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NATION OF JUDGE CLARENCE THOMAS TO BE SSOCIATE JUSTICE OF THE SUPREME COURT F THE UNITED STATES



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HEARINGS

BEFORE THE

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E HUNDRED SECOND CONGRESS

FIRST SESSION

ON

THE NOMINATION OF CLARENCE THOMAS TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

SEPTEMBER 20, 1991

Part 3 of 4 Parts

J-102-40

Printed for the use of the Committee on the Judiciary

AUTHENTICATED
U.S. GOVERNMENT
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HRG. 102-1084, PT. 3

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COMMITTEE ON THE JUDICIARY
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NOMINATION OF JUDGE CLARENCE THOMAS TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

FRIDAY, SEPTEMBER 20, 1991

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 9:07 a.m., in room 325, Senate Caucus Room, Russell Senate Office Building, Hon. Strom Thurmond, presiding.

Present: Senators Biden, Kennedy, Metzenbaum, Heflin, Simon, Thurmond, Simpson, Specter, and Brown.

Senator THURMOND. The committee will come to order. Senator Biden has requested I go ahead and open the hearing and proceed.

We are very pleased to have you all with us, and we are sorry we didn't get to you last night. You may go ahead now and make your statement. We have Mr. Palmer and Ms. Alvarez. We are glad to have them.

PANEL CONSISTING OF JOHN E. PALMER, PRESIDENT AND CEO, EDP ENTERPRISES, INC., ON BEHALF OF THE HEARTLAND COALITION FOR THE CONFIRMATION OF JUDGE CLARENCE THOMAS, AND J.C. ALVAREZ, VICE PRESIDENT, RIVER NORTH DISTRIBUTING

Mr. PALMER. Thank you. Good morning to the distinguished chairman, Senator Thurmond, and to all of the esteemed members of this U.S. Senate Judiciary Committee.

My name is John E. Palmer. I was born in Kansas and reared in Missouri, truly the heartland of our great Nation. I am the president and CEO of EDP Enterprises, Inc., a full food service management company which specializes in feeding military troops. We currently feed our courageous men and women at Fort Leonard Wood, MO, and Fort Riley, home of the Big Red One in the great State of Kansas.

I have traveled to our Nation's Capital this day to represent and raise the collective voice of a group named the Heartland Coalition for the confirmation of Judge Clarence Thomas. This group is comprised of men and women, blacks and Hispanics, Kansans and Missourians, liberals and conservatives, business men and women, elected officials, and, of particular note, prominent Democrats and prominent Republicans.

The common thread which bonded this diverse group of independent minds was a willingness to step forward and boldly call at-

tention to the fact that there does exist a consensus within the minority community of our country which supports the confirmation of Judge Thomas to the Supreme Court of the United States.

We firmly believe that we embody the true essence of mainstream America defined. The coalition formed to demonstrate the bipartisan, culturally diverse support which this nomination has throughout America. We are reflective of the 54 percent who supported Judge Thomas' confirmation prior to even the beginning of these hearings, as illustrated in a USA Today newspaper poll. We are representative of the 63 percent who currently back the confirmation of Judge Thomas, as pointed out in an ABC News poll.

We find Judge Thomas to be a man of integrity, of compassion, of principle, of strong moral fiber, of ability, and a man who is fiercely independent.

Although some views of Judge Thomas may differ from those held by Justice Thurgood Marshall, he, like Justice Marshall, has overcome hardships, discrimination, and deprivation to prepare himself for the challenge of our country's highest court.

It is important that you know the Heartland Coalition is not a professional lobbying group. There is no organizational structure. There are no officers. There exists no committees. Not one single, solitary dollar of the millions of dollars which have changed hands fueling campaigns both for and against the confirmation found its way into the Heartland Coalition.

You see, this coalition evolved as a result of a conversation between two people about the onslaught of unyielding and uncompromising denunciations of Judge Thomas by national civil rights and legislative organizations. The participants in this conversation strongly disagreed; neither believed these positions to be representative of a consensus of the working class minority America.

While the motives of these groups were never at issue nor questioned, one participant in this conversation, Linda Hunter, of Jefferson City, MO, the State capital, said, "Let's call some of our friends, both Republican and particularly Democrats, known, respected leaders throughout the heartland, and see how they feel."

Phone calls were made; schedules were coordinated; consensus on a press release was reached; a date and time was decided; a press conference was held; and, thusly, the Heartland Coalition was born.

The U.S. Supreme Court needs not a man who knows all. We believe that our highest court needs the diversity of youth, vitality, and promise of growth; representation of leadership of the future; one who has dedicated his life to the attainment of a colorblind society; one who has demonstrated the courage to travel the road less traveled by.

Senator THURMOND. I will have to call your attention to the fact that your time is up. You have 5 minutes today. We have lots of witnesses. Can you finish up in just a little bit?

Mr. PALMER. Just a real quick second here, Senator. Thank you.

One whose very life is characterized by an insatiable appetite for knowledge, punctuated by a willingness to work, tempered by an openness to listen and learn as no man or woman has come to the Court yet fully formed; one who has dared to awaken, arouse, and

stir the soul and conscience of minority America by boldly stating that it is broken and in desperate need of repair.

We, from the heart of America, respectfully urge you, the U.S. Senators, elected Members of the most prestigious, distinguished, and powerful body in the world, to vote to confirm Judge Clarence Thomas to the U.S. Supreme Court.

Mr. Chairman, I thank you.

[The prepared statement of Mr. Palmer follows:]

TESTIMONY OF
JOHN E. PALMER
BEFORE THE SENATE JUDICIARY COMMITTEE
IN SUPPORT OF THE NOMINATION OF
JUDGE CLARENCE THOMAS TO THE UNITED STATES SUPREME COURT

Good Evening. To the distinguished Chairman Biden and to all of the esteemed members of this U.S. Senate Judiciary committee. My name is John E. Palmer. I was born in Kansas and reared in Missouri the heartland of this wonderful country. I am the President and CEO of EDP Enterprises, Inc. a full food service management company which specializes in feeding military troops. I currently feed our courageous military troops at Ft. Leonard Wood, Missouri and Ft. Riley, Kansas.

I have traveled to our nation's capital this day to represent and raise the collective voice of a Group named the Heartland Coalition for the Confirmation of Judge Clarence Thomas. This group is comprised of men and women --- blacks and Hispanics --- Kansans and Missourians --- liberals and conservatives --- businessmen and woman --- elected officials -- and of particular note --- prominent democrats and republicans.

The common thread which bonded this diverse group of independent minds was a willingness to step forward --- and boldly call attention to the fact that there exists a consensus within the minority community of our country which supports --- the confirmation of Judge Thomas to the Supreme Court of the

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It is <u>important</u> that you know --- the Heartland Coalition <u>is not</u> a professional lobbying group. There is no organizational structure --- there are no officers --- there exist no committees.

Not one single solitary dollar --- of the millions of dollars --- which have changed hands fueling campaigns both for

and against the confirmation --- found its way into this Heartland Coalition.

You see --- this Coalition evolved as a result of a conversation between two people --- about the onslaught of unyielding and uncompromising denunciations of Judge Thomas --- by national civil rights and legislative organizations. The participants in this conversation strongly disagreed. Neither believed these positions to be representative of a consensus of working class minority America.

While the motives of these groups were never at issue nor questioned --- one participant in this conversation, Linda Hunter of Jefferson City, Missouri, the State Capital said --- Let's call some of our friends --- both Republican and particularly Democrats, known respected leaders throughout the Heartland --- and see how they feel. Phone calls were made --- schedules were coordinated --- consensus on a press release was reached --- a date and time was decided --- a press conference was held, and thusly the HEARTLAND COALITION WAS BORN.

The U.S. Supreme Court needs not ~~a~~ a man who knows all. We believe that our highest court needs:

-- the diversity of youth, vitality and the promise of growth;

-- representation of leadership of the future;

-- one who has dedicated his life to the attainment of a color-blind society;

-- one who has demonstrated the courage to travel the road --- less traveled by;

-- one whose very life is characterized by an insatiable appetite for knowledge -- and punctuated by a willingness to work hard --- tempered by an openness to listen and learn --- as no man nor woman has come to the court fully formed.

-- one who has dared to awaken, arouse and stir the sole and consensus of minority America by boldly stating that it's broken and in desperate need of repair --- while solutions of the past --- have not worked --- it is now time to wake up that sleeping giant called --- HEARTLAND AMERICA --- and enroll us into the solution driven debate.

We from the Heartland of America respectfully urge you --- U.S. Senators, elected members of the most prestigious, distinguished, powerful body in this world --- to vote yes --- to confirm Judge Clarence Thomas to the U.S. Supreme Court.

Thank you very much for this opportunity.

Senator THURMOND. Thank you very much.

Ms. Alvarez, we will be glad to hear from you. This yellow light means you just have about a minute left. The red light means your time is up. And we have to be strict today because we have so many witnesses.

Ms. ALVAREZ. I understand.

Senator THURMOND. Thank you very much. Your whole statement can go in the record, though, whatever you have.

You may proceed.

STATEMENT OF J.C. ALVAREZ

Ms. ALVAREZ. Let me tell you about the first time I met Clarence Thomas. It was 13 years ago in some cramped offices in an annex building that no longer exists today. I had been with Senator Danforth a few months, undoubtedly out of place in an industry that employed very few minorities. If there were a half a dozen of us on the Senate side at that time, that was too many.

Almost daily I heard comments about the fact that I had been hired only because of my minority background. It never occurred to me to flaunt my bachelor's degree from Princeton and my master's degree from Columbia in defense of my presence on the Hill. Affirmative action was like a cloud that kept people from looking directly at my abilities, and I bore it like a scarlet letter of shame.

I was young, 23 years old, and thought perhaps that they were right. I was almost apologetic that I wasn't a white Anglo–Saxon Protestant male or that my daddy had not made some enormous financial contribution to some campaign. And then one day a big black guy with a booming voice comes into the office as the newest addition to Danforth's staff.

Although everyone in the office knew he had worked with Jack before and that he had degrees from Holy Cross and Yale, one cynical staffer decided to challenge him directly by saying, "Let's face it. The only reason you are here is because you went to Yale, and the only reason you got into Yale was not because of your ability, but because of affirmative action."

Clarence turned to him, took a deep breath that filled out his broad shoulders, looked at him straight on and said, "You know, I may have been lucky enough to get in, but I was smart enough to get out."

From that day forward, my life was changed. I would never be ashamed again to be a minority, to be a Hispanic. I had nothing to apologize for, I realized. Most importantly, Clarence that day gave me a confidence that I had never felt before. I realized that affirmative action was perhaps just a minority's version of the same nepotism that had gotten that staffer his job.

OK, perhaps I had been fortunate enough to have had doors opened for me, but I alone had been smart enough, capable enough to walk through those doors.

It has been 13 years, and to say that I know Clarence well is probably an understatement. Although politically and professionally Clarence has grown and developed over the years, the basic character of the man has never changed in all the time that I have

known him. And this is critical to consider when reviewing his appointment to the Supreme Court.

Clarence is a brutally honest man, an independent thinker who is careful and deliberate in making decisions. He is not egotistical enough or presumptuous enough to think that he alone knows everything. Far from it.

When making decisions, I can recall seeing Clarence surround himself with all types of people, from the book-smart people to the people with experience about those specific issues. He always wanted to be sure not just to get the fact, but to get some real-life perspective so that he could make the right decision.

Take, for instance, when Clarence was appointed to head the EEOC. He asked me to join his staff to address the issues of two particular protected classes who had long been neglected by the EEOC: The Hispanics and the handicapped. He pulled out all the stops. There was no limit to the communication or the meetings that he would hold to learn about the issues that were important to these groups.

I can recall at the time how bitter many Hispanic leaders were because they had been ignored or shut out by the EEOC under the previous administration. And they obviously expected no more from Clarence and the Republicans. I arranged meetings between Clarence and these Hispanic leaders, almost expecting to hand out flak jackets at each meeting because they came in loaded for bear, as we say in the Midwest; and they had a good reason to feel that way.

But in every instance I can recall, the Hispanic leadership was shocked and amazed at the reaction and the response of the chairman. He was genuinely sincere in his concern for their cause. He solicited their views and their experiences, shared his perspective, and ultimately responded to the recommendations to address the issues. In every instance, they walked into his office as his enemy and left as his ally.

I must admit that listening to the criticism levied against Clarence last week about his lack of commitment to the Hispanic community sort of shocked me, and I prepared this statement, which I ask be submitted as part of the record.

Senator THURMOND. Your entire statement will be admitted in the record. Mr. Palmer, yours too.

Mr. PALMER. Thank you, Senator.

[The prepared statement of Ms. Alvarez follows:]

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TESTIMONY OF J.C. ALVAREZ
BEFORE THE SENATE IN SUPPORT OF THE
NOMINATION OF CLARENCE THOMAS TO U.S. SUPREME COURT

Let me tell you about the first time I met Clarence Thomas. It was 13 year ago in some cramped offices in an annex building that no longer exists today. I had been with Senator Danforth a few months, undoubtedly out of place in an industry that employed very few minorities (if there were a half dozen of us on the Senate side at the time, that was too many). Almost daily I heard comments that I had been hired only because of my minority background. It never occurred to me to flaunt my bachelors degree from Princeton or my masters degree from Columbia in defense of my presence on the Hill. Affirmative action was a cloud that kept people from looking directly at my abilities and I bore it like a scarlet letter of shame. I was young, 23 years old and thought perhaps they were right. I was almost apologetic that I wasn't a white anglo-saxon protestant male or that my daddy had not made an enormous financial contribution to some campaign.

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From that day forward my life was changed. First, I would never be ashamed to be a minority, to be a Hispanic again. I had nothing to apologize for. Second, and more importantly, Clarence's answer gave me a confidence that I had never felt before. I realized then that affirmative action was just a minority's version of nepotism that had gotten that cynical staffer his job. Perhaps I had been fortunate enough to have had the door open for me, but I alone had been smart enough, capable enough to walk through that door.

I realized that it was time for me to start to think and analyze what I truly felt about my life, my philosophies, and my future. I would not let affirmative action either be a crutch or hang like a dark cloud over my head because I was going to have to rely on my own individual abilities to succeed. Needless to say, in case it is not obvious, I have succeeded and I am very proud of it. After only 2 years with Anheuser-Busch Companies in St. Louis, I was made the first Hispanic female beer distributor in the country with ownership of my own 100 employee business in Chicago. Without even realizing it, Clarence set down the first cornerstone to my success.

It's been 13 years, and to say that I know Clarence well is probably an understatement. Although politically and professionally Clarence has grown and developed over the years, the basic character of the man has never changed in all the time I have known him -- and this is critical to consider when reviewing his appointment to the Supreme Court. Clarence is a brutally honest man, an independent thinker who is careful and deliberate in making decisions. He is not egotistical enough or presumptuous enough to think he alone knows everything. Far from it.

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I can recall how bitter many Hispanic leaders were at the time because they had been ignored and shut out by the EEOC under the Democrats and Eleanor Holmes Norton, and they obviously expected no more from Clarence and the Republicans. I arranged meetings between Clarence and these Hispanic leaders, almost expecting to hand out flak vests at each meetings because these people came in "loaded for bear", as we say in the Midwest, and they had good reason to feel that way.

But in every instance I can recall, the Hispanic leadership was shocked and amazed at the reaction and response of the Chairman. He was genuinely sincere in his concern for their cause. He solicited their views and experiences, shared his perspectives and ultimately responded to their recommendations to address the issues. In every instance, they walked into his office as his enemy and left his office as his ally.

I must admit that listening to the criticism levelled against Clarence last week about his lack of commitment and responsiveness to the Hispanic community surprised me. It prompted me to prepare a statement which I submitted last week and I would like to ask that it be entered here as part of the record. It specifies in detail the level of activity with the Hispanic community during my time with the Chairman.

Anyone who knows Clarence, knows that he does not make a half-assed effort toward a goal. The goal is committed to 500 percent or not at all. The handicapped issue is another example. If I may take time to show you. Clarence wanted to truly demonstrate his commitment to this community and their concerns. As his liaison, I had to learn how to use sign language to be able to communicate with the deaf employees we had working at EEOC -- not communicate in my language, but in theirs. That is the level of commitment Clarence demonstrated in his performance at EEOC and that was what he demanded of his staff.

I told you before about the first time I met Clarence -- let me tell you about the last time I saw him. It happened to be his last week at EEOC -- coincidental that I happened to be there during his first week at EEOC and I was in D.C. visiting during his last week there.

What a surprise to find out that the EEOC was no longer housed in the dungeon, the ghetto that we had been in during Clarence's first years with the Commission. Clarence proudly took me on a tour of his "dream come true" -- things we had talked about trying to achieve during those first few weeks in 1982.

Gone were the beat-up, bargain priced computers that had been obsolete when they were purchased by the previous administration. Charges taken in the field were now directly entered on-line into the system and within seconds could be retrieved in Washington D.C.

The furniture was top of the line. The building was modern and breathtaking, the people were well-dressed. The atmosphere was professional -- pride, enthusiasm, and productivity effused from every corner. Honestly, it was hard to distinguish this "federal government agency" from the infamous "private sector" I had now become a part of.

As we say at Anheuser-Busch/Budweiser, Clarence didn't "hope it happened" -- he "made it happened". At that moment, no one could have been prouder of Clarence than perhaps his granddaddy -- or me. I know what he wanted to achieve. I know the dreams he had dreamed. And I knew at that moment the future impact of the legacy he had left at EEOC. He had left the EEOC with pride, commitment and performance -- the 3 keys to any successful business.

I have known Clarence Thomas as the Chairman, boss, and co-worker. I have known Clarence Thomas as a friend, confidant, and advisor. I have spent time with Clarence "the politician" as well as Clarence "the single parent." I have sat with him at the head table making speeches and I have sat next to him at the movies watching "Bambi". I have seen him laugh and cry, win and lose, be angry and be happy, fight and acquiesce, struggle, deliberate and take a stand.

But more than that, I understand Clarence. We share much in common, having both come from impoverished minority backgrounds, he Black, I Hispanic, yet both "pull up from your bootstrap", strong, driven, determined, and Ivy League educated. I know and I understand what it has taken to make and mold the character of this man. I can empathize with Clarence because I have lived the Hispanic female version of his life.

I have heard many comments over the past few weeks about his abilities -- whether he is the best and the brightest, whether he is the best man for the job. I am not a lawyer, so I cannot comment about his legal expertise. But I don't think anyone can question his ability to learn the facts about anything that is in the law books or presented before the Supreme Court. You can't deny it. Clarence is a smart man.

But more importantly, Clarence is a wise man. He has a wisdom that comes from having experienced life. Trust me, I know -- Clarence is a summa cum laude graduate of the "School of Hard Knocks". We need that kind of perspective on the Supreme Court.

Remember this -- it is not only what is in Clarence's brain that qualifies him as the best and the brightest. It is what is in his heart and his soul -- the things that he has learned from life that make him the best man for the job.

Among Clarence's friends his nickname was: " a real American". His whole life is an example of what anyone with the dreams and determination can achieve in America. But no matter how far he has gotten, Clarence has not forgotten from where he came. He is a fair man, a compassionate man, and a man who is willing to listen, to argue, to learn, to think through an issue in the most intimate detail to insure the right decision is made.

I say it's time to put Clarence Thomas -- the "real American"-- on the Supreme Court.

Thank you.

J.C. Alvarez
Owner - River North Distributing

Senator THURMOND. Now, Mr. Palmer, is your testimony based on personal acquaintance or on reading his writings and his reputation or hearing him speak, or on what basis?

Mr. PALMER. My testimony is based on accounts in the various——

Senator THURMOND. Speak a little louder. I can't hear you.

Mr. PALMER. My testimony is based on accounts read from various newspapers, magazine articles, and accounts that I have seen on different television programs.

Senator THURMOND. In other words, on his reputation, as you gained it from those sources.

Mr. PALMER. That is correct.

Senator THURMOND. Ms. Alvarez, I believe you worked with Mr. Thomas, Judge Thomas. Is that correct?

Ms. ALVAREZ. I am sorry. Say that again?

Senator THURMOND. You were with him on Senator Danforth's staff.

Ms. ALVAREZ. Yes, sir.

Senator THURMOND. You were with him at the Department of Education, and you were with him at the EEOC. In other words, you have worked with him in all those different places.

Ms. ALVAREZ. I did not work with him at the Department of Education. I was on Secretary Ted Bell's staff at that time.

Senator THURMOND. I see.

Ms. ALVAREZ. And he was Assistant Secretary for Civil Rights.

Senator THURMOND. So you know him personally.

Ms. ALVAREZ. Yes, sir.

Senator THURMOND. You know him well.

Ms. ALVAREZ. Yes, sir.

Senator THURMOND. And you endorse him.

Ms. ALVAREZ. Absolutely.

Senator THURMOND. I want to ask both of you two questions. Knowing him as you do, through reputation or personally, is it your opinion that he has the integrity, the professional qualifications, and the judicial temperament to make a good U.S. Supreme Court Justice?

Mr. PALMER. Yes.

Ms. ALVAREZ. Yes, sir. Clarence is a smart man, but Clarence is a wise man from the experience of his life. And that is what qualifies him; not just within his brain, but what is in his heart and his soul.

Senator THURMOND. Now, do you know of any reason why Clarence Thomas should not be confirmed by this committee and the Senate to be a U.S. Supreme Court Justice?

Mr. PALMER. No, Senator. I know of absolutely, resolutely no reason.

Ms. ALVAREZ. As long as I have known Clarence and as long as I will continue to know him, absolutely not.

Senator THURMOND. Do you heartily endorse him for this position?

Mr. PALMER. A resounding yes.

Ms. ALVAREZ. Absolutely.

Senator THURMOND. The distinguished Senator from Pennsylvania, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman. And it is nice to see you as chairman again, Mr. Chairman.

Ms. Alvarez, you tell a very poignant story about a person who confronted Judge Thomas about being affirmative action on getting into Yale but smart enough to get out of Yale. The hearings, I think, could have provided a much better forum to discuss the public policy concerns on affirmative action, and Judge Thomas has written extensively about opposing affirmative action because he believes that it degrades the beneficiary from the minority and that it is unfair to the person who is displaced, and he writes about creating racial tension.

There is a very poignant story in an article by Juan Williams in the Atlantic Monthly on Judge Thomas where he talks about Judge Thomas' swearing-in after he was reconfirmed to EEOC, when he was sworn in by Attorney General Meese and by Assistant Attorney General Bradford Reynolds and by Senator Thurmond. And at that time, after the swearing-in, Bradford Reynolds went over to Clarence Thomas and said, "You are a great product of affirmative action." And Thomas' face fell, and all of the staff noted how unhappy he was to be characterized as just a product of affirmative action.

But the other side of the issue which concerns me and the one that I discussed at some length with Judge Thomas was the benefits of affirmative action that he received—as he characterized it, preference on getting into the Yale Law School. And I then asked him the question about the policy considerations on giving a preference to hypothetically a 10-grade dropout African-American who was looking for a job.

We had considerable discussion about the Building Trades Union, local 28 in New York City, which had more than two decades of egregious discrimination. And it was clear from the history of those hiring practices that not only were people discriminated against in the past, but you knew very well that future applicants would be discriminated against as well, because that had been going on for so long it just was certain to be the case. And why not establish a flexible goal and timetable, which Judge Thomas had favored earlier in his career in 1983 speeches, so that you would deal specifically with projected discrimination.

Now, what is your view on that, Ms. Alvarez? Why not apply affirmative action to that 10-grade dropout in the context where you know that African-Americans are going to be discriminated against?

Ms. ALVAREZ. Do you want my personal views on it?

Senator SPECTER. Sure.

Ms. ALVAREZ. Affirmative action has, I guess, opened a lot of doors, and I certainly have been one person that has benefited from it as well. But as I said in my statement, it has also been something that has kept people from looking directly at my abilities. People always make the presumption that I am only there not because I am competent, but because of affirmative action.

Senator SPECTER. But how can someone look at the ability of the person if the person doesn't get a job?

Ms. ALVAREZ. And that is right. I do believe that it has helped open the doors. But all it does is open the doors, and there are——

Senator SPECTER. But that is all affirmative action is supposed to do, is to open the doors. So if Judge Thomas gets the affirmative action preference at Yale Law, why shouldn't the 10-grade dropout get it in employment context?

Ms. ALVAREZ. Everyone ought to be given a fair and equal opportunity, and in the perfect world that would be the case. The world isn't perfect. My personal views about affirmative action, I believe there is room for it. I believe there is a place for it, I think that with some modifications, though, because I think that sometimes setting goals and timetables hasn't always been effective.

The general premise of affirmative action I believe in; how it is carried out isn't always—I am not always in agreement with.

Senator SPECTER. Well, I am not going to prolong the discussion at this point because we have so many witnesses. But you brought up the situation with Judge Thomas and how he felt personally affronted by being stigmatized as being a beneficiary of affirmative action. And I can understand that, and I wish we had talked more in the hearings about the downside of affirmative action. But also I wish we had talked more in the hearings about the context where Judge Thomas disagreed. Because as Judge Thomas would extend protection to the specific African-American who was discriminated against, he would not extend affirmative action to the African-American who is virtually certain to be discriminated against in the future in the context of the hiring practices of local 28.

I was district attorney of Philadelphia for 8 years and saw employment as a key factor giving African-Americans and minorities, women, a chance to move up. And that is a source of enormous problems. Without a job, there is the problem of turning to crime. Without a job, there is the problem of turning to drugs. Without a job, there is no opportunity to move ahead in the world.

What so many people don't understand is that when you talk about affirmative action, you are not talking just about the 10-grade dropout and his benefit. You are talking about a peaceful society and progressive society that benefits everybody. Those views haven't been brought across. All affirmative action is debated in terms of is reverse discrimination and displacing some white person who is better qualified. But the societal benefit has much to recommend the affirmative action in that context that I have articulated and perhaps narrowing the range of debate.

Well, thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. You have made that point repeatedly, Senator, and I want to associate myself with your remarks. It is funny. We wouldn't need affirmative action were there not prejudice out there. Isn't that strange? And isn't it strange how people are affronted after having been the recipients of affirmative action because they were the recipients of affirmative action? But if they weren't the recipients of affirmative action, they wouldn't have had the job in which they got affronted. I find that fascinating.

I find it interesting to be offended that someone would say that you got to Yale Law School because of affirmative action when, in fact, you would have never gotten to Yale Law School had there not been affirmative action—not you. I mean "you" in an editorial sense.

It is a dilemma. I understand. I have some sense of both sides of the dilemma, but as you said, in a perfect world we wouldn't need affirmative action, at least not in the context it is used now.

Thank you both very, very much, particularly since you were the crossover panel. You were here, the record should show, until after 10 o'clock last night, and you were here at 9 o'clock this morning. So that goes not only to your interest as public-spirited citizens, but also your physical constitution, to spend so much time with us all. Thank you very, very much.

Mr. PALMER. Mr. Chairman, thank you for the opportunity to return, particularly after the benefit of a good night's sleep.

The CHAIRMAN. Thank you very much.

Now, we will move to what was scheduled to be our first panel: Dr. Benjamin J. Hooks, the executive director of the NAACP; the Reverend Dr. Amos Brown, the National Baptist Convention, U.S.A., Inc.; and Rev. Archie Le Mone, Progressive National Baptist Convention.

Gentlemen, welcome.

Mr. HOOKS. Good morning, Senator.

The CHAIRMAN. Good morning, Mr. Hooks, Reverend Brown, Reverend Le Mone. Are you Reverend Le Mone? We have got to move your nameplate down. Sit over there to make it easier, if that is OK. Or if you would rather sit there, it doesn't matter where you sit, actually. They just had your nametag there.

Why don't we begin, gentlemen, in the order in which you were called. We will begin with you, Mr. Hooks. It is a pleasure to have you back here before this committee.

PANEL CONSISTING OF BENJAMIN L. HOOKS, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; REV. DR. AMOS C. BROWN, THE NATIONAL BAPTIST CONVENTION, U.S.A., INC.; AND REV. ARCHIE LE MONE, THE PROGRESSIVE NATIONAL BAPTIST CONVENTION

Mr. HOOKS. Thank you, Senator. Mr. Chairman and members of the committee, I am testifying on behalf of the National Association for the Advancement of Colored People, the Nation's oldest and largest civil rights organization. We oppose the confirmation of Judge Thomas to the Supreme Court. My name is Benjamin Hooks, and I am the executive director and chief executive officer of the NAACP.

In a purely narrow sense, the immediate business before the committee is the nomination of Judge Clarence Thomas to be an Associate Justice of the Supreme Court. But in the broader sweep of our domestic history, there is at hand here a unique, transcendent moment which will significantly define America in our time, what America is, what America can be, what America shall be.

Twenty-five years ago when Justice Marshall became a member of the Supreme Court, our hearts were thrilled and our spirits came alive with renewed hope. We believed then and to this day that out of the bloody trench of collective struggle a fellow child of bondage would help light our future with the glow of progress and to fan the flame of human freedom.

African-Americans for 20 generations have cried vainly for the simple, decent entitlements of the most elemental civil rights, only to be denied. Yet more than any people in this Nation, we fervently believed in the promise that all of us are created equal. Thirty-five years ago, Justice Marshall stood before that Court and prevailed with them, and they, after 150 years, yielded. We thought the long nightmare was over, and yet there were still problems.

We do not speak here of ancient folklore but of a period of time entirely within the lifetime of Judge Thomas, whose nomination to the Supreme Court we must firmly resist. We did not come to this opposition lightly or recently. We opposed Judge Thomas' renomination to the Equal Employment Opportunity Commission, and when he became very hostile to our aspirations, we asked for his resignation. We did not oppose or support him for the appellate court but hoped that he would serve sufficiently long in that position that we might further evaluate his record. But we put it on record then that if he were a nominee for the Supreme Court we would reexamine his record very closely.

We all know affirmative action is a strong, unwavering national policy of inclusion in the vital pursuit of everyday necessities—a home, an education, a job, a promotion. In other words, all that affirmative action requires is a fair break. It is not a quota system nor, in its highest application, a preference system. It guards sharply against a quota system, and we believe that these are the fundamental guarantees of the American Constitution. And yet Judge Thomas has consistently expressed his steadfast opposition.

Now, if the committee pleases, I would like to summarize very briefly our major points of opposition.

First, Judge Thomas in his statements and actions as a Government official has rejected class-based relief as a major element of the solution to both past and present racial discrimination. He has overly emphasized individual relief. We support individual relief, but this is not enough. Does every black have to apply to the police department and be turned down? Does everyone have to be a Rosa Parks and sit on the streetcar and be arrested? Do we have to have a million James Merediths or Arthur Luciuses applying to the University of Alabama or Ole Miss? Or should we have class action relief?

This was a carefully crafted NAACP legal strategy, effectively promulgated by Thurgood Marshall, and we have trouble with the concept that we must get rid of it.

Second, we have trouble with the effects test that he has tried to talk against in the Voting Rights Act because we know that—we believe that without that, the Voting Rights Act was dead.

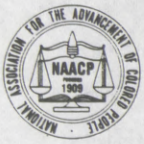
Third, he has opposed many of the court cases that labored to bring about school desegregation.

Fourth, in 1985, when Executive Order No. 11246 was under attack by Attorney General Meese, Judge Thomas allied himself with Attorney General Meese.

Finally, Judge Thomas' record as a public official at the Department of Education and as Chairman of the Equal Employment Opportunity Commission demonstrate a disrespect for the enforcement of the law. Yes, we appreciate his rise from poverty, but that rise can be exemplified by millions of black Americans. And we be-

lieve that based on the record, we must and we do oppose his confirmation as a Supreme Court Justice.

[The prepared statement of Mr. Hooks follows:]



WASHINGTON BUREAU
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
1025 VERMONT AVENUE, N.W. • SUITE 730 • WASHINGTON, D.C. 20005
(202) 638-2269 FAX (202) 638-5936

TESTIMONY

OF

BENJAMIN L. HOOKS
EXECUTIVE DIRECTOR

OF THE

NATIONAL ASSOCIATION

FOR THE

ADVANCEMENT OF COLORED PEOPLE

ON THE

NOMINATION

OF

JUDGE CLARENCE THOMAS

FOR THE

SUPREME COURT

OF THE

UNITED STATES

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

September 20, 1991

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to present the views of the National Association for the Advancement of Colored People (NAACP) in opposition to the nomination of Judge Clarence Thomas to become an Associate Justice of the Supreme Court of the United States. I am Benjamin L. Hooks, Executive Director of the NAACP.

The National Association for the Advancement of Colored People is the oldest and largest civil rights organization in the nation.[1] The NAACP has over 500,000 members with over 2100 branches in the 50 states, the District of Columbia and abroad. The NAACP is singularly committed to the empowerment and protection of African Americans under the Constitution through principles of equal justice under law for all persons in the United States.

Introduction

The NAACP's decision to oppose the confirmation of Judge Thomas for the Supreme Court has been especially difficult for us because of our belief -- shared among many African Americans -- in the particular importance of having African Americans on the Supreme Court. As Executive Director of the NAACP, I am aware that our decision

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[1] The NAACP was organized on February 12, 1909, on the 100th anniversary of President Lincoln's birth, in response to an epidemic of race riots which swept the country in the early 20th century.

to oppose Judge Thomas has sparked a firestorm of controversy. Some rather harsh questions have come both from our predictable detractors, as well as some who are usually our allies.

Some individuals have tried to equate the NAACP's opposition to the confirmation of Judge Thomas with rejection of his avowed "self-help" philosophy. Others have claimed that the NAACP is trying to suppress the views of an African American who disagrees with us, and have asserted that we are betraying the concept of "racial solidarity". Finally, some have argued that we are ignoring the importance of adding the unique perspective of an African American born in poverty to an otherwise all-white, privileged court.

After all, the NAACP has always endorsed self-help initiatives that foster individual achievement among African Americans. But the NAACP cannot support a nominee to the Court who disparages a meaningful role of government in shaping programs that address pervasive discrimination and thus make individual achievement more possible.

The NAACP certainly supports free speech, and we recognize its importance to the fundamental interests of all Americans. We also recognize that there has always been, and should be, a diversity of views among African Americans.

However, we also know that rulings of the Supreme Court have been central to the social, political and economic advancement of African Americans. Therefore, the NAACP has long held the view that race alone cannot be the deciding factor governing our actions on Court appointments.

We are concerned that all of the sound and fury has drowned out discussion of the real basis for our opposition to Judge Thomas -- his public record. The NAACP believed, and we still believe, that the only way to determine whether to support a Supreme Court nominee is to evaluate his or her record of competence and fairness before they are confirmed.

It was this belief which led the NAACP's Board of Directors to examine the public record of Judge Thomas with care and deliberation. Our review included consideration of a thorough report prepared by our staff with input from scholars of law and history.[2] Additionally, we requested and received direct information from the nominee and his supporters, upon which we could assess his views on several issues of concern to us.

We also reviewed the history of the NAACP, recognizing that from its inception, the NAACP has been an organization willing to speak truth to the powerful on behalf of African Americans. After carefully considering Judge Thomas' record and our own history of struggle, the NAACP Board concluded that Judge Thomas not only opposes legal principles that have enabled African Americans to advance, however slowly, toward true equality; he also helped subvert efforts to translate these principles into reality.

Moreover, we have concluded that in many ways, Judge Thomas' opposition to positions of importance to us has been more pronounced and strident than that of previous Supreme Court nominees whom the NAACP also opposed.

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[2] See Appendix I, "A Report on the Nomination of Judge Clarence Thomas as Associate Justice of the United States Supreme Court", National Association for the Advancement of Colored People, August 15, 1991.

We recognize that many in the African American community know little about Judge Thomas' views on important questions of constitutional law. And unfortunately, the limitations inherent in the confirmation process have meant that Judge Thomas' record has received only limited attention. Those in the African American community who know little of his record often respond to Judge Thomas' nomination with an understandable measure of racial pride that obscures other considerations. We believe that recently announced polls showing support for Judge Thomas among African Americans reveal very little about the level of awareness among African Americans about the nominee's stated views and his record.

Not surprisingly, Judge Thomas has preferred to focus during his testimony before this Committee on his admirable, personal triumph over poverty. However, it is important to note that not even the most ardent supporters of Judge Thomas have attempted to defend their position on the basis of his record. They appear to support him in spite of his record, not because of it. Instead, they have reminded us, time and time again, about the harsh circumstances of his childhood and the strength of his character forged from the difficulties of his early life.

The NAACP also takes pride in the personal accomplishments of Judge Thomas. As an organization, one of whose primary purposes is the collective advancement of African Americans, the NAACP is well aware of the present day to day difficulties faced by our people. The agenda of the NAACP includes litigation, advocacy, and social programs which go to the heart of some of the most pressing problems facing African Americans today.

As an African American growing up in a rigidly segregated society, I have felt the sting of overt and blatant prejudice and segregation. Countless scores of African Americans have lived through the debilitating circumstances of poverty and discrimination, and yet excelled through faith, determination, hard work and help from others.

We are a noble people; we have a proud heritage. We have been loyal to our beloved nation; we have chopped cotton, cropped the tobacco, dug the ditches, plowed the fields, carved highways through mountain ranges, built railroads through swamps. Yet, we have been told again and again that we must wait for equal justice under the law. Our determination has been borne from our respect for our heritage and faith in our struggle. Many have chosen not to abandon the struggle or to become preoccupied with personal achievement over collective group advancement.

Despite Judge Thomas' compelling personal story, the interests of African Americans would not be well served, if after his confirmation to the Court, he dismantled the consensus elements of our nation's civil rights policy. The prospect of this occurrence is heightened by evidence drawn from the record Judge Thomas has amassed over the past decade.

Importance of the Supreme Court

Perhaps it would be useful to frame the discussion of Judge Thomas' confirmation and the NAACP's decision to oppose him in a slightly broader historical context. The history of the NAACP's efforts to advance the interests of African Americans makes us

particularly sensitive to the increasingly important role in American life played by the Supreme Court.

As the final arbiters of the American constitutional system, the Justices of the Supreme Court collectively exercise an influence on the destiny of America unequalled by any other branch of government. When the NAACP was still in its infancy, two important legal victories for the organization had much to do with shaping the Association's institutional view on the importance of the Supreme Court. In 1915, the Supreme Court ruled Oklahoma's "grandfather clause" unconstitutional[3] and two years later, the Court invalidated a Louisville ordinance requiring residential segregation.[4] These victories propelled the NAACP on an aggressive campaign to use the courts and political advocacy to change the dire circumstances of African Americans.

It is not surprising, therefore, that the NAACP has a long historical record of carefully scrutinizing the social and political views of Supreme Court nominees, as well as their judicial philosophies, in determining whether they should be subsequently confirmed by the Senate.[5]

As early as 1912, for example, the NAACP opposed the nomination of Judge Hook to the United States Supreme Court because of his views on race issues and other

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[3] Guinn v. U.S., 238 U.S. 347 (1915). Under the "grandfather clause", which was a part of a 1910 amendment to the Oklahoma sate constitution, a person could become a registered voter if he had served in the armies of the U.S. or the Confederacy, or was a descendant of such a person, or had the right to vote before 1867. This method of disqualifying black voters was so effective that other southern states inserted the clause in their constitutions as well.

[4] Buchanan v. Warley, 245 U.S. 60 (1917).

[5] The NAACP also opposed the Supreme Court confirmation of Justice Souter, Judge Bork, Justice Scalia, and Chief Justice Rehnquist.

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matters. Based on the NAACP's vigorous opposition, President Taft withdrew Judge Hook's nomination.

In April 1930, when President Herbert Hoover nominated Judge John J. Parker to a vacancy on the Supreme Court, Walter White, acting secretary of the NAACP, ordered a prompt investigation of Judge Parker's record.[6] The inquiry revealed that while running for governor of North Carolina in 1920, Judge Parker had approved of literacy and poll taxes for voters and had also approved of the "grandfather clause" which the Supreme Court had declared unconstitutional in 1915. The NAACP launched a successful national campaign to block Judge Parker's confirmation, which was rejected by the Senate by a vote of 39-41.

Twenty-five years later, after the Supreme Court's landmark decision in Brown v. Board of Education,[7] Judge Parker led the judicial resistance to integration in Briggs v. Elliott in which he wrote:

> It is important that we point out exactly what the Supreme Court has decided and what it has not decided...[A]ll that a state may not deny to any person on account of race the right to attend any school that it maintains...Nothing in the Constitution or in the decisions of the Supreme Court takes away from the people the freedom to choose the schools they attend. *The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation* [emphasis added].[8]

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6 Richard Kluger, Simple Justice. (New York: Random House, 1975), pp. 141-142.

7 Brown v. Board of Education of Topeka, 347 U.S. 483 (1954); 349 U.S. 294 (1955).

8 132 F. Supp. 776, 777 (D.N.C. 1955).

The Briggs dictum was intended to offer aid and comfort to segregationists and to those who wanted to undermine the mandate of Brown.

Fortunately, in subsequent decisions such as Swann v. Charlotte-Mecklenberg Bd. of Ed.,[9] the Supreme Court went beyond Briggs through holdings which suggested that federal courts could (in limited circumstances) use busing to desegregate formerly de jure segregated school districts. Nonetheless, one must ask whether there would have been the Brown decision if Judge Parker had been elevated to the Supreme Court?

Judge Thomas has criticized the Supreme Court's decision in Brown on the grounds that it was based on "dubious social science" and on an inaccurate premise that separate facilities are inherently unequal.[10] The issue in Brown was not whether attending schools with whites would make black children smarter. The issue was whether racially segregated schools would ever receive the resources and benefits needed to make them equal to the competitive opportunities given to whites. Judge Thomas' rejection of equal protection jurisprudence in Brown is particularly disturbing.

Moreover, Judge Thomas seems to have embraced completely the Briggs dictum and the words of Judge Parker. Judge Thomas has denounced, for example, the entire line of school desegregation decisions implementing Brown as "disastrous."[11] Judge Thomas regards Green v. School Board of New Kent County,[12] one of the pivotal

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[9] 402 U.S. 1, (1971).

[10] See, Thomas, "The Higher Law Background of the Privilege or Immunities Clause of the Fourteenth Amendment, 12 Harvard Law Journal - Public Policy 63, p.68 (1989).

[11] Thomas, Civil Rights As a Principle Versus Civil Rights as an Interest, in D. Boaz, ed., Assessing the Reagan Years, 391, 393 (1988).

[12] 391 U.S. 430 (1968).

Supreme Court decision implementing the Brown decision, as an unwarranted extension, objecting that in Green "we discovered that Brown not only ended segregation but required school integration."[13]

Ironically, this seemingly obscure remark in effect endorses what was the single most effective tactic of southern segregationists determined to avoid compliance with Brown -- the use of so-called "freedom of choice" plans, which were a subterfuge used to perpetuate the maintenance of segregated schools.

There is no question that if Judge Thomas' race were not a positive factor in consideration of his appointment to the Court, the NAACP might have opposed him on this basis alone. The NAACP believes that it was correct in opposing Judge Parker in 1930 and we also believe that our opposition to Judge Thomas today is correct.

Justice Marshall's Replacement

When Thurgood Marshall was nominated to become an Associate Justice of the Supreme Court, he enjoyed the overwhelming support of African Americans. By no means was race the only factor that generated African American's pride in Thurgood Marshall. The NAACP's national publication, The Crisis, set forth the views of many in the African American community:

> "The nomination of Thurgood Marshall to become an Associate Justice of the United States Supreme Court represents an historic breakthrough of transcendent significance. It is not merely that Mr. Marshall is the first Negro to be selected to serve at the summit of the nation's judicial structure. It is also that he achieved

[13] Id. at 391.

> national eminence as the No. 1 civil rights lawyer of our times -- the Special Counsel of the National Association for the Advancement of Colored People and the Director-Counsel of the NAACP Legal Defense and Educational Fund. As such he was in constant battle against entrenched tradition and archaic laws, emerging as victor in 23 of 25 encounters before the Supreme Court..."[14]

Justice Marshall's retirement from the Court would have significance for the nation no matter when it occurred. His departure at this time in our nation's history, however, is especially troubling to many African Americans because it could accelerate the conservative shift in Supreme Court doctrine on civil rights, *habeas corpus*, and individual liberties which has been evident now for the past two terms of the Court.

Last term, Chief Justice William Rehnquist announced the Court's intention to review existing precedents, particularly those decided by close margins over vigorous dissents[15]. When Justice Marshall warned in a dissenting opinion that the Supreme Court's new majority had launched a "far-reaching assault upon the Court's precedents,"[16] it was not only a parting reflection on the term that had just ended, but also a dire prediction about the Court's future.

Areas of Additional Inquiry

The NAACP believes that a thorough examination of the actual record of Judge Thomas would reveal to the public that Clarence Thomas fails to demonstrate a respect

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[14] "Associate Justice Thurgood Marshall", The Crisis, Vol. 74, No.6, July 1967, p.282.

[15] See Payne v. Tennessee, 59 U.S.L.W. 4814, 4819 (1991). Chief Justice Rehnquist's majority opinion suggested that the Court is not bound by considerations of stare decisis when cases are badly reasoned, particularly in constitutional cases where "correction through legislative action is practically impossible." at p.4819.

[16] Id.

for or commitment to the enforcement of federal laws protecting civil rights and individual liberties. Moreover, in a substantial number of speeches, writings and interviews, Judge Thomas has revealed an hostility to constitutional principles affecting civil rights protections, including the use of meaningful remedies for both past and present discrimination such as "goals and timetables".

Unfortunately, Judge Thomas' confirmation hearings have proven to be a missed opportunity to examine his beliefs on issues of fundamental importance to the nation. Although Judge Thomas has demonstrated intelligence and stamina, the American people no little more about his judicial philosophy today than we did prior to the start of these hearings.

Judge Thomas' nomination has captured the attention of the nation for reasons that go beyond his biography or even his color. He built his career within the Reagan Administration as a social critic who took forceful positions on some of the most divisive issues in the nation -- including affirmative action. After a decade of speaking out fearlessly and receiving much criticism from within the African American community, Judge Thomas seems to be running from his earlier views. In his moment of destiny, Judge Thomas has presented himself to this Committee as "a man who didn't really mean it" on many of his most ardently presented beliefs.

We concur with the view of Legal Times columnist Terence Moran, who suggests that Judge Thomas' hearings might have offered a rare opportunity to debate the issues he so passionately articulated.[17] From the perspective of the NAACP, there are

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[17] Moran, "Lost In The Hearings", The New York Times, September 15, 1991, p.E17.

important and honorable reasons for championing these policies, which we believe appeal to many Americans.

Notwithstanding the conclusion of Judge Thomas' testimony before this Committee, at least two areas which have been discussed extensively by Judge Thomas over the past decade have been only superficially addressed during these confirmation hearings. These issues are too important both to the individual victims of discrimination and to the country as a whole for the Committee to leave unaddressed; they demand further review. We would urge this Committee to consider the following:

I. The Case for Affirmative Action

As a general matter, affirmative action is the conscious use of race, sex or national origin in a active attempt to overcome the effects of both past and present discrimination. During his decade of public life, Judge Thomas has been particularly critical of most forms of affirmative action:

> "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."[18]

The goal of affirmative action is not to establish a permanent quota system, but rather to break the cycle of discrimination and to achieve equality which is real and not

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

illusory. As Justice Blackmun has stated, "In order to get beyond racism, we must first take racism into account."[19]

The particular affirmative action measures utilized will vary in different situations. In the school desegregation context, affirmative action may mean taking the race of students and teachers into account in making school assignments. In a broader educational context, it may mean taking race into account in admissions policies, in order to recognize the potential of disadvantaged candidates who do not possess the traditional credentials. In the voting rights area, affirmative action sometimes means taking affirmative steps to register eligible African American voters and to assure that electoral systems and policies do not have a discriminatory effect on their ability to elect representatives of their choice.[20]

In the school and employment contexts, affirmative action does not mean admitting or hiring unqualified or less meritorious candidates. However, it may mean changing over time our narrow definitions of qualifications. Rather than abandonment of merit selection, affirmative action recognizes that we have rarely achieved that ideal. "[I]nstitutions of higher learning...have given conceded preferences to those possessed of athletic skills, to the children of alumni, to the affluent and to those who have connections with celebrities, the famous and the powerful."[21]

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[19] Regents of the University of California v. Bakke, 438 U.S. 265, 407 (1978).

[20] Statement of Julius LeVonne Chambers, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc. Regarding the Status and Future of Affirmative Action Before the Subcommittee on Civil and Constitutional Rights and Subcommittee on Employment Opportunities; July 11, 1985.

[21] Bakke, 438 U.S. at 404.

In addition to invidious discrimination based on race or other factors, our employment system has always relied upon such non-merit-related criteria as nepotism and cronyism. Reliance on facially-neutral devices such as test scores and paper credentials also may perpetuate the effects of past discrimination without contributing to selection of a qualified workforce. Affirmative action moves the nation closer to a true merit system, by shifting the focus to the job-related qualifications and potential of the individual candidates, whatever their race.

The concept of affirmative action first appeared in the program mandating that government contractors not discriminate in their employment practices. Executive Order 10925, issued by President Kennedy in 1961,[22] required most federal contractors not to discriminate in their employment practices on the grounds of race, color, creed, or national origin, and further required such contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color or national origin."

The mandate of nondiscrimination and affirmative action by government contractors was retained when President Johnson strengthened the program in Executive Order 11246, issued in 1965.[23] But the concept was not defined until 1970, when, under President Richard Nixon, a conservative Republican, the Office of Contract Compliance in the Department of Labor issued the following definition:

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[22] 26 Fed. Reg. 1977, (March 6, 1961).

[23] 30 Fed. Reg. 12319 (September 24, 1965).

> "An affirmative action program is a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort. The objective of those procedures plus such efforts is equal employment opportunity. Procedures without effort to make them work are meaningless; and effort, undirected by specific and meaningful procedures, is inadequate..."[24]

As now implemented, the Executive Order program requires most non-construction contractors of the federal government to analyze their work forces in light of the availability of qualified minorities and women in the available labor pool, and to devise a plan, including goals and timetables, to correct their under-utilization.

As you know, both the courts[25] and the Congress[26] have repeatedly approved of the use of affirmative action measures, including the use of goals and timetables, for the purpose of remedying the effects of past discrimination and segregation.

Attempt to Gut Executive Order 11246

In August 1985, the Reagan Administration promulgated a draft of a new Executive Order that would have gutted the long-standing principle that the tens of thousands of employers who are awarded contracts by the federal government must take positive steps to include qualified minorities and women in their work forces. The proposed new Order would have prohibited the government from seeking to have

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[24] "Order No. 4," 35 Fed. Reg. 2586, 2587 (Feb. 5, 1970); 41 CFR Part 60.2.10 (1970).

[25] United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986); United States v. Paradise, 480 U.S. 149 (1987).

[26] In 1972, for example, while Congress was considering amendments to Title VII of the Civil Rights Act of 1964, there were several unsuccessful attempts to enact legislation ending the use of goals and timetables under the Executive Order. See 118 Cong. Rec. 2276 (1972).

contractors adopt affirmative action plans that include numerical goals and timetables. The Administration's effort was spearheaded by Attorney General Edwin Meese.

The effect of the new Executive Order would have been disastrous for African Americans, who even today, face unacceptably high levels of employment discrimination.[27] The DOL's monitoring of government contractors each year under E.O. 11246 has been the federal government's main weapon in combatting job discrimination.

The Attorney General and his supporters tried to frame the debate over modifications to the Executive Order as a referendum on quotas. They claimed that the Executive Order mandates quotas despite DOL regulations which clearly state that E.O. 11246 is not a quota program. Moreover, they sought to ignore important research, generated within the Administration itself, on the substantial benefits of the Executive Order program.[28]

Fortunately, a successful campaign was waged within the Administration led by Secretary of Labor William Brock, among others; and by an unusual coalition of civil rights organizations, business and labor mobilized to block the changes. Over 240 members of Congress, including Republican leaders such as Senator Robert Dole (KS)

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[27] See, "The State of Black America 1991," prepared by the National Urban League, "The Glass Ceiling," Study conducted within the Department of Labor, and "Opportunities Denied, Opportunities Diminished: Discrimination on Hiring," a study by the Urban Institute.

[28] Office of Federal Contract Compliance Programs, Employment Standards Administration, U.S. Department of Labor, A Review of the Effect of Executive Order 11246 and the Federal Contract Compliance Program on Employment Opportunities of Minorities and Women (1983).

and House Minority Leader Robert Michel (IL) sent letters to President Reagan urging him to back away from a new policy.

In the course of the effort to save the Executive Order, a consensus emerged, at least with respect to the benefits of E.O.11246. For example, the National Association of Manufactures stated in its support for the Executive Order:

> "...affirmative action has been, and is, an effective way of ensuring equal opportunity for all persons in the workplace. Minorities and women, once systematically excluded from many professions and companies, are now systematically included."[29]

Judge Thomas on Executive Order 11246

Judge Thomas has been especially critical of most affirmative action initiatives. This has been well documented in his speeches and writings, including his criticism of Executive Order 11246. Last week before this Committee, Judge Thomas suggested that this criticism reflected only his interest in political theory. However, there is much evidence to suggest that Judge Thomas' role in the effort to gut the Executive Order was more proactive than that of a mere political theorist.

Judge Thomas was a member of the Reagan Administration's transition team reviewing the work of the Equal Employment Opportunity Commission. The leader of the transition team was Jay Parker. Here are the findings of the "working document" prepared by the team:

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[29] William S. McEwen, Director of Equal Opportunity Affairs for Monsanto Company, testifying on behalf of the National Association of Manufacturers before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, and the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, July 10, 1985, p.1-4.

> "The program of "affirmative action" has been used by the EEOC and other government agencies to "implement" the Civil Rights Act of 1964. That act does not contain the phrase "affirmative action," nor does any other piece of legislation. It originates, instead, in Executive Order 11246, signed by President Lyndon Johnson in 1965. The order's original non-discriminatory intent was changed into a weapon to, in effect, endorse discriminatory hiring. Percentage hiring goals, first imposed upon the construction industry in the "Philadelphia Plan" and the "Long Island Plan," spread quickly to racial and sexual quotas in other industrial hiring."[30]

During the 1985 fight to save the Executive Order, the Reagan Administration's leader in the struggle for equal employment opportunity seemed curiously silent on one of the most important policy questions faced by the Administration. In a 1987 interview with reporter Juan Williams in The Atlantic Monthly, the issue of the Executive Order was apparently discussed with Judge Thomas. Williams reports that:

> "With arguments between Thomas and his critics growing louder, the EEOC chairman suddenly found himself warmly received at the Justice Department and the White House. He worked closely with Attorney General Edwin Meese in pushing for a change in an executive order that requires federal contractors to show that they have made efforts to hire minorities and women. Meese and Thomas argued that the order amounted to quotas, because contractors who failed to hire minorities and women were given goals and timetables that had to be met under pain of losing government contracts."[31]

In a subsequent speech in November 1987 at Claremont McKenna College, Judge Thomas presented his rationale for his apparent willingness to repudiate the Executive Order:

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[30] See, documents accompanying memorandum from Clarence Thomas to Jay Parker dated December 22, 1980, regarding EEOC/Civil Rights Act of 1980.

[31] Williams, "A Question of Fairness", The Atlantic Monthly, February 1987, p.82.

> "The Administration could have put much of the issue of racial preferences behind them by quickly modifying Executive Order 11246, so that it would prohibit racial and gender based preferences in government-funded projects. But it didn't, and hence the fruitless rhetorical war over "affirmative action" continued. (Note, incidentally, how affirmative action always meant preference for blacks -- rarely were women or Hispanics included in Administration denunciations.) The term, AA, became a political buzz word, with virtually no substantive meaning. We could have maintained an aggressive enforcement of civil rights statutes, while demonstrating that racial and gender based preference policies in practice simply don't aid those they purport to. This is not to mention the violation of a sense of justice and the assumption of inferiority in racial set-asides policies."[32]

In Judge Thomas' analysis, affirmative action is impermissible under Title VII of the Civil Rights Act of 1964 because the term "affirmative action" never appears in the statute itself. Moreover, he suggests that since the Executive Order 11246 is the only legitimate basis for affirmative action, a modification of the Executive Order like that proposed in 1985 could easily resolve the problem of so-called race and gender-based preferences in the law.

Judge Thomas has embraced the kind of program under which he was admitted to Yale Law School. Judge Thomas has expressed the belief that this program employed a combination of race and socio-economic status as a basis for admission. It is apparent that in attempting to escape the brunt of his own personal attacks on race-conscious remedies or preferences in affirmative action programs, Judge Thomas has misrepresented the character of the Yale Law School program under which he was admitted as a student in 1972.[33] The program was, pure and simple, an express,

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[32] Remarks at Claremont McKenna College in November 16, 1987, p.5.

[33] See, Thomas Testimony in response to questions posed by Senator Arden Specter on September 13, 1991, p.31-32.

affirmative action program based on taking race into account -- in selecting among students who were deemed qualified -- in order to provide expanded opportunities for Blacks and other minorities disproportionately underrepresented in the student body.[34]

That program (we are advised) was and is consistent with the provisions of Title VI of the Civil Rights Act of 1964, which bans racial discrimination in all institutions receiving Federal financial assistance, including private universities like Yale.

Judge Thomas' record of writings and speeches, as well as his testimony before this Committee, indicates that he opposes on legal grounds such clearly legal forms of affirmative action as the Yale Law School Program. We are distressed by his opposition to this essential and proper form of affirmative action to remedy past and present racial discrimination, as well as its pervasive effects. We are distressed even more by his apparent attempt to conform the truth about the Yale program to fit his convictions.

It should be pointed out that the net effect of Judge Thomas' view would be to literally bar all meaningful forms of affirmative action, including the use of goals and timetables. Moreover, even the most benign of practices like the Yale program would be vulnerable.

Judge Thomas' view on the importance of Executive Order 11246 and his role in seeking its modification, as well as his general view of the constitutionality of affirmative action principles generally should be determined before the vote of this Committee is taken.

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[34] See, Statements and Supporting Documents submitted to the Washington Bureau of the NAACP in regard to the nomination of Judge Clarence Thomas by Richard Paul Thornell, Professor of Law, Howard University School of Law.

As Professor Charles Ogletree has suggested in his contribution to the NAACP's staff report on Judge Thomas' confirmation, Judge Thomas' writings present a construct that is oblivious to the complex structural factors of racism in America. The theme of self-help is most evident in Judge Thomas' autobiographical recollections. Judge Thomas' commencement speech at Savannah State College bears ample witness to his faith in self-help. Judge Thomas' speech is most eloquent. He exhibits what appears to be genuine humility and speaks movingly about racial discrimination.

However, no acknowledgement is made of the systemic exclusion of blacks from venture capital. No recollection of racist policies which have denied mortgages to blacks. No memory of the debilitating effects of overcrowded and underfunded schools is recalled.

Clarence Thomas' logic is straightforward: he sets up a liberal straw man (blacks have tried to abdicate all responsibility for their own liberation because of prejudice) and then knocks it down by citing some anecdotal evidence of those who survived. He infers, from the few, that everyone can make it.

What is even more disturbing, however, is the way in which this logic leads into blaming the victim. For it follows, if some blacks can make it in the face of discrimination, how does one account for the fact that so many don't make it? The obvious answer is that there is something wrong with them -- they just don't work hard enough. The implication as well is that somehow, in reminding the African American community of systemic racism, white and black progressives have disabled the

community. It is not difficult then to extend this logic to a generalized opposition to affirmative action.

The American people have a right to know where Judge Thomas stands on these important questions.

II. Voting Rights

Of all the rights secured by the blood of African Americans, none is more precious than the right to vote. Without question, the Voting Rights Act of 1965 is the single most important piece of remedial legislation to emerge from the great Civil Rights Movement of the 1960's. The Voting Rights Act, in conjunction with the Civil Rights Act of 1964, has been largely responsible for the political empowerment of African Americans over the past twenty-five years.

The NAACP has a vital interest in preserving the right to vote for African Americans. The NAACP has been -- and it presently -- involved in voting rights cases across the United States brought under the Voting Rights Act. The NAACP routinely conducts voter education, voter registration and voter outreach programs designed to empower the African American community.

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

> The Voting Rights Act of 1965 certainly was crucial legislation. It has transformed the politics 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.[35]

Judge Thomas' observations at the Tocqueville Forum are consistent with his statements that the 1982 Voting Rights amendments to Section 2 were "unacceptable."[36] Presumably, the Supreme Court decisions referred to by Judge Thomas include Thornburg v. Gingles[37]. The Gingles 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 dilute minority voting strength.

At the hearings last week, Judge Thomas spoke approvingly of the Voting Rights Act. However, he expressed difficulty in accepting the "effects test", which is the heart of meaningful enforcement of the Voting Rights Act.

Further confirmation testimony from the nominee raise troubling questions concerning his understanding of Supreme Court interpretation of the Voting Rights Act. His awkward attempts to clarify statements he has made regarding Supreme Court rulings in the area of voting rights present a flawed account of the law. His testimony in this regard has been quite confusing. Judge Thomas has not made it clear whether his negative discussions about voting rights decisions reveal his belief that the law should be

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

[36] Thomas, Speech to the Heritage Foundation, June 18, 1987, p.4; Speech at Suffolk University, March 30, 1988, p.14.

[37] 478 U.S. 30 (1986).

changed or instead reflect his ignorance of the law. African Americans cannot be comforted by his ambivalent responses.

At the time his remarks were made at the Tocqueville Forum it appears that they were crafted to serve a conservative political agenda, the judicial acceptance of which would cripple the Voting Rights Act as an empowerment tool for enabling minorities to elect representatives of their choice. His statements during the confirmation hearings that he was concerned about the promotion of proportional representation for minorities flies in the face of the reality that those concerns had already been resolved in both Congressional legislation and the Supreme Court decision in Thornburg.

Judge Thomas emphasized at his confirmation hearing that his concern about interpretations of the Voting Rights Act rested on his judgment that these rulings presuppose that racial and ethnic groups will inevitably vote in blocs. It is well established in voting rights litigation that racial bloc voting is not presupposed, it must be proven. In Thornburg, the Supreme Court explained that legally significant racial bloc voting occurs only when the voting behavior of a white majority results, in the absence of unusual circumstances, in the defeat of candidates preferred by minority voters.[38] The persistence and pervasiveness of racial bloc voting is established by evidence presented in several voting rights cases.[39] Further legislation extending the Voting Rights Act

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[38] Thornburg v. Gingles, 106 S.Ct. 2752, 2767 (1986).

[39] See, Book Review, Without Fear and Without Research: Abigail Thernstrom on the Voting Rights Act, by Pamela S. Karlas and Peyton McCrary, in the Spring 1988 issue of the Journal of Law and Politics at p.760.

explicitly says that no group is entitled to legislative seats in numbers equal to their proportion of the population.

The future of voting rights protection for minorities is of extreme importance. Last term the Supreme Court significantly extended the reach of judicial protection under the Voting Rights Act.[40] Moreover, the Department of Justice has objected to legislative redistricting plans in Louisiana and Mississippi on the grounds they would fragment and thereby continue to vitiate the black vote.

Conclusion

The life story of Judge Thomas is, indeed, compelling. But it should not be the principal basis of his confirmation to the Supreme Court. The many contradictions between the record compiled by Judge Thomas before his nomination, and the opinions offered during his testimony before the Senate Judiciary Committee are troubling. We find it difficult to believe the suggestion that he has simply changed his mind on so many issues. As Senator Specter stated on September 16, 1991, the last day of Judge Thomas's testimony "Your writings and your answers are inconsistent; they're at loggerheads....". Other Senators have raised similar concerns about the consistent discrepancies between Judge Thomas's written record and oral testimony before the Judiciary Committee.

Those who have gone beyond their own individualistic concerns to address the broader concerns of all humanity have not gained civil rights victories without a price.

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[40] See, esp. Chisom v. Roemer 111 S.Ct. 2354 (1991) where the Court held that judicial elections are covered by Section 2 of the Act.

We have learned to mark the counsel of Frederick Douglass, who said, "We may not get everything we pay for, but we shall certainly pay for everything we get."

The NAACP believes:

> Our people who want freedom and justice must take the lead in fighting for it. We must be prepared to die for it, just as our strongest black leaders have done before us. We must not only be smart but smarter. We must not only be wide awake, we must be forever vigilant. We must not only clean up our own backyards, we must insist that America cleans up its act and face up to its misdeeds. We need not be perfect, but we have to be truthful, honest and proud.

We know of no civil rights organization that urges confirmation of Judge Thomas, based on his public record. To ameliorate strong concerns raised by that record, and his statements on civil rights protection, it has become apparent that the nominee has chosen to distance himself from past pronouncements through evasion and skewed logic during these hearings, rather than to defend or to clarify his controversial record. Thus, in Senator Heflin's words, the nominee remains, in part, an enigma.

In the final analysis, we are persuaded that the confirmation testimony presented by Judge Thomas fails to resolve the concerns we have raised about his public record or to reassure us that he is an suitable successor to Justice Marshall.

For these reasons, in the strong interests of all Americans, we have put reason above race, principle above pigmentation, and conscience above color. We urge the members of the United States Senate, to exercise their advise and consent authority by rejecting this nomination.

A REPORT

on the

NOMINATION

of

JUDGE CLARENCE THOMAS

as

ASSOCIATE JUSTICE

of the

UNITED STATES SUPREME COURT

National Association for the
Advancement of Colored People

August 15, 1991

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EXECUTIVE SUMMARY

Introduction

On July 31, 1991 the NAACP announced its opposition to the confirmation of Judge Clarence Thomas to become Associate Justice of the United States Supreme Court.

This decision was difficult for the NAACP because of our belief in the particular importance of having an African American as a successor to Justice Thurgood Marshall. We also recognize, however, that rulings of the Supreme Court have been central to the social, political and economic advancement of African Americans. Therefore, the NAACP has long held the view that race alone should not be the deciding factor governing our actions on Court appointments.

The NAACP opposes Judge Thomas' confirmation to the Supreme Court because his record of performance as Assistant Secretary for Civil Rights in the Department of Education (1981-'82) and as Chairman of the Equal Employment Opportunity Commission (1982-'90) fails to demonstrate a respect for or commitment to the enforcement of federal laws protecting civil rights and individual liberties.

In a substantial number of speeches, writings and interviews, Judge Thomas has revealed a hostility to constitutional principles affecting civil rights protections, including the use of meaningful remedies for both past and present discrimination such as "goals and timetables".

Several of these statements are fundamentally at odds with policy positions taken by the NAACP:

Thomas - Affirmative Action: "[It] is just as insane for blacks to expect relief from the federal government for years of discrimination as it is to expect a mugger to nurse his victims back to health. Ultimately, the burden of your being mugged falls on you ... Before affirmative action, how did I make it?" ["Administration Asks Blacks to Fend for Themselves," The Washington Post, December 5, 1983, p.A1].

Thomas - Goals and Timetables: "[American business] has a vested interest in the predictability of goals and timetables....[It] makes your jobs easy and neat, but

it's wrong, insulting, and sometimes outright racist." [Remarks, March 8, 1985].

The NAACP, of course, has supported both self-help initiatives and affirmative action as remedies against societal discrimination.

Thomas - Bork Nomination: "It is preposterous to think that by spending so much energy in opposing as decent and moderate a man as Judge Robert Bork that this [civil rights] establishment was actually protecting the rights and interests of black Americans." [Remarks, November 16, 1987].

The NAACP opposed the nomination of Judge Robert Bork to the Supreme Court.

Judge Thomas is not a "blank slate"; his public record is known and available for review. In the final analysis, Judge Thomas' inconsistent views on civil rights policy make him an unpredictable element on an increasingly hostile and radical Supreme Court. It is a risk too consequential to take.

Moreover, given the NAACP's past opposition to Judge Bork and Justices Scalia and Souter, and the elevation of Justice Rehnquist to become Chief Justice, our failure to oppose Judge Thomas would appear both inconsistent and race-based. We would be giving Thomas the benefit of our doubts, even though his opposition to positions of importance to us is, in many ways, more strident than that of previous nominees.

The principles of the NAACP, and positions taken on previous nominations, leave us compelled to oppose the confirmation of Judge Thomas.

Personal Philosophy

The doctrine of self-help, which has become an article of faith in Judge Thomas' public statements, has been an important element in the advancement of African Americans and has long been supported by the NAACP. Judge Thomas' nomination to the Court does not involve a debate over the value of self-help initiatives.

The philosophy of self-help is admirable, so long as it encourages initiative and achievement in a society that gives all of its members an opportunity to develop in the manner best suited to their talents. It is not, however, as Judge Thomas apparently presumes, a substitute for society's obligation to deal equitably with all of its members and to promote their general well-being, including equal educational, economic and political opportunity regardless of age, gender or race.

Judge Thomas' conservatism generally favors a government's interest over an individual's. Conservative judges tend to strictly construe the Constitution and federal

statutes, and generally leave to legislators the establishment of new rights or remedies for societal problems. This approach to civil rights law has had profoundly negative implications for the broad political interests of African Americans throughout our history.

Despite his own background, Judge Thomas is hostile to civil rights laws that have opened schoolhouse and workplace doors to millions of African Americans and other minorities. He has attacked as "egregious" and "disastrous" landmark Supreme Court decisions protecting against job discrimination and school segregation.

Moreover, Judge Thomas champions the "property rights" and "economic liberties" of big business, but opposes the minimum wage and other worker protection laws.

The Two Sides of Judge Clarence Thomas

The significance of the Supreme Court in American life, and the critical role played by Justice Thurgood Marshall in protecting the rights of all persons in the United States, make it important to view Judge Thomas' nomination to the Supreme Court in the context of the Court's recent history.

The Supreme Court, which all but destroyed our two most effective employment discrimination statutes in its decisions in Patterson v. McLean Credit Union (1989) and Wards Cove v. Atonio (1989), has already signaled its hostility to African Americans. Justice David Souter's arrival on the Supreme Court seems to have cemented a voting majority, which in the words of Justice Marshall, has launched a "far-reaching assault upon the Court's precedents." This overreaching approach to Supreme Court precedent puts into jeopardy many of the Court's most important modern constitutional cases.

The NAACP is aware that some of Judge Thomas' earlier writings send "mixed signals" on his civil rights views. For example, in his 1982 speech at Savannah State College, Clarence Thomas speaks eloquently about the importance of many of the values that the NAACP supports. However, his writings seem to reflect two distinctly different views on several important constitutional issues.

After his confirmation for a second term at the EEOC, his position on affirmative action shifted dramatically. In fact, the NAACP believed that his positions were so detrimental to the interests of African Americans, that we called for his resignation at that time.

Record at the Department of Education

As Assistant Secretary for Civil Rights at the Department of Education, Clarence Thomas failed to further the cause of higher education for African Americans and to

implement provisions that would have channeled millions of dollars to the historically black colleges. The weakening of civil rights protections during his tenure at the Department of Education represented a flight from the full, fair and faithful execution of laws governing equal educational opportunity and was a disservice to the African American community.

The Office of Civil Rights (OCR) is responsible for insuring that educational institutions do not discriminate on the basis of race, sex, handicap and age. The OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964 and Title IX of the Educational Amendments of 1973. It uses federal financial assistance as a "carrot and stick" to insure equal opportunity for a quality education.

When Clarence Thomas took office as Assistant Secretary, his agency had been under court order since 1970 to implement desegregation and the enhancement of black colleges to make up for their neglect by southern state governments in the past. The court order made clear that institutions which received federal funds must do more than just adopt nondiscriminatory policies; they must take affirmative steps, including eliminating duplicate programs and enhancing black colleges.

During Clarence Thomas' first months at the OCR, he began to undermine enforcement of the Adams order by negotiating with states to accept plans which gave the states free rein to handle desegregation. In accepting these higher education desegregation plans, the OCR waived established guidelines that had the force of law.

The path taken by Thomas led to the increasing budget reductions, admission constraints and other impediments that strangle black public colleges and universities today. Ironically, these decisions are at the heart of the issues in the Mississippi higher education case, Ayers v. Mabus, that the Court will decide in its next term. Clarence Thomas, whose tenure at the OCR helped to erode the leverage the black colleges and universities had gained, could be on the Supreme Court to ratify his neglect of these institutions, should he be confirmed.

Clarence Thomas also deliberately disobeyed a court order, substituting his judgement for the court's, even though as he admitted in federal court, the beneficiaries under the civil rights laws would have been helped by compliance with the court order.

Record at the Equal Employment Opportunity Commission

At EEOC, it appears that Clarence Thomas built on his OCR record of ignoring his responsibilities, complaining about the law he was required to enforce and allowing complaints to go unattended.

During each year of Clarence Thomas' tenure as Chairman of the EEOC, the backlog of cases at the agency increased and the number of complainants who received a hearing

or investigation declined. Between 1983 and 1987 the backlog *doubled* from 31,500 to approximately 62,000 complaints [See, GAO Report HRD-89-11, October 1988].

Judge Thomas also secretly ordered EEOC attorneys to back away from using court-approved remedies, such as goals and timetables, and only reinstated them when Congress discovered his actions and insisted that he enforce the law. In addition, a federal court found that, as a boss himself at the EEOC, Thomas illegally punished an employee who dared to disagree with his anti-civil rights policies.

During Chairman Thomas' tenure, the EEOC failed to process the age discrimination charges of thousands of older workers within the time needed to meet statutory filing requirements under the Age Discrimination in Employment Act (ADEA), leaving these workers without any redress for their claims. Some 13,873 age discrimination claims missed the statutory deadline. Ultimately, Congress had to intervene and enact legislation which reinstated the older workers' claims.

Moreover, Clarence Thomas failed to take affirmative steps to prevent Reagan Administration officials from attempting to overturn Executive Order 11246, a 20 year-old presidential order requiring businesses doing work for the government to employ racial minorities and women. In fact, he encouraged them to proceed with their efforts so that the Administration could move on to other areas of the law involving civil rights. However, because of the efforts of both Democrats and Republicans in Congress, and because of major business organizations, this regressive effort was blocked.

Affirmative Action

In speeches, writings, and interviews, Judge Thomas has left little doubt about his negative views on the uses of affirmative action -- including court-ordered affirmative action -- to address the effects of both past and present discrimination in employment:

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

* "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 deepen the original problem." [Thomas, Letter to the Editor, Wall Street Journal, p.23, Feb. 20, 1987].

Under Judge Thomas' view, *even* Title VII of the Civil Rights Act of 1964 would make affirmative action unlawful because it prohibits employers from discriminating on the basis of race, color, sex, religion or national origin.

Clarence Thomas' opposition to affirmative action remedies has led to his criticism of several important Supreme Court decisions which were decided by close votes, including United Steelworkers of America v. Weber, 443 U.S. 193 (1979) and Fullilove v. Klutznick, 448 U.S. 448 (1980). The replacement of Justice Marshall by Judge Thomas could lead to the reversal of these cases that have been important to African Americans.

In Weber the Court upheld a private employers' hiring and training program which reserved skilled jobs for African Americans. The Court emphasized the severe under-representation of African Americans in the workforce and the fact that the plan did not unnecessarily ignore the interests of other employees.

In Fullilove, the Court upheld as constitutional a federal public works program which set aside 10% of the federal contracts for minority business enterprises (MBE's). Judge Thomas criticized both the Supreme Court for "reinterpret[ing] civil rights laws to create schemes of racial preference where none was ever contemplated" and the Congress, of which he 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? [Thomas, Assessing the Reagan Years, 1988]

Voting Rights[1]

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

> The Voting Rights Act of 1965 certainly was crucial legislation. It has transformed the politics 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

[1] See, "An Analysis of the Views of Judge Clarence Thomas, "NAACP Legal Defense and Educational Fund, Inc., August 13, 1991, p. 4-5.

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

This is consistent with Judge Thomas' statements that the 1982 amendments to section 2 were "unacceptable" [Speech to the Heritage Foundation, June 18, 1987, p. 4; Speech at Suffolk University, Boston, March 30, 1988, p. 14], and his somewhat obscure objection to the Supreme Court's redistricting decisions.

The Supreme Court decisions referred to by Judge Thomas presumably include Thornburg v. Gingles, 478 U.S. 30 (1986). The Gingles 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.

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.

School Desegregation

Judge Thomas, who was educated in parochial schools during his childhood, has criticized the Supreme Court's decision in Brown v. Board of Education on the grounds that it was based on "dubious social science" and on an inaccurate premise that separate facilities are inherently unequal. In the Brown decision, a unanimous Supreme Court ruled, based on the equal protection clause of the Fourteenth Amendment, that "separate educational facilities" are inherently unequal.

The issue in Brown was not whether attending schools with whites would make black children smarter. The issue was whether segregated schools would ever receive the resources and benefits needed to make them equal to the competitive opportunities given to whites. Judge Thomas' rejection of equal protection jurisprudence in Brown is disturbing.

Even more disturbing is his criticism of the line of school desegregation cases following Brown. Judge Thomas has referred to such cases, including the critically important cases of Green v. County School Board and Swann v. Charlotte-Mecklenburg Board of Education, as a "disastrous series of cases." Until the Supreme Court rulings in these cases, almost all children in the South attended one-race schools, despite the ruling in Brown 15 years earlier.

Conclusion

Judge Clarence Thomas is not the best qualified successor to Justice Marshall. His confirmation would solidify a regressive majority on the Supreme Court, which would jeopardize a number of civil rights protections that have been established by closely-decided rulings of the Court.

For the foregoing reasons, the NAACP is compelled to oppose the confirmation of Judge Clarence Thomas.

* * * * * * * * * * *

Q & A's *[Frequently Asked Questions]*

If the NAACP and others succeed in defeating Judge Thomas' confirmation, won't President Bush simply name another nominee, equally as conservative, perhaps more so, and, assuredly, not an African American?

Certainly, that is a possibility. However, historically, Senate rejection of highly conservative nominees has been followed by approval of more moderate candidates. For example, Senate rejection of President Nixon's nominations of Judges Haynsworth and Carswell to the Court led to the appointment of Justice Blackmun, who has been moderate on the Court and has often joined Thurgood Marshall on civil rights and constitutional issues.

The question is: does Clarence Thomas possess the qualities and philosophy that we believe are essential for a Justice of the Supreme Court? We believe he does not.

Judge Thomas' record is so bad and the damage that he could do to civil rights and liberties on the Court is so severe that he must be opposed as a matter of principle. This is where the NAACP draws the line. The question of "who will come next" can always be raised. Each nomination, however, must be judged on its own merits. If people concerned about civil rights had allowed that question to stop them, we would now have Bork and Haynsworth or Carswell on the Court. Judge Thomas' nomination should be rejected by the Senate.

But don't we need an African American perspective on the Court?

Judge Thomas' views are potentially so devastating to the interests of African Americans that he should be rejected. In fact, precisely because he is an African American, Thomas may be even more effective than a white conservative on the Court in legitimatizing the attack and undermining the civil rights principles critical to African Americans.

The replacement for Thurgood Marshall should be someone who shares Marshall's commitment to civil and constitutional rights. There are many eminent black lawyers and judges who meet this description. We will urge the President to nominate such a person, assuming the Senate rejects Judge Thomas.

Judge Thomas is only 43 years of age. He has many years to serve, if he is confirmed. He might mature into a jurist of whom we can all be proud.

That is possible, of course. However, that would be a triumph of hope. Should we entrust a seat on the High Court to hope? Moreover, Judge Thomas' confirmation may mean that we are even less likely to see the appointment of another African American, so long as Judge Thomas holds his seat on the Court.

I. INTRODUCTION

On July 1, 1991, President George Bush nominated Judge Clarence Thomas as Associate Justice of the Supreme Court following Justice Thurgood Marshall's announcement on June 27, 1991, that he was retiring from the nation's highest court.

In view of the Supreme Court's critical role in guaranteeing constitutional rights, and the towering contributions of Justice Marshall in his 24 years as an Associate Justice, NAACP[2] Chairman Dr. William F. Gibson and Executive Director Dr. Benjamin L. Hooks issued a statement on July 7, 1991, noting "the importance of this appointment and its far-reaching implications in shaping the future of the Court."[3] The NAACP would "proceed at a deliberate pace in formulating our position, taking into full account any matter relating to Judge Thomas' qualifications to sit on the Supreme Court," the statement said.

The statement also noted that the NAACP's National Board of Directors had directed the Washington Bureau to "conduct an exhaustive review of Judge Thomas' record

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[2] The National Association for the Advancement of Colored People (NAACP) is the nation's oldest and largest civil rights organization.

Since its formation in 1909, the NAACP has been the principal vehicle by which African Americans have advanced their claims of legal rights in our nation's political and legal processes. The NAACP has championed the civil rights of women and other minorities, in addition to African Americans, through the courts and legislatures, on a national, state and local level.

[3] The Joint Statement was released by directive of the National Board of Directors on July 7, 1991 at the 82nd Annual National Convention in Houston, Texas.

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in public office." The Washington Bureau's report was presented to the members of the NAACP's National Board of Directors and it was considered at a special meeting of the Board on July 31, 1991. At that time the National Board voted by a margin of 49-1 to oppose Judge Thomas' nomination on the grounds that it "would be inimical to the best interests of the NAACP."

Justice Marshall's Replacement

When Thurgood Marshall was nominated to become an Associate Justice of the Supreme Court, he enjoyed the overwhelming support of African Americans. By no means was race the only factor that generated African American pride in Thurgood Marshall! The NAACP's national publication, The Crisis, set forth the views of many in the African American community:

> "The nomination of Thurgood Marshall to become an Associate Justice of the United States Supreme Court represents an historic breakthrough of transcendent significance. It is not merely that Mr. Marshall is the first Negro to be selected to serve at the summit of the nation's judicial structure. It is also that he achieved national eminence as the No. 1 civil rights lawyer of our times -- the Special Counsel of the National Association for the Advancement of Colored People and the Director-Counsel of the NAACP Legal Defense and Educational Fund. As such he was in constant battle against entrenched tradition and archaic laws, emerging as victor in 23 of 25 encounters before the Supreme Court..."[4]

Justice Marshall's retirement from the Court would have significance for the nation no matter when it occurred. His departure at this time in our nation's history, however, is especially troubling to many African Americans because it could accelerate the conservative shift in Supreme Court doctrine on civil rights, habeas corpus, and individual liberties which has been evident now for the past two terms of the Court.

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[4] "Associate Justice Thurgood Marshall", The Crisis, Vol. 74, No. 6, July 1967, p.282.

Synopsis of Judge Thomas' Career

Judge Thomas is a 1974 graduate of the Yale Law School. He obtained his undergraduate degree from Holy Cross College. He also spent a year in a Missouri seminary considering the priesthood.

The 43-year old Judge Thomas began his legal career as an assistant attorney general in Missouri under then - Attorney General John Danforth (now the senior Senator from Missouri) where he handled appellate matters on tax and finance issues. He later worked for the Monsanto Co. in St. Louis, Missouri. In 1979, he joined the staff of Senator John Danforth (R-MO) as a legislative aide handling energy and environmental matters.

In May, 1981, Clarence Thomas was appointed by President Ronald Reagan as Assistant Secretary of the United States Department of Education's civil rights division.

In 1982, he was confirmed as Chairman of the Equal Employment Opportunity Commission (EEOC). The NAACP did not then oppose his confirmation. When President Reagan renominated Clarence Thomas to another four-year term in 1986, the nominee faced serious opposition from a number of groups, including the NAACP[5]. Nonetheless, he was confirmed to a second term.

President Bush appointed Clarence Thomas to the United States Court of Appeals for the District of Columbia Circuit in February, 1990. The NAACP neither opposed nor endorsed his appointment to this position.

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[5] NAACP Resolutions, 77th NAACP Annual National Convention, Baltimore, MD (June 29 - July 3, 1986), Resolution #4 "Call for Resignations". See also, letters dated July 22, 1986 from Althea T. L. Simmons, then Director of the Washington Bureau of the NAACP to members of the United States Senate, urging them to vote against reconfirmation.

Basis for NAACP's Concern

This NAACP report reviews Clarence Thomas' tenure as Assistant Secretary for Civil Rights at the Department of Education, his chairmanship of the Equal Employment Opportunity Commission, his judicial opinions and his speeches and writings. From May 1981 to May 1982, when Judge Thomas held the mantle of responsibility for the Department of Education's Office of Civil Rights, he led a regressive effort to undermine Title VI, Title IX and the policies through which the federal government had strengthened and extended the constitutional guarantees of equal educational opportunity established by Brown v. Board of Education and its progeny.[6] The Thomas tenure left a legacy of initiatives and neglect that threatened to reverse more than a generation of progress toward equal educational opportunity for the nation's youth (See Chapter 5).

Judge Thomas' record of enforcement of existing law, management priorities and policy making pronouncements while he was EEOC Chairman, particularly during his second term, came under attack by members of Congress[7] and civil rights groups. Moreover, Judge Thomas' handling of age discrimination cases while at the EEOC has been sharply criticized[8]. The NAACP found Judge Thomas' record of enforcement at the EEOC especially troubling (See Chapter 4).

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[6] See, e.g. Griffin v. County School Bd., 377 U.S. 218 (1964); Green v County School Bd., 391 U.S. 430 (1968); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969); Swann v. Charlotte Mecklenberg Board of Educ., 402 U.S. 1 (1971);Lau v. Nichols, 414 U.S. 563 (1974); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (Dayton II).

[7] See e.g. Letter to C. Thomas, Chairman, Equal Employment Opportunity Commission from Rep. A. Hawkins, Chairman, Committee on Education and Labor, April 23, 1985.

[8] See Letters to Senator Joseph Biden (D-DE), Chairman, Senate Judiciary Committee, and Senator Strom Thurmond (R-SC), from the American Association of Retired Persons (AARP), January 26, 1990; February 1, 1990; February 16, 1990.

Judge Thomas' brief tenure on the Court of Appeals for the District of Columbia Circuit provides little enlightenment as to his fundamental beliefs on core constitutional questions -- including questions involving principles of equal opportunity or the use of race-based remedies to correct past discrimination. The relatively few opinions he has written or joined while on the bench do not exhibit strong evidence of his ideological persuasion (See Chapter 5).

In speeches, writings and interviews, Judge Thomas has left little doubt about his strongly-held conservative views. Judge Thomas' conservatism, for instance, generally favors a government's interest over an individual's. Conservative judges tend to strictly construe the Constitution and federal statutes, and generally leave to legislators the establishment of new rights or remedies for societal problems. This approach to civil rights law has had profoundly negative implications for the broad political interests of African Americans throughout our history (See Chapter 5).

Judge Thomas' announced positions on remedies for discrimination in education and the uses of affirmative action to remedy the effects of both past and present discrimination in employment are especially troubling. Several of these statements are fundamentally at odds with policy positions taken by the NAACP:

> Affirmative Action
>
> In a two-part NAACP exclusive interview with Clarence Thomas, which was reported in the The Crisis, then-EEOC Chairman Thomas explained his opposition to affirmative action:
>
> "Why am I opposed to affirmative action? The primary reason I am opposed to it is that I don't see where it solves any problems. As a lawyer, I don't legally see how it is going to be supportable as a social policy for a sufficient period to help black people. We have to sit down and think about the effects of it in the employment

arena, when we talk about policies that are *race-coriscious, --particularly the quota system."*[9] [emphasis added]

Judge Thomas, as chairman of the Equal Employment Opportunity Commission, said it is just as "insane" for blacks to expect relief from the federal government for years of discrimination as it is to expect a mugger to nurse his victim back to health.

"Ultimately, the burden of your being mugged falls on you. Now, you don't want it that way, and I don't want it that way. But that's the way it happens....Before affirmative action, how did I make it?" asked Thomas, who is black."[10]

The NAACP, of course, has supported both self-help initiatives and affirmative action as remedies against societal discrimination.

Goals and Timetables

"[American business] has a vested interest in the predictability of goals and timetables....[It] makes your jobs easy and neat, but it's wrong, insulting, and sometimes outright racist."[11]

The NAACP has supported goals and timetables for meaningful remedies.

Bork Nomination

"It is preposterous to think that by spending so much energy in opposing as decent and moderate a man as Judge Robert Bork that this [civil rights] establishment was actually protecting the rights and interests of black Americans."[12]

The NAACP opposed the nomination of Judge Robert Bork to the Supreme Court.

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[9] "I Am Opposed to Affirmative Action!," Interview with Clarence Thomas, Chairman, EEOC, by Chester A. Higgins, Sr., The Crisis, March, 1983, vol. 90. No. 3 (the first part, "We Are Going to Enforce the Law," was published in the February, 1983 edition of The Crisis.

[10] "Administration Asks Blacks to Fend for Themselves," The Washington Post, December 5, 1983, p.A1, p.A8.

[11] Addressing the EEO Committee of the ABA's Labor and Employment Law Section, Palm Beach Gardens, Florida, March 8, 1985.

[12] Speech: Remarks of Clarence Thomas, Chairman, Equal Employment Opportunity Commission, Claremont McKenna College, Claremont, California, November 16, 1987.

In light of the longstanding principles of the NAACP and our concern for the future of our nation, the final decision on the suitability of any successor to Justice Marshall must be made with care and deliberation.

II. The Importance of Supreme Court Nominations to the NAACP

As the final arbiters of the American constitutional system, the Justices of the Supreme Court collectively exercise an influence on the destiny of America unequalled by any other branch of government.[13] When the NAACP was still in its infancy, two important legal victories in the Supreme Court had much to do with shaping the Association's institutional view on the importance of the Supreme Court. In 1915, the Supreme Court ruled Oklahoma's "grandfather clause" unconstitutional[14] and, two years later, the Court invalidated a Louisville ordinance requiring residential segregation.[15]

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[13] In a most important sense, the Supreme Court is the nation's balance wheel. As Justice Robert H. Jackson stated:

> In a society in which rapid changes tend to upset all equilibrium, the court, without exceeding its own limited powers, must strive to maintain the great system of balances upon which our free government is based. Whether these balances and checks are essential to liberty elsewhere in the world is beside the point; they are indispensable to the society we know. Chief of these balances are: first, between the Executive and Congress; second, between the central government and the States; third, between state and state; fourth, between authority, be it state or national, and the liberty of the citizen, or between the rule of the majority and the rights of the individual.

[14] Guinn v. U.S., 238 U.S. 347 (1915). Under the "grandfather clause", which was a part of a 1910 amendment to the Oklahoma state constitution, a person could become a registered voter if he had served in the armies of the U.S. or the Confederacy, or was a descendant of such a person, or had the right to vote before 1867. This method of disqualifying blacks was so effective that other southern states inserted the clause in their constitutions as well.

[15] Buchanan v. Warley, 245 U.S.60 (1917). The Louisville ordinance, which became effective in May, 1914, was enacted to restrict minorities to live within certain boundaries.

It is unsurprising, therefore, that the NAACP has a long historical record of carefully scrutinizing the social, political, and economic views of the Justices, as well as their judicial philosophies, in determining whether they should be nominated to the Court and subsequently confirmed by the Senate.[16] As early as 1912, for example, the NAACP opposed the nomination of Judge Hook to the United States Supreme Court because of his views on race issues and other matters. Based on the NAACP's vigorous opposition, President Taft withdrew Judge Hooks' nomination.

In April 1930, when President Herbert Hoover nominated Judge John J. Parker to a vacancy on the Supreme Court, Walter White, acting secretary of the NAACP, ordered a prompt investigation of Judge Parker's record.[17] The inquiry revealed that while running for governor of North Carolina in 1920, Judge Parker had approved of literacy and poll taxes for voters and had also approved of the "grandfather clause" which the Supreme Court had declared unconstitutional in 1915. The NAACP launched a successful national campaign to block Judge Parker's confirmation, which was rejected by the Senate by a vote of 39-41. "The first national demonstration of the Negro's power since Reconstruction days," the Christian Science Monitor said of Parker's defeat.

Twenty-five years later, after the Supreme Court's landmark decision in Brown v. Board of Education[18], Judge Parker led the judicial resistance to integration in Briggs v.

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[16] See,Olive Taylor, Two Hundred Years, An Issue: Ideology in the Nomination and Confirmation Process of Justices to the Supreme Court of the United States, A Report Prepared for the NAACP Washington Bureau, September 1987, p.2.

[17] Richard Kluger, Simple Justice. (New York: Random House, 1975), pp. 141-142.

[18] Brown v. Board of Education of Topeka, 347 U.S.483 (1954); 349 U.S. 294 (1955).

Elliott in which he wrote:

> It is important that we point out exactly what the Supreme Court has decided and what it has not decided...[A]ll that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decisions of the Supreme Court takes away from the people the freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation.[19]

The Briggs dictum was intended to offer aid and comfort to segregationists and to those who wanted to undermine the mandate of Brown. Fortunately, Brown prevailed over Briggs but if Judge Parker had been elevated to the Supreme Court, would there have been Brown?

More recently, the NAACP opposed the nomination of Judge Robert H. Bork to the Supreme Court because of his previous judicial record and opposition to NAACP policy on civil rights matters.

At the NAACP's 78th Annual Convention, the delegates unanimously adopted a resolution of opposition to Judge Bork, which said in part:

> "...the confirmation of Judge Bork would place on the High Court a justice who does not feel constrained by precedent and who has favored a congressional limit on...school desegregation techniques...[T]he Supreme Court is too important in our thrust for equality and justice to permit us to sit idly by and watch a whole line of civil rights and liberties [cases] be threatened by the appointment of a Justice whose ideological orientation would deprive us of the gains achieved in the last twenty years."

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[19] 132 F. Supp. 776,777 (D.N.C. 1955).

Now therefore be it resolved, that the NAACP launch an all-out effort to block the confirmation of Judge Bork."[20]

The NAACP initially took no position on the nomination of Judge Douglas H. Ginsburg to the Court. In a statement issued shortly after Judge Ginsburg's nomination to the Court, Dr. Benjamin Hooks, Executive Director of the NAACP, stated, "At this point, we do not know enough about Judge Ginsburg to make a decision on where we will stand on his nomination. We are researching his record in the same careful way we did with Judge Bork and will do with any nominee to the Court. Only then will we take a position."[21]

The nomination of Judge Anthony Kennedy was handled similarly.[22] Ultimately, the NAACP did not oppose the nomination of Judge Kennedy.

The NAACP took no position initially on the nomination of Judge David Souter to become an Associate Justice on the Supreme Court. Because so little public information was known about Judge Souter, the NAACP decided to withhold judgement, and elected instead to await the outcome of the Senate Judiciary Committee's hearings and to review Judge Souter's public record. The NAACP did argue, however, that Judge Souter "must affirmatively demonstrate an unwavering respect for individual rights, for the progress that

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[20] Resolutions adopted by the 78th Annual National Convention of the NAACP; New York, New York; July 5-9,1987. Emergency Resolution - Text of Bork Resolution.

[21] Statement by Dr. Benjamin L. Hooks, on the Nomination of Douglas H. Ginsburg to the Supreme Court; October 30, 1987.

[22] Statement of Benjamin L. Hooks, LCCR Chairperson and Ralph G. Neas, LCCR Executive Director, Regarding the Anthony Kennedy Supreme Court Nomination Hearings; November 20, 1987.

has been made, and for the Court as a forward-looking institution."[23]

After a review of Judge Souter's testimony before the Senate Judiciary Committee, the NAACP opposed his nomination to the Supreme Court.[24]

The NAACP also opposed the nomination of Justice William H. Rehnquist to become Chief Justice of the Supreme Court and the nomination of Judge Antonin Scalia to become an Associate Justice of the Court.[25]

Some have asked whether the NAACP's decision to neither endorse nor oppose Clarence Thomas for a seat on the Court of Appeals should somehow preclude us from taking a position on his confirmation to the Supreme Court? The answer, unequivocally, is "no."

The NAACP's decision neither to oppose nor endorse Judge Thomas' Court of Appeals appointment in 1990 was both a reflection of his troubling record at the EEOC -- a record which had prompted an earlier call by the NAACP for his resignation as Chairman of the EEOC[26] -- and a concern about the difficulty and justification for attempting to stop his confirmation to a lower court position based on that record.

Moreover, an individual's suitability for a lower federal court appointment does not automatically qualify him for a seat on the Supreme Court. As the nation's "particular

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[23] See Letter to Senator Joseph Biden, Chairman, Senate Judiciary Committee, from NAACP, et. al; August 3, 1990.

[24] Statement by Dr. Benjamin L. Hooks, Executive Director, NAACP on Nomination of Judge David Souter to Supreme Court; September 21, 1990.

[25] Resolutions adopted at the 77th Annual National Convention of the NAACP; Baltimore, MD; June 29 - July 3, 1986.

[26] NAACP Resolutions, 77th NAACP Annual National Convention, Baltimore, MD (June 29 - July 3, 1986), Resolution #4 "Call for Resignations".

guardian of the terms of the written constitution,"[27] the Supreme Court has become the most powerful court of the modern world era. It can override the will of the majority expressed in an act of Congress. It can forcefully remind a president that in this nation all persons are subject to the rule of law. It can require the redistribution of political power in every state of the Union. And it can persuade the nation's citizens that the fabric of their society must be rewoven into new patterns.[28]

The significance, range and complexity of the issues which are considered by the Supreme Court, and their potential importance to the resolution of society's most complex problems, makes the Supreme Court appointment distinct.

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[27] Charles Grove Haines, The American Doctrine of Judicial Supremacy (Berkeley, CA.: University of California Press, 1932; reprint ed., New York: Da Capo Press, 1973), p.23.

[28] The Supreme Court and Its Work, Congressional Quarterly Inc. (Washington, D.C.), 1981., p.1.

III. The Record at the Department of Education

During Clarence Thomas' tenure as Assistant Secretary for Civil Rights at the Department of Education from May 1981 until May 1982,[29] he spearheaded an effort to undermine the Department's compliance with a 1970 federal court order to implement desegregation and assist Black colleges and a 1975 court order to promptly investigate race and sex discrimination complaints and conduct compliance reviews. These actions raise serious questions about his commitment to faithfully execute the laws of the land, particularly on issues that are so central to the NAACP's mission.[30]

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[29] The civil rights office of the Education Department is responsible for enforcing Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1973. It is responsible for insuring that institutions that discriminate on the basis of race, sex, handicap and age do not receive student aid, Chapter I grants and other federal funds. It uses federal financial assistance as a carrot and a stick to insure equal opportunity for a quality education in the 16,000 school systems, 3,200 colleges and universities, 10,000 proprietary institutions (for-profit schools for career preparation) and other types of institutions such as libraries and museums that receive Education Department funds.

[30] For instance, at the 66th Annual NAACP Convention held in the Washington, D.C., between June 30, 1975 and July 9, 1975, convention delegates adopted the following Statement of Policy:

> Access to an equal educational opportunity and quality education are affirmative goals of our Association.
>
> We reaffirm our commitment to integrated education for all children and condemn the current racist attempts by Federal, state, local officials and others to postpone meaningful school desegregation because of negative public opinion. We demand that the scales be balanced on the side of the students who are being denied an education in a desegregated/integrated setting rather than on the side of recalcitrant school officials.

The court orders, which had been promulgated as regulations of the Department of Health, Education and Welfare and published in the Federal Register in 1978, made clear that institutions which received federal funds must do more than just adopt nondiscriminatory policies; they must take affirmative steps, including eliminating duplicate programs and enhancing the resources and programs of Black college.[31] For example, on the basis of the court orders, the Black community in Oklahoma was able to keep Langston University open and to expand its operations despite several state government attempts to close it.

Under Clarence Thomas, however, the Education Department began negotiating with states to accept plans which gave the states free rein to determine whether desegregation had been achieved. For example, the Department settled its case against the state of North Carolina by ignoring requirements of the court order.[32]

In the spring of 1982, women and minority plaintiffs brought contempt proceedings against the Department of Education for refusing to investigate discrimination complaints and perform compliance reviews in a timely manner. The Education Department argued

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> We therefore direct our branches, youth councils and college chapters to use every legal and/or educational means to accelerate the rate of school desegregation and improve the quality of education.

[See also, NAACP Resolutions Regarding: (A) HEW, Title VI, and Schools in the South (63rd conv. res. 1967); (B) HEW, Title VI, and Schools in the South (59th conv. res. 1968); (C) HEW, Title VI and Public Schools, North and West (63rd conv. res. 1972); (D) Federal Enforcement of Education Legislation (68th conv. res. 1977); and (E) Survival of Public Education (73rd conv. res. 1982).]

[31] Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education (prepared pursuant to Second Supplemental Order), Adams v. Califano, 430 F. Supp. 118 (1971).

[32] Letter dated February 12, 1982, from Arthur S. Fleming, Chairman of the U.S. Commission on Civil Rights, writing for the Commissioners, to the Honorable Thomas P. O'Neill, Jr., Speaker of the House of Representatives, Washington, D.C. p. 7.

that they did not need court supervision.

Clarence Thomas testified that he just did not think investigations could be done in a timely manner as required by the court. He had a study underway but he did not know when it would be completed: "The Adams time frames study, which is designed to ferret out the time frames with the degree of specificity that you are requiring, is incomplete at this time."[33]

He also made the following admissions:

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

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.

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

A: Yes.[34]

Following the Clarence Thomas testimony, Judge Pratt found that the order to

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[33] Testimony of Clarence Thomas, March 12, 1982, p. 7-8 Deposition of Clarence Thomas in Adams v. Bell March 8, 1982 in Civil Action 3095-70, p. 48.

[34] Testimony of Clarence Thomas, supra.

investigate and engage in compliance reviews speedily "had 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." Judge Pratt ruled that the order would remain in effect.[35]

Judge Pratt's comments about Clarence Thomas are very instructive. He contrasted Thomas' non-performance with that of his predecessor, David Tatel, saying "I contrasted Mr. Tatel on the one hand, who was sitting in the same position Mr. Thomas was four years ago or four and a half years ago, with Mr. Thomas...and it seems the difference between those two people is the difference between day and night."[36]

Judge Pratt also noted that, prior to the Thomas term, as a result of a lot of hard bargaining, "time frames were temporarily suspended and certain serious efforts were made to eliminate the complaints backlog, and all that type of thing." However, under Clarence Thomas "we have almost come full cycle. It seems to me, Mr. Levie (counsel for the government), we've gotten down to the point of where, with the change of administration, sure we've got Title VI, and these other statutes, 504 and Title IX, but we will carry those out in our own way and according to our own schedule. And that's the problem that I have."

Because of Thomas' inaction, the federal government continued to ignore complaints that students were being excluded from education programs; assigned to "special education" classes inappropriately; and, refused admission, suspended or expelled from school for

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[35] WEAL v Bell, Civil Action No. 74-1720 March 15, 1982; The Court's Findings of Fact and Conclusions of Law.

[36] WEAL v. Bell, supra.

invidious reasons. In short, the federal funds continued to flow.[37]

As Judge Pratt predicted, Clarence Thomas was just a "bird of passing."[38] By May 1982, he was confirmed as Chair of the Equal Employment Opportunity Commission (EEOC). The weakening of civil rights protections during the Clarence Thomas tenure at the Department of Education,[39] represented a flight from the full, fair and faithful execution of laws governing equal educational opportunity and was a disservice to the African American community. The Thomas tenure left a legacy of initiatives and neglect that threatened to dismantle the crucial federal civil rights effort in education and to reverse more than a generation of progress toward equal educational opportunity for the nation's youth.

Clarence Thomas did nothing to further the cause of higher education for African Americans and he failed to implement provisions that would have funnelled millions of dollars into the historically Black colleges. Indeed, because of steps taken by him and followed by successor appointees of the Reagan Administration, Black colleges and universities have seen their funds from the state governments drastically cut and steps taken to make them noncompetitive in every state in the South.

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[37] Statements by Judge Pratt in response to Closing Arguments of Defendants, March 15, 1982 Civil Action No 3095-70 in WEAL v. Bell and Adams v. Bell.

[38] Judge Pratt's comments in response to Closing Argument of the Defendant", p.4, WEAL v. Bell and Adams v. Bell.

[39] *Some efforts by the Department of Education to weaken civil rights protections were blocked because the Department of Justice found them to be inconsistent with the law.* The Department of Education tried to exempt from all its civil rights requirements over 3,500 postsecondary institutions assisted by Federal student aid, again to prevent a court ruling that may uphold its enforcement responsibilities [according to a February 12, 1982 letter to the Honorable Thomas P. O'Neill from Arthur S. Fleming, Chairman of the United States Commission on Civil Rights, p, 12].

The path Clarence Thomas trod led inexorably to the increasing budget reductions, admission constraints and other impediments that strangle Black public colleges and universities today. It led to the 1988 announcement by William Bennett (then-Secretary of the Department of Education) that the southern states were all in compliance and had desegregated higher education.

Importantly, these decisions are at the heart of the issues in the Mississippi higher education case that the Supreme Court will decide in its next term.[40] Clarence Thomas, whose tenure at the Education Department helped to erode the leverage the Black colleges and universities had gained, could be on the Supreme Court to ratify his neglect of these institutions, should he be confirmed.

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[40] The Supreme Court has agreed to decide whether Mississippi is required by either the United States Constitution or federal civil rights laws to do more than end official segregation in its public universities. (The question of a state's obligation to desegregate its public higher education institutions is also at issue in Alabama, Louisiana, Kentucky and Texas). United States v. Mabus; Ayers v. Mabus; Nos. 90-1205; 90-6588; U. S. Supreme Court, October Term, 1991.

IV. The Record at the Equal Employment Opportunity Commission

In May 1982 Clarence Thomas was confirmed as Chairman of the Equal Employment Opportunity Commission (EEOC). The EEOC is responsible for enforcing federal law guaranteeing equal employment opportunity, including provisions remedying age, sex, handicap, religion, national origin and race discrimination.

The EEOC's policy is made by five commissioners who are nominated by the President and confirmed by the Senate. The chair not only is the spokesperson, but is also responsible for the overall management of the agency. There is also a general counsel confirmed by the Senate who is responsible for the litigation program of the agency.

It appears that Clarence Thomas built on his record at the U.S. Department of Education's Office of Civil Rights by ignoring his responsibilities, complaining about the law he was required to enforce, and allowing discrimination complaints to go unattended at the EEOC. The result was an officeholder who seemingly pleased his presidential sponsors who were apparently not interested in strong enforcement policy. Clarence Thomas' record at the EEOC led directly to his nomination to the Court of Appeals and to the United States Supreme Court.

Judge Thomas' management priorities while at the EEOC appear at best strange in view of his repeated emphasis on making individual victims of discrimination whole.[41] As

[41] See, EEOC's Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination (February 5, 1985).

he said in 1985, "In the past the Commission has chosen to concentrate on prospective relief in the form of numerical goals and timetables, rather than full relief for the party actually filing the charge. I find it ironic that anyone would put a policy in place which provided less for those who were actually hurt than for those who may have been hurt as a result of historical events."[42] Despite his protestations, Judge Thomas ill served the interests of individual, identifiable victims of discrimination as well as those who belong to groups who were the victims of both past and present discrimination.

In congressional hearings, Clarence Thomas established a pattern of complaining about his agency not being organized or not having the resources to perform the investigation of complaints and the enforcement it was required to do under law. He noted that he abandoned the "Rapid Charge"[43] processing procedure in use at the agency, citing a 1981 General Accounting Office (GAO) report that wondered whether it might thwart efforts to end discrimination by over-emphasizing settlements. It should be noted, however, that he put no procedure in place that provided more expeditious settlements for the victims of discrimination.

Instead, during each year of Clarence Thomas' tenure, the backlog at the agency increased. In addition, a substantial portion of charges reviewed by the GAO during the Thomas Administration were closed without full investigations.[44]

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[42] See, Remarks of Clarence Thomas, EEO Law Seminar in Pittsburgh, PA (May 2, 1985).

[43] The Rapid Charge Processing System initiated by Thomas' predecessors encouraged settlement only in small individual cases not suitable for litigation.

[44] "EEOC and State Agencies Did Not Fully Investigate Discrimination Charges," GAO Report/HRD-89-11, October 1988 [hereinafter cited as "GAO Report].

At the beginning of the Reagan administration (1980), 43% of new charges at the EEOC resulted in a settlement. The average benefit was at least $4,600. By November 1982, only one-third of new charges filed resulted in some kind of settlement the average benefit was down to $2,589. The length of time to process an individual charge had also increased from 5.5 months to 9 months -- almost twice as long as the previous year.[45]

Over the years of Clarence Thomas' tenure at the EEOC the complaints backlog grew. Thomas's policy of requiring full investigation of every charge, and an appeal of "no cause" findings from district directors to EEOC headquarters for another review, meant that hardly any of the complaints filed ever got any attention at all. Between 1983 and 1987 the backlog doubled from 31,500 to approximately 62,000 complaints.[46]

As a result of continuing concern in Congress and among civil rights advocates regarding these problems, Chairman Augustus Hawkins (D-CA), Chairman of the House Committee on Education and Labor, subsequently joined by eight other members of Congress, requested in April 1987 that the GAO conduct a comprehensive study of the Agency's enforcement activities and administrative procedures.

After investigating six District offices and five State agencies which were under contract with the EEOC to investigate discrimination charges, the GAO released its report in October 1988.[47] The GAO found that 41-82% of the charges closed by the District EEOC District offices and 40-87% of charges closed by the contract State agencies had not

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[45] Id.

[46] Id.

[47] Id.

been fully investigated. Moreover, the backlog of charges still to be investigated had increased substantially.

By the end of fiscal year 1984 -- the first full year of Chairman Thomas' alleged policy of full investigation of all charges -- the backlog had increased to 40,000 cases. The number of charges had remained constant over this same period. By the end of fiscal year 1987, the backlog was approximately 62,000 cases with a slightly lower intake than the previous year.[48]

The GAO review was undertaken in large part to determine what impact, if any, Chairman Thomas' philosophical views might have had on compromising EEOC field staff's enforcement activity.

The GAO findings are instructive in this regard. First, the GAO found that large percentages of the charges closed by EEOC District Offices and State Fair Employment Practice Commissions with no-cause determinations "were not fully investigated."[49] In making this determination, the GAO first asked the EEOC to delineate for it the elements of an appropriate charge investigation. Based on the criteria provided to the GAO, the agency determined that critical evidence "was not verified in all 11 of the offices in at least 40% of the charge investigations."[50] As the GAO report noted further:

> "According to EEOC's Director of Program Operations, the verification of evidence is particularly important to determine whether an employer has omitted certain information that might adversely affect its position on the charge. Investigators

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[48] Id.

[49] Id.

[50] Id.

frequently accepted employer-provided data without verifying its validity."[51]

Second, the GAO noted that the next most common deficiency was the Commission's failure to interview relevant witnesses. As the GAO noted:

> "[I]n all 11 of the EEOC and FEPA offices we reviewed, we found charges that were closed although investigators had not interviewed relevant witnesses who had been identified by the charging party, employer, or investigator."[52]

Third, the GAO found the EEOC frequently failed to obtain information on similarly situated employees which was critical to the investigation of charges alleging disparate treatment. Although almost all of the charges it reviewed were based on this allegation, "in five of the eleven EEOC and FEPA offices we reviewed, we estimate that at least 20% of the disparate treatment charge investigations did not compare the charging party with any similarly situated employees or with all of those who were identified as similarly situated."[53]

Finally, and of particular importance, the GAO specifically noted that EEOC imposed quantitative production goals creating an incentive among its investigators to complete a certain number of cases. As the report stated, "investigative staff in four of the six offices we reviewed said they were still required to meet headquarters-established production goals, or face some adverse action such as a low performance rating." The report noted further that:

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[51] Id.

[52] Id.

[53] Id.

> "[I]n one EEOC District Office, some supervisors commented that they frequently placed more emphasis on meeting their quantitative goals than adhering to the Compliance Manual requirements for investigations."[54]

The General Accounting Office reported in October 1988 that the Commission's full investigation policy did nothing except create confusion among the staff about when an investigation was complete. In many instances the staff simply closed cases without any settlement.

In response to these and other criticisms, Chairman Thomas labelled the GAO report "a hatchet job." In an interview with the Los Angeles Times, he said that "it's a shame Congress can use GAO as a lap dog to come up with anything it wants...."[55] Most of these negative policies which were disclosed through the GAO study persisted throughout his tenure as Chairman of the EEOC.

Meanwhile, as people complained about not being hired, or promoted or losing their jobs because of discrimination, Chairman Thomas continued blithely to tell the appropriations committees about his satisfaction with the way things were going at EEOC. When the House Appropriations subcommittee asked about the 1988 GAO report, Chairman Thomas criticized the report's "methodology."

He also told the subcommittee in 1989, seven years after he became EEOC chairman, "Never did we say that we could accomplish that overnight and never did we say we were perfect." Chairman Thomas continued, saying, "But I have not seen, even in the GAO report, any effort forthcoming to finance the agency in a way that it can do the things

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[54] Id. at 31.

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

necessary, improvements in the library, the necessary improvements in personnel, etc."[56] Chairman Thomas' interest in helping individual victims was not evident in his procedures for handling complaints. Large numbers of people who complained to his agency obtained no relief and did not even have their cases investigated.

In policy direction and leadership Clarence Thomas operated consistent with his legal mandate for over a year at EEOC. He supported affirmative action in a 1983 speech.[57] At that time he noted "it is settled that, as a matter of law, affirmative action including the use of numerical goals, may be used in appropriate circumstances."[58]

In testimony before the House Subcommittee on Employment Opportunities on April 15, 1983, Chairman Thomas agreed that affirmative action relief was proper not just for identifiable victims but also as a group remedy in discrimination cases.

Congressman Hawkins asked him:

> Suppose there is a case in which specific discriminatory practices are identified, such as in disparate treatment cases for example, in which women are denied entrance into certain training programs, or in cases where indefensible low numbers of minority employees are promoted to bank officer positions, in such cases the discriminatory practice is clear and overall liability can be assessed. However, it is absolutely impossible to identify the individual victims of discrimination as distinct from the affected classes. Now in such a hypothetical situation, would Title VII of the law recognize formula relief?

Thomas: It is our view that it does Mr. Chairman.

Hawkins: Would you say formula relief would be appropriate for class members?

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[56] Testimony Before the Subcommittee on Commerce, Justice, State and Judiciary, Committee on Appropriations, 101st Congress, 1st Session (February 21, 1989).

[57] Speech to Personnel/Equal Employment Management Conference, Department of Health and Human Services, November 16, 1983.

[58] Id.

Thomas: I would, again, I am not the judge, but in cases where it is impossible or difficult to determine the precise relief that should go to the individuals, remedies have permitted the use of formula relief. Whether or not the specific case that you outline would be one of those cases, I do not know. But it is available in cases where it would be impractical to provide such individual relief.[59]

Chairman Thomas soon changed his public position on affirmative action in what appeared to be an effort to conform to the views expressed by William Bradford Reynolds, the Assistant Attorney General for Civil Rights, in opposition to affirmative action numerical remedies. By 1984 Chairman Thomas consistently announced his opposition to federal laws and regulations requiring affirmative action remedies. Only when substantial pressure was put on EEOC by the Congress did Thomas and the Commission retreat.

In his EEOC confirmation hearings in 1986 Clarence Thomas agreed to change the nonenforcement policy. He did, however, continue to express his opposition to affirmative action in the Congress, in speeches and in writings.

Chairman Thomas told the Subcommittee on Government Activities and Transportation of the House Committee on Government Operations on July 25, 1984:

> The Chairman of the Endowment, William J. Bennett, in a letter to me but delivered to the Washington Post and me, dated January 16, 1984, explained his opposition to making determinations of under-representation and to setting [employment] goals for fiscal year 1983 by stating that the Department of Justice had declared that the Commission exceeds its authority in seeking such information. He also said that he believes that employment policies should not be influenced by race, ethnicity or gender. My personal views are consistent with Mr. Bennett's on this issue. However, we have viewed our statutory authority and obligations to be at odds with such personal views.[60]

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[59] Testimony Before House Subcommittee on Employment Opportunities (April 15, 1983).

[60] Hearing before the Subcommittee on Government Activities and Transportation of the House Committee on Government Operations, 98th Congress, 1st Session 19 (July 25, 1984).

In late 1985, the staff at the Committee on Education and Labor conducted an investigation of the effect of the implementation of recent directives relating to goals and timetables and to the overall enforcement posture of the EEOC. The Committee's investigation also reflected concern regarding the status of case processing operations, the use of performance standards in employee evaluations and, as noted above, the impact of the EEOC's reorganization in 1984 on its overall enforcement program.

In the course of its review, Committee staff learned that the Acting General Counsel had also instructed his legal staff not to seek the enforcement of goals and timetables in existing consent decrees as well as in future ones.[61] This policy, although implemented by the Acting General Counsel, was in all respects reflective of Chairman Thomas' position regarding the use of goals and timetables.

A further concern to the Committee was the fact that class action cases and charges which did not identify "actual victims of discrimination" were regarded as unacceptable to the Commission. The staff also learned that the Commission had begun evaluating charges on a new -- higher -- standard of proof than the previously relied upon "reasonable cause to believe" test. The new standard was articulated in a "Statement of Enforcement Policy" dated September 11, 1984, which also created substantial confusion among EEOC staff regarding the circumstances in which they could seek "full relief," such as back pay, retroactive seniority, and in general, placement of a person in the position in which he or she would have been in, but for the unlawful discrimination.

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[61] "A Report on the Investigation of Civil Rights Enforcement by the Equal Employment Opportunity Commission," the House Committee on Education and Labor, U.S. House of Representatives, 99th Congress, 2nd Session (May 1986), at p.11.

Among the other policy concerns was the Commissions' apparent renunciation of the adverse impact theory traditionally used to prove discrimination and articulated by the U.S. Supreme Court in Griggs v. Duke Power Company.[62] This policy change, like the goals and timetable policy, was issued orally.

Professor Alfred Blumrosen of the Rutgers University School of Law described this process as "government by innuendo, where responsible officials skulk in the corridors of power, hoping that staff will intuit their desires."[63] Moreover, the EEOC has a policy on goals and timetables which includes the use of goals and timetables in court decrees that result from litigation. That policy is expressed in the Affirmative Action Guidelines which were adopted after notice and comment proceedings under the Administrative Procedure Act and which have the force of law.[64]

The congressional staff also investigated a number of administrative and personnel practices which were of concern to the Committee, including a greater emphasis on the rapid closure of cases at the expense of quality investigations, and efforts by some District Directors to "pad" the number of charges processed in order to present more favorable statistics and to disguise the Commission's failure to do complete reviews of the work of state and local Fair Employment Practice Agencies (FEPA).

All of these negative policies and administrative procedures were a result of either

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[62] 401 U.S. 424 (1971).

[63] Hearing on EEO Enforcement, Subcommittee on Employment Opportunities, Committee on Education and Labor, 99th Congress, 1st Session (March 13, 1986) (Statement of Professor Alfred Blumrosen) [hereinafter cited as "Hearings"].

[64] 29 C.F.R. S1608 (1979).

Chairman Thomas' philosophy or assumptions made by staff regarding what they perceived he expected they do. Thomas, aware of these several problems, either attempted to deny responsibility for them or to explain them away as necessary procedural modifications to improve the Agency's overall enforcement activities. Such improvement never manifested itself in relief to victims of discrimination.

While consistently assuring concerned members of Congress that the agency was not abandoning the use of goals and timetables, the Commission published a resubmission in the Regulatory Program of the United States which stated, with respect to affirmative action:

> "[T]he federal enforcement agencies...turn the statutes on their heads by requiring discrimination in the form of hiring and promotion quotas, so-called goals and timetables, and by using rigid statistical rules to define discrimination without regard to the plain meaning of that term.... As Chairman of the EEOC, I hope to reverse this fundamentally-flawed approach to enforcement of the anti-discrimination statutes."[65]

As a result of these and other disclosures, members of Congress wrote to Chairman Thomas on January 23, 1986 regarding the goals and timetables policy, articulated by Acting General Counsel Butler. On January 31, 1986, the Chairman responded stating his support for the Acting General Counsel's actions. In that letter he stated that the General Counsel "has acted within the scope of statutory authority.... [E]xercise of his litigation authority is not inconsistent with the... Code of Professional Responsibility, Commission policy or the

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[65] EEOC Resubmission to the Office of Management and Budget in Regulatory Program of the United States Government (April 1, 1985 - March 31, 1986).

Commission guidelines... which permit but do not require the use of goals and timetables."[66]

In a January 11, 1986, Washington Post article he disclosed that the "de facto policy (on goals and timetables) has been in effect for about a year as the Commission considers proposed legal settlements." Thomas told the Post that "should a consent decree with goals and timetables come before the Commission, it doesn't have the votes. They simply don't get approved."[67]

In 1986 Thomas testified before the House Subcommittee on Employment Opportunities in a hearing called over concern about an announcement that the agency would no longer include goals and timetables in the consent decrees negotiated with employers. He told the committee that four years before, which would have been 1982, "the first case in which we had a direct vote on that was the Beecher case, which was similar to the Williams case. At that time, the vote was four to one, as I remember, in favor of goals and timetables."[68]

Representative Martinez asked him:

> Are goals and timetables acceptable now?

Thomas: To me they are not. The way I read Stotts - [the Memphis firefighter's case in which a defeat for the black firefighters was described by Bradford Reynolds as a "slam-dunk" for the Administration], the broad way. I think that goals and timetables, as implemented, wind up eventually or result in the consideration of race or sex, and I think Title VII on its face says that is not to be done.

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66 Letter to Congress January 31, 1986 responding to Congressional letter (January 23, 1986).

67 Washington Post (January 11, 1986)

68 Hearings, Supra.

Martinez: Then it is definitely your opinion that timetables and goals are not proper to use or a remedy?

Thomas: That is my opinion, although I will not necessarily say that is shared by every Commissioner.

Chairman Thomas continued his public arguments against goals and timetables even after the Supreme Court made clear in 1987 that they were still permissible and his and the Justice Department's interpretation of Stotts was wrong.[69] By 1989 Thomas said in a Cato Institute publication, "Assessing the Reagan Years", 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."[70] This statement came from Clarence Thomas who was admitted to Yale Law School as a part of an affirmative action policy and who has had a succession of government jobs in positions that only opened to blacks since affirmative action was instituted.[71]

Chairman Thomas became adept, in his last years at EEOC, at advancing his anti-affirmative action position behind a facade of interest in promoting remedies to employment discrimination. The careless reader might think Thomas' article, "Affirmative Action Goals

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[69] Judge Thomas has openly and often criticized Supreme Court decisions regarding affirmative action programs and policies. These cases include decisions such as Fullilove v. Klutznick, 448 U.S. 448 (1980), where the Court ruled that Congress has the power to enact remedial legislation. See also, The Cato Institute, "Civil Rights as a Principle Versus Civil Rights as an Interest," Assessing the Reagan Years, at 396 (1989).

[70] Id., at 397.

[71] See letter to the Washington Bureau from Richard P. Thornell, Professor of Law, Howard University School of Law, July 29, 1991 and supplemental statement, dated August 1, 1991, which provide a history and description of the affirmative action plan under which Clarence Thomas was admitted to the Yale Law School. These documents also provide an analysis and a commentary on the anti-affirmative action positions taken by Judge Thomas in relation to the affirmative action efforts that have benefitted him.

and Timetables; Too Tough? Not Tough Enough," was a strong defense of statistical remedies for employment discrimination.[72] But they would be misled. Chairman Thomas admitted the Supreme Court had upheld goals and timetables and other race conscious remedies but insisted "goals and timetables, long a rallying cry among some who claim to be concerned with the right to equal employment opportunity, have become a sideshow in the war on discrimination."[73]

Most complaints filed do not call for goals and timetables, said Thomas, and for those that do, goals and timetables "are fairly easy on employers". In addition to back pay and other already legally permitted relief, he thought there were tougher means of deterrence. "One such approach would be for courts to impose heavy fines and even jail sentences on discriminators who defy court injunctions against further discrimination. To those of us who consider employment discrimination not only unlawful but also a moral abomination, such measures are altogether fitting." He also supported handing "control of an employer's personnel operations to a special master" or requiring family businesses "to eliminate the family member preference" in hiring. All these, Thomas proposes in the article.

Aside from the question as to why Thomas did not propose using these approaches in addition to goals and timetables as possible solutions, his behavior made clear he was not serious about the proposals in the article. Not once in his eight years as EEOC chairman, nor in countless pages of testimony before the House and Senate did Chairman Thomas

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[72] Yale Law & Policy Review (Spring 1987).

[73] Id.

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ever propose that Congress legislate these proposals. In other words, they seemed to be a smoke screen behind which to hide his personal disagreement with the Court's approval of numerical remedies," and his refusal to implement the law.

He continued, however, to express his objections regarding affirmative action in various newspaper articles as well as in speeches before various organizations. These statements were a continuing concern to members of Congress and to civil rights advocates.

Thomas' affirmative action views and policies also placed the Commission's "Guidelines on Affirmative Action" and the "Uniform Guidelines for Employee Selection Procedures" in question.[74] The Affirmative Action Guidelines specifically approve the use of goals and timetables to encourage voluntary compliance with Title VII.[75] The principles underlying the guidelines were based on Griggs v. Duke Power Company, which barred the use of tests and other employment selection criteria which had a disproportionately adverse impact on women and minorities. Thomas indicated that he believed the guidelines encouraged "too much reliance on statistical disparities as evidence of employment discrimination."[76]

Chairman Thomas frequently criticized the Commission's proceedings, as well as cases in progress. On one occasion, he criticized the merits of a then-pending EEO sex discrimination lawsuit against Sears, Roebuck & Company, stating that it "relies almost exclusively on the statistics." A Sears attorney attempted to depose Thomas because of his

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[74] The Uniform Guidelines for Employee Selection Procedures, 29 C.F.R. S1607.1 (1985).

[75] See Blumrosen, The Binding Effect of Affirmative Action Guidelines, 1 Labor Lawyer 261 (1985).

[76] New York Times, December 3, 1984, p. 61.

statement. Congressman Hawkins, during hearings, queried whether it was "appropriate for (Thomas) as Chairman of the Commission...to criticize the Commission's own case while the case is still before the Court."[77]

Although the 1972 amendments to Title VII gave the EEOC the mechanism to attack institutionalized patterns and practices of discrimination, the EEOC under Chairman Thomas made little use of this authority. Both individual and systemic charges decreased significantly while he was Chair of the EEOC. At one point in time, the Education and Labor Committee was forced to work with the Appropriations Committee to earmark funds in the EEOC appropriation to be used for the specific purpose of increasing the number of systemic cases being brought by the EEOC. On another occasion, the Committee threatened other cuts in the budget of the Chairman and members of EEOC because of their failure to pursue more systemic charges.

After several news articles about the Commission's policy of focusing on individual, rather than class charges, in March 1985, 43 members of Congress sent a letter to Chairman Thomas expressing "their grave concern" regarding the EEOC's failure to pursue systemic litigation. In the letter they indicated their concern that the new focus on individual charges and individual victims of discrimination "may be a way for the EEOC to avoid pursuing class action cases." Thomas explained that the Commission was not avoiding class actions, but instead was merely attempting to seek "full and effective relief, on behalf of every victim of unlawful discrimination, through individual and class actions, as appropriate."

As the Committee's investigation and report indicated, the new policy was an

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[77] Despite Class-Action Doubts, EEOC Presses Bias Case, The Washington Post (July 9, 1985), at A1.

immediate and predictable failure in that sufficient resources simply are never available to pursue every valid charge of discrimination filed with the EEOC or a contracting state agency.

If one considers also the significantly negative impact which Commission policies had on the Commission's processing of age discrimination cases and the mishandling of the ADEA cases which occurred in 1987, it is altogether reasonable to conclude that Chairman Thomas did not undertake his duties in good faith nor did he pursue them in a way likely to achieve the goals of Title VII of the Civil Rights Act of 1964.

During Judge Thomas' tenure, the EEOC failed to process the age discrimination charges of thousands of older workers within the time needed to meet statutory filing requirements under the Age Discrimination in Employment Act (ADEA), leaving these workers without any redress for their claims. Some 13,873 age discrimination claims missed the statutory deadline. Ultimately, Congress had to intervene and enact legislation which reinstated the claims, but the issue remains a matter of serious concern.[78]

Clarence Thomas was tied to a philosophy which opposed use of most of the tools which had been effective in achieving non-discrimination for minorities and women. He effectively spent eight years misrepresenting to the Congress a commitment to the full and fair enforcement of these laws.

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[78] See, Letter from Rep. Edward Roybal, Chairman, House Select Committee on Aging to Senators Joseph Biden and Strom Thurmond expressing "strong opposition" to the nomination of Judge Clarence Thomas (July 16, 1991).

V. Articles and Speeches: An Analysis

Judge Clarence Thomas has a modest record on which to base an evaluation of his judicial opinions and legal writings.

Judge Thomas' previous litigation experience is minimal; his judicial record is scant. At the time of this writing, only two opinions with constitutional issues attributable to Judge Thomas are available: 1) Farrakhan and Stallings v. U.S., 1990 WL 104925 (July 5, 1990) where the court remanded the matter to the district court with instructions to review its decision to exclude Reverend Louis Farrakhan and Reverend George Stallings from attendance at the Marion Barry trial; and 2) Boyd v. Coleman, 906 F.2d 783 (1990), where the court found that entry of summary judgement in a jury trial was a harmless error even though a possible violation of the defendant's Seventh Amendment right to trial by jury.

But what is published in law reviews and court reports is not the only measure by which to assess the quality of a judicial nominee. What follows represents both a digest of and commentary upon a wide variety of documents. These include articles, speeches, and interviews by Clarence Thomas; press accounts and opinion pieces on Thomas' views; and a large amount of biographical data -- most of it drawn from the published statements of Judge Thomas himself.

This part of the assessment is divided into two sections. The first section is entitled "How Clarence Thomas Views Himself and the World." In this section we have tried to

articulate what Judge Thomas has presented as his animating beliefs, his basic world view. We believe that, by far, this is the most significant issue to consider with regard to any Supreme Court nominee. The second section demonstrates the way Judge Thomas -- the student, lawyer, EEOC chairman, and federal judge -- uses institutional roles to realize those convictions.

A. How Clarence Thomas Views Himself and the World

When considering Judge Thomas' views as expressed in the written record, we believe it important to talk both of content and affect. The "intangibles" of Thomas' political faith may be more important than the ideas he has publicly espoused. By way of illustration, we offer Thomas' enshrinement of Oliver North as an example of "the feel" of Thomas' conservative views.[79]

Thomas' world view seems to rest on three intellectual pillars:

(1) Individualism - Thomas embraces a radical individualism ordinarily associated with 19th century laissez faire capitalists. This individualism informs not only Judge Thomas' views on economics and government regulation but, also his understanding of affirmative action, constitutional rights, government assistance to poor people, and national education policy. The individualism of Clarence Thomas does not merely

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[79] In Assessing the Reagan Years, Thomas wrote:

> The always arduous task of preserving freedom was a simpler task when limited government was respected. The question now becomes, How do we achieve this object? That its defense is still possible was seen in the testimony of Oliver North before the congressional Iran-Contra committee. Partly disarmed by his attorney's insistence on avoiding closed sessions, the committee beat an ignominious retreat before North's direct attack on it and, by extension, on all of Congress. This shows that people, when not presented with distorted reporting by the media, do act on their common sense and good judgment...". (399)

exalt the ability to overcome hardship. It reflects a distrust and devaluation of collective effort, group identity, and communal struggle.

(2) Self-Help - This may be seen as a derivative of Clarence Thomas' commitment to individualism, but because it seems to play such a large role in Judge Thomas' self-understanding, it has its own peculiar aspects and deserves to be treated separately. Clarence Thomas embraces the myth of the self-made man. He seems to believe that he "made it" through hard work and self-discipline, and that therefore, anyone else can do the same. Though Thomas has occasionally shown some sense of indebtedness to the countless African Americans who struggled before him, he demonstrates virtually no appreciation for the sheer luck involved in his success -- i.e. natural genetic endowments, being born into a decent family, getting into a nurturing grade school environment, making the right contacts, etc. Moreover, Thomas displays little loyalty to or appreciation for African American community groups which have long espoused both self-help responsibilities and government assistance.[80]

Judge Thomas appears to have even less appreciation for the irony of his profiting from being an African American conservative. A particularly ironic example of this can be illustrated by remarks Thomas made at a gathering of African American conservatives at the Fairmont conference in December of 1980. Thomas

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[80] Thomas' speech to the Heritage Foundation on "Why Black Americans Should Look to Conservative Policies," (June 18, 1987) is an interesting case in point. The speech has an extensive autobiographical introduction in which Thomas speaks about the environment in which he was raised. Though it may be natural for Thomas to attribute his success to his fine upbringing, his complete silence on the social struggles of African Americans is striking. From reading Clarence Thomas one would never gather that a civil rights struggle ever took place in this country.

told an interviewer:

> "If I ever went to work for the EEOC or did anything directly connected with Blacks, my career would be irreparably ruined. The monkey would be on my back again to prove that I didn't have the job because I am black. People meeting me for the first time would automatically dismiss my thinking as second-rate."[81]

Thomas accepted Ronald Reagan's appointment as Assistant Secretary of Education for Civil Rights in 1980, and as Chairman of the EEOC in 1982.

(3) Higher Law - There is no clear consensus as to what extent, if at all, Judge Thomas would rely on his often-quoted theories -- higher law, natural law and natural rights -- in determining the most fundamental privacy rights of individuals. On the other hand, Judge Thomas has stated admiration for a controversial essay authored by Lewis Lehrman, entitled the Declaration of Independence and the Right to Life, which he said provided "a splendid example of applying natural law."[82]

The term "natural law" has a fairly long and generally respected philosophical lineage. Indeed, within the American political tradition, the phrase may evoke thoughts of Thomas Jefferson. But such an association is, it appears, incorrect. The natural law of which Clarence Thomas speaks of has little to do with the secular humanism of Thomas Jefferson, and a great deal to do with the sectarian and highly theological writings of medieval scholastic philosophers like Thomas Aquinas. In the scholastic understanding, natural law is seen as a prumulgation and instantiation of

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[81] See "Wrong Man For The EEOC," Washington Post, Carl Rowan, July 14, 1982, p. A21, col. 4. See also, "A Question of Fairness", The Atlantic Monthly, February 1987, p.75, col.2.

[82] "Why Black Americans Should Look to Conservative Policies," Speech to Heritage Foundation, Clarence Thomas, June 8, 1987.

the divine law. Thomas appears to view it in much simpler terms -- as a principle of adjudication to protect economic rights.

Recently, the issue of natural law came up in a courtesy visit between Judge Thomas and Senator Howard Metzenbaum (D-OH). Senator Metzenbaum asked Judge Thomas to elaborate on his view of natural law. "Well Senator," Thomas reportedly asked, "do you think it's proper for a human being to own another human being?" Senator Metzenbaum said no. "The reason you think that's wrong is because we all have natural rights," Thomas explained. That did not end the subject, however. "What about a human being owning an animal?" the Senator said. "Is that part of natural law?" Judge Thomas said he would have to check his own and other writings on natural law for an answer.[83]

B. How This Worldview Has Played Itself Out In The Life of Clarence Thomas

First, with regard to individualism, Clarence Thomas has consistently used the notion of individual rights to attack affirmative action policies and a broad range of progressive interventions by the judiciary. The word "individual" recurs scores of times in Judge Thomas' syllabus. In Assessing the Reagan Years he expresses his understanding of the purpose of an insulated judiciary in writing: "The judiciary was protected to ensure justice for individuals."[84]

Given this understanding of the judicial role, it should not be difficult to see why

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[83] Fred Barnes, "Weirdo Alert", The New Republic, August 5, 1991, p.7.

[84] Clarence Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," Assessing the Reagan Years, Cato Institute, p. 394.

Thomas objects so strongly to what he perceives to be judicial protection/recognition of group rights. Writing for the Yale Law & Policy Review Thomas remarks:

> 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.[85]

Judge Thomas' understanding of the correct response to discrimination is consistent with his emphasis on individualism. Not surprisingly, Clarence Thomas' tenure at the EEOC was characterized by a dramatic reduction in the number of class action suits. In focusing on individualism, Thomas adopts a tort-like understanding of discrimination. That is to say, a specific individual demonstrates a specific intentional harm by a specific discriminator and a particular remedy is fashioned to meet that individual's needs.

The NAACP has reason to be particularly concerned about this approach to employment discrimination law. African Americans, particularly African American women, have fewer employment options and are particularly vulnerable to downturns in the economy.[86] As reported in a recent Washington Post article:

> "White women have more job mobility because they are more often seen by management as sisters, daughters, or wives, but black women are seen as outsiders. So white women get to be patronized, and black women get nothing."[87]

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[85] Clarence Thomas, "Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!" Yale Law and Policy Review, Vol. 5: Number 2, 402, 403.

[86] A Common Destiny, National Research Council, (Washington, DC: 1989), p.7.

[87] Carol Kleinman, "Black Women Still Likely to Get Stuck at Low-End Jobs," The Washington Post, July 14, 1991, p.2.

An example of the inherent limitations of an "individualistic, tort-like" approach to employment discrimination law may be gleaned from a review of an EEOC opinion rendered under Chairman Thomas in 1985.[88]

Three female sales clerks filed a Title VII complaint after losing their jobs as clerks in a women's fashion store. Each had been fired after refusing to wear swim attire while at work during a swimsuit promotion. The women charged that unlike other promotional outfits, swimsuit attire would subject them to sexual harassment and leave them vulnerable to unwanted sexual remarks and conduct. They complained that even when dressed in their normal working attire of jeans and a blazer, they were subjected to recurring instances of young men whistling and knocking on the store's windows to get their attention. The women also noted that they regularly had to venture outside the store to use common mall facilities because the store had no restroom or eating facilities of its own.

Almost four years after the women lost their jobs, the EEOC ruled against them. According to the Commissioners' decision, the evidence was not sufficient to support a finding that the outfits would have subjected them to unwelcome sexual conduct or harassment. The EEOC noted, however, that in certain circumstances a requirement that employees wear sexually provocative outfits can violate Title VII.

Inextricably bound to his belief about radical individualism is Clarence Thomas' conception of limited government. Judge Thomas articulates that affirmative action policies, like other forms of government assistance, reduce motivation and foster dependence. In this

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[88] Equal Employment Opportunity Commission, EEOC Decision No. 85-9, June 11, 1985.

regard, there is a question of whether he will add to the already solid majority on the Court which endorses a theory of government where the "baseline" for government services is zero.

Judge Thomas, however, adds something new: an explicit declaration that the protection of group rights leads to totalitarianism:

> Maximization of rights is perfectly compatible with total government and regulation. Unbounded by notions of obligation and justice, the desire to protect rights, simply plays into the hands of those who advocate a total state.[89]

The theme of self-help is most evident in Judge Thomas' autobiographical recollections where he provides us with his thinking about all government assistance programs to disadvantaged people. Thomas' commencement speech at Savannah State College bears ample witness to Thomas' faith in self-help.[90] Judge Thomas' speech is most eloquent. He exhibits what appears to be genuine humility and speaks movingly about racial discrimination. Judge Thomas sounds the old theme that anyone can overcome discrimination if they work hard enough:

> Over the past 15 years, I have watched as others have jumped quickly at the opportunity to make excuses for black Americans. It is said that blacks cannot start businesses because of discrimination. But I remember businesses on East Broad and West Broad that were run in spite of bigotry. It is said that we can't learn because of bigotry. But I know for a fact that tens of thousands of blacks were educated at historically black colleges, in spite of discrimination. We learned to read in spite of segregated libraries. We built homes in spite of segregated neighborhoods. We learned how to play basketball (and did we ever learn!) even though we couldn't play in the NBA.

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[89] Assessing the Reagan Years, p. 399.

[90] June 9, 1985 -- see New York Times, July 17, 1991, p. A21, col. 2.

Judge Thomas presents a construct that is oblivious to the complex structural factors of racism. No acknowledgement is made of the systemic exclusion of blacks from venture capital. No recollection of racist policies which have denied mortgages to blacks. No memory of the debilitating effects of overcrowded and underfunded schools is recalled. No mention of the organizations -- the communal enterprises against bigotry and oppression -- that African-Americans have formed in their struggle for equal rights.

Clarence Thomas' logic is straightforward: he sets up a liberal straw man (blacks have tried to abdicate all responsibility for their own liberation because of prejudice) and then knocks it down by citing some anecdotal evidence of those who survived. He infers, from the few, that everyone can make it.

What is even more disturbing, however, is the way in which this logic leads into blaming the victim. For it follows, if some blacks made it in the face of discrimination, then surely all blacks can, and if all blacks can make it in the face of discrimination, how does one account for the fact that so many don't make it? The obvious answer is that there is something wrong with them -- they just don't work hard enough. Why don't they work hard enough? Judge Thomas seems to suggest an answer in this autobiographical reflection on his own success:

> In 1964, when I entered the seminary, I was the only black in my class and one of two in the school. A year later, I was the only one in the school. Not a day passed that I was not pricked by prejudice. But I had an advantage over black students and kids today. I had never heard any excuses made. Nor had I seen my role models take comfort in excuses.

The obvious implication is that somehow, in reminding the African American

community of systemic racism, white and black progressives have disabled the community. It is not difficult to extend this logic to a generalized opposition to affirmative action. What may be more difficult to see, but what is critical to the assessment of the NAACP, is Clarence Thomas' subtle but profound message that civil rights organizations are themselves to blame for the disempowerment of black America.

Finally, Judge Thomas' view of Natural Law impacts upon his understanding of the constitution and might form the basis of his opposition to a generalized right of privacy. That Thomas has praised Lewis Lehrman's article on the right to life of a fetus is well known.[91] Lehrman defends an inalienable right to life for the fetus (thus precluding the possibility of any state allowing even therapeutic abortions). In numerous public statements, Thomas has shown hostility toward the two decisions most fundamental to the privacy and reproductive freedoms of Americans: Griswold v. Connecticut, 381 U.S. 479 (1965) (right to use contraception) and Roe v. Wade, 410 U.S. 113 (1973) (right to obtain an abortion). Will this potential future Justice invoke this higher law rather than enforce the law of the land?

Perhaps the best example of Judge Thomas' thinking on the subject is his article "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment" for the Harvard Journal of Law & Public Policy.[92] There, Judge Thomas

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[91] "Why Black Americans Should Look to Conservative Policies," June 18, 1987, Heritage Foundation. Thomas praised Lehrman's essay as a "splendid example of applying natural law." (p. 8) Defenders of Judge Thomas have dismissed this as nothing more than a rhetorical compliment (Thomas was speaking in the Lehrman auditorium). However, even for those not concerned about a woman's right to choose an abortion, the prospect of Thomas generally applying this method of jurisprudence should still be profoundly troubling.

[92] Vol. 12, Number 1, p.64.

advocates that "Natural rights and higher law arguments are the best defense of liberty and limited government." Thomas uses his discussion to sound a theme to which he frequently returns: praise of Justice Harlan's dissent in Plessy v. Ferguson.

Judge Thomas has become very adept in portraying African American heroes as supporters of his point of view. In this regard he distorts the views of Frederick Douglass to provide support for his arguments against Brown v. Board of Education and other civil rights measures in ways that raise serious doubts about his integrity.

In his 1987 article in the Howard Law Journal, Thomas would have the reader believe that Frederick Douglass and Thomas were intellectual soulmates. According to Thomas, we should regard "...the Constitution to be the fulfillment of the ideals of the Declaration of Independence, as Lincoln, Frederick Douglass, and the Founders understood it."[93] (emphasis ours)

Frederick Douglass, of course, believed one could argue for the abolition of slavery by claiming that the Constitution was an antislavery document, but imagine his surprise if he knew that for Thomas' purposes he considered the Declaration of Independence to be an antislavery document, as well.[94]

Thomas distorts the view and insults the memory of Frederick Douglass, who hated the Declaration of Independence so much that he refused to speak on the Fourth of July

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[93] Howard Law Journal on "Toward a 'Plain Reading' of the Constitution - The Declaration of Independence in Constitutional Interpretation", vol. 30, 1987, p. 693.

[94] Douglass' position that the Constitution could be interpreted for abolition was an abolitionist strategy at a time when they had little hope that the Constitution would ever be changed and no idea that there would be a Civil War. Thomas used the position of Douglass, taken out of historical context, to lambast Justice Thurgood Marshall for truthfully saying that the framers of the Constitution put provisions in it to uphold slavery.

and gave his Fourth of July address on the Fifth. "The celebration of the Bicentennial," wrote Thomas, "should remind Black Americans, in particular, of the need to return to Frederick Douglass' 'plain reading' of the Constitution--which puts the fitly spoken words of the Declaration of Independence in the center of the frame formed by of the Constitution."[95]

Here is what Frederick Douglass said about the Declaration of Independence:

> "What have I, or those I represent, to do with your national independence? Are the great principles of political freedom and of natural justice, embodied in that Declaration of Independence, extended to us?...Would to God for your sakes and ours that an affirmative answer could be truthfully returned to those questions!...But such is not the state of the case. I say it with a sad sense of the disparity between us. I am not included within the pale of this glorious anniversary! The rich inheritance of justice, liberty, prosperity and independence, bequeath by your fathers, shared by you not by me...This Fourth of July is yours, not mine."

Thomas makes Frederick Douglass, who excoriated the Declaration of Independence because its promises of life, liberty and the pursuit of happiness did not apply to blacks, agree that it did apply to African Americans. Yet, Frederick Douglass cried:

> "What, to the American slave, is your Fourth of July? I answer: a day that reveals to him, more than all other days in the year, the gross injustice and cruelty to which he is the constant victim. To him, your celebration is a sham; your boasted liberty, an unholy license; your national greatness, swelling vanity; your sounds of rejoicing are empty and heartless; your denunciation of tyrants, brass fronted impudence; your shouts of liberty and equality, hollow mockery. Your prayers and hymns, your sermons and thanksgivings, with all your religious parade and solemnity are, to him, mere bombast, fraud, deception, impiety, and hypocrisy--a thin veil to cover up crimes that would disgrace a nation of savages..."

Douglass begged white Americans to interpret the Constitution in such a way that

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[95] Howard Law Journal, Ibid., p. 703.

would let them remove the blot on the national escutcheon made by the hypocrisy of the Declaration of Independence. To do as Thomas does and have Frederick Douglass agree with him that "we should put the fitly spoken words of the Declaration of Independence in the center of the frame formed by the Constitution" is to sully the name of Frederick Douglass and to falsify the history of Douglass' fuming speech in 1852.

In summary, though the record of Clarence Thomas' judicial opinions may be slim, there is ample evidence to reconstruct the political philosophy which has animated Judge Thomas' career. Even more importantly, the record demonstrates that Thomas' performs -- whenever he is in an institutional role -- in a manner completely inconsistent with the overall objectives of the NAACP.

VI. CONCLUSION

The National Association for the Advancement of Colored People has been since its formation, the principle advocate for African Americans' struggle to achieve equality. On February 12, 1909, the New York Evening Post reported "The Call" to arms for persons concerned with the protection of human and civil rights. For almost a century, the NAACP, in response to "The Call", has developed aggressive programs of activity to achieve its mission of achieving and preserving equal rights for African Americans.

The NAACP has consistently chosen to be the advocate for African-Americans for equal education, for voting rights, for access to public facilities, for housing and for affirmative action. Equally as consistently, the NAACP has reviewed judicial nominations to determine whether these nominations were inimical to its mission.

This report examines and exhibits the public service record and writings of Judge Clarence Thomas. The examined record is set forward in a manner that provides an analytical and informational framework upon which the National Board of Directors may consider this important and historic nomination in the context of the principles and policies of the Association.

The report provides a detailed review of the institutional roles Clarence Thomas has played and the record he has developed as the Assistant Secretary for the Office of Civil Rights at the United States Department of Education; the Chairman of the Equal

Employment Opportunities Commission; and as Judge for the United States Court of Appeals for the District of Columbia Circuit. Further, the report provides an analysis of the extensive writings and remarks of Judge Thomas. As to each segment of this report, the known legacy and pronounced policy of the NAACP have been highlighted.

Thus, the existing record of Clarence Thomas has been studied in relation to the established aims and goals of the Association. The entirety of this exhaustive exercise has been summarized and set forth in the report.

It is presented to the National Board of Directors of the NAACP, as directed, with the greatest hope that the decision makers who review it will have the essential elements of information and analyses required for thoughtful deliberations on this extraordinary nomination.

VII. EPILOGUE

John Hope Franklin

James B. Duke Professor Emeritus
Department of History
Duke University

When white Americans chose Booker T. Washington as the spokesman and leader of African-Americans in 1895, they launched him on a course of action that had much to do with the founding of the N.A.A.C.P. almost twenty years later. Washington advocated vocational education for his people at a time when the country was already moving on to a much more sophisticated program of mass industrial production. He decried the advocacy of civil and political rights for African-Americans at a time when they were being annually lynched by the hundreds. He upheld racial separation that many whites interpreted not only as accepting an inferior status but conceding to whites the right to determine what African-Americans should be and do.

Washington's preachments and programs, set forth in his speech at the Exposition in Atlanta in 1895, were praised by whites who saw in his agenda a means to achieve sectional peace as well as a formula for establishing a satisfactory economic and social equilibrium between the races. Washington believed that African-Americans, starting with so little, would have to work up gradually through programs of self-help, before they could attain anything resembling power or even respectability. Meanwhile, he enjoyed virtually unlimited

access to centers of political and economic influence throughout the nation.

What disturbed some African-American leaders such as William Monroe Trotter, W.E.B. Du Bois, Ida B. Wells, and Reverdy Ransom was that as Washington made his ascendancy among the influential circles of white America, the general condition of African-Americans deteriorated markedly. Disfranchisement by constitutional means was increasing, lynching statistics were rising sharply, other forms of racist terrorism were rampant, and economic opportunities for blacks were declining. In 1906, some of those active in the Niagara Movement declared that in that year "the work of the Negro hater has flourished in the land. Stripped of verbose subterfuge and in its naked nastiness, the new American creed says: fear to let black men even try to rise lest they become the equal of whites."

While the immediate incident that precipitated the call to organize the N.A.A.C.P. was the 1908 race riot in Springfield, Illinois, the underlying causes were the conditions that existed and the fact that neither their designated leader nor white America was addressing their problems in any manner that looked toward their early and satisfactory solution. Washington declined an invitation to attend the founding conference, fearing that his presence "might restrict freedom of discussion," or "tend to make the conference go in directions which it would not like to go," or that "in the present conditions in the South, it would [hardly] be best for the cause of education." Thus, the person who had promulgated what came to be known as "The Atlanta Compromise" declined to help shape the agenda that would be in the forefront in the struggle for racial equality for the remainder of the century.

The doctrine of self-help so eloquently argued by Washington in 1895 and so

passionately advanced by Judge Clarence Thomas while he chaired the Equal Employment Opportunity Commission, has been described by their supporters as characteristically American and so symbolic of the fulfillment of the American dream. The self-help syndrome has created and perpetuated a myth regarding advancement up the ladder of success in the United States. While Washington was calling on African-Americans to rely on the quite commendable effort of self-reliance, the United States gave away a half-billion acres of public land to speculators and monopolists, making a mockery of the very notion of free land for poverty-stricken settlers. While Judge Thomas and his handlers praised the admirable concept of self-help and urged it as worthy of emulation, Chrysler, Lockheed, and the savings and loan industry, to name a few enterprising groups, were helping themselves at the public trough as the hungry, the homeless, and those in need of health care could merely shake their heads in disbelief.

Self-help is admirable so long as it encourages initiative and achievement in a society that gives all of its members an opportunity to develop in the manner best suited to their talents. It must not be confused with or used as a substitute for society's obligation to deal equitably with all of its members and to assume the responsibility for promoting their general well-being. This surely involves equal educational, economic, and political opportunity regardless of age, gender, or race. Judge Thomas, in failing in his utterances and policies to subscribe to this basic principle, has placed himself in the unseemly position of denying to others the very opportunities and the kind of assistance from public and private quarters that have placed him where he is today.

The position of N.A.A.C.P. has always been clear, for it has consistently adhered to

principle. It has never equivocated on questions of political and civil rights and on matters of economic opportunity and justice. It has adhered to its principles regardless of race or status. It would be unthinkable that it could countenance any course of action in the nomination of Judge Thomas to the United States Supreme Court that would be contrary to the principles by which it has lived since 1909.

July 25, 1991

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"Keep Your Eyes on E.E.O.C.," Speech by Dr. J. Clay Smith, Jr., NAACP Emergency Summit Meeting, Washington, D.C., Friday, May 17, 1985.

EEOC Resubmission to the Office of Management and Budget in Regulatory Program of the United States Government, April 1, 1985 - March 31, 1986.

"Two Hundred Years, An Issue: Ideology in the Nomination and Confirmation Process of Justices to the Supreme Court of the United States," Olive Taylor, Department of History, Howard University, September 1987.

"Civil Rights as a Principle Versus Civil Rights as an Interest," Assessing the Reagan Years, January 4, 1989.

Memorandum to Dr. Benjamin L. Hooks from Wade Henderson and Edward A. Hailes, Jr. regarding Nomination of Judge Clarence Thomas to the United States Supreme Court, July, 1991.

Letter to the Washington Bureau from Richard P. Thornell, Professor of Law, Howard University School of Law, July 29, 1991.

Appendix I
NAACP ARCHIVES

HISTORICAL BACKGROUND

The impact of the Supreme Court's decision in Plessy v. Ferguson[96] produced in stark and legal reality the two worlds of race in America -- one black and one white. This decision meant that the United States Supreme Court had officially sanctioned governmental separation and segregation of the races, thereby the abdicating the federal government's role as a protector of racial minorities. This process had begun in the 1870's and was completed as America approached the Twentieth Century.[97]

As a result of Plessy v. Ferguson, African Americans were "denied education...labeled like dogs in traveling; refused decent employment...; compelled to pay the highest rent for the poorest homes...; ridiculed in the press, on the platform, and on stage; disfranchised; taxed without representation; denied the right to choose their friends or to be chosen by them; deprived by custom and law of protection for their women; robbed of justice in the courts; and lynched with impunity."[98]

Early in the 20th century an epidemic of race riots which swept the country, arousing great anxiety and fear among the black population. Rioting in the North was as vicious and almost as prevalent as in the South.

The riot that shook the entire country, however, was the Springfield, Illinois riot of August 1908. A meeting was called in 1909 of progressive whites and leaders of the Niagara Movement -- including W.E.B. DuBois -- to discuss "the present evils" of American society. "The Call" for the meeting was published in the New York Evening Post on February 12, 1909, on the 100th anniversary of President Lincoln's birth. It was a powerful statement -- a call to arms for persons concerned with the protection of human and civil rights.

The result of the conference was the formation of the National Association for the Advancement of Colored People.[99]

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[96] 163 U.S 537 (1896).

[97] Affirmative Action to Open the Doors of Job Opportunity, A Report of the Citizens' Commission on Civil Rights, June 1984; p.31.

[98] Carter G. Woodson and Charles H. Wesley, The Negro in Our History. (Washington, D.C.: The Associated Publishers, Inc., 1972), p.484.

[99] See, Certificate of Incorporation of the National Association for the Advancement of Colored People, in Minutes of the Meetings of the Board of Directors; June 20, 1911.

The incorporators stated their objectives as follows:

"...To promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to advance the interests of colored citizens; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law."

THE CALL

A Lincoln Emancipation Conference

February 12, 1909

The celebration of the centennial of the birth of Abraham Lincoln widespread and grateful as it may be, will fail to justify itself if it takes no note and makes no recognition of colored men and women to whom the great emancipator labored to assure freedom. Besides a day of rejoicing, Lincoln's birthday in 1909 should be one of taking stock of the nation's progress since 1865. How far has it lived up to the obligations imposed upon it by the Emancipation Proclamation? How far has it gone in assuring to each and every citizen, irrespective of color, the equality of opportunity and equality before the law, which underlie American institutions and are guaranteed by the Constitution?

If Mr. Lincoln could revisit this country he would be disheartened by the nation's failure in this respect. He would learn that on January 1, 1909, Georgia has rounded out a new oligarchy by disfranchising the Negro after the manner of all the other Southern states. He would learn that the Supreme Court of the United States, designed to be a bulwark of American liberties, has failed to meet several opportunities to pass squarely upon this disfranchisement of millions by laws avowedly discriminatory and openly enforced in such manner that white men may vote and black men be without a vote in their government; he would discover, there, that taxation without representation is the lot of millions of wealth-producing American citizens, in whose hands rests the economic progress and welfare of an entire section of the country. He would learn that the Supreme Court, according to the official statement of one of its own judges in the Berea College case, has laid down the principle that if an individual State chooses it may "make it a crime for white and colored persons to frequent the same market place at the same time, or appear in an assemblage of citizens convened to consider questions of a public or political nature in which all citizens, without regard to race, are equally interested." In many States Lincoln would find justice enforced, if at all, by judges elected by one element in a community to pass upon the liberties and lives of another. He would see the black men and women, for whose freedom a hundred thousand soldiers gave their lives, set apart in trains, in which they pay first-class fares for third-class service, in railway stations and in places of entertainment, while State after State declines to do its elementary duty in preparing the Negro through education for the best exercise of citizenship.

Added to this, the spread of lawless attacks upon the Negro, North, South and West--even in the Springfield made famous by Lincoln--often accompanied by revolting brutalities, sparing neither sex, nor age nor youth, could not but shock the author of the sentiment that "government of the people, by the people, for the people shall not perish from the earth."

Silence under these conditions means tacit approval. The indifference of the North is already responsible for more than one assault upon democracy, and every such attach reacts as unfavorably upon whites as upon blacks. Discrimination once permitted cannot be bridled; recent history in the South shows that in forging chains for themselves. "A house divided against itself cannot stand"; this government cannot exist half slave and half free any better to-day than it could in 1861. Hence we call upon all the believers in democracy to join in a national conference for the discussion of present evils, the voicing of protests, and the renewal of the struggle for civil and political liberty.

Miss Jane Addams,
Chicago
Ray Stannard Baker,
New York
Mrs. Ida Wells Barnett,
Chicago
Mrs. Harriet Stanton Blatch,
New York
Mr. Samuel Bowles,
(Springfield Republican)
Prof. W. L. Bulkey,
New York
Miss Kate Claghorn
New York
E. H. Clement,
Boston
Prof. John Dewey,
New York
Miss Mary E. Dreier,
Brooklyn
Prof. W. E. B. Du Bois,
Atlanta
Dr. John L. Elliott,
New York
Mr. William Lloyd Garrison,
Boston
Rev. Francis J. Grimke
Washington, D.C.
Prof. Thomas C. Hall
New York
Rabbi Emil G. Hirsch
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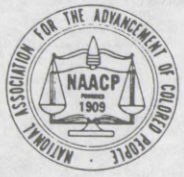
New York
Hamilton Holt,
New York
William Dean Howells,
New York
Rev. Jenkin Lloyd Jones,
Chicago
Mrs. Florence Kelley,
New York
Rev. Walter Laidlaw,
New York
Rev. Frederick Lynch,
New York
Miss Mary E. McDowell,
Chicago
Miss Helen Marot,
New York
Mr. John E. Milholland,
New York
Dr. Henry Moskovitz,
New York
Miss Leonora O'Reilly,
New York
Miss Mary W. Ovington,
New York
Rev. Charles H. Parkhurst,
New York
Rev. John P. Peters,
New York
J. G. Phelps Stokes,
New York
Louis F. Post,
Chicago
Dr. Jane Robbins,
New York
Charles Edward Russell,
New York
William M. Salter,
Chicago
Joseph Smith,
Boston

Mrs. Anna Garlin Spencer,
New York
Judge Wendell S. Stafford,
Washington, D.C.
Lincoln Steffens,
Boston
Miss Helen Stokes,
New York
Mrs. Mary Church Terrell,
Washington, D.C.
Prof. W. I. Thomas,
Chicago
President Charles F. Thwing,
Western Reserve University

Oswald Garrison Villard,
New York
Mrs. Henry Villard,
New York
Miss Lillian D. Wald,
New York
Dr. J. Milton Waldron,
Washington, D.C.
William English Walling,
New York
Bishop Alexander Walters,
New York
Dr. William H. Ward,
New York
Mrs. Rodman Wharton,
Philadelphia
Miss Susan P. Wharton,
Philadelphia
Horace White,
New York
Mayor Brand Whitlock,
Toledo
Rabbi Stephen S. Wise
New York
President Mary E. Wooley,
Mt. Holyoke College
Rev. N. St. Croix Wright,
New York
Prof. Charles Zueblin
Boston

Appendix II



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NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

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ACKNOWLEDGEMENTS

The NAACP's Report on the Nomination of Judge Clarence Thomas as Associate Justice of the United States Supreme Court was prepared under the direction of the Washington Bureau of the NAACP. We wish to gratefully acknowledge the contributions of the following individuals, without whose assistance this report would not have been possible: Dr. John Hope Franklin; Dr. Mary Frances Berry; Professor Charles Ogletree; Professor Richard P. Thornell; Cecelie Counts Blakey; Carolyn Johnson; Leesa Richardson; Danielle Bolden; Barbara Washington; Nyisha Shakur, Esq.; Rosalind Gray, Esq.; Cherie Turpin; Dennis Courtland Hayes, Esq.; and Simone Braxton.

Wade Henderson, Esq.
Director

Edward A. Hailes, Jr., Esq.
Bureau Counsel

The CHAIRMAN. Thank you very much, Mr. Hooks.
Reverend Brown.

STATEMENT OF REV. AMOS C. BROWN

Reverend BROWN. Mr. Chairman, members of the committee, in a virtually unanimous vote in independent conventions during the months of August and September, the nomination of Judge Clarence Thomas to the U.S. Supreme Court is opposed by the National Baptist Convention of America, the National Baptist Convention, U.S.A., Inc., and the Progressive National Baptist Convention.

It is significant that this action was taken by bodies that represent constituencies of 14 million people. Our decision was done with deliberation, much thought, debate, and prayer. We took this action based on Judge Thomas' personal record, his speeches, the political ideology that he espouses, and the associates he maintains.

We feel that Judge Thomas must be subjected to the words of St. Paul, that we are all living epistles read of men and women. Judge Thomas has written his epistle, and we have, with compassion, understanding, and a sense of justice, concluded that he is not the man to be chosen for this high position.

We consider it to be unfortunate that his personal beginnings, professional, and academic careers have been so much the focus by the media and even the process of the Senate Judiciary Committee during opening hearings and testimony. The American public has not been given a fair opportunity to get a sense of what the real issues are and the impact of this gentleman's serving on the Court.

Instead, Judge Thomas has used his own background to justify himself, in my estimation, giving the appearance that he has had a more difficult time, when we know he received advantages not extended to the vast majority of African-Americans.

It has been the lay of the land for African-Americans to virtually have to make a way out of no way. We were denied a way not just due to poverty, but we have experienced terror and acts of dehumanization, as I personally witnessed in my childhood in Jackson, MS. At 14, I witnessed the lynching of Emmett Phail. I attended segregated schools where African-American teachers received inferior wages and students were given second- and third-hand textbooks from white schools.

My constitutional rights were further violated when I was refused readmittance to a segregated high school because I went to Cleveland, OH, and testified to the national convention of the NAACP on the low quality of education for African-Americans in Mississippi and low salaries for teachers.

We are further disturbed that when the hearings are over Judge Thomas' epistle records that he has disavowed and disowned all his previous writings and speeches that he had embraced up to the point of being appointed a Federal judge. Now he is trying to give the appearance of being a changed man, saying to the American public that once he puts on his judicial robes he will be singing a different song, talking a different talk, and walking a different walk.

We have no recourse but to feel that he has taken this stance in order to get himself ahead. In his speech entitled "Economic Free-

dom," he has also maintained that the minimum wage was a deterrent for African-Americans, and he considered it a denial of economic freedom. We consider this to be a blatant act of denying economic parity and dignity to African-Americans specifically, who earn 50-percent less than the dominant culture.

Would he say the same for himself regarding the minimum wage when he aspires for his check for $100,000 plus?

Further, we must, as representatives of the Church of Jesus Christ, call him to task for misrepresenting the status of his sister, Emma Mae Martin, when he berated her before a group of black Republicans, indicating she was like most blacks on welfare, not taking initiative, trying to chisel the system, getting angry when the check didn't come on time. We know that, in fact, when this speech was made, Ms. Martin was actually working two minimum-wage jobs, trying to make a way out of no way, as many African-American women have had to do as single parents.

During his testimony before this committee, Judge Thomas said on several occasions that his speeches did not reflect his views but what he believed his audience wanted to hear from an African-American.

Mr. Chairman and members of this committee, what if Dr. Martin Luther King, Jr., had appealed to popularity and not to justice? What is Mr. Justice Thurgood Marshall had appealed to popularity and not to justice?

There is a responsibility to instill justice and a duty to speak for justice, especially when it is not popular. Though we are ministers and people of compassion, we must be sensible. The Scriptures say we shall be wise as serpents and harmless as doves. We must love God with our heart and our mind.

Our mind causes us to question Judge Thomas' legal qualifications. He has not rendered any major judicial opinions. At best, what he has produced is a barrage of speeches and writings in support of the right-wing conservative ideology. Moreover, he has gone around the country making speeches defending Oliver North, a man who obviously violated the Constitution through his actions. He has also fraternized with persons who have embraced the South African apartheid government by serving as lobbyists.

Therefore, we consider it to be disgraceful and an insult to African-Americans, to women, and minorities to ask us to have the heart to trust a man who has not respected his sister, who has advanced a faulty argument regarding the solutions to racial injustice, and prays to and sings the glories of the conservative political religious right that has sought to turn the clock back and dismantle all of the civil rights gains that were won through blood, sweat, and tears.

If I may put it in church and ecclesiastical language, as one of my mentors said, maybe he has converted. But we don't think that you would take a man off the mourner's bench and make him chairman of the deacon board or pastor of the church.

Finally, this Senate Judiciary Committee ought to have in this hour a sense of history and recall that in yesteryears there was one Booker T. Washington—a sincere man, yes; an industrious man, yes; a committed man, yes. But he was so used by our oppressors, so presented as a symbol, that while he was having dinner at the

White House with Theodore Roosevelt, it was common practice that blacks were lynched monthly.

We cannot afford to desecrate our heritage or mar the struggle for freedom by repeating in the 1990's a scenario of lifting up Clarence Thomas as the symbol and embodiment of African-American achievement and being worthy of sitting on this Court at a time when it is more dangerous for an African-American male youth in urban America than it was in combat in Vietnam or the Persian Gulf.

We cannot lift him up as a symbol on a Court that is already stacked, thus rendering his one presence ineffective. We cannot afford to have a symbol devoid of substance at a time when the life expectancy of African-Americans is 6 to 7 years less than the majority culture. We cannot deal with cotton-candy politics that would give us a good taste in our mouths, but keep us with empty stomachs which cause us to have poor nutritional and health lifestyles.

We must have at least one person of African-American descent on the Court who knows what it means to be concerned about all of God's children, who maintains a sensitivity that would cause him to think about the locked out, the left out, the looked over, as he sits in postured halls to render opinions that would impact on the lives of millions.

We need a judge who will do justly, love mercy, and walk humbly with his Maker until the day will come when all of us in this great Nation will find a sense of self-worth and pride and dignity, and be able to say: I am black and I am proud; I am brown and I am sound; I am yellow and I am mellow; I am red and I ain't dead; I am white and I am all right.

Thank you very much.

[The prepared statement of Reverend Brown follows:]

STATEMENT OF REVEREND
DR. AMOS C. BROWN
ON BEHALF OF
THE NATIONAL BAPTIST CONVENTION, USA, INC.

Mr. Chairman and members of the committee, I am Dr. Amos C. Brown, Pastor of the Third Baptist Church in San Francisco, California. Today, I am representing the membership of the National Baptist Convention, USA, Inc., chaired by Reverend Dr. T.J. Jemison of Baton Rouge, Louisiana. I serve as the chairperson of the National Baptist Convention Civil Rights Commission. The National Baptist Convention is an organization of 8.7 million African Americans and we are located in 49 states. Our membership consists of some 33,000 Baptist churches concentrated primarily in the Southern part of these United States. In other words, Mr. Chairman and members of the Committee, the bulk of our membership is located in the deep South. Nearly 100,000 pastors are active members of our organization.

During our recent convention held in Washington, D.C., September 2-8, 1991, our membership voted overwhelmingly, after careful consideration, to oppose the nomination of Judge Clarence Thomas to the United States Supreme Court.* Our action is of particular significance because we are a religious organization that does not usually speak on matters such as these; however, we

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*Attached is our Resolution on the Clarence Thomas Nomination to the U.S. Supreme Court.

could not in good conscience remain silent on the nomination of Judge Clarence Thomas.

Why have we taken this position?

First, it is the position of the National Baptist Convention that the successor to Mr. Justice Marshall should also bring to the bar of justice the experiences and aspirations of African Americans who have been locked-out, looked-over and denied respect and equal opportunity in our society. In fact, Mr. Chairman, we have listened to the testimony of Judge Thomas and, despite his general proclamations and utterances, we believe that his approach to constitutional adjudication is one informed by a philosophy that ignores history and today's realities with respect to race discrimination, and would thereby undermine the constitutional and civil rights so important to African Americans.

Secondly, within the past five years, nominees to the Supreme Court confirmed by the Senate have established a majority of the Court and that majority has adopted positions that are antithetical to our interests as African Americans. Judge Thomas would seem to fit well within extreme factions of the Court that have been particularly unsympathetic. We say enough is enough.

We would like to see an African American on the Court, however, in our view Judge Thomas's legal philosophy and his views of the civil rights statutes reflect hostility toward the African American community; thus, his color offers us no solace.

Our national leader Dr. T.J. Jemison has been a champion of human rights and liberties and was a leader of the Montgomery bus

boycott. The National Baptist Convention would do a great disservice to support a nominee who has given every indication of being against the traditional commitment of black churches to the struggle of African Americans for equality, equal rights and justice.

Mr. Thomas has displayed a lack of understanding of the history of the African American Community and the contributions of African American men and women who risked all they had during the civil rights movement. Their sacrifices led to an increase in the opportunities for African Americans and opened the doors of Yale University to Judge Thomas. Yet Judge Thomas would deny similar opportunities to others. From his testimony it appears that he may be able to support as a policy matter some type of affirmative action which recognizes only the economically disadvantaged, but he declines to support affirmative action to address systemic race or sex discrimination.

Mr. Justice Thurgood Marshall's career was a constant rebuke to those who have misrepresented and distorted the civil rights movement. Judge Thomas contends that African Americans should pull themselves up by their own bootstraps, under the guise that this represents a new message rather than using this opportunity to be a witness that African Americans have always been the primary advocates of self-reliance. Justice Thurgood Marshall was an advocate of self-help within the community and he was a man who was willing to organize his people and marshal their efforts to confront lawfully and through the courts racial barriers that

permeate our day-to-day lives. In our view, Mr. Thomas has promoted an ideology that is muddled, confused, misinformed and yields benefits only unto himself.

As leaders in the African American community who constantly interact with millions of African Americans we do not choose to oppose Judge Thomas; however, we are morally called upon to be soldiers of the cross and Judge Thomas's record compels us to oppose him.

Thank you Mr. Chairman.

RESOLUTION ON THE CLARENCE THOMAS NOMINATION TO THE U.S. SUPREME COURT

Whereas, the National Baptist Convention has the moral responsibility to be prophetic in our message, and not turn aside from our witness; and

Whereas, President George Bush now has the authority to nominate and the United States Senate holds the authority to conduct hearings and decide on confirmation on a successor to the distinguished jurist Judge Thurgood Marshall of the Supreme Court of the United States; and

Whereas, Mr. Justice Marshall has been the embodiment of the aspirations of African Americans to secure a place of justice on which to stand firmly in the United States; and

Whereas, the National Baptist Convention concurs that the successor to Mr. Justice Marshall should also bring to the bar of justice the experiences, witness and aspirations of African Americans who have been locked-out, looked-over and not received respect and equal opportunity in our society, and;

Whereas, the Reagan-Bush Administrations have shifted the Supreme Court toward an ideology of the conservative right by packing the bench with ideologues who would rather blame the victims of society than give them the tools that give access to the fruits of our democracy; and

Whereas, the Reagan-Bush Administrations have further created a climate that perpetuates systemic racism that keeps African Americans from access to the training and resources to become first class citizens equal with others in our society, by its failures in education, housing, drug policy, health care, child care and those programs that make a healthy nation; and

Whereas, the Reagan-Bush Administrations have sought to move the American consensus away from justice, inclusion and equal opportunity and return it to an era of divisiveness, distortion and deception within the African American community as well as between the African American community and all Americans; and

Whereas, President Bush has nominated to the Supreme Court of the United States Mr. Clarence Thomas, a man of African American descent whose record includes positions as an aide to a United States Senator, director of the Equal Employment Opportunity Commission, and a federal judge; and

Whereas, Mr. Thomas in carrying out his duties has manifested an ideology that is bemuddled, confused and misinformed; and

Whereas, the National Baptist Convention can not be silent but must be witnesses to the truth by calling attention to the Bible narrative that the greatest opponents of Jesus were the Pharisees and Sadducees who represented a select, conservative and reactionary religious complex and who put our Lord on a cross and rejected a man who was a man for others; and

Whereas, we are morally called upon to be soldiers of the Cross, followers of the Lamb, that we must not fail to own His calls or blush to speak His name as regards this critical issue; and

Whereas, we must rebuff Mr. Thomas' arguments against affirmative action to remedy systemic racism in our society by affirming the fact that as proponents of affirmative action we have never said that unqualified individuals should be given jobs, but instead of called attention and witness to the historical record which reveals that too many with qualifications did not receive job opportunities prior to affirmative action; and

Whereas, Mr. Thomas evidences a failure to understand the history of the African American community which led to the process now creating a new African American middle class and which opened the doors of Yale University to him and others through affirmative action and program support; and

Whereas, Mr. Thomas perpetuates stereotyping, myths and misrepresentation of our achievements as an African American people; and

Whereas, Mr. Thomas contends that African Americans should pull themselves up by their own bootstraps, under the guise that this represents a new message rather than using his opportunity to be a witness that African Americans have always been the primary advocates of self-reliance; and

Whereas, Mr. Thomas' silence on the proud history of the African American community's efforts at self-reliance is an insult and distortion to an historical record that includes the Anna T. Jeanes Foundation schools, the partnership with the Rosenwald Foundation in which African Americans in the darkest years of the post-Civil War era raised the largest share of funds to create schools for our children, the establishment of the Freedman's Bureau which initiated schools, the sacrifices of African Americans who sold land and cattle for seed money to create schools, as well as the African American-led efforts which created such institutions of higher learning as Morehouse, Fisk, and Spellman; and

Whereas, Mr. Thomas in fact has been part of an alliance that has sought to distort and misrepresent the civil rights movement going back to the days of W.E.B. DuBois whose vision and leadership understood the relationship between self-help and the need to confront racism; and

Whereas, Mr. Justice Thurgood Marshall's career was a constant rebuke to those who misrepresented and distorted the civil rights movement, as a product of the oldest African American university, Lincoln University, as a student excluded from the University of Maryland because of his race, as an advocate of self-help within the community and as a man who was willing to confront the barriers placed by a racist society; and

Whereas, Mr. Thomas is a part of this same alliance that has reflected an ideology that the few are to profit at the expense of the many, as reflected in their unwillingness to support such measures as former Congressman Augustus Hawkins' employment bill while at the same time being willing to provide bail-outs for the Savings and Loan industry executives, establish land grant colleges with white-only restrictions with federal intervention, and to recognize the initiative of American farmers by providing additional support through farm bank programs and price supports; and

Whereas, Mr. Thomas has further added fuel to the stereotyping of African Americans by calling public attention to his sister, Emma Mae Martin of Savannah, Georgia, with attacks on her eligibility for public assistance and claiming that she and her children "have no motivation for doing better or getting out of that situation"; and

Whereas, in actual fact Emma Mae Martin was not receiving public assistance at the time of Clarence Thomas' public ridicule of her, but had taken two minimum-wage jobs at the same time in order to better provide for her family, in a manner familiar to many African Americans; and

Whereas, Mr. Clarence Thomas himself was the beneficiary of a private education in Catholic schools which provided him with advocates and intervenors on his behalf; and

Whereas, the national leader Dr. T.J. Jemison has been a champion of human rights and liberties as the progenitor of the Montgomery bus boycott and the National Baptist Convention would do a great disservice to support one who has given every indication of being against the traditional aspirations of African Americans for equality, equal rights and justice; and

Whereas, we are called to speak the truth with courage, and not to be dissuaded from our witness by those who seek to divide African Americans in order to create further gains for a socio-

political leadership that will not confront systemic racism but seeks to benefit from it; and

Whereas, the National Baptist Convention represents eight million African Americans and is the largest organizational body in the nation, who reject the label of special pleading because our only plea is to be a witness to His name as regards this critical issue;

Therefore, Be it Resolved, that the National Baptist Convention go on record calling on all state presidents, district moderators and members to mount immediately a massive lobbying campaign to approach their respective Senators to vote against the confirmation of Clarence Thomas; and

Therefore, Be it Resolved, that our call is for a nominee from the African American community who has a sensitivity to the aspirations of African Americans, the poor and women, unlike the current nominee; and

Therefore, Be it Resolved, that our position will be communicated to the President of the United States, so he will nominate a person that will reflect another judicial and ideological position that would give the U.S. Supreme Court a healthy balance.

Humbly Submitted,

National Baptist USA, Inc.
Civil Rights Commission
Amos C. Brown
Chairman, Amos C. Brown - California
Matthew Johnson - North Carolina
Albert Campbell - Pennsylvania
Timothy Mitchell - New York
Samuel B. McKinney - Seattle, Washington
Dr. T.J. Jemison - National President

The CHAIRMAN. Reverend Brown, I must say that is the most concise, explicit, and damning bill of particulars against Judge Thomas I have heard, and somewhat convincing.

Reverend Le Mone.

STATEMENT OF REV. ARCHIE LE MONE

Reverend. LE MONE. Thank you, Mr. Chairman and members of the Senate Judiciary Committee.

I am officially representing the Progressive National Baptist Convention, which is headquartered here in Washington, DC. My denomination is one of the historic African-American churches. The Progressive National Baptist Convention has just under 2 million members and approximately 2,300 individual congregations throughout the United States. Many of our congregations are located in States with large urban centers and are attempting to meet the needs that impact on the minority population in those centers.

It is not uncommon to find as many as 1,500 to 5,000 people who belong to one of our churches. I think it can be stated that an African-American Baptist church is made up of a variety of people coming from a diverse socioeconomic, educational, and varying regional background.

The church in typical African–American life has been and is a place not only for worship, but serves the real unmet needs of our communities. The church represents a place where the human rights and values are reconfirmed as a counterpoint, even today, to the historical and contemporary indignities that have been a part of our life experiences in this country.

The Progressive Baptist National Convention wishes this testimony to be viewed as speaking analytically, and not critically, concerning the nomination and possible confirmation of Judge Clarence Thomas.

Because of the unique sensitivity surrounding the Thomas nomination, my convention has not taken lightly the position it has officially adopted at its 30th annual session in Pittsburgh, PA, last month. Permit me to read the relevant paragraph of my convention's resolution:

> Be it therefore resolved, that the Progressive National Baptist Convention opposes the nomination of Judge Clarence Thomas to the U.S. Supreme Court, until or unless in his Senate hearings he expresses support for the constitutional rights won in our hard fight and struggle for civil rights.

Subsequent to the above, the convention has concluded that it is not in favor of confirmation, either. There are reasons for this, and I wish to be brief in explaining them. However, I hope that clarity will not be sacrificed on the altar of brevity.

According to public testimony during the course of these hearings, there has been no convincing statement on the part of Judge Thomas that satisfies or satisfied our concerns as expressed in the relevant paragraph as cited by the resolution adopted by the Progressive Baptist Convention in August. Indeed, we have not had answers to questions that are of a paramount importance to us, as a Christian body, a body made up of citizens who are from African ancestry.

We do not and we cannot accept the responses that are cleverly crafted in terms that are just that, responses and not answers. For example, what is the nominee's real position on capital punishment, not his stated willingness to look at the final judgment handed up from lower courts. Is he, like retiring Associate Justice Thurgood Marshall, opposed to capital punishment, or not? Is the nominee radically concerned, as a human being, with not only the question about justice, but the question of human rights, and especially the right to be human?

The nominee has not answered, nor was the question raised about something that goes far beyond personal considerations and values, and that question has to do with ecology. Our world is being systematically eroded, due to improper stewardship of our natural and human resources. The former has to do with the contamination of land, water, and air with toxins, and the latter has to do with the right to earn a decent wage, a fair wage for one's work, and that an employee, whether female or male, should be paid the same salary and enjoy the same benefits for the same jobs performed.

Additionally, those people who have spent their reproductive lives and life earning a living and raising a family should not be discriminated against because they are more expensive to maintain on the job than someone who is much younger and just entering the job market. This is called age discrimination. And it is uncomfortable to know that an overwhelming amount of complaints concerning age discrimination were unattended to during the nominee's tenure as the head of the EEOC. More than that, the statute of limitations has run out and the complainants no longer have any redress or course of action.

It has been said that during his time as a top Government official, Clarence Thomas was ostracized by the established civil rights community. Perhaps this was so, perhaps not. If it is true, the nominee certainly should have gone to the black churches, in order to find a forum in which to express his ideas and views. The black church, especially the Baptist churches, represent a community wherein a wide range of ideas and positions are easily found. He could have, indeed should have, sought out that community in which he would have been welcome, because he is part of that community and he still is.

There are too many critical questions that remain unanswered, repetition for emphasis. Responses are not synonyms for answers to those questions that still linger. When in any human situation, the dialog, the conversation, the debate, or any other exchange takes place, there cannot be more questions at the end than there were at the beginning.

Therefore, in good conscience, even in view of the nominee's singular achievements, his sitting on the U.S. Supreme Court would not be in the best interests of all groups and communities that need progressive jurisprudence, in order to ensure, as well as enhance, an egalitarian society under law.

There are those who claim that if Judge Thomas is not successful in these confirmation hearings, the next nominee may hold regressive views on constitutional rights and liberties. That is not a major concern at this time, nor is it the concern of having another

minority on the Court. Our concern, in reality, is that our needs have to be met as human beings and as citizens, not only of this country, but indeed of the world.

What we need in terms of actualized concern from the bench, whether the High Court or lower appellate courts, is to see that justice indeed is implemented, that justice must serve the poor, the unhappy, the children, and the aging. It has been said and manifested in the form of a statue that justice is blind. For those in this society and world, the blindfolds of justice should be lifted off justice's face, so that justice can see clearly that all isn't well, and the scale in its hands is tilted. The scales of justice need to be balanced, made equal. This can only be arrived at, if justice can see human needs that confront our modern era.

The Progressive Baptist Convention was founded in 1961, over the issue, oddly enough, of civil rights. And in keeping with one of its founders, the Reverend Dr. Martin Luther King, Jr., and in his spirit and memory, our convention maintains a progressive outlook on life through the manifestation and theology of the church. Therefore, we are not convinced, we have no recourse to recall an Associate Justice. There are too many unanswered questions for us to be in support of the confirmation of Judge Thomas at this time.

Mr. Chairman and members of the committee, thank you for your attention.

The CHAIRMAN. Thank you, Reverend Le Mone.

I was going to ask the difference between the National Baptist Convention and the Progressive National Baptist Convention. I think it has just been answered.

Now, let me ask you all this question, beginning with you, Mr. Hooks. Without going into all of what prompted each of your organizations to conclude that Judge Thomas should not sit on the Supreme Court, would you be willing to or able to tell us what one thing about Judge Thomas is it that you find most disturbing, offensive, troublesome, that would be the thing above all else that should keep him off the Court, in your opinion? Pick out one thing, if you can, for me.

Mr. HOOKS. Senator Biden, I would have to repeat what I said, that in his years as a public official, as Assistant Secretary for Civil Rights in the Department of Education and as Chair of the Equal Employment Opportunity Commission, that he showed a disregard for the affirmative action laws. He was opposed to class action, which has been the classic method that has advanced the cause of minorities.

He favored General Meese's attempt to gut Executive Order 11246, promulgated by President Johnson, expanded by President Nixon, and that he has been opposed to the very things of affirmative action that made it possible for him. He climbed up the ladder, and it would seem that he would hand the ladder down. It is his record and his statement, as a public official, that caused the NAACP, very painfully, to have to oppose his nomination.

May I remind you again, sir, that we opposed his nomination as Chair of EECO and we asked for his resignation after his conduct, so this is not a new thing for us.

The CHAIRMAN. I was going to point that out, that this is not a confirmation conversion on the part of the NAACP. This was the

NAACP's position and, as I recall it, you put it out in a sense in the form of a warning, not warning threat, but a warning to all Members of the Senate and the House that this man did not, in your view, share a point of view that would be beneficial to minority Americans, and I acknowledge that. That has been your position for some time.

Mr. HOOKS. He would not represent the best interests of America at this point in time, a transcendent moment in history. When we are trying to move forward, we think he would move the Supreme Court further back.

The CHAIRMAN. Reverend Brown.

Reverend BROWN. I think that it should be underscored here that the American public ought to take note that three predominantly African-American religious bodies came together. In 1917 and 1919, we split over some internal concerns. In 1960, we split over a question of tenure. But for these bodies to be unanimous in the opposition——

The CHAIRMAN. Now, the three bodies you are talking about the National——

Reverend BROWN. The National Baptist Convention USA, Inc., of which Dr. T.J. Jemison is our national president, and our headquarters is in Nashville, TN, and to my left is the general secretary, Dr. W. Franklin Richardson, of New York City, and also a member of our Civil Rights Commission, Dr. Timothy Mitchell. This is the largest religious body in the world of African-Americans. We represent the masses. We preach to thousands every Sunday morning. I might say parenthetically here that maybe you should be sensitized to that by now, but when election time comes around, basically you politicians will make a beeline to the black church, but not in your white church on Sunday morning.

The CHAIRMAN. Reverend Brown, I have probably spent as much time in your black church as maybe even you have sometimes, on occasion.

Reverend BROWN. Because you know that is where the votes are and that is where the voting population is.

The CHAIRMAN. I am very familiar with your church. Now, what I want to know, though, without giving me political advice on where I should and shouldn't be——

Reverend BROWN. No, I am not giving you advice. I am stating a reality.

The CHAIRMAN [continuing]. I want you to answer the question, if you would, please.

Reverend BROWN. Yes, sir.

The CHAIRMAN. What one thing is the most disturbing about Judge Thomas to you and your church, if you had to single out one thing, one most important reason why you don't want him on the bench, the Supreme Court?

Reverend BROWN. He has forgotten what grandma and granddaddy taught us, to look out for each other, and the Lord has blessed you and you ought to be a blessing to somebody else.

The CHAIRMAN. Now, let me ask the same question of you, Reverend Le Mone, if I may.

Reverend LE MONE. Mr. Chairman, that question is the type of interrogatory that demands prior notice of something like 3 weeks. It is a complex issue. At one time, I would——

The CHAIRMAN. If there is no one issue, then just suggest that.

Reverend LE MONE. Very well. I am a minister and I have to give an example, and I will be brief. I at one time was an unofficial tutor in a law school for black law students, preparing them for moot court examinations during their first year. I asked one of the students, can you give me a layman's working definition of what is the law. The student thought for a moment and said law is life. I would say also that the theology of the church has to do with life here on Earth, not in heaven. We want to enjoy life here on Earth and the benefits of the creation that was made for everybody on this Earth.

Equally, the one thing that disturbs us, as the Progressive National Baptist Convention and our sister convention, the National Baptists and the other National Baptist Convention, numbering over 14 million people, about the nominee is inconsistency.

We are living in a world that is unstable and increasingly becoming so by the day, and I think you know better than I, Mr. Chairman, what I am referring to, because you sit in judgment, economic and political judgment, over the welfare of thousands and millions, if not millions of people around the world.

The world is being constantly destabilized. We must have order, not law and order, but stability. Inconsistency does not lend itself towards stability. That inconsistency profoundly disturbs us.

Finally, Judge Thomas is a man of impeccable credentials. He has studied long and hard and has made a success of himself, but that is not for the individual, that is for the group. There is no self-made man or woman on the face of this Earth. It has to do also with the fact that Judge Thomas may be a good Supreme Court jurist, but not now, and I think it is too much of a risk to have Judge Thomas enjoy OJT, on-the-job training, when there is no recourse. It is much too delicate a situation for us to support his nomination, and certainly not his confirmation.

The CHAIRMAN. I thank you for your answer.

Since my time is up, I yield to my colleague from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

We are glad to have you gentlemen here and appreciate your appearance. I have no questions.

I just want to say, Reverend Brown, that in view of your statement against this nominee here and the manner in which you say it, you sound more like a politician than a preacher.

I have nothing else to say.

Senator KENNEDY. First of all, I want to welcome all of you to the hearing and say how much all of us appreciate the thoughtfulness of your presentation and the seriousness in which we regard these comments.

Mr. Hooks, in your testimony you talk about, on page 22,

Clarence Thomas' logic is straightforward: he sets up a liberal straw man (blacks have tried to abdicate all responsibility for their own liberation because of prejudice) and then knocks it down by citing some anecdotal evidence of those who survived. He infers from the few that everyone can make it.

I think all of us are enormously impressed by the personal qualities of Mr. Thomas—his resoluteness from the earliest of days; his steadfastness, dedication; his hard work; his obvious affection for the members of his family.

And, as I gather, what you are saying there is that you are observing that he was able sort of to make it. All of us admire the qualities which he had in order to be able to make it, and if we were to just interpret it the way that he presented it, it is almost an indictment for those that haven't made it. Somehow, those that have been left out or left behind, it is really because, you know, they haven't had the personal kinds of qualities to be able to emerge.

How real is that in the real world of people of color and women in our society? I think that is really what he is saying, but is that really real world which you are speaking from?

Mr. HOOKS. Senator Kennedy, may I answer by saying that there has been presented testimony here that would indicate affirmative action has only benefited those at the top of the ladder. Nothing could be further from the truth. Adam Clayton Powell came to prominence in this Nation marching and demonstrating in Harlem to get black people jobs as sales clerks, as tellers in banks in Harlem in the 1930's.

When I came along in 1949 and was admitted to the practice of law, there was not a single black in the courthouse except janitors and maids and one messenger. There were no blacks in the banks receiving money or using computers or typewriters, as the case might be. There were no blacks working in the stores downtown.

Affirmative action has benefited America and millions of black people who otherwise would not have those jobs. The paper reported this morning that less than 3 percent of black women now work as domestics, when in the 1950's more than half worked, which meant those were the only jobs available.

Affirmative action has worked; it is necessary now. It is a fact that many black people have still not benefited, but that illustrates the whole dilemma that we face. Judge Thomas is apparently saying that we did not need affirmative action, and we certainly do not need it now since we have come so far.

But the fact that there are still 30 percent of black Americans who have not made it does not indicate to me that it is a lack of personal qualities. It means that we must continue affirmative action and reach the unreached. If, in the last 30 years, 40 percent of black Americans have risen from poverty to above poverty so that 70 percent of blacks—and those of us who love America must admit to its successes as well as its failures, and we have had a large number of blacks—millions of them have risen from poverty to at least living above the level of poverty, and it is due to the changed conditions, particularly the aftereffects and the effects of affirmative action.

Now, to be opposed to those programs now—and I read four things here: 11246, which was important in contracts, promulgated by a Democratic President, expanded by a Republican President. I talked about the effects test in the Voting Rights Act, which we fought, as you know, very well because you were involved in that

fight, to make sure that we dealt with effects and not intent because that is what counted.

When we look at the total record of Judge Thomas, he seems to be saying that the ladder, which not only brought him up, but brought millions of black Americans up, must now be knocked out. We are concerned about those—as Amos Brown put it, the least of the laws, the left out.

And we therefore feel, if the Secretary of Labor in this administration can talk about a glass ceiling, if the New York paper this morning can report that black men still lag far behind in the rate of pay, it means that affirmative action is necessary if we are going to bring in—that does not mean affirmative action is the only answer; other things must be done, but we cannot discount the major importance of affirmative action. Therefore, by any objective test, Judge Thomas fails in the only area which he has any expertise, supposedly in, and that is the field of affirmative action.

Senator KENNEDY. I would have been glad to hear from the others, but my time is up, Mr. Chairman.

The CHAIRMAN. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman. Reverend Brown, in your statement you say that Judge Thomas, "ignores history and today's realities with respect to race discrimination," and I would cite an article which Judge Thomas wrote in the Howard Law Journal back in 1987 where he said this: "Major elements of Chief Justice Taney's opinion in *Dred* v. *Scott* continue to provide the basis for the way we think today about slavery, civil rights, ethnicity, as well as the way we think of the nation in general," which is a very strong statement in 1987 for Judge Thomas to say that the tenets of the *Dred Scott* decision remain in America as long as 1987. I think he said that in other of his speeches, and I think that is a factual situation, regrettably, that there is a great deal of discrimination and racism that goes on today.

What we are trying to do is to figure out here what Judge Thomas would do if confirmed, and it is hard to get a picture of him. We have heard a lot about his roots. More important is what he thinks about today. I thought that it was a telling bit of testimony when he commented about sitting in his office in the court of appeals, which overlooks the alley where criminal defendants are brought in, and he commented about African-American young men who were brought in and made a statement on the witness stand that there but for the grace of God goes Clarence Thomas.

And he at one point in his career, in 1983, favored affirmative action with flexible goals and timetables, and then he has turned against it. And a very significant case among many that he was a participant in was the *Lopez* case where he took socioeconomic factors which are supposed to be ruled out, not considered on sentencing, and over the objection of the prosecuting attorney, who said it would open the floodgates, Judge Thomas was a part of a panel which really expanded considerations at sentencing to the background of the young Hispanic who was involved in that case, Lopez.

Now, if we are going to try to predict what he is going to do in the future, aside from a lot of technicalities and case interpretation and whether he is going to provide diversity—and I have heard the

witnesses say that they would rather not have an African-American who doesn't stand for their values than have a non-African-American who does stand for their values.

But we have a projection of a likelihood of having a Republican President for some time in the future and I, for one, think diversity is very important on the Court. That means an African-American on the Court.

Now, in this balance, all these factors in mind, why reject this man who has at least a likelihood, a possibility, of a voice on that Court to tell what it is like as an African-American—the feelings about *Dred Scott* and slavery, and the African-American defendants? Why not go that route?

Reverend BROWN. Well, Senator, at this point I say that he has not given me conclusive evidence that he is freed from the ideology that he has espoused, the political alliances that he has maintained, and he has felt comfortable with this climate that is prevalent in this country today.

Second, one man, as I said in my statement, on that Court, though he may be an African-American, in our estimation, will not make any difference at all. The Court is already stacked, and we all know what has been going on historically for the last 10 years.

And I might say here that our concern is to be right. We are not concerned about winning a battle here. As ministers of the church of Jesus Christ, it is our moral obligation to be right, to do justly, to love mercy, and to walk humbly with our God. And then we must keep in mind that before Justice Marshall went on the Court, though he did do a great, outstanding job, we as African-Americans made it. We were able to make a way out of no way. God is still on our side.

The end will not come if there is not a black on that Court, but we have the moral responsibility to stand up and to speak out as prophets and not as politicians, Senator Thurmond. The prophet speaks, words fall, that justice may roll down like waters and righteousness as a perennial stream.

Senator SPECTER. Well, thank you, Reverend Brown. My time is up. I don't think we can find conclusive evidence on anything. I don't think we can do that, and I would feel a lot more comfortable having somebody in that conference room who understands African America.

Reverend BROWN. Well, he is indicating he doesn't understand. He has misrepresented our history, he has also misrepresented the NAACP's position, suggesting that we were only interested in civil rights, while he hasn't read possibly the works of W.E. DuBois, James Weldon Johnson, Benjamin Elijah Mays, and many others who spoke about taking initiative, who spoke about self-help, but they were not so naive that they did not realize the nature of systemic racism that had to be attacked in a frontal way by governmental intervention, the same as we had governmental intervention when we established these land grant colleges that excluded black people for years. That was the Government intervening.

When we look at the Soil Bank Program, where brother Eastland and Stennis from Mississippi and others have benefited from, that is governmental intervention. The S&L's, that was governmental intervention. So, this is the thing that concerns us greatly, as to

how he comes down as regards solving the problem. He does a good job, a commendable job of defining the problem.

He can do a great job of stating the antithesis of the ugly, nasty situations. He could talk about what the ideal ought to be in this Nation. But when it comes to raising the relevant questions and saying how do you do it, that is where he falls down. It is not an either/or matter, it is both/and, and that has been the position of the NAACP and the black church ever since we have been in this Nation, and he has misrepresented that or permitted his friends to misrepresent him on that point.

The CHAIRMAN. Thank you very much, Reverend.

Reverend LE MONE. Mr. Chairman, might I have a word, please?

The CHAIRMAN. No. I will tell you how you can do it, so we are under the rules and I do not get nailed here. I am going to yield to the Senator from Illinois, and I am sure he will give you a word and you can talk then, otherwise I will not be playing by the rules here.

The Senator from Illinois.

Senator SIMON. Thank you very much.

First of all, I thank all three of you. Judge Hooks, this is a good time to say, as a member of the NAACP, that we are very proud of your courageous and effective leadership.

Mr. HOOKS. Thank you, Senator.

Senator SIMON. I don't know that I have said that in a public forum before, but you have been the kind of a leader in the tradition going back to when I first joined as a student. Walter White was the leader, and you go through that tier of leadership and you bring honor to that position that you hold.

Mr. HOOKS. Thank you.

Senator SIMON. Reverend Brown, one of my colleagues said you sound more like a politician than a preacher. I am sure they said the same thing to the Prophet Amos.

Reverend BROWN. Yes, sir.

Senator SIMON. I remember they said the same thing to Martin Luther King. The church has to be the servant church.

The CHAIRMAN. He has put you in fast company, Reverend Brown. [Laughter.]

Senator SIMON. I might add, I would like to hear you preach sometime on the basis of this little preview we got this morning. But the church was audibly silent in Germany when Hitler rose, when they should have been standing up, and it would be the easiest thing in the world for you to sit back and not say anything. Just as one person—and I am not a member of your organization—I appreciate it.

Reverend Le Mone, in your thoughtful statement, you said something about how you were taking a stand in opposition until or unless you heard statements from the nominee that would convince you to the contrary.

If I could ask all three of you this, have you heard anything in Judge Thomas' testimony that makes you wonder whether you took the right stand or not or has caused you to in any way feel that you might have made a mistake?

Reverend LE MONE. I would like to go first, if you don't mind, Senator Simon.

Senator SIMON. Reverend Le Mone, we will start with you, yes.

Reverend LE MONE. I am sorry Senator Specter has left the room and cannot hear this remark I want to make in response to his question to Reverend Brown. Senator Specter gave a very clear outline of not only affirmative action, but a quota system, by saying he must have an African-American on the Court. That was clearly stated. It is not limitation of language, even though he didn't give the title of affirmative action, that is exactly what the substance of that comment should mean, in terms of its interpretation.

Our position is not to have a minority on the Court, but to have the best possible human being on the Court, male or female, Hispanic, Chicano, Native American, white or black, who understands that justice must serve the interests of all of the people, particularly those who are least in society, that justice indeed must open its eyes and look at what is happening not only to this country, but to the world.

We, as ministers of the gospel, make no apology to the fact that we articulate our ministries from the pulpit and also in the streets, because we are on the side of God and we speak the politics of God. All one has to do is read the 61st chapter of Isaiah or the 4th chapter of Luke, and you understand why we are doing what we are doing.

In direct response to your question, it is really hard to say, but I don't think that we can take the chance in terms of this confirmation going through. It is too risky. Therefore, we are even more resolved, based on the testimony of previous days, that Judge Clarence Thomas should not at this time be a Supreme Court Associate Justice.

Senator SIMON. Reverend Brown.

Reverend BROWN. I say amen.

Senator SIMON. That sounds like a preacher there.

Mr. HOOKS. I would say, Senator Simon, after hearing Judge Thomas in these hearings, we are more convinced than ever that we took the right position, because the only thing that has happened, which is even more disturbing, I think Senator Heflin referred to it as confirmation conversion, that he has in some ways denied that he said what he said or that he meant what he said or that he is starting over again.

We are very convinced that his total record as a public official is of such nature that we cannot support him, and nothing in these hearings has changed our opinion. We believe more firmly now than ever that we were correct.

Senator SIMON. I thank all three of you.

Thank you, Mr. Chairman.

Senator KENNEDY [presiding]. Senator Brown.

Senator BROWN. Thank you, Mr. Chairman.

I want to thank our witnesses for coming today. I appreciate how trying and difficult this process has been for you and your willingness to state forthrightly your position. I think it is helpful to this committee.

In trying to get a handle on the differences between your organization and Judge Thomas, I was hoping you could help me with regard to the question of affirmative action. The judge has indicated that he believes in affirmative action, but does not believe in

racial quotas. How would you describe your view of what is appropriate under affirmative action and what would not be?

Mr. HOOKS. Senator Brown, let me say we have always been opposed at the NAACP to quotas because quotas is defined as an artificial goal above which you cannot rise. The courts, however, adopted goals and timetables because where blacks had been excluded wholesale, could not be in the police department, could not be in the State highway patrol, could not be clerks in stores, all the law really was saying is you must take aggressive action to include in those whom you have excluded. This business of preference and reverse discrimination is nothing but lies that have been forced upon the American public. How do you include in those who have been excluded unless you are aggressive about it?

In the *Alabama Highway Patrol* case, the commissioner over a period of months refused to hire any, even though he was under court order. It was the judge who then decided that you are not only dealing with blacks but you are dealing with the dignity of the Federal courts. Therefore, by a certain date, you must have a certain number of black patrolmen.

Goals and timetables came into the equation in order to make the law effective. And, by the way, Judge Thomas, in his first term at EEOC early on, sort of went along with goals and timetables, and then he was opposed to them. That is why we opposed his reconfirmation.

Affirmative action is aggressive action to include in those who are excluded out. It is not and should not be viewed as reverse discrimination. And it has to be class-based. As someone has said here, the difference between wholesale and retail, we could not possibly take care of all of the millions of blacks and women and minorities who have been excluded by taking one case at a time. As I have said earlier, it would have meant that everybody would have had to have been a Rosa Parks, and only those who could sit on the front of the streetcar would be those who had been arrested; or only those could go to school who had gone there with a Federal marshal to take them in.

Affirmative action is necessary, and Judge Thomas' record indicates that he did not favor that remedy, and we are opposed to him, among other reasons, for that.

Senator BROWN. Well, that is helpful to me. I think it clearly defines the differences. And you might want to correct me. Let me see if I am stating it correctly.

The difference isn't that you are advocating racial quotas and that he is not. That is not advocated by either one of you. The difference is a question over the timetables that have been put together. Would that be a fair statement?

Mr. HOOKS. Goals and timetables were mandated by law. The *Griggs* v. *Duke Power* case was perhaps the finest refinement of it. Because if you have a workplace that employed a thousand people in a city where the workforce was 80-percent black, 20-percent white, there were no blacks employed. They then employ one black or two blacks out of a thousand. The question has to be answered at some point: When have you really affirmatively tried to give employment? This necessitates—and we do not back up from it one iota—goals and timetables which are reasonably calculated to show

that affirmative action not only has resulted in some rules and regulations but in some results.

President Johnson stated eloquently that at some point affirmative action must result in equality of results as well as equality of opportunity. This may be a hard pill to swallow, but from the viewpoint of those who have been historically denied—and I don't think we have to define that years of slavery, 244 years, years of second-class citizenship, *Dred Scott, Plessy* v. *Ferguson.* Now we stand on the brink of a breakthrough, and we simply do not need an African-American on the Supreme Court who does not subscribe to the concept that affirmative action must work. The Supreme Court is already bad enough. We do not need an African-American adding sanction to what is being done.

Senator BROWN. So the goals and timetables would be the difference, and I assume that is in an area where you had a showing that they have discriminated in the past or you have a clear impact of discrimination in the past.

Mr. HOOKS. Well, there are cases that indicate that there must be a showing of discrimination, but there are other cases which simply deal with the fact that the statistical results of—let's use that absolute term of no blacks employed in a city where a factory has a work force available to it of 50 or 60 percent or whatever number of blacks, that the mere showing of that can be enough to change the burden of proof, which was the *Griggs* case. It did not mean that the black applicants or plaintiffs won. It simply meant that the company which then had the knowledge of why they were doing what they did had the burden of proof. And it is this type of thing that is very important if we are to continue our progress.

I mentioned earlier that the present Secretary of Labor has indicated in a study that there is a glass ceiling above which women and blacks cannot seemingly advance. And she has said that something must be done.

At West Point, President Bush marveled over the fact that we have now had 1,000 black graduates of West Point, when you and I know when General Davis went there he was given the silent treatment for 4 years.

The man in charge of West Point said it is because of aggressive affirmative action that we have now had 1,000 graduates of West Point. It is necessary to have affirmative action, and to make it work there must be goals and timetables and systematic class-based remedies in order that we will not spend forever all the money in the Treasury trying to do it one case at a time. And that is one of the weaknesses of Judge Thomas' position. He only talks about affirmative action for someone who has proven somehow that they have been the victim of discrimination. But we know that when they did not have blacks in the police department, it was not based on an individual. It was based on the fact that no blacks were going to be employed as a group. And why should an individual have to go there and almost be lynched?

And I want to say very quickly that the time has not passed—the fact that affirmative action has been in existence for some time does not mean that we do not still need it, that we do not still need class-based remedies, and that we still need goals and timetables.

Senator BROWN. If I may, Mr. Chairman—I see the red light—I would like to ask one followup question.

Senator KENNEDY. It is fine with me if Senator Thurmond agrees.

Senator THURMOND. We have to move on, but go ahead this time.

Senator BROWN. Just briefly, putting aside goals and timetables, obviously that is an area of disagreement. My impression of the judge is that he has a heartfelt commitment to civil rights, acknowledging that there is a significant disagreement in your mind over goals and timetables. But aside from that, at least my impression was he had a heartfelt commitment to civil rights.

Would you share that view or do you disagree in that area as well?

Mr. HOOKS. I disagree, sir. Respectfully, I maintain the experiences are neutral. He talks about his experiences, his grandfather being called a boy. He talks about prejudice and discrimination. But those experiences did not leave him with the lessons of how to overcome that. We have yet to hear from the judge in his official actions basically—with one or two exceptions, of course—how he would overcome that.

He went to the right school, the university of hard knocks, the school of discrimination and prejudice, but he learned the wrong lesson. He seemed to be saying that we do not need Government help, we only need self-help.

We maintain, the NAACP and the Baptist Conventions and the great mass of black people, that we need both self-help and Government help. And Judge Thomas seems to always emphasize only self-help, and that bothers us as to a sincere commitment to the eradication of the problems. He understands and enunciates very well the problem, but the question is: How do we get by the problem? That requires some affirmative action, which he seems to disavow.

Senator BROWN. I appreciate that.

Mr. Chairman, thank you for your indulgence.

Senator KENNEDY. Thank you very much.

Senator Kohl.

Senator KOHL. Thank you very much, Mr. Chairman.

Gentlemen, in a 1959 article for the Harvard Law Review, William Rehnquist wrote that the Senate has the obligation to "thoroughly inform itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him."

Do you feel that we are thoroughly informed on the philosophy judicially of Clarence Thomas?

Mr. HOOKS. I do not think that his testimony has informed you as to his judicial philosophy, and I would have hoped that in his testimony he would have informed you. But I do not think he has.

I hope I have answered your question.

Reverend LE MONE. Following these hearings, Senator, we have seen or read or heard no indication of understanding the judicial philosophy of Clarence Thomas. We have, at best, had vague, elusive, flexible answers to many key issues. And permit me to add that this issue, this nomination, is not about affirmative action only. It is more complicated and complex and comprehensive than that. That is certainly a key issue, but not the sole issue. We do not

want to be interpreted as being here sitting at this table representing one issue that is supposed to be something concerning minorities and women. That is an issue, but not the issue.

Reverend BROWN. I would respectfully say, Senator, that Judge Thomas, in my estimation, has not been forthright in dealing with the issues. And let me say parenthetically here that we must be careful as to how we accept these polls as being gospel truth regarding the position of African-Americans on Judge Thomas.

I happened to stand in a bank on the day before yesterday, and a man came up to me panhandling, wanting the money. And before I gave him the money, I said to him, "What do you think about Clarence Thomas' nomination to the Supreme Court?" He said, "Well, you know, yeah, a brother ought to be up there; yeah, a brother should be up there." I said, "You mean that if this brother is talking against affirmative action, if he has problems with minimum wage, if he misrepresented his sister's status in terms of her being on welfare, if he is in alliance with a socio-religious-political gang that is attempting to turn back the clock on all of our rights, would you support that man?" He said to me, "Rev, you laid something on my brain. No, I don't think he should be on the Supreme Court."

Senator KOHL. Are you then all saying that it is not that we don't know his philosophy—are you saying that we do know his philosophy and that is why you are advocating that we vote against him?

Reverend BROWN. That is right. Now, on some other technical legal question is not an answer to you——

Senator KOHL. Is that what you are saying, Mr. Hooks?

Mr. HOOKS. I am saying, sir, that we opposed him because we thought his judicial philosophy was not what was the basic broad stream of American thought, and particularly African-American thought; that nothing in this confirmation hearing has changed that. He has not expressed, in my judgment, any judicial philosophy except to simply say he can't give an answer to this, he cannot give an answer to that. So we are convinced that his judicial philosophy is wrong for this time, yes, sir.

Senator KOHL. So that he has one, but it is not acceptable.

Mr. HOOKS. That is our position——

Reverend LE MONE. Or entirely understandable.

Mr. HOOKS. Before he testified, and nothing in his testimony, in my judgment, has changed it.

Senator KOHL. All right. I would like to go on.

In an article in last Sunday's Washington Post, Juan Williams said that when Thomas came to Washington in 1982, he was a far more liberal person, even anxious to talk with civil rights groups, but that they snubbed him. And as a result, Thomas became more conservative, and the groups lost an opportunity to have an influence on his development and growth.

Do you have any comment on that?

Mr. HOOKS. My comment is that snubbing and failure to be included is a two-way street. I have served as a public official in Washington. I met some antagonism when I came here, but I made a conscious effort to associate with all of the leaders so that they

could know who I was and what I stood for. And I think that effort was successful.

If Judge Thomas felt he was snubbed, he was a high-ranking Government official, at one time one of the highest ranking in the administration. And I think he had a right and a duty to seek out. I don't think he did that as he should have, and I think that whether or not he was snubbed or not should not change his basic philosophy if he believed in the things that we have been talking about, that he should not have changed that because he felt personally snubbed.

Reverend LE MONE. Senator, in my testimony, I indicated that if the allegation is true that he was snubbed, then certainly a man born and raised in Georgia would go to a black church where acceptance is the order of the day, no matter what your philosophy. He didn't seek out the black church during that time. Had he done so, he would have been educated and would have been in a position to educate. Why he didn't choose that option I don't know, and I think it is his loss.

Reverend BROWN. If I might put it in some homespun wisdom from Mississippi, and maybe from Pin Point, GA, grandmom and granddaddy said he or she who would have friends must first be a friend.

Senator KOHL. Are you saying that this man has walked away from his roots?

Reverend BROWN. He has not been in touch with those old rich roots.

Senator KENNEDY. I think the time is up, Senator. I think we have to express our appreciation to—oh, excuse me. Senator Simpson.

Senator SIMPSON. Mr. Chairman, I thank you and I thank the panel. I was listening to your remarks, and I came over and wanted to participate, to try to do that.

It has been dramatic. I think that is what you intended, to be dramatic. I think it is important to say that Mr. Thomas' responses to questions, at least as I heard them here in several days, indicated that he believes in affirmative action in this respect: He believes in reaching out to increase the applicant pool, increasing the applicant pool, then choosing from that pool the best qualified applicant without regard to race. And I think that that is what most Americans view as—you know, their view is they are against racial preference. They are not against affirmative action. And there is a difference. I know the flashwords don't fit well, but there is a difference.

But, Dr. Brown, in your written statement you say the group wants a nominee who has experienced discrimination. You write that his views reflect hostility toward the African-American community. You write that he is against equality, equal rights, and justice. You claim that he doesn't understand the history of the African-American community.

I can tell you, sir, it is most difficult to reconcile your written and your oral testimony with the Clarence Thomas that we or this committee or this country saw and who we questioned and listened to for 5 days, or with the Clarence Thomas described to us over the

past 4 days by persons, mostly African-Americans, who have known him well, some for many, many years.

I don't think anyone I have ever seen has come before this committee with more friends from around the country, by people who really know him. And the harsh and the intemperate and the nasty statements come from people who don't know him at all.

Now, you can't tell me—I don't care what race or color or creed that we are talking about—where there have been more friends and more people respond to a man than this man, Judge Clarence Thomas, without question. Never in my experience in 13 years. I would think that you would feel demeaned to hear white liberals telling blacks how blacks ought to feel. That can't be a very good experience. And the reason there is a huge, huge split and schism in the black community is because this man is splendid but he is a conservative Republican. So why don't we just cut the baloney and lay it out there and just say you don't like him because he is a conservative Republican, and that is what he is. That is his credentials. But the rest of this is really an exercise—and here is a white conservative speaking—is an exercise in why this is just dissembling before your eyes.

You have got a group of people who are on their own in the black community, and you have never had that before. And they are not going to be in locked step. And I heard from the NAACP group in California, and that was a tremendous lady. What a spirited and energetic lady, and, boy, she laid it out in spades as to why they didn't want to join in locked step.

These are the things that stun me, and I don't understand how you can say those things about a fellow Christian—you are a pastor of your flock—as to those things which are just plain not so, after listening to him for 5 days. And I would ask you how you came to that conclusion.

Reverend BROWN. Senator, if you read my text, I said Paul said that we are living epistles read of men and women. Judge Thomas' record speaks for itself.

Senator SIMPSON. It certainly does.

Reverend BROWN. Yes, before. The speeches he has given, the company he has kept. And I think that we are aware enough to know the implications of the political ideology that he espouses.

I don't mean to be too technical here, but when you talk about conservative views, I think we need to put that in perspective. African-Americans, in terms of their religious experience, have tended to be conservative when it comes to biblical truths and some doctrinal questions. We have been conservative as regards respecting our elders, though there appears to be a generation in these urban centers who have gotten away from that.

But when it comes to political conservatism, we have never been conservative. But we know that, taking a page out of the Bible, the pharisees and sadducees of Jesus' day were the political religious conservatives who would rather keep, hoard the blessings of the promise for themselves. Jesus was a man for the people of the land, and for that reason they put Him on the cross.

What we are saying conservatism means, from an African-American vantage point, the few profiting at the expense of the many, the rich getting richer and the poor getting poorer. And I think

that it is high time that we lay down these labels, right wing, left wing. As one brother said, we ought to be concerned about the bird, because if you have just got one wing you ain't going nowhere. You are just going around in circles. And if in this Nation we do not come together and talk to each other and get rid of this kind of rhetoric that has been afoot for the last 10 years—and it has been afoot. We have had these so-called conservatives who would be more concerned about a fetus or an unborn child. And we are concerned about reverence of life. But at the same time we embrace a political philosophy that would deny child care, a decent job, a good education, a spokesman who would even go to South Africa of that bent, where people have been gunned down and dehumanized for years, and called Bishop Tutu a phony.

It is that kind of conservatism that we have seen afoot in this Nation. And what we are saying is it is time that we get on with the business of putting our Nation back to work, of developing our infrastructure, of being involved with each other to keep this a strong nation.

We ought to take a lesson from Russia. Russia went around the world trying to acquire power but did not take care of home. And as the last 10 years have indicated, we have not taken care of home. We have been more concerned about how things——

Senator SIMPSON. I hear those things and they are passionately and sincerely said, but we are talking about Judge Clarence Thomas. That is who we are talking about.

Reverend BROWN. I know what he stands for and who he is with.

Senator SIMPSON. You know, I believe something about that teaching. I think it was about forgiveness and kindness and compassion. That is what it was about, too. Those were the words of Jesus Christ.

Reverend BROWN. I am talking about him, too.

The CHAIRMAN. Thank you very much.

Senator SIMON. Mr. Chairman, one more question, if I may.

The CHAIRMAN. Has Senator Brown asked any questions yet?

Senator BROWN. Yes.

The CHAIRMAN. All right. The Senator from Illinois.

Senator SIMON. Just one more question. In one of his writings, Judge Thomas, in outlining his legal theories, said the Constitution should be colorblind, and we don't argue with that. Then he goes on to denounce what he calls race-conscious legal devices.

One of the things that I helped to develop back when I was in the House, working with the late Dr. Patterson, was Federal aid for historically black colleges. That is clearly a race-conscious legal device. Now, he has not specifically denounced that but has denounced the race-conscious legal devices.

What would be the impact on historically black colleges if we were to have a Supreme Court saying that is unconstitutional to do that?

Mr. HOOKS. Senator Simon, two things, briefly. Justice Blackmun stated very eloquently that the only way we can advance beyond racism is to take racism into account. The only way we can advance beyond color is to take color into account. You can't have veterans' laws unless you recognize there are veterans. You cannot have laws for the disabled unless you recognize there are disabled.

I do not understand this business of not dealing with color when color was the problem. For that reason, as Justice Blackmun said in *Bakke,* we must take it into account.

Second, I think, in direct answer to your question, that the black colleges have been and are now a great cultural repository of help for this Nation. We would be much the poorer if we did not have black colleges. And if we were to adopt that suggestion that you talked about in totality—and that case, by the way, is before the Supreme Court, will be coming up soon—we will destroy historically black colleges.

It was never the intention of the NAACP to destroy black institutions. It was our intent to integrate all institutions. We think that black schools like Fisk have as much right to exist as white schools like Duke. But they must both be integrated. And we have found that black schools have integrated far more rapidly and far more totally than have the white institutions, and we do not want to see them destroyed, and we do not want to see this whole business of the colorblind society aid in the elimination of a great cultural institution which has been of help and is of help.

Finally, Senator Simon, when we look at the totality of the question that we face, it is important that we know we are the watershed, and as has been stated by one of the members of this panel, the present course of the Supreme Court must be reversed. This committee has a chance to reverse it now by not consenting to the confirmation of an African-American who is obviously opposed to that which is good for America and to that for which the great majority of Americans stand.

It has been stated these public opinion polls simply reflect that all African-Americans basically would like to see one on the Bench. If they do not know what he stands for, they favor it. When you ask them, as Reverend Brown has put it, about the reality of it, then it changes. And there has been a change in public opinion polls. A Werthlin poll indicated that not as many blacks were in favor as it first appeared.

So I am saying give the people light and they will find their way. This Senate has the light, and I am sure they are not going to be guided by public opinion polls which do not ask the right questions and therefore come up with the wrong answers.

Thank you, Senator.

The CHAIRMAN. Thank you very much, gentlemen.

Reverend Le Mone, I had not allowed you to continue because time was up, but now on my time was there anything you would like to say.

Reverend LE MONE. Thank you, Senator. With regard to Senator Simpson, I don't think that we speak the same language that was called English. We are not here for the dramatic, nor are we being overly dramatic. We are telling the truth based on history and experience and a crying human need for corporate justice for everybody in this country.

I notice that sometimes language is suggested when different panelists speak. It is very eloquent. It is informed. It is well thought out, et cetera. But the language applied to people of color is always dramatic, entertaining, and so on.

I think we can speak the same language once and only if we all have the same experience. Our position is simply this: We can't take the chance on this confirmation. The relationship between slaves and masters is not to be improved. We want the elimination of the categories in the first place so all people can live their God-given rights as human beings, men and women.

With regard to racism, racism unfortunately is alive and well in this country. About 3 months ago, perhaps a bit more, there were two surveys conducted—one in the city of Chicago, Senator Simon. One black man, qualified experience, same level of education, and his white male counterpart. The white male counterpart prevailed for the job application in terms of a ratio of 7 to 1. That is less than 5 months old.

The CHAIRMAN. Say that again, please.

Reverend LE MONE. The ratio was 7 to 1. The white applicant——

The CHAIRMAN. In the context of the——

Reverend LE MONE. Job applications for the same job requiring the same education——

The CHAIRMAN. A black man and a white man, same educational background.

Reverend LE MONE. And experience.

The CHAIRMAN. And experience.

Reverend LE MONE. And education.

The CHAIRMAN. And they filed a number of applications.

Reverend LE MONE. That is right. It was conducted by a company. Chicago was one site, and here in the District of Columbia was the second site. And the white applications were successful seven times to one time. Even a physical factor was injected into the data, physical factor of height, weight, and so on.

The Washington Post finally produced something of value to us.

The CHAIRMAN. Thank you very much, Reverend.

Are there any more questions for the panel?

[No response.]

The CHAIRMAN. Gentlemen, thank you very, very much for your testimony.

Mr. HOOKS. Thank you.

Reverend BROWN. Thank you.

Reverend LE MONE. Thank you.

[The prepared statement of Rev. Archie Le Mone follows:]

PROGRESSIVE NATIONAL BAPTIST CONVENTION, INC

601 50th Street, N. E.
Washington, D.C. 20019

Rev. Tyrone S. Pitts
General Secretary

(202) 396-0558
(202) 396-0559
1-800-876-7622
Fax (202) 398-4998
Rev. Dr. Charles G. Adams, President

TESTIMONY AT THE JUDGE CLARENCE THOMAS HEARINGS

September 20, 1991

Russell Senate Building

by

The Progressive National Baptist Convention, Inc.

Mr. Chairman, Members of the Senate Judiciary Committee,

Thank you for the opportunity to testify at today's hearing concerning the nomination of Judge Clarence Thomas. I am officially representing the Progressive National Baptist Convention, Inc., (PNBC). My denomination is one of the historic African-American churches. The Progressive National Baptist Convention has just over 2,000,000 members in approximately 2,300 congregations throughout the United States. Many of our churches are located in states with large urban centers and are attempting to meet the needs that impact on our cities.

It is not uncommon to find as many as 1,500 to 5,000 people who belong to one of our congregations. I think it can be stated that

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an African-American Baptist church is made up of a variety of people coming from diverse socio-economic, educational, and varying regional backgrounds. The church in typical African-American life has been and is a place not only for worship but serves the real, unmet needs of our communities. The church represents a place where our human rights and values are reconfirmed as a counterpoint, even today, to the historical and contemporary indignities that have been part of our life experiences in this country.

The Progressive National Baptist Convention, Inc., wishes this testimony to be viewed as speaking analytically and not critically concerning the nomination and possible confirmation of Judge Clarence Thomas. Because of the unique sensitivity surrounding the Thomas nomination, the Convention has not taken lightly the position it has officially adopted at its 30th Annual Session in Pittsburgh, Pennsylvania, in August of this year. Permit me to read the relevant paragraph of the Convention's resolution:

> "BE IT THEREFORE RESOLVED that the Progressive National Baptist Convention opposes the nomination of Judge Clarence Thomas to the U.S. Supreme Court until or unless in his Senate hearings he expresses support of the Constitutional rights won in our hard fought struggles for civil rights."

Subsequent to the above, the Convention has concluded that it is not in favor of the confirmation. There are reasons for this and I wish to be brief in explaining them. However, I hope that clarity will not be sacrificed on the alter of brevity.

According to public testimony during the course of these hearings, there has been no convincing statement on the part of Judge Thomas that satisfied our concern as expressed in the relevant paragraph as cited from the resolution adopted by the PNBC last month. Indeed, we have not had answers to questions that are of paramount importance to us as a Christian body made up of citizens who are of African ancestry. We do not and can not accept responses that are cleverly crafted in terms that are just that -- responses, not answers. For example, what is the nominee's real position on capital punishment? His willingness to just look at final judgments handed up to the (Supreme) court is insufficient. Is he, like retiring Associate Justice Thurgood Marshall, opposed to capital punishment? Is the nominee radically concerned, as a human being, with not just the question of human rights, but the right to be human?

The nominee has not answered nor was the question raised about something that goes beyond personal considerations and values, and that question has to do with ecology. Our world is being systematically eroded due to improper stewardship of our natural

and human resources. The former has to do with toxic contamination of land, water and air, and the latter with the right to earn a fair and decent wage for one's work; that an employee, whether female or male, should be paid the same salary and enjoy the same benefits for the same job(s).

Additionally, those people who have spent their productive years earning a living and raising families should not be discriminated against because they are more expensive to employ than someone who is much younger and entering the job market for the first time. This is called age discrimination, and it is uncomfortable to know that an overwhelming amount of complaints concerning age discrimination were unattended to during the nominee's tenure as the head of EEOC. More than that, the statue of limitations has run out and the complaintives no longer have any redress or course of action.

It has been said that during his time as a top government official, Clarence Thomas was ostracized by the established civil rights community. Perhaps that was so -- perhaps not. If it was true, the nominee certainly should have gone to the Black church(es) in order to find a forum in which to express his ideas and views. The Black church(es), especially the Baptist church, represent a community wherein a wide range of ideas and positions can be easily

found. He could have, indeed should have, sought out a community in which he would have been welcome because he was a part of that community. He still is.

There are too many critical questions that remain unanswered. Repetition for emphasis, responses are no synonyms for answers to those questions that still linger. That is all we are faced with in these hearings: questions, questions, questions, questions. When in any human situation the dialogue, the conversation, the debate, or when any other interchange takes place, there cannot be more questions at the end than there were at the beginning. Therefore, in good conscience, even in view of the nominee's singular achievements, his sitting on the United States Supreme Court would not be in the best interest of all groups and communities that need progressive jurisprudence in order to ensure, as well as enhance, an egalitarian society under law.

There are those who claim that if Judge Thomas is not successful in these confirmation proceedings, the next nominee may hold regressive views on constitutional rights and liberties. That is not of major concern, neither is the nomination of another minority to the Court a matter of priority. Our concern and the reality that has to be met is that justice must serve the poor, the unhappy, the children, and the aging. It has been said and manifested in a form of a statue that justice is "blind". For those in this society and the world, the blindfold should be lifted

from justice's eyes so it can clearly see that all is not well and the scale in its hand is tilted. That scale needs to be balanced -- made equal. That can only be arrived at if justice can see the human needs that confront our modern era.

The Progressive National Baptist Convention was founded in 1961 over the issue of civil rights in keeping with one of its most widely known pastors, Rev. Dr. Martin Luther King, Jr. It is in his spirit and memory that our Convention maintains a progressive outlook on life.

We are not convinced, there are too many unanswered questions for us to support the confirmation of Judge Clarence Thomas at this time.

Supreme Court justices cannot be recalled.

Thank you Mr. Chairman, and members of the committee.

Statement delivered on behalf of the Progressive National Baptist Convention, Inc., by Rev. Mr. Archie Le Mone.

RESOLUTION ON THE CLARENCE THOMAS NOMINATION TO THE SUPREME COURT

Preamble

1. The U.S. Supreme Court is our nation's highest court. The Justices have been delegated the authority to interpret the laws that affect all citizens.

2. President George Bush's nomination of Judge Clarence Thomas to fill the vacancy of retiring Justice Thurgood Marshall, provides the country a unique opportunity to reflect on our current dilemma in the field of American politics.

3. There is a "conservative trend" sweeping the body politic. The hard won gains of the Civil Rights Movement are being eroded by a series of court decisions.

4. We, the members of the Progressive National Baptist Convention, meeting in Pittsburgh, Pennsylvania, view the nominee, Judge Clarence Thomas, as a product of African American descent. He has seen the injustices that afflict people of color.

5. While we affirm his humanity, believing that God's redeeming grace can transform our brother into a new creature, we must set forth a standard by which the U.S. Senate and citizenry must judge this nominee.

6. America is a multiracial society. Therefore, a justice on the U.S. Supreme Court must be sensitive to human rights and social alienation. We affirm the right of every individual (Black or White) to hold whatsoever view he or she may wish, be it liberal, conservative, or otherwise. Moreover, we recognize that diversity of opinions and points of view are necessary within our community.

7. However, the 21st Century American agenda demands a Judiciary that is not locked into ideological waring factions. The U.S. Supreme Court must provide equal justice under the Laws of the Constitution.

8. The U.S. Senate hearings of September 9, 1991, scheduled for Washington, DC, shall afford the nominee an opportunity to express views on a variety of topics. His record to date leaves many citizens troubled over his basic judicial philosophy.

RESOLUTION

9. WHEREAS, the Progressive National Baptist Convention (PNBC) was born out of a climate and an experience of turmoil and violence, struggling for the rights, freedoms, and liberties of its constituency and all people; and

10. WHEREAS, PNBC is the only such convention that stood forth and championed the cause of Civil Rights, while providing a home and a national platform for one of God's most dynamic servants and our beloved leader and brother, the late Dr. Martin Luther King, Jr.; and

11. WHEREAS, African Americans, other racial minorities, and women have historically been victims of immeasurable crimes of hatred and oppression, discrimination in the labor force and denied access to public and private institutions in the United States for reasons unrelated to their merit and qualifications, but based on race and gender preferences; and

12. WHEREAS, the aforementioned victims of racial hatred and discrimination have appealed to the Supreme Court of the United States for equal protection of their constitutional rights; and

13. WHEREAS, the U.S. Supreme Court is a critical national institution, which should combine scholarly constitutional interpretation with a deep appreciation of the concrete history and social reality of the American people; and

14. WHEREAS, a proper consideration of the nomination of Mr. Thomas to the U.S. Supreme Court requires not only a careful examination of the qualifications, outlook, and history of Mr. Thomas, but also the intent, history, and policy direction of President Bush; and

15. WHEREAS, the Reagan/Bush and the Bush/Quayle administrations have reflected a consistent policy direction with clear and measurable negative impacts on the African American community for over ten years; and

16. WHEREAS, this policy direction includes deregulation and structural unemployment, removal of anti-discrimination protection for historically oppressed minorities, reduction in health care, cutbacks in social assistance for the poor in general, and a major redistribution of wealth away from the middle class and the poor towards the already wealthy and super-rich; and

17. WHEREAS, the political tactics and strategy of Mr. Bush reflect sinister manipulation of race, as in the case of Willie Horton; and

18. WHEREAS, the policy direction of the last ten years has resulted in unprecedented impoverishment of the working poor and the bottom strata of the population, yet at the same time the unprecedented growth of wealth among the upper strata of the population; and

19. WHEREAS, Mr. Thomas has been a part of the conservative trend for the entire ten year period as an aid to Senator Danforth, as EEOC Director, and as a federal circuit court judge; and

20. WHEREAS, we are called to know a tree by the fruit it bears and

21. WHEREAS, the record (fruits) of Mr. Thomas shows a consistent pattern, most clearly reflected in his years as Director of EEOC, of joining the Bush policy direction of removing anti-discrimination protection for African Americans, denying equal pay for equal work for women, and failing to act decisively on age discrimination cases brought before the EEOC; and

22. WHEREAS, the Thomas nomination is part of an accelerated trend of Bush to strengthen the power, prestige, and influence of a network of people, who are more effective in opposing the gains of the Civil Rights Movement and a progressive African American agenda than white conservatives because they appeal to the commendable reluctance of African Americans to not publicly oppose other African Americans; and

23. WHEREAS, the trend to strengthen the prestige, power, and influence of African Americans who (objectively, regardless of personal intent) promote confusion, division, and lay the African American community open to further abuse and exploitation, and is therefore dangerous, short-sighted, and unfaithful to the best tradition of struggle and sacrifice of the African American people; and

24. WHEREAS, the nomination of Mr. Thomas for U.S. Supreme Court Justice should be considered in context and as part of a dangerous trend that does not measure up to the principles on which the PNBC was founded and which has guided its existence; and

25. WHEREAS, we, the PNBC, know that our hope still is in God and never was in a cynical Republican government nor in a luke-warm Democratic government.

26. BE IT THEREFORE RESOLVED that the Progressive National Baptist Convention opposes the nomination of Judge Clarence Thomas for the U.S. Supreme Court until or unless in his Senate hearings he expresses support of the Constitutional rights won in our hard fought struggles for civil rights.

The CHAIRMAN. Our next panel testifying in support of Judge Thomas' nomination includes the following: Sheriff Carl Peed, of Fairfax County, VA; Johnny Hughes is no stranger to this committee and has testified here on a number of occasions, a captain in the Maryland State Police who is testifying on behalf of the National Troopers Coalition; Bob Suthard, former superintendent of the Virginia State Police, who is testifying on behalf of the International Chiefs of Police; James Doyle III, former assistant attorney general of the State of Maryland; Donald Baldwin on behalf of the National Law Enforcement Council and a frequent person before this committee whom we rely on a great deal; and John Collins on behalf of Citizens for Law and Order. Welcome back, Mr. Collins.

Let me say to all the panelists it is a delight to have you here. We have spent a lot of time together. Usually it is on matters relating to law enforcement issues, but it is nonetheless a pleasure to have you here to testify on behalf of Judge Thomas.

Sheriff Peed, would you—unless the panel has——

Mr. BALDWIN. Mr. Chairman, I have got a very brief statement, and I would prefer—and I have discussed it with these gentlemen. If I could just put this in, make this brief statement, and then defer to them. My point is that this is a small segment of the law enforcement community, but I want to state that this represents what I consider the broader aspect and the overwhelming majority. So I will just make this brief statement and then defer, if I might, with your permission.

The CHAIRMAN. Surely. However the panel would like to proceed.

PANEL CONSISTING OF DONALD BALDWIN, NATIONAL LAW ENFORCEMENT COUNCIL: CARL R. PEED, SHERIFF, FAIRFAX COUNTY, VA; JOHNNY HUGHES, NATIONAL TROOPERS COALITION; JAMES DOYLE III, FORMER ASSISTANT ATTORNEY GENERAL, STATE OF MARYLAND; BOB SUTHARD, INTERNATIONAL CHIEFS OF POLICE; AND JOHN COLLINS, CITIZENS FOR LAW AND ORDER

Mr. BALDWIN. Mr. Chairman and members of the Senate Judiciary Committee, I am Donald Baldwin, the executive director of the National Law Enforcement Council. The NLEC is an umbrella group for 14 member organizations. Through these organizations we reach some 500,000 law enforcement officers throughout the country and certainly the overwhelming majority of our law enforcement community.

Now, these gentlemen here will represent the views of their organizations, and I can state that they will represent the views of our member organizations as well.

We have endorsed Judge Thomas for the U.S. Supreme Court because we feel that Judge Thomas will assure that justice will be carried out through the right interpretation of our laws as they have been enacted by our legislative bodies. Judge Thomas in our view will interpret the Constitution as written. Legal scholars have determined that the nominee believes that a Supreme Court Justice, or any other judge, should not use his position as a judge to legislate new laws not already on the books. This is most important

because the law enforcement personnel must put their lives on the line every day and have to trust the laws. Our members want to know that if they arrest a person for breaking a law that he will be judged on the basis of that particular law, not by a new law that might be legislated on the spot by a judge. The law is the law. The Constitution is the Constitution.

Judge Thomas should certainly be confirmed for a seat on the U.S. Supreme Court. He has our wholehearted support.

We thank you for the opportunity to express our views.

As I have said, I am sure that these gentlemen here will speak not only for themselves, but they will speak for the entire law enforcement community, I believe.

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

[The prepared statement of Donald Baldwin follows:]

NATIONAL LAW ENFORCEMENT COUNCIL

Suite 600
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Ordway P. Burden
Chairman

Donald Baldwin
Executive Director

Telephone: (202) 835-8020
Fax: (202) 331-4291

STATEMENT

of

Donald Baldwin
Executive Director
National Law Enforcement Council

Before the Senate Judiciary Committee
on behalf of
Judge Clarence Thomas
to serve as Associate Justice of the United States
Supreme Court

September 20, 1991

REPRESENTING FIFTEEN NATIONAL LAW ENFORCEMENT ASSOCIATIONS WITH A COMBINED MEMBERSHIP OF OVER 450,000 LAW ENFORCEMENT OFFICERS

Mr. Chairman and members of the Senate Judiciary Committee, I am Donald Baldwin, Executive Director of the National Law Enforcement Council. The NLEC is an umbrella group for fourteen member organizations. Through the fourteen member organizations we reach some 500,000 law enforcement officers throughout the country, and certainly the overwhelming majority of our law enforcement community.

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Judge Thomas should be confirmed for the seat on the U.S. Supreme Court. He has our wholehearted support.

We thank you for this opportunity to express our views.

The CHAIRMAN. Gentlemen, have you decided who should go next? Otherwise, we will go in seniority before this committee. Johnny, you go ahead. You have testified before this committee more than anybody. Or do you want—you all figure out how the devil you want to go; otherwise, I am just going to pick somebody and you are going to go.

Mr. PEED. I will go first.

The CHAIRMAN. All right.

I have been informed by my senior colleague to get you to watch the light. You all are very familiar with green and amber and red lights. When the red light comes on, as he has informed me to tell you, please stop.

STATEMENT OF CARL R. PEED

Mr. PEED. Mr. Chairman and members, good morning. It is a distinct honor and privilege to come before you this morning to share with you the reasons why the National Sheriffs' Association wholeheartedly supports the nomination of Judge Clarence Thomas for the U.S. Supreme Court.

I am Carl Peed, sheriff of Fairfax County, VA, and I am speaking on behalf of Sheriff Marshall Honaker of Bristol, VA, who is president of the National Sheriffs' Association. I am a long-time National Sheriffs' associate with membership on the law and legislative committee, the detention and corrections committee, and the accreditation committee. I am a career law enforcement professional with over 17 years' experience with the Fairfax County sheriff's office. I have the honor of coming from a family of law enforcement officers. My father was a deputy sheriff in North Carolina who was shot in the line of duty, and my brother was a police officer in Virginia.

The National Sheriffs' Association was established in 1940, representing the Nation's sheriffs, deputy sheriffs, police executives, corrections professionals, and other criminal justice officials. The National Sheriffs' Association has over 25,000 members and represented 3,096 sheriffs in this country. Because of my background in law enforcement and because of the concerns of the association's members, I am especially grateful for the opportunity to address you today.

As the drug war rages on and law enforcement officers continue to struggle with the rising tide of violent crime nationwide, we need an experienced Associate Justice with the qualifications of Judge Thomas.

Throughout his career, Judge Thomas has preserved his personal integrity, honesty, and principles, maintaining these qualities in the face of discrimination, bigotry, and political rivalry. His appointment to the Supreme Court will provide an experienced, just voice on the fundamental issues plaguing this Nation today. President Bush has thoughtfully chosen a demonstrated leader who will make a difference.

The National Sheriffs' Association surveyed its membership regarding Judge Thomas' nomination. Sheriff Robert C. Rufo, an active member from Massachusetts, a member of the National Sheriffs' Association, said, "Judge Thomas brings an exemplary

educational background and diverse legal experience to the bench. Additionally, he appears to possess the humanistic qualities critical to the issues before the Nation's highest Court." Along with Sheriff Rufo's comments, NSA headquarters received comment after comment filled with praise from sheriffs across this country regarding Judge Thomas. They spoke of Judge Thomas as a "person of the highest caliber," "an anti-crime person," "a judge who recognizes the tough job facing law enforcement professionals today." Those who know him and those who read of his credentials are equally enthusiastic about his appointment. Our Nation's sheriffs shoulder their position of responsibility in the criminal justice system with pride. They fully recognize Judge Thomas' acknowledged talents and qualifications. Frankly, we need and we want Judge Thomas and what he has to offer our entire criminal justice system.

It is our definite belief that he will approach the cases that come before the Court with a commitment to deciding them fairly, as the facts, the law, and his oath dictate.

Never in our Nation's history have we needed more desperately to add to our highest judicial body a totally fair, impartial, brilliant Associate Justice. Unquestionably, now is the hour for this man. He has our admiration and our respect.

On behalf of your Nation's sheriffs and the National Sheriffs' Association, let me urge you to proceed with all due haste to see that Judge Thomas is seated on that Bench.

Mr. Chairman and members of the committee, thank you very much.

[The prepared statement of Mr. Peed follows:]

TESTIMONY OF

SHERIFF CARL R. PEED, FAIRFAX COUNTY, VIRGINIA

ON BEHALF OF

SHERIFF MARSHALL E. HONAKER

PRESIDENT OF THE NATIONAL SHERIFFS' ASSOCIATION

BEFORE THE U.S. JUDICIARY COMMITTEE OF THE U.S. SENATE

ON THE NOMINATION OF

JUDGE CLARENCE THOMAS

FOR

THE U.S. SUPREME COURT

September 20, 1991

MR. CHAIRMAN AND MEMBERS: IT IS A DISTINCT HONOR AND PRIVILEGE TO COME BEFORE YOU AND THE MEMBERS OF THIS COMMITTEE TO SHARE WITH YOU THE REASONS WHY THE NATIONAL SHERIFFS' ASSOCIATION WHOLEHEARTEDLY SUPPORTS THE NOMINATION OF JUDGE CLARENCE THOMAS FOR THE UNITED STATES SUPREME COURT.

I AM CARL R. PEED, SHERIFF OF FAIRFAX COUNTY, VIRGINIA SPEAKING ON BEHALF OF SHERIFF MARSHALL HONAKER OF BRISTOL, VIRGINIA WHO IS PRESIDENT OF THE NATIONAL SHERIFFS' ASSOCIATION. I AM A LONG-TIME NATIONAL SHERIFFS' ASSOCIATE WITH MEMBERSHIP ON THE LAW & LEGISLATIVE COMMITTEE, THE DETENTION & CORRECTIONS COMMITTEE AND THE ACCREDITATION COMMITTEE. I AM A CAREER LAW ENFORCEMENT PROFESSIONAL WITH 17 YEARS EXPERIENCE WITH THE FAIRFAX COUNTY SHERIFF'S OFFICE. I HAVE THE HONOR OF COMING FROM A FAMILY OF LAW ENFORCEMENT. MY FATHER WAS A DEPUTY SHERIFF AND MY BROTHER WAS A POLICE OFFICER.

THE NATIONAL SHERIFFS' ASSOCIATION WAS ESTABLISHED IN 1940, REPRESENTING THE NATION'S SHERIFFS, DEPUTY SHERIFFS, POLICE EXECUTIVES, CORRECTIONS PERSONNEL, AND OTHER CRIMINAL JUSTICE OFFICIALS. THE NATIONAL SHERIFFS' ASSOCIATION, WITH ITS 25,000 MEMBERS, REPRESENTS THE 3,096 SHERIFFS OF THIS COUNTRY. BECAUSE OF MY BACKGROUND IN LAW ENFORCEMENT AND BECAUSE OF THE CONCERNS OF THE ASSOCIATION'S MEMBERS, I AM ESPECIALLY GRATEFUL FOR THE OPPORTUNITY TO ADDRESS YOU TODAY.

AS THE DRUG WAR RAGES ON AND LAW ENFORCEMENT OFFICERS CONTINUE TO STRUGGLE WITH A RISING TIDE OF VIOLENT CRIMES NATIONWIDE, WE NEED AN ANTI-CRIME ASSOCIATE JUSTICE WITH THE QUALIFICATIONS OF JUDGE THOMAS.

THROUGHOUT HIS CAREER, JUDGE THOMAS HAS PRESERVED HIS PERSONAL INTEGRITY, HONESTY, AND PRINCIPLES, MAINTAINING THESE QUALITIES IN THE FACE OF DISCRIMINATION, BIGOTRY, AND POLITICAL RIVALRY. HIS APPOINTMENT TO THE SUPREME COURT WILL PROVIDE AN EXPERIENCED, JUST VOICE ON THE FUNDAMENTAL ISSUES PLAGUING THIS NATION TODAY. PRESIDENT BUSH HAS THOUGHTFULLY CHOSEN A MAN, A DEMONSTRATED LEADER, WHO WILL MAKE A DIFFERENCE.

THE NATIONAL SHERIFFS' ASSOCIATION SURVEYED OUR MEMBERSHIP REGARDING JUDGE THOMAS' NOMINATION. SHERIFF ROBERT C. RUFO, MEMBER OF THE NATIONAL SHERIFFS' ASSOCIATION, SAID, "JUDGE THOMAS BRINGS AN EXEMPLARY EDUCATIONAL BACKGROUND AND DIVERSE LEGAL EXPERIENCE TO THE BENCH. ADDITIONALLY, HE APPEARS TO POSSESS THE HUMANISTIC QUALITIES CRITICAL TO THE ISSUES BEFORE THE NATION'S HIGHEST COURT." ALONG WITH SHERIFF RUFO'S COMMENTS, NSA HEADQUARTERS RECEIVED COMMENT AFTER COMMENT FILLED WITH PRAISE FROM SHERIFFS ACROSS THE COUNTRY REGARDING JUDGE THOMAS. THEY SPOKE OF JUDGE THOMAS AS A "PERSON OF THE HIGHEST CALIBRE," "AN ANTI-CRIME PERSON," "A JUDGE WHO RECOGNIZES THE TOUGH JOB FACING LAW ENFORCEMENT PROFESSIONALS TODAY." THOSE WHO KNOW HIM, AND THOSE WHO READ OF HIS CREDENTIALS, ARE EQUALLY ENTHUSIASTIC. OUR NATION'S SHERIFFS SHOULDER THEIR POSITION OF RESPONSIBILITY IN THE

CRIMINAL JUSTICE SYSTEM WITH PRIDE. THEY FULLY RECOGNIZE JUDGE THOMAS' ACKNOWLEDGED TALENTS AND QUALIFICATIONS. FRANKLY, WE NEED, AND WE WANT JUDGE THOMAS AND WHAT HE HAS TO OFFER THE ENTIRE CRIMINAL JUSTICE SYSTEM.

IT IS OUR DEFINITE BELIEF THAT HE WILL APPROACH THE CASES THAT COME BEFORE THE COURT WITH A COMMITMENT TO DECIDING THEM FAIRLY, AS THE FACTS AND THE LAW REQUIRES.

NEVER IN OUR NATION'S HISTORY HAVE WE NEEDED MORE DESPERATELY TO ADD TO OUR HIGHEST JUDICIAL BODY A TOTALLY FAIR, IMPARTIAL, BRILLIANT ASSOCIATE JUSTICE. UNQUESTIONABLY, NOW IS THE HOUR FOR THIS MAN. HE HAS OUR ADMIRATION - AND OUR RESPECT. ON BEHALF OF YOUR NATIONS' SHERIFFS, AND THE NATIONAL SHERIFFS' ASSOCIATION, LET ME URGE YOU TO PROCEED WITH ALL DUE HASTE TO SEE THAT JUDGE THOMAS IS SEATED ON THAT BENCH.

THANK YOU.

CARL R. REED
SHERIFF
FAIRFAX COUNTY, VIRGINIA

PROFESSIONAL EXPERIENCE

Sheriff	Fairfax County Sheriff's Office	1990 - Present
Chief Deputy Sheriff	Fairfax County Sheriff's Office	1980 - 1990
Captain	Diagnostic & Treatment Division	1977 - 1979
Lieutenant	Classification Section	1976 - 1977
Coordinator	Work Release Program	1974 - 1976
Instructor/Coach	Pembroke State University	1972 - 1974
United States Army	Presidential Honor Guard Fort Meyer, Virginia	1970 - 1972

EDUCATION

- B.S. Pembroke State University, North Carolina — 1970
- National Institute of Corrections — 1978
- National Sheriffs Institute — 1983
- FBI National Academy — 1984
- Certificate of Criminal Justice Administration, University of Virginia — 1984

PROFESSIONAL CONSULTANT EXPERIENCE

- Certified auditor for American Correctional Association
- Auditor for the National Sheriffs Association
- Consultant for the National Institute of Corrections and the National Sheriffs Association
- One of six people selected nationally to review the seven volume National Institute of Corrections Classification Training Manual
- One of seventeen people selected nationally to field test the National Sheriffs Association's Supervisor Training Manual

ADDITIONAL GRADUATE CREDIT

- Communication for Justice Administrators, University of Virginia
- Correctional Institution Design & Development, Virginia Commonwealth University
- Group Counseling in Corrections, American University
- Graduate Survey Administration of Justice, American University
- Innovative Corrections Practice & Theory, American University
- Introduction to Social Research, American University
- Community Relations, George Mason University

PROFESSIONAL MEMBERSHIPS

- National Sheriffs Association
- Virginia State Sheiffs Association
- American Jail Association
- FBI National Academy Association
- American Correctional Association
- Virginia Correctional Association
- Fairfax County Sheriffs Association
- NO. VA Mental Health Alliance

NATIONAL SHERIFFS' ASSOCIATION
1450 DUKE STREET • ALEXANDRIA, VIRGINIA 22314 • 703-836-7827

CHARLES "BUD" MEEKS
EXECUTIVE DIRECTOR

TESTIMONY OF

SHERIFF MARSHALL E. HONAKER

PRESIDENT OF THE NATIONAL SHERIFFS' ASSOCIATION

BEFORE THE U.S. JUDICIARY COMMITTEE OF THE U.S. SENATE

ON THE NOMINATION OF

JUDGE CLARENCE THOMAS

FOR

THE U.S. SUPREME COURT

September 20, 1991

Mr. Chairman: It is a distinct honor and privilege to come before you and members of this committee to share with you the reasons why the National Sheriffs' Association wholeheartedly supports the nomination of Judge Clarence Thomas for the United States Supreme Court.

I am Marshall Honaker, Sheriff of Bristol, Virginia. For the last 18 years I have held the office of Sheriff. I am a career law enforcement professional, with a background in The Office of Sheriff dating back to 1957. I have been president of the Virginia State Sheriffs' Association and it is my pleasure this year to serve as president of the National Sheriffs' Association. The National Sheriffs' Association was established in 1940, representing the nation's sheriffs, deputy sheriffs, police executives, corrections personnel, and other criminal justice officials. The National Sheriffs' Association, with its 25,000 members, represents the 3,096 sheriffs of this country. Because of my background in law enforcement, and because of the concerns of the Association's members, I am especially grateful for the chance to address you today.

As the drug war rages on and law enforcement officers continue to struggle with a rising tide of violent crimes nationwide, we need an anti-crime Associate Justice with the qualifications of Judge Thomas.

Throughout his career, Judge Thomas has preserved his personal integrity, honesty, and principles, maintaining these qualities in the face of discrimination, bigotry, and political rivalry. His appointment to the Supreme Court will provide an experienced, just voice on the fundamental issues plaguing this nation today. President Bush has thoughtfully chosen a man, a demonstrated leader, who will make a difference.

The National Sheriffs' Association surveyed our sheriff members about Judge Thomas' nomination. Sheriff Robert C. Rufo, member of the National Sheriffs' Association and president of the Massachusetts Sheriffs' Association, said, "Judge Thomas brings an exemplary educational background and diverse legal experience to the bench. Additionally, he appears to possess the humanistic qualities critical to the issues before the nation's highest court." Along with Sheriff Rufo's comments, NSA headquarters heard words of praise from sheriffs across the country about Judge Thomas. They spoke of Thomas as a person of the highest calibre, an anti-crime person, a judge who recognizes the tough job facing law enforcement professionals today. Those who know him, and those who read of his credentials are equally enthusiastic. Our nation's sheriffs shoulder their position of responsibility in the criminal justice system with pride. They fully recognize and hope for the invaluable assistance of Judge Thomas' acknowledged talents and qualifications. Frankly, we <u>need</u>, and we <u>want</u> Judge Thomas and what he has to offer the entire criminal justice system.

It is our definite belief that he will approach the cases that come before the Court with a commitment to deciding them fairly, as the facts and the law require.

Never in our nation's history have we needed more desperately to add to our highest judicial body a totally fair, impartial, brilliant new Associate Justice. Unquestionably, now is the hour for this man. He has our admiration - and our respect. On behalf of your nation's sheriffs, and the National Sheriffs' Association, let me urge you to proceed with all due haste to see that Judge Thomas is seated on that bench.

Thank you.

The CHAIRMAN. Thank you very much, sheriff.
Mr. Hughes.

STATEMENT OF JOHNNY HUGHES

Mr. HUGHES. Mr. Chairman, good morning.
The CHAIRMAN. Good morning.
Mr. HUGHES. Larry Tally and the Delaware troopers send their regards.
The CHAIRMAN. Thank you very much.
Mr. HUGHES. Honorable members of this committee, I would like to thank the committee for once again giving me the opportunity to appear before you and speak on this matter of great public interest, the nomination of an individual for Associate Justice of the U.S. Supreme Court.

The National Troopers Coalition, an organization representing State troopers in 44 States, strongly endorses the nomination of Judge Clarence Thomas to Justice of the U.S. Supreme Court. Judge Thomas has a diverse background.

As assistant attorney general for the State of Missouri, where he practiced in the areas of criminal and tax law, Assistant Secretary of Civil Rights in the Department of Education, Chairman of the Equal Employment Opportunity Commission, and a Federal appellate judge, a member of the Circuit Court of Appeals for the District of Columbia, his experience qualifies him to be appointed to our Nation's highest court.

More importantly, the National Troopers Coalition has reviewed Judge Thomas' criminal law opinions while on the court of appeals and believes him to be a tough law enforcement judge who at the same time will protect the constitutional rights of the accused. He has participated in over 140 decisions, many of them criminal cases.

Like a vast majority of citizens throughout this country, law enforcement officers are particularly interested in a nominee's qualifications in the area of criminal law. The criminal courts and the decisions they render vitally affect the lives of all Americans.

The National Troopers Coalition believes that in criminal cases, which occupy a large percentage of cases that ultimately reach the Supreme Court, Judge Thomas has demonstrated, while sitting on the appellate court, a clear understanding of the challenges facing police officers. He has been supportive of law enforcement, yet fair to the accused.

Judge Thomas, we believe, has struck the appropriate balance between protecting the rights of society and enforcing its laws on the one hand, and upholding the constitutional rights of the accused on the other.

As we have repeatedly stated in past confirmation hearings, we could not support a nominee who would sacrifice either of these interests for the sake of the other.

More than others in society, police officers know of the evil and tragic side of life—crackhouses, senseless and brutal killings, the carnage caused by the drunk driver. Law enforcement officers know how people are intimidated by drug dealers and muggers on our streets. Millions of Americans are deeply concerned about the

effectiveness of our criminal justice system, which needs to be able to deal effectively with these vicious and violent criminals. We believe that Judge Thomas has the resolve and the conviction to do just that.

We view the nomination of Judge Thomas as evidence of the President's strong commitment to effective law enforcement. It is still unfortunately true that our legal system too often breaks down after an arrest is made. Legal rulings sometimes impede prosecution and turn a trial away from the search for the truth, into an exercise into legal technicalities.

The exclusionary rule, for example, may turn a criminal proceeding into a trial more of the police officer than the defendant. Officers who act in good faith in conducting a search or interrogating a suspect may find highly relevant evidence inadmissible, because a court, sitting with 20/20 hindsight, finds a technical violation of a legal right.

As an organization, the National Troopers Coalition is committed to backing the nomination of individuals to the Court who have shown a strong commitment to law enforcement. As an appellate judge, Judge Thomas has fairly, yet effectively, dealt with criminal defendants. We have the necessary confidence in him to believe that he will fairly judge and decide the many and important criminal law issues that will come before him on the Supreme Court. We strongly endorse Judge Clarence Thomas and urge confirmation by the Senate.

I passed out a copy of our resolution which was passed at a national troopers conference.

The CHAIRMAN. It will be made a part of the record.

Mr. HUGHES. Thank you, Mr. Chairman.

[The resolution referred to follows:]

NATIONAL TROOPERS COALITION
112 STATE STREET, SUITE 1212, ALBANY, N.Y. 12207 518-462-7448

RESOLUTION
TO ENDORSE CLARENCE THOMAS AS ASSOCIATE JUSTICE
OF THE UNITED STATES SUPREME COURT

WHEREAS, President George Bush has chosen to nominate Judge Clarence Thomas for Associate Justice of the United States Supreme Court, it is the sense of this assembled body to extend our most stringent support of that nomination; and

WHEREAS, the National Troopers Coalition recognizes that the office of Associate Justice demands integrity, intellectual skills, and dedication to the principles of equal justice; and

WHEREAS, the office also requires unbending dedication to principle, basic fairness, human decency, and justice under law; and

WHEREAS, the record of Judge Thomas impressively demonstrates that these qualities from his days as Assistant Attorney General in the State of Missouri to his term as Chairman of the Equal Employment Opportunity Commission, to his latest office as a member of the United States Court of Appeals for the District of Columbia; and

WHEREAS, the National Troopers Coalition firmly believes there must be a fair and equitable balancing of protecting the right of society to enforce its laws on the one hand; and the constitutional rights of the accused on the other;

THEREFORE, BE IT RESOLVED that this assembly, which represents over 40,000 Troopers and protects more than 200 million Americans, seize upon this great opportunity to most stringently support the nomination of Judge Clarence Thomas to Associate Justice of the United States Supreme Court.

BE IT FURTHER RESOLVED, that a copy of this resolution be sent to the honorable members of the United States Senate.

Adopted this 6th day of September, 1991 at the National Troopers Coalition Conference, Portland, Maine.

Richard J. Darling

Richard J. Darling
Chairman, NTC

The CHAIRMAN. Thank you very much.
Now, our next witness is Mr. James Doyle.

STATEMENT OF JAMES DOYLE III

Mr. DOYLE. Mr. Chairman, my name is James Doyle. I am an attorney from Baltimore. I am also here on behalf of the National Troopers Coalition.

I have previously prepared and I believe have had distributed to the committee my written testimony, and I would simply request that it be placed in the record, in lieu of my reading it.

The CHAIRMAN. It will be placed in the record.

Mr. DOYLE. However, I would like to make a couple of points, while I have the opportunity, and that is that, first, as the committee knows, the Supreme Court in this country deals with criminal law issues that are of extreme importance.

For example, last term, the Court decided major decisions concerning auto searches, interrogation of suspects, use of victim impact statements in sentencing, the use of confessions and whether a confession can ever amount to harmless error. So, there are very important criminal law questions that come before the Supreme Court. I think, for that reason, the nominee's qualifications to decide fairly criminal law issues should also be of great importance to this committee.

Now, I have reviewed Judge Thomas' criminal law decisions, the decisions that he has authored while a member of the Federal appellate court, and I think that those decisions consistently show a judge who has performed a well-reasoned type of analysis of the criminal cases that have come before him. In fact, I believe that the American Bar Association, in its testimony before this committee, has similarly indicated that his opinions are well crafted, analytical, and well reasoned.

In addition to that, however, I have looked at those opinions from the viewpoint of law enforcement and I think that, as Captain Hughes has testified, those decisions have been extremely supportive of law enforcement. Yet, at the same time, his decisions have also been fair to the accused, and my written testimony goes into a number of the decisions that he has written, but I will just mention two here in my testimony today.

United States v. *Halliman,* for example, was a search and seizure case involving an investigation of a drug operation. The particular drug dealers in this case were using a hotel in Washington and switching rooms and renting a number of rooms and constantly switching rooms on a day-to-day basis.

In upholding the search of one of those hotel rooms where drugs were found, I think Judge Thomas showed a keen understanding of the difficulties that police officers face in today's society, particularly when they are investigating crimes involving drugs and drug operations, which tend to be of an evasive and clandestine nature, and his opinion in that case I think is particularly well reasoned and particularly shows his understanding of the kinds of difficulties that police officers face today.

On the other hand, Judge Thomas has also shown a keen desire to be fair to the criminal accused. For example, in the case of

United States v. *Long*, Judge Thomas reversed a firearm conviction of an individual in a drug case. Even though a jury had found that there was sufficient evidence for the conviction, Judge Thomas, in rather strong language, indicated that his role as an appellate judge would not allow him to simply sit by when there was clearly insufficient evidence to sustain the conviction, so in that particular case he reversed.

The point that I think needs to be made to the committee is that Judge Thomas has shown through his criminal decisions that he is supportive of law enforcement, yet he has struck the appropriate balance and has also shown that he intends to be fair to the accused. I think that is all we can ask of a judge. I think that his qualifications in this area are clear and, on behalf of the National Troopers Coalition, I would urge this committee's endorsement.

Thank you.

The CHAIRMAN. Thank you very much.

Mr. Suthard.

STATEMENT OF BOB SUTHARD

Mr. SUTHARD. Chairman Biden, members of the Judiciary Committee, I am Robert L. Suthard. I am the Secretary of Public Safety in the Commonwealth of Virginia.

I want to express my sincere appreciation for the honor of being able to appear before you and add the endorsement of the International Association of Chiefs of Police for Judge Thomas. I am the second vice president of IACP, and there are presently in excess of 8,000 police chiefs across America who are members of IACP.

The governing body of our organization carefully reviewed the background and experience of Judge Thomas before voting to support his confirmation as an Associate Justice of the Supreme Court.

Suffice it to say that we are really impressed with his personal background, with his legal training, his diverse legal experience, and his record as a jurist, especially in the area of crime and criminal justice issues. We believe him to be extremely well qualified to serve on the highest court in the United States.

Our governing body determined that Judge Thomas is a tough anticrime judge who has recognized the problems that law enforcement officers face in combating crime. As an example, he has resisted efforts to impose unreasonably burdensome requirements on the police and prosecutors or to overturn criminal convictions on technicalities that are not required by the Constitution, and at the same time he has guarded against infringement on the fundamental rights of the criminal defendants.

His decision in *United States* v. *Long*, *United States* v. *Rogers*, and *United States* v. *Wooly* all highlight his commitment to the tough law enforcement of our criminal laws and a common sense and reality based on a reasonable approach of judging in this society, both of which are consonant with the stated policy of the International Association of Chiefs of Police.

We believe that Judge Thomas was nominated by President Bush to be a Supreme Court Justice because of his fidelity to the Constitution and the rule of law. We believe that he will interpret the

Constitution fairly and apply the laws equally. These qualities, coupled with his education and experience, make him highly qualified for the position of Associate Justice on the U.S. Supreme Court.

For these reasons, the governing body of IACP, meeting on August 10, in New York City, voted to endorse his nomination. I am pleased to add IACP's endorsement of Judge Thomas to his long list of endorsements. We give him our unqualified support during these confirmation hearings. We urge you gentlemen and Members of the Senate to speedily confirm his nomination.

I want to say personally, as I conclude, that I have been a policeman since 1954. I started as a trooper in the Virginia State Police. I worked up through the ranks and I was appointed as superintendent of the State police, and now serve in the cabinet as the secretary of public safety.

I sincerely believe that the Supreme Court Justices, each of them, are as important to us being able to do a proper job to protect the people as anything else. I have followed the system, I have read a lot about Judge Thomas, and I just feel that he is a very qualified person to serve on the Supreme Court.

Thank you very much.

The CHAIRMAN. Thank you very much.

Mr. Collins.

STATEMENT OF JOHN COLLINS

Mr. COLLINS. Mr. Chairman and members of the committee, it is very nice to be back here and see you all again. My name is Jack Collins, and I am the eastern regional representative and director of Citizens for Law and Order, CLO.

Our grass roots organization of citizen activists was founded more than 21 years ago in Oakland, CA, by four concerned citizens who felt very deeply about the growth of violent crime in their city and in their Nation. For the past two decades, our organization has successfully encouraged ordinary citizens to become more directly involved in the criminal justice system and to support law enforcement agencies and other organs of justice.

We are committed, gentlemen, to the reduction of violent crime in America and to ensuring a balanced and fair criminal justice system, and we want to root out inequities in the judicial process. We also hold a very special concern for victims and survivors of violent crime and we try to ensure for them a position of centrality in the criminal justice system.

I speak from experience; I am a victim; I am a survivor. Our 19-year-old lovely daughter Susanne was viciously and brutally murdered 6 years ago, in July 1985, and since that date I and my wife, Trudy, and our son, Steven, have become all too familiar with the criminal justice system.

It is against this backdrop of concern and commitment that we look at the U.S. Supreme Court as a very, very telling instrument in bringing about a healthy, fair, and just criminal justice system. Its decisions on criminal law impact not only on individual litigants, but also they resonate forcefully throughout the Federal court system and the State court system.

Given this key role of the Court, CLO and our members wanted to know more about Judge Thomas and his views and his philosophy. Given that face, we commissioned Barbara Bracher, a litigation attorney with one of the major D.C. law firms, to prepare a report on the judicial philosophy of Judge Thomas, particularly as it is reflected in his criminal law decisions on the D.C. circuit court.

Our own reflection, gentleman, combined with our reading of Ms. Bracher's report, leads us to the conviction that Judge Thomas will bring to the Court a voice of reason, fairness, and equity in the area of criminal justice. He is a thoughtful jurist. He possesses a keen intellect and a restrained judicial temperament. With these qualities, he will very likely help to bring much needed certainty and predictability in this area of the law to the Court.

Judge Thomas has demonstrated a commonsense approach to questions of criminal law, and he is very sensitive to the needs of those law enforcement officials actually out on the beat, on the street. He has shown throughout all of his opinions a firm commitment to established rules of law. He is scrupulous in his observance of controlling precedent and the proper jurisdiction of the court. He complies with accepted principles of statutory construction.

Throughout all his opinions, it is evident that he sees his charter as one of construing and interpreting the law, and not shaping the law to suit his own predilections or any private agenda. But even beyond his legal opinions, it is evident that Judge Thomas has thought deeply and carefully about the scourge of violent crime in this country.

In 1985, at one symposium, he was asked about ways to help the inner cities. He responded, "The first priority is to control the crime."

Another element which argues for Judge Thomas' sensitivity towards victims of crime is his own history of victimization in a segregated society, where the pain and hurt of discrimination was a daily feature of life. Judge Thomas knows what it is like to be a victim. We are convinced that he will carry these memories with him to the Supreme Court, along with the sense of injustice they engendered.

It is our expectation that Judge Thomas, for him, victims will no longer be forgotten and invisible players relegated to the margins of the criminal justice system, but, rather, figures central to the process, whose legitimate rights, needs, and concerns must be heeded and honored.

Noticing all of these attributes and facts, Citizens for Law and Order is proud to endorse Judge Thomas' nomination to the U.S. Supreme Court. Joining us in this endorsement are four victim groups who have joined us for this purpose: Justice for Murder Victims, San Francisco; Survivor on Call, Inc., Saltillo, MS; Memory of Victims Everywhere, Irvine, CA; and Citizens Against Violent Crime, Charleston, SC. CLO, together with these 4 organizations, represent more than 40,000 citizens committed to the cause of good criminal justice.

Thank you, Mr. Chairman. Thank you, members of the committee.

[The prepared statement follows:]

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"dedicated to law and order with justice for all"



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EASTERN REGIONAL DIRECTOR

CITIZENS FOR LAW AND ORDER

BEFORE THE JUDICIARY COMMITTEE OF THE UNITED STATES SENATE

ON THE NOMINATION OF JUDGE CLARENCE THOMAS

AS

ASSOCIATE JUSTICE OF THE SUPREME COURT

SEPTEMBER 19, 1991

BOX 13308 OAKLAND, CALIFORNIA 94661 (415) 531-4664 FAX (415) 531-1861

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Mr. Chairman and Members of the Committee:

My name is Jack Collins and I am the Eastern Regional Director of Citizens for Law and Order (CLO). Our organization was founded twenty-one years ago in Oakland, California, by four concerned citizens who were deeply troubled by the steady growth of violent crime in both their city and nation. For the past two decades, CLO has successfully encouraged ordinary citizens to actively involve themselves in the support of law enforcement agencies. We are committed to reducing violent crime, bringing about a fair and balanced criminal justice system, and rooting out inequities from our judicial processes. We also hold a very special concern for victims and survivors of violent crime and strive constantly to insure for them a central position within the justice system. I, myself, am a victim/survivor -- our nineteen year old daughter, Suzanne, was brutally murdered six years ago.

Against this backdrop of concern and commitment, it is clear to us that the United States Supreme Court plays a telling role in insuring a healthy, fair, and balanced criminal justice system. Its decisions on criminal law impact not only on individual litigants, but they resonate forcefully throughout the Federal and State court systems for years to come. Given this key role of the Court and its individual Justices, CLO was naturally interested in learning as much as possible about the character, views, and legal approach of Judge Clarence Thomas.

Accordingly, we commissioned Barbara K. Bracher, a Litigation Attorney for a major Washington, D.C. law firm, to prepare a report for us on the judicial philosophy of Judge Thomas, as it is reflected in his opinions on criminal law and procedure during his tenure on the United States Court of Appeals for the D.C. Circuit.

Our own research, combined with our reading of Ms. Bracher's report, lead us to the conviction that Judge Thomas will bring to the Supreme Court a voice of reason, fairness, and balance in the area of criminal justice. He is a thoughtful jurist who possesses both a keen intellect and a restrained judicial temperament. With these qualities, he will very likely help to bring much needed certainty and predictability to this area of the law.

Judge Thomas has demonstrated a common sense approach to questions of criminal law and procedure, consistently recognizing the practical problems faced by law enforcement officials on the streets. He has shown throughout all his opinions his firm commitment to established rules of law. He is scrupulous in his observance of controlling precedent and in his careful observation of the proper jurisdiction of the court. He complies with accepted principles of statutory construction using confirmed and traditional tools in construing applicable statutes. Throughout all his opinions, it is evident that he sees his charter as construing and interpreting the law and not shaping it to fit his own predilections or private agenda. While

he has repeatedly expressed concern for protecting the rights of criminal defendants, his open-mindedness and innate sense of fairness and balance promise that he will be as equally forthright in protecting the rights and concerns of victims and the community at large.

But even beyond his legal opinions, it is evident that Judge Thomas has thought deeply and carefully about the scourge of violent crime and its victimization of law abiding citizens. In a 1985 symposium, Judge Thomas was asked about ways to help the inner cities. He responded, "The first priority is to control the crime. The sections where the poorest people live aren't really livable. If people can't go to school, or rear their families, or go to church without being mugged, how much progress can you expect in a community? Would you do business in a community that looks like an armed camp, where the only people who inhabit the streets after dark are the criminals?" Similarly, in a 1987 speech, Judge Thomas returned to this broad theme and noted, "We should be at least as incensed about the totalitarianism of drug traffickers and criminals in poor neighborhoods as we are about totalitarianism in Eastern bloc countries."

Another element which argues for Judge Thomas' sensitivity towards victims of crime is his own history of victimization in a segregated society, where the pain and hurt of discrimination was a daily feature of life. Judge Thomas knows what it is like to be a victim. We are convinced that he will carry these memories

with him to the Supreme Court, along with the sense of injustice they engendered. It is our expectation that with Judge Thomas victims will not be forgotten and invisible players relegated to the margins of the criminal justice system, but rather figures central to the process whose legitimate rights, needs and concerns must be heeded and honored.

Noting these positive judicial attributes of Judge Thomas, along with the fine qualities of character reflected in his background, personal history, and career to date, Citizens for Law and Order, is proud to endorse Judge Thomas' nomination to the United States Supreme Court. Joining us in this endorsement are four Victim organizations from around the country who have come under our "umbrella" configuration for this purpose. Those organizations include: Justice for Murder Victims, San Francisco, California, Survival, Inc., Saltillo, Mississippi, Memory of Victims Everywhere, Irvine, California, and Citizens Against Violent Crime, Charleston, South Carolina. These organizations, together with CLO, represent more than forty thousand individuals who are actively concerned with criminal justice issues.

Thank you Mr. Chairman and Committee Members for your courtesy and attention.

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

Gentlemen, I have one question. I am not going to ask all of you to answer it, but anyone who wishes to answer, please do. Does it disturb you that Judge Thomas in these hearings endorsed the *Miranda* decisions and the need for Miranda warnings? Since you have testified on the crime bill that you would like to see the administration's position, where they would like to see the Miranda warnings changed, is that of any concern to any one of you?

Mr. SUTHARD. Mr. Chairman, it doesn't concern me. We have been working with the Miranda warnings for many years now, and I think that at the time that came about, it brought about a more reasonable justice system insofar as law enforcement was concerned. It was a real struggle for a while and we have to get adjusted to it, but I think, in the balance, that to be able to inform certain people of what the situation actually is, I think that Judge Thomas brings a good balance to the system.

The CHAIRMAN. I appreciate the answer. I really, quite frankly, had an ulterior motive for asking the question, because all the talk about how police agencies are clamoring for a change in the Miranda warning, the answer that I got from you is the answer that I almost always get from every person who has ever been out there in the street, and I just wanted to make sure that was on the record and that you didn't have a problem with Judge Thomas because of that.

Mr. BALDWIN. Mr. Chairman, I would prefer that Johnny Hughes, Sheriff Peed, and Jack Collins expound on this, but——

The CHAIRMAN. I just assume Mr. Collins has no expertise on this, so I would rather——

Mr. BALDWIN. Right.

The CHAIRMAN. I do not mean that as a criticism, I mean he is not a law enforcement officer. But anybody else who wants to expound on it, please do.

Mr. BALDWIN. My observation, from talking with the members of the Law Enforcement Council, as I say, which represents the vast majority of the law enforcement community, is that we believe that some look at it and some modification would be helpful. I don't believe that Mr. Suthard would disagree with that. I think that they have learned to live with it, and I believe they recognize that some modifications and some changes might be helpful.

The CHAIRMAN. What I have heard, quite frankly, Mr. Baldwin—I have great respect for you, you and I have worked together on a lot of these issues, you keep saying that and everybody I speak to in the law enforcement community says it has made them better, the comment made by Mr. Suthard, and I don't hear anybody talking about modification. But that is not really the issue here.

You and I are going to get to debate that a lot in the crime bill, but my point is does it bother you that Judge Thomas wants no modification? Does it bother you, Mr. Suthard and Mr. Baldwin?

Mr. BALDWIN. I didn't read it that he said that he didn't believe there shouldn't be any kind of modification. I think he endorsed the concept of it.

The CHAIRMAN. No, I think he endorsed explicitly. I will go get the record and make sure. Because if you have a problem, we are going to vote on this guy in a little bit, and this is the time to make

sure that we know you have a problem about it, because it is a big deal issue, it is a big ticket item, and I just want to make sure everybody knows what he said. I take him at his word, and I know you do, too. But I heard an explicit endorsement of *Miranda,* nothing about modification.

Mr. BALDWIN. On balance, I find his position a strong one that law enforcement can support. Now, we can single out an issue and might have a little difference, but on balance I would say——

The CHAIRMAN. I am not suggesting, by the way, that if you had a difference that would change the reason to be for him. It is a matter of balance. When 1 of maybe 5 or 6 or 10 most vocally expressed issues, not by law enforcement necessarily, but relative to law enforcement—that is why I wanted to know your stand. I yield to my colleague——

Mr. SUTHARD. Could I expand 1 second?

The CHAIRMAN. Sure you can.

Mr. SUTHARD. It has always bothered me, whether I was a trooper or sergeant, anywhere in law enforcement, that one technical problem could cause a serious offender to be set free because some police officer didn't follow something to the very last point of law. And I have seen on occasions a person who should have been convicted of serious crimes be freed when a police officer made the mistake. And it seemed to me like the police officer perhaps needed to be penalized, and the guy still needed to serve the penalty. To that extent, of course, I would like to see some possibility somewhere of all of the evidence being considered before a case would be thrown out of court based on one technical—whether it is *Miranda* or anything else.

The CHAIRMAN. I thank you for your further explanation. I yield to my friend from South Carolina.

Senator THURMOND. Thank you very much, Mr. Chairman.

I want to welcome you men here today. I want to compliment you for having the courage to come and testify in support of a man that you think will serve well on the Supreme Court of the United States; one who will stand for law and order and protect the citizens of this country. I appreciate your appearing here.

Now, as I understand it, Sheriff Peed, the National Sheriffs' Association has endorsed the nominee here. Is that correct?

Mr. PEED. Yes, sir; wholeheartedly.

Senator THURMOND. Wholeheartedly.

Mr. Hughes, I understand that your organization, the National Troopers Coalition, has endorsed the nominee here. Is that correct?

Mr. HUGHES. Yes, Senator Thurmond; at a meeting earlier this month up in Portland, ME. We certainly did.

Senator THURMOND. Mr. Doyle, you are working with the Troopers Association, too, as I understand it.

Mr. DOYLE. Yes, Senator. That is correct.

Senator THURMOND. You endorse him, too, as I understand.

Mr. DOYLE. That is correct.

Senator THURMOND. Now, Chief Suthard, you represent the International Chiefs of Police, do you?

Mr. SUTHARD. Yes, sir.

Senator THURMOND. I understand that organization has endorsed him.

Mr. SUTHARD. Very strongly, sir.

Senator THURMOND. Very strongly.

Mr. SUTHARD. Yes, sir.

Senator THURMOND. Mr. Baldwin, I believe you represent the National Law Enforcement Council and that is an umbrella group for 14 member organizations, involving 500,000 law enforcement officers in this country. Is that correct?

Mr. BALDWIN. Yes, sir; that is correct. And these organizations——

Senator THURMOND. And this organization has endorsed the nominee.

Mr. BALDWIN. It has, very enthusiastically, and it includes these organizations and a number of others, as you point out.

Senator THURMOND. Mr. Collins, I believe you represent the Citizens for Law and Order.

Mr. COLLINS. That is right, Senator.

Senator THURMOND. And I notice in your statement it says, "We are committed to reducing violent crime, bringing about a fair and balanced criminal justice system, and ruling out inequities for our judicial processes. We also hold a very special concern for victims of violent crime."

I understand your organization has endorsed the nominee.

Mr. COLLINS. That is very true, Senator.

Senator THURMOND. Is that correct?

Mr. COLLINS. Yes, sir.

Senator THURMOND. So it appears that the law enforcement agencies of this Nation, not just States but nationwide, although, for instance, the Alabama Sheriffs' Association here specifically has endorsed him. But nationwide the law enforcement organizations have endorsed this man, Clarence Thomas. Is that true?

Mr. BALDWIN. Yes, sir.

Mr. PEED. Yes, sir.

Senator THURMOND. Now, are you doing this through personal knowledge or through his reputation and the record you have studied and are convinced that he is the right man? Sheriff, we will take you.

Mr. PEED. Yes, sir. We certainly are, Senator.

Senator THURMOND. How is that?

Mr. PEED. We like his rulings, his anticrime and prolaw enforcement positions.

Senator THURMOND. I just want to know why your organization endorsed him. Is it a personal acquaintance, you know him well, or his reputation and the service he has rendered heretofore and you are satisfied with that or what?

Mr. PEED. His reputation.

Senator THURMOND. I see.

Mr. HUGHES. Reputation and service from the troopers.

Mr. DOYLE. Reputation and record, Senator.

Senator THURMOND. Chief Suthard.

Mr. SUTHARD. His reputation, his decisions in court cases, and some of the chiefs across the Nation are familiar personally with Judge Thomas, but I represent more than 8,000 police chiefs across the Nation.

Senator THURMOND. Mr. Baldwin.

Mr. BALDWIN. From my personal knowledge of him and from my observation and respect for his decisions that he has made.

Senator THURMOND. Mr. Collins.

Mr. COLLINS. Sir, his character, his professional reputation, and a special study we commissioned on his criminal law decisions.

Senator THURMOND. I have two questions. You can answer them very briefly. In your opinion, does this nominee have the integrity, the professional qualifications, and the judicial temperament to be a Supreme Court Justice of the United States? Sheriff Peed.

Mr. PEED. From the National Sheriffs' Association, yes, sir.

Senator THURMOND. Johnny Hughes.

Mr. HUGHES. From the troopers, yes, Senator.

Senator THURMOND. Mr. Doyle.

Mr. DOYLE. I have studied all of his criminal law decisions, Senator, and I believe that he does.

Senator THURMOND. Mr. Suthard.

Mr. SUTHARD. On behalf of the International Association of Chiefs of Police, yes, sir.

Senator THURMOND. Mr. Baldwin.

Mr. BALDWIN. The National Law Enforcement Council certainly believes that.

Senator THURMOND. Mr. Collins.

Mr. COLLINS. Yes, sir. On behalf of Citizens for Law and Order, we certainly do.

Senator THURMOND. So you all answer yes to that, as I understand.

Now, the next question is: Do you know of any reason why this committee and the Senate should not approve this man for the Supreme Court of the United States?

Mr. PEED. No, sir.

Mr. HUGHES. I know of none, Senator Thurmond.

Mr. DOYLE. No, I do not.

Mr. SUTHARD. No, sir, I do not.

Mr. BALDWIN. No, sir.

Mr. COLLINS. No, sir.

Senator THURMOND. The answer is no by all of you.

That is all the questions I have. I think those are the most important aspects. The two questions I have asked go right to the guts of our decision. Thank you very much for your appearance and keep up your good work.

Thank you, Mr. Chairman.

Senator KENNEDY [presiding]. I too want to join in welcoming all of you. Thank you very much for expressing your views and opinions about the nominee.

Senator Specter.

Senator SPECTER. Thank you very much.

The analysis of the cases is very helpful, especially the testimony by Mr. Doyle on analyzing the cases. I am interested in your response on *Miranda* from the point of view of Judge Thomas' response that he did not think the Warren Court was an activist court in bringing down the *Miranda* decision, which candidly I found a little surprising.

I remember the day *Miranda* came down. It was on a Monday. It was June 13, 1966. I had been DA of Philadelphia for about 6

months. And all hell broke loose when that decision came down, especially when, the week following, it was decided—I think it was a New Jersey case—that it would be applied to any case where the trial had started on June 13 or after. So that I had cases where we had gotten confessions and found evidence, conclusive evidence on people, where the police practices were exactly correct when they were undertaken, for example, in May of 1966. You couldn't bring a case to trial before June 13, but when you brought the trial up in July or August, you couldn't use the evidence which had been obtained because it was applied to cases where the investigation was done consistent with the *Escobedo* rules.

So the *Miranda* cases that applied before we had a chance to put out information on the warnings and waivers was really extremely, extremely problemsome. And that gave me a lot of pause at that time, and I thought—the law enforcement agencies have learned to live with *Miranda.* But to apply it in a context where it affected investigations which were proper when done seemed to me very difficult.

Do any of you gentlemen feel that Judge Thomas himself might be an activist judge in bringing up another case like *Miranda*?

Mr. BALDWIN. I don't feel so, Senator, and I think what I am basing my thought on this is—I was listening to you. The National District Attorneys Association—and you were very active as a district attorney—has endorsed Judge Thomas enthusiastically, and they have filed a statement with this committee backing his confirmation. So I think that I would rely on their analysis.

Senator SPECTER. Don, what did you think about the *Lopez* case, the case I questioned him about where he sat on a panel, did not write the opinion but sat on a panel which disregarded the limitation on socioeconomic factors in sentencing? As you know, we now have Federal guidelines, and one of the guidelines is that you may not consider socioeconomic factors. And Mr. Lopez complained about the sentence and brought up his background and his childhood and his family circumstances, and the panel, where Judge Thomas said that notwithstanding the prohibition against bringing up socioeconomic factors, you could bring up these matters in Mr. Lopez' background, over the objection of the prosecuting attorney that that would open the door wide to all sorts of considerations in violation of the sentencing guidelines. What do you think about that kind of a case?

Mr. BALDWIN. Well, it would bother me a little bit if it were opened up broadly. I think that is a concern that the law enforcement community has. I think we just had a recent concern, and I discussed it with the Attorney General of the United States and his staff, the decision by the Ninth Circuit Court of California where they ruled that personnel records of a Federal investigator could be opened up and brought into court by a defense attorney if he wanted to go back. And I think that they have ruled, in further looking into it to decide whether or not to appeal, that it did not say that; that, in fact, there was a limitation. You could not bring it into court unless it was for some specific fact that was in his record that was needed to support a charge, a criminal charge against him, but not the whole record.

So I think there is a—we have problems with the broadening of the use of evidence.

Mr. SUTHARD. Senator Specter, could I comment?

Senator SPECTER. It is up to the chairman.

Senator KENNEDY. Briefly. Regrettably, having to follow these clocks, we would welcome a brief comment, if you would, please.

Mr. SUTHARD. In regard to the *Miranda* decision, no one was any more disappointed than I was as a young police officer when that decision came down. But in looking back on that decision, even though many guilty people have been released as a result of it, I am convinced that a few people that were innocent have not been convicted as a result of it. And so the good that came out of the *Miranda* decision in the training of police to me outweighs the problems that it caused in the years that passed, although I still continue to say that anything that is so rigid where the evidence is overwhelming that the case is thrown out on one technicality, including the *Miranda* decision, is bad for the overall criminal justice system.

Senator SPECTER. Well, I don't quarrel with the *Miranda* case today, but I did quarrel very much with its retroactive application. I still quarrel with that today as a principle. But there is no way to define that except as an activist court coming into that area as they did.

Thank you very much.

Senator KENNEDY. Thank you very much.

Senator DeConcini.

Senator DECONCINI. Mr. Chairman, I only want to make a comment regarding this panel and all the panels here because it goes more to the chairman and the ranking member of the wide dispersion of the different interests that we have had. I am glad to see law enforcement take a position, just like I am glad to hear from the NAACP and the American Association of University Women and many, many other groups that have appeared here. I think that is part of the process, and I am pleased that these gentlemen—I know most of them—will take the time to review in their area of concern Judge Thomas' decisions. And I thank them very much for being here.

Senator KENNEDY. Thank you very much.

Senator Heflin.

Senator HEFLIN. Mr. Doyle, I assume you have read a good deal about Judge Thomas and his criminal law philosophy. I believe there are three opinions that he has written in the field of criminal law since he has been on the court of appeals. They are not particularly significant in giving you some idea—at least, they weren't particularly significant in giving me an idea as to whether he would be, in the field of criminal law, a liberal judge or a law-and-order judge. What indications do you have in the field of criminal law, other than his opinions, that persuade you that he would be a law-and-order judge?

Mr. DOYLE. I think if I recall, he has written approximately seven criminal law opinions. I reviewed each of those, and that is what I base my opinion on. I think that those opinions, if you look at each one of them, are very well reasoned, well documented, well supported legally.

For example, in the search-and-seizure case that I mentioned in my direct testimony, there were issues involved regarding the search of the particular hotel room. And the judge upheld the search on the basis of exigent circumstances, meaning that he felt that under the particular circumstances the police officers did not need a warrant to go into the hotel room.

I think in that case—and in other cases—he has shown an understanding of the difficulties that a police officer in that particular situation, in that hotel on that evening, has in making determinations about whether or not, for example, a warrant is necessary. And I think he has shown a willingness in the case of a doubt, in the case of a tie, to rule in favor of law and order, to rule in favor of the police officer. I think he understands the difficulties that the officer faces when he is investigating that kind of a drug operation with its ever-changing circumstances.

I can only base my opinion on the six or seven or eight criminal law decisions that he has written. But having reviewed all of them, I think they are very well reasoned and have been extremely supportive of law enforcement.

Senator HEFLIN. I have no other questions.

Senator KENNEDY. Senator Simon.

Senator SIMON. I just want to thank the panel for your coming here and your testimony. Let me add my appreciation for what at least most of your organizations have done in the field of gun control, which I hope we will listen to a little more gradually. We want to make sure responsible citizens have the opportunity to have guns, but we do need restraint in this field obviously for the criminal element.

Let me just add, Mr. Collins, I don't know as much about your organization as I should. If you can send me some information, I would appreciate it. I have always believed that if we get more people involved, more citizens involved—not just the troopers and the others, but more citizens involved in this area of law enforcement, we could do a heck of a lot better job in our country.

Mr. COLLINS. I will be happy to do that, Senator. Our organization has made quite an impact in 21 years in California, and it is only this past year, Senator, that we have, in effect, opened up an office on the east coast. And I am the director here, so you will be hearing a lot more about the organization.

Senator SIMON. You send me some literature.

Mr. COLLINS. I certainly will, sir.

Could I add a footnote on what Senator Heflin asked before? He asked a question about what made us think that Judge Thomas might be a law-and-order judge. In the good sense of the word, I was heartened, Senator, by Judge Thomas' response to the question as to whether he was philosophically opposed to the death penalty. And my recollection is he said he is not philosophically opposed in appropriate cases, which I think is a fine answer. And I am heartened in this sense: Obviously I have a personal concern because our daughter was viciously murdered, and we are involved in capital litigation right now.

But I was doubly heartened by Judge Thomas' later comment. I think he said when he looked out the window of his district courthouse and he sees these vans pulling up with young black defend-

ants in them. It seems to me that here is a man who is going to bring a balanced approach to the Court. This to me is true law and order. I think the true advocates of law and order don't want their judges to be on one side of the spectrum. We want our judges to really look at both cases, to be sensitive to victims, criminal defendants, but as well be sensitive to victims and survivors. And this is what we have lacked, in my opinion, over the last 15 or 20 years, a lack of balance.

And I am very heartened by Judge Thomas because, first of all, philosophically he feels there is a place for capital punishment, but he has also indicated that he is going to be open minded and fair in judging these types of cases. And I am very, very heartened by that.

The CHAIRMAN. Are there any further questions of the panel?

[No response.]

There being none, gentlemen, again, thank you for your service. We appreciate your always being willing to come and give us your views.

I want to personally thank you on a matter totally unrelated to this nomination, for your work on the crime bill and for your help. Quite frankly, it would not have been passed, without us being able to work together. Thanks for your help, and thank you again. We appreciate it.

Mr. HUGHES. Thank you, Chairman Biden.

The CHAIRMAN. Now, our next panel is an extremely distinguished panel testifying in opposition to Judge Thomas' nomination, and the panel includes:

Ms. Harriet Woods, former lieutenant governor of the State of Missouri, on behalf of the National Women's Political Caucus, an extremely articulate spokesperson in whatever she chooses to be involved in. It is good to see you again, Harriet, and welcome.

Ms. Molly Yard, on behalf of the National Organization for Women. It is a pleasure to have Ms. Yard back again.

Eleanor Smeal, on behalf of the Fund for the Feminist Majority. Ms. Smeal has testified on a number of occasions before this committee on nominees, as well as other issues, and it is a pleasure to have her back, as well.

Ms. Helen Neuborne, on behalf of the NOW Legal Defense and Education Fund, who probably spent more time up here on the Hill working on behalf of issues that affect Americans, I suspect—and I might add, I am going to be very presumptuous—knows the process and is extremely bright, is a resource that I personally rely on a great deal, as well as the rest of the committee, and it is good to have you here, Ms. Neuborne.

Ms. Anne Bryant, on behalf of the American Association of University Women, an organization that has a wide and long involvement in issues of the day and is always listened to up here on the Hill.

And Ms. Byllye Avery, on behalf of the National Black Women's Health Project. Welcome, Ms. Avery.

Now, let me ask the panel, has the panel concluded how they would like to proceed, or, if not, then I would suggest we begin in the order in which you were called by the Chair, unless there is

another way you would wish to proceed. Why don't we start, then, with Harriet Woods.

STATEMENT OF A PANEL CONSISTING OF HARRIET WOODS, PRESIDENT, NATIONAL WOMEN'S POLITICAL CAUCUS; MOLLY YARD, PRESIDENT, NATIONAL ORGANIZATION FOR WOMEN; ELEANOR SMEAL, FUND FOR THE FEMINIST MAJORITY; HELEN NEUBORNE, NOW LEGAL DEFENSE AND EDUCATION FUND; ANNE BRYANT, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AND BYLLYE AVERY, NATIONAL BLACK WOMEN'S HEALTH PROJECT

Ms. WOODS. Mr. Chairman and other Senators, I am really pleased to be here.

I am Harriet Woods, former lieutenant governor of Missouri, and now president of the National Women's Political Caucus, which is a national bipartisan membership organization that works hard to get women into elected and appointive office. I guess you could call us the bootstrap organization, an electoral organization for women, and we do it the hard way, one-by-one-by-one-by-one, sort of the way Clarence Thomas wants to provide relief for discrimination for women in the economic and civil areas.

Someone has estimated that, looking at the U.S. Senate and some of our other electoral bodies, that if we keep up this way, it could take 400 years to get gender equity in our electoral bodies, and, as someone else has remarked, justice delayed is justice denied.

So, I am here for justice and I am also, with due respect to the Senators, here to remind you that advice and consent is more than a prerogative of the Senate, it is a protection for the people.

Now, I have heard some talk about special interest groups, and I have to say right off to this panel that women are not a special interest group, we are the majority, a majority of the population, a majority of the registered voters, and a majority of those who do vote. Yet we continue to receive less pay for our work, we suffer indignities in the workplace, we have fewer opportunities for career advancement, we are the teachers, rather than the superintendents, we are often ignored at medical research, and paternalistically told that we can't even make our own reproductive decisions.

But when we do turn to legislative relief, as I have said, what do we find? We find 29 out of 435 Members of Congress. It is not for want of trying. Since the 20 years since the caucus was founded, we have guadrupled the number of women in legislatures, all the way to 18 percent. In Louisiana, when they passed what they probably boasted was the most punitive law on abortion, out of 144 members of that legislature, 3 were women.

So, it is important that when we come here, we come because we can't make those decisions ourselves, we have to petition for our rights. We need to look to the courts, and so Judge Thomas is important.

I thank those Senators who asked questions on our behalf and the behalf of women for us, but, I have to tell you, we weren't very happy with the responses. They seemed to be based on the notion

that we ought to trust him on the basis of his life story. I wish we could do that. His friends say he is a very nice man, and I do think it is important if we could get more diversity in the Court, particularly the presence of someone who has experienced the impact of racism in our society.

But this is too important for blind faith, and I think Senator Biden has indicated he is puzzled that he hasn't come out forthrightly on some of these positions elsewhere. I think there are a lot of clues to that, Senator Biden. I think he is a man who is running away from himself, but also has avoided taking positions on some issues, because he is insensitive to some of them.

Well, what can I add to these already rather lengthy deliberations? I know that other members of the panel will be speaking to some of our frustrations in his testimony. I can remember—with painful clarity—a debate in the Missouri State Senate in 1977, when certain male legislators successfully argued that it would violate the natural order of the universe, if wives, as well as husbands, could be held liable for criminal support. You know, it is not just esoteric legalese, when we talk about the way some people want to apply natural law when it comes to women.

I can remember a frustrated investigator for the EEOC, in St. Louis, who came to me and said he had an air-tight case of systemic sexual discrimination—discrimination in a St. Louis corporation—and the case was taken up to the central office and died, and was pigeonholed under Clarence Thomas. So, I don't care what the statistics say, actions were taken to block relief.

There is a new phenomenon in this country called political homelessness, because people in this country have lost faith in their Government. The millions who are watching this process, what are they going to think about advice and consent, if a nominee can appear before you, and stonewall you, and refuse to answer, be evasive, and yet be confirmed?

I want to say to you that you may be dooming us to a similar game plan for all future nominees. Will we ever again hear forthright responses? They also wonder what we are talking about in terms of costs of these campaigns for nomination.

I would like to conclude with a quote from a play, "A Raisin in the Sun," where some of you may recall how Langston Hughes described the story of a black family struggling to pursue the dream of escaping the ghetto, by the way around the dream of a strong woman: "What happens to a dream deferred?" he wrote.

> Does it dry up like a raisin in the sun? Or fester like a sore—and then run? Does it stink like rotten meat? Or crust and sugar over—like a syrupy sweet? Maybe it just sags like a heavy load. Or does it explode?

Senators this Nation can't afford a Supreme Court Justice who fulfills his own dreams, but accepts detours and delays for those pursuing dreams of their own. We urge you to vote against the confirmation of Judge Thomas.

Thank you.

The CHAIRMAN. Thank you very much, Governor.

Ms. Yard.

STATEMENT OF MOLLY YARD

Ms. YARD. Good morning.

The CHAIRMAN. Good morning. Welcome back.

Ms. YARD. Thank you very much for affording us this opportunity to speak once again on a nomination for a Supreme Court Justice.

My name is Molly Yard. I am president of the National Organization for Women, an organization of women and men dedicated to equality and justice for women in this country. I am please to be here today. I am particularly grateful to you for accommodating my time constraints.

You may be aware that I am recovering from a stroke that I suffered several months ago. I am still working on physical and speech therapy. Despite that, I was determined to present this testimony. I feel that I must make yet one more appeal to you to stand up for the rights of women and other oppressed groups. My commitment to women's rights is as strong as ever and I have suffered nothing in intensity due to my illness.

NOW is adamantly opposed to the nomination of Clarence Thomas. Mr. Thomas has demonstrated none of the qualities necessary for a member of this Nation's highest Court. While a Supreme Court Justice must be compassionate, Mr. Thomas has shown scorn for the oppressed. While a Justice must have respect for the law, Judge Thomas has demonstrated a willingness to promote his conservative personal agenda in defiance of the law of the land. While a Justice should be forthright, Judge Thomas has been evasive. Clarence Thomas has simply not shown himself to be worthy on the Supreme Court.

Judge Thomas seems to be doing his best to imitate the Teflon candidacy of David Souter. Perhaps he feels that a blank slate is an unimpeachable one. Yet, how can the good of this country possibly be served by a man who has spent weeks backing away from his own record?

Perhaps the most blatant example of Mr. Thomas' attempt to rewrite history is his claim that we should not take seriously his public praise for Lewis Lehrman's antiabortion polemic. Mr. Thomas now would have us believe that he did not agree with the piece, but was only citing it to gain the support of his conservative audience.

Frankly, I don't believe that story, and neither should you. But even if I did, Mr. Thomas' defense that he says things that he doesn't believe in order to win an audience, does not inspire confidence in the statements he has made before your committee, and certainly does not make me secure that he will be a strong and zealous guardian of our constitutional rights.

Similarly, even if we were to accept Judge Thomas' astonishing claim that he has never given much thought to *Roe* v. *Wade,* this lack of interest in one of the crucial civil rights issues of the last 20 years would show Mr. Thomas to be so disengaged from modern legal and social debate as to disqualify him from sitting on the Supreme Court.

In fact, Clarence Thomas is not the enigma he would like to be. Both his words and his actions show him to be cold and callous.

Mr. Thomas compiled a record of neglect at the EEOC, particularly with regard to women's rights. This man insulted women who have suffered discrimination in employment, by calling their legitimate complaints cliches. He said that women avoid professions like the practice of medicine, because it interferes with our roles as wives and mothers. This type of medieval claptrap would doom any politician running for electoral office. Now, then, can it be considered acceptable for a Supreme Court nominee?

It is always easy to cut through people's pretensions by looking at how they treat their families. Many saints have been unmasked as sinners in the privacy of their homes. Clarence Thomas used his own sister, Emma Mae Martin, as an example to denigrate people on welfare. Yet, Mr. Thomas' sister overcame a life of poverty, to graduate high school and enter the work force.

After she was deserted by her husband, she supported her young children by working at two minimum wage jobs. She was indeed on welfare during a period when she was forced to leave her jobs to take care of her and Mr. Thomas' aunt, who had had a stroke. She now works as a cook on a shift that starts at 3 o'clock in the morning. As is too often the case, it appears that in Mr. Thomas' family, the male child was given the opportunity to get a college education and a professional career, while the girl accepted the responsibility of caring for the family. To me, Emma Mae Martin sounds like a brave, strong, admirable woman, committed to her family and fighting to do the best she can. Yet, Clarence Thomas sees her as dishonorable.

Mr. Thomas' cruel remarks would be bad enough when said of a total stranger. That he would use his own sister as the butt of such an insult is shocking. Mr. Thomas has been nominated for a position that requires, above all, sensitivity and concern about all those who come before the courts seeking justice. Rather than demonstrating those qualities, he has, instead, shown himself to be cynical and cold.

This nomination is particularly poignant for me, because of the man that Clarence Thomas has been nominated to replace. Had Thurgood Marshall never spent 1 day on the bench, his brilliant career as an activist civil rights lawyer would have guaranteed him a place in history and in the hearts of all people who believe in quality and justice.

Yet, Thurgood Marshall went on to champion the rights of the oppressed from the Supreme Court, tirelessly fighting to uphold the very principles that Clarence Thomas sees as outmoded and unnecessary. While nothing can extinguish the light that Thurgood Marshall lit, it would be sad to replace him with a man who is committed to dousing the torch that Justice Marshall carried so proudly.

I am glad President Bush nominated an African-American. I still remember the excitement, when President Johnson nominated Thurgood Marshall to the Court. Here was a man who epitomized the civil rights battle and the yearnings of African-Americans to be free. On the Court, Marshall has shown a concern for all those who suffer discrimination. He represents the best of the American dream. He makes the promise of the Declaration of Independence and the Constitution live. We need another on the Court of his caliber.

It has become increasingly difficult to come here on each succeeding Supreme Court nomination and beg for women's lives, only to have our pleas ignored. We urged you, in the strongest terms, to understand that the confirmation of Justices Kennedy and Scalia would lead inevitably to the erosion of women's right to safe, legal abortion.

Those predictions proved true 2 years ago, as the Court severely undercut *Roe* v. *Wade* in the *Webster* case, and went on a year later in the *Akron* and *Hodgson* decisions to take away the rights of young women to control their bodies. We warned that David Souter, silent though he was on many significant issues, would be yet another conservative, antiabortion vote. As we feared, Justice Souter was an instrumental part of the majority last term, when the Court took the incredible step of holding that women had no right to be informed by their physicians and other medical personnel of even the fact that abortion exists.

Senators many of you and your colleagues in the House have spent time in recent sessions trying to restore the civil rights that the Court has undercut, fighting to reverse the gag rule that the Court has upheld, and working to guarantee the right to abortion that the Court has imperiled.

Yet, had you held fast against the unsuitable nominees put before you by the Reagan–Bush administration, these efforts would not have been necessary. Your constitutional role is not to be a rubber stamp for the President.

Instead, you must look into your hearts and judge what is best for this country, before you advise and consent on nominations. It is not just your prerogative, but your duty to protect the fundamental constitutional rights of all of the people. How can you in good conscience consent to an increasingly unbalanced court that represents one judicial philosophy, a philosophy that ignores the needs of the majority of this country?

You have the chance with this nomination of restoring the promise of America, which for too many is an empty promise. You will live in history, if you give life to the promise. President Bush has ignored the chipping away of the dream. You can restore it, and we beseech you to do so. The history of this country has been one of developing individual rights. The courts have been crucial to this, but in the recent years we have been going backward. We must move forward, and you can set us on that path, so, once more, I appeal to you on behalf of women's rights.

In April of 1989, we pledged to the women of America that not one life would be lost due to illegal back-alley abortions. Unfortunately, some lives have been lost, but the end to that must come and we depend on you to make this possible.

The conservative tide has swept over the Supreme Court. With each Reagan–Bush nominee that the Senate confirmed, you entrench still more firmly a Supreme Court that is at best indifferent and, at worse, hostile to the rights of women, people in color, lesbians and gays, the handicapped, the elderly, the poor—all those who most need protection from the Nation's highest court.

You still have some ability to stop that tide, to give the dispossessed and disenfranchised a faint glimmer of hope that someone

cares about them, that the entire Government of the United States is not a cynical enterprise run by the privileged for the privileged.

I use you, once again, to stand up for equality for justice and for compassion. Vote against the confirmation of Clarence Thomas and assure that women will not once again face death from illegal back-alley abortions, and will assure that women will not suffer discrimination on the job. Nothing that has happened in this country, in my estimation, in the last 50 years has been as important as what Congress has done to guarantee the civil rights of all. The Civil Rights Acts of the 1960's were tremendous steps forward for this country. They gave hope to all of us.

I sit and read every day letters from women who are discriminated against in every way on the job. I can imagine what Ben Hooks' desk must be like, in terms of letters he gets from African-Americans who are discriminated against.

The time has come to put a stop to discrimination. It is in your hands to do that. You can absolutely affect the history of this country, and you can live in the history of this country as those who dared make the American dream a reality, and we ask that you do that by rejecting this nomination.

Thank you very much.

The CHAIRMAN. Ms. Yard, your commitment is never doubted, and you have never been more eloquent than you were today. I thank you, and I am impressed—we all are—that in light of what you have recently undergone physically that you would be here. I can assure you, you don't need any more speech therapy. You did incredibly well.

Ms. YARD. Good. That is very kind of you because——

The CHAIRMAN. That is true.

Ms. YARD. I listen to my own voice, and it doesn't sound like me. It sounds like someone else. So if I sound OK to you, that pleases me a lot.

The CHAIRMAN. You sound all right to everyone, and I thank you for being here. I mean that sincerely. I know it is not easy to be here.

Ms. Smeal.

STATEMENT OF ELEANOR SMEAL

Ms. SMEAL. Thank you, Senator Biden.

I am Eleanor Cutri Smeal, president of the Fund for the Feminist Majority, and I come before this committee to express strong and unequivocal opposition to the nomination of Clarence Thomas as Associate Justice for the U.S. Supreme Court. I am submitting into the record formal testimony that was prepared with the assistance of Erwin Chemerinsky, who is a distinguished professor of constitutional law at the University of Southern California.

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

Ms. SMEAL. Thank you.

I would like to summarize that testimony but more importantly, in a very short time, to give a feeling of why it is that we have come before you. Molly Yard has come with great determination, although certainly under trying times. I have come in some ways worried that what I would say is redundant, because so many dis-

tinguished civil rights leaders and women's rights leaders have already testified in opposition. I felt, though, that I should come as part of a duty. I was president of the National Organization for Women during part of the time that Clarence Thomas was Chair of the EEOC. Over the past decade, while Judge Thomas was in various public offices, I have held a leadership position in this preeminent women's right organization.

I have reviewed his words and his acts, but more importantly I have witnessed the devastating impact of his philosophy in action on the efforts to curb discrimination. As a person who has spent too many years now working actively to eliminate that discrimination, I know firsthand what his record in office has meant for trying to eliminate discrimination on the basis of race or age, or sex, or sexual orientation, or a whole host of discriminatory factors.

In his record, his performance, and his writings, there is not one shred of evidence in any of this that indicates any willingness on his part to protect the civil liberties or the civil rights of women. In fact, his record is chilling. It represents the furthest rightwing fringe of our Nation.

I believe that his being sworn in represents yet another major threat to the civil rights and liberties of Americans. I will focus my comments simply on women's rights, but, believe me, in my heart I am just as disturbed at his record on the other major areas of civil rights and civil liberties of this Nation.

In the area of abortion—and so many have spoken to that. I do not want to repeat, but I cannot understand how any of you could think that this is a question mark. I cannot understand—when you review his record and his writings, he has gone out of his way, it seems to me, to state that he is opposed to this right of privacy. It is not just in the Lehrman article. It is in other articles that he has stated, that he has inferred that he is opposed.

In the areas of employment, you know his record. He has been a vigorous foe of affirmative action, of timetables and goals, of statistical analysis. And I do not for the life of me know how you enforce laws without having any measures at all.

But in these last minutes—and I know that I have presented very carefully in my testimony and others have presented very carefully in theirs his record—I would like to call attention to the record of this Judiciary Committee. I have testified repeatedly to people I know would stand in opposition to women's rights, and civil rights, and to the right of privacy. You have given the benefit of the doubt to people who, in their record and in their writings, have stood opposed. I plead with you: Do not give the benefit of the doubt yet again to a person whose record is replete with opposition to those very issues you stand for yourselves.

I do this for the process and for the integrity of this process. I think it is an honor to have a deliberative process. I think it does us no good—and I would like to submit into the record the Newsweek article that calls this process a charade. It says that the Thomas confirmation hearings reveal little about the nominee, but

a lot about a ritual process that becomes a caricature of itself. I would like to submit this to the record because I think that this is in the common domain.

The CHAIRMAN. Without objection.

[The article follows:]

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HEADLINE: Court Charade

BYLINE: DAVID A. KAPLAN with BOB COHN in Washington

HIGHLIGHT:
The Thomas confirmation hearings reveal little about the nominee -- but a lot about a ritual process that's become a caricature of itself

BODY:
Just imagine what the Soviets must have thought if they were watching the Clarence Thomas hearings on CNN last week.

Behold! In the crucible of the Capitol, in the marbled splendor of the Senate Caucus Room, was the world's oldest democracy in action, weighting who in the land should sit on the U.S. Supreme Court. Here is what a free people seemed to get for their faith in their government: an evasive, overcoached nominee; a cynical, manipulative White House; a windy collections of senators. And in the corridors just outside the hearing room were platoons of interest groups eager to characterize what Thomas was saying before he even said it; there haven't been so many spin cycles since the last Maytag convention. It was not exactly a glorious display of the American political process, notwithstanding how painfully accurate it may have been.

For the better -- and worst -- part of the four days of confirmation hearings last week, Clarence Thomas did all he could to disavow every controversial position he's ever taken. On abortion, on affirmative action, on natural law -- no speech or article was sufficiently tame not to repudiate. He didn't read it, he didn't mean it, he wouldn't do it as a judge. On a few matters, such as church-state relations and gender discrimination. Thomas committed himself in broad strokes to a centrist position. But on the question of Roe v. Wade, the 1973 court decision creating a constitutional right to abortion, Thomas went so far as to say that he had never discussed the case with anyone, even in private. "I can't imagine any lawyer in the last 17 years having no opinion on Roe," said Sen. Patrick Leahy, a Democrat.

All along, the administration maintained publicly that its nominee to the high court was the best man for the job and was selected for nonracial reasons. The latter claim, of course, can't be serious. Indeed, White House officials acknowledge privately what is clear circumstantially: picking a black conservative with a rags-to-robes life story was a political bonus. The former claim is undercut by the fact that Thomas wasn't even the runner-up in 1990, when David Souter was nominated. The American Bar Association last month gave Thomas its lowest approval rating, in part because of his lack of judicial experience. His unfamiliarity with constitutional law was highlighted last Friday when Leahy asked him to name "a handful of the most important cases"

decided by the court since he entered law school in 1971. After a long pause, Thomas mentioned only Roe and one other case. Leahy repeated the question twice, but Thomas came up empty.

Despite Leahy's foray, most senators were a study in docility. Except for the prosecutorial Arlen Specter, the Republican members of the Judiciary Committee saw themselves as speechifying cheerleaders for the nominee. Orrin Hatch asked Thomas this mind twister: "When you become a justice on the U.S. Supreme Court, do you intend to uphold the Constitution of the United States?" At times, Alan Simpson didn't bother with questions; on Wednesday he went on for 15 minutes seemingly without even indicating where one sentence stopped and the next one began.

The Democrats promised better. Ever since Thomas was named, they warned that this time they wouldn't let a nominee slide by without answering specific questions about abortion and the right to privacy. They said they had learned their lesson over the past five years by confirming Antonion Scalia, Anthony Kennedy and Souter -- only to see reticent nominees become Hard Right loyalists on the high court. The result? Some senators certainly have pressed Thomas. Joe Biden of Delaware scolded him, calling one answer "the most unartful dodge I have heard." No one, though, would confuse any of the interrogators with Perry Mason. And nothing close to a committee majority has indicated that Thomas's evasiveness would cost him when it comes down to a vote; Thomas is expected to win committee approval by a 9-5 or 10-4 vote. With that lack of fight, the senators will have little power to influence whom the White House nominates for the court in the future.

Much of the hypocrisy from the Senate, the White House and Thomas himself is based on a set of myths about the confirmation process that were trotted out yet again last week:

Answering questions about current issues compromises a nominee's impartiality. Thomas has used this bromide to avoid discussing Roe (just as Thurgood Marshall did at his confirmation hearings 24 years ago, when he was asked by conservatives about Miranda warnings). Even Thomas's toughest questioner, Sen. Howard Metzenbaum, insisted (unpersuasively) that his questions were merely about privacy and not a specific case. The platitude has visceral appeal; after all, judges wouldn't seem able to rule fairly on matters they've already worked out. The fallacy, though, is that nominees presumably have thought about the vital constitutional issues of the day. (If they haven't, it suggests they've been practicing law on Neptune.) Why are those ruminations less prejudicial simply because they remain unspoken? And what about the objectivity of, say, Justices Harry Blackmun or Scalia, who already have taken extreme, opposite positions on the viability of Roe? Should they be required to recuse themselves from future abortion cases? The truth is that nominees refuse to answer controversial questions because they're concerned about hurting their confirmation chances, not their veneer of impartiality.

A nominee's personal views have nothing to do with his or her constitutional philosophy. Thomas refused last week to divulge even nonlegal opinions on abortion. He said such views were "irrelevant" to any court decisions he would reach. While that sounds great, the days are long past since we believed jurists were special beings endowed with the power to reach into the sky and pull out neutral principles to resolve dispute. Seventy years ago, Benjamin

Cardozo, later to become a justice, put it well. Judges "do not stand aloof on these chill and distant heights," he wrote, "and we shall not help the cause of truth by acting and speaking as if they do." In 1981, at her confirmation hearings, Sandra Day O'Connor said she personally opposed abortion.

There is a presumption in favor of the president's pick. This, obviously, is the view of all presidents. But it has support in neither the text of the Constitution nor the words of its authors. The purpose of the Senate's "advice and consent" role is to act as a check on the chief executive, not simply ratify his choice based on a review of credentials. In the modern era, the test has become whether the nominee is woefully incompetent (G. Harrold Carswell, rejected in 1970) or way out of the philosophical mainstream (Robert Bork, rejected in 1987).

Don't worry. You never can tell what kind of justice you'll wind up getting. Thomas's supporters have tried to show their man has a libertarian streak and could wind up voting with the court's liberals (both of them) sometimes. True enough, even Scalia isn't a robot; for example, he voted in favor of a protester's right to burn the flag. Still, presidents typically get what they want. Their justices are their legacy. All five appointed by Ronald Reagan and George Bush have been consistently conservative.

Politics is a dirty word. The process of filling Supreme Court vacancies surely contemplates politics: cajoling, calculating, counting Senate heads. That's why the two dominantly political branches were given the joint power to pick justices. Politics can produce consensus, compromise and even wise policy on occasion. But before the Bork summer of 1987, confirmation hearings rarely resulted in the sideshow we now take for granted. "The process isn't working well," Sen. Herbert Kohl, a Democrat, told NEWSWEEK. Because the nominee prepares so long with politicians rather than scholars, "We are almost assured of getting a less-than-totally candid performance." Hatch laments the process, too, but blames "single-issue politics," meaning abortion.

Both explanations ring true, but neither is complete. The problem is perception: What is the Supreme Court about? In the past, presidents and senators paid at least some attention to the stature of nominees and the prestige of the court as the principled branch of government. A Cardozo wasn't required, but some distinction and diversity in public life or academe or the judiciary was usually a prerequisite. Today, ideology drives all actors in the process, and it usually takes us down the low road. Until that changes, confirmation hearings like Thomas's will remain a September charade.

The Abortion Side Step

Democratic Sen. Howard Metzenbaum: "I must ask you to tell us here and now whether you believe that the Constitution protects a woman's right to choose to terminate her pregnancy."
Clarence Thomas: "I think that to take a position would undermine my ability to be impartial."

Democratic Sen. Patrick Leahy: "Have you ever had a discussion of Roe v. Wade, other than in this room?"
Thomas: "If you're asking me whether or not I've ever debated the contents of it, the answer to that is no, Senator."

Ms. SMEAL. I believe fundamentally in the process of hearings, of a judicial review system of the Senate Judiciary Committee. I believe fundamentally in the right to confirmation, and I believe fundamentally that if these hearings are to have any meaning, a nominee cannot be allowed to come before you and to make statements that strain the credibility so much that a mainstream magazine would scoff at it. When a man says that he has not reviewed *Roe*, he has not spoken to anybody on it in the last 17 years, but it is the only case—I guess he mentioned two when Senator Leahy asked him what cases he thought were important. He could muster up *Roe* and another one. Yet he has never discussed it? Who is to believe this?

His silence does not, in my opinion, give us dignity. It just makes this whole process seem not sincere. I believe in this process. We have got to have a check and balance. And for all of us who have no place else to turn, we come before you again, not in drama, not trying to give good speeches, just trying to say we are about to lose the Supreme Court. I have no doubt where this man stands, and I don't think any other reasonable person could.

[The prepared statement of Ms. Smeal follows:]

THE FUND FOR THE
FEMINIST
MAJORITY

1600 Wilson Blvd., #704, Arlington, VA 22209
(703) 522-2214

Testimony of

Eleanor Cutri Smeal

President, The Fund for the Feminist Majority

Before the Senate Committee on the Judiciary

on the Nomination of Clarence Thomas

for Associate Justice of the Supreme Court

September 20, 1991

Testimony of Eleanor Cutri Smeal
President, The Fund for the Feminist Majority
Before the Senate Committee on the Judiciary
on the Nomination of Clarence Thomas for the Supreme Court

I am Eleanor Cutri Smeal, President of the Fund for the Feminist Majority, and I come before this Committee to express strong and unequivocal opposition to the nomination of Clarence Thomas as an Associate Justice for the United States Supreme Court. My testimony was prepared with the assistance of Erwin Chemerinsky, distinguished professor of constitutional law at the University of Southern California.

The Fund for the Feminist Majority in its very name raises the conscience of the nation that today in national public opinion polls a majority of women identify as feminists and a majority of men identify as supporters of the women's movement. The Fund for the Feminist Majority specializes in programs to empower women and to achieve equality for women in all walks of life.

During part of the period Clarence Thomas served in the government, first at the Office of Civil Rights and then as Chair of the Equal Employment Opportunity Commission (EEOC), I was President of the National Organization for Women. Over the past decade, Judge Thomas repeatedly expressed his views in numerous law review articles, speeches, and essays in newspapers. I carefully have reviewed his words and acts. And as a leader of the pre-eminent women's rights organization during his presence in government, I have done more than reviewed his words and acts. I have witnessed the devastating impact of his philosophy in action on the efforts to curb discrimination.

There is nothing in his record, performance, or writings -- not a shred of evidence -- that indicates any willingness to protect civil liberties or civil rights for women. Quite the contrary, his record is chilling; for the past decade, he has expressed the views of the farthest right fringe of the Republican Party.

Although I believe that Clarence Thomas poses a threat to constitutional rights in many areas, my testimony will focus on women's rights. At the outset, it is important to emphasize that the rights of more than half of the population must not be dismissed as merely the concerns of a special interest group. I hope that every member of this Committee, Democrat and Republican, liberal and conservative, agrees that an individual who is hostile to women's rights under the Constitution has no place on the United States Supreme Court. A person should not be confirmed for the Supreme Court unless he or she evidences commitment to certain basic constitutional values; reproductive privacy and gender equality must be among them.

Four years ago, this Committee rightly rejected Robert Bork for a seat on the Supreme Court because of his views, especially on privacy and gender discrimination. Clarence Thomas expresses almost identical opinions and frequently has aligned himself with Bork's judicial philosophy. In fact, Thomas' performance as Chair of the EEOC makes his hostility to civil rights even clearer and less abstract.

My testimony will focus on two areas of vital importance to women: reproductive privacy and employment discrimination. Clarence Thomas' views and performance on these issues make him unacceptable for a position on the Supreme Court which ultimately is responsible for protecting the civil rights of women and men.

A person is unsuitable for the Supreme Court unless he or she expresses a commitment to basic constitutional freedoms. Reproductive privacy is one of these guarantees. Indeed, reproductive freedoms are not simply one right among many. No civil liberty touches more people on a daily basis or more profoundly affects human lives than access to contraceptives and safe, legal abortions. Virtually all people -- at one time or another -- will use contraceptives. Studies show that forty-six percent of all women will have an abortion at some point in their lives. Without constitutional protection of reproductive freedom, women will die and suffer from unwanted pregnancies and illegal abortions.

Senators, each of you knows that the next person you confirm for the Supreme Court will be the decisive vote on reproductive freedoms for decades to come. Thus, a key question -- perhaps the crucial question: will Clarence Thomas follow precedents such as Griswold v. Connecticut, Eisenstadt v. Baird, and Roe v. Wade which establish the right of each person to choose whether to exercise fertility control?

Clarence Thomas' writings leave no doubt as to his views. In fact, no nominee for the Supreme Court -- not even Robert Bork -- has so consistently expressed opposition to reproductive freedoms as Clarence Thomas. In notes for a speech, titled "Notes on Original Intent," Clarence Thomas wrote: "Restricting birth control devices or information, and allowing, restricting, or (as Senator Kennedy put it) requiring abortions are all matters for a legislature to decide; judges should refrain from 'imposing their values' on public policy." (Undated manuscript, p. 2).

Thomas specifically discussed Griswold v. Connecticut and Roe v. Wade in a footnote in a law review article. (Thomas, "The Higher Law Background of the Privileges and Immunities Clause of the Fourteenth

Amendment," 12 Harvard Journal of Law and Public Policy 63, 63 n. 2 (1989)). After stating the holdings in Griswold and Roe, Thomas wrote: "I elaborate on my misgivings about activist use of the Ninth Amendment in [a chapter of a book published by the Cato Institute.]" In this chapter, Thomas defended Robert Bork's view that reproductive privacy is not worthy of constitutional protection. Thomas called Griswold an "invention" and argued that it is inappropriate for the Supreme Court to protect rights that are not expressly enumerated in the Constitution. (Thomas, "Civil Rights as Principle, Versus Civil Rights as an Interest," in Assessing the Reagan Years 398-99 (D. Boaz ed. 1988)).

Thomas' restrictive views about reproductive freedom were also reflected in the conclusions of a White House Working Group on the Family, of which Thomas was a member. The report sharply criticizes Roe v. Wade and several other Court rulings on privacy as "fatally flawed" decisions that should be "corrected" either by constitutional amendment or through the appointment of new judges and their confirmation to the Court." White House Working Group on the Family, The Family Preserving America's Future 12 (1986). The report also calls for the overruling of such basic decisions as Eisenstadt v. Baird, which held that every person has the right to purchase and use contraceptives; Moore v. City of East Cleveland, which held that a city cannot use a zoning ordinance to keep a grandmother from living with her grandchildren; and Planned Parenthood v. Danforth, which held that a state may not condition a married woman's abortion on permission from her husband.

There is nothing -- not a paragraph, not a sentence, not a word -- in Thomas' writings that indicates a willingness to protect reproductive freedoms and women's lives. To the contrary, Thomas may well be the first

Justice in American history even willing to prohibit states from allowing abortions. As you know, Clarence Thomas gave a speech in which he praised an article written by Lewis Lehrman as "a splendid example of natural law reasoning." Thomas, "Why Black Conservatives Should Look to Conservative Policies," Speech to the Heritage Foundation, June 18, 1987.

The central thesis of Lehrman's essay is that fetuses are human lives entitled to protection, from the moment of conception, by the Declaration of Independence and the Constitution. (Lehrman, "The Declaration of Independence and the Right to Life," American Spectator 21 (April 1987)). Lehrman called Roe a "spurious right born exclusively of judicial supremacy" and "a coup against the Constitution." Lehrman maintained that human life under the Declaration of Independence and the Constitution starts "at the very beginning of the child-to-be."

It is imperative to realize that Lehrman's views, endorsed by Thomas as "splendid," would justify more than overruling Roe v. Wade. Lehrman's argument is that the Constitution should protect fetuses from the moment of conception. From this perspective, abortion would be constitutionally prohibited. States would not even have the authority that existed before 1973 to allow abortion in their jurisdiction.

Simply stated, it is difficult to imagine a nominee with a more documented record of hostility to a basic civil liberty than Clarence Thomas' opposition to reproductive freedom. If a nominee for the Supreme Court expressed an unwillingness to protect freedom of speech, would not each and every one of you vote against confirmation? If a nominee expressed an unwillingness to safeguard free exercise of religion, would not each and every one of you vote against confirmation? Right now you are considering a nominee who has expressed an unwillingness to protect privacy. Surely,

if the word "liberty" in the Constitution means anything it must include privacy and the right of each person to choose whether to have a child.

This is not just about a legal abstraction. It is about women's lives. The confirmation of Clarence Thomas almost surely would create a majority on the Court to overrule Roe and condemn thousands of women to death and suffering. Because he has expressed unqualified hostility to a basic constitutional freedom, Clarence Thomas should be denied confirmation to the Supreme Court.

Independently, Clarence Thomas' views and record on the crucial issue of employment discrimination make him unsuitable for a seat on the high Court. Women in this society continue to face serious discriminatory treatment in the workplace. If a man and a woman hold the same job, the woman earns, on the average, 68 cents of each dollar paid to a man. Countless jobs remain closed to women. In many businesses and industries, discrimination against women remains the norm not the exception.

Clarence Thomas was Chair of the Equal Employment Opportunity Commission, the federal agency responsible for enforcing the laws protecting women from discrimination in the workplace. I ask you, when in Thomas' almost eight years at the agency, did he use his position to condemn discrimination against women and to fight in any meaningful way for gender equality in the workplace? As you read through Thomas' numerous speeches and articles, it is telling that he virtually never even mentions the civil rights of women.

The Equal Employment Opportunity Commission had a dismal record under Clarence Thomas' leadership in fighting discrimination. A study by the Women Employed Institute found that under Thomas'

leadership, 54 percent of all cases were found to lack cause, compared with 28.5 percent under the Carter EEOC in fiscal year 1980. The study also found that less than 14 percent of all new EEOC cases resulted in some type of settlement under Thomas, compared to settlements in 32 percent of the cases at the beginning of the Reagan administration. And these statistics do not even reflect the fact that Thomas' EEOC allowed 13,000 age discrimination claims, many by women, to lapse.

Thomas repeatedly has expressed hostility to the use of statistical evidence to prove employment discrimination. In Griggs v. Duke Power Company, in 1971, the Supreme Court held that evidence of disparate impact against women or racial minorities establishes a prima facie case of discrimination. Because it is so difficult to prove that an employer acted with a discriminatory intent, statistical proof is the basic and essential way of establishing a violation of Title VII of the 1964 Civil Rights Act.

But Clarence Thomas has strongly criticized allowing statistical evidence to prove discrimination. He stated that "we have, unfortunately, permitted sociological and demographic realities to be manipulated to the point of surreality by convenient legal theories such as 'adverse impact' and 'prima facie cases.'" Thomas, "The Equal Employment Opportunity Commission: Reflections on a New Philosophy," 15 Stetson Law Review 31, 35-6 (1985). Thomas, thus, would go even further than the current Supreme Court in preventing the use of statistical evidence to prove discrimination. The effect of Thomas' position would be effectively to drastically lessen Title VII's ban on employment discrimination.

In fact, as Chair of the EEOC, Thomas proposed to eliminate the use of statistical evidence to prove discrimination by the federal government. The Uniform Guidelines on Employee Selection Procedures were adopted in

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1978 by the EEOC, the Department of Justice, the Labor Department and the Civil Service Commission. The Uniform Guidelines follow Griggs and allow statistical proof of employment discrimination. Thomas as Chair of the EEOC sought to revise these guidelines to eliminate such statistical evidence. If Thomas' position prevails on the Supreme Court, the fight against gender discrimination in employment would be immeasurably damaged.

Likewise, Thomas repeatedly has opposed the use of hiring timetables and goals which are an essential to gender equality in the workplace. The Supreme Court, in cases such as United Steel Workers v. Weber and Local 28 of the Sheet Metal Workers' International Association v. EEOC, approved hiring timetables and goals to remedy workplace inequality. But Thomas has strongly criticized these decisions. Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," at 395-96. In fact, in Fall 1985, the acting general counsel of the EEOC, under Thomas' leadership, ordered regional counsel not to enforce goals or timetables in consent decrees, nor to seek them in the future.

Countless other examples exist of the failure of Thomas' EEOC to enforce Title VII and other laws protecting women from discrimination. It must be emphasized that Thomas was not simply an employee in the agency; he was the Chair. He was not simply following preset policies; he was the architect of the Reagan Administration's effort to lessen civil rights protections. As Chair, he was charged with working to end discrimination against women. But he did nothing constructive in this regard.

At the very least, his poor performance at the EEOC should disqualify him for a "promotion" to the Supreme Court. Moreover, his documented

record of hostility to protecting the civil rights of women and minorities make him a grave threat to equal justice if he is confirmed.

Senators, I ask you to look past all of the rhetoric on both sides and focus on simple questions. Is there any place in Clarence Thomas' record where he has ever supported constitutional protection of reproductive freedoms? Is there anything in Clarence Thomas' record as Chair of EEOC to indicate that he would be a force for advancing civil rights and women's rights on the Supreme Court? Can you point to any evidence -- any speech, any article, any judicial opinion -- where Clarence Thomas has expressed a meaningful commitment to reproductive privacy or civil rights for women?

The rights of millions of women rest on this nomination. I urge you to vote against Clarence Thomas' confirmation.

The CHAIRMAN. Thank you very much.
Ms. Neuborne.

STATEMENT OF HELEN NEUBORNE

Ms. NEUBORNE. Mr. Chairman and members of the committee, my name is Helen Neuborne. As executive director of the NOW Legal Defense and Education Fund, I thank you for this opportunity to express our view that Judge Clarence Thomas should not be confirmed as an Associate Justice of the Supreme Court.

We appreciate the efforts of the committee, especially its Chair, to develop a complete record on which to base the Senate's decision whether to confirm the nomination of Judge Thomas.

That record, as developed before this committee, contains three troubling components:

First, Judge Thomas' past record, including his articles, speeches, and performance as EEOC Chair;

Second, his decision at the hearing to stonewall and to present the committee with a selective silence concerning his views on the constitutional issues surrounding abortion; and

Third, his disavowals of most of his past record.

There is no need for me to detail the record at length. Among the items that raise the most serious concerns are Judge Thomas' signature on a White House report calling for the repeal of *Roe* v. *Wade*; his praise for a speech calling for the criminalization of abortion; his adamant, and selective, refusal to discuss the legal issues surrounding abortion; his record at the EEOC; and his utterly unconvincing disavowals of his past statements on topics ranging from the competence of Congress to the separation of powers.

Viewing the record in the light most favorable to Judge Thomas, the best you can say is that serious doubt exists concerning his commitment to existing constitutional rights of critical importance to women and minorities.

The real issue, therefore, is what is the role of a Senator under the advice and consent clause when he or she is confronted with a nominee whose commitment to the constitutional rights of millions of Americans is seriously in doubt. Should you defer to the President, or should you exercise an independent judgment under the advice and consent clause?

We have now listened to Judge Thomas' testimony before this committee and have heard nothing to calm our fears about the effect Judge Thomas' personal philosophy would have on the existing constitutional and statutory rights of women. His assertions that he has set aside his most dearly held and often expressed views in the name of judicial impartiality simply do not ring true. He has stated that he praised extremist rightwing articles he says he has never even read in an effort to convince conservatives to accept his agenda. And he is apparently ready to disavow almost all his prior statements if it will convince this committee to vote for his confirmation.

His sudden and unconvincing confirmation conversion is not the only reason for our negative position. We are also profoundly troubled by his retreat during these hearings into silence on crucial issues affecting women, in stark contrast to his open and forthcom-

ing discussion of numerous other controversial legal issues that will undoubtedly arise during his tenure on the Supreme Court. Judge Thomas has sought to defend his selective refusal to reveal his judicial philosophy in the abortion area as necessary to maintain his impartiality as a judge. However, a similar concern with impartiality did not prevent him from discussing the equally controversial legal issues of church and state, the binding quality of precedent, and the balance between the rights of the accused and the rights of victims—issues that will certainly arise before the Court during his tenure.

His selective refusal on the issue of abortion does not, therefore, foster an appearance of impartiality. Quite the contrary, it sends an ominous message that Judge Thomas has views on the subject that he dare not reveal because they would jeopardize his nomination, an ominous message of covert partiality that is reinforced by his numerous public statements and actions in the area.

Just 1 year ago, I urged this committee to refuse to permit then-Judge Souter to avoid discussing his legal philosophy in this area with the committee. Unfortunately, in the absence of clear prior statements from Justice Souter, a majority of the committee elected to gamble on Justice Souter's silence. American women suffered the first consequences of the committee's gamble when Justice Souter cast the crucial fifth vote in *Rust* v. *Sullivan* depriving poor women of desperately needed information from their doctors concerning the availability of abortion as a lawful treatment option. President Bush, who nominated both Justice Souter and Judge Thomas, threatens to veto any bill which undoes the Supreme Court's handiwork in *Rust.* We are asking you not to gamble with the lives of women yet again.

The Constitution vests advice-and-consent power in the Senate precisely to prevent the President from stacking the Supreme Court with nominees that reflect a single, narrow judicial philosophy. When, as now, a profound national division on many issues has resulted in a sustained division in control of the Presidency and the Senate, the Senate's advice and consent power takes on extraordinary importance since, unless the Senate fulfills its responsibility in the confirmation process, the resulting Supreme Court may exclude the mainstream philosophies that have broad support in the American people.

The closest analogue to the Senate's advice-and-consent power is the President's power to veto legislation passed by both Houses of Congress. Both the veto and the advice-and-consent power permit one political branch of the Government to check the other in order to assure an accurate reflection of the Nation's democratic will.

President Bush has vetoed congressional legislation 21 times in 3 years. He never defers to Congress' role. It is inconceivable that the Senate, exercising its veto power over Supreme Court appointments, will defer to the President's drive to stack the Supreme Court with nominees hostile to the rights of women and minorities.

If the advice-and-consent power is to fulfill its constitutional role, Senators must be prepared to exercise the same independent judgment in vetoing a Supreme Court nominee as the President exercises when he repeatedly vetoes the will of Congress. Many of you

have spoken out before on the importance of this role to ensure that the Court reflects the core values of our society today.

If, after reviewing the record before this committee, you have no doubt about Judge Thomas' willingness to support and defend critical constitutional rights of women and minorities, you should vote to confirm him. If, however, after reviewing the record, you believe—as so many witnesses before you have stated—that Judge Thomas poses a risk to the rights of millions of Americans, you should oppose his confirmation. Thank you.

[The prepared statement of Ms. Neuborne follows:]

NOW Legal Defense and Education Fund
99 HUDSON STREET • NEW YORK, NY 10013 • (212) 925-6635 • FAX: (212) 226-1066

Testimony of Helen Neuborne, Esq.

NOW Legal Defense and Education Fund

Presented at the Senate Judiciary Committee Hearings

on the Confirmation of Judge Clarence Thomas

as an Associate Justice of the U.S. Supreme Court

September 20, 1991

Helen Neuborne, Esq.
Executive Director

Alison Wetherfield, Esq.
Director, Legal Program

Mr. Chairman and Members of the Committee:

My name is Helen Neuborne. I am the Executive Director of the NOW Legal Defense and Education Fund, a women's rights legal and educational advocacy organization founded in 1970. Thank you for this opportunity to express our view that Judge Clarence Thomas should not be confirmed as an associate Justice of the Supreme Court.

We appreciate the efforts of the Committee -- especially its Chair -- to develop a complete record on which to base the Senate's decision whether to confirm the nomination of Judge Thomas.

That record, as developed before this Committee, contains three troubling components:

(1) Judge Thomas' past record, including his articles, speeches and performance as EEOC Chair;

(2) Judge Thomas' decision at the hearing to stonewall and to present the Committee with a selective silence concerning his views on the constitutional issues surrounding abortion; and

(3) Judge Thomas' disavowals of most of his past record.

There is no need for me to detail the record at length. Among the items that raise the most serious concerns are Judge Thomas' signature on a White House report calling for the repeal of Roe v. Wade; his praise for a speech calling for the criminalization of abortion; his adamant -- and selective -- refusal to discuss the legal issues surrounding abortion; his record at the EEOC; and Judge Thomas' utterly unconvincing disavowals of his past

statements on topics ranging from the competence of Congress to the separation of powers.

Viewing the record in the light most favorable to Judge Thomas, the best you can say is that serious doubt exists concerning his commitment to existing constitutional rights of critical importance to women and minorities.

The real issue, therefore, is what is the role of a Senator under the "advice and consent" clause when he or she is confronted with a nominee whose commitment to the constitutional rights of millions of Americans is seriously in doubt. If you are in serious doubt, should you defer to the President or should you exercise an independent judgment under the "advice and consent" clause?

It's clear that the record in this case creates an inescapable doubt concerning Judge Thomas' commitment to the protection of existing constitutional liberties.

We have now listened to Judge Thomas' testimony before this Committee and have heard nothing to calm our fears about the effect Judge Thomas' personal philosophy would have on the existing constitutional and statutory rights of women were he to be confirmed. Judge Thomas' assertions that he has set aside his most dearly held and often expressed views in the name of judicial impartiality simply do not ring true. Judge Thomas has stated that he praised extremist right wing articles he says he has never even read in an effort to convince conservatives to accept his agenda and he is apparently ready to disavow almost all his prior statements if it will convince this Committee to vote for his

confirmation.

His sudden and unconvincing confirmation conversion is not the only reason for our vote of no confirmation. We are also profoundly troubled by his retreat during these hearings into silence on crucial issues affecting women, in stark contrast to his open and forthcoming discussion of numerous other controversial legal issues that will undoubtedly arise during his tenure on the Supreme Court. Judge Thomas has sought to defend his selective refusal to reveal his judicial philosophy in the abortion area as necessary to maintain his impartiality as a judge. However, a similar concern with impartiality did not prevent him from discussing the equally controversial legal issues of church-state, the binding quality of precedent and the balance between the rights of the accused and the rights of victims - issues that will certainly arise before the Court during his tenure. His selective refusal to talk about a woman's constitutional right to choose whether to continue a pregnancy does not, therefore, foster an appearance of impartiality. Quite the contrary, it sends an ominous message that Judge Thomas has views on the subject that he dare not reveal because they would jeopardize his nomination - an ominous message of covert "partiality" that is reinforced by his numerous public statements and actions in the area.

One year ago, I urged this Committee to refuse to permit then-Judge Souter to avoid discussing his legal philosophy in this area with the Committee. Unfortunately in the absence of clear prior statements from Justice Souter on this issue, a majority of the

Committee elected to gamble on Judge Souter's silence. American women suffered the first consequences of the Committee's gamble when Justice Souter cast the crucial fifth vote in Rust v. Sullivan depriving poor women of desperately needed information from their doctors concerning the availability of abortion as a lawful treatment option. President Bush, who nominated both Justice Souter and Judge Thomas, threatens to veto any bill which undoes the Supreme Court's handiwork in Rust. We simply cannot afford to allow you to gamble with the lives of women yet again. Please do not permit Judge Thomas, who, unlike Judge Souter, has a public record of hostility to Roe v Wade, to single out abortion rights as the only matter he refuses to discuss.

Judge Thomas signed a White House report calling for the overturning of Roe v. Wade. Judge Thomas publicly praised an article that urged the recriminalization of abortion, despite Roe v. Wade. Given that public record of hostility, for the Committee to accept Judge Thomas' silence and his incredible explanations that he never read that report or article as adequate exploration of the issue would be to break faith with America's women and with your own obligations as Senators.

The Constitution vests "advice and consent" power in the Senate precisely to prevent the President from stacking the Supreme Court with nominees that reflect a single, narrow judicial philosophy. When, as now, a profound national division on many issues has resulted in a sustained division in control of the Presidency and the Senate, the Senate's "advice and consent" power

takes on extraordinary importance since, unless the Senate fulfills its responsibility in the confirmation process, the resulting Supreme Court may exclude the mainstream philosophies that have broad support in the American people.

The closest analogue to the Senate's "advice and consent" power is the President's power to veto legislation passed by both Houses of Congress. Both the "veto" and the "advice and consent" power permit one political branch of the government to check the other in order to assure an accurate reflection of the nation's democratic will.

President Bush has vetoed Congressional legislation twenty-one times in three years. He never defers to Congress' role. It is inconceivable that the Senate, exercising its veto power over Supreme Court appointments, will defer to the President's drive to stack the Supreme Court with nominees hostile to the rights of women and minorities.

If the "advice and consent" power is to fulfill its constitutional role, especially in eras of divided government, Senators must be prepared to exercise the same independent judgment in vetoing a Supreme Court nominee as the President exercises when he repeatedly vetoes the will of Congress. / Many of you . . .

If, after reviewing the record before this Committee, you do not harbor significant doubts concerning Judge Thomas' willingness to support and defend critical constitutional rights of women and minorities, you should vote to confirm him. If, however, after reviewing the record, you believe that Judge Thomas poses a risk to

the rights of millions of Americans you should oppose his confirmation. Senators exercising the "advice and consent" power have no right to gamble with the lives of women.

The CHAIRMAN. Thank you very much.
Ms. Bryant.

STATEMENT OF ANNE BRYANT

Ms. BRYANT. Thank you, Chairman Biden, and good morning to other members of the committee. I am Anne Bryant, executive director of the American Association of University Women—as many of you know—135,000 members strong in 1,800 communities, working for education and equity for women and girls, recently focusing on the whole issue of girls in education but historically working on reproductive freedom, civil rights, and workplace discrimination. I have submitted written testimony. You will be grateful to know I am not going to use it, and what I am going to say is shorter.

The CHAIRMAN. The entire statement will be placed in the record.

Ms. BRYANT. Thank you.

It is because of AAUW's deep concern for education and equity issues that I am here today. We are very disturbed by Judge Thomas' record, and we understand that you have a tough choice before you. You can decide to make this choice based on his writings, his track record, his action, or on 5 days of testimony when he, in many cases, reversed what many of those opinions were.

Over the past several days, I have been struck—as I have a feeling some of you have been—with the great contrast between those who have come before you to oppose him and those who have come before you to praise him. I have noticed, as you may have, that those who have come to oppose him have brought careful documentation, have used cases, articles, speeches. Those who have come to praise him have much more often used childhood stories, personal character traits. I will read some of them.

Judge Gibbons called him receptive to persuasion. "Open-minded" said Sister Reidy. Dean Calabresi, who spoke for him, ended his testimony by saying that there was a significant chance that Clarence Thomas would be a powerful figure in the defense of civil rights. But at the end he said, "However, I am not confident of that." But the phrase he used in talking about the youth of Judge Thomas was that he believed he had a significant chance for growth.

A chance for growth? Is the Supreme Court of our land going to be a training program?

So we have learned about Clarence Thomas, the man. We have actually learned a lot about Clarence Thomas, the politician. But the question before us is Clarence Thomas, the jurist.

Patricia King so eloquently said last Tuesday that the issue is not one person's individual struggle. Actually the issue is what Clarence Thomas will do on the Supreme Court for others' struggles. The major principle in this great democracy is the principle of equal opportunity; that inalienable right, in fact, that we are in this country to ensure equal opportunity for all people, which in essence is making sure that all Americans have greater odds of success.

It is becoming increasingly clear, too, that equal opportunity is not just a principle of justice. It is an economic and social necessity

when 80 percent of the entering work force are women and minorities by the year 2000.

Does Judge Thomas understand that equal opportunity in the workplace means holding businesses accountable for providing a climate which is open, accepting of all cultures, nurturing of disparate talents? Has Clarence Thomas demonstrated at EEOC that he would enforce the laws of this land which reward businesses for reaching out to those different populations, punishing those who do not, but, most importantly, protecting the rights of individuals who are treated in a discriminatory way? Does he understand the right and the responsibility of the Court to protect these individuals?

The American Association of University Women fears he does not. And what about equal opportunity in education? Does Clarence Thomas, who himself received an excellent and selective education, understand that to develop a vibrant educational system for all of our children has huge obstacles? Does Judge Thomas understand the critical role the Court will have to play to ensure that public education survives and flourishes in the future? Does he understand how quickly our Nation's public schools could decline even further if precious resources were funneled off to private and religious schools through tax credit and tuition voucher systems?

From his actions and his words and his record, the American Association of University Women fears he does not understand this.

One of the fundamental tenets of a democracy, stated in the Constitution, protected by the Supreme Court, is the separate of church and state. Throughout all of AAUW's long history, our members have found for that principle.

Does Clarence Thomas understand the long-term effects of allowing a simple Christian prayer, seemingly harmless, at the beginning of every school day? Does he feel the discomfort, the insecurity that a Jewish, Muslim, or Buddhist child has when forced, even by peer pressure, to join in or listen to words she doesn't believe?

The American Association of University Women fears that Judge Thomas would rather legislate morality than protect religious freedom.

You do have a tough decision to make, and with tough decisions you have got to weigh the evidence, the facts and Judge Thomas' record. We believe that Judge Thomas' actions speak louder than his recent words. If you vote against this confirmation, it will be another battle for the next nominee. We know that. If you confirm him, will the battles that you have to fight in Congress to protect equal opportunity, individual rights, privacy, and religious freedom be even longer and tougher?

The eyes of the American Association of University Women are on the future, and we think all Americans deserve a better future than is promised by putting Clarence Thomas on the Supreme Court.

Thank you.

[The prepared statement of Ms. Bryant follows:]



AMERICAN
ASSOCIATION OF
UNIVERSITY
WOMEN

Opposition to the Nomination of Clarence Thomas to the United States Supreme Court

Testimony Submitted to the
Senate Judiciary Committee

September 19, 1991

by

Anne L. Bryant, Ed.D.
Executive Director

American Association of University Women
1111 16th Street, N.W.
Washington, DC 20036

202/785-7788

I am Anne Bryant, executive director of the American Association of University Women (AAUW). It is a privilege to testify on behalf of AAUW's 135,000 members: women and men who are committed to equity and education for women and girls.

On behalf of our membership, I urge the Judiciary Committee to reject Clarence Thomas' nomination to the United States Supreme Court. In his testimony before this Committee, Judge Thomas has suggested that statements he made and views he expressed prior to 1990 are not necessarily positions he would hold as a Supreme Court Justice. AAUW believes that the Senate has a responsibility to consider the public record of a Supreme Court nominee in assessing a nomination. We believe that Judge Thomas' record as chair of the Equal Employment Opportunity Commission and his tenure as Assistant Secretary for Civil Rights in the Education Department raise grave concerns about his commitment to equal opportunity and provide examples of his failure to enforce federal law.

AAUW opposes Clarence Thomas' nomination for five reasons.

First, we believe that in his positions at the EEOC and the Department of Education, Judge Thomas showed a blatant disregard for the law of the land. As Chair of the EEOC, he allowed more than 13,000 age discrimination complaints to lapse by failing to investigate them within the legal time limit. Congress had to pass the Age Discrimination Claims Assistance Act to assist those

individuals whose complaints of age discrimination had been ignored by the EEOC.

Although Judge Thomas served in the Education Department's Office of Civil Rights for less than a year, a similar pattern of failure to enforce the law was present there. In 1981, the Women's Equity Action League filed suit against the Department charging improper enforcement of Title IX of the Education Amendments of 1972. In 1982, a District Court judge ruled that the Department was both misinterpreting the Title IX regulations and providing inadequate remedies when a Title IX violation was determined.

This pattern of failure to enforce the law casts grave doubts on Judge Thomas' judicial temperament. We are particularly disturbed that he has been unwilling to enforce key federal laws intended to guarantee individual rights in employment and education.

Second, AAUW opposes Judge Thomas' nomination because of his record of vocal opposition to efforts to ensure equal opportunity in the workplace. While heading the EEOC, he undermined the effectiveness and credibility of the agency by publicly expressing his personal opposition to affirmative action programs, even those ordered as remedies following a finding of discrimination.

Judge Thomas was also vocal about his opposition to Title VII class action suits, despite Congress' mandate that his agency

initiate such cases. His negative comments about a class action suit filed by the EEOC against Sears led attorneys to explore calling him as a defense witness. By calling into question the validity of lawsuits involving claims of disparate impact, Judge Thomas contravened both the intent of Congress in passing Title VII and the Supreme Court's ruling in the 1971 Griggs case.

In 1985, the EEOC ruled that federal law does not require equal pay for jobs of comparable value, and the agency stopped investigating complaints involving pay equity claims. This ruling contradicted the Supreme Court's 1981 decision in the Gunther case. Again, Judge Thomas directed EEOC activities based on his own beliefs, rather than abiding by relevant federal law.

Third, AAUW is distressed by Judge Thomas' apparent hostility to the constitutional right to privacy as outlined in Griswold v. Connecticut. In an article published by the Cato Institute in Assessing the Reagan Years, Judge Thomas stated that the unenumerated rights specified in the Ninth Amendment were not intended to be cited by the Supreme Court in overturning laws.

By stating his opposition to the constitutional basis of the fundamental right to privacy, Judge Thomas has given evidence of his willingness to restrict individual liberties, including the right to reproductive choice.

Fourth, Judge Thomas' support of a "natural law" concept is deeply disturbing to AAUW. In speeches and articles, Thomas has

maintained that judges should be guided by a "natural law" philosophy, the belief that the "inalienable rights" cited in the Declaration of Independence are a higher authority than the U.S. Constitution.

Thomas has said he believes in the existence of moral norms derived from "nature's god," and that those norms can be used to critique and even invalidate civil law. Thomas' statements about "natural law" raise serious doubts about his commitment to maintain separation of church and state.

Finally, AAUW believes that the Judiciary Committee should not confirm Clarence Thomas' nomination to the Supreme Court because of the critical need for judicial balance on the most important court in our nation. The recent appointments of Anthony Kennedy, Antonin Scalia, and David Souter solidified a strong conservative shift in the Supreme Court. With the resignation of Justice Thurgood Marshall, the Court swung dangerously out of balance.

Confirmation of Clarence Thomas, a probable sixth conservative vote on the Court, threatens to unleash the sweeping change we have glimpsed in the Rehnquist Court. Replacing Justice Marshall with a judicial conservative like Clarence Thomas will effectively eliminate the Supreme Court as an instrument for ensuring continued progress and protection of individual rights for decades to come.

The American Association of University Women believes that the Senate has a responsibility to ensure an ideologically balanced Supreme Court and must, therefore, defeat the Thomas nomination.

On behalf of AAUW, I thank you for the opportunity to testify.

The CHAIRMAN. Thank you, Ms. Bryant.
Ms. Avery.

STATEMENT OF BYLLYE AVERY

Ms. AVERY. Thank you. Good morning. I am Byllye Avery, founder and president of the National Black Women's Health Project, and our organization opposes the nomination of Judge Clarence Thomas and we base that position on the following areas: first, the area of self-help.

The National Black Women's Health Project is a self-help advocacy organization committed to improvement of conditions that affect the health status of black women. The organization's philosophy is based on the concept and practice of self-help and mutual support through which members obtain vital information on the prevention and treatment of illness, as well as emotional support and practical assistance. It is largely composed of those sisters who struggle on lower incomes in our society.

Judge Thomas' reference to public statements about self-help as the answer to social ills for black people implies that we have not been using self-help approaches to problem-solving. Rather, the achievement of African American people and the history of self-help development in this country are inextricably bound.

Black people extensively practice self-help today and have done so throughout our history. Slaves worked together to buy each other out of slavery. The first black hospitals were the result of black people pooling their resources to assure the availability of medical care. The list goes on and on; schools, trade and credit unions, banks, newspapers, and other basic services were initiated by black people.

There are many new forms of self-help today, like the ones of our organization. They are a part of a growing tradition. It is not self-help we are lacking, but commitment to the vigorous enforcement of laws protecting our freedoms. That is the piece that is not in place.

Those of us who promote self-help and practice it daily recognize that such activities cannot secure rights and freedoms. No one can self-help themselves to employment, housing, education, or health care when basic access is denied based on discriminatory practices or employers.

The second area is affirmative action. As chairperson of the EEOC, Clarence Thomas was openly hostile to the guidelines developed during the 1960's to prohibit employer practices which have a disparate impact on minority workers and applicants and that cannot be justified as measures of job performance.

These guidelines were also the basis for hundreds of class action suits in the 1970's and 1980's attacking systemic barriers to job opportunities. Thomas said he believed the guidelines encouraged too much reliance on statistical disparities as evidence of employment discrimination, and although he didn't carry through on his threat to repeal the guidelines, he did muzzle efforts by the EEOC to enforce them through suits attacking institutionalized practices of discrimination.

The third area is age discrimination. Hundreds of senior African-American women have suffered in silence as the result of Judge Thomas' violation of the rule of law in failing to act on over 13,000 age discrimination cases. These senior African American women are our mothers and our grandmothers, women who have traditionally held the dirtiest jobs, worked the longest hours for the lowest wages, and received the least amount of praise and recognition, and who have paid a heavy price in order that we might stand here today, and indeed a heavy price that Judge Thomas would be able to sit before you.

The fourth area is reproductive rights. Clarence Thomas' stated belief in—and advocacy of—natural law, which historically has been used to limit the lives and opportunities for women in crafting and applying law principles, and his expressed hostility to the fundamental right to privacy embodied in the *Griswold* v. *Connecticut* and the *Roe* v. *Wade* decisions, which protect and guarantee the right of married couples to use contraceptives and for women to choose abortion, is cause for great concern for all women in general and poor African-American women, in particular.

Historically, African-American women have had the least control of their reproductive choices, including if, when, where, and by whom we would have children. Before abortion was legalized in this country, the majority of women who died gruesome deaths from illegally performed abortions, or bore more children than they could adequately care for, were women of color.

Clearly, the right to safe, legal, and inexpensive abortions is critical to the health of African-American women and their families. Given the extreme nature of Judge Thomas' views, the possibility that, if confirmed, he will endorse extreme limitations on women's most fundamental, important right—the right to make their own reproductive choices—is alarming, and his nomination must be vigorously opposed.

The current health crisis in the United States is forcing the Nation to look to health care reforms. African-Americans need public servants who will ensure that health care is protected as a right, and that includes the right to abortion, and ensured by the nature of our birth. We need public servants who will enact legislation that will holistically improve the quality of life for African-Americans.

We reject Judge Thomas and strongly encourage you to reject others that are sent up until we get the right person for the job. We refuse to accept this person because he might be the best of the worst. We are Americans; we deserve to have the very best there is, and we demand that.

Thank you.

[The prepared statement of Ms. Avery follows:]

POSITION STATEMENT
OF THE

NATIONAL BLACK WOMEN'S HEALTH PROJECT
ON THE

NOMINATION OF CLARENCE THOMAS TO THE SUPREME COURT

The National Black Women's Health Project opposes the nomination of Judge Clarence Thomas to the Supreme Court of the United States. We oppose Judge Thomas' nomination based on his record of performance as Assistant Secretary for Civil Rights in the Dept. of Education (1981-1982), as Chairman of the Equal Employment Opportunity Commission (1982-1990); and based on the content of a substantial number of speeches, writings and interviews, which clearly reflect a disrespect for and lack of commitment to the enforcement of constitutional and statutory protections/federal laws protecting civil rights and individual liberties.

Our position justification is based on a review and discussion of Judge Thomas' position in the following five areas:

1. SELF HELP

The National Black Women's Health Project is a self-help, health advocacy organization committed to improving the conditions that affect the health status of Black women. The organization's philosophy is based on the concept and practice of self-help and mutual support through which members obtain vital information on the prevention and treatment of illnesses as well as emotional support and practical assistance.

Our organization's opposition to Judge Clarence Thomas in this area is based on his assertions that self-help approaches should be favored over other government policies to correct the historic injustices which continue to negatively effect the quality of life for Black Americans. It is inappropriate for any government official to suggest that self-help activities can secure basic rights and freedoms in a democratic society. The Constitution of the United States created the government as the vehicle to insure that the protection of the Bill of Rights would be extended to all Americans.

Judge Thomas' reference in his public statements to self-help as the answer to the social ills of Blacks implies that we have not been trying self-help approaches to problem solving. Rather, the achievements of African American people and the history of self-help development in this country are inextricably bound. Black people extensively practice self-help today and have done so

throughout our history. Slaves worked together to buy each other out of slavery; the first Black hospitals were the result of Black people pooling their resources to assure the availability of medical care. The list goes on and on - schools, trade and credit unions, banks, newspapers and other basic services were initiated for Black people, by Black people when no other resources were available to us. Today many new forms of self-help, like the National Black Women's Health Project, are part of this growing tradition. It is not self-help that we are lacking, but commitment to the vigorous enforcement of laws protecting our freedoms that is not in place.

Those of us who promote self-help and practice it daily recognize that such activities cannot secure rights and freedoms. No one can self-help their way to employment, housing, education or health care when basic access is denied based on the discriminatory practices of employers, lenders and service providers. Promoting self-help solutions as the logic to resolve the issues of lack of access and opportunity in a free society, leads to the faulty conclusion that the victims of discrimination are somehow to blame for the outcomes of the practices and policies that have been used against them. For example, it suggests that if people do not enjoy basic opportunities in the work place it is their own fault rather than the discriminatory practices of employers. Political strategies like blaming the victim exacerbate racial tensions and derail efforts for needed structural reforms.

The conditions affecting the health status of Black women in the United States are among the worse of any industrialized nation and, in fact, many nations in the developing world have more favorable outcomes for infant mortality than urban U.S. Blacks. The continuing social and psychologic stress which results from the combined inequities based on race, sex and class dramatically alters the quality of life and enjoyment of basic freedoms for Black Americans. Any person desiring a seat on the highest court in the land, ought, at a minimum, be able to articulate the basic issues of life, liberty and the pursuit of happiness for such a significant population group - especially when it is his own referent group in question.

2. AFFIRMATIVE ACTION

As Chairperson of the Equal Employment Opportunity Commission, Clarence Thomas was openly hostile to the guidelines developed during the 1960s to prohibit employer practices which have a disparate impact on minority workers or applicants, and that, cannot be justified as measures of job performance. These guidelines were a basis for the Supreme Court's unanimous decision in Griggs v. Duke Power Company in 1971, holding that such practices were violations of Title VII when they were not justified by business necessity. These guidelines were also the basis for hundreds of class action suits in the 1970s and 1980s attacking systemic barriers to equal job opportunity. Thomas said he

believed the guidelines encouraged "too much reliance on statistical disparities as evidence of employment discrimination".[1] Although Thomas did not carry through his threat to repeal the guidelines, he did muzzle efforts by the EEOC to enforce them through suits attacking institutionalized practices of discrimination. Systemic charges decreased while he was Chair of the EEOC.[2] Thomas opposed the use of goals and timetables as a part of conciliation agreements and court approved settlements, and demolished the EEOC's unit set up to secure systemic relief including goals and timetables.[3]

Thomas has attacked the two most important Supreme Court decisions approving voluntary affirmative action by private and public employers to overcome past patterns of exclusion or limited representation of minorities and women. He called these decisions an "egregious examples" of misinterpretation of the constitution and legislative intent.[4] Thomas attacked a Supreme Court decision upholding the authority of Congress to assure qualified minority contractors a share of government contracts as remedy for past exclusion, terming the law an improper creation of "schemes of racial preference where none was ever contemplated".[5]

Of grave concern is Thomas' across-the-board and all encompassing attack on affirmative action to remedy systemic discrimination. Unlike some proponents of judicial restraint, he gives no deference to the will of the majority as expressed in Congressional legislation (Fullilove), nor would he permit private employers to act voluntarily to remedy their past practices (Weber). Additionally, he would restrain the authority of the courts to order race conscious remedies even in the most egregious cases of systemic discrimination (Paradise).

While Thomas recognized the absurdity of the once-debated notion that the "American ideal of freedom" included freedom to own slaves, he failed to recognize that powerful activist government intervention was required to address the effects of the bitter history of slavery. Thomas' conservative view is an outgrowth of his attempt to relate nature law to the Constitution and expand the Constitution's original intent. He would have us believe in the absence of government intervention, fairness and equal opportunity would exist. Unfortunately, Thomas is out-of-touch with 20th century discrimination in the United States and should be denied a seat on the Supreme Bench of the Land.

3. AGE DISCRIMINATION

Hundreds of senior African-American women have suffered in silence as the result of Judge Thomas' violations of the "rule of law" in failing to act on over 13,000 Age Discrimination cases while Chairman of the EEOC.

These senior African-American women are our mothers and grandmothers, women who have traditionally held the dirtiest jobs,

worked the longest hours, for the lowest wages, received the least amount of praise and recognition and who have paid a heavy price in order that we might stand here today. These same women represent one of our richest resources, the elders of our communities and our churches. Judge Thomas has demonstrated by his actions, far beyond any works we can say, why he should not be seated on the Supreme Court of the United States.

In America, those who rise to sit in judgement of others have traditionally been noted for their extraordinary ability to provide incisive insight into issues, compassion, caring, wit and must be the possessor of an unshakable system of principles, values and beliefs in which we could all be proud -- a value system which was distinguished by its ability to provide equity and equality to all human beings but especially those most vulnerable and/or unable to protect themselves.

In our view, Judge Thomas fails each of these tests. His speeches, rulings, actions and refusals to act, all portray a lack of incisive insight, a lack of compassion and caring and, perhaps most important, a lack of an unshakable system of principles in which we could all be proud. Instead, it would appear that the ebb and flow of politics is his guiding principle.

As America becomes grayer and grayer, it will become more important, not less so, that our Supreme Court justices have an overall appreciation of the need to protect and defend those who have spent their lifetimes contributing to the welfare of this nation. Sadly, we find no evidence that Judge Thomas has reached that stage in his development and that he can only contribute his own narrow, flawed view of all of America's senior workers regardless of race and gender.

Given these views, we do not believe that it is only senior African-American women who are in danger but anyone who attains the age of 60 and attempts to force an employer to treat them fairly and equitably under the current Age Discrimination laws.

4. REPRODUCTIVE RIGHTS

Clarence Thomas' stated belief in and advocacy of "Natural Law" (which historically has been used to limit the lives and opportunities of women) in crafting and applying law principles and his expressed hostility to the fundamental right to privacy embodied in the Griswold v. Connecticut and Roe v. Wade decisions (which protects and guarantees the right of married couples to use contraceptives and for women to choose abortion) is cause for great concern for all women in general and poor African American women in particular. Historically, African American women have had the least control of their reproductive choices, including if, when, where and by whom we would have children. Before abortion was legalized in this country, the majority of women who died gruesome deaths from illegally performed abortions, or bore more children

than they could adequately care for were women of color. Clearly the right to safe, legal and inexpensive abortions is critical to the health of African American women and their families. Given the extreme nature of Judge Thomas' views, the possibility that if confirmed, he will endorse extreme limitation on women's most fundamentally important right, the right to make her own reproductive choices, is alarming, and his nomination must be vigorously opposed.

5. ACCESS TO HEALTH CARE

We hold valuable the right of individuals to have equal access to the best health care that our society can provide, and that cost not be a determining factor in the quality of services rendered.

A vast majority of African-American women are single heads of families, underemployed, undereducated and challenged with rearing children. The interconnections between education, economics and health are so entwined that in order to break the cycle of poverty the working and non working poor need to receive the best services available.

Health care coverage that is employer based, which is limited at best, and coverage that is subsidized by the government, sets up two classes of care. A lack of access and coverage of preventive services means that it is difficult for poor families to promote healthy lifestyles. This is evident when examining infant mortality statistics of African-Americans, which clarify the medical and social implications of health care. The current approach involves increased technology when increased access to service and improved quality of life are needed.

The current health care crisis is forcing the Nation to look to health care reforms. African-Americans need public servants who will ensure that health care is protected as a right and ensured by nature of birth. We need public servants who will enact legislation that will holistically improve the quality of life for African-Americans. We hold evident that every decision, every law, affects the quality of current life and future generations.

ENDNOTES

1. New York Times, December 3, 1984, p.1

2. Committee on Education and Labor, U.S. House of Representatives, Ninety-Ninth Congress, Second Session, A Report on the Investigation of Civil Rights Enforcement by the Equal Employment Opportunity Commission, Serial N. 99-Q, May 1986.

3. See Interview with Michael Middleton, St. Louis Post-Dispatch, February 26, 189, p.1B.

4. Thomas, "Civil Rights as a Principle Versus Civil Rights as Interest," Assessing the Reagan Years, ed. by Cata Institute, 1988, supra note 2 at 388-99.

5. Ibid, at 396.

The CHAIRMAN. Thank you very much. Let me begin the questioning by asking first of Ms. Yard, are you concerned that, from your perspective, Judge Thomas' failure to recognize a woman's reproductive rights as being fundamental—that not only will it deny women the right to abortion, but it will also affect the other end of the spectrum, and that is that it could require women to be in a position where they would have to choose between not bearing children and having a job, like the case involved where a majority of the Supreme Court ruled that the practice of a business saying that if a woman wished to continue to work in this particular department of the business because, "it might endanger the fetus," she had to make a choice? She either had to do something, which would be sterilization, or she had to move to another department, which would be in many cases a lower-paying job. Is your concern at both ends of this?

Ms. YARD. Yes, I am.

The CHAIRMAN. Well, let me ask you, Ms. Neuborne—as usual, in my experience with dealing with you on legislative matters, you have put things very succinctly and to the point. And, to you, as I understand this, it breaks down into basically one of two choices for this committee. We either look at his record and conclude from his testimony, where he has moved away from that record, that he has changed, or we conclude that a combination of the changes he has enunciated and his silence requires us to rely on the record prior to his testimony. Is that the essence of what you are telling us? Is this a credibility issue?

Ms. NEUBORNE. Some of it is a credibility issue, and indeed as to what you can do now, you could bring him back and you could insist that he answer the questions he has not answered, which left you and certainly left us unsure of his position. So we are forced to either—among us, the witnesses and the Senate, to perhaps argue over certain words and what those words meant in past statements that he has attempted to disavow rather than dealing with his honest statement now of what he believes about the constitutional rights that are at risk here.

So, yes, I think you do have an enormous responsibility here. You are faced with a record that is equivocal at best, and indeed we believe it is a very negative record. That is our perception of it. You could bring him back to ask the questions that you—indeed, Senator Hatch said he was asked 60 times to tell us his position on the issues about the woman's constitutional right to choose, and he did not answer 60 times.

You could bring him back; you could insist that he answer that question and tell the American people where he stands. At that point, I think you then have to decide are his views appropriate views; is that where we want our Supreme Court to be going.

When he makes statements about affirmative action and about women's rights—and we have seen that for 40 or 50 years we have been moving in one direction on those issues. We have understood the need to expand the rights of women and blacks because they have not shared in the equality that this Constitution promises. Do we want to turn that around?

The CHAIRMAN. Well, I don't mean to cut you off, but my time is about up and I want to ask Ms. Smeal a question, if I may. I was

impressed with your precision, and I am not being solicitous. You said that his writings have inferred that he has opposed, and I don't know anybody who could quarrel with that. At least I don't quarrel with that. And you joined the legitimate chorus of those who talk about the process.

Now, I have two questions, if I may, and a preface. It wasn't until relatively recently—as a matter of fact, if I am not mistaken, it wasn't until a speech I made to the American Bar Association about 4 years ago out West, or 5 years ago, that the editorial writers of this country even acknowledged we had a right to take into consideration philosophy.

This committee used to dance around about character and dance around about judicial temperament rather than frontally say we have a right to know what the philosophy, what the jurisprudence, what direction the nominee would take this country in. The irony is once we have crossed that threshold finally, now we find ourselves in a position where the process is viewed as a caricature of itself when for the first time it is being honest in terms of attempting to—whether it gets it or not, whether it makes the right judgment or not, a different question.

And I don't say that in defense of the committee. I say that as a preface to the question. First, should this committee, in your view, ask a nominee explicitly what his or her position is not just on choice but on whatever issue is of interest to a committee member, and be entitled to get a specific answer as to whether they would uphold, or whether they would modify, or whether or not they would overturn any existing case based on constitutional interpretation, not statutory.

And, second, the flip side of that: is there any limitation at all, if not a constitutionally prescribed limitation, a practical limitation, on how far a committee or a Senate should go in demanding to know every thought that a nominee has about any issue that is before the country.

Ms. SMEAL. Well, I think that it is in the purview of this Judiciary Committee and the Senate—I think it is their right and their obligation to know the philosophy of a person who is being nominated. I have argued continuously, I think, that it serves no one well to have a pig in a poke with something so vitally important as interpreting the Constitution.

Obviously, a person sitting here could not give his or her particular opinion on a particular case that is future-oriented, something that is coming before them in the future in that particular case. But for them to tell us how they stand on the right to privacy with some depth, how they stand on *Roe* v. *Wade* or *Griswold* or *Eisenstadt* with some depth—those are cases in the past. We already know how the rest of the Supreme Court Justices who are sitting on the Court feel on this. They ruled on it. I mean, Rehnquist and White were on the body and ruled on *Griswold*. We know how they stood.

We have a right to know where a person stands, and it is not credible to believe that they have no position, not even a personal position, on a subject like abortion. I think it makes a mockery of the process when you allow that kind of answer.

But more important than that, I think that we all have such limited vision. Maybe Molly or Senator Thurmond could say this; certainly, they have been here longer. But it seems to me that when Abe Fortas was opposed to be raised to Chief Justice, his philosophy was at issue.

The CHAIRMAN. But no one ever said that.

Ms. SMEAL. What?

The CHAIRMAN. The point is no one ever directly said that. They all said it related to his credibility and his honesty. No one flat out said until recently, until Bork, that explicitly, in the last 40 years that I am aware of—explicitly.

Ms. SMEAL. What about Carswell and Haynesworth?

The CHAIRMAN. Look at the record. It was all based on this notion of qualifications, were their educational backgrounds sufficient, did they have enough experience, did they have a judicial temperament.

I am not being critical in any way. My point is it is a dilemma for me as the Chair of this committee. I think the Senate has an obligation to respond. Historically, what the Senate has done—when a President has not made it clear that he is responding in a way to put his ideological view on the Court, the Congress—the Senate, in particular—has never responded. When, in fact, the President says, I am attempting to remake the Court in my own likeness, whether it was a Democratic President or a Republican President, the Senate has responded and said, OK, now we understand the game.

Now, my only point is, for a combination of reasons, I would argue—my friends on my physical right would probably disagree, but I would argue that for a number of reasons, in part because Eisenhower, and Kennedy, and Nixon even were not as frontal in their attempt to remake the Court—they appointed people whom they thought were, "the best qualified lawyers," and it was not into issues of what is your view on A, B, C, or D, whether it was explicitly asked or implicitly implied by the nominee or those seeking to find a nominee.

I teach a class on constitutional law at a law school on Saturday mornings, a relatively conservative class. I asked the people who originally, immediately, like most law school students do, bridle at the notion that we should be able to ask nominees where they are on specific issues—that tended to be the instinctive response of most people in my experience, since I have been on the other end of that criticism.

Then I asked the question of the class, I said, how many of you believe the President of the United States said the following: look, there is a vacancy on the Court, go and find me a woman or man who has a very strong record academically, who is honest and decent, and who has a depth of knowledge about the law, period? I said, how many of you believe that went out from the White House; don't do anything else, just go out and find that? Not a single student raised their hand, almost all of whom rejected my view as well, I might add.

The point I find interesting—as a matter of fact, I tell you very bluntly and tell everyone here, after this is over, regardless of whether or not Judge Thomas is elevated to the Supreme Court, it

is my instinct and inclination—and I have been working with my staff on this—to hold a series of hearings on the process to determine whether or not new ground rules have to be set for a process, and debate it in this committee and with the leading intellectuals of this country who are for and against the way it runs now, but it frustrates me.

Ms. SMEAL. It totally frustrates me. I mean, that is why I decided to move to the process because those of us who are participating in it and, in fact, are being questioned, as well as you, as the Senators—how can we be more effective—basically, there is a hopelessness now that is setting into the opposition mainly because there don't seem to be any game rules.

And, basically, I don't know who established these game rules on philosophy, but even on that it falls so shallow and so flat. But then there is the bottom line that our opposition on certain key issues has said they are going to stack the Court and now are proceeding to stack the Court. We cannot act in a vacuum. That is why I decided to bring in this magazine. We are not in a vacuum; we are all living right now, and we know that is the opposition's tactic.

I think that you Senators who are opposed to having the Court stacked must use every power that you were given, including the power to filibuster an appointment. You don't need to take what the president gives you on blind faith. I don't see why anybody would have to do that.

You were given a power of confirmation. We beg you to use that power with all of its might to protect our rights.

The CHAIRMAN. I apologize to my colleagues. I have run over my time. Again, I thank you for the precision of your statement and for raising an issue that is perplexing, I think, everyone for and against and undecided. But I yield to my colleague from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

I want to welcome these distinguished ladies here today. I am glad to see Ms. Yard again. I hope your health is better. We have been concerned about you. I have no questions. I appreciate your presence.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Thank you very much.

I too want to join in welcoming the panel and to welcome back Molly Yard, who has had a difficult struggle fighting and continues the battle. We welcome your continued fight and courage.

In the testimony of Judge Thomas on the issue about women's rights, he indicated to a question that he had no quarrel with the heightened scrutiny test and indicated that he might even apply a more rigorous test. Why doesn't that give you some assurances that he would be more sensitive to the range of different issues involving gender?

Ms. NEUBORNE. Well, one of my thoughts, Senator, is that while he may use those words, in his actions and in his other discussions about women's rights he has not shown that he acknowledges the need for a heightened scrutiny test. In his treatment of women, for instance, in his discussion of the *Santa Clara* case where there were 258 male road workers and one female applied, he saw abso-

lutely no reason why she should be given even the most marginal voluntary preference by an employer in that situation. That to me says that he does not understand the need to move forward on women's equality, to have heightened scrutiny.

I think when we look back at what he did on the fetal protection policy that the EEOC basically sat on for several years while women were not able to get jobs in companies because the companies were excluding them because of the possibility of some injury to the fetus; again there he didn't move forward quickly. He sat on that policy for many years, and then came out with a very weak policy favoring women.

I don't believe that he truly understands the need for heightened scrutiny. He may say it, but when it comes to his making a decision that would resolve the issue against the Government and in favor of the women's right, I am not convinced that he will act that way.

Senator KENNEDY. Are you concerned about his quoting of Sowell about stereotyping women in terms of employment?

Ms. NEUBORNE. I think that was the most devastating, when he stated that he thought that women—he was very comfortable with Sowell's statement that women were not achieving—or not in particular jobs because they chose to remain at home, that they chose not to take the more difficult jobs. And then he again wanted to sort of wave that statement away and said he really was just addressing the issue of statistics and that we mustn't always count on statistics.

We must look at statistics because the numbers of women that have achieved in the workplace and the difficulty of women and minorities to move forward are still vital issues for us, and the numbers are very low. And it cannot be just on an individual basis that we would identify discrimination.

Senator KENNEDY. Is this one of the central concerns of women, that the stereotype is very alive and real out there in the job market?

Ms. WOODS. I was in my opening remarks talking about the one-by-one-by-one approach, and then citing the specific example in St. Louis at the EEOC office. We heard statistics back and forth, and everyone is going to cite them. But the fact is that most women are not in a position to seek individual redress, and you don't hear about it. But the overall impact is to depress their earnings, to make it less possible for them to support their families at a time when—what is it?—two-thirds of the new hires in the next decade are going to be women and minorities, and we are sitting around, instead of trying to get the final redress for women to make it possible for them to support their families. We are trying to find the excuse why we can justify casting a vote for a man whose record has been in the opposite direction.

That is why I think you hear this theme. We didn't consult on this at all about concern for the advice-and-consent process and our skepticism about it, because listening out there you can't believe this is happening.

Senator KENNEDY. Let me just ask a final question of Anne Bryant on title IX and the *New Haven* case, the application in terms of employment for women. What is your own sense about

how if Judge Thomas had been on the Supreme Court he might have ruled in that extremely important case involving employment for women?

Ms. BRYANT. The record of Judge Thomas at the Department of Education is one that I have in my written testimony in greater detail. But the case that you are referring to, the *North Haven Board of Education* v. *Bell*, was a very important case, coming after a series of events that I think are important. One is, Judge Thomas comes to the Department of Education and announces, when he is at the Office of Civil Rights, that he in fact has it in his future plans to undermine the enforcement of title IX regulations.

He comes in after the *Weil* case has been decided, and in fact that case and a court order has determined that certain time lines and policies need to be monitored, and he in fact does not—he basically goes against that court order and does not enforce the Title IV regulations.

So what the *North Haven Board of Education* case confirms again is that within title IX, as it was intended from 1975 on, it should, in fact, also include job discrimination and job protection for employees in schools and colleges, not just title IX regulations for students.

I think the connection that I worry about is the whole issue that I was talking about in terms of equal opportunity in education and employment.

Your prior question I think is important. The Department of Labor under Secretary Martin has come out with this major "glass ceiling" study. The fact is stereotyping is alive and well. Women are not moving up in the work force into jobs where there is a greater wage than minimum wage. And I think the Department of Education study, Cliff Adelman's study on "Thirtysomething," where he studies masses of women in the class of 1971—the fact is that we have a discriminatory workplace, and we need these laws to protect women.

Senator KENNEDY [presiding]. Thank you.

Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman.

Welcome to the committee. Ms. Yard, I do indeed wish you well and healing. You and I have had a couple of good rounds together in the past, both here and in private—spirited would be the word, I guess—and then once in the hall, too. I don't agree with you on many things, but I want to tell you I deeply admire your courage, and I told you that before. That is not some obsequious statement or fawning statement. I really do. It does take one to know one. You are a very courageous lady, and you have passion, true passion, for your causes. I wish that more people had passion for their causes. Maybe some of the Justices, if they showed that passion, they would never get by this committee, though. That is the problem—for them. And so we have to have the passion from the citizens, and you certainly are one of those.

You make that passionate defense of a woman's right to abortion, and I have said before to you I fully agree with that position on reproductive choice. And I grilled him pretty extensively on that in private when he was making his visits. I asked him, you know, I said I feel very strongly on this issue. And he answered

much as he did here. There was nothing different he said in private than what he said here publicly.

And he knows, like all of them know, whatever decision he would make in public he would get torn to pieces. I mean, that is the way it works. If he sat on one side, the other side would tear him to shreds. If he goes one way, the other side tears him to shreds. Suddenly this procedure, which I earnestly say to you is very fair and very expansive—and that is the way the chairman does his work. Chairman Biden is fair. And this is rather tedious, protracted, prolix. We help make it so. That is part of our lives. It is a long procedure. It is not news of the hour procedure or news of every half-hour procedure, and that is what I think some seek in it. They are over—they expect something that cannot be in a procedure like this.

So it works, and I think it is good that we do have some hearings on the system and what it is, and maybe we can make it better. But we can't make it better by limiting people from both sides, who feel very, very strongly on both sides.

I have been asked—I come from Wyoming, and I get my lumps on the reproductive rights issue. But I get another one. They say, Why don't you ask him about something that really is important to us, and that is ask him about how he is on the 2d amendment and gun control. Because if he is not right on that, Simpson, junk him. Get him. We are counting on you to do that.

Well, I am not going to do that. I have asked him about that, and he said, you know, he wasn't going to get into anything of high controversy. No Justice ever has, and especially Justice Thurgood Marshall when he avoided all questions with regard to the *Miranda* decision when he was seeking confirmation. He never responded to the passion of Irwin, to the passion of Eastland who wanted to nail Thurgood Marshall and find out what he was going to do with that decision, *Miranda*, which so irritated them and they wanted to do something through him. He responded just as Clarence Thomas has responded to us.

Let me just ask one question. I appreciate your forbearance, Mr. Chairman.

I think it was Anne Bryant—and my wife is very active in AAUW for many years in a chapter in Wyoming, and I know what work you do. It is very special. But you spoke of the characterization of the testimony of those in opposition as being very detailed and specific. It wasn't the same hearing I have been at all these days. You say the testimony in support of him was just mainly stories about his personal life from his childhood and so on.

I respectfully say that that isn't so. Some of the law professors who testified against the nomination had not even read his opinions. One lady last night, a lady lawyer, had not read his criminal decisions and was speaking about how terrible they were. And I said every one of his criminal decisions was concurred in by Judge Ginsburg, by Pat Wald, and by Abner Mikva, so please let's have honest remarks. If you don't like him, that is a different matter. I can understand that.

But all of the highly qualified witnesses that studied his record spoke authoritatively of his skill. The American Bar Association said that to give him this rating he had to have "outstanding legal

ability and wide experience and meet the highest standards of integrity, judicial temperament, and professional competence." That is the ABA. A thousand lawyers were polled to give that decision.

It just seems to me that it is, I think, not correct when we have been here all these days and found that these things are just not so. I guess that is what makes the hearing vexing.

Well, I haven't asked any questions. I have done that again.

Ms. BRYANT. Senator Simpson, let me just respond to that.

Senator SIMPSON. Yes, please.

Ms. BRYANT. I can speak for my colleagues here and for those that I have worked with as they prepared their testimony in opposition to Judge Thomas. And I will tell you that the kinds of case analysis, his speeches, his writings have been in great detail. So we may disagree on the nature of everyone's testimony, but I was talking about the highlights and simply referring to the comments that were made to the panel before us about what a wonderful person he was. And I think he probably is. But I am talking about his record as a jurist, his record in EEOC, and the Office of Civil Rights, which is what I focused on.

So we may have a disagreement about all of the different people who came before you, but I think the homework has been done, at least by my colleagues here.

Senator SIMPSON. Well, I do appreciate that, and I think the homework has been done by those of us here, too, respectfully. And I think if you can read the decisions about the accusations about the EEOC, hear what he did for women in the *Meritor Savings Bank* case, hear what he did for them with regard to the U.S. Navy and the woman with the sex discrimination case—these things were done by Judge Clarence Thomas, not by some surrogate. And it seems to me that it is so easy to overlook those things, and my purpose is to try to address them.

The *Adams* v. *Bell* litigation was clearly defined by the man that was his predecessor. He said there was amassed a tremendous backlog of complaints and that Clarence Thomas was the one who just happened to move into the cross hairs at the time that the trigger was pulled.

Now, Singleton wrote about that. That is in the record. I would just say for everything that you can present to us, almost without exception today, everything has been covered and responded to.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Simon.

Senator SIMON. Thank you.

First, I want to join everyone else in welcoming Molly Yard. They didn't take any fire out of you in the hospital. One great advantage of having been there is that even Alan Simpson is good to you now. [Laughter.]

Senator SIMPSON. She kind of got to me.

Senator SIMON. Harriet Woods started off by saying advice and consent is more than a prerogative, it is a protection for the people. If I may modify that excellent statement, by saying it is more than a prerogative, it should be a protection for the people. Whether it is a protection for the people depends on what we do.

If I may differ just slightly—and I am not sure I am differing with the Chairman—in terms of philosophy, that has always been

a consideration. If I may quote Senator Strom Thurmond, in 1968, the Abe Fortas nomination:

> It is my contention that the Supreme Court has assumed such a powerful role as a policy-maker in the government, that the Senate must necessarily be concerned with the views of the prospective Justices or Chief Justices as they relate to broad issues confronting the American people and the role of the Court in dealing with those issues.

In 1971, three legal scholars prepared an excellent memorandum for Senator Birch Bayh, and let me just read their summary at the beginning of their memorandum:

> Our conclusion, briefly, is that although a nominee's experience, legal ability and personal integrity are necessary conditions for his confirmation to the Supreme Court, they are not and they have never been considered sufficient conditions. It is the Senate's affirmative responsibility to examine a nominee's political and constitutional philosophy, and to confirm his nomination only if he has demonstrated a clear commitment to the fundamental values of our Constitution, the rule of law, the liberty of the individual and the equality of all persons.
>
> That seems to me to be just fundamental, in terms of our responsibility.

If I may ask any of you who cares to respond, I notice that later today we have one group, Concerned Women for America, who is going to be speaking for Judge Thomas. Is it fair to say that the majority of independent women's organizations who have taken a stand have taken a stand in opposition to Judge Thomas?

Ms. WOODS. Yes, and I think it is important to notice the bipartisan nature, too, because there has been a suggestion that the opposition to him is because of his party or political philosophy, and I think that many of these groups are either bipartisan or nonpartisan groups.

Ms. AVERY. I think it is also important to look at income levels. Our membership, as I said, is composed mostly of women who live on lower incomes, and when our board made a decision to see if our membership was interested in testimony in opposition, we received overwhelming responses from women in opposition. I thought that was quite significant for us.

Ms. NEUBORNE. I would just add that I think, you know, there are many women in the Republican Party—indeed, Republican Women for Choices, and organizations like that—who speak out very strongly in favor of a woman's constitutional right to choose, and there is clearly no secret that President Bush has on his agenda appointment of judges who will reverse that policy.

So, I think when Senator Simpson says that, whichever way Clarence Thomas would go, it would be difficult for this committee to decide. I think this committee has to think about the constitutional right of a woman to make that choice, and that is the issue that is up before the Supreme Court, and if this nominee is that fifth vote against that constitutional right for women, that decision will have been made here when this body votes.

Senator SIMON. If I may get one quick question in before that light turns red, and I see it just has——

The CHAIRMAN. Go right ahead.

Senator SIMON. Each of your organizations has taken a stand before the hearings commenced. Has Judge Thomas' testimony in any way ameliorated your feeling? Do you feel better about his nomination than you did before his testimony?

Ms. BRYANT. I would like to address that. The American Association of University Women treads carefully and lightly in decisions like this, because our members are Republican, Democrat, and go across the spectrum. In fact, in the last 5 days, the kind of outpouring from our members, when they have heard and listened—mostly on NPR, because they don't all get C-SPAN—to the testimony, it has become even clearer to them that the record, the track record is what we are afraid of, and that the hearings and listening to Thomas have made them even more afraid of the potential that he would overturn some basic rights for women when he gets on the Court.

Ms. SMEAL. Frankly, the hearings brought up a new issue, and that is his credibility, because there is no question that some of the statements he has made have stretched any reasonable person's credibility. So, if anything, you see more determination and more feeling that this is a vote that is going to be extremely hostile to those women's rights that we hold so dear.

Ms. WOODS. Briefly, I found many women are offended, because, for example, in the whole issue of that White House report, where he responded very quickly on *East Cleveland* and said, oh, I wouldn't want that in. And when the question was, what about these other issues that are more related to women; it was hem, it was haw, it was finally saying, well, of course, I really feel they should have restricted this report; but it wasn't the same sensitivity or respect for those concerns and it reinforced the record which you might have assumed was sort of a get-along, go-along, that's what the administration wanted of the EEOC kind of thing. This now showed that he seemed to be really unresponsive on women's issues.

Senator SIMON. Molly Yard, you have the last word.

Ms. YARD. Senator Simon, what I think you need to understand about the National Organization for Women is that this decision was not made by me nor by our national board. It was made by our entire membership assembled in a national conference, a delegated body selected by their peers back at the grass roots level, and this decision was of the membership of NOW to oppose Judge Thomas.

Listening to the testimony, frankly, I was totally puzzled at the beginning as to why being born into poverty qualified anyone to sit on the Court, why was that such a big to-do. I suppose it may make a person more compassionate, which would be good, but I don't think it qualifies one to sit on the Court, and the more I listened, the less impressed I was with his possible promise for the Court.

Remember that the only people we really have had to count on on the Court are Brennan and Marshall. They are both gone and we need to have a replacement of that caliber, otherwise, women will not have any faith in the Court and we need to have that faith, so that we don't consider what is happening in this country to be a totally hopeless situation as far as women are concerned.

We are discriminated against everywhere, constantly, and now we are being told by the Court that we can't even control our own lives, because of the abortion question. What is going on here is really a very serious development, in terms of our futures and the future of our children, and we are dead serious when we say we want the Judiciary Committee of the U.S. Senate to lead a revolu-

tion. We need a revolution to change what is happening. You could be the agents for that change, by turning down this nomination.

Believe you me, we need change desperately in this country, not just for women, but for many, many people who are discriminated against and are oppressed. Their greatest champions, Brennan and Marshall, are gone, and we need to feel that we can have some hope in the Court in the future, and really that hope depends on what all of you do.

Thank you.

Senator SIMON. Thank you. I thank all of you.

Thank you, Mr. Chairman.

The CHAIRMAN. Ms. Yard, the likelihood that this President will ever nominate a Brennan or Marshall is about as likely as me nominating a Scalia, or our President. I think that is——

Ms. SMEAL. Yes, but if this Judiciary Committee turned back appointments, the likelihood of him continuing to nominate Scalias would decrease.

The CHAIRMAN. I am not suggesting that is not true, but getting a Brennan or a Marshall is another story.

Let me make it clear one other thing, and then I yield to my friend from Pennsylvania. This Judiciary Committee does not have the right, in my view, to turn back anyone. All it has the right to do is make a recommendation to the U.S. Senate, and I have been clear since I have been Chair of this committee, even if the vote on this committee were 14 against and 0 for, I would still report the nomination to the floor of the U.S. Senate, because nowhere in the Constitution does it say this committee shall advise and consent. This committee shall recommend. I know you were not implying that, but I want to make that clear for the record for those who may be listening.

Let me yield to Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

I think this panel has been very informative in going beyond the cases, on the issues, to the whole approach of procedure. Historically, nominees have been turned down for ideology, at least as far back as Judge Parker in 1930, and perhaps all the way back where there were considerations on Jay.

But the matter of questioning is new. I think it wasn't until Justice Frankfurter in the late 1930's that we started to question the nominees. Justice Douglas was supposed to have been outside the room waiting to see if anybody had a question for him. Justice White was supposed to have answered 8 questions. And when Justice Scalia didn't answer anything, there was great concern, and Senator DeConcini and I were preparing a resolution to structure the kinds of questions and answers which the Senate should expect, when Judge Bork came up.

Although Newsweek Magazine is sharply critical of the Senate for their characterization of the charade, they do acknowledge that it was in the Judge Bork nominations hearings that we first began to ask some questions. I have long believed that nominees answer as many questions as they have to for confirmation. I think we saw that with Chief Justice Rehnquist.

I think we have seen it right along, and the process has changed, because now it is like an NFL football game, where we trade tapes

in advance of the game. They look at our questions of the predecessor and we read their speeches, so it comes in fairly heavily scripted, with a lot of opportunity for coaching and for preparation, and it does eliminate a lot of the candor, because we know a lot about each other's positions and the kind of approach.

Judge Thomas has answered a fair number of questions and he has also refused to answer a fair number of questions. He answered questions about freedom of religion. Ms. Bryant, you commented about school prayer, he did answer pretty forthrightly on separation of law and state. He probably didn't know that case was pending on the docket for next term. He answered a pretty good question on the exercise clause and was pretty strong on stare decisis.

You may not have liked his answer on death penalty, but he answered it. On the right to privacy, marital privacy, single person's privacy, three-party equal protection clause test. He wouldn't answer about *Bowers* v. *Hardworth,* wouldn't answer much about *Rust* v. *Sullivan*, wouldn't answer *Paine* v. *Tennessee*, and mostly he wouldn't answer about *Roe* v. *Wade.*

The *Roe* question—and, Ms. Smeal, you really had it on the nub, I think, to what a lot of it comes down to, wanting to know in-depth his position on *Roe* v. *Wade.* Maybe he should answer that question, but I frankly can't quite see it, because that really has to come up in the context, in my judgment, of a specific case where you have facts. There are a lot of different approaches and argument, briefs and deliberation, and then a decision.

Let me go to that issue, Ms. Smeal, and any one of you could answer it. As I understand your position, you really want assurance—and we went through this with Justice Souter last year, and I don't think that *Rust* v. *Sullivan* is conclusive as to what Justice Souter is going to do on *Roe* v. *Wade.* There are a lot of different issues in the cases, and I make that point, because I think Justice Souter may be watching. They have a lunch break over there now, and this is about the time to watch.

Let me ask you, Ms. Smeal or anyone—I am not lobbying, he can do anything he wants, he has got a life position—but you really are looking for a commitment, as I understand you, that the nominee is going to uphold *Roe* v. *Wade*, and——

Ms. SMEAL. Actually, I think I was careful in what I——

Senator SPECTER. Let me give you the second part of the question, because the light is on and I can't ask this later. Maybe I can, as the Chairman has just nodded——

The CHAIRMAN. You go ahead.

Ms. SMEAL. I was very careful, when I said that what was happening here is what he was answering was challenging credibility. He says that he never discussed this issue since 1971. I think that is a character answer. I mean, do you believe that? How can anybody believe it? He only named two cases that he thought were important since 1971, and this is one of them. He never discussed it? He has no personal opinion on the subject of abortion? That is a credibility question. How could a grown man of this age, in this day and age, not have a personal opinion?

Judge O'Connor had a personal opinion. She testified that she was personally opposed. I happen to have testified, incidentally, to make the record, I testified for her. I feel very strongly that he

could tell us his reasoning on the right to privacy. Obviously, he can't tell us of a case that is either pending, like *Pennsylvania*, but, my goodness, he can say more and I think he has to say more, and I think that this decision should be a part of your confirmation process, because this is not just any vote. This is a vote that will determine for women a crucial, crucial civil liberty which many of the Senators, not only on this Judiciary Committee, but the full body are pledged to, and they should know and we should know how important they view it.

Senator SPECTER. Let me ask you a question bluntly: Do you think he should answer whether, had he been on the Court when *Roe* v. *Wade* was decided, whether he would have been with the majority or minority?

Ms. SMEAL. Yes, I think he should tell us where he stands on *Roe* v. *Wade* and the right to privacy.

Senator SPECTER. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Let me ask one last question, before I let the panel go. Again, as usual, Ms. Smeal, you are direct and to the point. You point out to the committee that you believe those of us who took a chance on Justice Souter, that we made a mistake, we should not have taken a chance, et cetera.

The point I was making earlier with regard to the way in which the process has developed and evolved wasn't that people in the past did not consider ideology, did not consider philosophy, and not that there weren't some like the Senator from South Carolina who very forthrightly stated it, but the Senate as a whole, at a minimum, danced around that subject for the last 30 years, as a whole.

Now, since you mentioned it, you testified on behalf of Justice O'Connor. She did not answer directly what she would do on *Roe*, when asked. She said she would not comment, to the best of my recollection, and we had to make a judgment based on faith. I assume you made a judgment based on faith, and I assume that then Judge O'Connor—no, Senator O'Connor—Judge O'Connor, she was on the State court at that time, she went from Senator to State court—then Judge O'Connor, I assume she didn't confide in you before she testified how she would rule on *Roe* v. *Wade*.

So, is your standard changing, as well? Not that it shouldn't. I am not being critical, I am just trying to figure out how this process moves. You were prepared, you came as a leader of the largest women's organization in America, if not the world, came forward and said we are for this person, she refuses to answer how she would rule on *Roe*, we are still for her. Would you do that again for any nominee who would not explicitly tell you whether they were for *Roe*?

Before you answer, Harriet, let Ms. Smeal answer this question, and then you can make whatever comment you want.

Ms. SMEAL. The reason I put in the testimony on Judge O'Connor is that she did say she is personally opposed. I think that she was more forthright than this nominee.

The CHAIRMAN. I agree with that.

Ms. SMEAL. There is no question in my mind. We made the decision on supporting her, not because of her sex alone, although she was the first woman to be confirmed. We did it, because her entire

record up to this point had shown moderation, had shown that she could rule with us in some cases. We knew that she was going to rule against us in others, from the record, but at least we felt that coming from Ronald Reagan at that time, that we had a chance with this nominee.

I think history shows that, in fact, she has not been consistently one way or another, frankly, more conservative than we maybe had thought, but there still was some chance. We don't feel that way with this appointment at all.

The CHAIRMAN. If I can stop you, I understand how you feel about this appointment. What I am trying to work through here is that I doubt whether there is any nominee—correct me if I am wrong, any of you—the next nominee, and, God willing, there will be no more as long as I am chairman, but I expect that won't be the case. This is becoming an annual event.

Ms. NEUBORNE. We know that.

The CHAIRMAN. We may be here next August, assuming we are all in good health and I am here, we may be here next August doing the same thing.

What I sense is changing, as the deck changes, the deck on the Court changes, is less latitude—I don't say this as a criticism—less latitude in terms of a nominee being able to give generalizations about his or her view—this is not a criticism—less latitude in terms of a nominee being able to give generalizations about his or her view, and a requirement explicitly that unless a nominee sits before us, a Bush nominee next year if it occurs, or if this nominee is defeated and another nominee is sent up, I suspect—I may be wrong—unless there is an explicit recognition by the nominee from his or her past writings that he or she supports choice or a willingness of the nominee to explicitly say that before this committee, that you would urge us to vote against that nominee. Is that right or wrong?

Ms. NEUBORNE. I think there is some truth to that, but it is not the entire story. I think there are two issues here. First, we have seen two administrations that are so ideologically focused in one direction that we have lost the sense of process, Senator, and I think that's what you are saying, that there is no question that they are not appointing the best nominees, and Presidents in the past—and I think you heard this from the law school deans from Harvard and Yale—appointed Republican and Democratic. We know the process has changed. What we are facing now is a Court that is going to reverse constitutional rights that we have worked for 30 or 40 years to develop for women and for people of color. It is not just choice.

Clearly, the affirmative action and——

The CHAIRMAN. No, I know it's not——

Ms. NEUBORNE. So I think the answer is yes, we have to know and you have to know whether the Supreme Court precedent of the last 30 or 40 years is going to turn around——

The CHAIRMAN. Right. Notwithstanding the fact that in the recent past, we did not do that. That's the only point I'm making.

Ms. NEUBORNE. Well, and the other point—and I think you made it, or—I can't remember; I heard it late at night—someone said it—

maybe the first or maybe the second or maybe the third nominee——

The CHAIRMAN. It was I.

Ms. NEUBORNE. It was you, Senator, and I was listening even though it was very late at night when I was hearing it. We are on the fifth or the six nominee. We are at a point where the Court is irreversibly going to change——

The CHAIRMAN. Don't, don't——

Ms. NEUBORNE. No, I'm not arguing.

The CHAIRMAN. Your response seems to be—I am not being critical. I am just trying to point something out——

Ms. NEUBORNE. But that is the truth.

The CHAIRMAN [continuing]. And ask a question about process. When it was the first nominee of Ronald Reagan, and there was a Court where no one feared that there was a legitimate prospect of *Roe* being overruled, you, the leading women in America, speaking for the leading women's organizations in America, said, "We'll take a chance," and that's what you did, and O'Connor was a chance. O'Connor said, "I am"—what was her comment, so I don't misspeak—what was her comment?

Ms. SMEAL. My understanding was she was personally opposed.

Ms. NEUBORNE. Personally opposed.

The CHAIRMAN. Yes. So she explicitly said, "I, Sandra Day O'Connor, am personally opposed to abortion," first. I imagine any nominee—we didn't even get Clarence Thomas to say that. Nothing in his record explicitly says that—implicitly—nothing explicitly said that.

Had Clarence Thomas said in any of his writings, "a) I personally oppose abortion," there would be a crescendo that would have occurred—I think.

Ms. NEUBORNE. Senator——

The CHAIRMAN. Let me finish. The reason I mention it is not that that is bad, not that it is good, but that what has happened now is the Court is no longer a pro-choice Court with the possibility of adding an anti-choice nominee, Sandra Day O'Connor. The choice looks like it is an anti-choice Court, or about to be firmly an anti-choice court, and now the threshold is raised. And that is part of the process I think the American public doesn't understand—not that they agree or disagree with it—doesn't understand and that we, in terms of process, have not accurately articulated.

You would not, I suspect, Eleanor, or Ms. Smeal—I doubt whether the nominee—if the Court were exactly like it is now in terms of its make-up ideologically, and Sandra Day O'Connor came before us now, I would be very surprised if you would be here to testify on her behalf, her having said under oath, "I am opposed personally to abortion," and her then refusing, as she did, to answer any questions about *Roe* v. *Wade*. I suspect you all would be here saying as much as we want a woman on the court—no—or am I wrong?

Yes, Harriet.

Ms. WOODS. Senator, let me just jump in, because I know of jurists with records who would probably say "I am personally opposed" but who have, in the way they have administered justice, or in their cases in any number of issues, demonstrated a record where they approached those cases in a way to look at past law,

the precedent, the situation in society, the impact—I really don't know in the case of this Wichita judge what he stands for or what he doesn't, but in effect he said is "Whatever my personal belief, I am here to follow precedent and to follow what the rule of law is, the Federal law."

So I want to be very careful. I think it might very well be that personally, I could not stand before you and support anyone who said, "I am opposed," but I might very well, if that person had a record of showing their ability and were honest—that's the issue—here is somebody, when this is one of the greatest issues of our time, and he won't even say that he has thought about it. I mean, that——

The CHAIRMAN. I was trying not to focus this on Clarence Thomas. I was trying to focus on the process——

Ms. WOODS. I understand that.

The CHAIRMAN [continuing]. And maybe we should leave it for another hearing.

Ms. NEUBORNE. There is a process question. Can I make one comment on the process?

The CHAIRMAN. You can always make another comment.

Ms. NEUBORNE. The issue of separation of powers is something we have discussed a little, and I think that's a very important thing to look at. If in fact the President has the power to stack the court, to have an ideological court, and he has the veto power to stop Congress from trying to change what that court has done——

The CHAIRMAN. No question about it.

Ms. NEUBORNE. Look at the civil rights legislation and why it has been vetoed——

The CHAIRMAN. I am going to cut you off, because I don't disagree with that.

Ms. NEUBORNE. All right.

The CHAIRMAN. That wasn't the purpose of my question. I was just trying to find out whether the threshold is changing.

Let me leave you all with the following concern. Beware of being too critical of the notion of natural law, for if you are too critical of the notion of natural law, you will find it incredibly more difficult to find the notion of unenumerated rights within the Constitution, and you may find you have to swallow a concern that I don't think you may have thought through. And there is all kinds of natural law, but if you blanketly criticize the notion of natural law being any part of our historical and constitutional tradition, then I challenge you to find where you are going to find unenumerated rights, the very things that are the essence of what you believe most deeply in, for if there are no unenumerated rights, there is no privacy and there is no choice.

Because you look like you have the microphone, Ms. Yard, you will have the last word, including myself; no one else speaks. What would you like to say?

Ms. YARD. I just want to say, Senator Biden, I can't believe you are asking the question you are asking, because of course we aren't going to put on the court someone whom we believe will vote to overturn *Roe* v. *Wade*. We are talking about women's lives.

The CHAIRMAN. I know.

Ms. YARD. We don't take it that lightly. We can't, we can't possibly. That's our concern.

The CHAIRMAN. I appreciate that, and all I can say is I hope you or no one else thinks I or anyone else up here takes it lightly, because I don't.

Ms. YARD. I am sure you don't.

The CHAIRMAN. Anyway, thank you very, very much for your testimony.

Senator SIMPSON. Mr. Chairman.

Ms. YARD. Senator Biden, Senator Simpson reminded me of the altercation we had, and I wanted to say that when we came up here, I was very disappointed that Senator Thurmond wasn't there, because of all the days I would have been happy to have been greeted as "a lovely lady," today would have been one of them—but he wasn't there to do it. [Laughter.]

The CHAIRMAN. I think he did—well—[Laughter.]

Senator THURMOND. Well, as far as I'm concerned, you're all lovely ladies. [Laughter.]

The CHAIRMAN. With that, don't you think it's time we leave?

Senator SIMPSON. Mr. Chairman.

The CHAIRMAN. I think we're ahead, Al.

Senator SIMPSON. No, I don't.

The CHAIRMAN. I don't mean "we"; I mean the process.

Senator SIMPSON. No—I think that this is great for the process, and I thought what you just said was excellent. And when Senator Specter related the history of the questioning, I think another part of it, if I might put it in the record, is relating to the kind of questions which should be answered, and it was my colleague from Massachusetts who said it eloquently at the time of the hearing of Thurgood Marshall, when Ted said, "It is my belief"—this is our colleague, and I enjoy him thoroughly; we don't agree on a lot of things, and we enjoy facing off—but he said,

> It is my belief that it is our responsibility as members of the committee to which the recommendation has been made by the President in advising and consenting that we are challenged to ascertain the qualifications and the training and the experience and the judgment of the nominee, and that it is not our responsibility to test out the particular philosophy, whether we agree or disagree, but his own good judgment, and being assured of this good judgment, that we have the responsibility to indicate our approval or, if we are not satisfied, our disapproval.

Now, that's what we have to do here, and it is the way it is, and this chairman does it beautifully, and there is no other way to describe it. It just doesn't happen to hit your end of the spectrum this trip, and we have members here—Judge Heflin and Arlen Specter and others who come to listen and to hear the testimony before they make a decision. And I think this is where some of these groups make a tragic mistake.

If on July 9 or July 6, suddenly they say, "We're going to 'Bork' him; we need to kill him politically"—and those are quotes by people in the movement—and people say his nomination is "an insult to the life and legacy of Thurgood Marshall and everything that he stood for"—and that's a quotation of your national president—how in the world do you expect us to have the willingness to listen when you have already buried him alive in July, before you have ever heard a word—and that's our job.

The CHAIRMAN. Well, Senator, if I could cut you off there——

Senator SIMPSON. I'm through.

The CHAIRMAN [contining]. And just make the point that it seems to me if you all are not able to say you are against him before you heard the record, then Senators shouldn't here say they are for him before they have heard the record, and all the Senators said we are for him—that's not a problem. So what's good for the goose is good for the gander, and we are finding that the goose changes as time moves.

Thank you all very, very much. I appreciate it.

Ms. YARD. Thank you. Let's hope we're not here next August doing the same thing.

The CHAIRMAN. Believe me, Ms. Yard, I hope I get to see you next August, but I hope it's not at one of these hearings.

Let me move on, and I have received the proper admonition of my colleague from South Carolina that I allowed and encouraged and was part of going beyond the time, and I will try not to let that happen again.

Our next panel, testifying in support of Judge Thomas' nomination includes a group of distinguished professors. I apologize if I sound too familiar with the first names, but this is the list as the White House gave us the list, and it says "Joe"—I don't mean to sound familiar—but Joe Broadus—I don't know whether it is Joseph or Joe and I apologize for the familiarity, but it is the list we were given by the White House—a professor at George Mason Law School in Arlington, VA; James Ellison, a professor at Cumberland Law School, which I have had the great pleasure of speaking at as well, and it is a fine law school, at Samford University in Birmingham, AL; Shelby Steele, a professor at San Jose State University in San Jose, CA; Rodney Smith, Dean of the Capital University Law School in Columbus, OH; and Charles F. Rule, a partner in the law firm of Covington & Burling in Washington, DC.

Welcome to all of you, and professor, if you would begin.

STATEMENTS OF A PANEL CONSISTING OF JOE BROADUS, PROFESSOR, GEORGE MASON LAW SCHOOL, ARLINGTON, VA; JAMES ELLISON, PROFESSOR, CUMBERLAND LAW SCHOOL, BIRMINGHAM, AL; RODNEY SMITH, DEAN, CAPITAL UNIVERSITY LAW SCHOOL, COLUMBUS, OH; AND CHARLES F. RULE, COVINGTON & BURLING, WASHINGTON, DC

Mr. BROADUS. Thank you, Senator.

It is a pleasure to appear here before the committee today, and I thank you for this opportunity. Primarily, I will be giving a report that evaluates two reports that I made on Judge Thomas—one on his performance at the EEOC, and the other on his work as assistant secretary of education at the Office of Civil Rights.

Primarily, these reports were approached by taking earlier reports that were critical of Judge Thomas and attempting to verify their conclusions from the record and going to court cases, going to the records of the EEOC, and going to various others sources to see whether those charges could be confirmed.

In terms of the attitude of my report, I want to tell you that I tried to make a certain kind of decision. I tried to separate out

those issues which could be said to be disputes over prudential issues—that is, issues of policy—whether or not it was good to do (a) or (b), and issues that related to fundamental commitments—fundamental commitments to equal opportunity, fundamental respect for law, and tried to make a decision so that we wouldn't—I believe it would be improper to have an overlap where someone in the executive was merely being punished later, for example, for failing to agree with others on particular approaches rather than for a lack of commitment to law or a lack of commitment to equal opportunity.

I believe that the charges that were made against Judge Thomas and his chairmanship that, for example, he weakened the EEOC, lacked commitment to equal opportunity, that those cannot be supported in the record.

Already over the last few days, you have heard from people who have worked at the EEOC and have personally known Judge Thomas, and you have already heard some of the statistics. You have heard about the problems that that agency had when he came to the agency, and you have heard about the efforts that he made to turn that agency around. You know about the disputes over guidelines and tables, and you also know about the improvement on the administrative side of the agency, and you have been told by other witnesses that if you are going to have equal opportunity, it is not enough to have laws—you must have an efficient and effective agency for carrying out those laws. And the record does support that Judge Thomas worked with innovative ideas.

We have already heard a great deal about the dispute over whether you should have an individual case approach or whether you should try for class action remedies, and we know that that is somewhat misleading because in fact the agency both had record numbers of cases in both categories and record returns in both categories during Judge Thomas' tenure.

The other area that is of interest is Judge Thomas' performance at the Office of Civil Rights, and much of the dispute in this time seems to center from his involvement in something that has already been greatly discussed, and that is the *Adams* litigation. It is significant in *Adams* because the charge that emerges is that Judge Thomas lacked the basic respect for law in his performance or response to the court orders that were issued to establish tables and guidelines for the performance of OCR in the *Adams* litigation.

I think in reviewing this there has been to a certain extent a certain amount of misrepresentation of the posture of that case and of Judge Thomas' response to it. We know already that he was not the initial party who was charged in the motion to show cause. What hasn't been quite made as clear is that there were kind of conflicting motions—one to show cause, and the other one was to modify the order that the court had. And we know that ultimately this order trying to find the Government, trying to find Judge Thomas in contempt, was held to be premature. That is, he hadn't been in office long enough for the judge to decide that you could make a decision on this.

So I would think that there is nothing in that kind of performance that would establish that the judge behaved in a reckless

manner or showed disregard or disrespect for the law, which is the more serious charge that grows out of this litigation.

But what hasn't further been discussed is the ultimate outcome of that case, and that outcome was a determination that it was in fact the court itself which had exceeded its jurisdiction in attempting to impose those guidelines. So we have there a case where what really happens is that there is a conflict over what is the proper role of the judiciary and the executive which is ultimately resolved for the executive, but a great deal of bitterness, which is turned into a kind of personal vendetta against the judge and which is largely unjustified.

Thank you.

Senator SIMON [presiding]. We thank you, Professor Broadus.

Professor Ellison.

STATEMENT OF JAMES ELLISON

Mr. ELLISON. Mr. Chairman, I would like to thank you for giving me the opportunity to state my reasons for supporting the confirmation of Judge Clarence Thomas as an Associate Justice of the U.S. Supreme Court.

My name is W. James Ellison. I am a professor of law at the Cumberland School of Law, Samford University, Birmingham, AL. I am also cochairman of Alabama Citizens Committee to Confirm Clarence Thomas and of Alabama Attorneys to Confirm Clarence Thomas.

I would like to limit my remarks to a brief statement in support of Clarence Thomas' concerns about affirmative action policies which permit and encourage race-norming tests and gender and race-based preferences and quotas.

As currently engaged in, race-norming tests and gender and race-based preferences and quotas have three incontrovertible characteristics. The first of these is that they discriminate against white males in favor of ethnically identifiable minorities and in favor of white females who have had themselves legislatively declared a disadvantaged class.

It seems to me that the same constitutional standards which prohibit discrimination against African-Americans solely because of the color of their skin prohibit similar discrimination against white American males.

Today, racially discriminatory attitudes and practices cause much pain and suffering, but we cannot end discrimination against one class of Americans by discriminating against another class of Americans. Instead of gender or race-based remedies, corporate and individual wrongdoers should be held accountable for their discriminatory conduct under existing traditional civil law remedies. After proving discrimination in a court of law, a plaintiff should be awarded actual damages, attorney fees, and significant punitive damages. Each individual plaintiff would, in essence, act as a private attorney general.

Second, race-norming tests and gender and race-based preferences and quotas are premised on the proposition that their beneficiaries are intellectually inferior to white males or are otherwise

unqualified to succeed on their own merit. Nothing could be further from the truth.

Race-norming tests and gender and race-based preference and quota policies are at odds with the original intent of African-American civil rights movement. For hundreds of years, we African-Americans had never asked for or demanded anything that had the effect of making us appear less than equal to any man or any woman.

The original civil rights movement never asked for special treatment from the State or the private sector. What we demanded was the right to educate ourselves and our children, to work at jobs commensurate with our skills and talents, to market our ideas, to practice our faith, to vote, to live in decent housing without interference from the State. We wanted the right to dream.

The thought of entering America's marketplace and institutions predicated on race-norming tests and gender and race-based preferences and quotas were then and are now repugnant concepts which have no place in a free society. The original intent and goals of the African-American civil rights movement was a demand for equality of opportunity. We demanded an even playing field where we could compete as equals.

In Rock Hill, SC, where I grew up, we were taught from a very young age that we had to be twice as smart as our white counterparts in order to get a good job. We never doubted our ability to compete. The idea that we needed special dispensation on tests, that we needed special preferences and quotas because we were intellectually inferior or could not otherwise compete were concepts unknown to our psyches.

Third, policies supporting and promoting race-norming tests and gender and race-based preferences and quotas require a perpetual class of victims and a perpetual class of villains. Too many Americans have become psychologically and emotionally dependent on these policies. This, in turn, has promoted their intellectual decline and their will to take responsibility for their own successes or failures. These policies have promoted and aggregated the ethnic and gender tensions they were intended to eradicate.

Civil rights groups should be applauding instead of criticizing Clarence Thomas for his opposition to race-norming tests and race and gender-based preferences and quotas. Thomas should be praised for his effort to return African America to the original goals and intent of our civil rights movement.

Clarence Thomas' life personifies the very best that America has to offer—his hard work, intellectual competence, and independence are what raised him from the cotton fields of a segregated Georgia to a seat on the U.S. court of appeals, and hopefully will elevate him to the U.S. Supreme Court.

Mr. Chairman, that concludes my prepared remarks. May I submit an extended statement for the record?

Senator SIMON. The full statements will be entered in the record, and I appreciate your abbreviating your remarks to try and stay within the 5-minute rule.

[The prepared statement of Mr. Ellison follows:]

STATEMENT

OF

W. JAMES ELLISON[1]

IN SUPPORT OF THE CONFIRMATION OF CLARENCE THOMAS AS

A JUSTICE ON THE UNITED STATES SUPREME COURT

UNITED STATES SENATE JUDICIARY COMMITTEE

September 20, 1991

Mr. Chairman, I would like to thank you for giving me the opportunity to state my reasons for supporting the confirmation of Judge Clarence Thomas as a Justice of the United States Supreme Court.

My name is W. James Ellison. I am a professor of law at the Cumberland School of Law, Samford University, Birmingham, Alabama. I am Co-Chairman of Alabama Citizens Committee To Confirm Clarence Thomas and of Alabama Attorneys To Confirm Clarence Thomas.

As an African-American, I am here also on behalf of the vast majority of African-Americans who support Clarence Thomas, those who picked cotton from sun-up to sun-down; who marched in the civil rights movement when it was a deadly enterprise; who watched our churches and homes bombed and leaders murdered; who attended inferior and underfunded schools; who took the best and the worst that America had

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[1]Professor of Law, Cumberland School of Law, Samford University, 800 Lakeshore Drive, Birmingham, Alabama 35229, Telephone 205/870-2403; B.A., Rutgers College, Rutgers, The State University of New Jersey, 1974; J.D., The University of Michigan School of Law, 1977. Professor Ellison is a former Assistant United States Attorney, serving in the Carter and Reagan administrations. Professor Ellison teaches primarily in the area of constitutional criminal procedure and substantive criminal law. Professor Ellison is Co-Chairman of Alabama Citizens Committee To Confirm Clarence Thomas and of Alabama Attorneys To Confirm Clarence Thomas.

to offer and still believed in the idea of America: those Americans who still demand the right to compete as equals, and on no other basis, in America's market place of ideas and services.

Much has been said and written about Judge Thomas, his humble background, his political activity as a member of President Ronald Reagan's administration, and his testimony before this Committee. In the hope of not being unduly redundant I would like to limit my regards to a brief statement in support of Judge Thomas' concerns about affirmative action policies which permit and encourage race norming tests, and gender and race based preferences and quotas. As currently engaged in, race norming tests, and gender and race based preferences and quotas have three incontrovertible characteristics.

The first of these is that they discriminate against white males in favor of ethnically identifiable minorities, and in favor of white females who have had themselves legislatively declared a disadvantaged class. It seems to me that the same constitutional standards which prohibits discrimination against African-Americans, solely because of the color of their skin, prohibits similar discrimination against white American males. Today, racial and gender discriminatory attitudes and practices cause much pain and suffering. But we can not end discrimination against one class of Americans by discriminating against another class of Americans. Each corporate or individual wrongdoer should be held accountable for their discriminatory conduct under existing traditional civil law remedies. After proving discrimination in a court of law, a plaintiff should be awarded actual damages, attorney fees, and significant punitive damages. Each individual plaintiff would, in essence act as a private attorney general.

Second, race norming tests, and gender and race based preferences and quotas are premised on the proposition that their beneficiaries are intellectually inferior to white males, or are otherwise unqualified to succeed on their own merit. Nothing could be further from the truth. Race norming tests, and gender and race based preference and quota policies are at odds with the original intent of the African-American civil rights movement. For hundreds of years we African-Americans had never asked for or demanded anything that had the effect of making us appear less than the equal of any man or woman. The original civil rights movement never asked for special treatment from the State or the private sector. What we demanded was the right to educate ourselves and our children, to work at jobs commensurate with our skills and talents, to market our ideas, to practice our faiths, to vote, and to live in decent housing without interference from the State. We wanted the right to dream. The thought of entering America's market place and institutions predicated on race norming tests, and gender and race based preferences and quotas were then and are now repugnant concepts, which have no place in a free society. The original intent and goal of the African-American civil rights movement was a demand for *equality of opportunity*. We demanded an even playing field so we could compete as equals. In South Carolina, where I grew up, we were taught from a young age that we had to be twice as smart as our white counterparts in order to get a good job. We never doubted our ability to compete. The ideal that we needed special dispensation on tests, that we needed racial preferences

and quotas because we were intellectually inferior or could not otherwise compete were concepts unknown to our psyches.

Third, policies supporting and promoting race norming tests, and gender and race based preferences and quotas require a perpetual class of victims and a perpetual class of villains. Too many Americans have become dependent on these polices. This in turn has promoted their intellectual decline and their will to take responsibility for their success or failure. These policies have promoted and aggravated the ethnic and gender tensions they were intended to eradicate.

The mentality behind race norming tests, preferences, and quotas have caused too many of our children to believe that the State, society, and even their own families owe them something, simply because they happen to be here. Nothing could be further from the truth. There are no free lunches; someone always pays. The proper role of the State is to provide each citizen with *equality of opportunity* to be educated, to use and market her intellectual skills and talents, and to otherwise stay off the backs of its citizens and commerce. Government programs that go beyond providing *equality of opportunity* have and will continue to fail. These programs are contrary to the idea of America. In the end each of us succeeds as a direct result of a personal and individual decision not to fail. The best our families, our friends, and the State can do for us is to ensure that we be allowed to complete on an even playing field. No one can give us success. We have to work for it. We have to earn it.

Our mothers and fathers did not suffer the many indignities of second class citizenship so we might declare in 1991, to the world and to our children, that we African-Americans need race norming tests, preferences, quotas, and welfare to survive, that we cannot compete because we are intellectually or otherwise inferior to other American groups. Look at our best and our brightest at Spelman College, Florida A & M, Hampton, Fisk, and Tuskegee Universities, and Morehouse College. We African-Americans have genius all around us at colleges and universities all over America. As slaves, we African-Americans sought to educate ourselves when the punishment for doing so was death. We educated ourselves when the States gave us inferior schools and substandard learning materials. We educated ourselves even though we were not allowed to market our ideas and services. We took pride in our achievements. No matter what, we had our self-respect and dignity as a people. We were poor, but we did not steal from each other. We left the doors and windows of our homes unlocked. We suffered State and social oppression, but we kept our faith in God, in ourselves, and in the idea of America. We made America rethink the possibility of living up to its human potential.

We African-Americans survive the most brutal experiences of America's racism -- slavery, reconstruction, and segregation. We survived and prospered. Racism is not our problem. Racism is the problem of the person having a racist point of view. At some point we must bury the psychological wounds of our enslavement and segregation and get on with our lives. Victims of past and present discrimination, should never forget the historical experience and lessons to be learned such suffering and pain. But we who

have survived have no excuse or right to burden our children with the negatives psychological baggage of our past, or to let our children use racism or gender discrimination as excuses for failing a mathematics or science course.

A preference or quota which appears to aid a class of persons today may discriminate against them tomorrow. Imagine the reaction in the year 2001 of a person, who has earned her place in society, to the news that her child will not be admitted into a certain school or employed at a certain job because the quota for the child's race, gender, or class has been filled. Orientals and Jews are now complaining that they are denied entrance into and employment at certain schools because of racial and ethnic quotas in favor of white males. We African-Americans will find ourselves making similar complains if a quota mentality continue to dominate America's civil rights movement. Instead of fighting over perceived limit resources and opportunities, we Americans need to stop fighting each other, and get on with the business of producing more than we consume so their will always be an abundance of opportunity for all of us. Entrance into schools and into employment should be earned on the basis of race and gender neutral standards, not granted solely on the basis of person's race or sex.

Civil rights groups should be applauding, instead of criticizing Clarence Thomas for his opposition to race norming tests, and race and gender based preferences and quotas. Thomas should be praised for his efforts to return African-America to the original goals and intent of our civil rights movement.

Clarence Thomas' life and works personify the very best that America has to offer. His hard work, intellectual competence, and independence are what raised him from the cotton fields of a segregated Georgia to a seat on the United States Court of Appeals. Clarence Thomas' life personifies the very essence of America. Clarence Thomas is the true role model for all African-Americans who dream that one day we will be judged by the contents of our character instead of racist myths associated with the color of our skin.

Mr. Chairman, that concludes my prepared remarks, may I submit a written statement of my remarks, including a statement on the confirmation process, into to record of these proceedings.

Senator SIMON. Mr. Smith, we are happy to have you here, and let me add a personal note. Some years ago, I spoke at a commencement at Capital University and they, in a moment of weakness, gave me an honorary doctorate, so I can even claim to be an alumnus of Capital University. It is a pleasure to have you here, dean.

STATEMENT OF RODNEY SMITH

Mr. SMITH. Thank you, Senator Simon. My name is Rodney K. Smith. I am dean and professor of law at Capital University Law and Graduate Center in Columbus, OH. As one who has primarily written in the area of religious liberty, I am persuaded that, if confirmed, Judge Thomas will be sensitive to issues of religious liberty as they arise in the United States.

There are two types of conservatives in America today. Traditional conservatives are those who are committed to limited government. These conservatives are concerned with liberty, believing, as Madison recognized, that the Court and all branches of government should take an active role in protecting rights.

Another type of conservative, however, which developed in part as a response to judicial activity in the area of rights of criminal defendants and the right of privacy as applied to the abortion issue have come to espouse a broad theory of judicial restraint.

In refusing to scrutinize the acts of the democratic branches of government, particularly when those acts may implicate rights, these newer conservatives often find themselves supporting big government. Few individuals espouse a pure version of either brand of conservatism.

An important question, I believe, for this committee is which view is held by Judge Thomas. To answer that question, one must examine both Judge Thomas' theory of precedent and his theory of constitutional interpretation. Any Supreme Court Justice should develop both a theory of precedent—how he or she treats existing precedent—and a theory of constitutional interpretation—the methodology that he or she uses to interpret or examine constitutional issues.

Theories of precedent fall along a continuum between two views: First, the view that a Justice is bound only by the decision in a case as it relates to the particular facts of that case; or, second, the view that a Justice is bound both by the particular decision and by the doctrine espoused by the majority in prior case law.

The view that the Justice is only bound by the decision in a particular case provides very broad latitude or discretion in future cases. The view that a Justice is bound by principles articulated in the prior case, however, is more effective in limiting a Justice's discretion.

While few Justices adhere to either of these views in the extreme, a Justice should develop some theory regarding precedent. Theories of precedent are related to theories of constitutional interpretation. A theory of constitutional interpretation provides a methodology for approaching constitutional analysis.

The dialogue fostered by the debate over originalism, the use of the intent of the framers and ratifiers in constitutional analysis

versus nonoriginalism, the use of other methodologies that rely on other items has been rich and has helped focus attention on theories of constitutional interpretation.

A theory of constitutional interpretation limits the subjective policy preferences of a Justice and legitimizes the independence of the Court. Even originalism, with its reliance on text and history, rarely yields a clear-cut answer in significant cases. At best, it provides parameters, a canvas upon which the Court may legitimately do its work. It rarely dictates, although it often limits constitutional choices. Like theories of precedent, theories of constitutional analysis, however well developed, rarely yield automatic answers to constitutional issues.

In his writing, with emphasis on the role of the Declaration of Independence and natural rights, Judge Thomas placed himself on the side of the more libertarian strand of conservatism. He has stated that, "Natural rights arguments are the best defense of liberty and of limited government."

He has argued for restraint as well, stating that, "Without recourse to higher law, we abandon our best defense of judicial review, a judiciary active in defending the Constitution, but judicious in its restraint and moderation."

During the course of the hearings, Judge Thomas reiterated his commitment to a fairly stringent theory of precedent. He recognizes the binding authority of the specific holding in cases and the general doctrine elucidated in those cases. For example, he has noted his general support of the *Lemon* test, a test used in establishment clause decisions.

Appropriately, however, Judge Thomas recognizes that the three-part *Lemon* test presents difficulties. Nevertheless, as demonstrated by his general acceptance of *Lemon,* he is willing to go beyond the mere holding in a case to general endorsement of the doctrines underpinning those decisions. His theory of precedent should be of comfort to those who are fearful that his personal policy predilections might dictate how he decides future cases.

Even a fairly stringent theory of precedent like that espoused by Judge Thomas, however, cannot be determined a decision in every case. Case law operates interstitially, leaving gaps even for those who closely follow precedent. Those gaps must be filled in subsequent cases.

Senator SIMON. If you could conclude your remarks?

Mr. SMITH. I will conclude by saying that it is my sense that Judge Thomas, in cases like *Oregon* v. *Smith* and in cases dealing with the establishment clause, will take a liberty-maximizing approach. I think that he is an apt and appropriate candidate to be a Justice on the Supreme Court and will make a meaningful contribution in the interests of religious liberty well into the 21st century.

Thank you.

[The prepared statement of Mr. Smith follows:]

TESTIMONY OF RODNEY K. SMITH
BEFORE THE SENATE JUDICIARY COMMITTEE
ON THE NOMINATION OF CLARENCE THOMAS
TO BE AN ASSOCIATE JUSTICE
OF THE UNITED STATES SUPREME COURT
September 20, 1991

Chairman Biden and Members of the Committee, my name is Rodney K. Smith. I am Dean and Professor of Law at the Capital University Law and Graduate Center in Columbus, Ohio. I am honored to have been asked to offer this testimony in support of the confirmation of Judge Clarence Thomas as an Associate Justice on the United States Supreme Court.

I do not know Judge Thomas personally. I do have some familiarity with his writing and testimony, however, and I believe that he will be a force for liberty and equality on the Court. As one who has primarily written in the area of the religion provision of the First Amendment, I am persuaded that, if confirmed, Justice Thomas will be sensitive to issues of religious liberty as they arise in the United States.

To explain why I believe that Judge Thomas will be a positive voice for liberty on the Court, I will divide this testimony into the following parts: Part I will examine two versions of "conservatism" extant in American political and legal thought; Part II will examine the distinction between theories of precedent and Constitutional interpretation; Part III will examine Judge Thomas'

theories of precedent and constitutional interpretation and will support the proposition that Judge Thomas is well within the mainstream of Constitutional thought in American legal thought; Part IV will examine issues related to religious liberty; and, Part V will serve as a conclusion and summary.

I

There are two somewhat divergent types of conservatives in American today. Traditional conservatives are those who are committed to limited government. These conservatives are more libertarian in nature, believing, as Madison recognized, that the Court and all branches of government should take an active role in protecting human rights. Another type of conservative, however, which developed largely as a response to judicial activity in the area of rights of criminal defendants and the right of privacy as applied to the abortion issue, have come to espouse a broad theory of judicial restraint. This theory has sometimes been criticized as being too deferential to the power of government. In refusing to scrutinize the acts of the democratic branches of government, particularly when those acts may implicate human rights, these newer conservatives often find themselves supporting "big" (or at least bigger) government. Such support of government action, the action of the democratic branches of government, is anathema to more traditional conservatives. These two brands of conservatism might well be placed at ends of a continuum and often are a source of tension among "conservatives." Of course, few individuals

espouse a pure version of either brand of conservatism -- most individuals fall somewhere between the two ends of the continuum. An important question, I believe, for this Committee is where on the continuum Judge Thomas falls. Before that issue can be effectively explored, however, one must examine both Judge Thomas' theory of precedent and his theory of constitutional interpretation.

II

Any Supreme Court Justice should develop both a theory of precedent -- how he or she treats existing precedent -- and a theory of constitutional interpretation -- the methodology that he or she uses to interpret or examine constitutional issues. Theories of precedent fall along a continuum between two somewhat ill-defined categories: (1) the view that a Justice is bound only by the decision in a case as it relates to the particular facts of that case; or (2) the view that a Justice is bound both by the particular decision and by the analysis or theory (the principle(s), if you will) espoused by the majority in prior case law. Given that the facts of a case are rarely replicated in precisely the same manner in a subsequent case, the view that the Justice is only bound by the decision in a particular case provides him or her with very broad latitude or discretion in future cases. The view that a Justice is bound by the principles articulated in the prior case, however, is more effective in limiting a Justice's discretion. While few Justices adhere to either of these views in

the extreme, a Justice should develop some theory regarding precedent over time.

Theories of precedent, however, are related to theories of constitutional interpretation. Indeed, a theory of constitutional interpretation may well include or dictate a theory of precedent. It helps, however, to look at theories of precedent and constitutional interpretation separately. As an aside, it is worth noting that I know of no Justice, with the possible exception of Justice Felix Frankfurter, who came to the Court with a refined theory of precedent or constitutional interpretation.

A theory of constitutional interpretation provides a methodology for approaching and organizing constitutional analysis. The dialogue fostered by the debate over originalism (the use of the intent of the framers and ratifiers in constitutional analysis) versus nonoriginalism or the use of other methodologies of constitutional analysis that rely on items other than or in addition to textual and other evidence of the intent of the framers and ratifiers, has been rich and has helped focus attention on theories of constitutional interpretation. A theory of constitutional analysis or interpretation limits the purely subjective policy preferences of a Justice and helps to legitimize the independence of the Court.

Originalism as a theory of constitutional interpretation, like textualism, rarely yields a clear-cut answer in significant cases that come before the Court. Indeed, I have argued that, at best, it provides parameters -- a canvas upon which the Court may

legitimately do its work -- and rarely dictates (although it often limits) constitutional choices. Like theories of precedent, theories of constitutional analysis, however well developed, rarely yield automatic answers to pressing constitutional issues. It is little wonder, therefore, that the Committee rightfully spends as much time as it does trying to get a sense of a potential Justice's temperament and character.

III

The Committee has heard much during the course of the hearings regarding the character and temperament of Judge Thomas. The Committee, and thanks to television, the public at large, have been able to get a sense of Judge Thomas' sensitivity and humanity. Not knowing Judge Thomas, I can add little to the discussion regarding his character. I can, however, add some analysis regarding his temperament, as it has manifested itself in his writing and testimony.

In his writing, with his emphasis on the role of the Declaration of Independence and natural rights, Judge Thomas placed himself on the side of the traditional (more libertarian) strand of conservatism. For example, he has stated that "natural rights...arguments are the best defense of liberty and of limited government." He has, however, argued for restraint, as well: "[W]ithout recourse to higher law, we abandon our best defense of judicial review -- a judiciary active in defending the Constitution, but judicious in its restraint and moderation.

Rather than being a justification of the worst type of judicial activism, higher law is the only alternative to willfulness of both run-amok majorities and run-amok judges."

At first blush, it is difficult to understand how Judge Thomas can combine notions of restraint with his libertarian leanings. A look at how restraint and libertarian notions potentially impact Judge Thomas' theories of precedent and constitutional interpretation will be helpful.

During the course of the hearings, Judge Thomas has reiterated his commitment to a fairly stringent theory of precedent. He is willing to recognize the binding authority of the holding or decision in cases and the general doctrine or principles elucidated in those cases. For example, he has noted his support of the Lemon test, a test used in establishment clause decisions. Thus, he is willing to go beyond the mere holding in a case, as it relates to particular facts, to general endorsement of the doctrines underpinning those decisions. In this regard, his theory of precedent should be of comfort to those who are fearful that his personal policy predictions might dictate how he decides future cases. Of course, even a fairly stringent theory of precedent, like that espoused by Judge Thomas, cannot predetermine the decision in every case. Law operates only interstitially, leaving gaps even for those who closely follow precedent. Those gaps must be filled in subsequent cases. Thus, while Judge Thomas has a restrained theory of precedent, that restraint does not determine the "correct" decision in each new case.

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How Judge Thomas fills those gaps will in significant part be dictated by his developing theory of constitutional interpretation. His theory of constitutional interpretation, at least as to cases implicating individual rights, has its roots in the Declaration of Independence. In his words, "the Constitution is a logical extension of the principles of the Declaration of Independence." It is at this point in his analytic matrix that Judge Thomas may potentially take a libertarian turn. If precedent permits a libertarian or liberty-maximizing result, Judge Thomas may be inclined to support the libertarian rendering. Indeed, he may justifiably conclude that the aspiration of liberty and equality espoused by the founders directs that such a route be taken. As one who believes that such a course is appropriate and needed on the Court, I am heartened by the concern for liberty and equality expressed in Judge Thomas' writing.

At any rate, it is clear that Judge Thomas is in the mainstream in terms of his theory of precedent and his theory of constitutional interpretation. He may, however, be somewhat less "restrained" than some of the Justices currently serving on the Court. This would provide some welcome moderation on the Court -- an intellectual moderation that would be complemented well by his social and educational background. A look at the way in which Judge Thomas might decide cases in the area of religious liberty will be helpful in demonstrating the preceding points.

IV

With the Supreme Court's fairly recent decision in Employment Division v. Smith, in which the Court held that the free exercise clause of the First Amendment did not protect a person's religiously motivated use of peyote from the reach of a state's general criminal law prohibition, much concern for the status of religious liberty has been expressed by those who believe that the freedom of conscience should be protected against general government limitation.

Given Judge Thomas' theory of precedent, it is fairly clear that he would reluctantly (I suspect) accept the Court's decision. To the extent that the precedent or established doctrine did not dictate the decision in a future case, however, Judge Thomas might well argue for a more libertarian decision. Given the tenor of politics in America today, it is doubtful that anyone appointed to the Court would espouse a view more congenial to individual liberty than Judge Thomas. His form of moderate conservatism is more traditional or libertarian than many of the current members of the Court, his personal experience and background imply a sensitivity to individuals and minorities, and his writings are heartening. He is in the mainstream of American jurisprudence, but where permitted to do so in light of the constraints of his theory of precedent, Judge Thomas will no doubt take a welcome libertarian approach to issues.

V

Judge Thomas should be confirmed. As one who has examined past confirmation hearings and the constitutional theories espoused by the various nominees, I am convinced that Judge Thomas is a fine nominee. When able to do so, I suspect he will find ways to keep the spirit of the Declaration of Independence alive in our constitutional jurisprudence. His own independence and his written, consistent commitment to the liberty and equality of others will, in all likelihood, benefit the American people well into the Twenty-first Century.

An important aside -- a footnote to an academic like myself -- is in order. I have long felt that Congress should be more aggressive in furthering human rights. Courts can only work on a piecemeal basis -- addressing one case at a time, at great cost to the litigants. Congress, on the other hand, can fill broad gaps, as it did with civil rights legislation. Regardless of whether or not I am correct when I conclude that Judge Thomas will bring a respect for rights to the Court, the Court itself will not be significantly libertarian. Thomas Jefferson argued that each branch of government should work to protect the rights of the American people. Congress should not abdicate the responsibility for respecting rights to the Court; the courage necessary to protect against the tyranny of the majority must be mustered by members of the majoritarian branches of government as well as by members of the judiciary.

Thank you.

Senator SIMON. Thank you.
Mr. Rule.

STATEMENT OF CHARLES F. RULE

Mr. RULE. Thank you, Mr. Chairman, members of the committee. My name is Charles F. Rule and I am a partner at the Washington law firm of Covington and Burling. It is an honor to appear here before you today on behalf of myself and for my colleagues—Tom Christina, Deborah Garza, Michael Socarras, and Jim Tennies.

At the request of the Washington Legal Foundation, the five of us prepared a report analyzing the professional background, judicial opinions, and published statements on natural law of Judge Clarence Thomas. Our report was completed before the commencement of this committee's current hearings and was published on September 10 of this year. The report concludes that Judge Thomas is eminently qualified to serve on the Supreme Court.

Mr. Chairman, on behalf of the Washington Legal Foundation, I ask that our report be included in its entirety in the record.

Senator SIMON. It will be included in the record.

Mr. RULE. Thank you.

[The information referred to follows:]

JUDGE CLARENCE THOMAS'S PROFESSIONAL BACKGROUND, JUDICIAL OPINIONS, AND STATEMENTS ON NATURAL LAW

A Report Prepared for the
Washington Legal Foundation

September 10, 1991

Charles F. Rule, Esq.
Thomas M. Christina, Esq.
Deborah A. Garza, Esq.
Michael P. Socarras, Esq.
F. James Tennies, Esq.

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INTRODUCTION AND EXECUTIVE SUMMARY

At the request of the Washington Legal Foundation, the undersigned lawyers of Covington & Burling have undertaken the following study of Judge Clarence Thomas's qualifications to serve as an Associate Justice of the United States Supreme Court. While we have examined what we regard as the pertinent aspects of Judge Thomas's educational background, his career prior to his appointment to the United States Court of Appeals for the District of Columbia Circuit (hereinafter "D.C. Circuit"), his speeches, and his scholarly articles, we have devoted most of our analysis to his judicial opinions. We believe that Judge Thomas's judicial record provides the clearest picture of his qualities as a jurist.[1/]

Our conclusions regarding Judge Thomas's personal and professional qualifications (pp. 5-9) may be summarized as follows:

- Judge Thomas's personal and professional qualifications place him in the first rank of American lawyers and qualify him to be an Associate Justice of the Supreme Court.

1/ Our analysis of Judge Thomas's judicial opinions does not reflect any opinion concerning what is the "correct" outcome in any case, but focuses entirely on objective criteria -- e.g., the ability to master and apply complex bodies of law, clarity and persuasiveness of writing, appropriate deference to the constitutional scheme of separation of powers. In addition, we have refrained from commenting on the merits of any cases in which Covington & Burling appeared as counsel for any party or as amicus curiae. For that reason, we have omitted any discussion of National Treasury Employees Union v. United States, 927 F.2d 1253 (D.C. Cir. 1991) and Cross-Sound Ferry Services, Inc. v. ICC, 934 F.2d 327, 335 (D.C. Cir. 1991). (Thomas, J. concurring).

- In particular, the breadth of Judge Thomas's professional experience -- a career of service in state government and in all three branches of the federal government, as well as in private practice -- indicates that he is likely to see legal issues from a variety of perspectives and will take full account of the diverse interests of the litigants that come before the Court.

- Similarly, the broad range of Judge Thomas's legal experience -- including the law of tax, products liability, antitrust, civil rights, the environment, contracts, and criminal procedure -- indicates that he is amply equipped to decide the full range of cases the Court may be asked to decide.

- The burden of poverty and prejudice Judge Thomas has had to overcome demonstfates his uncommon strength of character and dedication and gives him what will be a unique perspective on the Supreme Court as to how the Court's decisions may affect persons who come from non-privileged backgrounds.

These conclusions are borne out by our study of Judge Thomas's opinions as a Circuit Judge (pp. 10-59). We believe those opinions demonstrate the following points:

- Judge Thomas's opinions reflect his outstanding qualities as a jurist: the ability to master complex areas of the law, clarity of expression, persuasiveness, and dedication to resolving cases on the basis of explicitly articulated rules of law.

- Judge Thomas's decisions are squarely in the mainstream of American law, and do not reflect any ideological or other biases.

- Judge Thomas has promoted the careful and orderly development of the law. His adherence to these goals is most evident in his principled efforts to resolve each case without deciding issues that need not be addressed and to refrain from announcing rules of law broader than necessary to decide the case at hand.

- Judge Thomas's opinions show special respect for the separations of powers provided for by the Constitution. His judicial actions show due regard for established principles of constitutional law and deference to the policy choices committed by law to the Congress and to the administrative agencies.

- Judge Thomas has expressly rejected the notion that judges should substitute their policy preferences for the choices made by the democratically elected branches of the government -- the Congress and the Executive.

- Notwithstanding his principled judicial restraint in matters of congressional and agency policy-making, Judge Thomas has not hesitated to protect the constitutional rights of the individual.

Finally, taking note of speculation by some critics regarding Judge Thomas's reference to natural law in speeches delivered before his nomination to the D.C. Circuit, we have examined his writing on this topic and find no support for any such speculative concern (pp. 60-75). In particular, these writings indicate that:

- Judge Thomas's natural law views are essentially restricted to the traditional opinions of Abraham Lincoln and Dr. Martin Luther King, Jr., regarding racial equality.

- Judge Thomas does not view natural law principles as rules of decision that supplant the language of the Constitution.

- Judge Thomas's thoughts on natural law do not reflect his personal religious views, as some have insinuated and, in fact, his views on natural law render him entirely unlikely to allow his personal views to intrude upon his judicial decision-making.

On the basis of our analysis, we believe Clarence Thomas is exceptionally well qualified for the Office of Associate Justice of the Supreme Court.

I. Judge Thomas's Professional and Personal Qualifications

There is no single career path or background that best qualifies a person to serve as an Associate Justice of the Supreme Court. In the past, Supreme Court Justices have been drawn from the Executive Branch, state courts, lower federal courts, political office, and academia.[1/] It is therefore impossible, as well as undesirable, to generalize about the kind of professional background a nominee for the Supreme Court should have. It is possible, however, to identify personal and professional qualities that are important for a nominee to possess, regardless of the nominee's prior experience, including: strong academic credentials; personal and professional integrity; professional competence and dedication; collegiality; the ability to comprehend and resolve complex issues of statutory and constitutional law and to communicate decisions to the American public and to lower courts with clarity and persuasive force; and an appreciation for the role of the Court in our constitutional system of government. Measured by these standards, Judge Thomas is amply qualified to be an Associate Justice of the Supreme Court.

Especially in light of his age, Judge Thomas's professional qualifications and achievements are by any

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1/ See Abraham, Justices and Presidents (2d ed. 1985), p. 61, Table 3 (hereinafter referred to as "Abraham").

measure impressive.[3/] His experience is remarkably broad both in the substantive areas in which he has practiced and in the variety of positions he has held. Since obtaining his law degree from the Yale Law School in 1974, he has served both in state government and in all three branches of the federal government, including service as chairman of a large independent agency.[4/] He has been intimately involved in

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3/ The American Bar Association Standing Committee on Federal Judiciary (ABA Standing Committee) has concluded the same in rating Judge Thomas as "Qualified" to serve as an Associate Justice. To be rated as "Qualified" by the ABA Standing Committee, a Supreme Court nominee "must be at the top of the legal profession, have outstanding legal ability and wide experience and meet the highest standards of integrity, professional competence and judicial temperament." American Bar Association, Standing Committee on Federal Judiciary: What it is and How it Works 9 (1991).

The ABA's decision to rate Judge Thomas as "Qualified" rather than "Well Qualified" in no way detracts from our conclusions. The ABA also qualified its rating of Justice Sandra Day O'Connor, apparently because the ABA considered her experience on the bench to be less challenging and extensive than that of others the ABA considered as alternative nominees. Abraham at 335. Indeed, the ABA's rating of Judge Thomas is not particularly surprising because the ABA has tended to reserve its highest rating for nominees with longer and more traditional legal experience.

4/ Thomas graduated in honors from Holy Cross College in 1971 and obtained his law Degree from the Yale Law School in 1974. During the next 17 years, he was an Assistant Attorney General for the State of Missouri (1974-77), in-house counsel to the Monsanto Company (1977-79), Legislative Assistant to Sen. John C. Danforth (1979-81), Assistant Secretary for Civil Rights at the U.S. Department of Education (DOE) (1981-82), two-term Chairman of the Equal Employment Opportunity Commission (EEOC) (1982-90), and judge on the D.C. Circuit (1990 to present).

(continued...)

enacting, enforcing, and interpreting legislation. Moreover, he has had the opportunity to understand how the various parts of the federal government interact, and how the government's actions affect its citizens.

Although most of Judge Thomas's career has been devoted to the public sector, for two years he also served as in-house counsel to a Fortune 100 company, advising on a wide range of issues, including issues of tax, contract, antitrust, product liability and environmental law. If confirmed, Judge Thomas's experience in the private sector can contribute a significant practical perspective to the Court's deliberations.

Judge Thomas has had substantial hands-on trial and appellate litigation experience. As Assistant Attorney General for the State of Missouri, he handled criminal appeals before all three State appellate courts and the Missouri Supreme Court. During his tenure in the office of the Missouri Attorney General, he also handled civil trial and appellate litigation for the Missouri Department of Revenue and State Tax Commission. As Chairman of the Equal Employment

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[4/](...continued)
Biographical data referenced in this paper is taken from Judge Thomas' response to the Senate Judiciary Committee's Questionnaire for Judicial Nominees submitted in connection with Judge Thomas' appointment to the D.C. Circuit, reprinted in Confirmation Hearings on Federal Appointments: Hearings Before the Senate Committee on the Judiciary, 101st Cong. 2d Sess. (1990).

Opportunity Commission (EEOC), Judge Thomas played a major role in developing legal positions in matters before the United States Supreme Court and the various federal district and appellate courts.

Judge Thomas also has had substantial administrative and policy-making experience as Missouri Assistant Attorney General (in representing the Missouri Revenue Department and Tax Commission), as Assistant Secretary for Civil Rights at the Department of Education (in proceedings to terminate financial assistance to violators of federal anti-discrimination laws), and as Chairman of the EEOC. He has had substantial responsibility at both the state and federal levels for developing, enforcing, and articulating public policies implementing state and federal legislation.

What makes Judge Thomas's achievements to date even more remarkable -- and also demonstrates his strength of character -- are the well-known poverty and prejudice he overcame in achieving them. It is clear that what Judge Thomas has achieved, he has achieved through uncommon hard work, dedication, and vision.

Finally, concerns about Judge Thomas's youth (he is 43 years old) and the relative brevity of his tenure on the

United States Court of Appeals appear unwarranted in light of the quality and breadth of Judge Thomas's experience.[5/]

[5/] In fact, fourteen Justices were 45 years or younger when appointed, including Justice Douglas (who was 41), Justice Stewart (who was 43), Justice White (who was 45), and Justice Story (who was 32). See Abraham, at 386-391, App. D.

Many of the most highly-respected members of the Court had no prior judicial experience, including most recently Chief Justices Warren and Rehnquist and Associate Justices Goldberg, Fortas and Powell. Seven Associate Justices had three years or less experience on state or federal courts (including Justices Black, Harlan II, and Whittaker), and 14 of the last 25 Justices appointed had less than five years prior judicial experience. See Abraham, at 52, 54-56. According to Justice Frankfurter, in an essay considering the selection of Supreme Court Justices,

> [T]he correlation between prior judicial experience and fitness for the Supreme Court is zero. The significance of the greatest among the Justices who had such experience, Holmes and Cardozo, derived not from that judicial experience but from the fact that they were Holmes and Cardozo. They were thinkers, and more particularly, legal philosophers.

Frankfurter, "The Supreme Court in the Mirror of Justices," 105 University of Pennsylvania Law Review (1957), p. 781, cited in Abraham at 52-53. Justice Sherman Minton, who himself served for eight years on a lower federal court, urged Justice Frankfurter to send a statement of this view, "explod[ing] the myth of prior judicial experience," to "every member of Congress." See Letter from Sherman Minton to Felix Frankfurter, Apr. 18, 1957, Frankfurter Papers, Library of Congress, cited in Abraham, at 52.

II. Judge Thomas's Opinions[5/]

The fact that Judge Thomas has served on the D.C. Circuit, frequently referred to as the second highest court in the land, enables us to draw more specific conclusions about his qualifications to be an Associate Justice. In this section of the paper, we first provide an overview of Clarence Thomas's record as a judge, considering his ability to write clearly and effectively, his ability to develop a consensus with his colleagues on the court, and his principled decision-making (see pp. 11-13). Next, we describe in greater detail his more significant opinions. As our analysis indicates, several admirable strains can be discerned in Judge Thomas's opinions: his commitment to judicial restraint and the orderly development of law (pp. 13-25); his respect for separation of powers and deference to the Constitution, Congress, and the Executive (including administrative agencies) (pp. 26-40); his willingness to uphold society's right to protect itself from criminals, but at the same time his courage to protect the rights of the accused (pp. 41-47); and his capacity to resolve complex issues of commercial law and business regulation (pp. 47-59).

5/ As of September 19, 1991, Judge Thomas has issued twenty published opinions, including seventeen majority opinions, two concurrences, and one dissent. A party has requested Supreme Court review in three of these twenty cases. That court has denied the writs of certiorari in two cases and the request is pending in the third case.

A. Judge Thomas's Qualities as a Jurist

Before turning to particular categories of issues or types of cases, we think it appropriate to note our overall impressions of Judge Thomas's qualities as a jurist, based on his opinions. Chief among these is that his opinions place him squarely in the mainstream of American law, both in the substance of his views and in his approach to legal analysis. On a court known for ideological divisions, one is equally likely to find Judge Thomas agreeing with appointees of President Carter as with Reagan and Bush appointees. Furthermore, of the more than one hundred fifty cases Judge Thomas has heard since joining the D.C. Circuit, he has published a dissent only once and concurred separately only twice. Of the seventeen opinions Judge Thomas has authored, there has been only one dissent and only one separate concurrence.

In addition, as discussed in more detail below, Judge Thomas's opinions reveal a refined ability to resolve complex issues. These qualities are evident regardless of the subject matter of the case: whether the case involves complex issues of civil procedure (for example, when a court should dismiss a suit because a non-party essential to a reasonable resolution of the case cannot be joined, (see Western Maryland

Ry. Co. v. Harbor Ins. Co., 910 F.2d 960 (D.C. Cir. 1990)[7/]) or the interpretation of ambiguous statutory language requiring the court to draw precise distinctions among an array of precedents (see United States v. Long, 905 F.2d 1572 (D.C. Cir. 1990)[8/]).

Finally, each of Judge Thomas's opinions reflects his dedication to deciding cases on the basis of explicit principles. In Long, 905 F.2d at 1578-79, Judge Thomas wrote the following passage that sums up this important aspect of his respect for the legal process and his sense of responsibility to it.

> We decline to decide the case so narrowly, however, as to reveal no principle applicable beyond these facts. The concurrence argues that we should hold only that "[o]n the present facts, the government did not offer evidence of possession or any other evidence that Long had used the firearm." Conc. op. at 1582 (emphasis modified). This analysis, however, begs the central question in the case: was there sufficient evidence to show that Long "used" the gun? The government obviously thought there was. It argued strenuously in this appeal that Long's connection to the drugs and his presence in the room with the gun amounted to "use" of the gun. Deciding whether there was sufficient evidence to support Long's conviction for "using" a gun necessarily entails some decision about what it means to "use" a gun. Despite the

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[7/] Western Maryland Ry. Co., is discussed in greater detail at pp. 48-51, infra.

[8/] The Long opinion is discussed in greater detail at pp. 24-25.

> concurrence's qualms about setting a minimum threshold for finding "use" within the meaning of section 924(c)(1), this case forces us to set such a threshold, either explicitly (as we have done) or implicitly.

As illustrated below, Judge Thomas's dedication to carefully reasoned and carefully explained rules of law is a hallmark of his work as a judge.

B. Judge Thomas Prudently Avoids Deciding Unnecessary Issues, Thereby Permitting the Orderly Development of the Law

All federal judges must be able to weigh competing arguments bearing on narrow points of law fairly and intelligently. As a result of the D.C. Circuit's special role in reviewing the decisions of federal government agencies, a judge sitting on that Court bears the additional responsibilities of promoting the orderly development of administrative law, of ensuring that administrative decisions properly reflect the goals established by Congress, and of protecting the discretion conferred on administrative agencies by the Congress from judicial law-making.

Several cases that came before the D.C. Circuit during Judge Thomas's tenure might have given a judge inclined to rule dramatically on wide-ranging issues legitimate opportunities to do so.[2/] Judge Thomas declined to use these

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2/ See, e.g., Doe v. Sullivan, No. 91-5019, 1991 U.S. App. LEXIS 14,984 (D.C. Cir. July 16, 1991); U.S. v. Shabazz, 933 (continued...)

cases as vehicles for announcing rules of law broader than necessary to decide the issues at hand. Instead, even when the litigants invited far-reaching decisions that might affect a broad class of cases or persons, Judge Thomas exhibited an unwillingness to reach out and decide the issues unnecessarily and instead allowed future courts to address the issues in more appropriate circumstances.

One such case was United States v. Shabazz, 933 F.2d 1029 (D.C. Cir. 1991). The appellants, Shabazz and McNeil, pled guilty to conspiracy to distribute and distribution of Dilaudid pills, a brand name pharmaceutical pain killer that contains a controlled substance, hydromorphone. The specific issue on appeal was whether the length of the appellants' prison sentences should have been calculated based on the gross weight of the Dilaudid pills involved or on the smaller, net weight of the hydromorphone contained in the pills. The resolution of that issue potentially had broad implications for the severity of sentencing in drug cases. Its outcome turned on an interpretation of the United States Sentencing Commission's Guidelines Manual, which provides that the weight of a controlled substance for the purposes of calculating a sentence is "the entire weight of any mixture or substance

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[2/](...continued)
F.2d 1029 (D.C. Cir. 1991); Otis Elevator Co. v. Secretary of Labor, 921 F.2d 1285 (D.C. Cir. 1990).

containing a detectable amount of the controlled substance."[10/]

The issue typically has arisen in disputes concerning the proper weight to be used in connection with blotter paper laced with LSD. Most courts had found that the proper measure was the entire weight of the laced blotter paper because the controlled substance, LSD, was physically inseparable from the paper. In upholding a sentence based on the weight of LSD-laced blotter paper, the Seventh Circuit, for example, noted that it is impossible to "pick a grain of LSD off the surface of the paper."[11/] However, in United States v. Healy, another case involving LSD-laced blotter paper, Judge Gesell of the D.C. District Court rejected the argument that simply because the LSD and blotter paper were physically inseparable, the blotter paper became part of a "mixture or substance."[12/] According to Judge Gesell, two different and separate substances or materials do not become a common "mixture or substance" unless the particles of each

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[10/] United States Sentencing Commission, Guidelines Manual § 2D1.1(c) n.* (Nov. 1990) (emphasis added).

[11/] See United States v. Marshall, 908 F.2d 1312, 1317 (7th Cir.) (en banc), aff'd sub. nom. Chapman v. United States, 111 S. Ct. 119 (1991).

[12/] United States v. Healy, 729 F. Supp. 140, 142 (D.D.C. 1990).

"are more or less evenly diffused among those of the rest."[13/] Under this more restrictive standard, Judge Gesell held that the net weight of the LSD was the proper measure for sentencing purposes.

In Shabazz, the district court judge, purporting to follow the Seventh Circuit's definition of "mixture or substance," determined that Dilaudid tablets are a "mixture," and so based the defendants' sentences on the total weight of the tablets, rather than on the weight of the hydromorphone.[14/] On appeal, Shabazz and McNeil argued that the district court decision had improperly failed to follow the standard in Healy, while the government urged the Court to reject Healy and follow the Seventh Circuit's decision in Marshall.[15/]

Judge Thomas, writing for a unanimous panel, refused to opine whether the definition of "mixture or substance" used by the Seventh Circuit or that used by Judge Gesell was the correct one. Rather, the court concluded that it need not choose between the two approaches because, given the facts presented in Shabazz, the same result would be reached by applying either the Healy or Marshall definitions: the controlled substance hydromorphone was both "inseparable" from

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[13/] Id.

[14/] United States v. Shabazz, 750 F. Supp. 1 (D.D.C. 1990).

[15/] Shabazz, 953 F.2d at 1032.

and "evenly diffused" throughout a Dilaudid tablet.[16] Judge Thomas's opinion upheld the appellants' sentences without attempting to resolve the alleged conflict between Healy and Marshall and without adopting a broad rule that might tend to result in longer sentences in circumstances dissimilar to those present in Shabazz. In addition, because the Supreme Court had already granted certiorari to review Marshall,[17] Judge Thomas properly left the decision to be rendered in a case where the result actually turned on whether the Healy or Marshall definition of "mixture or substance" was chosen.[18]

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[16] Id.

[17] Two days after the court issued Judge Thomas's opinion in Shabazz, the Supreme Court affirmed the Seventh Circuit. See Chapman v. United States, 111 S. Ct. 119 (1991).

[18] In United States v. Rogers, 918 F.2d 207 (D.C. Cir. 1990), Judge Thomas exercised similar restraint when confronted with a dispute concerning the interpretation of 21 U.S.C. § 845a(a), which makes it a federal offense to possess drugs with the intent to distribute them within 1000 feet of a school. The government argued that the statute was violated so long as the drugs were possessed within 1000 feet of a school, even if the defendant intended to distribute them outside the 1000-foot zone. The defendant argued that the statute required the government to prove that he intended to distribute the drugs within the 1000-foot zone. The trial court gave a narrow instruction in accord with the defendant's interpretation of the statute; however, the defendant appealed the conviction on the ground that there was insufficient evidence upon which the jury could have found that he had the requisite intent. Judge Thomas's opinion declined to review the instruction since there was sufficient evidence to support the jury verdict even on the narrower interpretation of the statute employed by the district court and supported by the defendant. Id. at 213-14.

The decision in Otis Elevator Co. v. Secretary of Labor, 921 F.2d 1285 (1990), also illustrates the important practical consequences of Judge Thomas's determination to avoid deciding issues unnecessarily and to focus on the narrow issue actually presented. In Otis Elevator, the D.C. Circuit was called upon to review a determination by the Secretary of Labor that an independent contractor responsible for servicing the underground elevators at a coal mine was subject to the Secretary's regulatory jurisdiction under the Federal Mine Safety and Health Act.[19/] In essence, the case required the Court to determine whether the Secretary had correctly interpreted the scope of her jurisdiction under the Act.

Judge Thomas wrote the opinion for a unanimous court (which included Chief Judge Wald and Judge Sentelle), upholding the Secretary's determination. As a threshold matter, Judge Thomas pointed out that the case arguably raised the issue whether the doctrine of Chevron USA Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), requires courts to defer to an agency's interpretation of its own jurisdiction. On two prior occasions, at least, the D.C. Circuit had declined to decide the question of judicial deference to an agency's interpretation of its own

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19/ Pub. L. No. 95-164, 91 Stat. 1290 (codified as amended at 30 U.S.C. §§ 801-960).

jurisdiction.[20/] In Otis Elevator, Judge Thomas's opinion also declined to decide the issue. Judge Thomas wrote that the Secretary's interpretation in favor of broader mine safety regulation was correct even assuming the Secretary was not entitled to Chevron deference.[21/]

Had the Otis Elevator court not exercised such restraint but instead upheld the Secretary's determination by finding that it was due Chevron deference, the decision effectively would have shielded from judicial review a substantial proportion of decisions by administrative agencies defining their jurisdiction. In addition, as a practical matter, a more activist approach by Judge Thomas and his colleagues would have left jurisdictional conflicts between administrative agencies significantly less susceptible to judicial resolution.[22/] Whether such a profound impact on judicial review of the jurisdiction of administrative agencies is warranted is not only a complex issue, it is also an important one -- one best suited for resolution in a case in

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[20/] See, e.g., Business Roundtable v. SEC, 905 F.2d 406, 408 (D.C. Cir. 1990); Public Utilities Commission v. FERC, 900 F.2d 269, 275 n.5 (D.C. Cir. 1990).

[21/] Otis Elevator, 921 F.2d at 1288.

[22/] As a potential additional result, pursuant to Executive Order 12146, Section 1-401, and 28 C.F.R. Section 0.25, the Attorney General and the Office of Legal Counsel of the Department of Justice arguably would have gained added discretion, beyond the reach of effective judicial oversight, to resolve jurisdictional conflicts between agencies.

which the issue is unavoidable and the ramifications of the resolution are thereby brought into sharp focus for the court.

In the only case in which Judge Thomas has issued a dissenting opinion, Doe v. Sullivan, he did so on the ground that the court should not have reached the merits because the appellants' claims were moot. Doe involved a challenge by an American serviceman participating in Operation Desert Storm (and a derivative claim by his wife) to a Food and Drug Administration ("FDA") regulation that permitted the Department of Defense ("DOD") in certain combat situations to use unapproved experimental drugs on service personnel without their informed consent. The appellants claimed the regulation violated the relevant statute as well as the appellants' constitutional rights.

On January 31, 1991, as Operation Desert Storm continued, the district court dismissed the complaint on the ground that Doe's challenges were not justiciable.[23/] While the dismissal was being appealed, Iraq was defeated, the war ended, and the FDA regulation ceased to have any effect on Doe or anyone else. Accordingly, the government sought to have the appeal dismissed as moot.

The majority of the panel refused to dismiss the appeal as moot because, in their view, there was a reasonable

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[23/] Doe v. Sullivan, 756 F. Supp. 12 (D.D.C. 1991). Alternatively, the Court ruled that the Does' claims lacked merit.

expectation that Doe would be subjected to the same FDA action in the future.[24/] The majority found that it was reasonably likely that international hostilities involving the threatened use of chemical and/or biological weapons might break out and that Doe would still be in the military and would be assigned to combat. The court also disagreed with the district court and held that the appellants' claims were subject to judicial review. However, on the merits, the majority affirmed the dismissal of the complaint.

Judge Thomas dissented on the ground that the end of the Gulf War made the Does' claims moot.[25/] In Judge Thomas's opinion there was "little expectation, much less a reasonable one, that John Doe [would] ever be subjected to the operation of [the regulation] again."[26/] Judge Thomas and the majority judges were in agreement concerning the appropriate legal standard for determining whether the appeal was moot; however, they differed in their assessment of whether the facts met the standard.

As Judge Thomas noted, and the majority agreed, before John Doe would be subjected again to the regulation,

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[24/] Doe, 1991 U.S. App. LEXIS at *18-*27.

[25/] Id. at *41-*51. Judge Thomas therefore did not address the merits of the appellants' claims. The practical effect of Judge Thomas's views was identical to the effect of the majority's opinion: the appellants' complaint would have been dismissed.

[26/] Id. at *47.

six contingencies would have to transpire, including most significantly, the United States would have to be engaged in hostilities involving chemical and biological warfare and John Doe would have to be sent to the front.[27/] Although Judge Thomas disputed that the likelihood of chemical warfare is as significant as the majority claimed, he more significantly indicated that the majority improperly focused on the "abstract" likelihood of a chemical war and reapplication of the regulation "and in the process for[got] about Doe, the plaintiff."[28/] Judge Thomas stated that he believed the appellant had failed to carry his burden to show there was a reasonable expectation that he (as opposed to some other service personnel not actually party to that case) would be subject to it.[29/]

The People for the American Way Action Fund, which opposes Judge Thomas's nomination, has criticized Judge Thomas's dissent in Doe, stating that "[r]ather than

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[27/] Id. at *47-*48.

[28/] Id. at *49.

[29/] Id. at *49-*50. Among the questions unanswered in the record were the following:

> Is Doe about to be discharged, this year, or next? Does he serve in the infantry, or behind a desk? Has he been assigned for the rest of his tour to permanent duty in the United States? If sent back overseas, will Doe serve in England or Germany, or in the Middle East?

Id. at *50.

considering plaintiff's complaint, Mr. Thomas would have simply closed the courthouse door."[10/] We think it more accurate to say that Judge Thomas wanted to leave the courthouse door open for a future litigant who had an actual stake in the outcome of the case, rather than foreclosing an issue at the behest of a litigant whose interest in the case became purely theoretical and impersonal after hostilities in the Gulf ceased.

Unless the judges were convinced that the particular plaintiff, John Doe, could reasonably be expected to confront the challenged regulation sometime in the future, respect for the rule of law required them to dismiss the appeal as moot. For if there was no reasonable expectation that Doe would be subjected to the challenged regulation in the future, then there would have been no continuing "case or controversy" involving the plaintiff and thus no constitutional basis for further judicial review. Obviously, reasonable men and women can (and in Doe did) disagree in their assessment whether it was reasonable to expect Doe to be subjected to the regulation

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10/ People for the American Way Action Fund, Judge Clarence Thomas: 'An Overall Disdain for the Rule of Law', 6 (July 30, 1991).

again in the future.[11/] Nevertheless, given Judge Thomas's own assessment of the facts, his principles dictated prudence in trying to decide an important issue.

Finally, it is worth noting Judge Thomas's restraint and judiciousness in handling a notice of appeal in a criminal case that was filed out of time. In United States v. Long, 905 F.2d 1572 (D.C. Cir. 1990), one of two defendants convicted of drug and firearms crimes did not file her notice of appeal with the district court until 11 days after her judgment was entered even though the Federal Rules of Appellate Procedure require that the filing of such a notice occur within ten days of the entry of judgment.[12/] The government argued that the appeal should be dismissed. The defendant argued that the court of appeals should imply that the district court granted her an extension of the period to file the notice by virtue of the fact that the clerk accepted her untimely notice.

Judge Thomas refused to dismiss the appeal, noting that the relevant procedural rule allows the district court to extend the time for filing a notice upon a showing by the

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[11/] The majority expressly acknowledged "that, as our dissenting colleague underscores, the recurrence here does not qualify as a strong probability." Doe, 1991 U.S. App. LEXIS at *23.

[12/] 905 F.2d at 1574, citing Fed. R. App. P. 4(b).

defendant of excusable neglect.[13/] However, Judge Thomas's unanimous opinion for the court refused to imply that the court had granted such an extension on the basis of the district court's purely ministerial act of docketing the notice.[14/] Rather, the court of appeals remanded the case to the district court to determine explicitly whether the defendant should be granted the extension.[15/]

In his opinion, Judge Thomas noted that some older Eighth Circuit cases had implied a grant of an extension when the district court dockets an untimely notice of appeal. Nevertheless, Judge Thomas and his colleagues refused to accept the "fiction." Judge Thomas explained that "the unambiguous language of the rule forecloses this short-cut. The time limits specified in the rules serve vital interests of efficiency and finality in the administration of justice, and are not designed merely to ensnare hapless litigants."[16/] At the same time, by refusing to dismiss the appeal and instead remanding the matter to the district court, Judge Thomas's opinion gave the defendant a fair opportunity to preserve her right to an appeal.

13/ 905 F.2d at 1574.

14/ Id.

15/ Id. at 1575.

16/ Id. at 1574-75 (footnote omitted).

C. Judge Thomas's Judicial Record Reflects His Respect for Separation of Powers and Deference to the Constitution, Congress, and Administrative Agencies

The D.C. Circuit reviews a large volume of administrative decisions. Judge Thomas has therefore had ample opportunity to establish whether he is willing to substitute his own views for the views of Congress and the Executive, or whether he respects the separation of powers, and so gives appropriate deference to the Constitution and the other two branches of government. Judge Thomas's record indicates that he is not bent on imposing his personal ideology; rather, he has displayed appropriate deference to the Constitution and to the other Branches of the federal government.

1. The Constitution -- Judge Thomas has written opinions in a number of cases involving "routine" constitutional challenges to criminal convictions, and has resolved those cases consistent with established constitutional jurisprudence.[37/] In addition, he was a

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[37/] For examples of Judge Thomas's opinions addressing constitutional issues raised in criminal appeals, see United States v. Poston, 902 F.2d 90, 98-99, 99-100 (D.C. Cir. 1990) (rejecting Sixth Amendment claim that defendant had ineffective assistance of counsel because his substitute counsel was chosen only a day before trial began and rejecting Fifth Amendment claim that defendant was improperly induced to waive his right against self-incrimination by unfulfilled promises of the police); United States v. Harrison, 931 F.2d 65, 69-71 (D.C. Cir. 1991) (rejecting Fifth Amendment claim that defendant had been deprived of his right against self-incrimination based on conduct of co-defendant's counsel);

(continued...)

member of the panel in Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) ("ACT II"), which unanimously vacated on First Amendment grounds an order of the Federal Communications Commission ("FCC") prohibiting completely broadcasts of indecent material.[38/]

The FCC order reviewed in ACT II was promulgated after a virtually identical order had been vacated by the D.C. Circuit in 1988.[39/] In the 1988 case ("ACT I"), the court had remanded the order to the FCC with instructions to establish safe-harbor time periods during which indecent material could be broadcast. Before the FCC could respond to the remand instructions, Congress passed legislation requiring the FCC to enforce its ban on indecent material 24 hours a day.[40/] The FCC complied with the Congressional mandate, and a variety of petitioners once again sought review.

Despite the popularity of a 24-hour ban both in Congress and in the Administration, the court (in a decision

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[37/](...continued)
United States v. Halliman, 923 F.2d 873 (D.C. Cir. 1991) (affirming district court's refusal to suppress evidence that defendant claimed was obtained by a warrantless search in violation of the Fourth Amendment).

[38/] Because Covington & Burling represented Post-Newsweek Stations, Inc., we will not comment on the merits of the decision.

[39/] See Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) (hereinafter ACT I).

[40/] Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988).

written by Chief Judge Mikva and joined by Judge Thomas) reiterated its position in ACT I that a ban on indecent material (as opposed to obscene material) was unconstitutional in the absence of safe-harbor time periods. According to the court, "the judiciary [may not] ignore its independent duty to check the constitutional excesses of Congress."[41/] The court renewed its instruction to the FCC to develop appropriate safe harbors and again remanded the order.

2. The Congress -- Judge Thomas has more frequently been called upon to interpret and enforce the constitutional will of Congress. He has proven himself to be a careful interpreter of statutes, employing the traditional judicial tools of statutory interpretation. There is no evidence that Judge Thomas allows his own personal policy views or any bias to interfere with the faithful interpretation of constitutionally-promulgated statutes.

Perhaps the best example of Judge Thomas's deference to the will of Congress is Otis Elevator Co. v. Secretary of Labor, 921 F.2d 1285 (D.C. Cir. 1990). As described earlier, that case raised the question of whether an independent contractor that performed maintenance on an underground mine elevator was subject to the safety regulation jurisdiction of the Secretary of Labor under the Federal Mine Safety and Health Act ("FMSHA"). Although Judge Thomas's opinion for the

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41/ ACT II, 932 F.2d at 1509-10.

unanimous court found it unnecessary to decide whether the court must defer to the discretion of the Secretary in interpreting her statutory jurisdiction (see the discussion above in II.B at pp. 18-20), the opinion did uphold the Secretary's jurisdiction under the FMSHA.

Judge Thomas reached this conclusion by relying on the plain meaning of the statutory language and by rejecting point-by-point the various arguments of the petitioner to avoid that meaning. On its face, FMSHA gives the Secretary jurisdiction to regulate the health and safety of employees working for "any independent contractor performing services or construction" at a mine.[42/] The petitioner did not dispute that it fell within this definition read literally; however, it argued that Congress had not intended the language to be read as broadly as the literal language provided. Rather, according to the petitioner, the statute gave the Secretary jurisdiction only over independent contractors that operate, control, or supervise a mine.[43/] The petitioner's argument was based on the ejusdem generis doctrine of statutory construction, on precedent in other circuits, and on the policy argument that providing the Secretary with broad jurisdiction under FMSHA would create confusion between that

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[42/] See 921 F.2d at 1286, quoting 30 U.S.C. § 802(d) (1982).

[43/] 921 F.2d at 1289.

act and the Occupational Safety and Health Act, 29 U.S.C. §§ 651-78 (OSHA).

After careful analysis, Judge Thomas rejected each of the petitioner's arguments. First, he noted that the petitioner's ejusdem generis analysis was based on a misconstruction of the doctrine and stated that, properly construed, the doctrine did not warrant a narrowing of the Secretary's jurisdiction.[44/] Second, Judge Thomas's opinion held that the petitioner's references to cases in other circuits either misconstrued those precedents,[45/] or were unpersuasive.[46/]

Finally, Judge Thomas rejected the petitioner's policy arguments.[47/] While noting that the Secretary had argued that, rather than eliminating confusion concerning the overlap between the Mine Act and the OSHA, the petitioner's interpretation of the Mine Act would increase confusion, Judge Thomas found it unnecessary to resolve the dispute. "Congress

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[44/] Id. at 1289.

[45/] Id. at 1289-90 ("we find Otis's reliance on National Sand misplaced"), referring to National Indus. Sand Ass'n v. Marshall, 601 F.2d 689 (3d Cir. 1979).

[46/] 921 F.2d at 1290-91 (stating that legislative history cited by the Fourth Circuit to support its decision to narrow the Secretary's jurisdiction was too ambiguous to raise any doubt that Congress intended what the plain language of the statute states), referring to Old Dominion Power Co. v. Donovan, 772 F.2d 92 (4th Cir. 1985).

[47/] 921 F.2d at 1291.

has written [the FMSHA] to encompass 'any independent contractor performing services at a mine' (emphasis added)."[48/] Accordingly, Judge Thomas deferred to Congress's stated intent even in the face of arguments by business that such a result represented bad policy.

3. The Executive (including administrative agencies) -- On a number of occasions, Judge Thomas has confronted the need to defer to the discretion of agencies in carrying out their congressionally-mandated duties. While Judge Thomas has recognized that there are limits to that deference, he has faithfully recognized that it is the constitutional duty of the Executive Branch to execute the law.

For example in Buongiorno v. Sullivan, 912 F.2d 504 (D.C. Cir. 1990), Judge Thomas, writing for a unanimous panel, upheld an action by the Secretary of Health and Human Services against a challenge by a recipient of National Health Service Corps medical school scholarships. In return for receiving scholarship money, Dr. Buongiorno agreed either to serve two years in a medically understaffed location designated by the Corps or to pay a penalty equal to three times the value of his scholarship, plus interest. When Dr. Buongiorno completed his medical residency, the Corps assigned him to serve in the Indian Health Service in Oklahoma or Arizona. Dr. Buongiorno

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[48/] Id.

immediately applied for a waiver from his agreement, based on his wife's medical condition, but the Corps requested that he demonstrate an inability to pay the penalty for failure to serve.

The issue for decision was whether the statute establishing the scholarship program permitted the Corps to require a waiver applicant to demonstrate an inability to pay the penalty in addition to an inability to perform the medical service without extreme hardship. The district court held that the Corps' regulations were invalid in requiring proof of both conditions. The Circuit Court vacated the district court's judgment as inconsistent with the requirements of the Supreme Court's decision in Chevron that the court must defer to an agency's expertise unless the agency's regulations are not based on a permissible construction of the statute. Id. at 508-09. Accordingly, Judge Thomas wrote:

> Were we entitled to choose between the parties' positions, we could proceed to list each position's merits and demerits, and we might go on to decide that Buongiorno has interpreted the statute more to our liking. Chevron, however, tells us to gauge the Secretary's interpretation by its statutory parent, and not to contrast it with an interpretive rival.

Id. at 510.[49/]

[49/] Judge Thomas's opinion remanded the case to the District for consideration of Dr. Buongiorno's further argument that the Secretary's actions were arbitrary and capricious. Id.

(continued...)

Another example of Judge Thomas's deference to an administrative agency is A/S Ivarans Rederi v. United States, 1991 U.S. App. LEXIS 14983 (D.C. Cir. 1991) (Ivarans II), which Judge Thomas authored for a unanimous panel. Ivarans II involved an interpretation by the Federal Maritime Commission ("FMC") of a "pooling" agreement that had been entered into by competing maritime shippers plying between the United States and Brazil (called the "Atlantic Agreement") and that had been filed with the FMC pursuant to the Shipping Act of 1984, 46 U.S.C. App. § 1704(a). In attempting to resolve a dispute that had arisen among shippers as to whether a certain class of shipments was covered by the Atlantic Agreement, the FMC declined to defer to an arbitrated resolution of the dispute. The FMC concluded that, because the Atlantic Agreement was silent, the class of shipments were not covered (and thus were not afforded antitrust immunity).

In his opinion for the court, Judge Thomas first reiterated the court's holding in Ivarans I that the FMC retained jurisdiction to resolve the dispute notwithstanding an arbitration provision in the agreement.[10/] Judge Thomas

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[9/](...continued)
(citing Community for Creative Non-Violence v. Lujan, 908 F.2d 992, 995 (D.C. Cir. 1990)).

[10/] In Ivarans I, the D.C. Circuit had rejected the petitioner's agreement that an arbitration provision in the Atlantic Agreement divested the FMC of jurisdiction to hear the dispute. See A/S Ivarans Rederi v. United States, 895 F.2d 1441 (D.C. Cir. 1990).

found it rational for the FMC not to defer to arbitration in this case because the dispute involved only legal issues that had implications for the public at large.[51/]

Next, the court upheld the FMC's resolution of the dispute, noting that the court "must defer to the agency's reasonable construction of the contract's terms."[52/] Judge Thomas specifically applied the FMC's rule of construction that, since the Shipping Act exempts from the antitrust laws all activity covered by policy agreements, "[t]he contract must clearly and specifically identify the particular anticompetitive activity in which a party seeks to engage."[53/]

Yet another majority opinion authored by Judge Thomas that reflects his willingness to defer to an agency's congressionally-mandated discretion is Citizens Against Burlington, Inc. v. Busey.[54/] In that case, the Federal Aviation Administration ("FAA") had approved a plan by the city of Toledo to expand the Toledo Express Airport. The expansion was necessary in order to enable Burlington Air

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[51/] Ivarans II, 1991 U.S. App. LEXIS at n.5.

[52/] Id. at n.11.

[53/] Id. at n.13.

[54/] No. 90-1373, 1991 U.S. App. LEXIS 12036 (D.C. Cir. June 14, 1991).

Express to move its operations from outmoded facilities in Fort Wayne, Indiana and to create a new cargo hub at Toledo.

The petition for review was filed by individuals and groups representing users of a park that would be affected by the expansion of the Toledo airport. The petitioners sought review of the FAA's approval, claiming that in several respects the approval did not fulfill the agency's obligations under several federal statutes and related regulations. The most significant objections related to whether the FAA had met all the requirements of the National Environmental Policy Act of 1969 (NEPA).[33/]

Judge Thomas began the majority's opinion by noting that NEPA is an extremely important statute protecting the environment. Nevertheless, his opinion stressed that Congress opted to achieve its goal of preserving the environment not by dictating substantive results but by requiring that agencies adhere to certain procedural requirements, most importantly that they consider the environmental impact of proposed action and of alternatives that could achieve the same objectives. Moreover, Judge Thomas wrote:

> [j]ust as NEPA is not a green Magna Carta, federal judges are not the barons at Runnymede. Because the statute directs agencies only to look hard at the environmental effects of their decisions, and not to take one type of action or another, federal judges correspondingly enforce the statute by ensuring that

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33/ Pub. L. No. 91-190, 83 Stat. 852 (1970), codified as amended at 42 U.S.C. §§ 4321-4370b.

> agencies comply with NEPA's procedures, and not by trying to coax agency decisionmakers to reach certain results.[56/]

With this as background, Judge Thomas's opinion carefully considers all of the petitioners' objections to the FAA's approval.[57/]

By far the most significant objection to the FAA's approval rested on the claim that the FAA's Environmental Impact Study (EIS) failed to consider all the alternatives to expansion of the Toledo airport as required by NEPA. The EIS studied only two alternatives in depth, expanding the Toledo airport as planned, or doing nothing. The petitioners argued that the FAA should have considered a number of alternatives, including expansion of other airports, such as Burlington's

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[56/] 1991 U.S. App. LEXIS 12036 at *9 (citation omitted).

[57/] In addition to objections relating to NEPA, the majority opinion also considered challenges based on the FAA's alleged failure to adhere to the requirements of the regulations of the Council on Environmental Quality (the CEQ); of section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 303(c); and of section 509(b)(5) of the Airport and Airway Improvement Act of 1982, 49 U.S.C. App. § 2208(b)(5). The court found that the FAA had complied with the statutes. In two respects, however, the court found that the FAA had failed to comply with the CEQ regulations in preparing the EIS. First, the FAA should have selected one of the contractors who prepared the EIS, but its failure to do so did not compromise the "objectivity and integrity of the NEPA process." 1991 U.S. App. LEXIS 12036 at *37. The court thus refused to invalidate the EIS on this ground alone. Second, the FAA should have required the contractor to execute a disclosure statement to ensure he had no conflict of interest. As a result, the court ordered the FAA to remedy its failure and to take appropriate action if the disclosure revealed a conflict.

existing facilities at Fort Wayne.[58/] Indeed, Judge Buckley wrote a partial dissent from the majority's holding that the FAA fulfilled its obligations under NEPA, because he believed that the FAA had failed to consider additional alternatives that were open to Burlington.[59/]

Judge Thomas's opinion for the majority concludes that "an agency bears the responsibility for deciding which alternatives to consider in an environmental impact statement [and] . . . [i]t follows that the agency . . . bears the responsibility for defining at the outset the objectives of an action."[60/] The court went on to emphasize, however, that "[d]eference . . . does not mean dormancy."[61/]

Under this standard, the court approved the FAA's definition of objectives, namely "launch[ing] a new cargo hub in Toledo and thereby helping to fuel the Toledo economy."[62/] Because of the excessive cost of alternative expansions in

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[58/] In connection with the petitioners' claims that the FAA should have considered alternative geographic sites for the cargo hub, Judge Thomas noted that "Congress has . . . said that the free market, not an ersatz Gosplan for aviation, should determine the siting of the nation's airports." 1991 U.S. App. 12036 at *21.

[59/] See id. at *53-*66. Judge Buckley's dissent is discussed further below.

[60/] 1991 U.S. App. LEXIS 12036 at *15-*16 (citations omitted).

[61/] Id. at *16.

[62/] Id. at *23.

Toledo, and because building a cargo hub anywhere outside of Toledo would not fuel Toledo's economy, the court held it was reasonable for the FAA to consider only the options of pursuing the planned expansion of Toledo Express Airport or doing nothing. Judge Thomas concluded

> "[w]e are forbidden from taking sides in the debate over the merits of developing the Toledo Express Airport; we are required instead only to confirm that the FAA has fulfilled its statutory obligations. Events may someday vindicate [petitioner's] belief that the FAA's judgment was unwise. All that this court decides today is that the judgment was not uninformed.[63/]

These examples indicate that Judge Thomas is careful not to let his own views interfere with the congressionally-mandated discretion of the Executive Branch and administrative agencies. Nevertheless, they also indicate that Judge Thomas recognizes that deference is not the same as, in Judge Thomas's word, "dormancy" (i.e., an abdication of the judge's constitutional responsibilities). As explained above, even while rejecting most of the objections to the EIS at issue in

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63/ 1991 U.S. App. LEXIS 12036 at *28 (citations omitted). In his partial dissent, Judge Buckley stated that the FAA should have considered in its EIS alternative locations for the cargo hub and should not have deferred to Burlington's choice of Toledo over the alternatives. Judge Buckley admitted that his difference with the majority related not to a difference in view concerning the relevant law but rather to the fact that he read the goal stated by the FAA in the EIS differently from the majority. See id. at *55.

Busey, the majority ordered the FAA to remedy its failure to satisfy a requirement in the CEQ regulations.[64/]

In a concurring opinion in Tennessee Gas Pipeline Co. v. FERC, 926 F.2d 1206, 1213-14 (D.C. Cir. 1991), Judge Thomas indicated that in some cases the conduct of an administrative agency may be so egregious that a court is warranted in taking unusual steps. In that case, the D.C. Circuit for the second time disapproved and remanded a Federal Energy Regulatory Commission (FERC) order that without proper justification established a rate of return for the petitioner's pipeline that was inconsistent with FERC precedent. Judge Thomas concurred in the second remand; however, he severely criticized FERC's conduct, particularly in light of the previous remand.

In his concurrence, Judge Thomas stated that he was tempted to grant the petitioner's request to allow the court itself to establish the rate of return that seemed to be compelled by FERC precedent. Despite Judge Thomas's obvious frustration with the FERC's conduct, however, he ultimately concluded that the unusual remedy of the court itself doing the administrative agency's job was unwarranted because "legitimate concerns about judicial overreaching always militate in favor of affording the agency just one more chance

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64/ See footnote 57, supra.

to explain its decision."[65] Nevertheless, Judge Thomas indicated that there could be exceptions to this rule, even if they were likely only "once-in-a-decade" events.[66]

D. Judge Thomas Has Shown Support For Society's Right To Protect Itself From Criminals, But At The Same Time Has Been Sensitive When The Rights Of Criminal Defendants Are Violated

The largest single category of decisions by Judge Thomas involves appeals from criminal convictions. Judge Thomas has shown himself to be in the mainstream of the judiciary in handling such appeals. Judge Thomas's opinions address a broad range of the issues raised by criminal defendants who seek to overturn a jury verdict including challenges to the sufficiency of the evidence,[67] appeals of a trial court's denial of a motion to sever,[68] exceptions based on the Federal Rules of Evidence to the trial court's refusal to exclude evidence,[69] and challenges to the legal

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[65] 926 F.2d at 1214.

[66] Id.

[67] United States v. Rogers, 918 F.2d 207, 214 (D.C. Cir. 1990); United States v. Poston, 902 F.2d 90, 92-96 (D.C. Cir. 1990).

[68] United States v. Harrison, 931 F.2d 65, 67-71 (D.C. Cir. 1991); Long, 905 F.2d at 1580-81.

[69] See Rogers, 918 F.2d at 209-13; United States v. Long, 905 F.2d 1572, 1579-80 (D.C. Cir. 1990). In Rogers, Judge Thomas quotes United States v. Moore, 732 F.2d 983, 989 (D.C. Cir. 1984), stating that "'[t]he language of [rule 403] tilts, as do the rules as a whole, toward the admission of evidence in close cases. . . . [T]he balance should generally be struck

(continued...)

sufficiency of jury instructions.[70] In all of the appeals but one, for which Judge Thomas wrote for the majority, he voted to affirm the conviction.

Judge Thomas has also had to resolve a number of constitutionally based challenges to criminal convictions.[71] For example, in United States v. Halliman, 923 F.2d 873 (D.C. Cir. 1991), Judge Thomas wrote the opinion for a unanimous panel affirming the trial court's denial of the defendants' motions to suppress evidence (primarily drugs) on Fourth Amendment grounds. The case involved an effort by the D.C. police to shut down a cocaine trafficking scheme being operated out of a hotel. The hotel management tipped off the police. A background investigation corroborated the tip and established the identity of the suspects. After the suspects changed hotel rooms (as they had done repeatedly in the past in an attempt to evade police detection), the police obtained a warrant to search the new rooms, based on trace findings of narcotics in the rooms that had been vacated.

When the police arrived at the hotel, they learned that one of the suspects had rented an additional room not

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[69] (...continued)
in favor of admission when the evidence indicates a close relationship to the event charged.' (footnotes omitted)." 918 F.2d at 211.

[70] United States v. Whoie, 925 F.2d 1481, 1485-86 (D.C. Cir. 1991).

[71] See the cases discussed at footnote 69, supra.

listed on the warrant. Rather than delay their execution of the search in order to obtain a new warrant, one of the police knocked on the door to the room and requested permission to search it. In response to the knock, the suspect began flushing drugs down the toilet; hearing the toilet, the officer broke into the room, found cocaine in plain view, and subdued the defendant. Believing that the suspect subsequently gave his permission to a further search of the room, the police discovered additional evidence. When the suspect later refused to verify in writing that he had authorized the search, the police suspended their activities in order to seek an emergency search warrant, which they obtained shortly thereafter.

The court of appeals held that the actions of the police did not violate the Fourth Amendment and that the trial court therefore had properly allowed the evidence to be presented to the jury. Citing numerous precedents, Judge Thomas first noted that once the police had reason to believe that the suspect was destroying evidence, the "exigent circumstances" doctrine justified the police's initial entry into the room.[72/] Drugs in plain view in the room were therefore properly seized.

Judge Thomas's opinion went on to consider the admissibility of the evidence that was not in plain view and

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72/ 923 F.2d at 878-80.

that was found before the police obtained the emergency search warrant. The court noted that the subsequent warrantless search of the room was not proper without the suspect's authorization. Nevertheless, the police subsequently obtained a search warrant for the room based on information unrelated to the unauthorized search; consequently, Judge Thomas's opinion held that the evidence found in the room was properly admitted under the independent source doctrine.[73/] In sum, Judge Thomas's opinion in Halliman is a model of careful analysis leavened with common sense, which protected the public's interest in truth in the courtroom while adhering to precedents defining the constitutional rights of the accused.

Even though most of Judge Thomas's opinions have affirmed criminal convictions, he has authored an opinion reversing a conviction in United States v. Long, 905 F.2d 1572 (D.C. Cir. 1990). The police had arrested Long in an apartment that contained a variety of drugs and drug-related paraphernalia. In addition, the police found a gun partially concealed in a sofa in a part of the apartment that was separated from the area in which Long was arrested. At trial, the jury convicted Long both of drug possession charges and of "using" a firearm in connection with a drug offense. Long

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[73/] Id. at 880-81. Judge Thomas's opinion also affirmed the trial court's refusal to suppress the admission of the quantity of cocaine found on the person of another suspect who approached the hotel rooms during the course of the police search. Id. at 881-82.

neither owned, rented, nor lived at the premises where he was arrested, and the government offered no evidence that Long was aware of the gun's presence.

The court upheld Long's conviction relating to drug possession;[74/] however, the court reversed his conviction for the firearms violation.[75/] Judge Thomas first stated that "[o]verturning a jury's determination of guilt on the ground of insufficient evidence is not a task we undertake lightly [because] . . . we owe tremendous deference to a jury verdict."[76/] Nevertheless, a court cannot "fulfill [its] duty through rote incantation of these principles . . . [but] must ensure the evidence . . . is sufficient to support a verdict as a matter of law."[77/] Taking this duty seriously, the court held that given the lack of evidence that Long knew of the gun's existence, much less touched it, "[t]here was no

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[74/] 905 F.2d at 1579-81.

[75/] Id. at 1575-79. Long had been charged with violating 18 U.S.C. § 924(c)(1), which provides in part that it is a federal crime to "use[] or carr[y] a firearm ... during and in relation to any . . . drug trafficking crime." In addition to overturning Long's conviction for the federal firearms offense, Judge Thomas's opinion also provided the other defendant with an opportunity to correct an otherwise fatal deficiency in her notice of appeal. See 905 F.2d at 1574-75 (discussed above at pp. 23-24).

[76/] Id. at 1576.

[77/] Id.

evidence ... that the firearm was ever either actually or constructively in Long's possession."[78/]

Judge Thomas noted that the word "use" in section 924(c)(1) "has been losing its conventional, active connotation for some time."[79/] In the circumstances of Long's conviction, to hold that Long "used" the firearm "would be to concede that the word 'use' has no discernible boundaries."[80/] Judge Thomas noted the impropriety of such a concession, especially in the context of the construction of a criminal statute. Moreover, the court found all the cases cited by the government to support its expansive definition were inapposite since all those cases, unlike Long, involved at least some evidence of a nexus between the defendant and the firearm that the defendant allegedly possessed.[81/] As the court summarized its holding, "we reverse Long's conviction because the government failed to adduce any evidence suggesting that Long actually or constructively possessed the revolver."[82/]

78/ Id.

79/ Id.

80/ Id. at 1577.

81/ Id. at 1577-78 (emphasis in original).

82/ Id. at 1578. Judge Sentelle filed a partial concurrence claiming that "[o]n the present facts, the government did not offer evidence of possession or any other evidence that Long had used the firearm." Id. at 1582 (emphasis in original). As

(continued...)

Judge Thomas's majority opinion is an example of an effort to bring order out of chaos and to ensure that the original meaning of a criminal statute does not get stretched beyond recognition over time. It does not, however, represent an aversion to upholding a conviction under the firearms statute in the appropriate circumstances. Indeed, in his subsequent opinion for a unanimous panel in United States v. Harrison, 931 F.2d 65 (D.C. Cir. 1991), Judge Thomas upholds a conviction under the same statute based on the defendant's constructive possession of a gun. In Harrison, the court affirmed the conviction of a defendant who was present in a van being used to traffic narcotics. The defendant was wearing a bulletproof vest but did not have a gun. The two other occupants did possess firearms and there were two loaded clips of ammunition plus weapons magazines in the van. Under these circumstances, Judge Thomas's opinion held:

> Since drug dealers are hardly known to be ironically disposed (as evidenced by the weapons, weapons magazines, and ammunition recovered in this case), the jury could reasonably have inferred that when and if Butler was shot at, he would either use one of his confederates' guns to shoot back, or else instruct one of them to do so. It could have inferred, in other words, that Butler knew he had 'some appreciable ability to guide the density' of

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[82]/(...continued)
a result, according to Judge Sentelle, there was no need to articulate a "technical rubric of possession." Id. As Judge Thomas points out in the majority opinion, however, since the government believed there was evidence of "possession," it was indeed necessary for the court to articulate "what it means to 'use' a gun." Id. at 1579.

the weapons, 'some stake in them, some power over them.' That is sufficient to establish constructive possession as to Butler.[93/]

E. Judge Thomas's Judicial Record Reveals His Ability Intelligently to Resolve Complex and Important Issues of Commercial Law and Business Regulation

Most of the public debate about a judicial candidate's qualifications understandably focuses on how the candidate handles issues of great moment to citizenry, such as constitutional controversies, the rights of the criminally accused, and separation of powers. As the foregoing demonstrates, Judge Thomas has established that he can successfully handle such issues. That should not be the end of the debate, however. The way in which a justice handles the seemingly more mundane matters, including civil procedure, contract interpretation, commercial law, and general business regulation in the area of tax, antitrust, and securities laws, can have just as profound an impact on the lives of Americans. The ability to deal effectively with such issues, of course, requires a justice to be learned in the law. Perhaps equally importantly, however, a justice also must be able to sort through complex sets of facts, to master non-legal disciplines such as economics, accounting, and financial theory, and to appreciate the practical consequences of his or her decisions on individuals, businesses, and the economy as a whole.

93/ 931 F.2d at 73 (citations omitted).

As we have already described, Judge Thomas's background, particularly his employment in the legal department of one of this country's largest corporations, should provide him with a particularly relevant perspective on such issues. While on the D.C. Circuit, Judge Thomas has written several panel decisions in cases involving complex issues of business regulation which carried significant financial consequences for the litigants. Judge Thomas's opinions in those cases reflect intelligence, common sense, and an appreciation for each decision's practical consequences. Moreover, his opinions in the Alpo and Baker Hughes cases, discussed below, made a significant contribution to the law of unfair competition and antitrust, respectively.

First, however, we describe Judge Thomas's majority opinion in Western Maryland Co. v. Harbor Ins. Co., 910 F.2d 960 (D.C. Cir. 1990), in which Judge Thomas resolved a rather arcane dilemma involving questions of civil procedure and federal jurisdiction in a complex insurance dispute. In that case the district court had dismissed two actions brought by railroads against their insurance carriers to establish coverage for asbestos-related claims by railroad employees. In the first of the two cases, three railroads sued forty insurers. In the second case, Western Maryland Railway Co., the subsidiary of one of the three plaintiff railroads in the

first action, sued nine of the forty insurance carriers that were defendants in the first action.[84/]

The insurance companies argued that asbestos-related claims were subject to overall policy limits applicable to occupational diseases and that the aggregate sum that could be recovered by the four railroads was therefore limited to the maximum overall amount available under the policies for occupational diseases. Accordingly, the insurance carriers claimed, all four railroads should be required to join in a single action because they were claimants to a single, limited fund. If the railroads were permitted to sue the insurers in separate actions, the insurers argued that they might be subject to multiple recovery or to inconsistent findings regarding whether the occupational disease limitation in fact applied. Thus, in the insurance companies' view, all the railroads should be required to bring only one lawsuit. Id. at 962-63.

At the same time, the insurance companies argued that joining Western Maryland's claim with the action brought by the other three railroads was not feasible. Western Maryland was incorporated in the same state as some of the insurance companies that were defendants in only the first case. If Western Maryland were made a plaintiff in that case, the district court would lose diversity of citizenship

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84/ 910 F.2d at 961-62.

jurisdiction over the entire controversy. As the carriers pointed out, a federal court's authority under 18 U.S.C. § 1332(a) to hear suits between "citizens of different States" requires that each plaintiff be from a state different from each defendant's state.[85/]

Judge Thomas's opinion for a unanimous court took a very practical approach to the issues, allowing the claims to proceed without exposing the insurance companies to a substantial risk of incurring inconsistent obligations. First, Judge Thomas held that since both suits were pending before the same district court, the judge could guarantee that the insurers' total liability in the two cases did not exceed any aggregate limits that might ultimately be found to apply. Second, Judge Thomas noted that the railroads had conceded on appeal that if the occupational disease limitations did apply, their overall recovery would stop at the aggregate limits. Judge Thomas held that this concession would be binding on the railroads when the case was returned to the district court, and they would be prohibited from taking a different approach to damages in the lower court.[86/]

The Western Maryland opinion provides evidence that when consistent with the rule of law, Judge Thomas is willing and able to find solutions to permit cases to go forward and

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[85/] Id. at 963.

[86/] Id. at 963-64.

to be decided on their merits, rather than on narrow procedural grounds. Moreover, the Western Maryland opinion is a further example of Judge Thomas's ability to bring a considerable breadth of legal wisdom and sound common sense to bear on a complex body of legal rules.

While Judge Thomas's decision in Western Maryland demonstrates his ability to resolve apparent procedural obstacles to the resolution of complex commercial disputes, two other opinions by Judge Thomas reflect his ability to make significant legal contributions to important areas of business regulation. First, in Alpo Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958 (D.C. Cir. 1990), Judge Thomas wrote an opinion for a unanimous panel in a case involving cross claims between pet food producers for false advertising under the Lanham Act. The case is particularly noteworthy because of its careful and comprehensive discussion of the appropriate way for courts to measure damages in cases of false advertising.

In Alpo, the trial court had found that both Alpo and Ralston violated the Lanham Act by making false claims about their products -- without any credible scientific basis, Ralston had claimed that its dog food ameliorated the effects of canine hip disease (CHD), and, in retaliation, Alpo falsely claimed that veterinarians preferred its product "2 to 1" over Ralston's product. The district court awarded damages to Alpo

approximately equal to Ralston's profits from sales of its product during the period that the advertising was run, plus attorney's fees. Ralston was awarded only its attorney's fees and no damages because the district court found that the magnitude of its wrongdoing far exceeded that of Alpo's. Finally, the district court entered an injunction requiring Ralston to pre-clear any claims relating to CHD it intended to make with the court. The court subsequently determined that the injunction applied even to scholarly articles written by non-Ralston scientists which did not refer to Ralston products, and it threatened Ralston with contempt for stating in a professional journal that it disagreed with the district court's ruling and planned to appeal.

The D.C. Circuit reversed the damage award to Alpo, finding that a profit-based award was appropriate only where the Lanham Act violation was willful and in bad faith, and Ralston's conduct was neither. It also required the district court to determine whether Ralston suffered damages, finding that the Lanham Act did not authorize a court to deny monetary relief where a violation was found, and it narrowed the scope of the injunction.

In deciding this case, Judge Thomas was required to analyze the purpose of the Lanham Act and to compare remedies available in other, related unfair trade cases (such as trademark infringement actions) in order to choose among

competing remedial theories -- viz., whether the Lanham Act is intended to punish the violator even if the violation is not willful; or, if not, whether it is intended to compensate the disadvantaged competitor, or to require the violator to give up its ill-gotten gains, even if those gains far exceed the detriment suffered by its competitor.

In the year since Alpo was decided Judge Thomas's opinion has been cited as one of the leading cases interpreting the Lanham Act in numerous legal seminars. Moreover, Judge Thomas's resolution of the issues involved in Alpo was so thorough and convincing that counsel for Alpo (which had its $10.4 million damage award reversed) has praised Judge Thomas's opinion for its clear and thoughtful discussion of the law.[87/]

Finally, in United States v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir. 1990), Judge Thomas wrote for a unanimous

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[87/] Some persons have suggested that Judge Thomas should have disqualified himself from deciding this case because the family of his friend and former boss, Sen. John Danforth, holds shares of Ralston stock and is represented on its board of directors, and that his failure to do so was improper. Both Professor Geoffrey C. Hazard, Jr., who is often regarded as the premier expert on legal ethical matters, and Professor Ronald D. Rotunda, also an expert on ethical matters, have opined that there was no impropriety on Judge Thomas's part in failing to disqualify himself and that indeed it would have been inappropriate for him to do so. See Appendix (letters from Geoffrey C. Hazard, Jr. to C. Boyden Gray (July 27, 1991) and from Ronald D. Rotunda to C. Boyden Gray (July 26, 1991)). We also note that Alpo's counsel, who was aware of Judge Thomas's relationship with Senator Danforth during the litigation and did not object, has publicly called claims that Judge Thomas should have disqualified himself "frivolous."

panel affirming the district court's denial of the U.S. Department of Justice's request for an injunction prohibiting a merger. The merger involved a 1989 proposal by a Finnish manufacturer of hydraulic underground drilling rigs to acquire the business of a French manufacturer of the same type of drilling rigs. The government sought to block the merger on the ground that it would create a dominant firm and would significantly increase concentration in a highly concentrated market in violation of section 7 of the Clayton Act, 15 U.S.C. § 18.

District Court Judge Gerhard Gesell denied the government's request for an injunction after a hearing.[88/] In his opinion, Judge Gesell found that, based on the merging parties' market shares, the government had made a prima facie showing that the merger violated section 7; however, other factors, including questions about the reliability of the government's market share statistics, the defendant's ability to exercise market power given the existence of a few, large sophisticated customers, and, most importantly, the likelihood of new entry, established that, on balance, the merger on balance did not violate the law. As Judge Gesell explained his decision, "while competition is likely to be lessened immediately if the proposed acquisition is completed, long-range prospects in the market, while uncertain, are favorable

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88/ 731 F. Supp. 3 (D.D.C. 1990).

to new entry which will ensure continued vigorous competition."[89/]

The government appealed, arguing that Judge Gesell had employed the wrong legal standard in evaluating the evidence offered by the defendants to rebut the government's prima facie case. The government argued that "as a matter of law, section 7 defendants can rebut a prima facie case only by a clear showing that entry into the market by competitors would be quick and effective."[90/] In rejecting on behalf of the court the legal standard proposed by the government, Judge Thomas stated that the standard "is devoid of support in the statute, in the case law, and in the government's own Merger Guidelines."[91/]

In a careful and clear articulation of section 7 law, Judge Thomas explained why the court could not adopt the standard. First, the court noted that the government's implicit proposition that only evidence of new entry can rebut a prima facie case was flatly inconsistent with the Supreme Court's seminal decision in United States v. General Dynamics.[92/] Moreover, the court noted that it is now

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89/ 731 F. Supp at 11.

90/ 908 F.2d at 983 (emphasis in original).

91/ Id.

92/ 415 U.S. 486 (1974) (rejecting the government's prima facie case on the ground that evidence indicated that market

(continued...)

"hornbook law" that a variety of factors can rebut a prima facie showing based on market shares[93], and that even the government's Merger Guidelines recognize this.[94] Despite the clear weight of authority concerning the relevance of factors other than entry, according to Judge Thomas's opinion, the government's arguments on appeal ignored several non-entry related factors that Judge Gesell had relied upon in rendering his decision: the "misleading" nature of the government's market share statistics and the sophistication of the customers.[95]

Second, the court rejected the government's proposed "quick and effective" standard for evaluating entry as "novel and unduly onerous."[96] The court again noted that there was no support in the case law for the government's standard and that the one case, Waste Management, cited by the government

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[92](...continued)
share statistics were an unreliable predictor of the merging firm's future competitive significance).

[93] 908 F.2d at 985, citing P. Areeda & H. Hovenkamp, Antitrust Law ¶¶ 919, 920.1, 921', 925', 934', 935', 939' (Supp. 1989); H. Hovenkamp, Economics and Federal Antitrust Law § 11.6 (1985); L. Sullivan, Handbook of the Law of Antitrust § 204 (1977).

[94] 908 F.2d at 985-86, citing U.S. Dep't of Justice, Merger Guidelines §§ 3.21-3.5 (June 14, 1984).

[95] 908 F.2d at 986.

[96] Id. at 987.

provided no support for the government's arguments.[97/] The court noted, moreover, that the proposed standard was unattractive because it is inflexible, "overlooks the point that a firm that never enters a given market can nevertheless exert competitive pressure on that market," and the meaning the government intended by the term, "quick and effective," was unclear.[98/] Reviewing the evidence of entry that the district court relied on, Judge Thomas found "no error" in the lower court's finding that the prospects for entry would "likely avert anticompetitive effects" from the merger.[99/]

Third, Judge Thomas's opinion determined that requiring the defendants to make a "clear" showing of the likelihood of entry in order to rebut the government's prima facie case based on market shares would result in an impermissible shifting of the government's ultimate burden of proof to the defendants.[100/] Judge Thomas's opinion

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97/ Id., citing United States v. Waste Management, Inc., 743 F.2d 976 (2d Cir. 1984). As Judge Thomas's opinion points out, the Second Circuit in Waste Management, on the basis of evidence of likely new entry, reversed a district court decision enjoining the merger.

98/ Id. at 987-88 (emphasis in the original).

99/ Id. at 989.

100/ Id. at 991 (requiring "evidence 'clearly' disproving future anticompetitive effects" entails essentially persuading "the trier of fact on the ultimate issue in the case . . .[and a]bsent express instructions to the contrary, we are loath to depart from settled principles and impose such a heavy burden").

recognized that dictum in some Supreme Court decisions from the early 1960s suggested that defendants must make a "clear" showing in order to rebut a prima facie case.[101/] Nevertheless, Judge Thomas's opinion correctly noted that subsequent Supreme Court decisions from the 1970s did not repeat the earlier dictum and instead recognized that concentration statistics had proven not to be as accurate an indicator of anticompetitive mergers as the Court thought when it first articulated the dictum.[102/] Moreover, requiring a clear showing by the defendants would put too much emphasis on market share statistics and, as Judge Thomas pointed out, it would be contrary to the government's own admonition against "slavish[] adhere[nce]" to such statistics.[103/]

The appellate court's decision in Baker Hughes is a good example of synthesizing a substantial body of business regulation law, applying principles from a non-legal discipline (in this case economics), and sorting through complex facts in order to write a thoughtful opinion. The

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[101/] Id. at 989-90, citing United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963); United States v. Von's Grocery Co., 384 U.S. 270 (1966); United States v. Pabst Brewing Co., 384 U.S. 546 (1966).

[102/] See 908 F.2d at 990-91 collecting the decisions. The most important Supreme Court decision in this line is General Dynamics Corp., supra n.92.

[103/] Id. at 992 n.13, quoting Department of Justice statement (explaining the 1984 revision of the Merger Guidelines), reprinted in 4 Trade Reg. Rep. (CCH) at 20,552.

resulting opinion is to be commended to anyone trying to understand how mergers are properly analyzed under the antitrust law.

Moreover, Judge Thomas's opinion is no apologia for big business.[104/] Rather, it is a pains-taking effort, solidly grounded on ample precedent and on the views of the leading antitrust scholars,[105/] and it reflects the mainstream of current section 7 jurisprudence.[106/] It also reflects Judge Thomas's common sense in avoiding a "legal standard" that had no basis in precedent and had no clear meaning. The creation of such an unprecedented, ambiguous standard for entry could have had a deleterious effect on business certainty without providing any benefits for consumers.

[104/] In his opinions, Judge Thomas has shown he has no reluctance to rule against business when the facts and law do not support its position. See, e.g., Otis Elevator Co. v. Secretary of Labor 921 F.2d 1285 (D.C. Cir. 1990).

[105/] Interestingly, in referring to hornbook law, Judge Thomas does not cite the works of the sometimes controversial "Chicago School" scholars, such as Judge Robert Bork. See supra n.93.

[106/] The government has lost a number of litigated merger cases in recent years, frequently on the issue of entry. See, e.g., Waste Management, supra; United States v. Syufy Enterprises, 903 F.2d 659 (9th Cir. 1990). Moreover, as Judge Thomas's opinion indicates, Judge Gesell's opinion appeared more faithful to the Department's articulated policy in the Merger Guidelines than the position advocated by the government in its brief.

III. Judge Thomas and "Natural Law"

On several occasions prior to his nomination to the D.C. Circuit, Judge Thomas advanced the view that the Constitution gives effect to certain principles of the American Founding, especially to the natural equality of all men and women that is the cornerstone of the Declaration of Independence. Judge Thomas has sometimes called this view a "natural law" principle or an appeal to a "higher law."[107/]

Despite the complete absence of any support for such speculation in Judge Thomas's judicial record, a few individuals and groups have asserted that, if confirmed, Justice Thomas will invoke "natural law" to make his decisions as an Associate Justice.[108/] They base this speculation on

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[107/] See, e.g., The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment (hereinafter "The Privilege or Immunities Clause"), 12 Harv. J.L. & Pub. Pol'y 63, 64 (1989); Toward a "Plain Reading" of the Constitution -- The Declaration of Independence in Constitutional Interpretation (hereinafter "The Declaration of Independence in Constitutional Interpretation"), 30 Howard L.J. 983, 992-95 (1987); Civil Rights as a Principle Versus Civil Rights as an Interest, in Assessing The Reagan Years, 391, 400 (D. Boaz, ed. 1988) (hereinafter "Civil Rights as a Principle"); Speech by Clarence Thomas before the Pacific Research Institute, August 10, 1987 (hereinafter "Pacific Research Institute Address"), at p. 3; "The Calling of the Higher Law," Address by the Honorable Clarence Thomas, Chairman, Equal Employment Opportunity Commission, on the Occasion of the Martin Luther King, Jr., Holiday Delivered at the U.S. Department of Justice, January 16, 1987, (hereinafter "Martin Luther King, Jr., Address"), reprinted in 133 Cong. Rec. 2656-58 (Feb. 3, 1987).

[108/] See, e.g., People for the American Way Action Fund, Judge Clarence Thomas: 'An Overall Disdain for the Rule of Law', (continued...)

speeches and articles Clarence Thomas wrote prior to becoming a judge.[109/]

After examining Judge Thomas's record as a whole, we believe the speculations of his critics to be unfounded. Nothing in Judge Thomas's record on the court of appeals indicates that Judge Thomas would allow his own personal philosophy, religious beliefs or moral doctrines to "trump" the Constitution and constitutionally enacted statutes. In particular, Judge Thomas has never mentioned "natural law" in his opinions, much less invoked a natural law principle as a rule of decision.

Judge Thomas's views on natural law were already well known when he was a nominee to the Court of Appeals. In

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[108/](...continued)
July 30, 1991; Lawrence H. Tribe, "Clarence Thomas and 'Natural Law,'" New York Times, July 15, 1991, at A15, col. 1; E. Chemerinsky, Clarence Thomas' Natural Law Philosophy, undated (study prepared for the People for the American Way).

[109/] On the basis of Mr. Thomas' extrajudicial writings, for example, the People for the American Way Action Fund insinuates that a Justice Thomas might overturn Supreme Court decisions that ended segregation and decisions that established the right of privacy. People for the American Way, at 20-22. Erwin Chemerinsky, in an analysis for the People For the American Way Action Fund, has argued that reliance on natural law would lead a Justice Thomas to create rights that are not enumerated in the Constitution, including the right to life of an unborn fetus and economic rights. Chemerinsky, supra, passim. In a New York Times op/ed article published shortly after President Bush nominated Judge Thomas to the Supreme Court, Lawrence Tribe claimed that, relying on natural law, a Justice Thomas would bring "theological" concerns to bear on constitutional issues and thereby promote "moralistic intrusions on personal choice." Tribe, supra, loc. cit.

his D.C. Circuit confirmation hearings, Judge Thomas clearly indicated that he would not rely on natural law in making decisions as a member of the judicial branch.

> In writing on natural law, as I have, I was speaking more to the philosophy of the founders of our country and the drafters of our Constitution. . . .
>
> But recognizing that natural rights is a philosophical, historical context of the Constitution is not to say that I have abandoned the methodology of constitutional interpretation used by the Supreme Court. In applying the Constitution, I think I would have to resort to the approaches that the Supreme Court has used. I would have to look at the texture of the Constitution, the structure. I would have to look at the prior Supreme Court precedents on those matters.[110/]

If Supreme Court nominee Clarence Thomas gives the same response, the fears raised by these critics should be further laid to rest. Nevertheless, because of the disproportionate public attention that has been given to these alarming predictions, we have examined Judge Thomas's published speeches and articles to determine whether, notwithstanding his testimony before the Committee on the Judiciary, there is some basis for his opponents' dire predictions.

110/ Confirmation Hearing on Clarence Thomas to be a Judge on the U.S. Court of Appeals for the District of Columbia: Hearings before the Senate Comm. on the Judiciary, 101st Cong., 2d Sess., at 30 (1990).

In fact, Judge Thomas's speeches and articles published before his judicial appointment do not support the alarmist views of his critics. Rather, the conclusions reached by his opponents appear to be based on a mischaracterization of those writings and on selective and out-of-context quotations.

A. Natural Law as an Aid to Interpreting the Express Provisions of the Constitution

First, Clarence Thomas's writings reflect a view that the Constitution was written as it was in order to give effect to certain philosophical principles embraced by the Founding Fathers. In particular, according to articles and speeches written before he became a judge, Clarence Thomas stated that the Constitution and Civil War amendments reflect the "self-evident truth" that "all men are created equal" which is the cornerstone of the Declaration of Independence. At times, Clarence Thomas referred to this view as a "natural law" principle or as an appeal to a "higher law."[111/]

Despite his references to natural law, Clarence Thomas did not claim in these speeches and articles to be a systematic natural law thinker.[112/] Moreover, Clarence

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[111/] See, e.g., The Privileges or Immunities Clause, at 64; The Declaration of Independence in Constitutional Interpretation, at 992-95, Pacific Research Institute Address at 3; Martin Luther King, Jr., Address, at 2657.

[112/] In fact, the "natural law" label is not essential to the content of Judge Thomas's position. In his most detailed and

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Thomas has never argued that natural law provides judges with a license to ignore the express language of the Constitution, or even the Constitution's silence, in favor of unenumerated rights derived from higher law. Rather, Clarence Thomas's reflections on the subject of natural law are confined to the unremarkable proposition that in trying to understand the meaning of the Constitution's words, one must be aware of and understand the natural law principles that in large part guided the drafting of the Constitution.[113/]

[112/](...continued)
comprehensive speech on civil rights and racial equality, Judge Thomas elaborated his views without referring to them as a "natural law" doctrine. "The Modern Civil Rights Movement: Can a Regime of Individual Rights and the Rule of Law Survive?," Remarks Delivered by Clarence Thomas, Chairman, Equal Employment Opportunity Commission at the Tocqueville Forum, Wake Forest University, 1-14 (Apr. 18, 1988) (hereinafter "The Civil Rights Movement"). Only after elaborating his thoughts did Judge Thomas remark that "[Justice] Harlan kept alive the higher law background of the Constitution . . . ." Id. at 14. Similarly, in a 1988 speech at California State University, Judge Thomas used Walter Lippman's phrase "public philosophy" to refer to the very same principles of equality he had discussed as "natural law" principles in earlier speeches. Remarks by Clarence Thomas, Chairman, Equal Employment Opportunity Commission, at California Sate University, at 8-10 (Apr. 25, 1988) ("At the heart of the American public philosophy, I have come to conclude, is the 'self-evident truth' of the equality of all men which lies at the center of the Declaration of Independence.").

[113/] See, e.g., The Declaration of Independence in Constitutional Interpretation, supra, at 697 (the founding Fathers created "good institutions [in the Constitution] that protect and reinforce good intentions," such as the rights of life, liberty and the pursuit of happiness); The Privileges or Immunities Clause, supra, at 66 ("[t]he higher law background of the Constitution reminds us that our political arrangements (continued...)

The limited significance of this proposition for judicial review is illustrated by the fact that in his writings, Clarence Thomas has identified only two Supreme Court precedents, Dred Scott[114/] and Plessy v. Ferguson,[115/] that were wrongly decided as a consequence of the Supreme Court's failure to recognize the natural law underpinnings of the Constitution.[116/] Not only is condemnation of those two

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[113/](...continued)
are not mere mechanical contrivances, but rather have a purpose"). Even the opponents of Judge Thomas's nomination to the Supreme Court acknowledge that "[a]t the time of the Constitution's drafting, natural law was the dominant political philosophy." Chemerinsky, at 1, citing C. LeBoutillier, American Democracy and Natural Law 126-27 (1950).

[114/] Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

[115/] 163 U.S. 537 (1896).

[116/] The core of Clarence Thomas's condemnation is based on the failure of both decisions to recognize the natural law principle that all men are created equal. According to Mr. Thomas, such recognition was required because "the Constitution is a logical extension of the principles of the Declaration of Independence." The Privileges or Immunities Clause, at 64. From this premise, Clarence Thomas has argued that it follows that the Declaration's promise of the equality of all men must be the guiding principle of the regime established by the Constitution and therefore that slavery and racial discrimination are illegitimate. See id. at 65-66; The Declaration of Independence in Constitutional Interpretation, at 984. This argument is neither radical nor extreme; to the contrary, Clarence Thomas' views are based on similar arguments made by Abraham Lincoln and Dr. Martin Luther King, Jr. Moreover, the NAACP Legal Defense and Education Fund, Inc., agrees with Judge Thomas that "the promise of the Declaration of Independence" is essential to a proper understanding of civil rights, and, perhaps for that very reason, does not criticize or even mention Judge Thomas' references to natural law. Public Statement of the NAACP
(continued...)

decisions representative of mainstream legal thinking, it is hard to imagine anyone today arguing that those decisions were correctly decided.[117] Thus, the limited and uncontroversial focus of Clarence Thomas's natural law critique of the Supreme Court decisions in Dred Scott and Plessy v. Ferguson provide no support for assertions that Clarence Thomas qua Justice Thomas would invoke natural law principles for any purpose other than to guarantee racial equality.[118]

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[116](...continued)
Legal Defense and Education Fund, Inc. on the Nomination of Judge Clarence Thomas to the Supreme Court of the United States, at 3 (Aug. 13, 1991).

[117] Judge Thomas's critics point out that Clarence Thomas has also used the same arguments to criticize the rationale of the Supreme Court's decision in Brown v. Board of Education, 381 U.S. 479 (1965). See, e.g., People for the American Way, at 21. Clarence Thomas has never condemned the result in Brown, which put an end to legal segregation. To the contrary, he has written that the Court in Brown was acting "in a good cause." Civil Rights as a Principle, supra, at 392. However, Clarence Thomas's writings indicate that he would have preferred the Court to have reached the same result on what he regards as a more secure basis than its subjective impression of ambiguous sociological studies. In Judge Thomas's view, the basis of Brown would be immune from subsequent changes in sociological theories if the Court had based its opinion on Justice Harlan's dissent in Plessy, which implicitly relied on the principles of the Declaration of Independence to find that de jure segregation violates the Fourteenth Amendment. See, e.g., The Declaration of Independence in Constitutional Interpretation, at 697-99.

[118] Some opponents of Judge Thomas' nomination to the Supreme Court also have argued that Judge Thomas' natural law views would lead him to overrule Roe v. Wade, 410 U.S. 113 (1973), and perhaps even to decide that the unborn have a constitutionally protected right to life. See, e.g., Chemerinsky, at 10-11. It is true that in his writings before becoming a judge Clarence Thomas generally criticized judicial

(continued...)

B. Judge Thomas Does Not View Natural Law Principles as Rules of Decision in Particular Cases

The principal basis on which we reject the fears of Judge Thomas's critics is that Judge Thomas does not appear to view natural law arguments as rules of decision in particular cases. Instead, his writings indicate that he believes that natural law arguments are instances of political, rather than legal, reasoning. Thus, rather than espousing a natural law

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118/(...continued)
use of the Ninth Amendment to find unenumerated rights, including the right to privacy. See, e.g., Thomas, Civil Rights as a Principle Versus Civil Rights as an Interest, in Assessing The Reagan Years 398-99 (D. Boaz ed. 1988). Clarence Thomas, however, did not premise that criticism on principles of natural law.

Rather, the critics' assertions that Judge Thomas's natural rights views are a threat to Roe are based solely on a single sentence in a 1987 speech in which Clarence Thomas referred to a then-recently published essay by Lewis Lehrman as "a splendid example of applying natural law". See, e.g., Chemerinsky, at 10, citing Thomas, "Why Black Conservatives Should Look to Conservative Policies," Speech to the Heritage Foundation (June 18, 1987). Mr. Lehrman's essay in part asserts that the unborn's right to life is guaranteed by natural law. The fact that Mr. Thomas referred to the essay hardly means, however, that a Justice Thomas would adopt its reasoning. Mr. Lehrman is a trustee of the Heritage Foundation, which sponsored Judge Thomas' speech, and the allusion to Mr. Lehrman's recently published article well may have been nothing more than a polite gesture to his host. Even if the praise were more than that, admiration is not the same as an endorsement; one can admire another's skill as an advocate while disagreeing in whole or in part with the position being advocated. Compare, for example, Clarence Thomas's statement in a 1987 address to the Pacific Research Institute, discussed below, that he finds "attractive" certain libertarian arguments by scholars such as Stephen Macedo but rejects them because they are inconsistent with Mr. Thomas's views on separation of powers and judicial restraint. See Pacific Research Institute speech, at 16.

defense of judicial activism, Clarence Thomas's writings invoke natural law as a means to persuade and inspire his fellow citizens to political action. For example, Judge Thomas has written,

> [t]he best defense of limited government, of the separation of powers, and of the judicial restraint that flows from the commitment to limited government, is the higher law political philosophy of the Founding Fathers. [119]

In the same article, he went on to state

> In defending these rights [i.e., those enumerated in the Declaration of Independence], conservatives need to realize that their audience is not one composed of simply lawyers. Our struggle, as conservatives and political actors, is not simply another litigation piece or technique. This is a political struggle calling for us to use not only the most just and wise of arguments, but the most noble as well.[120]

Judge Thomas's identification of natural law principles with political debate rather than legal argument comes through most clearly in his admiration of Dr. King's use of natural law arguments to build a consensus that supported the Civil Rights Act of 1964.

> Of recent American political figures, the only one who comes to mind speaking about natural law or higher law is the Reverend

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[119] The Privileges or Immunities Clause, at 63.

[120] Id. at 68. The distinction Judge Thomas draws between political debate and legal issues is most succinctly demonstrated by his warning to conservatives against "argu[ing] like lawyers for political causes." Id. at 69.

> Martin Luther King. I think much of the power and all the legitimacy of the civil rights movement derive from that appeal to the same higher law that created America. Natural rights provide a moral compass for society, an objective ethical basis for our political institutions. They serve as a constant reminder of our direction.[121]

This admiration is based on Dr. King's ability to persuade society at large to accept legislation to give effect to the moral principle of racial equality. "By speaking to the best in the American tradition, Dr. King was able to forge a national consensus on the need to establish civil rights protection."[122]

Clarence Thomas's writings expressly recognize that differences over the proper interpretation and application of natural law principles are to be expected and that those differences most appropriately are resolved at the ballot box, not in the courtroom. Speaking specifically of "higher law" ideals, Clarence Thomas stated

> Of course there will be dispute about the proper interpretation of those ideals, and their application in a particular circumstance, and so forth. Democratic government and the majority rule behind it allow such disputes to be judged in a rational way.[123]

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[121] Speech by Clarence Thomas Before the American Bar Association, San Francisco, California, 11 (Aug. 11, 1987).

[122] The Civil Rights Movement, at 14.

[123] Martin Luther King, Jr., Address, at 2657.

C. Judge Thomas has Never Advocated Natural Law as a Means of Importing Particular Moralistic or Religious Views into the Law

In addition to misconstruing the way in which Clarence Thomas's writings suggest he might use natural law as a justice of the Supreme Court, his critics mischaracterize what Clarence Thomas means when he refers to "natural law." The core of the fears expressed by Judge Thomas's critics is that his willingness to consider natural law might lead him to base his judicial decisions on his religious beliefs.[124/] The apparent sole basis for this supposition is that Clarence Thomas's articles and speeches invoke the phrase "the law of nature and nature's God" from the Declaration of Independence. Judge Thomas's opponents have given the phrase a meaning that was never intended by the Founding Fathers or by Clarence Thomas.

There is no indication that Judge Thomas's natural law views embody his personal religious views, or that he would try to impose his beliefs on others. Natural law, as Judge Thomas most likely understands it, is the attempt to learn what can be known about justice by man's reason alone, without recourse to authority such as religious

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[124/] For example, in his study of Judge Thomas's views, Erwin Chemerinsky suggests that Judge Thomas's notions of natural law are mere expressions of his religious beliefs. Chemerinsky, at 8. See also id. at 10-11; Tribe, loc. cit.

teachings.[125/] The Declaration of Independence, on which Judge Thomas's natural law views depend so heavily, states explicitly that politically important principles such as equality are "self-evident," i.e., evident to any reasonable mind unassisted by religious precepts or Scriptural support.[126/] Judge Thomas's writings clearly indicate that he shares this view: ". . . [T]he 'self-evident truth' of the equality of all men . . . is a universal truth, which depends

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125/ See Strauss, Natural Right and History, 84-85 (7th imp. 1971) see also Strauss, "What is Political Philosophy?", reprinted in What is Political Philosophy? and Other Studies, 13 (1959).

126/ The Declaration's reference to "the law of nature and nature's God" was not an attempt to invoke the precepts of any particular religion to support the American Revolution. The natural law traditions of the Declaration have their roots in the political thought of the Enlightenment. Bailyn, The Ideological Origins of the American Revolution 26 (1976). The political doctrines of the Enlightenment were founded on the attempt to separate reason from revelation. See, e.g., Spinoza, A Theologico-Political Treatise 9 (Elwes, trans. 1951). In particular, the Enlightenment teaching regarding the rights of life, liberty, and property, which formed the basis for crucial portions of the Declaration, was founded on reason, not revelation. Locke, The Second Treatise of Government 5 (Peardon, ed. 1952) ("The state of nature has a law of nature to govern it . . . reason, which is that law, teaches all mankind who will but consult it that, being all equal and independent, no one ought to harm another in his life, health, liberty or possessions . . . ."). Thus, the phrase "nature's God" has been interpreted as a deistic formulation for the rational principles underlying nature. See, e.g., Paul G. Kauper, "The Higher Law and the Rights of Man in a Revolutionary Society," in American Enterprise Institute, America's Continuing Revolution 49 (1975).

upon no government for its validity, only nature and reason."[127/]

Clarence Thomas also wrote that "the fundamental principle that all men are created equal means that no individual is the natural or God-annointed ruler of another."[128/] Quoting from James Madison's arguments in The Federalist, Judge Thomas went on to state that "[i]t is the reason, alone, of the public that ought to control and regulate the government."[129/] A claim that natural law authorizes one person (or even a majority) to impose religious precepts on another is clearly inconsistent with these views. Thus, to the extent one fairly can draw any inferences about Clarence Thomas's judicial philosophy on the basis of his past natural law writings, one would be required to infer that his views on natural law would preclude, rather than encourage, him from relying on his personal moral or religious beliefs in interpreting the Constitution.

127/ Remarks by Clarence Thomas, Chairman, Equal Employment Opportunity Commission, at California State University 8 (Apr. 25, 1988).

128/ The Privileges or Immunities Clause, at 64. See also Civil Rights as a Principle, at 400.

129/ The Privileges or Immunities Clause, at 64, quoting The Federalist No. 49, at 260 (J. Madison) (M. Beloff 2d ed. 1987) (emphasis added by Mr. Thomas).

D. In the Same Writings on Natural Law Judge Thomas Advocated Judicial Restraint

The critics of Judge Thomas also dismiss the relevance of Clarence Thomas's repeated and unequivocal statements supporting judicial restraint and separation of powers.[130/] However, those statements further confirm that Clarence Thomas's published views on natural law raise no basis for concern about his approach to judicial decision-making.

Clarence Thomas has expressly stated that his view of natural law reinforces a commitment to traditional constitutional values such as limited government, separation of powers, and judicial restraint.

> Contrary to the worst fears of my conservative allies, [the higher law philosophy of the Founding Fathers] is far from being a license for unlimited government and a roving judiciary. Rather, natural rights and higher law arguments are the best defense of liberty and of limited government. Moreover, without recourse to higher law, we abandon our best defense of judicial review -- a judiciary active in defending the Constitution, but judicious in its

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130/ For example, when confronted with the inconsistency between his gross mischaracterization of Clarence Thomas's statements on natural law and Clarence Thomas's unambiguous support judicial restraint and separation of powers, Mr. Chemerinsky cites the inconsistency as evidence of some supposed intellectual failing on Judge Thomas's part. Chemerinsky, at 5. The inconsistency is better understood as Mr. Chemerinsky's own distortion of Clarence Thomas's views concerning the relevance of natural law to the Constitution, which are entirely consistent with his views on judicial restraint and separation of powers.

> restraint and moderation. Rather than being a justification of the worst type of judicial activism, higher law is the only alternative to the willfulness of both run-amok majorities and run-amok judges.[131]

Similarly, in a 1987 speech to Pacific Research Institute advocating the use of natural law arguments in political debate to promote government policies that protect economic rights, Clarence Thomas explicitly rejected libertarian arguments that "defend an activist Supreme Court, which would strike down laws restricting property rights."[132] Although Mr. Thomas admitted that he found the libertarian arguments "attractive" because of his own belief in the importance of economic rights, he stated that the arguments "overlook[] the place of the Supreme Court in a scheme of separation of powers. One does not strengthen self-government and the rule of law by having the non-democratic

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[131] The Privileges or Immunities Clause, at 63-64. The People for the American Way in its study of Judge Thomas has focused on the last sentence of the quoted statement to support its claim that "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." People for the American Way, at 20. Read in context, it is clear that Mr. Thomas does not make such an assertion. Rather, he is making the argument that judicial restraint and limited government would be politically more attractive to the majority of Americans if the connection between those concepts and the higher law philosophy of the Founding Fathers were explained.

[132] Pacific Research Institute Speech, at 16.

branch of the government make policy."[133/] Thus, Clarence Thomas's writings not only fail to support, but rather they expressly refute, the insinuations by some of Clarence Thomas's critics that a Justice Thomas would attempt to resurrect the long defunct Lochner era during which the Court frequently struck down as unconstitutional regulations that interfered with economic rights.[134/] Similarly, when objectively taken as a whole, Judge Thomas's writings on natural law provide no basis for the dire predictions of his critics.

133/ Id.

134/ See, e.g., Chemerinsky, at 11-12 ("[i]f Clarence Thomas implements his belief in natural economic liberties, he likely would favor a return to many of the Lochner era decisions").

CONCLUSION

Based on our study of Judge Thomas's academic and professional record, his speeches and articles, and especially his opinions as a Circuit Judge, it is clear to us that Judge Thomas has all the qualities of intellect, character and experience required for the office to which he has been named. We therefore believe that Clarence Thomas is eminently qualified to serve as an Associate Justice of the Supreme Court.

Charles F. Rule
Thomas M. Christina
Deborah A. Garza
Michael P. Socarras
F. James Tennies

APPENDIX

GEOFFREY C. HAZARD, JR.
STERLING PROFESSOR OF LAW
YALE LAW SCHOOL
127 WALL STREET
NEW HAVEN, CONNECTICUT 06520

TELEPHONE: (203) 432-4971
FAX: (203) 432-2696

July 27, 1991

Honorable C. Boyden Gray
Counsel to the President
The White House
Washington, D.C.

Dear Mr. Gray:

This responds to your request for my opinion concerning the ethical propriety of conduct by Judge Clarence Thomas in sitting as a member of the panel of the Court of Appeals for the District of Columbia in the case of ALPO Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958 (D.C. Cir. 1990).

It is my opinion that there was no impropriety on the part of Judge Thomas in this matter and, indeed, that it would have been inappropriate for him to disqualify himself.

The Alpo case involved an action by Alpo for damages and injunction under the Lanham Act, and a counterclaim by Ralston based on the same statute. The district court issued an injunction against both parties restraining future false advertising and made a damages award in favor of Alpo. On appeal the damages award was reversed. Judge Thomas participated as one of three judges determining the appeal and wrote the opinion for the court.

The suggestion has been made that Judge Thomas should have disqualified himself from the case. The argument supporting this suggestion is that: (1) Ralston was a party to the appeal and benefitted from the reversal of the judgment against it; (2) Senator Danforth and his family own substantial stock in Ralston; (3) Before being appointed to the bench, Judge Thomas had been employed in Senator Danforth's offices at two stages in Judge Thomas's career, and Senator Danforth was strongly supportive of Judge Thomas's appointment to the Court of Appeals, as indeed Senator Danforth is now supportive of Judge Thomas' nomination to the Supreme Court.

As you have advised me in more detail, the facts concerning the relationship between Judge Thomas and Senator Danforth are as

follows:

Judge Thomas worked for Senator Danforth from 1974 to 1977, when the Senator was Attorney General of the State of Missouri. After a two year interval, during which he worked in the Monsanto Corporate Counsel's office, he then went back to work for Senator Danforth as a legislative assistant in his Senate office from 1979 to 1981. Senator Danforth has strongly endorsed Judge Thomas for all the federal positions he has held. He played a leading role in Judge Thomas's confirmation for the Court of Appeals, and has done so again in the proceedings on Judge Thomas's nomination to be an Associate Justice.

Senator Danforth has told your office that he had no personal involvement in the case at issue. Indeed, he knew nothing about the case and never discussed it with Judge Thomas. He, his wife, and his children have significant holdings in Ralston Purina, but collectively they amount to substantially less than 1% of the total stock in the company.

No request was made by either party to the case that Judge Thomas disqualify himself. The lawyer for Alpo has stated that he was aware of Judge Thomas's friendship with Senator Danforth but made no request for disqualification because he considered the connections insignificant.

Whether Judge Thomas was required to be disqualified is determined by 28 U.S.C. (455. Section 455 defines a number of specific relationships that require disqualification and also has a general provision concerning disqualification. The general provision, which is (455(a), is interpreted in the context of the specific relationships that are defined in other subsection. These other subsections, for example, require disqualification where the judge was previously involved in the case while a lawyer (subsection (b)(2)); or was involved while in a government position (subsection (b)(3)); or where the judge "individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter..." (subsection (b)(4)). Judge Thomas had none of these relationships, or anything close to them.

It is noteworthy that the specific subsections of (455 do not preclude a judge from serving in a case in which a former law partner of the judge appears as advocate, or in a case involving a former employer of the judge, or in a case involving issues similar to those in which the judge was involved prior to becoming a judge. The specific restrictions in (455 thus have limited and carefully defined scope. This limitation is for good reason.

Most people appointed to the federal court have had extensive experience in law practice, government, business transactions, or politics, or a combination of such experience. Most of them have extensive acquaintance with government,

business and political officials, and civic leaders. If relationships arising from this experience and acquaintance were the basis for disqualification, the effects on the federal judiciary would be very adverse. Either judges could not serve in many cases involving the government, political issues, or business controversies, or appointments as federal judge would have to be limited to people with narrow legal backgrounds. It has been the carefully considered judgment in our country for years that neither of these consequences is desirable.

It is against this background that the general provision of (455 is interpreted. This is (455(a), which provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

In my opinion, the fact that Judge Thomas had a professional relationship with Senator Danforth, and personal friendship with the Senator based on that relationship, and that Senator Danforth and his family owned substantial stock in Ralston, is not a relationship such that Judge Thomas's impartiality in the Alpo case might reasonably be questioned. The amount involved in the case, although large compared with someone's personal income, is small for a national business corporation such as Ralston. The effect of the litigation on Ralston one way or the other would have been minor. The effect on Senator Danforth's financial situation would have been minuscule if it could be measured at all. There is no connection between Ralston and the relationship between Senator Danforth and Judge Thomas.

I am of the firm opinion that there was no basis on which Judge Thomas should have disqualified himself. Indeed, there was no basis on which he should have considered the possibility of disqualification a serious alternative. When grounds do not exist for a judge to be disqualified, the judge has an obligation to perform his duties as a judge. A judge should not be intimidated into disqualification by the prospect that some voices might later be critical. In the situation presented in the Alpo-Ralston case, in my opinion Judge Thomas fully met his legal and ethical responsibilities.

Sincerely,

Geoffrey C. Hazard, Jr.

GCH:mg

Ronald D. Rotunda
Professor of Law
217/333-3459
(elex: 5106007653 UI LAW UD
FAX: (217)244-1478
bitnet: rrotunda@uiucvmd

UNIVERSITY OF ILLINOIS
College of Law
147 Law Building
504 E. Pennsylvania Ave.
Champaign, IL 61820-6996

July 26, 1991

C. Boyden Gray, Esq.
Counsel to the President
The White House
1600 Pennsylvania Ave., N.W.
Washington, D.C. 20500

Dear Mr. Gray:

You have asked my opinion regarding the propriety of Judge Clarence Thomas's participation in *Alpo Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958 (D.C. Cir. 1990), a unanimous opinion authored by Judge Thomas and joined by Judges Edwards and Sentelle. The Nation Institute, a not-for-profit organization, has said that Judge Thomas should have removed himself from that case because of Ralston Purina's connection to Senator John Danforth and his family, and Judge Thomas's connection to Senator Danforth. The Nation Institute's Supreme Court Watch issued a report claiming that "Judge Thomas clearly showed flagrant disregard for common sense and legally encoded standards of judicial conduct."

The Factual Background. You have explained to me that the facts, as your office has established them, are as follows. Judge Thomas worked for Senator Danforth from 1974 to 1977, when the Senator was Attorney General of the State of Missouri. From 1977 to 1979 Judge Thomas worked in the Monsanto Corporate Counsel's office, and then he went back to work for Senator Danforth as a legislative assistant in his Senate Office from 1979 to 1981. Senator Danforth has strongly endorsed Judge Thomas for all the federal positions that he has held, and the Senator played a leading role in

Judge Thomas' confirmation for the Court of Appeals.[1]

Senator Danforth has told your office that he had no personal involvement in the *Alpo Petfoods* decision, knew nothing about it, and never discussed it with Judge Thomas. Neither the Senator nor anyone in his family was a party to the *Alpo Petfoods* case, but Senator Danforth, his wife, and his children have significant holdings in Ralston Purina (which was a party). The Senator and his family collectively own an amount of stock that amounts to substantially less than 1% of the total stock of Ralston Purina.

When this case was assigned to Judge Thomas, no party made a request that he recuse or disqualify himself. The lawyer for Alpo has now stated publicly that he was aware, at the time the case was assigned to Judge Thomas, of the relationship between Judge Thomas and Senator Danforth, but the Alpo lawyer made no request for disqualification because he considered the connections insignificant. He continues to hold this view. This lawyer has made this statement even though he obviously now knows how Judge Thomas ruled in the *Alpo Petfoods* case.

In *Alpo Petfoods* Judge Thomas, for a unanimous court, affirmed the trial court decision finding that both Alpo and Ralston Purina violated § 43(a) of the Lanham Act, and that each is entitled to an award of actual damages.[2] Judge Thomas accepted the factual conclusions of the trial court and ruled that Alpo had satisfactorily carried its burden of proof on each element of its false advertising claim against Ralston.[3] However, the court overruled the trial court's decision to award to Alpo $10.4 million (which represented Ralston's profits) because Alpo did not show willful, bad-faith conduct, as previous caselaw requires. The court then sent the case back to the trial court so that it could determine what Alpo's actual damages were,

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[1] Senator Danforth has also strongly supported Judge Thomas in the proceedings and activities that have begun as a result of Judge Thomas's nomination to be an Associate Justice. That support has, of course, occurred after the 1990 Alpo Petfoods decision, for Judge Thomas was not nominated until a few weeks ago.

[2] Alpo did not appeal the trial court's ruling that its advertising of Alpo Puppy Food was "false, material, and aimed at Ralston." 913 F.2d at 962.

[3] 913 F.2d at 965.

and award only that amount to Alpo.[4] The court also reversed the district court's decision to award attorneys' fees to Alpo because the trial court did not find "exceptional " circumstances as the federal statute requires. And the court ordered the trial court to modify the prohibitory injunction against Ralston because it was so broad in restricting speech that it raised first amendment prior restraint concerns.[5] The attorney for Alpo has been quoted as noting that Alpo could end up collecting a larger award from Ralston in light of the formula that Judge Thomas and the appellate court ordered the trial judge to follow.

You have asked my opinion as to whether, on the facts as described, Judge Thomas' failure to disqualify himself was improper.

The Federal Statute. The federal statute that governs this situation is 28 U.S.C. § 455. Subsection (b) of this section lists various circumstances that require a judge to disqualify himself or herself. For example, if Judge Thomas or his spouse or his minor child residing in his house owned even one share of Alpo or Ralston stock, he would have had to disqualify himself. § 455(b)(4) & (d)(4). No party could waive this mandatory disqualification. § 455(e). However, no one in Judge Thomas's household is the owner of any relevant stock; hence this subsection is inapplicable.

The only subsection that appears to be applicable is § 455(a), which provides:

> "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

The Appearance of Impropriety Standard. During the fight over the nomination of Justice Brandeis, some of his detractors challenged his ethics, magnified every conceivable fault, and charged that Brandeis had improperly represented conflicting interests. Now lawyers recognize that acting like Brandeis, as "counsel to the situation," can

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[4] 913 F.2d at 969.

[5] The speech "suppresses more speech than protecting these interests requires." 913 F.2d at 972. "Especially given the prior restraint involved . . .." Id.

be the best service that a lawyer can render. G. Hazard, *Ethics in the Practice of Law* 64-65 (1978).

The Brandeis episode illustrates that the invitation in the federal statute to examine the appearance of impropriety is not intended to grant *carte blanche* authority to amplify every imagined mite or speck. In considering similar language in the Code governing lawyers, the Second Circuit warned that in dealing with ethical principles, "we cannot paint with broad strokes. The lines are fine and must be so marked. [T]he conclusion in a particular case can be reached only painstaking analysis of the facts and the precise application of precedent." *Fund of Funds, Ltd. v. Arthur Andersen & Co.*567 F.2d 226, 227 (2d Cir. 1977). The American Bar Association has also warned that the "appearance of impropriety" language should not degenerate into "a determination on an instinctive, or even *ad hominem* basis . . .." ABA Formal Opinion 342 (1975).[6] That, of course, is what happened during the controversy surrounding the Brandeis nomination.

No one wishes to go down that road again. Thus, in answering your inquiry, I have turned to the case law and have sought to avoid conclusory and vague statements.

The Case Law. State courts typically must comply with state law comparably worded to the federal law. Both state and federal guidelines direct the judge to disqualify himself if "his impartiality might reasonably be questioned." The standards are similar because both state and federal standards share a similar paternity in the ABA's Model Code of Judicial Conduct.

An analysis of both state and federal cases interpreting the catch-all section dealing with the "appearance of impropriety" indicate that Judge Thomas acted properly in not offering to disqualify himself unless both of the parties would waive any objection to his presence.[7]

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[6] Discussed in, Rotunda, Ethical Problems in Federal Agency Hiring of Private Attorneys, 1 Georgetown Journal of Legal Ethics 85, 102-104 (1987).

[7] Subsection 455(e) allows a judge to sit, notwithstanding a violation of subsection 455(a) (the "appearance of impartiality" standard), if the parties waive the alleged disqualification. However, if one is not required to disqualify oneself under § 455(a), then there is no need to disclose the alleged "ground for disqualification" under § 455(e). If there is no violation of §

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Prior to the 1974 amendment to 28 U.S.C. § 455, federal courts generally held that a judge had a "duty to sit" in cases where there was no technical violation of the disqualification statute. The amended section removes this "duty to sit" requirement by requiring disqualification if there is merely a "reasonable" question as to the judge's impartiality. However, this "reasonableness" test does not mean that the judge should disqualify himself or herself merely because there might be *un*reasonable charges of impartiality. The test of when § 455(a) comes into effect is objective: would a "reasonable man knowing all the circumstances [come] to the conclusion that the judge's 'impartiality might reasonably be questioned' . . ." Reporter's Notes to [ABA] Code of Judicial Conduct 60 (1973). Thus, although there is no duty to sit, judges still should not disqualify themselves merely to avoid difficult or controversial cases. H.R. Rep. No. 1453, 93d Cong., 2d Sess. 5 (1974). "Public Policy forbids a judge to disqualify himself for frivolous reasons which would delay the proceedings, overburden other judges, and encourage improper judge-shopping."[6] Litigants, in short, have no right to disqualify a judge just because they do not want that judge. Such a system would mean that "some judges would never try cases, others would be heavily overburdened, and the system of assigning judges would become much too cumbersome for everyday

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455(a), then no party could force the judge to disqualify himself under that section. If no party could force the judge to disqualify himself, there is no need to make disclosure under § 455(e), because there is no need to secure any waiver from any party.

This issue whether Judge Thomas should have disclosed his prior relations with Senator Danforth is moot in the present case because the lawyer for Alpo acknowledges that he already knew of Judge Thomas' friendship and relationship with Senator Danforth, and saw no need to seek disqualification.

If Judge Thomas specifically thought about his relations with Senator Danforth, and also thought that he (Judge Thomas) might not be able to judge the case impartially in light of his friendship for the Senator, then Judge Thomas should disqualify himself because he has a "personal bias or prejudice" concerning a person who has an indirect financial interest in the case. Cf. 28 U.S.C. § 455 (b)(1). However, no facts support such an assumption.

6 R. Rotunda, Professional Responsibility 217 (West Pub. Co. 2d ed. 1988).

operation."[9]

Consider *Darey v. Connecticut Bar*, 170 Conn. 520, 368 A.2d 125 (1976). The judge in that litigation properly decided the case where the state bar is the defendant, even though the judge was a member of the bar and any judgment against the bar could raise his dues. In *Rinden v. Marx*, 116 N.H. 58, 351 A.2d 559 (1976) the attorney was a defendant before the judge on a drunken driving charge. Earlier the attorney had served a complaint on the judge because the judge was a clerk of the corporate defendant and was therefore the person authorized to receive service of process. The judge did not have to disqualify himself, for there was no reason to believe that he would be personally liable for any adverse judgment. In *Alpo Petfoods*, as well, Judge Thomas had no financial interest in the judgment. He owned no Ralston stock, had no direct or indirect financial interest in either party, and could not be personally liable, either directly or indirectly, for any damages that the trial judge, on remand, might impose on Ralston.

It has long been the rule that a judge is not disqualified from hearing a case simply because an appellate court reversed the judge's ruling and remanded the case for further proceedings. *Mayberry v. Maroney*, 558 F.2d 1159 (3d Cir. 1977). For example, in *Alpo Petfoods* the D.C. Circuit remanded the case back to the trial judge who had committed error. Similarly, there is no evidence of the appearance of impartiality merely because the appellate court ruled against Alpo on certain issues. See also, *In re International Business Machines Corp.*, 618 F.2d 923 (2d Cir. 1980). IBM claimed that the trial judge was biased against IBM because 86% of 10,000 oral motions and 74 out of 79 written motions were decided against IBM and in favor of the Government. Adverse rulings alone do not create the appearance of impartiality. In *Alpo Petfoods* Thomas joined two other judges in deciding some issues against Alpo, but that fact does not demonstrate the appearance of impropriety.

In *Commonwealth v. Perry*, 468 Pa. 515, 364 A.2d 312 (1976) the judge was acquainted with the victim, a police officer, in a murder case. In fact, the judge attended the victim's funeral. The officer had often appeared in the judge's court as a witness. The murder suspect sought to reverse his conviction because the judge did not disqualify himself, but the appellate court affirmed the decision of the judge not to disqualify himself. The court reasoned that judges do not and should

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[9] C. Wolfram, Modern Legal Ethics 989 (West Pub. Co. Practitioner's Ed. 1986).

not live in a vacuum, and a ruling favoring disqualification could result in judges being disqualified in too many cases. A judge should be permitted to form social relationships and society should not reasonably expect judges to be prejudiced merely because of the fact of such relationships.

Similarly, in *Mattheus v. Rodgers*, 651 S.W.2d 453, 456 (Ark. 1983), the court held that there was no need to disqualify the lower court judge merely because he had asked one of the attorneys appearing before him to be a pallbearer at his father's funeral: "friendships within the bench and bar do not, of themselves, cause prejudice . . . The public and the clients are aware of their mutual acquaintances and friendships." 651 S.W.2d at 456. Such actions did not demonstrate that there was lack of impartiality. 651 S.W.2d at 457. See also, *Duncan v. Sherrill*, 341 So.2d 946 (Ala. 1977), ruling that there was no disqualification required when a party was also the homeroom teacher for the judge's child. And *Berry v. Berry*, 654 S.W.2d 155 (Mo. App. Ct. 1983), ruled that there was no disqualification required when the judge's wife was the teacher of the party's child.

See also, *T.R.M. v. State*, 596 P.2d 902 (Okl. Crim. App. Ct. 1979). The complaining witness in a rape prosecution was a high school classmate and good friend of the judge's daughter, who was present during the proceedings. The rape victim was to be maid of honor in the wedding of the judge's daughter. The court held that the judge acted properly in refusing to disqualify himself.

In *Meeropol v. Nizer*, 429 U.S. 1337 (1977), the Meeropols (the sons of Julius and Ethel Rosenberg, who were executed in 1953) sued attorney Louis Nizer for libel, invasion of privacy, and infringement of copyright. They also filed a motion before U.S. Supreme Court Justice Marshall to designate judges from other circuits to sit as appellate judges. Justice Marshall had earlier been a member of the second circuit panel that years earlier had denied relief to Morton Sobell, the Rosenberg's codefendants. Justice Marshall ruled that he did not believe that he should disqualify himself on appearance of impartiality grounds.

The judge may have close relations with persons who are not parties or lawyers to the proceeding, but that fact does not require disqualification. Thus, the court did not impose disqualification although the judge's *son* was associated in a party's law firm, when the son did not personally act as a lawyer in the proceeding. *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456 (5th Cir.

1977), cert. denied, 434 U.S. 1035 (1978).

Another case involving a judge's relationship is *Amidon v. State*, 604 P.2d 575 (Alaska 1979), where the defense counsel had publicly criticized the judge in the past and the judge had earlier referred the lawyer to the lawyer discipline authority; the court still ruled that the defense counsel may not require the judge to disqualify himself, notwithstanding claims that the judge had a personal animus against the lawyer.

See also, *Black v. American Mutual Insurance Co.*, 503 F. Supp. 172 (E.D. Ky. 1980): no ground for disqualification because the judge, while a lawyer in practice, had litigated unrelated product-liability cases against the present corporate defendants.

In *Union Carbide Corporation v. United States Cutting Service*, 782 F.2d 710 (7th Cir. 1986), Judge Susan Getzendanner got married in the midst of discovery in a large antitrust class action. Her new husband had stock of IBM and Kodak in his self-managed retirement account. Because IBM and Kodak had brought products from the defendant, the judge would normally have to disqualify herself. However, to avoid this result, the judge immediately ceased ruling on motions in the case while her husband sold his interest in the two companies. The court of appeals upheld this procedure and the judge's refusal to disqualify herself. After the sale, the court reasoned, the judge's husband no longer had an interest in the stock. The court also rejected the defendant's argument that the judge "might be sore at Union Carbide" because her husband, in selling the stock, had to pay nearly $1000 in brokerage fees and give up the expected potential appreciation in the stock. Subsequently, Congress amended the federal law, 28 U.S.C. § 455(f) to explicitly incorporate the holding of this decision.

The main case that superficially might suggest a contrary conclusion is *Liljeberg v. Health Services Acquisition Corp.*, 108 S.Ct. 2194 (1988).[10] In this case the trial judge decided a case without a jury. The issue was who owned a hospital corporation. The loser of this case discovered that the trial judge was a trustee of Loyola University. While the case was pending, Liljeberg (the ultimate winner) was negotiating with Loyola to buy some land for a hospital. Prevailing in the litigation was central to Loyola. Liljeberg's proposal

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[10] This case, as well as Union Carbide, are discussed in T. Morgan & R. Rotunda, Problems and Materials on Professional Responsibility 523-25 (Foundation Press, 5th ed. 1991).

to reopen the Loyola negotiations was formally approved at Loyola's Board meeting of November 12th, which the trial judge attended. The judge regularly attended their meetings, including this crucial November 12th meeting. The trial judge ruled for Liljeberg, which thereby benefitted Loyola.

The *Liljeberg* judge should have disqualified himself under § 455(b)(4). He was a fiduciary of Loyola (he was a trustee), which had "a financial interest in the subject matter in controversy." While holding office in the not-for-profit Loyola University is not a "financial interest" in the securities held by the organization [§455(c)(4)(ii)], Loyola's interest in the land and its sale is not a security, and so is not covered by this exception.

However, the judge argued that since he had forgotten about his fiduciary interests, § 455(b)(4) was not violated, because that section required a "knowing" violation. At a hearing, the trial judge testified that he knew about the land dealings before the case was filed, but he had forgotten all about them during the pendency of the matter. He learned again of Loyola's interest after his decision, but before the expiration of the 10 days in which the loser could move for a new trial. Even then the judge, inexplicably, did not disqualify himself or tell the parties what he now knew.

The Supreme Court accepted the interpretation that § 455(b)(4) required a "knowledge," even though the justices regarded the judge's memory lapses "remarkable."[11] The Supreme Court also ruled that the judge should have disqualified himself for violating this section on March 24, 1982, when the trial judge once again had admitted actual knowledge of the need to disqualify himself under § 455(b)(4). At that point, he violated that subsection by not disqualifying himself.[12]

In addition, the Court ruled (5 to 4) that the trial judge should also have disqualified himself under § 455(a). The Supreme Court relied on the "impartiality might reasonably be questioned" language of § 455(a) but also noted that the trial judge's claim that he was not informed of his fiduciary interest in Loyola "may well constitute a separate violation of § 455,"[13] citing § 455(c), which provides that a judge "should inform himself about his personal and fiduciary financial

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[11] 108 S.Ct. at 2205.

[12] 108 S.Ct. at 2206.

[13] 108 S.Ct. at 2206.

interests . . . ."

Liljeberg, in short, is not analogous to the present circumstances In *Liljeberg* the trial judge knew, on March 24, 1982, that he was violating § 455(b)(4). His failure to disqualify himself at that point led also to a violation of § 455(a), as the Supreme Court pointed out.[14] To make *Liljeberg* comparable to Judge Thomas's situation, one must assume, among other things, that Judge Thomas was also violating one of the other provisions of § 455, but that assumption is contrary to the facts outlined above.

Conclusion. In any given instance, one might argue, "what is the harm of a judge disqualifying himself in a particular fact situation, so as to avoid later charges that he might have acted unethically?" If ethics is good, why not be extra-ethical?

It is certainly true that when presented with an unusual set of facts, one can always argue that the judge should err on the side of disqualification. However, at the end of the day, if one added up this litany of situations where judges perhaps should disqualify themselves, the list would become quite long. When I clerked for a federal judge on the Second Circuit, a law clerk for another judge had the personal rule that he would not work on a case if he played golf with a lawyer for a law firm that represented one of the parties. The result of this highly ethical law clerk was that he disqualified himself in a lot of cases, giving him more time to play golf, resulting in more opportunities to create conflicts, allowing him to disqualify himself in even more cases.

I know of judges who have refused to disqualify themselves when one of the attorneys was the best man in the judge's wedding, or one of the attorneys is the judge's best friend. Such judges are not acting unethically. It is the judges who are too quick to disqualify themselves who are not obeying the intent of the federal statute. We expect and encourage judges to have friends, to be part of the world that they must judge. The federal law, as the cases indicate, limit the cases where a judge must disqualify himself or herself on the grounds that their impartiality might reasonably be questioned.

Over the years I have dealt with many judges and lectured at judicial conferences. In particular, I have lectured on the question of when judges should disqualify themselves. Before the charges raised by The Nation Institute, it would never have occurred to me that a

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[14] 108 S.Ct. at 2206.

judge in Judge Thomas' position should disqualify himself. But then, in reaching my conclusion I am no different than the lawyer for Alpo, who still does not claim that Judge Thomas should have disqualified himself.

When Justice Marshall recently resigned, I recall seeing one of his interviews. He remarked how President Johnson was a warm, personal friend of his. It was Johnson, after all, who appointed Justice Marshall to several offices, including the Supreme Court. But, said Marshall, both he and Johnson knew that once a judge, Marshall would have to decide cases based on the merits, not on his friendship for Johnson. Marshall did not disqualify himself whenever President Johnson was very interested, or was thought to be very interested, in the outcome of a case, even though Marshall enjoyed a warm friendship with the person responsible for putting him on the Supreme Court. Similarly, Justice Marshall did not make it a practice to disqualify himself simply because the NAACP or the Legal Defense Fund was very interested in; or concerned about, a case. To require Marshall and the other judges to disqualify themselves in such circumstances would be bad policy, for it would subject judges to a vague, standardless gauge. And it would deprive us of their judgment and would force judges to live in a ivory tower, removed from the world that they must judge.

The Nation Institute is advancing the argument that Judge Thomas acted unethically in not disqualifying himself in the *Alpo* case. This argument does not find support in the case law, in the statute, and in the experience and practice of other judges in both reported and nonreported cases.

I trust that this letter has responded to your inquiry. If I can be of further assistance, please let me know.

Sincerely,

Ronald D. Rotunda

Ronald D. Rotunda
Professor of Law

Mr. RULE. The report is based on our analysis of publicly available material concerning Judge Thomas' personal and professional background and on the judicial opinions that Judge Thomas has written as a judge on the Court of Appeals for the District of Columbia Circuit.

In addition, because of the public interest in Judge Thomas' views on natural law and because his opinions as a judge are utterly silent on the issue, we examined his published speeches and articles that discuss natural law. After reviewing these materials, as well as some of the recently published criticisms of Judge Thomas, we reached three general conclusions.

First, we concluded that especially in light of his age, Judge Thomas' professional qualifications and achievements are by any measure impressive. We were impressed not only by Judge Thomas' well-chronicled success in overcoming poverty and prejudice, but also by the extraordinary breadth of his professional experience, which—as we know—includes service in State government and every branch of the Federal Government, and in the legal department of a major corporation.

Second, we concluded that although it is not extensive, Judge Thomas' record as a member of the Court of Appeals for the DC circuit reflects the qualities of an outstanding jurist, including judicial temperament, intelligence, and clarity of expression.

As the report states, Judge Thomas' opinions reveal a refined ability to resolve complex issues. At the same time, his opinions place him squarely in the mainstream of American law both in the substance of his views and in his approach to legal analysis.

We also found that Judge Thomas' opinions exhibit highly principled decisionmaking, in particular in the exercise of judicial restraint in deference to the political branches of government. His opinion in the *Otis Elevator* case is a good example of his conscientious efforts to give effect to the will of Congress without regard to his own personal views.

Third, we concluded that the speeches and articles that Clarence Thomas wrote before becoming a judge do not support the alarmist views of his critics that he would use natural law to trump the Constitution and constitutionally enacted statutes.

Before Judge Thomas had uttered a word in these hearings, we independently concluded that, read fairly, his natural law arguments are instances of political rather than legal reasoning. Rather than espousing a natural law defense of judicial activism, Clarence Thomas' writings invoke natural law as a means to persuade and inspire his fellow citizens to political action.

As the report points out, in his confirmation hearings for the court of appeals, Judge Thomas' response to the question of his use of natural rights in constitutional adjudication was identical to the response he has given in these hearings. Nothing in his court of appeals opinions contradicts that testimony.

Moreover, we noted that in his writings Judge Thomas has made repeated and unequivocal statements supporting judicial restraint. One area is in the area of protecting economic rights where even though he views those ideas as attractive, he rejects them as a rule of decisionmaking.

At the end of the report, we summarized our overall assessment of Judge Thomas' record as follows: Based on our study of Judge Thomas' academic and professional record, his speeches and articles, and especially his opinions as a circuit judge, it is clear to us that Judge Thomas has all the qualities of intellect and character and experience required for the office to which he has been named. We therefore believe that Clarence Thomas is eminently qualified to serve as an Associate Justice of the Supreme Court. After almost 2 weeks of hearings, we remain equally convinced that Judge Thomas is well qualified to become Associate Justice Thomas.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Rule follows:]

CHARLES F. (RICK) RULE, ESQ.
CO-AUTHOR OF "JUDGE CLARENCE THOMAS'S PROFESSIONAL BACKGROUND, JUDICIAL OPINIONS, AND STATEMENTS ON NATURAL LAW," A REPORT PREPARED FOR THE WASHINGTON LEGAL FOUNDATION, DATED SEPTEMBER 10, 1991

STATEMENT BEFORE THE SENATE JUDICIARY COMMITTEE HEARINGS ON THE NOMINATION OF JUDGE CLARENCE THOMAS TO THE UNITED STATES SUPREME COURT

September 20, 1991

Mr. Chairman and Members of the Committee,

It is an honor and a pleasure to appear before you on behalf of myself and four other members of the D.C. Bar, Tom Christina, Deborah Garza, Michael Socarras, and Jim Tennies. At the request of the Washington Legal Foundation, the five of us prepared a report analyzing the professional background, judicial opinions, and published statements on natural law of Judge Clarence Thomas. Our report was completed before the commencement of this Committee's current hearings and was published on September 10th. The report concludes that Judge Thomas is eminently qualified to serve on the Supreme Court. Mr. Chairman, on behalf of the Washington Legal Foundation, I ask that our report be included in its entirety in the record.

The report is based on our analysis of publicly available material concerning Judge Thomas's personal and professional background and on the judicial opinions that Judge Thomas has written as a judge on the Court of Appeals for the District of Columbia Circuit. In addition, because of the public interest in Judge Thomas's views on natural law and

because his opinions as a judge are utterly silent on the issue, we examined his published speeches and articles that discuss natural law.

After reviewing these materials as well as some of the recently published criticisms of Judge Thomas, we reached three general conclusions. First, we concluded that "[e]specially in light of his age, Judge Thomas's professional qualifications and achievements are by any measure impressive." We were impressed not only by Judge Thomas's well-chronicled success in overcoming poverty and prejudice but also by the extraordinary breadth of his professional experience, which includes service in state government, in every branch of the federal government, and in the legal department of a major corporation.

Second, we concluded that, although it is not extensive, Judge Thomas's record as a member of the Court of Appeals for the D.C. Circuit reflects the qualities of an outstanding jurist, including judicial temperment, intelligence, and clarity of expression. As the report states, "Judge Thomas's opinions reveal a refined ability to resolve complex issues." At the same time, "his opinions place him squarely in the mainstream of American law, both in the substance of his views and in his approach to legal analysis." We also found that Judge Thomas's opinions exhibit highly principled decision-making -- in particular, the exercise of judicial restraint and deference to the political

branches of government. His opinion in the Otis Elevator case[1/] is a good example of his conscientious efforts to give effect to the will of Congress without regard to his own personal views.

Third, we concluded that the speeches and articles that Clarence Thomas wrote before becoming a judge "do not support the alarmist views of his critics" that he would use natural law to trump the Constitution and constitutionally enacted statutes. Before Judge Thomas had uttered a word in these hearings, we independently concluded that read fairly his "natural law arguments are instances of political, rather than legal, reasoning. . . . [R]ather than espousing a natural law defense of judicial activism, Clarence Thomas's writings invoke natural law as a means to persuade and inspire his fellow citizens to political action."

We also noted that in those same writings Judge Thomas makes "repeated and unequivocal statements supporting judicial restraint." In particular, the report points out that Clarence Thomas's writings clearly reject libertarian arguments that the Supreme Court should return to the Lochner era and strike down all laws that infringe property rights. As Clarence Thomas stated, and I quote, "[o]ne does not

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[1/]Otis Elevator Co. v. Secretary of Labor, 921 F.2d 1285 (D.C. Cir. 1990).

strengthen self-government and the rule of law by having the non-democratic branch of the government make policy."[2/]

At the end of the report, we summarized our overall assessment of Judge Thomas's record as follows:

> Based on our study of Judge Thomas's academic and professional record, his speeches and articles, and especially his opinions as a Circuit Judge, it is clear to us that Judge Thomas has all the qualities of intellect, character and experience required for the office to which he has been named. We therefore believe that Clarence Thomas is eminently qualified to serve as an Associate Justice of the Supreme Court.

After almost two weeks of hearings, we remain equally convinced that Judge Thomas is well qualified to become Associate Justice Thomas.

Thank you, Mr. Chairman. I would be happy to answer any questions that you or the other members of the Committee may have.

[2/]Speech by Clarence Thomas before the Pacific Research Institute, August 10, 1987, at p. 16.

Senator SIMON. I thank all of you. Professor Ellison, as I listen to your testimony, you follow the same legal theories pretty much in your personal beliefs that Judge Thomas does. He has criticized, as you do, and I am quoting him, "race-conscious legal devices."

I am not asking you to say how Judge Thomas would rule now, but in your case. We have in Congress created special assistance for historically black colleges and universities. If Professor Ellison were Justice Ellison, would you rule those unconstitutional?

Mr. ELLISON. Not if they were race-neutral, not if the decision-making was a race-neutral process.

Senator SIMON. Aid for historically black colleges and universities is obviously not race-neutral.

Mr. ELLISON. Senator, you can have persons selected for different reasons. If the goal of the Senate is to bring in a geographical or ethnic or cultural mix of individuals and the Senate or the House of Representatives then goes out and selects those people, then what you have is a preference.

If the Senate, on the other hand, simply said we are going to reserve certain slots for minorities or for women without any other basis being considered, then I think that would be wrong.

Senator SIMON. Well, what we are saying is we are reserving certain money for historically black colleges and universities.

Mr. ELLISON. Are you asking me if that is constitutional?

Senator SIMON. I am asking Justice Ellison whether that is constitutional.

Mr. ELLISON. The only way I would be able to answer that question would be for you to tell me the basis upon which you made your decision. For instance, if you decide that black colleges play a certain role in society the same as similarly situated white colleges, whether they be in Appalachia or some other place, and that the Congress is delegating a certain amount of funds for those colleges, then I would have no problem constitutionally with the Congress doing that.

Senator SIMON. I think that is precisely what Congress does, but it is a race-conscious legal device; no question about that.

Mr. ELLISON. Well, you define it as race-conscious, Senator. It is only race-conscious if you decide that the only reason you are doing it is because of race. If you do it for some other public policy concern—that is, promoting the education of people wherever they tend to go to school, and the case with black colleges being that black students go to black schools primarily—then you send the money where the students are. Now, that is not race; it is just coincidence.

Senator SIMON. I suppose I had better stop this discussion here, but it seems to me that what you are doing is precisely what some of us feel we have to do, and that is to move away from the legal theories to see how we improve our society.

Dean Smith, you used a phrase about a liberty-maximizing approach to the church-state issue. Your assumption of a liberty-maximizing approach is to accept the *Lemon* criteria, I gather.

Mr. SMITH. Well, it is difficult to say that I accept the *Lemon* criteria, because I think Judge Thomas is right when he says that the way that test is interpreted can vary greatly. I think he said it effectively in his testimony, when he said the real question and what

we must face, whatever test is used, are issues about do we have something like strict separation which I think rarely can occur in reality, do we have some measure of accommodation and, if so, under what kind of test, or do we have some form of establishment, and he indicated his concern over issues like coercion—and I think that is something that must be examined in these cases.

He also indicated his concern over the notion of that State placing its imprimatur or endorsement on anything. I think whatever the test that is used, it needs to be a test that focuses on the liberty of individuals, including, as he pointed out and was sensitive to in his testimony, those individuals who feel coerced by the presence of religion in the public sector. So, I think he would be liberty maximizing on both sides, or so I would hope.

Senator SIMON. My time is expired. I gather you have written a fair amount in this field. The phrase "liberty-maximizing approach" is meaningless to me. You send me something that explains what you mean, if you will.

Mr. SMITH. I certainly would be pleased to do that, because I have something of the same title.

Senator SIMON. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

I want to take this opportunity to welcome you gentlemen here. This is one of the most distinguished panels I believe we have had thus far. You have expressed yourselves, you have endorsed Judge Clarence Thomas, and I think you have taken the right stand.

This committee has the greatest responsibility. The nine people on the Supreme Court are the most influential people in this Nation, next to the President. Some of them have gone on not only to interpreting the law, but making the law, which is a mistake, of course. So, it is very important that we put the right people on the Supreme Court.

From the view I made of Judge Clarence Thomas, I am convinced that he is a man of character, he is a man of integrity, he is a man of judicial temperament, he is a man of competence, and he should be confirmed.

Now, I would like to ask your opinion. I will just ask two questions. There is no use in taking a lot of time. We have had a lot of bickering on technicalities here and nit-picking over affirmative action and privacy and all of those things. It all boils down to this: In your opinion, is Judge Clarence Thomas qualified, by reason of integrity, judicial temperament, and competency to be on the Supreme Court of the United States? Those are the questions that the American Bar Association considers, integrity, professional competence, and judicial temperament, and I want to ask that question of you, and we will start with you, Mr. Broadus.

Mr. BROADUS. Yes, I believe he is qualified.

Senator THURMOND. Professor Ellison.

Mr. ELLISON. Yes, he is, Your Honor.

Senator THURMOND. Incidentally, you say you grew up in Rock Hills, SC?

Mr. ELLISON. That is correct.

Senator THURMOND. You were born there?

Mr. ELLISON. I was.

Senator SIMON. Don't hold that against him, Senator Thurmond. [Laughter.]

Senator THURMOND. I was just going to say that maybe that has got a lot to do with his great success, he is from South Carolina.

Mr. ELLISON. I don't doubt that, Senator.

Senator THURMOND. Dean Smith.

Mr. SMITH. I wholeheartedly concur, Senator.

Senator THURMOND. Mr. Rule.

Mr. RULE. Yes, Senator.

Senator THURMOND. I will ask this question now: Do you know of any reason that you heard advanced or that has come out while this committee should not confirm Judge Thomas and why the Senate should not confirm him, do you know of any reason for that?

Mr. BROADUS. No.

Mr. ELLISON. None.

Mr. SMITH. None.

Mr. RULE. No, Senator.

Senator THURMOND. Those are all the questions I have. I think that is the essence of the whole confirmation situation.

Thank you very much, Mr. Chairman.

Senator SIMON. Thank you, Senator Thurmond.

We thank all of you for being here.

Let me just add that no one on this committee has been more faithful in attendance than Senator Thurmond and, just as another member of the committee, I want you to know I appreciate it, Senator Thurmond.

Senator THURMOND. Well, you have done a good job yourself, being here more than the rest of them, and I commend you.

Senator SIMON. Our next panel, testifying in opposition to Judge Thomas' nomination, includes Dr. James J. Bishop, on behalf of Americans for Democratic Action; Patricia Williams, on behalf of the Center for Constitutional Rights; Haywood Burns, on behalf of Supreme Court Watch; and William B. Moffitt, on behalf of the National Center for Criminal Defense Lawyers.

Unless anyone has any reason to do otherwise, we will call on you first, Dr. Bishop.

Mr. BISHOP. Some of us have spoken earlier, Senator, and we thought that perhaps——

Senator SIMON. Let me add again, for all of you, we will enter your full statements in the record and we will limit you to the 5-minute rule.

Mr. BISHOP. We thought earlier that if Mr. Burns would go first, it would be helpful.

Senator SIMON. Fine, and let me just add, Mr. Burns, I have looked at your document and I am impressed by the scholarship of you and whoever else is involved in this.

Mr. BURNS. Thank you, Senator.

Senator SIMON. Mr. Burns.

STATEMENT OF A PANEL CONSISTING OF HAYWOOD BURNS, SUPREME COURT WATCH; PATRICIA WILLIAMS, CENTER FOR CONSTITUTIONAL RIGHTS; JAMES J. BISHOP, AMERICANS FOR DEMOCRATIC ACTION; AND WILLIAM B. MOFFITT, NATIONAL CENTER FOR CRIMINAL DEFENSE LAWYERS

Mr. BURNS. Senator Simon, Senator Thurmond, my name is Haywood Burns. I am dean and professor of Law at the City University of New York Law School, at Queens College, and president of the Nation Institute.

I appear before you today on behalf of Supreme Court Watch, a project of the institute dedicated to scholarly research and public education on the civil rights and civil liberties records of Supreme Court nominees.

Supreme Court Watch has testified before his committee regarding nominees since Judge Sandra Day O'Connor. We have previously submitted an extensive report on Judge Clarence Thomas, as the Senator has indicated. I now formally request, with respect, Senator, that it be made a part of the record.

Based on the past week's hearings, it would appear that Judge Thomas believes there are four rules of confirmation of Justices: First, disown your past record; second, don't predict your future; third, smile with self-deprecating humor; and, fourth, express virtually no opinions on any subject with which anyone would likely disagree.

But this committee knows those are not the rules. You have a high constitutional duty to perform, which is being frustrated. As Senators, you should not be asked to approve a nominee who so dodges and distorts his own long record, who refuses to address broad questions of social and judicial philosophy well within the scope of this committee's mandate. Candid answers to reasonable questions ought to be a minimum qualification for a lifetime Supreme Court appointment.

Supreme Court Watch, like others who preceded us before this committee, opposes Judge Thomas, because of his record of disdain for the law while in previous government service. His willingness to elevate personal political preference over the mandate of Congress and the courts, his long record of attacks on established constitutional precedents in the areas of civil rights and civil liberties.

We are deeply troubled, as are tens of millions of other Americans, by his attitudes and actions as they affect women, racial minorities, the poor, the elderly, and the environment.

Beyond the record, however, we ask that you also consider the grave implications of Judge Thomas' lack of forthrightness with this committee.

You have all witnessed Judge Thomas' numerous equivocations. His past vociferous attacks on civil rights and privacy were simply philosophical musings. Despite his extravagant praise for the Lewis Lehrman antiabortion article, he now tells us he doubts he ever read it. Judge Thomas signed a White House report calling for an end to a woman's right of choice, and now claims he hasn't read that, either.

In response to questions from Senator Leahy, he stated, incredibly, that not once since *Roe* v. *Wade* came down during his law

school days has he engaged in a discussion or held a view on this most controversial case. While refusing to discuss reproductive rights, he readily discusses capital punishment.

In response to questions from Senator Simon, he asked us to believe that he had no knowledge of his close friend and mentor Jay Parker's paid representation of the race in South African Government, though, as Senator Simon noted, others have come forward to say that they engage in long meetings with Judge Thomas on this very subject.

Unfortunately, Judge Thomas' performance before this committee is consistent with a history of lack of candor, compassion, and ethical judgment. As head of the EEOC, he misrepresented to Congress the number of lapsed Age Discrimination in Employment Act cases. In callous and intemperate terms, he has repeatedly attacked the country's civil rights leadership. In the most opportunistic and self-serving manner, he has publicly degraded and humiliated his own sister, to make a point about his views on welfare.

Despite his supposed commitment to impartiality repeated several times to this committee, Judge Thomas did not recuse himself in the 1990 District of Columbia Circuit Court decision to reject Special Prosecutor Lawrence Walsh's request for an en banc hearing of Colonel Oliver North's criminal conviction, notwithstanding having spoken out publicly in support of Colonel North on several occasions.

Perhaps most egregiously, he participated in the *Alpo Petfoods* v. *Ralston Purina* case, involving a company in which his mentor and political sponsor Senator John Danforth holds a significant financial interest. Rather than recuse himself from this case, Judge Thomas voted to overturn a multi-million-dollar judgment against the Ralston Purina Co. Without in any way impugning Senator Danforth, it should be clear that Judge Thomas' participation in the case showed a serious ethical blind spot unworthy of someone who would sit on the High Court.

Over and over in these hearings, members of this committee have asked who is the real Clarence Thomas. Indeed, on the surface, Judge Thomas seems profoundly inconsistent. But, in fact, in avoiding this committee's reasonable inquiries, Judge Thomas displays a lack of regard for the role of the legislative branch and acceptance of unchecked Presidential authority quite similar to that which he displayed repeatedly as a government official.

What is more—

Senator SIMON. If you would conclude your remarks.

Mr. BURNS. Thank you, Senator. I will.

What is more, it is here on the bench that Judge Thomas has shown several examples of the same disturbing deference to executive authority.

Against the backdrop of this record, we urge the members of this committee to assert the full constitutional authority that is theirs. As coequal partners with the President in the appointment of a Supreme Court Justice, do not permit us to go unchecked further along the road to what has been called the imperial presidency. The next Justice, probably serving well into the 21st century, will affect the hearts, minds, and bodies of Americans in ways not likely to soon be undone.

To Judge Thomas and to anyone who follows in his train who lacks the requisite qualifications for this high office, we urge the Senate to firmly and resolutely say no.

Thank you.

[Report follows:]



WATCH

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72 Fifth Avenue
New York, New York 10011
(212) 463-9270

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Supreme Court Watch Analysis

CLARENCE THOMAS: CAREER, WRITINGS AND DECISIONS

September 5, 1991

Editor: Jan Kleeman
Writers: Jedidiah Alpert
Laura Farina
Audrey Feinberg
Paula Tuffin

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ABOUT THIS REPORT

Supreme Court Watch examines and reports on the judicial record of all nominees to the Supreme Court, and works to bring public attention to Supreme Court decisions affecting civil rights and civil liberties. Founded in 1981, Supreme Court Watch maintains a network of attorneys, legal scholars and investigative journalists committed to monitoring legal trends in such areas as reproductive rights, affirmative action and the First Amendment. Supreme Court Watch publishes an annual review of civil rights and civil liberties cases, and produces a series of radio programs heard on over 50 stations nationwide. Supreme Court Watch is supported by grants from the Aaron Diamond Foundation and the Boehm Foundation, and individual contributions.

The editor and authors of this report are attorneys in private practice in New York.

This is the third in a series of reports concerning Judge Clarence Thomas released by Supreme Court Watch. Grateful acknowledgement is made to Simone Monesebian for research and Nick Yasinski for editorial assistance.

Bruce Shapiro
Project Director, Supreme Court Watch

Peter Meyer
Acting Director, The Nation Institute

Haywood Burns
President, The Nation Institute

Introduction

Preparing an analysis of Judge Clarence Thomas's record on civil rights and civil liberties issues is at once a simple and a difficult task. It is simple because he has written very little; it is difficult for that very same reason and because his writings and his performance do not reveal a coherent civil rights philosophy.

Clarence Thomas served as a Missouri assistant attorney general from 1974 to 1977; he was Assistant Secretary for Civil Rights in the Department of Education from 1981 until 1982; he was the chairperson of the Equal Employment Opportunity Commission ("EEOC" or "Commission") from 1982 until 1990; and he has been a judge on the Court of Appeals for the District of Columbia for the past eighteen months.

Nevertheless, in spite of these achievements, Clarence Thomas's record yields remarkably little for scholarly review. His writings include only two scholarly legal articles[1/], plus a handful of miscellaneous articles[2/] and

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1/ Clarence Thomas, The Higher Law Background of the Privileges and Immunities Clause of The Fourteenth Amendment, Harv. L. & P. Pol'y, 63 (1988); Clarence Thomas, Toward A Plain Reading of the Constitution -- The Declaration of Independence In Constitutional Interpretation," 30 Harv. L. J. 691 (1987).

2/ Clarence Thomas, With Liberty . . . For All, (Book Review), The Lincoln Review, vol. 2, No. 4, Winter-Spring 1982, at 41; Clarence Thomas, Minorities, Youth, and Education, 3 Journal of Labor Research 429 (1982); Clarence Thomas, Pay Equity and Comparable Worth, 34 (continued...)

twenty judicial opinions as of August 27, 1991. In addition, he has delivered numerous speeches, many of which have been reduced to writing.

Supreme Court Watch, a project of the Nation Institute dedicated to analysis and public education concerning constitutional rights, has analyzed Judge Thomas's relatively sparse written record and, to a lesser extent, his tenure at the EEOC. Our analysis reveals that, at best, Clarence Thomas appears to be disinterested in advancing the civil rights of groups suffering from the effects of past and continuing discrimination. In many cases, he is openly hostile to those rights.

Several aspects of his record make this clear:

. . As chairman of the EEOC, Clarence Thomas was actively opposed to the EEOC's longstanding practice of establishing goals and timetables to remedy employment discrimination. He reversed his predecessor Eleanor Holmes Norton's policy of bringing class action suits

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[2/](...continued)
Lab. L.J. 3 (1983); Clarence Thomas, Current Litigation Trends and Goals at EEOC, 34 Lab. L.J. 208 (1983); Clarence Thomas, The Equal Employment Opportunity Commission: Reflections on a New Philosophy, 15 Stetson L.J. 29 (1985); Clarence Thomas, Remembering an Island of Hope in an Era of Despair, The Lincoln Review, Vol. 6, no. 4, Spring 1986 at 53; Clarence Thomas, Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough? 5 Yale L. & Pol'y Rev. 402 (1987); Clarence Thomas, Thomas Sowell and the Heritage of Lincoln, The Lincoln Review, vol. 8, no. 2, Winter 1988 at 7.

to cure the effects of systemic discrimination, and adopted instead a policy that focused on individual cases of discrimination. The result of this policy change was that the number of people benefitted by EEOC action decreased. Moreover, because it is much more difficult to prove discrimination against an individual than to prove systemic discrimination on behalf of a class, the likelihood for any plaintiff to succeed declined as well. Clarence Thomas also was criticized as a poor administrator by U.S. District Court Judge Harold Greene, who described Thomas's conduct at the helm of the EEOC as "at best . . . slothful, at worst deceptive to the public."[3/]

. . Clarence Thomas's writings and speeches display a strong contempt for affirmative action policies and laws. According to Thomas, it is inappropriate to use race-based remedies to redress race-based inequities; he believes that race should not be a factor in interpreting the "color blind" Constitution. But he fails entirely to suggest alternate ways to overcome the effects of past and continuing discrimination.

3/ AARP v. EEOC, 655 F. Supp. 228, 229 (D.D.C.), aff'd in part, rev'd in part, 823 F.2d 600 (D.C. Cir. 1987).

. . Clarence Thomas has expressed disapproval of Griswold v. Connecticut, the Supreme Court case finding a right to privacy in matters concerning birth control.[4/] Furthermore, he maintains that natural law and the Declaration of Independence inform the interpretation of constitutional rights. He has approved of the analysis used by other writers who maintain that natural law protects the unborn and vitiates a woman's right to choose. In plain language, this means that Clarence Thomas almost certainly would vote to overturn Roe v. Wade. Even more disturbingly, it suggests that he does not believe that states have the authority to permit abortions. This dangerous and extreme position goes well beyond the stated positions of those Supreme Court justices who are likely to vote to overturn Roe v. Wade if the opportunity arises.

. . Judge Thomas's judicial philosophy is difficult to discern from the twenty opinions he has authored in his eighteen months on the Court of Appeals. However, his opinions reveal a strong tendency to deny access to the courts on highly technical, procedural grounds; extreme deference to the

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4/ Griswold v. Connecticut, 381 U.S. 479 (1965).

executive branch of the federal government; and an insensitivity to important environmental concerns.[5/]

Although the Nation Institute is concerned about his sparse scholarly record, and although many questions about Judge Thomas remain unanswered, one thing is clear: Clarence Thomas most assuredly will not carry on the tradition of the justice he was nominated to replace.

* * *

A growing number of voices have expressed concern about the trend of recent administrations to select nominees with scant records. This apparently calculated effort to avoid challenges similar to those which defeated Robert Bork's nomination should not be countenanced.

The Senate's duty of advice and consent is constitutionally mandated. In performing that duty, the Senate is obliged to explore Judge Thomas's constitutional and judicial philosophies, and his views on specific areas of the law. This inquiry requires the nominee's cooperation. It is unacceptable for a nominee to refuse to answer questions about matters, no matter how attenuated, which may some day come before him as a Supreme Court Justice. The Senate cannot fully discharge its duty if a candidate's record does not shed sufficient light on that candidate's

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5/ Infra, pp. 22 to 25.

judicial philosophy or fitness to ascend to the nation's highest court.[6/]

Nor should the disingenuous selection of an African-American to replace Justice Marshall -- even as the Bush administration decries the use of affirmative action -- succeed in thwarting objections to this nominee. As Justice Marshall said in announcing his retirement: "[T]here's no difference between a white snake and a black snake. They'll both bite."[7/]

We note that numerous organizations devoted to the protection and promotion of civil rights and liberties have analyzed Clarence Thomas's written record and other aspects of his background. Their opposition to his nomination has been nearly unanimous.[8/] Their rejection reflects not only

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6/ For a detailed discussion of the Senate's role in the appointment process, see "Supreme Court Watch Statement on the Nomination of Judge David H. Souter," a copy of which is attached.

7/ Haywood Burns, the Dean of CUNY Law School and the Chair Emeritus of the National Conference of Black Lawyers, put it another way: "[T]here need be no concern about toppling [a] black idol. He is a counterfeit hero, having been outrightly antagonistic toward those struggling for social justice. Haywood Burns, Counterfeit Hero, N.Y. Times, July 9, 1991 at A19 (Op. Ed.).

8/ They include: The NAACP; The NAACP Legal Defense and Education Fund; People For The American Way; The Executive Committee of the National Conference of Black Lawyers; The Alliance For Justice; the AFL-CIO; NOW Legal Defense and Education Fund; National Association of Criminal Defense Lawyers; NARAL; and LAMBDA. The (continued...)

the well-founded concern that Clarence Thomas is unlikely to champion the constitutional rights of all persons in our society in the tradition of retiring Justice Thurgood Marshall; it also reflects the fear that he may work actively to dismantle all that Justice Marshall, and so many others, have fought long and hard to achieve.

Accordingly, The Nation Institute urges the Senate to explore fully Clarence Thomas's position on the vital issues that implicate the rights and liberties of all Americans and assure his willingness to protect them. Without such assurances, his nomination should be defeated.

[8/](...continued)
ACLU came within one vote of opposing Judge Thomas's nomination, but decided as an internal policy matter to remain neutral. Its Director, Ira Glasser, stated, "if this were a vote on Thomas, it would have probably been 61 to nothing." Karen DeWitt, ACLU To Remain Neutral On Nomination Of Thomas, N.Y. Times, Aug. 19, 1991, at A10. Additionally, the Southern California Chapter of the ACLU independently decided to oppose Clarence Thomas. A.C.L.U. Dissent on Thomas, N.Y. Times, Aug. 30, 1991 at B20.

Clarence Thomas's Writings

Clarence Thomas may be more of an enigma than any Supreme Court nominee in recent history. The dearth of his legal opinions and other legal writings, combined with his several obtuse policy articles and speeches, make it difficult to discern his judicial temperament. Thomas's writings create only a sketchy outline of the principles that drive him and suggest that those principles derive from his belief in higher and natural law. Therefore, a grounding in his background may shed light on what informs his legal theories, and ultimately on how he may rule if confirmed to the Supreme Court.

Judge Thomas is a complex person with a seemingly simplistic philosophy that appears to reflect complicated, conflicting and disturbing life experiences. His response to the racism, segregation and poverty he suffered inevitably shaped his views on affirmative action, the role of government, abortion and civil rights.

Judge Thomas's current political leanings are the result of an evolutionary process.[2/] He was a Democrat in

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2/ While change often reflects growth, here it could be considered opportunism. Thomas attended what has become known as the Fairmount Conference while working on the staff of Senator John Danforth of Missouri. In referring to the conference, which was intended as a meeting of black conservatives, Mr. Thomas noted that some attendees attended "solely to gain strategic

(continued...)

his early life and did not become a Republican until 1979, when assuming a position with Republican Senator John Danforth.[10/] As a teenager, Mr. Thomas went through what he has described as a "self-hate" phase that derived from his feelings of anger at being part of an oppressed minority group.[11/] In his youth, Thomas could have been called an activist with militant propensities. In the late 1960s, while at Holy Cross, he encouraged black students to stage a walk-out demonstration against the college's investments in South Africa; led a free-breakfast program for children in Worcester, Massachusetts; and flirted with the Black Panther movement.[12/]

During his years at Yale Law School, his earlier leanings began to shift. Although he was in the top 10% of his class at Holy Cross and clearly qualified to be a Yale student, he subsequently revealed he felt set apart from his

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9/(...continued)
political position(s) in the new administration." He did not, however, include himself among that group. Clarence Thomas, Address before the Heritage Foundation (Washington, D.C., June 18, 1987) at 6.

10/ Juan Williams, A Question of Fairness. The Atlantic Monthly, Feb. 1987 p. 71, at 75 (hereafter, "Williams Article").

11/ See Williams Article at 74.

12/ Williams Article, at 74; see also Clarence Thomas, Address before Cato Institute (Washington, D.C., April 23, 1987) at 5-7; Interview by Bill Kauffman, Clarence Thomas, Reason (Nov. 1987) at 31-32, (hereafter, "Kauffman Article").

classmates because he was admitted under Yale's recently enacted affirmative action program.[13/] Although Thomas rightfully attributes his achievements to hard work, he felt categorized at Yale because of the affirmative action program and reacted by avoiding any classes that focused on civil rights or other minority-related issues.[14/] Thomas did not want to be identified as one who perhaps had been admitted and must be coddled precisely because he was black.[15/] Even though he worked for New Haven Legal Assistance Association, Mr. Thomas spent his years at Yale studying tax, antitrust, and property law.[16/]

Mr. Thomas's reluctance to be identified with black issues become more apparent as the years progressed. Echoing his "self hate" phase, he said at the Fairmount Conference, one month before Reagan's inauguration, "If I ever went to work for the EEOC or did anything directly connected with blacks, my career would be irreparably ruined."[17/] Thomas has also said that he was "insulted" by the initial contacts made to him concerning both his

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13/ Williams Article at 74.

14/ Id.

15/ Id.

16/ Clarence Thomas, Address before the Heritage Foundation (June 18, 1987), at 7.

17/ Williams Article at 75; Kauffman Article at 33.

position with the Department of Education and as chairperson of the EEOC.[18/]

In his effort to overcome his perception that white colleagues perceived him to be somehow unfit, Thomas shunned minority issues. He apparently began to approach the world as an individual alone, rather than as an individual who not only understands that his life experience in white society is directly and profoundly influenced by his membership in a distinctly identifiable minority group, but also accepts that this negative influence is not the fault of those in that group. Mr. Thomas maintains that individual effort alone can overcome the adverse effects of discrimination without any government involvement aimed at protecting the rights of classes of persons. Indeed, he has favored the rights of the individual over those of classes of persons since the late 1970s. Moreover, Mr. Thomas has often said that he refuses to see civil rights as a matter of group equity.[19/]

Judge Thomas's preference for individual rights over group interests solidified after he encountered the

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18/ Mr. Thomas was offended by these overtures because his background is not in civil rights. Address before Heritage Foundation, supra note 7.

19/ Clarence Thomas, The Equal Employment Opportunity commission: Reflections on New Philosophy 15 Stetson L. Rev. 29 (1985); Thomas, Thomas Sowell and the Heritage of Lincoln: Ethnicity and Individual Freedom, Lincoln Review, Vol. 8, No. 2, Winter 1988.

work of conservative economist Thomas Sowell.[20] In an analysis of Sowell's philosophy, Clarence Thomas wholeheartedly endorsed his view that restraints on private decision-making, including affirmative action laws, may achieve equality for minorities, but only at the expense of the freedom of the majority. Sowell and Judge Thomas maintain that the so-called equality minority persons achieve under affirmative action laws entails less freedom than can be achieved by other (albeit undefined) mechanisms which do not restrict a majority person's rights.[21] Judge Thomas also heralded this view as described by Anne Worthan in "The Other Side of Racism - A Philosophical Study of Black Consciousness."[22] In addition, Judge Thomas endorses a belief in a "color blind" interpretation of the Constitution.[23] To Thomas, affirmative action promotes

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20/ Clarence Thomas, Address before the Cato Institute, (Washington, D.C., April 23, 1987), at 7.

21/ Thomas has not explained why some restrictions on freedoms -- e.g., a woman's right to abortion -- are permissible, whereas others to achieve a level economic playing field are not.

22/ Anne Worthan, The Other Side of Racism - A Book Review Philosophical Study of Black Consciousness, Lincoln Review, Vol. 2, No. 4, Winter/Spring 1982.

23/ Clarence Thomas, Address before Cato Institute, pp. 20-23 (Washington, D.C., April 23, 1987) at 23; Clarence Thomas, The Modern Civil Rights Movement: Can a Regime of Individual Rights and the Rule of Law Survive?, Address before the Tocqueville Forum, Wake Forest University, April 18, 1988 at 6-8.

the idea that "justice is to be achieved by having white males feel [the] anger and frustration" experienced by blacks and women at being denied a job or promotion because of discrimination and is nothing more than "social engineering in the work place."[24/]

These views sharply contrast with the views of Justice Thurgood Marshall. Justice Marshall believes that race-conscious remedies are necessary to remove the vestiges of discrimination and to achieve a truly color-blind society:

> It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give considerations to race in making decisions about who will hold the positions of influence, affluences, and prestiges in America. For far too long, the doors to those positions have been shut to negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of the past is impermissible.[25/]

Justice Marshall dismisses the argument that the Constitution prohibits race-conscious remedies: "It is plain that the Fourteenth Amendment, which was designed to

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24/ Clarence Thomas, Address before the Cato Institute, Washington, D.C., April 23, 1987 at 22.

25/ Fullilove v. Klutznick, 448 U.S. 448 at 522 (1980) (Marshall, J., concurring), (Quoting, University of California Regents v. Bakke, 438 U.S. 265 at 402 (Marshall, J., dissenting)).

remedy inequity was not intended to prohibit measures designed to remedy the effects of the Nation's past treatment of Negroes."[26/]

Not surprisingly, Judge Thomas likens some of his views to those of conservative libertarian philosophy.[27/] The primacy of an individual's economic right to the fruits of his or her labor appears repeatedly in Thomas's speeches and writings.[28/] Judge Thomas implemented these beliefs as chairperson of the EEOC. The first policy change he effected there was to reverse the Agency's practice of pursuing prospective relief for broad numbers of persons, and focused instead on cases involving individuals who were actually harmed by discrimination.[29/] As a result, the EEOC pursued fewer class actions aimed at employment

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26/ University of California v. Bakke, 438 U.S. 265 at 396-9 (Marshall, J., dissenting).

27/ Kauffman Article at 31; Clarence Thomas, Keynote Address Celebrating the Formation of the Pacific Research Institute's Civil Rights Task Force (August 4, 1988), at 2.

28/ Clarence Thomas, Keynote Address Celebrating the Formation of the Pacific Research Institute's Civil Rights Task Force, see supra note 19; Clarence Thomas, Address for Pacific Research Institute (August 10, 1987); See Clarence Thomas, Remarks Prepared for Delivery at Suffolk University (March 30, 1987) at 11; Clarence Thomas, Remarks Delivered Address before Tocqueville Forum, Wake Forest University, see supra note 15.

29/ Williams Article at 80.

discrimination.[30] Clarence Thomas specifically decried the prior chairperson's focus on victims of historical events.[31]

Clarence Thomas's libertarian leanings, inevitably, inform his views on economic freedom. Judge Thomas has suggested that he values an individual's right to harm himself or herself more than any notion of governmental protection. He has endorsed the view that African-Americans, and presumably all persons, should be free to work for less than minimum wage, without joining unions, and without licensing regulation from the state.[32]

Mr. Thomas, however, apparently does not hold free will in such high esteem when it is a woman's right to choose that is in issue. He appears to place a fetus's "inalienable right" to life, liberty and the pursuit of happiness above the woman's very same right. Mr. Thomas said "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

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30/ Congressional Black Caucus Statement in Opposition to the Nomination of Judge Clarence Thomas to the Supreme Court at 7.

31/ Id.

32/ Id. at 43; Clarence Thomas, Thomas Sowell and the Heritage of Lincoln: Ethnicity and Individual Freedom. Lincoln Review, Vol. 8, No. 2, Winter 1988 at 7. Clarence Thomas, The EEOC: Reflections on New Philosophy. 15 Stetson L. Rev. at 31.

law."[33] In that article, Lehrman maintains that abortion is impermissible because it violates the Declaration of Independence and natural law.

Mr. Thomas has attacked Griswold v. Connecticut,[34] which held that there is a constitutionally protected right to marital privacy. He takes issue with Justice Goldberg's concurrence because Justice Goldberg relies on the Ninth Amendment[35] to discover additional fundamental rights, such as the right to marital privacy. Mr. Thomas believes such reliance poses a threat to limited government. According to Mr. Thomas:

> Maximization of rights is perfectly compatible with total government and regulation. Unbounded by notions of obligation and justice, the desire to protect rights simply plays into the hands of those who advocate a total state. The rhetoric of freedom (license, really) encourages the expansion of bureaucratic government. . . . Far from being a protection, the Ninth Amendment will likely become an additional weapon for the enemies of freedom.[36]

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[33] Clarence Thomas, Address before the Heritage Foundation, (Washington, D.C., June 18, 1987) at 22. See Lewis Lehrman, The Declaration of Independence and the Right to Life, The American Spectator, Apr. 1987, at 21.

[34] 381 U.S. 499 (1965).

[35] "The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. Amend. IX

[36] Clarence Thomas, Civil Rights as a Principle Versus Civil Rights as an Interest in Assessing the Reagan Yews 391 (D. Boaz ed.).

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To illustrate his point, Judge Thomas speculated that the court may find a Ninth Amendment right to welfare which would require Congress to raise taxes, resulting inevitably in a larger government.[37] Judge Thomas seems to believe that if "notions of obligation and justice" do not temper the desire to protect rights, then we are in danger of falling under a "total state" with a large governmental bureaucracy set up to protect our unemumerated rights. Disturbingly, this argument implies that in the hands of those who are bound by "notions of obligation and justice", which seems to be a catch phrase for higher law, the discovery of unemumerated rights would not pose such a threat.

While Mr. Thomas does not directly attack the right to privacy or a woman's right to reproductive freedom, he certainly believes that Justice Goldberg's reasoning in the Griswold concurrence, which partially underlies these rights, is wrong. Therefore, Judge Thomas has already outlined a basis for challenging Roe v. Wade. Not only is it likely that he would overturn Roe given the opportunity, but it is also possible that he may believe that states cannot permit abortions either.

Mr. Thomas elaborated on his view of natural rights theory in an article published in the Harvard Journal

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[37] Id.

of Law & Public Policy in 1989. There he described the "higher law" background of the privileges and immunities clause of the Fourteenth Amendment.[38] He argued that higher law "is the only alternative to the willfulness of both run-amok majorities and run-amok judges"[39]. He rationalized that natural rights and higher law interpretations are not judicial activism, but rather the best defense of liberty and limited government.[40] As he explained:

> [the] thesis of natural law is that human nature provides the key to how men ought to live their lives. As John Quincy Adams put it: "Our political way of life is by the laws of nature of nature's God, and of course presupposes the existence of a 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." Without such a notion of natural law, the entire American political tradition, from Washington to Lincoln, from Jefferson to Martin Luther King, would be unintelligible.[41]

Mr. Thomas maintains that natural law and higher law theory support the primacy of the individual and "establishes our inherent equality as a God-given

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38/ Clarence Thomas, The Higher Law Background of the Privileges or Immunities Class of the Fourteenth Amendment, 12 Har. J. of L. & P. Pol'y, at 63 (1989).

39/ Id. at 64.

40/ Id. at 63.

41/ Clarence Thomas, Address before the Heritage Foundation (Washington, D.C., June 18, 1987) at 22.

right."[42/] He claims to have learned from his grandfather that "all of our rights as human beings [come] from God, not man."[43/] Mr. Thomas claims it is this view that enabled him to believe he was equal to whites despite segregation. Judge Thomas has stated that he learned that the laws of man are often at odds with the laws of God.[44/] In his own words, as a result, he has become "deeply suspicious of laws and decrees."[45/] This is, at the a minimum, a disturbing perspective for a man who would sit on the nation's highest court and interpret those very laws he holds suspect. Directly contradicting his belief that natural law is an alternative to "run-amok judges" Thomas has said he sympathizes with libertarians such as Stephen Macedo who defend the notion of an activist Supreme Court striking down laws

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42/ Id. at 23.

43/ Clarence Thomas, Address before the Kiwanis Club (Washington, D.C., January 14, 1987) at 1; Clarence Thomas, Address before Cato Institute (Washington, D.C., April 23, 1987) at 4.

44/ Id. Given Thomas's views on the origin of rights, the Senate should explore whether Thomas believes that laws protecting an individual's right to exercise their sexual preference are at odds with his God's higher law and whether reliance on his God's law conflicts with the establishment clause of the Constitution.

45/ Clarence Thomas, Address before Cato Institute, see, infra note 31.

that restrict property rights, but tempers this view by saying that the judicial branch should not make policy.[46/]

Judge Thomas's reliance on natural law theory is at odds with current mainstream constitutional thought. Natural law theory was prevalent at the time of the drafting of the Constitution, but, according to at least one legal scholar, Mr. Thomas is the first Supreme Court nominee in the past fifty years to express the belief that natural law is the appropriate basis for constitutional decision-making.[47/] Accordingly, it is imperative that the Senate question Judge Thomas extensively at the confirmation hearings to discern his willingness to disregard precedent and pursue his own interpretation of natural law.

The picture that emerges from Mr. Thomas's sparse writings and the text of his speeches reveals that he prizes individual freedom and liberty above all else, with little or no governmental restraint. Disturbingly, this analysis does not appear to include the freedom of a woman to choose an abortion; freedom from discrimination; freedom from an unsafe work environment; or freedom from any other manner of

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[46/] Clarence Thomas, Address for Pacific Research Institute, supra note 25. (Subsequently in this speech, Thomas praises Bork as an "extreme moderate" and lambasts the process that prevented his nomination. Id.

[47/] Erwin Chemerinsky, Clarence Thomas' Natural Law Philosophy prepared at the Request of People for the American Way Action Fund, 1991.

exploitation. His open hostility toward affirmative action, his belief in unfettered economic freedom, his expressed cynicism about many of the laws of man and his approbation of natural law suggests he may be disposed -- if not compelled -- to overturn precedent in any or all of these areas.

Clarence Thomas's Judicial Decisions

Clarence Thomas has been a Judge on the United States Court of Appeals for the District of Columbia for the past eighteen months, having been appointed by President Bush in 1990. In his brief tenure on the bench, Judge Thomas has written approximately twenty opinions, many of which involve routine matters. Accordingly, it is simply too early to tell from his judicial record what kind of a judge he is.

Nevertheless, even this slim judicial record should set off alarm bells in a few areas -- environmental law, access to the courts for those seeking to enforce their rights against the government, and the degree of deference given the executive branch of government.

In two important environmental cases, Judge Thomas decided against those seeking to protect the environment, denied them a hearing on the substantive issues based on technicalities, and deferred to the views of the federal agencies, as follows:

In Citizens Against Burlington v. Busey, (D.C. Cir. LEXIS 12035 1991), Ohio citizens who live near the Toledo airport and who use a park and campground near the airport challenged the Federal Aviation Administration's ("FAA") decision to allow expansion of the airport. The Ohio citizens urged that expansion of alternative airports,

where less environmental damage might occur, be considered by the FAA in its environmental impact statement. The law requires consideration of "reasonable alternatives" in environmental impact statements. Judge Thomas, writing the 2 to 1 majority opinion of the Court, decided against the Ohio citizens. Instead, he accepted the FAA's reasoning that only alternatives which supported the goal of improving the Toledo economy needed to be considered.

Judge Thomas's decision shows extreme deference to the FAA. Judge Thomas's deference to the FAA's twisted logic, even when it usurped the purpose of the environmental laws, prompted a vigorous dissenting opinion from conservative Judge James Buckley who harshly criticized Judge Thomas's opinion, writing that it "will undermine the NEPA [National Environmental Policy Act] aim of 'inject[ing] environmental considerations into the federal agency's decision making process.'" Judge Buckley further wrote:

> In our first encounter with NEPA, twenty years ago, we spoke of the duty to ensure that "important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy." [citations omitted]. Because I believe that the court today shirks that duty, I respectfully dissent.

If Judge Thomas's narrow interpretation of the environmental protection laws continues, it will result in partial dismantling of the thin umbrella of protection those laws provide for our fragile environment.

In addition, in Cross-Sound Ferry Services Inc. v. Interstate Commence Commission, 934 F.2d 327 (D.C. Cir. 1991), a ferry service complained that the ICC had given its competitor an exemption from NEPA. The Court upheld the ICC's action and held that the exemption was valid. Judge Thomas wrote a separate concurring opinion stating, not only that the exemption was valid, but that the ferry company had no standing to bring this issue before the Court at all. In this case, Judge Thomas would have denied access to the courts to a company seeking to enforce the environmental protection laws.

Similar threads of deference to the executive branch and denial of access to the courts run through Judge Thomas's other decisions. For example, in Judge Thomas's dissenting opinion in Doe v. Sullivan (D.C. Cir. LEXIS 14984 1991), Judge Thomas would have denied as moot a serviceman's challenge to the military's use of unapproved drugs to protect troops from chemical weapons in the Gulf War -- thus closing the courthouse doors to the serviceman's claim and deferring to the federal government. The majority of the Court disagreed, and ruled in favor of the serviceman.

Another example is New York Times Co. v. NASA, 920 F.2d 1002 (D.C. Cir. 1990), in which Judge Thomas joined a 6 to 5 majority opinion that denied the New York Times request that NASA make public the audio tape of the Challenger

astronauts' final minutes. The majority's narrow interpretation of the Freedom of Information Act, and deference to NASA's interpretation of that act, are typical of Judge Thomas's method of deciding cases.

In short, while his brief judicial tenure makes making any final conclusions impossible, some of the hallmarks of Judge Thomas's decisions so far -- extreme deference to the executive branch of the federal government, overly narrow interpretation of laws used to close the courthouse doors to those suing the government, and insensitivity to important environmental concerns -- do not bode well for the future of the Supreme Court.

Clarence Thomas at the EEOC

Clarence Thomas headed the EEOC from 1982 to 1990. During his tenure, the EEOC shifted its emphasis from class actions that help large groups of people to individual actions, failed to use goals and timetables as a way remedying discrimination and neglected thousands of claims by the elderly. In order to analyze his performance there and to understand why it does not reveal much about his legal philosophy, it is necessary to understand how the EEOC works. The following is a brief description of that agency.

The Commission consists of five commissioners, one of whom is appointed chairperson,[48] who decide matters by majority vote and participate equally on issues involving the exercise of authority. The Commission decides if and when to issue charges alleging discrimination, and, among other functions, authorizes the filing of suits by the EEOC.[49]

The EEOC is empowered "to prevent any person from engaging in any unlawful employment practice as set forth in [42 U.S.C. §§] 2000e-2 or 2000e-3."[50] The Commission has the authority to investigate charges of discrimination, to promote voluntary compliance with equal employment laws and

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[48] 42 U.S.C. § 2000e-4(a) (1981).

[49] EEOC Compl. Man. (CCH) ¶ 1911.

[50] 42 U.S.C. § 2000e-5.

to institute civil actions against employers or unions that violate those laws.[51/] The Commission itself does not have the authority to adjudicate claims or impose sanctions; it is the federal courts that have final decision-making responsibilities.[52/] In essence, the Commission acts as police and prosecutor.

An individual who believes that he or she has been the victim of an unlawful employment practice as defined by 42 U.S.C. §§ 2000e-2 or 2000e-3 may file a "charge" with the EEOC.[53/] The charge must describe the facts surrounding the incident, and the legal theory relied on, with sufficient clarity to notify the EEOC that employment discrimination is being claimed.[54/] The claimant need not,

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51/ EEOC v. Sears, Roebuck & Co., 504 F. Supp. 241 (N.D. Ill. 1980), aff'd, 839 F.2d 302 (7th Cir. 1988).

52/ EEOC v. General Tel. Co. of Northwest, Inc., 599 F.2d 322 (9th Cir. 1979), aff'd, General Tel. Co. of Northwest, Inc. v. EEOC, 446 U.S. 318 (1980).

53/ EEOC regulations require the agency to assist persons who wish to file charges or complaints under 42 U.S.C. § 2000e et seq. ("Title VII"), the Age Discrimination in Employment Act, 29 U.S.C. 621, 623 et seq. ("ADEA"), the Equal Pay Act, 29 U.S.C. 204(d)(1) et seq., ("EPA"), or Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791. See EEOC Compl. Man. (CCH) ¶ 131; see also Clarence Thomas, Address before The National Symposium on Employment of Handicapped Individuals by the Federal Government, Galludet College (Washington, D.C. Oct. 24, 1982) at 7.

54/ Cooper v. Bell, 628 F.2d 1208 (9th Cir. 1980).

however, present a formalistic legal pleading, and the charge will be liberally construed.[55/]

Claimants initially file charges with the EEOC's local field office. After determining that the agency has jurisdiction over the charge, EEOC investigators begin a factual investigation of the allegations. Investigators can subpoena documents, interview employers and employees, and do what is necessary to determine whether discrimination has occurred. Investigators also are authorized to pursue a settlement of the dispute between the claimant and the employer if the parties so desire.[56/] If settlement is not a viable option, the investigation is completed and the investigator prepares a report stating whether or not the employer has violated the law. If a violation is found, the investigator sends a letter to the employer outlining the violation. If conciliation between the parties does not follow, the employer can be sued by the EEOC.

Whether or not the EEOC commences a lawsuit is governed more by the Commission's prevailing policy than by the circumstances of any particular case. It was Congress's intent that suits brought by the EEOC would supplement, not

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[55/] Id.

[56/] EEOC Compl. Man. (CCH) ¶ 545.

supplant, an individual's right to sue to enforce equal employment laws.[57]

Consequently, an EEOC finding that discrimination has occurred is not a prerequisite to a claimant's private discrimination action. Rather, the statute under which the claim is brought governs the procedure. For example, under Title VII the claimant must file a charge and obtain a notice of right to sue before bringing suit.[58] Under ADEA, a claimant may sue any time after 60 days of the charge filing date but before the statute of limitations expires. In contrast, persons suing under the Equal Pay Act may proceed without first filing a charge with the EEOC.[59] Eventually, the courts will look more favorably on a suit buttressed by a positive EEOC determination than on one in which the EEOC finds no discrimination.[60]

If the EEOC determines that discrimination has occurred, the field office investigator sends the case file to attorneys at the EEOC's district offices. The district

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[57] General Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318 (1980).

[58] See EEOC Compl. Man. (CCH) ¶ 321. Notices of right to sue are issued on request.

[59] See EEOC Compl. Man. ¶ 154.

[60] The information on the workings of the EEOC were provided in a conversation with Leroy Clark, former General Counsel to the EEOC under Eleanor Holmes Norton, on July 24, 1991 (hereafter "Clark Conversation").

office attorneys review each case; if they consider it meritorious, they then make a presentation to the general counsel's office in Washington D.C.[61] The general counsel reviews the cases that survive the administrative process and determines whether they are sufficiently strong, factually and/or legally, to take into court. The meritorious cases are presented to the Commission for a vote. The EEOC general counsel then litigates those claims that are approved by the Commission.[62] Ideally, the general counsel should present all cases involving policy issues to the Commission for a vote.[63]

The Commission directly implements its policies during this phase of the EEOC administrative process by choosing which claims to litigate.[64] It is here that the chairperson, as the leader of the Commission, can have a significant impact on the direction of the agency. For example, Eleanor Holmes Norton, EEOC Chairperson from 1977

61/ Clark Conversation.

62/ 42 U.S.C. § 2000e-4(b)(1) & (2); EEOC Compli. Man. (CCH) ¶ 1911.

63/ Clark Conversation.

64/ To facilitate this decision-making process, the Chairman appoints standing committees, composed of one or two commissioners. Among its tasks, these committees are charged with identifying issues likely to arise so that the Commission will be prepared to handle any new issues that come before it. Clark Conversation.

to 1980, chose to pursue cases testing the doctrine of comparable worth. Generally, she favored the use of the class action suit as the most effective vehicle to enforce anti-discrimination laws.[65/] Accordingly, she instructed Leroy Clark, her general counsel, and the rest of the agency, to identify appropriate test cases.

Mr. Thomas, on the other hand, criticized Norton's focus on what he called victims of "attenuated, historical" events and class actions.[66/] He chose to pursue only those cases that involved individuals specifically harmed by discrimination; i.e., cases in which a person was denied a job or a promotion solely because of his or her sex or race.[67/] As a result, the number of class action suits attacking systemic discrimination decreased during Thomas's tenure as chairperson.[68/]

65/ Clark Conversation.

66/ Clarence Thomas, "The EEOC: Reflections on New Philosophy." 15 Stetson L. Rev. at 33.

to the Pacific Research Institute (August 10, 1987), at 2; Clarence Thomas, Keynote Address Celebrating the Formation of the Pacific Research Institute's Civil Rights Task Force, (August 4, 1988), at 22.

68/ Statement of the Leadership Conference on Civil Rights Opposing the Confirmation of Judge Clarence Thomas to the United States Supreme Court, (August 7, 1991), at 4 (August 7, 1991); Congressional Black Caucus Statement in Opposition to the Nomination of Judge Clarence Thomas to the Supreme Court, at 7.

In light of the above-described process, the cases the EEOC chooses not to pursue provide additional important information about the Commission, its policies and its chairperson.[69] Thus, to determine Thomas's effectiveness in pursuing the enforcement of anti-discrimination laws as head of the EEOC, a review of the cases he chose not to pursue, as well as policy statements he made, is critical. Such an analysis has been undertaken by several other organizations. The following is a summary of their findings.

As noted above, Clarence Thomas abandoned the EEOC's prior practice of pursuing class actions and focused on individual cases. By way of explanation, Judge Thomas stated that he did not consider individuals who have been harmed by "historical events" to be appropriate beneficiaries of relief from discrimination.[70] But significantly, Thomas's record in prosecuting individual cases was abysmal.

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[69] Unfortunately, the procedural obstacles to suits by aggrieved persons against the EEOC render the opinions in those suits unhelpful in discerning complaints against EEOC policies. Persons who feel the EEOC has not served them properly face enormous obstacles in suing the EEOC. 42 U.S.C. § 2000e et seq. does not confer a right of action against the Commission. Gibson v. Missouri Pac. R. Co., 579 F.2d 890 (5th Cir. 1978), cert. denied, 440 U.S. 921, (1979). As a result, very few cases challenging the actions of the EEOC survive to be determined on the merits.

[70] "NAACP Report on The Nomination of Judge Clarence Thomas," (NAACP) Aug. 1, 1991 at 4.

Moreover, although Thomas criticized the size of his predecessor's case backlog, the General Accounting Office reported that during Thomas's tenure "the backlog of complaints increased and the number of complaints that received a hearing or investigation declined."[71/]

Clarence Thomas also departed from the EEOC's traditional use of goals and timetables in settlements of employment discrimination cases. He explained this departure by adopting a specious interpretation of Stotts, the Supreme Court precedent on this issue,[72/] in order "to . . . conclude that the Court prohibited the long accepted practice of employment goals and timetables."[73/]

Thomas's tenure at the EEOC has been characterized as "display[ing] a failure and unwillingness to enforce . . . federal laws forbidding employment discrimination."[74/] He has never adequately explained the EEOC's failure to prosecute over 13,000 age discrimination cases which resulted in the victims' loss of their right to pursue

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71/ "Statement of the Leadership Conference on Civil Rights Opposing the Confirmation of Judge Clarence Thomas to the United States Supreme Court," (Leadership Conference on Civil Rights) Aug. 7, 1991 at 6.

72/ Fire Fighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984).

73/ "Judge Clarence Thomas - An Overall Disdain for the Rule of Law," Report by People for the American Way, July 30, 1991 at 12.

74/ Id.

their claims.[75] Indeed, upon the discovery of this EEOC failure, Congress passed emergency legislation restoring all 13,000 cases. Throughout the entire congressional inquiry, Thomas failed to cooperate with Congress in congressional hearings. On numerous occasions he grossly underestimated the number of cases in which the victim lost the right to pursue his or her other claim. Furthermore, he displayed open hostility towards the congressional inquirers.[76]

Again demonstrating insensitivity to the elderly, Mr. Thomas failed to implement adequately rules which would require employers to make pension fund contributions for workers over 65 years of age, despite a federal statute mandating such contributions. U.S. District Court Judge Harold Greene characterized the Agency's behavior in this regard as, "[a]t best . . . slothful, at worst deceptive to the public."[77]

In conclusion, Thomas's record at the EEOC raises serious concerns that, as a Supreme Court Justice, he will not be sensitive to individuals pursuing claims under anti-discrimination statutes, and may be openly hostile to such suits by groups. Moreover, it is unlikely that he will support, much less champion, the rights of oppressed groups.

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[75] Id. at 13.

[76] Id.

[77] AARP v. EEOC, supra. note 3.

His record also reveals that he will likely oppose affirmative legislation to alleviate the effects of historical discrimination.

SUPREME COURT WATCH

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THOMAS SITS ON BOARD OF ANTI-ABORTION MAGAZINE,
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Contact:
Bruce Shapiro or Nick Yasinski
212-242-8400
David Corn
202-546-2239

Judge Clarence Thomas, nominated by President Bush for the U.S. Supreme Court, sits on the editorial board of a conservative journal which has published numerous attacks on abortion rights, according to an exclusive report in this week's issue of The Nation.



Supreme Court Watch, a project of The Nation Institute devoted to analysis of Supreme Court nominees and Court trends, is making this story and related background material available to the press.

According to the investigative report by Nation columnist David Corn, Judge Thomas has sat on the editorial advisory board of the Lincoln Review, a quarterly journal devoted to conservative black opinion published by the Washington-based Lincoln Institute for Research and Education, since 1981. The Lincoln Review has printed frequent and virulent attacks on abortion and affirmative action.

Thomas himself has written three articles for the Lincoln Review since 1981. None are directly concerned with abortion. In his articles, Thomas:

* assails government interference in the economy including minimum wage laws and laws protecting labor unions;
* defends fellow black conservative Thomas Sowell; and

-- more --

* praises the values of the nuns who educated him.

Thomas did not disclose his affiliation with the Lincoln Review or his publications there during his judicial nomination hearings in 1990 or his prior federal appointments, despite the requirement that he list all affiliations and publications on the disclosure form required of presidential appointees.

* A COPY OF THE NATION'S COPYRIGHT ARTICLE IS ENCLOSED. PLEASE FEEL FREE TO CITE IT WITH ATTRIBUTION.

* INVESTIGATIVE REPORTER DAVID CORN IS AVAILABLE FOR INTERVIEWS AT 202-546-2239.

* FOR COPIES OF SUPPORTING DOCUMENTS RELATING TO THIS STORY, INCLUDING THOMAS' ARTICLES, CALL BRUCE SHAPIRO OR NICK YASINSKI AT 212-242-8400.

***

Also enclosed for your information is an op-ed column by Supreme Court Watch advisory board member Haywood Burns, published in the New York Times on July 9,1991.

In this strongly-worded opinion column, Burns, President Emeritus of the National Conference of Black Lawyers and Dean of the CUNY Law School at Queens College, argues that Thomas merits no support from civil rights groups or African-Americans.

DEAN HAYWOOD BURNS IS AVAILABLE FOR TELEPHONE INTERVIEWS AT 718-575-4202.

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BELTWAY BANDITS.

DAVID CORN

■ Judge Thomas's Neighborhood

In their excavation of Judge Clarence Thomas's character and philosophical disposition, members of the Senate Judiciary Committee might sift through back issues of the *Lincoln Review*, a quarterly journal published by the Lincoln Institute for Research and Education. Thomas has sat on the editorial advisory board of this magazine, a bastion of black conservatism, since 1981—far longer than he has sat on any court—and its record during his tenure there should at least prompt questions as to the ideas that animate the judge.

Thomas's written opinions in the *Review* have not been extensive. In 1982 he assailed government interference in the economy—citing laws that establish a minimum wage, that require expensive licenses for taxi drivers and that protect "discriminatory labor unions"—as attacks on the freedom of blacks and others. In 1988 at great length he defended Thomas Sowell, a fellow black conservative who has scorned affirmative action, placing the man in the "pantheon of black Americans such as Frederick Douglass, Booker T. Washington, and Martin Luther King, Jr." He noted his own strong aversion to affirmative action and hailed Sowell for presenting "a much-needed antidote to cliches" about the discrimination women face in the workplace. He also argued that individual freedom derives from free enterprise: "Because we Americans are a commercial people, we express our freedom most typically in the diverse means by which we take to gain wealth. And this wealth can in turn serve as a means to higher ends."

In 1986 the *Review* published remarks he made in tribute to the nuns who taught in the Catholic schools he attended in Georgia: "They have taught me to *believe* in God and the word of God." To the nuns, Thomas declared, "I will have no part of this *orgy of self indulgence* that is running rampant in our society. . . . I will *not forsake* you."

Secularists might find something to worry about in the tone of that speech. Abortion-rights activists should note that the *Review* has taken a fiercely anti-choice stand while Thomas has served on its board. Patrick Monaghan, the general counsel for the Milwaukee-based Catholic League for Religious and Civil Rights, decried abortion in its pages in 1983 as "an elite-oriented attempt to judicially slaughter the poverty class, particularly the black portion of it." He added, "The time to move against the racist Abortion Power is now." In 1985 Edward Smith, an associate editor, proclaimed that "the fetus is an unborn human baby and therefore its destruction—for whatever the reasons—is an act of murder." He compared abortion to slavery and likened those who firebomb abortion clinics to John Brown, the abolitionist who stormed the government arsenal at Harpers Ferry in 1859.

■ Does He Read This Stuff?

Much of the *Review*'s content has been standard Reaganite fare—sometimes delivered with a racial twist. An article defending the Strategic Defense Initiative claimed Star Wars spending would lead to "new pathways out of the bondage of economic dependence and welfarism." A 1986 editorial declared capital punishment "an idea whose time has come—again" and pooh-poohed the argument that race is a factor in who is executed. J.A. Parker and Allan Brownfeld—the editor and an assistant editor—castigated the Reagan Administration in 1982 for not doing enough to ban affirmative action. (Both were on Reagan's transition team for the Equal Employment Opportunity Commission, which Thomas came to head.) They also chastised Reagan for backing an extension of the Voting Rights Act to "court favor" with civil rights groups. One article opposed a national holiday for Martin Luther King Jr. and recommended that a commemorative coin be issued instead. An editorial criticized the Commission on Civil Rights for reporting that persistent discrimination is the main reason blacks and Latinos are unemployed at higher rates than whites. (That capitalism is the cure for racism is one prominent motif of the *Review*.) And a 1983 piece argued there was a pressing need for judicial activism—in order to implement a conservative agenda.

On the more wild side, the *Review* favorably evaluated a book that suggested that Karl Marx was a devil worshiper. In 1986 it published an article by John Snyder, the Washington lobbyist for the Citizens Committee for the Right to Keep and Bear Arms, which observed that most of the evil in the world—including homosexuality, adultery, murder, abortion and communism—is the handiwork of the Antichrist. And the journal has frequently charged that South Africa's African National Congress has been controlled by the Communist Party of the Soviet Union.

The *Review*'s take on the A.N.C. is understandable. Editor Parker and William Keyes, a contributing editor, ran a consulting firm that worked for South Africa; a South African newspaper reported in 1988 that U.S. records showed Keyes was receiving $360,000 a year from Pretoria. Keyes also directs the Black Political Action Committee, which has supported Jesse Helms. In the 1970s and 1980s, Parker was a member of the U.S. affiliate of the World Anti-Communist League, whose chapters in other nations contained neo-Nazis and right-wing terrorists. Parker has also worked with Causa, an anticommunist group founded by Sun Myung Moon's Unification Church. Both Parker and Keyes sit on the advisory board of the American Freedom Coalition, another group connected to the Unification Church.

The pedigrees of Parker and Keyes, and anyone else involved with the *Review*, are relevant only to the extent that they show the milieu in which Thomas apparently feels comfortable. His position on the board—which he should have declared on government disclosure forms and did not—has compromised his judicial integrity. Judges are not supposed to associate with entities that adopt controversial stands, particularly on issues that might come before them. Thomas should not be measured by the writings and affiliations of others. But as an editorial advisor, what does he think of the opinions expressed in the *Review* by his comrades? According to Parker, Thomas never complained about any of the *Review*'s articles. Does silence imply assent?



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CONTACTS: Bruce Shapiro
212 242-8400 (office)
[redacted](home)

Peter Meyer, 212 242-8400

THOMAS VIOLATED JUDICIAL CODE IN RALSTON PURINA CASE

"Supreme Court Watch" Says Nominee's Impartiality Questionable in Decision Affecting Danforth Family Business

WASHINGTON -- Supreme Court nominee Clarence Thomas apparently violated standards of judicial conduct last year by ruling in a false advertising case that could save millions of dollars for Ralston Purina, the company started and still largely controlled by the family of Thomas's personal friend and political mentor, Senator John Danforth (R-Mo.), a report by The Nation Institute's Supreme Court Watch charged today.

The September 1990 decision, one of Thomas's first opinions as a judge on the U.S. Court of Appeals for the District of Columbia, vacated U.S. District Court Judge Stanley Sporkin's fine of $10.4 millon and attorney's fees against the pet food giant for willful misconduct in making false claims promoting the canine health benefits of its Puppy Chow. Thomas ordered the lower court to re-calculate any penalty against Ralston Purina at a drastically reduced rate.

"Judge Thomas clearly showed flagrant disregard for common sense and legally-encoded standards of judicial conduct," the report said, noting a federal law that declares that any judge is disqualified from a case if his or her "impartiality might reasonably be questioned."

Senator Danforth was Thomas's employer both as Attorney General of Missouri and as a U.S. Senator, and is widely recognized as the central proponent of the controversial jurist during his rise through the ranks of the Reagan administration and the federal judiciary.

Full copies of the report and background materials -- including more contacts, the 1990 opinion and financial data -- are available from Supreme Court Watch.

This is the second report on Judge Thomas released by Supreme Court Watch to raise serious questions about Thomas's ethics. The first report revealed his undisclosed membership on the editorial board of the *Lincoln Review*, a conservative quarterly which has published numerous articles opposed to abortion rights and affirmative action.

# # # #



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A BREACH OF ETHICS?

CLARENCE THOMAS, JOHN DANFORTH AND RALSTON PURINA

The second in a series of reports on Judge Clarence Thomas

By Bruce Shapiro
Project Director
Supreme Court Watch
The Nation Institute

Based on reporting by Steve Bennish of the Columbia (Mo.) Daily Tribune, Nick Yasinski and Matthew Ruben.

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ABOUT SUPREME COURT WATCH

Supreme Court Watch is a project of The Nation Institute, a nonprofit organization dedicated to research and education in the areas of civil rights, civil liberties and journalism. Supreme Court Watch prepares background reports on Supreme Court nominees, analyses Court trends and produces radio programs. The Supreme Court Watch advisory committee consists of legal scholars, practicing attorneys and journalists.

ABOUT THIS REPORT

This is the second in a series of background reports on Judge Clarence Thomas. It was researched by a team of investigative journalists in consultation with leading experts in judicial ethics.

This report was written by Bruce Shapiro, project director of Supreme Court Watch. Shapiro is an investigative journalist who specializes in civil rights and civil liberties. He is a frequent contributor to *The Nation* and other magazines and has written for the *Guardian* of London, the *Irish Times* and other newspapers abroad. He is former editor of the *New Haven Independent*, a weekly newspaper he co-founded in 1986.

The first Supreme Court Watch report on Judge Thomas revealed Thomas's undisclosed position as an editorial board member of the *Lincoln Review*, a conservative quarterly which has published numerous articles opposing abortion rights and affirmative action.

CONTACTS AND MORE INFORMATION

For more information concerning this report, or for background materials, contact BRUCE SHAPIRO, 212-242-8400 (o), [redacted]

JAN KLEEMAN, an attorney with Paul, Weiss, Rifkind and Wharton, is researching Clarence Thomas's judicial record as a member of the Supreme Court Watch advisory board: 212-373-3110 (w)

Two experts on judicial ethics are familiar with this report and may be contacted for comment:

STEPHEN GILLERS is professor of judicial ethics at New York University Law School and a member of the Supreme Court Watch advisory committee: [redacted] (h), 212-998-6264 (o).

MONROE FREEDMAN is former dean of Hofstra University Law School, where he still teaches. He is unaffiliated with Supreme Court Watch or The Nation Institute: [redacted] (h), 516-463-5516 (w).

A BREACH OF ETHICS?
Clarence Thomas, John Danforth and Ralston Purina

The second in a series of reports on Judge Clarence Thomas

By Bruce Shapiro
Project Director
Supreme Court Watch
The Nation Institute

Based on reporting by Steve Bennish of the Columbia *(Mo.)* Daily Tribune, *and Nick Yasinski and Matthew Ruben of The Nation Institute.*

In apparent violation of the standards of judicial conduct, Judge Clarence Thomas last year played a crucial role in sharply reducing a $10.4 million damage claim against the Ralston Purina Company, a corporation owned in large part by the family of his former employer, close personal friend and political mentor Senator John Danforth of Missouri. Thomas's opinion in *Alpo Petfoods Inc. v. Ralston Purina Company*, written in September 1990 on behalf of a unanimous three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit, reversed a damage award that, even by Fortune 500 standards, had a measurable impact on the company and thus on the finances of Danforth and other members of his family.

Thomas, recently nominated by President Bush for the Supreme Court, failed to disqualify himself from the case despite federal law prohibiting a judge from sitting on any case in which his "impartiality might reasonably be questioned." He did not publicly disclose his relationship to Danforth, which under federal law would have permitted Alpo's attorneys to make their own decision about his participation. As a member of the appeals panel, he presided over the Ralston Purina case just months after Danforth played an instrumental role in persuading fellow senators to approve Thomas's nomination.

A FAMILY BUSINESS

Ralston Purina was founded by Senator Danforth's grandfather, William Danforth. His descendants remain the company's largest shareholders. According to 1990 Senate disclosure forms, Senator Danforth owns more than $7.5 million worth of Ralston Purina stock. He claimed as assets seven different trusts and other stock holdings in Ralston Purina worth more than $1 million, plus an additional Ralston Purina holding worth between $500,000 and $1 million. His actual holdings may well exceed the $7.5 million: disclosure rules require only that senators describe holdings in broad categories, so there is no way of distinguishing holdings greater than $1 million. According to 1990 proxy reports, Danforth's brothers, William and Donald, both members of the Ralston Purina board of directors, either own themselves or control through a family foundation roughly 5 percent of the company's stock. William Danforth is also chancellor and a trustee of Washington University, which owns an addition 7.46 percent of Ralston Purina shares. The Danforth family's role in Ralston

Purina is well known and widely publicized.

In 1986, one of Ralston Purina's top competitors, Alpo Petfoods, sued Ralston Purina for false advertising, charging Ralston Purina with promoting unproven canine health benefits of its Puppy Chow. Ralston Purina sued back, charging that an Alpo ad was equally false. After a sixty-one-day bench trial, U.S. District Court Judge Stanley Sporkin ruled in Alpo's favor, finding that while both companies were guilty of false advertising, Ralston Purina had acted with willful disregard for the law. Sporkin awarded each side attorney's fees but slapped a massive $10.4 million damage award on Ralston Purina.

Ralston Purina appealed. In April 1990 the case was heard by a three-judge panel of the U.S. Court of Appeals for the District of Columbia, including Judge Thomas, who had been confirmed just a few weeks earlier on February 22. Thomas's opinion agreed that both sides had engaged in misleading advertising but found no evidence of willful misconduct on Ralston Purina's part. Thomas vacated the $10.4 million damage award as well as the attorney's fees levied against Ralston Purina, ordering the lower court to recalculate any penalty at a drastically reduced rate. The case is still pending.

A LONG FRIENDSHIP

John Danforth recruited Clarence Thomas out of law school in 1974. Danforth, then Missouri's Attorney General, hired Thomas as an assistant attorney general. Thomas remained on Danforth's staff for one and a half years. When Danforth moved to the U.S. Senate in 1979, he rehired Thomas as a legislative assistant. At the beginning of the Reagan Administration, Danforth promoted Thomas to new prominence, intervening to gain him appointments on the Reagan transition team, on the Department of Education and finally as chair of the Equal Employment Opportunity Commission (EEOC).

Danforth's intervention was central to the Senate confirmation of all of Thomas's government appointments. With each post, Danforth testified publicly and effusively in Thomas's favor. "He is a person of very high character, very fine judgment, has a fine mind, and is a person who is totally committed to the cause of improving employment opportunity for all the people of this country," Danforth said about Thomas in 1986, when Thomas's controversial decisions as EEOC chair led some senators to question his reappointment. The Senator also lobbied hard behind the scenes. "Frankly, Senator Danforth has spoken to me about you and has spoken very highly," Senator Paul Simon of Illinois told Thomas during the 1986 reappointment hearings. Privately, Senate staffers describe Danforth's role as "central" in winning Thomas's confirmation to the Circuit Court of Appeals in 1990.

Danforth and Thomas are also close friends. "I have spent countless hours of my life talking to Clarence Thomas," Danforth declared during Thomas's 1989-90 confirmation hearings for the federal bench. "I consider myself to be his personal friend." Their relationship continues to this day: as indicated by numerous news accounts, negotiations between Danforth and the White House played a crucial role in gaining Thomas's Supreme Court nomination.

INTEGRITY COMPROMISED?

For all these reasons -- their long professional relationship, their friendship and Danforth's political sponsorship -- common sense suggests that Judge Thomas should have disqualified himself from any case of significance to Danforth or his family to avoid even the appearance of indebtedness. Yet when the Alpo case crossed his bench, he made no such offer or disclosure of his connections, according to Richard Leighton, senior partner of Leighton and Regnery, the law firm that represented Alpo.

There is more involved than common sense. Federal law (28 USC 455 a) declares that any judge is disqualified from a case if her or his "impartiality might reasonably be questioned." A related law (28 USC 455 e) permits attorneys to request a judge's recusal, but only after the judge has made a complete disclosure of any connection to the case under consideration. In practical terms, this assessment of conflict generally involves a two-pronged legal test: the closeness of the relationship between a judge and a party appearing before him, and whether the judge's decisions might have a material impact on an individual's finances or other substantive concerns. Of Thomas's close relationship and the appearance of personal indebtedness to Danforth there can be no doubt. What about financial impact?

Rough calculations of the damage award's impact based on the company's 1990 annual report shows the impact is measurable and substantial. Last year, Ralston Purina reported $375.8 million in profits available to shareholders. The Alpo damage award would have amounted to almost 3 percent of that total, a figure of considerable significance to large, long-term shareholders like the Danforths. In addition, a $10.4 million damage award and its elimination would almost certainly affect performance of the company's stock.

The only journalist to underline Thomas's conflict of interest has been Forrest Rose, a columnist for the *Columbia* (Mo.) *Daily Tribune* (circulation approximately 17,000). He discussed the Ralston Purina case in the course of a July 11 column concerning Thomas's character. "An upright and honest judge would be loath to rule on a case involving a close personal, professional, and political associate," Rose wrote. "Thomas had no such qualms."

The point is not to suggest a conspiracy between Thomas and Danforth. Rather, Judge Thomas clearly showed flagrant disregard for common sense and legally encoded standards of judicial conduct.

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LEGAL TIMES • WEEK OF AUGUST 26, 1991

Bruce Shapiro 441

Thomas' Ethics and the Court

Nominee 'Unfit to Sit' For Failing to Recuse In Ralston Purina *Case*

BY MONROE FREEDMAN

Doubts about the suitability of Clarence Thomas as a nominee for the Supreme Court have been raised on a number of grounds. Chief among these is that Thomas, having received the benefits of affirmative action, would now deny those same benefits to others who are no less deserving than he.

As my father once said of his illiberal friend Moe, if Moe had come to America before Moe's father got here, Moe's father would never have been allowed into the country. Similarly, if Thomas had been subject to the same rules that he would apply to others, we probably would have heard nothing about Thomas himself, and we also might have been spared his insensitive slurs of his sister and her need for welfare.

CASES AND CONTROVERSIES

Another serious ground for doubting Thomas' fitness to sit on the Supreme Court is that just last year he wrote an opinion for the U.S. Court of Appeals for the D.C. Circuit in violation of a federal statute that required him to disqualify himself on ethical grounds.

Before 1974, the judicial recusal statute, 28 U.S.C. §455, used a subjective standard that required disqualification only if "in his opinion" a judge should not sit on a case. In addition, case law had developed a judicial "duty to sit" that tilted against recusal.

These standards ran against the grain of Supreme Court decisions holding that, as a matter of constitutional due process, judges not only must be unbiased but also must avoid even the appearance of bias. As the Court reiterated in a 1984 case, "justice must satisfy the appearance of justice."

In 1974, Congress amended §455 to reflect this constitutional concern with the appearance of impartiality in the administration of justice. The new provision replaced the subjective standard of recusal with an objective one, eliminated the notion of a duty to sit, and broadened substantially the range of cases in which federal judges are required to disqualify themselves.

Sweeping Duty

As §455(a) now reads, any federal judge "shall" disqualify himself in any proceeding in which the judge's impartiality "might" reasonably be questioned.

A good illustration of the sweep of §455(a) is the 1988 Supreme Court decision in *Liljeberg v. Health Services Acquisition Corp.*, 108 S. Ct. 2194. The federal district judge who decided *Liljeberg* was also a trustee of Loyola University in Louisiana. Loyola was not a party in the case, but it did have a significant interest in the outcome. Although the judge at one time had been aware of Loyola's interest, he had forgotten about it and did not connect Loyola to the case when he heard and decided the matter.

Almost a year after judgment had been entered in a way that indirectly benefited Loyola, the losing party learned of the trial judge's relationship to Loyola and moved to vacate the decision and start the case over.

The Supreme Court agreed. "The problem," the Court held, "is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges." To discourage such suspicions and doubts, "[t]he very purpose of §455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible."

The congressional mandate of §455(a) that judges avoid "even the appearance of impropriety" was well-established in 1990 when D.C. Circuit Judge Clarence Thomas sat in *Alpo Petfoods Inc. v. Ralston Purina Co.*, 913 F.2d 958.

In the *Ralston Purina* case, the nonparty who had a significant interest in the outcome was Sen. John Danforth (R-Mo.). Judge Thomas' debt to Danforth is considerable, beginning with Thomas' first job after graduation from law school in 1974 and continuing to this day.

Danforth, as Missouri's attorney general, hired Thomas out of law school as assistant attorney general. When Danforth went to the Senate in 1979, he brought Thomas with him as a legislative assistant. Danforth was then instrumental in moving Thomas up the career ladder, helping to get him appointed to the Reagan transition team, to the Department of Education, and to the top position at the Equal Employment Opportunity Commission.

At each stage, Danforth testified publicly and effusively in Thomas' favor and lobbied for him behind the scenes. This sponsorship included Thomas' appointment to the federal appeals court, when Danforth described Thomas in testimony as his "personal friend." And it is no secret that Danforth's role was crucial in gaining Thomas' nomination to the Supreme Court.

Danforth's connection to Ralston Purina is also a significant one. The company was founded by the senator's grandfather, and members of the Danforth family remain major shareholders. The senator himself owns Ralston Purina stock worth more than $7.5 million. His brothers, William and Donald, are members of the company's board of directors and are also heavy holders of stock, and brother William is chancellor and a trustee of Washington University in St. Louis, which also has large holdings in Ralston Purina.

These facts regarding Thomas' relationship to Danforth and Danforth's relationship to Ralston Purina were set forth more than a month ago in a report by *Supreme Court Watch* (published by the Nation Institute), which was based on reporting in the *Columbia (Mo.) Daily Tribune*. They have not been challenged.

The *Alpo v. Ralston Purina* case involved cross-charges of false advertising. After a two-month bench trial, U.S. District Judge Stanley Sporkin found both companies in the wrong, but found that Ralston Purina alone had acted willfully. Indeed, he found that the firm had "perpetrated a cruel hoax" on dog owners in its false claims that its dog food could cure a serious ailment. He therefore assessed a whopping $10.4 million penalty against Ralston Purina.

Only a few weeks after having been confirmed, Judge Clarence Thomas heard Ralston Purina's appeal—a case in which his patron's family firm was challenging not only a severe penalty but also a finding of deliberate dishonesty in its advertising.

To use the language of the Supreme Court, was there not a sufficient "appearance of impropriety" to require

Freedman
Legal times
8/26/91

Thomas to recuse himself in order to avoid "suspicions and doubts"? Or, in the words of the statute, "might" a reasonable person question Thomas' impartiality in *Ralston Purina*, in which event he "shall" disqualify himself?

Note that the statutory phrasing is not whether a reasonable person "would" question Thomas' impartiality with regard to a case in which his chief sponsor had a significant stake. Rather, it is whether his impartiality "might" reasonably be questioned. Unless no reasonable person could raise a question, recusal is mandated.

Judge Thomas ignored the statutory command. Indeed, he wrote a lengthy opinion for the court overturning the $10.4 million penalty against Ralston Purina and specifically disapproving the trial court's finding that Ralston Purina had perpetrated a "cruel hoax" by running advertisements that it knew lacked support. Defending the honor of the Danforth family firm against Judge Sporkin's finding of bad faith toward its customers, Thomas wrote that Ralston Purina's protestations of innocence could reflect "an honest difference of scientific opinion, rather than a specific intent to mislead consumers."

In reaching this conclusion, Thomas acknowledged that it was necessary to hold that Judge Sporkin's finding of bad faith on the company's part was "clearly erroneous." Thomas further recognized that the Supreme Court has described the deference to trial judges under the "clearly erroneous" standard "in expansive terms," making such findings extremely rare, particularly in lengthy bench trials. Nevertheless, Ralston Purina won its reversal on issues of both money and honor.

The outcome, of course, is irrelevant. Thomas would have been wrong in failing to recuse himself even if he had ultimately held against Ralston Purina. The statute looks to the outset of the proceeding, not to its result. As Yale Law Professor Geoffrey Hazard Jr. has observed, the notion of "no harm, no foul" is "invalid as an ethical proposition."

For the same reason, it is also irrelevant that Thomas' opinion was joined by the other two judges in the case. Judging is a "shared enterprise," as Justice Harry Blackmun put it. Justice William Brennan Jr. added that "[e]xperience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition." For that reason, Justice Blackmun wrote, the presence on a panel of a single judge who is not impartial poses "an unacceptable danger of subtly distorting the decision-making process."

Also irrelevant is the fact that counsel for Alpo did not object to Thomas' presence on the bench. No objection or motion is required to trigger judicial disqualification under §455(a). Rather, as expressed by the 5th Circuit in *Delesdernier v. Porterie*, 666 F.2d 16, 121 (1982), the statute is "directed to judges . . . and it is meant to be self-enforcing."

This is emphasized by §455(e), which allows waiver of disqualification by the parties, "provided it is preceded by a full disclosure on the record of the basis for disqualification." Thus, it is not sufficient that the judge surmise, even correctly, that counsel are aware of the grounds for disqualification and choose not to complain. As made clear at the Senate hearings on the recusal statute, the drafters were conscious of counsel's dilemma of risking the enmity of a judge by initiating the recusal process.

Silence No Excuse

But Thomas failed to initiate a waiver process by making "full disclosure on the record" of his connections with Danforth and of Danforth's connections with Ralston Purina. Since this statutory precondition for waiver was not met, no waiver of Thomas' recusal can be inferred from the silence of the parties.

Counsel for Alpo, Richard Leighton of D.C.'s Leighton and Regnery, says that he was aware of Thomas' jobs with Danforth and of Danforth's connections with Ralston Purina. "We saw it and even made jokes about it," he said in a recent telephone interview. He was not aware of what he called the "abiding friendship" between Thomas and Danforth. Even assuming that, he said, he saw no grounds for a recusal motion.

Leighton's observations may be affected by a felt need to justify his own failure to act as well as Thomas' (although the statute places the onus on the judge, not the lawyer). My own judgment and that of other litigators is that the appearance of impropriety in the *Alpo v. Ralston Purina* case is not a joking matter and that it is clearly within the mandate of §455(a).

In the *Ralston Purina* case, Thomas showed no regard for his ethical obligations as a judge and no respect for the statutory mandate that he recuse himself. On both counts, Thomas is unfit to sit on the Supreme Court of the United States.

Monroe Freedman, the Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra University Law School, testifies frequently as an expert witness on lawyers' ethics. "Cases and Controversies" appears monthly in Legal Times.

Senator SIMON. Thank you very much.
Is there any preference about who goes next?
Ms. WILLIAMS. I will go next.
Senator SIMON. Patricia Williams.

STATEMENT OF PATRICIA WILLIAMS

Ms. WILLIAMS. Good afternoon, Senator Simon and ladies and gentlemen.

I come today before you on behalf of the Center for Constitutional Rights, and it is with great regret that we oppose the nomination of Clarence Thomas. Based on his candidacy, it would be presenting a threat to the assiduous protection of civil liberties, particularly in the areas of women's rights, affirmative action, and rights of the elderly.

I would start by making a brief observation about the course of these hearings. There has been a deeply disconcerting pattern of Judge Thomas either revising or disclaiming many of the most troubling aspects of his record over the past decade.

If one believes in this epiphanous recanting, we are left with the disturbing phenomenon of a Supreme Court nominee who didn't read his own citations, who misunderstood the legal import of his own obstructionist administrative actions, and who really didn't mean most of what he said. And if one is not inclined to believe that Clarence Thomas' keen intelligence could leave him in quite so disingenuous a state of disarray, then you the Senate must come to terms with the fact that you are confronted with an outright practiced refusal to answer questions, and this is a tremendously serious violation of the Senate's right to answers about any nominee's views and his position to uphold precedent, judge facts, interpret new law.

Ambiguity is not the standard. A senatorial leap of faith, as the Philadelphia Inquirer put it yesterday, is not good enough. The Senate has a constitutional duty to ensure that the Court remains a place where both popular and unpopular causes may be heard.

There have been many careless accusations about how politicized the hearings have become, but the Constitution expressly makes the senatorial process of inquiry a political one. The Constitution specifies that no nominee shall be confirmed, without the advice and consent of the Senate. And let me be clear, this concern has nothing to do with whether Clarence Thomas is conservative, liberal, Republican, or Democrat. This concern has nothing to do with whether Clarence Thomas is a role model or not. It is about the Court's actions. The job is more than a role, and Clarence Thomas would be more than a model. It is about real power over the real fates of very real future generations.

If the Senate is confronted with a tabula rasa or even a tabula not so clara, mystery, as even some of you have acknowledged, then there is little basis for knowledgeable advice or informed consent, and this again is a severe threat to the functioning of our tripartite system of government, to the balance of political input that the involvement of several branches of government must provide, before somebody is placed into that most sensitive position of dis-

cretionary insularity, that shielded office of highest trust that is the Supreme Court.

Second, one of the most distinguishing features of Clarence Thomas' philosophy is his wholesale rejection of statistics and other social science data, and with it the rejection of a range of affirmative action remedies that have been central to our social and economic progress.

While self-help and strong personal values are marvelous virtues, they are no standard for the zealous protection of civil and human rights, that protection being the paramount task of the judiciary in any democracy and of our Supreme Court in greatest particular.

The problem with Clarence Thomas' espousal of self-help values is that he positions them in direct either/or tension with any other value. Self-help is presented as bitterly competitive, rather than in complete concert with those social remedies and measures that would help ever more, rather than ever fewer people.

I recently saw a television program, something that we have all seen, I think, over voices presenting statistics about the lack of educational opportunity for black children in inner-city schools, about dropout rates, drugs, crime, teacher apathy, lack of funding, padlocked public libraries, and the low expectations of officials and school administrators.

At the end of this very depressing summary, the anchor turned to four teenagers, all black and all excellent students in a special program designed to encourage inner-city black youths with an interest in math and science, "Are you here to show us that's a lie?" asked the commentator. The students then proceeded to try to redeem themselves from the great group of the "not very good" inner-city black kids, by seeing themselves apart as ambitious, dedicated, different in one sense, yet just the same as the majority of all other kids at the same time.

It was unbearable listening to these young people try to answer this question. It put them in an impossible double bind. They were lower-class kids who came from tough inner-city neighborhoods, where very few of their friends could realistically entertain aspirations to become neurosurgeon or microbiologists, and it was this community from which they were being cued to be different, in order to prove the truth of their individualism.

Let me be very clear, I am not faulting, but praising these young people's aspirations and goals, but what concerns me is the way in which not only the TV anchor, but also many in the society, including many blacks and including Clarence Thomas, force them and others like them to reconcile their successful status by presenting the conditions from which they were so serendipitously rescued as mere fiction, waiting to be willed away by the mere choice to overcome it.

Moreover, a question, a model that asks children whether they can prove statistics to be a lie does not treat statistics as genuinely informative. If the actual conditions of large numbers of people can be proved a lie by the accomplishments of an exemplary few, then social science data only reinforce an exception that proves the rule. They do not represent the likely consequences of social impoverishment, they bear no lessons about the chaotic costs of the last sever-

al years of having eliminated from our social commitment the life nets of basic survival.

Rather, social science data are reduced to evidence of deserved destitution and chosen despair, the numerical tracking of people who dissemble their purported deprivation, and dismissed as mere lockstep thinking opinion, rather than empiricism.

The Supreme Court in recent cases, perhaps most vividly in *City of Richmond* v. *Croson*, has persistently done something with statistical evidence that is very like asking schoolchildren if they can make into a lie the lost opportunities of countless thousands of others.

The dismissiveness of Clarence Thomas' analysis of social science evidence exceeds even that of the majority's reasoning in *Croson.* For all his constant and admittedly quite moving anecdotalizing about his own history, Thomas by this gesture effectively supplants our larger common history with individualized hypotheses about free choice, in which each self chooses her destiny, even if it is destitution.

Clarence Thomas has not clearly committed to an historical context that gives at least as much weight to the possibility that blacks and other groups historically disenfranchised groups have not had as many chances to be in charge of things as to the possibility that they just don't want to or that they just can't.

If we do not begin to take the horrendous social conditions of black people seriously as social and constitutional matters, not just individual problems, we risk becoming a permanently divided society. Social necessity not only must have, it may and does have at least some place in the Supreme Court's considerations into the next century.

Thank you.

[The prepared statement of Ms. Williams follows:]

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Testimony of Patricia J. Williams

STATEMENT
BY
PATRICIA J. WILLIAMS
ON BEHALF OF
THE CENTER FOR CONSTITUTIONAL RIGHTS
AGAINST THE NOMINATION
OF JUDGE CLARENCE THOMAS TO THE
U.S. SUPREME COURT

Senators, Ladies and Gentlemen, Good afternoon. I come before you today on behalf of the Center for Constitutional Rights. It is with great regret that we oppose the nomination of Clarence Thomas.

Many of the civil rights organizations who have preceded me have distilled the basis of our concern that Clarence Thomas's nomination represents a threat to the assiduous protection of civil liberties, particularly in the areas women's rights, affirmative action, rights of the elderly. I will not repeat all of the bases of the Center's concern. You may refer to the Statement of the Center which I will enter into the record at the end of this presentation.

One of the most distinguishing features of Clarence Thomas's philosophy is his wholesale rejection of statistics and other social science data, and with it the rejection of a range of affirmative action remedies that have been central to our social and economic progress.

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Testimony of Patricia J. Williams

While self-help and stong personal values are marvelous virtues they are no stand-in for the zealous protection of civil and human rights--that protection being the paramount task of the judiciary in any democracy, and of our Supreme Court in greatest particular. The problem with Clarence Thomas's espousal of these self-help values is that he positions them in direct "either/or" tension with the any other value; self-help is presented as bitterly competitive rather than in complete concert with those social measures that would help ever more rather than ever fewer people.

An example of why this kind of created tension is so pernicious: recently, I saw a television program, such as we have all seen, with overvoices presenting statistics about the lack of educational opportunity for black children in inner-city schools--statistics about drop-out rates, drugs, crime, teacher apathy, lack of funding, inadequate facilities (particularly for math and science study), padlocked public libraries, low expectations of civic officials and school administrators, and general conditions of hopelessness. At the end of this very depressing summary, the anchor turned to four young teenagers in the studio, all black, all excellent students in a special program designed to encourage inner-city students with an interest in science. He asked: "We've just heard that black kids aren't very good in math and science; are you here to show us that that's a lie?" The students then

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proceeded to try to redeem themselves from the great group of the "not very good" inner city black children by setting themselves apart as ambitious, dedicated, "different" in one sense, yet "just the same as" the majority of all other kids at the same time.

It was unbearable listening to these young people try to answer this question. It put them in an impossible double bind. These were lower class kids who came from tough inner-city neighborhoods where very few of their friends could realistically entertain aspirations to become neurosurgeons or microbiologists. It was this community from which they were being cued to be different. Let me be very clear: I am not faulting, but praising these young people's aspirations and goals. What concerns me is the way in which not only the TV anchor, but also many in this society, including many blacks, and including Clarence Thomas, force them and others like them to reconcile their successful status by presenting the conditions from which they were so serendipitously rescued as a mere fiction waiting to be willed away by the mere choice to overcome it. In this way, the commentator's question actually limited their alternatives, compromised their function as *realistic* role models, and prompted explanations of their good fortune that tended to kill their sense of communal affiliation as the only way of permitting the truth of their individualism to remain intact. Although this sort of rhetoric is frequently wrapped in

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aspirations of racial neutrality, it in fact pits group against individual in a way that is not only race-based, but pits successful or middleclass blacks against their less fortunate friends and even family.

Moreover, a question, a model that asks children whether they can prove statistics to be a lie does not treat statistics as genuinely informative. If the actual conditions of large numbers of people can be proved a lie by the accomplishments of an exemplary few, then social science data and statistics only reinforce an exception that proves the rule. They do not represent the likely consequences of social impoverishment; they bear no lessons about the chaotic costs of the last several years of having eliminated from our social commitment the life nets of basic survival. Rather, these data are reduced to evidence of deserved destitution, and chosen despair, the numerical tracking of people who disssemble their purported deprivation--dismissed as mere "lockstep" thinking, opinion rather than empiricism.

The Supreme Court in recent cases, perhaps most vividly in City of Richmond v. J.A. Croson, has persistently done something with statistical evidence that is very like asking four schoolchildren if they can make into a lie the lost opportunities of countless thousands of others. Richmond had a black population of approximately 50%, yet only 0.67% of public construction expenditures went to minority contractors. The city set a

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30% goal in the awarding of its construction contracts to minorities, based on its findings that local state and national patterns of dicrimination had resulted in all but complete lack of access for minority-owned businesses. The Croson majority dismissed these gross underrepresentations of people of color, of blacks in particular, as potentially attributable to their lack of "desire" to be contractors. In other words, the nearly one hundred percent absence of a given population from an extremely lucrative profession was explained away as mere lack of initiative. As long as the glass is 0.67% full....

The dismissiveness of Clarence Thomas's analysis of statistical evidence exceeds that even of the majority's reasoning in Croson. For all of his quite moving anecdotalizing about his own history, Thomas by this gesture effectively supplants our larger common history with individualized hypotheses about free choice, in which each self chooses her destiny even if it is destitution. Clarence Thomas has not clearly committed himself to taking into account past and present social constraints as realistic infringements on the ability to exercise choice. He ignores that history which gives at least as much weight to the possibility that certain minority groups have not had many chances to be in charge of things as to the possiblity that they just don't want to, or that they just can't.

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But if we do not begin to take the horrendous social conditions of black people seriously--as social not just individual problems--we risk becoming a permanently divided society. Such social necessity not only may have, it MUST have at least some place in the Supreme Court's considerations into the next century.

I will close by making a brief observation about the course of these hearings. There has been a deeply disconcerting pattern of Judge Thomas either revising or disclaiming much of the most troubling aspects of his record over the past decade. If one believes in this epiphanous recanting, we are left with the disturbing phenomenon of a Supreme Court nominee who didn't read his own citations, who misunderstood the legal import of his own obstructionist administrative actions, and who didn't really mean most of what he said.

And if one is not inclined to believe that Clarence Thomas's keen intelligence could leave him in quite so disingenous a state of disarray, then you, the Senate must come to terms with the fact that you are confronted with an outright, practiced refusal to answer questions. And this is a tremendously serious violaton of the Senate's right to answers about any nominee's views and disposition to uphold precedent as well as judge facts, interpret new law. The Senate has a constitutional *duty* ensure that the court remains a place where voices of dissent and unpopular

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causes may be heard. Ambiguity is not the standard. A senatorial leap of faith, as the Philadelphia Enquirer urged yesterday, is not good enough. Much of the vocabulary that even some senators have employed during the course of these hearings--"impression," "faith," "instinct," "hope," and "trust"--simply does not amount to a reasoned "choice" to support Clarence Thomas.

There have been many careless accusations about how "politicized" these hearings have become. But the Constitution expressly makes the Senatorial process of inquiry a political one. The Constitution specifies that no nominee shall be confirmed without the "advice and consent" of the senate. Let me be clear: the basis of this concern has nothing to do with whether Clarence Thomas is conservative, liberal, republican, or democrat. If the senate is confronted with a tabula rasa--or even a tabula-not-so clara, a "mystery" as some of you have acknowledged--then there is little basis for either knowledgeable advice, or informed consent.

And this, this is a severe threat to the functioning of our tripartite system of government, to the balance of political input that the involvement of the several branches of government must provide before someone is placed into that most sensitive position of discretionary insularity, that shielded office of highest trust that is the Supreme Court.

STATEMENT BY

THE CENTER FOR CONSTITUTIONAL RIGHTS

AGAINST THE NOMINATION OF

JUDGE CLARENCE THOMAS

TO THE U.S. SUPREME COURT

Statement by the

Center for Constitutional Rights

against the nomination of

Judge Clarence Thomas

to the United States Supreme Court

The Center for Constitutional Rights (CCR) is a non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights.

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Additional copies of this booklet can be ordered from the Center for Constitutional Rights at the address below.

This pamphlet was prepared at CCR.

Center for Constitutional Rights
666 Broadway
New York, New York 10012
(212) 614-6464
(212) 614-6499 (fax)

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"I am unalterably opposed to programs that force or even cajole people to hire a certain percentage of minorities."

JUDGE CLARENCE THOMAS

The Center for Constitutional Rights urges all groups and individuals who are concerned with social justice to vigorously oppose the nomination of Judge Clarence Thomas to the Supreme Court.

This nomination is competely unacceptable for the many reasons detailed below, which include Judge Thomas' controversial role as administrator of the Equal Employment Opportunity Commission (EEOC), his views on the most serious issues currently facing women and people of color, and his judicial qualifications, which, like most of the Bush-Reagan appointments to the federal bench, reflect slender legal and judicial experience.

Moreover, this nomination is an insult to the African-American community which must now endure, if President Bush has his way, the replacement of a legendary African-American fighter for human rights -- Justice Thurgood Marshall -- with a right-wing African-American bureaucrat -- Judge Clarence Thomas.

It is also an affront to millions of Americans -- people of color, women, laboring people, the poor, the elderly -- who, for the past 25 years, looked to the Supreme Court as the final arbiter and protector of their rights.

By selecting Judge Thomas, President Bush seeks to get one step closer to the goal he and President Reagan charted 11 years ago, and which they have nearly accomplished: the appointment of conservative judges to all levels of the federal court system, including the Supreme Court, who will alter the judicial face of our country for generations to come.

While President Bush, who recently demonstrated his dedication to civil rights by opposing the Civil Rights Bill, cynically plays on the legitimate desire of many people to see diversity on the court, let there be no doubt about it: he intends to utilize a person of color to put the last nail in the coffin containing the progressive legacy of Justice Marshall. This nomination raises the nightmarish prospect of right-wing presidents using women and people of color to reverse the gains won over the past three decades, gains won with blood and tears. It cannot -- to use President Bush's own words in another grim context -- be allowed to stand.

Judge Thomas is an unsuitable candidate for the following reasons:

Record as Chair of the Equal Employment Commission

While serving as Chairman of the EEOC, the agency which enforces federal laws prohibiting employment discrimination on the basis of race, sex, national origin and age, Judge Thomas informed a senate committee that more than 13,000 age discrimination complaints were at risk of being lost because they were not processed before the expiration of the two-year statute of limitations.[1]

During his tenure, the number of class action suits declined precipitously in comparison to the number of individual cases. This meant that the agency was more concerned with individual cases than with challenges to systemic discrimination. In fact, Judge Thomas wrote, "most of our cases involve discrimination by a particular manager or supervisor, rather than a 'policy' of discrimination..."[2]

Judge Thomas' methodology was described as follows in a profile in the Atlantic Monthly:

> If an employer over the years denies jobs to hundreds of qualified women or blacks because he does not want women or blacks working for him, Thomas is not prepared to see a "pattern and practice" of discrimination. He sees hundreds of local, individual acts of discrimination. Thomas would require every woman or black whom that employer had discriminated against to come to the government and prove his or her allegation. The burden is on the individual. The remedy is back pay and a job. "Anyone asking the government to

do more is barking up the wrong tree," Thomas says.[3]

The General Accounting Office found in 1988 that a large number of cases were closed -- from 40 to 87 percent -- because allegations were not fully investigated by the field offices and state fair employment practices agencies.[4] In addition, the backlog of cases at the EEOC rose from 31,500 in 1983 to 46,000 in 1989, as did the processing time -- from 4 to 7 months in 1983 to almost 10 months in 1989.[5] The number of equal pay cases declined from 35 in 1982 to 7 in 1989.[6] And the agency ceased to aggressively pursue its mandate: former EEOC Chair Eleanor Holmes Norton wrote, "The EEOC effectively has lost the role as lead agency conferred to it by the historic Civil Rights Reorganization of 1978, not because of any change in law, but by abdication to the Justice Department."[7] Finally, even the Civil Rights Commission, which had lost much of its steam in the Reagan years, reported in 1987 that "on a number of policy issues requiring regulatory activity, the EEOC to date has accomplished very little."[8]

"I don't think that government should be in the business of parceling out rights or benefits."

- Judge Clarence Thomas

Actions and views about affirmative action

Judge Thomas regards affirmative action as useless and harmful to the initiative of African-Americans (this despite the fact that he took advantage of an affirmative action policy at Yale Law School). The author of the Atlantic Monthly portrait described Judge Thomas as believing that "There is no governmental solution" [to historical discrimination], and that "government simply cannot make amends, and therefore should not try."[9]

In an interview in the New York Times in July 1982, Judge Thomas said:

> I am unalterably opposed to programs that force or even cajole people to hire a certain percentage of minorities. I watched the operation of such affirmative-action policies when I was in college, and I watched the destruction of many kids as a result. It was wrong for those kids, and it was wrong to give that kind of false hope.[10]

He wrote, "A positive civil rights policy would aim at reducing barriers to employment, instead of trying to get 'good numbers.'"[11] And further:

> I don't think that government should be in the business of parceling out rights or benefits. Rights emanate from the Constitution and from the Declaration. They are there, and they should be protected. I am not confident that Washington is any more moral or stronger than anyone else to assign rights, or even better able to do it. We should be careful not to concede the rights of individuals in our society in order

to gain something such as parity. Ultimately that will do us a disservice.[12]

While heading up the EEOC, Judge Thomas changed its previous practice of setting goals and timetables for employers to make jobs available to women and people of color. In 1985, according to an Alliance for Justice report, "the EEOC acting general counsel, with the Chairman's support, ordered EEOC regional attorneys not to include goals and timetables for settlements or in actions in which the EEOC had intervened. The general counsel also ordered legal staff not to seek enforcement of goals and timetables in existing consent decrees." This prompted a protest by five congresspersons who stated that the "Commission is forfeiting the most effective tool to combat centuries of discrimination." It was only when the Supreme Court handed down three decisions in May and June 1986 upholding the use of goals and timetables that Judge Thomas promised to reinstate the policy.[13]

Judge Thomas acknowledged the deeply entrenched racism in this country when he said, "There is nothing you can do to get past black skin. I don't care how educated you are, how good you are at what you do -- you'll never have the same contacts or opportunities, you'll never be seen as equal to whites."[14] Yet he eschews affirmative action as a way to reduce "barriers to employment," and offers no other alternatives, leaving women and people of color to the mercy of the very people he distrusts.

Other racial matters

Judge Thomas complained about civil rights leaders who "bitch, bitch, bitch, moan and moan and whine" about the Reagan Administration.[15]

A sharp exchange took place between Judge Thomas and Joseph H. Duff in a symposium on affirmative action:

> *Thomas:* A race-conscious law is one that defines rights based on race. Segregation and apartheid are race-conscious laws.
>
> *Duff:* I was admitted to law school under the University of California's Equal Opportunity Program. I passed the bar exam, and now practice law in the community. That is a good race policy.
>
> *Thomas:* It is good for you.
>
> *Duff:* It is also good for the community and the society.
>
> *Thomas:* No, I think it is good for you. When I went to college the problems with those policies were quite significant as were the animosities they generated.[16]

"Right to life," the family, and contraception

Although Judge Thomas has not ruled directly on these issues during his tenure as a judge, a good idea of his general attitude about family issues can be obtained from the 1987 report issued by President Reagan's Working Group on the Family, of which Judge Thomas was a member. This report is such a litany of right-wing views about the family that it is worthwhile quoting it at length. It includes discussions about the nature of the family (preferably, a traditional nuclear constellation), divorce (it should

be made harder to obtain); the Supreme Court's "weakening" of the traditional family; teen-age sexuality (it must be restricted); women staying at home to care for children (it should be encouraged), and so on:

> ...If an ever larger percentage of adults choose not to marry or choose to remain without children, there will be public implications...With current fertility levels and without immigration, our population will decline; this is a problem we share with much of the western world...[17]

***

> The disconcerting truth is that judicial activism over the last several decades has eroded this special status [of the family] considerably.[18]

***

> ...[In the past 25 years the Supreme Court has handed] down a series of decisions which would abruptly strip the family of its legal protections and pose the question of whether this most fundamental of American institutions retains any standing...The Court has struck down State attempts to protect the life of children in utero, to protect paternal interest in the life of the child before birth, and to respect parental authority over minor children in abortion decisions...The Supreme Court has turned the fundamental freedom to marry into a right to divorce without paying court costs. It has journeyed from protection of the "intimate relation of husband and wife" in its contraception cases to the dictum that "the marital couple is not an independent entity with a heart and mind of its own..."[19]

***

> ...traditional divorce laws inhibited easy separations...In so doing, they sometimes made things difficult, and changes in divorce law may well have been overdue. But in a relatively short period of time, almost all the states adopted a model divorce law that established, in effect, no-fault divorce.[20]

***

> ...enrollment in a family planning program appeared to raise a teenager's chances of becoming pregnant and of having an abortion.[21]

***

> At a minimum, no Federal program should provide incentives for sexual activity by teens. No Federal activity should contravene the approach we have taken to drug abuse: we do not compromise with self-destructive behavior. We insist that it stop and we provide assistance to those young people who want to regain control of their future.[22]

***

> Government should not provide incentives -- or make things easier

-- for teenagers tempted to promiscuity. For example, AFDC benefits should be restructured to limit their availability to those minors who agree to continue to live with their parents. This step would go a long way toward making illegitimate motherhood less attractive in the poverty culture.[23]

***

Unlike Sweden, for example, the mothers of America managed to avoid becoming just so many more cogs in the wheels of commerce.[24]

***

In one of the great tragedies of American life, tens of thousands of childless families wait for children to adopt while 1.8 million other Americans abort their unborn children each year.[25]

Judge Thomas' comments about abortion have raised such enormous concern that most leading women's organizations are opposing his nomination. In a speech he made in 1987 to the Heritage Foundation Judge Thomas spoke favorably about an article written by another conservative, Lewis E. Lehrman, in which Lehrman wrote:

> Adapting Lincoln's words from his patient struggle for the inalienable right to liberty in the 1850's, we may now say that the "durable" moral issue of our age is the struggle for the inalienable right to life of the child-in-the-womb -- and thus the right to life of all future generations...
>
> May it be reasonably supposed that an expressly stipulated right to life, as set forth in the Declaration 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 lawful 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?[26]

Judge Thomas said Lehrman's article "on the Declaration of Independence and the meaning of the right to life is a splendid example of applying natural law."[27] This view, according to some legal scholars, puts Judge Thomas to the right even of Justice Scalia in the matter of abortion, since no justice currently on the Supreme Court has voiced the view that the fetus has either God-given or constitutional rights. Translated into current realities, a court that took this

position could not only overturn Roe but could make abortion illegal in all states.

The Griswold v. Connecticut decision, which gave married couples the right to obtain legal contraceptives, also caused Judge Thomas some unease. He wrote:

> 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." ["The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."]
>
> ...A major question remains: Does the Ninth Amendment, as Justice Goldberg contended, give to the Supreme Court certain powers to strike down legislation? That would seem to be a blank check. The Court could designate something to be a right and then strike down any law it thought violated that right. And Congress might also use its powers to protect such rights -- say a "right" to welfare.[28]

Economic issues and congressional oversight

As illustrated above, Judge Thomas' distaste for welfare surfaces in many of his writings and speeches, but probably his most widely-publicized comment was made about his own sister, who received public assistance for six years while she cared for the aged aunt who had helped raise her. Judge Thomas said, "She gets mad when the mailman is late with her welfare check. That is how dependent she is. What'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."[29] His distrust of governmental economic aid extends to criticisms of minimum wage laws and unfair labor practices as unnatural interference with the economic process.[30]

"As Lt. Col. Oliver North made it perfectly clear last summer, it is Congress that is out of control."

- Judge Clarence Thomas

Judge Thomas also appears to distrust congress. He wrote that congress was "out of control," and cited none other than Ollie North as a person competent to assess this: "Congress remains the keystone of the Washington establishment. Over the past several years, Congress has cleverly assumed a neutral ombudsman role and has thrust the tough choices on the bureaucracy, which Congress dominates through its oversight function. As Lt. Col. Oliver North made it perfectly clear last summer, it is Congress that is out of control."[31] Legal scholars fear that Judge Thomas may be unsympathetic to congressional initiatives on oversight.

Judicial experience

The idea that President Bush chose the best-qualified person for this job is not credible.

Judge Thomas has served on the U.S. District Court of Appeals for only 16

"Even had Bush limited his selection pool to black judges on the federal courts of appeal, there are at least a half-dozen other black judges whose accomplishments, both on the bench and before becoming federal judges, put those of Thomas to shame."

- Prof. Derrick Bell
Harvard University

months. Before that, he was Chairman of the Equal Employment Opportunities Commission for eight years, an administrative role which was much-criticized and controversial. His actual legal experience includes three years in then-Missouri Attorney General John Danforth's office, followed by a two-year stint at the Monsanto Corporation. He then served as a legislative assistant to Danforth for two years, and served for a year at the Department of Education's civil rights division.

In the days following the nomination many legal scholars expressed concern about the question of qualifications, especially Professor Derrick Bell of Harvard, who commented, "Even had Bush limited his selection pool to black judges on the federal courts of appeal, there are at least a half-dozen other black judges whose accomplishments, both on the bench and before becoming federal judges, put those of Thomas to shame."[32]

Judge Thomas' record since becoming an appeals judge is undistinguished and spotty. As of July 3, 1991 Judge Thomas had authored 16 opinions. While these opinions, standing alone, offer no clear indication of what positions Judge Thomas will take in civil rights and women's rights cases if he is elevated to the Supreme Court, it appears that he will provide an additional vote to the Court's present conservative majority in criminal cases.

Two decisions, however, should be of concern to workers and environmentalists. In one case,[33] Judge Thomas rejected a union challenge to a Labor Department decision permitting a mine owner in Alabama to use a high-voltage electrical cable within 150 feet of a working mine face in violation of federal regulations. The union had argued that use of these cables would increase miners' exposure to dust and methane, create ventilation problems and make escape from the mines more difficult. In another case,[34] Judge Thomas rejected a challenge by an alliance of Toledo, Ohio residents to a Federal Aviation Administration decision authorizing expansion of a local airport. The residents contended that the FAA had violated several environmental statutes and regulations.

The qualifications issue existed even when Judge Thomas was nominated to his present post on the U.S. district court: fourteen members of congress, all chairpersons and high-ranking members of house committees which oversee the Equal Employment Opportunity Commission, opposed it. At that time, representatives of more than 20 public interest organizations expressed concerns about Judge Thomas' qualifications during Senate Judiciary Committee hearings.

"It horrifies me that the country might have to endure 40 years of opinions of a black man who has shown no sense of compassion for the needs of the poor, who hasn't the guts to acknowledge that 'self-help' isn't enough in a milieu of institutionalized racism, and who embraces heartless legalisms where abortion and other rights of women are at issue."

-Carl Rowan

Conclusion

Judge Thomas, who called Robert Bork's defeat "disgraceful,"[35] is a complicated man, at once a dedicated conservative and a self-described admirer of both Dr. Martin Luther King, Jr. and Malcolm X, something of a nationalist, a critic of affirmative action and a "bootstrapper," a man who suffered extreme poverty and discrimination but one who believes in little or no government assistance to combat these conditions. His nomination has appalled otherwise moderately conservative African-American commentators like Carl Rowan:

> "It horrifies me that the country might have to endure 40 years of opinions of a black man who has shown no sense of compassion for the needs of the poor, who hasn't the guts to acknowledge that 'self-help' isn't enough in a milieu of institutionalized racism, and who embraces heartless legalisms where abortion and other rights of women are at issue."[36]

The Center for Constitutional Rights believes that Judge Thomas' inconsistency and complexity should be scant comfort to progressive-minded people. As Christopher Edley, an African-American commentator, wrote in the Washington Post: "If there were a snowball's chance in Hades that Thomas would be a moderate on the court, he would not have been nominated."[37]

In fact, we fear that Judge Thomas' successful appointment will impact on the court in a way that goes beyond mere conservatism. His voice will be used to permit extreme conservatism to re-emerge. That it comes from an African-American will be used as tragic legitimation of those views. Judge Thomas will likely participate in the end of legal abortion in this country; and he may also extend new economic concepts of deregulation, which will make life even more difficult for the great majority of people in this country.

Even if, as some people predict, a defeat of this nomination is followed by the selection of someone even less suitable, the Center for Constitutional Rights believes that this battle is worthwhile. Though the conservative tide is lapping over the steps of the Supreme Court, there are many millions of people who will continue to search -- and who will find -- a way to struggle successfully for their human rights. It is this standard of human rights to which we must insist that all prospective Supreme Court justices subscribe.

We urge all civil rights and civil liberties organizations to take a position against the nomination of Judge Thomas and request all such organizations that haven't issued conclusive positions to do so as soon as possible. This nomination is an insult, not a pat on the back. Finally, we urge all fair-minded people to communicate their ideas and thoughts on this subject to the members of the Senate Judiciary Committee, to their congressperson and senator, and to their local newspapers and media outlets. We remain convinced that the voices of the millions of people to whom this is a vital concern will be heard.

New York City
July 30, 1991

ENDNOTES

1. Statement of the Alliance for Justice on the Nomination of Clarence Thomas to the U.S. Court of Appeals for the District of Columbia, February 16, 1990, p. 2.

2. Ibid., p. 7. Judge Thomas' original remarks appeared in 5 Yale L. & Pol. Rev. 402 (1982).

3. Juan Williams, "A Question of Fairness," Atlantic Monthly, February 1987, p. 79. (Hereafter, Atlantic Monthly profile.)

4. Ibid., p. 7.

5. Ibid., p. 8.

6. Ibid., p. 8.

7. Ibid., p. 8. Ms. Norton's comments appeared in 62 Tulane Law Review 601, 703 (1988).

8. Ibid., p. 8.

9. Atlantic Monthly profile, p. 79.

10. Quoted in Time, July 25, 1991, p. 19.

11. Judge Clarence Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," in Assessing the Reagan Years, Cato Inst., p. 397.

12. Symposium, "Affirmative Action: Cure or Contradiction," Center Magazine, November/December 1987, p. 23.

13. All the information in this paragraph appears in the Alliance for Justice Report, p. 4.

14. Atlantic Monthly profile, p. 72.

15. Atlantic Monthly profile, p. 80.

16. "Affirmative Action: Cure or Contradiction," Center Magazine, Nov./Dec. 1987, p. 25.

17. "The Family -- Preserving America's Future, A Report to the President from the White House Working Group on the Family," Gary L. Bauer, Chairperson, p. 3.

18. Ibid., p. 10.

19. Ibid., p. 11-12.

20. Ibid., p. 11-12.

21. Ibid., p. 27.

22. Ibid., p. 28.

23. Ibid., p. 28.

24. Ibid., p. 31.

25. Ibid., p. 33.

26. Lewis E. Lehrman, "The Declaration of Independence and the Right to Life," in The American Spectator, April 1987, p. 22.

27. Judge Clarence Thomas, "Why Black Americans Should Look to Conservative Policies," a speech given to the Heritage Foundation on June 18, 1987.

28. Judge Clarence Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," in Assessing the Reagan Years, ed. David Boaz, Cato Institute, 398-9.

29. Atlantic Monthly profile, p. 75.

30. As paraphrased by David Corn in The Nation, July 29/August 2, 1991.

31. Judge Clarence Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 Harvard Journal of Law & Public Policy, 63.

32. Prof. Derrick Bell, "The Choice of Thomas Insults Blacks," New York Newsday, July 10, 1991, p. 79.

33. International Union, United Mineworkers of America v. Federal Mine Safety and Health Administration, 931 F.2d 908 (1991).

34. Citizens Against Burlington v. Busey, 1991 WL 100655 (D.C. Cir. June 14, 1991).

35. Judge Clarence Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," in Assessing the Reagan Years, ed. David Boaz, Cato Institute, 392.

36. Carl T. Rowan, Baltimore Sun, July 4, 1991.

37. Christopher Edley, Jr. Washington Post, July 7, 1991.

The CHAIRMAN. Dr. Bishop.

STATEMENT OF JAMES J. BISHOP

Mr. BISHOP. Thank you very much, Chairman Biden. To you, to other members of the Judiciary Committee, and particularly to my own Senator Metzenbaum, I thank you for allowing me to testify today on behalf of the nomination of Judge Thomas.

The CHAIRMAN. By the way, Dr. Bishop, let me interrupt you—and I apologize for not mentioning this earlier. Senator Metzenbaum asked me to extend his regrets. He is in the Gates hearing for the new director of Central Intelligence, and that is why he is not here, and he apologizes for not being here to welcome you.

Mr. BISHOP. Thank you very much. I understand that it has been difficult at times trying to figure out which TV program to watch—the one of these hearings or the one on the Gates nomination, and our Senator is involved in both of those. But thank you.

I am here on behalf of Americans for Democratic Action, a national, liberal, multi-issue public policy organization. We in ADA share nearly all of the concerns that have been addressed so eloquently by other groups. But at this time, in the interest of brevity, I would like to confine my remarks to three specific considerations and to ask, Senator, if my extended remarks could be submitted for the record.

The CHAIRMAN. They will be.

Mr. BISHOP. First, reasoned and principled discharge of the Senate's constitutional advice-and-consent role requires vigorous application of a confirmation standard that legitimately takes into account, among other things, a nominee's ideology.

Second, and related to the first point, in determining whether Judge Thomas would faithfully and fairly discharge his duty of constitutional and statutory interpretation, his entire record at the Office of Civil Rights and the EEOC, as well as his writings and other activities, not only should, but must be considered. That record demonstrates that Judge Thomas does not satisfy the standard for confirmation that this committee and the Senate must apply.

Finally, Judge Thomas' frequent strident and hostile public pronouncements on various civil rights, social issues and programs reflect a genuine insensitivity and indifference to the plight of individuals who have not been as fortunate as he in their attempts to overcome barriers of discrimination, poverty, and intolerance.

There is simply no basis for concluding on Judge Thomas' record that he can be counted on to champion the rights of the disadvantaged and the disenfranchised.

At the beginning of these hearings, a majority of this committee expressed serious doubts regarding Judge Thomas. Those doubts seem to persist. Some members of this committee have referred to him as an enigma. These doubts, these concerns must be resolved in favor of the interests and the needs of the entire country, not simply those of the nominee or the executive branch.

Throughout Judge Thomas' testimony, he has steadfastly attempted to run away from his public record. He has repeatedly contended that many of his more pointed and abhorrent public pro-

nouncements were throw-away lines or comments designed to invite debate.

The committee should reject Judge Thomas' sweeping request that he start a clean slate for two reasons.

First, a failure to do so would invite an essentially standardless review of his fitness to receive life tenure on the Nation's highest court. Never has a Supreme Court nominee asked the American people, and this committee, and the Senate to overlook so much.

Second, Judge Thomas' efforts to nullify his past public records ignore the fact that, as EEOC chair, he was not only a policymaker; he was first and foremost the Nation's chief civil rights law enforcement officer. He was sworn to uphold and to enforce a host of antidiscrimination laws.

In addition to his law enforcement capacity, Judge Thomas was also a quasi-judicial officer. Indeed, while Chair, the EEOC consistently and successfully argued that it was a quasi-judicial agency, and as such its proceedings are entitled to various of the common law protections that prevail in judicial actions.

Because of his dual role as an enforcement officer and a quasi-judicial officer, his record should be held more accountable than that of a mere policymaker. But in those roles, it should be noted that he improperly expressed opinions on matters that were pending before the Commission for consideration. Indeed, his willingness to do so is in marked contrast to his reserve on many items before these proceedings.

For example, early in his tenure as EEOC chair, Judge Thomas publicly criticized a major pending systemic title VII lawsuit that the EEOC was then litigating against Sears Roebuck and Co. In his comments, he disparaged statistical evidence—

The CHAIRMAN. Sir, excuse me. I hope you don't have another 5 minutes' worth of material, because you are beyond the time; so if you'd get ready to summarize, I'd appreciate it.

Mr. BISHOP. No, we do not, Senator. Thank you.

Because of that, Judge Greene, a respected jurist, openly castigated the EEOC for its failure under Thomas to move forward in revising admittedly unlawful regulations along the way.

Senator I would like to conclude by indicating that we in ADA would also like to point out that despite the great strides that have been made, it is sad to say that the need for affirmative action persists in this Nation. A recent test by the Urban Institute on employment indicates that blacks, regardless of their backgrounds, when all other factors are taken into consideration, fared less in employment-securing than whites who were tested.

As an educator, as a scientist, as an activist, and also, like Judge Thomas, as an African-American, I have witnessed the need for affirmative action programs, especially those for students from economically disadvantaged backgrounds.

We in ADA at this point believe that the committee has no choice but to reject Judge Thomas' nomination. His speeches and writings; his frequent attacks on Congress, the courts and Federal judges; his intolerance of viewpoints that differ from his; his expressed admiration for extremist causes; his apparent disdain for the Nation's civil rights leaders; his contempt, at times, for con-

gressional records—all bespeak an ideological extremism that ill-suits a nominee for this court.

Equally significant, his confirmation would serve primarily to solidify a block of such extremism on the court and would ensure its perpetuation for decades to come. The Senate would abrogate its constitutional responsibility if it were to allow this nomination to occur.

On behalf of ADA, I thank you very much.

[The prepared statement of Mr. Bishop follows:]

TESTIMONY
of
DR. JAMES J. BISHOP
BEFORE THE
SENATE JUDICIARY COMMITTEE
September 20, 1991

Chairman Biden, Members of the Judiciary Committee and particularly my own Senator Metzenbaum, thank you for allowing me to testify today on the nomination of Judge Clarence Thomas. I am James Bishop. I am here on behalf of Americans for Democratic Action where I am privileged to serve as Chair of the National Executive Committee.

ADA is the nation's premier liberal, multi-issue public policy organization. Founded in 1947, ADA is dedicated to promoting a liberal agenda that is socially conscious and economically just. During our history we have been active participants in numerous battles where the individual rights and liberties of Americans were at stake. We have carefully reviewed past judicial nominations, opposing some, supporting others. Always, the guiding principle in our deliberations has been that our nation's judicial system is the last bulwark of individual freedom: it must protect the rights of those least able to protect themselves against the swings of political or ideological extremism. We have applied this principle in our considerations of this historic nomination and in our executive committee's unanimous decision to oppose Judge Thomas' elevation to the Supreme Court.

Scores of individuals and organizations have testified about their concerns regarding this nomination. ADA shares many of these

same concerns addressed so eloquently by groups representing women, people of color, the elderly, the disabled and America's workers. In my testimony today, however, I will confine my own remarks to three specific considerations that ADA believes should guide this Committee's deliberations.

First, reasoned and principled discharge of the Senate's constitutional "advise and consent" role requires rigorous application of a confirmation standard that legitimately takes into account, among other things, a nominee's ideology.

Second, and related to the first, in determining whether Judge Thomas would faithfully and fairly discharge his duty of constitutional and statutory interpretation, his entire record at the Office of Civil Rights and the EEOC -- as well as his writings and other activities -- not only should, but must be considered. That record demonstrates that Judge Thomas does not satisfy the standard for confirmation that this Committee must apply.

Finally, Judge Thomas' frequent strident and hostile public pronouncements regarding various civil rights and social justice issues and programs reflect a genuine insensitivity and indifference on his part to the plight of individuals who have not been as fortunate as he in their attempts to overcome barriers of discrimination, poverty and intolerance. There is simply no basis for concluding, on this record, that Judge Thomas can be counted on to champion the rights of the disadvantaged and disenfranchised, many of whom did not even have the family or institutional support that was so important to his development.

The Senate's Advise and Consent Role and the Confirmation Standard. The Constitution envisions that the Senate will play a meaningful and constructive role in the confirmation process. Contrary to the arguments of some, the Senate's role is not limited to assuring only that a nominee be technically qualified. Rather, because of the federal judiciary's role in our tripartite system of governance and the life tenure that federal judges enjoy, the Senate's "advise and consent" function is co-equal with the President's nominating role. The Senate is not simply a rubber stamp but represents the people and must protect the people's interest. Therefore, the Senate must exercise this "advise and consent" role in a manner designed to preclude an ideological stranglehold on the Court.

The insulation which the Constitution accords Supreme Court Justices was designed to ensure that the Court discharge its function without regard to the political extremism that all too easily can prevail in the other, elected branches of government. Similarly, the Court's preeminent role as guarantor of the Bill of Rights -- those protections that safeguard individual liberties against majority rule -- underscores the framers' intent that the Court not become captive to shifting poles of ideological extremism.

To ensure fidelity to this constitutional design, the Senate cannot properly exercise its role without regard to a nominee's ideological stance on significant issues of constitutional moment. And it must be especially vigilant in performing its advise and

consent role where, as here, the President has nominated an individual, primarily because of his ideology, to sit on a Court that Senator Specter and others have characterized as "revisionist".

The Senate must not lightly discharge its "advise and consent" function simply because of this nominee's apparent confirmation conversion. Good preparation, advice of others, and a demeanor that is adopted for a hearing are not enough. His writings and actions--before he knew a judicial appointment was in the wings--provide a far more reliable basis on which the Senate must judge his fitness to serve on the Court.

At the outset of these hearings, a majority of the members of this Committee expressed serious concerns about Judge Thomas. Those doubts appear still to exist. In fact, several members have referred to Judge Thomas as an enigma. Doubts as serious as these must be resolved in favor of the interests and needs of the entire country, not simply those of the nominee or the Executive Branch. The Senate has an obligation <u>not</u> to confirm a nominee if it is <u>not fully satisfied</u> that that individual belongs on the Supreme Court.

In this regard, an essential part of your consideration must be the evaluation of Judge Thomas by his peers at the American Bar Association. Their "qualified" rating represents an unacceptable low in the standards one should expect in a candidate for the nation's highest court. No current U.S. Supreme Court Justice has ever gotten a single "not qualified" vote let alone the two that

Judge Thomas received. In fact, no current Justice has failed to get at least a majority of "highly qualified" ratings from ABA evaluation committee members. The weakness of the ABA endorsement must carry considerable weight in your consideration.

Judge Thomas' Conduct During His EEOC Tenure Must Be Considered in Measuring His Fitness for the Court. Throughout his five days of testimony, Judge Thomas steadfastly attempted to run away from the public record he created during his tenure as EEOC Chair. Repeatedly, he contended that many of his more pointed and abhorrent public pronouncements were "throw-away" lines, comments designed to invite debate, or were merely the philosophic musings of a policy-maker. He asked the Committee to excuse and ignore this record on the ground that when he created it, he was a member of the executive branch, and he contended that these strident and categorical ideological pronouncements have not followed him into the judicial arena.

The Committee should reject Judge Thomas' sweeping request that he start with a clean slate for two reasons. First, it invites an essentially standardless review of his fitness to receive life tenure on the nation's highest and most important court. Never has a Supreme Court nominee asked the Senate and the American people to overlook so much. Supreme Court nominees come before this Committee with long, often distinguished public records, created in a variety of forums. It is precisely those records that the Committee must look to in determining a nominee's fitness for the Court. For Judge Thomas and his supporters to

suggest that a lesser standard applies to him would make a mockery of the confirmation process. But even were Judge Thomas correct in contending that his record should be ignored, the remaining "record" on which he then can be judged is simply too slim to permit his confirmation.

Second, Judge Thomas' efforts to nullify of his past public statements ignores the fact that, in his role as EEOC Chair, he was not a mere policy-maker. He was, first and foremost, the nation's chief civil rights law enforcement officer, sworn to uphold and enforce the host of anti-discrimination laws the EEOC administers. Both the Supreme Court and Congress have recognized that eradication of discrimination is the highest national priority; both have recognized the EEOC as the preeminent federal authority in securing this national objective.

But, Judge Thomas was not merely a law enforcement officer. In his capacity as Commissioner and EEOC Chair, he was also a quasi-judicial official. Indeed, while he was Chair, the EEOC consistently and successfully argued in a number of lawsuits that the EEOC is a quasi-judicial agency and, as such, its proceedings are entitled to various of the common law protections that prevail in judicial actions.

As a law enforcement official and quasi-judicial officer, Judge Thomas engaged in a number of actions of questionable propriety, which certainly raise questions regarding his suitability for the Supreme Court.

Judge Thomas improperly expressed opinions on matters that

were pending or likely to arise before the Commission for consideration. Indeed, his willingness to do so there is in marked contrast to his reserve in these proceedings.

For example, early in his tenure as EEOC Chair, Judge Thomas publicly criticized a pending major systemic Title VII lawsuit that the EEOC was then litigating against Sears Roebuck and Co. In his comments, he disparaged EEOC's reliance on statistical evidence to prove its claims, despite the Supreme Court's repeated admonition that such evidence is relevant, probative and, in some cases, decisive. So damaging were his remarks to the agency's litigation that the defense lawyers attempted (albeit unsuccessfully) to compel his testimony at trial.

Later, in 1986, Judge Thomas was a keynote presenter at a labor law seminar sponsored by a private law firm representing Xerox Corporation in an age discrimination suit then pending before the Commission. Though that action involved private plaintiffs, the EEOC was simultaneously investigating a parallel classwide charge based on essentially the same conduct that gave rise to the private suit. During this speech, Judge Thomas discussed -- apparently at defense counsel's express request -- whether the disparate impact theory applies to claims under the Age Discrimination in Employment Act. Despite unanimous favorable precedent in the courts of appeals and the EEOC's own regulations endorsing application of the theory to ADEA claims, Judge Thomas ventured his opinion that the theory does not apply to age discrimination cases. Significantly, that statement was not only

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at odds with the EEOC's own published position in its regulations and its earlier litigation, but it also prejudged an issue that, in fact, came before the Commission a scant year later, when staff recommended suit against Xerox. The Commission rejected the staff recommendation. The Supreme Court is likely to revisit the disparate impact issue -- which applies to Title VII as well as the ADEA -- and the role of statistical data in litigation.

On at least three occasions during his Department of Education and EEOC tenure, federal district judges took Judge Thomas to task for his failure to discharge his duties consistent with the requirements imposed by law. In 1982, in the ongoing Adams v. Bell Title VI proceedings, Judge Thomas candidly admitted that, as head of the Education Department's Office of Civil Rights (OCR), he was violating the Court's order regarding processing of civil rights cases. Based in part on these admissions, the Adams judge found OCR in violation of the court's order in many important respects.

One year later, after his appointment as EEOC Chair, Judge Thomas was again the object of criticism by a federal judge. In Quinn v. Thomas, the court struck down the attempted cross-country transfer of a longtime EEOC manager who had been critical of Thomas. The judge found Thomas' action arbitrary, capricious and unlawful and concluded it had been taken as punishment for the employee's exercise of his First Amendment rights.

Finally, in 1987, Judge Harold Greene, a well respected jurist on the District Court for the District of Columbia, openly castigated the EEOC for its failure, under Thomas, to move forward

in revising admittedly unlawful ADEA regulations that permitted age discrimination in the accrual of pension benefits. Openly expressing his skepticism of the EEOC's candor in its professed commitment to move forward, Judge Greene characterized the agency's conduct as "at best slothful, at worst deceptive to the public ..." He went on to note that, "[T]here are not likely to be many cases in which an agency conclude[s] again and again over a long period of time ... that its published interpretation ... is wrong, yet ... consistently fail(s), on one pretext or another, to rectify the error." (AARP v. EEOC, 43 FEP Cases 120, 128.)

Judge Thomas frequently and repeatedly expressed his disdain of Congress, and, in particular, its exercise of its oversight mandate both in his speeches and as Chair of the EEOC. In a speech delivered at Creighton University, Judge Thomas referred to the GAO as the "lapdog of Congress." As became clear, however, intense scrutiny of Judge Thomas' EEOC administration was essential. Repeatedly, Congress found he was attempting to effect major policy changes at the EEOC, often simply by refusing to enforce statutory provisions with which he did not personally agree; or by prohibiting staff from securing remedies traditionally available under Title VII; or by illegally disciplining employees who had the temerity publicly to criticize him and the direction in which he sought to move the agency.

The record of EEOC oversight also reflects a lack of forthrightness on Judge Thomas' part, as when, for example, he failed to provide in a timely manner to the Senate Special

Committee on Aging adequate and accurate data on the numbers of ADEA charges in which the statutes of limitations had expired without the EEOC's having acted to protect the rights of complainants. Moreover, on several occasions, Congress was required to enact legislation to override the refusal of then-Chair Thomas to carry out Congressional intent in enforcing anti-discrimination measures.

It bears remembering that, during his EEOC tenure, Judge Thomas' response to the legitimate concerns raised by Congress regarding his stewardship of the EEOC was to castigate legislators as "run amok" majorities. And it bears stressing that the contemptuous attitude Judge Thomas bore toward the Congress while at the EEOC could well affect his deliberation on questions of statutory intent and the scope of Congressional power if he is elevated to the Supreme Court.

In this regard, the Committee must not forget that the Supreme Court interprets statutes as frequently, or perhaps even more often, than it addresses constitutional questions. The Constitution is not self-executing. Its promise often becomes a reality only when Congress legislates and the Court accords a broad scope to these enactments. This is especially true in the area of civil rights, with the Civil Rights Act of 1964 serving as the single most important vehicle through which the Constitution's equal protection guarantees have been advanced. Judge Thomas' tenure at the EEOC, where he was responsible for enforcing the cornerstone of that Act as well as numerous other anti-

discrimination measures, is thus the only gauge this Committee has to measure his fidelity to Constitution and the laws implementing it. As such, the Committee simply cannot ignore this record, but instead must conclude, based on it, that this nomination should be rejected.

Confirmation of Judge Thomas Will Not Safeguard or Advance Individual Rights and Freedoms. As many witnesses forcefully have recounted, Judge Thomas has expressed frequently views that raise genuine doubt about his capacity for sensitivity, objectivity and compassion, and the degree to which he would bring those instincts to bear in resolving difficult questions of constitutional and statutory interpretation. I will not belabor the many areas that are of grave concern to ADA members. But we would be remiss were we not to state publicly our profound misgivings about the position Judge Thomas has staked out on the issue of affirmative action. Moreover, we believe that Judge Thomas' antipathy to affirmative action reflects more than simply an opposing viewpoint on a difficult question about which reasonable people can -- and do -- disagree.

As an aside, let me say that I -- like Judge Thomas and, I suspect, all of us -- have been shaped by my own experiences. I, too, am an African American who grew up in the segregated South and suffered the anger, shame and sense of powerlessness of seeing my parents denigrated. However, the sum total of my experience and, more importantly, of others less fortunate than I in overcoming this history of oppression, has led me to positions

diametrically opposed to those Judge Thomas has espoused.

Affirmative action programs have been an underpinning of our flawed society's attempts to correct its shameful history of discrimination against racial minorities and women. The simple truth is, without affirmative action, many of us, including Judge Thomas, would not be where we are today. That is not to say that our qualifications are not comparable to those of white co-workers, or that we received unwarranted preferential treatment. It is simply to acknowledge a stark reality: to overcome centuries of discrimination and oppression requires, in many instances, not only that institutions stop discriminating; it requires, as well, that they take affirmative measures to assure inclusiveness where exclusion was previously the norm.

Sadly, despite great strides, the need for affirmative action persists. Only last year, for example, the Urban Institute undertook a major employment discrimination "testing" project, designed to determine whether individual employers treated similarly situated African American and white job applicants the same or differently in the hiring process. In a significant percentage of cases, the study found that, even after carefully controlling for all legitimate factors (e.g., experience and education), African American candidates fared less well than their white counterparts. Just this year, the Older Women's League found that, despite twenty-five years of anti-discrimination efforts designed to open job and educational opportunities for women and to end pay discrimination, the workforce patterns and experiences

of the vast majority of younger women are virtually identical to those of their older counterparts. Clearly, the need for affirmative action in employment has not vanished.

As an educator, scientist and activist, I have personally witnessed the need for affirmative action programs, including one with which I am intimately involved. That program is designed to attract economically disadvantaged, minority and other under-represented youth to higher education. Daily, I see the need for such outreach and "special" programs. Daily, I see that -- despite Brown v. Board of Education (whose reasoning Thomas has criticized) and its progeny (which Judge Thomas rejects) -- minority students in this country are still all too often the victims of inferior educational opportunities. Daily, I see that they suffer economic hardship that is rooted in past and present discriminatory practices. Daily, I must recognize how far we have come but, unfortunately, how far we still have to go.

Judge Thomas has recently indicated that he sees a need for affirmative action in education and that such programs are appropriate. But, unlike Judge Thomas, I see no principled distinction between the propriety or need for affirmative action in education and its appropriateness in the employment context. Indeed, for many of Judge Thomas' immediate peers who grew up in Pin Point or other southern communities or, for that matter, in much of the nation, theirs was a history of segregated, and often inadequate, public education. Recognition of the ongoing effects of such educational deprivations was one of the reasons the Burger

Supreme Court, held, in Griggs v. Duke Power Co. (another decision Judge Thomas eschews), that Title VII bans employment practices that have an arbitrarily exclusionary effect on minorities and women.

As former Justice Powell later noted for a unanimous Court, in McDonnell Douglas v. Green, "Griggs was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." Judge Thomas' recent conversion to or acceptance of a belief in affirmative action in education -- under pressure from Senator Specter -- simply does not go far enough in recognizing the need for affirmative action in other arenas as well, to remedy this long history of exclusion and deprivation.

Unlike Judge Thomas, I and the Americans of Democratic Action deeply believe that without Brown, without its progeny, and without other affirmative action programs, minorities and women in this nation would be the victims of even greater discrimination than that with which they still contend today.

* * * * *

As I have already stated, we have carefully reviewed Judge Thomas' record. We have also listened attentively to his testimony before this Committee. Candidly, Judge Thomas' testimony raises even more concerns for us now than we had at the time of our initial unanimous vote to oppose him. His eagerness to distance

himself from his past rhetoric and actions on issues of crucial concern to all Americans leaves many of us deeply troubled and uncertain about his judicial philosophy and temperament.

Among of the questions this Committee must answer before coming to a conclusion is which Clarence Thomas it is being asked to confirm? Is it the Clarence Thomas who addressed the Cato Institute and the Heritage Foundation and presided over the EEOC? Or is it the Clarence Thomas who last week seemed to recant many of his past statements, striking most observers as being considerably more moderate?

Particularly troubling is Judge Thomas' attempt to make a virtue of his backtracking, revisionism and lack of candor by saying, "When one becomes a member of the Judiciary, it is important for one to stop accumulating personal viewpoints." The real Clarence Thomas seems far more likely to be the one who forthrightly stated in a 1984 speech at his alma mater, Holy Cross College, "I do have opinions on virtually all issues."

To those who say that Judge Thomas' background demonstrates the real possibility for growth and compassion, we submit that the best test is to understand the direction of his growth during his adult life, i.e., the last decade and particularly his articles, speeches, writings and other actions during his second term with EEOC.

Measured against this standard, we believe that the Committee has no choice but to reject Judge Thomas' nomination. The Committee has rightly subjected Judge Thomas' entire public record

to intense scrutiny. And that record -- Judge Thomas' numerous speeches and writings; his frequent virulent attacks on Congress, the courts and federal judges; his intolerance of viewpoints that differ from his; his expressed admiration for extremist causes and their proponents; his apparent disdain for the nation's civil rights leaders; and his seeming contempt for those not as fortunate as he in overcoming the barriers of his childhood -- all bespeak an ideological extremism that ill suits a nominee for the Supreme Court. Equally significant, his confirmation would serve primarily to solidify a block of such extremism on the Court and assure its perpetuation for decades to come. The Senate would be abrogating the exercise of its advise and consent function were it to allow this to occur.

For identification purposes only, James Bishop is Special Assistant to the Provost at the Ohio State University.

The CHAIRMAN. Thank you very much, Doctor.
Mr. Moffit.

STATEMENT OF WILLIAM B. MOFFITT

Mr. MOFFITT. Senator Biden, I am here today representing the National Association of Criminal Defense Lawyers. We have submitted a report and ask that that report be made a part of the record.

The CHAIRMAN. The entire report will be placed in the record.

Mr. MOFFITT. Senator, we are the people who day-by-day live in the courtrooms of this country. It is the goal of our profession to see that the lofty notions of natural law and constitutional rights and duties are applied at the lowest level of our judicial process.

For us, liberty is not an abstraction; it is at issue every time a criminal lawyer, along with a client, steps before the bar of the court. Perhaps more importantly in this era of an expanded death penalty, we are confronted with situations where the life of the client is at issue before the court.

Today, hopefully, I speak not only for the attorneys who work in the vineyards of justice but for our clients, those who are accused of crime, who are presumed innocent, who seek merely the justice that the Constitution guarantees, and who are seldom, if ever, heard in these corridors.

It is not easy today to practice criminal law. The conventional wisdom is that society has been too lenient, and thus the process by which we adjudicate guilt and innocence has been radically altered in the past 10 years, resulting in a stream of convictions and incarceration unprecedented in our history.

This is particularly true when we consider the plight of young African-American males, one-quarter of whom between the ages of 19 and 27 are incarcerated or under some form of court-ordered supervision.

Recent studies indicate that young African-Americans are being incarcerated at rates higher than their South African counterparts.

Despite these astounding statistics with regard to the rate of incarceration, the assault on judicial precedent which forms the basis of our criminal jurisprudence continues. Such well-established precedent as *Miranda* and *Boyd* are presently under attack. Last term, in what can only be called the end-of-the-term massacre, criminal precedent was cast aside like derelicts floating on the sea of the law. Stare decisis was redefined, and any 5-to-4 Supreme Court decision was held to be of questionable validity. Coerced confessions can now be introduced and convictions sustained on the basis of harmless error.

Against this backdrop, Senator, we are treated on the evening news to the brutal beating of Rodney King and other citizens accused of crime by the forces of authority.

At this crucial moment in the history of our country, the one individual on the Supreme Court who knew what it meant to represent a citizen accused of a crime, or a citizen denied franchise, or a citizen despised by the community because of his color or political belief, has removed himself from the field of battle and retired to a much-deserved rest.

It is in this context that the nomination of Clarence Thomas must be viewed. Simply put, Senator, when the door to the conference room at the Supreme Court is closed, what does Clarence Thomas bring to the table? Most, if not all, of the justices currently on the court bring to the conference room their well-developed theories of constitutional law. What will this man—who has stated that he has no fixed constitutional concepts, who has repudiated many of his prior statements and writings—do when confronted with the strongly held consitutional views of other justices? Will the color of his skin and the deprivation of his youth be sufficient to withstand such a challenge?

His supporters say yes. His testimony says "Trust me." Where constitutional rights and fundamental liberties are at stake, the risks are simply too great to trust him.

And what of his legal experience? Where will he reach beyond the color of his skin and the deprivation of his early life to develop a constitutional vision that will compete with those of the other justices—a man who can name only two Supreme Court decisions of the last 20 years which he considers important; a man who has never discussed *Roe* v. *Wade,* a decision, incidentally, which he considers important; and a man who dismisses his own public remarks as the musings of an amateur political scientist?

As practicing lawyers who represent living human beings, we do not seek an advocate for the court. We seek a person who simply understand what it is to represent the poor, the deprived, and the despised, and to walk into an American courtroom questioning whether the process will treat your client fairly. The many days of hearings before this committee have failed to establish that understanding in this nominee. The hearings have left more questions than answers, and certainly nothing other than his race has surfaced to indicate the type of understanding and the depth of experience that commends one to a seat on the Supreme Court. Clarence Thomas is simply not the man for this time.

Finally, sir, I ask you to use the criteria that Clarence Thomas urges to be used in evaluating others for employment. Under that criteria, the race and economic background of the applicant are not by themselves sufficient to qualify the person for the job. This committee is entitled to judge Clarence Thomas by his own criteria. We believe that if so judged, he cannot be confirmed.

[The prepared statement of Mr. Moffitt follows:]

NACDL

National Association of
Criminal Defense Lawyers
Suite 1150
1110 Vermont Avenue, N.W.
Washington, D.C. 20005
(202) 872-8688

REPORT ON THE NOMINATION OF JUDGE CLARENCE THOMAS TO BECOME AN ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT

Adopted unanimously by the NACDL Board of Directors
August 17, 1991.

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Report on the Nomination of Judge Clarence Thomas
to Become an Associate Justice of the
Supreme Court of the United States

On July 1, 1991, President George Bush nominated Clarence Thomas, a Judge of the United States Court of Appeals for the District of Columbia Circuit, to fill the vacancy on the Supreme Court of the United States created by the resignation of Associate Justice Thurgood Marshall. The NACDL opposes the nomination of Judge Thomas to serve on the Supreme Court.

1. Why NACDL Cannot Support the Nomination of Judge Clarence Thomas to the Supreme Court. Certainly, NACDL cannot affirmatively endorse this nomination. While Judge Thomas appears to have the intellect, temperament and legal ability to serve on the High Court, he has not clearly demonstrated a professional commitment to the ideals of individual liberty and justice for which the Association stands, particularly with respect to the rights of the criminally accused. Since becoming a lawyer, Judge Thomas has apparently never represented a private individual, much less an accused criminal. Nor has he otherwise shown particular concern for enforcing the rights of the individual against assertions of state power. It is not nearly enough that his appointment would help somewhat to restore the loss of critical diversity of personal background and life experience among Members of the Court occasioned by the resignation of Justice Marshall.

Except for two years as an in-house attorney for the Monsanto chemical company, Judge Thomas has always chosen to work for the state or federal government; his earliest responsibilities with the office of the Missouri Attorney General upon graduating from Yale Law School in 1974 involved arguing criminal appeals for the state. (To our knowledge, he has never either tried a case or presided over a trial as a judge.) As discussed in the reports of leading civil rights groups, his tenure as Chair of the EEOC raises serious questions about his devotion to the law and legal process, especially as regards the system of checks and balances among the three branches of the federal government. Judge Clarence Thomas does not merit an affirmative endorsement from the NACDL.

2. Why NACDL Opposes the Nomination of Judge Thomas. The NACDL opposes the nomination of Judge Clarence Thomas to become an Associate Justice of the Supreme Court for three reasons: lack of commitment to certain basic but threatened principles of criminal justice, a dubious sense of judicial ethics, and adherence to an unusual and dangerously ill-defined jurisprudential philosophy.

a. Lack of Commitment to Equal Justice and Due Process.

The first reason that NACDL should oppose Judge Thomas's nomination is that he has not demonstrated a commitment to certain basic principles of equal justice and due process for which this Association stands. Not the least of these is the Constitutionally-mandated role of the defense attorney in ensuring fairness in criminal cases. Nor is it certain that he accepts the exclusionary rule as a necessary means of enforcing of Fourth, Fifth and Sixth Amendment rights, or that he would demand the most scrupulous fairness in the administration of capital punishment if the death penalty is not to be abolished (as NACDL would prefer). (If Judge Thomas opposes the death penalty, as does his mentor Senator Danforth, or believes in strict limits on its application, he has never said so publicly.) Finally, we do not know whether he supports the vital role of the federal courts, exercising their constitutionally-mandated habeas corpus power, to review the fundamental fairness of criminal judgments that have been upheld in state court.

Judge Thomas has had little or nothing to say publicly about any of these most critical issues, nor are we aware of any privately-expressed opinions. His views on other civil rights and civil liberties questions, while not directly applicable in the context of defendants' rights, may provide some guidance. In addition, his support for the exercise of executive power and disdain for that of Congress and the judiciary, as noted below, strongly suggest that he would take unsatisfactory positions on these issues. Because his views are not known with certainty, however, NACDL urges the Senate to inquire closely during the confirmation process into Judge Thomas's views on basic principles of equal justice and due process, as they pertain to the rights of the accused.

b. Lack of Ethical Sensitivity as a Judge. Attorneys who have argued criminal appeals before Judge Thomas find him to be intelligent, courteous, attentive and well-prepared on the bench. We do not fault him on any of these grounds. Nevertheless, his failure to recuse himself when his impartiality could reasonably be questioned does raise a serious concern about his ethical judgment and ability to separate personal bias from official judicial responsibility.

Most troubling is Judge Thomas's record on the Oliver North case. Judge Thomas publicly praised Col. North in several 1987 and 1988 speeches and in a 1989 article. One speech lauded North for having done "a most effective job of exposing congressional irresponsibility." Remarks at Wake Forest Univ., April 18, 1988, at 21 (referring to him familiarly as "Ollie North"). Nevertheless, despite holding strong personal views in support of this defendant, Judge Thomas did not disqualify himself from voting on North's appeal. Specifically, Judge Thomas participated in the vote to deny rehearing in banc in United States v. North, 920 F.2d 940, 959 (1990), the decision which overturned North's

convictions for endeavoring to obstruct Congress (and other charges). Since by his own public admission Judge Thomas had an extrajudicial bias in favor of a party, it is beyond peradventure that he should not have voted in the Oliver North case. Two other members of the D.C. Circuit (Judges Mikva and Edwards) declined for reasons of their own to participate in that vote.

Also of concern to the committee is Judge Thomas's failure to recuse himself in Alpo Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958 (D.C.Cir. 1990). In that case, he wrote the opinion overturning a large damage award against a company owned by members of Danforth family, and of which his close friend and mentor, Senator Danforth, is an heir. Again, it seems apparent that Judge Thomas's impartiality in that situation could reasonably be questioned, requiring him to disqualify himself.

c. Dangerous "Natural Law" Philosophy. Like Robert Bork before him, Judge Thomas has an unusual jurisprudential view of the Constitution, but it is not Bork's "originalist," pro-government, anti-libertarian view. Thomas has consistently endorsed a "natural rights" theory of the Constitution, suggesting that the Constitution should be interpreted according to an extra-legal standard of right and wrong that humans can deduce from a study of "human nature," revealing the "laws of Nature and of Nature's God." Judge Thomas states that the "revolutionary meaning" of America is the basing of its government "on a universal truth, the truth of human equality." 30 Howard L.J. 691, 697 (1987). NACDL recognizes that this philosophy was indeed shared by those who signed the Declaration of Independence and by many who framed the Constitution as well. It was invoked by some of the abolitionists, such as Frederick Douglass, who argued that nothing in the original Constitution endorsed slavery; indeed, Judge Thomas has drawn on that tradition in support of his view that Brown v. Board of Education was decided the right way for the wrong reasons. (In the same essay, he also relies on the Rev. Martin Luther King, Jr., Attorney General Edwin Meese III, President Ronald Reagan, St. Thomas Aquinas, and Tom Paine, all within two paragraphs.)

Curiously coupled with Thomas's "natural law" argument is an expressed disdain for the right of privacy, as applied in Griswold v. Connecticut and Roe v. Wade, on the basis that privacy is not explicitly identified in the text of the Bill of Rights. The Ninth Amendment declares that such unenumerated rights exist and are to be protected. Failure to recognize that the right of privacy extends beyond the confines of the First, Fourth and Fifth Amendments leads inexorably to overcriminalization and abuse of state power. NACDL must not forget that the laws challenged in Griswold and Roe carried criminal penalties.

If we knew that "human equality" were the only "universal truth" that Judge Thomas finds behind (or above) the Constitu-

tion, and if we were confident that he is deeply committed to applying this truth to women's lives as completely as to men's, we might be less uneasy with this "natural law" philosophy. But Eighteenth and Nineteenth Century ideas of "human nature" spell indifference to the problem of poverty, and personal and professional oppression for women in today's world. The Supreme Court explicitly invoked "nature herself" and "the law of the Creator" to hold in 1873 that a woman could be refused the right to practice law. Moreover, many traditional views of human nature are fundamentally punitive and unforgiving, and have profound implications for criminal law which are contrary to NACDL's understanding of the "liberty" which is protected by the Constitution. Judge Thomas has not clarified whether the view of "human nature" that he believes to lie behind the Constitution is an unchanging one, nor which one it is.

Likewise, whose appreciation of "nature's God" informs Judge Thomas's "natural law"? We fully support the command of Article VI of the Constitution that "no religious test shall ever be required as a qualification to any office or public trust under the United States," and we codemn any suggestion that a nominee's religious opinions, as such, could be disqualifying. But this is because we believe that the Constitution invites a broad diversity of religious and nonreligious opinions in government. When a judicial nominee states that an understanding of "God's law" should inform Constitutional decisionmaking, however, it becomes incumbent on him to reveal what that understanding is. Judge Thomas's failure to make this clear in any of his dozen speeches and eight published articles advancing a "natural law" interpretation of the Constitution suggests that he may draw on an assertion of what is "natural" merely to justify a personal, political or philosophical agenda.

Judge Thomas believes that the "task of those involved in securing the freedom of all Americans is to turn policy toward reason rather than sentiment, toward justice rather than sensitivity, toward freedom rather than dependence--in other words, toward the spirit of the Founding.... The first principles of equality and liberty should inspire our political and constitutional thinking." 30 Howard L.J. at 699, 703. Some of these words NACDL could wholeheartedly endorse. Yet they do not seem to mean the same to Judge Thomas as to us: "Such a principled jurisprudence would pose a major alternative to ... esoteric hermeneutics rationalizing expansive powers for the government, <u>especially the judiciary</u>." <u>Id.</u> (emphasis added). Our principal concern, of course, is with that final twist. Who will check prosecutors' and politicians' "rationalization of] expansive powers for the [executive branch of the] government," to be used against the criminally accused, if not "the judiciary" in its interpretation and application of the Constitution, especially the Bill of Rights? NACDL believes that a powerful and independent judiciary, devoted to even-handed enforcement of the "first

principles of equality and liberty," is essential for "securing the freedom of all Americans." We also believe that "justice" is not an alternative to "sensitivity"; without sensitivity there can be no justice.

Judge Thomas, who has served on the D.C. Circuit less then a year and a half and was not previously a judge, is the author of only seven published opinions on appeals of criminal convictions, all in drug cases. (He has participated in another ten or so decisions that resulted in published opinions by other judges, and about 20 unpublished affirmances, in some of which he wrote unpublished memorandum opinions. He does not appear ever to have concurred separately or dissented in a criminal case, which may indicate a relative lack of interest in the subject.) The opinions on their face are thoroughly researched, lucidly written, and temperate in tone. None breaks new ground, either for the government or for the defense. In these cases, Judge Thomas explained the affirmance of convictions over claims involving, for example, asserted evidentiary insufficiency, severance, denial of continuance, search and seizure, and definitions of terms in the Sentencing Guidelines; in other words, the routine issues seen in federal criminal appeals. As a Supreme Court Justice, however, he would face far more difficult issues, and would have far more freedom from the strictures of established precedent (if he were inclined to exercise such freedom) than as a Circuit Judge.

A handful of Judge Thomas's opinions do show a gratifying independence from prosecutorial argument. In United States v. Long, 905 F.2d 1572 (1990), he overturned a conviction for "using" a firearm in connection with a drug offense, where the unloaded gun was found between the cushions of a sofa. It might seem easy to say that this evidence was insufficient, but a jury had convicted, and a judge had upheld that verdict and imposed the mandatory five year sentence. The truth is that many if not most appellate judges today would have affirmed, perhaps without publishing an opinion; the concept of "using" a firearm has been diluted to meaninglessness in several other circuits. Obviously alluding to that fact, Judge Thomas wrote, "As an appellate court, we owe tremendous deference to a jury verdict; we must consider the evidence in the light most favorable to the government.... We do not, however, fulfill our duty through rote incantation of these principles followed by summary affirmance." 905 F.2d at 1576. In the same case, Judge Thomas's opinion goes out of its way to salvage the appellate rights of a defendant whose lawyer filed the required notice one day late, rejecting the prosecutor's plea to dismiss the appeal outright.

In United States v. Rogers, 918 F.2d 207, 212 (1990), while upholding the admission of "prior bad acts" evidence, Judge Thomas's opinion rejects the argument that the defense attorney's acquiescence in a cautionary instruction had waived any objection

to the admission of the questionable evidence. The opinion explicitly and accurately recognizes the legitimate tactical decisions a defense attorney must make in the midst of trial when an objection to prejudicial evidence has been overruled. And in United States v. Barry (Farrakhan and Stallings v. U.S.), 1990 WestLaw 104925 (1990), Judge Thomas participated in issuing an unsigned order requiring a trial judge to consider the First and Fifth Amendment rights of controversial, allegedly psychologically "intimidating" supporters of a criminal defendant to attend his trial.

These few commendable decisions, however, are greatly outnumbered by those of Judge Thomas's rulings which brush off troubling appeals. Especially disturbing are the opinions which demonstrate a cold indifference to the realities of the criminal justice system's harsh, discriminatory impact on the poor and uneducated. In United States v. Jordan, 920 F.2d 1039 (unpublished decision, available on WestLaw), Judge Thomas joined an unsigned opinion in which a defendant was denied a two-point reduction under the federal sentencing guidelines, costing him an additional 2½ years in prison, because his inability to raise the required bail to secure his release before trial prevented him from fulfilling an offer to cooperate with the authorities. Viewing the case as if the defendant were claiming some benefit on account of his poverty, the court invoked against him a Sentencing Commission rule that "one's socio-economic status 'is not relevant in the determination of a sentence.'"

Similarly, in United States v. Poston, 902 F.2d 90, 99-100 (1990), Judge Thomas's opinion passes without comment the transparent, self-contradictory lies of the arresting officers about whether promises of benefit were given to the father of a youthful arrestee and instead parses like the words of a business contract the father's testimonial recollection of what was said to him at the stationhouse. The result is an icy justification of the prosecutor's later refusal to give the defendant the benefit of a good word at sentencing so as to relieve him from an otherwise mandatory five year prison sentence for knowingly giving a ride to a drug dealer. If the Jordan and Poston cases illustrate what Judge Thomas means by "justice [without] sensitivity," NACDL must demur.

Conclusion. As discussed, Judge Thomas's record reveals several points worthy of favorable comment. Nevertheless, NACDL opposes the nomination of Judge Thomas for three basic reasons: his lack of demonstrated commitment to equal justice and due process, his failure to recognize the need for recusal where his impartiality is open to question, and his adherence to a philosophy of constitutional interpretation and judicial action which is outside the mainstream of contemporary thought and leads to unacceptable departures from the duty of the courts to enforce fundamental rights.

In addition, we are very concerned that Judge Thomas's views on the enforcement of civil rights laws, as expressed in both word and deed during his tenure as chair of the EEOC, bode ill for his willingness to enforce civil liberties, including those of the criminally accused. We hold in highest regard the expertise of such sister organizations in the broader civil rights and civil liberties community as the NAACP, the Leadership Conference on Civil Rights, the National Conference of Black Lawyers, the Congressional Black Caucus, the Alliance for Justice, the National Abortion Rights Action League, the Women's Legal Defense Fund, the National Organization for Women, AFSCME, and others which have publicly announced their opposition to this nomination. We are concerned that his unique legal philosophy and his laissez-faire attitude toward civil rights point to an approach to criminal law which is very punitive, rigid and unforgiving, and ultimately extremely dangerous to individual liberties.

As this report notes, there are several areas in which Judge Thomas's views are not yet entirely clear, and where we hope the Senate Judiciary Committee will press for more definite answers before considering confirmation. The record already available however, requires that NACDL oppose the nomination of Judge Clarence Thomas to become an Associate Justice of the Supreme Court of the United States.

Members of the Committee:
Peter Goldberger, Chair, Philadelphia, PA
Samuel J. Buffone, Washington, DC
Nina Ginsberg, Alexandria, VA
Prof. William W. Greenhalgh, Washington, DC
William B. Moffitt, Alexandria, VA
William H. Murphy, Jr., Baltimore, MD
Prof. Charles J. Ogletree, Cambridge, MA
Alan Ellis, Mill Valley, CA, President of NACDL, ex officio

The CHAIRMAN. Thanks, Mr. Moffitt.

It is kind of fascinating, whether or not Judge Thomas intended it or not, that the two things most prominently promoted by everyone who supports Judge Thomas—not alone, but prominently—are the fact that it would keep a black man on the Court and his humble beginnings. I never thought of it quite in the terms you just stated it, in terms of his standard—although I am not sure that's what he is suggesting.

I also want, Professor Williams, to indicate—and I have been derelict in my duty—that Senator Kohl wanted me to expressly state that he wished he could be here, but he had a scheduling conflict as well that prevents him from being here at the committee hearing.

You all are very articulate and passionate in your views as to why Clarence Thomas should not be on the Court, and I think you capture at a minimum the dilemma that a lot of us, who truly have not made up our minds, are wrestling with. Your comment, professor, about the Philadelphia Inquirer, your reference to it—the Philadelphia Inquirer chose to take a chance and endorsed him; others are going to choose not to take a chance, those who are not sure. But hopefully we'll be able to reach a resolution of that in this committee by next week's end, after I have conferred with my senior Republican colleague as to when we'll schedule this markup.

I thank you all very, very much for taking the time to come and for your continued interest.

It is good to see you, Mr. Burns; welcome back.

Mr. BURNS. Thank you, Senator.

The CHAIRMAN. Thank you all very much.

Now, we have our last-but-not-least panel, who have waited a long time to testify. This is a panel of individuals who have come to testify on behalf of Judge Thomas. The final panel will be testifying in support of Judge Thomas and it includes the following people: Ms. Ellen Smith, on behalf of Concerned Women for America; Dr. George Dumas, national chairman of the Republican Black Caucus; George Jenkins, chairman of the Montgomery County Black Republican Council. It is not a county council, it is a part of the organization?

Mr. JENKINS. Part of the organization.

The CHAIRMAN. I see. Mr. Celes King, on behalf of the Professional Bail Agents; and Connie Mack Higgins, chairman of the D.C. Black Republican Council. I have not had the privilege to be before so many Republicans other than on this committee. It is an honor to have you all here and we are anxious to hear your testimony, and I would implore you all to keep it to 5 minutes.

We will, unless the panel has otherwise decided, begin with you, Ms. Smith, if that is okay.

STATEMENTS OF A PANEL CONSISTING OF ELLEN SMITH, CONCERNED WOMEN FOR AMERICA; CELES KING, PROFESSIONAL BAIL AGENTS; GEORGE L. JENKINS, JR., CHAIRMAN, MONTGOMERY COUNTY BLACK REPUBLICAN COUNCIL; AND GEORGE C. DUMAS, NATIONAL CHAIRMAN, REPUBLICAN BLACK CAUCUS

Ms. SMITH. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Ms. SMITH. My name is Ellen Smith. I am legislative counsel for Concerned Women for America, the largest grass-roots women's organization in the country.

The CHAIRMAN. Is that right?

Ms. SMITH. I am here on behalf of Beverly LaHaye, our founder and president, who is unable to be with you today, and I am here on behalf of hundreds of thousands of CWA members across the Nation who do not imbibe the orthodoxy of the feminist establishment and who do support the appointment of Clarence Thomas as Associate Justice to the U.S. Supreme Court.

Judge Thomas' character, temperament, jurisprudence, and professional qualifications clearly show that he should sit on the highest court in the land. To begin with, let me recall the wisdom of George Mason, the author of the Virginia Declaration of Rights. In 1776, he wrote, "No free government or the blessings of liberty can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles."

Throughout his career, and indeed throughout his life, Judge Thomas has reflected these ideals. No one can credibly deny that he is a man of character, compassion, hard work, and uncompromising integrity. These qualities help to explain the level of success he has already achieved at the young age of 43.

And at the same time, as we have witnessed in these hearings, Judge Thomas never fails to acknowledge his personal gratitude and debt for those individuals who encouraged, trained, and assisted him along the way, as well as those larger-than-life heroes who have gone before.

Similarly, the most notable hallmark of Judge Thomas' jurisprudence has been, in Mason's words, a recurrence to fundamental principles. In 1987, Judge Thomas, then Chairman of the Equal Employment Opportunity Commission, wrote, "But what is the ultimate American principle but that contained in the Declaration of Independence: that all men are created equal."

He further argued that the first principles of equality and liberty should inspire our political and constitutional thinking. In so stating, Judge Thomas placed himself in the philosophical company of such distinguished Americans as Thomas Jefferson, Abraham Lincoln, Judge John Marshall Harlan, Frederick Douglas, and Dr. Martin Luther King, Jr.

Judge Thomas recognizes that our fundamental constitutional rights rest upon immutable principles inherent in the very nature of things, not upon personal biases, sentimentality, political majorities, or the musings of would-be social engineers. Sadly, the language of rights has been trivialized by some special interest groups solely concerned with their own narrow political agenda. This certainly is true in the case of some within the so-called women's movement who claim to speak on behalf of American women.

Judge Thomas understands that true rights are a matter of law rather than politics. In this regard, I would note that Judge Thomas has expressed profound appreciation and respect for religious liberty guaranteed by the first amendment. This is of great encouragement to CWA and to other organizations working in both

the legislative and judicial arenas to ensure that our long-cherished first liberty continues to be secured and vigilantly defended.

Some have expressed concern that Judge Thomas' belief in natural law or, if you will, the laws of nature and of nature's God would cause him to disregard court precedent and time-tested constitutional jurisprudence, but such fears are unjustified.

As surely as Judge Thomas' belief in natural law inspires his vigorous defense of individual liberty and equality, it impels his adherence to the rule of law, his high regard for judicial restraint, and his respect for the constitutional scope of judicial authority. In short, Judge Thomas recognizes that it is the duty of a judge to interpret and to state the law, not to propound his or her own pet notions of sound public policy. In his own words, he has no agenda.

Finally, Judge Thomas has professional qualifications that will serve the Court and the Nation well. Having served as an aide to Senator John Danforth, as Assistant Secretary for Civil Rights in the Department of Education, as Chairman of the Equal Employment Opportunity Commission, and currently as a judge on the U.S. Court of Appeals for the District of Columbia, Judge Thomas has distinguished himself in all three branches of the Federal Government.

Mr. Chairman, at the beginning of my testimony I recited an exhortation delivered by George Mason in 1776. His wisdom is no less fitting in 1991, and perhaps more so. Because the character, temperament, judicial philosophy and qualifications of Judge Thomas are in keeping with that wisdom, I respectfully urge the members of this committee to support his confirmation as Associate Justice to the United States Supreme Court.

Thank you.

[The prepared statement of Ms. Smith follows:]

Statement of
Beverly LaHaye
President, Concerned Women for America

Before the
Committee on the Judiciary,
United States Senate

Concerning the Nomination of
Clarence Thomas
as Associate Justice of
the Supreme Court of the United States

September 20, 1991

Mr. Chairman, thank you for affording me this opportunity to address you and your colleagues on the Judiciary Committee. I am Beverly LaHaye, founder and President of Concerned Women for America (CWA). I am here today on behalf of hundreds of thousands of CWA members across the nation who do not imbibe the orthodoxy of the feminist establishment, and who support the appointment of Clarence Thomas as Associate Justice to the United States Supreme Court. Judge Thomas' character, temperament, jurisprudence and professional qualifications clearly show that he should sit on the highest court in the land.

First, let me recall the wisdom of George Mason, author of the Virginia Declaration of Rights. In 1776 he wrote, "No free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles."

Throughout his career, indeed, his entire life, Judge Thomas has reflected these ideals. No one can credibly deny that he is a man of character, compassion, hard work and uncompromising integrity. These qualities help to explain the level of success he has already enjoyed at the age of forty-three. At the same time, as we have witnessed in these hearings, Judge Thomas never fails to acknowledge his personal gratitude for those individuals who encouraged, trained and assisted him along the way, as well as those larger-than-life heroes who "have gone before."

Similarly, the most notable hallmark of Judge Thomas'

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jurisprudence has been, in Mason's words, his "recurrence to fundamental principles." In 1987 Judge Thomas, then Chairman of the Equal Employment Opportunity Commission, wrote, "But what is the ultimate American principle but that contained in the Declaration of Independence: that all men are created equal." He further argued that "[t]he first principles of equality and liberty should inspire our political and constitutional thinking." In so stating, Judge Thomas placed himself in the philosophical company of such distinguished Americans as Thomas Jefferson, Abraham Lincoln, Justice John Marshall Harlan, Frederick Douglass, and Dr. Martin Luther King, Jr.

Judge Thomas recognizes that our fundamental, constitutional rights rest upon immutable principles inherent in the very nature of things, not upon personal biases, sentimentality, political majorities or the musings of would-be social engineers. Sadly, the language of "rights" has been trivialized by some special interest groups solely concerned with their own, narrow political agenda. This is certainly true in the case of those within the so-called "women's rights" movement who claim to speak on behalf of American women.

Judge Thomas understands that true rights are a matter of law rather than politics. In this regard, I would note that Judge Thomas has expressed profound appreciation and respect for religious liberty guaranteed by the First Amendment. This is of great encouragement to my organization and others working in both the legislative and judicial arenas to ensure that our long-

cherished, "first liberty" continues to be secured and vigilantly defended.

Some have expressed concern that Judge Thomas' belief in "natural law" or, if you will, the "laws of nature and of nature's God," would cause him to disregard court precedent and time-tested constitutional jurisprudence. But such fears are unjustified. As surely as Judge Thomas' belief in "natural law" inspires his vigorous defense of individual liberty and equality, it impels his adherence to the rule of law, his high regard for judicial restraint and his respect for the constitutional scope of judicial authority. In short, Judge Thomas recognizes that it is the duty of a judge to interpret and to state the law, not to propound his or her own pet notions of sound public policy. In his own words, he has "no agenda."

Finally, Judge Thomas has professional qualifications that will serve the Court and the nation well. Having served as an aide to Senator John Danforth, as Assistant Secretary for Civil Rights in the Department of Education, as Chairman of the Equal Employment Opportunity Commission, and currently as a judge on the U.S. Court of Appeals for the District of Columbia, Judge Thomas has distinguished himself in all three branches of the federal government.

At the beginning of my testimony I recited an exhortation delivered by George Mason in 1776. His wisdom is no less fitting in 1991, and perhaps more so. Because the character, temperament, judicial philosophy and qualifications of Judge

Thomas are in keeping with that wisdom, I respectfully urge the members of this committee to support his confirmation as Associate Justice to the United States Supreme Court.

The CHAIRMAN. Thank you, Ms. Smith. We appreciate it very much.

Mr. King.

STATEMENT OF CELES KING

Mr. KING. Thank you very much, Senator Biden. I guess we are here to wrap this up, and that you will go home and we will go home. I came in on the red-eye special this morning, and let me tell you it has been an interesting day, but these lights are pretty tough. So I am going to see if I can't stay within——

The CHAIRMAN. You came from California?

Mr. KING. Yes, sir. I am going to stay within——

The CHAIRMAN. Well, I hope neither of us go home on bail. [Laughter.]

Mr. KING. Well, that is the business that I am in. It is a business that I have become involved in as a result of self-help. When I came along, there was no private nor public kind of help, and I think to a degree many people in the black community have been able to have that as a background.

I can remember when I was a young person and my dad opened up a store, and that meant that he had to go and buy the lumber and he had to put the nails in himself, and there was no bank to help and there never was any thought about public assistance. We can make it out there and we are going to make it, and I certainly like some of the ideas of Judge Thomas.

In our own community, we have established many businesses and we have done a considerable job, not as good as I would like to see. I will mention that I am at some odds with some of my contemporaries. I am the past president of the Los Angeles chapter of NAACP, having served there during those rather turbulent 1960's. For the last 6 years, I have been national president of the Bail Agents Association. There are some 5,000 to 6,000 of us that are there that are licensees, and we are talking about the agencies, and for each one of those agencies we are talking about 8 or 10 people.

We are trying to do a good job, and long ago in this business the question of gender, the question of race is absolutely secondary to the quality of service that you deliver. If you are willing to work 60 to 70 hours a week year in and year out, you do not have those kinds of things as a problem in our industry.

Of course, our principal competitor is you, meaning the governmental services that are out there. But we do want to point out very much that as far as minorities are concerned, there are some businesses that are out here where we have overcome most of these problems, and we have worked at it very hard.

I am also the State chairman of the Congress of Racial Equality in California, and I serve in one other capacity. I represent the county of Los Angeles on the Century Freeway Affirmative Action Committee, and I can tell you that no affirmative action program is going to work unless the people have a self-actualizing approach. They have got to do some self-help or they are not going to be able to do it.

Many of us went to school and we had to work at the same time. I had the GI bill when I came out of the Air Force. I was a pilot in

the Air Force, but after that was over with I paid for every dollar of it because it had not come to the point at which I could reach out and get those types of assistance.

The CHAIRMAN. It was kind of helpful, though, when you had it, wasn't it?

Mr. KING. I am sorry?

The CHAIRMAN. The GI bill was kind of helpful when you had it, though, wasn't it?

Mr. KING. It was, and it was for all of us.

The CHAIRMAN. Right.

Mr. KING. And that is exactly the way that I think that affirmative action should happen. It should be for whoever needs it to the extent that we as taxpayers can afford it. Our industry has to do what we can in order to reduce taxes that people have to pay.

I am coming in under the light. I would like to call that to the chairman's attention. Well, I came in on target anyway.

[The prepared statement of Mr. King follows:]

TESTIMONY OF CELES KING III

U.S. SENATE JUDICIARY COMMITTEE
SEPTEMBER 20, 1991

SENATOR BIDEN, OTHER DISTINGUISHED MEMBERS OF THE SENATE JUDICIARY COMMITTEE. I AM CELES KING III OF LOS ANGELES CALIFORNIA.

I BRING YOU GREETINGS FROM THE CALIFORNIA BRANCH OF THE CONGRESS OF RACIAL EQUALITY, FOR WHICH I AM STATE CHAIRMAN; AND FROM THE PROFESSIONAL BAIL AGENTS OF THE U.S., OF WHICH I AM NATIONAL PRESIDENT.

I AM PROUD TO COME BEFORE YOU THIS MORNING TO PLACE AN EXCLAMATION POINT ON THE EVER INCREASING SUPPORT FOR THE CONFIRMATION OF JUDGE CLARENCE THOMAS TO THE UNITED STATES SUPREME COURT.

IN THE BAIL BOND BUSINESS LONG AGO, WE BEGAN THE PRACTICE OF SELF-HELP AND REMOVED RACIAL AND GENDER GAPS BASED ON THE QUALITY AND QUANTITY OF WORK. OF THE 5,000-PLUS LICENSED PEOPLE IN THE U.S., WE MUST WORK 60-70 HOURS A WEEK AND WHEN PEOPLE ARE RELEASED FROM CUSTODY, THEY COULD CARE LESS WHO EVER POSTED THE BOND.

I AM ALSO PROUD TO SAY THAT I NOT ONLY SUPPORT JUDGE THOMAS AS AN UNABASHED AFRICAN-AMERICAN AND BLACK REPUBLICAN, BUT ALSO AS A PERSON, WHO LIKE MYSELF, EXEMPLIFIES THE UNAPOLEGETIC SOUND PRINCIPLES OF HARD WORK AND SELF-HELP.

JUDGE THOMAS' CAREER, IN MY OPINION, IS A GREAT MODEL FOR AMERICAN YOUTH.

I ALSO COME BEFORE YOU NOT ONLY AS A PROPONENT OF THE SELF-HELP PRINCIPLES THAT JUDGE THOMAS EXPOUSES, BUT ALSO AS A PERSON THAT AGREES WITH SOME FORMS OF AFFIRMATIVE ACTION. MY SUPPORT FOR BOTH IS NOT A CONTRADICTION IN TERMS.

AS YOU KNOW, JUDGE THOMAS' NOMINATION FOR SUPREME COURT JUSTICE HAS REIGNITED THE WHOLE AFFIRMATIVE ACTION DEBATE. AS I SAID, I AGREE WITH JUDGE THOMAS' BELIEF THAT MINORITIES MUST UNDERTAKE SELF-HELP TO IMPROVE THEIR ECONOMIC AND SOCIAL WELL BEING.

BUT I ALSO BELIEVE THAT SOME AFFIRMATIVE ACTION PROGRAMS ARE BENEFICIAL AND ESSENTIAL TOWARD ACCOMPLISHING RACIAL EQUALITY AND ECONOMIC EMPOWERMENT.

IN THE LOS ANGELES AREA, THE CENTURY FREEWAY AFFIRMATIVE ACTION COMMITTEE IS AN EXAMPLE OF AN AFFIRMATIVE ACTION PROGRAM WHICH WORKS. BUT SELF-HELP IS NECESSARY.

WHILE THE CENTURY FREEWAY POSSESSES ONE OF THE MOST AMBITIOUS AFFIRMATIVE ACTION PROGRAMS IN THE NATION, IT ALSO HAS A NUMBER OF RESOURCES WHICH, WHEN PROPERLY UTILIZED, CONSTITUTES THE FORMS OF SELF-HELP WHICH JUDGE THOMAS HAS LONG PROMOTED.

I BELIEVE THAT ALL AMERICANS, NOT JUST MINORITIES AND WOMEN, SHOULD HEED JUDGE THOMAS' ADVICE OF HELPING OURSELVES, BUT WE MUST ALSO SUPPORT CONSTRUCTIVE AND EFFECTIVE AFFIRMATIVE ACTION PROGRAMS LIKE CFAAAC WHICH ENSURE THAT RACIAL EQUALITY IN EMPLOYMENT AND BUSINESS ARE ACHIEVED.

AGAIN, SEN. BIDEN, I WANT TO THANK YOU AND YOUR COMMITTEE FOR INVITING ME TH PARTICIPATE IN THESE HISTORIC CONFIRMATION

HEARINGS.
I AM CONVINCED THAT THE CANDIDATE OF THE HOUR, JUDGE CLARENCE THOMAS, WILL MAKE AN HONORABLE ADDITION TO THE SUPREME COURT.
I WILL BE HONORED AND HAPPY TO ENTERTAIN ANY QUESTIONS YOU MAY HAVE.

CELES KING,III
1530 W. MARTIN LUTHER KING, JR. BLVD.
LOS ANGELES, CALIFORNIA, 90062
(213) 299-1234
FAX: (213) 290-KFAX

The CHAIRMAN. Thank you very much.

Chairman Jenkins. By the way, are you one of the fellows I would have to appear before if I wanted to be a candidate in Montgomery County?

Mr. JENKINS. Well, I would hope not. [Laughter.]

The CHAIRMAN. Well said, Mr. Jenkins. Thank you for your testimony. Dr. Dumas. [Laughter.]

Chairman Jenkins.

STATEMENT OF GEORGE L. JENKINS, JR.

Mr. JENKINS. Well, thank you, Mr. Chairman and Senator Thurmond. My name is George Jenkins and I am chairman of the Montgomery County Black Republican Council of Montgomery County, MD, an organization composed of African-American businessmen and businesswomen, lawyers, teachers, professionals, retired professionals, civic leaders, and involved citizens. We are one of the significant organized African-American chapters of Republicans in this country.

I appear before you today to testify in support of the nomination of Judge Clarence Thomas to serve as an Associate Justice of the U.S. Supreme Court. We as an organization are affiliated with the Montgomery County Republican Central Committee. This committee consists of 19 members elected to represent the 120,807 registered Republican Party voters who live in Montgomery County.

Our committee has unanimously passed a resolution supporting the nomination of Judge Thomas and I would like to submit that at this point for the record.

The CHAIRMAN. Without objection.

[The information referred to follows:]

NEWS RELEASE

Melissa Martin Cartano, Chairman of the Montgomery County Republican Central Committee, announced today that the Committee has passed a resolution supporting President Bush's nomination of Judge Clarence Thomas to the United States Supreme Court. As a part of their endorsement the members stated:

> We are proud of his personal and professional past and feel confident that his experience within the American scheme has created an individual to be admired and respected. We believe that he is an honorable and well qualified individual who is deserving of the appointment. His experience, objectivity and knowledge will benefit all Americans. Therefore, we believe that Judge Clarence Thomas deserves confirmation for appointment to the Supreme Court.

The Montgomery County Republican Central Committee consists of 19 members elected to represent the 120,807 registered Republican party voters who live in Montgomery County.

August 28, 1991

Mr. JENKINS. The Montgomery County Black Republican Council voted unanimously in support of Clarence Thomas to the Supreme Court. We commend President Bush for his selection of a fiercely independent-minded individual who has demonstrated many qualities that distinguish him as a person who is highly qualified to serve on the highest court in the land.

Judge Thomas has a broad and diversified legal career, including assistant attorney general in Missouri, corporate lawyer for Monsanto Co., congressional staffer, Assistant Secretary for Civil Rights for the Department of Education, and appellate judge for the District of Columbia court. Throughout his life and legal career, he has modeled himself on the American dream by progressing through increasingly challenging assignments and carrying out each one very effectively.

During the early years of his life in Georgia, Judge Thomas did not have many of life's comforts and material possessions. However, and perhaps more importantly, he was blessed to have grandparents and religious counselors who taught him the value of hard work, personal integrity, self-discipline, and obdurant perseverance.

In taking to heart these lessons and seizing all available opportunities provided by law, Judge Thomas achieved much of his dream and now stands as a paragon of success in his community and the Nation.

Reflecting on the various experiences and values ascribed to Judge Thomas, we find that many Americans share with him some of the same basic values—respect for and belief in family, religious commitments, dedication to education and being well prepared for opportunities when they come to you, lifelong appreciation of family and teachers who help develop one's character, and an abiding sense of self-help when challenges occur.

Judge Thomas said in a previous confirmation hearing that he had become a lawyer to ensure that minorities were not excluded from opportunities to prosper in our society. He also said that he may differ with others on how best to do that, but the objective has always been to include those who have been excluded.

We have done some research and there are a number of his actions that we would want to submit and include for the record.

The CHAIRMAN. They will be included.

Mr. JENKINS. There have been many articles in the media concerning Judge Thomas. Some have been supportive and some have been critical, and an issue of whether blacks would support his nomination has been ever-present. It is noteworthy that some have opposed this nomination, and based on recent polls there have been indications that at least 58 percent of American—blacks approve the nomination of Judge Thomas to the Supreme Court. I represent a group of African-Americans that unanimously support Judge Thomas.

Gentlemen, Clarence Thomas, a product of the unique American experience, now seeks your confirmation. We, the Montgomery County, Maryland, Black Republican Council, support the nomination of Judge Thomas as an Associate Justice of the Supreme Court, and believe that he has the moral fortitude, intellect, breadth of experience, and regard for the appropriate interpretation of the Constitution. In view of these prime requirements for a

Supreme Court Justice, we urge the Senate to confirm Judge Thomas.

Thank you for the opportunity.

[The prepared statement of Mr. Jenkins follows:]

STATEMENT OF
GEORGE L. JENKINS, JR

CHAIRMAN
MONTGOMERY COUNTY BLACK REPUBLICAN COUNCIL
MONTGOMERY COUNTY, MARYLAND
BEFORE THE
SENATE JUDICIARY COMMITTEE
U.S. SENATE

20 SEPTEMBER, 1991

Mr. Chairman and Members of the Committee:

My name is George Jenkins and I am Chairman of the Montgomery County Black Republican Council of Montgomery County, Maryland, an organization composed of African American businessmen and businesswomen, lawyers, teachers, professionals, retired professionals, civic leaders, and involved citizens. We are one of the significant, organized African American chapters of Republicans in this country. I appear before you today to testify in support of the nomination of Judge Clarence Thomas to serve as an Associate Justice of the United States Supreme Court.

The Montgomery County Black Republican Council voted unanimously in support of Clarence Thomas to the Supreme Court. We commend President Bush for his selection of a fiercely independent-minded individual who has demonstrated many qualities that distinguish him as a person who is highly qualified to serve on the highest Court in the land. Judge

Thomas has had a broad and diversified legal career including Assistant Attorney General in Missouri, corporate lawyer for Monsanto Company, Congressional staffer, Assistant Secretary for Civil Rights for the Department of Education, and Appellate Judge for the District of Columbia Circuit. Throughout his life and legal career, he has modeled himself on the American dream by progressing through increasingly challenging assignments and carrying out each one very effectively.

During the early years of his life in Georgia, Judge Thomas did not have many of life's comforts and material possessions. However, and perhaps more importantly, he was blessed to have grandparents and religious counselors who taught him the value of hard work, personal integrity, self-discipline, and obdurate perseverance. In taking to heart these lessons and seizing all available opportunities provided by the law, Judge Thomas achieved much of his dream and now stands as a paragon of success in his community and the nation. Reflecting on the various experiences and values ascribed to Judge Thomas, we find that many Americans share with him some of the same basic values: respect for and belief in family; religious commitments; dedication to education and being well prepared for opportunities when they come to you; life-long appreciation of family and teachers who help develop one's character; and an abiding sense of self-help when challenges occur.

Judge Thomas said in a previous confirmation hearing that he had become a lawyer to ensure that minorities were not excluded from opportunities to prosper in our society. He also said that he may differ with others on how best to do that, but the objective has always been to include those who have been excluded.

When he was chairman of the Equal Employment Opportunity Commission (EEOC) Clarence Thomas compiled an outstanding record of accomplishments. He revitalized the agency, making it proactive rather than reactive, and emphasized its law enforcement mission. Judge Thomas' philosophy on affirmative action has been stated in many speeches -- every American should have the affirmative opportunity to advance and succeed on his or her merit in our society.

Notably, under the leadership of Clarence Thomas, the Commission:

***secured over a billion dollars in relief for victims of discrimination;

***filed more than 3,000 legal actions in U.S. District Courts during his tenure. In 1983, the Commission filed 195 lawsuits; by 1990 that annual figure had more than tripled to 640;

***instituted policies to insure that every charge filed was fully investigated and litigated with full relief sought for

victims of discrimination;
***transformed and revitalized the work environment at EEOC and revamped and improved the case processing system;

Under Judge Thomas, the EEOC championed the rights of older workers by:
***fully investigating and prosecuting charges of age discrimination under the Age Discrimination and Employment Act (ADEA);
***securing a total of $389.7 million in benefits under the ADEA from 1982-1990;
***filing 781 ADEA lawsuits from 1982 - 1990;
***filing pattern and practice/class action lawsuits that represented annually between one-third and three-fourths total ADEA lawsuits; and
***establishing standards and procedures to reconcile older workers' ADEA rights and benefits achieved through collective bargaining.

There have been many articles in the media concerning Judge Thomas. Some have been supportive and others have been critical, and an issue of whether blacks would support his nomination has been ever present. It is noteworthy that while certain institutions, notably the NAACP and the Congressional Black Caucus, have opposed Judge Thomas' nomination, recent polls have indicated that at least 58% of American blacks approve of the appointment of Judge Thomas to

the U.S. Supreme Court. I represent a group of African Americans that unanimously support Judge Thomas.

We believe that Judge Thomas is an independent thinker and a highly qualified and able jurist. He has personal integrity, compassion, and intellectual honesty. Notably, Judge Thomas has stated that he has no intention of sacrificing his principles to accommodate others or because it would be expedient. We believe that Clarence Thomas is a fair judge who will interpret our constitution rightly and properly, and make decisions consonant with the intentions of our forefathers, instead of engaging in judicial legislating. We also believe that Judge Thomas is deeply committed to individual rights and will bring a broad and unique experience and perspective to the Court not shared by the other Justices.

Finally, we believe that Clarence Thomas has committed himself to hard work and excellence. As a product of a great and diversified American work ethic, Clarence Thomas should be applauded for his personal and professional achievements in spite of enormous difficulties. Because of his personal background, the offices he has held in government service, and his life's experiences, Judge Thomas understands the needs of all Americans including minorities, women, the elderly and the handicapped.

Distinguished Senators, Clarence Thomas, a product of a unique American experience, now seeks your confirmation. We, the Montgomery County (MD) Black Republican Council, support the nomination of Judge Clarence Thomas as Associate Justice to the United States Supreme Court and believe that he has the moral fortitude, intellect, breadth of experience, and regard for the appropriate interpretation of the constitution. In our view, these are the prime requirements for a Supreme Court Justice and we urge the Senate to confirm Judge Thomas.

Mr. Chairman, this concludes my prepared statement. Thank you for the opportunity to appear before you to offer this testimony.

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

Dr. Dumas, the honored spot; after 90 witnesses, you will be the last witness to be heard on the subject of Judge Thomas. It is an honor to have you here and thank you for your patience.

STATEMENT OF GEORGE C. DUMAS

Mr. DUMAS. Thank you, Mr. Chairman. Mr. Chairman, members of the Committee on the Judiciary, my name is George Dumas, national chairman of the Republican Black Caucus, RBC. We, the members of the Republican Black Caucus, would like to place in the record our organization's unanimous support of the nomination of Judge Clarence Thomas for confirmation as an Associate Justice on the Supreme Court of the United States.

Mr. Chairman and members of this committee and each Member of the full Senate, we respectfully request each of you to fully support the confirmation of this great American, one of America's brightest and most devoted public servants. Our country needs his experience, his wisdom, his judicial and constitutional expertise, as well as his ability to rise above politics of party, of race, of sex, of religion, or national origin.

In our opinion, Judge Clarence Thomas is a national role model, a splendid example of accomplishments despite insurmountable odds. His life mirrors my life. I was born in Eupora, MS, where picking cotton was a way of life. During my early childhood, my parents moved our family to East St. Louis, IL, and shortly after arriving there they separated.

My mother struggled to rear and educate four children on welfare, which at that time was called Aid to Dependent Children, ADC. By the grace of God, hard work, self-help, education, church and community role models, such as black ministers, doctors, lawyers, business leaders and teachers that lived in our community, we succeeded against the odds. Today, I am a successful entrepreneur. Because of this background, I can identify with Judge Clarence Thomas.

Some past national role models that immediately come to mind are Presidents Abraham Lincoln, John F. Kennedy, Lyndon B. Johnson, all great men. President Abraham Lincoln is credited with abolishing slavery. Today, Abraham Lincoln is honored as one of our country's greatest Presidents.

President John F. Kennedy said, "Ask not what your country can do for you, but ask what you can do for your country." Judge Clarence Thomas is reviving that spirit of service ignited by President Kennedy. Over 24 years ago, President Lyndon B. Johnson nominated Judge Thurgood Marshall, a truly great American, to the Supreme Court of the United States. Today, President George W. Bush has nominated Judge Clarence Thomas to the Supreme Court of the United States. President Bush continues that tradition of recognizing the best person for the position by nominating Judge Thomas.

Each of these Presidents dared to dream great dreams, and they dared to be different. Their ability to dream great dreams and stand by their commitments, to see their dreams become a reality, is the essence of the elements that have made America great.

Judge Thomas also dares to dream great dreams and to be different.

Our Nation owes these great Presidents and the great Justice Thurgood Marshall much gratitude. Our U.S. Senate owes President Bush and the American people a vote of confirmation of Judge Clarence Thomas to the Supreme Court of the United States.

An ABC poll presented last Monday night, September 16, 1991, revealed that 63 percent of all Americans approve of the confirmation of Judge Clarence Thomas, including 61 percent of African-Americans and 61 percent of women. This is an approval rating increase of 5 to 7 percentage points for African-Americans.

Mr. Chairman and members of this committee and the full Senate, you have heard a great volume of testimony in favor and against this nomination. Some individual testimony has caused confusion. However, the central issue is that the President of the United States has nominated Judge Thomas, a highly qualified jurist of high moral character with integrity and independence.

We do not know why some people are against him. We do not now need to know how he will vote in the future. The fact is the American people have approved of this confirmation, as indicated by the latest ABC poll. We ask of you to vote to confirm this great American judge, this positive role model for our Nation.

We, the members of the Republican Black Caucus, RBC, thank you for this opportunity to testify before you during these historical proceedings. God bless Judge Thomas. God bless this committee and the full Senate. God bless the President of the United States, and God bless America.

[The prepared statement of Mr. Dumas follows:]

Republican Black Caucus (RBC)

4716 LEEHIGH COURT • SUITE 3 • FAIRFAX, VIRGINIA 22030-5636

The Nomination of Judge Clarence Thomas as an Associate Justice on the Supreme Court of the United States

Testimony of

Dr. George C. Dumas
National Chairman
Republican Black Caucus (RBC)

Before

United States Senate
Committee on the Judiciary
The Honorable Joseph R. Biden, Jr.
Chairman

on

Friday, September 20, 1991

MR. CHAIRMAN, members of the Committee on the Judiciary, my name is Dr. George Dumas, national chairman of the Republican Black Caucus (RBC). We, the members of the Republican Black Caucus, would like to place in the

record, our organization's unanimous support of the nomination of Judge Clarence Thomas, for confirmation as an associate Justice on the Supreme Court of the United States.

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God bless Judge Thomas;

God bless this Committee and the full Senate;

God bless the President of the United States; and

God bless America.

Senator THURMOND [presiding]. The chairman will be back in a moment. He asked me to proceed.

I want to take this opportunity first to welcome you here. I think it is very thoughtful of you and very considerate to appear here and use your talent and time to express yourself on a very important nomination.

There is no more important nomination that could be made in the United States than to the Supreme Court. These nine individuals have unusual power. Next to the President of the United States, they are the most influential people in this country, and I appreciate your coming here and expressing yourselves.

Now, I believe, Ms. Ellen Smith, you are with Concerned Women for America, is that correct?

Ms. SMITH. Yes, Senator.

Senator THURMOND. Your representatives have testified here on a number of appointments and have done a fine job.

Mr. King, you are with the Professional Bail Agents?

Mr. KING. Yes, sir.

Senator THURMOND. Just what is that organization?

Mr. KING. Sir, our responsibility is to save taxpayers money.

Senator THURMOND. Is what?

Mr. KING. Save taxpayers money.

Senator THURMOND. To get people out on bail, so they don't have to keep them in jail? [Laughter.]

Mr. KING. We take them out and we see to it that they get back.

Senator THURMOND. See that they return.

And the third is Mr. Jenkins. You are chairman of Montgomery County Black Republican Council?

Mr. JENKINS. Yes.

The CHAIRMAN [presiding]. Why don't you ask what his responsibility is? [Laughter.]

Senator THURMOND. How many members of the county council are there?

Mr. JENKINS. There are 19 members of the Montgomery County Central Committee, and they represent 120,000 Montgomery County voters.

Senator THURMOND. 120,000 voters.

Mr. JENKINS. Yes.

Senator THURMOND. How many black members and how many white members?

Mr. JENKINS. We have 56 members of the Black Republican Council.

The CHAIRMAN. If I could interrupt for a minute, he represents a party organization, not an elected public organization. It is not the county council.

Senator THURMOND. So, yours is a party organization and not the county council?

Mr. JENKINS. That's right.

Senator THURMOND. I see. Thank you very much.

Dr. Dumas, you are the national chairman of the Republican Black Caucus, as I understand.

Mr. DUMAS. That is correct, sir.

Senator THURMOND. How many members have you in that?

Mr. DUMAS. At this time, Senator, we have several hundred members and we are a grassroots organization and we are trying to make sure that African-American people get a chance to participate in the democratic process in this country by belonging to more than the Democratic Party. We believe that we should have more African-Americans in the Republican Party, and so our mission is to make that happen.

At this juncture, sir, I would like to thank you and your staff. Your staff was really tremendous in assisting me in being able to be at this hearing today, so I would like to thank you and the chairman so much.

Senator THURMOND. We are very glad to be of assistance.

Now, where do you live?

Mr. DUMAS. Sir, I live in Fairfax, VA.

Senator THURMOND. Fairfax County?

Mr. DUMAS. Yes, sir.

Senator THURMOND. Now, I am not going to ask you a lot of questions. It all boils down to this, whether or not this man is qualified to be on the Supreme Court. You can say what you please about all other questions, but that is all that counts.

Now, I am going to start with you, Ms. Smith: In your opinion, is Judge Clarence Thomas, by reason of integrity, professional qualifications and judicial temperament and other qualities you feel important to be on the Supreme Court, is he qualified to be on the Supreme Court?

Mr. SMITH. Senator, without hesitation, I can say that we believe that Judge Thomas is qualified to serve on the Supreme Court.

Senator THURMOND. The answer is yes?

Ms. SMITH. Yes.

Senator THURMOND. Mr. King.

Mr. KING. The answer is yes, and we see many, many judges.

Senator THURMOND. Mr. Jenkins.

Mr. JENKINS. Yes, Senator.

Senator THURMOND. Dr. Dumas.

Mr. DUMAS. The answer is yes, Senator.

Senator THURMOND. As I understand, all of you feel that he is qualified to be on the Supreme Court.

Mr. DUMAS. That is correct.

Senator THURMOND. The next question is: Do you know of any reason why this committee and the Senate should not confirm him for the Supreme Court? Ms. Smith.

Ms. SMITH. I know of no reason, Senator.

Mr. KING. None, Senator.

Mr. JENKINS. No, I do not, Senator.

Mr. DUMAS. I know of no reason, Senator.

Senator THURMOND. As I understand, all of you say no, that you know of no reason why he shouldn't be.

Well, you have answered the questions correctly. [Laughter.]

You have given good answers, and I have a feeling that the committee and the Senate, too, will confirm the position you have taken.

I want to thank you again for your presence. I wish you well, and God bless you.

The CHAIRMAN. Before the Senator starts asking me questions, what I will do is thank you, as well, and particularly you, Mr. King, for making the long trip. Obviously, you feel strongly about the nomination. It is good to have you here and all of you here.

I am not going to dismiss the committee, but I will dismiss this panel. Thank you very much.

Now, we have no more public witnesses. The Senator from South Carolina is recognized.

Senator THURMOND. Mr. Chairman, as we come to the conclusion of this hearing, I want to make a few observations: First, I want to congratulate you, as chairman of this committee, for the fair manner in which you have conducted the hearings. I appreciate the equitable, thorough job that you have done throughout these 2 weeks.

The CHAIRMAN. Thank you, Senator.

Senator THURMOND. Next, I want to say that these hearings, in my opinion, have been comprehensive. Judge Thomas was before the committee for 5 days, testifying for some 25 hours. We have heard from approximately 100 witnesses and, without question, the hearings, in my opinion, have been very thorough and complete.

Next, I want to comment on the testimony given by Judge Thomas. Judge Thomas displayed the intellectual capacity to sit on the Supreme Court. His answers showed a keen sense of fairness and a sincere willingness to be open minded.

He has substantial experience. He served as assistant attorney general in Missouri, he served as Assistant Secretary for Civil Rights at the Department of Education, he served as Chairman of the Equal Employment Opportunity Commission, and he has served 18 months on the D.C. circuit court of appeals.

I want to say, too, that Judge Thomas deserves a lot of consideration. He has overcome difficult circumstances early in his life, and this gives him a clear understanding of and sensitivity to the plight of minorities and the less fortunate.

I think he is a man of great compassion. Then, too, the testimony of Judge Thomas and those who testified on his behalf convince me that he should be confirmed for a position on the Supreme Court.

Finally, Mr. Chairman, I again want to commend you for your efforts to insure that these hearings were conducted fairly, and I look forward to swift committee action, so that the full Senate can act on this nomination as soon as possible.

Thank you.

The CHAIRMAN. Thank you very much, Senator, for those kind remarks and for your summary.

Let me conclude these hearings by stating a few things:

I would like to thank my colleagues for how attentive they have been to the hearings, and the attendance over, by what I think, by anyone's standards, would be a relatively long period of time, has been exemplary.

I would also like to thank the staff. You get to see a lot of the staff that advises us sitting behind us who go into great detail and have worked with us for literally tens, if not hundreds of hours in preparation for these hearings on both sides of the aisle.

But there are staff persons who are in the back there who actually mechanically have kept this whole operation going, as well as

doing a good deal of work, and I would like to take this opportunity to mention just some of their names:

Stacey Ainbinder, Peter Bynum, Sean Kleeg, Ken Dean, Anthony Dunn, Tammy Fine, Kevin Howard, David Kowal, Don Long, Lisa Rothenberg, Ann Rung, Phil Shipman—and Phil is the fellow who has kept this all rolling, including keeping the doors open and closed and moving people in and out, thank you, Phil—Justin Tillinghast, Ben Turner, Joel Vengrin, Pam Yonkin. I have left out somebody here, Kathleen Sakelaris, as well.

I also want to publicly thank—no pun intended—public broadcasting for covering these hearings, from the beginning to the end, allowing what I am told is millions of Americans to make their own judgments about the nominee, about the witnesses who have testified and about the committee, in terms of whether or not the process is fair or adequate.

So, I would like to thank, on behalf of the Senate, public broadcasting, both public TV and National Public Radio, for their willingness to do what they have done. It is getting harder and harder for television networks to cover a lot of things, because of costs and judgments they have to make, and I think public television and public radio and CNN is of great service to the people of this country, and I want to thank them.

Last, there will be a number of questions by folks, as well as the press, as to when we are going to move on the nomination. Senator Thurmond and I will confer on that, but it is my hope and expectation that the Judiciary Committee will have what we refer to as an executive session.

That is a fancy way of saying we will sit down and hash out the nomination and actually vote, each of us will vote and make a recommendation to the Senate, whether to report favorably or unfavorably the nomination to the Senate, and I hope we can do that by next Friday, although that is not a certainty at this point, because of Senate schedule and because of committee rules and regulations relating to how much time must pass between the end of a hearing and an executive session, but I expect we will be able to do that.

After that point, the committee will then report to the floor of the Senate this nomination, one way or another, one way or another meaning favorably or unfavorably, and, depending on the Senate schedule and the constraints of time to file minority and majority reports, so the Senate has not only the record, but also the reports of the members of the committee and their recommendations.

I have spoken to the majority leader and, in a timely fashion, it will be taken up, although it is too early to predict when that will occur. But we are not looking way into the future, by any stretch of the imagination.

Again, I thank everyone from the public to the staff to the press to my colleagues for their cooperation, especially to the camera persons who are up there. They are probably so happy what I am about to do.

This hearing is adjourned.

Senator THURMOND. Mr. Chairman.

The CHAIRMAN. This hearing is reconvened. [Laughter.]

I am so accustomed, having been the chairman for so long, he would rather say the last word.

The Senator from South Carolina.

Senator THURMOND. Thank you. I don't think I can get in the last word with you around, but I will try. [Laughter.]

Mr. Chairman, in addition to expressing my appreciation to the people that you have mentioned, and I do so, I would also like to express my appreciation to some of my Judiciary Committee staff who have worked diligently on this nomination: Terry Wooten, Melissa Riley, and John Grady were here throughout the entire hearings and have been dedicated throughout this nomination process.

I would like to thank Duke Short, my administrative assistant and chief of staff, who also did double duty, by looking after my office as well as assisting here and overseeing the proceedings of the hearing.

In all of these instances, I appreciate the work of the staff. The Senators have so much work to do now that they could not get along without competent and dedicated staff members, and we appreciate the service of yours and mine, both.

The CHAIRMAN. The committee is adjourned.

[Whereupon, at 3:10 p.m., the committee was adjourned.]

[Additional documents submitted for the record are contained in Part 4, Appendix.]



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