a project of The Nation Institute

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Supreme Court Watch Analysis

CLARENCE THOMAS: CAREER, WRITINGS AND DECISIONS

September 5, 1991

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ABOUT THIS REPORT

Supreme Court Watch examines and reports on the judicial record of all nominees to the Supreme Court, and works to bring public attention to Supreme Court decisions affecting civil rights and civil liberties. Founded in 1981, Supreme Court Watch maintains a network of attorneys, legal scholars and investigative journalists committed to monitoring legal trends in such areas as reproductive rights, affirmative action and the First Amendment. Supreme Court Watch publishes an annual review of civil rights and civil liberties cases, and produces a series of radio programs heard on over 50 stations nationwide. Supreme Court Watch is supported by grants from the Aaron Diamond Foundation and the Boehm Foundation, and individual contributions.

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This is the third in a series of reports concerning Judge Clarence Thomas released by Supreme Court Watch. Grateful acknowledgement is made to Simone Monesebian for research and Nick Yasinski for editorial assistance.

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Introduction

Preparing an analysis of Judge Clarence Thomas's record on civil rights and civil liberties issues is at once a simple and a difficult task. It is simple because he has written very little; it is difficult for that very same reason and because his writings and his performance do not reveal a coherent civil rights philosophy.

Clarence Thomas served as a Missouri assistant attorney general from 1974 to 1977; he was Assistant Secretary for Civil Rights in the Department of Education from 1981 until 1982; he was the chairperson of the Equal Employment Opportunity Commission ("EEOC" or "Commission") from 1982 until 1990; and he has been a judge on the Court of Appeals for the District of Columbia for the past eighteen months.

Nevertheless, in spite of these achievements, Clarence Thomas's record yields remarkably little for scholarly review. His writings include only two scholarly legal articles[1/], plus a handful of miscellaneous articles[2/] and

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1/ Clarence Thomas, The Higher Law Background of the Privileges and Immunities Clause of The Fourteenth Amendment, Harv. L. & P. Pol'y, 63 (1988); Clarence Thomas, Toward A Plain Reading of the Constitution -- The Declaration of Independence In Constitutional Interpretation," 30 Harv. L. J. 691 (1987).

2/ Clarence Thomas, With Liberty . . . For All, (Book Review), The Lincoln Review, vol. 2, No. 4, Winter-Spring 1982, at 41; Clarence Thomas, Minorities, Youth, and Education, 3 Journal of Labor Research 429 (1982); Clarence Thomas, Pay Equity and Comparable Worth, 34 (continued...)

twenty judicial opinions as of August 27, 1991. In addition, he has delivered numerous speeches, many of which have been reduced to writing.

Supreme Court Watch, a project of the Nation Institute dedicated to analysis and public education concerning constitutional rights, has analyzed Judge Thomas's relatively sparse written record and, to a lesser extent, his tenure at the EEOC. Our analysis reveals that, at best, Clarence Thomas appears to be disinterested in advancing the civil rights of groups suffering from the effects of past and continuing discrimination. In many cases, he is openly hostile to those rights.

Several aspects of his record make this clear:

. . As chairman of the EEOC, Clarence Thomas was actively opposed to the EEOC's longstanding practice of establishing goals and timetables to remedy employment discrimination. He reversed his predecessor Eleanor Holmes Norton's policy of bringing class action suits

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Lab. L.J. 3 (1983); Clarence Thomas, Current Litigation Trends and Goals at EEOC, 34 Lab. L.J. 208 (1983); Clarence Thomas, The Equal Employment Opportunity Commission: Reflections on a New Philosophy, 15 Stetson L.J. 29 (1985); Clarence Thomas, Remembering an Island of Hope in an Era of Despair, The Lincoln Review, Vol. 6, no. 4, Spring 1986 at 53; Clarence Thomas, Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough? 5 Yale L. & Pol'y Rev. 402 (1987); Clarence Thomas, Thomas Sowell and the Heritage of Lincoln, The Lincoln Review, vol. 8, no. 2, Winter 1988 at 7.

to cure the effects of systemic discrimination, and adopted instead a policy that focused on individual cases of discrimination. The result of this policy change was that the number of people benefitted by EEOC action decreased. Moreover, because it is much more difficult to prove discrimination against an individual than to prove systemic discrimination on behalf of a class, the likelihood for any plaintiff to succeed declined as well. Clarence Thomas also was criticized as a poor administrator by U.S. District Court Judge Harold Greene, who described Thomas's conduct at the helm of the EEOC as "at best . . . slothful, at worst deceptive to the public."[1/]

. . Clarence Thomas's writings and speeches display a strong contempt for affirmative action policies and laws. According to Thomas, it is inappropriate to use race-based remedies to redress race-based inequities; he believes that race should not be a factor in interpreting the "color blind" Constitution. But he fails entirely to suggest alternate ways to overcome the effects of past and continuing discrimination.

1/ AARP v. EEOC, 655 F. Supp. 228, 229 (D.D.C.), aff'd in part, rev'd in part, 823 F.2d 600 (D.C. Cir. 1987).

. . Clarence Thomas has expressed disapproval of Griswold v. Connecticut, the Supreme Court case finding a right to privacy in matters concerning birth control.[1/] Furthermore, he maintains that natural law and the Declaration of Independence inform the interpretation of constitutional rights. He has approved of the analysis used by other writers who maintain that natural law protects the unborn and vitiates a woman's right to choose. In plain language, this means that Clarence Thomas almost certainly would vote to overturn Roe v. Wade. Even more disturbingly, it suggests that he does not believe that states have the authority to permit abortions. This dangerous and extreme position goes well beyond the stated positions of those Supreme Court justices who are likely to vote to overturn Roe v. Wade if the opportunity arises.

. . Judge Thomas's judicial philosophy is difficult to discern from the twenty opinions he has authored in his eighteen months on the Court of Appeals. However, his opinions reveal a strong tendency to deny access to the courts on highly technical, procedural grounds; extreme deference to the

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1/ Griswold v. Connecticut, 381 U.S. 479 (1965).

executive branch of the federal government; and an insensitivity to important environmental concerns.[3/]

Although the Nation Institute is concerned about his sparse scholarly record, and although many questions about Judge Thomas remain unanswered, one thing is clear: Clarence Thomas most assuredly will not carry on the tradition of the justice he was nominated to replace.

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A growing number of voices have expressed concern about the trend of recent administrations to select nominees with scant records. This apparently calculated effort to avoid challenges similar to those which defeated Robert Bork's nomination should not be countenanced.

The Senate's duty of advice and consent is constitutionally mandated. In performing that duty, the Senate is obliged to explore Judge Thomas's constitutional and judicial philosophies, and his views on specific areas of the law. This inquiry requires the nominee's cooperation. It is unacceptable for a nominee to refuse to answer questions about matters, no matter how attenuated, which may some day come before him as a Supreme Court Justice. The Senate cannot fully discharge its duty if a candidate's record does not shed sufficient light on that candidate's

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3/ Infra, pp. 22 to 25.

judicial philosophy or fitness to ascend to the nation's highest court.[6/]

Nor should the disingenuous selection of an African-American to replace Justice Marshall -- even as the Bush administration decries the use of affirmative action -- succeed in thwarting objections to this nominee. As Justice Marshall said in announcing his retirement: "[T]here's no difference between a white snake and a black snake. They'll both bite."[7/]

We note that numerous organizations devoted to the protection and promotion of civil rights and liberties have analyzed Clarence Thomas's written record and other aspects of his background. Their opposition to his nomination has been nearly unanimous.[8/] Their rejection reflects not only

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6/ For a detailed discussion of the Senate's role in the appointment process, see "Supreme Court Watch Statement on the Nomination of Judge David H. Souter," a copy of which is attached.

7/ Haywood Burns, the Dean of CUNY Law School and the Chair Emeritus of the National Conference of Black Lawyers, put it another way: "[T]here need be no concern about toppling [a] black idol. He is a counterfeit hero, having been outrightly antagonistic toward those struggling for social justice. Haywood Burns, Counterfeit Hero, N.Y. Times, July 9, 1991 at A19 (Op. Ed.).

8/ They include: The NAACP; The NAACP Legal Defense and Education Fund; People For The American Way; The Executive Committee of the National Conference of Black Lawyers; The Alliance For Justice; the AFL-CIO; NOW Legal Defense and Education Fund; National Association of Criminal Defense Lawyers; NARAL; and LAMBDA. The (continued...)

the well-founded concern that Clarence Thomas is unlikely to champion the constitutional rights of all persons in our society in the tradition of retiring Justice Thurgood Marshall; it also reflects the fear that he may work actively to dismantle all that Justice Marshall, and so many others, have fought long and hard to achieve.

Accordingly, The Nation Institute urges the Senate to explore fully Clarence Thomas's position on the vital issues that implicate the rights and liberties of all Americans and assure his willingness to protect them. Without such assurances, his nomination should be defeated.

[2/](...continued)
ACLU came within one vote of opposing Judge Thomas's nomination, but decided as an internal policy matter to remain neutral. Its Director, Ira Glasser, stated, "if this were a vote on Thomas, it would have probably been 61 to nothing." Karen DeWitt, ACLU To Remain Neutral On Nomination Of Thomas, N.Y. Times, Aug. 19, 1991, at A10. Additionally, the Southern California Chapter of the ACLU independently decided to oppose Clarence Thomas. A.C.L.U. Dissent on Thomas, N.Y. Times, Aug. 30, 1991 at B20.

Clarence Thomas's Writings

Clarence Thomas may be more of an enigma than any Supreme Court nominee in recent history. The dearth of his legal opinions and other legal writings, combined with his several obtuse policy articles and speeches, make it difficult to discern his judicial temperament. Thomas's writings create only a sketchy outline of the principles that drive him and suggest that those principles derive from his belief in higher and natural law. Therefore, a grounding in his background may shed light on what informs his legal theories, and ultimately on how he may rule if confirmed to the Supreme Court.

Judge Thomas is a complex person with a seemingly simplistic philosophy that appears to reflect complicated, conflicting and disturbing life experiences. His response to the racism, segregation and poverty he suffered inevitably shaped his views on affirmative action, the role of government, abortion and civil rights.

Judge Thomas's current political leanings are the result of an evolutionary process.[2/] He was a Democrat in

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2/ While change often reflects growth, here it could be considered opportunism. Thomas attended what has become known as the Fairmount Conference while working on the staff of Senator John Danforth of Missouri. In referring to the conference, which was intended as a meeting of black conservatives, Mr. Thomas noted that some attendees attended "solely to gain strategic

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his early life and did not become a Republican until 1979, when assuming a position with Republican Senator John Danforth.[10/] As a teenager, Mr. Thomas went through what he has described as a "self-hate" phase that derived from his feelings of anger at being part of an oppressed minority group.[11/] In his youth, Thomas could have been called an activist with militant propensities. In the late 1960s, while at Holy Cross, he encouraged black students to stage a walk-out demonstration against the college's investments in South Africa; led a free-breakfast program for children in Worcester, Massachusetts; and flirted with the Black Panther movement.[12/]

During his years at Yale Law School, his earlier leanings began to shift. Although he was in the top 10% of his class at Holy Cross and clearly qualified to be a Yale student, he subsequently revealed he felt set apart from his

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[9/](...continued)
political position(s) in the new administration." He did not, however, include himself among that group. Clarence Thomas, Address before the Heritage Foundation (Washington, D.C., June 18, 1987) at 6.

[10/] Juan Williams, A Question of Fairness. The Atlantic Monthly, Feb. 1987 p. 71, at 75 (hereafter, "Williams Article").

[11/] See Williams Article at 74.

[12/] Williams Article, at 74; see also Clarence Thomas, Address before Cato Institute (Washington, D.C., April 23, 1987) at 5-7; Interview by Bill Kauffman, Clarence Thomas, Reason (Nov. 1987) at 31-32, (hereafter, "Kauffman Article").

classmates because he was admitted under Yale's recently enacted affirmative action program.[13/] Although Thomas rightfully attributes his achievements to hard work, he felt categorized at Yale because of the affirmative action program and reacted by avoiding any classes that focused on civil rights or other minority-related issues.[14/] Thomas did not want to be identified as one who perhaps had been admitted and must be coddled precisely because he was black.[15/] Even though he worked for New Haven Legal Assistance Association, Mr. Thomas spent his years at Yale studying tax, antitrust, and property law.[16/]

Mr. Thomas's reluctance to be identified with black issues become more apparent as the years progressed. Echoing his "self hate" phase, he said at the Fairmount Conference, one month before Reagan's inauguration, "If I ever went to work for the EEOC or did anything directly connected with blacks, my career would be irreparably ruined."[17/] Thomas has also said that he was "insulted" by the initial contacts made to him concerning both his

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13/ Williams Article at 74.

14/ Id.

15/ Id.

16/ Clarence Thomas, Address before the Heritage Foundation (June 18, 1987), at 7.

17/ Williams Article at 75; Kauffman Article at 33.

position with the Department of Education and as chairperson of the EEOC.[18/]

In his effort to overcome his perception that white colleagues perceived him to be somehow unfit, Thomas shunned minority issues. He apparently began to approach the world as an individual alone, rather than as an individual who not only understands that his life experience in white society is directly and profoundly influenced by his membership in a distinctly identifiable minority group, but also accepts that this negative influence is not the fault of those in that group. Mr. Thomas maintains that individual effort alone can overcome the adverse effects of discrimination without any government involvement aimed at protecting the rights of classes of persons. Indeed, he has favored the rights of the individual over those of classes of persons since the late 1970s. Moreover, Mr. Thomas has often said that he refuses to see civil rights as a matter of group equity.[19/]

Judge Thomas's preference for individual rights over group interests solidified after he encountered the

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18/ Mr. Thomas was offended by these overtures because his background is not in civil rights. Address before Heritage Foundation, supra note 7.

19/ Clarence Thomas, The Equal Employment Opportunity commission: Reflections on New Philosophy 15 Stetson L. Rev. 29 (1985); Thomas, Thomas Sowell and the Heritage of Lincoln: Ethnicity and Individual Freedom, Lincoln Review, Vol. 8, No. 2, Winter 1988.

work of conservative economist Thomas Sowell.[20/] In an analysis of Sowell's philosophy, Clarence Thomas wholeheartedly endorsed his view that restraints on private decision-making, including affirmative action laws, may achieve equality for minorities, but only at the expense of the freedom of the majority. Sowell and Judge Thomas maintain that the so-called equality minority persons achieve under affirmative action laws entails less freedom than can be achieved by other (albeit undefined) mechanisms which do not restrict a majority person's rights.[21/] Judge Thomas also heralded this view as described by Anne Worthan in "The Other Side of Racism - A Philosophical Study of Black Consciousness."[22/] In addition, Judge Thomas endorses a belief in a "color blind" interpretation of the Constitution.[23/] To Thomas, affirmative action promotes

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20/ Clarence Thomas, Address before the Cato Institute, (Washington, D.C., April 23, 1987), at 7.

21/ Thomas has not explained why some restrictions on freedoms -- e.g., a woman's right to abortion -- are permissible, whereas others to achieve a level economic playing field are not.

22/ Anne Worthan, The Other Side of Racism - A Book Review Philosophical Study of Black Consciousness, Lincoln Review, Vol. 2, No. 4, Winter/Spring 1982.

23/ Clarence Thomas, Address before Cato Institute, pp. 20-23 (Washington, D.C., April 23, 1987) at 23; Clarence Thomas, The Modern Civil Rights Movement: Can a Regime of Individual Rights and the Rule of Law Survive?, Address before the Tocqueville Forum, Wake Forest University, April 18, 1988 at 6-8.

the idea that "justice is to be achieved by having white males feel [the] anger and frustration" experienced by blacks and women at being denied a job or promotion because of discrimination and is nothing more than "social engineering in the work place."[21/]

These views sharply contrast with the views of Justice Thurgood Marshall. Justice Marshall believes that race-conscious remedies are necessary to remove the vestiges of discrimination and to achieve a truly color-blind society:

> It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give considerations to race in making decisions about who will hold the positions of influence, affluences, and prestiges in America. For far too long, the doors to those positions have been shut to negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of the past is impermissible.[22/]

Justice Marshall dismisses the argument that the Constitution prohibits race-conscious remedies: "It is plain that the Fourteenth Amendment, which was designed to

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21/ Clarence Thomas, Address before the Cato Institute, Washington, D.C., April 23, 1987 at 22.

22/ Pullilove v. Klutznick, 448 U.S. 448 at 522 (1980) (Marshall, J., concurring), (Quoting, University of California Regents v. Bakke, 438 U.S. 265 at 402 (Marshall, J., dissenting)).

remedy inequity was not intended to prohibit measures designed to remedy the effects of the Nation's past treatment of Negroes."[26]

Not surprisingly, Judge Thomas likens some of his views to those of conservative libertarian philosophy.[27] The primacy of an individual's economic right to the fruits of his or her labor appears repeatedly in Thomas's speeches and writings.[28] Judge Thomas implemented these beliefs as chairperson of the EEOC. The first policy change he effected there was to reverse the Agency's practice of pursuing prospective relief for broad numbers of persons, and focused instead on cases involving individuals who were actually harmed by discrimination.[29] As a result, the EEOC pursued fewer class actions aimed at employment

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[26] University of California v. Bakke, 438 U.S. 265 at 396-9 (Marshall, J., dissenting).

[27] Kauffman Article at 31; Clarence Thomas, Keynote Address Celebrating the Formation of the Pacific Research Institute's Civil Rights Task Force (August 4, 1988), at 2.

[28] Clarence Thomas, Keynote Address Celebrating the Formation of the Pacific Research Institute's Civil Rights Task Force, see supra note 19; Clarence Thomas, Address for Pacific Research Institute (August 10, 1987); See Clarence Thomas, Remarks Prepared for Delivery at Suffolk University (March 30, 1987) at 11; Clarence Thomas, Remarks Delivered Address before Tocqueville Forum, Wake Forest University, see supra note 15.

[29] Williams Article at 80.

discrimination.[20/] Clarence Thomas specifically decried the prior chairperson's focus on victims of historical events.[21/]

Clarence Thomas's libertarian leanings, inevitably, inform his views on economic freedom. Judge Thomas has suggested that he values an individual's right to harm himself or herself more than any notion of governmental protection. He has endorsed the view that African-Americans, and presumably all persons, should be free to work for less than minimum wage, without joining unions, and without licensing regulation from the state.[22/]

Mr. Thomas, however, apparently does not hold free will in such high esteem when it is a woman's right to choose that is in issue. He appears to place a fetus's "inalienable right" to life, liberty and the pursuit of happiness above the woman's very same right. Mr. Thomas said "Lewis Lehrman's recent essay in the American Spectator on the Declaration of Independence and the meaning of the right to life is a splendid example of applying natural

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20/ Congressional Black Caucus Statement in Opposition to the Nomination of Judge Clarence Thomas to the Supreme Court at 7.

21/ Id.

22/ Id. at 43; Clarence Thomas, Thomas Sowell and the Heritage of Lincoln: Ethnicity and Individual Freedom. Lincoln Review, Vol. 8, No. 2, Winter 1988 at 7. Clarence Thomas, The EEOC: Reflections on New Philosophy. 15 Stetson L. Rev. at 31.

law."[13] In that article, Lehrman maintains that abortion is impermissible because it violates the Declaration of Independence and natural law.

Mr. Thomas has attacked Griswold v. Connecticut,[14] which held that there is a constitutionally protected right to marital privacy. He takes issue with Justice Goldberg's concurrence because Justice Goldberg relies on the Ninth Amendment[15] to discover additional fundamental rights, such as the right to marital privacy. Mr. Thomas believes such reliance poses a threat to limited government. According to Mr. Thomas:

> Maximization of rights is perfectly compatible with total government and regulation. Unbounded by notions of obligation and justice, the desire to protect rights simply plays into the hands of those who advocate a total state. The rhetoric of freedom (license, really) encourages the expansion of bureaucratic government. . . . Far from being a protection, the Ninth Amendment will likely become an additional weapon for the enemies of freedom.[16]

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[13] Clarence Thomas, Address before the Heritage Foundation, (Washington, D.C., June 18, 1987) at 22. See Lewis Lehrman, The Declaration of Independence and the Right to Life, The American Spectator, Apr. 1987, at 21.

[14] 381 U.S. 499 (1965).

[15] "The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. Amend. IX

[16] Clarence Thomas, Civil Rights as a Principle Versus Civil Rights as an Interest in Assessing the Reagan Years 391 (D. Boaz ed.).

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To illustrate his point, Judge Thomas speculated that the court may find a Ninth Amendment right to welfare which would require Congress to raise taxes, resulting inevitably in a larger government.[17] Judge Thomas seems to believe that if "notions of obligation and justice" do not temper the desire to protect rights, then we are in danger of falling under a "total state" with a large governmental bureaucracy set up to protect our unenumerated rights. Disturbingly, this argument implies that in the hands of those who are bound by "notions of obligation and justice", which seems to be a catch phrase for higher law, the discovery of unenumerated rights would not pose such a threat.

While Mr. Thomas does not directly attack the right to privacy or a woman's right to reproductive freedom, he certainly believes that Justice Goldberg's reasoning in the Griswold concurrence, which partially underlies these rights, is wrong. Therefore, Judge Thomas has already outlined a basis for challenging Roe v. Wade. Not only is it likely that he would overturn Roe given the opportunity, but it is also possible that he may believe that states cannot permit abortions either.

Mr. Thomas elaborated on his view of natural rights theory in an article published in the Harvard Journal

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[17] Id.

of Law & Public Policy in 1989. There he described the "higher law" background of the privileges and immunities clause of the Fourteenth Amendment.[38] He argued that higher law "is the only alternative to the willfulness of both run-amok majorities and run-amok judges"[39]. He rationalized that natural rights and higher law interpretations are not judicial activism, but rather the best defense of liberty and limited government.[40] As he explained:

> [the] thesis of natural law is that human nature provides the key to how men ought to live their lives. As John Quincy Adams put it: "Our political way of life is by the laws of nature of nature's God, and of course presupposes the existence of a God, the moral ruler of the universe, and a rule of right and wrong, of just and unjust, binding upon man, preceding all institutions of human society and of government." Without such a notion of natural law, the entire American political tradition, from Washington to Lincoln, from Jefferson to Martin Luther King, would be unintelligible.[41]

Mr. Thomas maintains that natural law and higher law theory support the primacy of the individual and "establishes our inherent equality as a God-given

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[38] Clarence Thomas, The Higher Law Background of the Privileges or Immunities Class of the Fourteenth Amendment, 12 Har. J. of L. & P. Pol'y, at 63 (1989).

[39] Id. at 64.

[40] Id. at 63.

[41] Clarence Thomas, Address before the Heritage Foundation (Washington, D.C., June 18, 1987) at 22.

right."[42] He claims to have learned from his grandfather that "all of our rights as human beings [come] from God, not man."[43] Mr. Thomas claims it is this view that enabled him to believe he was equal to whites despite segregation. Judge Thomas has stated that he learned that the laws of man are often at odds with the laws of God.[44] In his own words, as a result, he has become "deeply suspicious of laws and decrees."[45] This is, at the a minimum, a disturbing perspective for a man who would sit on the nation's highest court and interpret those very laws he holds suspect. Directly contradicting his belief that natural law is an alternative to "run-amok judges" Thomas has said he sympathizes with libertarians such as Stephen Macedo who defend the notion of an activist Supreme Court striking down laws

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[42] Id. at 23.

[43] Clarence Thomas, Address before the Kiwanis Club (Washington, D.C., January 14, 1987) at 1; Clarence Thomas, Address before Cato Institute (Washington, D.C., April 23, 1987) at 4.

[44] Id. Given Thomas's views on the origin of rights, the Senate should explore whether Thomas believes that laws protecting an individual's right to exercise their sexual preference are at odds with his God's higher law and whether reliance on his God's law conflicts with the establishment clause of the Constitution.

[45] Clarence Thomas, Address before Cato Institute, see, infra note 31.

that restrict property rights, but tempers this view by saying that the judicial branch should not make policy.[46/]

Judge Thomas's reliance on natural law theory is at odds with current mainstream constitutional thought. Natural law theory was prevalent at the time of the drafting of the Constitution, but, according to at least one legal scholar, Mr. Thomas is the first Supreme Court nominee in the past fifty years to express the belief that natural law is the appropriate basis for constitutional decision-making.[47/] Accordingly, it is imperative that the Senate question Judge Thomas extensively at the confirmation hearings to discern his willingness to disregard precedent and pursue his own interpretation of natural law.

The picture that emerges from Mr. Thomas's sparse writings and the text of his speeches reveals that he prizes individual freedom and liberty above all else, with little or no governmental restraint. Disturbingly, this analysis does not appear to include the freedom of a woman to choose an abortion; freedom from discrimination; freedom from an unsafe work environment; or freedom from any other manner of

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[46/] Clarence Thomas, Address for Pacific Research Institute, supra note 25. (Subsequently in this speech, Thomas praises Bork as an "extreme moderate" and lambasts the process that prevented his nomination. Id.

[47/] Erwin Chemerinsky, Clarence Thomas' Natural Law Philosophy prepared at the Request of People for the American Way Action Fund, 1991.

exploitation. His open hostility toward affirmative action, his belief in unfettered economic freedom, his expressed cynicism about many of the laws of man and his approbation of natural law suggests he may be disposed -- if not compelled -- to overturn precedent in any or all of these areas.

Clarence Thomas's Judicial Decisions

Clarence Thomas has been a Judge on the United States Court of Appeals for the District of Columbia for the past eighteen months, having been appointed by President Bush in 1990. In his brief tenure on the bench, Judge Thomas has written approximately twenty opinions, many of which involve routine matters. Accordingly, it is simply too early to tell from his judicial record what kind of a judge he is.

Nevertheless, even this slim judicial record should set off alarm bells in a few areas -- environmental law, access to the courts for those seeking to enforce their rights against the government, and the degree of deference given the executive branch of government.

In two important environmental cases, Judge Thomas decided against those seeking to protect the environment, denied them a hearing on the substantive issues based on technicalities, and deferred to the views of the federal agencies, as follows:

In Citizens Against Burlington v. Busey, (D.C. Cir. LEXIS 12035 1991), Ohio citizens who live near the Toledo airport and who use a park and campground near the airport challenged the Federal Aviation Administration's ("FAA") decision to allow expansion of the airport. The Ohio citizens urged that expansion of alternative airports,

where less environmental damage might occur, be considered by the FAA in its environmental impact statement. The law requires consideration of "reasonable alternatives" in environmental impact statements. Judge Thomas, writing the 2 to 1 majority opinion of the Court, decided against the Ohio citizens. Instead, he accepted the FAA's reasoning that only alternatives which supported the goal of improving the Toledo economy needed to be considered.

Judge Thomas's decision shows extreme deference to the FAA. Judge Thomas's deference to the FAA's twisted logic, even when it usurped the purpose of the environmental laws, prompted a vigorous dissenting opinion from conservative Judge James Buckley who harshly criticized Judge Thomas's opinion, writing that it "will undermine the NEPA [National Environmental Policy Act] aim of 'inject[ing] environmental considerations into the federal agency's decision making process.'" Judge Buckley further wrote:

> In our first encounter with NEPA, twenty years ago, we spoke of the duty to ensure that "important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy." [citations omitted]. Because I believe that the court today shirks that duty, I respectfully dissent.

If Judge Thomas's narrow interpretation of the environmental protection laws continues, it will result in partial dismantling of the thin umbrella of protection those laws provide for our fragile environment.

In addition, in Cross-Sound Ferry Services Inc. v. Interstate Commence Commission, 934 F.2d 327 (D.C. Cir. 1991), a ferry service complained that the ICC had given its competitor an exemption from NEPA. The Court upheld the ICC's action and held that the exemption was valid. Judge Thomas wrote a separate concurring opinion stating, not only that the exemption was valid, but that the ferry company had no standing to bring this issue before the Court at all. In this case, Judge Thomas would have denied access to the courts to a company seeking to enforce the environmental protection laws.

Similar threads of deference to the executive branch and denial of access to the courts run through Judge Thomas's other decisions. For example, in Judge Thomas's dissenting opinion in Doe v. Sullivan (D.C. Cir. LEXIS 14984 1991), Judge Thomas would have denied as moot a serviceman's challenge to the military's use of unapproved drugs to protect troops from chemical weapons in the Gulf War -- thus closing the courthouse doors to the serviceman's claim and deferring to the federal government. The majority of the Court disagreed, and ruled in favor of the serviceman.

Another example is New York Times Co. v. NASA, 920 F.2d 1002 (D.C. Cir. 1990), in which Judge Thomas joined a 6 to 5 majority opinion that denied the New York Times request that NASA make public the audio tape of the Challenger

astronauts' final minutes. The majority's narrow interpretation of the Freedom of Information Act, and deference to NASA's interpretation of that act, are typical of Judge Thomas's method of deciding cases.

In short, while his brief judicial tenure makes making any final conclusions impossible, some of the hallmarks of Judge Thomas's decisions so far -- extreme deference to the executive branch of the federal government, overly narrow interpretation of laws used to close the courthouse doors to those suing the government, and insensitivity to important environmental concerns -- do not bode well for the future of the Supreme Court.

Clarence Thomas at the EEOC

Clarence Thomas headed the EEOC from 1982 to 1990. During his tenure, the EEOC shifted its emphasis from class actions that help large groups of people to individual actions, failed to use goals and timetables as a way remedying discrimination and neglected thousands of claims by the elderly. In order to analyze his performance there and to understand why it does not reveal much about his legal philosophy, it is necessary to understand how the EEOC works. The following is a brief description of that agency.

The Commission consists of five commissioners, one of whom is appointed chairperson,[18] who decide matters by majority vote and participate equally on issues involving the exercise of authority. The Commission decides if and when to issue charges alleging discrimination, and, among other functions, authorizes the filing of suits by the EEOC.[19]

The EEOC is empowered "to prevent any person from engaging in any unlawful employment practice as set forth in [42 U.S.C. §§] 2000e-2 or 2000e-3."[20] The Commission has the authority to investigate charges of discrimination, to promote voluntary compliance with equal employment laws and

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[18] 42 U.S.C. § 2000e-4(a) (1981).

[19] EEOC Compl. Man. (CCH) ¶ 1911.

[20] 42 U.S.C. § 2000e-5.

to institute civil actions against employers or unions that violate those laws.[21/] The Commission itself does not have the authority to adjudicate claims or impose sanctions; it is the federal courts that have final decision-making responsibilities.[22/] In essence, the Commission acts as police and prosecutor.

An individual who believes that he or she has been the victim of an unlawful employment practice as defined by 42 U.S.C. §§ 2000e-2 or 2000e-3 may file a "charge" with the EEOC.[23/] The charge must describe the facts surrounding the incident, and the legal theory relied on, with sufficient clarity to notify the EEOC that employment discrimination is being claimed.[24/] The claimant need not,

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21/ EEOC v. Sears, Roebuck & Co., 504 F. Supp. 241 (N.D. Ill. 1980), aff'd, 839 F.2d 302 (7th Cir. 1988).

22/ EEOC v. General Tel. Co. of Northwest, Inc., 599 F.2d 322 (9th Cir. 1979), aff'd, General Tel. Co. of Northwest, Inc. v. EEOC, 446 U.S. 318 (1980).

23/ EEOC regulations require the agency to assist persons who wish to file charges or complaints under 42 U.S.C. § 2000e et seq. ("Title VII"), the Age Discrimination in Employment Act, 29 U.S.C. 621, 623 et seq. ("ADEA"), the Equal Pay Act, 29 U.S.C. 204(d)(1) et seq., ("EPA"), or Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791. See EEOC Compl. Man. (CCH) ¶ 131; see also Clarence Thomas, Address before The National Symposium on Employment of Handicapped Individuals by the Federal Government, Galludet College (Washington, D.C. Oct. 24, 1982) at 7.

24/ Cooper v. Bell, 628 F.2d 1208 (9th Cir. 1980).

however, present a formalistic legal pleading, and the charge will be liberally construed.[23/]

Claimants initially file charges with the EEOC's local field office. After determining that the agency has jurisdiction over the charge, EEOC investigators begin a factual investigation of the allegations. Investigators can subpoena documents, interview employers and employees, and do what is necessary to determine whether discrimination has occurred. Investigators also are authorized to pursue a settlement of the dispute between the claimant and the employer if the parties so desire.[24/] If settlement is not a viable option, the investigation is completed and the investigator prepares a report stating whether or not the employer has violated the law. If a violation is found, the investigator sends a letter to the employer outlining the violation. If conciliation between the parties does not follow, the employer can be sued by the EEOC.

Whether or not the EEOC commences a lawsuit is governed more by the Commission's prevailing policy than by the circumstances of any particular case. It was Congress's intent that suits brought by the EEOC would supplement, not

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[23/] Id.

[24/] EEOC Compl. Man. (CCH) ¶ 545.

supplant, an individual's right to sue to enforce equal employment laws.[27/]

Consequently, an EEOC finding that discrimination has occurred is not a prerequisite to a claimant's private discrimination action. Rather, the statute under which the claim is brought governs the procedure. For example, under Title VII the claimant must file a charge and obtain a notice of right to sue before bringing suit.[28/] Under ADEA, a claimant may sue any time after 60 days of the charge filing date but before the statute of limitations expires. In contrast, persons suing under the Equal Pay Act may proceed without first filing a charge with the EEOC.[29/] Eventually, the courts will look more favorably on a suit buttressed by a positive EEOC determination than on one in which the EEOC finds no discrimination.[30/]

If the EEOC determines that discrimination has occurred, the field office investigator sends the case file to attorneys at the EEOC's district offices. The district

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[27/] General Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318 (1980).

[28/] See EEOC Compl. Man. (CCH) ¶ 321. Notices of right to sue are issued on request.

[29/] See EEOC Compl. Man. ¶ 154.

[30/] The information on the workings of the EEOC were provided in a conversation with Leroy Clark, former General Counsel to the EEOC under Eleanor Holmes Norton, on July 24, 1991 (hereafter "Clark Conversation").

office attorneys review each case; if they consider it meritorious, they then make a presentation to the general counsel's office in Washington D.C.[51] The general counsel reviews the cases that survive the administrative process and determines whether they are sufficiently strong, factually and/or legally, to take into court. The meritorious cases are presented to the Commission for a vote. The EEOC general counsel then litigates those claims that are approved by the Commission.[52] Ideally, the general counsel should present all cases involving policy issues to the Commission for a vote.[53]

The Commission directly implements its policies during this phase of the EEOC administrative process by choosing which claims to litigate.[54] It is here that the chairperson, as the leader of the Commission, can have a significant impact on the direction of the agency. For example, Eleanor Holmes Norton, EEOC Chairperson from 1977

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[51] Clark Conversation.

[52] 42 U.S.C. § 2000e-4(b)(1) & (2); EEOC Compli. Man. (CCH) ¶ 1911.

[53] Clark Conversation.

[54] To facilitate this decision-making process, the Chairman appoints standing committees, composed of one or two commissioners. Among its tasks, these committees are charged with identifying issues likely to arise so that the Commission will be prepared to handle any new issues that come before it. Clark Conversation.

to 1980, chose to pursue cases testing the doctrine of comparable worth. Generally, she favored the use of the class action suit as the most effective vehicle to enforce anti-discrimination laws.[52] Accordingly, she instructed Leroy Clark, her general counsel, and the rest of the agency, to identify appropriate test cases.

Mr. Thomas, on the other hand, criticized Norton's focus on what he called victims of "attenuated, historical" events and class actions.[53] He chose to pursue only those cases that involved individuals specifically harmed by discrimination; i.e., cases in which a person was denied a job or a promotion solely because of his or her sex or race.[54] As a result, the number of class action suits attacking systemic discrimination decreased during Thomas's tenure as chairperson.[55]

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[52] Clark Conversation.

[53] Clarence Thomas, "The EEOC: Reflections on New Philosophy." 15 Stetson L. Rev. at 33.

to the Pacific Research Institute (August 10, 1987), at 2; Clarence Thomas, Keynote Address Celebrating the Formation of the Pacific Research Institute's Civil Rights Task Force, (August 4, 1988), at 22.

[54] Statement of the Leadership Conference on Civil Rights Opposing the Confirmation of Judge Clarence Thomas to the United States Supreme Court, (August 7, 1991), at 4 (August 7, 1991); Congressional Black Caucus Statement in Opposition to the Nomination of Judge Clarence Thomas to the Supreme Court, at 7.

In light of the above-described process, the cases the EEOC chooses not to pursue provide additional important information about the Commission, its policies and its chairperson.[69] Thus, to determine Thomas's effectiveness in pursuing the enforcement of anti-discrimination laws as head of the EEOC, a review of the cases he chose not to pursue, as well as policy statements he made, is critical. Such an analysis has been undertaken by several other organizations. The following is a summary of their findings.

As noted above, Clarence Thomas abandoned the EEOC's prior practice of pursuing class actions and focused on individual cases. By way of explanation, Judge Thomas stated that he did not consider individuals who have been harmed by "historical events" to be appropriate beneficiaries of relief from discrimination.[70] But significantly, Thomas's record in prosecuting individual cases was abysmal.

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[69] Unfortunately, the procedural obstacles to suits by aggrieved persons against the EEOC render the opinions in those suits unhelpful in discerning complaints against EEOC policies. Persons who feel the EEOC has not served them properly face enormous obstacles in suing the EEOC. 42 U.S.C. § 2000e et seq. does not confer a right of action against the Commission. Gibson v. Missouri Pac. R. Co., 579 F.2d 890 (5th Cir. 1978), cert. denied, 440 U.S. 921, (1979). As a result, very few cases challenging the actions of the EEOC survive to be determined on the merits.

[70] "NAACP Report on The Nomination of Judge Clarence Thomas," (NAACP) Aug. 1, 1991 at 4.

Moreover, although Thomas criticized the size of his predecessor's case backlog, the General Accounting Office reported that during Thomas's tenure "the backlog of complaints increased and the number of complaints that received a hearing or investigation declined."[21/]

Clarence Thomas also departed from the EEOC's traditional use of goals and timetables in settlements of employment discrimination cases. He explained this departure by adopting a specious interpretation of Stotts, the Supreme Court precedent on this issue,[22/] in order "to . . . conclude that the Court prohibited the long accepted practice of employment goals and timetables."[23/]

Thomas's tenure at the EEOC has been characterized as "display[ing] a failure and unwillingness to enforce . . . federal laws forbidding employment discrimination."[24/] He has never adequately explained the EEOC's failure to prosecute over 13,000 age discrimination cases which resulted in the victims' loss of their right to pursue

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21/ "Statement of the Leadership Conference on Civil Rights Opposing the Confirmation of Judge Clarence Thomas to the United States Supreme Court," (Leadership Conference on Civil Rights) Aug. 7, 1991 at 6.

22/ Firs Fighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984).

23/ "Judge Clarence Thomas - An Overall Disdain for the Rule of Law," Report by People for the American Way, July 30, 1991 at 12.

24/ Id.

their claims.[25] Indeed, upon the discovery of this EEOC failure, Congress passed emergency legislation restoring all 13,000 cases. Throughout the entire congressional inquiry, Thomas failed to cooperate with Congress in congressional hearings. On numerous occasions he grossly underestimated the number of cases in which the victim lost the right to pursue his or her other claim. Furthermore, he displayed open hostility towards the congressional inquirers.[26]

Again demonstrating insensitivity to the elderly, Mr. Thomas failed to implement adequately rules which would require employers to make pension fund contributions for workers over 65 years of age, despite a federal statute mandating such contributions. U.S. District Court Judge Harold Greene characterized the Agency's behavior in this regard as, "[a]t best . . . slothful, at worst deceptive to the public."[27]

In conclusion, Thomas's record at the EEOC raises serious concerns that, as a Supreme Court Justice, he will not be sensitive to individuals pursuing claims under anti-discrimination statutes, and may be openly hostile to such suits by groups. Moreover, it is unlikely that he will support, much less champion, the rights of oppressed groups.

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[25] Id. at 13.

[26] Id.

[27] AARP v. EEOC, supra, note 3.

His record also reveals that he will likely oppose affirmative legislation to alleviate the effects of historical discrimination.

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THOMAS SITS ON BOARD OF ANTI-ABORTION MAGAZINE,
NATION/SUPREME COURT WATCH REVEAL

Contact:
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Judge Clarence Thomas, nominated by President Bush for the U.S. Supreme Court, sits on the editorial board of a conservative journal which has published numerous attacks on abortion rights, according to an exclusive report in this week's issue of The Nation.

Supreme Court Watch, a project of The Nation Institute devoted to analysis of Supreme Court nominees and Court trends, is making this story and related background material available to the press.

According to the investigative report by Nation columnist David Corn, Judge Thomas has sat on the editorial advisory board of the Lincoln Review, a quarterly journal devoted to conservative black opinion published by the Washington-based Lincoln Institute for Research and Education, since 1981. The Lincoln Review has printed frequent and virulent attacks on abortion and affirmative action.

Thomas himself has written three articles for the Lincoln Review since 1981. None are directly concerned with abortion. In his articles, Thomas:

* assails government interference in the economy including minimum wage laws and laws protecting labor unions;
* defends fellow black conservative Thomas Sowell; and

-- more --

* praises the values of the nuns who educated him.

Thomas did not disclose his affiliation with the Lincoln Review or his publications there during his judicial nomination hearings in 1990 or his prior federal appointments, despite the requirement that he list all affiliations and publications on the disclosure form required of presidential appointees.

* A COPY OF THE NATION'S COPYRIGHT ARTICLE IS ENCLOSED. PLEASE FEEL FREE TO CITE IT WITH ATTRIBUTION.

* INVESTIGATIVE REPORTER DAVID CORN IS AVAILABLE FOR INTERVIEWS AT 202-546-2239.

* FOR COPIES OF SUPPORTING DOCUMENTS RELATING TO THIS STORY, INCLUDING THOMAS' ARTICLES, CALL BRUCE SHAPIRO OR NICK YASINSKI AT 212-242-8400.

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Also enclosed for your information is an op-ed column by Supreme Court Watch advisory board member Haywood Burns, published in the New York Times on July 9,1991.

In this strongly-worded opinion column, Burns, President Emeritus of the National Conference of Black Lawyers and Dean of the CUNY Law School at Queens College, argues that Thomas merits no support from civil rights groups or African-Americans.

DEAN HAYWOOD BURNS IS AVAILABLE FOR TELEPHONE INTERVIEWS AT 718-575-4202.

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BELTWAY BANDITS.

DAVID CORN

■ Judge Thomas's Neighborhood

In their excavation of Judge Clarence Thomas's character and philosophical disposition, members of the Senate Judiciary Committee might sift through back issues of the *Lincoln Review*, a quarterly journal published by the Lincoln Institute for Research and Education. Thomas has sat on the editorial advisory board of this magazine, a bastion of black conservatism, since 1981—far longer than he has sat on any court—and its record during his tenure there should at least prompt questions as to the ideas that animate the judge.

Thomas's written opinions in the *Review* have not been extensive. In 1982 he assailed government interference in the economy—citing laws that establish a minimum wage, that require expensive licenses for taxi drivers and that protect "discriminatory labor unions"—as attacks on the freedom of blacks and others. In 1988 at great length he defended Thomas Sowell, a fellow black conservative who has scorned affirmative action, placing the man in the "pantheon of black Americans such as Frederick Douglass, Booker T. Washington, and Martin Luther King, Jr." He noted his own strong aversion to affirmative action and hailed Sowell for presenting "a much-needed antidote to cliches" about the discrimination women face in the workplace. He also argued that individual freedom derives from free enterprise: "Because we Americans are a commercial people, we express our freedom most typically in the diverse means by which we take to gain wealth. And this wealth can in turn serve as a means to higher ends."

In 1986 the *Review* published remarks he made in tribute to the nuns who taught in the Catholic schools he attended in Georgia: "They have taught me to *believe* in God and the word of God." To the nuns, Thomas declared, "I will have no part of this *orgy of self indulgence* that is running rampant in our society. . . . I will *not forsake* you."

Secularists might find something to worry about in the tone of that speech. Abortion-rights activists should note that the *Review* has taken a fiercely anti-choice stand while Thomas has served on its board. Patrick Monaghan, the general counsel for the Milwaukee-based Catholic League for Religious and Civil Rights, decried abortion in its pages in 1983 as "an elite-oriented attempt to judicially slaughter the poverty class, particularly the black portion of it." He added, "The time to move against the racist Abortion Power is now." In 1985 Edward Smith, an associate editor, proclaimed that "the fetus is an unborn human baby and therefore its destruction—for whatever the reasons—is an act of murder." He compared abortion to slavery and likened those who firebomb abortion clinics to John Brown, the abolitionist who stormed the government arsenal at Harpers Ferry in 1859.

■ Does He Read This Stuff?

Much of the *Review*'s content has been standard Reaganite fare—sometimes delivered with a racial twist. An article defending the Strategic Defense Initiative claimed Star Wars spending would lead to "new pathways out of the bondage of economic dependence and welfarism." A 1986 editorial declared capital punishment "an idea whose time has come—again" and pooh-poohed the argument that race is a factor in who is executed. J.A. Parker and Allan Brownfeld—the editor and an assistant editor—castigated the Reagan Administration in 1982 for not doing enough to ban affirmative action. (Both were on Reagan's transition team for the Equal Employment Opportunity Commission, which Thomas came to head.) They also chastised Reagan for backing an extension of the Voting Rights Act to "court favor" with civil rights groups. One article opposed a national holiday for Martin Luther King Jr. and recommended that a commemorative coin be issued instead. An editorial criticized the Commission on Civil Rights for reporting that persistent discrimination is the main reason blacks and Latinos are unemployed at higher rates than whites. (That capitalism is the cure for racism is one prominent motif of the *Review*.) And a 1983 piece argued there was a pressing need for judicial activism—in order to implement a conservative agenda.

On the more wild side, the *Review* favorably evaluated a book that suggested that Karl Marx was a devil worshiper. In 1986 it published an article by John Snyder, the Washington lobbyist for the Citizens Committee for the Right to Keep and Bear Arms, which observed that most of the evil in the world—including homosexuality, adultery, murder, abortion and communism—is the handiwork of the Antichrist. And the journal has frequently charged that South Africa's African National Congress has been controlled by the Communist Party of the Soviet Union.

The *Review*'s take on the A.N.C. is understandable. Editor Parker and William Keyes, a contributing editor, ran a consulting firm that worked for South Africa; a South African newspaper reported in 1988 that U.S. records showed Keyes was receiving $360,000 a year from Pretoria. Keyes also directs the Black Political Action Committee, which has supported Jesse Helms. In the 1970s and 1980s, Parker was a member of the U.S. affiliate of the World Anti-Communist League, whose chapters in other nations contained neo-Nazis and right-wing terrorists. Parker has also worked with Causa, an anticommunist group founded by Sun Myung Moon's Unification Church. Both Parker and Keyes sit on the advisory board of the American Freedom Coalition, another group connected to the Unification Church.

The pedigrees of Parker and Keyes, and anyone else involved with the *Review*, are relevant only to the extent that they show the milieu in which Thomas apparently feels comfortable. His position on the board—which he should have declared on government disclosure forms and did not—has compromised his judicial integrity. Judges are not supposed to associate with entities that adopt controversial stands, particularly on issues that might come before them. Thomas should not be measured by the writings and affiliations of others. But as an editorial advisor, what does he think of the opinions expressed in the *Review* by his comrades? According to Parker, Thomas never complained about any of the *Review*'s articles. Does silence imply assent?

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THOMAS VIOLATED JUDICIAL CODE IN RALSTON PURINA CASE

"Supreme Court Watch" Says Nominee's Impartiality Questionable in Decision Affecting Danforth Family Business

WASHINGTON -- Supreme Court nominee Clarence Thomas apparently violated standards of judicial conduct last year by ruling in a false advertising case that could save millions of dollars for Ralston Purina, the company started and still largely controlled by the family of Thomas's personal friend and political mentor, Senator John Danforth (R-Mo.), a report by The Nation Institute's Supreme Court Watch charged today.

The September 1990 decision, one of Thomas's first opinions as a judge on the U.S. Court of Appeals for the District of Columbia, vacated U.S. District Court Judge Stanley Sporkin's fine of $10.4 million and attorney's fees against the pet food giant for willful misconduct in making false claims promoting the canine health benefits of its Puppy Chow. Thomas ordered the lower court to re-calculate any penalty against Ralston Purina at a drastically reduced rate.

"Judge Thomas clearly showed flagrant disregard for common sense and legally-encoded standards of judicial conduct," the report said, noting a federal law that declares that any judge is disqualified from a case if his or her "impartiality might reasonably be questioned."

Senator Danforth was Thomas's employer both as Attorney General of Missouri and as a U.S. Senator, and is widely recognized as the central proponent of the controversial jurist during his rise through the ranks of the Reagan administration and the federal judiciary.

Full copies of the report and background materials -- including more contacts, the 1990 opinion and financial data -- are available from Supreme Court Watch.

This is the second report on Judge Thomas released by Supreme Court Watch to raise serious questions about Thomas's ethics. The first report revealed his undisclosed membership on the editorial board of the *Lincoln Review*, a conservative quarterly which has published numerous articles opposed to abortion rights and affirmative action.

# # # #

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A BREACH OF ETHICS?

CLARENCE THOMAS, JOHN DANFORTH AND RALSTON PURINA

The second in a series of reports on Judge Clarence Thomas

By Bruce Shapiro
Project Director
Supreme Court Watch
The Nation Institute

Based on reporting by Steve Bennish of the Columbia (Mo.) Daily Tribune, Nick Yosinski and Matthew Ruben.

ABOUT SUPREME COURT WATCH

Supreme Court Watch is a project of The Nation Institute, a nonprofit organization dedicated to research and education in the areas of civil rights, civil liberties and journalism. Supreme Court Watch prepares background reports on Supreme Court nominees, analyses Court trends and produces radio programs. The Supreme Court Watch advisory committee consists of legal scholars, practicing attorneys and journalists.

ABOUT THIS REPORT

This is the second in a series of background reports on Judge Clarence Thomas. It was researched by a team of investigative journalists in consultation with leading experts in judicial ethics.

This report was written by Bruce Shapiro, project director of Supreme Court Watch. Shapiro is an investigative journalist who specializes in civil rights and civil liberties. He is a frequent contributor to *The Nation* and other magazines and has written for the *Guardian* of London, the *Irish Times* and other newspapers abroad. He is former editor of the *New Haven Independent*, a weekly newspaper he co-founded in 1986.

The first Supreme Court Watch report on Judge Thomas revealed Thomas's undisclosed position as an editorial board member of the *Lincoln Review*, a conservative quarterly which has published numerous articles opposing abortion rights and affirmative action.

CONTACTS AND MORE INFORMATION

For more information concerning this report, or for background materials, contact BRUCE SHAPIRO, 212-242-8400 (o), 203-776-0068.

JAN KLEEMAN, an attorney with Paul, Weiss, Rifkind and Wharton, is researching Clarence Thomas's judicial record as a member of the Supreme Court Watch advisory board: 212-373-3110 (w)

Two experts on judicial ethics are familiar with this report and may be contacted for comment:

STEPHEN GILLERS is professor of judicial ethics at New York University Law School and a member of the Supreme Court Watch advisory committee: 212-769-4749 (h), 212-998-6264 (o).

MONROE FREEDMAN is former dean of Hofstra University Law School, where he still teaches. He is unaffiliated with Supreme Court Watch or The Nation Institute: 718-507-2728 (h), 516-463-5516 (w).

A BREACH OF ETHICS?
Clarence Thomas, John Danforth and Ralston Purina

The second in a series of reports on Judge Clarence Thomas

By Bruce Shapiro
Project Director
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The Nation Institute

Based on reporting by Steve Bennish of the Columbia *(Mo.)* Daily Tribune, *and Nick Yasinski and Matthew Ruben of The Nation Institute.*

In apparent violation of the standards of judicial conduct, Judge Clarence Thomas last year played a crucial role in sharply reducing a $10.4 million damage claim against the Ralston Purina Company, a corporation owned in large part by the family of his former employer, close personal friend and political mentor Senator John Danforth of Missouri. Thomas's opinion in *Alpo Petfoods Inc. v. Ralston Purina Company*, written in September 1990 on behalf of a unanimous three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit, reversed a damage award that, even by Fortune 500 standards, had a measurable impact on the company and thus on the finances of Danforth and other members of his family.

Thomas, recently nominated by President Bush for the Supreme Court, failed to disqualify himself from the case despite federal law prohibiting a judge from sitting on any case in which his "impartiality might reasonably be questioned." He did not publicly disclose his relationship to Danforth, which under federal law would have permitted Alpo's attorneys to make their own decision about his participation. As a member of the appeals panel, he presided over the Ralston Purina case just months after Danforth played an instrumental role in persuading fellow senators to approve Thomas's nomination.

A FAMILY BUSINESS

Ralston Purina was founded by Senator Danforth's grandfather, William Danforth. His descendants remain the company's largest shareholders. According to 1990 Senate disclosure forms, Senator Danforth owns more than $7.5 million worth of Ralston Purina stock. He claimed as assets seven different trusts and other stock holdings in Ralston Purina worth more than $1 million, plus an additional Ralston Purina holding worth between $500,000 and $1 million. His actual holdings may well exceed the $7.5 million: disclosure rules require only that senators describe holdings in broad categories, so there is no way of distinguishing holdings greater than $1 million. According to 1990 proxy reports, Danforth's brothers, William and Donald, both members of the Ralston Purina board of directors, either own themselves or control through a family foundation roughly 5 percent of the company's stock. William Danforth is also chancellor and a trustee of Washington University, which owns an addition 7.46 percent of Ralston Purina shares. The Danforth family's role in Ralston

Purina is well known and widely publicized.

In 1966, one of Ralston Purina's top competitors, Alpo Petfoods, sued Ralston Purina for false advertising, charging Ralston Purina with promoting unproven canine health benefits of its Puppy Chow. Ralston Purina sued back, charging that an Alpo ad was equally false. After a sixty-one-day bench trial, U.S. District Court Judge Stanley Sporkin ruled in Alpo's favor, finding that while both companies were guilty of false advertising, Ralston Purina had acted with willful disregard for the law. Sporkin awarded each side attorney's fees but slapped a massive $10.4 million damage award on Ralston Purina.

Ralston Purina appealed. In April 1990 the case was heard by a three-judge panel of the U.S. Court of Appeals for the District of Columbia, including Judge Thomas, who had been confirmed just a few weeks earlier on February 22. Thomas's opinion agreed that both sides had engaged in misleading advertising but found no evidence of willful misconduct on Ralston Purina's part. Thomas vacated the $10.4 million damage award as well as the attorney's fees levied against Ralston Purina, ordering the lower court to recalculate any penalty at a drastically reduced rate. The case is still pending.

A LONG FRIENDSHIP

John Danforth recruited Clarence Thomas out of law school in 1974. Danforth, then Missouri's Attorney General, hired Thomas as an assistant attorney general. Thomas remained on Danforth's staff for one and a half years. When Danforth moved to the U.S. Senate in 1979, he rehired Thomas as a legislative assistant. At the beginning of the Reagan Administration, Danforth promoted Thomas to new prominence, intervening to gain him appointments on the Reagan transition team, on the Department of Education and finally as chair of the Equal Employment Opportunity Commission (EEOC).

Danforth's intervention was central to the Senate confirmation of all of Thomas's government appointments. With each post, Danforth testified publicly and effusively in Thomas's favor. "He is a person of very high character, very fine judgment, has a fine mind, and is a person who is totally committed to the cause of improving employment opportunity for all the people of this country," Danforth said about Thomas in 1986, when Thomas's controversial decisions as EEOC chair led some senators to question his reappointment. The Senator also lobbied hard behind the scenes. "Frankly, Senator Danforth has spoken to me about you and has spoken very highly," Senator Paul Simon of Illinois told Thomas during the 1986 reappointment hearings. Privately, Senate staffers describe Danforth's role as "central" in winning Thomas's confirmation to the Circuit Court of Appeals in 1990.

Danforth and Thomas are also close friends. "I have spent countless hours of my life talking to Clarence Thomas," Danforth declared during Thomas's 1989-90 confirmation hearings for the federal bench. "I consider myself to be his personal friend." Their relationship continues to this day: as indicated by numerous news accounts, negotiations between Danforth and the White House played a crucial role in gaining Thomas's Supreme Court nomination.

INTEGRITY COMPROMISED?

For all these reasons -- their long professional relationship, their friendship and Danforth's political sponsorship -- common sense suggests that Judge Thomas should have disqualified himself from any case of significance to Danforth or his family to avoid even the appearance of indebtedness. Yet when the Alpo case crossed his bench, he made no such offer or disclosure of his connections, according to Richard Leighton, senior partner of Leighton and Regnery, the law firm that represented Alpo.

There is more involved than common sense. Federal law (28 USC 455 a) declares that any judge is disqualified from a case if her or his "impartiality might reasonably be questioned." A related law (28 USC 455 e) permits attorneys to request a judge's recusal, but only after the judge has made a complete disclosure of any connection to the case under consideration. In practical terms, this assessment of conflict generally involves a two-pronged legal test: the closeness of the relationship between a judge and a party appearing before him, and whether the judge's decisions might have a material impact on an individual's finances or other substantive concerns. Of Thomas's close relationship and the appearance of personal indebtedness to Danforth there can be no doubt. What about financial impact?

Rough calculations of the damage award's impact based on the company's 1990 annual report shows the impact is measurable and substantial. Last year, Ralston Purina reported $375.8 million in profits available to shareholders. The Alpo damage award would have amounted to almost 3 percent of that total, a figure of considerable significance to large, long-term shareholders like the Danforths. In addition, a $10.4 million damage award and its elimination would almost certainly affect performance of the company's stock.

The only journalist to underline Thomas's conflict of interest has been Forrest Rose, a columnist for the *Columbia (Mo.) Daily Tribune* (circulation approximately 17,000). He discussed the Ralston Purina case in the course of a July 11 column concerning Thomas's character. "An upright and honest judge would be loath to rule on a case involving a close personal, professional, and political associate," Rose wrote. "Thomas had no such qualms."

The point is not to suggest a conspiracy between Thomas and Danforth. Rather, Judge Thomas clearly showed flagrant disregard for common sense and legally encoded standards of judicial conduct.

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LEGAL TIMES • WEEK OF AUGUST 26, 1991

Bruce Shapiro 4/91

Thomas' Ethics and the Court

Nominee 'Unfit to Sit' For Failing to Recuse In Ralston Purina *Case*

BY MONROE FREEDMAN

Doubts about the suitability of Clarence Thomas as a nominee for the Supreme Court have been raised on a number of grounds. Chief among these is that Thomas, having received the benefits of affirmative action, would now deny those same benefits to others who are no less deserving than he.

As my father once said of his illiberal friend Moe, if Moe had come to America before Moe's father got here, Moe's father would never have been allowed into the country. Similarly, if Thomas had been subject to the same rules that he would apply to others, we probably would have heard nothing about Thomas himself, and we also might have been spared his insensitive views of his sister and her need for welfare.

CASES AND CONTROVERSIES

Another serious ground for doubting Thomas' fitness to sit on the Supreme Court is that just last year he wrote an opinion for the U.S. Court of Appeals for the D.C. Circuit in violation of a federal statute that required him to disqualify himself on ethical grounds.

Before 1974, the judicial recusal statute, 28 U.S.C. §455, used a subjective standard that required disqualification only if "in his opinion" a judge should not sit on a case. In addition, case law had developed a judicial "duty to sit" that tilted against recusal.

These standards ran against the grain of Supreme Court decisions holding that, as a matter of constitutional due process, judges not only must be unbiased but also must avoid even the appearance of bias. As the Court reiterated in a 1984 case, "justice must satisfy the appearance of justice."

In 1974, Congress amended §455 to reflect this constitutional concern with the appearance of impartiality in the administration of justice. The new provision replaced the subjective standard of recusal with an objective one, eliminated the notion of a duty to sit, and broadened substantially the range of cases in which federal judges are required to disqualify themselves.

Sweeping Duty

As §455(a) now reads, any federal judge "shall" disqualify himself in any proceeding in which the judge's impartiality "might" reasonably be questioned.

A good illustration of the sweep of §455(a) is the 1988 Supreme Court decision in *Liljeberg v. Health Services Acquisition Corp.*, 108 S. Ct. 2194. The federal district judge who decided *Liljeberg* was also a trustee of Loyola University in Louisiana. Loyola was not a party in the case, but it did have a significant interest in the outcome. Although the judge at one time had been aware of Loyola's interest, he had forgotten about it and did not connect Loyola to the case when he heard and decided the matter.

Almost a year after judgment had been entered in a way that indirectly benefited Loyola, the losing party learned of the trial judge's relationship to Loyola and moved to vacate the decision and start the case over.

The Supreme Court agreed. "The problem," the Court held, "is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges." To discourage such suspicions and doubts, "[t]he very purpose of §455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible."

The congressional mandate of §455(a) that judges avoid "even the appearance of impropriety" was well-established in 1990 when D.C. Circuit Judge Clarence Thomas sat in *Alpa Petfoods Inc. v. Ralston Purina Co.*, 913 F.2d 958.

In the *Ralston Purina* case, the nonparty who had a significant interest in the outcome was Sen. John Danforth (R-Mo.). Judge Thomas' debt to Danforth is considerable, beginning with Thomas' first job after graduation from law school in 1974 and continuing to this day.

Danforth, as Missouri's attorney general, hired Thomas out of law school as assistant attorney general. When Danforth went to the Senate in 1979, he brought Thomas with him as a legislative assistant. Danforth was then instrumental in moving Thomas up the career ladder, helping to get him appointed to the Reagan transition team, to the Department of Education, and to the top position at the Equal Employment Opportunity Commission.

At each stage, Danforth testified publicly and effusively in Thomas' favor and lobbied for him behind the scenes. This sponsorship included Thomas' appointment to the federal appeals court, when Danforth described Thomas in testimony as his "personal friend." And it is no secret that Danforth's role was crucial in gaining Thomas' nomination to the Supreme Court.

Danforth's connection to Ralston Purina is also a significant one. The company was founded by the senator's grandfather, and members of the Danforth family remain major shareholders. The senator himself owns Ralston Purina stock worth more than $7.5 million. His brothers, William and Donald, are members of the company's board of directors and are also heavy holders of stock, and brother William is chancellor and a trustee of Washington University in St. Louis, which also has large holdings in Ralston Purina.

These facts regarding Thomas' relationship to Danforth and Danforth's relationship to Ralston Purina were set forth more than a month ago in a report by *Supreme Court Watch* (published by the Nation Institute), which was based on reporting in the *Columbia (Mo.) Daily Tribune*. They have not been challenged.

The *Alpa v. Ralston Purina* case involved cross-charges of false advertising. After a two-month bench trial, U.S. District Judge Stanley Sporkin found both companies in the wrong, but found that Ralston Purina alone had acted willfully. Indeed, he found that the firm had "perpetrated a cruel hoax" on dog owners in its false claims that its dog food could cure a serious ailment. He therefore assessed a whopping $10.4 million penalty against Ralston Purina.

Only a few weeks after having been confirmed, Judge Clarence Thomas heard Ralston Purina's appeal—a case in which his patron's family firm was challenging not only a severe penalty but also a finding of deliberate dishonesty in its advertising.

To use the language of the Supreme Court, was there not a sufficient "appearance of impropriety" to require

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Thomas to recuse himself in order to avoid "suspicions and doubts"? Or, in the words of the statute, "might" a reasonable person question Thomas' impartiality in *Ralston Purina*, in which event he "shall" disqualify himself?

Note that the statutory phrasing is not whether a reasonable person "would" question Thomas' impartiality with regard to a case in which his chief sponsor had a significant stake. Rather, it is whether his impartiality "might" reasonably be questioned. Unless no reasonable person could raise a question, recusal is mandated.

Judge Thomas ignored the statutory command. Indeed, he wrote a lengthy opinion for the court overturning the $10.4 million penalty against Ralston Purina and specifically disapproving the trial court's finding that Ralston Purina had perpetrated a "cruel hoax" by running advertisements that it knew lacked support. Defending the honor of the Danforth family firm against Judge Sporkin's finding of bad faith toward its customers, Thomas wrote that Ralston Purina's protestations of innocence could reflect "an honest difference of scientific opinion, rather than a specific intent to mislead consumers."

In reaching this conclusion, Thomas acknowledged that it was necessary to hold that Judge Sporkin's finding of bad faith on the company's part was "clearly erroneous." Thomas further recognized that the Supreme Court has described the deference to trial judges under the "clearly erroneous" standard "in expansive terms," making such findings extremely rare, particularly in lengthy bench trials. Nevertheless, Ralston Purina won its reversal on issues of both money and honor.

The outcome, of course, is irrelevant. Thomas would have been wrong in failing to recuse himself even if he had ultimately held against Ralston Purina. The statute looks to the outset of the proceeding, not to its result. As Yale Law Professor Geoffrey Hazard Jr. has observed, the notion of "no harm, no foul" is "invalid as an ethical proposition."

For the same reason, it is also irrelevant that Thomas' opinion was joined by the other two judges in the case. Judging is a "shared enterprise," as Justice Harry Blackmun put it. Justice William Brennan Jr. added that "[e]xperience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition." For that reason, Justice Blackmun wrote, the presence on a panel of a single judge who is not impartial poses "an unacceptable danger of subtly distorting the decision-making process."

Also irrelevant is the fact that counsel for Alpo did not object to Thomas' presence on the bench. No objection or motion is required to trigger judicial disqualification under §455(a). *Rather*, as expressed by the 5th Circuit in *Delesdernier v. Porterie*, 666 F.2d 16, 121 (1982), the statute is "directed to judges . . . and it is meant to be self-enforcing."

This is emphasized by §455(e), which allows waiver of disqualification by the parties, "provided it is preceded by a full disclosure on the record of the basis for disqualification." Thus, it is not sufficient that the judge surmise, even correctly, that counsel are aware of the grounds for disqualification and choose not to complain. As made clear at the Senate hearings on the recusal statute, the drafters were conscious of counsel's dilemma of risking the enmity of a judge by initiating the recusal process.

Silence No Excuse

But Thomas failed to initiate a waiver process by making "full disclosure on the record" of his connections with Danforth and of Danforth's connections with Ralston Purina. Since this statutory precondition for waiver was not met, no waiver of Thomas' recusal can be inferred from the silence of the parties.

Counsel for Alpo, Richard Leighton of D.C.'s Leighton and Regnery, says that he was aware of Thomas' jobs with Danforth and of Danforth's connections with Ralston Purina. "We saw it and even made jokes about it," he said in a recent telephone interview. He was not aware of what he called the "abiding friendship" between Thomas and Danforth. Even assuming that, he said, he saw no grounds for a recusal motion.

Leighton's observations may be affected by a felt need to justify his own failure to act as well as Thomas' (although the statute places the onus on the judge, not the lawyer). My own judgment and that of other litigators is that the appearance of impropriety in the *Alpo v. Ralston Purina* case is not a joking matter and that it is clearly within the mandate of §455(a).

In the *Ralston Purina* case, Thomas showed no regard for his ethical obligations as a judge and no respect for the statutory mandate that he recuse himself. On both counts, Thomas is unfit to sit on the Supreme Court of the United States.

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