordon Public Policy Center, Brandeis University, April 8, 1988, p. 4.

[19] Speech to the Pacific Research Institute, August 4, 1988, p. 19.

[20] Brandeis University speech at 10.

[21] Harvard University speech at 13.

[22] Speech to the Palm Beach Chamber of Commerce, May 18, 1988, p. 24.

"feeble executive which means a weakened presidency."[23] This despite the allegedly overbroad grant of power to the executive branch.

The example of "selective intervention" Thomas used to demonstrate his thesis concerned an attempt at oversight by three members of the Senate Labor and Human Resources Committee, Senators Edward Kennedy, Howard Metzenbaum and Paul Simon. They asked Thomas at the time of his 1986 renomination as head of the EEOC to keep them apprised of the EEOC's work by submitting semi-annual reports "to be sure this committee is informed about EEOC progress in enforcing the law as Congress and the Supreme Court intend."[24] Thomas was harshly critical of this "intrusion into the deliberations of an administrative agency."[25]

Thomas even resents congressional "intrusion" into serious allegations of improper behavior at his agency. In 1989, a House Subcommittee looked into charges that an EEOC district director had been demoted for testifying before Congress under subpoena in such a way as to cast EEOC in a negative light. When asked about these harassment charges Thomas responded:

> The one thing that I do want is for at least at some point the legislative branch to leave the agency alone so it can get its house in order and hopefully at some point miraculously give it the resources so it can get its house in order.
>
> You want to talk about harassment, I can tell you about two years of harassment, and I can tell you about two years of not

---

[23] Brandeis University speech at 4-5.

[24] Quoted in Brandeis University speech at 5.

[25] Id. at 6.

giving the agency the resources to do the incredible job that is being required.[26]

Besides trivializing the charges of retaliation against a whistleblower, Thomas' statement shows two things. First he views a congressional investigation as "harassment," and second he believes Congress should simply provide funds with no oversight into how the money is spent.

This was not merely an example of Thomas losing his temper under sharp questioning. He was repeating a sentiment that he had expressed earlier in his own speeches.

> Through subcommittees and professional staff, the typical member of Congress is a kind of unseen co-administrator of a part of the executive branch bureaucracy. They are able to exercise this authority on a regular basis by subjecting administrators to the will, not of Congress, but that of the members who have jurisdiction over the agency.
>
> They are able to do so through control of agency budgets, personnel, and reporting requirements, as well as through the power of investigation.[27]

Rather than viewing congressional control of the purse, the power to confirm appointments, and authority to investigate abuses as constitutional mandates, Thomas

---

[26] EEOC's Reprisal against District Director for Testimony before Congress on Age Discrimination Charges before the Employment and Housing Subcommittee of the House Government Operations Committee, 101st Cong., 1st Sess., March 20, 1989, p. 99.

[27] Brandeis University speech at 12. See also Palm Beach speech at 24-25.

disparages such oversight as an inappropriate intrusion into executive autonomy.[28]

Thomas' complaints include the confirmation process for Supreme Court Justices. "It was a disgrace on the whole nomination process that Judge Bork is not now Mr. Justice Bork."[29] The Senate's rejection of Robert Bork was undoubtedly a disappointment to right-wing extremists, but it was certainly not a disgrace to the process.[30] Judge Bork testified for five days before the Judiciary Committee on a whole range of constitutional questions. In the end, the nation rejected a man who defended the constitutionality of the poll tax and who would not uphold the use of contraceptives by a married couple as a constitutionally protected right of privacy.[31]

Further evidence of Thomas' contempt for the legislative process and the rule of law can be found in his praise for Oliver North. In one speech, as support for the proposition that Congress is too involved in executive matters, Thomas stated, "I thought that Ollie North did a most effective job of exposing congressional irresponsibility. He

---

[28] As recently as this year, Judge Thomas indicated that Congress' investigating body, the General Accounting Office, is not credible since it is the "lapdog of Congress." Speech at Creighton University School of Law, February 14, 1991, p. 6.

[29] Speech before the Cato Institute, October 2, 1987, p. 2. <u>See also</u> Harvard University speech at 11.

[30] Thomas' very use of the phrase "nominating process" seems to exclude any role for the Senate. The President nominates but then the Senate must exercise its constitutional responsibility to confirm or reject the nominee. The nominating process for Judge Bork was done in the White House; the confirmation process was carried out in view of the entire country.

[31] In other speeches Thomas attacked Senator Joseph Biden, whom he depicted as "crowing" over the defeat of Bork's nomination to the Supreme Court. Pacific Research Institute speech at 12. <u>See also</u> Harvard University speech at 12.

forced their hand, and revealed the extent to which their public persona is a fake."[32] In another speech, Thomas said that the congressional committee "beat an ignominious retreat before Colonel North's direct attack on it, and by extension all of Congress."[33] In other speeches, while decrying Congress' role in overseeing the federal bureaucracy, he noted that "as Ollie North made perfectly clear last summer, it is Congress that is out of control!"[34] This praise for North's open disregard of the intentions of Congress and its constitutional role as the law-making body is wholly inappropriate from one being considered for an appointment to the Supreme Court.

One indication of how Thomas would limit congressional power on the Supreme Court came in his comments on the case of Morrison v. Olson.[35] That case tested the authority of Congress to appoint a special prosecutor -- an issue of considerable importance to Oliver North. Although the Court ruled 7-1 in favor of Congress' authority, Thomas could only praise Justice Scalia's "remarkable" dissent. Calling the decision "the most important Court case since Brown v. Board of Education," Thomas placed himself to the ideological right of even Chief Justice Rehnquist in attempting to limit Congress' power. He stated that, "Unfortunately, conservative heroes such as the Chief Justice failed not only conservatives but all Americans" in Morrison.[36] Such

---

[32] Wake Forest University speech at 21.

[33] Cato Institute speech at 13.

[34] University of Virginia speech at 13 (emphasis in original). See also Harvard University speech at 13.

[35] 487 U.S. ___; 108 S.Ct. 2597 (1988).

[36] Pacific Research Institute speech at 6-7.

attitudes by the Supreme Court nominee are of grave concern.

THE VERDICT OF CONGRESS AND THE COURTS ON THOMAS

As members of Congress and the federal bench have reviewed Thomas and his performance at the EEOC, they have forcefully voiced their own concerns about Thomas' respect for Congress and the rule of law. In July 1989, 14 Representatives, many of them Committee and Subcommittee chairs with responsibility for overseeing EEOC, wrote an extraordinary letter to President Bush. They urged the President not to nominate Thomas to the U.S. Court of Appeals. "Mr. Thomas' actions as chair of the Equal Employment Opportunity Commission raise serious questions about his judgment, respect for the law and general suitability to serve as a member of the Federal judiciary."[37] Eight years of dealing with Thomas had shown the members that "Mr. Thomas has resisted congressional oversight and been less than candid with legislators about agency enforcment policies."[38] The letter concluded that "Mr. Thomas has demonstrated an overall disdain for the rule of law."[39]

The courts have also noticed Thomas' attitude toward Congress and the rule of law. When Thomas took over EEOC in 1982 he inherited an administrative interpretation of a regulation concerning pension contributions for workers over age 65. He acknowledged that the interpretation was incorrect and should be changed. After

[37] Letter to President Bush.

[38] Ibid.

[39] Ibid.

years of delay including repeated assurances to members of Congress that a change was imminent, a lawsuit was filed to force a change. The court held that the delay was inexcusable and ordered an immediate revision. "Although it is among the Commission's duties under law to eradicate age discrimination in the workplace and to protect older workers against discrimination, that agency has at best been slothful, at worst deceptive to the public, in the discharge of these responsibilities."[40] The court agreed that Thomas and his staff had misled Congress. "[T]he Commission has been no more candid with this Court than with the Senate committees and the public."[41]

CONCLUSION

The need for Supreme Court Justices to respect the intent and authority of Congress is well established. Much of the Court's work involves interpretation of statutory language and congressional intent. In recent years, conservative Justices have undermined many statutes, most notably in the areas of civil rights and family planning legislation. These Court decisions have damaged privacy interests and civil rights protections, forcing Congress to take repetitive steps to overrule the Court that should not be necessary.

---

[40] American Association of Retired Persons v. EEOC, 655 F. Supp. 228, 229 (D.D.C.), aff'd in part, rev'd in part on other grounds, 823 F.2d 600 (D.C. Cir. 1987).

[41] Id. at 238. In its decision, the court gave one example in which EEOC had literally told Senators one thing while doing another. Id. at 234, n.19. Even before Thomas joined EEOC, another federal judge found that while Thomas was head of the Office for Civil Rights at the Department of Education, a court order governing OCR had "been violated in many important respects." Adams v. Bell, No. 3095-70 (D.D.C. Mar. 15, 1982) at 3.

Instead of effectuating Congress' intent in passing statutes, Thomas has viewed any section that is open to interpretation as void and seizes the opportunity to make new law. The disdain that Thomas has displayed for Congress and its intentions strongly suggests that, if confirmed, he would further the current Court's disturbing trend of misreading legislation and limiting congressional authority.

JUDGE CLARENCE THOMAS:

'An Overall Disdain for the Rule of Law'

July 30, 1991

For Further Information,
Please Contact:
People For the American Way Action Fund
Communications Department
202-467-4999

2000 M Street NW
Suite 400
Washington DC 20036

202 467 4999
202 293 2672 / Fax

JUDGE CLARENCE THOMAS: 'AN OVERALL DISDAIN FOR THE RULE OF LAW'[1]

The nomination of Judge Clarence Thomas to the Supreme Court comes at a historic juncture when the rights and liberties of the American people are under siege. After weeks of research into Mr. Thomas' public record, the Board of Directors of the People For the American Way Action Fund has concluded that Judge Thomas is an unacceptable choice for the Supreme Court and urges the United States Senate to reject his nomination.

INTRODUCTION

The Supreme Court is the last bulwark of protection of the rights of every American citizen. Recently, the Supreme Court has charted a dramatic course that has changed the law in just a few years. Rights and protections that millions of Americans depend on are now threatened. Reproductive freedom has been restricted, and the basic right to choice on abortion is imperiled as new state laws make their way to the Supreme Court. Civil rights protections for women and minority workers have been undermined. The bright line separating church and state is gradually being weakened.

For all the setbacks to individual rights we have already witnessed, the potential future threats are even more severe. The Court has already accepted cases involving school desegregation and church-state questions for the next term. Looming just over the horizon are cases involving the restrictive abortion laws passed in the wake of the Court's decision in Webster v. Reproductive Health Services. As we enter a new century, the Court will grapple with complex new legal issues spawned by significant changes in technology, communications, medicine and a host of other fields.

---

[1] Letter from 14 Members of Congress to President George Bush asking that the President not nominate Clarence Thomas to the United States Court of Appeals for the District of Columbia, July 17, 1989.

Even as the Court has reversed course, a thin line still exists among the Justices on many of these issues. The conservative judicial activists, led by Chief Justice Rehnquist and Justice Scalia, have been pushing for a wholesale rewriting of the law. Respect for prior decisions -- the principle of stare decisis -- has always been central to our constitutional system. But in its judicial activism the current Court seems determined to abandon this principle and replace it with an approach in which "power, not reason, is the new currency of [the] Court's decisionmaking."[2]

In his final dissent, Justice Thurgood Marshall inveighed against his fellow justices' reversal of precedent and their "far-reaching assault" on the Bill of Rights.[3] To date, a comparatively more moderate bloc on the Court has been able to restrain the activist impulse in a number of critical cases.

The next justice will play a pivotal role in determining the future direction of the Court. Not only will he or she participate in cases that will have a profound impact on the quality of life for millions of Americans, the new justice will also help to define whether the Court will pursue an even more activist agenda of reversing Supreme Court precedents that protect individual liberties and civil rights. It is in this context that we consider the nomination of Clarence Thomas to fill the seat being vacated by Justice Marshall.

In weighing this historic nomination, the People For the American Way Action Fund measured Judge Thomas' record against five essential standards that must be met by any nominee to our highest court. The standards are: demonstrated outstanding legal ability and competence as evidenced by substantial legal experience; proven respect for established legal precedents and commitment to core constitutional values; respect for the constitutional system of government and the separation of powers; a judicial philosophy that falls in the mainstream of legal thought; and an appreciation for the impact of the law and government actions on individuals. We base our final judgment on this broad range of criteria.

---

[2] Payne v. Tennessee, 59 U.S.L.W. 4814, 4824 (1991) (Marshall, J., dissenting). Chief Justice Rehnquist reiterated his attack on stare decisis in a speech to the Fourth Circuit Judicial Conference. See Legal Times, July 15, 1991 at 9.

[3] Payne, 59 U.S.L.W. at 4824 (Marshall, J., dissenting).

After a thorough examination of Clarence Thomas' public record, we find that he fails to meet these essential standards for elevation to the Supreme Court. The reasons for our conclusion are:

- **Mr. Thomas' legal and judicial experience are far too limited for a Supreme Court nominee.** Mr. Thomas served for nine years -- more than half his professional career -- as an official in the Reagan and Bush administrations, and his performance in these positions was marred by proven allegations of lax enforcement and disrespect for the law. Mr. Thomas has served only 17 months on the appellate court, not long enough to amass a significant record.

- **Mr. Thomas has repeatedly attacked key Supreme Court precedents.** Mr. Thomas has severely criticized a dozen landmark Supreme Court rulings, focusing especially on cases involving fundamental individual liberties, remedies for workplace discrimination, and school segregation cases.

- **Mr. Thomas has time and again failed to enforce the law.** In his positions as Chair of the EEOC and as Director of the Office of Civil Rights in the Department of Education, Mr. Thomas has often disregarded Congressional mandates or court orders.

- **Mr. Thomas has shown hostility to legislative authority.** Mr. Thomas was extremely uncooperative with Congress, and in one instance a committee was forced to subpoena agency records he had refused to produce. In speeches and articles, Mr. Thomas publicly endorsed the flouting of Congressional authority and investigations.

- **Mr. Thomas espouses a judicial philosophy based on natural law that is "outside the mainstream of constitutional interpretation."**[4] Since 1987, Mr. Thomas has written and spoken extensively about natural law or higher law as being a necessary part of constitutional interpretation. The natural law theory that Mr. Thomas has embraced has been widely discredited, and Mr. Thomas' suggested applications of the theory could result in dramatic reversals of Supreme Court precedents.

For these reasons, we have concluded that Clarence Thomas' nomination to the Supreme Court must be opposed. This was not an easy conclusion to reach. The People For

---

[4] Geoffrey Stone, dean of the University of Chicago Law School, quoted in Page, "Will Thomas Be Borked?: Views Are Fair Game," Washington Times, July 12, 1991.

the American Way Action Fund has only once before opposed a nominee to the Supreme Court. Moreover, Mr. Thomas is only the second African-American nominated to the high Court. He is a man with a compelling personal story of overcoming discrimination and poverty. Nonetheless, after carefully analyzing his record and views, we are absolutely convinced that Clarence Thomas' nomination to the highest court is not in the best interests of the nation.

I. LIMITED EXPERIENCE -- NOT THE 'BEST MAN FOR THE JOB'

The Supreme Court should be the place where our nation's most distinguished lawyers and jurists decide the thorniest issues of the day. The members of the Court should have great stature, achieved through long, celebrated careers in the law. Service on the Supreme Court should be reserved for those who are truly the best and brightest that this nation has to offer.

President Bush said that he nominated Clarence Thomas because Mr. Thomas was "the best man for the job on the merits." This statement is transparently false. For all his accomplishments, Clarence Thomas is obviously not the most qualified person, not even the most qualified conservative, and far from the most qualified Republican African-American or Hispanic, to fill the vacancy on the Supreme Court. Former Solicitor General Erwin Griswold recently said: "This is a time when [President] Bush should have come up with a first-class lawyer, of wide reputation and broad experience, whether white, black, male or female. And that, it seems to me obvious, he did not do." Griswold complained that Mr. Thomas "has no breadth of experience at all."[5]

Mr. Thomas served for nine years, more than half of his professional life, as an official in the Reagan and Bush administrations. As documented in detail later in this report, Mr. Thomas' tenure in these positions was marred by proven allegations of lax enforcement and disrespect for the law -- notable largely for Mr. Thomas' conflicts with Congress and the courts.

For the past 17 months, Mr. Thomas has been a judge on the Court of Appeals for the District of Columbia. Although he has participated in some 170 appeals, during this period

---

[5] Torry, "At 87, Erwin N. Griswold is the Dean of Supreme Court Observers," Washington Post, July 15, 1991.

Mr. Thomas has written only 17 majority opinions, all but one of which was a unanimous decision. Mr. Thomas has written separate concurring or dissenting opinions in only three cases.

Most of the cases in which Mr. Thomas played a part were unanimous and relatively uncontroversial cases. Two of the occasions on which Mr. Thomas chose to write separately from the majority do, however, raise concerns because both opinions specifically address critical issues involving the scope of judicial review. In both instances, Mr. Thomas argued for limiting access to the courts, once on the basis of standing, and once on the grounds of mootness.

In Cross Sound Ferry Services v. ICC,[6] Mr. Thomas maintained that the Court should have dismissed plaintiff's complaint on the grounds of standing. The court found that the Interstate Commerce Commission had properly decided that certain ferry services were exempt from ICC regulation. Mr. Thomas agreed with this portion of the decision. The majority further concluded that this ICC decision did not trigger environmental review responsibilities under National Environmental Policy Act (NEPA) and the Coastal Zone Management Act (CZMA). Mr. Thomas dissented from the ruling on the applicability of the environmental statutes, arguing that the plaintiff did not have standing to raise the environmental claims. While the majority found that the environmental claims did not have merit, Mr. Thomas would not even have addressed the merits of the petitioner's complaint.

Similarly, Mr. Thomas dissented in Doe v. Sullivan,[7] arguing that the case should have been dismissed on the grounds of mootness. Doe, which was decided on July 16, 1991, involved a regulation that permitted the use of unapproved drugs to protect troops from chemical weapons during the Gulf War. A serviceman challenged the regulation. The government argued that the court should have found the plaintiff's claim moot because the regulation had been terminated. The majority ruled that the claim was not moot, holding that the controversy was "capable of repetition, yet evading review" because the underlying regulation that permitted the waiver of the ordinary drug approval process was still in effect. The majority then dismissed plaintiff's claims on the merits. Mr. Thomas took exception. He wrote: "The war has ended and the troops are home, but to the majority the case lives

---

[6] ___ F.2d ___, No. 90-1053 (D.C. Cir. May 10, 1991).

[7] ___ F.2d ___, No. 91-5019, (D.C. Cir. July 16, 1991).

on."[8] Rather than considering plaintiff's complaint, Mr. Thomas would have simply closed the courthouse door.

Overall, Mr. Thomas' record as a judge is extremely limited. However, the rest of Mr. Thomas' record, as revealed in speeches and articles about key legal precedents and policy questions, and as shown in Mr. Thomas' performance as an official in the Reagan and Bush administrations, is extremely troubling.

II. CRITICISM OF KEY SUPREME COURT PRECEDENTS

Mr. Thomas has attacked the results and legal underpinnings of a dozen landmark Supreme Court decisions of the past four decades. Mr. Thomas' criticisms focus on Supreme Court rulings involving fundamental rights with respect to privacy, workplace discrimination and school segregation, as well as congressional authority under the Constitution. These criticisms are not simply abstract or theoretical; he has severely attacked a number of Court decisions, even going so far in one case as to urge lower courts to follow the dissent and not the majority opinion.

A. The Right to Privacy

The Supreme Court first enunciated the constitutional right to privacy in Griswold v. Connecticut, a 1965 decision striking down a Connecticut law banning the sale of contraceptives.[9] Griswold, in turn, became the foundation for the Court's decision in Roe v. Wade, where the Court held that the right to privacy included a woman's right to choose an abortion.[10]

Mr. Thomas has criticized Griswold, however, particularly a concurring opinion signed by Chief Justice Warren and Justices Goldberg and Brennan, which relied on the Ninth Amendment as the foundation for the right to privacy. Just three years ago, Mr. Thomas complained of the Court's improper "invention" of the Ninth Amendment in Griswold, and

---

[8] Id. Slip. op. at 1 (Thomas, J. dissenting).

[9] 381 U.S. 479 (1965).

[10] 410 U.S. 113 (1973).

wrote that the Ninth Amendment "will likely become an additional weapon for the enemies of freedom."[11]

Mr. Thomas has also suggested that he finds fault with Roe v. Wade. In a 1987 speech, Mr. Thomas lavishly praised an article arguing not only that Roe should be overturned, but that fetuses should be granted constitutional protection.[12] The article, which Mr. Thomas called a "splendid example of applying natural law," was an unbridled attack on Roe written by anti-abortion activist Lewis Lehrman.[13] Lehrman asserted that the right to choose abortion recognized in Roe is "a spurious right" with "not a single trace of lawful authority" that has produced a "holocaust". The Lehrman article that Mr. Thomas so heartily endorsed takes the most extreme position on choice, insisting that abortion is prohibited by the Constitution and that neither Congress nor the states may protect the right to choose an abortion.[14]

In addition to his personal criticism of key Court precedent concerning the right to privacy, Mr. Thomas was a member in 1986 of a White House Working Group on the Family that produced a report sharply critical of Court decisions in this area. The report disparages Roe v. Wade and Planned Parenthood v. Danforth,[15] which ruled unconstitutional a state law preventing a woman from obtaining an abortion without her husband's consent. The report also attacked the reasoning of Eisenstadt v. Baird, which held that the right of privacy protects the rights of unmarried people to use contraceptives,[16] and Moore v. City of East Cleveland, which struck down a zoning law forbidding a grandmother from living, in extended family fashion, with her son and grandsons.[17] The report pointedly notes that such

---

[11] Thomas, "Civil Rights as a Principle versus Civil Rights as an Interest," Assessing the Reagan Years (D. Boaz, ed. 1988) at 399 (hereinafter "Principle versus Interest").

[12] Thomas, Speech before the Heritage Foundation, June 18, 1987, at 22.

[13] Lehrman, "The Declaration of Independence and the Right to Life: One Leads Unmistakably to the Other," The American Spectator, Apr. 1987, at 21.

[14] Id.

[15] 428 U.S. 52 (1976).

[16] 405 U.S. 438 (1972).

[17] 431 U.S. 494 (1971).

"fatally flawed" decisions could be "corrected" either by Constitutional amendment or through "the appointment of new judges and their confirmation by the Senate."[18]

B. Workplace Discrimination

Mr. Thomas has also taken aim at a broad range of employment discrimination decisions -- rulings that helped break down barriers to the hiring and advancement of women and minorities in the workplace.

For example, Judge Thomas criticized the Court's ruling in United Steel Workers v. Weber, upholding voluntary affirmative action programs by private employers[19] and its decision in Johnson v. Transportation Agency, Santa Clara County, permitting a state employer's voluntary affirmative action programs for job categories traditionally segregated against women.[20] Mr. Thomas called these decisions an "egregious example" of misinterpretation of the equal protection clause and legislative intent in civil rights statutes.[21] In fact, he has specifically suggested the overruling of Johnson, and went so far as to state that he hoped Justice Scalia's dissent in the case would "provide guidance for lower courts and a possible majority in future decisions."[22]

Mr. Thomas voiced similar concerns about the Court's holding in Fullilove v. Klutznick, in which the Court ruled that Congress has the power to pass remedial legislation to correct past discrimination.[23] Mr. Thomas charged that the Court in Fullilove improperly "reinterpret[ed] civil rights laws to create schemes of racial preference where none was ever contemplated."[24]

---

[18] White House Working Group on the Family, The Family: Preserving America's Future, 1986, at 12.

[19] 443 U.S. 193 (1979).

[20] 480 U.S. 616 (1987).

[21] "Principle Versus Interest" at 395.

[22] Thomas, Speech before the Cato Institute, Apr. 23, 1987, at 20-21.

[23] 448 U.S. 448 (1980).

[24] "Principle Versus Interest" at 396.

Mr. Thomas also objected to the Court's rulings in three employment discrimination cases dealing with court-ordered remedies and consent decrees. In Local 28 Sheet Metal Workers International v. EEOC, the Court upheld court-ordered affirmative action as a remedy for egregious and longstanding discrimination.[25] In Firefighters v. Cleveland, the Court approved consent decrees including affirmative action measures in job-bias cases.[26] Finally, in United States v. Paradise, the Court upheld an affirmative action remedy for egregious bias where an employer resisted previous anti-discrimination orders.[27] Mr. Thomas criticized all three cases by name, expressing "personal disagreement with the Court's approval of numerical remedies."[28]

C. School Segregation

Mr. Thomas has also attacked several landmark rulings in the area of school desegregation. Most notably, he criticized the reasoning in the Court's historic opinion in Brown v. Board of Education, in which the Court confronted and struck down as unconstitutional school segregation and the notion of "separate but equal" schools.[29]

Mr. Thomas has disparaged Brown as being based on "dubious social science" and containing a "great flaw."[30] Mr. Thomas has said that the proper ground for outlawing segregation in Brown would have been the privileges and immunities clause of the Fourteenth Amendment, even though Mr. Thomas himself admits that this clause has been made meaningless as a source of authority for the Court since 1873.[31] Mr. Thomas has also

---

[25] 478 U.S. 421 (1986).

[26] 478 U.S. 501 (1986).

[27] 480 U.S. 149 (1987).

[28] Thomas, "Affirmative Action Goals and Timetables," 5 Yale L. and Pol. R. 402 at 403 (1987).

[29] 347 U.S. 483 (1954).

[30] Thomas, Speech before the Federalist Society for Law and Public Policy Studies, University of Virginia Law School, Charlottesville, Virginia, Mar. 5, 1988, at 11; Thomas, "Toward a 'Plain Reading' of the Constitution," 30 Howard L. J. 985 at 990 (1987).

[31] 30 Howard L. J. at 994.

specifically disagreed with the Court's premise in Brown that separate is inherently unequal.[32]

In the years following Brown, many school authorities sought to circumvent the decision by contriving new methods for assigning students to schools -- methods that were designed to produce segregated schools. In Green v. County Board of Education, the Supreme Court was faced with one such system. The Court held that the so-called "freedom of choice" assignment system used by many school districts to avoid desegregation was incompatible with Brown and held that all vestiges of state-imposed segregation must be eliminated.[33]

Mr. Thomas described the Court's decision in Green as reflecting a "lack of principle."[34] Mr. Thomas has complained that, according to Green, the decision in Brown "not only ended segregation, but required school integration."[35]

In the key decision of Swann v. Charlotte-Mecklenberg Board of Education, the Court held that courts may order student reassignment, transportation, and other remedies to fully realize the promise of Brown.[36] Although not mentioning Swann by name, Mr. Thomas has denounced what he terms "a disastrous series of cases requiring busing and other policies that were irrelevant to parents' concern for a decent education" after Green.[37]

D. Congressional Authority under the Constitution

Mr. Thomas has also criticized several key Court decisions upholding the authority of Congress under the Constitution. As discussed above, he has disparaged the decision in Fullilove, where the Court ruled that Congress has the power to enact legislation to remedy the effects of past discrimination. In addition, he has attacked the Court's important holding

---

[32] Williams, "A Question of Fairness," Atlantic Monthly, February, 1987, at 72.

[33] 391 U.S. 430 (1968).

[34] "Principle Versus Interest" at 393.

[35] Id.

[36] 402 U.S. 1 (1971).

[37] "Principle Versus Interest" at 393.

in Morrison v. Olson, where the Court ruled 7-1 that Congress could properly create independent prosecutors such as those which investigated Watergate and Iran-Contra.[38] The lone dissent was by Justice Scalia, who argued that Congress had absolutely no authority to appoint special prosecutors, no matter how serious a crime may have been committed by Executive branch officials. According to Mr. Thomas, however, Justice Scalia's dissent was "remarkable" and should have been followed, while Chief Justice Rehnquist's majority opinion "failed not only conservatives but all Americans."[39]

III. UNWILLINGNESS TO FOLLOW ESTABLISHED LAW

A. Controversial Tenure as Chair of the EEOC

Mr. Thomas' most significant legal experience is the eight years he served as Chair of the Equal Employment Opportunity Commission, the agency with prime responsibility for enforcing federal laws forbidding employment discrimination. During this period, Mr. Thomas repeatedly displayed a failure and unwillingness to enforce fully federal anti-discrimination laws as mandated by Congress. He frequently denounced court-approved methods of establishing discrimination and remedies for workplace discrimination. In many instances, Mr. Thomas appeared not to believe in the very laws he was sworn to enforce, especially the laws forbidding discrimination against older workers. Congress and the courts had to intervene to require Mr. Thomas to enforce the law. Throughout his tenure as an executive branch official, Mr. Thomas demonstrated aggressive hostility to congressional oversight and direction.

One particularly disturbing example of Mr. Thomas' behavior at the EEOC was his attempt to reverse the Commission's long-standing policy of seeking goals and timetables in conciliation efforts and court-approved settlements. Mr. Thomas attempted to justify his shift by arguing that the Supreme Court's decision in Firefighters Local Union No. 1984 v. Stotts[40] required that the agency stop seeking goals and timetables.[41] Mr. Thomas'

---

[38] 108 S.Ct. 2597 (1988).

[39] See Barnes, "Weirdo Alert," The New Republic, Aug. 5, 1991, at 7.

[40] 467 U.S. 561 (1984).

[41] Regulatory Program of the United States, August, 1985.

conclusion was extraordinary because the Court in Stotts was very careful to say that its decision simply allowed employers to use a seniority system that had an adverse impact on minority employees, not that the Constitution required it. To conclude, as Mr. Thomas did, that the Court prohibited the long-accepted practice of employing goals and timetables was a tortured reading of the decision, a reading that seemed to be motivated by a personal hostility to these types of remedies. In fact, Mr. Thomas' statement about Stotts directly contradicted a representation he himself had made to Congress in August, 1984, where he wrote that Stotts "does not require the EEOC to reconsider stated policies with respect to the availability of numerical goals and similar forms of affirmative action relief."

Mr. Thomas was widely criticized for his shift concerning Stotts, and in 1986, the Supreme Court firmly rejected Mr. Thomas' revised reading of the case, reiterating that goals and timetables are constitutionally permissible remedies for employment discrimination under appropriate circumstances.[42] However, even in the face of this long line of authority, Mr. Thomas continued to voice his "personal disagreement" with the Supreme Court's approach, and insisted that the use of goals and timetables "turns the law against employment discrimination on its head."[43]

Mr. Thomas' purposeful misreading of Stotts is emblematic of his defiant refusal to enforce anti-discrimination laws and his willingness to allow his personal policy preferences to take precedence over established law. A particularly egregious example of this problem can be found in the EEOC's failure to enforce the Age Discrimination in Employment Act (ADEA).

In 1987 and 1988, Congress discovered that the EEOC under Mr. Thomas had failed to act on more than 13,000 cases charging violations of ADEA. This failure to act reflects a callous disregard for the legal rights of older workers.

Perhaps even more troubling than this dereliction of duty was Mr. Thomas' response once the problem was discovered. Mr. Thomas was extremely uncooperative with Congress. When he was first asked by the Senate Special Committee on Aging about the number of ADEA cases whose time limits had lapsed, Mr. Thomas reported that 78 cases had expired.

---

[42] See Local Number 93, International Association of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 US 501 (1986); Local 28 Sheet Metal Workers' International Association v. EEOC, 478 US 421 (1986); and United States v. Paradise, 480 U.S. 149 (1987).

[43] Thomas, 5 Yale L. & Pol. R. at 403, n. 3.

However, the EEOC's own information revealed at this point that well over 1,000 cases had lapsed. After published news reports brought attention to the problem of lapsed cases, Mr. Thomas reluctantly confirmed that the statute of limitations had run on over 900 cases. These estimates were later revised to over 1,500, then to over 7,500, and finally to more than 13,000 lapsed claims.[44]

Instead of cooperating with Congress in investigating and resolving this massive problem, Mr. Thomas repeatedly complained about Congress' role in overseeing the EEOC, and refused to cooperate with the Senate oversight committee. Eventually, the Senate Aging Committee had to resort to a subpoena to obtain the EEOC's records on lapsed cases. Even when the Aging Committee's investigation turned up evidence of gross dereliction of duty by the EEOC, Mr. Thomas still attacked Congress. He at one point complained that a "willful committee staffer . . . succeeded in getting a Senate Committee to subpoena volumes of EEOC records."[45] Mr. Thomas added that "it will take weeks of time, and costs in the hundreds of thousands of dollars, if not in the millions. Thus, a single unelected individual can disrupt civil rights enforcement--and all in the name of protecting rights."[46]

Ultimately, Congress had to pass special legislation to restore the rights of these older workers whose claims the EEOC had allowed to lapse.[47] This incident is representative of a pattern in which Congress had to pass legislation to address problems created by Mr. Thomas' administration of the EEOC.[48]

Mr. Thomas' actions with respect to employers' obligation to make pension contributions for workers over age 65 is another example of his failure to protect older workers' interests. Mr. Thomas pledged to rescind an improper Department of Labor interpretation stating that employers were not required to make pension contributions for workers older than age 65, but never carried through on his promise. After four years of

---

[44] Letter to the President by 14 Members of Congress, July 17, 1989; United States Senate, Committee on the Judiciary, Nomination Hearing for Clarence Thomas to be a Judge on the United States Court of Appeals for the District of Columbia, Feb. 6, 1990, at 90.

[45] Speech before the Federalist Society, University of Virginia, Mar. 5, 1988, at 13.

[46] Id.

[47] "EEOC Raises Number of Mishandled Age Discrimination Cases to 7,546," Los Angeles Times, June 25, 1988 at Part IV, p. 1.

[48] Letter to the President by 14 Members of Congress, July 17, 1989.

agency inaction under Mr. Thomas, Congress passed an amendment to the ADEA requiring pension contributions. Still, the agency did not rescind the incorrect regulation until ordered to do so by a federal court, and failed to issue new regulations on pension accruals in a timely fashion. As a consequence of EEOC inaction, older workers lost benefits valued at as much as $450 million per year. As U.S. District Court Judge Harold Greene wrote in finding against the EEOC, the agency "has at best been slothful, at worst deceptive to the public, in the discharge of [its] responsibilities."[49]

Similarly, in 1987, over vocal objections from Congress and the senior community, the EEOC issued a regulation permitting employers to ask older workers to waive their ADEA rights even before any discrimination claim existed and without the supervision or approval of the EEOC. Congress responded by passing riders on the 1988, 1989, and 1990 EEOC appropriation to prevent the Commission from implementing the new rule on unsupervised waivers. Even in the face of this Congressional action, Mr. Thomas continued to oppose EEOC supervision.

The extent and seriousness of the problems with Mr. Thomas' performance at the EEOC were brought to the fore when Mr. Thomas surfaced as a possible nominee to the Court of Appeals. Fourteen Members of Congress who served on subcommittees with oversight responsibilities for the EEOC took the extraordinary step of writing to President Bush, asking that Mr. Thomas not be nominated to the federal bench. According to these Members of Congress, Mr. Thomas' "questionable enforcement record" at the EEOC "frustrates the intent and purpose" of the Civil Rights Act of 1964. In addition, the letter took strong exception to Mr. Thomas' lack of candor in dealing with the oversight committees, and concluded that Mr. Thomas "has demonstrated an overall disdain for the rule of law."[50]

B. Questionable Performance as Director of the Office of Civil Rights in the Department of Education

Mr. Thomas' tenure at the EEOC has received the most attention to date. However, before becoming Chair of the EEOC, Mr. Thomas served for one year as Director of the

---

[49] AARP v. EEOC, 655 F.Supp. 228, 229 (D.D.C.), *aff'd in part, rev'd in part, on other grounds*, 823 F.2d 600 (D.C. Cir. 1987).

[50] Letter to President Bush by 14 Members of Congress, July 17, 1989.

Office of Civil Rights (OCR) in the Department of Education. During this short period, Mr. Thomas manifested a similar pattern of flouting established law. Mr. Thomas admitted in federal court that he had violated his legal obligations governing civil rights enforcement at OCR. In addition, Mr. Thomas' failure to enforce civil rights protections was so serious that on three separate occasions, OCR actions were opposed even by the Reagan Justice Department.

During Mr. Thomas' tenure, OCR was governed by a court order issued in the Adams v. Bell litigation, which required that OCR meet specified time limits in processing complaints and taking other enforcement action. This order was necessary because of a "general and calculated default" over a period of years in enforcing civil rights laws in education.[31] In 1982, while Mr. Thomas was head of OCR, the Adams court held a hearing concerning charges that OCR was failing to comply with the court order.

At the hearing, Thomas specifically admitted that he was violating the court order's requirements for processing civil rights cases:

> Q: . . . 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?
>
> A: That's right.
>
> Q: So aren't you, in effect, substituting your judgment 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 you have not imposed a deadline [for an OCR study concerning lack of compliance with the Adams order]; is that correct?
>
> A: I have not imposed a deadline.

---

[31] See H.Rep. 99-458 (1985) at 5.

56-271 O—93——27

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

A: Yes.[52]

Shortly after Mr. Thomas' testimony, the federal court in Adams in fact found that the court's order "has been violated in many important respects." [53]

One reason that Mr. Thomas failed to comply with the Adams order is that OCR placed "holds" on the processing of certain kinds of civil rights complaints while it considered or reconsidered its policies. As a memorandum to Mr. Thomas from his deputy pointed out, the use of hold categories not only "impeded the timely processing of a number of OCR cases" but also "stifled morale in OCR."[54]

In 1982, even the Reagan Justice Department protested OCR's refusal to enforce civil rights laws through the continuation of "hold" categories. OCR was suspending processing of complaints of improper job discrimination against the handicapped by universities and other recipients of federal education aid. Assistant Attorney General Bradford Reynolds wrote to Mr. Thomas, specifically questioning "the propriety of refusing to process" such complaints in most states, and pointedly requested that Mr. Thomas promptly notify OCR offices to "begin accepting, investigating and, where appropriate, remedying" those complaints.[55] Even after this complaint from the Department of Justice, which occurred less than a month after the court found significant violations of the Adams order, Mr. Thomas took no action to remedy this violation of law.

In addition, during Mr. Thomas' tenure, OCR finalized the implementation of a procedure called ECR, or Early Complaint Resolution.[56] Under ECR, OCR would seek to settle civil rights complaints in non-class action cases before an investigation had even begun.

---

[52] Transcript of Hearing in WEAL and Adams v. Bell, D.D.C., Mar. 12, 1982, at 48, 51.

[53] Adams transcript, Mar. 15, 1982, at 3.

[54] Memorandum to Clarence Thomas from Michael Middleton, Dec. 3, 1981, at 1.

[55] Letter to Clarence Thomas from William Bradford Reynolds, Apr. 9, 1982.

[56] See Adams transcript at 20.

During Mr. Thomas' tenure, in November, 1981, the Justice Department specifically alerted OCR of its "major concern" that the use of ECR did not meet applicable standards and "could lead to a weakening of your enforcement posture and our litigation position."[57] According to a House Committee that investigated the use of ECR, however, no significant changes were made by Thomas or his successor in this area, despite Justice's complaint and its request that the use of ECR be closely monitored. By 1985, the Committee reported, 312 cases had been settled through ECR, and OCR could not assure the committee that "any or all of the ECR settlements were in accordance with statutory or regulatory requirements."[58] As the House Committee concluded, however, the use of ECR "may be illegal, may not protect the rights of complainants, and may jeopardize future litigation involving violations of civil rights laws."[59]

Mr. Thomas was also involved in a blatant attempt in 1981 by the Department of Education to change its position and undermine enforcement of sex discrimination laws. Since the mid-1970s, federal regulations provided that it was illegal for universities or other recipients of federal education funds to commit job bias on the basis of sex.[60] In 1981, however, even as the Supreme Court was considering a case challenging the Department of Education rules, Mr. Thomas announced that the Department was about to reverse its position and argue that the anti-sex discrimination law "does not cover employment."[61]

In fact, two weeks after Thomas' announcement, Education Secretary Bell wrote to the Justice Department to seek permission to repeal the anti-sex discrimination rules and effectively to concede that they were invalid in the Supreme Court.[62] The Justice Department refused, rejecting this apparent attempt by Mr. Thomas and Secretary Bell to seriously weaken anti-discrimination protections.[63] The Supreme Court repudiated the

---

[57] Letter from Stewart B. Oneglia, Civil Rights Division, Department of Justice to Kristine M. Marcy, Office of Civil Rights, Nov. 13, 1991.

[58] H. Rep. 99-458 at 29.

[59] See H.Rep. 99-458 at 27.

[60] See 34 CFR 106.51-61 (1975).

[61] UPI Release, July 13, 1981.

[62] See BNA Daily Labor Report, Aug. 5, 1981, at p. A-5 (reprint of letter of July 27, 1981).

[63] See North Haven Board of Educ. v. Bell, 456 U.S. 509, 522 n. 12 (1982).

Thomas-Bell position, ruling that the regulations were valid and that the anti-sex bias law did in fact prohibit employment discrimination.[64]

IV. HOSTILITY TO LEGISLATIVE AUTHORITY

The need for Supreme Court justices to respect the will and intent of Congress is well established. Much of the Court's work involves interpretation of statutory language and congressional intent. In recent years, conservative justices have undermined many statutes, most notably in the areas of civil rights and family planning legislation. These Court decisions have damaged privacy interests and civil rights protections, and have led to congressional efforts to overrule the Court decisions.[65]

Mr. Thomas' attitude towards the legislative function suggests that, if confirmed, he would further the Court's disturbing trend in this area. Mr. Thomas' record at the Office of Civil Rights and the EEOC, as described above, contains numerous examples of actions and statements contrary to existing law. This disrespect for Congress is even clearer in his writings and speeches.

For example, Mr. Thomas has frequently condemned Congress, and commented that willful violations of its intentions are to be applauded.[66] In a speech on the role of Congress in the formation of public policy, Mr. Thomas said that "it may surprise some but Congress is no longer primarily a deliberative or even a law-making body... [T]here is little deliberation and even less wisdom in the manner in which the legislative branch conducts its business."[67]

---

[64] Id.

[65] See, for example, H.R. 1 (1991) (the Civil Rights Act of 1991, attempting to overrule a series of Supreme Court decisions narrowing the scope of employment discrimination and civil rights laws); S. 323, H.R. 392 (1991) (attempting to overrule Rust v. Sullivan, which upheld a rule forbidding doctors at federally funded health clinics from providing patients with information about abortion).

[66] Thomas, Speech to the Federalist Society, University of Virginia, Mar. 5, 1988.

[67] Thomas, Speech to the Gordon Public Policy Center, Brandeis University, Waltham, Massachusetts, April 8, 1988, at 4.

In his 1988 speech, Mr. Thomas specifically attacked Congress' oversight activity. Mr. Thomas focussed his criticism on three members of the Senate Labor and Human Resources Committee who simply requested that Mr. Thomas at the time of his 1986 re-nomination as head of the EEOC keep them appraised of the EEOC's work by submitting semi-annual reports. Mr. Thomas referred to this oversight as an "intrusion" into the administrative deliberative process.[68]

A further example of Mr. Thomas' contempt for the legislative process and the rule of law can be found in his repeated praise for Oliver North. In one speech, Mr. Thomas said that the congressional committee "beat an ignominious retreat before Colonel North's direct attack on it, and by extension all of Congress."[69] In another speech, while decrying Congress' role in overseeing the federal bureaucracy, he noted that "as Ollie North made perfectly clear last summer, it is Congress that is out of control!"[70] This praise for North's open flouting of Congress and the Constitution is wholly inappropriate from someone being considered for the Supreme Court, whose respect for the Constitution, the separation of powers, and the rule of law must be beyond reproach.

Mr. Thomas' harsh disparagement of congressional authority is particularly troubling in light of his belief that Congress does not even have the power to create a special prosecutor to investigate executive branch misconduct and his own refusal at OCR and EEOC to comply with the law. These aspects of Mr. Thomas' record strongly suggest that, if confirmed, he would join justices like Rehnquist and Scalia in seeking to undermine congressional statutes protecting individual rights and liberties and to limit improperly congressional authority under the Constitution.

---

[68] Id. at 5.

[69] Thomas, Speech before the Cato Institute, Washington, D.C., Oct. 2, 1987, at 13.

[70] Thomas, Speech to the Federalist Society, University of Virginia, Mar. 5, 1988, at 13 (emphasis in original).

V. JUDICIAL PHILOSOPHY: ADHERENCE TO A 'DISCREDITED'[71] THEORY OF NATURAL LAW

Mr. Thomas' overall judicial philosophy is centered on a belief in "natural law" or "higher law". According to Mr. Thomas, there are fixed objective truths in natural law that somehow trump or override the Constitution or other written law.[72] Mr. Thomas asserts that the Supreme Court is justified in overturning the decisions of "run-amok majorities" and "run-amok judges" as long as it adheres to natural law.[73] Legal scholars and judges have recognized, however, that this emphasis on natural law is extraordinarily troubling, and the theory has been rejected as a basis for constitutional analysis for over fifty years. Geoffrey Stone, dean of the University of Chicago Law School has characterized Mr. Thomas' ideas as "strange" and "further outside the mainstream of constitutional interpretation than Bork."[74]

Legal scholars have explained that there are no fixed "higher law" principles that can override the Constitution. Indeed, as Professor John Hart Ely has noted: "natural law has been summoned in support of all manner of causes in this country -- some worthy, some nefarious -- and often on both sides of the same issue."[75] Professor Gary McDowell recently wrote: "To suggest that the Constitution sprang from and rests upon the natural law teaching of the Declaration of Independence is one thing; but to argue that it is appropriate for judges to claim recourse to that body of law in deciding the cases that come before them is quite a different matter."[76]

---

[71] J. Ely, Democracy and Distrust, (1980), at 50.

[72] See, e.g., Thomas, Speech before the Heritage Foundation, Washington, D.C., June 18, 1987, at 22; Thomas, "The Higher Law Background of the Privileges or Immunities Clause," 12 Harv. J. of L. and Pub. Pol. 63 (1989) (hereinafter "Higher Law"); Thomas, Speech before the U.S. Department of Justice -- Dr. Martin Luther King, Jr. Holiday Observance, Washington, D.C., Jan. 16, 1987, at 6.

[73] "Higher Law" at 64; Thomas, Speech to the Federalist Society, University of Virginia, Mar. 5, 1988, at 2.

[74] Page, "Will Thomas be Borked?: Views Are Fair Game," Washington Times, July 12, 1991.

[75] See, J. Ely, Democracy and Distrust, at 50, (1980); Tribe, New York Times, July 12, 1991.

[76] McDowell, "Doubting Thomas: Is Clarence a Real Conservative?," The New Republic, July 29, 1991, at 15.

Despite his belief in unwritten, natural law, Mr. Thomas has attacked one of the most important Supreme Court decisions protecting rights not explicitly mentioned in the Constitution, Griswold v. Connecticut.[77] In Griswold, the Court ruled that the Constitution protects the right of privacy-- not because of higher, natural law superior to the Constitution, but because the right of privacy is implicit in written Constitutional guarantees and traditions. One part of the basis for Griswold was the Ninth Amendment, which provides that rights need not be explicitly enumerated in the Constitution to be protected. Notwithstanding his belief in fixed principles of unwritten natural law not mentioned expressly in the Constitution, however, Mr. Thomas has criticized Griswold because of its "invention" of the Ninth Amendment, asserting that the Ninth Amendment "will likely become an additional weapon for the enemies of freedom."[78] Mr. Thomas' views on the Ninth Amendment, particularly in light of his views on natural law, are extremely troubling.

In fact, Mr. Thomas' applications of natural law could result in dangerous and dramatic reversals of Supreme Court precedents. Mr. Thomas has used natural law analysis to severely criticize the Supreme Court's reasoning in Brown v. Board of Education[79] as well as the right to privacy.[80] He has praised as a "splendid example of applying natural law" an article that urged overturning Roe v. Wade and establishing a constitutional imperative against abortion.[81] Mr. Thomas' belief that natural law requires that the government be "color-blind" in all actions has led him to disagree with virtually every Supreme Court decision that approved of affirmative action, even in cases involving intentional discrimination. In other instances, Mr. Thomas has suggested that natural law analysis protects economic liberty, and that government regulation somehow violates natural

---

77 381 U.S. 479 (1965).

78 "Principle versus Interest" at 399.

79 Thomas, "The Modern Civil Rights Movement: Can a Regime of Individual Rights and the Rule of Law Survive?," Speech before the Tocqueville Forum, Wake Forest University, Winston-Salem, North Carolina, Apr. 19, 1988, at 16.

80 Thomas, "Higher Law," at 63, n. 2.

81 Thomas, Speech to Heritage Foundation, June 18, 1987, praising Lehrman, "The Declaration of Independence and the Right to Life: One Leads Unmistakably to the Other," The American Spectator, Apr. 1987, at 21.

law.[82] Indeed, Mr. Thomas has severely criticized regulatory legislation such as minimum wage laws.[83]

The natural law theme pervades Mr. Thomas' speeches and writings since the beginning of 1987. Between January 1987 and April 1988, Mr. Thomas gave at least 11 speeches in which he discussed natural law. He has published at least eight articles that argue for natural law analysis. The theme is constant, the endorsement is unequivocal. In light of Thomas' criticism of fundamental Court precedents concerning privacy and civil rights, as well as the important cases the Supreme Court will be deciding in these areas in the future, Mr. Thomas' natural law views are cause for serious concern.

VI. CONCLUSION

When Clarence Thomas was nominated to the Court of Appeals 18 months ago, the People For the American Way Action Fund expressed serious reservations but stopped just short of opposing his confirmation. Nominated to the Supreme Court, he must be held to a higher standard. The power of a Supreme Court justice is infinitely greater. Lower court judges are required to follow the guidance of the Supreme Court, and are subject to appellate review. On the Supreme Court, particularly the Court under the leadership of Chief Justice Rehnquist, the stricture of following precedent is largely removed, and there is no appeal.

Based on a thorough examination of Mr. Thomas' record as a judge and government official, and the opinions he has expressed in hundreds of articles and speeches, we believe that, were he confirmed by the Senate, Clarence Thomas would pose a substantial threat to the right to privacy and to efforts to combat discrimination. Mr. Thomas' record indicates a willingness to overturn precedents involving fundamental individual liberties and civil rights. His turbulent tenure at the EEOC and his oft-expressed distaste for the legislative branch suggest that he would join forces with those justices who willingly disregard legislative directives in favor of their personal policy preferences.

---

[82] Thomas, Speech before the American Bar Association, Luncheon Meeting of Business Law Section, Aug. 11, 1987, at 14.

[83] See "Black America Under the Reagan Administration," Policy Review, Fall 1985, at 37.

One of the key arguments the Bush Administration has highlighted in campaigning for Clarence Thomas is that his experiences will make him a defender of victims of poverty and discrimination. Mr. Thomas' personal history merits praise, but his public record contradicts the Administration's assertion. We agree with Rep. John Lewis' response to that argument: "Look at his record. He has forgotten from whence he has come."[84]

On behalf of the Board of Directors and members of the People For the American Way Action Fund, we call upon the United States Senate, in the exercise of its co-equal role in the selection of Supreme Court justices, to reject the nomination of Clarence Thomas.

The People for the American Way Action Fund is a 300,000-member, nonpartisan constitutional liberties organization. People For was a leader in the effort to defeat the nomination of Robert Bork to the Supreme Court. For more information, or to arrange interviews, contact the People For Communications Department at 202/467-4999.

---

84 Lewis, "Why I Oppose the Thomas Nomination," July 16, 1991.

The CHAIRMAN. Thank you very much, Congressman.
Mr. Chambers.

STATEMENT OF JULIUS CHAMBERS

Mr. CHAMBERS. Thank you, Mr. Chairman. Thank you for permitting me to address the committee on behalf of the NAACP Legal Defense and Educational Fund.

I serve as director counsel of the NAACP Legal Defense Fund, a position previously held by retiring Justice Thurgood Marshall and Jack Greenberg, who is now dean of Columbia University.

The legal defense fund played a major role in litigating most of the civil rights cases during the past 50 years. We have litigated more than 500 cases in the U.S. Supreme Court, including many of those that this committee discussed during these proceedings——

The CHAIRMAN. 500, you say?

Mr. CHAMBERS. Yes. In addition to *Brown* v. *Board of Education,* the legal defense fund represented the Griggs plaintiff. I personally argued over eight cases in the U.S. Supreme Court, including *Albemarle Paper Company* v. *Moody, Swann* v. *Charlotte-Mecklenburg, Thornburgh* v. *Gingles,* and the recent *Houston Lawyers Association* case that was decided last term.

With great regret, as I think exists among several others who oppose this nominee, I urge you to reject this nomination and to advise the President that Judge Thomas, based on the evidence produced at these hearings, does not meet the standards for elevation to the U.S. Supreme Court.

In summary, my reasons are: first, that the nominee, with no articulated or supportable constitutional or judicial standards would reject much of what this country has done to ensure that African-Americans and other disadvantaged people will have an equal chance in life. This position, as I will develop, is based on the writings and speeches of the nominee as well as my own personal experience.

Second, even if we accept the nominee's recantations or explanations offered during these hearings, the committee and the Senate are left with a candidate who cannot possibly demonstrate qualifications or judicial attributes to serve on our highest Court.

For more than 50 years, the legal defense fund has appealed to the judicial system to ensure improved opportunities for minorities and disadvantaged Americans. We have had marked success and have convinced minorities that, despite its flaws, the Court offers a reasonably fair and peaceful means for seeking equality. We have raised hopes among African-Americans and others that whatever their grievances, they can be fairly or sympathetically heard and addressed in our judicial system. But these accomplishments and the progress we have made would be seriously threatened by Judge Thomas' elevation to the Supreme Court. He threatens and would challenge the precedents established in the Court and in Congress in practically every area of concern to us.

For example, in voting rights, he questions the effects test, established by Congress in 1972 and approved by the Court in *Thornburgh* v. *Gingles.* He questions the affirmative obligations imposed by the Court in *Green* v. *New Kent County* and *Swann* v. *Charlotte-*

Mecklenburg, which I argued, for school districts to disestablish the vestiges of past discrimination.

He has soundly criticized litigation such as class action lawsuits designed to bring about remedies to address systemic discrimination. He has problems with group or affirmative obligations established to ensure equal opportunities for minorities in the workplace.

Since Brown, the Court and Congress have tried to develop fair and effective means to make real Brown's promise of equality. The civil rights remedies that exist today are the product of experience drawn from a wide array of efforts, some successful and some which have not been.

For example, we have tried voluntary efforts like freedom of choice, broad prohibitions as in the voting rights area, and threatened damages as are available under the 1866 Civil Rights Act.

Whatever steps were finally taken have come only after careful analysis of the facts, the law, and proven experience. Judge Thomas would discard all of this.

Second, if we accept the nominee's statements during this hearing at face value, the Senate and the committee would be left with the fact that we have nothing here to determine whether the nominee has the qualifications, the judicial temperament to serve on the Supreme Court. We have prepared an exhibit, an appendix A to our submitted testimony, and I would like to call your attention to it because it lists the 48 Supreme Court Justices who were appointed during the 20th century.

In every instance here, the nominees possessed at least two major qualifications to serve on the Supreme Court. Judge Thomas possesses not one of those. We think when you make your comparison with this list with the qualifications that Judge Thomas has presented, you too would agree that this nominee simply does not have the qualifications to be elevated to the U.S. Supreme Court.

Thank you.

The CHAIRMAN. Thank you very much.

Mr. Rauh.

STATEMENT OF JOSEPH L. RAUH, JR.

Mr. RAUH. I testify this afternoon for organizations of people devoted body and soul to the Bill of Rights. But I also testify for myself.

I had the honor and privilege to serve as last law clerk to Justice Benjamin Cardozo and first law clerk to Felix Frankfurter, the two great successors to the legendary Oliver Wendell Holmes. When Senator Kennedy read Clarence Thomas' trashing of Oliver Wendell Holmes last week, I was made ill. I felt not only Holmes but Cardozo and Frankfurter, his great successors, were being trashed as well.

The years I spent with the Court in the 1930's were years when Presidents reached out for the best person. Republican conservative President Calvin Coolidge appointed Justice Harlan Fiske Stone, a great Justice and ultimately the Chief Justice. His successor, Republican conservative President Hoover appointed Justice Cardozo

even though that meant two Jews and three New Yorkers on the Court and knowing how liberal he was.

The importance of that minority cannot be understated. What happened was that the Brandeis-Stone-Cardozo minority on the anti-New Deal Court saved the New Deal and the system under which we lived by two things. One, they educated the public and two, they restrained the majority.

There is no such minority now. You have no such persons who are going to restrain the Court or are going to educate the public to what is wrong with the present system. Now, that was a time when the Presidents reached for the best.

President Bush has suggested, and I quote, that he has appointed "the best person for the job." Why, he didn't even look for the best person. They took the sitting judges and decided which one is best for what we believe in—no abortion, no affirmative action, school prayer, defendants' rights. This was a question of starting with sitting judges and looking for those who would carry out their position. There is no distinction in this man. How he can be called the best person for the job when there is no distinction in anything he has written that has been shown to us.

He has the lowest rating—not only the performance in the appendix just offered the committee, but he has the lowest rating from the American Bar Association of any nominee. There have only been two that had unqualified votes. But Thomas, he not only had unqualified votes, he didn't have a single well-qualified vote. How could the President of the United States tell the people that this is the best person for the job when he can't get 1 of 15 conservative lawyers to say he is well qualified?

Even Carswell had a better record. Thomas has a worse record than even Carswell. I can't see how the Senate can confirm somebody who has a worse record, a worse evaluation than Carswell.

And the hearing. The hearing is quite remarkable. The testimony is inconsistent, incredible, and inoperative. It was inconsistent. You all heard the number of inconsistencies, but probably the basic one is the inconsistency of testifying about dozens of cases that are going to come before the Court and refusing to say where *Roe* v. *Wade* stood. It is incredible. The idea that he has never discussed with anyone *Roe* v. *Wade*—well, the word is incredible. I think there are better odds on the existence of the tooth fairy than the truth of that statement that he never considered or discussed *Roe* v. *Wade*.

Finally, it is inoperative. What he said is everything he has said in life up to the time he went on the court is inoperative because he was doing policy for the administration. Well, I think whichever way you look at that, it is very, very damning.

Well, in the 5 minutes—they are almost up—I only have this final appeal to the committee. Don't approve this man. He will do what he said he was going to do. He believes in the things—the conversion at the hearing here is no answer for you. The last two have done exactly what they said they were going to do on the Court, and what we argued they shouldn't be on the Court for, because they would do just what they said. And this man will, too.

Finally, you are the keeper now of the Bill of Rights. There is a majority of the Court which is very prone to having an erosion of

the Bill of Rights. Don't add one more. Don't take the historic voice out of this country. The Supreme Court has been the greatest protector of the Bill of Rights in America. Don't take the last shot here to complete the transition from the voice of liberty to now the silence on the Bill of Rights.

Thank you, sir.

The CHAIRMAN. Thank you very much, Mr. Rauh.

Ms. Hernandez, welcome back.

STATEMENT OF ANTONIA HERNANDEZ

Ms. HERNANDEZ. Thank you, and thank you for giving me the privilege to testify before you today. Not only do I represent the Mexican-American Legal Defense Fund, but today I also represent the Alliance for Justice, a coalition that represents legal, not-for-profit organizations concerned with the administration of justice. The alliance monitors judicial nominees and issues pertaining to the Court.

Because of the Nation's history of discrimination against Hispanics and because of the U.S. Supreme Court's unique role for more than 30 years in vindicating the civil and constitutional rights of Hispanics, we Hispanics have placed a particular reliance on the Supreme Court in assuring our civil and constitutional rights. Whether the Supreme Court's decision in 1989, hostile to the civil and constitutional rights of Hispanics, actually signals a Supreme Court retrenchment or turning back the clock, I have little doubt that the next person confirmed as an Associate Justice on the Supreme Court will, in fact, have a major impact on the future course of Supreme Court adjudications.

The reason for this determinative impact is obvious. The next nominee confirmed by the Senate will be replacing Justice Thurgood Marshall, whose fairness and compassion for civil and constitutional rights were crucial to the rights of Hispanics.

We have in our written document outlined the various reasons for our opposition. What I will do with my time is concentrate on two. The first matter deals with Judge Thomas' view of the equal protection clause and its impact on our community, which is an issue that I don't believe has been quite explored or discussed here today.

In reviewing Clarence Thomas' legal views on equal protection in the context of school desegregation and segregation, it reveals his preference to abandon the 14th amendment equal protection clause and substitute instead his views of the 14th amendment's privilege or immunities clause as paramount. Regardless of what freedoms Judge Thomas might find to be encompassed within the privilege and immunities clause, the fact of the matter is that his preferred privilege or immunity clause only protects citizens, whereas the equal protection clause protects any person.

As you know, within the Hispanic community, a large portion of our community are legal resident aliens, and a substantial percentage of our community are undocumented aliens. Some of the rights given by the Court—and let me go further. Since the privilege or immunities clause cannot and does not protect noncitizens, Judge Thomas may very likely reject the Supreme Court's historical ap-

plication of the equal protection doctrine to protect noncitizens in cases running from *Yick Ho* v. *Hopkins* back in 1886, a San Francisco ordinance invalidating a San Francisco ordinance that outlawed Chinese laundries and declared that it violated the equal protection clause, and also overrule *Doe* v. *Plyler*, which is a case involving a Texas law that denied education to undocumented children.

In fact, had Judge Thomas rather than Judge Marshall been on the Supreme Court at the time of Plyler, and had Judge Thomas rejected the equal protection analysis in favor of his privileges or immunities approach, MALDEF's 5–4 victory would have been a 5–4 loss.

Now, I would like to deal with the testimony of Judge Thomas and his 5 days and statements that he made. Apparently recognizing that many of the philosophical positions that he has taken in his speeches and his writings were out of the mainstream, Clarence Thomas appeared to pursue at least four strategies in his 5 days of testimony before this committee.

First, he occasionally reiterated and tried to defend several of his previously stated philosophical views, particularly his opposition to virtually all forms of affirmative action as unlawful and unconstitutional. Second, he tried to modify and, in fact, to moderate some of his most extreme views.

Third, he refused to answer questions in a few areas altogether, particularly with regard to whether he would overrule the constitutional right to reproductive freedom. And finally and most sweepingly, he argued that his past philosophical positions should be deemed irrelevant to the confirmation process because they were arrived at and presented when he was a policymaker rather than in his current role as an impartial judge. This position lacks substance and credibility.

Finally, in conclusion, presenting MALDEF's position in opposition to the confirmation of Clarence Thomas is not a task that I had looked forward to at all. I know Clarence Thomas; I consider him a friend. And as other witnesses have brought to the attention of this committee, there is no question that he has many positive qualities.

Additionally, on matters of importance to Hispanics, there similarly is no question that during his tenure at EEOC, he was accessible to me and I have gotten to know him then in trying to deal with him on the many matters that EEOC dealt with. He was sensitive to our concerns and we did discuss that.

He also was sensitive in supporting Spanish language forms and brochures, and commendable here was his testimony in response to Senator DeConcini about his opposition to English only. Nevertheless, in determining our position here, we at MALDEF had to look at the entire picture in the context of a Supreme Court nomination and we, in particular, had to look closely indeed at Judge Thomas' legal and philosophical views about the civil rights and constitutional provisions and about Supreme Court decisions interpreting them, all of such importance to protecting and advancing the rights of Hispanics. The big picture we found was not all very positive.

Based on his widely expressed legal and constitutional views which are summarized herein, we reached the inescapable conclusion that Judge Thomas should not be on the Supreme Court. We accordingly urge the Senate to exercise its coequal role in the process by not confirming Judge Thomas as an Associate Justice to the Supreme Court.

Thank you.

[The prepared statement of Ms. Hernandez follows:]

STATEMENT

On Behalf Of The

MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND
("MALDEF")

By

ANTONIA HERNANDEZ
PRESIDENT AND GENERAL COUNSEL

Before The

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

IN OPPOSITION TO THE
CONFIRMATION OF CLARENCE THOMAS
AS AN ASSOCIATE JUSTICE OF THE
UNITED STATES SUPREME COURT

102nd CONGRESS
1st SESSION
September 19, 1991

TABLE OF CONTENTS

I. The Background of MALDEF's Position on Judge Thomas 1

II. Judge Thomas' Writings and Speeches Antagonistic to Civil and Constitutional Rights 5

A. Affirmative Action in Employment 6

B. Set-Aside Programs in Government Contracting 10

C. Inclusion and Diversity in Higher Education 12

D. School Desegregation Remedies 14

E. Equal Protection for Undocumented Children 19

F. Privacy and Reproductive Choice 20

III. Judge Thomas' Testimony Before This Committee 24

Conclusion 28

STATEMENT OF ANTONIA HERNANDEZ

I am Antonia Hernandez, the President and General Counsel of the Mexican American Legal Defense and Educational Fund ("MALDEF"). This Statement is submitted on behalf of MALDEF in opposition to Senate confirmation of Clarence Thomas as an Associate Justice of the United States Supreme Court.

In this Statement, I address hereafter three primary matters: (1) the background of MALDEF's position on Clarence Thomas; (2) Judge Thomas' writings and speeches antagonistic to civil rights laws and constitutional provisions which protect the rights of Hispanics; and (3) Judge Thomas' testimony before this Committee.

I. The Background of MALDEF's Position on Judge Thomas

Because of our nation's history of invidious discrimination against Hispanics, and because of the United States Supreme Court's unique role for more than thirty years (1954-1988) in beginning to vindicate the civil and constitutional rights of Hispanics, we Hispanics have placed particular reliance on the Supreme Court in assuring our civil and constitutional rights.

The history of discrimination against Hispanics in this country, particularly in the Southwest and especially from the mid-Nineteenth Century to date,[1] has been similar to

[1] This nation's discrimination against Hispanics dates back at least to the period following the 1848 Treaty of Guadalupe-Hidalgo, through which Mexico ceded to the United States territory which would become the states of Arizona, California, Colorado, New Mexico, and Texas, and which would become parts of Nevada and Utah. Article IX of that Treaty guaranteed all persons of Mexican igin continuing to reside in that territory not only United States citizenship but also "the enjoyment of all the rights of the citizens of the United States according to the principles of the Constitution," including of course "free enjoyment of their

that experienced by African Americans. We Hispanics have been subjected to segregation in schools, in restaurants, and in hotels. We have been denied the opportunity to serve on juries. We have been, and still are, denied employment, and often treated badly when employed. And we have even been, and still are, denied the most fundamental of rights, the right to vote for representatives of our choice.

But we Hispanics, like African Americans in our country, were finally given hope in 1954 by the United States Supreme Court. In fact, two weeks prior to the Supreme Court's unanimous ruling in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (holding school segregation unconstitutional), the Supreme Court in Hernandez v. Texas, 347 U.S. 475 (1954), unanimously decided that Mexican Americans were protected by the Fourteenth Amendment, and unanimously held that the exclusion of Mexican Americans from juries in Texas violated the Fourteenth Amendment's equal protection clause. In subsequent years, it again was the Supreme Court -- and thereafter also Congress -- that continued to recognize some of our basic civil rights.

This fight to establish our basic civil and constitutional rights has not been an easy one. It in fact has required MALDEF attorneys to file and to litigate hundreds of lawsuits. And a number of our lawsuits have ended up in the United States Supreme Court.

A prime example is the voting rights case of White v. Regester, 412 U.S. 755 (1973). In this case, a unanimous Supreme Court struck down Texas' imposition of a multimember legislative district in Bexar County, a heavily Hispanic county where San

---

liberty and property." Despite these guarantees, what the once-Mexican population received instead was more than a century of subjugation.

Antonio is located. Based on such facts as the reality that only five Hispanics in nearly 100 years had ever been elected to the Texas Legislature from Bexar County, the Supreme Court upheld our claim that the multimember district diluted the votes of Hispanics in violation of the Fourteenth Amendment, and the Court thus affirmed the remedial redrawing of single-member districts.

Apart from the Supreme Court's decision in White and its earlier decision in Hernandez, few of our victories have been the result of unanimous decisions by the Supreme Court. Instead -- and increasingly in the 1980s -- we faced a divided Supreme Court, a Court which in fact often was very closely divided on issues of special importance to Hispanics.

For example, in Plyler v. Doe, 457 U.S. 202 (1982), we challenged Texas' denial of a free public school education to undocumented Hispanic children. These children were Texas residents most of whom would eventually become legal residents, but who, without an education, would become a permanent underclass. The Supreme Court in this case agreed that Texas' policy was unconstitutionally discriminatory in violation of the Fourteenth Amendment. But the Court reached this decision through a bare 5-4 majority, with Justices Thurgood Marshall and Lewis Powell joining the majority decision written by Justice William Brennan.

Following the resignation of Justice Powell and his replacement by Justice Anthony Kennedy, the Supreme Court -- within a matter of weeks in June, 1989 -- rendered, usually on five-to-four votes, a series of decisions devastating to the rights of Hispanics, other minorities, and women to a discrimination-free workplace. These

decisions[2] are, of course, well known to the United States Senate given the vast amount of time that the Senate had to expend last year to try to restore prior law through the Civil Rights Act of 1990 (S. 2104), legislation passed by the Senate on a lopsided vote,[3] only to be vetoed by the President, and with the Senate thereafter falling only one vote short of a veto override. In the meantime, the effect upon Hispanics of these recent Supreme Court decisions has been particularly devastating in view of increased discrimination against Hispanics, which was revealed by a recent government study showing that as many as 19% of all employers are now engaging in discrimination against "foreign-looking" or "foreign-sounding" employees and job applicants.[4]

Whether the Supreme Court's decisions in 1989 hostile to the civil and constitutional rights of Hispanics actually signal a Supreme Court retrenchment or turning-back-of-the-clock on civil rights, I have little doubt that the next person confirmed

---

[2] These decisions, listed roughly in chronological order, include the following: Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) (reallocating burdens of proof and redefining business necessity, among other things, in Title VII disparate impact cases); Martin v. Wilks, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989) (permitting "reverse discrimination" collateral attacks on consent decrees at any time); Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989) (striking down EEOC charges as untimely under Title VII when filed shortly after the discrimination affected the female charging parties); Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) (eviscerating § 1981 by limiting it to intentional discrimination only in the formation of contracts); Jett v. Dallas Independent School District, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989) (further eviscerating § 1981 in the public sector by subjecting it to the "policymaker" constraints governing § 1983 lawsuits); Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754, 109 S. Ct. 2732, 105 L.Ed.2d 639 (1989) (disallowing statutory attorneys fees to successful Title VII plaintiffs who had to litigate for years against an intervening defendant's attack on their back pay and seniority remedies); cf. Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989) (insulating discriminatory benefit plans from age discrimination challenges under the ADEA).

[3] Virtually identical legislation, H.R. 4000, was passed by the House by a similarly lopsided vote of 272-154.

[4] United States General Accounting Office, GAO Report to the Congress: Employer Sanctions and the Question of Discrimination, 5-7, 37-79 (March, 1990).

as an Associate Justice on the Supreme Court will in fact have a major impact upon the future course of Supreme Court adjudication: either at least occasionally respecting and vindicating the civil and constitutional rights of Hispanics, or denying our rights altogether.

The reason for this determinative impact is obvious. The next nominee confirmed by the Senate will be replacing Justice Thurgood Marshall, whose fairness and compassion for civil and constitutional rights were crucial to the rights of Hispanics.

With Justice Marshall no longer on the Supreme Court, and with the future of the Supreme Court hanging in the balance, I am of course concerned about his possible replacement, and I am particularly concerned about the legal philosophy of the person nominated to succeed Justice Marshall.

II. Judge Thomas' Writings and Speeches Antagonistic to Civil and Constitutional Rights

MALDEF has historically and consistently sought (quite successfully) to protect and to advance the civil and constitutional rights of Hispanics through litigation and advocacy: (a) by winning voluntarily-adopted and court-ordered goals and timetables and other forms of affirmative action in employment; (b) by defending set-aside programs in government contracting for minority business enterprises; (c) by urging increased inclusion of Hispanics in higher education through effective affirmative action programs; (d) by obtaining and now maintaining effective school desegregation remedies; (e) by making the Fourteenth Amendment's equal protection clause meaningful for noncitizens

and particularly for undocumented children; and (f) by trying to hold on to (especially for economically disadvantaged Latinas) the constitutional right to reproductive choice and indeed to privacy itself.

Through his lengthy paper trail of extrajudicial writings and speeches on civil and constitutional rights, Judge Clarence Thomas has revealed an ideological conservatism which differs little from that of Judge Robert Bork,[5] and, of great importance to us, solid philosophical positions in virtually all six of the foregoing areas. And in virtually all such areas of great concern to Hispanics, Judge Thomas' positions are diametrically opposed (or, possibly in the latter two instances, only potentially diametrically opposed) to the positions which have been and continue to be advanced by MALDEF on behalf of the civil and constitutional rights of Hispanics.

A. Affirmative Action in Employment

One of the most frequently-repeated themes in Clarence Thomas' writings and speeches is his steadfast opposition to affirmative action in virtually all forms, including affirmative action ordered by the courts to remedy proven past discrimination.

Clarence Thomas' opposition to affirmative action is based on his belief that the Constitution must in all circumstances be colorblind:

---

[5] Judge Thomas' ideological conservatism, as is explored more thoroughly infra at 6-24, has frequently been compared with that of Judge Robert Bork particularly with regard to their mutual opposition to Twentieth Century jurisprudence on affirmative action, on school desegregation, and on the Ninth Amendment right to privacy. Given their mutual views, it may not be surprising that Judge Thomas beleives to be "disgraceful" the fact "that Judge Bork is not now Justice Bork." Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," in Assessing the Reagan Years, 391,392 (Cato Institute, 1988) (cited hereafter as Assessing the Years).

"I firmly insist that the Constitution be interpreted in a colorblind fashion. It is futile to talk of a colorblind society unless this constitutional principle is first established. Hence, I emphasize black self-help, as opposed to racial quotas and other race-conscious legal devices that only further and deepen the original problem."[6]

Judge Thomas' views of affirmative action under Title VII of the Civil Rights Act of 1964, and of employment discrimination law in general, are the same as his view of a colorblind Constitution:

"I continue to believe that distributing opportunities on the basis of race or gender, whoever the beneficiaries, turns the law against employment discrimination on its head. Class preferences are an affront to the rights and dignity of individuals -- both those individuals who are directly disadvantaged by them, and those who are their supposed beneficiaries."[7]

Stated otherwise, in Judge Thomas' view, Title VII in fact makes affirmative action unlawful. Although Title VII bars "employers from discriminating on the basis of race,

---

[6] Thomas, Letter to the Editor, Wall Street Journal, 23 (Feb. 20, 1987). See also, e.g., Thomas, "The Black Experience: Rage and Reality," Wall Street Journal (Oct. 12, 1987). "Much of the current thinking on civil rights has been crippled by the confusion between a 'colorblind society' and a 'colorblind Constitution.' The Constitution, by protecting the rights of individuals, is colorblind."

[7] Thomas, "Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!," 5 Yale Law & Policy Review 402, 403 n. 3 (1987) (emphasis added) (cited hereafter as Yale Policy Review).

color, sex, religion, or national origin,"

> "Unfortunately, this commitment to nondiscrimination soon gave way to a system of group preferences.
>
> "The government encouraged and required employers to institute the very practices that sponsors of the civil rights law had observed 'are themselves discriminatory.'"[8]

Accordingly, "group preferences" in any form "conflict with the law."[9]

Given Judge Thomas' personal opposition to affirmative action, as well as his above-illustrated legal views, it may not come as a surprise that he has formally criticized as wrongly decided most of the Supreme Court's decisions approving various forms of affirmative action. The most "egregious example," according to Judge Thomas, is the Supreme Court's Weber decision in 1979 approving voluntary affirmative action.[10] Also worthy of his "personal disagreement with the Court" are four decisions on affirmative action rendered in 1986 and 1987.[11]

Because all of these five decisions were rendered by the Supreme Court usually on

---

[8] Thomas, "Abandon the Rules; They Cause Injustice," USA Today (Sept. 15, 1982).

[9] Id. In a subsequent commentary, Clarence Thomas argued that the Supreme Court's contrary view of the law, as set forth in its decisions upholding various forms of affirmative action as lawful under Title VII, reflected the "politicization" of the Court:

> "Let us look once more at the Civil Rights Act of 1964 as an example of the way this process has worked. We note that Congress passed a general law in relatively clear language. Subsequently, though, as in the case of Title VII of the act, the law was interpreted in a very different way."

Thomas, Assessing the Years, 395.

[10] Thomas, Assessing the Years, 395.

[11] Thomas, Yale Policy Review, 403 & 402 n. 2.

very close votes, and because Judge Thomas' vote (in place of Justice Thurgood Marshall's vote) would have caused a contrary result in several of the cases and could in the future cause a reversal of all of the cases, we briefly summarize below the five decisions with which Clarence Thomas has to date voiced his personal disagreement:

>> United Steelworkers of America v. Weber, 443 U.S. 193 (1979). On a 5-3 vote, the Court upheld as lawful under Title VII a private employer's hiring and training program which reserved half of the skilled-craft jobs for Blacks. The Court specifically noted that the program was designed to remedy the severe underrepresentation of Blacks in the employer's workforce in a manner that is consistent with the objectives of Title VII, and that the program was temporary and did not unnecessarily trammel the interests of white employees.

>> Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986). On a 5-4 vote, the Court upheld as appropriate relief under Title VII -- in order to remedy "egregious" and longstanding past discrimination by the defendant trade union -- a 29% minority membership and employment goal to be achieved by 1987 or soon thereafter. In reaching this decision, the Court expressly rejected the argument made by the federal government[12] that Title VII remedies could benefit only identifiable victims of the

[12] Despite the title of this case -- seemingly the EEOC (and the Justice Department) against a discriminatory construction trade union -- neither the EEOC nor the Justice Department supported the numerical remedy in this case. As is set forth in their Brief for the United States in this case, the EEOC (then chaired by Clarence Thomas) and the Justice Department in fact opposed the numerical remedy. Support for the numerical remedy was provided instead by two other plaintiffs in the case (the State of New York and the City of New York) and by a host of civil rights organizations.

longstanding past discrimination.

>> Local 93, Firefighters v. Cleveland, 478 U.S. 501 (1986). On a 6-3 vote, the Court upheld as lawful under Title VII a consent decree (per usual not containing an admission of past discrimination) requiring specified promotions of minority employees to remedy historical underrepresentation. This, the Court observed, is consistent with Congress' strong preference for voluntary settlements of Title VII claims.

>> United States v. Paradise, 480 U.S. 149 (1987). On a 5-4 vote, the Court upheld as constitutional under the Fourteenth Amendment's equal protection clause a court order requiring one-for-one (one Black for every white) promotions for state troopers to remedy pervasive past discrimination by the defendant law enforcement agency.

>> Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987). On a 6-3 vote, the Court upheld as lawful under Title VII a voluntary affirmative action plan pursuant to which a female was given a preference for promotion over an equally qualified male so as to desegregate a job classification historically filled only by males. As in Weber, the Court again noted that this plan was consistent with Congress' objectives in enacting Title VII.

The continued viability of each of these decisions, among others, as well as the future of affirmative action in general, hang in the balance today.

B. Set-Aside Programs in Government Contracting

Similar to his disagreement with the Supreme Court's decisions approving affirmative action in employment is Clarence Thomas' criticism of the Supreme Court's decision in Fullilove v. Klutznick, 448 U.S. 448 (1980), in which the Court upheld as constitutional a federal public works program which set aside 10% of the federal contracts for minority business enterprises (MBEs). Disagreeing with this decision, Judge Thomas claimed that the Supreme Court "reinterpret[ed] civil rights laws to create schemes of racial preference where none was ever contemplated."[13]

Nevertheless aware that Congress not only contemplated the MBE set-aside program but in fact enacted it, Judge Thomas aimed his criticism at Congress as well. In the same commentary quoted from above, Judge Thomas, after lambasting the Supreme Court, stated:

> "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?"[14]

Unfortunately -- from the perspective of MALDEF and of other civil rights organizations -- the constitutionality of federal MBE programs, now a matter of settled law, may be revisited by a newly configured Supreme Court. Fullilove, a 1980 decision, was decided on a 6-3 vote. A decade later, in Metro Broadcasting, Inc. v. FCC, 497 U.S.

---

[13] Thomas, Assessing the Years, 396 (brackets added).

[14] Id.

___, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990), the Court upheld as constitutional the FCC's minority preference policies in granting new broadcast licenses and in distress sales of broadcast licenses, but this decision was rendered on a narrow 5-4 vote.[15]

A new Justice personally and philosophically opposed to affirmative action, such as Clarence Thomas, could very well tip the balance to form a new Supreme Court majority not only willing to strike down future federal programs but also willing to overrule cases such as Fullilove and Metro Broadcasting.

C. Inclusion and Diversity in Higher Education

In the Supreme Court's seminal decision on the legality and constitutionality of race-conscious affirmative action, Regents of the University of California v. Bakke, 438 U.S. 265 (1978), a case involving the Davis Medical School's policy of reserving 16 of its 100 admission slots for minority students, the Court ruled 5-4 that the rigid reservation of 16 seats was impermissible without a showing that the school was remedying its own past discrimination, but that reliance on race or ethnic origin as an important factor in the admissions process was legally and constitutionally permissible in view of the interest of institutions of higher education in attaining diverse student bodies.

---

[15] One year earlier, a 6-3 majority of the Supreme Court in City of Richmond v. Croson, 488 U.S. 469 (1989), struck down Richmond's MBE set-aside program as unconstitutional under the Fourteenth Amendment. The majority reached this result by applying the rigorous strict-scrutiny standard of review to the set-aside program, by ruling that state and local governments could enact such programs only if they are narrowly tailored to remedying identifiable past discrimination, and by distinguishing Fullilove based on the greater deference given by the Court to Congress.

In Metro Broadcasting, the four dissenters -- Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Kennedy -- argued that the same strict-scrutiny standard of review should be applied to Congress' enactments, and that Congress' approval of the FCC minority preference policies thereby should be struck down as unconstitutional.

Although Clarence Thomas has not widely criticized the Supreme Court's majority decision in Bakke -- at least possibly because he was a beneficiary of the race-conscious admissions program at Yale Law School[16] -- the Bakke ruling does not fit within his legal philosophy compelling the Constitution to be colorblind. Although not widely, Judge Thomas thus necessarily has criticized the Court's ruling in Bakke.

In Judge Thomas' commentary quoted from frequently above, in which he initially noted that it "is easy enough to blame the Court for 'voodoo jurisprudence,'"[17] Judge Thomas essentially argued that -- at least since Brown v. Board of Education, 347 U.S. 483 (1954), if not also in Brown itself -- the Supreme Court and then the lower courts wrongfully moved from their intended judicial role of statutory and constitutional interpretation to an improper role of political and social policymaking; and Judge Thomas then sought to illustrate this alleged move into policymaking through reference to four decisions with which he disagreed: Bakke and three other affirmative action

---

[16] As described in the opening paragraphs of a recent article in The New York Times, 1 (July 14, 1991):

> "Judge Clarence Thomas, who came to prominence as a fierce black critic of racial preference programs, was admitted to Yale Law School under an explicit affirmative action plan with the goal of having blacks and other minority members make up about 10 percent of the entering class, university officials said.
>
> "Under the program, which was adopted in 1971, the year Judge Thomas applied, blacks and some Hispanic applicants were evaluated differently than whites, the officials said. Nonetheless, they were not admitted unless they met standards devised to predict they could succeed at the highly competitive school."

This apparently was not the first time that Judge Thomas had benefitted from affirmative action, as years earlier he reportedly had won "a race-based scholarship to attend college." Los Angeles Daily Journal, 1 (July 16, 1991).

[17] Thomas, Assessing the Years, 392. Judge Thomas concluded this sentence as follows: "but Congress must share a great deal of the blame." Id.

cases.[18] Specifically with regard to its purported policymaking role on affirmative action: "The Court has made rather creative interpretations of equal protection and legislative intent in a number of civil rights cases beginning with Regents of the University of California v. Bakke."[19]

Although Bakke today seems to have been so correctly decided that it is a component part of the fabric of American law, it is at least possible that Bakke could be revisited by a newly configured, activist, anti-affirmative-action Supreme Court. In addition, it is a virtual certainty that the Court within only a few more years will review the legality and constitutionality of race- and ethnic-conscious scholarships for minorities. These are matters which we would not want constitutionally colorblind Clarence Thomas to be able to rule on.

D. School Desegregation Remedies

Any review of Clarence Thomas' legal position on school desegregation should

---

[18] In his analysis leading to his use of Bakke as an illustration of wrongful political and social policymaking, Judge Thomas stated, in relevant part:

> "There is no question that courts have entered the policymaking process in an important way. But the founders purposely insulated the courts from popular pressures, on the assumption that they should not make policy decisions.
>
> * * *
>
> "When political decisions have been made by judges, they have lacked the moral authority of the majority.
>
> * * *
>
> "When they [the courts] have made important political and social decisions in the absence of majority support, they have only exacerbated the controversies they have pronounced on.
>
> * * *
>
> "The dignity of the judiciary is not enhanced by its politicization."

Id. at 394-95 (brackets added).

[19] Id. at 395.

begin with a brief review of the Supreme Court's unanimous decisions in Brown v. Board of Education, 347 U.S. 483 (1954) ("Brown I"), and in Brown v. Board of Education, 349 U.S. 294 (1955) ("Brown II"). This is because Clarence Thomas has criticized not only the remedies for school desegregation but also the basis for the original Brown I decision itself.

In the initial 1954 decision, which was based upon and effectively compelled by a long series of earlier Supreme Court decisions holding that racial segregation in higher education was unconstitutional under the equal protection clause of the Fourteenth Amendment,[20] the Court unanimously ruled: "Separate educational facilities are inherently unequal." Brown I, 347 U.S. at 495. This unanimous ruling unquestionably was based on the equal protection clause of the Fourteenth Amendment.[21]

Following rebriefing and reargument on the issue of remedy, the Court a year later unanimously ruled that the public school systems were required "to effectuate a transition to a racially nondiscriminatory school system" and that this transition was to occur "with all deliberate speed." Brown II, 349 U.S. at 301.

Clarence Thomas' quarrel with Brown I is not with its result but with the grounds on which it was based. Because he firmly believes that African American school children

20 See, e.g., McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Board of Regents, 332 U.S. 631 (1948); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938). See generally Brown I, 347 U.S. at 492.

21 As stated by the unanimous Supreme Court in Brown I, 347 U.S. at 495:

> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

"can do quite well in their own schools,"[22] Judge Thomas disagrees with the equal-protection-of-the-laws premise of Brown I that separate is inherently unequal, and he in fact disagrees with the Supreme Court's reliance in Brown I on the equal protection clause at all.[23]

Instead, according to Judge Thomas, Brown I should have been based on Justice Harlan's constitutional colorblindness dissent in Plessy v. Ferguson, 163 U.S. 537 (1896), which Judge Thomas believes was in turn based primarily on the Fourteenth Amendment's privileges or immunities clause, which Judge Thomas in turn believes incorporates or should incorporate principles of higher law or natural law.[24]

---

22 Williams, "A Question of Fairness," The Atlantic Monthly, 72 (Feb. 1987).

23 See generally Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 Harvard Journal of Law & Public Policy 63 (1989) (cited hereafter as "Higher Law"); Thomas, "Toward a 'Plain Reading' of the Constitution -- The Declaration of Independence in Constitutional Interpretation," 30 Howard Law Journal 983 (1987) (cited hereafter as "Plain Reading").

As Judge Thomas concluded in another writing, following a reference to Brown I: "The main problem with the Court's opinions in the area of race is that it never had an adequate principle in the great Brown precedent to proceed from." Thomas, Assessing the Years, 392-93.

24 This sometimes-confusing and often-circular argument is set forth primarily in Thomas, "Higher Law," and Thomas, "Plain Meaning." Although Judge Thomas' reasoning is not entirely clear to us, we nevertheless attempt to summarize his views briefly here by quoting from several of his seemingly most relevant statements.

> "Brown v. Board of Education would have had the strength of American political tradition behind it if it had relied upon Justice Harlan's [colorblindness] arguments instead of relying on dubious social science. That case might have been an opportunity to revive the Privileges or Immunities Clause as the core of the Fourteenth Amendment."

Thomas, "Higher Law," 68 (brackets added, footnote omitted).

> "Justice Harlan's reasoning, as we understand him, provides the best basis for the Court opinions in the Civil Rights [sic] cases from Brown on."

Thomas, "Plain Meaning," 700.

> "Our best guide to the purpose behind the Privileges or Immunities Clause of the Fourteenth Amendment is Justice John Marshall Harlan's famous and lone dissent in Plessy v. Ferguson.
>
> * * *
>
> "It is not sufficiently appreciated that Justice Harlan's dissent focused on both the Thirteenth and the entire Fourteenth Amendments --

Among the problems with Clarence Thomas' approach to Brown I and its progeny is the fact that his approach swims against the tide of enormous scholarly research concluding that the equal protection clause is the core of the Fourteenth Amendment. Also problematic are not only his willingness to reject the then-emerging equal protection jurisprudence on which Brown I was based, see supra note 21, but also his apparent willingness to reject the legal arguments advanced by all the parties in a case and to legislate his own views instead.

But the primary problem with Clarence Thomas' approach is that it seems to omit the Fourteenth Amendment's equal protection clause entirely from constitutional jurisprudence.

And if there can be no or only a few violations of the equal protection clause, there then can be no or only few remedies therefor. And that seems to be the next step

---

> in particular, the 'privileges or immunities of citizens of the United States' clause. Justice Harlan's opinion provides one of our best examples of natural rights or higher law jurisprudence. He brings us back to privileges and immunities by constantly speaking of 'citizens' and then rights. For example, Justice Harlan spoke of segregation as putting the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the law. That Justice Harlan spoke of 'citizens' rather than 'persons' shows that he relied on the Privileges or Immunities Clause rather than on either the Equal Protection or Due Process Clause, both of which refer to persons. For Justice Harlan, the key to the Civil War amendments was the privileges and immunities of citizens of the United States.
>
> * * *
>
> "In Justice Harlan's view, the original intention of the framers of the Fourteenth Amendment was to bring about an equality of rights or privileges and immunities exercised by United States citizens."

Thomas, "Higher Law," 66-67 (footnotes omitted).

> "In order to appreciate the subtleties of Justice Harlan's dissent, one must read it in light of the 'higher law' background of the Constitution. Justice Harlan understood, as did Lincoln, that his task was to bring out the best of the Founders' arguments regarding the universal principles of equality and liberty."

Thomas, "Plain Meaning," 701.

in Judge Thomas' approach:

> "[Fourteen years after Brown I], in the Green v. County Board of Education case, we discovered that Brown not only ended segregation but required school integration. And then began a disastrous series of cases requiring busing and other policies that were irrelevant to parents' concern for a decent education."[25]

In a mere two sentences, Judge Thomas reflected both a serious misunderstanding of school desegregation law and a severe disagreement with that body of law. First, neither Brown I or Brown II "ended segregation" as both were followed by a more-than-decade-long campaign of Massive Resistance. Second, the Supreme Court's remedy of desegregation through integration commenced with Brown II, as pointed out above, and not with Green v. County School Board, 391 U.S. 430 (1968), in which a unanimous Supreme Court merely held freedom-of-choice plans to be inadequate to satisfy the mandate of Brown II in view of the decades upon decades of legally entrenched segregation. Third, Judge Thomas' reference to the beginning of "a disastrous series of cases requiring busing" merely emphasizes his disagreement with Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), in which the Court held that the trial court did not abuse its remedial discretion in requiring redrawn school attendance zones and altered feeder patterns (which in turn required some school buses to travel in different directions) so as to remedy a prolonged pattern of unconstitutional actions.

---

[25] Thomas, Assessing the Years, 393 (footnote omitted).

Finally, in view of the fact that Judge Thomas apparently would allow parents who care about a decent education -- all parents care about a decent education -- to trump constitutional rights, he appears to prefer judicial policymaking of his own totally contrary to the neutral constitutional principle reiterated by a unanimous Supreme Court in the Little Rock case: that "constitutional rights ... are not to be sacrificed or yielded" because of opposition to those rights, Cooper v. Aaron, 358 U.S. 1 (1958).

The next generation of school desegregation cases moving toward the Supreme Court involve the issue of when a federal court should relinquish jurisdiction and in effect permit resegregation.[26] There can be little doubt about Judge Thomas' position on this crucial issue.

E. Equal Protection for Undocumented Children

The foregoing review of Clarence Thomas' legal views on equal protection in the context of school segregation and desegregation reveals his ideological preference to abandon the Fourteenth Amendment's equal protection clause and to substitute instead his view of the Fourteenth Amendment's privileges or immunities clause (including his concepts of higher law and of natural law) as paramount. See supra note 24 and accompanying text.

Regardless of what freedoms Judge Thomas might find to be encompassed within the privileges or immunities clause, the fact of the matter is that his preferred privileges

---

[26] See, e.g., Keyes v. School District No. 1, Denver, 895 F2d 659 (10th Cir. 1990), cert. denied, 498 U.S. __, 111 S.Ct. 951, 112 L.Ed.2d 1040 (1991).

or immunities clause protects only "citizens,"[27] whereas the equal protection clause protects "any person."[28]

Since the privileges or immunities clause cannot and does not protect noncitizens, Judge Thomas may very likely reject the Supreme Court's historical application of equal protection doctrine to protect noncitizens[29] in cases running from Yick Wo v. Hopkins, 118 U.S. 356 (1886) (San Francisco ordinances effectively outlawing Chinese laundries violate equal protection), to Plyler v. Doe, 457 U.S. 202 (1982) (Texas law which denies a free public education to undocumented children violates equal protection). In fact, had Judge Thomas rather than Justice Thurgood Marshall been on the Supreme Court at the time of Plyler, and had Judge Thomas rejected equal protection analysis in favor of his privileges or immunities approach, MALDEF's 5-4 victory in Plyler would have been a 5-4 loss.

F. Privacy and Reproductive Choice

Because at least half of the community we represent is female, and because most Latinas are economically disadvantaged and disproportionately at or below the poverty line, MALDEF for more than a decade has sought to preserve the constitutional right to

[27] The privileges or immunities clause provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. Amend. XIV § 1 (emphasis added).

[28] The equal protection clause provides in relevant part: "nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV § 1 (ellipsis and emphasis added).

[29] Since Judge Thomas finds it inappropriate to apply the equal protection clause to protect African Americans (for whom the Fourteenth Amendment was primarily designed), it would be difficult indeed, and certainly legally inconsistent, for him to extend the equal protection clause to noncitizens.

reproductive choice. We thus have been most skeptical about Supreme Court nominees who question continuation of the right to choice based on the constitutional right to privacy. Clarence Thomas is such a nominee.

In his "Higher Law" article published in 1989, Judge Thomas introduced his philosophical objection to a Ninth Amendment right to privacy as follows:

> "The current case provoking the most protest from conservatives is Roe v. Wade, 410 U.S. 113 (1973), in which the Supreme Court found a woman's decision to end her pregnancy to be part of her unenumerated right to privacy established by Griswold v. Connecticut, 381 U.S. 479 (1965)....
>
> "I elaborate on my misgivings about activist judicial use of the Ninth Amendment in Thomas, 'Civil Rights as a Principle Versus Civil Rights as an Interest,' in Assessing the Reagan Years, 398-99 (D. Boaz ed. 1988)."[30]

In the 1988 publication, Judge Thomas expressed more than just his "misgivings" about the Ninth Amendment right to privacy. He began as follows:

> "I cannot resist adding a note here to the recent discussion of the meaning of the Ninth Amendment ('The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'). It relates directly to our theme of civil rights and

---

30 Thomas, "Higher Law," 63 n. 2 (ellipsis and emphasis added).

> the courts. Some senators and scholars are horrified by Judge Bork's dismissal of the Ninth Amendment, as others were horrified by Justice Arthur Goldberg's discovery, or rather invention, of it in Griswold v. Connecticut. But the Ninth Amendment has to be considered in its context at the founding."[31]

Judge Thomas thereupon argued that "the Constitution is a document of limited government," that Supreme Court recognition of any unenumerated right in the Ninth Amendment would "give to the Supreme Court certain powers to strike down legislation," that such power in essence "would seem to be a blank check" for the Court to discover any right and to require "Congress to raise taxes to enforce this right," that accordingly "[m]aximization of rights is perfectly compatible with total government and regulation," and that, therefore, "[f]ar from being a protection, the Ninth Amendment will likely become an additional weapon for the enemies of freedom."[32]

Apart from Judge Thomas' "misgivings" about, if not disagreement with, the Supreme Court's "invention" of the Ninth Amendment right to privacy, even more controversial have been his printed remarks on natural law in a speech delivered a year earlier at the Heritage Foundation. In that speech, Judge Thomas quoted approvingly from John Quincy Adams:

> "Our political way of life is by the laws of nature, of

---

[31] Thomas, Assessing the Years, 398 (emphasis added, footnote omitted).

[32] Id. (brackets added).

nature's God, and of course presupposes the existence of God, the moral ruler of the universe, and a rule of right and wrong, of just and unjust, binding upon man, preceding all institutions of human society and of government."[33]

He also stated that the "need to reexamine the natural law is as current as last month's issue of Time on ethics," and, most controversially, that "Lewis Lehrman's recent essay in The American Spectator on the Declaration of Independence and the meaning of the right to life is a splendid example of applying natural law."[34]

As is set forth in footnote 34 below, the core of Mr. Lehrman's argument is that,

---

[33] Thomas, "Why Black Americans Should Look to Conservative Policies," 9 (Heritage Foundation, 1987) (cited hereafter as "Conservative Policies").

[34] Id. at 8. In view of Judge Thomas' endorsement of the essay by Lewis Lehrman, a well known right-to-life activist, it may be worth quoting from that article here:

> "May it be reasonably supposed that an expressly stipulated right to life, as set forth in the Declaration [of Independence] and the Constitution, is to be set aside in favor of the conjured right to abortion in Roe v. Wade, a spurious right born exclusively of judicial supremacy with not a single trace of legal authority, implicit or explicit, in the actual text or history of the Constitution itself?
>
> "Are we finally to suppose that the right to life of the child-about-to-be-born -- an inalienable right, the first in the sequence of God-given rights warranted in the Declaration of Independence and also enumerated first among the basic positive rights to life, liberty, and property stipulated in the Fifth and Fourteenth Amendments of the Constitution -- are we, against all reason and American history, to suppose that the right to life as set forth in the American Constitution may be lawfully eviscerated and amended by the Supreme Court of the United States with neither warrant nor amendment directly or indirectly from the American people whatsoever? Is it not a biological necessity, if it were not manifestly plain from the sequence of the actual words in the Declaration and in the constitutional amendments themselves, that *liberty is made for life, not life for liberty*? Is it to be reasonably supposed that the right to liberty is safe if the right to life is not first secured; and, further, is it to be maintained that human life 'endowed by the Creator' commences in the second or third trimester and not at the very beginning of the child-in-the-womb?"

Lehrman, "The Declaration of Independence and the Right to Life," The American Spectator, 21, 23 (April, 1987) (brackets added, emphasis in the original).

as a matter of natural law, fetuses are entitled to constitutional protection to life from the moment of conception. This argument, if enshrined in law, would justify more than just overruling Roe v. Wade, 410 U.S. 113 (1973), as it would also impose a constitutional prohibition on abortion. States would no longer have even the authority that existed prior to 1973 to permit abortion.

Given Clarence Thomas' hostility to any unenumerated rights in the Ninth Amendment combined with his express endorsement of Mr. Lehrman's essay as "a splendid example of applying natural law," confirmation of Judge Thomas as Justice Thomas could lead not only to the elimination of the constitutional right to reproductive choice but also to the elimination altogether of the constitutional right to privacy.

III. Judge Thomas' Testimony Before This Committee

Apparently recognizing that many of the philosophical positions that he had taken in his speeches and his writings were not only out of the mainstream but often extreme, Clarence Thomas appeared to pursue at least four strategies in his five days of testimony before this Committee: first, he occasionally reiterated and tried to defend several of his previously-stated philosophical views (particularly his opposition to virtually all forms of affirmative action as unlawful and unconstitutional); second, he tried to modify and in fact to moderate some of his most extreme views; third, he refused to answer questions in a few areas altogether (particularly with regard to whether he would overrule the constitutional right to reproductive choice); and, finally, and most sweepingly, he argued that his past philosophical positions should be deemed irrelevant to the confirmation

process because they were arrived at and presented when he was a policy maker rather than in his current role as an "impartial" judge. To at least several and maybe to many Members of this Committee, parts of Clarence Thomas' testimony accordingly bordered on being unbelievable.

Most problematic to me is Judge Thomas' argument that his past philosophical views should now be disregarded. That is an argument which itself must be disregarded. Because his past philosophical views were freely arrived at by Clarence Thomas, because those views were voluntarily delievered in speeches and voluntarily presented in numerous writings, because those views form at least part of the reason he was nominated in the first place, and because no nominee can or is expected to shed his or her philosophical views upon nomination to the judiciary, Clarence Thomas' past philosophical views are of crucial importance to the determination of whether he should be confirmed by the Senate. And it is precisely because of his widely-expressed past philosophical views that we urge the Senate not to confirm Clarence Thomas.

A. One area in which Judge Thomas did not alter his views in his testimony before this Committee concerns his widely expressed legal view that race-based or gender-based affirmative action goals, timetables, or preferences of any kind in employment are unlawful and unconstitutional. Although he maintined this legal position at the outset of his testimony under questioning by Senator Spector (on Wednesday, September 11), he sort of conceded in response to questioning by Senator Spector and by Chairman Biden (on Friday, September 13) that such policies might sometimes be okay, but only from a policy viewpoint; Judge Thomas declined to give even tentative

approval in a legal context. His consistent speeches and writings, of course, leave no doubt about Judge Thomas' position from a legal viewpoint.

Supreme Court adjudication in this area hangs in the balance today. Judge Thomas should not be confirmed.

B. In the area of congressionally-enacted MBE set-aside programs and similar federal programs, Judge Thomas here too did not alter his prior views about the unconstitutionality of such programs. Although he agreed in his testimony (on Monday, September 16) that the Supreme Court, in such decisions as Metro Broadcasting, has accorded more deference to Congress than it has to the states in this area, Judge Thomas declined to state his legal view. But his legal philosophy here is also well known from his speeches and writings.

Given that Metro Broadcasting was decided barely more than a year ago on a 5-4 vote with Justice Marshall in the majority, Supreme Court adjudication in this area also hangs in the balance today. Judge Thomas should not be confirmed.

C. On the matters of inclusion and diversity in higher education, Judge Thomas only slightly altered his previously-expressed legal criticsm of the Supreme Court's approval of race- and ethnic-based affirmative action programs. As a beneficiary of such a program at Yale Law School, he conceded under questioning by Senator Brown (on Wednesday, September 11) and by Senator Kennedy (on Thursday, September 12) his approval of Yale's affirmative action program, but again only from a policy perspective, not from a legal viewpoint. And, under questioning by Senator Simon (on Wednesday, September 11), Judge Thomas similarly voiced approval of race- and ethnic-

based scholarships, but only from a policy perspective, not from a legal perspective. His legal philosophy opposing all forms preference, again, are well known.

Given that Bakke was a 4-1-4 decision rendered in 1978 -- with Justices Marshall, Brennan, and Powell casting key votes -- the legality and constitutionality of inclusive affirmative action plans in higher education, and even of essential race- and ethnic-based scholarships, may hang in the balance today. Judge Thomas should not be confirmed.

D. As to his legal views on school desegregation remedies, Judge Thomas somewhat expanded upon his previous criticism of several Supreme Court decisions by stating to Senator Spector (on Monday, September 16) that the remedies must be related to improving the quality of education, thereby at least implying that he continues to oppose such desegregation remedies as integrating students and integrating faculty as a bottom-line principle of having not African American schools, Hispanic schools, and Anglo schools, but just schools.

Resegregation issues are currently pending before the Supreme Court, and cases presenting similar issues will be reviewed hereafter. Judge Thomas should not be confirmed.

E. As far as I'm aware, Judge Thomas was not asked about and did not testify about his stated preference for the privileges or immunities clause, rather than the equal protection clause, as the "core" of the Fourteenth Amendment's guarantee of equality under law. Because the privileges or immunities clause applies only to "citizens," whereas the equal protection clause protects "any person," his preferred approach to Fourteenth Amendment decision-making is especially troubling to me.

Fourteenth Amendment cases involving discrimination against noncitizens come before the Supreme Court quite frequently. Again, Judge Thomas should not be confirmed.

F. Finally, on the issue of reproductive choice, Judge Thomas during his testimony repeatedly sought to distance himself from some of his previously-expressed views (by, for example, at least recognizing a constitutional right to privacy in the liberty clause of the Fourteenth Amendment, and by claiming that he never intended his belief in natural law to be used in constitutional adjudication), but he repeatedly refused to comment on his view of the constitutional right to choice. This is something that the Senate and the American people have a right to know.

Given that the constitutionality of the right to reproductive choice is certain to be reevaluated by the Supreme Court, given that his vote on this issue could be crucial to its outcome, and in view of his previously-stated antagonism to the right to choice, Judge Thomas should not be confirmed.

Conclusion

Presenting MALDEF's position in opposition to the confirmation of Clarence Thomas is not a task that I have looked forward to at all.

I know Judge Thomas. I consider him a friend. And, as other witnesses have brought to the attention of this Committee, there is no question that he has many extremely positive qualities.

Additionally, on matters of importance to Hispanics, there similarly is no question

that, during his tenure at the EEOC, he was accessible to me in my various roles at MALDEF, and that he was accessible to others too. He also was sensitive to matters of particular concern to Hispanics. Illustrative was his support for Spanish-language forms and brochures. And commendable here was his testimony in response to Senator DeConcini (on Thursday, September 12) about his opposition to English-only policies which affect Hispanics so negatively.

Nevertheless, in determining our position here, we at MALDEF had to look at the entire picture in the context of a Supreme Court nomination, and we in particular had to look closely indeed at Judge Thomas' legal and philosophical views about the civil rights laws and constitutional provisions, and about Supreme Court decisions interpreting them, all of such importance to protecting and advancing the rights of Hispanics. The big picture, we found, was not at all a positive one.

Based on his widely-expressed legal and constitutional views, which are summarized herein, we reached the inescapable conclusion that Judge Thomas should not be, and cannot be, on the Supreme Court. We accordingly urge the Senate to exercise its co-equal role in this process by not confirming Clarence Thomas as an Associate Justice of the Supreme Court of the United States.

Alliance for Justice

A National Association of Organizations Working for Equal Justice

1601 Connecticut Avenue, N W Suite 600 ■ Washington, D C 20009 ■ 202/332-3224

NAN ARON
Executive Director

FRANCES DUBROWSKI
Chair

MEMBERS

Business and Professional People for the Public Interest
Center for Law and Social Policy
Center for Law in the Public Interest
Center for Public Representation
Center for Science in the Public Interest
Children's Defense Fund
Consumers Union
Education Law Center
Employment Law Center
Equal Rights Advocates
Food Research and Action Center
Harmon Curran & Tousley
Institute for Public Representation
Juvenile Law Center
Mental Health Law Project
Mexican American Legal Defense and Educational Fund
National Education Association
NOW Legal Defense and Education Fund
National Wildlife Federation
National Women's Law Center
Native American Rights Fund
Natural Resources Defense Council
New York Lawyers for the Public Interest
Public Advocates Inc
Sierra Club Legal Defense Fund
Women's Law Project
Women's Legal Defense Fund

**TESTIMONY ON
THE NOMINATION OF
CLARENCE THOMAS TO
THE SUPREME COURT**

The Alliance for Justice appreciates the opportunity to present testimony on the nomination of Judge Clarence Thomas to the United States Supreme Court. The Alliance is a national association of public interest legal organizations representing minorities, women, labor, children, consumers, the environment, and the poor.

The federal courts historically have played a critical role in leveling the playing field for the underrepresented and disadvantaged in our society. Because of our belief that the courts are central to the struggle for equality and fairness in society, the Alliance launched its Judicial Selection Project in 1985. The cornerstone of the project is an extensive review of each federal judicial nominee's competency, integrity, and commitment to equal justice.

The Alliance opposes the nomination of Clarence Thomas to the Supreme Court. In a statement released July 29, 1991 (see attached), the Alliance concluded that Judge Thomas' extensive record as head of the Equal Employment Opportunity Commission and his writings and speeches demonstrated a stubborn unwillingness to enforce federal law consistent with Congressional intent and a judicial philosophy that threatens to undermine constitutional protections. After closely following Judge Thomas' testimony before the Senate Judiciary Committee, the Alliance remains firmly convinced that the nominee's views pose a threat to individual rights and liberties.

At his confirmation hearings, Judge Thomas adopted a strategy to disavow past statements that were either controversial or inflammatory. In doing so, he was asking the Senate to disregard his prior positions in evaluating his fitness for the Supreme Court. It should categorically reject that request. President Bush nominated Judge Thomas for the Court precisely because of his record as an outspoken partisan for conservative causes. He should not be allowed to disown that record now.

SUMMARY OF JUDGE THOMAS' RECORD

Before he was appointed to the District of Columbia Circuit, Judge Thomas compiled an extensive record. As summarized more fully in the attached opposition statement, that record displays a defiance of the rule of law and an excessively narrow role for the courts in protecting individual rights and civil liberties.

Judge Thomas' tenure as chairman of the EEOC was marked by an overall disdain for the nation's civil rights laws. As chairman, he imposed his personal views of anti-discrimination on the agency--contrary to the will of Congress, the overwhelming weight of Title VII case law, and the traditions of the agency itself. He took numerous positions that weakened the EEOC's commitment to enforcement of the law and proved inimical to the rights of workers.

In addition, before his nomination, Judge Thomas consistently advocated a very limited, at times radical, role for the courts. He passionately spoke of natural law and economic rights. He lamented the "willfulness . . . of run-amok judges" and criticized numerous civil rights precedents, labeling them "rather creative interpretations of equal protection and legislative intent . . ." (Speech before the Cato Institute, October 2, 1987, at 7). Prior to the hearings, he did not speak of evolving constitutional standards. Rather, he scorned "the nihilism" of Oliver Wendell Holmes, rejected the judicial philosophy of William Brennan, and praised the opinions of Justice Scalia.

CREDIBILITY

Judge Thomas' testimony before the Senate Judiciary Committee exacerbated the Alliance's concerns about his record and his fitness for the Supreme Court. Riddled with contradictions, disavowals, and evasions, it lacked both candor and credibility.

Contradictions: Judge Thomas' contradictions are most starkly indicated in his comments on natural law. Before confirmation, Judge Thomas wrote that "[t]he higher-law background of the American Constitution, whether explicitly invoked or not, provides the only firm basis for a just, wise and constitutional decision." "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 Harvard Journal of Law and Public Policy 63, 68 (1989) (emphasis in original). However, in the very first round of questioning before the Committee, Judge Thomas stated "I don't see a role for the use of natural law in constitutional adjudication."

(September 10, 1991, Tr. at 137).

If Judge Thomas had changed his mind about the role of natural law in constitutional adjudication, he had ample opportunity during the hearings to say so and explain the reasons. Instead, he blatantly and inexplicably contradicted prior, unequivocal statements. Only after much prodding by Chairman Biden did Judge Thomas finally admit that natural law does impact the adjudication of cases, "[t]o the extent that the Framers believed." (September 12, 1991, Tr. at 43-44). By that time, his inconsistencies had inescapably clouded any understanding of his judicial philosophy.

Disavowals: Some of Judge Thomas' remarks during his testimony can be categorized only as outright disavowals of past positions. A glaring example of this is his comment about Johnson v. Santa Clara County Transportation Agency, which upheld an employer's voluntary affirmative action plan designed to bring more females into traditionally and overwhelmingly male-dominated positions. Judge Thomas, while he was Chairman of the EEOC, harshly criticized the Supreme Court decision, praising instead Justice Scalia's dissent. Of the dissent, he stated "I hope [it] will provide guidance for lower courts and a possible majority in future decisions." (Speech before the Cato Institute, April 23, 1987, at 20-21). When Senator Kennedy asked him why he was urging lower courts to follow the dissent, Judge Thomas replied that "in using the word 'guidance,' I suggested . . . we look at the opposite side of the argument." (September 12, 1991, Tr. at 80). Dubious at best, that explanation shows no recognition of the message the statement was sending to judges.

Evasions: The right to privacy and the Supreme Court's role in preserving it has been a burning public issue in this country for the past decade. Yet, on no issue was Judge Thomas more evasive. He quickly stated his belief in a right to marital privacy, which he had to do in order to pass even minimum scrutiny by the Committee. However, marital privacy is the only privacy right that Judge Thomas unequivocally recognized as constitutional. He flatly refused to comment on Roe v. Wade, the landmark case recognizing a woman's fundamental right to choose to terminate her pregnancy. He even said he did not have a personal opinion on Roe. (September 11, 1991, Tr. at 105-106).

Moreover, the evasiveness of Judge Thomas' testimony on personal privacy went beyond Roe. He painstakingly circumvented Chairman Biden's questions about the fundamental right to privacy of single persons. Even when Chairman Biden pulled from him a "yes" to the question of whether he believed the Constitution protects a single individual's right to privacy in the area of procreation, Judge Thomas felt compelled to add "I have expressed on what I base that, and I would leave it at that." (September 13, 1991, Tr. at 120). At a minimum, this is not the kind of

answer that instills confidence about Judge Thomas' views of the right to privacy outside the marital relationship.

Finally, Judge Thomas avoided questions on the controversial White House Working Group on the Family report, which criticized as "fatally flawed" a number of Supreme Court right to privacy cases, including Roe. Although Judge Thomas was the highest ranking Reagan Administration official on the Working Group, he said he never read the report and did not realize it contained criticism of numerous privacy cases. He gave a similar explanation in avoiding questions about Lewis Lehrman's anti-abortion article. His explanation -- that he had not reviewed the article in preparation for his testimony, despite the highly publicized controversy it generated after his nomination -- implies willful evasion. More importantly, it trivializes an issue that is of primary concern to the American public.

In an attempt to explain the inconsistencies in his testimony, Judge Thomas stated that his past statements and positions were taken as a policymaker, not as a judge, and therefore should be discounted. He implied that they were of little relevance to the question of what judicial philosophy he will bring to the Supreme Court. That is utterly untenable. A person cannot -- and should not -- shed his personal philosophy when he or she dons a black robe. Personal philosophy is the most relevant evidence of judicial philosophy. Judge Thomas' failure to recognize the inseparable link between the two only casts further doubt on his fitness for the Court.

THE NEED FOR MODERATION

The departure of Justice Thurgood Marshall from the Supreme Court represents a pivotal point in the history of the Supreme Court. Led by Chief Justice Rehnquist, the Supreme Court has embarked on a brazen course to overturn significant constitutional protections with which it ideologically disagrees. It was disturbing and ironic that as Justice Marshall was bringing his Court tenure to a close, Chief Justice Rehnquist was "send[ing] a clear signal that essentially all decisions implementing the personal liberties protected by the Bill of Rights and the Fourteenth Amendment are open to reexamination." (Marshall, J., dissenting in Payne v. Tennessee).

The Court's present course makes it imperative that the Senate halt the ideological court-packing plan of the Reagan/Bush Administrations. The Senate should insist on a nominee who will bring moderation to an increasingly monolithic Court out of step with the American people. Judge Thomas is not that nominee.

CONCLUSION

Justice Thurgood Marshall brought to the Supreme Court an extraordinary sensitivity and insight to the plight of those suffering injustice. Conversely, Judge Thomas has displayed a disrespect for the law and an indifference to the very individuals he was entrusted to protect. An individual who throughout his career overlooked the most vulnerable in our society and openly flouted the law presents too great a risk of reversing this country's progress towards equality and justice. Given the current course of the Court, which has declared open season on standing precedents, the country cannot afford to give Judge Thomas the benefit of the doubt on his longstanding, but recently disavowed, record.

Alliance for Justice

A National Association of Organizations Working for Equal Justice

1601 Connecticut Avenue, N W Suite 600 ■ Washington, D C 20009 ■ 202/332-3224

NAN ARON
Executive Director

FRANCES DUBROWSKI
Chair

MEMBERS

Business and Professional People for the Public Interest

Center for Law and Social Policy

Center for Law in the Public Interest

Center for Public Representation

Center for Science in the Public Interest

Children's Defense Fund

Consumers Union

Education Law Center

Employment Law Center

Equal Rights Advocates

Food Research and Action Center

Harmon, Curran & Tousley

Institute for Public Representation

Juvenile Law Center

Mental Health Law Project

Mexican American Legal Defense and Educational Fund

National Education Association

NOW Legal Defense and Education Fund

National Wildlife Federation

National Women's Law Center

Native American Rights Fund

Natural Resources Defense Council

New York Lawyers for the Public Interest

Public Advocates Inc

Sierra Club Legal Defense Fund

Women's Law Project

Women's Legal Defense Fund

STATEMENT OF THE
ALLIANCE FOR JUSTICE

ON THE
NOMINATION OF

CLARENCE THOMAS
TO THE SUPREME COURT
OF THE UNITED STATES

July 29, 1991

INTRODUCTION

The Alliance for Justice, a national association of public interest legal organizations, opposes the nomination of Judge Clarence Thomas to the United States Supreme Court. Judge Thomas' extensive record as chairman of the Equal Employment Opportunity Commission and his writings and speeches demonstrate a stubborn unwillingness to enforce federal law consistent with Congressional intent and a judicial philosophy that threatens to undermine Constitutional protections.

In February 1990, the Alliance issued a detailed report raising questions about Judge Thomas' nomination to the U.S. Court of Appeals for the D.C. Circuit. The report reviewed and analyzed Judge Thomas' tenure at the EEOC and concluded that he had promoted positions that weakened the agency's enforcement of federal anti-discrimination laws. Judge Thomas' brief tenure on the Court of Appeals has done nothing to alleviate our concerns. We urge the United States Senate to reject this nomination and send a message to the President to nominate an individual who will bring moderation to a run-amok Supreme Court bent on overturning, not interpreting, existing law.

CONSTITUTIONAL INTERPRETATION - OUT OF THE MAINSTREAM

Just 43 years old, Judge Thomas, if confirmed, will likely be a powerful and influential voice on the Supreme Court for decades. Unfortunately, his writings, speeches, and public comments portray a Constitutional philosophy that is dangerously out of the mainstream.

In his writings and speeches, Judge Thomas displays an inclination toward an extremely restrictive philosophy. For

example, he has severely criticized Griswold v. Connecticut, which upheld the rights of a married couple to use birth control and recognized the constitutional right to privacy. He has also mocked the Supreme Court's use of the Fourteenth Amendment's due process and equal protection clauses as "extremely creative. . . . The Court has used them to make itself the national school board, parole board, health commission, and elections commissioner, among other titles." (1988 Speech to Wake Forest University). Such a view shows no recognition of the vital barrier the 14th Amendment imposes to protect the disadvantaged from unlawful government action.

Judge Thomas also displays a strong adherence toward "natural law" theory, which he says stems from a belief in "the laws of nature and of nature's God." (Speech to the Pacific Research Institute). He has used the natural law theory to repudiate the reasoning in Brown v. Board of Education, which struck down the "separate but equal" doctrine. More startling, however, are his comments on natural law and a women's Constitutional right to choose. His views on choice were telegraphed when he praised an article proclaiming that a fetus has a Constitutional right to life as a "splendid example of applying natural law." (1987 Speech to Heritage Foundation). This comment indicates more than just a likely vote to overturn Roe. It implies that Judge Thomas believes the Constitution actually forbids abortion. Under this reading, states would not be free to enact laws protecting a woman's right to choose.

Judge Thomas' views on economic liberties also illustrate a Constitutional vision out of the mainstream. He describes economic liberties as "protected as much as any other [Constitutional] rights." The economic rights doctrine was routinely invoked from 1905 to the mid-1930s by the Lochner-era Court to strike down legislation setting limits on work hours and minimum wages, barring child labor and protecting the right of workers to organize. However, the doctrine has been discredited for decades. Will Judge Thomas, in the name of natural law, revive the economic rights doctrine, at least in some form, and strike down laws designed to protect the environment, eradicate discrimination, or enhance worker health and safety? Some of his writings point to an affirmative answer.

Finally, Judge Thomas has hinted at a predisposition for judicial activism reminiscent of that of former Judge Robert Bork. In a 1987 speech at the Cato Institute, he showed signs that he would willingly overturn Supreme Court precedent on Constitutional issues. In criticizing Johnson v. Transportation Agency of Santa Clara County (1986), which upheld an employer's right to establish a gender-conscious affirmative action policy, he commended "Justice Scalia's dissent, which I hope will provide guidance for lower courts and a possible majority in future decisions."

LACK OF COMPASSION

Many have argued that Judge Thomas' background and life experience have provided him with a sensitivity and insight to the concerns of the poor and disadvantaged in our society. They believe that Judge Thomas will therefore bring diversity to the Court that would otherwise be lacking with the departure of Justice Marshall. Unfortunately, while his life experience is inspirational to all Americans, his record displays an

animosity to views different from his own and a disregard for the needs of others.

For example, Judge Thomas repeatedly attacks the leaders of the civil rights community and denigrates their contributions to the fight for equality. He has stated that "[a]ll too often, the players in [the civil rights] arena intentionally distort and misinform. The tendency is to exploit issues rather than solve problems." (1986 Speech at the North Carolina Affirmative Action/EEO Conference). He has also commented:

> "[A]s long as the convenient and unflattering history of this country can be trotted out to support so-called progressive policies, politicians who thrive on creating miseries that can only be solved by them and government and civil rights groups who are adept at the art of generating self-perpetuating social ills, will continue to beat back the voices of reason."

(1986 Speech to Associated Industries of Cleveland).

His indifference towards his sister's plight underscores the concerns about his regard for the needs of others. A single parent, his sister worked two minimum wage jobs while an aunt took care of her children. When the aunt became ill and could no longer take care of herself or the children, Judge Thomas' sister had to quit her jobs and resort to governmental assistance. She is currently back in the workforce, and no longer on such assistance. However, Judge Thomas publicly depicted his sister as lacking initiative and so dependent on welfare that she "gets mad when the mailman is late with her welfare check." (Washington Post, December 16, 1980). He added that "[w]hat's worse is that now her kids feel entitled to the check, too. They have no motivation for doing better or getting out of that situation." This, too, is a distortion. Her oldest son recently served in the Persian Gulf War, and her other son is a carpenter. One of her daughters was recently laid off from her job in a bakery, and the youngest daughter is still in school. (Los Angeles Times, July 5, 1991).

LACK OF RESPECT FOR THE RULE OF LAW

Judge Thomas' tenure as chairman of the EEOC was marked by strife and confrontation with Congress and an overall disdain for the nation's civil rights laws. As chairman, he imposed his personal views of anti-discrimination on the agency, contrary to the will of Congress, the overwhelming weight of Title VII case law, and the traditions of the agency itself.

Congress created the EEOC with the mission to eradicate prejudice and inequality of opportunity in the workplace. Established under Title VII of the historic, bipartisan Civil Rights Act of 1964, the EEOC was intended to be the advocate for workers against biased employers. As the agency matured, its enforcement powers and mandate were strengthened by both Congress and the executive branch. By the late 1970s, the EEOC was the lead agency in coordinating all federal equal employment policies and procedures.

As chairman, Judge Thomas took numerous positions which weakened the EEOC's commitment to enforcement of the law and proved inimical to the rights of workers. For example, in several cases under the Age

Discrimination in Employment Act (ADEA) -- intended by Congress to outlaw discrimination against older workers -- Judge Thomas urged the Commission to side with employers, or not to litigate on behalf of victims, despite overwhelming evidence of discrimination. He proposed regulatory measures under the ADEA that limited the scope of its protections. In addition, the agency allowed possibly over 13,000 age discrimination complaints to lapse by failing to investigate them before the two-year time limit ran out for filing suit in federal court. Congress bailed him out by extending the time limit for such cases. However, Judge Thomas still failed to act responsibly to correct the problem. He allowed several thousand more ADEA complaints to expire, again requiring Congress to intervene.

In addition, Judge Thomas effectively dismantled the agency's systemic litigation operations, a component of EEOC litigation to combat broad, institutional patterns and practices of discrimination. In an agency reorganization, he split the systemic unit among several divisions, which resulted in the unit's loss of independence and power. In March 1985, a bipartisan group of forty-three members of the House of Representatives wrote that a retreat from systemic litigation "would be in direct contradiction of the original intent of Congress" in passage of the 1964 Civil Rights Act and the 1972 amendments and would result in the agency losing important tools of enforcement.

Judge Thomas also sought to dilute EEOC rules that were the collaborative product of five federal agencies. The rules, known as the Uniform Guidelines on Employee Selection Procedures, bar employers from using hiring practices that effectively hinder the employment of qualified women and minorities. He often stated that the rules subverted the intent of Title VII, even though they were consistently supported by Congress. Judge Thomas dropped his plans after House members criticized them.

In the area of affirmative action to remedy past discrimination, Judge Thomas abandoned the agency's longstanding policy of encouraging the use of goals and timetables for hiring qualified women and minorities, despite approval of their use by Congress and all of the courts of appeals addressing the issue. Only when the Supreme Court issued three decisions upholding the policy did Judge Thomas reluctantly agree to reinstate it. However, he continued to send contrary messages to victims and to the business community by publicly and repeatedly criticizing affirmative action. Finally, Judge Thomas abdicated all responsibility for enforcing the EEO laws in the federal government, the nation's largest employer, by issuing an order that shifted the responsibility to agency heads, some of whom, such as then-Attorney General Ed Meese, balked at complying with federal sector affirmative action plans.

Judge Thomas' lack of respect for the rule of law was such that in June 1989, the Leadership Council of Aging Organizations sent a letter to President Bush questioning Thomas' qualifications for a federal judgeship. It stated that "people cannot properly take an oath to enforce certain laws and, once in office, work consistently to undermine them." In addition, fourteen chairs and high-ranking members of committees in the House of Representatives with oversight responsibility for the EEOC wrote to the U.S. Senate in July 1989 that Judge Thomas' "questionable enforcement record frustrates the intent and purpose" of Title VII of the 1964

Civil Rights Act and that he had "demonstrated an overall disdain for the rule of law."

HOSTILITY TOWARDS CONGRESS

Concerns about Judge Thomas' open-mindedness are compounded by his contempt for the role of Congress as it has evolved over 200 hundred years. Almost from the start of his tenure at the EEOC, Thomas attacked members of Congress. Instead of seeking to work with Congress and the public, Thomas created a climate completely counterproductive to forging new approaches to eliminating employment discrimination.

The nominee's hostility towards Congress is starkly reflected in his writings and speeches. In a 1988 speech at Wake Forest University, Thomas accused Congress of being "an enormous obstacle to the positive enforcement of civil rights laws that protect individual freedom." Thomas stated that Congress is actually run by subcommittee members and zealous staff members who, "in obscure meetings, . . . browbeat, threaten and harass agency heads to follow their lead." He adds that Congress no longer stands for a deliberative body which legislates for the common good or public interest.

In a 1989 law review article, Judge Thomas condemned Congress for examining potential abuses of power by the executive branch, stating that the legislature is "out of control" and that "numerous congressional investigations in recent years . . . seem little more than attempts to embarrass the White House." (Harvard Journal of Law & Public Policy, vol. 12, no. 1.)

Judge Thomas' disrespect for the rule of law and hostility towards Congress raises serious questions about his understanding of the separation of powers and his qualifications to interpret statutory laws. On the Court, Judge Thomas will be called upon to revisit precedents and decide many issues involving legislative intent on numerous federal statutes protecting the environment, consumers, public health and safety, and civil rights. His EEOC record and writings and speeches indicate that he is likely to bring his own personal views to bear on those issues, rather than a loyalty to the law.

CONCLUSION: THE NEED FOR MODERATION

For the American people to have faith in the Supreme Court, the Court must be perceived as a balanced, open-minded institution. With the departure of Justice Marshall and the nomination of Judge Thomas, the American people face the prospect of a monolithic Court dominated by conservative philosophy lasting well into the twenty-first century. That prospect must not materialize. It is time for the Senate to draw the line and insist that the Court reflect the rich texture and complexity of American society itself.

Contrary to public announcements, both the Reagan and Bush Administrations have sought to appoint judges intent on making law rather than interpreting it. Their success thus far was illustrated by the 1990 term, which revealed a Court all too eager to abandon prior precedent in order to advance the Reagan-Bush conservative platform.

The Court's deferential philosophy presents a grave danger to the rights upon which Americans have come to rely. The judiciary is the only branch of government able to ensure that the liberties of all Americans are protected, including those who do not always have a voice in shaping the policies of Congress and the executive branch. The Court must be more than a compliant, politicized arm of the executive branch. By insisting that the President appoint an individual who will bring moderation to the Court, the Senate can ensure that the Court will remain independent and will reflect the diversity of viewpoints representative of American society.

# # # # #

Please note: Consumers Union, National Wildlife Federation, and Natural Resources Defense Council do not take positions on judicial nominations.

The CHAIRMAN. Thank you very much, Ms. Hernandez.
Mr. Lucy.

STATEMENT OF WILLIAM LUCY

Mr. LUCY. Thank you, Mr. Chairman, members of the committee. My name is William Lucy. I am here today as president of the Coalition of Black Trade Unionists, an organization of rank-and-file members of trade unions affiliated with the AFL-CIO. I am here to urge that the damage, the past injustices, and the insensitivity heaped upon workers in general and black workers in particular who sought redress and fairness before Mr. Thomas as a policy maker and implementor will not be disregarded.

For the past week, you have questioned the nominee. Like many of you, I sat while Mr. Thomas asked to be given high marks for his personal achievements, to be forgiven for his omissions, and for you to totally ignore any shortcomings in his record.

The American Bar Association, from among the options available, chose to designate Mr. Thomas as "qualified." While this is no small achievement, this rating for a Supreme Court vacancy would not be acceptable in a colorblind process. If "qualified" or "average" becomes acceptable, let us all understand that it is acceptable only because the candidate is black and replacing a black.

As we review some of Mr. Thomas' speeches and writings, we must be concerned about his views, views such as those expressed in his article in the Yale Law and Policy Review. Mr. Thomas wrote:

> I continue to believe that distributing opportunities on the basis of race or gender, whoever the beneficiaries, turns the law against employment discrimination on its head. Class preferences are an affront to the rights and dignity of individuals, both those individuals who are directly disadvantaged by them and those who are their supposed beneficiaries.

While it is clearly possible for the nominee to be misquoted or misunderstood, Mr. Thomas' views in this case can't be faulted for lack of clarity. His is the bedrock argument used by those who raise the cry of reverse discrimination. It seems to me that you cannot hold the notion of reverse discrimination without accepting the fact of basic discrimination, which is what the EEOC was created to deal with.

And yet, while chairman of that agency, Mr. Thomas put far more emphasis on reverse discrimination than on its unavoidable root. According to Mr. Thomas, and I again quote,

> The government cannot correct the wrongs of the past. There is no government solution to ending discrimination and we should not attempt to remedy longstanding, historic cases of discrimination against a group of people.

These words lead only to the conclusion that he does not believe that government should step in to help injured parties in cases of systematic and institutional discrimination, that individuals must seek legal redress strictly on their own.

Mr. Thomas cannot possibly believe that black people, women or other ethnic groups suffer systematic discrimination as individuals. His statement opposing class action remedies strongly suggests that he believes that institutions should not be held accountable for their discriminatory behavior and should not be forced by government to change that behavior. Mr. Thomas leaves us with this

absurdity: a wrong that affects millions should be dealt with on a one-by-one basis.

We further believe that Mr. Thomas has demonstrated a striking lack of understanding of women workers. His belief that women decide to fill jobs of lower status and lower pay than men in order to accommodate family life reflects a total lack of understanding of the realities of working women, and particularly those single parents who head households.

Women today, and particularly black women, are not exercising an option when they go to work. They work because they have to, and every dollar taken from them by gender-based wage discrimination denies them economic justice. The failure of the Equal Employment Opportunity Commission under Mr. Thomas' leadership to even investigate thousands of complaints alleging gender-based wage discrimination in violation of the Equal Pay Act and Title VI of the Civil Rights Act reflects flagrant disregard for the serious problems that Congress had sought to remedy.

Assuming Mr. Thomas believes what he says that government cannot correct the wrongs of the past and that there is no government solution to ending discrimination in the workplace, as a black male I have a difficult time and would have a difficult time placing before Mr. Thomas as a Supreme Court Justice the most critical question affecting blacks and other minorities—economic exploitation and systematic denial of opportunity.

During the last 10 or 12 years, we have witnessed implementation of policies designed to roll back progress towards the equality that our Nation achieved at great cost. In the course of this retreat, millions of hard-working Americans, without regard to sex, age, race or creed have sought the protection of the EEOC only to become frustrated by appointees who refuse to carry out the mission that Congress assigned the agency.

Mr. Chairman, you and members of this committee must evaluate a man who either did things he did not believe in or believed in things he did not do. Whichever the case, many workers have paid a high price in consequence.

Mr. Chairman, if the EEOC had been headed by a conservative who was white who so singly failed to uphold the mandate of that agency, that person's name would not be before you today as a nominee.

Thank you.

[The prepared statement of Mr. Lucy follows:]

EXECUTIVE COMMITTEE:
WILLIAM LUCY, *President*
Secy-Treas., AFSCME, AFL-CIO
CLEVELAND ROBINSON, *Executive Vice President*
Secy-Treas., District 65, UAW, AFL-CIO
WILLIE BAKER, *First Vice President*
Vice President, UFCW, AFL-CIO
CONNIE BRYANT, *Second Vice President*
Vice President, CWA, AFL-CIO
WILLIAM SIMONS, *Treasurer*
President, Local 6, AFT, AFL-CIO
ERNEST LOFTON, *Secretary*
Vice President, UAW, AFL-CIO
ROBERT SIMPSON, *Corr. Secretary*
President, Local 743
Warehouse & Mail Order Empl Union
IBT, AFL-CIO

Administrative Office
P.O. Box 73120
Washington, D.C. 20056-3120
(202) 429-1203

TESTIMONY OF

WILLIAM LUCY, PRESIDENT

COALITION OF BLACK TRADE UNIONISTS

ON

THE NOMINATION OF JUDGE CLARENCE THOMAS

TO THE U.S. SUPREME COURT

BEFORE THE

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

SEPTEMBER 19, 1991

Mr. Chairman and distinguished members of the Senate Judiciary Committee, I am William Lucy, President of the Coalition of Black Trade Unionists (CBTU) and Secretary-Treasurer of the American Federation of State, County, and Municipal Employees (AFSCME). I am extremely pleased to have this opportunity to come before you today to share my thoughts on the nomination of Judge Clarence Thomas to the U.S. Supreme Court.

I am here representing the views of the Coalition of Black Trade Unionists. The CBTU represents the views of concerned workers, but particularly Black workers. We decided to oppose this nomination for a number of reasons. Most importantly, we believe that as a Supreme Court Justice, Judge Thomas would not act in the best interest of the working men and women in this country, particularly Black workers. His questionable public record as an official at the Department of Education and as Chairman of the Equal Employment Opportunity Commission (EEOC), his limited judicial qualifications, his numerous writings and speeches, indeed his entire professional background, leave us with uneasy feelings about what his confirmation could mean for the men and women we represent. Moreover, we believe that the content of his character is of grave importance – not the color of his skin or the numerous barriers he has overcome to reach his current status in life. All of this is of little consequence in determining his qualifications to sit on the Supreme Court.

Once we take a closer, more objective look into the public record of Judge Clarence Thomas, which Mr. Chairman, you spent the better part of last week doing, we must now ask ourselves what he actually accomplished as an official at the

Department of Education and the EEOC. I believe an examination of his public record and indeed his testimony last week reveal that he did not carry out his agencies' mandates. Instead Judge Thomas ran the Office of Civil Rights (OCR) at the Department of Education and the EEOC, based on his own opinions and philosophy, not on prevailing law. If we find that my belief is true, that his public record is so unsatisfactory, then we have to ask ourselves, "why are we, in effect, rewarding him for poor performance and why are we even considering this man for a seat on the Supreme Court?" Judge Thomas must be held accountable for what I believe is an unsavory record.

Judge Thomas went to the OCR in May of 1981. At the OCR Judge Thomas was charged with enforcing laws barring discrimination in education. It was his responsibility to enforce the laws that require institutions receiving federal funds to refrain from discriminating on the basis of race, sex or disability. Before Judge Thomas' arrival civil rights groups had successfully filed a court suit, *Adams v. Bell* against the Department (then HEW), resulting in a settlement requiring the OCR to investigate complaints, conduct compliance reviews and initiate enforcement action in accordance with specific time frames. This settlement set the atmosphere in which the OCR was mandated to operate.

Judge Thomas did not follow the terms of the settlement and admitted that he was violating the court-ordered requirements for processing civil rights cases. A hearing was held to investigation Judge Thomas' failure to comply with the court

order. When the judge asked Judge Thomas: .

"...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?

Judge Thomas responded:

That's right.

Judge asked:

So aren't you, in effect substituting your judgment 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?

Judge Thomas responded:

That's right..."

Ultimately, a federal judge cited that the OCR was guilty of misinterpreting and inadequately enforcing Title IX, the statute which prohibits gender discrimination in federally-funded education programs and institutions. Judge Thomas' tenure at the OCR resulted in students being assigned to classes for the mentally retarded because of their race or national origin, a suspension of the processing of improper job discrimination complaints against the handicapped by universities and, long delays in

the handling of discrimination complaints.

Judge Thomas brought his own perception of the law and established policy with him to the EEOC. It was Judge Thomas' responsibility at the EEOC to enforce federal laws that prohibit employment discrimination on the basis of sex, race, national origin, religion, and age. Judge Thomas, however, ran the EEOC based on his own opinions and philosophy and not on the prevailing law. He ignored the authority given the EEOC to vigorously attack widespread institutional patterns and practices of discrimination in the workplace. Instead, he eliminated or attempted to eliminate from the Commission proven mechanisms for enforcing federal antidiscrimination law.

Particularly troubling about Judge Thomas' tenure at the EEOC is his attempt to weaken the Uniform Guidelines on Employee Selection Procedures which are based on a unanimous decision by the Supreme Court in _Griggs v. Duke Power Company_ in 1971. These guidelines were designed to help employers comply with federal antidiscrimination laws when implementing tests for the purposes of hiring and promotions. _Griggs_ prohibits the use of employment criteria that have a disparate impact on women and minority workers or applicants unless the criteria are proven to be job-related. _Griggs_ has played a critical role in removing barriers that have historically limited job opportunities for women and minorities. Fortunately, criticism by certain Members of Congress prevented Judge Thomas from weakening the guidelines.

Judge Thomas criticized the EEOC's reliance on class action litigation and severely weakened the litigation unit at the EEOC specifically created to address systematic discrimination in the workplace. He reduced the number of attorney's assigned to this unit by half. And, he eliminated the system for identifying systemic cases. In 1980, before Judge Thomas arrived at the EEOC, the Commission filed 218 class action suits. In 1989, Judge Thomas' last year at the EEOC, the Commission filed only 129 class action suits. Judge Thomas wrote in the *Yale Law and Public Policy Review* in 1987, in an article "Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!" that "emphasis on 'systemic' suits led the Commission (prior to his appointment) to overlook many individuals who came before their offices to file charges and seek assistance."

Unfortunately, Judge Thomas also relaxed its enforcement of individual cases at the EEOC. Under Judge Thomas individuals were unlikely to receive any type of remedy to their claims. In fact, in 1980 settlement rates were over 30 percent while in 1989, under Judge Thomas, settlement rates were down to 14 percent. Cases were inadequately investigated and the number of cases where the claimant received no remedy at all doubled. A 1988 General Accounting Office study found that this change in the Commission's success rate was due to cases not being fully investigated. Basically, people were denied their rights under the law to have discrimination claims adequately investigated.

56-271 O—93——29

Judge Thomas has also repeatedly questioned the effectiveness of affirmative action policies. He used his position at the EEOC to dismantle affirmative action programs which had proven to be effective and which helped to protect the rights of women and minorities from discriminatory practices in the workplace.
The use of goals and timetables for the training, hiring, and assigning or promoting of qualified women and minorities was an important aspect of the EEOC affirmative action program. In 1984, Judge Thomas announced that the EEOC would discontinue its use of goals and timetables. He did so in spite of substantial evidence that goals and timetables had benefitted women and minorities and in spite of several Supreme Court decisions upholding the use of goals and timetables. During his reconfirmation hearings as EEOC chair, Judge Thomas promised to discontinue his attack on goals and timetables. He returned to the EEOC and continued his attack on the Commission's affirmative action policies including goals and timetables. Judge Thomas wrote in a publication titled *"Assessing the Reagan Years,"* in 1988, that "I am confident it can be shown, and some of my staff are now working on this question, that blacks at any level, especially white collar employees, have simply not benefitted from affirmative action policies as they have developed."

Judge Thomas' record shows that although he had sworn to uphold the prevailing laws against employment discrimination, he continued to write and give speeches showing his opposition to affirmative action. Judge Thomas also continued to criticize important Supreme Court decisions dealing with combatting discrimination in the workplace.

United Steel Workers v. Weber (1979) is a particularly important decision because it encourages and allows employers to take voluntary action to correct past discriminatory practices without employees or the government entering into litigation. Judge Thomas in five speeches in 1982 and 1983 supported the decision in *Weber*. Then in a speech in 1987 to the Cato Institute, Judge Thomas announced that he disagreed with the Court's findings in *Weber*. Judge Thomas flipped-flopped on one of the most important Supreme Court decisions dealing with discrimination in the workplace.

In *Fullilove v. Klutznick* (1980) the court held that Congress had a constitutional right to correct past discrimination by passing appropriate legislation. The case dealt with a set-aside program enacted by Congress to alleviate historic discrimination against minorities in the construction industries. The Court found that Congress' response was appropriate in enacting the set-aside program in response to proven charges that minority businesses had historically been denied contracting opportunities because of unfair procurement practices. Judge Thomas criticized the decision in a paper titled *Assessing the Reagan Years* in 1988 by saying:

> "the Court reinterpreted civil rights laws to create schemes of racial preference where none was ever contemplated."

Judge Thomas also criticized _Johnson v. Transportation Agency, Santa Clara County_ (1987), where the Supreme Court upheld Santa Clara County's voluntary affirmative action program which was implemented to correct historic underrepresentation by women in certain well paying jobs. The Court said that the county's plan to consider gender and ethnicity when choosing among qualified candidates was acceptable when these groups were underrepresented. Judge Thomas wrote in a _New York Times_ article titled, "Anger and Elation at Ruling on Affirmative Action,":

> "It's just social engineering, and we ought to see it for what it is. I don't think the ends justify the means, and we're standing the principle of nondiscrimination on its head -- it's simple as that -- and we're standing the legislative history of Title VII on its head."

In _Local 28, Sheet Metal Workers v. EEOC_ (1986), the court held that race conscious remedies such as goals and timetables may be used to correct intentional racial discrimination. The case involved flagrant and long-standing intentional discrimination against Black workers as well as a disregard of federal court orders. Early in 1987, Judge Thomas appeared to agree with the decision. Later that year Judge Thomas grouped _Sheetmetal Workers_ with _Weber_ and subsequent cases all together saying that they were all mistaken applications of Title VII. Judge Thomas later wrote in a 1987 law review article,

"I continue to believe that distributing opportunities on the basis of race or gender, whoever the beneficiaries, turns the law against employment discrimination on it head...I think that preferential hiring on the basis of race or gender will increase racial divisiveness, disempower women and minorities by fostering the notion that they are permanently disabled and in need of handouts, and delay the day when skin color and gender are truly the least important things about a person in the employment context."

Judge Thomas also brought a strong and inappropriate pro-business bias to his role as Chairman of the EEOC. When elderly employees of the Clorox Corporation came before the EEOC because they were being fired and replaced with younger, lower paid workers, Judge Thomas refused to investigate their complaints. He said, "This is a standard practice in industry." It may have been standard practice in industry, but EEOC regulations clearly state that economic necessity is not a legal justification for such a practice. Judge Thomas, therefore, chose to ignore the Commission's own regulations while placing his opinions before the law.

The elderly suffered many undo hardships under Judge Thomas at the EEOC. He sat on over 13,000 age discrimination cases until Congress found it necessary to rescue these victims of age discrimination. The EEOC, under Judge Thomas, also failed to rescind regulations that allowed employers to stop making pension contributions for workers over the age of 65. Congress stepped in to pass a law

specifically requiring employers to make pension contributions for employees over age 65. The EEOC continued its insensitivity towards older workers by failing to issue the regulations after Congress passed remedial legislation.

Judge Thomas' record shows a deep insensitivity towards the rights of the elderly in the workplace. He failed to enforce federal age discrimination laws while taking positions even in defiance of the Congress, which went against the economic interests of older workers.

We must take a close look at Judge Thomas' personal opinions when examining his policy decisions. His opinions on women are particularly insightful when reviewing his policies towards women at the OCR and the EEOC. Judge Thomas embraced an analysis of working women, written by a right wing academic, that denies the existence of sex discrimination and rejects the notion that such discrimination plays a part in women working in lower paying, lower status jobs. This analysis suggested that women were in jobs of lower pay and lower status than men because they made decisions about employment in order to accommodate their roles as wives and mothers, and, further, that any inequities which exist between men and women in the workforce are due to women's behavior -- opting for jobs which allow them more flexibility. The analysis went on to say that Black women did better in the work force than white women, a notion which is totally incorrect. Judge Thomas told readers of the November 1987 issue of _Reason Magazine_ that, "I consider the author

of this concept not only an intellectual mentor, but my salvation as far as thinking through these issues." Judge Thomas went on to say in the _Lincoln Review_ in 1988 that the above-mentioned analysis on working women is:

> "...a useful concise discussion of discrimination faced by women. We will not attempt to summarize it except to note that by analyzing all the statistics and examining the role of marriage on wage-earning for both men and women, the author presents a much-needed antidote to cliches about women's earnings and professional status."

Mr. Chairman, women in our society today, most women, and Black women particularly, work out of necessity, not because they are exercising an option. Judge Thomas apparently is not aware of this _fact_. I am alarmed that someone who believes that gender discrimination does not exist may sit on the Supreme Court and judge sex discrimination cases which may come before the Court.

It is from this point of reference, or perhaps this lack of understanding about a fundamental aspect of the lives of working women, which we must view Judge Thomas' disturbing public record on women in the workplace. The EEOC, under Judge Thomas' leadership, rejected the concept of "pay equity" eliminating the hopes of many women in seeking comparable pay with their male counterparts. Major labor unions took Judge Thomas to task in an effort to remedy discrimination based on sex.

His failure to investigate large numbers of complaints alleging gender-based wage discrimination in violation of the Equal Pay Act and Title VII of the 1964 Civil Rights Act, prolonged the exploitation of millions of working women.

Judge Thomas' actions were particularly harmful to women of color, particularly Black women, who are often crowded in the lower paying, female dominated jobs. Federal civil rights laws provide the necessary means for addressing this inequity. The EEOC, under Judge Thomas, did not adequately enforce the applicable laws. In fact, wage discrimination complaints were mishandled and many were not investigated at all.

As a representative of working men and women of this country, particularly Black working men and women, I am extremely disturbed by Judge Thomas' record with regards to fair employment and equal opportunity for women, the elderly and racial and ethnic minorities. The thought that government should not intervene on behalf of all working people does not reflect the true story of the labor movement in this country.

Judge Thomas' record shows us that he does not have a commitment to equal justice under the law and he does not endorse equal employment opportunities. I do not see anything in his record that convinces me that Judge Thomas should be confirmed to sit on the U.S. Supreme Court -- not his ABA rating, not his performance

at the Department of Education, and certainly not at the EEOC. I reject Judge Thomas' assertion that we should not judge him on his record, a record that has damaged the lives of so many people who were victims of discrimination. I, therefore, urge the members of the Committee to reject the nomination of Judge Clarence Thomas to the U.S. Supreme Court.

Thank you.

The CHAIRMAN. Thank you all very much. Mr. Chambers, let me begin with you, if I may. It was obviously a comprehensive brief filed with the committee. You say on page 8—and I realize you didn't have the opportunity to read all that is in here, but I had a chance to read it.

You said,

It is argued in support of Judge Thomas that he is merely a judicial philosophy, but these and other similar remarks are not judicial and involve no philosophy.

Judge Thomas does not reach these conclusions,

Referencing things you have said in the previous seven pages,

By any general legal methodology that might be characterized as conservative or by any methodology that could plausibly be characterized as legal at all. There is no analysis of the language of relevant statutory constitutional provisions or regulations, no discussions of precedent, no consideration of Congressional debates or reports, no evaluation of experience of lower courts. There is in these and other statements no pretense that Judge Thomas arrived at his conclusion by conventional legal analysis. His evaluation of legal decisions follows directly from his personal ideological preferences about the matter at issue.

Now, let me ask you, does not that lend credibility to his assertion that these were just musings of a—how does he phrase it, part-time political theorist, and that they were not notions that were born out of a view of the Constitution that would lead him to those conclusions by applying whatever methodology he has to the Constitution?

Mr. CHAMBERS. Mr. Chairman, I think they would suggest more a lack of appreciation by the candidate on the proper basis for going through, analyzing legal judicial issues. What we get when presented with a number of facts—and when we look at history and when we look at where Congress, for example, in the voting rights area goes through and says that based on this evidence, it is imperative that we enact an effects test in the voting rights area, he condemns it without any kind of analysis.

And rather than talk about whether it is just a muse, I think more it is a question about the candidate's ability or judicial qualifications for serving as a Justice of the Supreme Court.

The CHAIRMAN. In exhibit A that you submitted, you indicated that each of the Justices—and exhibit A, for the record, is a listing beginning with Oliver Wendell Holmes, Jr., who served on the Court from 1902 to 1932, going all the way up through Justice Souter.

Mr. CHAMBERS. That is correct.

The CHAIRMAN. And you list the qualifications as they are from your perspective of Judge Thomas.

Mr. CHAMBERS. That is correct.

The CHAIRMAN. Now, you said each of these people possessed two qualifications, and I thought I was listening closely. I didn't hear what those two qualifications were.

Mr. CHAMBERS. They differed. We have in footnote 5 on page 12 of the submitted text listed 7 of the important qualifications we think that the nominees—each of the nominees possessed at least 2 of these qualifications.

The CHAIRMAN. I see.

Mr. CHAMBERS. They are identified in footnote 5 on page 12.

The CHAIRMAN. A substantial law practice either in the private or the public sector generally covering more than 10 years. You would suggest he does not have that, I assume.

Mr. CHAMBERS. That is correct.

The CHAIRMAN. Extensive legal scholarship or teaching; you would argue he does not possess that. Significant experience as a judge generally for five or more years; he clearly does not have that. The highest level of expertise in a particular area of law; he does not argue that.

Mr. CHAMBERS. That is correct.

The CHAIRMAN. Superior intellect. You have made a subjective judgment that he does not possess that, is that correct?

Mr. CHAMBERS. That is correct.

The CHAIRMAN. Ability to persuade and lead; generally outstanding achievement over the course of his career. "These are, in our view," quoting your report in footnote 5, "the most important qualifications to stand out in reviewing the more than 120-year span by the legal careers of 20th century judges."

I understand what you are saying now.

Let me go to you, Ms. Hernandez. You make a very telling point that all the focus, at least all of my focus on the equal protection clause in these hearings has related to the question of whether or not he was using that to avoid dealing with whether or not single individuals had a right to privacy. I think it is important for the record that you restate it. You raise the point that since many people that you represent are not American citizens and are, to use your phrase, if I am not mistaken, undocumented aliens, that arguably, based on his view of the equal protection clause, they would—to put it in laymen's terms, not be equally protected under the Constitution as American citizens are protected. Is that the point you are making?

Ms. HERNANDEZ. Well, it is even more than that, and let me restate it. The benefits and privileges guaranteed by the Constitution differ, and there are different protections whether you are a citizen, whether you a legal resident alien, and whether you are nondocumented individual. And the equal protection, if you look at the 14th amendment, there are two clauses, and very little attention is given to those clauses. One is the equal protection that clearly says every person, and then it goes to——

The CHAIRMAN. And your argument is that he relies more on privileges and immunities, which applies to American citizens?

Ms. HERNANDEZ. Only. And in reading some of his writings, if you understand, he would—and he argues that Brown, too—he doesn't quarrel with the conclusion of the *Brown* decision. He quarrels with the reliance of the Court on the equal protection. He feels that it should rather be the privilege or immunities clause. And if you carry that argument through its conclusion and if his view were to prevail, the impact to the immigrant community, whether they be Asian, Hispanic, Ethiopian, Polish, whatever, will be significant, because the privilege or immunity says "every citizen." And as you know, the Supreme Court has just ruled on a case involving Hispanics and the issue of citizenship.

It is an issue that comes up quite a bit for our community.

The CHAIRMAN. Well, my time is up. Let me ask you this question. I realize that—well, I won't characterize it. Let me ask you this question. When he made the two speeches that I am aware of where he talks about the privileges and immunities clause being of greater consequence than it has been recognized to be, from his perspective, and when he argues that its application in *Brown* would have been appropriate, do you believe that his argument was based on and that he understood that its application might exclude—following his logic, exclude individuals who are not American citizens? Or do you believe he was just making a point to sustain his overall argument relative to black America and desegregation? Or does it matter?

Ms. HERNANDEZ. Well, one, I do not know. Two, it does not matter. If a certain individual places such importance on those matters which are critical to the interpretation of law and does not think through the implications that that would have to a broad-based, diverse community that this country is, then I would question, once again, the qualifications of that individual to say such matters. And I would urge that this issue be further looked into because, from my community's perspective, it is an additional factor that very directly impacts our community.

The CHAIRMAN. I appreciate your testimony and your answering my questions.

Senator Hatch.

Senator HATCH. Let me reserve my time.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Thank you very much.

I want to join in welcoming this panel of witnesses. They have been in the vanguard of so many important efforts to ensure our freedoms and our equalities. I have had, as other members of the panel, the good opportunity to work with many of them for over a very considerable period of time, and this country is in debt to many of them for all of their tireless work on behalf of the Bill of Rights and the Constitution.

Mr. Chambers, you are aware of the time restraints that we have. I would like to cover a few areas. Judge Thomas criticized some of the Supreme Court decisions, primarily in the areas of voting rights. We had an exchange with him there. It was really unclear from the exchange what he was really driving at.

In your own study, were you able to determine the nature of the criticisms and the value of the criticisms of Supreme Court holdings, particularly in regard to the voting rights cases?

Mr. CHAMBERS. Senator Kennedy, the best that we have been able to determine was his statement here that he disapproved of the effects test and he disapproved of the types of districting or remedies that the courts were directing in voting rights cases.

It wasn't clear why he disapproves of the effects test except his continued questioning of the possible use of statistics to establish a violation. And under the effects test, if one demonstrates that a certain practice results in a deprivation, one makes that showing frequently through the use of statistics.

In terms of the remedy, the remedies, of course, of the record have been the only ones the courts have found effective. Exactly why he disapproves of those remedies, again, unless he is raising

some question about race, it isn't clear—under any circumstance. Again, this goes to his qualifications, I think.

He offers no alternative. He concedes that blacks have been deprived of voting opportunities. He concedes that the Senate and the Congress were looking at real practices when it was necessary to enact the 1972 amendments, and yet offers no remedy that would provide meaningful opportunities for minorities to participate in the electoral process.

Senator KENNEDY. Mr. Rauh, you have been very much involved, as most of the panel has, in the fashioning and shaping of various civil rights legislation. The key element of all of the legislation are remedies.

Going back to I guess even the 1957 Act, maybe even go back even further, but the importance of remedies in ensuring that the rights are going to be achieved and his approach as a case-by-case means, where would we really be if we had used a case-by-case approach in the various important pieces of legislation which have been accepted by the country, that had bipartisan support? When you look at public accommodations, the housing, the voting rights, the whole range of difference, where would we be as a society if we accepted or the Supreme Court accepted that route to try and remedy the discrimination in our society?

Mr. RAUH. We wouldn't have the right to vote in any serious sense. What happened in 1957 was, because it was on an individual basis, the law failed even though we all supported it because we wanted a civil rights law. In 1960 and 1964 there was tinkering, but it was always on a retail basis.

The whole thing changed in 1965 when it was on a wholesale basis. What happened in the 1965 law was that they said the Federal Government will register the people if these States continue to discriminate. The whole problem—I think one of the witnesses said it this morning. The distinction between wholesale and retail enforcement of the civil rights law is the distinction between success and failure.

Senator KENNEDY. Ms. Hernandez, it is good to see you back here again, and I commend you for your testimony.

The point that Judge Thomas makes—and I don't know whether Mr. Lucy will make a comment on this—is that given his particular background, he has a particular sensitivity. I mean, no one really disputes what has been an extraordinary life experience which he has had and admire his own personal determinations for self-improvement.

But you, Ms. Hernandez and Mr. Lucy, why doesn't that in and of itself—I think there are probably millions of Americans who have been watching these hearings and say, well, that is right, that will give him an insight in terms of the concerns for whether it is women, women of color, or minorities. Why doesn't that kind of emphasis or that kind of thrust give you a sense of confidence as to how the nominee might vote on questions of equal protection?

Ms. HERNANDEZ. Well, they haven't to date, and I must say that it is most commendable. Most Americans can relate to the strides, to the efforts, to the determination. I myself as an immigrant am familiar with that.

But one must look to the person and what he or she has done with that experience, and to date he doesn't have a clean slate. He has been in positions of power. He has been in positions of authority. He has been in a position to influence policy in a way that it would impact other people similarly situated. And we have the record on what he has done in those instances.

Mr. LUCY. I would certainly have to, Senator, support what was just said. In his public record as a public official, as a policymaker or policy implementor, he has never shown the kinds of sensitivity that ought to flow out of that past experience.

One of the Senators earlier on mentioned the fact that the polls show his—not necessarily approval rating but openmindedness waiting to hear. By and large, minorities want to be fair. But when you look at the record, his record doesn't suggest that he understands that.

I think, as he indicated, he believes discrimination exists. I think he is honest about that. But I think he believes it exists as it impacts on individuals as opposed to on groups.

I would so eagerly want to say to him, Senator, that when the sign said "No Irish Need Apply," that didn't mean Mr. O'Reilly or Mr. O'Rourke. That meant all. And he doesn't seem to grasp that even coming out of his own background. His resistance to class action remedies for the purpose of changing behavior strongly suggests that he thinks it is an individual personal situation.

Senator KENNEDY. My time is up, and I promise I won't ask a question of the next panel if I can ask Mr. Lucy the last one. But he will, I imagine, point out that the Constitution protects individuals, not groups.

Mr. LUCY. Well, certainly you would think that he would be aware of that in his own role and would have made more effort in his policymaking role to really apply the class action pursuit that had been given to them under the authority of the EEOC.

I would only add, Senator, that on the trade union side we are representing those who theoretically come through as beneficiaries of this entire civil rights-equal opportunity set of laws.

Senator KENNEDY. Thank you very much.

The CHAIRMAN. Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman.

Welcome to this panel. I know many of you and have worked with many of you. And I have disagreed with many of you. I have always enjoyed that, and I mean that. Antonia Hernandez, you and I worked long and hard with the immigration issues, and I think that we would both agree that we have been fair with each other and always direct. And I have great respect and rich regard for you.

And I have known John Buchanan for many years. I do not know the other folks as well, but I know, indeed, of your reputation as well and have had you testifying here, the chairman has.

So you speak powerfully in opposition to Clarence Thomas. I understand that. I guess I would ask a question of Ms. Hernandez because I know her well. We have worked together on serious issues with immigration reform, illegal immigration. We have often, as I say, disagreed, but we have done so in a very honest and candid

and straightforward manner. And yet one part of your testimony caught my eye.

On page 6, it was the point of—you state, "Clarence Thomas' opposition to affirmative action is based on his belief that the Constitution must in all circumstances be colorblind." You then recite a number of cases you believe would be overturned if Clarence Thomas were on the Supreme Court.

My question is this: What is wrong with a colorblind society? Is that not what we have been seeking in this quest for perfection for decades?

Ms. HERNANDEZ. You are absolutely right. That is what we have been seeking and that is what I, more than anyone, want to have a society where the color of my skin or the gender is not an important factor, but my character.

The fact of the matter is that we are not dealing in a perfect world and we are dealing with a society that still has discrimination, it is much more difficult, it is much more subtle, and we must deal with societal discrimination.

The interesting thing—you were not here when I mentioned it—is I know Clarence very well. I worked with him when he was in the AK. I discussed his philosophy and point of view and his opposition to class remedies and tried to come up, as you know, I tried to come up with ways to deal and come up with solutions and ways we could prepare society and the legal profession in dealing on a one-to-one basis.

It is OK to believe in the goal of equality. It is not OK not to face reality and understand the discrimination that exists and attempt to deal with it. I am sometimes troubled by how we as a society zero in on this whole issue of dealing with problems on an individual basis when it deals with discrimination, and not dealing with situations on an individual basis in other matters.

When you deal with the banking situation, you don't say, well, we are going to deal with, you know, fraud or mismanagement or problems in regulation on a one-to-one situation. You look at what is causing the problem, you see if it is systemic, you see if it is larger than that one situation, and you pass policies so that it doesn't happen. Yet, when you are dealing with discrimination, all of a sudden it has to be 1 on 1 as it comes up and not having the systems to deal with those fortunate enough to go to an AK or to other agencies who protect their rights.

Senator SIMPSON. We have heard Martin Luther King's name brought into this debate over these days many times, on both sides, interestingly enough, but the greatest civil rights leader, I think many would agree, was Dr. Martin Luther King and he asked only that he and his children be judged "based on the content of their character, and not on the color of their skin," and isn't what he was asking for was a colorblind judgment, and isn't that just exactly what Judge Thomas is advocating?

Ms. HERNANDEZ. I also advocate that, but the fact of the matter is that we do not have that today and we must deal with that.

Senator SIMPSON. I think Judge Thomas has said that. But to have him criticized on that basis, I don't understand that. That escapes me. I think that is what people have been talking about.

Well, did you set a quick clock on me?

The CHAIRMAN. We sure did. We gave everyone else 15 minutes, and you 5. [Laughter.]

No, Senator, we are giving everyone 5 minutes.

Senator SIMPSON. Oh, it is because Howard is done, is that it?

The CHAIRMAN. That's it. [Laughter.]

Senator SIMPSON. Well, I will come back. Thank you, Mr. Chairman.

The CHAIRMAN. Senator DeConcini.

Senator DECONCINI. Thank you.

Welcome to the panel. I appreciate the effort that you put in in analyzing this Judge, I must say, you have spent more time studying his opinions than I have, although my staff has spent a great deal of time analyzing them.

I am really interested in the comparison, Ms. Hernandez, that you make regarding the privilege and immunities clause of the 14th amendment and the equal protection clause. I specifically went to Judge Thomas, when it was my turn, and asked him whether or not he accepted, understood and would follow the three tests used by the Court under the equal protection clause of the 14th amendment. We discussed the three and the heightened scrutiny test, and he said yes, he understood it, that it did apply to alienage, as well as gender, and yet that doesn't satisfy you, is that correct? And can you make the distinction why, if he accepts those three standards, that the question of undocumented aliens would not fall into that intermediate scrutiny, assuming that we can believe him that he does accept that, that is what he told us?

Ms. HERNANDEZ. Well, there are two points. One is that the Constitution does distinguish, even if you just take the equal protection clause of the 14th amendment, there are distinctions in coverage between a citizen, a legal resident, and very few benefits to an undocumented person.

What we are really talking about is the difference between citizens and legal resident aligns, and the Court has spoken on those issues. In granting certain rights to legal resident aliens, they did not give the strict scrutiny, they found an in-between.

Senator DECONCINI. Yes, they found the intermediate scrutiny, right?

Ms. HERNANDEZ. That is assuming that you accept the equal protection clause. The problem that we have is in reading Clarence Thomas' writings, he would hold the privilege or immunities clause supreme and paramount above the equal protection clause, and if his legal philosophy and constitutional philosophy is that and you carry it in a consistent manner, it is very clear what it says.

Senator DECONCINI. Yes, and that is partly from his article in the Harvard Journal of Law and Public Policy, is that right, the article that he wrote in 1988——

Ms. HERNANDEZ. Yes.

Senator DECONCINI [continuing]. Entitled "The Higher Law Background of the Privilege and Immunities Clause of the Fourteenth Amendment." Is that where that comes from?

Ms. HERNANDEZ. That is part of it.

Senator DECONCINI. I did not get into the distinction here that you make, and I appreciate it, but I did go to the 14th amendment equal protection clause, and I was satisfied, whether you agree

with him anyplace else. This is because he recognized the three tests, and particularly the intermediate scrutiny test and that it applied to aliens. I didn't ask him if it applied to nondocumented aliens, but the question was aliens, and maybe I should have been astute enough to be more precise, nevertheless he accepted that as a given in our constitutional interpretation and had not only no quarrel with it, he supported it.

So, I came away, quite frankly, far more satisfied than I did when Bork for a long time failed to recognize the three tests, until the Senator from Massachusetts finally got him to change his position, I thought. To me, this man did satisfy that, but the distinction you make, I see it, but I cannot agree with it. I just don't understand how you can make that fine distinction, when he clearly said that he accepted the intermediate scrutiny for aliens.

Ms. HERNANDEZ. The distinction I would like to have made is not so much as to the Equal Protection Clause, but as to what he believes should be supreme with the Fourteenth Amendment, the Equal Protection Clause or the Privilege of Immunities, because if, in fact, he believes it is the Equal Protection Clause, then your questions and his answers follow, as he is talking about that specific one.

Senator DECONCINI. Yes.

Ms. HERNANDEZ. If it is the privilege of immunities, and he says that I would argue that—if he were to argue that the privilege or immunities clause should be supreme, then whatever his views are on the equal protection are irrelevant.

Senator DECONCINI. And your point is in the article he makes that argument?

Ms. HERNANDEZ. Yes.

Senator DECONCINI. And so, based on that article, not on his testimony here, you conclude that his view, if confirmed on the Court, will be that the privilege and immunities clause is supreme and, therefore, the equal protection clause and these three tests would fall as it deals with aliens, that is your position?

Ms. HERNANDEZ. Exactly.

Senator DECONCINI. OK.

Let me ask any member here, I have struggled with this a great deal, as I struggled with Bork. I don't think anything is more important than what we do here, and we may make mistakes, as you all thought we did on Souter, but I struggled with that one and I struggled with Bork.

I gather, from looking at your testimony here, you compare Judge Thomas' judicial philosophy with that of Robert Bork, is that correct, or am I incorrect? Does anyone want to say that is not—do you consider him of the same philosophical bent, Mr. Rauh or Mr. Chambers?

Mr. RAUH. I will try to answer that. I don't think you can say that the thing is the same, except if you want to mean how far to the right have they gone, because they have gone in different ways.

I bet I am the only person in this room that has read Bork's book that came out afterwards. Have you read it, Senator?

Let me say what I think. He has very strong views, but he wouldn't necessarily be the same as Thomas. For example, in the book he takes the position that the only real self-restraint of a

judge is not the Frankfurter restraint that you hold the statute presumptively constitutional, he says that isn't his restraint. His great restraint is simply that a judge has got to say no in certain circumstances. In other words, I think if you try to compare——

Senator DECONCINI. It is not a matter of degree and area.

Mr. RAUH [continuing]. If you try to compare the two, don't do it on some specifics. I think if you want to go back over that book with me, you will find that in specifics it is different, but in general attitude I think you would find they are very similar, and I think——

Senator DECONCINI. Ms. Hernandez, you said in your statement that they reveal an ideological conservatism which differs little from that of Judge Bork.

Ms. HERNANDEZ. Yes, and what we meant in that is that a certain set mind and view of the world, notwithstanding his testimony, and if you look at the latter part of my testimony, we review his statements during the last 5 days, that he has very strong views on the world, on life and how he views the world, and I think it is unreasonable to expect or ask of a person, notwithstanding what happened here, that that person is going to change.

People that go into the courts do not change, you don't want them to change.

Senator DECONCINI. Thank you. I know that my time is up. Thank you. I just want to note that, you know, unlike Bork, Thomas stated that he recognizes the right of privacy as a constitutional right. Bork didn't recognize that. I find that a big distinction. Maybe you do not, but I find that a big distinction.

He comes up with the three-tier test in the equal protection clause of the 14th amendment. Bork had real problems with that, under careful scrutiny from a number of us. So, I see a great difference. I still respect your feelings that he should not be on the Supreme Court, but I see a great difference between these two.

My last comment, Mr. Chairman, I wonder, really, if the panel thinks that President Bush could appoint anybody that you would support. Based on President Bush's very strong conservative bent and philosophy, it appears to me that, you know, you have to take what you have, and we might do this for months and months, if we turn this one down, because I do not see any movement on the President or any indication that you are going to see somebody a whole lot different.

Mr. RAUH. Let me say in answer to that, may I please, Senator——

Senator DECONCINI. It is more gratuitous than anything else.

Mr. RAUH [continuing]. That there is a difference here. If this nominee were turned down, the threat often used on us is, well, you will get somebody worse. Well, there is precedent for beating the second person and getting somebody much better, and the precedent is Haynsworth, Carswell and Blackmun. We got a very excellent judge by the fact that the Senate, in its wisdom, turned two persons down.

I do not believe the President, as a matter of politics, is going to take it on a third time. I think if President Nixon had to appoint a Harvard suma cum laude with moderate views in Blackmun, I think President Bush would not want a third struggle. The ques-

tion is is this Senate ready to turn down a Thomas and someone of that ilk. I think the third time would be the charm, as it was in the Blackmun case.

Mr. BUCHANAN. Mr. Chairman, can I respond? You know, members of this committee have repeatedly expressed something of a redemption theory in terms of Clarence Thomas, notwithstanding his writings, because of his origins, because of what he said about a different attitude if he reached the Court, that he would be different.

And I want to express a redemption theory so far as the President is concerned. I think many of us who are concerned about such things believe that the Federal judiciary over the last 10 years has been filled with ideological conservatives to an extent that Franklin Delano Roosevelt never dreamed of, on the other side.

I think—I can't prove it sitting here, Mr. Chairman, but I think there is significant evidence that that process has taken place in the Court itself, and its sea change in 1989 would reflect that change.

The President is replacing the towering figure of Thurgood Marshall, truly an exclamation point. He appears to have done so with someone who is a long series of question marks. He could decide to attempt to replace a Thurgood Marshall with a towering figure. The Court already has a strong conservative leaning. But think of the strength he could give the Court, and think of what it would mean to the President in terms of statesmanship in terms of history if he were to decide, wait 1 minute. Maybe we have done enough of this. Maybe it is time to truly look through that large pool of, yes, black Americans who might be persons of more clearer stature, longer experience, clear track record, and decide to make an appointment that is truly statesmanlike.

Senator DECONCINI. You have a lot more faith in President Bush than I do, Mr. Buchanan, I must say.

Mr. BUCHANAN. Well, it is the redemption theory, Senator.

Mr. CHAMBERS. May I briefly respond to that too? And first going to the question by Senator DeConcini about the similarities between Judge Thomas and Judge Bork.

I think, as Mr. Rauh mentioned, they may differ in some areas or in some degrees, but I think the adamancy and the position that they are advancing and the unwillingness to look at approaches that are necessary in order to provide some meaningful relief, as in the race area, they are pretty much together.

And I think it is pretty clear from Judge Thomas' writings, speeches and action that he would come out in a sitting with the Court that would be at odds with many of the precedents that the Court has adopted.

But finally in that connection, on the equal protection clause that you are talking about, one also has to remember that there are three tiers, and one of those tiers provide very limited relief. And, in the alien situation there is a real problem in terms of the kind of protection that is there.

And finally, I think when we look at a candidate like this we make a decision on the basis of the qualifications of the candidate. Regardless of what the President may do tomorrow, we are faced now with a candidate.

Senator DECONCINI. I agree.

Mr. CHAMBERS. We have to make a decision whether he is qualified for the position.

Senator DECONCINI. That is a fair point, in my judgment.

Thank you, Mr. Chairman. I am sorry to take as long as I did.

The CHAIRMAN. Thank you. With the permission of my colleagues, I would like to just follow up.

Mr. Rauh, you said earlier that, something to the effect that there should be balance on the Court, and you pointed to the Roosevelt era and you mentioned Hoover, pre-Roosevelt, you mentioned and Calvin Coolidge and who they appointed.

Do you think you would be here if the Court had six liberals and the President nominated Judge Scalia, knowing what Judge Scalia thinks and how he views the world? Would you be here supporting or opposing Judge Scalia?

I have never heard anybody talk about Judge Scalia's qualifications. I have incredible difficulty with Judge Scalia's methodology, personally. But I never heard anybody talk about his qualifications as being in jeopardy.

Would you be here opposing Judge Scalia? It is a tough hypothetical, but.

Mr. RAUH. I don't think the exact case has ever come up, but it may have. The reason I say I don't think that the exact case has ever come up, it hasn't come up for liberals. I think it came up for the Republicans in the Senate in 1932. The conservative Republicans in the Senate, I think they had that, because you had a conservative Court in 1932 and you had a liberal appointed, which is the exact opposite of the case you gave me.

The CHAIRMAN. Yes. That is why I asked the question.

Mr. RAUH. And I think the Republicans in that instance aced with great dignity. Indeed, Senator Watson of Indiana—am I right?

The CHAIRMAN. I don't know.

Mr. RAUH. I think he was the majority leader. And he said to Hoover, "The best appointment politically is the best man," and, in fact, a liberal was confirmed there.

I can't—I want to give you an honest answer about Scalia there. I think I would feel that that was a pretty bad appointment. But I really think if there were six liberals this panel wouldn't be here.

The CHAIRMAN. I appreciate that.

I am sorry. The Senator from Pennsylvania, I believe, is next.

Senator SPECTER. Thank you, Mr. Chairman.

Within a short round, it is hard to cover much ground that this very distinguished panel has articulated in both the written statements and their oral testimony. Let me start with the qualification and background issue that Mr. Chambers writes about. And he lists a litany, one of which is the ability to grasp the intricate relationships and ramifications of a decision that is an integral part of the mosaic of Federal law, one among many qualifications. And he compared Judge Thomas to 48 Supreme Court Justices appointed in the 20th century and find him coming out lacking.

And, I wonder as I go through it if any really measure up except for the two that Joe Rauh talks about having clerked for—Benjamin Cardozo and Felix Frankfurter. And I think back on the testimony given here, Chief Judge John Gibbons from the Third Cir-

cuit, a very distinguished jurist who knew Judge Thomas for many years, or they sat on the board of Holy Cross and had some detailed of the individual and his legal qualifications, read all of his opinions before coming to testify. And you had Professor Drew Days of the Yale Law School who, although he opposed Judge Thomas, thought he was educationally and intellectually qualified. And then you had Dean Calabrese of the Yale Law School who was at Yale in the teaching field, although he did not have Clarence Thomas as a student when he was at Yale, and all of those individuals give him pretty high marks in terms of base qualifications.

Why should we not accept their approach, Mr. Chambers, as opposed to your analysis?

Mr. CHAMBERS. Well, first of all, Senator Specter, I listened to some of that testimony and I am not certain how high a mark they gave him, but let's make that assumption. But I ask you to look at the Justices we have listed here in this exhibit, at the litigation experience or practice of law experience, at the teaching experience, at the judicial experience they have had, at the status they had obtained in the legal field, and make a comparison with Judge Thomas.

I think if one wants to look at the Constitution and talk about what the standard is as what we have developed to judge candidates for the bench for, and in that instance I think the ABA said that Judge Thomas was qualified.

But, if we are trying to develop a Court, or preserve a Court that has been responsive to the issues that have been brought before it, that had people who were really exceptional as we collect here in this exhibit, Judge Thomas doesn't measure up, and that is what we are presenting with this exhibit.

Senator SPECTER. Well, you would disagree with Dean Calabrese who said that he at least may not measure up to the Cardozo-Holmes standard, but Dean Calabrese insisted that he at least measured up, if not better than, the other recent appointees.

But you would disagree with that as well?

Mr. CHAMBERS. Again, I would call your attention to this exhibit, and according to this exhibit and looking at the objective standards we are trying to use in the exhibit, the answer is no.

Senator SPECTER. Well, your exhibit picks seven standards, but you might pick some others. You might pick a totality. But I would be interested in the answer to that question as to your agreement or disagreement with what Dean Calabrese said, that Judge Thomas is at least as good as the recent appointees.

Mr. CHAMBERS. As the recent?

Senator SPECTER. Appointees to the Supreme Court of the United States.

Mr. CHAMBERS. If that is what Dean Calabrese said, I would think that that is not the way I would evaluate Judge Thomas' qualifications.

Senator SPECTER. I would like to discuss a number of the areas with you, but the yellow light is on, so let me instead turn to Mr. Lucy on one question.

Mr. Lucy went to the Yale article which Judge Thomas wrote, the Yale Law and Policy Review, and picked out his writings on Judge Thomas' disagreement on affirmative action. I note there

that Judge Thomas has opposed affirmative action most of the time, except to a very limited extent on preferences in education, and he has opposed the class preferences because he says that for the minorities whom they benefit—and this is what you had read—they foster the view of disability or being in need of handouts, and for the individuals who are being replaced they promote a feeling of being replaced by someone who doesn't have as high test scores. And then he emphasizes the point of increase on racial divisiveness. Those are in the context of footnote 3 that you cited.

Now, whether or not you agree with his conclusion that affirmative action is undesirable, when you take his reasons for being opposed to that, would you not say that there was at least a reasonable basis for his conclusion?

Mr. LUCY. I think, Senator, if you look at what the serious problems are that caused the establishment of EEOC itself and some of the provisions of the law, the question of whether affirmative action is designed to bring about remedies or designed to prevent others from being injured, Mr. Thomas placed more emphasis on the issue of reverse discrimination than on carrying out the mandate of his agency. And whether or not he had a reasonable basis for that judgment may well be true. I can't say what was the basis of his concern.

But the basis of my concern, and for millions of other workers, is that there be some process by which fairness can be brought to those who have been disadvantaged by systematic discrimination, and the charge of EEOC it would seem to me is not only to promote affirmative action as a remedy for past discrimination, but also to be fair in providing remedies where it has been established that there has been injury to groups.

My reading of Mr. Thomas is that it was defensive of (a) the individual injury to individuals, and a defense against reverse discrimination.

Senator SPECTER. If I just might make one comment in closing, because my time is up. Not saying that I agree with Judge Thomas, but I think he does more than focus on reverse discrimination. He focuses very hard on discrimination. He has said some very powerful things about believing that discrimination was as bad in 1987 when he made his speech as it was when Chief Justice Taney decided *Dred Scott,* but he deals with discrimination on an individual basis. And when he comes to the group action he finds as a policy decision these factors which lead him to a contrary conclusion.

Mr. LUCY. Well, Senator, I would only say that these provisions were not put into the law just sort of willy-nilly. There was a great deal of discussion, debate, and I am sure thought by those in the Congress who, in fact, enacted the legislation, and I am sure they concerned themselves with the possibilities of others being injured as a result of, not preferential treatment, but really affirmative action to correct past wrongs.

Again, I think this is much more of an instance of Mr. Thomas assuming and asserting his judgment as opposed to the intent of the law to start.

Senator SPECTER. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much. Senator Simon.

Senator SIMON. Thank you, Mr. Chairman. First, I welcome the panel and I thank you for your testimony. Just a few comments and then a general question. If you were to list who were the giants in the field of civil rights and civil liberties in this century, Joe Rauh would be one of them, and when Joe Rauh tells that today—and I think you are saying that no matter what happens with this nominee—the keeper of the Bill of Rights is Congress, I think that is something we have to weigh very, very carefully, and I believe that to be the case.

In commenting on my colleague Senator DeConcini's comments that he can't imagine George Bush nominating someone with differing views, it is interesting that every Republican President, from Calvin Coolidge through Gerald Ford, has nominated a Supreme Court Justice with views more liberal than the President. And President Kennedy nominated Justice White, and Harry Truman, who certainly wasn't short on strong views, nominated a Republican Senator from Ohio, Justice Burton.

So this idea of balance on the Court and that the Court and the law should not be a pendulum swinging back and forth has some historic precedent.

Ms. Hernandez, I think the point that you make on privileges and immunities is important. The Constitution in a great many places makes distinctions between persons and citizens, and we have had court decisions that are not good court decisions because we have not recognized the rights specifically of people who are here legally. I think of the action taken when we were involved with Iran and the hostages were taken, where I think an unfortunate decision was made by the appellate court.

And then finally this is my question to all of you. I recognize that there is a difference between Judge Bork and Judge Thomas in terms of the basis for arriving at decisions, natural law being one, the area of privacy, for example, being another.

But my question to each of you would be this: Judge Bork, who was turned down 9–5 by this committee—can you think of any specific decision of the Court where Judge Thomas might have voted differently than a Judge Bork would have voted had either been in the Court?

Mr. RAUH. Well, there is a basic difference between their views on self-restraint. I didn't say it very well when I was talking about their differences before. Judge Thomas believes, he says, in self-restraint, but he doesn't believe in original intent. Judge Bork—and that is why I mentioned the book—says in the book the only restraint that matters is original intent, which is, I think, ridiculous, since the greatest exponent of self-restraint, Justice Frankfurter, was not a believer in original intent.

So they do have differences in their purposes and in their principles of constitutional interpretation. They may come out the same way, but they do have a substantial difference. One says self-restraint; the only thing that matters is original intent. The other says, no, it is a withholding of your views as against the views of the Congress. And so I would say there are differences, but as Mr. Chambers pointed out, they are small differences and they would most times come in the same place.

Senator SIMON. And I would be interested in hearing from the others, but if you take one view of privacy and another view of privacy, whether the Constitution has it, but you come out the same on *Roe* v. *Wade*, the net result for the American public is the same.

Mr. BUCHANAN. I think it is very important, Senator. I think in terms of a fundamental threat to our liberties, the rights and liberties of the American people, it ends in the same place. They may have differences in philosophies, but the mind set or at least the gamble the Senate is taking with the rights and liberties of the American people is very troubling indeed.

And may I add one footnote on affirmative action, since it has been such a subject throughout these hearings? We white males, like me and like every member of this panel, have had an affirmative action program going for centuries. We have had preferences that we have enjoyed for centuries throughout American history, and it is only very recently in this century that we have gotten around to extending some affirmative action, or at least some redress to black Americans, to women.

One specific example is the Vietnam war. That was a wonderful affirmative action program. The sons of the rich and the powerful, in preponderance, were able to get into the guard and the reserves, and I was here and I well remember, and I think that can be clearly documented. The people who had to go to Vietnam and fight and kill and be killed were disproportionately poor and minority.

Well, that is a different kind of affirmative action program, but if we waited for a case-by-case basis to redress historic injustices done to the black community in my State of Alabama and throughout the country and to women through the centuries, we would be to the year 2200 getting to first base.

If you can't have class action—blacks are discriminated against as a class in the United States, regardless of individual differences; women were here and many other places. If we can't deal with it on a class action basis, we can never solve the problem. So I find the danger to the liberties of the people just as great in one case as the other.

Mr. LUCY. Senator, if I can just add maybe an extension on the question of economic justice, be it for black males, black workers or workers in general, but particularly with regard to women workers—and while I don't want to quote Mr. Thomas out of context, at least his description of the economic question was when he made the statement that comparable worth or pay equity was loony tunes, sort of reflecting the fact that he does not believe that the value of work of women will ever equal the value of work that males contribute. And this by itself in 1991 is the critical issue confronting female workers in the workplace, and particularly as statistics show our society moving toward substantial numbers of single-headed households by women.

As I said in my testimony, any dollar denied them by gender-based wage discrimination is almost a denial of economic justice. And on that point alone, I think he is so far out of the mainstream.

Mr. CHAMBERS. Senator, for African-Americans, I was thinking really as you raised that question—I don't think in the race area that there would be very much difference in the outcome in decisions between Judge Bork and Judge Thomas. In fact, there is from

several of Judge Thomas' writings suggestions that he may come out worse in several instances than Judge Bork, and that is one of the concerns that we have.

As I indicated earlier, we have been before the Supreme Court now over our 51-year history over 500 times and we have gotten different results coming out of there, and most of those cases now would be questioned by Judge Thomas, as made clear by his writings and comments.

So I don't see that much difference in the outcome and, in fact, I would be more concerned that Judge Thomas would come out more adversely to the causes that we are raising than Judge Bork.

Senator SIMON. So if I may follow through, it would be, in your opinion, inconsistent for me to vote against Judge Bork and for Judge Thomas?

Mr. CHAMBERS. That is quite correct.

Senator SIMON. Thank you all very much. Thank you, Mr. Chairman.

The CHAIRMAN. Now, I have a few more questions, as does my friend from Wyoming, is that correct?

Senator SIMPSON. I do, Mr. Chairman.

The CHAIRMAN. Let me ask my question; I actually have one question. I thought the most compelling testimony that we have heard today—we all have a different view; it is subjective, obviously—was the testimony of Faye Wattleton and Kate Michelman this morning.

I am wrestling with what you all have said in one form or another, the issue of credibility. You have all either said it directly like the Congressman has, or indirectly like Ms. Hernandez has. She is obviously going to be Secretary of State in somebody's administration. [Laughter.]

I am trying to be as precise as I can be because, Mr. Chambers, I don't think there is any correlation between Judge Bork and Judge Thomas in terms of their methodology. They may come out the same place, but they are fundamentally different.

As a matter of fact, as Mr. Rauh can tell you, in Mr. Bork's book he reserves an entire chapter for people who think like Judge Thomas, talk like Judge Thomas, use the rationale Judge Thomas does for his brilliant ridicule, and he is a brilliant fellow and his ridicule is real and it is compelling.

Judge Thomas—everything he has said and written is a rejection of the positivist view of the Constitution. So I don't see how anyone can possibly say they are in any way related in terms of how they approach interpreting the Constitution.

Mr. CHAMBERS. The question, though, was whether there would be any different in the results of the decisions.

The CHAIRMAN. I see, OK, but we don't have a disagreement, do we, on from whence they begin their analysis as being so fundamentally different? I mean, they are as different as any two nominees. I have been here not that long, 19 years. I have been here for a while and I know of no two who have evidenced a view that is so diametrically opposed.

The words "natural law" do not emanate from the lips of Judge Bork. I mean, it never even—you know, it is the ultimate legal sacrilege, if there is such a thing.

Mr. CHAMBERS. Senator Biden, the question again goes to the second point that I was trying to raise in the testimony about the qualifications of the candidate.

The CHAIRMAN. That is what I want to get to.

Mr. CHAMBERS. OK.

The CHAIRMAN. OK. That is what I want to get to in my question. Now, I want to stick, actually, with the question of credibility first. One of the arguments Judge Thomas raised, one of the statements Judge Thomas would counter with, I say to Mr. Rauh and all of you, whenever I would press him on any of the number of speeches that he made—and I think I have read as many as anyone in this room, including my staff, and I know they have read all of them.

He would say something along the following lines: well, if I wished to say what you are asserting, I would have explicitly said it. For example, in the Lehrman quote, in the footnote that he refers to, in the Cato speech where he says, do you want to understand why I criticize *Roe*? Go look at my—and then he goes back and there is this labyrinth he takes you through. I wondered whether he ever wrote the footnote or someone else wrote the footnote for him. I don't say that critically. A lot of footnotes are written for a lot of people, including Justices.

You wrote a hell of a lot of footnotes, Mr. Rauh, for brilliant Justices, I suspect. I do not suspect they were brilliant; they were brilliant, but I suspect you may have written some of those footnotes.

Having said that, how do you respond to the assertion by Judge Thomas that "If I wanted to criticize *Roe*, I would have criticized *Roe*. Why would I not have just criticized *Roe* way back in 1981 and 1982 and 1983? Why didn't I just say by the way, this is not just a splendid example of the application of natural law; this is also a view held by Mr. Lehrman that I believe is correct, and I think *Roe* is a wrongly decided decision, and I think it should be overturned"?

Why would a man like him have not said that 6, 8, 9 years ago when he was making some of these speeches—not all of them; some of them are as late as 1987, 1988—why would he not have done that?

Ms. HERNANDEZ. Well, let me try——

The CHAIRMAN. But you know him, so maybe I'll start with you, Madam Secretary.

Ms. HERNANDEZ. Let me try by saying that most of his writings, his speeches, centered around his chairmanship of the EEOC and battling those issues and speaking on his philosophy and point of view dealing with the matter at hand.

Some of his articles and speeches when he left the area of affirmative action or where he left the area of his views when he was with the Department of Education, and he commented on an article that he liked in the speeches that he made, it was that indirect comment. I think that it was lack of opportunity as far as his ability to speak on the many issues of the day. He was preoccupied, and his hands were full with the issues at hand.

But we listened very carefully to his testimony, and if you listened very carefully, and particularly a couple of times when you tried to push him, even when he conceded on certain policies, and

we were very careful in his response—in fact, let me give you an example on the legal position on his testimony to Senator Specter, dealing with goals and timetables, and you got some comments there.

He sort of conceded in his response that such policies might sometimes be okay, but only from a policy point of view. He declined to give even his tentative approval from a legal perspective which is what he was going to be called to deal with as a judge and has been called to deal with as a judge. And when he conceded when pushed, it was from a political point of view.

The CHAIRMAN. Well, I understand that—and I know my time is up—but one of the things that I'm trying to get at here is to try to deal with some precision about what he did say and what he didn't say. And there is no question—in my view, there is no question—that there was an overwhelming effort on the part of Judge Thomas, I suspect—I'd be willing to bet anything—at the direction of the White House not to answer anything about the law, period, if you could avoid it—anything. That's one issue, whether or not we should "allow a nominee to get away with that", quote-unquote, and that is something we are going to have to decide as a matter of policy here in this committee.

But that is not the same as saying that because he didn't speak to the law, his views on the law are able to be clearly arrived at by this panel or anyone else listening from what he didn't say.

Ms. HERNANDEZ. That's true.

The CHAIRMAN. So that's the only point I'm trying to make sure—I have to deal with, in determining whether to vote for or against him, his credibility in terms of whether he is telling me what he is thinking; whether or not we should, at what point, is this the time—we keep changing the standard as we go, legitimately, in my view—that is, as more nominees stonewall, this committee, at least some of us, get more upset about the stonewalling, for example. Justice Scalia answered nothing at all, zero, zip, nothing. Two members of this Committee said, "Oh, no, we're not doing that again." Each nominee is answering a little more. Whether they answer enough or not is a different question.

I'm trying to focus on what he said in his writings, and as I looked at every one of them, the worrisome passages of all of his speeches have been throwaway lines or paragraphs, almost all of them without any connection to the subject matter of the speech, almost without exception.

Now, the privileges and immunities speech by itself is something to worry about on its face, and you made that point very well. But all the lines we have heard so much about today—not today, but that I have raised; I think I was the first one to raise them—all of them are in the context of a single paragraph dropped at the beginning or the end of a speech unrelated to the paragraph.

When I questioned him at length about Professor Epstein, what worried me most about it after I listened to him wasn't that he agreed with Epstein, but that he didn't know what Epstein was saying.

So—and I'm going to stop talking here—but you understand the dilemma that I have and that I want you to speak to, and that is that the man said, look, if I wanted to say Epstein's notion of the

fifth amendment and the takings clause was correct, why wouldn't I have gone on one more paragraph and said it? If I wanted to make the case that Macedo was right, why would I have quoted Macedo the way I did and then spent a significant portion of the speech pointing out that Macedo had gone too far? If I wanted to make my point known on *Roe*, why would I have complemented, for any reasons other than I stated, this splendid application of natural law by Lew Lehrman in Lehrman Hall of the Heritage Foundation and then never again mention abortion?

Is it that this man 9 years ago thought, "I want to get to the Supreme Court, and I'd better not say anything"? Could he have been that—how can I say it—optimistic about his future?

Mr. RAUH. No, that isn't the point, Senator. You are making a good point, but I think you are wrong. I think the words "splendid application of natural law" are a statement of fact, and if you——

The CHAIRMAN. Let's assume they are, Joe, for the sake of discussion.

Mr. RAUH. Let me go on, please.

The CHAIRMAN. Sure.

Mr. RAUH. If you were making a speech to someone, you wouldn't use those pedestrian words—"I think we ought to overrule *Roe* v. *Wade*." That's not the way a speech is constructed. It is constructed in a way that——

The CHAIRMAN. That's the way he talks in his speeches, though.

Mr. RAUH [continuing]. There is a certain elegance which, if you are a natural law freak, as he was at that time——

The CHAIRMAN. I am one of those natural law guys, you know—I think, by the way, Frankfurter was, too.

Mr. RAUH. I'm not saying what he said here; I'm saying what he said there. To say that's a "splendid application of natural law" is the best way to say the overruling of *Roe* v. *Wade*. He said something worse, though, because if that memorandum was right, then abortion is murder, and maybe he didn't want to go quite that far. But if you start parsing it and saying, "Oh, I am for the repeal," then the next question will be, "Well, are you also for the other half of this memorandum, which says abortion is murder?" I just——

The CHAIRMAN. Well, at least you admit it raises the question that he might not have been for the whole memorandum. The only point I am making is that it doesn't seem clear because he is very explicit about other things he says. He is very explicit when he talks about issues relating to affirmative action. He doesn't mince words in his speeches. He is very explicit about the privileges and immunities clause. He doesn't mince words.

And I am in a quandary, a sincere quandary, as to why, if these phrases were as troublesome as they could be from my perspective, why he didn't—one of the things he said to us was, "Look, if I meant to say it, I'd say it." He said it other places. I don't know whether that is compelling, but at least it has me thinking, and I wondered.

I've got to yield now to my colleague. But I want to point out that when I was talking about natural law in Bork, you all were applauding. I want to remind you all of that. When I talked about I derive my rights not from a piece of paper, you all thought that

was pretty good back then. So all of a sudden, natural looks like it's just a matter of how you apply natural law and what your framework is, from my perspective. But at any rate, you all thought that was pretty good back then to take on Bork's positivist view that there was no such thing as unenumerated rights—"you all" I use in an editorial sense; not any one of you in particular.

With that, let me yield to my colleague from Wyoming.

Senator SIMPSON. Mr. Chairman, I do indeed remember that, but I can understand your frustration because it was a different reception to those remarks.

But just quickly, we want to get on, and I have not delayed the issue; I've taken just maybe 20 minutes all day, but I'll take these 5.

It really is fascinating to me to hear this continual reference to the word "balance"—balance, balance, balance. It is my opinion that no nominee could ever pass your test of George Bush, and I wouldn't be too sure about the views of Clarence Thomas and George Bush and where they'll end up when it's all up on the scorecard. I wouldn't go into that one at all.

But I don't think any nominee could be both conservative and the best person in your view, period. That's the way it is, and we'd just as well maybe start from there. But if you really do believe in balance—and you said you did—what about the balance in the U.S. House of Representatives where, under the remarkable preponderance of Democrats, nearly all of my life there has been no balance whatsoever? How about a little balance there?

Does anyone—I'm sure that's an absurd idea, but I just thought I'd throw it in. We have an abused minority over there called Republicans. Don't you think it would be good to unleash them and allow them to have a little staff and do the other things that other people get to do in society, and that is produce papers and writings, and it's called "balance".

What do you think of that absurd and totally nutty idea?

Mr. RAUH. Well, it's only nutty because of the fact that one is an appointed body and the other is an elected body. The appointed body, it is easy to have balance. The elected body, it is much harder to have balance.

Senator SIMPSON. Well, Joe, I would say—and I know you have a bit of disregard, I would say, for Presidents Reagan and Bush—they went out and told the American people when they ran, as they campaigned for President, that if they were nominated and elected that they would nominate judicial candidates who shared their views. That's exactly what they said when they were out on the stump. They were elected, they made the appointments, and they were reelected based sometimes on those appointments. So that's the way that is, too.

Mr. CHAMBERS. But the Senate didn't run on that same platform, and the Senate has a constitutional responsibility as well.

Senator SIMPSON. Of course.

Mr. CHAMBERS. So when the President makes his nomination, one hopes that the Senate exercises its responsibility.

Senator SIMPSON. Well, I think we have. I have been here under Presidents of the Democratic faith and the Republican faith, and I don't think I ever got tangled up in any judge of Jimmy Carter on

any issue except were they competent, capable, had judicial temperament, and so on. This is bizarre. This guy is a conservative. You don't like him——

Mr. RAUH. Jimmy Carter didn't have an appointment to the Supreme Court.

Senator SIMPSON. I know. There were many judges that Jimmy Carter appointed to the Federal district court, and some I helped get through, to the detriment of my own party support.

But I think there is one that has to be settled, because I have heard Mr. Lucy now speak several times on this issue of women in the workplace. Let's get to that.

On page 11 of your testimony, you speak of Judge Thomas' "disturbing record on women in the workplace". That is your quote. Then you give an example of his record, and you say the following: "the EEOC under Judge Thomas' leadership rejected the concept of pay equity, eliminating the hopes of many women in seeking comparable pay with their male counterparts."

Now, every one of us in Congress knows that "pay equity" is a euphemism for "comparable worth". The comparable worth doctrine attempts to intervene in the marketplace and decides that nurses and truck drivers, for example, ought to be equally paid, with absolutely no attention at all paid to supply and demand or to other relevant economic and social factors.

My question is this. You speak of Thomas' criticism of comparable worth as if this were a mainstream, well-accepted concept, this comparable worth. And yet most Federal courts have been absolutely unwilling to extend title VII to cover comparable worth claims. We have case-after-case in the Federal court rejecting comparable worth—not just Clarence Thomas. Let's get serious here. The following cases have rejected comparable worth's validity under title VII of the Civil Rights Act: *Christianson* v. *Iowa* was the eighth circuit; *Lemons* v. *City of Denver*, the tenth circuit; *Spaulding* v. *University of Washington*, the ninth circuit.

Aren't you really, honestly asking Judge Thomas to endorse an agenda of yours which is already shown to be out of the mainstream by every court that has yet dealt with it?

Mr. LUCY. Well, Senator, that's not quite true, I think, and while I don't know every specific case you cited, most of the opposition to comparable worth flows from the economic consequence of in effect supporting it.

What we have, and particularly at State and local Government levels, and particularly within the marketplace, is systemic discrimination against female workers.

Second, you've got the notion, appearing to flow from Mr. Thomas' own comments, that women make employment judgments on the basis of family life as opposed to the need to work.

Comparable worth and the evaluation of the relevant value of jobs—there is a procedure that can supply the proper analysis. And if that analysis is justified, then support of it and decisions supporting it ought to be justified. I don't know the cases you cited, but by and large the resistance is the resistance to change to make economic justice in the marketplace for female workers a reality. And whether it is Mr. Thomas or even the courts, the fact is systematic

discrimination exists against female workers in the workplace, be it the public sector or be it the marketplace.

Senator SIMPSON. Well, I am just saying to you that comparable worth is so complex, so difficult to deal with——

Mr. LUCY. So is discrimination, Senator.

Senator SIMPSON [continuing]. That the courts haven't decided to do it at all. It can't be dealt with.

Mr. LUCY. But that's the point.

Senator SIMPSON. Well, the point is that to put that all on Judge Thomas, eliminating the hopes of women, you have to talk about every other court and talk about us—we can't deal with it. Comparable worth in this body would be like an impossible dream to figure out what to do with comparable worth. We all agree that women should have these rights. Who challenges that? It's trying to put it together——

Mr. LUCY. But Senator, could we not have found a different way to describe it? I mean, Mr. Thomas' comments of "loony tunes" does not quite reflect——

Senator SIMPSON. What did you say?

Mr. LUCY. His comment was that the concept was "loony tunes".

Senator SIMPSON. Well, there are a lot of Congressmen who feel the same thing about comparable worth, that it is "loony tunes", but there are a lot of them who think that women should have the same equity in pay as men, but they don't know how to get to it, and they can't get it through this crazy business of whether nurses and truck drivers and not paying attention to the other issues can't even be decided. It can't, or we'd have done something about it long ago. And they tried.

But finally, many people have asked why do these judges, these potential nominees do this. Why are they mute? Why do they duck these questions? That answer should well be understood after what happened to Judge Bork. Who can even challenge that? The man was on the bench for 5½ years, and I never heard a single comment about his 5½ years on the bench while I sat here for days. All I heard about was some goofy Indiana Law Review article written in 1971, and I had to watch that and then to watch the advertising that came in the face of this man, and see where it came from—powerful, hysterical, extraordinary national television, irresponsible beyond comprehension. And you are wondering why nobody is going to say anything. I have a thought for you all: Stop smearing them, stop ridiculing them, stop tearing their past lives to shreds and their past comments to shreds, made when they were 10, 20, 30 years back down the line, and they will start talking. Until then, they won't—and who would?

Mr. RAUH. Is that a question?

Senator SIMPSON. That's not a question.

The CHAIRMAN. Are you finished, Senator?

Senator SIMPSON. Yes, I am, all finished, for the day, or for a while. I may rise again.

The CHAIRMAN. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

I just want to welcome you distinguished people to this hearing. We thank you for your presence. I have no questions.

The CHAIRMAN. Thank you.

Folks, thank you very much. We appreciate it. It was very enlightening.

Mr. RAUH. Thank you very much.

[Pause.]

The CHAIRMAN. The committee will come to order.

I am sorry—I kept you waiting because I was waiting for the fourth panelist, who I am told is not here now.

Our next and patient panel is made up of Dr. Julius Becton, Jr., president of Prairie View A&M University. Welcome, Doctor.

We welcome also Dr. Jimmy Jenkins, chancellor of Elizabeth City State University, and Yvonne Thomas of Zeta Phi Beta Sorority.

Welcome, all three. We are anxious to hear what you have to say. Obviously, our interest in the previous panels is one of the reasons why we are as late as we are, but we are here to hear what you have to say, and we will stay here. So we appreciate very much your patience.

Have you concluded how you would like to begin, or should we begin in the order you have been called?

Mr. BECTON. You are more senior than I am, you've got more tenure. What do you want to do?

Mr. JENKINS. I'll go first.

Mr. BECTON. I knew they'd do that to me.

The CHAIRMAN. All right, Chancellor, you begin, please.

STATEMENTS OF A PANEL CONSISTING OF JIMMY JENKINS, CHANCELLOR, ELIZABETH CITY STATE UNIVERSITY, NC; YVONNE THOMAS, ZETA PHI BETA SORORITY, AND JULIUS BECTON, JR., PRESIDENT, PRAIRIE VIEW A&M UNIVERSITY

Mr. JENKINS. Mr. Chairman, distinguished members of this august body, ladies and gentlemen, I am both honored and humbled by this opportunity to come before you and this Nation to voice my views on whether or not Judge Clarence Thomas should be confirmed as an Associate Justice of our Nation's highest court.

I am honored because this chancellor of a small university in North Carolina called Elizabeth City State University, which this year is celebrating its 100th anniversary, was selected.

The CHAIRMAN. Congratulations.

Mr. JENKINS. I am humbled because I realize that what I say here today may have some influence on your decision to affirm or reject Judge Thomas as the nominee with all of the ramifications your decision has for our Nation now and in the future.

I have come to express my support of Judge Thomas as the second such nominee in the history of America's highest court. Let me quickly say to you that my support of Judge Thomas is not based upon a personal association. Judge Thomas and I have never met. My support is not based upon a party affiliation, since I am a registered Democrat. My support is not based upon the notion that he and I agree on every aspect of the philosophies that have molded his character.

I am here this evening, Mr. Chairman and members of this body, because Judge Thomas is widely acknowledged for his philosophy