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 N. 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 demonstrates 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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[1/](...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.[3/]

[3/] 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[6/]

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).

6/ 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.[1/] Judge Thomas declined to use these

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1/ 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, ever 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."[12/] 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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12/ 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/]

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.[12/] 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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[12/] 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.[11/] 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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[11/] 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."[20/] 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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[20/] 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.[17/] In addition, he was a

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[17/] 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.[18/]

The FCC order reviewed in ACT II was promulgated after a virtually identical order had been vacated by the D.C. Circuit in 1988.[19/] 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.[20/] 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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[17/](...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).

[18/] Because Covington & Burling represented Post-Newsweek Stations, Inc., we will not comment on the merits of the decision.

[19/] See Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) (hereinafter ACT I).

[20/] 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.[12/] 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.[13/] 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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[12/] See 921 F.2d at 1286, quoting 30 U.S.C. § 802(d) (1982).

[13/] 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)."[49/] 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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[49/] 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.[12/]

[12/] 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.[19] Judge Thomas

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[18](...continued)
(citing Community for Creative Non-Violence v. Lujan, 908 F.2d 992, 995 (D.C. Cir. 1990)).

[19] 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.[11/]

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."[12/] 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."[13/]

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.[14/] 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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[11/] Ivarans II, 1991 U.S. App. LEXIS at n.5.

[12/] Id. at n.11.

[13/] Id. at n.13.

[14/] 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).[12/]

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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12/ 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.[36]

With this as background, Judge Thomas's opinion carefully considers all of the petitioners' objections to the FAA's approval.[37]

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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[36] 1991 U.S. App. LEXIS 12036 at *9 (citation omitted).

[37] 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.[48/] 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.[49/]

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."[50/] The court went on to emphasize, however, that "[d]eference . . . does not mean dormancy."[51/]

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."[52/] Because of the excessive cost of alternative expansions in

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[48/] 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.

[49/] See Id. at *53-*66. Judge Buckley's dissent is discussed further below.

[50/] 1991 U.S. App. LEXIS 12036 at *15-*16 (citations omitted).

[51/] Id. at *16.

[52/] 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.[42]

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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[42] 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."[55] Nevertheless, Judge Thomas indicated that there could be exceptions to this rule, even if they were likely only "once-in-a-decade" events.[56]

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,[57] appeals of a trial court's denial of a motion to sever,[58] exceptions based on the Federal Rules of Evidence to the trial court's refusal to exclude evidence,[59] and challenges to the legal

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[55] 926 F.2d at 1214.

[56] Id.

[57] 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).

[58] United States v. Harrison, 931 F.2d 65, 67-71 (D.C. Cir. 1991); Long, 905 F.2d at 1580-81.

[59] 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. Whole, 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.[12/] 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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[12/] 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.[23/] 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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[23/] 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 destiny' of

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[12]/(...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.[11/]

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.

11/ 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.[44/]

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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[44/] 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.[93/]

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.[94/]

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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[93/] Id. at 963.

[94/] 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.[42/]

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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42/ 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[22], and that even the government's Merger Guidelines recognize this.[24] 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.[25]

Second, the court rejected the government's proposed "quick and effective" standard for evaluating entry as "novel and unduly onerous."[26] 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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[22](...continued)
share statistics were an unreliable predictor of the merging firm's future competitive significance).

[23] 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).

[24] 908 F.2d at 985-86, citing U.S. Dep't of Justice, Merger Guidelines §§ 3.21-3.5 (June 14, 1984).

[25] 908 F.2d at 986.

[26] 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.[108/]

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.[119/]

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.

[119/] 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 (continued...)

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
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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. [118]

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. [119]

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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[118] The Privileges or Immunities Clause, at 63.

[119] Id. at 69. 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.[119/] 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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119/ 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.[121]

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."[122] 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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[121] 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.

[122] Pacific Research Institute Speech, at 16.

branch of the government make policy."[113] 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.[114] Similarly, when objectively taken as a whole, Judge Thomas's writings on natural law provide no basis for the dire predictions of his critics.

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[113] Id.

[114] 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
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APPENDIX

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July 27, 1991

Honorable C. Boyden Gray
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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

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July 28, 1991

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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 969.

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.

he 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 225, 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 unreasonable 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. 6 (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."[8] 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.

[8] R. Rotunda, Professional Responsibility 217 (West Pub. Co. 2d ed. 1988).

operation."[9]

Consider *Davey 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 659 (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 66% 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 *Matthews 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 2203.

[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
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.