JUDGE CLARENCE THOMAS:

Contempt For Congress

2000 M Street NW
Suite 400
Washington DC 20036

202 467 4999
202 293 2672 / Fax

INTRODUCTION

In recent years, Supreme Court decisions narrowly interpreting congressional legislation and legislative authority have posed increasing problems for Congress and the nation. A series of Court decisions according a cramped construction to federal civil rights laws has led to divisive and difficult battles over legislation to correct the Court rulings.[1] This year in Rust v. Sullivan,[2] the Court deferred to a controversial agency interpretation of a federal family planning law imposing an abortion "gag rule." The decision produced outcries in Congress and both houses have approved legislation to prevent its implementation, which President Bush has threatened to veto.[3] Recently, the Court upheld by only a narrow 5-4 vote the authority of Congress to pass remedial legislation to counteract prior discrimination.[4] As a result, the views of any Court nominee concerning Congress and congressional authority are critical for the Senate to examine.

Article I of the U.S. Constitution established Congress as the legislative branch of government vested with appropriate powers. Among its mandates is the authority to make all laws necessary for the functioning of government.[5] To carry out its constitutional duty, Congress must be able to monitor the effectiveness of congressionally created entities.

The record reveals, however, that one of the central concerns about Clarence

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[1] See H.R.1 (1991) (Civil Rights Act of 1991).

[2] 111 S.Ct. 1759 (1991).

[3] See S.323, H.R.392 (1991).

[4] See Metro Broadcasting v. FCC, 110 S.Ct. 2997 (1990).

[5] Art. 1, sec. 8, cl. 18. "To make all Laws which shall be necessary and proper for carrying into Execution the foregoin Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Thomas is his attitude toward Congress and its authority. Throughout his professional career, Thomas has avoided accountability to congressional committees; he has been uncooperative and hostile when forced to confront Congress' necessary oversight responsibilities; and he has disparaged Congress' authority and praised those who disregard that authority. Before Thomas was nominated to the U.S. Court of Appeals for the D.C. Circuit, 14 members of the House of Representatives took the extraordinary step of writing to President Bush urging him not to nominate Thomas precisely because of his "overall disdain for the rule of law."[6] All of the members who signed the letter either chaired or were senior members of congressional committees with responsibility for oversight of the EEOC.[7]

A brief review of Thomas' quotes about Congress, all of which are examined in further detail in this report, is revealing. According to Thomas:

- Congress has "proven to be an enormous obstacle to the positive enforcement of civil rights laws."
- "Congress is no longer primarily a deliberative or even a law-making body."
- As EEOC chair, he was "defiant in the face of some petty despots in Congress."
- The General Accounting Office is the "lapdog of Congress."
- "As Ollie North made perfecly clear last summer, it is Congress that is out of control."
- "Under the guise of exercising oversight functions," a

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[6] Letter from 14 members of the House of Representatives to President Bush, July 17, 1989.

[7] The signatories of the letter were: Don Edwards, Edward Roybal, Cardiss Collins, Charles Hayes, Barney Frank, Tom Lantos, Pat Williams, William Clay, Gerry Sikorski, Augustus Hawkins, Matthew Martinez, Dale Kildee, Patricia Schroeder and John Conyers.

congressional staffer "seeks to implement the program of the American Association of Retired Persons."

- "Democratic Subcommittee and Committee Chairmen mircromanage agencies and departments."
- An oversight request for semi-annual reports on the EEOC's work was an "intrusion into the deliberations of an administrative agency."
- "Ollie North did a most effective job of exposing congressional irresponsibility" and "revealed the extent to which their public persona is a fake."
- A Supreme Court decision by Chief Justice Rehnquist upholding Congress' authority to appoint special prosecutors "failed not only conservatives but all Americans."
- "There is little deliberation and even less wisdom in the manner in which the legislative branch conducts its business."

Thomas' consistent contempt for Congress, its processes, its mandates and its constitutional role indicates an impatience with democratic ideals ill-suited to a nominee for the U.S. Supreme Court. His past actions and statements indicate that if Thomas is confirmed for the Supreme Court, he is likely to heighten the conflict between the Court and Congress and contribute to undermining legislative authority.

A CASE STUDY: CLARENCE THOMAS AND CONGRESSIONAL OVERSIGHT OF "LAPSED CASES" BY EEOC

An egregious example of Clarence Thomas' resistance to legislative oversight came during a congressional inquiry into EEOC enforcement of the Age Discrimination in Employment Act (ADEA). Thomas' hostile and uncooperative behavior during a

legitimate congressional inquiry raises serious questions about his fitness for a seat on the nation's highest court.

The EEOC is responsible for implementation of the ADEA and ensuring that seniors are not discriminated against in matters of employment. After a person who thinks he or she has been the victim of age discrimination files a claim with EEOC, there is a two-year statute of limitations within which EEOC must act or the claim will lapse. In 1988, in response to concerns raised by seniors and other, the Senate Special Committee on Aging investigated EEOC's enforcement of the ADEA.

According to a finding by the Committee on Aging, "The EEOC misled the Congress and the public on the extent to which ADEA charges had been permitted to exceed the statute of limitations."[8] The Committee report provides a revealing comparison of what then-Chairman Thomas knew and what he stated to the Committee at a public hearing.

Acting on reports that large numbers of cases were exceeding the statute of limitations, the Committee on Aging requested figures on the number of lapsed cases from EEOC on September 3, 1987. EEOC conducted a telephone survey of regional offices and learned that before the end of the month over 1,500 cases would exceed the statute of limitations. At the hearing, Thomas elected to reduce that figure by 95 percent and reported that only 70 cases had lapsed.[9]

In response to a request for further data by the Senate Committee Thomas

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[8] Unpublished report of the Senate Special Committee on Aging, 100th Cong., 2d Sess., 1988, p. 36.

[9] Id. at 37.

balked, saying "we do not routinely keep statistics in forms that are of no use to us."[10] He was completely oblivious to the need for others, specifically Congress, to be able to monitor EEOC's progress and effectiveness, and said nothing to Congress about the data already in EEOC's possession responsive to the Committee's requests.

Over the next three months the Committee continued its efforts to obtain information on lapsed cases from EEOC. Thomas refused, leading the Chair of the Committee to write an unusually harsh letter to EEOC: "Your unnecessary delay in supplying us with information is an unwarranted withholding of information from the Senate."[11] On December 23, 1987 EEOC reported a total of only 78 lapsed cases.

Only after news reports put the number at nearly 900, did Thomas acknowledge that approximately 900 cases had exceeded the statute of limitations. In the face of continuing reports of more lapsed cases, the Committee issued a subpoena demanding more exact information by March 11, 1988. EEOC responded to the subpoena by claiming that 779 ADEA charges had exceeded the statute of limitations between 1984 and 1987 with 350 of them lapsing in 1987. Two weeks later Thomas received an internal report that the actual figure was 1,200 for 1987 alone. But the ballooning number of lapsed charges did not end there.

To ensure that claimants would not necessarily lose their rights due to EEOC's neglect, Congress passed the Age Discrimination Claims Assistance Act of 1988, extending the statute of limitations for some lapsed cases. In November 1988, over one

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[10] Id. at 38.

[11] Id. at 39-40.

year after the Committee's original request, EEOC submitted a report mandated under the new law, which stated that as many as 8,800 cases may have exceeded the statute of limitations between 1984 and 1987 -- more than ten times the number that EEOC had reported under subpoena.[12] Eventually EEOC admitted mailing notices of expiration to more than 13,000 seniors whose claims had been allowed to lapse.[13]

Senator David Pryor, the current Chair of the Committee on Aging, summed up the results of Thomas' disregard of congressional authority.

> I was dismayed to learn about several erroneous statements made by Chairman Thomas...These statements are certainly misleading, and raise serious questions about the nominee's appropriateness for the Federal bench.
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> [T]here should be little dispute that thousands of ADEA claimants have unfairly and unacceptably lost their rights during Chairman Thomas' 8-year tenure. We all agree that the massive lapses of ADEA charges prior to 1988 should have never happened. Likewise, we must recognize the tragedy and irony that even as Congress was acting to restore the rights of those who lose [sic] claims during that period, hundreds more cases were lapsing.[14]

Thomas nonetheless harshly criticized Congress' oversight efforts, particularly the Committee on Aging. "My agency will be virtually shut down by a willful Committee staffer who has succeeded in getting a Senate Committee to subpoena volumes of EEOC records...Thus, a single unelected individual can disrupt civil rights enforcement -- and all

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[12] Id. at 44.

[13] Cong. Rec. S1542 (daily ed. February 22, 1990) (statement of Sen. Pryor).

[14] Id. at S1542-43.

in the name of protecting rights."[15] In a later speech, he further derided the motives and integrity of the staff member. "Under the guise of exercising oversight functions, the staffer seeks to implement the program of the American Association of Retired Persons, AARP."[16] Thomas seems unconcerned that had it not been for the Senate Committee's diligent actions in determining the number of lapsed ADEA charges, no remedial legislation would have been enacted and thousands of claimants would have lost their rights forever due to his agency's neglect. It therefore seems odd that he would conclude that Congress has "proven to be an enormous obstacle to the positive enforcement of civil rights laws that protect individual freedom."[17]

Thomas' open hostility to Congress' legitimate role shows a disturbing disregard for the system of constitutional checks and balances and for Congress' oversight authority.

THOMAS' SPEECHES AND PUBLIC STATEMENTS ON CONGRESS AND CONGRESSIONAL AUTHORITY

Further instances of Thomas' disparaging references to Congress checker his writings and speeches. For example, in a speech on the role of Congress in the

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[15] Speech to The Federalist Society at the University of Virginia, March 5, 1988, p. 13. Similar statements were also made in other forums. See also speech to The Tocqueville Forum at Wake Forest University, April 18, 1988, p. 22.

[16] Prepared text for speech to The Federalist Society at Harvard University, April 7, 1988, p. 13, not delivered.

[17] Wake Forest University speech at 20.

formation of public policy, he said that "it may surprise some but Congress is no longer primarily a deliberative or even a law-making body...[T]here is little deliberation and even less wisdom in the manner in which the legislative branch conducts its business."[18]

The theme of this speech was that Congress has generally abdicated its responsibility to formulate readily understandable legislation, and that it instead enacts overly broad laws, the interpretation of which is left to the bureaucracy. Despite the view that Congress takes a hands-off approach Thomas nonetheless charges that "Democratic Subcommittee and Committee Chairmen micromanage agencies and departments."[19] Worse still, according to Thomas, is that such a process puts tremendous power in the hands of Subcommittee chairs, who "direct and administer bureaucracies in a manner compatible with their own interests."[20] This point of view is apparently responsible for his characterization of members of Congress as "petty despots."[21]

Clearly in Thomas' eyes Congress cannot win. If it passes a statute that is insufficiently detailed, it is because members "prefer to remain in the shadows on controversial issues."[22] But if Congress acts to check the improper implementation of a statute by an executive agency, it is engaging in "selective intervention" and creating a

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[18] Speech to the Gordon Public Policy Center, Brandeis University, April 8, 1988, p. 4.

[19] Speech to the Pacific Research Institute, August 4, 1988, p. 19.

[20] Brandeis University speech at 10.

[21] Harvard University speech at 13.

[22] Speech to the Palm Beach Chamber of Commerce, May 18, 1988, p. 24.

"feeble executive which means a weakened presidency."[23] This despite the allegedly overbroad grant of power to the executive branch.

The example of "selective intervention" Thomas used to demonstrate his thesis concerned an attempt at oversight by three members of the Senate Labor and Human Resources Committee, Senators Edward Kennedy, Howard Metzenbaum and Paul Simon. They asked Thomas at the time of his 1986 renomination as head of the EEOC to keep them apprised of the EEOC's work by submitting semi-annual reports "to be sure this committee is informed about EEOC progress in enforcing the law as Congress and the Supreme Court intend."[24] Thomas was harshly critical of this "intrusion into the deliberations of an administrative agency."[25]

Thomas even resents congressional "intrusion" into serious allegations of improper behavior at his agency. In 1989, a House Subcommittee looked into charges that an EEOC district director had been demoted for testifying before Congress under subpoena in such a way as to cast EEOC in a negative light. When asked about these harassment charges Thomas responded:

> The one thing that I do want is for at least at some point the legislative branch to leave the agency alone so it can get its house in order and hopefully at some point miraculously give it the resources so it can get its house in order.
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> You want to talk about harassment, I can tell you about two years of harassment, and I can tell you about two years of not

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[23] Brandeis University speech at 4-5.

[24] Quoted in Brandeis University speech at 5.

[25] Id. at 6.

> giving the agency the resources to do the incredible job that is being required.[26]

Besides trivializing the charges of retaliation against a whistleblower, Thomas' statement shows two things. First he views a congressional investigation as "harassment," and second he believes Congress should simply provide funds with no oversight into how the money is spent.

This was not merely an example of Thomas losing his temper under sharp questioning. He was repeating a sentiment that he had expressed earlier in his own speeches.

> Through subcommittees and professional staff, the typical member of Congress is a kind of unseen co-administrator of a part of the executive branch bureaucracy. They are able to exercise this authority on a regular basis by subjecting administrators to the will, not of Congress, but that of the members who have jurisdiction over the agency.
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> They are able to do so through control of agency budgets, personnel, and reporting requirements, as well as through the power of investigation.[27]

Rather than viewing congressional control of the purse, the power to confirm appointments, and authority to investigate abuses as constitutional mandates, Thomas

[26] EEOC's Reprisal against District Director for Testimony before Congress on Age Discrimination Charges before the Employment and Housing Subcommittee of the House Government Operations Committee, 101st Cong., 1st Sess., March 20, 1989, p. 99.

[27] Brandeis University speech at 12. See also Palm Beach speech at 24-25.

disparages such oversight as an inappropriate intrusion into executive autonomy.[28]

Thomas' complaints include the confirmation process for Supreme Court Justices. "It was a disgrace on the whole nomination process that Judge Bork is not now Mr. Justice Bork."[29] The Senate's rejection of Robert Bork was undoubtedly a disappointment to right-wing extremists, but it was certainly not a disgrace to the process.[30] Judge Bork testified for five days before the Judiciary Committee on a whole range of constitutional questions. In the end, the nation rejected a man who defended the constitutionality of the poll tax and who would not uphold the use of contraceptives by a married couple as a constitutionally protected right of privacy.[31]

Further evidence of Thomas' contempt for the legislative process and the rule of law can be found in his praise for Oliver North. In one speech, as support for the proposition that Congress is too involved in executive matters, Thomas stated, "I thought that Ollie North did a most effective job of exposing congressional irresponsibility. He

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[28] As recently as this year, Judge Thomas indicated that Congress' investigating body, the General Accounting Office, is not credible since it is the "lapdog of Congress." Speech at Creighton University School of Law, February 14, 1991, p. 6.

[29] Speech before the Cato Institute, October 2, 1987, p. 2. See also Harvard University speech at 11.

[30] Thomas' very use of the phrase "nominating process" seems to exclude any role for the Senate. The President nominates but then the Senate must exercise its constitutional responsibility to confirm or reject the nominee. The nominating process for Judge Bork was done in the White House; the confirmation process was carried out in view of the entire country.

[31] In other speeches Thomas attacked Senator Joseph Biden, whom he depicted as "crowing" over the defeat of Bork's nomination to the Supreme Court. Pacific Research Institute speech at 12. See also Harvard University speech at 12.

forced their hand, and revealed the extent to which their public persona is a fake."[32] In another speech, Thomas said that the congressional committee "beat an ignominious retreat before Colonel North's direct attack on it, and by extension all of Congress."[33] In other speeches, while decrying Congress' role in overseeing the federal bureaucracy, he noted that "as Ollie North made perfectly clear last summer, it is Congress that is out of control!"[34] This praise for North's open disregard of the intentions of Congress and its constitutional role as the law-making body is wholly inappropriate from one being considered for an appointment to the Supreme Court.

One indication of how Thomas would limit congressional power on the Supreme Court came in his comments on the case of Morrison v. Olson.[35] That case tested the authority of Congress to appoint a special prosecutor -- an issue of considerable importance to Oliver North. Although the Court ruled 7-1 in favor of Congress' authority, Thomas could only praise Justice Scalia's "remarkable" dissent. Calling the decision "the most important Court case since Brown v. Board of Education," Thomas placed himself to the ideological right of even Chief Justice Rehnquist in attempting to limit Congress' power. He stated that, "Unfortunately, conservative heroes such as the Chief Justice failed not only conservatives but all Americans" in Morrison.[36] Such

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[32] Wake Forest University speech at 21.

[33] Cato Institute speech at 13.

[34] University of Virginia speech at 13 (emphasis in original). See also Harvard University speech at 13.

[35] 487 U.S. ___; 108 S.Ct. 2597 (1988).

[36] Pacific Research Institute speech at 6-7.

attitudes by the Supreme Court nominee are of grave concern.

THE VERDICT OF CONGRESS AND THE COURTS ON THOMAS

As members of Congress and the federal bench have reviewed Thomas and his performance at the EEOC, they have forcefully voiced their own concerns about Thomas' respect for Congress and the rule of law. In July 1989, 14 Representatives, many of them Committee and Subcommittee chairs with responsibility for overseeing EEOC, wrote an extraordinary letter to President Bush. They urged the President not to nominate Thomas to the U.S. Court of Appeals. "Mr. Thomas' actions as chair of the Equal Employment Opportunity Commission raise serious questions about his judgment, respect for the law and general suitability to serve as a member of the Federal judiciary."[37] Eight years of dealing with Thomas had shown the members that "Mr. Thomas has resisted congressional oversight and been less than candid with legislators about agency enforcment policies."[38] The letter concluded that "Mr. Thomas has demonstrated an overall disdain for the rule of law."[39]

The courts have also noticed Thomas' attitude toward Congress and the rule of law. When Thomas took over EEOC in 1982 he inherited an administrative interpretation of a regulation concerning pension contributions for workers over age 65. He acknowledged that the interpretation was incorrect and should be changed. After

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[37] Letter to President Bush.

[38] Ibid.

[39] Ibid.

years of delay including repeated assurances to members of Congress that a change was imminent, a lawsuit was filed to force a change. The court held that the delay was inexcusable and ordered an immediate revision. "Although it is among the Commission's duties under law to eradicate age discrimination in the workplace and to protect older workers against discrimination, that agency has at best been slothful, at worst deceptive to the public, in the discharge of these responsibilities."[40] The court agreed that Thomas and his staff had misled Congress. "[T]he Commission has been no more candid with this Court than with the Senate committees and the public."[41]

CONCLUSION

The need for Supreme Court Justices to respect the intent and authority of Congress is well established. Much of the Court's work involves interpretation of statutory language and congressional intent. In recent years, conservative Justices have undermined many statutes, most notably in the areas of civil rights and family planning legislation. These Court decisions have damaged privacy interests and civil rights protections, forcing Congress to take repetitive steps to overrule the Court that should not be necessary.

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[40] American Association of Retired Persons v. EEOC, 655 F. Supp. 228, 229 (D.D.C.), aff'd in part, rev'd in part on other grounds, 823 F.2d 600 (D.C. Cir. 1987).

[41] Id. at 238. In its decision, the court gave one example in which EEOC had literally told Senators one thing while doing another. Id. at 234, n.19. Even before Thomas joined EEOC, another federal judge found that while Thomas was head of the Office for Civil Rights at the Department of Education, a court order governing OCR had "been violated in many important respects." Adams v. Bell, No. 3095-70 (D.D.C. Mar. 15, 1982) at 3.

Instead of effectuating Congress' intent in passing statutes, Thomas has viewed any section that is open to interpretation as void and seizes the opportunity to make new law. The disdain that Thomas has displayed for Congress and its intentions strongly suggests that, if confirmed, he would further the current Court's disturbing trend of misreading legislation and limiting congressional authority.