National Asian Pacific American Bar Association

STATEMENT OF THE NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION REGARDING THE NOMINATION OF THE HONORABLE CLARENCE THOMAS TO THE SUPREME COURT OF THE UNITED STATES

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INTRODUCTION

The National Asian Pacific American Bar Association ("NAPABA"), after careful review and long, painstaking discussion, analysis and deliberation, opposes the nomination of the Honorable Clarence Thomas to the Supreme Court of the United States.

NAPABA is the national organization of Asian Pacific American attorneys, with thousands of members throughout the country. NAPABA represents the professional concerns of its members and promotes the interests of the fastest-growing minority group in the country -- the Asian Pacific American community. NAPABA has achieved recognition as an important source of leadership and resource, and acts as a national voice and effective advocate, for Asian Pacific American attorneys and their communities.

NAPABA's activities include: addressing the legal needs of Asian Pacific Americans; advocating equal opportunity in education and in the workplace; combating anti-Asian violence and other hate crimes; participating in the legislative process; monitoring judicial appointments; promoting Asian Pacific American political leadership; participating in the preparation of amicus briefs; presenting programs of particular interest to Asian Pacific American attorneys; and working in coalition with people of all colors in the legal profession and in communities at large.

NAPABA supports the nomination of minority candidates to the Supreme Court and believes that, once confirmed, such Justices, who possess a perspective that may otherwise be absent, can play a vital role in the deliberations of the Court. Judge Thomas undoubtedly has experienced poverty and felt keenly the sting of discrimination. It is also clear that Judge Thomas' diligence and hard work enabled him to succeed when given the opportunity as a result of affirmative action programs.

The compelling nature of his life story, however, is not in and of itself a sufficient basis to support his nomination.

Evaluating Judge Thomas' suitability for lifelong tenure on the Supreme Court poses certain difficulties. Because Judge Thomas was only recently appointed to the U.S. Court of Appeals, his judicial record, the traditional primary source for evaluating a Supreme Court nominee, does not provide adequate information to evaluate his nomination. However, Judge Thomas has in other contexts spoken and written on topics such as affirmative action, employment discrimination, race, and judicial philosophy.

Based upon Judge Thomas' record, NAPABA has concluded that he should not be confirmed. First, the examples of "natural law" which Judge Thomas has advocated as appropriate for construing the Constitution have disturbing implications. Second, his inaccurate characterization of the Asian Pacific American community in his attempts to justify opposition to affirmative action are a cause of concern. Finally, his views on employment discrimination are contrary to previously well-settled law.

In addition to the aforementioned areas of particular interest from an Asian Pacific American perspective, there are a number of other factors, such as Judge Thomas' record while he served at the Office of Civil Rights of the Department of Education and as Chairman of the Equal Employment Opportunity Commission, which were also considered by NAPABA. Our concerns about that record have been aptly presented at these proceedings by other witnesses opposing Judge Thomas' nomination and therefore will not be repeated herein.

ANALYSIS

A. Judge Thomas' advocacy of "natural law" has troubling ramifications.

Judge Thomas has, in numerous articles and speeches, advocated the application of "natural law" concepts in construing the Constitution. His flirtation with natural law principles as a basis for judicial decisions has troubling ramifications, as can be readily seen from examining several Supreme Court cases mentioning or involving Asian Pacific Americans.

For instance, Judge Thomas has repeatedly praised as "one of our best examples of natural rights or higher law jurisprudence" Justice Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537 (1896), a Supreme Court case which espoused the "separate but equal" doctrine and upheld a Louisiana law requiring railroad companies to segregate their passenger cars based on race. Although Justice Harlan rejected the "separate but equal" doctrine in his dissent which is often cited for the concept of a "color-blind" Constitution, he nonetheless referred, with tacit approval, to the racist

Chinese Exclusion Acts: "There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race." 163 U.S. at 561.

Moreover, two years after Plessy, the Supreme Court held in United States v. Wong Kim Ark, 169 U.S. 649 (1898), that pursuant to the plain language of the Fourteenth Amendment, any person born in the United States, under its jurisdiction, is a citizen. Thus, a man of Chinese descent who was born in this country was allowed to re-enter the United States following a visit to China. Significantly, Justice Harlan joined the dissent in arguing for his exclusion. In its analysis, the dissent quoted favorably from another case, Fong Yue Ting v. United States, 149 U.S. 698 (1893), describing the Chinese as "of a distinct race and religion . . . apparently incapable of assimilating with our people . . . [who] . . . might endanger good order, and be injurious to the public interests. . . ." 169 U.S. at 731. The Wong Kim Ark dissent then proclaimed: "It is not to be admitted that the children of persons so situated become citizens by the accident of birth." Id. at 731-732.

While NAPABA does not mean to suggest that Judge Thomas condones Justice Harlan's views regarding the Chinese, it is clear that Judge Thomas is fully aware of Justice Harlan's remarks in the Plessy dissent. Indeed, Judge Thomas, in an article defending Justice Harlan's analysis, has himself admitted that Justice Harlan's views on the Chinese are "opprobrious." Thomas, *Toward a "Plain Reading" of the Constitution -- the Declaration of Independence in Constitutional Interpretation*, 30 Howard L.J. No. 4 at 993 (1987). Nonetheless, Harlan's dissent in the Plessy and Wong Kim Ark cases vividly illustrate that the singling out of an ethnic group for unequal and unjust treatment is not necessarily inconsistent with the natural law analysis praised by Judge Thomas. That such overt racism is so readily evident -- in a context selected by Judge Thomas himself -- reflects poorly on the desirability of the theory and raises serious questions about the suitability of a Supreme Court candidate who has often commented favorably on the application of such natural law principles to judicial decisions.

B. Judge Thomas inaccurately portrays the Asian Pacific American experience in his attempt to justify opposition to affirmative action.

Judge Thomas has portrayed Asian Pacific Americans as a minority group whose accomplishments justify opposition to affirmative action as a remedy for discrimination. "Thomas Lowell and the Heritage of Lincoln: Ethnicity and Individual Freedom," 8 Lincoln Review 7 (1988). Specifically, Judge Thomas asserts that because Asian Pacific Americans have "substantially greater family incomes than whites", they have "transcended the ravages caused even by harsh legal and social discrimination". Id. at 15. He goes on to state that Asian Pacific Americans are "overrepresented" in areas

such as employment opportunities and hence, are not deserving beneficiaries of affirmative action as a remedy for discrimination. Id. at 16. NAPABA categorically rejects Judge Thomas' conclusions.

Judge Thomas' assertions are inaccurate and misleading generalizations of the Asian Pacific American experience. For example, with respect to family income, Judge Thomas fails to recognize the struggles of various ethnic groups which comprise the Asian Pacific American community. Had Judge Thomas investigated further, he would have found that among the Filipino American, Asian Indian American and Vietnamese American communities, average family incomes are only a fraction of the incomes of comparable Caucasian families. U.S. Commission on Civil Rights, The Economic Status of Americans of Asian Descent, 1988 at 8. Moreover, a crucial contributing factor to the incomes enjoyed by Chinese American, Japanese American and Korean American families is simply the fact that more family members work than in the average household. Id. at 9. Other Asian Pacific American households are larger than average so that when family incomes are adjusted on a per capita basis, the relative economic status of such Asian Pacific American families falls substantially. Id. Unfortunately, Judge Thomas is evidently content to accept the stereotypes and myths that continue to plague the Asian Pacific American community.

Further, NAPABA disagrees with Judge Thomas' belief that Asian Pacific Americans are overrepresented. In a 1988 study which reaffirmed the existence of the "glass-ceiling" phenomenon whereby qualified minority candidates are not promoted to senior management positions, the U.S. Commission on Civil Rights noted that U.S.-born Asian Pacific American men are "less likely to be in managerial positions than are whites with comparable skills and characteristics". Id. at 13. In embracing stereotypes and cliches (that is, the "model-minority" myth), Judge Thomas fails to recognize the very real difficulties and barriers confronting Asian Pacific Americans. Moreover, his belief that Asian Pacific Americans are not appropriate candidates for remedies such as affirmative action raises significant concerns should Judge Thomas be called upon to adjudicate a discrimination claim brought by Asian Pacific Americans.

C. Judge Thomas' views on employment discrimination are in opposition to well-settled law.

Judge Thomas has made numerous statements and has taken actions while at the Office of Civil Rights of the Department of Education and as Chairman of the Equal Employment Opportunity Commission that bring into serious question both his commitment to effective remedies to discrimination as well as his adherence to well established legal principles. In particular, Judge Thomas has repeatedly stated that statistical evidence is much overused in employment discrimination cases. Yet, statistical evidence is often extremely important in both proving and remedying employment discrimination.

One type of claim which relies extensively on statistics is known as an "adverse impact" case. Restricting the use of statistics as a method of proof would essentially eliminate the ability to prove such cases, to the significant detriment of Asian Pacific Americans. For example, Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), involved alleged discrimination against Filipino American cannery workers that was manifested by the segregation of those workers into inferior jobs and living conditions. As a result of the severe limitations place on the use of statistics to demonstrate the segregation, it was not possible for those Filipino American workers to obtain relief.

Second, even in "disparate treatment" cases, statistics often are used to buttress a discrimination claim. For example, if an Asian Pacific American believes that he or she was not promoted to a managerial position because of discrimination (i.e., the "glass ceiling"), an important element of proving the existence of discrimination would likely include evidence that the employer has consistently passed over other qualified Asian Pacific Americans (i.e., statistical evidence).

In addition to making it significantly harder for those who have been discriminated against to prove their cases, Judge Thomas' views on goals and timetables would severely limit a victim's remedies. Because Judge Thomas, in his writings and speeches, has indicated his opposition to the use of goals and timetables against even proven and persistent discriminators, his views are contrary to recent Supreme Court decisions which have endorsed the use of goals and timetables when the defendant has discriminated against the protected group in the past. See, e.g., United States v. Paradise, 480 U.S. 149 (1987); Firefighters v. Cleveland, 478 U.S. 501 (1986); Local 28 Sheet Metal Workers Internat'l v. EEOC, 478 U.S. 421 (1986). Criticizing these well-settled decisions, Judge Thomas, in his capacity as EEOC Chairman, opposed "race conscious" relief distributing opportunities on the basis of race or gender.

CONCLUSION

NAPABA's opposition is the result of a careful review of Judge Thomas' record as a public official, his writing and his speeches.

Judge Thomas' documented advocacy of the application of "natural law" principles to judicial decisions has disturbing ramifications and raises serious doubts about his suitability to serve as a member of the highest court in this country.

NAPABA is also concerned by Judge Thomas' attempts to use the Asian Pacific American community as a basis to justify opposition to affirmative action. Not only are such attempts inaccurate and contrary to established facts, but Judge Thomas' apparent readiness to embrace racial stereotypes and cliches is disturbing and raises significant concerns should Judge Thomas be called upon to adjudicate a discrimination claim brought by Asian Pacific Americans.

Finally, the evidence is clear that Judge Thomas' opposition to using statistical evidence to prove discrimination, and his narrow view of appropriate remedies once discrimination is established, would impair severely an employment discrimination victim's ability to prove a discrimination case and to be made whole.

For the foregoing reasons, the National Asian Pacific American Bar Association opposes the nomination of the Honorable Clarence Thomas to the Supreme Court of the United States and urges that he not be confirmed by the United States Senate.