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

by

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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.