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REPORT ON THE NOMINATION OF JUDGE CLARENCE THOMAS TO BECOME AN ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT

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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 condemn 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, especially the judiciary." Id. (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 Sentancing 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.