Senator SIMPSON. Well, I think that's overly dramatic and untrue, based on his testimony.

So I have no further questions.

Senator KOHL. Thank you, and thank you very much. We appreciate your being here this morning.

Senator KOHL. Our next panel is composed of Gail Norton, who is the attorney general of Colorado; Larry Thompson of Atlanta's King and Spaulding; Judge John Kern, representing the Judiciary Leadership Development Council; Barbara K. Bracher of Wilmer, Cutler & Pickering, and Sadako Holmes, of the National Black Nurses Association.

We'd like to have each of you come up here and take a seat at the table. Senator Brown would like to introduce our first panelist this morning.

Senator Brown.

Senator BROWN. Thank you, Mr. Chairman.

I am particularly pleased that Colorado's attorney general has been able to come and testify before us today. Gail Norton is the first woman attorney general in Colorado's 115-year history. She has a distinguished legal background—both her bachelor's and juris doctorate degrees are from the University of Denver. She has extensive years of practice. She was a national fellow for Stanford University's Hoover Institute and in addition has a distinguished career here in Washington in previous years as Assistant to the Deputy Secretary of Agriculture and then later on as Associate Solicitor of the Interior.

She is well-known in Colorado as a person of great integrity and exceptional brilliance, and I particularly appreciate her coming back to share with us her thoughts today.

Senator KOHL. Thank you very much.

Ms. Norton.

STATEMENTS OF A PANEL CONSISTING OF HON. GAIL NORTON, ATTORNEY GENERAL, STATE OF COLORADO; LARRY THOMPSON, KING & SPAULDING, ATLANTA, GA; HON. JOHN W. KERN, III, JUDICIARY LEADERSHIP DEVELOPMENT COUNCIL; BARBARA K. BRACHER, WILMER-CUTLER & PICKERING; AND SADAKO HOLMES, NATIONAL BLACK NURSES ASSOCIATION

Ms. NORTON. Thank you.

Mr. Chairman and members of the Committee, and Senator Brown, it is an honor to be here today and personally urge you to confirm Judge Clarence Thomas to the Supreme Court of the United States.

State attorneys general like myself have a vital interest in who sits upon the U.S. Supreme Court because we are involved in almost one-third of the cases that are handled in front of that Court. We litigate issues as diverse as taxation, antitrust, superfund hazardous waste cleanups, and business regulation.

Furthermore, my office is responsible for most of the criminal appeals handled in the State of Colorado, and it is from that perspective that I wish to comment on today's nomination.

Perhaps this is somewhat surprising, but as a prosecutor, I do not desire a pro-prosecution judge. I would like to see a fair one. I

do not advocate unfettered freedom to use coerced confessions, arbitrary and intrusive searches, or draconian punishments. That is, I value justice—not simply securing convictions.

As Attorney General, I am very concerned that we achieve an adequate balance between the rights of the accused and society's interest in effective law enforcement. This balance is critical in a society facing devastating issues of law and order, a drug war, a murder rate of epidemic proportion, and an alarming decline of the respect for property and persons.

The promise of Judge Thomas is that he brings a realistic and balanced perspective on law enforcement. He has expressed his deep concern about crime. Today, we face a world where crime is a constant concern. In an average lifetime, 72 percent of us will see our homes burglarized, and 83 percent of us will suffer a violent crime of either assault, rape or robbery. Crime's most tragic and enduring legacy is the pain, suffering and mental scars of its victims.

The Supreme Court has recently shown a willingness to reconsider the broad sweep of some of its previous holdings. While critics have attacked this trend in apocalyptic terms, it is often simply a return to common sense criminal jurisprudence.

While Judge Thomas has not extensively explained his approach to criminal law jurisprudence, nor certainly should we expect him to reach his conclusions before he becomes a member of the Court. The possibility that he would join with the new Court majority should not be viewed with alarm.

Judge Thomas began his distinguished career as a criminal prosecutor, arguing cases for the Missouri Attorney General's Office. One concern that has been raised about Judge Thomas is his relatively short time on the Federal bench. But of the 105 people who have served on the U.S. Supreme Court, 40 had no prior judicial experience whatsoever. That included John Marshall, Earl Warren, Felix Frankfurter, William O. Douglas, and Byron White. If that list is any indication, Judge Thomas is in superb company.

Judge Thomas' appellate decisions are strikingly careful, thorough and evenhanded. He has adhered to the proper role of a judge, enforcing the requirements of the Constitution and statutes, rather than his own views. All seven of the criminal decisions authored by Judge Thomas dealt with drug offenses. Two of those cases provide an interesting contrast and illustrate the care with which Judge Thomas reviews the decisions and evaluates evidence.

In *United States* v. *Harrison*, police arrested three men in a van with a substantial quantity of drugs. Two of the men carried guns. The third, defendant Butler, was seated next to some ammunition and wore a bullet-proof vest. All three were convicted of the drug offense and of using or carrying a firearm in committing a drug trafficking crime. Butler challenged his firearm conviction, saying he was not carrying a gun. A unanimous panel of the Appeals Court joined Judge Thomas in ruling that Butler constructively used the firearms of his companions.

In *United States* v. *Long*, Judge Thomas faced a similar situation. The defendant was apprehended in an apartment that "brimmed with evidence" of drug activity. In that apartment was a firearm unloaded in the seat of the sofa. In that case, Judge Thomas re-

fused to infer that the defendant had constructively or actually used the revolver. This illustrates the way in which he carefully evaluates the difference between the circumstances that he is faced with. He faces cases with unbiased integrity.

I strongly believe he would be fair to both prosecutor and defendant alike. Therefore, I urge this committee to vote favorably on the nomination of Judge Clarence Thomas.

Thank you.

[The prepared statement of Ms. Norton follows:]

COMMENTS CONCERNING THE NOMINATION OF JUDGE CLARENCE THOMAS TO THE SUPREME COURT OF THE UNITED STATES

by

The Honorable Gale A. Norton
Attorney General of Colorado

Before the U.S. Senate
Committee on the Judiciary

September 1991

It is an honor to appear before this committee and urge you to confirm Judge Clarence Thomas to the Supreme Court. State Attorneys General have a vital interest in who sits upon the Supreme Court because we are involved in almost a third of all cases that come before the Court. We litigate issues as diverse as antitrust exemptions, Superfund hazardous waste cleanups, taxation, water quality regulation, sovereign immunity, and interstate water compacts. My office is responsible for most of the criminal appeals in Colorado, and it is from that perspective that I wish to comment on the nomination.

As a prosecutor, I do not seek a pro-prosecution justice, but a fair one. I do not advocate unfettered prosecutorial freedom to use coerced confessions, arbitrary and intrusive searches, or draconian punishments. I do welcome a return to a judicial environment that fosters effective law enforcement, dispenses appropriate punishment, and listens to the innocent victims of crime. That is, I value justice, not simply securing convictions. The promise of Judge Thomas is that he brings a realistic and balanced perspective on law enforcement issues.

Judge Thomas expressed his deep concern about the effect of crime on inner cities in a moving statement:

> The first priority is to control the crime. The sections where the poorest people live aren't really livable. If people can't go to school, or rear their families, or go to church without being mugged, how much progress can you expect in a community? Would you do business in a community that looks like an armed camp, where the only people who inhabit the streets after dark are the

criminals?[1]

Yet Judge Thomas also demonstrates a respect for the rights of the criminally accused, as I will discuss below.

TRENDS IN SUPREME COURT CRIMINAL LAW DECISIONS

As Attorney General, I am very concerned that we achieve an adequate balance between the rights of the accused and society's interest in effective law enforcement. Crime has been and will continue to be a central issue for the Supreme Court, and it is a major concern of the public. Very recently the Court has shown a willingness to narrow or reconsider the broad sweep of some previous holdings. While some critics have attacked this trend in apocalyptic terms, it is simply an incremental return to common-sense criminal jurisprudence. This balance is critical in a society facing devastating issues of law and order -- a drug war, murder rates of epidemic proportion, and an alarming decline of the moral spirit of respect for persons and property.

The judicial activism of the 1960s and early 1970s Supreme Court created an imbalance that too often benefited criminals. The rulings of the Court in recent years have begun to rectify this imbalance. This can be seen, for example, in areas of the law relating the application of the exclusionary rule, the availability of federal habeas corpus review of state convictions, and the admissibility of victim impact evidence. Court rulings that increase the certainty of punishment, when consistent with constitutional principles, will help the law enforcement community fight crime.

A. Crime Victims

Until very recently, the Supreme Court demonstrated a strong concern for the rights of criminals, while dismissing victims as peripheral to the process. Recently, however, the Court has been reawakened to the notion that the victim is an essential part of the process. For true justice to be dispensed, the victim's suffering and loss must be fully considered in sentencing.

Government spending for law enforcement or corrections is not the most important cost of crime. Crime's most tragic and enduring legacy is the pain, suffering and mental scars borne by its victims. According to the Bureau of Justice Statistics, in an average lifetime, 72% of us will see our homes burglarized, and 83%

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[1]C. Thomas, Black America Under the Reagan Administration: A Symposium of Black Conservatives, Heritage Foundation Policy Review 37 (Fall 1985).

of us will suffer a violent crime of either assault, rape, or robbery.[2]

It is against this tragic background that I voice my support for the Supreme Court's recent trend toward including victims in the criminal justice equation. The most notable example of this in the Court's last term was Payne v. Tennessee.[3] In 1987, the Supreme Court decided in a highly controversial 5-4 decision that most types of victim impact evidence could not be presented to the jury in the sentencing phase of a capital case.[4] Two years later, the Court reaffirmed that position in yet another highly controversial 5-4 decision.[5] Owing to the very strong dissents in those cases, the Court once more decided to look at the issue and this year overturned both prior decisions. The Court advised sentencing courts that "just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."[6] Justice demands that we listen to the victims. How else can society balance the goals of deterrence and retribution that are a part of criminal sentencing?

B. Exclusionary Rule

In 1961 in Mapp v. Ohio,[7] the Supreme Court overruled prior precedent to conclude that evidence obtained by searches and seizures in violation of the Fourth Amendment is inadmissible in state court. The resulting exclusionary rule was premised upon the need for a mechanism to control abuses in law enforcement investigative activity.

The rule gained considerable prominence not because of the protection it afforded the average law-abiding citizen, but because of the safe haven from punishment it gave many criminals. It often freed the criminal because "the constable had blundered," and it often prevented prosecutors from using evidence that was tainted through even a technical violation of search and seizure requirements. The rule thus came under severe attack for punishing

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[2]Lifetime Likelihood of Victimization, Bureau of Justice Statistics Technical Report (1987).

[3]111 S. Ct. 2597 (1991).

[4]Booth v. Maryland, 482 U.S. 496 (1987).

[5]South Carolina v. Gathers, 490 U.S. 805 (1989).

[6]Payne, 111 S. Ct. at 2608.

[7]367 U.S. 643 (1961).

the public interest while effectively placing both the guilty offender and the "blundering constable" beyond the reach of the law.[8]

In the mid-1970s, the Supreme Court began restricting the application of the exclusionary rule.[9] In United States v. Leon,[10] the Supreme Court weighed the competing goals of deterring unreasonable invasions of privacy and "establishing procedures under which criminal defendants are 'acquitted or convicted on the basis of all the evidence which exposes the truth.'"[11] In pursuit of a balance, the Court created the "good faith" exception to the exclusionary rule.

The Court in Leon refused to suppress evidence obtained on the basis of an officer's good faith and objectively reasonable reliance on a warrant that was later found to lack probable cause support. The exclusionary rule, the Court said, "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity."[12] This modification of the exclusionary rule, the Court determined, would not jeopardize the rule's ability to perform its intended functions.[13]

The Court has continued this trend toward using the exclusionary rule only where it serves the substantial purpose of deterring official misconduct, while restricting its ability to frustrate an objective search for truth.[14]

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[8]See, e.g., People v. Lowe, 616 P. 2d 118, 125-26 (Colo. 1980)(Rovira, J., specially concurring).

[9]See, e.g., United States v. Calandra, 414 U.S. 338 (1974) (exclusionary rule not available in grand jury proceedings); United States v. Janis, 428 U.S. 433 (1976)(exclusionary rule not available in some civil proceedings); Michigan v. DeFillippo, 443 U.S. 31 (1979)(exclusionary rule does not apply when officer relies in good faith on a statute that is later declared to be unconstitutional); United States v. Havens, 446 U.S. 620 (1980)(illegally seized evidence can be used to impeach defendant's testimony).

[10]468 U.S. 897, 906 (1984).

[11]Id. at 900-01 (quoting Alderman v. United States, 394 U.S. 165, 175 (1969)).

[12]Id. at 918-19.

[13]Id. at 905.

[14]See, e.g., New York v. Harris, 110 S.Ct. 1640, 1644 (1990).

C. Habeas Corpus

Another major area where the transition in criminal law has been demonstrated is federal habeas corpus, which is invoked by state prisoners who claim that "they are in custody in violation of the Constitution or laws or treaties of the United States."[15] It often entails review by a single federal judge of rulings made by several state trial and appellate court judges. State judges, like federal judges, are sworn to uphold the Constitution of the United States. State authorities are naturally concerned about the finality of judgments in criminal cases and are somewhat sensitive to being subjected to what they perceive to be the unwarranted supervisory authority of federal courts. I hope, too, that Congress will soon act to contribute statutorily to the necessary balance of these issues.

Again, it is important to understand recent developments in this area of the law with an eye toward constitutional history. Until World War II, habeas corpus relief was limited to jurisdictional defects in state criminal proceedings. Federal courts eventually expanded it to encompass all claims regarding the constitutional rights of a prisoner.[16] The Warren Court expanded its reach by ruling that state prisoners could come to federal court with claims that they had not raised in state court, unless state authorities could show that the prisoners deliberately bypassed state procedures.[17]

In 1976, the Court began returning to its initial conclusions about the significance of the states' interest in not having their judgments so easily disturbed by federal authorities. In the first of the landmark rulings, the Court disallowed habeas review on Fourth Amendment claims where the state prisoner had a full and fair opportunity to litigate those claims in state court.[18] The following year, the Court barred federal review of claims that prisoners had failed to raise at trial, unless the prisoner could show both "cause" for the failure to timely raise the claim, and actual, substantial "prejudice" resulting from the claimed error.[19]

In 1986, the Court made it clear that, absent the extraordinary case where it was probable that an innocent person was convicted, a showing of actual prejudice arising from the

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[15]28 U.S.C. § 2254.

[16]See Waley v. Johnson, 316 U.S. 101 (1942).

[17]Fay v. Noia, 372 U.S. 391 (1963).

[18]Stone v. Powell, 428 U.S. 365 (1976).

[19]Wainwright v. Sykes, 433 U.S. 72 (1977).

alleged error is not sufficient. To permit federal review, defendants must make a showing of cause to excuse the procedural default.[20] Just this year, the Court required state prisoners to meet the exacting "cause" and "prejudice" standards regardless of the type or timing of the procedural default involved.[21] Also this year, the Court restricted the right of state prisoners to seek habeas relief on grounds that they failed to assert in a prior habeas petition. The Court barred consideration of these new claims unless the prisoners were able to show sufficient cause for the failure to raise them earlier, and actual and substantial prejudice suffered as a result of the claimed error.[22] This rule requires prisoners to raise their claims early, at an appropriate point in the proceedings, rather than encouraging repetitious, dilatory tactics of filing endless petitions based upon every conceivable permutation of the record.

The Court's recent decisions recognize that the states can be entrusted with the great responsibility of protecting constitutional rights. The Framers recognized this in creating a system of government that made federalism a core value.

In summary, it is appropriate for the Court to adopt practical, common-sense approaches to law enforcement, such as these examples. They are based on traditional constitutional interpretation, and they provide defendants with adequate constitutional safeguards. Thus, while Judge Thomas has not extensively explained his approach to criminal law jurisprudence, the possibility that he would join with the new Court majority should not be viewed with alarm.

ANALYSIS OF JUDGE THOMAS' DECISIONS

Judge Thomas began his distinguished legal career as a criminal prosecutor, arguing criminal appeals for the Missouri Attorney General's office. Judge Thomas' strong law enforcement philosophy was also much in evidence during his tenure at the Equal Employment Opportunity Commission ("EEOC"). Specifically, as Chairman he implemented a fundamental shift of focus in enforcement philosophy. The previous "rapid charge" approach emphasized negotiated no-fault settlements, wherein the EEOC made no effort to determine the merits of discrimination charges. Both frivolous and meritorious claims received the same treatment. Judge Thomas required the EEOC to investigate each discrimination charge and, if

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[20] Smith v. Murray, 106 S. Ct. 2639 (1986).

[21] Coleman v. Thompson, 111 S. Ct. 2546 (1991).

[22] McCleskey v. Zant, 111 S. Ct. 1454 (1991).

necessary, to litigate.[23] This shifted the focus from generating statistics to credible, effective enforcement of the civil rights laws.

As a federal appellate judge, Clarence Thomas has demonstrated objectivity, restraint, and an innate sense of fundamental fairness. His relatively short time on the federal bench is not especially consequential. It is a nominee's overall character and experience, rather than tenure as a judge, that should be determinative. Of the 105 people who have thus far served on the Supreme Court, 40 had no prior judicial experience whatsoever, including John Marshall, Earl Warren, Charles Evans Hughes, Joseph Story, Louis Brandeis, Felix Frankfurter, William O. Douglas, and Byron White. Nine other Justices had less than two years' experience, including the senior Justice John Marshall Harlan, who dissented in Plessy v. Ferguson,[24] his namesake grandson who concurred in Griswold v. Connecticut,[25] and the great Justice Hugo Black, who early in his career spent 18 months as a police court judge. If the preceding list is any indication, Judge Thomas is in superb company.

Judge Thomas' appellate decisions are strikingly careful, thorough, and even-handed. He has implicitly displayed an understanding of the societal tension created by the need of people to be secure against arbitrary intrusion by the government, on one hand, and the need to be secure from the devastating impact crime can have on their lives, on the other hand. Above all, he has adhered to the proper role of a judge: enforcing the requirements of the Constitution and statutes, rather than his own predilections. His decisions tread neither into the province of legislators on policy issues nor of district courts on evidentiary issues.

All seven of the criminal decisions authored by Judge Thomas involved drug offenses.[26] For example, last year Judge Thomas

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[23]As a result, the number of discrimination charges considered for litigation authorization rose from 401 in fiscal year 1982 to 764 in 1988 and approximately 800 in 1989. The number of cases granted such authorization likewise grew from 241 in fiscal year 1982 to 554 in 1988.

[24]163 U.S. 537 (1896) (endorsing racial "separate but equal" treatment).

[25]381 U.S. 479 (1965) (recognizing a right to marital privacy).

[26]United States v. Halliman, 923 F.2d 873 (D.C. Cir. 1991); United States v. Whoie, 925 F.2d 1481 (D.C. Cir. 1991); United States v. Shabazz, 933 F.2d 1929 (D.C. Cir. 1991); United States v.

faced a case[27] involving narcotics dealers who conducted their illegal trade out of several rooms in a hotel. He rejected the argument that a warrantless search of one of the rooms was unlawful. Judge Thomas held that, although "the police carefully investigated the suspicious hotel guests for more than a week and sought warrants for all the rooms that they could link to [defendant]," the defendant "tried to frustrate the warrant process by hopping from room to room."[28] Following recent Supreme Court precedent[29], he further ruled that evidence seen by the police during an unlawful search was nonetheless admissible at trial because it was subsequently acquired on the basis of an independent source.

In another case[30], a unanimous panel upheld the conviction of a defendant who said he merely gave a drug dealer a ride to the scene of a drug transaction. Judge Thomas applied the appropriate standards of appellate review and concluded that the jury reasonably could have found that Poston was a lookout, not an innocent chauffeur. Thus he could be found guilty of aiding and abetting possession with intent to sell.

Judge Thomas also correctly anticipated a recent Supreme Court ruling[31] by finding that sentences for certain drug offenses could be calculated according to the gross weight of the pills containing the illegal drug.[32]

Two cases provide an interesting contrast and illustrate the care with which Judge Thomas evaluates evidence and interprets statutes. In United States v. Harrison,[33] police arrested three men in a van with a substantial quantity of drugs. Two of the men carried guns. The third, defendant Butler, was seated next to some ammunition and wore a bullet-proof vest. All three were convicted

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Harrison, 931 F.2d 65 (D.C. Cir. 1991); United States v. Poston, 902 F.2d 90 (D.C. Cir. 1990); United States v. Long, 905 F.2d 1572 (D.C. Cir.), cert. denied, 111 S.Ct. 365 (1990); United States v. Rogers, 918 F.2d 207 (D.C. Cir. 1990).

[27]Halliman, supra.

[28]923 F.2d at 879-80.

[29]Murray v. United States, 487 U.S. 533 (1988).

[30]Poston, supra.

[31]Chapman v. United States, 111 S. Ct. 1919 (1991).

[32]Shabazz, supra.

[33]931 F.2d 65 (D.C. Cir. 1991).

of both a drug offense and using or carrying a firearm in committing a drug trafficking crime. Butler challenged his firearm conviction. A unanimous panel of the appeals court joined Judge Thomas' ruling that Butler constructively possessed the firearms.[34]

In United States v. Long,[35] Judge Thomas confirmed his concern for the rights of the defendant when he reversed a conviction under the same firearms statute. The defendant had been arrested in a co-defendant's apartment that "brimmed with evidence" of drug-related activity. Police found a functional but unloaded revolver between the cushions of a sofa. Judge Thomas ruled that the government had provided no evidence from which to infer that the defendant constructively or actually used the revolver:

> Upholding the conviction of a defendant in the absence of any indicia of possession would stretch the meaning of `use' beyond the breaking point. . . . To affirm Long's conviction for `using' the revolver in the sofa would be to concede that the word `use' has no discernible boundaries. That prospect is particularly troubling where, as here, we are construing a criminal statute.[36]

Taken together, these two cases illustrate the unbiased integrity with which Judge Thomas approaches criminal adjudication.

As a further indication that Judge Thomas does not reflexively rule for the government in criminal cases, I note that he joined an opinion by Judge Silberman overturning a conviction for wire fraud on the ground that the trial court had excluded admissible exculpatory evidence.[37] Judge Thomas also severely criticized government attorneys for attempting to block the defendant from raising an issue,[38] and expressed his "dismay" at learning that the government could not give the court certain information.[39] Rather than entirely dismiss an untimely appeal, he remanded it to the district court to consider an extension of time.[40]

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[34]"[T]he jury could reasonably have inferred that when and if Butler was shot at, he would either use one of his confederates' guns to shoot back, or else instruct them to do so." Id. at 73.

[35]905 F.2d 1572 (D.C. Cir. 1990).

[36]Id. at 1577.

[37]United States v. Miller, 904 F.2d 65 (D.C. Cir. 1990).

[38]Long, 905 F.2d at 1580-81 n.14.

[39]United States v. Halliman, 923 F.2d at 879 n.3.

[40]United States v. Long, supra.

Judge Thomas' opinions reveal a highly analytical and well-organized mind. They also confirm his commitment to judicial restraint, as he tended to resolve issues on appropriately narrow grounds, and continually confined his analysis to whether the language of the rule or statute under consideration could be given its normal and common-sense meaning. In my view, these qualities will serve him and the public well as a member of the United States Supreme Court. I would not expect him to reach out to consider issues that were not adequately raised or presented to the Court; nor would I expect him to resolve issues based on considerations unrelated to the text and history of the applicable law. He would not intrude upon those areas reserved to either the concomitant branches of the federal government or state governments. I strongly believe he would be fair to both prosecutor and defendant alike.

Judge Thomas' concern for the rights of the individual strongly commends him as someone who is especially suited to serve as a Justice of the Supreme Court. When we speak of judicial "temperament," what we are really talking about is a person's ability to decide cases objectively, according to the rule of law, without regard for his or her own personal preconceptions or preferences.

Law, as we commonly understand the term, can have little meaning if it is not based upon neutral, readily discernible principles. If law is not based upon neutral principles, it ceases to be law but rather becomes an invitation for legislation by the judiciary. Therefore, the cornerstone of any assessment of judicial temperament must be an evaluation of the nominee's commitment to the rule of law. Not law as the judge would wish it to be, or thinks it ought to be, but the law as expressed by those who wrote the words and consistent with what they intended those words to mean.

As Judge Thomas has written, "the founders purposely insulated the courts from popular pressures, on the assumption that they should not make policy decisions. . . . [I]t was unthinkable that courts would take the side of particular groups in the policymaking arena."[4] There is nothing in Judge Thomas' record that suggests he would suddenly abandon his careful judicial approach in favor of expediency. Rather, there is every indication that he will consider each case before him on its own merits, and give appropriate deference to precedent.

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[4] "Civil Rights as a Principle Versus Civil Rights as an Interest," Assessing the Reagan Years, ch. 28 (1988).

CONCLUSION

I urge the Committee to recommend that the Senate confirm Clarence Thomas as Associate Justice of the United States Supreme Court.

Senator KOHL. Thank you, Ms. Norton.

Mr. Thompson, I hope you will respect the 5-minute limitation.

STATEMENT OF LARRY THOMPSON

Mr. THOMPSON. Thank you, Mr. Chairman and members of the committee.

I am pleased to appear before you today in support of the nomination of Judge Clarence Thomas to the U.S. Supreme Court.

I practiced law with Judge Thomas some 14 years ago in Monsanto Co., in St. Louis, MO. I knew Judge Thomas then as a bright young lawyer who was highly respected by his peers and superiors in a demanding corporate law environment. I know Judge Thomas today as a legal scholar, with valuable hands-on experience in the public policy arena. He now serves as a distinguished lecturer at the Emory University Law School in Atlanta.

Now, while Judge Thomas could have become quite comfortable financially by entering the private practice of law or continuing in a corporate law department, he chose not to do so. His entire career since leaving St. Louis to work with Senator Danforth, your colleague, has been dedicated to public service. As Chairman of the Equal Employment Opportunity Commission, he led the agency in removing a backlog of discrimination cases that served unfairly to deny relief to individuals who suffered employment discrimination.

Now, I have talked with several career EEOC professionals in Atlanta and from other parts of the country. These individuals praise and respect Judge Thomas for the job he did at the EEOC. They will tell you that the EEOC is in much better shape now, because of Judge Thomas, than it was when Judge Thomas took over.

One such person in Atlanta told me this past weekend that if Judge Thomas' critics do not want to change their views of him, then they should avoid getting to know him, and I agree. While some may disagree with Judge Thomas' views on several issues, I do not believe that many who may differ with him on these issues, but who have had an opportunity to know him will oppose his nomination to the United States Supreme Court.

Now, while Judge Thomas sharpened the focus of the EEOC in protecting individual victims of employment discrimination, he did not arbitrarily ignore larger class cases. In fact, the former General Counsel of the EEOC has noted that Judge Thomas himself initiated a race discrimination class complaint against a large foreign-based automobile manufacturer, which eventually led to a multi-million-dollar settlement.

As a black American, I am somewhat puzzled by the opposition to Judge Thomas' nomination from some of the organizations dedicated to the interest of black Americans. As a former U.S. Attorney in Atlanta, I believe that Judge Thomas' values and views on a number of subjects, including education, the need for self-esteem and a strong work ethic and the influence of a stable family and the church are not out of step with those of most black Americans who are, in fact, hard-working and law-abiding people.

Much of the good-faith and nonpartisan opposition to Judge Thomas from some of these organizations appears to center on his views on affirmative action. But Judge Thomas has stated that,

with the exception of quotas, he supports many affirmative action remedies, because these remedies are truly necessary and fair.

Both Judge Thomas and I have seen the pernicious effects of quotas. We both know many outstanding, highly trained and capable black American professionals and business people who are frustrated, because they are viewed only as members of a group who got their positions through quotas, rather than because of their qualifications as individuals. Their true achievements are being devalued and obscured.

Like the leaders of the organizations who oppose him, Judge Thomas understands that, unfortunately, many black Americans still suffer race discrimination and other forms of basic unfairness, but he differs with these leaders only as to how to attack the problems that face black Americans. But this difference, I submit, should not affect this body's decision as to whether to confirm Judge Thomas' nomination to the U.S. Supreme Court.

Black Americans need not and should not all think alike, and this diversity of opinion within the black community on how black Americans should advance is deeply rooted in our history and has served black Americans and this Nation well over the years.

Any distinguished American lawyer, with solid public policy experience, especially one like Judge Thomas, with his background, his intellect, his character, and his integrity, is needed not only on the United States Supreme Court, but inside the Court in its deliberations on a variety of issues, and not just on affirmative action.

For these reasons, I respectfully urge you to confirm the nomination of Judge Thomas to the United States Supreme Court.

Thank you.

Senator KOHL. Thank you very much, Mr. Thompson.

Mr. Kern.

STATEMENT OF JOHN W. KERN III

Mr. KERN. Mr. Chairman, I am pleased to be here this morning to testify on behalf of myself and not the Judiciary Leadership Development Council, which I serve as President. I am here to attest to Judge Thomas' combination of open-mindedness and an inner strength and a compassion which I have found in working with him in connection with the continuing judicial education efforts of the Judiciary Leadership Development Council.

President Lyndon Johnson appointed me to the District of Columbia Court of Appeals in 1968. In 1984, I took senior status and became the Dean of the National Judicial College, in Reno, NV, and I know a number of Wisconsin judges who came to our college in seeking continual judicial education. I came to have a great interest in the concept of judges continuing to keep open minds and express a willingness to learn new ideas and to pursue continuing judicial education.

I returned to Washington, DC, and I perform judicial services part-time for my court, but I also direct the Judiciary Leadership Development Council in providing continuing education of judges.

Judge Thomas is one of a number of judges, judicial educators, and State court administrators that are on our advisory committee. I have had a number of conversations with him and I have been

very impressed with his open-mindedness, his interest in maintaining readings, discussions, involving himself in the life of the mind, which I think is extremely important, based upon my experience with judges in judicial education.

I have also been struck by his combination of strength and determination that have caused him to rise above the serious obstacles that he faced in his early life and with his sensitivity and his compassion. I have had a number of conversations of an informal nature about life, about education of children, the kinds of things that judges frequently talk about in the cafeteria across the street from the courthouse over coffee and a roll, and I have found him always to be a person of keen intellect, very good humored, very approachable and very open-minded.

In many ways, he reminds me of my own father, who was a State trial judge in Indiana and then a Federal trial judge for almost 35 years. My father was stricken with polio very early in his life, and I found that rising above that early disaffection that occurred to him, he had unusual strength and determination, but he also had unusual sensitivity and compassion. I see that in Judge Thomas and I heartily recommend him for your approval.

Thank you.

Senator KOHL. Thank you very much, Mr. Kern.

Ms. Bracher.

STATEMENT OF BARBARA K. BRACHER

Ms. BRACHER. I am honored to speak before the committee on behalf of the confirmation of Judge Clarence Thomas. The report I submitted on Judge Thomas' criminal law and procedure opinions to this committee last week includes a comprehensive review of Judge Thomas' judicial opinions while serving on the D.C. Circuit Court of Appeals. This report was distributed last week to members of this committee, but I would like to request that it be submitted to the record of these hearings.

I want to highlight three major points from the report that I hope will be helpful to this committee in assessing Judge Thomas' judicial philosophy: first, Judge Thomas has demonstrated his strict adherence to the rule of law; second, his observance of controlling precedent and accepted principles of statutory construction; and, third, his faithfulness to prudential limitations on the scope and standard of review of the Court.

I have chosen these three principles because they are premised on the first ideals from the Preamble of our Constitution: to establish justice and ensure domestic tranquility. Judge Thomas' opinions reflect a true understanding of these words.

It is in this context that Judge Thomas faithfully construed the law to preserve the rights of individuals and the rights of society to be safe in their own homes. Judge Thomas interpreted many statutes in his opinions: the Federal Sentencing Guidelines, Rules of Evidence, Rules of Appellate Procedure, Criminal Procedure, among others.

When construing statutes, Judge Thomas utilizes accepted principles of statutory construction as established by Supreme Court precedent to first look to the actual text and the specific terms of

the statute. He has refused to read statutes in a textually awkward manner, interpreting the statutes to rely upon inferences and loose transitive implications.

Judge Thomas reviewed lower court and circuit court precedent to identify prior standards and assure consistency in the criminal laws. Judge Thomas observed the rule of the Court of Appeals in its limited scope of review while mindful of the standard of review imposed upon the particular appeal before the Court.

Judge Thomas has refused to go beyond the issues presented to the Court or to decide issues not brought before the Court of Appeals.

Judge Thomas has a scrupulous regard for the rights of the accused, mindful of the sufficiency of the evidence presented by the Government. In overturning a firearms conviction in the case *Long* v. *U.S.*, Judge Thomas found that the Government had failed to meet its burden to properly satisfy the elements of the alleged crime.

I want to conclude by saying that it is crucial to look at Judge Thomas' writings since becoming a member of the judicial branch. The review of what Judge Thomas has actually written as a member of the judicial branch reveals that Judge Thomas is a thoughtful jurist with a keen intellect. He interprets statutes as Congress has written and follows controlling precedent, mindful of the role of the Court in its review and the cases before it.

Judge Thomas' criminal law opinions evidence his judicial restraint, his commitment to established rules of law, utilizing traditional tools of statutory construction and thoughtful attention to decide only the issues required in a particular case. These writings affirm that he will be an outstanding addition to the Supreme Court, one who will judge according to the law rather than to his own personal predilections.

Judge Thomas' nomination should receive confirmation by the Senate to serve on the Supreme Court.

[The report prepared by Ms. Bracher follows:]

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CITIZENS FOR LAW AND ORDER

REPORT ON THE JUDICIAL PHILOSOPHY OF JUDGE CLARENCE THOMAS WITH RESPECT TO CRIMINAL LAW AND CRIMINAL PROCEDURE

BY
BARBARA K. BRACHER

Judge Clarence Thomas's Criminal Law and Procedure Opinions

Citizens for Law and Order ("CLO") commissioned this study of Judge Clarence Thomas's judicial philosophy as it relates to criminal law and procedure. A careful review of the legal opinions authored by Judge Thomas while a member of the United States Court of Appeals for the District of Columbia Circuit reflects a thoughtful jurist with a restrained judicial temperament and keen intellect. Judge Thomas has demonstrated strict adherence to the rule of law, even where his personal beliefs differ from a legal rule. His opinions and other writings demonstrate a fundamental understanding of the community's interest in deterring crime and meeting the needs of its victims. While Judge Thomas's opinions reflect an understanding that a judge is responsible for protecting the rights of those accused of crime, he also understands that a judge has a duty not to reshape the law according to his personal predilections.

Judge Thomas has participated in over 157 cases since joining the D.C. Circuit Court of Appeals. He has authored 17 majority opinions, 2 concurrences, and 2 dissents. Of those seventeen opinions, seven

were appeals from drug convictions. The criminal law opinions of Judge Thomas were reviewed with reference to his approach to controlling precedent, adherence to jurisprudential limitations on the power of the court, compliance with accepted principles of statutory construction, observance of settled rules concerning the standard of review, and faithfulness to prudential limitations on the scope of review and judicial decision-making.

Underlying Judge Thomas's approach to his obligation to decide criminal law cases is a common-sense approach to questions of criminal law and procedure, one that recognizes the practical problems faced by law enforcement officers combatting crime on the streets. When asked what should be done to solve the problems faced by America's inner cities, Judge Thomas remarked:

> The first priority is to control the crime. The sections where the poorest people live aren't really liveable. If people can't go to school, or rear their families, or go to church without being mugged, how much progress can you expect in a community? Would you do business in a community that looks like an armed camp, where the only people who inhabit the streets after dark are the criminals?

Black America Under the Reagan Administration: A Symposium of Black Conservatives, The Heritage Foundation Policy Review (Fall 1985) at 37.

None of the speeches or statements made by Judge Thomas, however, explains how he will rule as a justice of the United States Supreme Court as clearly as his actual majority opinions. To borrow the words of L. Gordon Crovitz of the Wall Street Journal, "the best way to predict how Justice Clarence Thomas would rule is to review how Judge Clarence Thomas has ruled." Thus, a review of Judge Thomas's criminal law decisions follows.

United States v. Shabazz
United States v. McNeil
1991 U.S. App. LEXIS 10579 (May 28, 1991)

In the district court, the two defendants pleaded guilty to drug offenses involving dilaudid pills, the active ingredient of which is hydromorphine, a controlled substance. On appeal, the two defendants

alleged that the district court erred when it calculated their sentences under the Federal Sentencing Guidelines according to the gross weight of the dilaudid pills rather than the lesser net weight of the hydromorphine.

Judge Thomas's opinion for a unanimous panel of the Court of Appeals begins with an analysis of the applicable Sentencing Guidelines. Judge Thomas found that the Sentencing Guidelines require sentences to be calculated according to "the entire weight of any mixture or substance containing a detectable amount of the controlled substance." Id at *4 (citing to United States Sentencing Commission, Guidelines Manual § 2D1.1(c)n.* (Nov. 1990). Relying on analogous decisions from the other circuits, Judge Thomas found defendants' claim that the pills were not a "mixture or substance" to be without support.

In an alternative argument, the defendants urged that an interpretive note to the Sentencing Guidelines supported the position that sentencing should be based on the weight of the controlled substance when the weight of the substance with which it was combined is

unknown. Judge Thomas explained that the "interpretive notes" served to illustrate how the guidelines were to be applied but were not intended to be a substitute for the clear text of the Guidelines. Judge Thomas determined that, "by its terms," defendant's reading was "textually awkward and produces absurd results" and that "nothing in the text ... suggest[s] that limitation." Id. at *10.

Judge Thomas rejected defendants' final claim that the method of sentencing articulated in the Sentencing Guidelines conflicted with a federal statute that requires sentencing based upon the gross weight of certain specified drugs. That statute did not refer to hydromorphine. Recognizing that the Sentencing Guidelines were promulgated "by the United States Sentencing Commission pursuant to an express grant of rulemaking authority," Judge Thomas held that the court may set aside the Guidelines "only if it contravenes an 'unambiguously expressed intent of Congress' or is unreasonable." Id. at *15 (citing to Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-45 (1984)). Judge Thomas relied on recent authority from the D.C. Circuit

in which the court had refused to accept "an argument that the negative implication of one provision unambiguously restricted a grant of authority that could otherwise be read into another provision." Id. at *18. Judge Thomas concluded that the court was "aware of no 'traditional tools of statutory construction,' that would compel [defendant's] proposed reading." Id. at *19 (citations omitted).

Two days after Judge Thomas issued the opinion in this case, the United States Supreme Court decided Chapman v. United States, 111 S. Ct. 1919 (1991). In Chapman, the Supreme Court reached the same conclusion based on the same rationale articulated by Judge Thomas in Shabazz. The Supreme Court held that a statute requiring the imposition of a mandatory minimum sentence for distribution of more than one gram of "a mixture or substance containing a detectable amount" should be determined by the weight of the mixture rather than the net weight of the controlled substance. Id. at 1925.

United States v. Harrison
United States v. Black
United States v. Butler
931 F.2d 65 (D.C. Cir. 1991)

Writing for a unanimous court, Judge Thomas affirmed the convictions of three defendants for possession with intent to distribute crack cocaine base and using or carrying a firearm during a drug trafficking offense. The three men were searched and subsequently arrested after police stopped a van in which they were traveling that carried a temporary license tag identified by the police as stolen. Harrison was carrying an unregistered handgun in a holster clipped to his belt and $595 in cash. Black had 4.5 grams of cocaine base in his pants pocket and was also carrying an unregistered handgun. Butler was wearing a bullet-proof vest under his clothing. Other incriminating evidence found in the van included: 42 grams of diluted cocaine base, a temporary license tag with a different number than the one displayed on the outside of the van, a weapons magazine that contained pictures of the guns carried by defendants, and two fully loaded ammunition clips. Harrison sought to call Black to the stand.

At trial, Black refused to testify, invoking his Fifth Amendment privilege against self-incrimination. Harrison and Butler each moved unsuccessfully to sever their trials from Black's in order to obtain his testimony. Harrison appealed from the district court's refusal to sever his trial from that of his co-defendants. Black claimed that the act of calling him as a witness violated his Fifth Amendment privilege against self incrimination and Butler challenged the sufficiency of the evidence underlying his firearms conviction.

Judge Thomas examined the Federal Rules of Criminal Procedure governing severance of trials. The language of the rules allows the district court judge to determine whether to sever trials based upon a determination that a joinder of offenses or defendants would prejudice the defendant or the government. Supreme Court as well as D.C. Circuit Court precedent favors joinder of trials unless it is determined that the defendant "did not get a fair trial." The D.C. Circuit set forth its general standard in United States v. Ford, 870 F.2d 729, 731 (D.C. Cir. 1989), requiring that the defendant seeking a severance show: (1) a bona fide

need for the testimony; (2) the substance of the testimony and its exculpatory nature and effect; and (3) the likelihood that the defendant will testify if the cases are severed. Failure to demonstrate any one of these elements was fatal to severance. Id. at 732.

After an extensive review of the trial record, Judge Thomas concluded that Harrison had not identified Black's allegedly exculpatory testimony with sufficient specificity to establish that the district court's failure to sever deprived Harrison of a fair trial. In response to Harrison's argument that the court should be guided by an analogous decisions from three other circuits, Judge Thomas distinguished those decisions based on controlling precedent of the D.C. Circuit.

Judge Thomas rejected Black's claim that his Fifth Amendment rights were violated when Harrison announced that he intended to call Black as a witness, reasoning that any error that may have occurred was not sufficiently prejudicial in light of the strong case against him to permit reversal under the "plain error" rule of criminal procedure applicable to

claims not properly preserved below.

Finally, Judge Thomas held that there was sufficient evidence to permit a rational jury to find Butler guilty of the firearms offense on a "constructive possession" theory. Judge Thomas cited D.C. Circuit precedent for the proposition that a person is in "constructive possession" of a firearm if it is "within easy reach and available to protect [the user] during his ongoing [drug trafficking] offense." After a thorough review of recent circuit decisions on constructive possession, Judge Thomas determined that the jury reasonably could have inferred (by Butler's presence in a van containing two guns, while wearing a bulletproof vest) that Butler constructively possessed either or both of the guns.

United States v. Whoie
925 F.2d 1481 (D.C. Cir. 1991)

A jury convicted the defendant of distributing crack cocaine and of using the telephone to facilitate his drug transactions. At trial, the

defendant claimed entrapment. The jury rejected that defense and convicted him on all nine counts. On appeal, Whoie argued for the first time that the district judge had erroneously instructed the jury on the elements of the entrapment defense. Judge Thomas examined the contention in light of the two elements of entrapment established by the Supreme Court: the government must have induced a defendant to commit a crime and it must be a crime that the defendant was not otherwise willing to commit. Whoie claimed that the district judge improperly allowed the jury to decide whether he had produced sufficient evidence of government inducement. Judge Thomas concluded that there was sufficient evidence of inducement to submit that issue to the jury.

Whoie also contended that the trial court failed to amend the model jury instructions to make explicit the government's burden to prove beyond a reasonable doubt that defendant was predisposed to commit the crimes. Judge Thomas relied on established D.C. Circuit precedent requiring that the court must "always consider the whole instruction -- not just the supposedly erroneous snippet.... In deciding whether jury

instructions are plainly erroneous, [the court will] consider as well the lawyers' arguments and the evidence." As a result, Judge Thomas concluded that the district judge's numerous explanations to the jury at trial of the defendant's presumed innocence properly evidenced that the government carried the burden of proof to show the defendant was "ready and willing" to commit the crime. Thus, the district court judge's use of the model jury instructions was not plain error.

United States v. Halliman
923 F.2d 873 (D.C. Cir. 1991)

Defendants were convicted of possession with the intent to distribute cocaine and crack cocaine base. The trial court rejected defendants motion to suppress evidence the police had obtained through searches.

After receiving a call from the manager of a hotel, the police conducted an investigation of a group of guests suspected of dealing

drugs. The police obtained search warrants to search the three rooms where the guests were staying. As they were leaving the station with the warrants, the police learned that one suspect had moved to another room. Rather than delay their search, the police decided to execute their warrants and attempt to interview the suspect in the newly rented room. When they knocked on the door of the newly rented room, a person inside asked them to wait "just a minute." The officers down the hall began to execute their searches on the other three rooms. Upon hearing a toilet flush inside the newly rented room and fearing that the person inside was destroying the evidence, the police officers forcibly entered the room. They found a bag of cocaine lying on the floor of the bathroom in plain view. They also executed a search that uncovered more cocaine in the room. The police subsequently obtained an emergency search warrant for this room and found certain drug paraphernalia. During the period of the initial search, the police executed a pat-down search of two other defendants as they returned to their hotel rooms. They discovered seventeen bags of crack cocaine and keys to the hotel rooms.

Judge Thomas, writing for a unanimous panel, affirmed the district court's denial of defendants' motion to suppress the evidence found during these searches. The court ruled that the warrantless search was justified by "exigent circumstances" doctrine. Judge Thomas relied on settled D.C. Circuit standards concerning exigent circumstances and found sufficient evidence in the trial record to satisfy that standard.

In Murray v. United States, 108 S. Ct. 2529 (1988), the Supreme Court had held that "evidence which is initially discovered during an illegal search, but is subsequently acquired through an independent and lawful source" is admissible at trial. Judge Thomas concluded that the emergency search warrant satisfied the requirement of an "independent source" and upheld the admission of the evidence.

The court also found that the police had probable cause to search the two men entering the hotel. The men had been under observation for over a week and when they entered the hotel and went to the rooms where the drugs were stored, the "totality of the

circumstances" provided probable cause to arrest the two defendants. The court also found that the district court did not abuse its discretion in denying the defendant's motion to sever the trials based upon the government's introduction of "independent and substantial evidence" in support of the defendant's individual charges.

United States v. Rogers
918 F.2d 207 (D.C. Cir. 1990)

The defendant was convicted of possessing more than 50 grams of crack cocaine with the intent to distribute within 1,000 feet of a school.

Police officers observed a group of men gathered on a street known to be frequented by drug dealers. Upon seeing the officers, the defendant grabbed a gym bag and ran. When the police pursued him, the defendant threw the gym bag into a sewer. The defendant was arrested and when searched, police found a telephone beeper. When the officers

retrieved the gym bag, it contained fifty-five grams of 82% pure crack cocaine.

Defendant took the stand and testified that he had been on his way to visit a girlfriend who lived on the street. The defendant further testified that the gym bag was not his bag but belonged to a friend. The district court then allowed the prosecution to question the defendant about his prior arrests as a juvenile -- that he had once before distributed crack cocaine on the same street and thrown the crack away in the same manner when he had seen the police. The district court also allowed testimony that he had once owned a beeper.

The jury convicted the defendant and he appealed. Judge Thomas, writing for a unanimous panel, rejected defendant's argument that the Federal Rules of Evidence prohibited admission of his prior conduct. He stated that the "Federal Rules of Evidence are creatures of statute" and thus should be interpreted by beginning with the language of the rules themselves using "'traditional tools'" of statutory

construction. After a review of the language, supported by Advisory Committee notes and decisions from other circuits, Judge Thomas upheld admission of the evidence. The testimony was not offered to prove character and the district court did not abuse its discretion in allowing the evidence.

Finally, Judge Thomas rejected defendant's argument that the district court should have granted his motion for acquittal or a new trial. Based upon Supreme Court standards, Judge Thomas found that "[a]mple and convincing evidence supported the jury's verdict under the reading of the statute even more favorable to [defendant]." Id. at 214.

United States v. Long
United States v. Mayfield
905 F.2d 1572 (D.C. Cir.),
cert. denied, 111 S. Ct. 365 (1990)

Two defendants were convicted of possession of cocaine with intent to distribute and of using a firearm in a drug trafficking crime. The

defendants were arrested in an apartment where cocaine and other drug paraphernalia was found. The police also found an unloaded handgun between the sofa cushions.

One of the defendants filed her notice of appeal one day later than the Federal Rules of Appellate Procedure permits. Judge Thomas rejected the appeal stressing that the time limit is "'mandatory and jurisdictional,'" citing the Supreme Court's decision in United States v. Robinson, 361 U.S. 220 (1960). The court rejected defendant's argument that the court's docketing of her untimely notice of appeal should have been construed as an implicit extension of time. Judge Thomas declined to equate the ministerial act of docketing an appeal with an implicit grant of an extension of time finding that "the unambiguous language of the rule forecloses this shortcut." 905 F.2d at 1574. Although Judge Thomas's interpretation was required by precedent of the D.C. Circuit, he also distinguished other circuit decisions that allowed untimely appeals. He emphasized that the specified time limits "serve vital interests of efficiency and finality in the administration of justice."

Id. at 1575. The court remanded the case for a determination whether the defendant should be granted a discretionary thirty day extension permitted in the rules based upon a showing of excusable neglect.

As to the other defendant, the court (with Judge Sentelle concurring separately) reversed the firearm conviction and affirmed the drug conviction. Noting that the appellate court owes "tremendous deference to a jury verdict" in the face of a challenge to the sufficiency of the evidence, Judge Thomas nonetheless, found that the government failed to produce any evidence that the defendant had "use[d] or carrie[d] a firearm" within the meaning of the statute. Judge Thomas rejected the government's argument that the defendant "used" the gun by committing a drug offense facilitated by a gun. He stated that such an interpretation would obliterate any remaining limits on the meaning and application of the word "use," a prospect particularly troubling when construing a criminal statute. Judge Thomas rejected "the notion that a loose, transitive relationship of this type is sufficient to show that a person 'used' a gun." Based upon a comprehensive review of D.C. as well as

other circuit court precedents, Judge Thomas explained that the government must establish some nexus whereby the defendant actually or constructively possessed the particular firearm in order to prove that he "used" it.

The narcotics charges were affirmed despite defendant's objections that evidence of a telephone call received by the police officer at the defendant's house should not be admissible. The statements made by the caller were not excluded as hearsay since they were not offered as assertions that the defendant was involved in drug dealing. Instead, the evidence was received as a series of nonassertive questions falling outside the scope of the hearsay rule.

Judge Thomas upheld the district court's denial of defendant's motion to sever his trial finding that the evidence against the defendants failed to rise to the "gross disparity of evidence" standard as dictated by the Supreme Court. Noting that there is a "strong and legitimate interest in efficient and expeditious proceedings," Judge Thomas added that "this

interest must never be allowed to eclipse a defendant's right to a fair trial." In holding that the district court did not abuse its discretion in denying the motion to sever, Judge Thomas found that an abundance of evidence implicating both defendants was presented to the court.

United States v. Poston
902 F.2d 90 (D.C. Cir. 1990)

Knowing that his friend was carrying PCP and intended to distribute it, the defendant drove him to the site of the drug sale. The defendant dropped off his friend and drove around the block to the next corner while the sale was being consummated. He was arrested while waiting in his truck. The jury found the defendant guilty of aiding and abetting the possession of PCP with intent to distribute but acquitted him of the charge of aiding and abetting the distribution. On appeal, the defendant argued that (1) there was insufficient evidence to convict; (2) the district court abused its discretion in denying his motion for a continuance on the day before trial; (3) he was denied effective

assistance of counsel because the lawyer he hired only had one day before trial to prepare; and (4) he was denied due process when the prosecution refused to request a downward departure from the federal Sentencing Guidelines.

Writing for a unanimous panel, Judge Thomas affirmed defendant's conviction. On the aiding and abetting charge, Judge Thomas was guided by the limited review the Supreme Court permits for assessing the sufficiency of evidence on appeal. Judge Thomas declined to construe the statute to require that the defendant must himself have actually possessed the illegal drug or assisted in obtaining possession of it. This "cramped" interpretation of the statute was rejected because of the court's well-established, broad standards that require only that the defendant have aided and abetted in the crime of possession of the drug.

The court also rejected the defendant's contention that it was an abuse of discretion to deny his motion for continuance on ground that it was the defendant's delay in deciding to select new counsel that

prompted the motion for continuance at the "eleventh hour." Judge Thomas noted the public's "strong interest in the prompt, effective, and efficient administration of justice," emphasizing defendant's lack of evidence to demonstrate that the trial judge abused his discretion to deny the continuance.

Defendant's claim that he received ineffective assistance of counsel was found to be without merit and unsupported by Supreme Court precedent. Defendant failed to point to any error made by his counsel or to show that it resulted in any prejudice to his defense. His ineffective assistance of counsel defense was therefore inadequate as a matter of law.

Finally, defendant argued that he was denied due process by the failure of the prosecution to request that his sentence be reduced below the statutory minimum mandated under the Sentencing Guidelines. This allegation arose from statements made by the arresting officers concerning the defendant's cooperation. Since the police did make this

cooperation known, Judge Thomas held that the commitment to the defendant to do so could not be construed to obligate the prosecution to file a motion to depart from the sentencing guidelines.

Conclusion

Judge Thomas's criminal law opinions evidence his belief in judicial restraint, his commitment to established rules of law and thoughtful attention to the issues before the court in a particular case. His opinions show scholarship and keen attention to detail with a scrupulous regard for the rights of defendants and a concurrent concern for victims. As shown by this analysis, Judge Thomas's observance of controlling precedent, particularly in cases such as Whoie, Poston and Harrison, provided the consistency and predictability we demand of criminal laws. In Long and Halliman, Judge Thomas refused to expand the jurisdiction of the court or to answer questions not properly before the court. Judge Thomas's observance of "traditional tools" of statutory construction in cases such as Rogers and Long, compelled the court to construe the applicable statutes as intended by the legislature rather than

in accordance with the judge's own predilections. Finally, in Rogers, Long, and Halliman for example, Judge Thomas rejected arguments that evidence must be excluded when there is a justifiable basis for admission. This study of Judge Thomas's criminal law and procedure majority opinions highlights his proven judicial qualifications and suggests that he would be an extremely able and valued member of the Supreme Court.

Senator KOHL. Thank you very much, Ms. Bracher.
Ms. Holmes.

STATEMENT OF SADAKO HOLMES

Ms. HOLMES. Mr. Chairman, members of the committee, I wish to thank you for the opportunity to speak in support of President George Bush's nominee, Judge Clarence Thomas, to the U.S Supreme Court. I have been asked by the National Black Nurses Association's Executive Committee to appear on their behalf for the purpose of reading into the record a letter sent by the board to our president. The president of my organization, Dr. Linda Bolton, would have appeared before you, but her schedule does not permit her attendance.

Highlights from the letter sent to the President is as follows:

August 16, 1991. Dear Mr. President: The Board of Directors of the 7,000-member National Black Nurses Association, Inc., has voted to support your nomination of Judge Clarence Thomas to be the newest Associate Justice to the United States Supreme Court.

The National Black Nurses Association reaches 130,000 black nurses in the United States, the Eastern Caribbean, and Africa. We have known Judge Thomas since 1985 when he spoke to the National Black Nurses Association's membership. We were impressed then by his vision. We continue to admire his strength. He is a committed public servant and a respected jurist. We admire his personal development from a child who lived in segregated rural Georgia to nomination to the highest Court in the United States. The uniqueness of his background promises to provide an important voice on the Court.

Justice Thurgood Marshall has been a lifelong champion for the creation of equal rights. We expect that Judge Thomas will continue this commitment. We believe that Judge Thomas at this point in his life is prepared to accept this challenge. Sincerely, C. Alicia Georges, President for the Board of Directors of the National Black Nurses Association.

Senators, as a private citizen, I would also like to express my support for Judge Clarence Thomas. I have known Judge Thomas for over 20 years, and it has been a privilege for me to witness the development and growth of Judge Thomas whom I have observed for so many years, starting from his college days to his nomination to be a member of the U.S. Supreme Court.

Shortly after Judge Thomas was confirmed as a judge and sworn in, I visited him in his office. On that day, he shared with me the now famous letter from the young man in Georgia who saw Judge Thomas as his role model. Judge Thomas was clearly moved by this youth's struggle to overcome obstacles similar to his own, and he enthusiastically responded to the young man's letter.

In August 1985, Judge Thomas presented a speech at the National Black Nurses Association's 13th National Institute and Conference. The speech, which was later published in the association's journal, was about a troubled black community, particularly the educational plight of black children.

Clarence Thomas is a role model for many of us of all ages. He is a man of impeccable integrity whose successes in life have been achieved against all odds. As an African-American, I am particularly proud of his accomplishments.

For many of us, especially those who I know in the nursing profession, the presence of Judge Clarence Thomas on the Supreme Court of the United States will be an assurance that someone with

a special hard-earned sensitivity is there, providing a special dimension to America's highest tribunal.

Lastly, as a nurse, I am particularly aware of the importance of sensitivity and compassion. The people of our country face many problems where a special understanding and patience makes an enormous difference in whether or not we successfully meet our challenges. I know that Judge Thomas will bring that special sensitivity and compassion to the Supreme Court, and all of us will benefit from his service on the Supreme Court.

Thank you.

Senator KOHL. Thank you very much, Ms. Holmes.

Justice Black once observed, and I quote, "Under our constitutional system, courts stand against any old winds that blow as havens of refuge for those who might otherwise suffer because they are helpless or weak or outnumbered, or because they are non-conforming victims of prejudice and public excitement."

My question is: Was Justice Black right when he argued that this is an important role of the courts? Or was that just rhetoric?

Mr. KERN. Right; not rhetoric.

Senator KOHL. He is right. Anybody disagree with that? The very important role of the courts. Ms. Norton.

Ms. NORTON. The role of the courts is that of something beyond the electoral branches where each person goes into court on an equal footing. And through that function, it allows people to have a voice that they might not otherwise have.

Senator KOHL. I would like to ask you all, in light of that, why you think Judge Thomas will measure up in this respect. Is it because of his work as a policymaker, his work on the courts for the past 16 months? What is it about Judge Thomas substantively—what can you point to in his background and his work history that leads you to believe that he will live up to this part of his responsibility as a Supreme Court Justice?

Mr. THOMPSON. Senator, if I may respond to your question?

Senator KOHL. Yes, Mr. Thompson.

Mr. THOMPSON. My response will be based somewhat on my knowledge of Judge Thomas as a lawyer and as a friend, and that is that in every position that he has held—in the private sector, as the head of a large public agency for which he had to have public policy considerations, and on to the District of Columbia Court of Appeals—he has taken every position seriously. He has attempted to and has discharged the duties of those positions faithfully, and I see nothing in his background that would lead me to believe that he would do anything less on the U.S. Supreme Court.

Senator KOHL. Any other comment on that, Ms. Bracher?

Ms. BRACHER. I would just like to comment. My comments come from a review of his criminal law opinions, and I take comfort that all of Judge Thomas' opinions are firmly grounded in law. He does not rule on policy considerations. When you review his opinions, you will see that he construes the statutes as written. He is very mindful of the precedent of the court, very mindful that, especially in criminal law decisions, there needs to be a firm ground from which people can work.

Senator KOHL. That isn't what I—I was referring to what Justice Black had said, that the courts stand as a haven for those people

who might otherwise suffer as a result of majority views or momentary public hysteria—that the court has an emotional and sympathetic kind of a role to play. You didn't answer that. Maybe I didn't make myself clear.

Ms. BRACHER. I would say that the court is a haven for people when they have a judge who is going to rule on the law, when they have laws that they can determine what is required, when they have laws that are not ruled upon a judge's personal views or policy matters. That is a haven for people to know that a judge is going to fairly give them their day in court, is going to follow the law as it is written.

Ms. NORTON. In looking at his criminal decisions, it is clear he did not just reflexively rule in favor of the Government and, in fact, criticized Government activities or arguments that they had made in a few instances because he felt that they were not giving appropriate deference to the rights of the defendant.

Mr. KERN. I would answer your question this way, Senator: You don't live to be more than 60, as I have, without developing a certain feel for a person based on conversations and working together. And my feel based upon my knowledge of Clarence Thomas is that I would be willing to trust my life and liberty and property to decisions that he makes. And I am convinced on the basis of my conversations with him and dealings with him that he has an extraordinary compassion and extraordinary sensitivity, and he would be the right person to be on a court in the sense of being very sensitive to those in the minority by one reason or another.

Ms. HOLMES. Senator, as I spoke in my testimony, we feel that Judge Thomas does have a compassion and sensitivity, and he has shown that throughout the years. And he is going to bring to the Court not only the sensitivity and the compassion, but I have found him to be a very just and fair person. And I, too, would put my life in the hands of the Supreme Court with he being on the Supreme Court.

Senator KOHL. How do you all square some of the things you have said with his position as stated here numerous times as he testified before us, which was that when he was a policymaker—the things that he was and did, the expressions of his views, the opinions he held, the kinds of compassions that he expressed before he became a judge were things that he was trying to put behind him, because being a judge was an entirely different kind of profession, requiring different disciplines? He, in fact, asked us not to regard the things that he spoke of as necessarily descriptive of how he felt at this time, having become a judge and wanting to go on to the Supreme Court.

How do you square that, particularly with what you said, Mr. Thompson? You said you have known him and seen him in different positions throughout his career, and you could predict, based on all of these things you have seen in his career, what kind of a Supreme Court Justice he is going to be. He said disregard that.

Mr. THOMPSON. I would respond to your question this way. I think Judge Thomas' performance as the head of the Equal Employment Opportunity Commission—which is a political appointment, we all know—showed that he still—he has integrity. He is not a shill for anyone. He didn't even, in that position, which was a

political appointment, he did not have any hidden agenda; he tried to carry out the duties of that job consistent with the mandate of that agency. And when in fact he had personal and professional disagreements with the administration that appointed him, he voiced those disagreements. He was critical of the Reagan administration's stand with respect to Bob Jones University. This is a man with integrity. This is a man who takes his job seriously, and he has done so at every job he has had, and he is certainly going to do so as a justice on the United States Supreme Court.

Senator KOHL. All right.

Ms. BRACHER. I just want to say I think that—I don't want to put words into Judge Thomas' mouth—but I think one's views as an advocate or as an educator or as a policymaker are very different from when one puts on the robes and joins the judicial branch. And I think Judge Thomas was trying to explain his recognition of the way you approach the law when you are judging the law as opposed to being an advocate or as opposed to being an educator or a policymaker within the executive branch.

Mr. KERN. I would just add that Judge Thomas has been on the bench for more than one year. Every opinion that he has made has been reduced to writing and published. In effect he has put his way of thinking and his views on the record day in and day out in the work as an appellate judge. And I have read some of those opinions, and I think they reflect a measured view, a fair statement of the contentions on both sides, a concise statement of what the issues are, a statement of the relevant facts and a persuasive conclusion. So you are not buying someone who has never done any kind of judicial work but in fact has been a judge and has articulated his decisions with an explanation, plus the fact that I think you realize that a judge doesn't have very much except his own integrity. Until you all raised salaries, there certainly weren't much material benefits out of serving on the court. And I think that when you are doing appellate judging, you've got to put your views on the line in public every time you make a decision, and nothing is more important than to be fair. You can't shade; you can't leave out a couple of facts in order to reach the conclusion that you want because the parties of both sides know those major facts. So you are called upon to tell it like it is within the framework of what are the precise contentions.

There is a lot of difference between being a lawyer before you go on the bench or being an administrator of a judicial education project and expressing viewpoints off the top of your head and making a decision on a precise question of law with contentions from both sides, and both sides looking at what you decide and how you decide it.

Senator KOHL. Thank you.

Senator Thurmond.

Senator THURMOND. Thank you very much, Mr. Chairman.

I want to take this opportunity to welcome this panel here today. I think each of you have brought out points that are very important. You know Judge Thomas, and you know of his activities, and you have firm convictions as to whether he'd make a Supreme Court Justice.

Now, I'm not going to take a lot of time. I just want to ask you two questions. I think this is the essence of this hearing. The first is—and we'll start with Ms. Norton and then on to Mr. Thompson, Mr. Kern, Ms. Bracher and Ms. Holmes, in that order—I will ask the same question to all of you. Is it your opinion that Judge Thomas is highly qualified and possesses the necessary integrity, professional competence and judicial temperament to be an Associate Justice of the United States Supreme Court?

Ms. Norton.

Ms. NORTON. Yes, that is certainly my view. I have looked at his record. I am not personally acquainted with him, so I cannot speak with the 20 years' worth of personal knowledge that other panel members can address, but I can look at the way in which he has functioned as a judge and the way in which he has made his decisions. They are exceptional decisions in the way in which they deal with the role of the judiciary, the role of an appeals court. He was very careful to act within his role and to act appropriately.

Senator THURMOND. So your answer is "Yes"?

Ms. NORTON. Yes.

Senator THURMOND. Mr. Thompson.

Mr. THOMPSON. Senator, my answer is yes, and my answer is based on not only my friendship and knowledge of Judge Thomas, but the fact that I am a lawyer, and I am a citizen, and I am very much concerned about having quality people on the U.S. Supreme Court.

Senator THURMOND. Mr. Kern.

Mr. KERN. Yes, sir.

Senator THURMOND. Ms. Bracher.

Ms. BRACHER. Yes, and my knowledge is based upon his writings in the criminal law area, and as a women and a citizen, I can say yes.

Senator THURMOND. Ms. Holmes.

Ms. HOLMES. Yes, definitely so. And my answer is based on having known Judge Thomas for over 20 years and having seen him not only in the positions that he has carried out but also in informal meetings with him.

Senator THURMOND. Now, my second question is this, and I will ask it of each one of you: Do you know of any reason why Judge Thomas should not be made a member of the Supreme Court of the United States?

Ms. Norton.

Ms. NORTON. These hearings have extensively dealt with every aspect of his record and of his approach to being a justice, and I believe that this committee has before it the information that would show that he will be an exceptional choice for that position. I know of nothing that would bar him from that position.

Senator THURMOND. So your answer is "No".

Ms. NORTON [nodding].

Senator THURMOND. Mr. Thompson.

Mr. THOMPSON. Senator, I know of no reason why this body should not confirm President Bush's choice for the U.S. Supreme Court.

Senator THURMOND. Mr. Kern.

Mr. KERN. No, sir.

Senator THURMOND. Ms. Bracher.

Ms. BRACHER. No, sir.

Senator THURMOND. Ms. Holmes.

Ms. HOLMES. No, Senator.

Senator THURMOND. So all of you have answered "Yes" to the first question and have answered "No" to the second question. I think that's the essence of the whole hearing, just what you have answered in those two questions.

Thank you very much for your appearance. This is a very intelligent panel. I congratulate you on your appearance.

I have no further questions, Mr. Chairman.

Senator KOHL. Thank you very much, Senator Thurmond.

Senator Simpson.

Senator SIMPSON. Mr. Chairman, I too thank the witnesses for coming. Your testimony was very moving and useful and very helpful and important to us, and we appreciate it, and I thank you for it.

Senator KOHL. Thank you very much.

Senator Heflin.

Senator HEFLIN. I apologize, I didn't get to hear all of your previous testimony. As many of us do, I have many other things going on, and we have to leave the hearing room and come back. So you may have answered this question, but what political party do each of you belong to?

Ms. NORTON. I am an elected Republican.

Mr. THOMPSON. I am a Republican, Senator.

Mr. KERN. I was appointed by President Lyndon Johnson after serving as an executive assistant to Attorney General Ramsey Clark.

Senator HEFLIN. What are you now?

Mr. KERN. As I have aged, Senator, my views have moved a bit more to the center than they were when I served with Attorney General Clark, whom I admire very, very much and have a deep personal regard and affection for.

Senator HEFLIN. You still haven't answered my question. [Laughter.]

Mr. KERN. I am registered an Independent in the District of Columbia.

Senator HEFLIN. All right. Ms. Bracher.

Ms. BRACHER. I am registered as a Republican in the State of Virginia.

Ms. HOLMES. I am registered as a Republican in Massachusetts.

Senator HEFLIN. All right. Ms. Bracher, you seem to have read a good deal of Judge Thomas' opinions on the Court of Appeals. Unfortunately, I don't have the cases before me, but two of those cases, according to my memory, were *United States* v. *Long* and *United States* v. *Harrison.* In regard to part of the decision in each—there were several issues involved—but one issue was the possession of a weapon during a drug raid where drugs were actually present, and the defendant in both these cases was convicted of the possession of a weapon, which carries more severe penalties with it. Both involved the constructive possession of a weapon. Judge Thomas went one way—it seems to me that he found for the

defendant in *Long,* and he found for the Government in the case of *U.S.* v. *Harrison.*

Now, in reading those cases, I was somewhat confused, and I wanted to ask him about it, but there were other matters that I thought were of higher priority. But are those decisions consistent in your judgment, and if so, why?1

Ms. BRACHER. Yes, they are consistent. As a matter of fact, they exemplify Judge Thomas' careful review of the statute. In *Long,* he looked at the statute and realized that in order to establish constructive possession, he must find that the defendant actually—and this is in quotes—"used the gun." To find that—he used in *Long*—the gun was located in the cushions of the couch. The defendant was coming into the room where the gun was located, and Judge Thomas stated that the prosecution failed to offer any evidence that he had actually or constructively used the gun or had it in his possession.

In contrast is the *Harrison* case where you had—I believe there were three people in a van with a gun under the seat, one person with a gun on his person, and the third person was found to have constructively possessed the gun by means of the other two persons in his proximity in the van.

Senator HEFLIN. As I recall, one of the reasons Thomas said was that if a bullet had been fired towards the defendant, the one that didn't have a gun, it was reasonable to assume that he could get a gun and fire back, which seemed to be some rather nebulous thinking relative to that.

Ms. BRACHER. Well, I believe you are referring to the *Harrison* case where the three gentlemen were in the van. Ms. Norton spoke on the case similarly where they were in possession of cocaine; one had a bulletproof vest on; they had a temporary license, unregistered gun; and the other gentleman actually had a gun on his person, and they were involved in cocaine dealings. Whereas, the other situation was a person who wasn't in the room where the gun was, he was alone, and just entering the room, and Judge Thomas found the fact that the gun was present in the room was not sufficient because if he had, there would be no limits. And the statute clearly required some boundaries and parameters to be set.

Senator HEFLIN. So you think that there is a factual distinction in his analysis of whether or not the defendant in each of these cases was in constructive possession of a gun?

Ms. BRACHER. I don't think it is just factual. I think it is the constructive possession, the law as it is written in interpretation, and the application of the precedent and the finding that it is actually used within the precedent set by the Court and the interpretation of the statute. It is not just on the factual ground.

Senator HEFLIN. That is all.

Senator KOHL. Thank you very much, Senator Heflin.

Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman.

I appreciate very much your testimony. I think it brings a lot of common sense to the support of Judge Thomas. Most importantly, it doesn't seem to be a shrillness voice in support of him, as we have had a lot of shrill voices in opposition to him. I think the lack of shrillness will sell better with the American people who oppose

or, particularly those who are watching, are still showing tremendous support for Judge Thomas.

My questioning has been a little bit touched upon by my colleague from South Carolina, Senator Thurmond, but I would like to proceed with those who have read the opinions. A couple of you referred to the fact you had read these opinions, and I want to say thank you for doing that because I think that brings a lot of knowledge to this committee, although we and our staff have had an opportunity to look at these opinions as well. It makes me feel good for those of you who have read the opinions that you have based your judgment and support of him to a considerable extent on what he has written.

The reason why I am glad for this is we did have some law professors here within the last few days who said Judge Thomas was not in the mainstream, and I asked them if that was based upon their reading of his opinions. Quite frankly, I was astonished that they had not read his opinions at all and they still had this judgment of him.

Ms. Norton and Ms. Bracher, is there any question, after reading these views of Clarence Thomas expressed through his opinions, that he is a mainstream jurist who is going to look at the written law and precedent to construe that law and who is going to look at the Constitution, the Framers' intent, and the precedent set by previous Supreme Courts in the interpretation of that Constitution? Ms. Norton?

Ms. NORTON. There seems to be a great concern that he will start bringing policy views unrelated to the Constitution into his judicial decision-making. I found absolutely no evidence of that in reviewing his decisions. His decisions were very carefully written, very carefully relied on precedent, on the exact language of statutes, on the proper role of an appellate court as compared to a trial court, and on the proper role of an appellate court compared to the U.S. Supreme Court. And I found his opinions to be just exceptional in the extent to which they were very carefully confined within the appropriate role of a judge.

Ms. BRACHER. I would also like to add I agree with Ms. Norton, but he has written opinions and they are joined by the judges on the D.C. Circuit considered to be on both sides of the political spectrum. And I would go one step further. Upon a reading of his opinions, I believe that every Senator could take comfort that Judge Thomas is a judge who will rule according to the law. His policy views and the policy positions that he has taken have not come into play when he has written his judicial opinions. He construes statutes as they are written with the intent of Congress, and he has ruled very narrowly on the precedent of the Court.

He even has gone so far as when precedents in other circuits have been to the contrary, he will review those precedents. He will distinguish them and explain where his rulings are coming from, and they are coming from the law.

Senator GRASSLEY. For those of you who would want to express a view, for those of you who support Judge Thomas—and all of you do—I am interested in whether viewing him not just as a jurist but as a whole person, do you think that he brings any special qualities to the Court that may not be there in some other Justices? Or do

you think that he is probably a duplicate in the sense of some other qualities that are on the Court already?

Mr. KERN. I would answer that by saying that I recall when his nomination was announced and his mother was interviewed on television, and she said, "He knows where he comes from, and he is never going to forget that."

When I would face the Supreme Court in the role of an advocate, I would see people from a variety of backgrounds and people with a variety of experiences, including an all-American football player and a Harvard Law Review member and a Chicago Law School professor.

It seems to me that Clarence Thomas, with his background and his life experiences that have been immeasurably different from, let's say, the last nominee—that is not to say that one has been better than the other, but they have been vastly different—I think he would bring a quality to the Court, a facet to the Court that is not now presently represented.

Senator GRASSLEY. And you are expressing that as a positive thing, that that ought to be present, a quality that ought to be present on the Court?

Mr. KERN. Absolutely. I would feel more comfortable as an advocate with that kind of component added to a multi-judge Court.

Mr. THOMPSON. Senator, I would add to what Judge Kern said, and that is, in addition to his background, arising from his background as a black American who grew up in the 1960's and has moved on, I think he would bring to the Court a demonstrated independence of thought, and the fact that he has valuable hands-on experience in the public policy arena as heading a major public agency such as the Equal Employment Opportunity Commission. I think those two ingredients, in addition to what Judge Kern said, his independence of thought and his public policy experience would be valuable additions to the Court, not only being on the Court but inside the deliberations of the Court. I think that would be a very positive factor.

Ms. HOLMES. Senator, I sat here thinking about what can he bring. To me the most important thing is you have to know who you are and where you have come from, and he certainly knows that, as it has been demonstrated over the past few days.

Judge Thomas, with his integrity, his sensitivity, his compassion, even though others on the Court have that, he still is going to bring a different dimension to the Court.

Ms. BRACHER. I would just like to add that beyond his experience and keen intellect, the experience that he has from serving on the D.C. Circuit, from serving in the executive branch, I find Judge Thomas to be inspirational, that someone with his background has done what he has done, and it proves to me that with hard work I can do anything I want to do. And I think that he represents what is best in all of America. And I think he brings that to the Court along with his background.

Senator GRASSLEY. Mr. Chairman, I have no further questions. Thank you all very much.

Senator KOHL. Thank you very much, Senator Grassley.

Senator SPECTER. Thank you, Mr. Chairman——

Senator KOHL. I am very sorry, Senator Specter. Senator Simon. Forgive me.

Senator SIMON. I have no questions for the panel, Mr. Chairman. Thank you.

Senator KOHL. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Attorney General Norton, in the case of the *United States* v. *Lopez*, Judge Thomas sat on a panel which remanded the case for resentencing under the Uniform Guidelines, notwithstanding a provision which prohibited the consideration of socioeconomic factors, where the argument was made by the defendant's lawyer that the defendant should be entitled to special consideration because of his home background, the circumstances of his mother's murder by the father, the defendant's problems growing up, and the threats made by the father against the young defendant. And the United States attorney prosecuting the case made the argument that if socioeconomic factors could be broadened or if those factors did not come within the ban, that socioeconomic factors should not be considered. There would be very wide latitude for trial courts to consider the background of individuals, and we would not have the desired uniformity in sentencing procedures.

What is your view of the Court's ruling in that case in the context of the argument made by the prosecuting attorney?

Ms. NORTON. I am sorry. I have seen a summary of that, but I have not seen the entire decision that was rendered in that case, and so I cannot comment in detail on that.

Senator SPECTER. Well, that was a matter that I had asked Judge Thomas about when he was testifying here, but I thought that you might have some knowledge of it.

Perhaps you do, Ms. Bracher. You had analyzed Judge Thomas' opinions, and I realize this was not one of his opinions. But if you are familiar with it, I would be interested in your observations on the case.

Ms. BRACHER. Unfortunately, no, I am not. I limited my research into the opinions that he authored. The similar opinion I found that he did author, not having read *Lopez,* is the *Chavez* decision where he reviewed the length of the sentence under the Federal Sentencing Guidelines. In his review of the Federal Sentencing Guidelines, the opinion is replete with discussion on its terms of textual analysis and construing the Sentencing Guidelines according to the intent of Congress.

Not having read the *Lopez* decision, I am not sure if that is helpful. But that is the philosophy he used in reviewing the decision in that case.

Senator SPECTER. Judge Kern, where you have the uniform sentencing guidelines precluding a trial judge from considering socioeconomic factors, do you think it is a fair interpretation for the court to consider the background of an individual defendant, where there were severe marital problems between the defendant's parents, the father apparently killed the mother, the kinds of things that I described earlier?

Mr. KERN. I think it is obviously a judgment call, when you are faced with what would appear to be a restrictive statutory demand that there be a limitation, but at the same time you are confronted

with a case in which a significant element is the extraordinarily troubled background of the defendant. I think it is a pull and a tug, and it would not disturb me to find—I am not familiar with the facts of the case, but it would not disturb me to find a certain leeway where the trial court could take that unique particular factor into consideration.

Senator SPECTER. You are not troubled by Judge Thomas' joining in that opinion?

Mr. KERN. No.

Senator SPECTER. Ms. Holmes, I believe you were in the hearing room this morning when the panel testified on the abortion issue and opposed Judge Thomas on the concerns they have on what might happen with *Roe* v. *Wade* and the issue of sensitivity to women's concerns in that kind of a situation? You heard that?

Ms. HOLMES. Yes.

Senator SPECTER. What is your evaluation, if you care to give one, as to how you think Judge Thomas might respond to sensitivity for women's concerns, especially for African-American women?

Ms. HOLMES. Senator, my organization, the National Black Nurses Association, has a great concern about the abortion issue, but we have not come out with a position statement on abortion, and anything that I would say here today would be construed as coming out from the association. Therefore, I would rather not make any comment on that.

Senator SPECTER. Well, I respect that, Ms. Holmes. Would you have any comment to make on your view as to his sensitivity on women's issues, generally?

Ms. HOLMES. He is going to be fair, he certainly is going to read all the opinions, sit down and meditate on it and think about it, and whatever he comes up with as his decision, I am sure that it will be something that has taken great thought.

Senator SPECTER. Mr. Thompson, I could not be present during your testimony. I came in shortly after you finished, but I understand you had testified in support of Judge Thomas, of course, but some difference in view with Judge Thomas on affirmative action. Do you agree with his position on affirmative action?

Mr. THOMPSON. I did not testify with respect to any difference of opinion, as I understand his views on affirmative action, so I do agree. As I understand what Judge Thomas' views are on that subject, Senator, I do agree with his views, but I think that his views on affirmative action as they have been portrayed in the media have been misinterpreted.

I do not view and understand Judge Thomas to take the position that he is opposed to all forms of affirmative action. He is opposed to quotas, as I am, but he understands that some forms of affirmative action are necessary, because they are really truly needed to make some of our individual rights and aspirations a reality, and they are fair. But he is opposed to quotas, and so am I.

Senator SPECTER. Well, with respect to his opposition to quotas, he was emphatic about that, and I think there is general agreement that quotas are bad. He did testify about agreeing to limited affirmative action in an educational context, and there was considerable discussion about his own experience. But he did oppose affirmative action in an employment context, unless the affirmative

action was directly remedial to a specific individual who had been discriminated against, and that he would not favor affirmative action if it would put the group in the place where the group had been, but for a generalized discrimination. Do you agree with that point on Judge Thomas' stand?

Mr. THOMPSON. Yes, I do. But I would also like to respond beyond that and indicate something and reiterate something I said in my direct testimony, and that is people may differ on affirmative action and people may differ with respect to how black Americans, in general, need to advance and overcome some of the problems that we face, but I do not believe that that difference of opinion should be a reason for this body to deny Judge Thomas' confirmation to the United States Supreme Court.

As I said in my testimony, I think this difference of opinion within the black community as to how we should advance, how we should and can attack the problems that we face is deeply rooted in this country's history, beginning with the differences of opinion between W.E.B. DuBois and Booker T. Washington, and I believe that this difference of opinion is a source of strength in the black community and in the Nation as a whole, and this difference, you should not use this difference to get off track and use it as a basis for confirming or for denying the confirmation of Judge Thomas.

Senator SPECTER. Mr. Thompson, how long have you worked with Judge Thomas at Monsanto?

Mr. THOMPSON. I worked with him for approximately 2 years.

Senator SPECTER. And you dealt with a great many legal issues during that 2-year period?

Mr. THOMPSON. We dealt with a great many legal issues that many young lawyers in our corporate law department would have to face.

Senator SPECTER. The American Bar Association rated Judge Thomas qualified, as opposed to being well qualified. How would you rate him?

Mr. THOMPSON. I would rate him well qualified, and I think, as I understand the American Bar Association's recommendation, I think it is unfairly tilted to the litigation experience of a lawyer, not just Judge Thomas, but any lawyer who is being viewed for a judicial position, and certainly discounted and did not take into consideration his public policy experience as the head of the EEOC or a major agency such as that. I would rate him well qualified.

Senator SPECTER. Thank you, Judge Thompson. Thank you, ladies and gentlemen.

Thank you, Mr. Chairman.

Senator KOHL. Thank you very much, Senator Specter.

Senator Brown.

Senator BROWN. Thank you, Mr. Chairman.

I suppose in hearings of this kind, it is natural that you would have both proponents and opponents. I think that is the purpose of the hearing, to allow both sides to come and speak, but one of the phenomenons that we have had is that the people who seem to know the Judge and have a personal contact with him all seem to be proponents, and the opponents seem to be made up of those who haven't had a chance to get to know him personally.

Senators do not always have that experience with regard to what people form views of them, so it is somewhat refreshing to have this phenomenon come up. It is particularly, I think, helpful to have people who have read the Judge's decisions. We have had a number of people testify on his judicial temperament and demeanor and how he would rule, but, unfortunately, many of them, as Senator Grassley has pointed out, have not had the opportunity to read his decisions, so this panel comes particularly well prepared and we appreciate your insights as a result of that.

Mr. Thompson, you having worked with the Judge, I wonder if you might share some observations about his work habits, his approach to problems, his temperament in the years you worked with him in corporate law.

Mr. THOMPSON. He was as very, very hard worker. He took his job serious. We both, as young lawyers in a corporate law department, faced many technical issues with respect to drafting long contracts and purchase agreements, and analyzing the myriad of regulations that a large corporation has to deal with. We both had many problems with respect to having to deal with that.

I recall Judge Thomas putting in many long hours, trying to grapple with the issues and master his craft, as you have to do as a young lawyer, and we spent a lot of time together. While we did have an opportunity to talk about some of the public policy issues facing the day, much of the time that we spent together was faced really trying to understand and grapple with the technical issues that we both faced, as young lawyers in a corporation, and I think that dedication to mastering his craft, his willingness to work hard, his desire to want to do a good job, these are all qualities that will serve him well on the U.S. Supreme Court.

Senator BROWN. Young attorneys, particularly, although I suspect attorneys generally, become advocates for their client, as indeed they are paid to do. Some become very strong advocates in the very competitive way. Some temper that advocacy with a sense of justice and fair play, as the ethics require to be honest, to not misrepresent facts, even though they are strong advocates of a viewpoint. Are there any observations you might share with us as to what kind of an advocate Clarence Thomas was in those early years, even-handed, able to see both sides or simply somewhat narrow-viewed advocate?

Mr. THOMPSON. Senator, if I can respond to your question based upon my knowledge of his tenure at the EEOC, and there he took over an agency in which many of the career professionals, I would think it is fair to say, had some strong differences of opinion with respect to affirmative action and some issues that Judge Thomas held strong views on.

But, notwithstanding these differences, many of the career professionals that I have talked with, who know Judge Thomas and his work at the EEOC, have nothing but praise and respect for him. They understand his fairness and his ability to see both sides, because many times he retreated from some of the very strongly held abstract views he had, in the face of the reality of running this agency and trying to serve its constituents and trying to protect American citizens from unlawful employment discrimination.

He did that and he took his job seriously, and I think that goes to his character and that goes to his integrity.

I don't know if you had an opportunity to hear my direct testimony, but this past weekend I talked to one of those career professionals in Atlanta, he has just retired from the EEOC after many years, and he will acknowledge that he and Judge Thomas differ on some issues, but he has nothing but praise and respect for Judge Thomas. He says, "I tell my friends that if they don't want to change their views on him, those who are critical of him, if they don't want to change their views on him, then they shouldn't get to know him, because once they get to know this man, they will respect his character, his integrity, his intellect, and all of the unfair and unfounded criticism of him will go aside."

Senator BROWN. Thank you.

Attorney General Norton, you have read, I take it, the criminal cases that Judge Thomas has written on the Circuit Court of Appeals?

Ms. NORTON. That is right.

Senator BROWN. In reviewing those decisions and opinions, have any dissents been filed in connection with those opinions?

Ms. NORTON. There were not dissents filed to any of those. There was one concurring opinion in one of the cases. It is the same opinion that has been discussed extensively on the interpretation of using a firearm, and in that case the one concern was that perhaps there had been too much of a burden placed on the Government to show the use of a firearm, and that was one that, nevertheless, concurred very much in the result.

Senator BROWN. Does the fact that there weren't dissents lead you to an impression of whether the Judge was in the mainstream of legal thinking or not?

Ms. NORTON. Certainly in the cases that I have examined, he was very much in the mainstream and very much presented a balanced view in his treatment of those cases.

Senator BROWN. In reviewing his opinions, do you have a view of whether or not the Judge would be overly strict with regards to the doctrines of standing or mootness? Would he have a tendency to deprive individuals of access to the court?

Ms. NORTON. I know that in some documents that have been presented by various organizations to this committee there have been some concerns about his views on standing and access to the courts. But having reviewed those decisions and Judge Thomas' concurring and dissenting views in those cases, I believe his views were very much in the mainstream on those cases. Questions of standing are often very difficult to decide for the courts, but his analysis was the traditional analysis.

Senator BROWN. Thank you very much. I thank all the panel for their testimony.

Senator KOHL. We thank you very much for appearing here today. You have been very helpful.

Senator THURMOND. Thank you very much for your appearance.

Senator KOHL. Our next witness today is Mr. Lane Kirkland, President of the AFL–CIO. Mr. Kirkland has been a distinguished spokesperson on behalf of working people of America for many,

many years, and we are honored and privileged to have him here with us today.

Mr. Kirkland, we would appreciate it if you could summarize your remarks in 5 minutes or as close to 5 minutes as possible.

STATEMENT OF LANE KIRKLAND, PRESIDENT, AFL-CIO, ACCOMPANIED BY LAWRENCE GOLD, GENERAL COUNSEL

Mr. KIRKLAND. Thank you, Mr. Chairman.

I have submitted a full statement for the record. I will give you a summary as briefly as I can. I have with me Lawrence Gold, who is the general counsel of the AFL-CIO, and a frequent practitioner before the Supreme Court and knowledgeable on legal matters that are too esoteric for me.

Mr. Chairman, members of the committee, thank you for the opportunity to testify on the nomination of Judge Clarence Thomas to be an Associate Justice of the Supreme Court of the United States.

In early August, the AFL-CIO, acting through its executive council, determined to oppose Judge Thomas. Our determination was based on a careful study of his record as a Government official and as a participant in the ongoing public debate over the future direction of the country. What we found was deeply disturbing from the perspective of the trade union movement and of the working men and women who comprise trade unions.

For most of the past 10 years in his role as EEOC Chairman and as a writer and a speaker on issues of the day, Judge Thomas has fervently championed the ideological agenda of the far right and has done so without deviation. This committee has questioned Judge Thomas regarding his extreme ideological rhetoric and his attacks on the role of Government in defense of the least privileged of its citizens.

You sought the specifics behind his alarm that the Nation is—and I quote—"careening with frightening speed toward collectivism, coercive centralized planning, and a statist-dictatorial system". You have examined his attacks on such perceived enemies of the right as Franklin Roosevelt and his "later-day political heirs", and particularly the judge's scorn for their "attack on property rights". And you have reviewed with Judge Thomas his writings that expound his view that—quoting again—"the government's role is to assure a climate in which business can flourish and then stand back and stay out of the way."

These quotations on their face, and as Judge Thomas has elaborated on their meaning, are sufficient to explain our opposition to his nomination. Judge Thomas quite simply has a misunderstanding, in our view, about America's historical experience, the role of democratic government in enabling Americans to create a more just and humane civil society, and the value of the social programs designed to meet the legitimate needs of the average working American.

Our child labor laws, environmental laws, securities and banking laws, and product safety and workplace safety laws are examples of the kind of Government action we take for granted today and that Judge Thomas has scorned.