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Eric Licht
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Social Issues
Stanton
Defense & Foreign Policy
Kingston
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A UNIQUE CONTRIBUTION TO AMERICA

An analysis of
President George Bush's nomination of

CLARENCE THOMAS

to be an associate justice on the
Supreme Court of the United States

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A UNIQUE CONTRIBUTION TO AMERICA

On July 1, 1991, President George Bush exercised his power under Article II, Section 2[1] of the U.S. Constitution and nominated U.S. Circuit Judge Clarence Thomas to be an associate justice on the Supreme Court of the United States. He would replace Thurgood Marshall, who announced his retirement on June 27, 1991, after 24 years on the Court.

This preliminary analysis and any that follow are intended to assist the Senate in fulfilling its constitutional role of advice and consent.

THE NOMINEE'S BACKGROUND

This analysis bears the title "A Unique Contribution to America" because Clarence Thomas would bring to the Supreme Court, and hence to America, a unique combination of personal and professional experience. His personal background of growing up poor in the segregated South differs from that of any sitting Justice. His professional record of work in both private and public law practice, in both state and federal government, and in all three branches at the federal level, is practically unique. This first section reviews Clarence Thomas' background.[2]

Clarence Thomas was born with the assistance of a midwife on June 23, 1948, in a small wood frame house in the rural town of Pinpoint, Georgia, nine miles southeast of Savannah. His father left while Clarence was still a toddler and Clarence saw him just once during his childhood. For nearly seven years, Clarence lived in the house where he was born with his mother, her aunt and uncle, and Clarence's older sister and younger brother. That house had no indoor plumbing and the family shared an outhouse with several neighbors. They carried water in buckets from a common pump. The women of Pinpoint typically cleaned houses for whites who lived nearby and the men were day laborers. Everyone worked.

Clarence started the first grade at the segregated Haven Home School in 1954, the same year the Supreme Court declared segregated education unconstitutional in *Brown v. Board of Education*.[3] Mid-way through the school year, Clarence and his brother Myers moved to Savannah to live with their mother. They lived in one room of a tenement with

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[1] Article II, Section 2 states in part that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint...Judges of the Supreme Court."

[2] This account is excerpted from "The Good, the Bad and the Judges," *Family, Law & Democracy Report*, October 1989, at 12.

[3] 347 U.S. 483.

a common kitchen and common toilet outside. Their mother worked long hours as a maid, making $20 every two weeks. Clarence completed the first grade at Florance Street School, though he had poor attendance and often wandered the Savannah streets.

In the summer of 1955, Clarence and brother moved again to live with their maternal grandparents, Myers and Christine Anderson, who had an ice delivery and fuel oil business. Myers Anderson had gone to the third grade and Christine Anderson had a sixth grade education. Mr. Anderson was a proud, disciplined man who believed that everyone who could work should work. He had never known his own father, and his mother died when he was just nine years old. He lived first with his grandmother, who he said was freed from slavery as a young girl, and then with his uncle, a hard man who led a family of about 16 children. Myers Anderson's hard life, without father or mother, no education, in an era of segregation and Jim Crow laws, made him determine that his grandson would learn how to work and to survive, no matter what happened in the world around them.

All of life in the world of Clarence's youth was segregated. Schools, libraries, water fountains, movies, lunch counters, and public restrooms were segregated. One time, the family was traveling and stopped for gasoline. Myers Anderson asked whether his wife could use the restroom. When the attendant said there was no "colored" restroom, Mr. Anderson replied that if his wife could not use their restroom, he could not use their gas.

Clarence and his brother worked with their grandfather delivering fuel or whatever else he was doing. During the school year, they had to be dressed and ready for work at 3:00 p.m., half an hour after the close of the school day. They worked in the yard, on old houses their grandparents owned, on trucks and cars, painting, roofing, and plumbing. Clarence's grandfather taught them that they could do anything. During 1957-58, they helped build a house on some family farm land and then began to farm, clearing land and raising chickens, pigs, and cows. They built garages, barns, and fences, plowed, hauled logs, and raked hay. They worked from sun-up to sun-down since their grandfather believed that the sun should never catch anyone still in bed. If the boys ever slept past sun-up, their grandfather would observe that they must have thought they were rich since a poor man could not afford to sleep that late.

Clarence's grandparents were honest, hardworking, and deeply religious people. They taught the boys decency and respect for others. For example, Clarence and his brother were never allowed to refuse to do an errand for a neighbor or to argue with an adult. They were to address adults in a respectful manner. And honest, hard work was the constant lesson. Myers Anderson told his grandson that if they did not work they did not eat. He reminded them daily of his goal to "raise them right," to teach them "to do for yourselves." He wanted them to be self-sufficient, able to survive in a hostile, segregated world where the odds seemed so heavily stacked against them.

Clarence and his brother Myers attended St. Benedict's Grammar School, a segregated Catholic school, and were taught by Franciscan nuns. They missed just one-half day of school during the years they lived with their grandparents. Their grandfather felt Catholic schools were better because there was strict discipline, corporal punishment, and school uniforms. He could not understand how children could properly be taught

without these. Clarence also attended St. Benedict's Catholic Church, where he served as an altar boy and where the nuns also pushed the students to excel. They taught him that all people are inherently equal.

Clarence attended the segregated St. Pius X High School for the 9th and 10th grades and in 1964 transferred to St. John Vianney Minor Seminary near Savannah, where he repeated the 10th grade to take three years of Latin. He graduated in 1967 from St. John's, where he was the only black student in his class - his first regular contact with whites. One indication of his drive to excel at St. John's comes from the statement his classmates chose to place under his year book picture: "Blew that exam, only got a 98."

Clarence was the first person in his family to attend college. He spent his freshman year at Immaculate Conception Seminary in Conception Junction, Missouri, and then transferred to Holy Cross College in Worcester, Massachusetts. He graduated with honors in 1971. At Holy Cross, he helped found the Black Students Union and served as an officer for three years. He worked in the Free Breakfast Program and tutored in the Worcester community. He financed his college education through a combination of scholarships, loans, and work study income.

From 1971-74, Clarence attended Yale Law School in New Haven, Connecticut. He worked for New Haven Legal Assistance during school and for two summers. During the summer of 1973, he worked for a small integrated firm back in Savannah financed, in part, by a grant from the Law Students Civil Rights Research Council.

John C. Danforth, then Attorney General of Missouri, hired Clarence as an assistant in 1974. Three days after being sworn in as a member of the Missouri bar, Clarence argued his first case before the Supreme Court of Missouri. Over the next 2 1/2 years, he represented the state in many cases before all levels of the Missouri courts in matters ranging from criminal law to taxation.

From 1977-81, Clarence first worked in the legal department of the Monsanto Company on general corporate legal matter including antitrust, contract, and governmental regulations. Then he re-joined John Danforth, this time in Washington as a legislative assistant to Senator Danforth. Clarence supervised work on issues including energy, the environment, federal lands, and public works.

President Ronald Reagan first nominated Clarence to be Assistant Secretary of Education for Civil Rights in 1981 and a year later to be the eighth chairman of the Equal Employment Opportunity Commission. He began service on May 17, 1982 and was renominated and reconfirmed in 1986. For most of his tenure at the agency, Clarence was a single parent. His first marriage had ended in divorce and he received custody of his son Jamal. His second wife, the former Virginia Bess Lamp, is now a Deputy Assistant Secretary of Labor.

THE NOMINEE'S RECORD

I. Equal Employment Opportunity Commission

A. Enforcement philosophy

Chairman Thomas' record at the EEOC has both qualitative and quantitative dimensions. On the qualitative side, he implemented a fundamental shift of focus in enforcement philosophy. The previous "rapid charge" approach was geared toward negotiated no-fault settlements and was actually **not enforcement at all**, since no effort was made to determine the merits of discrimination charges. Frivolous and meritorious claims received the same treatment. Few cases were actually investigated and decided on the merits. In fact, about 50% of charges brought to the agency were settled in this manner.

The new chairman changed this philosophy to require that each discrimination charge be investigated and, if necessary, litigated. This shifted the focus from generating statistics to credible, effective enforcement of the civil rights laws. His approach sought to maximize the relief available under the applicable statutes, eliminate discrimination from the workplace, and make the discrimination victim whole.

Making actual enforcement a reality required a series of policy initiatives. The 1984 *Enforcement Policy* required that all charges failing conciliation were to be forwarded to the full Commission, rather than given to the staff. The 1985 *Remedies Policy* required seeking maximum statutory remedies rather than minimum negotiated settlements. The 1987 *No Cause Review Policy* allowed independent review of no cause determinations.

B. Enforcement statistics

On the quantitative side, the EEOC's record under Clarence Thomas' leadership speaks for itself. The number of discrimination charges considered for litigation authorization rose from 401 in fiscal year 1982 to 764 in 1988 and approximately 800 in 1989. The number of cases granted such authorization likewise grew from 241 in fiscal year 1982 to 554 in 1988.

Merit resolutions, including simple settlements and both successful and unsuccessful conciliations, declined. Resolutions on the merits after full investigations, however, increased from 38% of total resolutions in 1982, when Clarence Thomas became chairman, to 50-60% by 1986-88. These statistics directly reflect the change in enforcement philosophy discussed above. Table 1 following shows these statistics from before Chairman Thomas took office and throughout his tenure.

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Table 1

Fiscal Year	Total Resolutions	Merit Resolutions	Resolutions After Full Investigations
1981	71,690	26,507	23,596
1982	67,052	21,675	25,432
1983	74,441	22,039	33,135
1984	55,034	13,588	27,803
1985	63,567	10,935	37,092
1986	63,446	9,613	38,877
1987	53,482	8,114	30,990
1988	70,749	10,641	37,086

Under Chairman Thomas, the EEOC steadily increased the number of suits filed and, by the close of his tenure, was filing more than at any time in the agency's history.

Table 2

Fiscal Year	Suits Filed
1981	444
1982	241
1983	195
1984	310
1985	411
1986	526
1987	527
1988	555

The agency now publicly discloses an annotated list of all lawsuits filed along with their docket numbers.

C. Public recognition of EEOC performance under Chairman Thomas

There can be no better testimony to Chairman Thomas' leadership, effectiveness, and dedication to the cause of civil rights than the editorial appearing in the liberal *Washington Post* on May 17, 1987. The *Post* lamented that the overall civil rights enforcement picture was dismal. The U.S. Commission on Civil Rights "no longer seems to be fulfilling a function" and the Department of Education's Office of Civil Rights since 1984 "has been unable to move against many kinds of discrimination that had been its responsibility before."[4] However, the *Post* cheered that "things are markedly different at the Equal Employment Opportunity Commission." The editorial offered as proof some of what has been discussed here. Citing "the quiet but persistent leadership of Chairman Clarence Thomas," the *Post* observed that "the caseload is expanding and budget requests are increasing."

The *Detroit News* noted that EEOC enforcement actions under Chairman Thomas were 60% ahead of the pace under President Carter. "He also obtained more than twice the level of damages collected during the Carter years," the *News* declared. Indeed, "Mr. Thomas' EEOC processed an average of more than 15,000 age discrimination cases a year, 50 percent higher than the average under President Carter." Finally, the *News* opined that the "hypocrisy of the left's attack on Mr. Thomas is revealed by the fact that under his leadership the Reagan administration sought some $30 million more in EEOC funding (1983-89) than Congress was willing to approve."[5]

II. U.S. Court of Appeals

President Bush announced his intention in early 1989 to nominate Clarence Thomas. He did so on October 30, 1989. The Senate Judiciary Committee finally held a hearing on February 6, 1990 and voted 13-1 on February 22 to approve the nomination. The full Senate consented to the appointment on March 6 by unanimous consent.

A. Endorsement of the nomination

Just as he was appointed to the EEOC by a conservative President and received rave reviews by the liberal media, Judge Thomas' 1989 nomination to the U.S. Court of Appeals was endorsed by both conservatives and liberals.

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[4] Clarence Thomas left his position as Assistant Secretary of Education for Civil Rights in 1982.

[5] Editorial, "Thomas: The Next Target," *The Detroit News*, August 1, 1989.

Paul M. Weyrich, National Chairman of Coalitions for America, stated the day after the nomination that "[d]uring more than seven years as chairman of the Equal Employment Opportunity Commission, Clarence Thomas demonstrated superb management ability, leading that agency out of the doldrums in which it had languished."

William T. Coleman, Jr., former Secretary of Transportation and Board Chairman of the NAACP Legal Defense Fund, stated the same day that "I think this is a fine appointment and that Mr. Thomas will add further luster and judicial ability to the Court." To his legal abilities, according to Secretary Coleman, Judge Thomas "adds the drive and understanding of human frailties which those who have not always had it easy had to have to reach important positions of public service."

Albert Nelson, president of the International Association of Official Human Rights Agencies, stated on October 5 that "we believe that Chairman Clarence Thomas would bring to the Federal judiciary a sense of fairness, a passion for fundamental commitment to the rule of law, and a temperament that would bring great credit to our system of justice." The IAOHRA represents "over 160 civil and human rights law enforcement agencies...which receive, initiate, investigate, mediate, and resolve complaints of discrimination in their individual jurisdictions." This organization is active in actual, hands-on law enforcement and had continuous opportunity to observe and interact with the EEOC under Chairman Thomas' leadership.

Senator John C. Danforth, Republican of Missouri, praised Clarence Thomas from the floor of the U.S. Senate when he said: "I know him to be an absolutely first-rate lawyer, and beyond that, I know him to be a first-rate human being."[6]

B. Opposition to the nomination

The civil rights establishment did not oppose Judge Thomas' nomination. The *Baltimore Sun* noted that "the Leadership Conference [on Civil Rights] does not appear to have arrived at a consensus."[7] The *Washington Times* later observed that "[c]ivil rights groups are not united in opposition."[8] The Associated Press likewise reported that the Leadership Conference "has not adopted a position thus far."[9] This was despite the fact that President Bush announced his intention to nominate Judge Thomas more than five months before; potential opponents had nearly half a year to probe, investigate, and analyze.

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[6] *Congressional Record*, October 31, 1989, at S14388.

[7] Parsons, "Debate Over Judicial Post for EEOC Chief Begins," *Baltimore Sun*, September 10, 1989.

[8] Weyrich, "Conservatives Mobilize Behind Court Nominee," *Washington Times*, November 3, 1990, at A11.

[9] "Liberals Ready 'To Do Job' on Nominee, Senator Says," *Washington Times*, November 1, 1989, at A3.

The opposition that did surface was centered not on qualifications or the facts about Judge Thomas' record as EEOC Chairman, but on ideological differences. Indeed, there was "acknowledgement from both sides of Mr. Thomas' keen intellect,"[10] and "Mr. Thomas...is commonly described as brilliant."[11] Rather, the opposition stemmed from a liberal demand that Clarence Thomas walk in some kind of ideological lock-step. This prompted Senator Danforth to urge his colleagues not to "attack Clarence Thomas because of some stereotype of what they think a black lawyer should believe."[12]

The nature of the opposition spoke volumes of its legitimacy. In a letter dated July 17, 1989, fourteen of the most liberal members of the U.S. House of Representatives expressed "concern about the possible nomination of Clarence Thomas." Disregarding the plain facts about the EEOC's enforcement record, this letter referred to "Mr. Thomas' questionable enforcement record." Ignoring Chairman Thomas' successful effort to shift the EEOC's enforcement policy toward accomplishing genuine law enforcement, the letter contended that "Mr. Thomas has demonstrated an overall disdain for the rule of law." An appropriate response was issued two days later by 52 members of the House in a letter expressing "strong support for the nomination of Clarence Thomas." It stated:

> *The record of the EEOC speaks for itself, however, we would like to point out that the number of discrimination cases processed since Mr. Thomas became Chairman has increased significantly as has the number of legal actions filed. This record of achievement has taken place during a period of budget cutbacks and a lower profile of the civil rights movement. Claims to the contrary are nothing more than political posturing.*

To some, "the rule of law" means little more than "our agenda." The *Washington Times* noted[13] that in September 1989 a group called the Alliance for Justice told the American Bar Association's controversial Standing Committee on Federal Judiciary that Judge Thomas "has shown a disregard for the rule of law." The Alliance for Justice is a paper organization devoted to enforcing conformity with the liberal political agenda. The International Association of Official Human Rights Agencies, in contrast, is actually involved with enforcing the civil rights laws, stated emphatically that "Chairman Clarence Thomas would bring to the Federal judiciary a...passion for fundamental commitment to the rule of law."

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[10] *Id.*

[11] Parsons, *supra* note 6.

[12] *Congressional Record*, October 31, 1989, at S14388.

[13] Weyrich, *supra* note 7, at A11.

Clarence Thomas has always been forthright and open about his personal positions on civil rights issues. He has never attempted to change EEOC policies, however, in any manner inconsistent with proper administrative procedures. This demonstrates a commitment to, rather than a disregard of, the very essence of the "rule of law," though it might not pass the ideological litmus test of some interest group.

The Alliance for Justice's September 22, 1989 memorandum to the ABA assaults Mr. Thomas' published articles for such deep and fundamental flaws as not citing enough (by the Alliance's measure) cases or for failing to discuss the Alliance's preferred topics. It says that he did not develop "a potentially substantive topic" and discussed others "without linking them to his thesis." These are the comments of someone editing a college term paper, not a meaningful substantive evaluation of an individual's qualifications for the federal appellate bench.

C. Judicial performance

Judge Thomas' tenure on the appellate bench has allowed him to write opinions on a wide variety of subjects including antitrust, civil procedure, constitutional law, criminal law, labor relations, and trade regulation. These opinions are thorough, well-written, and consistently observe the appropriate limits on the role of a federal appellate court. Their breadth of subject matter required application of various kinds of authorities including the Constitution, federal statutes, agency regulations, court decisions, authoritative texts and treatises, and court records and transcripts. Judge Thomas' opinions certainly belie the Alliance for Justice's outrageous claim to the ABA that he could not write well. Summaries of representative cases follow.

a. antitrust

United States v. Baker Hughes, Inc..[14] In this decision for a unanimous bench,[15] Judge Thomas affirmed the district court's denial of an injunction sought by the United States against a Finnish manufacturer's acquisition of a French manufacturer of underground drilling rigs. He held that the district court was correct that the acquisition would not undermine competition.

[14] 908 F.2d 981 (D.C. Cir. 1990).

[15] Judges Ruth Bader Ginsburg and David Sentelle joined the opinion.

b. civil procedure

Western Maryland Railway Co. v. Harbor Insurance Company.[16] In a decision for a unanimous bench,[17] Judge Thomas held that railroads suing insurers in two separate actions were not indispensable parties in each others' lawsuits and therefore did not have to be joined.

c. constitutional law

National Treasury Employees Union v. United States.[18] In this case, federal employees argued that a statutory ban on receiving honoraria violated their First Amendment rights. Writing for a unanimous bench,[19] Judge Thomas affirmed the district court's denial of a preliminary injunction against the ban on the ground that the employees would not suffer irreparable harm by complying with it. This allowed the constitutional challenge to the ban to continue in the district court.

United States v. Halliman.[20] Writing for a unanimous bench,[21] Judge Thomas affirmed convictions for possession of cocaine and crack with intent to distribute. He held that exigent circumstances justified a warrantless search of a hotel room, that officers had properly seized drugs and other evidence even though a defendant's consent to search was invalid, and that improper admission of drugs at trial against a second defendant did not unfairly prejudice that defendant. This case involved multiple defendants, complicated facts, and narrow points of law regarding search and seizure as well as joinder and severance. During his extremely careful analysis, Judge Thomas was again careful to identify questions he felt it unnecessary to answer[22] and to explain how the law of his circuit differed from that in other jurisdictions on important points.[23]

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[16] 910 F.2d 960 (D.C. Cir. 1990).

[17] Judges Harry Edwards and David Sentelle joined the opinion.

[18] 927 F.2d 1253 (D.C. Cir. 1991).

[19] Chief Judge Abner Mikva and Judge David Sentelle joined the opinion.

[20] 923 F.2d 873 (D.C. Cir. 1991).

[21] Judges Ruth Bader Ginsburg and David Sentelle joined the opinion.

[22] *Id.* at 881 n.5: "[W]e need not decide whether the district court erred in predicating its probable cause determination on the collective knowledge of the police force as a whole."

[23] *Id.* at 883 n.7 (distinguishing D.C. Circuit rule that the government need not demonstrate propriety of joinder decisions on face of indictment from rule in 11th, 5th, and 8th Circuits).

d. criminal law

United States v. Whoie.[24] A convicted drug dealer appealed, claiming entrapment. Writing for a unanimous bench,[25] Judge Thomas affirmed the conviction. He noted that the "Supreme Court has stressed that the [entrapment] defense centers on...a person's predisposition to commit a crime, not on the government's conduct."[26] In this opinion, Judge Thomas carefully explained the appropriate standard of review and avoided answering unnecessary questions or addressing non-essential issues.

United States v. Rogers.[27] A jury convicted John Rogers of possessing crack with intent to distribute within 1,000 feet of a school. Writing for a unanimous bench,[28] Judge Thomas affirmed the conviction. He rejected various arguments, among them that the trial court improperly admitted evidence of the defendant's prior distribution of crack. In doing so, he construed the Federal Rules of Evidence using "traditional tools" of statutory construction and began, "as we do with any statute, with the language of the rules themselves."[29] He refused to stretch these rules beyond their intended scope.[30] Finally, he ruled that sufficient evidence supported the conviction. Again, Judge Thomas refused to decide unnecessary issues.[31]

United States v. Poston.[32] In this appeal of a conviction for aiding and abetting possession of the drug PCP, Judge Thomas, writing for a unanimous bench,[33] addressed several statutory, evidentiary, and constitutional issues before affirming the conviction.

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[24] 925 F.2d 1481 (D.D. Cir. 1991).

[25] Judges James Buckley and Stephen Williams joined the opinion.

[26] *Id.* at 1483.

[27] 918 F.2d 207 (D.C. Cir. 1990).

[28] Chief Judge Patricia Wald and Judge Ruth Bader Ginsburg joined the opinion.

[29] *Id.* at 209.

[30] *Id.* at 211: "Rule 609(d) governs only the admissibility of evidence introduced for impeachment of a witness. Evidence not introduced to attack a witness's credibility falls outside the rule's scope."

[31] *Id.* at 214: "We need not decide here which interpretation of section 845a(a) is correct."

[32] 902 F.2d 90 (D.C. Cir. 1990).

[33] Judges Ruth Bader Ginsburg and Lawrence Silberman joined the opinion.

Judge Thomas was careful to note the limited nature of the appellate court's role[34] and rejected the invitation to contort a criminal statute to achieve a certain result.[35] Even though the defendant had retained a new lawyer just one day before trial began, Judge Thomas rejected the argument that this constituted ineffective assistance of counsel. He did so by a candid reading of relevant Supreme Court precedents,[36] rather than making up a rule of his own. This is a particularly careful, exhaustive opinion.

United States v. Long.[37] In this appeal of convictions for firearms and drug offenses, Judge Thomas showed his attention to jurisdictional as well as substantive legal issues. Writing for a unanimous bench,[38] Judge Thomas refused to consider the arguments by one appellant because her notice of appeal was filed one day late. He remanded her case to the district court to decide whether she should be granted an extension.[39] As is his practice, Judge Thomas carefully outlined the limited role of the appellate court.[40] In reviewing the conviction for using a firearm in the commission of a drug offense, Judge Thomas, after a very careful analysis, gave the word "use" a concrete and logical definition, rather than a "loose, transitive" one.[41] He then reversed the conviction on that count but emphasized the narrowness of that conclusion: "[W]e reverse Long's conviction because the government failed to adduce *any* evidence suggesting that Long actually or constructively possessed the revolver."[42] After rejecting the appellant's remaining claims, Judge Thomas affirmed the conviction for possessing cocaine with intent to distribute.

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[34] *Id.* at 94 ("This court's role in assessing a sufficiency of the evidence claim on appeal is sharply circumscribed. We are not a second jury weighing the evidence anew and deciding whether or not we would vote to convict the defendant."); at 96 ("A trial judge enjoys great discretion in ruling on a motion for a continuance....an appellate's court's role is limited to determining whether the judge 'clearly abused' his discretion.").

[35] *Id.* at 94.

[36] *Id.* at 98.

[37] 905 F.2d 1572 (D.C. Cir. 1990).

[38] Judges Lawrence Silberman and David Sentelle joined the opinion on this point. Judge Sentelle wrote a concurring opinion on another issue.

[39] *Id.* at 1575.

[40] *Id.* at 1576: "Overturning a jury's determination of guilt on the ground of insufficient evidence is not a task we undertake lightly. As an appellate court, we owe tremendous deference to a jury verdict."

[41] *Id.* at 1576-77.

[42] *Id.* at 1578.

e. labor relations

Otis Elevator Co. v. Secretary of Labor.[43] This brilliant opinion is a model of judicial restraint. A company servicing the elevators of two mining companies challenged citations issued by a Mine Safety and Health Administration inspector for safety violations. Writing for a unanimous bench[44] in this complicated case, Judge Thomas carefully avoided answering unnecessary questions,[45] sorted through difficult questions concerning application of cannons of statutory construction,[46] distinguished inapplicable precedents from other courts,[47] and declined the invitation to decide the case on purely policy grounds.[48] Judge Thomas first concluded that the elevator company was an "operator" within the meaning of the Federal Mine Safety and Health Act. He then affirmed the citation received at one mine after determining that the Administrative Law Judge's similar finding was supported by substantial evidence.[49] Finally, he refused to address the merits of the second citation because the elevator company had failed to pursue proper procedures for contesting it earlier.

f. trade regulation

Alpo Petfoods, Inc. v. Ralston Purina Company.[50] In this case involving a claim and counterclaim for false advertising, Judge Thomas, writing for a unanimous bench,[51] affirmed the district court's decision that both companies were guilty of false advertising. But he reversed the district court's judgment awarding attorney's fees to Alpo, allowing the district to redetermine the amount of damages.

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[43] 921 F.2d 1285 (D.C. Cir. 1990).

[44] Chief Judge Patricia Wald and Judge David Sentelle joined the opinion.

[45] *Id.* at 1288 (avoiding question whether standard from *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) that agency's reasonable construction of statute must be upheld applies in present case); *id.* at 1288 n.1 (same as to standard from *Donnovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D.C. Cir. 1984)); *id.* at 1290 n.3 (avoiding question whether independent contractor under different set of acts would constitute a mine "operator").

[46] *Id.* at 1289 (discussion of canon of *ejusdem generis*, holding it inapplicable).

[47] Id. at 1289-90 (distinguishing National Industrial Sand Assoc. v. Marshall, 601 F.2d 689 (3d Cir. 1979)).

[48] *Id.* at 1291 ("This court is ill-equipped to make the kind of expert policy judgment necessary to evaluate the relative merit of these competing accounts.).

[49] *Id.* at 1292.

[50] 913 F.2d 958 (D.C. Cir 1990).

[51] Judges Harry Edwards and David Sentelle joined in the opinion.

CONCLUSION

Other analyses of Judge Thomas' record and judicial philosophy will follow. This preliminary report demonstrates that he will bring a unique combination of professional and personal features to the Supreme Court of the United States.

The arguments against his nomination to the Court of Appeals were laughable and proven to be without merit. They have no more merit today. Indeed, he has added to his impressive qualifications a set of outstanding opinions while a U.S. Circuit Judge. He deserves swift approval.