JUDGE CLARENCE THOMAS'S PROFESSIONAL BACKGROUND, JUDICIAL OPINIONS, AND STATEMENTS ON NATURAL LAW

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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
(continued...)

B. Judge Thomas Does Not View Natural Law Principles as Rules of Decision in Particular Cases

The principal basis on which we reject the fears of Judge Thomas's critics is that Judge Thomas does not appear to view natural law arguments as rules of decision in particular cases. Instead, his writings indicate that he believes that natural law arguments are instances of political, rather than legal, reasoning. Thus, rather than espousing a natural law

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[118]/(...continued)
use of the Ninth Amendment to find unenumerated rights, including the right to privacy. See, e.g., Thomas, Civil Rights as a Principle Versus Civil Rights as an Interest, in Assessing The Reagan Years 398-99 (D. Boaz ed. 1988). Clarence Thomas, however, did not premise that criticism on principles of natural law.

Rather, the critics' assertions that Judge Thomas's natural rights views are a threat to Roe are based solely on a single sentence in a 1987 speech in which Clarence Thomas referred to a then-recently published essay by Lewis Lehrman as "a splendid example of applying natural law". See, e.g., Chemerinsky, at 10, citing Thomas, "Why Black Conservatives Should Look to Conservative Policies," Speech to the Heritage Foundation (June 18, 1987). Mr. Lehrman's essay in part asserts that the unborn's right to life is guaranteed by natural law. The fact that Mr. Thomas referred to the essay hardly means, however, that a Justice Thomas would adopt its reasoning. Mr. Lehrman is a trustee of the Heritage Foundation, which sponsored Judge Thomas' speech, and the allusion to Mr. Lehrman's recently published article well may have been nothing more than a polite gesture to his host. Even if the praise were more than that, admiration is not the same as an endorsement; one can admire another's skill as an advocate while disagreeing in whole or in part with the position being advocated. Compare, for example, Clarence Thomas's statement in a 1987 address to the Pacific Research Institute, discussed below, that he finds "attractive" certain libertarian arguments by scholars such as Stephen Macedo but rejects them because they are inconsistent with Mr. Thomas's views on separation of powers and judicial restraint. See Pacific Research Institute speech, at 16.

defense of judicial activism, Clarence Thomas's writings invoke natural law as a means to persuade and inspire his fellow citizens to political action. For example, Judge Thomas has written,

> [t]he best defense of limited government, of the separation of powers, and of the judicial restraint that flows from the commitment to limited government, is the higher law political philosophy of the Founding Fathers. [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.

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Thomas M. Christina
Deborah A. Garza
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F. James Tennies