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SPECIAL CIVIL RIGHTS MONITOR ON THE NOMINATION OF JUDGE CLARENCE THOMAS TO THE SUPREME COURT

This Special Monitor on the Clarence Thomas Supreme Court nomination is devoted to a discussion of his judicial philosophy and policy record as a federal government official, and does not address the sexual harassment charges that were aired before the American public. Professor Anita Hill's allegations of sexual harassment are extremely disturbing, raise serious questions about his character and credibility, and should have been taken more seriously by the Senate in September. We have, nonetheless, restricted this Monitor to the record on which the civil rights coalition made its decision to oppose Thomas' confirmation because we believe that it is important for the public to be informed about the reasons the civil rights community opposed the nomination prior to the sexual harassment charges.

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THE SENATE VOTE

On October 15, 1991, the Senate voted 52 to 48 to confirm the nomination of Judge Clarence Thomas to the Supreme Court of the United States. Judge Thomas' margin of victory was the slimmest margin of victory for a Supreme Court nomination since 1888 when Lucius Q. C. Lamar of Georgia won confirmation by a vote of 32-28.

The Senate voted after the Senate Judiciary Committee held a second set of hearings on the accusations of Oklahoma Law School Professor Anita F. Hill that Judge Thomas had verbally sexually harassed her while she worked for him during his tenure as Assistant Secretary for Civil Rights at the Department of Education and as Chair of the Equal Employment Opportunity Commission.

The charges came to light just before the Senate was scheduled to vote on the nomination on October 8th, and resulted in a postponement of the vote. In the end, few Senators changed the votes they had been expected to cast. Many Senators appeared to base their decision on the question who deserved the benefit of the doubt, Judge Thomas or Professor Hill. Senator Robert C. Byrd (D-WV) said the benefit of the doubt should go to the Supreme Court, and that a nominee with such a cloud should not be confirmed:

"Mr. President, this question of giving the benefit of the doubt, I have heard it said, well, ...it is obvious nobody can really say with certitude as to which one is telling the truth, the whole truth, and nothing but the truth, so help him or her God-then you should give the benefit of the doubt to Judge Thomas. He is the nominee.

"Mr. President, of all the excuses for voting for Judge Thomas, I think that is the weakest one that I have heard. When are Senators going to learn that this proceeding is not being made in a court of law? This is not a civil case; it is not a criminal case wherein there are various standards of doubt, beyond a reasonable doubt, so on and so on; if you have a doubt, it should be given to Thomas....

"Such an honor of sitting on the Supreme Court of the United States should be reserved for only those who are most qualified and those whose temperament and character best reflect judicial and personal commitments to excellence.

"A credible charge of the type that has been leveled at Judge Thomas is enough, in my view, to mandate that we ought to look for a more exemplary nominee. If we are going to give the benefit of the doubt, let us give it to the country."

Senator John Danforth (R-MO), Judge Thomas' most ardent supporter in the Senate, said:

"Mr. President, when the President named Clarence Thomas to be his nominee for the Supreme Court, he described the nominee to be the best person in the United States for the job. Many people poked fun at that description, but this Senator believes that description was well founded.

"I believe that Clarence Thomas is what America is all about. He captures in himself the American spirit, the tradition of being able to make the most of your life, and apply yourself, and to contribute something with your life.

"I believe on July 1 that he was an outstanding choice, and I believe that even more today. During the past few weeks especially, Judge Thomas has demonstrated a strength of character which I think is extraordinary. He has endured, particularly over the last 10 days, the agonies of hell. I believe that as a result of that, Clarence Thomas is more sensitive to constitutional rights, to the necessity of legal protection of the people of this country, than most people of this country, than most people who could conceivably be nominated for the U.S. Supreme Court."

The Senate vote took place 18 days after the Senate Judiciary Committee decided on September 27, 1991, not to report the nomination to the Senate with a favorable recommendation by a tie vote of 7-7. The Committee then voted to report the nomination to the Senate without a recommendation by a vote of 13-1. Senators voting against the favorable recommendation were: Joseph Biden (D-DE), Edward Kennedy (D-MA), Howard Metzenbaum (D-OH), Patrick Leahy (D-VT), Howell Heflin (D-AL), Paul Simon (D-IL), and Herbert Kohl (D-WI). Senators in support of the nomination were: Strom Thurmond (R-SC), Orrin Hatch (R-UT), Alan Simpson (R-WY), Charles Grassley (R-IA), Arlen Specter (R-PA), Hank Brown (R-CO), and Dennis DeConcini (D-AZ). Senator Simon alone voted against sending the nomination to the Senate without a recommendation.

JUDICIARY COMMITTEE HEARINGS

The Committee hearings on the Thomas nomination began on September 10 with opening statements from the 14 members of the Committee. Senator Biden, Chair of the Committee, opened the Hearings by saying:

"This Committee begins its sixth set of Supreme Court confirmation hearings held in the last five years, a rate of change that is unequaled in recent times. In this time of change, fundamental constitutional rights which have been protected by the Supreme Court for decades are being called into question. In this time of change, the Supreme Court's self-restraint from interference in fundamental social decisions about the regulation of health care, the environment, and the economy are also being called into question.

"Judge Thomas, you come before this Committee in this time of change with a philosophy different from that which we have seen in any Supreme Court nominee in the 19 years since I have been in the Senate. For as has been widely discussed and debated in the press, you are an adherent to the view that natural law philosophy should inform the Constitution. Finding out what you mean when you say that you would apply the natural law philosophy to the Constitution is, in my view, the single most important task of this committee, and, in my view, your most significant obligation to this Committee. This is particularly true because of the period of vast change in which your nomination comes before us."

Next came statements of six Senators who introduced Judge Thomas to the Committee, Senators John Danforth (R-MO), Christopher Bond (R-MO), Sam Nunn (D-GA), Wyche Fowler (D-GA), John Warner (R-VA), and Charles Robb (D-VA). In introducing the nominee, Senator Danforth, Clarence Thomas' former employer and most ardent supporter said:

"Other than the nominee himself, I know Clarence Thomas better than anyone who will appear before the committee. I hired him 17 years ago when he was a law student. He worked for me twice, as an assistant state Attorney General and as a legislative assistant, and we have kept in touch since he left my office....The Clarence Thomas I know has special qualities which convince me that he is more than the average nominee. He would be an extraordinary justice on the Supreme Court. What are these special qualities?

"First, Clarence Thomas is his own person...Repeatedly, he has said that as a judge, he has no personal agenda, that he will call them as he sees them. That pledge is a function of his independence, and it is completely consistent with the Clarence Thomas I know....Second, he laughs...And...in this most uptight of cities, the object of his laughter is most often himself. Third, he is serious--deeply serious in his commitment to make a contribution with his life....It is a proud day in my life to present for the Supreme Court a person I know so well and believe in so strongly."

Senator Danforth sat directly behind Judge Thomas during his five days of testimony before the Committee.

The NOMINEE'S TESTIMONY

Judge Thomas began his testimony on September 10 by giving a very personal and emotional recounting of his life story:

"My earliest memories...are those of Pin Point, Georgia, a life far removed in space and time from this room, this day and this moment...In 1955, my brother and I went to live with my mother in Savannah. We lived in one room in a tenement. We shared a kitchen with other tenants, and we had a common bathroom in the backyard, which was unworkable and unusable. It was hard, but it was all we had and all there was.

"Our mother only earned \$20 every two weeks as a maid, not enough to take care of us, so she arranged for us to live with our grandparents later in 1955....

"My grandparents always said there would be more opportunities for us. I can still hear my grandfather: 'Y'all goin' to have mo' of a chance than me.' And he was right...And they never lost sight of the promise of a better tomorrow. I follow in their footsteps and I have always tried to give back....

"It is my hope that when these hearings are completed, that this committee will conclude that I am an honest, decent, fair person. I believe that the obligations and responsibilities of a judge in essence involve such basic values."

Throughout his testimony Judge Thomas sought to keep the focus on his personal story of poverty and segregation and to distance himself from controversial positions he had taken in the past. Judge Thomas came before the Committee with a history of speeches and writings in which he had attacked landmark Supreme Court decisions that have provided protection for fundamental rights. As a public official in the Reagan Administration, according to his critics, he had chosen to enforce those laws and court decisions with which he agreed and to ignore or defy those with which he disagreed.

His responses to many of the Senators' questions can perhaps be best characterized as a dismissal of many of the positions he had previously expressed in his writings and speeches. Referring to his writings on natural law as the musings of a "part-time political theorist" and to his civil rights positions as those of a Reagan Administration "advocate", he sought to portray himself as more moderate and flexible than his "paper trail" would indicate. His prior record did not necessarily reflect the views he would take to the Supreme Court, he insisted. Following his first day of testimony, Senator Howell Heflin questioned whether the nominee was undergoing a confirmation conversion, and at the end of the week Senator Heflin questioned whether Judge Thomas was a conservative, closet liberal, or opportunist. Senator Edward Kennedy said: "The vanishing views of Judge Thomas have become a major issue in these hearings."

The dialogue among Senators and the nominee about Judge Thomas' views on the *Roe v. Wade* decision and natural law illustrates Judge Thomas' efforts to distance himself from previous statements.

Roe v. Wade

In response to questions from Senator Leahy about whether he had ever debated the *Roe v. Wade* decision (Supreme Court concluded in 1972 that the fundamental right of personal privacy included a woman's decision whether or not to terminate a pregnancy), decided while Thomas was a student at Yale Law School, he responded:

"Did I debate the contents of *Roe v. Wade*, the outcome in *Roe v. Wade*, do I have this day an opinion, a personal opinion, on the outcome in *Roe v. Wade*, and my answer to you is that I do not."

When Leahy expressed incredulity at the answer, Thomas added:

"Because I was a married student and I worked, I did not spend a lot of time around the law school doing what the other students enjoyed so much, and that is debating all the current cases and all of the slip opinions. My schedule was such that I went to classes and generally went to work and went home."

Senator Patrick Leahy responded:

"Judge Thomas, I was a married law student who also worked, but I also found at least between classes that we did discuss some of the law, and I am sure you are not suggesting that there wasn't any discussion at any time of *Roe v. Wade*."

Judge Thomas:

"Senator, I cannot remember personally engaging in those discussions."

Some opponents of Judge Thomas found his statement that he had never debated nor held a personal opinion on the *Roe* decision unbelievable in light of his praise of an article by Lewis Lehrman that argues that *Roe* should be overturned, and that fetuses should be given constitutional protection and thus abortions should be declared illegal under the Constitution. Judge Thomas in a 1987 speech, "Why Black Americans Should Look to Conservative Policies," presented at the Heritage Foundation referred to the Lehrman article as a "splendid example of applying natural law."

In response to questions about his characterization of the article, Judge Thomas said he "did not endorse the article," and made reference to the article only to try and convince his audience concerning his views on the need for strong enforcement of civil rights laws. He further said that he had only skimmed the Lehrman article before referring to it in the speech and had not read the article in preparation for his confirmation hearings.

"I was speaking in the Lew Lehrman Auditorium of the Heritage Foundation. I thought that if I demonstrated that one of their own accepted at least the concept of

natural rights, that they would be more apt to accept that concept as an underlying principle for being more aggressive on civil rights. My whole interest was civil rights enforcement."

Natural Law

Judge Thomas' reference to the Lehrman article as a "splendid example of applying natural law" also raised questions about his views on natural law and its application to constitutional decision making. In an article, "The Higher Law Background of the Privileges and Immunities Clause," published in the *Harvard Journal of Law and Public Policy*, Judge Thomas asserted 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."

In addition, in remarks he made as part of a panel discussion, "Affirmative Action: Cure or Contradiction?", *Center Magazine*, Judge Thomas asserted that the Constitution cannot be comprehended without reference to higher law:

"The rule of law in America means nothing outside constitutional government and constitutionalism, and these are simply unintelligible without a higher law. Men cannot rule others by their consent unless their common humanity is understood in light of transcendent standards provided by the Declaration's "Laws of Nature and of Nature's God." Natural law provides a basis in human dignity by which we can judge whether human beings are just or unjust, noble or ignoble."

During his confirmation hearing, however, Judge Thomas said that he did not "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." He further asserted that his present views on natural law did not represent a confirmation conversion:

"I have been consistent on this issue of natural law. As I indicated, my interest in the area resulted from an interest in finding a common theme and finding a theme that could rekindle and strengthen enforcement of civil rights, and ask the basic or answer a basic question of how you get rid of slavery, how do you end it."

Judge Thomas also said:

"My point has been that the framers [of the Constitution]...reduced to positive law in the Constitution aspects of life principles that they believed in, for example, liberty. But when it is in the Constitution, it is not a natural right; it is a constitutional right. And that is the important point.

"But to understand what the framers meant and what they were trying to do, it is important to go back and attempt to understand what they believed, just as we do when we attempt to interpret a statute that is drafted by this body, to get your understanding. But in constitutional analysis and methodology, as I indicated in my confirmation to the Court of Appeals, there isn't any direct reference to natural law....At no time did I feel nor do I feel now that natural law is anything more than the background to our Constitution. It is not a method of interpreting or a method of adjudication in the constitutional law area."

Apart from its implications about his views on rights to reproductive freedom, concern about Thomas' possible use of "natural law" stems from the fact that a theory of natural rights has been invoked in the past to strike down social welfare measures in the name of protecting "the liberty of employers to conduct business free of health and safety regulations." And earlier in 1873 in *Bradwell v. Illinois* the Supreme Court denied a woman a license to practice law, asserting that:

"...civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman.... The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life....The paramount destiny and mission of woman is to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."

Today, proponents of natural law use this theory to support their attacks on laws enacted during this century

to protect the environment, to permit the taking or use of property for public purposes, and to regulate child care and senior citizens facilities.

As with the Lehrman article, Judge Thomas at the hearing also sought to qualify his earlier praise of an article on the status of working women by Thomas Sowell, and to distance himself from the views expressed in a report issued by the White House Working Group on the Family on which he was the highest ranking Administration official.

Women in the Workforce

For a more thorough discussion of this topic, see the Women's Legal Defense Fund, *Endangered Liberties: What Judge Clarence Thomas' Record Portends for Women* from which this section borrows.

In 1988, in an article, "Thomas Sowell and the Heritage of Lincoln: Ethnicity and Individual Freedom," published in the *Lincoln Review*, Judge Thomas praised Thomas Sowell's analysis of working women's status. The Sowell analysis rejects the idea that discrimination plays an important role in limiting women's lives and their economic security and individual opportunity. Sowell concludes that differences in pay and career advancement stem merely from women's own behavior and choices, claiming that women prefer jobs and careers with greater flexibility -- yet lower pay -- to accommodate their roles as wives and mothers. Sowell makes no mention of data showing that a substantial portion of the wage gap between men and women (even after controlling for factors like experience, education, training, and length of workforce attachment) is attributable to discrimination.

Judge Thomas wrote that Sowell's work is:

"...a useful, concise discussion of discrimination faced by women. We will not here 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, Sowell presents a much-needed antidote to cliches about women's earnings and professional status."

Judge Thomas concluded that "in any event, women cannot be understood as though they were a racial minority group, or any kind of minority at all."

Judge Thomas had also stated prior to the hearings that:

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

During his testimony, Judge Thomas sought to distance himself from Sowell's conclusion saying "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."

"Senator Kennedy: Mr. Sowell goes on to suggest that employers are justified in believing that married women are less valuable as employees than married men. He says that if a woman is not willing to work overtime as often as some other workers or needs more time off for personal emergencies then that makes her less valuable as an employee or less promotable to jobs with heavier responsibilities.

"He says the physical consequences of pregnancy, childbirth alone are enough to limit a woman's economic option and then he reaches some troubling conclusions about women in the workplace based on stereotyped gender roles. Yet you call those descriptions of women workers a much needed antidote to cliches.

"Aren't those views the very cliches that women have been trying to escape for so long?

"Judge Thomas: Senator, I think, that someone like a Tom Sowell is certainly one who is good at engaging a debate, and I think it is important that there be individuals who look at statistics in this way.

"I did not indicate...that I agreed with his conclusions but I think this is an important point...the point is I think sometimes that we can be involved in debate and make generalizations, and it is always good to have someone who has a different point of view and have some facts to debate that."

White House Working Group on the Family

In 1986 Judge Thomas was part of a White House Working Group on the Family that issued a report, *The Family: Preserving America's Future*. He was the highest ranking Administration official on the Working Group. The report denounced a number of Supreme Court decisions stating: "Taken together, these *and other* decisions by the Supreme Court have crippled the potential of public policy to enforce familial obligations, demand family responsibility, protect family rights or enhance family identity."

An example is the report's criticism of *Moore v. City of Cleveland*: "the court denied to the citizens of that predominantly black community the power to zone their town to limit occupancy of dwelling units to members of a single family, in order to protect residents from the downward drag of the welfare culture. In doing so, *Moore* in effect forbade any community in America to define 'family' in a traditional way."

As reported in the NAACP Legal Defense Fund Analysis of the Views of Judge Clarence Thomas, the facts of the *Moore* case are that the petitioner in the case was a 63 year old grandmother who had been prosecuted and sentenced to jail for permitting her 10 year old grandson to live in her home. The grandson had lived with her since his mother died when he was still an infant; the grandmother was the only maternal figure the 10 year old had had in his life. The city insisted, however, that the 10 year old was an "illegal occupant" in his grandmother's home, and demanded that he be removed. His presence was unlawful under a city ordinance because the grandmother also shared her home with one of her sons and his son. The presence of the two grandsons in a single home violated city law, which forbade cousins from residing in a single family dwelling.

Justice Brennan, in a concurring opinion, stressed the impact the ordinance would have on blacks:

"In today's America, the 'nuclear family' is the pattern so often found in much of white suburbia...The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living....The 'extended' form is especially familiar among black families. We may suppose that this reflects the truism that black citizens, like generations of white immigrants before them, have been victims of economic and other disadvantages that would worsen if they were compelled to abandon extended for nuclear living patterns....In black households whose head is an elderly woman, as in this case, the contrast is even more striking: 48% of such black households, compared with 10% of counterpart white households, include related minor children not offspring of the head of the household."

In response to questions about the Working Group report, Judge Thomas said: "To this day, I have not read that report," that his only interest in the group was to address problems of low-income families, and that the only section he read was on low-income families. He also said that he did not necessarily agree with sections of the report although he did not explain the basis for his disagreement as he had just indicated that he had not read the report.

"Senator Biden...In 1986 as a member of the Administration, you were part of...the Administration's Working Group on the Family. This group put out what I think can only be characterized as a controversial report....Did you ever read the report, Judge?"

"Judge Thomas: The section that I read was on the family. I was only interested in whether they included my comments on the low-income family."

"Senator Biden: But anytime, even after it was published?"

"Judge Thomas: No, I did not."

"Senator Biden: You haven't to this moment read that report?"

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

"Senator Biden: There was an awful lot of discussion in the press and controversy about it.

"Judge Thomas: There was controversy about it. I was interested in low-income families. If you work with the domestic policy group or the working groups at the White House what one quickly learns is that you send your input, that that input is reduced to what they want it reduced to and then the report is circulated in final."

Affirmative Action

During the hearing, Senator Specter asked Judge Thomas probing questions about his views on affirmative action. Excerpts from those exchanges are provided in some detail below.

As reviewed in the Lawyers Committee for Civil Rights Under the Law's "Statement on the Nomination of Judge Clarence Thomas as an Associate Justice of the United States Supreme Court", Judge Thomas has consistently voiced reservations about the use of race- and gender-conscious remedies for discrimination. However during his first two years as Chair of the Equal Employment Opportunity Commission he usually was an advocate for existing EEOC policies including affirmative action. This stance often put him at odds with others in the Reagan Administration. But after President Reagan's re-election in 1984, Judge Thomas began to advocate dramatic changes in EEOC policy. In an interview on November 14, 1984, Judge Thomas told the *Daily Labor Reporter* that the next term would be marked by concerted efforts to promote the President's position on affirmative action:

"EEOC's next four years will be marked by concerted efforts to set forth the Reagan Administration's position on affirmative action --- favoring victim-specific remedies and moving away from quotas and proportional representation in both its conciliation efforts and court-approved settlements --- Chairman Clarence Thomas says."

During Thomas' tenure as Chair of EEOC the Commission abolished the unit set up to secure systemic relief including goals and timetables, and filed only the kinds of cases "that one former EEOC official described as cases employers write off as the cost of doing business." In 1986, Thomas told the *Washington Post* that EEOC had abandoned the use of goals and timetables and that it would no longer approve settlements involving the use of such goals.

For a brief period Thomas argued that goals and timetables had been rendered unlawful by the Supreme Court's decision in the 1984 *Stotts* case. The Reagan administration, perhaps disingenuously, interpreted the *Stotts* decision to "preclude persons who are not actual victims of discrimination from receiving preferential treatment as a part of any remedial measures designed to overcome the effects of past discriminatory policies." In fact, the Supreme Court addressed only the issue of layoffs in *Stotts*, not whether race consciousness is permissible in hirings and promotions. The Court held that a bona-fide seniority system takes precedence over an affirmative action plan which does not address the matter of layoffs.

But Thomas was forced to abandon this rationale upon the failure of his effort, along with Attorney General Edwin Meese, to repeal the goals and timetables provision of the Executive Order on Affirmative Action, and when the Supreme Court in 1986 in *Local Number 93, Firefighters v. Cleveland* upheld the use of goals and timetables as a court ordered remedy. He then reverted to an explanation for rejection of affirmative action based on his "personal disagreement" with the Supreme Court's approach, and his belief that such remedies had not benefitted blacks and were a "sideshow in the war on discrimination."

During his testimony as Supreme Court nominee, Judge Thomas, a beneficiary of affirmative action while a student at Yale Law School, spoke in favor of affirmative action preferences in education but not in employment.

"Senator Specter: Let's assume...that somebody who comes to Yale, an African American, a product of an inferior elementary school, high school and college, but has the potential, why shouldn't Yale give a preference...to give that person an opportunity to blossom fully, even though on the test scores at the moment that African American doesn't measure up quite to the white person he has displaced?

"Thomas: ...let me explain to you what I have supported and what we argued for when I was in school, and that was that schools like Yale...should look at how far a person has come as a part of the total person, that you can look at kids who had gone to elite schools or had the finest family background and professional parents, or you could

take a kid from the inner-city who did not have all those advantages, but had done very, very well...I think the law schools, that the colleges involved attempted to determine: are these kids, with all those disadvantages, qualified to compete with these kids who have had all the advantages. That is a difficult, subjective determination, but I thought that it was one that was appropriately made. One of the aspects of that is that the kids could come from any background of disadvantage. The kid could be a white kid from Appalachia, could be a Cajun from Louisiana, or could be a black kid or Hispanic from the inner-cities or from the barrios, but I defended that sort of a program then and I would defend it today.

"Specter: ...if a preference there for the disadvantaged kid, as you put it, who has come a long way, but he can't quite measure up at that moment, why not a preference in employment?

"Thomas: ...I have looked at education as a chance to become prepared...education was that chance to be prepared to go on in life. It was an opportunity to gain opportunities....

"Specter: ...that is fine for those of us who have gone to Yale, but what about the African American youngster who doesn't have an educational background and is fighting for a job...if you have someone who is a 10th grade dropout and is struggling to get a job in a trade union in Philadelphia or in New York...why not give that person a preference, because of the discrimination which has affected that person in his schooling, where that person has the potential to be ultimately as good as, if not better than the white applicant who he displaces?

"Thomas: ...I don't think that the cases necessarily break down that way...it doesn't say that this kid has to come from a disadvantaged background...it is race specific, and I think we all know that all disadvantaged people aren't black and all black people aren't disadvantaged....

"Specter: ...focusing on minorities for just a moment, because that is the central problem, when you talk about the lack of education opportunity of African-Americans, it is true across this country, and that is why it seems to me that the logic that you accept on a preference to get into Yale Law School ought to be applied as a preference to get a job in New York City, where the local discriminated, or Philadelphia where the Philadelphia plan had been put into operation, where there is good reason to conclude that that person has the potential to succeed."

Senator Specter also questioned Judge Thomas in detail about the Judge's opposition to the use of goals and timetables even in cases of egregious discrimination. Judge Thomas maintained his view that such remedies are unfair because they penalize white workers. The following exchange is illustrative of Judge Thomas' views:

"Specter: Very briefly, the facts...[in the case *Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC*,] are these: In 1964, the New York State Commission found discrimination against blacks, and the New York trial court ordered changes. In 1971, Federal litigation was started to stop discrimination. In 1975, the Federal court found discrimination and bad faith, and it was upheld by the Court of Appeals, which found that the union in the employment practices had consistently and egregiously violated the Civil Rights Act, and ordered a goal.

"In 1982, there was a contempt citation, in 1983 a second contempt citation. The discriminators were found guilty of contempt. In 1986, the United States Supreme Court upheld the contempt citation, noting a standard of persistent and egregious discrimination and found intentional discrimination, and the EEOC took a position that there should be an award of relief only to the actual victims of unlawful discrimination.

"Now, given the background of what had happened, it is clear that the future would have held more discrimination for the black workers there, and in setting a goal, the Court was putting the employers on notice that they had to move toward hiring blacks, and it was a flexible goal and the timetables had been extended.

"So, given the history, it was pretty plain that in the future there would be discrimina-

tion against specific individuals, and when you dealt with a base of about 3 percent, it was plain that there had to be more blacks qualified. Whether you could get to a higher number or what number you could get to was uncertain. But wasn't that remedy reasonably calculated, in a remedial sense, to prevent discrimination against specific blacks in the context where it was obvious that would happen, and in a context where there would be blacks at least equal to, if not superior to, some of the whites who would be competing for the same jobs?

"Thomas: ...[This case is] one among many of those cases involving this difficult area of relief to non-victims of discrimination during the 1980's, and the Supreme Court was going back and forth...this is an issue that reasonable people have disagreed on, I think that people who are well-intentioned all want to make sure that you do include individuals who have been excluded, but at the same time not violate the sense of fairness that is in the statute...Independent of...[EEOC] processes and as an individual in reflecting on this, I do recollect urging the Solicitor [of EEOC] to argue for contempt proceedings in this case in the brief, and that there be sanctions brought against such an egregious violation of a court order.

"That was consistent with the approach that I think I attempted to outline in some of not only my speeches, but in some of my other writings, that when there was a violation of the anti-discrimination laws or a court order that was in place to resolve it, that the appropriate response should not be the numerical approach, but, rather, that the appropriate response should be for the court to use its powers, its inherent powers to force compliance.

"Specter: Judge Thomas, I quite agree with you that reasonable men can differ on these issues, and I think that is one of the good features about your participation in this field, because you have been able to advocate positions, as a black American which had unique standing. When you were against affirmative action, that has special significance, because of your unique background.

"You have affirmative action having been sanctioned on all sides by the National Association of Manufacturers and by the liberals on one side and the conservatives on the other. When you talk about contempt citations, I agree with you, but it is very hard -- and I have had experience in the law enforcement field -- to deter people or to penalize them enough to really get the job done, to materially affect their future conduct. So, that brings us back to the remedy of establishing a flexible goal, which at one time you had agreed with.

"Now, you have just repeated the position you have taken consistently, and that is that there should not be relief to non-victims, but my question to you goes to the likelihood of future victims. In a context where blacks have been egregiously discriminated against, it is clear that that is going to happen in the future under the same circumstances, and the way to prevent future victims is to set the goal, and my question to you is, isn't that a reasonable course which the Federal court followed and the Supreme Court upheld, and, of course, which you disagree with?

"Thomas: It is certainly the course that the Supreme Court has upheld, and I disagreed with that as certainly [as] a policy-maker.

Other areas about which Judge Thomas was questioned included his failure to enforce the law while he was Assistant Secretary for the Office for Civil Rights of the Department of Education (OCR); the mishandling of age discrimination cases and the underserving of the Hispanic community during his tenure at EEOC; and his criticism of Supreme Court decisions applying the Voting Rights Act.

Failure To Enforce The Law At The Office For Civil Rights

(As reported in the Statement of the Leadership Conference on Civil Rights Opposing the Confirmation of Judge Clarence Thomas to the United States Supreme Court)

From May 1981 to May 1982, Thomas served as Assistant Secretary for the Office for Civil Rights of the Department of Education (OCR). In that capacity, his major responsibility was to carry out the laws that re-

quired institutions (such as public school systems and universities) that received federal funds to refrain from discrimination on the basis of race (Title VI of the Civil Rights Act of 1964), sex (Title IX of the Education Amendments of 1972) and disability (Section 504 of the Rehabilitation Act of 1973).

Strong enforcement of these statutes during periods in the 1960s and 1970s had been instrumental in bringing about gains in equal educational opportunity throughout the nation. In the early 1970s, however, a refusal to carry out the law had led to a successful court suit against the Department (then HEW) by civil rights groups (*Adams v. Bell*). When Thomas took office, the Department was operating under a settlement that required OCR to investigate complaints, conduct compliance reviews and initiate enforcement action in accordance with specific time frames.

In 1982, the federal district court in *Adams* held a hearing concerning charges that OCR had failed to comply with the court order. At the hearing Thomas admitted that he was violating the court-ordered requirements for processing civil rights cases:

When asked about this during the hearings, Judge Thomas said that he had done everything to comply with the court order.

"Senator DeConcini: ...you admitted in court that you were violating the court order rather egregiously, and the court found that the order was being violated in many important aspects....what troubles me about it is, when I practiced law, an injunction or a court order is pretty powerful stuff, and if you disagreed with it, you can go to jail...Also, if I disagree with it...I would immediately file some sort of action to try to get relief in another court, if I had to...instead of violating the court order, like it appears you said I am violating it and that is it, I can't say anything, judge, but I am violating it.

"Judge Thomas: Well, that certainly wasn't my attitude Senator....I have not gone back and looked at all the documents during my OCR days...We were attempting...and perhaps we were too slow, and I had expedited a study that was taking place prior to my going to the agency to determine what the time frame should be. I do not remember, however, to what extent we communicated our efforts to the Court. Again, that has been ten years ago....We did everything we could to comply with that court order. And I think ultimately what the judge realized is that we were doing all that we could, that it was impossible for us to comply with it."

Age Discrimination Cases At The EEOC

(As reported in the LCCR Statement)

In 1987 and 1988, Congressional committees discovered that the EEOC under Judge Thomas' had failed to investigate age discrimination charges within the two-year statute of limitations for filing suit as specified in the Age Discrimination in Employment Act. As a result, thousands of older workers had lost their rights to sue in federal court.

Judge Thomas' response to this problem did him little credit. Initially the EEOC admitted to only 78 lapsed discrimination charges, a figure which grew in several stages to more than 13,000. When the problem of lapsed cases persisted more than a year after the problem had been discovered, Judge Thomas sought to place responsibility elsewhere, blaming state and local fair employment agencies that investigate charges under contract with the EEOC. He also tried to minimize the problem by claiming that victims of age discrimination could still bring suit under state law. Congress had to solve the problem by twice enacting legislation extending the statute of limitations.

Judge Thomas also failed to follow the law protecting older people in dealing with the obligation of employers to make pension contributions for workers over the age of 65. Despite an EEOC policy decision to rescind a regulation that permitted employers to freeze the pension accounts of people who worked beyond the age of 65, Judge Thomas failed to follow through.

During his testimony Judge Thomas said that he did everything he could to respond to the problem of the lapsed complaints, putting the blame primarily on EEOC staff.

"The problem with respect to the lapse is...an administrative problem in the field offices. It is not a problem that comes from the period that the cases are sent to the

headquarters office....We did everything, and I certainly did [during] my tenure, with the resources that I had -- we have a very spread-out agency -- to respond to that problem. As you remember, it was a difficult problem. If I could have investigated every one of those cases, I would have...the point was that we were trying to make an entire agency respond to something that I felt strongly about and I know that you felt strongly about. It was enormously frustrating. I did as much as I could possibly do...but getting an agency to respond, a bureaucracy to respond is sometimes far more difficult than wanting it done."

(For a more thorough discussion of EEOC enforcement during Judge Thomas' tenure see *CIVIL RIGHTS MONITOR*, vol. 2, no. 3 March/April 1987; vol. 1 no. 5, June 1986; vol. 1 no. 3, December 1985.)

EEOC Underserving Of The Hispanic Community

(As reported in the National Council of La Raza report, *The Empty Promise: Civil Rights Enforcement and Hispanics*.)

Hispanics have consistently argued that their community does not benefit equitably from federal civil rights enforcement efforts. In the EEOC's own 1983 report, "Analysis of the EEOC's Services to Hispanics in the United States" (1983 Hispanic Charge Study), an EEOC-appointed task force unanimously found that the EEOC was not providing equivalent service to all protected groups, particularly Hispanics.

In 1990, NCLR conducted its own statistical analysis of EEOC data on charges, dispositions and litigation since the issuance of the 1983 Hispanic Charge Study. Overall, this analysis indicates that little or no improvement has been made by the EEOC since 1983. In fact, given the enormous growth of the Hispanic population during the last decade -- and the concomitant increase in the Hispanic proportion of the labor force -- NCLR's analysis shows a relative decrease in the EEOC's service to the Hispanic community over the last decade.

NCLR's analysis shows that, from 1985 through 1990, charges alleging discrimination based on Hispanic national origin have continued to constitute a disproportionately small percentage of the EEOC's total charge receipts. Charges from Hispanics during this period constituted only 4.15% of the EEOC's total charge caseload.

During his testimony, Senator DeConcini questioned Judge Thomas about the results of the NCLR report:

"Senator DeConcini: ...a study conducted by the National Council of La Raza indicates that...while the Hispanic population in the United States has grown in the last decade from 6 percent of the total...in 1980 to over nine percent of the total population today, the percentage of the EEOC total charge caseloads filed by Hispanics was only 4.15 percent....

"I realize a little bit of that time you weren't there. But does this figure reflect a weakness in the EEOC effort to pursue complaints filed by Hispanics, or does it suggest that the incidence of discrimination against Hispanics is lower than other protected groups?

"Judge Thomas: We did everything in our power during my tenure to reach out.

"Senator DeConcini: Well, did you, really, Judge? Did you go and meet with the Council of La Raza, the GI Forum, or any of the other national or local Hispanic groups, to see what they would suggest you do, or to ask what they would suggest you do, or to ask for their counsel and suggestions and advice?

"Judge Thomas: Senator, I can't name, again, sitting here, all of the groups that I have met with, but one of our commissioners in particular was very, very active, and he and I spent a great deal of time together, because he would go, and he would report back on what the perceptions of the problems were and approaches that we could take. Again, he and I were there the entirety of my tenure, with the exception of a few months. And a second commissioner who was also Hispanic, he and I worked very closely together to begin to address some of these problems."

Voting Rights

(As reported in the NAACP Legal Defense Fund, An Analysis of the Views of Judge Clarence Thomas.)

In 1988, Judge Thomas denounced, without identifying, Supreme Court decisions applying the Voting Rights Act:

"The Voting Rights Act of 1965 certainly was crucial legislation. It has transformed the policies of the South. Unfortunately, many of the Court's decisions in the area of voting rights have presupposed that blacks, whites, Hispanics, and other ethnic groups will inevitably vote in blocs. Instead of looking at the right to vote as an individual right, the Court has regarded the right as protected when the individual's racial or ethnic group has sufficient clout."

This is consistent with Judge Thomas's statements that the 1982 amendments to section 2 were "unacceptable", and his somewhat obscure objection to the Supreme Court's redistricting decisions.

The "many" Supreme Court decisions referred to by Judge Thomas presumably are *White v. Register*,...and *Thornburg v. Gingles*...The latter decision implemented the 1982 amendments to section 2 of the Voting Rights Act, which prohibits election laws and practices with a racially discriminatory effect. The most important application of this prohibition is to forbid schemes that dilute minority voting strength.

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

Thus, by mischaracterizing what the Court has actually held, Judge Thomas is able to denounce it as focusing on "group" rights and requiring relief in cases where, he asserts, there has been no showing of discrimination against individuals.

TESTIMONY FROM OTHER WITNESSES

The Senate Judiciary Committee heard from 90 witnesses beginning on the afternoon of September 16 and ending on September 20. The first witnesses were members of the American Bar Association Standing Committee on the Judiciary, which rated Judge Thomas qualified, with two of its 15 members rating him unqualified and none rating him well qualified. Ronald L. Olson, a Los Angeles attorney, who chaired the ABA committee said the two members who found him unqualified believed that "on the basis of professional competence, he did not measure up." Olson continued that the minority view of Judge Thomas' legal writings was that they were "shallow", did not evidence the scholarship that one would like to see from a Supreme Court nominee and purposely ignored opposing arguments.

Judge Thomas was supported by the Dean of the Yale Law School, Guido Calabresi, who testified that while he "disagree[d] with many, perhaps most, of the public positions that Judge Thomas has taken in the past few years" he was supporting the nomination because he believed Judge Thomas' "history of struggle and his past openness to argument, together with his capacity to make up his own mind, make him a much more likely candidate for growth than others who have recently been appointed to the Supreme Court and who, whatever they may have said at their confirmation hearings, had in fact been set in their ways and immovable back to their law school days.

"Such a capacity for growth, as a Justice develops his or her own Constitutional philosophy, is essential if a person is to become a truly great Justice. None of the great Justices of the past, not Justice Black, nor Justices Harlan or Stewart, not Justice Holmes nor Justices Brandeis or Cardozo, not even Justice Frankfurter - for all his years of teaching Constitutional Law - came to the Court fully formed. The Court itself, and the individual cases that came before them, shaped them, even as they shaped the Court. In the end it was the combination of character, ability, willingness to work really hard, and openness to new views that made them great Justices. These qualities, if there truly *is* openness, matter far more than past positions. I hope and believe that Judge Thomas has these qualities, and that is why I am here today."

In contrast, Erwin N. Griswold, former Dean of the Harvard Law School, spoke in opposition to the nomination and asserted that Judge Thomas was not qualified to sit on the Supreme Court:

"No one questions that Judge Thomas is a fine man, and deserves much credit for his achievements over the past forty-three years. But that does not support the conclusion that he has as yet demonstrated the distinction -- the depth of experience, the broad legal ability -- which the American people have the right to expect from persons chosen for our highest judicial tribunal. Compare his experience and demonstrated abilities with Charles Evans Hughes or Harlan Fiske Stone, with Robert H. Jackson or the second John M. Harlan, with Thurgood Marshall and Lewis H. Powell, for example. To say that Judge Thomas has such qualifications is obviously unwarranted. If he should continue to serve on the court of appeals for eight or ten years, he may show such qualities, but he clearly has not done so."

Some of the most compelling testimony was provided by four African American law professors who opposed the nomination. The first panel on Tuesday, September 17, 1991 was comprised of Drew S. Days, III, Yale Law School, Christopher Edley, Jr., Harvard Law School, and Charles Lawrence, Stanford Law School.

Professor Days was the first to speak:

"I was struck and, I must say moved, by the common theme of many of your eloquent opening remarks when these hearings got underway a week ago about your vision of the place of the Supreme Court in our system of government. You spoke of the Court's duty 'to administer justice,' of the need for its members to be 'able guardians of rights,' of its function as 'a people's court' dealing 'with real people, their rights, duties, property, and most importantly their liberty.' You expressed your concern that it be 'the champion of the less fortunate,' standing 'against any ill winds that blow as [a] haven of refuge' of the 'weak or helpless or outnumbered.'...With the departure of Justices Brennan and Marshall, the Court and the Country deserve a new Associate Justice capable of serving as a staunch defender of rights secured by the Constitution and laws of the United States...The Administration would like to persuade us that Judge Clarence Thomas is that person. But I, for one, have seen little in Judge Thomas' government service, writings and speeches, or, indeed, in his testimony during the past week before this Committee to convince me that he would be a champion for those who turn to the Court for protection or that he has the capacity or inclination to make it a kinder and gentler institution than it is today.

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

"I, for one, welcome challenges to orthodoxy, in civil rights or elsewhere. But I have difficulty accepting challenges from people who demonstrate a woeful ignorance of history. Judge Thomas' articles and speeches fall into that category...When Judge Thomas attacks affirmative action, or school desegregation or efforts to ensure minorities a meaningful role in the political process, it is evident that he lacks a basic understanding of the civil rights struggle in America.

"One would not gather from reading his articles or speeches, for example, that administrative agencies and courts adopted affirmative action 'goals and timetables' as a response to what, in many instances, were years of resistance by employers or unions to the opening up of employment opportunities to minorities and women...In several of his articles Judge Thomas offers his own rewriting of the Supreme Court's 1954 opinion in *Brown v. Board of Education*...His recitation and analysis seem devoid of any sense of the difficult legal campaign waged to overturn 'separate but equal' doctrine. And it does not show an awareness of the degree to which school desegregation doctrine after *Brown* was an understandable response to organized often massive, resistance to even minimal change in all-white, all-black assignment patterns for over a quarter century. I make these observations not to suggest that further debate over what we do about segregated education in America in the 1990s is unwarranted or that the

old approaches may not need to yield to new ones. But I seriously doubt that it can be a constructive one on Judge Thomas' terms."

Professor Christopher Edley said:

"In summary, my central point is this: The Constitution forces the executive and legislative branches to share responsibility for picking justices, and thereby share influence over the course of Constitutional history.

"In taking the measure of the nominee, you should look to the whole record, and recognize that good character and unimpeached integrity did not prevent *Dred Scott*, or *Plessy*, or *Lochner*.

"In the final analysis, it is not the character of this man that must be at issue, but the character of his record. Yet the heart of the Administration's affirmative case is Judge Thomas' personal story and character, in hopes, perhaps, that this strategy will undergird his credibility and present an image strikingly more attractive than the piles of speeches and abstractions.

"But that voluminous written record raises many grave concerns, to which the nominee offers one of three responses:

- First: 'Although what I said may sound extreme, I was really trying to make a far less controversial point.' Repeated so often, this lacks credibility.
- Second: 'That was the position I took as a policy official in the executive branch; as a judge, I do not make policy.' This argument is wrong, misconceiving the role of the Supreme Court and process of judging.
- Third: 'I have an open mind on that subject.' When applied to fundamental matters, this is almost *disqualifying*. A well-qualified nominee should at least be able to suggest, however tentatively, the framework for his or her analysis. How else can you discern someone's constitutional vision --the key question before you?

"You have his documents to analyze, and you have his credibility to assess. But here is what I believe you are left with in two of the more critical dimensions: civil rights and the separation of powers.

"First, in civil rights, the close questioning did not demonstrate that the nominee's views fall within the broad bipartisan consensus. If Judge Thomas joins the Court that gutted *Griggs* in a fit of activism, what grounds are there for confidence that he will dissent from further judicial activism of the same sort -- judicial activism to reverse those statutory and constitutional holdings he attacked so forcefully over the years?

"The second critical dimension is broader. Judge Thomas, on his record, is certainly an unlikely *Congressional* pick for referee or partner in the separation of powers structure...

"And your power includes this confirmation process. It is not for the nominee or the White House to design. Mr. Chairman, *this Committee* will decide whether there is to be, as you put it, a 'Thomas standard.' You will choose whether to reward a process that favors evasion over candor, conversion over consistency, platitudes over analysis, political scripts over constitutional debate, and selective memory over substantive command."

Professor Charles Lawrence told the Committee:

"It is with considerable anguish that I come before this committee to oppose the confirmation of Judge Clarence Thomas. No one who has himself experienced the headwinds of American Racism can easily oppose an individual who has traveled the same

buffeted road. No one who has been participant and witness to the courageous struggles that have opened doors so long closed to us is anxious to say that one of our own should not pass through one of those doors. But after a long and careful consideration of Judge Thomas' record as a public official, after listening to his testimony before this committee, I find that I must oppose him...

"Thurgood Marshall chose the path of leadership within his own community, of legal advocacy on behalf of those who were least powerful, of constant challenge to the institutions and politicians who exploited race and poverty. His way was to speak truth to power. Judge Thomas has come to this crossroad by a very different route. His choice was to serve those who are most powerful in this society and he has served them well. The President has nominated Judge Thomas to the Supreme Court precisely because he has proven his willingness to advance the ideology of his patrons without dissent. He has demonstrated his loyalty as an administration footsoldier. He has been an eager spokesperson for the agenda of the radical right. One cannot help but wonder what this history of accommodation has done to Clarence Thomas's character. In always striving to please those who have been his benefactors, has he lost himself? It is somehow not surprising that we have heard him, in the course of these hearings, disavow so much of what he has said before...

"It is your duty to reject this nomination and reject each nominee that follows until you are assured that this new Justice will stand against the current Court's assault on *Roe v. Wade*, *Brown v. Board of Education*, and *Griggs v. Duke Power*. It is not enough to guess, to hope, or even to pray, as I have, that if confirmed, Judge Thomas will grow and change. It is your responsibility to insure the American People that the legacy of Justice Marshall will live on."

On the afternoon of September 17 the testimony of Patricia King, Professor at the Georgetown Law Center, was extremely moving because of her recitation of her own rise from poverty and segregation, and her assertion that Judge Thomas' views on affirmative action and discrimination were particularly harmful to black women.

"As a black woman, it is difficult for me to oppose the nomination of a black individual who has known great personal struggle. Nevertheless, Judge Thomas's extensive record and personal posture is so antithetical to the interests of women and blacks -- especially black women -- that I feel an obligation to testify against his nomination.

"Much has been said of Judge Thomas' rise from Pinpoint, Georgia to the federal bench. Without question, the Supreme Court should include people who have endured such struggles. But we must recognize that that alone is not enough.

"I don't often talk publicly about my own background, but I think it is necessary to put Judge Thomas' life story -- dramatic and compelling as it is -- into the context of life in black America. Judge Thomas' background is not unique among African Americans of our generation. And virtually all of us over the age of forty have had at least one exceptional grandparent who has been injured and severely humiliated by racism in America.

"I grew up during segregation with my sister in a female headed household in a public housing project in Norfolk, Virginia. I attended segregated schools through high school and never knew any white contemporaries. I was able to apply to only one college because we did not have the money for multiple applications. I was able to attend Wheaton College in Norton, Massachusetts, because my uncle put a second mortgage on a house he owned -- the only piece of real property owned by anyone in my family -- in order to pay college bills.

"I am reluctant to parade that family history in public, but not because I am ashamed of my background. I am very proud of my mother's strength and tenacity and the love and determination she employed in raising my sister and me. I am grateful to my uncle for what he did and to the other members of my family for the encouragement they gave me...I don't talk about it simply because it has no impact on my capacity to func-

tion effectively as an adult or professionally as a lawyer and a legal educator. Moreover, my story is not unique in the black community and, frankly, I don't want either people's sympathy or their condescension....

"Though there are similarities between Judge Thomas' background and my own, it seems to me that there is an attitudinal difference that separates us. I readily acknowledge that some of my successes resulted from affirmative action -- my admission to Harvard Law School, for example -- and from the help and support I received from others. In remembering where I came from, I also remember very bright young black people who were not as fortunate as I. They did not have my mother or my aunts and uncles, but if they had had a chance, they could have made some real contributions to this society. But affirmative action came too late for them; they had slipped away before it was firmly established in the late 1960s when I went to law school. Somehow Judge Thomas seems not to remember those he must have encountered along the way who were lost to the darkness simply because there was no help for them. I surely worry about the lack of memory and empathy in someone of my race who is proposed as a Justice for the Supreme Court....

"Judge Thomas' positions on affirmative action, wage discrimination, class action litigation, and other proven remedies for discrimination may possibly become law and public policy that would further limit the choices for black women in the workplace. For example, Judge Thomas has repeatedly attacked well-established Supreme Court case law on affirmative action --even when developed to remedy proven egregious discrimination and despite its demonstrated effectiveness in expanding equal employment opportunity. As head of the EEOC he deliberately chose not to seek goals and timetables in settlement agreements and consent decrees, changing course only in reluctant response to vigorous objections from members of Congress. He drastically cut back enforcement of the Equal Pay Act, the law that prohibits gender-based differentials in jobs that are equal or substantially equal; and, notwithstanding the EEOC's obligation to enforce the laws prohibiting gender- and race-based wage discrimination, he adopted a cramped analysis of Title VII's application to such discrimination that left the claims of many women unremedied. And, in spite of the proven effectiveness of class action litigation, Judge Thomas criticized the EEOC's reliance on that strategy and reduced the resources devoted to it -- causing a substantial reduction in the number of class action cases filed by the agency....

"In conclusion, I want to repeat that this has been a most difficult decision for me to make. Our role models are all too few, and Judge Thomas' personal achievements are indeed impressive. However, we cannot afford to let those achievements blind us to the reality of his record on issues of critical importance to black women -- including, but not limited to, his apparent lack of compassion and understanding of the struggle of the black women in his life. Our role models -- and our Supreme Court justices -- should include not only those men and women who have demonstrated personal achievements, but also those men and women who have demonstrated an understanding of what it takes to rise up and out of oppressive circumstances. All of us who have 'made it' have an obligation to help others, and to recognize that others need our help. Judge Thomas has been able to dream and to reach for his dreams; yet he has ignored the need for or worked to deny that choice to others. He should not be confirmed."

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