STATEMENT OF A PANEL CONSISTING OF HAYWOOD BURNS, SUPREME COURT WATCH; PATRICIA WILLIAMS, CENTER FOR CONSTITUTIONAL RIGHTS; JAMES J. BISHOP, AMERICANS FOR DEMOCRATIC ACTION; AND WILLIAM B. MOFFITT, NATIONAL CENTER FOR CRIMINAL DEFENSE LAWYERS

Mr. BURNS. Senator Simon, Senator Thurmond, my name is Haywood Burns. I am dean and professor of Law at the City University of New York Law School, at Queens College, and president of the Nation Institute.

I appear before you today on behalf of Supreme Court Watch, a project of the institute dedicated to scholarly research and public education on the civil rights and civil liberties records of Supreme Court nominees.

Supreme Court Watch has testified before his committee regarding nominees since Judge Sandra Day O'Connor. We have previously submitted an extensive report on Judge Clarence Thomas, as the Senator has indicated. I now formally request, with respect, Senator, that it be made a part of the record.

Based on the past week's hearings, it would appear that Judge Thomas believes there are four rules of confirmation of Justices: First, disown your past record; second, don't predict your future; third, smile with self-deprecating humor; and, fourth, express virtually no opinions on any subject with which anyone would likely disagree.

But this committee knows those are not the rules. You have a high constitutional duty to perform, which is being frustrated. As Senators, you should not be asked to approve a nominee who so dodges and distorts his own long record, who refuses to address broad questions of social and judicial philosophy well within the scope of this committee's mandate. Candid answers to reasonable questions ought to be a minimum qualification for a lifetime Supreme Court appointment.

Supreme Court Watch, like others who preceded us before this committee, opposes Judge Thomas, because of his record of disdain for the law while in previous government service. His willingness to elevate personal political preference over the mandate of Congress and the courts, his long record of attacks on established constitutional precedents in the areas of civil rights and civil liberties.

We are deeply troubled, as are tens of millions of other Americans, by his attitudes and actions as they affect women, racial minorities, the poor, the elderly, and the environment.

Beyond the record, however, we ask that you also consider the grave implications of Judge Thomas' lack of forthrightness with this committee.

You have all witnessed Judge Thomas' numerous equivocations. His past vociferous attacks on civil rights and privacy were simply philosophical musings. Despite his extravagant praise for the Lewis Lehrman antiabortion article, he now tells us he doubts he ever read it. Judge Thomas signed a White House report calling for an end to a woman's right of choice, and now claims he hasn't read that, either.

In response to questions from Senator Leahy, he stated, incredibly, that not once since *Roe* v. *Wade* came down during his law

school days has he engaged in a discussion or held a view on this most controversial case. While refusing to discuss reproductive rights, he readily discusses capital punishment.

In response to questions from Senator Simon, he asked us to believe that he had no knowledge of his close friend and mentor Jay Parker's paid representation of the race in South African Government, though, as Senator Simon noted, others have come forward to say that they engage in long meetings with Judge Thomas on this very subject.

Unfortunately, Judge Thomas' performance before this committee is consistent with a history of lack of candor, compassion, and ethical judgment. As head of the EEOC, he misrepresented to Congress the number of lapsed Age Discrimination in Employment Act cases. In callous and intemperate terms, he has repeatedly attacked the country's civil rights leadership. In the most opportunistic and self-serving manner, he has publicly degraded and humiliated his own sister, to make a point about his views on welfare.

Despite his supposed commitment to impartiality repeated several times to this committee, Judge Thomas did not recuse himself in the 1990 District of Columbia Circuit Court decision to reject Special Prosecutor Lawrence Walsh's request for an en banc hearing of Colonel Oliver North's criminal conviction, notwithstanding having spoken out publicly in support of Colonel North on several occasions.

Perhaps most egregiously, he participated in the *Alpo Petfoods* v. *Ralston Purina* case, involving a company in which his mentor and political sponsor Senator John Danforth holds a significant financial interest. Rather than recuse himself from this case, Judge Thomas voted to overturn a multi-million-dollar judgment against the Ralston Purina Co. Without in any way impugning Senator Danforth, it should be clear that Judge Thomas' participation in the case showed a serious ethical blind spot unworthy of someone who would sit on the High Court.

Over and over in these hearings, members of this committee have asked who is the real Clarence Thomas. Indeed, on the surface, Judge Thomas seems profoundly inconsistent. But, in fact, in avoiding this committee's reasonable inquiries, Judge Thomas displays a lack of regard for the role of the legislative branch and acceptance of unchecked Presidential authority quite similar to that which he displayed repeatedly as a government official.

What is more—

Senator SIMON. If you would conclude your remarks.

Mr. BURNS. Thank you, Senator. I will.

What is more, it is here on the bench that Judge Thomas has shown several examples of the same disturbing deference to executive authority.

Against the backdrop of this record, we urge the members of this committee to assert the full constitutional authority that is theirs. As coequal partners with the President in the appointment of a Supreme Court Justice, do not permit us to go unchecked further along the road to what has been called the imperial presidency. The next Justice, probably serving well into the 21st century, will affect the hearts, minds, and bodies of Americans in ways not likely to soon be undone.

To Judge Thomas and to anyone who follows in his train who lacks the requisite qualifications for this high office, we urge the Senate to firmly and resolutely say no.

Thank you.

[Report follows:]

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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.

The editor and authors of this report are attorneys in private practice in New York.

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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3/(...continued)
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.

* * *

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

(continued...)

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

Freedman
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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.

Monroe Freedman, the Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra University Law School, testifies frequently as an expert witness on lawyers' ethics. "Cases and Controversies" appears monthly in Legal Times.

Senator SIMON. Thank you very much.
Is there any preference about who goes next?
Ms. WILLIAMS. I will go next.
Senator SIMON. Patricia Williams.

STATEMENT OF PATRICIA WILLIAMS

Ms. WILLIAMS. Good afternoon, Senator Simon and ladies and gentlemen.

I come today before you on behalf of the Center for Constitutional Rights, and it is with great regret that we oppose the nomination of Clarence Thomas. Based on his candidacy, it would be presenting a threat to the assiduous protection of civil liberties, particularly in the areas of women's rights, affirmative action, and rights of the elderly.

I would start by making a brief observation about the course of these hearings. There has been a deeply disconcerting pattern of Judge Thomas either revising or disclaiming many of the most troubling aspects of his record over the past decade.

If one believes in this epiphanous recanting, we are left with the disturbing phenomenon of a Supreme Court nominee who didn't read his own citations, who misunderstood the legal import of his own obstructionist administrative actions, and who really didn't mean most of what he said. And if one is not inclined to believe that Clarence Thomas' keen intelligence could leave him in quite so disingenuous a state of disarray, then you the Senate must come to terms with the fact that you are confronted with an outright practiced refusal to answer questions, and this is a tremendously serious violation of the Senate's right to answers about any nominee's views and his position to uphold precedent, judge facts, interpret new law.

Ambiguity is not the standard. A senatorial leap of faith, as the Philadelphia Inquirer put it yesterday, is not good enough. The Senate has a constitutional duty to ensure that the Court remains a place where both popular and unpopular causes may be heard.

There have been many careless accusations about how politicized the hearings have become, but the Constitution expressly makes the senatorial process of inquiry a political one. The Constitution specifies that no nominee shall be confirmed, without the advice and consent of the Senate. And let me be clear, this concern has nothing to do with whether Clarence Thomas is conservative, liberal, Republican, or Democrat. This concern has nothing to do with whether Clarence Thomas is a role model or not. It is about the Court's actions. The job is more than a role, and Clarence Thomas would be more than a model. It is about real power over the real fates of very real future generations.

If the Senate is confronted with a tabula rasa or even a tabula not so clara, mystery, as even some of you have acknowledged, then there is little basis for knowledgeable advice or informed consent, and this again is a severe threat to the functioning of our tripartite system of government, to the balance of political input that the involvement of several branches of government must provide, before somebody is placed into that most sensitive position of dis-

cretionary insularity, that shielded office of highest trust that is the Supreme Court.

Second, one of the most distinguishing features of Clarence Thomas' philosophy is his wholesale rejection of statistics and other social science data, and with it the rejection of a range of affirmative action remedies that have been central to our social and economic progress.

While self-help and strong personal values are marvelous virtues, they are no standard for the zealous protection of civil and human rights, that protection being the paramount task of the judiciary in any democracy and of our Supreme Court in greatest particular.

The problem with Clarence Thomas' espousal of self-help values is that he positions them in direct either/or tension with any other value. Self-help is presented as bitterly competitive, rather than in complete concert with those social remedies and measures that would help ever more, rather than ever fewer people.

I recently saw a television program, something that we have all seen, I think, over voices presenting statistics about the lack of educational opportunity for black children in inner-city schools, about dropout rates, drugs, crime, teacher apathy, lack of funding, padlocked public libraries, and the low expectations of officials and school administrators.

At the end of this very depressing summary, the anchor turned to four teenagers, all black and all excellent students in a special program designed to encourage inner-city black youths with an interest in math and science, "Are you here to show us that's a lie?" asked the commentator. The students then proceeded to try to redeem themselves from the great group of the "not very good" inner-city black kids, by seeing themselves apart as ambitious, dedicated, different in one sense, yet just the same as the majority of all other kids at the same time.

It was unbearable listening to these young people try to answer this question. It put them in an impossible double bind. They were lower-class kids who came from tough inner-city neighborhoods, where very few of their friends could realistically entertain aspirations to become neurosurgeon or microbiologists, and it was this community from which they were being cued to be different, in order to prove the truth of their individualism.

Let me be very clear, I am not faulting, but praising these young people's aspirations and goals, but what concerns me is the way in which not only the TV anchor, but also many in the society, including many blacks and including Clarence Thomas, force them and others like them to reconcile their successful status by presenting the conditions from which they were so serendipitously rescued as mere fiction, waiting to be willed away by the mere choice to overcome it.

Moreover, a question, a model that asks children whether they can prove statistics to be a lie does not treat statistics as genuinely informative. If the actual conditions of large numbers of people can be proved a lie by the accomplishments of an exemplary few, then social science data only reinforce an exception that proves the rule. They do not represent the likely consequences of social impoverishment, they bear no lessons about the chaotic costs of the last sever-

al years of having eliminated from our social commitment the life nets of basic survival.

Rather, social science data are reduced to evidence of deserved destitution and chosen despair, the numerical tracking of people who dissemble their purported deprivation, and dismissed as mere lockstep thinking opinion, rather than empiricism.

The Supreme Court in recent cases, perhaps most vividly in *City of Richmond* v. *Croson*, has persistently done something with statistical evidence that is very like asking schoolchildren if they can make into a lie the lost opportunities of countless thousands of others.

The dismissiveness of Clarence Thomas' analysis of social science evidence exceeds even that of the majority's reasoning in *Croson*. For all his constant and admittedly quite moving anecdotalizing about his own history, Thomas by this gesture effectively supplants our larger common history with individualized hypotheses about free choice, in which each self chooses her destiny, even if it is destitution.

Clarence Thomas has not clearly committed to an historical context that gives at least as much weight to the possibility that blacks and other groups historically disenfranchised groups have not had as many chances to be in charge of things as to the possibility that they just don't want to or that they just can't.

If we do not begin to take the horrendous social conditions of black people seriously as social and constitutional matters, not just individual problems, we risk becoming a permanently divided society. Social necessity not only must have, it may and does have at least some place in the Supreme Court's considerations into the next century.

Thank you.

[The prepared statement of Ms. Williams follows:]

Testimony of Patricia J. Williams

STATEMENT
BY
PATRICIA J. WILLIAMS
ON BEHALF OF
THE CENTER FOR CONSTITUTIONAL RIGHTS
AGAINST THE NOMINATION
OF JUDGE CLARENCE THOMAS TO THE
U.S. SUPREME COURT

Senators, Ladies and Gentlemen, Good afternoon. I come before you today on behalf of the Center for Constitutional Rights. It is with great regret that we oppose the nomination of Clarence Thomas.

Many of the civil rights organizations who have preceded me have distilled the basis of our concern that Clarence Thomas's nomination represents a threat to the assiduous protection of civil liberties, particularly in the areas women's rights, affirmative action, rights of the elderly. I will not repeat all of the bases of the Center's concern. You may refer to the Statement of the Center which I will enter into the record at the end of this presentation.

One of the most distinguishing features of Clarence Thomas's philosophy is his wholesale rejection of statistics and other social science data, and with it the rejection of a range of affirmative action remedies that have been central to our social and economic progress.

While self-help and stong personal values are marvelous virtues they are no stand-in for the zealous protection of civil and human rights--that protection being the paramount task of the judiciary in any democracy, and of our Supreme Court in greatest particular. The problem with Clarence Thomas's espousal of these self-help values is that he positions them in direct "either/or" tension with the any other value; self-help is presented as bitterly competitive rather than in complete concert with those social measures that would help ever more rather than ever fewer people.

An example of why this kind of created tension is so pernicious: recently, I saw a television program, such as we have all seen, with overvoices presenting statistics about the lack of educational opportunity for black children in inner-city schools--statistics about drop-out rates, drugs, crime, teacher apathy, lack of funding, inadequate facilities (particularly for math and science study), padlocked public libraries, low expectations of civic officials and school administrators, and general conditions of hopelessness. At the end of this very depressing summary, the anchor turned to four young teenagers in the studio, all black, all excellent students in a special program designed to encourage inner-city students with an interest in science. He asked: "We've just heard that black kids aren't very good in math and science; are you here to show us that that's a lie?" The students then

proceeded to try to redeem themselves from the great group of the "not very good" inner city black children by setting themselves apart as ambitious, dedicated, "different" in one sense, yet "just the same as" the majority of all other kids at the same time.

It was unbearable listening to these young people try to answer this question. It put them in an impossible double bind. These were lower class kids who came from tough inner-city neighborhoods where very few of their friends could realistically entertain aspirations to become neurosurgeons or microbiologists. It was this community from which they were being cued to be different. Let me be very clear: I am not faulting, but praising these young people's aspirations and goals. What concerns me is the way in which not only the TV anchor, but also many in this society, including many blacks, and including Clarence Thomas, force them and others like them to reconcile their successful status by presenting the conditions from which they were so serendipitously rescued as a mere fiction waiting to be willed away by the mere choice to overcome it. In this way, the commentator's question actually limited their alternatives, compromised their function as *realistic* role models, and prompted explanations of their good fortune that tended to kill their sense of communal affiliation as the only way of permitting the truth of their individualism to remain intact. Although this sort of rhetoric is frequently wrapped in

aspirations of racial neutrality, it in fact pits group against individual in a way that is not only race-based, but pits successful or middleclass blacks against their less fortunate friends and even family.

Moreover, a question, a model that asks children whether they can prove statistics to be a lie does not treat statistics as genuinely informative. If the actual conditions of large numbers of people can be proved a lie by the accomplishments of an exemplary few, then social science data and statistics only reinforce an exception that proves the rule. They do not represent the likely consequences of social impoverishment; they bear no lessons about the chaotic costs of the last several years of having eliminated from our social commitment the life nets of basic survival. Rather, these data are reduced to evidence of deserved destitution, and chosen despair, the numerical tracking of people who disssemble their purported deprivation--dismissed as mere "lockstep" thinking, opinion rather than empiricism.

The Supreme Court in recent cases, perhaps most vividly in City of Richmond v. J.A. Croson, has persistently done something with statistical evidence that is very like asking four schoolchildren if they can make into a lie the lost opportunities of countless thousands of others. Richmond had a black population of approximately 50%, yet only 0.67% of public construction expenditures went to minority contractors. The city set a

30% goal in the awarding of its construction contracts to minorities, based on its findings that local state and national patterns of dicrimination had resulted in all but complete lack of access for minority-owned businesses. The Croson majority dismissed these gross underrepresentations of people of color, of blacks in particular, as potentially attributable to their lack of "desire" to be contractors. In other words, the nearly one hundred percent absence of a given population from an extremely lucrative profession was explained away as mere lack of initiative. As long as the glass is 0.67% full....

The dismissiveness of Clarence Thomas's analysis of statistical evidence exceeds that even of the majority's reasoning in Croson. For all of his quite moving anecdotalizing about his own history, Thomas by this gesture effectively supplants our larger common history with individualized hypotheses about free choice, in which each self chooses her destiny even if it is destitution. Clarence Thomas has not clearly committed himself to taking into account past and present social constraints as realistic infringements on the ability to exercise choice. He ignores that history which gives at least as much weight to the possibility that certain minority groups have not had many chances to be in charge of things as to the possiblity that they just don't want to, or that they just can't.

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But if we do not begin to take the horrendous social conditions of black people seriously--as social not just individual problems--we risk becoming a permanently divided society. Such social necessity not only may have, it MUST have at least some place in the Supreme Court's considerations into the next century.

I will close by making a brief observation about the course of these hearings. There has been a deeply disconcerting pattern of Judge Thomas either revising or disclaiming much of the most troubling aspects of his record over the past decade. If one believes in this epiphanous recanting, we are left with the disturbing phenomenon of a Supreme Court nominee who didn't read his own citations, who misunderstood the legal import of his own obstructionist administrative actions, and who didn't really mean most of what he said.

And if one is not inclined to believe that Clarence Thomas's keen intelligence could leave him in quite so disingenous a state of disarray, then you, the Senate must come to terms with the fact that you are confronted with an outright, practiced refusal to answer questions. And this is a tremendously serious violaton of the Senate's right to answers about any nominee's views and disposition to uphold precedent as well as judge facts, interpret new law. The Senate has a constitutional *duty* ensure that the court remains a place where voices of dissent and unpopular

causes may be heard. Ambiguity is not the standard. A senatorial leap of faith, as the Philadelphia Enquirer urged yesterday, is not good enough. Much of the vocabulary that even some senators have employed during the course of these hearings--"impression," "faith," "instinct," "hope," and "trust"--simply does not amount to a reasoned "choice" to support Clarence Thomas.

There have been many careless accusations about how "politicized" these hearings have become. But the Constitution expressly makes the Senatorial process of inquiry a political one. The Constitution specifies that no nominee shall be confirmed without the "advice and consent" of the senate. Let me be clear: the basis of this concern has nothing to do with whether Clarence Thomas is conservative, liberal, republican, or democrat. If the senate is confronted with a tabula rasa--or even a tabula-not-so clara, a "mystery" as some of you have acknowledged--then there is little basis for either knowledgeable advice, or informed consent.

And this, this is a severe threat to the functioning of our tripartite system of government, to the balance of political input that the involvement of the several branches of government must provide before someone is placed into that most sensitive position of discretionary insularity, that shielded office of highest trust that is the Supreme Court.

STATEMENT BY

THE CENTER FOR CONSTITUTIONAL RIGHTS

AGAINST THE NOMINATION OF

JUDGE CLARENCE THOMAS

TO THE U.S. SUPREME COURT

Statement by the

Center for Constitutional Rights

against the nomination of

Judge Clarence Thomas

to the United States Supreme Court

The Center for Constitutional Rights (CCR) is a non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights.

Contributions to CCR are tax-deductible.

Additional copies of this booklet can be ordered from the Center for Constitutional Rights at the address below.

This pamphlet was prepared at CCR.

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"I am unalterably opposed to programs that force or even cajole people to hire a certain percentage of minorities."

JUDGE CLARENCE THOMAS

The Center for Constitutional Rights urges all groups and individuals who are concerned with social justice to vigorously oppose the nomination of Judge Clarence Thomas to the Supreme Court.

This nomination is competely unacceptable for the many reasons detailed below, which include Judge Thomas' controversial role as administrator of the Equal Employment Opportunity Commission (EEOC), his views on the most serious issues currently facing women and people of color, and his judicial qualifications, which, like most of the Bush-Reagan appointments to the federal bench, reflect slender legal and judicial experience.

Moreover, this nomination is an insult to the African-American community which must now endure, if President Bush has his way, the replacement of a legendary African-American fighter for human rights -- Justice Thurgood Marshall -- with a right-wing African-American bureaucrat -- Judge Clarence Thomas.

It is also an affront to millions of Americans -- people of color, women, laboring people, the poor, the elderly -- who, for the past 25 years, looked to the Supreme Court as the final arbiter and protector of their rights.

By selecting Judge Thomas, President Bush seeks to get one step closer to the goal he and President Reagan charted 11 years ago, and which they have nearly accomplished: the appointment of conservative judges to all levels of the federal court system, including the Supreme Court, who will alter the judicial face of our country for generations to come.

While President Bush, who recently demonstrated his dedication to civil rights by opposing the Civil Rights Bill, cynically plays on the legitimate desire of many people to see diversity on the court, let there be no doubt about it: he intends to utilize a person of color to put the last nail in the coffin containing the progressive legacy of Justice Marshall. This nomination raises the nightmarish prospect of right-wing presidents using women and people of color to reverse the gains won over the past three decades, gains won with blood and tears. It cannot -- to use President Bush's own words in another grim context -- be allowed to stand.

Judge Thomas is an unsuitable candidate for the following reasons:

Record as Chair of the Equal Employment Commission

While serving as Chairman of the EEOC, the agency which enforces federal laws prohibiting employment discrimination on the basis of race, sex, national origin and age, Judge Thomas informed a senate committee that more than 13,000 age discrimination complaints were at risk of being lost because they were not processed before the expiration of the two-year statute of limitations.[1]

During his tenure, the number of class action suits declined precipitously in comparison to the number of individual cases. This meant that the agency was more concerned with individual cases than with challenges to systemic discrimination. In fact, Judge Thomas wrote, "most of our cases involve discrimination by a particular manager or supervisor, rather than a 'policy' of discrimination..."[2]

Judge Thomas' methodology was described as follows in a profile in the Atlantic Monthly:

> If an employer over the years denies jobs to hundreds of qualified women or blacks because he does not want women or blacks working for him, Thomas is not prepared to see a "pattern and practice" of discrimination. He sees hundreds of local, individual acts of discrimination. Thomas would require every woman or black whom that employer had discriminated against to come to the government and prove his or her allegation. The burden is on the individual. The remedy is back pay and a job. "Anyone asking the government to

do more is barking up the wrong tree," Thomas says.[3]

The General Accounting Office found in 1988 that a large number of cases were closed -- from 40 to 87 percent -- because allegations were not fully investigated by the field offices and state fair employment practices agencies.[4] In addition, the backlog of cases at the EEOC rose from 31,500 in 1983 to 46,000 in 1989, as did the processing time -- from 4 to 7 months in 1983 to almost 10 months in 1989.[5] The number of equal pay cases declined from 35 in 1982 to 7 in 1989.[6] And the agency ceased to aggressively pursue its mandate: former EEOC Chair Eleanor Holmes Norton wrote, "The EEOC effectively has lost the role as lead agency conferred to it by the historic Civil Rights Reorganization of 1978, not because of any change in law, but by abdication to the Justice Department."[7] Finally, even the Civil Rights Commission, which had lost much of its steam in the Reagan years, reported in 1987 that "on a number of policy issues requiring regulatory activity, the EEOC to date has accomplished very little."[8]

"I don't think that government should be in the business of parceling out rights or benefits."

- Judge Clarence Thomas

Actions and views about affirmative action

Judge Thomas regards affirmative action as useless and harmful to the initiative of African-Americans (this despite the fact that he took advantage of an affirmative action policy at Yale Law School). The author of the Atlantic Monthly portrait described Judge Thomas as believing that "There is no governmental solution" [to historical discrimination], and that "government simply cannot make amends, and therefore should not try."[9]

In an interview in the New York Times in July 1982, Judge Thomas said:

> I am unalterably opposed to programs that force or even cajole people to hire a certain percentage of minorities. I watched the operation of such affirmative-action policies when I was in college, and I watched the destruction of many kids as a result. It was wrong for those kids, and it was wrong to give that kind of false hope.[10]

He wrote, "A positive civil rights policy would aim at reducing barriers to employment, instead of trying to get 'good numbers.'"[11] And further:

> I don't think that government should be in the business of parceling out rights or benefits. Rights emanate from the Constitution and from the Declaration. They are there, and they should be protected. I am not confident that Washington is any more moral or stronger than anyone else to assign rights, or even better able to do it. We should be careful not to concede the rights of individuals in our society in order

to gain something such as parity. Ultimately that will do us a disservice [12]

While heading up the EEOC, Judge Thomas changed its previous practice of setting goals and timetables for employers to make jobs available to women and people of color. In 1985, according to an Alliance for Justice report, "the EEOC acting general counsel, with the Chairman's support, ordered EEOC regional attorneys not to include goals and timetables for settlements or in actions in which the EEOC had intervened. The general counsel also ordered legal staff not to seek enforcement of goals and timetables in existing consent decrees." This prompted a protest by five congresspersons who stated that the "Commission is forfeiting the most effective tool to combat centuries of discrimination." It was only when the Supreme Court handed down three decisions in May and June 1986 upholding the use of goals and timetables that Judge Thomas promised to reinstate the policy.[13]

Judge Thomas acknowledged the deeply entrenched racism in this country when he said, "There is nothing you can do to get past black skin. I don't care how educated you are, how good you are at what you do -- you'll never have the same contacts or opportunities, you'll never be seen as equal to whites."[14] Yet he eschews affirmative action as a way to reduce "barriers to employment," and offers no other alternatives, leaving women and people of color to the mercy of the very people he distrusts.

Other racial matters

Judge Thomas complained about civil rights leaders who "bitch, bitch, bitch, moan and moan and whine" about the Reagan Administration.[15]

A sharp exchange took place between Judge Thomas and Joseph H. Duff in a symposium on affirmative action:

> *Thomas:* A race-conscious law is one that defines rights based on race. Segregation and apartheid are race-conscious laws.
>
> *Duff:* I was admitted to law school under the University of California's Equal Opportunity Program. I passed the bar exam, and now practice law in the community. That is a good race policy.
>
> *Thomas:* It is good for you.
>
> *Duff:* It is also good for the community and the society.
>
> *Thomas:* No, I think it is good for you. When I went to college the problems with those policies were quite significant as were the animosities they generated.[16]

"Right to life," the family, and contraception

Although Judge Thomas has not ruled directly on these issues during his tenure as a judge, a good idea of his general attitude about family issues can be obtained from the 1987 report issued by President Reagan's Working Group on the Family, of which Judge Thomas was a member. This report is such a litany of right-wing views about the family that it is worthwhile quoting it at length. It includes discussions about the nature of the family (preferably, a traditional nuclear constellation), divorce (it should

be made harder to obtain); the Supreme Court's "weakening" of the traditional family; teen-age sexuality (it must be restricted); women staying at home to care for children (it should be encouraged), and so on:

> ...If an ever larger percentage of adults choose not to marry or choose to remain without children, there will be public implications...With current fertility levels and without immigration, our population will decline; this is a problem we share with much of the western world...[17]

***

> The disconcerting truth is that judicial activism over the last several decades has eroded this special status [of the family] considerably.[18]

***

> ...[In the past 25 years the Supreme Court has handed] down a series of decisions which would abruptly strip the family of its legal protections and pose the question of whether this most fundamental of American institutions retains any standing...The Court has struck down State attempts to protect the life of children in utero, to protect paternal interest in the life of the child before birth, and to respect parental authority over minor children in abortion decisions...The Supreme Court has turned the fundamental freedom to marry into a right to divorce without paying court costs It has journeyed from protection of the "intimate relation of husband and wife" in its contraception cases to the dictum that "the marital couple is not an independent entity with a heart and mind of its own .."[19]

***

> ...traditional divorce laws inhibited easy separations...In so doing, they sometimes made things difficult, and changes in divorce law may well have been overdue. But in a relatively short period of time, almost all the states adopted a model divorce law that established, in effect, no-fault divorce.[20]

***

> ...enrollment in a family planning program appeared to raise a teenager's chances of becoming pregnant and of having an abortion.[21]

***

> At a minimum, no Federal program should provide incentives for sexual activity by teens. No Federal activity should contravene the approach we have taken to drug abuse: we do not compromise with self-destructive behavior. We insist that it stop and we provide assistance to those young people who want to regain control of their future.[22]

***

> Government should not provide incentives -- or make things easier

-- for teenagers tempted to promiscuity. For example, AFDC benefits should be restructured to limit their availability to those minors who agree to continue to live with their parents. This step would go a long way toward making illegitimate motherhood less attractive in the poverty culture.[23]

***

Unlike Sweden, for example, the mothers of America managed to avoid becoming just so many more cogs in the wheels of commerce.[24]

***

In one of the great tragedies of American life, tens of thousands of childless families wait for children to adopt while 1.8 million other Americans abort their unborn children each year.[25]

Judge Thomas' comments about abortion have raised such enormous concern that most leading women's organizations are opposing his nomination. In a speech he made in 1987 to the Heritage Foundation Judge Thomas spoke favorably about an article written by another conservative, Lewis E. Lehrman, in which Lehrman wrote:

Adapting Lincoln's words from his patient struggle for the inalienable right to liberty in the 1850's, we may now say that the "durable" moral issue of our age is the struggle for the inalienable right to life of the child-in-the-womb -- and thus the right to life of all future generations...

May it be reasonably supposed that an expressly stipulated right to life, as set forth in the Declaration and the Constitution, is to be set aside in favor of the conjured right to abortion in Roe v. Wade, a spurious right born exclusively of judicial supremacy with not a single trace of lawful authority, implicit or explicit, in the actual text or history of the Constitution itself?

Are we finally to suppose that the right to life of the child-about-to-be-born -- an inalienable right, the first in the sequence of God-given rights warranted in the Declaration of Independence and also enumerated first among the basic positive rights to life, liberty, and property stipulated in the Fifth and Fourteenth Amendments of the Constitution -- are we, against all reason and American history, to suppose that the right to life as set forth in the American Constitution may be lawfully eviscerated and amended by the Supreme Court of the United States, with neither warrant nor amendment directly or indirectly from the American people whatsoever?[26]

Judge Thomas said Lehrman's article "on the Declaration of Independence and the meaning of the right to life is a splendid example of applying natural law."[27] This view, according to some legal scholars, puts Judge Thomas to the right even of Justice Scalia in the matter of abortion, since no justice currently on the Supreme Court has voiced the view that the fetus has either God-given or constitutional rights. Translated into current realities, a court that took this

position could not only overturn Roe but could make abortion illegal in all states.

The Griswold v. Connecticut decision, which gave married couples the right to obtain legal contraceptives, also caused Judge Thomas some unease. He wrote:

> Some senators and scholars are horrified by Judge Bork's dismissal of the Ninth Amendment, as others were horrified by Justice Arthur Goldberg's discovery, or rather invention, of it in Griswold v. Connecticut." ["The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."]
>
> ...A major question remains: Does the Ninth Amendment, as Justice Goldberg contended, give to the Supreme Court certain powers to strike down legislation? That would seem to be a blank check. The Court could designate something to be a right and then strike down any law it thought violated that right. And Congress might also use its powers to protect such rights -- say a "right" to welfare.[28]

Economic issues and congressional oversight

As illustrated above, Judge Thomas' distaste for welfare surfaces in many of his writings and speeches, but probably his most widely-publicized comment was made about his own sister, who received public assistance for six years while she cared for the aged aunt who had helped raise her. Judge Thomas said, "She gets mad when the mailman is late with her welfare check. That is how dependent she is. What's worse is that now her kids feel entitled to the check too. They have no motivation for doing better or getting out of that situation."[29] His distrust of governmental economic aid extends to criticisms of minimum wage laws and unfair labor practices as unnatural interference with the economic process.[30]

"As Lt. Col. Oliver North made it perfectly clear last summer, it is Congress that is out of control."

- Judge Clarence Thomas

Judge Thomas also appears to distrust congress. He wrote that congress was "out of control," and cited none other than Ollie North as a person competent to assess this: "Congress remains the keystone of the Washington establishment. Over the past several years, Congress has cleverly assumed a neutral ombudsman role and has thrust the tough choices on the bureaucracy, which Congress dominates through its oversight function. As Lt. Col. Oliver North made it perfectly clear last summer, it is Congress that is out of control."[31] Legal scholars fear that Judge Thomas may be unsympathetic to congressional initiatives on oversight.

Judicial experience

The idea that President Bush chose the best-qualified person for this job is not credible.

Judge Thomas has served on the U.S. District Court of Appeals for only 16

"Even had Bush limited his selection pool to black judges on the federal courts of appeal, there are at least a half-dozen other black judges whose accomplishments, both on the bench and before becoming federal judges, put those of Thomas to shame."

- Prof. Derrick Bell
Harvard University

months. Before that, he was Chairman of the Equal Employment Opportunities Commission for eight years, an administrative role which was much-criticized and controversial. His actual legal experience includes three years in then-Missouri Attorney General John Danforth's office, followed by a two-year stint at the Monsanto Corporation. He then served as a legislative assistant to Danforth for two years, and served for a year at the Department of Education's civil rights division.

In the days following the nomination many legal scholars expressed concern about the question of qualifications, especially Professor Derrick Bell of Harvard, who commented, "Even had Bush limited his selection pool to black judges on the federal courts of appeal, there are at least a half-dozen other black judges whose accomplishments, both on the bench and before becoming federal judges, put those of Thomas to shame."[32]

Judge Thomas' record since becoming an appeals judge is undistinguished and spotty. As of July 3, 1991 Judge Thomas had authored 16 opinions. While these opinions, standing alone, offer no clear indication of what positions Judge Thomas will take in civil rights and women's rights cases if he is elevated to the Supreme Court, it appears that he will provide an additional vote to the Court's present conservative majority in criminal cases.

Two decisions, however, should be of concern to workers and environmentalists. In one case,[33] Judge Thomas rejected a union challenge to a Labor Department decision permitting a mine owner in Alabama to use a high-voltage electrical cable within 150 feet of a working mine face in violation of federal regulations. The union had argued that use of these cables would increase miners' exposure to dust and methane, create ventilation problems and make escape from the mines more difficult. In another case,[34] Judge Thomas rejected a challenge by an alliance of Toledo, Ohio residents to a Federal Aviation Administration decision authorizing expansion of a local airport. The residents contended that the FAA had violated several environmental statutes and regulations.

The qualifications issue existed even when Judge Thomas was nominated to his present post on the U.S. district court: fourteen members of congress, all chairpersons and high-ranking members of house committees which oversee the Equal Employment Opportunity Commission, opposed it. At that time, representatives of more than 20 public interest organizations expressed concerns about Judge Thomas' qualifications during Senate Judiciary Committee hearings.

"It horrifies me that the country might have to endure 40 years of opinions of a black man who has shown no sense of compassion for the needs of the poor, who hasn't the guts to acknowledge that 'self-help' isn't enough in a milieu of institutionalized racism, and who embraces heartless legalisms where abortion and other rights of women are at issue."

- Carl Rowan

Conclusion

Judge Thomas, who called Robert Bork's defeat "disgraceful,"[35] is a complicated man, at once a dedicated conservative and a self-described admirer of both Dr. Martin Luther King, Jr. and Malcolm X, something of a nationalist, a critic of affirmative action and a "bootstrapper," a man who suffered extreme poverty and discrimination but one who believes in little or no government assistance to combat these conditions. His nomination has appalled otherwise moderately conservative African-American commentators like Carl Rowan:

> "It horrifies me that the country might have to endure 40 years of opinions of a black man who has shown no sense of compassion for the needs of the poor, who hasn't the guts to acknowledge that 'self-help' isn't enough in a milieu of institutionalized racism, and who embraces heartless legalisms where abortion and other rights of women are at issue."[36]

The Center for Constitutional Rights believes that Judge Thomas' inconsistency and complexity should be scant comfort to progressive-minded people. As Christopher Edley, an African-American commentator, wrote in the Washington Post: "If there were a snowball's chance in Hades that Thomas would be a moderate on the court, he would not have been nominated."[37]

In fact, we fear that Judge Thomas' successful appointment will impact on the court in a way that goes beyond mere conservatism. His voice will be used to permit extreme conservatism to re-emerge. That it comes from an African-American will be used as tragic legitimation of those views. Judge Thomas will likely participate in the end of legal abortion in this country; and he may also extend new economic concepts of deregulation, which will make life even more difficult for the great majority of people in this country.

Even if, as some people predict, a defeat of this nomination is followed by the selection of someone even less suitable, the Center for Constitutional Rights believes that this battle is worthwhile. Though the conservative tide is lapping over the steps of the Supreme Court, there are many millions of people who will continue to search -- and who will find -- a way to struggle successfully for their human rights. It is this standard of human rights to which we must insist that all prospective Supreme Court justices subscribe.

We urge all civil rights and civil liberties organizations to take a position against the nomination of Judge Thomas and request all such organizations that haven't issued conclusive positions to do so as soon as possible. This nomination is an insult, not a pat on the back. Finally, we urge all fair-minded people to communicate their ideas and thoughts on this subject to the members of the Senate Judiciary Committee, to their congressperson and senator, and to their local newspapers and media outlets. We remain convinced that the voices of the millions of people to whom this is a vital concern will be heard.

New York City
July 30, 1991

ENDNOTES

1. Statement of the Alliance for Justice on the Nomination of Clarence Thomas to the U.S. Court of Appeals for the District of Columbia, February 16, 1990, p. 2.

2. Ibid., p. 7. Judge Thomas' original remarks appeared in 5 Yale L. & Pol. Rev. 402 (1982).

3. Juan Williams, "A Question of Fairness," Atlantic Monthly, February 1987, p. 79. (Hereafter, Atlantic Monthly profile.)

4. Ibid., p. 7.

5. Ibid., p. 8.

6. Ibid., p. 8.

7. Ibid., p. 8. Ms. Norton's comments appeared in 62 Tulane Law Review 601, 703 (1988).

8. Ibid., p. 8.

9. Atlantic Monthly profile, p. 79.

10. Quoted in Time, July 25, 1991, p. 19.

11. Judge Clarence Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," in Assessing the Reagan Years, Cato Inst., p. 397.

12. Symposium, "Affirmative Action: Cure or Contradiction," Center Magazine, November/December 1987, p. 23.

13. All the information in this paragraph appears in the Alliance for Justice Report, p. 4.

14. Atlantic Monthly profile, p. 72.

15. Atlantic Monthly profile, p. 80.

16. "Affirmative Action: Cure or Contradiction," Center Magazine, Nov./Dec. 1987, p. 25.

17. "The Family -- Preserving America's Future, A Report to the President from the White House Working Group on the Family," Gary L. Bauer, Chairperson, p. 3.

18. Ibid., p. 10.

19. Ibid., p. 11-12.

20. Ibid., p. 11-12.

21. Ibid., p. 27.

22. Ibid., p. 28.

23. Ibid., p. 28.

24. Ibid., p. 31.

25. Ibid., p. 33.

26. Lewis E. Lehrman, "The Declaration of Independence and the Right to Life," in The American Spectator, April 1987, p. 22.

27. Judge Clarence Thomas, "Why Black Americans Should Look to Conservative Policies," a speech given to the Heritage Foundation on June 18, 1987.

28. Judge Clarence Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," in Assessing the Reagan Years, ed. David Boaz, Cato Institute, 398-9.

29. Atlantic Monthly profile, p. 75.

30. As paraphrased by David Corn in The Nation, July 29/August 2, 1991.

31. Judge Clarence Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 Harvard Journal of Law & Public Policy, 63.

32. Prof. Derrick Bell, "The Choice of Thomas Insults Blacks," New York Newsday, July 10, 1991, p. 79.

33. International Union, United Mineworkers of America v. Federal Mine Safety and Health Administration, 931 F.2d 908 (1991).

34. Citizens Against Burlington v. Busey, 1991 WL 100655 (D.C. Cir. June 14, 1991).

35. Judge Clarence Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," in Assessing the Reagan Years, ed. David Boaz, Cato Institute, 392.

36. Carl T. Rowan, Baltimore Sun, July 4, 1991.

37. Christopher Edley, Jr. Washington Post, July 7, 1991.

The CHAIRMAN. Dr. Bishop.

STATEMENT OF JAMES J. BISHOP

Mr. BISHOP. Thank you very much, Chairman Biden. To you, to other members of the Judiciary Committee, and particularly to my own Senator Metzenbaum, I thank you for allowing me to testify today on behalf of the nomination of Judge Thomas.

The CHAIRMAN. By the way, Dr. Bishop, let me interrupt you—and I apologize for not mentioning this earlier. Senator Metzenbaum asked me to extend his regrets. He is in the Gates hearing for the new director of Central Intelligence, and that is why he is not here, and he apologizes for not being here to welcome you.

Mr. BISHOP. Thank you very much. I understand that it has been difficult at times trying to figure out which TV program to watch—the one of these hearings or the one on the Gates nomination, and our Senator is involved in both of those. But thank you.

I am here on behalf of Americans for Democratic Action, a national, liberal, multi-issue public policy organization. We in ADA share nearly all of the concerns that have been addressed so eloquently by other groups. But at this time, in the interest of brevity, I would like to confine my remarks to three specific considerations and to ask, Senator, if my extended remarks could be submitted for the record.

The CHAIRMAN. They will be.

Mr. BISHOP. First, reasoned and principled discharge of the Senate's constitutional advice-and-consent role requires vigorous application of a confirmation standard that legitimately takes into account, among other things, a nominee's ideology.

Second, and related to the first point, in determining whether Judge Thomas would faithfully and fairly discharge his duty of constitutional and statutory interpretation, his entire record at the Office of Civil Rights and the EEOC, as well as his writings and other activities, not only should, but must be considered. That record demonstrates that Judge Thomas does not satisfy the standard for confirmation that this committee and the Senate must apply.

Finally, Judge Thomas' frequent strident and hostile public pronouncements on various civil rights, social issues and programs reflect a genuine insensitivity and indifference to the plight of individuals who have not been as fortunate as he in their attempts to overcome barriers of discrimination, poverty, and intolerance.

There is simply no basis for concluding on Judge Thomas' record that he can be counted on to champion the rights of the disadvantaged and the disenfranchised.

At the beginning of these hearings, a majority of this committee expressed serious doubts regarding Judge Thomas. Those doubts seem to persist. Some members of this committee have referred to him as an enigma. These doubts, these concerns must be resolved in favor of the interests and the needs of the entire country, not simply those of the nominee or the executive branch.

Throughout Judge Thomas' testimony, he has steadfastly attempted to run away from his public record. He has repeatedly contended that many of his more pointed and abhorrent public pro-

nouncements were throw-away lines or comments designed to invite debate.

The committee should reject Judge Thomas' sweeping request that he start a clean slate for two reasons.

First, a failure to do so would invite an essentially standardless review of his fitness to receive life tenure on the Nation's highest court. Never has a Supreme Court nominee asked the American people, and this committee, and the Senate to overlook so much.

Second, Judge Thomas' efforts to nullify his past public records ignore the fact that, as EEOC chair, he was not only a policymaker; he was first and foremost the Nation's chief civil rights law enforcement officer. He was sworn to uphold and to enforce a host of antidiscrimination laws.

In addition to his law enforcement capacity, Judge Thomas was also a quasi-judicial officer. Indeed, while Chair, the EEOC consistently and successfully argued that it was a quasi-judicial agency, and as such its proceedings are entitled to various of the common law protections that prevail in judicial actions.

Because of his dual role as an enforcement officer and a quasi-judicial officer, his record should be held more accountable than that of a mere policymaker. But in those roles, it should be noted that he improperly expressed opinions on matters that were pending before the Commission for consideration. Indeed, his willingness to do so is in marked contrast to his reserve on many items before these proceedings.

For example, early in his tenure as EEOC chair, Judge Thomas publicly criticized a major pending systemic title VII lawsuit that the EEOC was then litigating against Sears Roebuck and Co. In his comments, he disparaged statistical evidence—

The CHAIRMAN. Sir, excuse me. I hope you don't have another 5 minutes' worth of material, because you are beyond the time; so if you'd get ready to summarize, I'd appreciate it.

Mr. BISHOP. No, we do not, Senator. Thank you.

Because of that, Judge Greene, a respected jurist, openly castigated the EEOC for its failure under Thomas to move forward in revising admittedly unlawful regulations along the way.

Senator I would like to conclude by indicating that we in ADA would also like to point out that despite the great strides that have been made, it is sad to say that the need for affirmative action persists in this Nation. A recent test by the Urban Institute on employment indicates that blacks, regardless of their backgrounds, when all other factors are taken into consideration, fared less in employment-securing than whites who were tested.

As an educator, as a scientist, as an activist, and also, like Judge Thomas, as an African-American, I have witnessed the need for affirmative action programs, especially those for students from economically disadvantaged backgrounds.

We in ADA at this point believe that the committee has no choice but to reject Judge Thomas' nomination. His speeches and writings; his frequent attacks on Congress, the courts and Federal judges; his intolerance of viewpoints that differ from his; his expressed admiration for extremist causes; his apparent disdain for the Nation's civil rights leaders; his contempt, at times, for con-

gressional records—all bespeak an ideological extremism that ill-suits a nominee for this court.

Equally significant, his confirmation would serve primarily to solidify a block of such extremism on the court and would ensure its perpetuation for decades to come. The Senate would abrogate its constitutional responsibility if it were to allow this nomination to occur.

On behalf of ADA, I thank you very much.

[The prepared statement of Mr. Bishop follows:]

TESTIMONY
of
DR. JAMES J. BISHOP
BEFORE THE
SENATE JUDICIARY COMMITTEE
September 20, 1991

Chairman Biden, Members of the Judiciary Committee and particularly my own Senator Metzenbaum, thank you for allowing me to testify today on the nomination of Judge Clarence Thomas. I am James Bishop. I am here on behalf of Americans for Democratic Action where I am privileged to serve as Chair of the National Executive Committee.

ADA is the nation's premier liberal, multi-issue public policy organization. Founded in 1947, ADA is dedicated to promoting a liberal agenda that is socially conscious and economically just. During our history we have been active participants in numerous battles where the individual rights and liberties of Americans were at stake. We have carefully reviewed past judicial nominations, opposing some, supporting others. Always, the guiding principle in our deliberations has been that our nation's judicial system is the last bulwark of individual freedom: it must protect the rights of those least able to protect themselves against the swings of political or ideological extremism. We have applied this principle in our considerations of this historic nomination and in our executive committee's unanimous decision to oppose Judge Thomas' elevation to the Supreme Court.

Scores of individuals and organizations have testified about their concerns regarding this nomination. ADA shares many of these

same concerns addressed so eloquently by groups representing women, people of color, the elderly, the disabled and America's workers. In my testimony today, however, I will confine my own remarks to three specific considerations that ADA believes should guide this Committee's deliberations.

First, reasoned and principled discharge of the Senate's constitutional "advise and consent" role requires rigorous application of a confirmation standard that legitimately takes into account, among other things, a nominee's ideology.

Second, and related to the first, in determining whether Judge Thomas would faithfully and fairly discharge his duty of constitutional and statutory interpretation, his entire record at the Office of Civil Rights and the EEOC -- as well as his writings and other activities -- not only should, but must be considered. That record demonstrates that Judge Thomas does not satisfy the standard for confirmation that this Committee must apply.

Finally, Judge Thomas' frequent strident and hostile public pronouncements regarding various civil rights and social justice issues and programs reflect a genuine insensitivity and indifference on his part to the plight of individuals who have not been as fortunate as he in their attempts to overcome barriers of discrimination, poverty and intolerance. There is simply no basis for concluding, on this record, that Judge Thomas can be counted on to champion the rights of the disadvantaged and disenfranchised, many of whom did not even have the family or institutional support that was so important to his development.

The Senate's Advise and Consent Role and the Confirmation Standard. The Constitution envisions that the Senate will play a meaningful and constructive role in the confirmation process. Contrary to the arguments of some, the Senate's role is not limited to assuring only that a nominee be technically qualified. Rather, because of the federal judiciary's role in our tripartite system of governance and the life tenure that federal judges enjoy, the Senate's "advise and consent" function is co-equal with the President's nominating role. The Senate is not simply a rubber stamp but represents the people and must protect the people's interest. Therefore, the Senate must exercise this "advise and consent" role in a manner designed to preclude an ideological stranglehold on the Court.

The insulation which the Constitution accords Supreme Court Justices was designed to ensure that the Court discharge its function without regard to the political extremism that all too easily can prevail in the other, elected branches of government. Similarly, the Court's preeminent role as guarantor of the Bill of Rights -- those protections that safeguard individual liberties against majority rule -- underscores the framers' intent that the Court not become captive to shifting poles of ideological extremism.

To ensure fidelity to this constitutional design, the Senate cannot properly exercise its role without regard to a nominee's ideological stance on significant issues of constitutional moment. And it must be especially vigilant in performing its advise and

consent role where, as here, the President has nominated an individual, primarily because of his ideology, to sit on a Court that Senator Specter and others have characterized as "revisionist".

The Senate must not lightly discharge its "advise and consent" function simply because of this nominee's apparent confirmation conversion. Good preparation, advice of others, and a demeanor that is adopted for a hearing are not enough. His writings and actions--before he knew a judicial appointment was in the wings--provide a far more reliable basis on which the Senate must judge his fitness to serve on the Court.

At the outset of these hearings, a majority of the members of this Committee expressed serious concerns about Judge Thomas. Those doubts appear still to exist. In fact, several members have referred to Judge Thomas as an enigma. Doubts as serious as these must be resolved in favor of the interests and needs of the entire country, not simply those of the nominee or the Executive Branch. The Senate has an obligation <u>not</u> to confirm a nominee if it is <u>not fully satisfied</u> that that individual belongs on the Supreme Court.

In this regard, an essential part of your consideration must be the evaluation of Judge Thomas by his peers at the American Bar Association. Their "qualified" rating represents an unacceptable low in the standards one should expect in a candidate for the nation's highest court. No current U.S. Supreme Court Justice has ever gotten a single "not qualified" vote let alone the two that

Judge Thomas received. In fact, no current Justice has failed to get at least a majority of "highly qualified" ratings from ABA evaluation committee members. The weakness of the ABA endorsement must carry considerable weight in your consideration.

Judge Thomas' Conduct During His EEOC Tenure Must Be Considered in Measuring His Fitness for the Court. Throughout his five days of testimony, Judge Thomas steadfastly attempted to run away from the public record he created during his tenure as EEOC Chair. Repeatedly, he contended that many of his more pointed and abhorrent public pronouncements were "throw-away" lines, comments designed to invite debate, or were merely the philosophic musings of a policy-maker. He asked the Committee to excuse and ignore this record on the ground that when he created it, he was a member of the executive branch, and he contended that these strident and categorical ideological pronouncements have not followed him into the judicial arena.

The Committee should reject Judge Thomas' sweeping request that he start with a clean slate for two reasons. First, it invites an essentially standardless review of his fitness to receive life tenure on the nation's highest and most important court. Never has a Supreme Court nominee asked the Senate and the American people to overlook so much. Supreme Court nominees come before this Committee with long, often distinguished public records, created in a variety of forums. It is precisely those records that the Committee must look to in determining a nominee's fitness for the Court. For Judge Thomas and his supporters to

suggest that a lesser standard applies to him would make a mockery of the confirmation process. But even were Judge Thomas correct in contending that his record should be ignored, the remaining "record" on which he then can be judged is simply too slim to permit his confirmation.

Second, Judge Thomas' efforts to nullify of his past public statements ignores the fact that, in his role as EEOC Chair, he was not a mere policy-maker. He was, first and foremost, the nation's chief civil rights law enforcement officer, sworn to uphold and enforce the host of anti-discrimination laws the EEOC administers. Both the Supreme Court and Congress have recognized that eradication of discrimination is the highest national priority; both have recognized the EEOC as the preeminent federal authority in securing this national objective.

But, Judge Thomas was not merely a law enforcement officer. In his capacity as Commissioner and EEOC Chair, he was also a quasi-judicial official. Indeed, while he was Chair, the EEOC consistently and successfully argued in a number of lawsuits that the EEOC is a quasi-judicial agency and, as such, its proceedings are entitled to various of the common law protections that prevail in judicial actions.

As a law enforcement official and quasi-judicial officer, Judge Thomas engaged in a number of actions of questionable propriety, which certainly raise questions regarding his suitability for the Supreme Court.

Judge Thomas improperly expressed opinions on matters that

were pending or likely to arise before the Commission for consideration. Indeed, his willingness to do so there is in marked contrast to his reserve in these proceedings.

For example, early in his tenure as EEOC Chair, Judge Thomas publicly criticized a pending major systemic Title VII lawsuit that the EEOC was then litigating against Sears Roebuck and Co. In his comments, he disparaged EEOC's reliance on statistical evidence to prove its claims, despite the Supreme Court's repeated admonition that such evidence is relevant, probative and, in some cases, decisive. So damaging were his remarks to the agency's litigation that the defense lawyers attempted (albeit unsuccessfully) to compel his testimony at trial.

Later, in 1986, Judge Thomas was a keynote presenter at a labor law seminar sponsored by a private law firm representing Xerox Corporation in an age discrimination suit then pending before the Commission. Though that action involved private plaintiffs, the EEOC was simultaneously investigating a parallel classwide charge based on essentially the same conduct that gave rise to the private suit. During this speech, Judge Thomas discussed -- apparently at defense counsel's express request -- whether the disparate impact theory applies to claims under the Age Discrimination in Employment Act. Despite unanimous favorable precedent in the courts of appeals and the EEOC's own regulations endorsing application of the theory to ADEA claims, Judge Thomas ventured his opinion that the theory does not apply to age discrimination cases. Significantly, that statement was not only

at odds with the EEOC's own published position in its regulations and its earlier litigation, but it also prejudged an issue that, in fact, came before the Commission a scant year later, when staff recommended suit against Xerox. The Commission rejected the staff recommendation. The Supreme Court is likely to revisit the disparate impact issue -- which applies to Title VII as well as the ADEA -- and the role of statistical data in litigation.

On at least three occasions during his Department of Education and EEOC tenure, federal district judges took Judge Thomas to task for his failure to discharge his duties consistent with the requirements imposed by law. In 1982, in the ongoing Adams v. Bell Title VI proceedings, Judge Thomas candidly admitted that, as head of the Education Department's Office of Civil Rights (OCR), he was violating the Court's order regarding processing of civil rights cases. Based in part on these admissions, the Adams judge found OCR in violation of the court's order in many important respects.

One year later, after his appointment as EEOC Chair, Judge Thomas was again the object of criticism by a federal judge. In Quinn v. Thomas, the court struck down the attempted cross-country transfer of a longtime EEOC manager who had been critical of Thomas. The judge found Thomas' action arbitrary, capricious and unlawful and concluded it had been taken as punishment for the employee's exercise of his First Amendment rights.

Finally, in 1987, Judge Harold Greene, a well respected jurist on the District Court for the District of Columbia, openly castigated the EEOC for its failure, under Thomas, to move forward

in revising admittedly unlawful ADEA regulations that permitted age discrimination in the accrual of pension benefits. Openly expressing his skepticism of the EEOC's candor in its professed commitment to move forward, Judge Greene characterized the agency's conduct as "at best slothful, at worst deceptive to the public ..." He went on to note that, "[T]here are not likely to be many cases in which an agency conclude[s] again and again over a long period of time ... that its published interpretation ... is wrong, yet ... consistently fail(s), on one pretext or another, to rectify the error." (AARP v. EEOC, 43 FEP Cases 120, 128.)

Judge Thomas frequently and repeatedly expressed his disdain of Congress, and, in particular, its exercise of its oversight mandate both in his speeches and as Chair of the EEOC. In a speech delivered at Creighton University, Judge Thomas referred to the GAO as the "lapdog of Congress." As became clear, however, intense scrutiny of Judge Thomas' EEOC administration was essential. Repeatedly, Congress found he was attempting to effect major policy changes at the EEOC, often simply by refusing to enforce statutory provisions with which he did not personally agree; or by prohibiting staff from securing remedies traditionally available under Title VII; or by illegally disciplining employees who had the temerity publicly to criticize him and the direction in which he sought to move the agency.

The record of EEOC oversight also reflects a lack of forthrightness on Judge Thomas' part, as when, for example, he failed to provide in a timely manner to the Senate Special

Committee on Aging adequate and accurate data on the numbers of ADEA charges in which the statutes of limitations had expired without the EEOC's having acted to protect the rights of complainants. Moreover, on several occasions, Congress was required to enact legislation to override the refusal of then-Chair Thomas to carry out Congressional intent in enforcing anti-discrimination measures.

It bears remembering that, during his EEOC tenure, Judge Thomas' response to the legitimate concerns raised by Congress regarding his stewardship of the EEOC was to castigate legislators as "run amok" majorities. And it bears stressing that the contemptuous attitude Judge Thomas bore toward the Congress while at the EEOC could well affect his deliberation on questions of statutory intent and the scope of Congressional power if he is elevated to the Supreme Court.

In this regard, the Committee must not forget that the Supreme Court interprets statutes as frequently, or perhaps even more often, than it addresses constitutional questions. The Constitution is not self-executing. Its promise often becomes a reality only when Congress legislates and the Court accords a broad scope to these enactments. This is especially true in the area of civil rights, with the Civil Rights Act of 1964 serving as the single most important vehicle through which the Constitution's equal protection guarantees have been advanced. Judge Thomas' tenure at the EEOC, where he was responsible for enforcing the cornerstone of that Act as well as numerous other anti-

discrimination measures, is thus the only gauge this Committee has to measure his fidelity to Constitution and the laws implementing it. As such, the Committee simply cannot ignore this record, but instead must conclude, based on it, that this nomination should be rejected.

Confirmation of Judge Thomas Will Not Safeguard or Advance Individual Rights and Freedoms. As many witnesses forcefully have recounted, Judge Thomas has expressed frequently views that raise genuine doubt about his capacity for sensitivity, objectivity and compassion, and the degree to which he would bring those instincts to bear in resolving difficult questions of constitutional and statutory interpretation. I will not belabor the many areas that are of grave concern to ADA members. But we would be remiss were we not to state publicly our profound misgivings about the position Judge Thomas has staked out on the issue of affirmative action. Moreover, we believe that Judge Thomas' antipathy to affirmative action reflects more than simply an opposing viewpoint on a difficult question about which reasonable people can -- and do -- disagree.

As an aside, let me say that I -- like Judge Thomas and, I suspect, all of us -- have been shaped by my own experiences. I, too, am an African American who grew up in the segregated South and suffered the anger, shame and sense of powerlessness of seeing my parents denigrated. However, the sum total of my experience and, more importantly, of others less fortunate than I in overcoming this history of oppression, has led me to positions

diametrically opposed to those Judge Thomas has espoused.

Affirmative action programs have been an underpinning of our flawed society's attempts to correct its shameful history of discrimination against racial minorities and women. The simple truth is, without affirmative action, many of us, including Judge Thomas, would not be where we are today. That is not to say that our qualifications are not comparable to those of white co-workers, or that we received unwarranted preferential treatment. It is simply to acknowledge a stark reality: to overcome centuries of discrimination and oppression requires, in many instances, not only that institutions stop discriminating; it requires, as well, that they take affirmative measures to assure inclusiveness where exclusion was previously the norm.

Sadly, despite great strides, the need for affirmative action persists. Only last year, for example, the Urban Institute undertook a major employment discrimination "testing" project, designed to determine whether individual employers treated similarly situated African American and white job applicants the same or differently in the hiring process. In a significant percentage of cases, the study found that, even after carefully controlling for all legitimate factors (e.g., experience and education), African American candidates fared less well than their white counterparts. Just this year, the Older Women's League found that, despite twenty-five years of anti-discrimination efforts designed to open job and educational opportunities for women and to end pay discrimination, the workforce patterns and experiences

of the vast majority of younger women are virtually identical to those of their older counterparts. Clearly, the need for affirmative action in employment has not vanished.

As an educator, scientist and activist, I have personally witnessed the need for affirmative action programs, including one with which I am intimately involved. That program is designed to attract economically disadvantaged, minority and other under-represented youth to higher education. Daily, I see the need for such outreach and "special" programs. Daily, I see that -- despite Brown v. Board of Education (whose reasoning Thomas has criticized) and its progeny (which Judge Thomas rejects) -- minority students in this country are still all too often the victims of inferior educational opportunities. Daily, I see that they suffer economic hardship that is rooted in past and present discriminatory practices. Daily, I must recognize how far we have come but, unfortunately, how far we still have to go.

Judge Thomas has recently indicated that he sees a need for affirmative action in education and that such programs are appropriate. But, unlike Judge Thomas, I see no principled distinction between the propriety or need for affirmative action in education and its appropriateness in the employment context. Indeed, for many of Judge Thomas' immediate peers who grew up in Pin Point or other southern communities or, for that matter, in much of the nation, theirs was a history of segregated, and often inadequate, public education. Recognition of the ongoing effects of such educational deprivations was one of the reasons the Burger

Supreme Court, held, in Griggs v. Duke Power Co. (another decision Judge Thomas eschews), that Title VII bans employment practices that have an arbitrarily exclusionary effect on minorities and women.

As former Justice Powell later noted for a unanimous Court, in McDonnell Douglas v. Green, "Griggs was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." Judge Thomas' recent conversion to or acceptance of a belief in affirmative action in education -- under pressure from Senator Specter -- simply does not go far enough in recognizing the need for affirmative action in other arenas as well, to remedy this long history of exclusion and deprivation.

Unlike Judge Thomas, I and the Americans of Democratic Action deeply believe that without Brown, without its progeny, and without other affirmative action programs, minorities and women in this nation would be the victims of even greater discrimination than that with which they still contend today.

* * * * *

As I have already stated, we have carefully reviewed Judge Thomas' record. We have also listened attentively to his testimony before this Committee. Candidly, Judge Thomas' testimony raises even more concerns for us now than we had at the time of our initial unanimous vote to oppose him. His eagerness to distance

himself from his past rhetoric and actions on issues of crucial concern to all Americans leaves many of us deeply troubled and uncertain about his judicial philosophy and temperament.

Among of the questions this Committee must answer before coming to a conclusion is which Clarence Thomas it is being asked to confirm? Is it the Clarence Thomas who addressed the Cato Institute and the Heritage Foundation and presided over the EEOC? Or is it the Clarence Thomas who last week seemed to recant many of his past statements, striking most observers as being considerably more moderate?

Particularly troubling is Judge Thomas' attempt to make a virtue of his backtracking, revisionism and lack of candor by saying, "When one becomes a member of the Judiciary, it is important for one to stop accumulating personal viewpoints." The real Clarence Thomas seems far more likely to be the one who forthrightly stated in a 1984 speech at his alma mater, Holy Cross College, "I do have opinions on virtually all issues."

To those who say that Judge Thomas' background demonstrates the real possibility for growth and compassion, we submit that the best test is to understand the direction of his growth during his adult life, i.e., the last decade and particularly his articles, speeches, writings and other actions during his second term with EEOC.

Measured against this standard, we believe that the Committee has no choice but to reject Judge Thomas' nomination. The Committee has rightly subjected Judge Thomas' entire public record

to intense scrutiny. And that record -- Judge Thomas' numerous speeches and writings; his frequent virulent attacks on Congress, the courts and federal judges; his intolerance of viewpoints that differ from his; his expressed admiration for extremist causes and their proponents; his apparent disdain for the nation's civil rights leaders; and his seeming contempt for those not as fortunate as he in overcoming the barriers of his childhood -- all bespeak an ideological extremism that ill suits a nominee for the Supreme Court. Equally significant, his confirmation would serve primarily to solidify a block of such extremism on the Court and assure its perpetuation for decades to come. The Senate would be abrogating the exercise of its advise and consent function were it to allow this to occur.

For identification purposes only, James Bishop is Special Assistant to the Provost at the Ohio State University.

The CHAIRMAN. Thank you very much, Doctor.
Mr. Moffit.

STATEMENT OF WILLIAM B. MOFFITT

Mr. MOFFITT. Senator Biden, I am here today representing the National Association of Criminal Defense Lawyers. We have submitted a report and ask that that report be made a part of the record.

The CHAIRMAN. The entire report will be placed in the record.

Mr. MOFFITT. Senator, we are the people who day-by-day live in the courtrooms of this country. It is the goal of our profession to see that the lofty notions of natural law and constitutional rights and duties are applied at the lowest level of our judicial process.

For us, liberty is not an abstraction; it is at issue every time a criminal lawyer, along with a client, steps before the bar of the court. Perhaps more importantly in this era of an expanded death penalty, we are confronted with situations where the life of the client is at issue before the court.

Today, hopefully, I speak not only for the attorneys who work in the vineyards of justice but for our clients, those who are accused of crime, who are presumed innocent, who seek merely the justice that the Constitution guarantees, and who are seldom, if ever, heard in these corridors.

It is not easy today to practice criminal law. The conventional wisdom is that society has been too lenient, and thus the process by which we adjudicate guilt and innocence has been radically altered in the past 10 years, resulting in a stream of convictions and incarceration unprecedented in our history.

This is particularly true when we consider the plight of young African-American males, one-quarter of whom between the ages of 19 and 27 are incarcerated or under some form of court-ordered supervision.

Recent studies indicate that young African-Americans are being incarcerated at rates higher than their South African counterparts.

Despite these astounding statistics with regard to the rate of incarceration, the assault on judicial precedent which forms the basis of our criminal jurisprudence continues. Such well-established precedent as *Miranda* and *Boyd* are presently under attack. Last term, in what can only be called the end-of-the-term massacre, criminal precedent was cast aside like derelicts floating on the sea of the law. Stare decisis was redefined, and any 5-to-4 Supreme Court decision was held to be of questionable validity. Coerced confessions can now be introduced and convictions sustained on the basis of harmless error.

Against this backdrop, Senator, we are treated on the evening news to the brutal beating of Rodney King and other citizens accused of crime by the forces of authority.

At this crucial moment in the history of our country, the one individual on the Supreme Court who knew what it meant to represent a citizen accused of a crime, or a citizen denied franchise, or a citizen despised by the community because of his color or political belief, has removed himself from the field of battle and retired to a much-deserved rest.

It is in this context that the nomination of Clarence Thomas must be viewed. Simply put, Senator, when the door to the conference room at the Supreme Court is closed, what does Clarence Thomas bring to the table? Most, if not all, of the justices currently on the court bring to the conference room their well-developed theories of constitutional law. What will this man—who has stated that he has no fixed constitutional concepts, who has repudiated many of his prior statements and writings—do when confronted with the strongly held consitutional views of other justices? Will the color of his skin and the deprivation of his youth be sufficient to withstand such a challenge?

His supporters say yes. His testimony says "Trust me." Where constitutional rights and fundamental liberties are at stake, the risks are simply too great to trust him.

And what of his legal experience? Where will he reach beyond the color of his skin and the deprivation of his early life to develop a constitutional vision that will compete with those of the other justices—a man who can name only two Supreme Court decisions of the last 20 years which he considers important; a man who has never discussed *Roe* v. *Wade,* a decision, incidentally, which he considers important; and a man who dismisses his own public remarks as the musings of an amateur political scientist?

As practicing lawyers who represent living human beings, we do not seek an advocate for the court. We seek a person who simply understand what it is to represent the poor, the deprived, and the despised, and to walk into an American courtroom questioning whether the process will treat your client fairly. The many days of hearings before this committee have failed to establish that understanding in this nominee. The hearings have left more questions than answers, and certainly nothing other than his race has surfaced to indicate the type of understanding and the depth of experience that commends one to a seat on the Supreme Court. Clarence Thomas is simply not the man for this time.

Finally, sir, I ask you to use the criteria that Clarence Thomas urges to be used in evaluating others for employment. Under that criteria, the race and economic background of the applicant are not by themselves sufficient to qualify the person for the job. This committee is entitled to judge Clarence Thomas by his own criteria. We believe that if so judged, he cannot be confirmed.

[The prepared statement of Mr. Moffitt follows:]

NACDL

National Association of
Criminal Defense Lawyers
(202) 872-

REPORT ON THE NOMINATION OF JUDGE CLARENCE THOMAS TO BECOME AN ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT

Adopted unanimously by the NACDL Board of Directors
August 17, 1991.

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Report on the Nomination of Judge Clarence Thomas to Become an Associate Justice of the Supreme Court of the United States

On July 1, 1991, President George Bush nominated Clarence Thomas, a Judge of the United States Court of Appeals for the District of Columbia Circuit, to fill the vacancy on the Supreme Court of the United States created by the resignation of Associate Justice Thurgood Marshall. The NACDL opposes the nomination of Judge Thomas to serve on the Supreme Court.

1. Why NACDL Cannot Support the Nomination of Judge Clarence Thomas to the Supreme Court. Certainly, NACDL cannot affirmatively endorse this nomination. While Judge Thomas appears to have the intellect, temperament and legal ability to serve on the High Court, he has not clearly demonstrated a professional commitment to the ideals of individual liberty and justice for which the Association stands, particularly with respect to the rights of the criminally accused. Since becoming a lawyer, Judge Thomas has apparently never represented a private individual, much less an accused criminal. Nor has he otherwise shown particular concern for enforcing the rights of the individual against assertions of state power. It is not nearly enough that his appointment would help somewhat to restore the loss of critical diversity of personal background and life experience among Members of the Court occasioned by the resignation of Justice Marshall.

Except for two years as an in-house attorney for the Monsanto chemical company, Judge Thomas has always chosen to work for the state or federal government; his earliest responsibilities with the office of the Missouri Attorney General upon graduating from Yale Law School in 1974 involved arguing criminal appeals for the state. (To our knowledge, he has never either tried a case or presided over a trial as a judge.) As discussed in the reports of leading civil rights groups, his tenure as Chair of the EEOC raises serious questions about his devotion to the law and legal process, especially as regards the system of checks and balances among the three branches of the federal government. Judge Clarence Thomas does not merit an affirmative endorsement from the NACDL.

2. Why NACDL Opposes the Nomination of Judge Thomas. The NACDL opposes the nomination of Judge Clarence Thomas to become an Associate Justice of the Supreme Court for three reasons: lack of commitment to certain basic but threatened principles of criminal justice, a dubious sense of judicial ethics, and adherence to an unusual and dangerously ill-defined jurisprudential philosophy.

a. Lack of Commitment to Equal Justice and Due Process.

The first reason that NACDL should oppose Judge Thomas's nomination is that he has not demonstrated a commitment to certain basic principles of equal justice and due process for which this Association stands. Not the least of these is the Constitutionally-mandated role of the defense attorney in ensuring fairness in criminal cases. Nor is it certain that he accepts the exclusionary rule as a necessary means of enforcing of Fourth, Fifth and Sixth Amendment rights, or that he would demand the most scrupulous fairness in the administration of capital punishment if the death penalty is not to be abolished (as NACDL would prefer). (If Judge Thomas opposes the death penalty, as does his mentor Senator Danforth, or believes in strict limits on its application, he has never said so publicly.) Finally, we do not know whether he supports the vital role of the federal courts, exercising their constitutionally-mandated habeas corpus power, to review the fundamental fairness of criminal judgments that have been upheld in state court.

Judge Thomas has had little or nothing to say publicly about any of these most critical issues, nor are we aware of any privately-expressed opinions. His views on other civil rights and civil liberties questions, while not directly applicable in the context of defendants' rights, may provide some guidance. In addition, his support for the exercise of executive power and disdain for that of Congress and the judiciary, as noted below, strongly suggest that he would take unsatisfactory positions on these issues. Because his views are not known with certainty, however, NACDL urges the Senate to inquire closely during the confirmation process into Judge Thomas's views on basic principles of equal justice and due process, as they pertain to the rights of the accused.

b. Lack of Ethical Sensitivity as a Judge. Attorneys who have argued criminal appeals before Judge Thomas find him to be intelligent, courteous, attentive and well-prepared on the bench. We do not fault him on any of these grounds. Nevertheless, his failure to recuse himself when his impartiality could reasonably be questioned does raise a serious concern about his ethical judgment and ability to separate personal bias from official judicial responsibility.

Most troubling is Judge Thomas's record on the Oliver North case. Judge Thomas publicly praised Col. North in several 1987 and 1988 speeches and in a 1989 article. One speech lauded North for having done "a most effective job of exposing congressional irresponsibility." Remarks at Wake Forest Univ., April 18, 1988, at 21 (referring to him familiarly as "Ollie North"). Nevertheless, despite holding strong personal views in support of this defendant, Judge Thomas did not disqualify himself from voting on North's appeal. Specifically, Judge Thomas participated in the vote to deny rehearing in banc in United States v. North, 920 F.2d 940, 959 (1990), the decision which overturned North's

convictions for endeavoring to obstruct Congress (and other charges). Since by his own public admission Judge Thomas had an extrajudicial bias in favor of a party, it is beyond peradventure that he should not have voted in the Oliver North case. Two other members of the D.C. Circuit (Judges Mikva and Edwards) declined for reasons of their own to participate in that vote.

Also of concern to the committee is Judge Thomas's failure to recuse himself in Alpo Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958 (D.C.Cir. 1990). In that case, he wrote the opinion overturning a large damage award against a company owned by members of Danforth family, and of which his close friend and mentor, Senator Danforth, is an heir. Again, it seems apparent that Judge Thomas's impartiality in that situation could reasonably be questioned, requiring him to disqualify himself.

c. Dangerous "Natural Law" Philosophy. Like Robert Bork before him, Judge Thomas has an unusual jurisprudential view of the Constitution, but it is not Bork's "originalist," pro-government, anti-libertarian view. Thomas has consistently endorsed a "natural rights" theory of the Constitution, suggesting that the Constitution should be interpreted according to an extra-legal standard of right and wrong that humans can deduce from a study of "human nature," revealing the "laws of Nature and of Nature's God." Judge Thomas states that the "revolutionary meaning" of America is the basing of its government "on a universal truth, the truth of human equality." 30 Howard L.J. 691, 697 (1987). NACDL recognizes that this philosophy was indeed shared by those who signed the Declaration of Independence and by many who framed the Constitution as well. It was invoked by some of the abolitionists, such as Frederick Douglass, who argued that nothing in the original Constitution endorsed slavery; indeed, Judge Thomas has drawn on that tradition in support of his view that Brown v. Board of Education was decided the right way for the wrong reasons. (In the same essay, he also relies on the Rev. Martin Luther King, Jr., Attorney General Edwin Meese III, President Ronald Reagan, St. Thomas Aquinas, and Tom Paine, all within two paragraphs.)

Curiously coupled with Thomas's "natural law" argument is an expressed disdain for the right of privacy, as applied in Griswold v. Connecticut and Roe v. Wade, on the basis that privacy is not explicitly identified in the text of the Bill of Rights. The Ninth Amendment declares that such unenumerated rights exist and are to be protected. Failure to recognize that the right of privacy extends beyond the confines of the First, Fourth and Fifth Amendments leads inexorably to overcriminalization and abuse of state power. NACDL must not forget that the laws challenged in Griswold and Roe carried criminal penalties.

If we knew that "human equality" were the only "universal truth" that Judge Thomas finds behind (or above) the Constitu-

tion, and if we were confident that he is deeply committed to applying this truth to women's lives as completely as to men's, we might be less uneasy with this "natural law" philosophy. But Eighteenth and Nineteenth Century ideas of "human nature" spell indifference to the problem of poverty, and personal and professional oppression for women in today's world. The Supreme Court explicitly invoked "nature herself" and "the law of the Creator" to hold in 1873 that a woman could be refused the right to practice law. Moreover, many traditional views of human nature are fundamentally punitive and unforgiving, and have profound implications for criminal law which are contrary to NACDL's understanding of the "liberty" which is protected by the Constitution. Judge Thomas has not clarified whether the view of "human nature" that he believes to lie behind the Constitution is an unchanging one, nor which one it is.

Likewise, whose appreciation of "nature's God" informs Judge Thomas's "natural law"? We fully support the command of Article VI of the Constitution that "no religious test shall ever be required as a qualification to any office or public trust under the United States," and we condemn any suggestion that a nominee's religious opinions, as such, could be disqualifying. But this is because we believe that the Constitution invites a broad diversity of religious and nonreligious opinions in government. When a judicial nominee states that an understanding of "God's law" should inform Constitutional decisionmaking, however, it becomes incumbent on him to reveal what that understanding is. Judge Thomas's failure to make this clear in any of his dozen speeches and eight published articles advancing a "natural law" interpretation of the Constitution suggests that he may draw on an assertion of what is "natural" merely to justify a personal, political or philosophical agenda.

Judge Thomas believes that the "task of those involved in securing the freedom of all Americans is to turn policy toward reason rather than sentiment, toward justice rather than sensitivity, toward freedom rather than dependence--in other words, toward the spirit of the Founding.... The first principles of equality and liberty should inspire our political and constitutional thinking." 30 Howard L.J. at 699, 703. Some of these words NACDL could wholeheartedly endorse. Yet they do not seem to mean the same to Judge Thomas as to us: "Such a principled jurisprudence would pose a major alternative to ... esoteric hermeneutics rationalizing expansive powers for the government, especially the judiciary." Id. (emphasis added). Our principal concern, of course, is with that final twist. Who will check prosecutors' and politicians' "rationalization of] expansive powers for the [executive branch of the] government," to be used against the criminally accused, if not "the judiciary" in its interpretation and application of the Constitution, especially the Bill of Rights? NACDL believes that a powerful and independent judiciary, devoted to even-handed enforcement of the "first

principles of equality and liberty," is essential for "securing the freedom of all Americans." We also believe that "justice" is not an alternative to "sensitivity"; without sensitivity there can be no justice.

Judge Thomas, who has served on the D.C. Circuit less then a year and a half and was not previously a judge, is the author of only seven published opinions on appeals of criminal convictions, all in drug cases. (He has participated in another ten or so decisions that resulted in published opinions by other judges, and about 20 unpublished affirmances, in some of which he wrote unpublished memorandum opinions. He does not appear ever to have concurred separately or dissented in a criminal case, which may indicate a relative lack of interest in the subject.) The opinions on their face are thoroughly researched, lucidly written, and temperate in tone. None breaks new ground, either for the government or for the defense. In these cases, Judge Thomas explained the affirmance of convictions over claims involving, for example, asserted evidentiary insufficiency, severance, denial of continuance, search and seizure, and definitions of terms in the Sentancing Guidelines; in other words, the routine issues seen in federal criminal appeals. As a Supreme Court Justice, however, he would face far more difficult issues, and would have far more freedom from the strictures of established precedent (if he were inclined to exercise such freedom) than as a Circuit Judge.

A handful of Judge Thomas's opinions do show a gratifying independence from prosecutorial argument. In United States v. Long, 905 F.2d 1572 (1990), he overturned a conviction for "using" a firearm in connection with a drug offense, where the unloaded gun was found between the cushions of a sofa. It might seem easy to say that this evidence was insufficient, but a jury had convicted, and a judge had upheld that verdict and imposed the mandatory five year sentence. The truth is that many if not most appellate judges today would have affirmed, perhaps without publishing an opinion; the concept of "using" a firearm has been diluted to meaninglessness in several other circuits. Obviously alluding to that fact, Judge Thomas wrote, "As an appellate court, we owe tremendous deference to a jury verdict; we must consider the evidence in the light most favorable to the government.... We do not, however, fulfill our duty through rote incantation of these principles followed by summary affirmance." 905 F.2d at 1576. In the same case, Judge Thomas's opinion goes out of its way to salvage the appellate rights of a defendant whose lawyer filed the required notice one day late, rejecting the prosecutor's plea to dismiss the appeal outright.

In United States v. Rogers, 918 F.2d 207, 212 (1990), while upholding the admission of "prior bad acts" evidence, Judge Thomas's opinion rejects the argument that the defense attorney's acquiescence in a cautionary instruction had waived any objection

to the admission of the questionable evidence. The opinion explicitly and accurately recognizes the legitimate tactical decisions a defense attorney must make in the midst of trial when an objection to prejudicial evidence has been overruled. And in United States v. Barry (Farrakhan and Stallings v. U.S.), 1990 WestLaw 104925 (1990), Judge Thomas participated in issuing an unsigned order requiring a trial judge to consider the First and Fifth Amendment rights of controversial, allegedly psychologically "intimidating" supporters of a criminal defendant to attend his trial.

These few commendable decisions, however, are greatly outnumbered by those of Judge Thomas's rulings which brush off troubling appeals. Especially disturbing are the opinions which demonstrate a cold indifference to the realities of the criminal justice system's harsh, discriminatory impact on the poor and uneducated. In United States v. Jordan, 920 F.2d 1039 (unpublished decision, available on WestLaw), Judge Thomas joined an unsigned opinion in which a defendant was denied a two-point reduction under the federal sentencing guidelines, costing him an additional 2½ years in prison, because his inability to raise the required bail to secure his release before trial prevented him from fulfilling an offer to cooperate with the authorities. Viewing the case as if the defendant were claiming some benefit on account of his poverty, the court invoked against him a Sentencing Commission rule that "one's socio-economic status 'is not relevant in the determination of a sentence.'"

Similarly, in United States v. Poston, 902 F.2d 90, 99-100 (1990), Judge Thomas's opinion passes without comment the transparent, self-contradictory lies of the arresting officers about whether promises of benefit were given to the father of a youthful arrestee and instead parses like the words of a business contract the father's testimonial recollection of what was said to him at the stationhouse. The result is an icy justification of the prosecutor's later refusal to give the defendant the benefit of a good word at sentencing so as to relieve him from an otherwise mandatory five year prison sentence for knowingly giving a ride to a drug dealer. If the Jordan and Poston cases illustrate what Judge Thomas means by "justice [without] sensitivity," NACDL must demur.

Conclusion. As discussed, Judge Thomas's record reveals several points worthy of favorable comment. Nevertheless, NACDL opposes the nomination of Judge Thomas for three basic reasons: his lack of demonstrated commitment to equal justice and due process, his failure to recognize the need for recusal where his impartiality is open to question, and his adherence to a philosophy of constitutional interpretation and judicial action which is outside the mainstream of contemporary thought and leads to unacceptable departures from the duty of the courts to enforce fundamental rights.

In addition, we are very concerned that Judge Thomas's views on the enforcement of civil rights laws, as expressed in both word and deed during his tenure as chair of the EEOC, bode ill for his willingness to enforce civil liberties, including those of the criminally accused. We hold in highest regard the expertise of such sister organizations in the broader civil rights and civil liberties community as the NAACP, the Leadership Conference on Civil Rights, the National Conference of Black Lawyers, the Congressional Black Caucus, the Alliance for Justice, the National Abortion Rights Action League, the Women's Legal Defense Fund, the National Organization for Women, AFSCME, and others which have publicly announced their opposition to this nomination. We are concerned that his unique legal philosophy and his laissez-faire attitude toward civil rights point to an approach to criminal law which is very punitive, rigid and unforgiving, and ultimately extremely dangerous to individual liberties.

As this report notes, there are several areas in which Judge Thomas's views are not yet entirely clear, and where we hope the Senate Judiciary Committee will press for more definite answers before considering confirmation. The record already available however, requires that NACDL oppose the nomination of Judge Clarence Thomas to become an Associate Justice of the Supreme Court of the United States.

The CHAIRMAN. Thanks, Mr. Moffitt.

It is kind of fascinating, whether or not Judge Thomas intended it or not, that the two things most prominently promoted by everyone who supports Judge Thomas—not alone, but prominently—are the fact that it would keep a black man on the Court and his humble beginnings. I never thought of it quite in the terms you just stated it, in terms of his standard—although I am not sure that's what he is suggesting.

I also want, Professor Williams, to indicate—and I have been derelict in my duty—that Senator Kohl wanted me to expressly state that he wished he could be here, but he had a scheduling conflict as well that prevents him from being here at the committee hearing.

You all are very articulate and passionate in your views as to why Clarence Thomas should not be on the Court, and I think you capture at a minimum the dilemma that a lot of us, who truly have not made up our minds, are wrestling with. Your comment, professor, about the Philadelphia Inquirer, your reference to it—the Philadelphia Inquirer chose to take a chance and endorsed him; others are going to choose not to take a chance, those who are not sure. But hopefully we'll be able to reach a resolution of that in this committee by next week's end, after I have conferred with my senior Republican colleague as to when we'll schedule this markup.

I thank you all very, very much for taking the time to come and for your continued interest.

It is good to see you, Mr. Burns; welcome back.

Mr. BURNS. Thank you, Senator.

The CHAIRMAN. Thank you all very much.

Now, we have our last-but-not-least panel, who have waited a long time to testify. This is a panel of individuals who have come to testify on behalf of Judge Thomas. The final panel will be testifying in support of Judge Thomas and it includes the following people: Ms. Ellen Smith, on behalf of Concerned Women for America; Dr. George Dumas, national chairman of the Republican Black Caucus; George Jenkins, chairman of the Montgomery County Black Republican Council. It is not a county council, it is a part of the organization?

Mr. JENKINS. Part of the organization.

The CHAIRMAN. I see. Mr. Celes King, on behalf of the Professional Bail Agents; and Connie Mack Higgins, chairman of the D.C. Black Republican Council. I have not had the privilege to be before so many Republicans other than on this committee. It is an honor to have you all here and we are anxious to hear your testimony, and I would implore you all to keep it to 5 minutes.

We will, unless the panel has otherwise decided, begin with you, Ms. Smith, if that is okay.

STATEMENTS OF A PANEL CONSISTING OF ELLEN SMITH, CONCERNED WOMEN FOR AMERICA; CELES KING, PROFESSIONAL BAIL AGENTS; GEORGE L. JENKINS, JR., CHAIRMAN, MONTGOMERY COUNTY BLACK REPUBLICAN COUNCIL; AND GEORGE C. DUMAS, NATIONAL CHAIRMAN, REPUBLICAN BLACK CAUCUS

Ms. SMITH. Thank you, Mr. Chairman.