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Defending Constitutional Liberties

JUDGE CLARENCE THOMAS:

'An Overall Disdain for the Rule of Law'

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JUDGE CLARENCE THOMAS: 'AN OVERALL DISDAIN FOR THE RULE OF LAW'[1]

The nomination of Judge Clarence Thomas to the Supreme Court comes at a historic juncture when the rights and liberties of the American people are under siege. After weeks of research into Mr. Thomas' public record, the Board of Directors of the People For the American Way Action Fund has concluded that Judge Thomas is an unacceptable choice for the Supreme Court and urges the United States Senate to reject his nomination.

INTRODUCTION

The Supreme Court is the last bulwark of protection of the rights of every American citizen. Recently, the Supreme Court has charted a dramatic course that has changed the law in just a few years. Rights and protections that millions of Americans depend on are now threatened. Reproductive freedom has been restricted, and the basic right to choice on abortion is imperiled as new state laws make their way to the Supreme Court. Civil rights protections for women and minority workers have been undermined. The bright line separating church and state is gradually being weakened.

For all the setbacks to individual rights we have already witnessed, the potential future threats are even more severe. The Court has already accepted cases involving school desegregation and church-state questions for the next term. Looming just over the horizon are cases involving the restrictive abortion laws passed in the wake of the Court's decision in Webster v. Reproductive Health Services. As we enter a new century, the Court will grapple with complex new legal issues spawned by significant changes in technology, communications, medicine and a host of other fields.

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[1] Letter from 14 Members of Congress to President George Bush asking that the President not nominate Clarence Thomas to the United States Court of Appeals for the District of Columbia, July 17, 1989.

Even as the Court has reversed course, a thin line still exists among the Justices on many of these issues. The conservative judicial activists, led by Chief Justice Rehnquist and Justice Scalia, have been pushing for a wholesale rewriting of the law. Respect for prior decisions -- the principle of stare decisis -- has always been central to our constitutional system. But in its judicial activism the current Court seems determined to abandon this principle and replace it with an approach in which "power, not reason, is the new currency of [the] Court's decisionmaking."[2]

In his final dissent, Justice Thurgood Marshall inveighed against his fellow justices' reversal of precedent and their "far-reaching assault" on the Bill of Rights.[3] To date, a comparatively more moderate bloc on the Court has been able to restrain the activist impulse in a number of critical cases.

The next justice will play a pivotal role in determining the future direction of the Court. Not only will he or she participate in cases that will have a profound impact on the quality of life for millions of Americans, the new justice will also help to define whether the Court will pursue an even more activist agenda of reversing Supreme Court precedents that protect individual liberties and civil rights. It is in this context that we consider the nomination of Clarence Thomas to fill the seat being vacated by Justice Marshall.

In weighing this historic nomination, the People For the American Way Action Fund measured Judge Thomas' record against five essential standards that must be met by any nominee to our highest court. The standards are: demonstrated outstanding legal ability and competence as evidenced by substantial legal experience; proven respect for established legal precedents and commitment to core constitutional values; respect for the constitutional system of government and the separation of powers; a judicial philosophy that falls in the mainstream of legal thought; and an appreciation for the impact of the law and government actions on individuals. We base our final judgment on this broad range of criteria.

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[2] Payne v. Tennessee, 59 U.S.L.W. 4814, 4824 (1991) (Marshall, J., dissenting). Chief Justice Rehnquist reiterated his attack on stare decisis in a speech to the Fourth Circuit Judicial Conference. See Legal Times, July 15, 1991 at 9.

[3] Payne, 59 U.S.L.W. at 4824 (Marshall, J., dissenting).

After a thorough examination of Clarence Thomas' public record, we find that he fails to meet these essential standards for elevation to the Supreme Court. The reasons for our conclusion are:

- **Mr. Thomas' legal and judicial experience are far too limited for a Supreme Court nominee.** Mr. Thomas served for nine years -- more than half his professional career -- as an official in the Reagan and Bush administrations, and his performance in these positions was marred by proven allegations of lax enforcement and disrespect for the law. Mr. Thomas has served only 17 months on the appellate court, not long enough to amass a significant record.

- **Mr. Thomas has repeatedly attacked key Supreme Court precedents.** Mr. Thomas has severely criticized a dozen landmark Supreme Court rulings, focusing especially on cases involving fundamental individual liberties, remedies for workplace discrimination, and school segregation cases.

- **Mr. Thomas has time and again failed to enforce the law.** In his positions as Chair of the EEOC and as Director of the Office of Civil Rights in the Department of Education, Mr. Thomas has often disregarded Congressional mandates or court orders.

- **Mr. Thomas has shown hostility to legislative authority.** Mr. Thomas was extremely uncooperative with Congress, and in one instance a committee was forced to subpoena agency records he had refused to produce. In speeches and articles, Mr. Thomas publicly endorsed the flouting of Congressional authority and investigations.

- **Mr. Thomas espouses a judicial philosophy based on natural law that is "outside the mainstream of constitutional interpretation."**[4] Since 1987, Mr. Thomas has written and spoken extensively about natural law or higher law as being a necessary part of constitutional interpretation. The natural law theory that Mr. Thomas has embraced has been widely discredited, and Mr. Thomas' suggested applications of the theory could result in dramatic reversals of Supreme Court precedents.

For these reasons, we have concluded that Clarence Thomas' nomination to the Supreme Court must be opposed. This was not an easy conclusion to reach. The People For

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[4] Geoffrey Stone, dean of the University of Chicago Law School, quoted in Page, "Will Thomas Be Borked?: Views Are Fair Game," Washington Times, July 12, 1991.

the American Way Action Fund has only once before opposed a nominee to the Supreme Court. Moreover, Mr. Thomas is only the second African-American nominated to the high Court. He is a man with a compelling personal story of overcoming discrimination and poverty. Nonetheless, after carefully analyzing his record and views, we are absolutely convinced that Clarence Thomas' nomination to the highest court is not in the best interests of the nation.

I. LIMITED EXPERIENCE – NOT THE 'BEST MAN FOR THE JOB'

The Supreme Court should be the place where our nation's most distinguished lawyers and jurists decide the thorniest issues of the day. The members of the Court should have great stature, achieved through long, celebrated careers in the law. Service on the Supreme Court should be reserved for those who are truly the best and brightest that this nation has to offer.

President Bush said that he nominated Clarence Thomas because Mr. Thomas was "the best man for the job on the merits." This statement is transparently false. For all his accomplishments, Clarence Thomas is obviously not the most qualified person, not even the most qualified conservative, and far from the most qualified Republican African-American or Hispanic, to fill the vacancy on the Supreme Court. Former Solicitor General Erwin Griswold recently said: "This is a time when [President] Bush should have come up with a first-class lawyer, of wide reputation and broad experience, whether white, black, male or female. And that, it seems to me obvious, he did not do." Griswold complained that Mr. Thomas "has no breadth of experience at all."[5]

Mr. Thomas served for nine years, more than half of his professional life, as an official in the Reagan and Bush administrations. As documented in detail later in this report, Mr. Thomas' tenure in these positions was marred by proven allegations of lax enforcement and disrespect for the law -- notable largely for Mr. Thomas' conflicts with Congress and the courts.

For the past 17 months, Mr. Thomas has been a judge on the Court of Appeals for the District of Columbia. Although he has participated in some 170 appeals, during this period

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[5] Torry, "At 87, Erwin N. Griswold is the Dean of Supreme Court Observers," Washington Post, July 15, 1991.

Mr. Thomas has written only 17 majority opinions, all but one of which was a unanimous decision. Mr. Thomas has written separate concurring or dissenting opinions in only three cases.

Most of the cases in which Mr. Thomas played a part were unanimous and relatively uncontroversial cases. Two of the occasions on which Mr. Thomas chose to write separately from the majority do, however, raise concerns because both opinions specifically address critical issues involving the scope of judicial review. In both instances, Mr. Thomas argued for limiting access to the courts, once on the basis of standing, and once on the grounds of mootness.

In Cross Sound Ferry Services v. ICC,[6] Mr. Thomas maintained that the Court should have dismissed plaintiff's complaint on the grounds of standing. The court found that the Interstate Commerce Commission had properly decided that certain ferry services were exempt from ICC regulation. Mr. Thomas agreed with this portion of the decision. The majority further concluded that this ICC decision did not trigger environmental review responsibilities under National Environmental Policy Act (NEPA) and the Coastal Zone Management Act (CZMA). Mr. Thomas dissented from the ruling on the applicability of the environmental statutes, arguing that the plaintiff did not have standing to raise the environmental claims. While the majority found that the environmental claims did not have merit, Mr. Thomas would not even have addressed the merits of the petitioner's complaint.

Similarly, Mr. Thomas dissented in Doe v. Sullivan,[7] arguing that the case should have been dismissed on the grounds of mootness. Doe, which was decided on July 16, 1991, involved a regulation that permitted the use of unapproved drugs to protect troops from chemical weapons during the Gulf War. A serviceman challenged the regulation. The government argued that the court should have found the plaintiff's claim moot because the regulation had been terminated. The majority ruled that the claim was not moot, holding that the controversy was "capable of repetition, yet evading review" because the underlying regulation that permitted the waiver of the ordinary drug approval process was still in effect. The majority then dismissed plaintiff's claims on the merits. Mr. Thomas took exception. He wrote: "The war has ended and the troops are home, but to the majority the case lives

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[6] ___ F.2d ___, No. 90-1053 (D.C. Cir. May 10, 1991).

[7] ___ F.2d ___, No. 91-5019, (D.C. Cir. July 16, 1991).

on."[8] Rather than considering plaintiff's complaint, Mr. Thomas would have simply closed the courthouse door.

Overall, Mr. Thomas' record as a judge is extremely limited. However, the rest of Mr. Thomas' record, as revealed in speeches and articles about key legal precedents and policy questions, and as shown in Mr. Thomas' performance as an official in the Reagan and Bush administrations, is extremely troubling.

II. CRITICISM OF KEY SUPREME COURT PRECEDENTS

Mr. Thomas has attacked the results and legal underpinnings of a dozen landmark Supreme Court decisions of the past four decades. Mr. Thomas' criticisms focus on Supreme Court rulings involving fundamental rights with respect to privacy, workplace discrimination and school segregation, as well as congressional authority under the Constitution. These criticisms are not simply abstract or theoretical; he has severely attacked a number of Court decisions, even going so far in one case as to urge lower courts to follow the dissent and not the majority opinion.

A. The Right to Privacy

The Supreme Court first enunciated the constitutional right to privacy in Griswold v. Connecticut, a 1965 decision striking down a Connecticut law banning the sale of contraceptives.[9] Griswold, in turn, became the foundation for the Court's decision in Roe v. Wade, where the Court held that the right to privacy included a woman's right to choose an abortion.[10]

Mr. Thomas has criticized Griswold, however, particularly a concurring opinion signed by Chief Justice Warren and Justices Goldberg and Brennan, which relied on the Ninth Amendment as the foundation for the right to privacy. Just three years ago, Mr. Thomas complained of the Court's improper "invention" of the Ninth Amendment in Griswold, and

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[8] Id. Slip. op. at 1 (Thomas, J. dissenting).

[9] 381 U.S. 479 (1965).

[10] 410 U.S. 113 (1973).

wrote that the Ninth Amendment "will likely become an additional weapon for the enemies of freedom."[11]

Mr. Thomas has also suggested that he finds fault with Roe v. Wade. In a 1987 speech, Mr. Thomas lavishly praised an article arguing not only that Roe should be overturned, but that fetuses should be granted constitutional protection.[12] The article, which Mr. Thomas called a "splendid example of applying natural law," was an unbridled attack on Roe written by anti-abortion activist Lewis Lehrman.[13] Lehrman asserted that the right to choose abortion recognized in Roe is "a spurious right" with "not a single trace of lawful authority" that has produced a "holocaust". The Lehrman article that Mr. Thomas so heartily endorsed takes the most extreme position on choice, insisting that abortion is prohibited by the Constitution and that neither Congress nor the states may protect the right to choose an abortion.[14]

In addition to his personal criticism of key Court precedent concerning the right to privacy, Mr. Thomas was a member in 1986 of a White House Working Group on the Family that produced a report sharply critical of Court decisions in this area. The report disparages Roe v. Wade and Planned Parenthood v. Danforth,[15] which ruled unconstitutional a state law preventing a woman from obtaining an abortion without her husband's consent. The report also attacked the reasoning of Eisenstadt v. Baird, which held that the right of privacy protects the rights of unmarried people to use contraceptives,[16] and Moore v. City of East Cleveland, which struck down a zoning law forbidding a grandmother from living, in extended family fashion, with her son and grandsons.[17] The report pointedly notes that such

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[11] Thomas, "Civil Rights as a Principle versus Civil Rights as an Interest," Assessing the Reagan Years (D. Boaz, ed. 1988) at 399 (hereinafter "Principle versus Interest").

[12] Thomas, Speech before the Heritage Foundation, June 18, 1987, at 22.

[13] Lehrman, "The Declaration of Independence and the Right to Life: One Leads Unmistakably to the Other," The American Spectator, Apr. 1987, at 21.

[14] Id.

[15] 428 U.S. 52 (1976).

[16] 405 U.S. 438 (1972).

[17] 431 U.S. 494 (1971).

"fatally flawed" decisions could be "corrected" either by Constitutional amendment or through "the appointment of new judges and their confirmation by the Senate."[18]

B. Workplace Discrimination

Mr. Thomas has also taken aim at a broad range of employment discrimination decisions -- rulings that helped break down barriers to the hiring and advancement of women and minorities in the workplace.

For example, Judge Thomas criticized the Court's ruling in United Steel Workers v. Weber, upholding voluntary affirmative action programs by private employers[19] and its decision in Johnson v. Transportation Agency, Santa Clara County, permitting a state employer's voluntary affirmative action programs for job categories traditionally segregated against women.[20] Mr. Thomas called these decisions an "egregious example" of misinterpretation of the equal protection clause and legislative intent in civil rights statutes.[21] In fact, he has specifically suggested the overruling of Johnson, and went so far as to state that he hoped Justice Scalia's dissent in the case would "provide guidance for lower courts and a possible majority in future decisions."[22]

Mr. Thomas voiced similar concerns about the Court's holding in Fullilove v. Klutznick, in which the Court ruled that Congress has the power to pass remedial legislation to correct past discrimination.[23] Mr. Thomas charged that the Court in Fullilove improperly "reinterpret[ed] civil rights laws to create schemes of racial preference where none was ever contemplated."[24]

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[18] White House Working Group on the Family, The Family: Preserving America's Future, 1986, at 12.

[19] 443 U.S. 193 (1979).

[20] 480 U.S. 616 (1987).

[21] "Principle Versus Interest" at 395.

[22] Thomas, Speech before the Cato Institute, Apr. 23, 1987, at 20-21.

[23] 448 U.S. 448 (1980).

[24] "Principle Versus Interest" at 396.

Mr. Thomas also objected to the Court's rulings in three employment discrimination cases dealing with court-ordered remedies and consent decrees. In Local 28 Sheet Metal Workers International v. EEOC, the Court upheld court-ordered affirmative action as a remedy for egregious and longstanding discrimination.[25] In Firefighters v. Cleveland, the Court approved consent decrees including affirmative action measures in job-bias cases.[26] Finally, in United States v. Paradise, the Court upheld an affirmative action remedy for egregious bias where an employer resisted previous anti-discrimination orders.[27] Mr. Thomas criticized all three cases by name, expressing "personal disagreement with the Court's approval of numerical remedies."[28]

C. School Segregation

Mr. Thomas has also attacked several landmark rulings in the area of school desegregation. Most notably, he criticized the reasoning in the Court's historic opinion in Brown v. Board of Education, in which the Court confronted and struck down as unconstitutional school segregation and the notion of "separate but equal" schools.[29]

Mr. Thomas has disparaged Brown as being based on "dubious social science" and containing a "great flaw."[30] Mr. Thomas has said that the proper ground for outlawing segregation in Brown would have been the privileges and immunities clause of the Fourteenth Amendment, even though Mr. Thomas himself admits that this clause has been made meaningless as a source of authority for the Court since 1873.[31] Mr. Thomas has also

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[25] 478 U.S. 421 (1986).

[26] 478 U.S. 501 (1986).

[27] 480 U.S. 149 (1987).

[28] Thomas, "Affirmative Action Goals and Timetables," 5 Yale L. and Pol. R. 402 at 403 (1987).

[29] 347 U.S. 483 (1954).

[30] Thomas, Speech before the Federalist Society for Law and Public Policy Studies, University of Virginia Law School, Charlottesville, Virginia, Mar. 5, 1988, at 11; Thomas, "Toward a 'Plain Reading' of the Constitution," 30 Howard L. J. 985 at 990 (1987).

[31] 30 Howard L. J. at 994.

specifically disagreed with the Court's premise in Brown that separate is inherently unequal.[32]

In the years following Brown, many school authorities sought to circumvent the decision by contriving new methods for assigning students to schools -- methods that were designed to produce segregated schools. In Green v. County Board of Education, the Supreme Court was faced with one such system. The Court held that the so-called "freedom of choice" assignment system used by many school districts to avoid desegregation was incompatible with Brown and held that all vestiges of state-imposed segregation must be eliminated.[33]

Mr. Thomas described the Court's decision in Green as reflecting a "lack of principle."[34] Mr. Thomas has complained that, according to Green, the decision in Brown "not only ended segregation, but required school integration."[35]

In the key decision of Swann v. Charlotte-Mecklenberg Board of Education, the Court held that courts may order student reassignment, transportation, and other remedies to fully realize the promise of Brown.[36] Although not mentioning Swann by name, Mr. Thomas has denounced what he terms "a disastrous series of cases requiring busing and other policies that were irrelevant to parents' concern for a decent education" after Green.[37]

D. Congressional Authority under the Constitution

Mr. Thomas has also criticized several key Court decisions upholding the authority of Congress under the Constitution. As discussed above, he has disparaged the decision in Fullilove, where the Court ruled that Congress has the power to enact legislation to remedy the effects of past discrimination. In addition, he has attacked the Court's important holding

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[32] Williams, "A Question of Fairness," Atlantic Monthly, February, 1987, at 72.

[33] 391 U.S. 430 (1968).

[34] "Principle Versus Interest" at 393.

[35] Id.

[36] 402 U.S. 1 (1971).

[37] "Principle Versus Interest" at 393.

in Morrison v. Olson, where the Court ruled 7-1 that Congress could properly create independent prosecutors such as those which investigated Watergate and Iran-Contra.[38] The lone dissent was by Justice Scalia, who argued that Congress had absolutely no authority to appoint special prosecutors, no matter how serious a crime may have been committed by Executive branch officials. According to Mr. Thomas, however, Justice Scalia's dissent was "remarkable" and should have been followed, while Chief Justice Rehnquist's majority opinion "failed not only conservatives but all Americans."[39]

III. UNWILLINGNESS TO FOLLOW ESTABLISHED LAW

A. Controversial Tenure as Chair of the EEOC

Mr. Thomas' most significant legal experience is the eight years he served as Chair of the Equal Employment Opportunity Commission, the agency with prime responsibility for enforcing federal laws forbidding employment discrimination. During this period, Mr. Thomas repeatedly displayed a failure and unwillingness to enforce fully federal anti-discrimination laws as mandated by Congress. He frequently denounced court-approved methods of establishing discrimination and remedies for workplace discrimination. In many instances, Mr. Thomas appeared not to believe in the very laws he was sworn to enforce, especially the laws forbidding discrimination against older workers. Congress and the courts had to intervene to require Mr. Thomas to enforce the law. Throughout his tenure as an executive branch official, Mr. Thomas demonstrated aggressive hostility to congressional oversight and direction.

One particularly disturbing example of Mr. Thomas' behavior at the EEOC was his attempt to reverse the Commission's long-standing policy of seeking goals and timetables in conciliation efforts and court-approved settlements. Mr. Thomas attempted to justify his shift by arguing that the Supreme Court's decision in Firefighters Local Union No. 1984 v. Stotts[40] required that the agency stop seeking goals and timetables.[41] Mr. Thomas'

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[38] 108 S.Ct. 2597 (1988).

[39] See Barnes, "Weirdo Alert," The New Republic, Aug. 5, 1991, at 7.

[40] 467 U.S. 561 (1984).

[41] Regulatory Program of the United States, August, 1985.

conclusion was extraordinary because the Court in Stotts was very careful to say that its decision simply allowed employers to use a seniority system that had an adverse impact on minority employees, not that the Constitution required it. To conclude, as Mr. Thomas did, that the Court prohibited the long-accepted practice of employing goals and timetables was a tortured reading of the decision, a reading that seemed to be motivated by a personal hostility to these types of remedies. In fact, Mr. Thomas' statement about Stotts directly contradicted a representation he himself had made to Congress in August, 1984, where he wrote that Stotts "does not require the EEOC to reconsider stated policies with respect to the availability of numerical goals and similar forms of affirmative action relief."

Mr. Thomas was widely criticized for his shift concerning Stotts, and in 1986, the Supreme Court firmly rejected Mr. Thomas' revised reading of the case, reiterating that goals and timetables are constitutionally permissible remedies for employment discrimination under appropriate circumstances.[42] However, even in the face of this long line of authority, Mr. Thomas continued to voice his "personal disagreement" with the Supreme Court's approach, and insisted that the use of goals and timetables "turns the law against employment discrimination on its head."[43]

Mr. Thomas' purposeful misreading of Stotts is emblematic of his defiant refusal to enforce anti-discrimination laws and his willingness to allow his personal policy preferences to take precedence over established law. A particularly egregious example of this problem can be found in the EEOC's failure to enforce the Age Discrimination in Employment Act (ADEA).

In 1987 and 1988, Congress discovered that the EEOC under Mr. Thomas had failed to act on more than 13,000 cases charging violations of ADEA. This failure to act reflects a callous disregard for the legal rights of older workers.

Perhaps even more troubling than this dereliction of duty was Mr. Thomas' response once the problem was discovered. Mr. Thomas was extremely uncooperative with Congress. When he was first asked by the Senate Special Committee on Aging about the number of ADEA cases whose time limits had lapsed, Mr. Thomas reported that 78 cases had expired.

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[42] See Local Number 93, International Association of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 US 501 (1986); Local 28 Sheet Metal Workers' International Association v. EEOC, 478 US 421 (1986); and United States v. Paradise, 480 U.S. 149 (1987).

[43] Thomas, 5 Yale L. & Pol. R. at 403, n. 3.

However, the EEOC's own information revealed at this point that well over 1,000 cases had lapsed. After published news reports brought attention to the problem of lapsed cases, Mr. Thomas reluctantly confirmed that the statute of limitations had run on over 900 cases. These estimates were later revised to over 1,500, then to over 7,500, and finally to more than 13,000 lapsed claims.[44]

Instead of cooperating with Congress in investigating and resolving this massive problem, Mr. Thomas repeatedly complained about Congress' role in overseeing the EEOC, and refused to cooperate with the Senate oversight committee. Eventually, the Senate Aging Committee had to resort to a subpoena to obtain the EEOC's records on lapsed cases. Even when the Aging Committee's investigation turned up evidence of gross dereliction of duty by the EEOC, Mr. Thomas still attacked Congress. He at one point complained that a "willful committee staffer . . . succeeded in getting a Senate Committee to subpoena volumes of EEOC records."[45] Mr. Thomas added that "it will take weeks of time, and costs in the hundreds of thousands of dollars, if not in the millions. Thus, a single unelected individual can disrupt civil rights enforcement--and all in the name of protecting rights."[46]

Ultimately, Congress had to pass special legislation to restore the rights of these older workers whose claims the EEOC had allowed to lapse.[47] This incident is representative of a pattern in which Congress had to pass legislation to address problems created by Mr. Thomas' administration of the EEOC.[48]

Mr. Thomas' actions with respect to employers' obligation to make pension contributions for workers over age 65 is another example of his failure to protect older workers' interests. Mr. Thomas pledged to rescind an improper Department of Labor interpretation stating that employers were not required to make pension contributions for workers older than age 65, but never carried through on his promise. After four years of

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[44] Letter to the President by 14 Members of Congress, July 17, 1989; United States Senate, Committee on the Judiciary, Nomination Hearing for Clarence Thomas to be a Judge on the United States Court of Appeals for the District of Columbia, Feb. 6, 1990, at 90.

[45] Speech before the Federalist Society, University of Virginia, Mar. 5, 1988, at 13.

[46] Id.

[47] "EEOC Raises Number of Mishandled Age Discrimination Cases to 7,546," Los Angeles Times, June 25, 1988 at Part IV, p. 1.

[48] Letter to the President by 14 Members of Congress, July 17, 1989.

agency inaction under Mr. Thomas, Congress passed an amendment to the ADEA requiring pension contributions. Still, the agency did not rescind the incorrect regulation until ordered to do so by a federal court, and failed to issue new regulations on pension accruals in a timely fashion. As a consequence of EEOC inaction, older workers lost benefits valued at as much as $450 million per year. As U.S. District Court Judge Harold Greene wrote in finding against the EEOC, the agency "has at best been slothful, at worst deceptive to the public, in the discharge of [its] responsibilities."[19]

Similarly, in 1987, over vocal objections from Congress and the senior community, the EEOC issued a regulation permitting employers to ask older workers to waive their ADEA rights even before any discrimination claim existed and without the supervision or approval of the EEOC. Congress responded by passing riders on the 1988, 1989, and 1990 EEOC appropriation to prevent the Commission from implementing the new rule on unsupervised waivers. Even in the face of this Congressional action, Mr. Thomas continued to oppose EEOC supervision.

The extent and seriousness of the problems with Mr. Thomas' performance at the EEOC were brought to the fore when Mr. Thomas surfaced as a possible nominee to the Court of Appeals. Fourteen Members of Congress who served on subcommittees with oversight responsibilities for the EEOC took the extraordinary step of writing to President Bush, asking that Mr. Thomas not be nominated to the federal bench. According to these Members of Congress, Mr. Thomas' "questionable enforcement record" at the EEOC "frustrates the intent and purpose" of the Civil Rights Act of 1964. In addition, the letter took strong exception to Mr. Thomas' lack of candor in dealing with the oversight committees, and concluded that Mr. Thomas "has demonstrated an overall disdain for the rule of law."[20]

B. Questionable Performance as Director of the Office of Civil Rights in the Department of Education

Mr. Thomas' tenure at the EEOC has received the most attention to date. However, before becoming Chair of the EEOC, Mr. Thomas served for one year as Director of the

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[19] AARP 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).

[20] Letter to President Bush by 14 Members of Congress, July 17, 1989.

Office of Civil Rights (OCR) in the Department of Education. During this short period, Mr. Thomas manifested a similar pattern of flouting established law. Mr. Thomas admitted in federal court that he had violated his legal obligations governing civil rights enforcement at OCR. In addition, Mr. Thomas' failure to enforce civil rights protections was so serious that on three separate occasions, OCR actions were opposed even by the Reagan Justice Department.

During Mr. Thomas' tenure, OCR was governed by a court order issued in the Adams v. Bell litigation, which required that OCR meet specified time limits in processing complaints and taking other enforcement action. This order was necessary because of a "general and calculated default" over a period of years in enforcing civil rights laws in education.[2] In 1982, while Mr. Thomas was head of OCR, the Adams court held a hearing concerning charges that OCR was failing to comply with the court order.

At the hearing, Thomas specifically admitted that he was violating the court order's requirements for processing civil rights cases:

Q: . . . But you're going ahead and violating those time frames; isn't that true? You're violating them in compliance reviews on all occasions, practically, and you're violating them on complaints most of the time, or half the time; isn't that true?

A: That's right.

Q: So aren't you, in effect, substituting your judgment as to what the policy should be for what the court order requires? The court order requires you to comply with this 90 day period; isn't that true?

A: That's right.....

Q: And you have not imposed a deadline [for an OCR study concerning lack of compliance with the Adams order]; is that correct?

A: I have not imposed a deadline.

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[2] See H.Rep. 99-458 (1985) at 5.

Q: And meanwhile, you are violating a court order rather grievously, aren't you?

A: Yes.[52]

Shortly after Mr. Thomas' testimony, the federal court in Adams in fact found that the court's order "has been violated in many important respects." [53]

One reason that Mr. Thomas failed to comply with the Adams order is that OCR placed "holds" on the processing of certain kinds of civil rights complaints while it considered or reconsidered its policies. As a memorandum to Mr. Thomas from his deputy pointed out, the use of hold categories not only "impeded the timely processing of a number of OCR cases" but also "stifled morale in OCR."[54]

In 1982, even the Reagan Justice Department protested OCR's refusal to enforce civil rights laws through the continuation of "hold" categories. OCR was suspending processing of complaints of improper job discrimination against the handicapped by universities and other recipients of federal education aid. Assistant Attorney General Bradford Reynolds wrote to Mr. Thomas, specifically questioning "the propriety of refusing to process" such complaints in most states, and pointedly requested that Mr. Thomas promptly notify OCR offices to "begin accepting, investigating and, where appropriate, remedying" those complaints.[55] Even after this complaint from the Department of Justice, which occurred less than a month after the court found significant violations of the Adams order, Mr. Thomas took no action to remedy this violation of law.

In addition, during Mr. Thomas' tenure, OCR finalized the implementation of a procedure called ECR, or Early Complaint Resolution.[56] Under ECR, OCR would seek to settle civil rights complaints in non-class action cases before an investigation had even begun.

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[52] Transcript of Hearing in WEAL and Adams v. Bell, D.D.C., Mar. 12, 1982, at 48, 51.

[53] Adams transcript, Mar. 15, 1982, at 3.

[54] Memorandum to Clarence Thomas from Michael Middleton, Dec. 3, 1981, at 1.

[55] Letter to Clarence Thomas from William Bradford Reynolds, Apr. 9, 1982.

[56] See Adams transcript at 20.

During Mr. Thomas' tenure, in November, 1981, the Justice Department specifically alerted OCR of its "major concern" that the use of ECR did not meet applicable standards and "could lead to a weakening of your enforcement posture and our litigation position."[57] According to a House Committee that investigated the use of ECR, however, no significant changes were made by Thomas or his successor in this area, despite Justice's complaint and its request that the use of ECR be closely monitored. By 1985, the Committee reported, 312 cases had been settled through ECR, and OCR could not assure the committee that "any or all of the ECR settlements were in accordance with statutory or regulatory requirements."[58] As the House Committee concluded, however, the use of ECR "may be illegal, may not protect the rights of complainants, and may jeopardize future litigation involving violations of civil rights laws."[59]

Mr. Thomas was also involved in a blatant attempt in 1981 by the Department of Education to change its position and undermine enforcement of sex discrimination laws. Since the mid-1970s, federal regulations provided that it was illegal for universities or other recipients of federal education funds to commit job bias on the basis of sex.[60] In 1981, however, even as the Supreme Court was considering a case challenging the Department of Education rules, Mr. Thomas announced that the Department was about to reverse its position and argue that the anti-sex discrimination law "does not cover employment."[61]

In fact, two weeks after Thomas' announcement, Education Secretary Bell wrote to the Justice Department to seek permission to repeal the anti-sex discrimination rules and effectively to concede that they were invalid in the Supreme Court.[62] The Justice Department refused, rejecting this apparent attempt by Mr. Thomas and Secretary Bell to seriously weaken anti-discrimination protections.[63] The Supreme Court repudiated the

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[57] Letter from Stewart B. Oneglia, Civil Rights Division, Department of Justice to Kristine M. Marcy, Office of Civil Rights, Nov. 13, 1991.

[58] H. Rep. 99-458 at 29.

[59] See H.Rep. 99-458 at 27.

[60] See 34 CFR 106.51-61 (1975).

[61] UPI Release, July 13, 1981.

[62] See BNA Daily Labor Report, Aug. 5, 1981, at p. A-5 (reprint of letter of July 27, 1981).

[63] See North Haven Board of Educ. v. Bell, 456 U.S. 509, 522 n. 12 (1982).

Thomas-Bell position, ruling that the regulations were valid and that the anti-sex bias law did in fact prohibit employment discrimination.[64]

IV. HOSTILITY TO LEGISLATIVE AUTHORITY

The need for Supreme Court justices to respect the will and intent 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, and have led to congressional efforts to overrule the Court decisions.[65]

Mr. Thomas' attitude towards the legislative function suggests that, if confirmed, he would further the Court's disturbing trend in this area. Mr. Thomas' record at the Office of Civil Rights and the EEOC, as described above, contains numerous examples of actions and statements contrary to existing law. This disrespect for Congress is even clearer in his writings and speeches.

For example, Mr. Thomas has frequently condemned Congress, and commented that willful violations of its intentions are to be applauded.[66] In a speech on the role of Congress in the formation of public policy, Mr. Thomas 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."[67]

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[64] Id.

[65] See, for example, H.R. 1 (1991) (the Civil Rights Act of 1991, attempting to overrule a series of Supreme Court decisions narrowing the scope of employment discrimination and civil rights laws); S. 323, H.R. 392 (1991) (attempting to overrule Rust v. Sullivan, which upheld a rule forbidding doctors at federally funded health clinics from providing patients with information about abortion).

[66] Thomas, Speech to the Federalist Society, University of Virginia, Mar. 5, 1988.

[67] Thomas, Speech to the Gordon Public Policy Center, Brandeis University, Waltham, Massachusetts, April 8, 1988, at 4.

In his 1988 speech, Mr. Thomas specifically attacked Congress' oversight activity. Mr. Thomas focussed his criticism on three members of the Senate Labor and Human Resources Committee who simply requested that Mr. Thomas at the time of his 1986 re-nomination as head of the EEOC keep them appraised of the EEOC's work by submitting semi-annual reports. Mr. Thomas referred to this oversight as an "intrusion" into the administrative deliberative process.[68]

A further example of Mr. Thomas' contempt for the legislative process and the rule of law can be found in his repeated praise for Oliver North. In one speech, Mr. Thomas said that the congressional committee "beat an ignominious retreat before Colonel North's direct attack on it, and by extension all of Congress."[69] In another speech, 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"[70] This praise for North's open flouting of Congress and the Constitution is wholly inappropriate from someone being considered for the Supreme Court, whose respect for the Constitution, the separation of powers, and the rule of law must be beyond reproach.

Mr. Thomas' harsh disparagement of congressional authority is particularly troubling in light of his belief that Congress does not even have the power to create a special prosecutor to investigate executive branch misconduct and his own refusal at OCR and EEOC to comply with the law. These aspects of Mr. Thomas' record strongly suggest that, if confirmed, he would join justices like Rehnquist and Scalia in seeking to undermine congressional statutes protecting individual rights and liberties and to limit improperly congressional authority under the Constitution.

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[68] Id. at 5.

[69] Thomas, Speech before the Cato Institute, Washington, D.C., Oct. 2, 1987, at 13.

[70] Thomas, Speech to the Federalist Society, University of Virginia, Mar. 5, 1988, at 13 (emphasis in original).

V. JUDICIAL PHILOSOPHY: ADHERENCE TO A 'DISCREDITED'[71] THEORY OF NATURAL LAW

Mr. Thomas' overall judicial philosophy is centered on a belief in "natural law" or "higher law". According to Mr. Thomas, there are fixed objective truths in natural law that somehow trump or override the Constitution or other written law.[72] Mr. Thomas asserts that the Supreme Court is justified in overturning the decisions of "run-amok majorities" and "run-amok judges" as long as it adheres to natural law.[73] Legal scholars and judges have recognized, however, that this emphasis on natural law is extraordinarily troubling, and the theory has been rejected as a basis for constitutional analysis for over fifty years. Geoffrey Stone, dean of the University of Chicago Law School has characterized Mr. Thomas' ideas as "strange" and "further outside the mainstream of constitutional interpretation than Bork."[74]

Legal scholars have explained that there are no fixed "higher law" principles that can override the Constitution. Indeed, as Professor John Hart Ely has noted: "natural law has been summoned in support of all manner of causes in this country -- some worthy, some nefarious -- and often on both sides of the same issue."[75] Professor Gary McDowell recently wrote: "To suggest that the Constitution sprang from and rests upon the natural law teaching of the Declaration of Independence is one thing; but to argue that it is appropriate for judges to claim recourse to that body of law in deciding the cases that come before them is quite a different matter."[76]

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[71] J. Ely, Democracy and Distrust, (1980), at 50.

[72] See, e.g., Thomas, Speech before the Heritage Foundation, Washington, D.C., June 18, 1987, at 22; Thomas, "The Higher Law Background of the Privileges or Immunities Clause," 12 Harv. J. of L. and Pub. Pol. 63 (1989) (hereinafter "Higher Law"); Thomas, Speech before the U.S. Department of Justice -- Dr. Martin Luther King, Jr. Holiday Observance, Washington, D.C., Jan. 16, 1987, at 6.

[73] "Higher Law" at 64; Thomas, Speech to the Federalist Society, University of Virginia, Mar. 5, 1988, at 2.

[74] Page, "Will Thomas be Borked?: Views Are Fair Game," Washington Times, July 12, 1991.

[75] See, J. Ely, Democracy and Distrust, at 50, (1980); Tribe, New York Times, July 12, 1991.

[76] McDowell, "Doubting Thomas: Is Clarence a Real Conservative?," The New Republic, July 29, 1991, at 15.

Despite his belief in unwritten, natural law, Mr. Thomas has attacked one of the most important Supreme Court decisions protecting rights not explicitly mentioned in the Constitution, Griswold v. Connecticut.[77] In Griswold, the Court ruled that the Constitution protects the right of privacy-- not because of higher, natural law superior to the Constitution, but because the right of privacy is implicit in written Constitutional guarantees and traditions. One part of the basis for Griswold was the Ninth Amendment, which provides that rights need not be explicitly enumerated in the Constitution to be protected. Notwithstanding his belief in fixed principles of unwritten natural law not mentioned expressly in the Constitution, however, Mr. Thomas has criticized Griswold because of its "invention" of the Ninth Amendment, asserting that the Ninth Amendment "will likely become an additional weapon for the enemies of freedom."[78] Mr. Thomas' views on the Ninth Amendment, particularly in light of his views on natural law, are extremely troubling.

In fact, Mr. Thomas' applications of natural law could result in dangerous and dramatic reversals of Supreme Court precedents. Mr. Thomas has used natural law analysis to severely criticize the Supreme Court's reasoning in Brown v. Board of Education[79] as well as the right to privacy.[80] He has praised as a "splendid example of applying natural law" an article that urged overturning Roe v. Wade and establishing a constitutional imperative against abortion.[81] Mr. Thomas' belief that natural law requires that the government be "color-blind" in all actions has led him to disagree with virtually every Supreme Court decision that approved of affirmative action, even in cases involving intentional discrimination. In other instances, Mr. Thomas has suggested that natural law analysis protects economic liberty, and that government regulation somehow violates natural

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[77] 381 U.S. 479 (1965).

[78] "Principle versus Interest" at 399.

[79] Thomas, "The Modern Civil Rights Movement: Can a Regime of Individual Rights and the Rule of Law Survive?," Speech before the Tocqueville Forum, Wake Forest University, Winston-Salem, North Carolina, Apr. 19, 1988, at 16.

[80] Thomas, "Higher Law," at 63, n. 2.

[81] Thomas, Speech to Heritage Foundation, June 18, 1987, praising Lehrman, "The Declaration of Independence and the Right to Life: One Leads Unmistakably to the Other," The American Spectator, Apr. 1987, at 21.

law.[82] Indeed, Mr. Thomas has severely criticized regulatory legislation such as minimum wage laws.[83]

The natural law theme pervades Mr. Thomas' speeches and writings since the beginning of 1987. Between January 1987 and April 1988, Mr. Thomas gave at least 11 speeches in which he discussed natural law. He has published at least eight articles that argue for natural law analysis. The theme is constant, the endorsement is unequivocal. In light of Thomas' criticism of fundamental Court precedents concerning privacy and civil rights, as well as the important cases the Supreme Court will be deciding in these areas in the future, Mr. Thomas' natural law views are cause for serious concern.

VI. CONCLUSION

When Clarence Thomas was nominated to the Court of Appeals 18 months ago, the People For the American Way Action Fund expressed serious reservations but stopped just short of opposing his confirmation. Nominated to the Supreme Court, he must be held to a higher standard. The power of a Supreme Court justice is infinitely greater. Lower court judges are required to follow the guidance of the Supreme Court, and are subject to appellate review. On the Supreme Court, particularly the Court under the leadership of Chief Justice Rehnquist, the stricture of following precedent is largely removed, and there is no appeal.

Based on a thorough examination of Mr. Thomas' record as a judge and government official, and the opinions he has expressed in hundreds of articles and speeches, we believe that, were he confirmed by the Senate, Clarence Thomas would pose a substantial threat to the right to privacy and to efforts to combat discrimination. Mr. Thomas' record indicates a willingness to overturn precedents involving fundamental individual liberties and civil rights. His turbulent tenure at the EEOC and his oft-expressed distaste for the legislative branch suggest that he would join forces with those justices who willingly disregard legislative directives in favor of their personal policy preferences.

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[82] Thomas, Speech before the American Bar Association, Luncheon Meeting of Business Law Section, Aug. 11, 1987, at 14.

[83] See "Black America Under the Reagan Administration," Policy Review, Fall 1985, at 37.

One of the key arguments the Bush Administration has highlighted in campaigning for Clarence Thomas is that his experiences will make him a defender of victims of poverty and discrimination. Mr. Thomas' personal history merits praise, but his public record contradicts the Administration's assertion. We agree with Rep. John Lewis' response to that argument: "Look at his record. He has forgotten from whence he has come."[84]

On behalf of the Board of Directors and members of the People For the American Way Action Fund, we call upon the United States Senate, in the exercise of its co-equal role in the selection of Supreme Court justices, to reject the nomination of Clarence Thomas.

The People for the American Way Action Fund is a 300,000-member, nonpartisan constitutional liberties organization. People For was a leader in the effort to defeat the nomination of Robert Bork to the Supreme Court. For more information, or to arrange interviews, contact the People For Communications Department at 202/467-4999.

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[84] Lewis, "Why I Oppose the Thomas Nomination," July 16, 1991.

The CHAIRMAN. Thank you very much, Congressman.
Mr. Chambers.

STATEMENT OF JULIUS CHAMBERS

Mr. CHAMBERS. Thank you, Mr. Chairman. Thank you for permitting me to address the committee on behalf of the NAACP Legal Defense and Educational Fund.

I serve as director counsel of the NAACP Legal Defense Fund, a position previously held by retiring Justice Thurgood Marshall and Jack Greenberg, who is now dean of Columbia University.

The legal defense fund played a major role in litigating most of the civil rights cases during the past 50 years. We have litigated more than 500 cases in the U.S. Supreme Court, including many of those that this committee discussed during these proceedings——

The CHAIRMAN. 500, you say?

Mr. CHAMBERS. Yes. In addition to *Brown* v. *Board of Education,* the legal defense fund represented the Griggs plaintiff. I personally argued over eight cases in the U.S. Supreme Court, including *Albemarle Paper Company* v. *Moody, Swann* v. *Charlotte-Mecklenburg, Thornburgh* v. *Gingles,* and the recent *Houston Lawyers Association* case that was decided last term.

With great regret, as I think exists among several others who oppose this nominee, I urge you to reject this nomination and to advise the President that Judge Thomas, based on the evidence produced at these hearings, does not meet the standards for elevation to the U.S. Supreme Court.

In summary, my reasons are: first, that the nominee, with no articulated or supportable constitutional or judicial standards would reject much of what this country has done to ensure that African-Americans and other disadvantaged people will have an equal chance in life. This position, as I will develop, is based on the writings and speeches of the nominee as well as my own personal experience.

Second, even if we accept the nominee's recantations or explanations offered during these hearings, the committee and the Senate are left with a candidate who cannot possibly demonstrate qualifications or judicial attributes to serve on our highest Court.

For more than 50 years, the legal defense fund has appealed to the judicial system to ensure improved opportunities for minorities and disadvantaged Americans. We have had marked success and have convinced minorities that, despite its flaws, the Court offers a reasonably fair and peaceful means for seeking equality. We have raised hopes among African-Americans and others that whatever their grievances, they can be fairly or sympathetically heard and addressed in our judicial system. But these accomplishments and the progress we have made would be seriously threatened by Judge Thomas' elevation to the Supreme Court. He threatens and would challenge the precedents established in the Court and in Congress in practically every area of concern to us.

For example, in voting rights, he questions the effects test, established by Congress in 1972 and approved by the Court in *Thornburgh* v. *Gingles.* He questions the affirmative obligations imposed by the Court in *Green* v. *New Kent County* and *Swann* v. *Charlotte-*