A REPORT

on the

NOMINATION

of

JUDGE CLARENCE THOMAS

as

ASSOCIATE JUSTICE

of the

UNITED STATES SUPREME COURT

National Association for the
Advancement of Colored People

August 15, 1991

TABLE OF CONTENTS

EXECUTIVE SUMMARY

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Personal Philosophy

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

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

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

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

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

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

The Two Sides of Judge Clarence Thomas

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

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

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

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

Record at the Department of Education

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

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

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

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

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

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

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

Record at the Equal Employment Opportunity Commission

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

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

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

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

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

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

Affirmative Action

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

> * "I continue to believe that distributing opportunities on the basis of race or gender, whoever the beneficiaries, turns the law against employment discrimination on its head. Class preferences are an affront to the rights and dignity of individuals -- both those individuals who are directly disadvantaged by them, and those who are their supposed beneficiaries." [Thomas, "Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!," 5 Yale Law & Policy Review 402, 403 n.3 (1987)].

> * "I firmly insist that the Constitution be interpreted in a colorblind fashion. It is futile to talk of a colorblind society unless this constitutional principle is first established. Hence, I emphasize black self-help, as opposed

> to racial quotas and other race-conscious legal devices that only further deepen the original problem." [Thomas, Letter to the Editor, Wall Street Journal, p.23, Feb. 20, 1987].

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

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

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

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

> Not that there is a great deal of principle in Congress itself. What can one expect of a Congress that would pass the ethnic set-aside law the Court upheld in Fullilove v. Klutznick? [Thomas, Assessing the Reagan Years, 1988]

Voting Rights[1]

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

> The Voting Rights Act of 1965 certainly was crucial legislation. It has transformed the politics of the South. Unfortunately, many of the Court's decisions in the area of voting rights have presupposed that blacks, whites, Hispanics, and other ethnic groups will inevitably vote

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

> in blocs. Instead of looking at the right to vote as an individual right, the Court has regarded the right as protected when the individual's racial or ethnic group has sufficient clout [Speech at the Tocqueville Forum, April 18, 1988, p. 17].

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

The Supreme Court decisions referred to by Judge Thomas presumably include Thornburg v. Gingles, 478 U.S. 30 (1986). The Gingles decision implemented the 1982 amendments to section 2 of the Voting Rights Act, which prohibits election laws and practices with a racially discriminatory effect. The most important application of this prohibition is to forbid schemes that dilute minority voting strength.

Thus, by mischaracterizing what the Court has actually held, Judge Thomas is able to denounce it as focusing on "group" rights and requiring relief in cases where, he asserts, there has been no showing of discrimination against individuals.

School Desegregation

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

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

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

Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

I. INTRODUCTION

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

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

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

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

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

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

56-272 O - 93 - 3

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

Justice Marshall's Replacement

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

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

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

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

Synopsis of Judge Thomas' Career

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

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

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

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

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

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

Basis for NAACP's Concern

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

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

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

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

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

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

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

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

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

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

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

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

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

Goals and Timetables

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

The NAACP has supported goals and timetables for meaningful remedies.

Bork Nomination

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

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

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

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

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

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

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

II. The Importance of Supreme Court Nominations to the NAACP

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

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

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

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

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

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

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

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

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

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

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

Elliott in which he wrote:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. The Record at the Department of Education

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

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[29] The civil rights office of the Education Department is responsible for enforcing Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1973. It is responsible for insuring that institutions that discriminate on the basis of race, sex, handicap and age do not receive student aid, Chapter 1 grants and other federal funds. It uses federal financial assistance as a carrot and a stick to insure equal opportunity for a quality education in the 16,000 school systems, 3,200 colleges and universities, 10,000 proprietary institutions (for-profit schools for career preparation) and other types of institutions such as libraries and museums that receive Education Department funds.

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

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

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

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

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

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

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

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

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

that they did not need court supervision.

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

He also made the following admissions:

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

A: That's right.

Q: So aren't you, in effect, substituting your judgment as to what the policy should be for what the court order requires? The court order requires you to comply with this 90 day period; isn't that true?

A: That's right....

Q: And you have not imposed a deadline [for an OCR study concerning lack of compliance with the Adams order]; is that correct?

A: I have not imposed a deadline.

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

A: Yes.[34]

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

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

[34] Testimony of Clarence Thomas, supra.

investigate and engage in compliance reviews speedily "had been violated in many important respects and we are not at all convinced that these violations will be taken care of and eventually eliminated without the coercive power of the Court." Judge Pratt ruled that the order would remain in effect.[35]

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

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

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

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

[36] WEAL v. Bell, supra.

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

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

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

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

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

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

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

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

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

IV. The Record at the Equal Employment Opportunity Commission

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[45] Id.

[46] Id.

[47] Id.

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

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

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

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

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

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[48] Id.

[49] Id.

[50] Id.

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

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

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

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

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

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[51] Id.

[52] Id.

[53] Id.

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

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

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

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

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

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[54] Id. at 31.

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

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

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

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

Congressman Hawkins asked him:

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

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

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

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

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

[58] Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[63] Hearing on EEO Enforcement, Subcommittee on Employment Opportunities, Committee on Education and Labor, 99th Congress, 1st Session (March 13, 1985) (Statement of Professor Alfred Blumrosen) [hereinafter cited as "Hearings"].

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

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

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

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

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

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

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

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

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

Representative Martinez asked him:

> Are goals and timetables acceptable now?

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

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

[67] Washington Post (January 11, 1986)

[68] Hearings, Supra.

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

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

Chairman Thomas continued his public arguments against goals and timetables even after the Supreme Court made clear in 1987 that they were still permissible and his and the Justice Department's interpretation of Stotts was wrong.[69] By 1989 Thomas said in a Cato Institute publication, "Assessing the Reagan Years", that "I am confident it can be shown, and some of my staff are now working on this question, that blacks at any level, especially white collar employees have simply not benefitted from affirmative action policies as they have developed."[70] This statement came from Clarence Thomas who was admitted to Yale Law School as a part of an affirmative action policy and who has had a succession of government jobs in positions that only opened to blacks since affirmative action was instituted.[71]

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

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

[70] Id., at 397.

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

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

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

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

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

[73] Id.

56-272 O - 93 - 4

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Articles and Speeches: An Analysis

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

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

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

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

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

A. How Clarence Thomas Views Himself and the World

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

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

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

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

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

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

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

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

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

told an interviewer:

> "If I ever went to work for the EEOC or did anything directly connected with Blacks, my career would be irreparably ruined. The monkey would be on my back again to prove that I didn't have the job because I am black. People meeting me for the first time would automatically dismiss my thinking as second-rate."[61]

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

(3) Higher Law - There is no clear consensus as to what extent, if at all, Judge Thomas would rely on his often-quoted theories -- higher law, natural law and natural rights -- in determining the most fundamental privacy rights of individuals. On the other hand, Judge Thomas has stated admiration for a controversial essay authored by Lewis Lehrman, entitled the Declaration of Independence and the Right to Life, which he said provided "a splendid example of applying natural law."[62]

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

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

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

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

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

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

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

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

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

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

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

> I continue to believe that distributing opportunities on the basis of race or gender, whoever the beneficiaries, turns the law against employment discrimination on its head. Class preferences are an affront to the rights and dignity of individuals both those individuals who are directly disadvantaged by them, and those who are their supposed beneficiaries.[85]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. CONCLUSION

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

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

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

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

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

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

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

VII. EPILOGUE

John Hope Franklin

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

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

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

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

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

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

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

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

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

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

July 25, 1991

[redacted]

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Appendix I
NAACP ARCHIVES

HISTORICAL BACKGROUND

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

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

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

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

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

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

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

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

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

The incorporators stated their objectives as follows:

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

THE CALL

A Lincoln Emancipation Conference

February 12, 1909

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

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

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

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

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

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

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

Appendix II

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

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ACKNOWLEDGEMENTS

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

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