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THE WHITE HOUSE

WASHINGTON

August 20, 1991

MEMORANDUM FOR CABINET AND AGENCY CONTACTS

FROM:

GARY BLUMENTHAL

Gary

SUBJECT:

Additional Materials on Clarence Thomas

Attached are additional materials on Supreme Court nominee Clarence Thomas. These materials were assembled to help summarize Judge Thomas' legal perspective. Therefore, you may wish to share this specific packet with your general counsel.

Attachment

MATERIALS ON NOMINATION OF JUDGE CLARENCE THOMAS
TO THE UNITED STATES SUPREME COURT

PERSONAL

Climb the Jagged Mountain

By Clarence Thomas

I grew up here in Savannah. I was born not far from here (in Pinpoint). I am a child of those marshes, a son of this soil. I am a descendant of the slaves whose labors made the dark soil of the South productive. I am the great-great-grandson of a freed slave, whose enslavement continued after my birth. I am the product of hatred and love — the hatred of the social and political structure which dominated the segregated, hate-filled city of my youth, and the love of some people — my mother, my grandparents, my neighbors and relatives — who said by their actions, "You can make it, but first you must endure."

You can survive, but first you must endure. You can live, but first you must endure. You must endure the unfairness. You must endure the hatred. You must endure the bigotry. You must endure the segregation. You must endure the indignities.

I stand before you as one who had the same beginning as yourselves — as one who has walked a little farther down the road, climbed a little higher up the mountain. I come back to you, who must now travel this road and climb this jagged, steep mountain that lies ahead. I return as a messenger — a front-runner, a scout. What lies ahead of you is even tougher than what is now behind you.

That mean, callous world out there is still very much filled with discrimination. It still holds out a different life for those who do not happen to be the right race or the right sex. It is a world in which the "haves" continue to reap more dividends than the "have-nots."

You will enter a world in which more than one-half of all black children are born primarily to youthful mothers and out of wedlock. You will enter a world in which the black teenage unemployment rate as always is more than double that of white teenagers. Any discrimination, like sharp turns in a road, becomes critical because of the tremendous speed at which we are traveling into the high-tech world of a service economy.

There is a tendency among young, upwardly mobile, intelligent minorities to forget. We forget the sweat of our forefathers. We forget the blood of the marchers, the prayers and hope of our race. We forget who brought us into this world. We overlook who put food in our mounds and clothes on our backs. We forget commitment to excellence. We procreate with pleasure and retreat from the responsibilities of the babies we produce.

We subdue, we seduce, but we don't respect ourselves, our women, our babies. How do we expect a race that has been thrown into the gutter of socio-economic indicators to rise above these humiliating circumstances if we hide from responsibility for our own destiny?

The truth of the matter is we have become more interested in designer jeans and break dancing than we are in obligations and responsibilities.

Over the past 15 years, I have watched as others have jumped quickly at the opportunity to make excuses for black Americans. It is said that blacks cannot start businesses because of discrimination. But I remember businesses on East Broad and West Broad that were run in spite of bigotry. It is said that we can't learn because of bigotry. But I know for a fact that tens of thousands of blacks were educated at historically black colleges, in spite of discrimination. We learned to read in spite of segregated libraries. We built homes in spite of segregated neighborhoods. We learned how to play basketball (and did we ever learn!), even though we couldn't go to the N.B.A.

We have lost something. We look for role models in all the wrong places. We refuse to reach back in our not too distant past for the lessons and values we need to carry us into the uncertain future. We ignore what has permitted blacks in this country to survive the brutality of slavery and the bitter rejection of segregation. We overlook the reality of positive values and run to the mirage of promises, visions and dreams.

I dare not come to this city, which only two decades ago clung so tenaciously to segregation, bigotry and Jim Crowism, to convince you of the fairness of this society. My memory is too precise, my recollection too keen, to venture down that path of self-delusion. I am not blind to our history — nor do I turn a deaf ear to the pleas and cries of black Americans. Often I must struggle to contain my outrage at what has happened to black Americans — what continues to happen — what we let happen and what we do to ourselves.

If I let myself go, I would rage in the words of Frederick Douglass: "At a time like this, scorching irony, not convincing argument, is needed. Oh! Had I the ability, and could reach the nation's ear, I would today pour out a fiery stream of biting ridicule, blasting reproach, withering sarcasm and stern rebuke. For it is not light that is needed, but fire; it is not the gentle shower, but thunder. We need the storm, the whirlwind and the earthquake."

I often hear rosy platitudes about this country — much of which is true. But how are we black Americans to feel when we have so little in a land with so much? How is black America to respond to the celebration of the wonders of this great nation?

In 1964, when I entered the seminary, I was the only black in my class and one of two in the school. A year later, I was the only one in the school. Not a day passed that I was not pricked by prejudice.

But I had an advantage over black students and kids today. I had never heard any excuses made. Nor had I seen my role models take comfort in

excuses. The women who worked in those kitchens and waited on the bus knew it was prejudice which caused their plight, but that didn't stop them from working.

My grandfather knew why his business wasn't more successful, but that didn't stop him from getting up at 2 in the morning to carry ice, wood and fuel oil. Sure, they knew it was bad. They knew all too well that they were held back by prejudice. But they weren't pinned down by it. They fought discrimination under W. W. Law (a Georgia civil rights leader) and the N.A.A.C.P. Equally important, they fought against the awful effects of prejudice by doing all they could do in spite of this obstacle.

They could still send their children to school. They could still respect and help each other. They could still moderate their use of alcohol. They could still be decent, law-abiding citizens.

I had the benefit of people who knew they had to walk a straighter line, climb a taller mountain and carry a heavier load. They took all that segregation and prejudice would allow them and at the same time fought to remove these awful barriers.

You all have a much tougher road to travel. Not only do you have to contend with the ever-present bigotry, you must do so with a recent tradition that almost requires you to wallow in excuses. You now have a popular national rhetoric which says that you can't learn because of racism, you can't raise the babies you make because of racism, you can't get up in the mornings because of racism. You commit crimes because of racism. Unlike me, you must not only overcome the repressiveness of racism, you must also overcome the lure of excuses. You have twice the job I had.

Do not be lured by sirens and purveyors of misery who profit from constantly regurgitating all that is wrong with black Americans and blaming these problems on others. Do not succumb to this temptation of always blaming others.

Do not become obsessed with all that is wrong with our race. Rather, become obsessed with looking for solutions to our problems. Be tolerant of all positive ideas; their number is much smaller than the countless number of problems to be solved. We need all the hope we can get.

Most importantly, draw on that great lesson and those positive role models who have gone down this road before us. We are daunted and pushed by our friends and peers to do unlike our parents and grandparents — we are told not to be old-fashioned. But they have weathered the storm. It is up to us now to learn how. Countless hours of research are spent to determine why blacks fail or why we commit crimes. Why can't we spend a few hours learning how those closest to us have survived and helped us get this far?

ahead and taken a long, hard look. I have seen two roads from my perch a few humble feet above the madding crowd. On the first, a race of people is rushing mindlessly down a highway of sweet, intoxicating destruction, with all its bright lights and grand promises constructed by social scientists and politicians. To the side, there is a seldom used, overgrown road leading through the valley of life with all its pitfalls and obstacles. It is the road — the old-fashioned road — traveled by those who endured slavery, who endured Jim Crowism, who endured hatred. It is the road that might reward hard work and discipline, that might reward intelligence, that might be fair and provide equal opportunity. But there are no guarantees.

You must choose. The lure of the highway is seductive and enticing. But the destruction is certain. To travel the road of hope and opportunity is hard and difficult, but there is a chance that you might somehow, some way, with the help of God, make it. □

Margaret Bush Wilson

The NAACP Is Wrong on Thomas

The young man standing at my door that summer day in 1974 looked like an African prince. "Hello, I'm Clarence Thomas," he said. "Wow," I replied. "I've been expecting you." And began a friendship with someone I think of only as a second son.

I first heard of young Thomas (then almost 26) from his employer-to-be, Sen. John Danforth (R-Mo.), who was attorney general of Missouri at the time. Mr. Danforth told me he had just hired a bright young law graduate from Yale and asked if I knew of a place the young man could live for the summer while studying for the Missouri bar. My own son, Robert, was then a law student with plans to work that summer in Washington. I invited young Clarence to stay in my son's empty room.

I don't recall seeing another young person as disciplined as Clarence Thomas. First thing every day, he would exercise with my son's weights and then be off to his studies. I asked of him only one thing: I would prepare dinner, and he would show up on time. We would eat together every night, often with one or two friends or relatives and talk about any and all of the problems of the world.

We didn't always agree (Clarence was "conservative" even then), but I was impressed continually with one so young whose reasoning was so sound. I must also admit that his arguments, both legal and logical, forced me to rethink some of my own views. I know I sometimes made him see things differently, too, because Clarence Thomas knew how to listen as well as talk.

Across the years, I have kept in touch with Thomas, and to this day I respect his integrity, his legal mind and his determination. Even when we disagree, I have found him to be a sensitive and compassionate person trying to do what is right, working to make the world a better place.

Back then I sensed that he would one day be in a position to have a larger impact, but I had no way of knowing that this determined young man might one day have the chance to tackle some of our country's problems on this nation's highest court.

Recently, the NAACP National Board took action opposing Judge Thomas's nomination. I wish it had withheld judgment until after the hearings, because the Clarence Thomas I have been reading about often bears little resemblance to the thoughtful and caring man I have known over these years.

Judge Thomas reflects the diversity and complexity of African-American thinking, but his views are not nearly as radical as his critics suggest. He has pushed for a new frontier in civil rights, and heaven knows we need one when one-third of African Americans are still in poverty as we approach the 21st century. He seeks a climate where African Americans and other minorities feel empowered to compete equally with their counterparts of other races, with rational support from government programs.

Some have said that despite his chairmanship of the Equal Employment Opportunity Commission for eight years, he has not been a champion of civil rights. Those people obviously don't know Judge Thomas or the real facts about his tenure with the EEOC. His record will speak for itself and will impress those willing to listen and look

beyond misinformed rhetoric. On a personal level, he knows the struggle and hardship blacks and the impoverished of every race grapple with daily—not to mention the plight of most families, since in my judgment the central issue of our time is that some 82 percent of the families in these United States have no discretionary income after bills and taxes are paid.

We didn't talk much about Judge Thomas's background that summer 17 years ago, so it is only recently that I have learned about his humble beginnings. The cramped house with no plumbing in rural Georgia, his wise but not learned grandparents, the Catholic nuns and the rest have only recently come into full view for me. To rise above the dual curses of poverty and discrimination requires tremendous individual effort from a special kind of person, help from others and luck. All these have been present in Judge Thomas's career.

Throughout the history of the U.S. Supreme Court, I don't believe any other nominee can claim to have come so far. In point of fact, Judge Thomas's unique perspective belongs not only on the Supreme Court but in the legislature, in the work place, at city hall and on our campuses.

No one can deny that Judge Thomas would differ with Justice Thurgood Marshall on some issues. I don't always agree with the justice myself. I do believe that both men show a common, fundamental belief in the inherent worth and rights of the individual. At one of his four previous Senate confirmation hearings, Judge Thomas said, "The reason I became a lawyer was to make sure that minorities, individuals who did not have access to this society, gained access. . . . I may differ with others on how best to do that, but the objective has always been to include those who have been excluded."

As young Clarence Thomas left my home at the end of the summer, he asked how much he owed for his stay. I told him that he owed me nothing, but I did want a promise from him. I asked him to promise that if he were ever in a position to reach out and help others that he would do it, just as some had done for me and as I had done for him.

He promised he would, and Judge Thomas has been keeping his word ever since, looking out for the vulnerable and victimized on the job, in the community and at the court. I know that as a Supreme Court justice Clarence Thomas will continue to defend and protect the rights of the needy. He does not permit anyone to think for him, and he is intellectually honest.

When the history of these times is written, it will be interesting to see how historians view the position of the National Board of the NAACP—an organization committed to advancing colored people, which is opposed, on ideological grounds, to this nomination of a black man to the U.S. Supreme Court.

Let the record show that the NAACP's former national board chair respectfully disagrees with its position.

The writer, an attorney in St. Louis, chaired the National Board of Directors of the National Association for the Advancement of Colored People from 1975 to 1984.

THE WALL STREET JOURNAL.

TUESDAY, JULY 2, 1991

The Marshall Seat Bush's Court Nominee, A Black Republican, Is Deft Political Choice

Conservatives Laud Thomas; Liberals May Be Hard Put To Mount a Strong Attack

Grandson of a Sharecropper

By STEPHEN WERMIEL
And PAUL M. BARRETT

Staff Reporters of THE WALL STREET JOURNAL.
WASHINGTON—By choosing Clarence Thomas, a conservative black federal judge, for the Supreme Court, President Bush may have defused a fierce political battle over the high court's shift to the right.

Judge Thomas, who has been sitting on the federal appeals court in Washington for just 14 months, won't be confirmed without a fight in the Senate focusing on his inexperience on the bench and his strong opposition to affirmative action.

But barring damaging unforeseen revelations about Judge Thomas, Democrats will have a hard time mounting a broad-based campaign against the affable 43-year-old, who is smart, tough and speaks powerfully about overcoming racism and poverty in the deep South.

"Anybody who takes him on in the area of civil rights is taking on the grandson of a sharecropper," observes conservative Republican Sen. Orrin Hatch of Utah.

Judge Thomas's nomination yesterday got a restrained reaction from many Senate Democrats. Civil rights groups, too, said they will have to study his record, both in his brief tenure on the appeals court and as chairman of the Equal Employment Opportunity Commission during the Reagan administration.

Mr. Bush's choice is a bold political move, coming in the midst of the current debate over civil rights legislation and quotas. The president has nominated a man who would be not merely the second black to serve on the Supreme Court, but a man who embodies the ideal of personal achievement rather than reliance on government programs for a leg up.



Clarence Thomas

Liberal Praise

The choice also will put Democrats on the defensive: Judge Thomas draws praise even from some liberals. "He has been a very good colleague," says Chief Judge Abner Mikva of the appeals court here, a former Democratic congressman. Moreover, Democrats specifically urged the president to consider appointing a minority-group member to fill the vacancy that was created when Thurgood Marshall announced his retirement last Thursday.

Judge Thomas's association with moderate Republican Sen. John Danforth of Missouri, for whom he worked after his graduation from Yale Law School in 1974, will also weigh in his favor. Mr. Danforth's support will help reassure many moderate Senate Democrats and Republicans, much as New Hampshire GOP Sen. Warren Rudman's sponsorship of David Souter did after President Bush nominated him last July.

While liberals will focus on Judge Thomas's legal inexperience, his record on the bench doesn't present them with the sort of target they had with the articulated, sharply conservative legal views of Robert Bork, whose Supreme Court nomination was defeated in 1987.

A number of Senate Democrats, including Judiciary Chairman Joseph Biden of Delaware, stressed when Judge Thomas was confirmed for the appeals court that he would face tougher scrutiny if he were nominated for the Supreme Court. But that will be a difficult position to defend in light of Mr. Thomas's success last year in deflecting liberal criticism.

Judge Thomas's strong opposition to affirmative action and the abortion debate will be grist for his confirmation hearings. "I don't know where Judge Thomas stands on a woman's right to choose, but I intend to find out," said Democratic Sen. Howard Metzenbaum of Ohio, who was the lone opponent last year in the Senate Judiciary Committee's 12-to-1 approval of his appeals court nomination. "Women have a right to know whether Judge Thomas is committed to protecting their fundamental rights."

Abortion and Catholicism

Abortion-rights groups are also likely to be concerned about the fact that Judge Thomas is a Catholic who spent a year in a Missouri seminary in the 1960s pondering the priesthood. As other Supreme Court nominees have done, however, Judge Thomas is likely to go to great lengths to avoid committing himself on abortion, an issue that is expected to come before the court again and again.

The reaction from civil rights groups was muted. Ralph Neas, executive director of the Leadership Conference on Civil Rights, said, "With so many constitutional rights and personal liberties at stake, the Senate must make sure Clarence Thomas has demonstrated a commitment to equal opportunity and equal justice under the law. We urge the Senate not to rush to judgment."

To friends and colleagues of Judge Thomas, his own life story is the most compelling thing about him. With Justice Marshall's retirement, civil rights advo-

cates worried that there would no longer be anyone on the court who had experienced racial segregation. Though Judge Thomas may not find favor with those groups, the fact is that he knew nothing but segregation as he grew up outside Savannah, Ga., in the 1950s.

Born into rural poverty, he lived in a house with no bathroom until he was seven years old. His father left when he was young, and his mother sent him to live with his grandparents.

The grandparents raised him with strict discipline, instilling in him a strong work ethic, and sent him to an all-black Catholic school run by white nuns. Yesterday, speaking at a news conference at President Bush's home in Kennebunkport, Maine, Mr. Thomas choked up when he talked about his grandparents' influence. For a moment, it appeared that he might not be able to finish his statement. He praised them as well as "my mother and the nuns, all of whom were adamant that I grow up to make something of myself."

As a child, Judge Thomas said, "I could not dare dream that I would ever see the Supreme Court, not to mention be nominated to it. Indeed, my most vivid childhood memory of the Supreme Court was the 'Impeach Earl Warren' signs which lined Highway 17 near Savannah. I didn't quite understand who this Earl Warren fellow was, but I knew he was in some kind of trouble."

The first person in his family to attend college, Judge Thomas spent a year at Immaculate Conception Seminary in Conception Junction, Mo., before transferring to Holy Cross College in Worcester, Mass. After law school, he went to work for Mr. Danforth, who was then Missouri's attorney general.

After two years in the Monsanto Co. legal department, Judge Thomas rejoined Mr. Danforth, by then a U.S. senator. He then served for a year as chief of the U.S. Education Department's civil rights office before President Reagan appointed him chairman of the EEOC in 1982.

His eight-year tenure at the EEOC was marked by controversy. He changed the agency's approach to de-emphasize settling large numbers of cases quickly, concentrating instead on instances in which specific victims of discrimination could be identified. In age discrimination, particularly, that created case backlogs that distressed advocates for senior citizens.

Liberals charged that, across-the-board, the EEOC under Mr. Thomas's leadership didn't aggressively attack civil rights violations. "As chairman of the EEOC, Clarence Thomas failed to demonstrate a commitment to civil rights and liberties," says Nan Aron of the liberal Alliance for Justice.

But Mr. Thomas had strong views and didn't shrink from expressing them. Rather, he seized every opportunity—including writing letters to editors, op-ed page articles and book reviews—to attack affirmative action as patronizing and as an ineffective remedy for discrimination. In a 1987 letter to *The Wall Street Journal*, he

said, "I firmly insist that the Constitution be interpreted in a colorblind fashion. . . . I emphasize black self-help, as opposed to racial quotas and other race-conscious legal devices that only further and deepen the original problem."

Since he has been on the federal bench, liberal and conservative legal analysts agree, the relatively few opinions he has written don't suggest a strong ideological slant, although he has tended to rule for the government in criminal cases and in business regulatory matters.

One highly controversial case on which Judge Thomas sat earlier this year has yet to be decided. A three-judge panel of the appeals court is considering the constitutionality of a Federal Communications Commission policy giving preference to women for broadcast licenses. The others

on the panel were Judges Mikva and James Buckley, a conservative. The questions are: Will Judge Thomas use the case to once again attack affirmative action, and will that pour fuel on his confirmation fight?

Judge Thomas is well-liked by colleagues, both at the EEOC, where the new headquarters building is named for him, and at the appeals court.

Ricky Silberman, a close friend who is vice chairman of the EEOC and whose husband, Laurence, sits on the appeals court, says: "He is a very simple person who loves to say he was a farm boy and remains a farm boy." A sometime jogger and weightlifter, he enjoys reading and listening to music ranging from classical to his favorite, country singer George Jones.

For much of his tenure at the EEOC, Mr. Thomas was a single parent, raising a son, Jamal. Some friends have expressed concern that the bitterness of the divorce from his first wife could spill over into his confirmation hearings. His second wife, Virginia, a deputy assistant secretary at the Labor Department, is white.

In light of the administration's strong attack on racial quotas in hiring, President Bush's selection of a black man to fill Justice Marshall's seat brought questions about whether he was in fact observing a quota on the court. In his press conference, Mr. Bush strongly denied the very thought of that, insisting that race wasn't a factor in the selection of Judge Thomas.

"The fact that he is black—a minority—has nothing to do with this," the president said. "He is the best qualified."

Judge Thomas, who just turned 43 last week, would be the youngest Supreme Court justice of the past 100 years with the exception of William O. Douglas, who joined the court when he was 40. Senate Judiciary Committee hearings on the Thomas nomination are expected to be held in September. If they go smoothly, Justice Thomas could be sworn in before the new Supreme Court term begins on Oct. 7.

WEDNESDAY, JULY 3, 1991

Influence of Nuns Lives On With Court Nominee

SAVANNAH, Ga., July 2 — The old St. Benedict the Moor School on East Gordon Street here, which Clarence Thomas attended for eight years in the 1950's and 60's, has long been closed, a footnote to the history of segregated Savannah. Its windows are boarded up, its swings broken, its plywood doors padlocked; the Irish nuns who taught there, whom some white townspeople called the "nigger sisters," have all retired to convents elsewhere.

But their influence, and St. Benedict's, lives on in Judge Thomas, as he quickly and regularly acknowledges. Fourteen months ago, three of the nuns were present when he took his seat on the United States Court of Appeals for the District of Columbia Circuit. He mentioned the nuns again on Monday, as he stood beside President Bush in Kennebunkport, Me. Along with his grandparents and mother, he said, the nuns had been "a part of that I grow up to make something of myself."

Old and fragile though they have become, Sisters Mary Carmine and Virgilius and Mary Daniel and Aquin will undoubtedly be invited to Washington if their former student takes his place on the United States Supreme Court.

Whether or not the Franciscan nuns attended the ceremony, their presence would certainly be felt. Their teachings are present in the defiant, almost-Darwinian conviction they instilled in Clarence Thomas that with enough hard work and determination he could overcome quadruple handicaps: being black, fatherless, poor and Catholic in the Eisenhower-era South.

But the nuns' lofty ideals about race, justice and tolerance inevitably collided with the harsh realities of life in Savannah, Conception, Mo., Worcester, Mass., and New Haven, Conn., and the resulting disappointment helped make him the complex man he has become: fiercely independent, sometimes bitter, stoic, profoundly skeptical of dogmas, conventions, and panaceas.

In dozens of interviews, Judge Thomas' friends, teachers, classmates and colleagues from his early

years said today that the Clarence Thomas they knew is not the one-dimensional conservative caricature that some news accounts have portrayed.

'No Knee-Jerk Conservative'

They recall a young man involved with black student protests at Holy Cross College, a receptive student of the writings of Malcolm X, a fledgling seminarian who gave up the possibility of a religious vocation after a brush with ugly racism.

"It had to be hard coming up as a black from the South into a northeastern white community with a heavy population from Boston, but he didn't let it throw him at all," said Father John E. Brooks, President of Holy Cross in Worcester, where Judge Thomas spent his undergraduate years as an English major. "He's not a complainer."

"He's obviously not a flaming liberal, but he's no knee-jerk conservative either," Father Brooks continued. "He wants to do his own thinking. He's not following a crowd."

Judge Thomas does represent an odd, seemingly contradictory amalgam of influences. He bears the mark of Booker T. Washington whose phi-

losophy of self-reliance was transmitted principally through Judge Thomas's grandfather, Myers Anderson, the Savannah fuel and ice dealer with whom he went to live at the age of 7. The better he prepared himself, Mr. Anderson told his grandson, the less dependent he would be on the white man.

"Clarence always seemed like a go-getter, but you didn't pay too much attention because his grandfather was like that," said Geraldine Williams of Savannah, a long-time family friend.

Then there are his current political mentors, — men like Ronald Reagan, George Bush, John Sununu and the Missouri Republican Senator, John C. Danforth, — who have helped make him anathema to leaders of traditional civil rights organizations.

To black schoolmates and friends, like J. Hanson Guest, a lawyer in Hartford, and Orian Douglass, a lawyer in Brunswick, Judge Thomas's appointment is a cause for joy. Whatever personal differences might have with him are overridden by two opposing forces: their loyalty to an old

friend and their conviction that his views on racial matters, though unconventional, may just be right.

"He's a controversial figure and I don't agree with all his positions, but I think he will make a superb judge," Mr. Guest said. "I just pray he will be confirmed."

A Conservative View

Mr. Douglass, a criminal defense lawyer, predicted that Judge Thomas would rule conservatively in criminal law and privacy cases. "Miranda is not going to find much comfort in Clarence Thomas," he said. But he added: "He's going to hold himself spiritually accountable for his decisions. He's not going to rule one way or the other because of pressure. He came up the rough side of the mountain, and I know he's not going to be insensitive."

Some who have long known Judge Thomas depict a man who has lost touch with his roots and grown ambivalent about his racial identity, a one-time black nationalist keeping company with conservative Republicans. It is an evolution that both grieves and puzzles these people.

"I'd like to see if the person I knew 20 years ago is still there lodged somewhere deep inside of him, and if the public person he's become over the past 15 years is more than a veneer," said Lani Guinier, who now teaches at the University of Pennsylvania Law School. She expressed hope that the magnitude of the Supreme Court would prompt Judge Thomas to reflect upon and reconnect himself to his roots.

In the fall of 1967, Clarence Thomas and 64 other young Catholic men entered Immaculate Conception Seminary in the northwestern Missouri town of Conception with the goal of becoming priests. Half the students, including Mr. Thomas, left the seminary after the first year.

"He and I were not close friends," said Father Benedict Neenan, a classmate who is now a Benedictine monk and the prior of Conception Abbey. "But in a small class you observe one another quite a bit and I remember him as a very intense person. I remember him as an excellent student. When he would speak in class he knew what he was talking about and people respected him."

"He didn't speak out a lot in class but when he did he spoke with maturity and understanding and you would say, 'Wow, he's been thinking about this.'"

LEGAL TIMES

LAW AND LOBBYING IN THE NATION'S CAPITAL

WEEK OF JULY 8, 1991 • VOL. XIV, NO. 7 • \$8.00

Clarence Thomas: Mind and Matter

How the Supreme Court Nominee
Brings His Hard Life Into the Law

BY TERENCE MORAN

It was just another drug appeal, just another lousy, losing case brought to the U.S. Court of Appeals by a kid caught with cocaine.

The facts before the D.C. Circuit panel last October were sadly familiar. José Lopez, the 18-year-old defendant, had pleaded guilty to conspiracy to distribute cocaine base, and now sought reduction of the stiff, 51-month sentence meted out to him under federal sentencing guidelines.

• How the choice is playing at the U.S. Courthouse. Page 7

• Thomas' 'plain reading' of the Constitution. Verbatim, Page 8

• Excerpts from 1984 interview. Page 11

Assistant U.S. Attorney James Meade made the government's routine response that morning, urging the judges to give great deference to the guidelines. There was no need to lessen Lopez's sentence simply because,

as his lawyers argued, he was young and had endured a violent, traumatic upbringing, even watching as his mother was thrown off a roof.

No trial-court judge, Meade noted, would find such a tragic history unusual.

"Wait a minute," interjected one of the judges on the panel, bearing down on the government lawyer. "Doesn't that depend on where the judge is—whether he's in suburban Fairfax County or Washington, D.C.?"

For a moment, the air in the courtroom was charged with tension. Judge Clarence Thomas' terse, steely demand had lifted Lopez's case out of the realm of abstraction and into the real world.

"It was the only question that Thomas asked during the arguments, but when he asked it, he cut straight to the heart of the issue," recalls Stephen Leckar, Lopez's court-appointed lawyer, who is of counsel at D.C.'s Cohen & White. "After it happened, I kind of smiled inwardly and thought, 'There's one vote for reality.'"

Leckar was right—the panel unexpectedly found for his client—but his comment resonates beyond his case. For the question of Clarence Thomas' reality, of



Clarence Thomas carries vivid memories of American apartheid.

how he brings the hard life he has led to the law he makes, is the focus of a burgeoning battle over his nomination by President George Bush to the Supreme Court.

As interest groups choose sides and Senate staffers pore over the nominee's public and private record, the search to capture the essential character of the man, to limn the mind of Clarence Thomas, has begun in earnest. It won't be easy.

Willfully iconoclastic, gleefully eclectic, Thomas defies categorization. He is

SEE THOMAS, PAGE 10

THOMAS FROM PAGE 1

an advocate of limited government who has recommended sweeping federal power to punish discriminators. He is a devotee of original intent in reading the Constitution who also asserts that the open-ended concept of natural law is the basis of that intent. He's a teetotaling Republican who drives a black Corvette.

Among his favorite recordings are the vintage sides of country music legend Hank Williams and the collected speeches of Malcolm X. He loves the cowboy romances of Louis L'Amour and quotes Thomas Aquinas' *Summa Theologica*. He is a private man who has lived a very public life.

"I don't fit in with whites, and I don't fit in with blacks," Thomas once told *Legal Times*. "We're a mixed-up generation, those of us who were sent out to integrate society." (For excerpts from the 1984 interview, see Page 11.)

Wrestling with that confusion has been the central drama of Thomas' public life. At the heart of all of his work in politics and in the law is an evolving intellectual struggle to reconcile his deeply held conservative values with his firsthand experience of poverty and injustice.

Over this philosophical journey Thomas, people who know him say that he will carry with him those vivid childhood memories of American apartheid.

"I grew up under state-enforced segregation, which is as close to totalitarianism as I would like to get," Thomas said in a 1987 speech to the Heritage Foundation. "My household, notwithstanding the myth fabricated by experts, was strong, stable, and conservative. . . . God was central. School, discipline, hard work,



Judge Clarence Thomas joins President George Bush in Maine July 1.

and 'right from wrong' were of the highest priority. Crime, welfare, slothfulness, and alcohol were enemies.

"But these were not issues to be debated by keen intellects, belabored about by rousing orators, or dissected by pollsters and researchers," Thomas contin-

ued. "They were a way of life; they marked the path of survival; and the escape route from squalor."

For more than a decade, Thomas has been in the vanguard of a counter-revolution in civil-rights law, and his nomination has sparked a decisive battle in

that conflict. The harsh questions that have always been flung at Thomas—how a black man could strictly construe a Constitution that enshrined slavery, or go to work for Ronald Reagan, a president whose blithe ignorance of the black American experience is legendary—are bound to come to a head when the Senate Judiciary Committee holds hearings on his nomination after Labor Day.

"These confirmation hearings are more important than any I can remember," says Andrew Popper, a professor at American University's Washington College of Law. "Are we going to see the Clarence Thomas who believes the Constitution is racially blind and who has indicated disfavor with any type of aggressive affirmative action, or are we going to see the Clarence Thomas who is sensitive to concerns of race and poverty?"

Thomas does not necessarily recognize a conflict in those stands, a view that puzzles and angers many civil-rights activists.

But the 43-year-old former Roman Catholic seminarian is more than a civil-rights curiosity. His views on a host of issues, ranging from unenumerated rights to antitrust law, reveal a social critic who looks constantly to the verities and values of the past to address the pressing questions of the present.

Take Thomas' approach to the problems of the poor. Time and again over the years, Thomas has scathingly criticized government welfare programs as a kind of slow poison at work in the black community, generating a culture of dependency that has touched his own family.

Thomas' response to this trend has been

SEE THOMAS, PAGE 11

THOMAS FROM PAGE 10

to advocate a return to such old-fashioned virtues as self-reliance and neighborliness. Many of his friends and colleagues insist that this constantly reiterated plea for community is not mere rhetoric; Thomas walks the walk.

"Once or twice a week, he would come into my office and tell me about somebody he had met in the elevator or out on the street, somebody he wanted us to help," recalls Pamela Talkin, a member of the Federal Labor Relations Authority who worked as Thomas' chief of staff during his tenure as chair at the Equal Employment Opportunity Commission. "He was always looking for the person he could pull up."

Jill Mack knows. A 58-year-old collection agent with the EEOC, Mack remembers the day Thomas struck up a conversation with her in the file room shortly after she arrived at the agency. Before coming to the EEOC, she had spent many years working on her feet in restaurants, developing phlebitis in her legs. She was also having some difficulty meeting other demands of her new job.

"He told me he was from Georgia," recalls Mack. "I'm from Georgia, too, and I used to sharecrop down there. We talked about working on the farm, picking cotton, pulling corn, you know. He really encouraged me—he put in a good word with my supervisor, stopped by my desk all the time, helped me get a little training. "He was always real nice," adds Mack, who has since been promoted. "I think he likes to see his people trying to help themselves."

Discrimination's Impact

Thomas' fundamental conservatism stems from his well-documented upbringing in Pin Point, Georgia. The traditions of the rural South—which as recently as 1910 was home to more than 90 percent of all American blacks—lend Thomas' views the patina of 19th-century optimism that endears him to conservatives and alienates him from liberals.

But it is the more immediate experience of racial discrimination in his own life that has fused many of Thomas' positions with deep-seated bitterness. The prejudices he has encountered and the responsibilities he held at the EEOC have led Thomas to develop an extremely tough law-enforcement approach to anti-discrimination laws, an approach that would probably shock many conservatives and libertarians.

During his tenure at the helm of the EEOC, Thomas was fiercely criticized for de-emphasizing systemic attacks on employers whose work forces were under-representative of minorities and women. This policy battle dominated the media coverage of the EEOC, obscuring the task Thomas tried to take.

In rejecting most broad-based group remedies to discrimination, Thomas pursued policies that sought to investigate thoroughly and vindicate fully every genuine, individual discrimination complaint. His success on that score has been contested.

Some of his proposals to carry out his policy—such as appointing special masters to take over a company's personnel department—are far from the laissez faire policies that other conservatives prefer.

"There are tougher means of deterrence," Thomas wrote in a 1987 article for the *Yale Law and Policy Review*. "One such approach would be for courts to impose heavy fines and even jail sentences on discriminators who defy court injunctions against further discrimination."

"I am not aware of any case where a court has resorted to such measures, and I must wonder why they are so reluctant," Thomas continued. "To those of us who consider employment discrimination not unlawful but also a moral abomination, such measures are altogether

That righteous note, echoed in many of Thomas' writings on race, is the source for

Clarence Thomas Sounds Off

Supreme Court nominee Clarence Thomas is anything but reticent. In 1984, 19 months after President Ronald Reagan appointed Thomas chairman of the Equal Employment Opportunity Commission, *Legal Times* interviewed him. He sounded off—sometimes quite bluntly—on a variety of topics. The following are excerpts from that interview:

On whether he was tailoring his views on civil rights to win a second term at the EEOC:

"I'm not going to lobby for this job. This job has kicked my ass, and you can quote me on that. . . . You don't just ask for more pain."

On his political allies in Washington:

"I don't fit in with whites, and I don't fit in with blacks. We're in a mixed-up generation—those of us who were sent out to integrate society. . . . If it were not for [the] few friends I have who do not give a damn about this stuff, this place could drive me insane."

On racial polarity in Washington:

"I've showed up in some of the nicest places in this city. You walk in one of the top-of-the-line restaurants, people look at you like you're out of your mind. . . . In my own neighborhood, I used to get stopped by the cops."

On promoting greater racial harmony:

"You don't see anyone trying to integrate marriages, do you? That would solve everything."

On civil-rights activists:

"They don't know what the hell I am. They have their accepted version of what the world should be like."

"What offends me is the civil-rights community saying I'm not black. I may disagree with [then Assistant Attorney General William Bradford Reynolds] and the Justice Department, but they don't offend me."

On why he goes to church any day but Sunday:

"I don't like people that much. God is all right. It's the people I don't like."



On refusing to toe the line:

"I'm a Dallas Cowboys fan. I love unpopular causes."

On how the media react to him:

"Here's a strange black. Let's go see if he has two heads and a tail."

On why the government should not be the guarantor of civil rights:

"In order to be free, you have to be independent. . . . People keep trying to sell me sugar-coated dependency, and I'm not going to buy it. The [Reagan] administration is honest. It's about time we got some honesty [instead of] people smiling in your face. . . . We're playing games with ourselves if we think suddenly, overnight, this national government is going to care for us."

On being true to his own beliefs:

"I will be me. . . . If [William Bradford Reynolds] gets on my nerves, I will argue with Brad. If the Civil Rights Commission gets on my nerves, I will argue with them. And if I can't stand the heat, I'll get out of the kitchen."

On being black in the North vs. the South:

"It was more difficult for me to live in Massachusetts than it was for me to live in Savannah. In Savannah, the rules were indeed clear."

On being interviewed by private law firms upon graduation from Yale Law School in 1974:

"They would always want to talk to me about doing pro bono work. . . . Here I was, really labored over tax. . . . and they always wanted me to throw in pro bono. They've got to say something black to me."

On being rich:

"I have no doubt I'm going to be wealthy, so I don't worry about it. . . . I'll write a book that will sell for \$19.95."

his most adventurous excursion in the law, into the murky, metaphysical territory of natural law and its relationship to the Constitution.

In the mid-1980s, as Thomas began to formulate more ambitious expressions of his philosophy, he turned toward the tradition of natural law to inform his reading of American history. The ancient concept—which holds that there are inherent, immutable principles of right and wrong in

nature that precede any social compact—is deeply rooted in Roman Catholic teaching. Thomas found the tradition alive and well in the lives and writings of such Americans as Abraham Lincoln and Frederick Douglass. (See "Verbatim," Page 8.)

"For a long period of time, he read everything by or about Abe Lincoln," recalls Talkin, Thomas' EEOC chief of staff from 1986 to 1989. "He would really ponder these things—he's the kind of person who literally loses sleep over difficult philosophical issues."

Thomas' foray into natural rights enabled him to find a way of reading the Constitution in the light of an expanded version of "original intent." It also led him, Talkin says, to wrestle with the thorny issue of unenumerated rights in the Constitution.

"He would try to figure out whether privacy is encompassed by the Constitution, what unenumerated rights are, where abortion fits in," says Talkin, who describes herself as a liberal Democrat. "I honestly believe he's still thinking about all this, and that he recognizes his personal views and subjugates those to what the law requires."

Thomas is clearly still thinking about a lot of things. His tenure on the D.C. Circuit has allowed him to return to the world of business law that he left years ago to fight the Reagan administration's civil-rights battles, and friends say he relishes the change.

Perhaps the most important decision that Thomas, if confirmed, will leave with the D.C. Circuit is his careful, comprehensive analysis of horizontal mergers in *United States v. Baker Hughes*.

The case, brought by the Bush administration's Justice Department, challenged a merger of two manufacturers of drilling

machinery. The Justice Department fought the merger, asserting that it would leave the U.S. market with too few suppliers and that new competitors would find it too difficult to enter the market.

Thomas, in the July 1990 opinion, shredded the government's case so thoroughly that Solicitor General Kenneth Starr has decided not to file an appeal.

The enthusiastic manner with which Thomas has embraced his work on the circuit reflects his basic enjoyment of the intellectual challenges of the bench. He goes out of his way to hire clerks who disagree with him, and he assigns all of his cases to all of his clerks, just to watch the sparks fly.

"He likes his clerks to fight it out," says Clint Bolick of the Landmark Legal Foundation, a friend and ideological soulmate of Thomas. "He really enjoys working with some of the best young minds around."

The intellectual combat Thomas thrives on should stand him in good stead when he faces the Senate, in what promises to be a grueling confirmation. That struggle will in part be an effort to get Clarence Thomas to define himself and his beliefs to the country. He has passionately resisted such efforts to pigeonhole him in the past and will probably put up a fight in September.

But Thomas' compelling personal history, which informs so much of his intellectual questing, is certain to leave a lasting impression, no matter what happens to his nomination.

"He never forgot where he came from," says Jill Mack, the EEOC collection agent whom Thomas encouraged. "I'm not talking about Republican, and I'm not talking Democrat. He's Georgia, just like me."

—Reporters Daniel Klaidman and Anne Kornhauser contributed to this story.



Clint Bolick says Thomas enjoys having his clerks debate cases.

Wounded by Discrimination

Some classmates were baffled by Mr. Thomas's decision to leave Conception. But Tom O'Brien, a close friend whose home in Kansas City Mr. Thomas often visited on weekends, said, "I think Clarence experienced some real discrimination there." Mr. O'Brien, now a high school teacher of American history, added: "He didn't go into names or specifics, but it was real and he was torn up a little talking about it. I know he was torn up about it and I was shocked. I just couldn't see it. I felt like such a fool being so close and being oblivious to it."

Mr. Thomas later told several black friends about the incident that some believe pushed him into leaving. On April 4, 1968, the day Rev. Dr. Martin Luther King Jr. was assassinated in Memphis, a group of students were watching television coverage of the event. Mr. Thomas heard one white student remark, "That's what they should do to all the niggers."

Jerry M. Hunter, general counsel for the National Labor Relations Board, said of Mr. Thomas: "He remembers thinking, 'We're supposed to be people of God. If people have a view here, then this is not a place for me to be.'" Mr. Hunter and Mr. Thomas met as fellow lawyers in St. Louis in the late 1970's.

Mr. O'Brien said he was surprised to hear Judge Thomas labeled as a conservative. After all, he said, this was the same fellow who, as a college student, used to end his letters with the slogan "Power to the people."

"Conservatives and liberals may both be surprised if he makes it onto the court," Mr. O'Brien said. "Clarence Thomas is absolute integrity. He's honest, he's courageous. I can't imagine him belying his own system of beliefs for anything."

Mr. Thomas transferred to Holy Cross in Worcester, Mass. He and most of the handful of other black students were housed together in Healey Dormitory, named for the black Roman Catholic bishop, said the Rev. Joseph J. LaBran, who is still a residence counselor at the college. The administration thought that placing the students together would help them find support in the overwhelmingly white school, he said. But the dormitory has since been integrated

and the college is now coeducational.

During Mr. Thomas's senior year, several students protested the campus recruitment of students by General Electric because of its military work. When the administration expelled some protesters, about half were black; the majority of protesters had been white.

Almost every black student, including Mr. Thomas, walked off campus until the administration reinstated those expelled, Father LaBran said.

Stanley E. Grayson, a former deputy mayor of New York City, was a friend of Mr. Thomas at Holy Cross, where they were both active in the black student union.

"Clarence was always an independent thinker," Mr. Grayson said. "He was the type who was going to look at a set of circumstances and reach his own conclusions. And I think that probably exists today."

Mr. Grayson said that when he started at Holy Cross there were about 32 black students at the college, which was going through a "time of heightened sensitivity."

"It was a time of adjustment for the school and, candidly, for many of us," he said. "It was a predominantly Irish Catholic college that was in the

midst of change. And the black student union became a useful sounding board for initiatives. The student union united us."

Mr. Thomas was as involved in the protests as anyone, Mr. Grayson said. "Clarence was always a leader, not a follower."

Father LaBran said he was elated at Judge Thomas's appointment to the High Court. "I hoped it would be Clarence," he said. "This country needs a man like him who, I hope, will be a symbol of all people."

In Missouri in the mid-70's a Confederate flag was usually a redneck political statement. But on the wall behind the desk of a new Assistant Attorney General in Jefferson City, it was a wry declaration of individuality. In effect, it meant: "Don't pigeon-hole me."

That's the most vivid memory old

colleagues like Poldine L. Otto and Richard Wieler have of Mr. Thomas, the only black then serving in the office of the Missouri Attorney General.

It was there he went after Yale Law School. Between 1974 and 1977, Mr. Thomas handled felony appeals and represented the Revenue Department in tax cases. He also was the lawyer for the Human Rights Commission, handling job discrimination matters.

His most celebrated case in the memory of the then-Attorney General and now United States Senator, Mr. Danforth, involved a dispute over low-number license plates, distributed by past Democratic Governors as political favors.

Mr. Danforth, a Republican, recalls suggesting that Mr. Thomas acknowledge the political reality that a lot of important people, like judges, had the vanity plates and wanted to keep them. He suggested his aide let the case die.

Mr. Thomas refused, another Danforth aide recalled, saying he would drop the case only if ordered to do so, because "this is the law." The courts agreed, finding there was no authority in Missouri law for the special plates, and he won. The Legislature has since restored vanity plates for drivers willing to pay a special fee.

Alex Netchvolodoff, a long-time Danforth assistant who is now vice president for government affairs of Cox Enterprises in Washington, recalled Mr. Thomas telling him of hiding in the back of his classes at Holy Cross and Yale, explaining "I didn't want anyone to see my blackness. I wanted them to judge my work."

Mr. Netchvolodoff tells of Mr. Danforth's recruiting Mr. Thomas at Yale Law School, where "he was a star." Mr. Netchvolodoff said the law student actually "interviewed us," asking if he would get good cases and enough work.

Chris Brewster, another colleague then and now a Washington attorney, recalled Mr. Thomas describing the pay as "\$11,000 a year and all the gruel he could eat."

And Mr. Brewster said his friend never shared his interest in movies, because "he grew up not going to movies much. All the first-run movies were in the white-run movie houses and you had to sit in the balcony" if you were black in Georgia. He said Mr. Thomas just would not go.

Gov. John Ashcroft, who shared an office with Mr. Thomas for 16 months, called him a "candid, frank individual who was a very hard worker."

JUDICIAL

The Views of Justice Thomas, According to Judge Thomas

The opinions on public policy he held before he joined the bench are getting a lot of attention, but the best way to predict how Justice Clarence Thomas would rule is to review how Judge Clarence Thomas has ruled. In his year on the federal appeals court in Washington, Judge Thomas wrote 19 opinions. His political enemies won't find much grist in these rulings, which are textbook examples of judicial restraint.

The cases deal with issues as diverse as

Rule of Law

By L. Gordon Crovitz

an airport for Toledo, searches of crack dealers and a spat over dog-food claims. What is most important is the approach Judge Thomas took. In interpreting statutes and precedents, he used close reasoning and shunned any search for shadows, penumbra or emanations.

The case challenging the expansion of the Toledo airport asked whether the Federal Aviation Authority complied with all the environmental regulations before approving the new plans. The plaintiffs invoked the broadly worded National Environmental Policy Act. In upholding most of the FAA's action, Judge Thomas showed a keen wit. He wrote, "Just as NEPA is not a green Magna Carta, federal judges are not the barons at Runnymede." He said that judges enforce the law "by ensuring that agencies comply with NEPA's procedures, and not by trying to coax agency decision makers to reach certain results." (*Citizens Against Burlington v. Busey*)

His most important constitutional ruling was on the doctrine of standing, which is a key limit to judicial activism. The Constitution requires a case or controversy before judges can issue an opinion; there must be real parties with real legal issues. Judicial activists often wave non-cases into

court by giving special-interest groups—and occasionally even dolphins and trees—standing to sue. Judge Thomas took the more traditional approach in a partial dissent when a ferry company challenged an exemption from a regulation that the Interstate Commerce Commission granted to one of its competitors.

Judge Thomas wrote in a partial dissent that the ferry company had no business in court because it wasn't the "aggrieved" party, as required by the statute regulating litigation involving the ICC. The company wanted the judges to force the ICC to prepare an environmental impact statement before granting new routes to its competitor. "I agree that as a matter of policy, it probably should," Judge Thomas wrote. "As a matter of law, however, the Commission has no power to regulate ferries for environmental reasons."

This meant the ferry company had no standing to sue, so judges had no right to hear the case. "When federal jurisdiction does not exist, federal judges have no authority to exercise it, even if everyone—judges, parties, members of the public—wants the dispute resolved," he wrote. "A federal court may not decide cases when it cannot decide cases, and must determine whether it can before it may." This is an important statement of separation of powers—not the view of a justice who would take social questions away from the political branches of government. (*Cross-Sound Ferry Services v. ICC*)

Judge Thomas also showed his judicial restraint in a case of ineptitude by the Federal Energy Regulatory Commission. Judges have repeatedly ruled that regulators used arbitrary calculations to determine the proper rate of return for a Tennessee gas pipeline. Judge Thomas warned FERC that he was tempted to grant the pipeline company's request for a certain rate. But, he wrote, "legitimate concerns about judicial overreaching always militate in favor of affording the agency just

one more chance to explain its decision." (*Tennessee Gas Pipeline v. FERC*)

One case at first glance seems to raise constitutional questions, but turns out to be more limited. Federal workers asked for a preliminary injunction against a recent law that bars them from accepting payment for articles or speeches. This raises free speech and property rights questions, but Judge Thomas's opinion was limited to whether the trial court was right to deny a preliminary injunction. He agreed that the plaintiffs did not risk irreparable harm by waiting for the trial court to rule on the case's merits. (*NTEU v. U.S.*)

A pair of business cases discloses a sophisticated approach. He ruled against a Justice Department claim that a merger in the market for underground drilling rigs would violate the antitrust laws. The merger between a Finnish company and a French subsidiary of a Texas firm would give the company a large U.S. market share,



Clarence Thomas

but Judge Thomas applied the Chicago School jurisprudence that now guides the Supreme Court. Contrary to the Justice Department's big-is-bad approach, he ruled that a large market share does not by itself signal barriers to entry for new competitors. (*U.S. v. Baker Hughes*)

Another case arose when two pet-food companies exchanged nasty accusations of misleading advertising—one dog food claimed it prevented hip disease, the other claimed it was preferred by more veterinarians. Judge Thomas reversed part of a damage award because there was no "finding of willfulness or bad faith," as required by the false-advertising statute.

This emphasis on bad intent, often overlooked in securities and environmental cases, is an important limit on liability. (*ALPO v. Ralston Purina*)

Seven of Judge Thomas's opinions were appeals from drug cases; as a justice, he will have some notion of what it is the police are up against. Most of these cases were requests by defense lawyers for a judge to find some technical problem with a search, seizure or confession, which Judge Thomas refused. In one case, the defendants tried to throw a gym bag containing crack into a sewer when the police approached. Other seizures included beepers, a favorite tool of the drug trade. Judge Thomas referred to one neighborhood as "an open-air drug bazaar."

His close reading of a statute led him to reverse part of a criminal conviction of a dealer named Keith Long. The police used a search warrant to find cocaine, butane torches for processing the drug and large amounts of cash. They also discovered a revolver between the cushions of a sofa. A jury convicted the defendant on the drug charges, but also under a law against using or carrying a weapon in drug trafficking.

Judge Thomas reversed the firearm conviction. He said the prosecution reasoning went too far: "Long was connected to the drugs; the distribution of the drugs was facilitated by the gun; since Long thus derived benefit from the gun, he 'used' it." He rejected this view, saying it would mean "that the word 'use' has no discernible boundaries."

Judge Thomas is a conservative judge, if this means that he views his job as interpreting the law and not making it up or ruling for or against parties based on who they are. A 30-year period of judicial activism from the Supreme Court is now destined to end. Even liberals should be able to resolve themselves to a Justice Thomas, who would know his job is the law and not politics.

14TH CASE of Level 1 printed in FULL format.

Cross-Sound Ferry Services, Inc., petitioner v. Interstate
Commerce Commission and United States of America,
respondents and Viking Starship, Inc., intervenor

No. 90-1053

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

1991 U.S. App. LEXIS 8977

November 28, 1990, Argued
May 10, 1991, Decided

RIOR HISTORY: [*1]

petition for Review of an Order of the Interstate Commerce Commission.

COUNSEL: Eugene D. Gulland for petitioner.

Craig M. Keats, Attorney, Interstate Commerce Commission, with whom Robert S. Ark, General Counsel, Henri F. Rush, Deputy General Counsel and Evelyn G. Itay, Attorney, Interstate Commerce Commission, and James F. Rill, Assistant Attorney General, Catherine G. O'Sullivan and David Seidman, Attorneys, Department of Justice, were on the brief, for respondents.

Edward D. Greenberg and Mark T. Priesing were on the brief for intervenor.

JUDGES: Mikva, Chief Judge, Williams and Thomas, Circuit Judges. Opinion for the Court filed by Chief Judge Mikva. Opinion concurring in part and concurring in the denial of the petition for review filed by Circuit Judge Clarence Thomas.

OPINIONBY: MIKVA

OPINION: In this case, we revisit the propriety of the Interstate Commerce Commission's ("ICC" or the "Commission") finding that certain water carrier services provided by intervenor Viking Starship, Inc. ("Viking") are ferry services exempt from ICC regulation. In *Cross-Sound Ferry Servs., Inc. v. ICC*, 3 F.2d 395 (D.C. Cir. 1989) [hereinafter *Cross-Sound I*], [*2] we remanded for further clarification of the Commission's views as to the scope of the ferry exemption. After reviewing the Commission's decision on remand, *Viking Starship, Inc., Common Carrier Application*, 6 I.C.C.2d 228 (1989) [hereinafter *Viking II*], and the contentions of petitioner *Cross-Sound Ferry Services, Inc. ("Cross-Sound")*, we conclude that the Commission has not changed its policy with respect to the ferry exemption. Accordingly, we uphold the Commission's finding that Viking is an exempt ferry service, and reject Cross-Sound's procedural challenges to the Commission's decisionmaking process. In addition, we find that the Commission's decision did not trigger environmental review responsibilities under the National Environmental Policy Act or the Coastal Zone Management Act.

I.

In 1988, the Commission granted Viking temporary authority to transport passengers over two routes in Long Island Sound: (1) Montauk, New York to

oton/New London, Connecticut, and 2) Montauk to Block Island, Rhode Island. Cross-Sound I, 873 F.2d at 396 (describing statutory basis for temporary exemptions). Relying on a provision of the Interstate [*3] Commerce Act that declares transportation provided "by a ferry" to be exempt from the Commission's jurisdiction, see 49 U.S.C. § 10544(a)(4) (1988), Viking subsequently asked the Commission to dismiss its application for a permanent license on the ground that its operations are exempt ferry services. Cross-Sound, which transports passengers, automobiles, and freight between Point, New York and New London, challenged Viking's claim, but, as stated in Cross-Sound I, 873 F.2d at 396-400, the Commission agreed with Viking that its operations are exempt. See Viking Starship, Inc. - Common Carrier Application, 4 I.C.C.2d 634 (1988) [hereinafter Viking I].

Reviewing Viking I, we acknowledged the Commission's "great latitude in determining the scope of the ferry exemption," Cross-Sound I, 873 F.2d at 398, but found ourselves unable to discern the Commission's interpretation. Id. at 399. We noted several ICC decisions asserting jurisdiction over apparently similar Long Island Sound routes, and suggested that the discrepancy between those cases and the Viking decision were "prima facie evidence [*4] of a change in ICC policy." Id. at 399. In addition, we expressed uncertainty about the significance of various factors the Commission uses to determine whether the ferry exemption applies, such as the length and directness of a carrier's route and the frequency of service. Id. at 399-400. Given these perceived ambiguities, we remanded "for a fuller exegesis of the Commission's views." Id. at 396.

Although it acknowledged on remand that prior decisions may have misconstrued the significance of certain factors flagged by the court in Cross-Sound I, see Viking II, 6 I.C.C.2d at 237 (referring to role of absolute distance), the Commission denied changing its view of the ferry exemption, id. at 233 n.8. It distinguished the Long Island Sound cases we cited in our panel opinion, id., and explained in greater detail the factors it uses to determine what constitutes a ferry, id. at 235-40. After discussing the general contours of the ferry exemption, the Commission specifically reaffirmed its earlier finding that Viking's services qualify as exempt ferriage under section 10544(a)(4). [*5] Id. at 241-46. In addition, the Commission rejected Cross-Sound's claim that a decision exempting Viking from the Commission's jurisdiction nonetheless obligated the ICC to comply with environmental review procedures under the National Environmental Policy Act and the Coastal Zone Management Act. Id. at 249.

II.

In order to determine whether the Commission has complied with our mandate in Cross-Sound I, we must evaluate the sufficiency of the Commission's explanations in Viking II as to the scope of the ferry exemption. If we find that the ICC's present view of the ferry exemption "diverges from agency precedent," then, in order to uphold the new interpretation, we must also find that the Commission applied a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." See *Hall v. McLaughlin*, 864 F.2d 868, 872 (D.C. Cir. 1989) (quoting *Greater Boston Television Corp. v. FCC*, 403 U.S. 923 (1971)); see also *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 57 (1983). [*6] If, on the other hand, we determine that the Commission "has in fact diverged from past decisions, [then] the need for a comprehensive explicit statement of its current rationale is less pressing." *Hall*, 864

2d at 872. The agency's explanation in such a case "need not be elaborate"; we will uphold its findings, "though of less than ideal clarity, if the agency's intent may reasonably be discerned." *Id.* at 872-73 (quoting *Greater Boston Transportation Commission*, 444 F.2d at 851).

Petitioner contends that our opinion in *Cross-Sound I* conclusively determined that the agency had changed its policy with respect to the ferry exemption. We decline, however, to adopt so narrow a view of our earlier holding. We remanded the Commission's decision in *Viking I* precisely because we were unsure what its interpretation of the ferry exemption was, see *Cross-Sound I*, 873 F.2d at 400; it would be inappropriate to let our earlier expressions of puzzlement prevent a subsequent panel from evaluating the Commission's newly tendered explanations *de novo*. Reviewing the *Viking II* decision, we conclude that the Commission [*7] has not diverged from prior precedent.

First, we believe that the Commission persuasively distinguished those cases where it has exercised jurisdiction over water carriers operating in Long Island Sound. As the Commission explained in *Viking II*, 6 I.C.C.2d at 233 n.8, three of the examples that we cited in *Cross-Sound I* as "prima facie evidence of a change in ICC policy," 873 F.2d at 398-99, involved the transportation not only of passengers but also of freight, a subject area over which the Commission has long exercised jurisdiction. See *Mascony Transport and Ferry Servs., Inc.*, 353 I.C.C. 60, 61 (1976), petition for review denied sub nom *Cross-Sound Ferry Servs., Inc. v. U.S.*, 573 F.2d 725 (2d Cir. 1978) (applicant sought to transport general commodities and passengers" between New London and Greenport, New York); *Cross-Sound Ferry Servs., Inc. - Extension*, ICC Docket No. W-1290 (Sept. 3, 1983) (applicant sought to transport "passengers, general commodities, automobiles with passengers, and tractors, trailers, and trucks" between New York and Montauk); and *B.I. Marine Express, Inc.*, [*8] ICC Docket No. W-1450 (Oct. 14, 1986) (applicant proposed to transport "both passengers and general freight" between Westerly, Rhode Island and Block Island).

Indeed, the Commission has repeatedly held that "the word ferry does not generally include the transportation of goods and merchandise," *McAllister Bros., Inc. - Investigation of Control*, 336 I.C.C. 590, 592-93 (1970), and has refused to exempt freight carriers from regulation simply because the passenger aspect of their operation, viewed in isolation, might qualify as a "ferry." *Id.* at 593-94 (finding that carrier authorized to transport passengers and general commodities between Bridgeport, Connecticut and Port Jefferson, New York was not a exempt ferry, even though carrier had apparently never exercised its freight authority). See also *B.I. Marine Express*, ICC Docket No. W-1450 ("ferry service . . . entails the transportation of passengers, their automobiles, and accompanying baggage, but does not involve the transportation of general freight"); *Ann Arbor R.R. Co. Common Carrier Application*, 250 I.C.C. 490, 491 (1942). The Supreme Court has interpreted the [*9] term "ferry" as excluding freight services, see *St. Clair County v. Interstate Sand and Car Transfer Co.*, 202 U.S. 454, 467 (1904) (noting that "the ferry business is confined to the transportation of persons with or without their property"), as have various Federal regulations. See, e.g., 46 CFR @ 171.010(d)(2) (1990) (Coast Guard safety regulations); 49 CFR @ 171.8 (1989) (hazardous materials transportation).

Although its efforts to distinguish the fourth example of Long Island Sound water carrier regulation that we cited in *Cross-Sound I* are less persuasive, the Commission's view that *Shoreline Boating Serv., Inc.*, ICC Docket No. W-1294 (Dec. 29, 1984), involved excursion operations (i.e., round-trip service

only) instead of point-to-point passenger service can be supported. See Viking II, 6 I.C.C.2d at 233 n.8 (noting that excursion operations, like freight services, have "historically been regulated"). The administrative law judge following Shoreline's original request for operating authority discussed the excursion character of the proposed services in some detail. See Shoreline Boating Serv., Inc., Common Carrier Application, [*10] ICC Docket No. W-1294 (August 19, 1976) (noting that carrier sold "round-trip transportation tickets alone"; describing public support for the excursion operations; and discussing excursion services offered by carriers contesting Shoreline's request for operating authority).

We also note that the Commission's decision in Viking II is consistent with at least one other decision finding water carrier services on Long Island Sound to be exempt ferriage. In North Rip Fish Harvest, Ltd., ICC Docket No. W-1325 (May 13, 1980), the Commission held that passenger service between Montauk and Block Island - one of Viking's proposed routes - was exempt from regulation under section 10544(a)(4). See also Michigan-Wisconsin Transp. Co., ICC Docket No. W-1377 (May 15, 1984) (carrier operating across Lake Michigan is exempt under section 10544(a)(4)).

Finally, we reject Cross-Sound's suggestion that the Commission's treatment of distance in Viking II rises to the level of a change in agency policy. See 6 I.C.C.2d at 237-40 (noting that earlier cases may have "overstated" the role of absolute distance). In Cross-Sound I, we criticized the Commission for failing [*11] to explain the significance it attached to the length of a carrier's route. See 873 F.2d at 399. Viking II suggests that the Commission, consistent with its decision in Michigan-Wisconsin Transp. Co., ICC Docket No. W-1377, views distance as a relevant but not dispositive factor in determining whether a particular service qualifies as a "ferry." That is, so long as the carrier possesses the usual attributes of a ferry - such as significant time or distance savings compared to overland routes - the absolute length of the route will not prevent the carrier from qualifying as a ferry. See Viking II, 6 I.C.C.2d at 240.

This approach is consistent with prior Commission decisions that seemed to establish per se limits on the distances a ferry could travel. As the Commission explained, those decisions also involved services not regularly associated with ferries. See Viking II, 6 I.C.C.2d at 239-40; Pere Marquette Ry. Co., 260 I.C.C. 206 (1944) (carrier transporting not only passengers but also railroad cars and newly manufactured automobiles across Lake Michigan); Ann Arbor R.R. Co. Common Carrier Application, 250 I.C.C. 490 (1942) [*12] (carrier transporting freight cars, in addition to passengers, across Lake Michigan); Canadian Pacific Ry. Co. v. U.S., 73 F.2d 831, 834-35 (9th Cir. 1934) (discussing excursion character and luxurious nature of service across Puget Sound). Moreover, the distances at issue in this case - between 15 and 30 miles, depending on the particular route, see Cross-Sound I, 873 F.2d at 397 - are well within the 50-145 mile upper boundaries even those earlier cases established for ferry service.

Thus, we conclude that the Commission did not diverge from prior precedent or policy in evaluating Viking's services. Accordingly, there was no need for the Commission to justify a change in policy. Given the Commission's comprehensive discussion of the ferry exemption, which responded specifically to this court's concerns about apparently inconsistent precedents and the relative importance of various criteria used to evaluate ferries, we have no difficulty

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discerning the agency's path and conclude that it satisfied the standards for reasoned decisionmaking.

Having concluded that the Commission did not impermissibly alter its view of the ferry exemption, [*13] we may set aside the Commission's decision applying the exemption to Viking only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1988). See *Railway Labor Execs. Ass'n v. ICC*, 914 F.2d 276, 280 (D.C. Cir. 1990).

Under section 10544(a)(4), ferries are exempt from regulation "except to the extent the Interstate Commerce Commission finds it necessary to exercise jurisdiction to carry out" the national transportation policy. See 49 U.S.C. § 10101 (1988) (describing national transportation policy). Applying the principles it enunciated earlier in its decision, the Commission reasonably determined that Viking's Montauk-Block Island and Montauk-Groton/New London operations qualify as exempt ferries. See *Viking II*, 6 I.C.C.2d at 241-42 noting the "frequent and regular" character of the service; its "modest," "no-frills" quality; the absence of any "freight service whatsoever" or "detours or sightseeing purposes or for intermediate stops"; and the services' ability to "substitute[] with a substantial reduction in overall mileage, for a road and bridge connecting nearby points [*14] in neighboring states").

We can find no error in the Commission's further determination that the national transportation policy does not require regulation of Viking's services in order to protect Cross-Sound against potential diversion or "cream-skimming" of its customer base. See 49 U.S.C. § 10101(a)(1)(C) (national transportation policy includes encouraging "sound economic conditions among carriers"); *Viking I*, 6 I.C.C.2d at 242-46. The Commission found that the services of the two carriers differed; that even with respect to shared services - i.e., passengers without vehicles - the distance between Orient Point, New York and Montauk, New York (75 "congested" highway miles) limited actual competition; and that, in any case, there was "sufficient traffic in the area to accommodate Viking's small-scale operation without driving Cross-Sound out of business." *Viking II*, 6 I.C.C.2d at 243-44.

Cross-Sound contends that the Commission ignored evidence that Viking actually offers excursion and freight services inconsistent with the ferry exemption. As the Commission concedes, however, Cross-Sound may pursue these alleged violations through [*15] a properly framed request for enforcement. See *Viking II*, 6 I.C.C.2d at 230 n.3; 49 CFR Part 1111 (1990) (procedures for filing complaints with the Commission).

Finally, we reject Cross-Sound's claims that the Commission erred in failing to hold further hearings regarding Viking's services, or in denying the company's discovery requests. Although we suggested in *Cross-Sound I* that the Commission might "find it useful on remand to use a hearing as a vehicle to re-examine and articulate its new view of the ferry exemption," 873 F.2d at 401, that advice was premised on our assumption that the Commission would be altering its traditional ferry policy. Given the agency's "broad discretion in deciding whether to grant a hearing," see, e.g., *Cities of Carlisle and Neola, Iowa v. FCC*, 741 F.2d 429, 431 (D.C. Cir. 1984), and its view (which we uphold here) that the Viking decisions do not constitute a change in policy, the Commission

reasonably concluded that hearings would not be "productive" and that "additional 'evidence' would not be particularly helpful in addressing the legal issues that predominate in this case." Viking II, 6 I.C.C.2d at 233. [*16]

As to Cross-Sound's discovery claims, we note this circuit's position that "the scope and extent of discovery in agency proceedings is a matter ordinarily entrusted to the expert agency in the first instance and will not, barring the most extraordinary circumstances, warrant the Draconian sanction of overturning a reasoned agency decision." See *Trailways Lines, Inc. v. ICC*, 766 F.2d 1537, 1546 (D.C. Cir. 1985). No such extraordinary circumstances exist to warrant overturning the Commission's denial of Cross-Sound's discovery requests.

IV.

Having approved on both substantive and procedural grounds the Commission's finding that Viking's services are exempt from regulation under section 10544(a)(4), we next address Cross-Sound's contention that the Commission violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370b (1988 & Supp. 1990), and the Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451-1464 (1988), by failing to conduct any environmental review of Viking's services.

As an initial matter, the Commission contends that Cross-Sound lacks standing to challenge its actions under either NEPA or CZMA. Standing constitutes a threshold [*17] jurisdictional inquiry. But this court has held that "when the merits of a case are clearly against the party seeking to invoke the court's jurisdiction, the jurisdictional question is especially difficult and unreach- ing, and the inadequacies in the record or briefing make the case a poor vehicle for deciding the jurisdictional question, we may rule on the merits without reaching" the jurisdictional contention. *Adams v. Vance*, 570 F.2d 950, 954 n.7 (D.C. Cir. 1978); accord *Chinese Am. Civic Council v. Attorney General*, 66 F.2d 321, 325 (D.C. Cir. 1977). See *Secretary of the Navy v. Avrech*, 418 U.S. 676, 678 (1974) (per curiam) (assuming that district court had jurisdiction and resolving case on the merits, noting that "even the most diligent and zealous advocate could find his ardor somewhat dampened in arguing a jurisdictional issue where the decision on the merits is thus foreordained"); *Porton v. Mathews*, 427 U.S. 524, 530-532 (1976) (finding it "unnecessary" to resolve "difficult and perhaps close jurisdictional arguments" where a prior Supreme Court decision dictated resolution of the merits against [*18] the party asserting jurisdiction). See also *United States v. Augenblick*, 393 U.S. 48, 351-52 (1969); *Southeastern Community College v. Davis*, 442 U.S. 397, 404 n.5 (1979). We believe that this is a rare case in which we should exercise our discretion to proceed directly to the merits.

First, as discussed more fully below, the merits of Cross-Sound's environmental contentions can be resolved easily, particularly in light of our earlier finding that the Commission has not altered its policy with respect to the ferry exemption. Second, the question of Cross-Sound's standing is quite complex, involving inquiries into difficult issues such as the prudential standing of competitors, see, e.g., *Hazardous Waste Treatment Council v. EPA*, 851 F.2d 277, 282-85 (D.C. Cir. 1988), cert. denied, 490 U.S. 1106 (1989); and owner injury, see, e.g., *Goos v. ICC*, 911 F.2d 1283, 1289-91 (8th Cir. 1990); and the Commission's statutory authority to consider environmental factors under the national transportation policy of 49 U.S.C. § 10101 in determining whether to override the ferry exemption. As to the [*19] last

question, which goes to the redressability of Cross-Sound's asserted injuries, we have serious doubts concerning the narrow construction of section 10101 urged by our concurring colleague. See Concurring Opinion at 3-6. Although this court usually defers to an agency's reasonable interpretation of a statute that Congress has entrusted it to administer, see *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984), the Commission has not definitively construed section 10101 as precluding consideration of environmental factors, notwithstanding the cursory footnote on which our colleague relies. See *Viking I*, 6 I.C.C.2d at 249 n.33; Concurring Opinion at 4-5. Whether Congress intended the agency's inquiry under section 10101 to encompass environmental considerations is an intricate question we need not answer on the undeveloped record before us. We note only that the term "efficient," which is used in section 10101(a)(1)(B)'s directive that the Commission promote "efficient transportation," has classically been thought to incorporate the full range of possible externalities, including environmental costs and benefits. [*20]

Finally, the administrative record and the briefs in this case provide insufficient factual documentation to verify or disprove Cross-Sound's environmental standing claims. See *Avrech*, 418 U.S. at 677-78 (expressing unwillingness to decide jurisdictional question without further argument, even after ordering supplemental briefing). Our concurring colleague's view that Cross-Sound's asserted injuries could not be redressed by the Commission, as to which we have serious qualms, allows him to avoid confronting knotty factual questions concerning Cross-Sound's injuries, see Concurring Opinion at 2, questions that would ultimately require a remand to the Commission for further findings. Under these circumstances, we deem it appropriate to review the merits of Cross-Sound's environmental claims directly, to which we now turn.

PA

Section 102(2)(C) of NEPA requires federal agencies to prepare an environmental impact statement ("EIS") for every "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 332(2)(C). In *Viking II*, the Commission found that a "decision simply holding that an operation is a ferry and [*21] declining to take the affirmative step necessary to assert jurisdiction is not the type of action that triggers" NEPA review. 6 I.C.C.2d at 248. Cross-Sound disputes this interpretation, arguing that the Commission's change in policy with respect to section 10544(a)(4) constitutes a major federal action under NEPA.

Our conclusion that the Commission did not change its policy with respect to the ferry exemption might well dispose of Cross-Sound's claim. Indeed, petitioner's counsel effectively conceded at oral argument that success on the policy change question was a prerequisite to success on the NEPA claim. In any case, the only "action" the Commission even conceivably took was in finding that Viking's services are statutorily exempt. We believe that *Defenders of Wildlife v. Andrus*, 627 F.2d 1238 (D.C. Cir. 1980), in which this court held that the secretary of the Interior's failure to prevent the state of Alaska from carrying out a wolf kill program on federal lands did not constitute a major federal action, is controlling. There, we held that an agency must undertake some "overt act" to trigger NEPA's requirements; the agency's mere refusal [*22] to exercise its statutory authority to act would not suffice. *Id.* at 1245-46.

Unlike an ordinary licensing decision, in which the Commission affirmatively determines that a water carrier's proposed services are required by the

public convenience and necessity" under 49 U.S.C. @ 10922, the Commission here simply applied the statutory ferry exemption of section 10544(a)(4) and declined to assert jurisdiction to advance the national transportation policy of section 10101 thereby placing the case squarely within the "inaction" rubric of *Defenders of Wildlife*. See *Viking II*, 6 I.C.C.2d at 247 (noting that section 10544(a)(4) "itself exempts ferry services from our jurisdiction, and all that the agency did was to take a look at whether Viking was conducting exempt services"). Common sense supports our conclusion that the Commission's decision does not constitute a major federal action; as we said in *Defenders of Wildlife*, no agency could meet its NEPA obligations if it had to prepare an environmental impact statement every time the agency had power to act but did not do so." 627 I.C.C.2d at 1246.

CZMA

The Coastal Zone Management [*23] Act seeks to protect the land and water resources of the nation's coastal zone through a cooperative governmental effort in which states are given primary responsibility for developing coastal resource management programs. See, e.g., 16 U.S.C. @ 1451(i) (congressional findings); 16 U.S.C. @ 1452(2) (congressional declaration of policy). Section 307(c)(1) of CZMA requires federal agencies "conducting or supporting activities directly affecting the coastal zone" to comply with the affected states' management programs "to the maximum extent practicable." 16 U.S.C. @ 1456(c)(1). An implementing regulation requires federal agencies to provide the affected states with so called "consistency determinations" for proposed activities at least ninety days prior to final federal approval. See 15 CFR @ 930.34(a), (b) (1990). *Cross-Sound* contends that the Commission violated these provisions by failing to notify the relevant states prior to deeming Viking exempt from its jurisdiction under section 10544(a)(4). We reject this claim.

CZMA and the implementing regulations on which *Cross-Sound* relies expressly exclude federal licensing or permitting activities from the definition of a federal [*24] activity," see 15 CFR @ 930.31(c); instead, a separate procedural scheme places primary compliance responsibilities for such matters on the applicant and the affected states, not the federal agency. See 16 U.S.C. @ 1456(c)(3)(A) ("any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone" of a state must certify to the federal agency that its activity will comply with state programs, and must furnish a copy of the certification to the affected states, which may file objections with the federal agency); 15 CFR Part 930, Subpart D, especially 15 CFR @ 930.54; *Viking II*, 6 I.C.C.2d at 248 n.30. Here, the Commission's dismissal of Viking's application for common carrier authority on jurisdictional grounds meant that no licensing proceeding existed sufficient to trigger these regulations. See *Viking I*, 4 I.C.C.2d at 640 n.9; *Exemption of Inter Carrier Operations*, 4 I.C.C.2d 656, 1988 ICC Lexis 189 (June 14, 1988) [hereinafter *Water Carriers*] (noting that "licensing" requires an "applicant" for a license); 15 CFR @ 930.52 (defining "applicant" [*25] as "any individual [or corporation who] files an application for a Federal license or permit to conduct an activity affecting the coastal zone"). Thus, neither the Commission nor Viking breached any notice obligation under CZMA.

We find unpersuasive *Cross-Sound's* analogies to an earlier decision in which the Commission concluded that its exemption of entire classes of water carriers constituted a "federal activity" requiring a CZMA consistency determination. See *Water Carriers*, 1988 ICC Lexis 189, at 11. Unlike *Viking II*, in which one

carrier's services were held exempt, Water Carriers involved a broad, traditional rulemaking proceeding in which four classes of carriers were exempted. See *id.* at 2-10 (describing exempted classes, and recognizing that Commission's action had "potential for directly affecting coastal zones by allowing some additional water carrier operations"). Indeed, the rulemaking fit squarely within the definition of "federal activity," and could not qualify under the less stringent licensing or permitting scheme discussed above. See *id.* at 11-12 (discussing why decision constitutes a federal activity); 15 CFR § 930.26] § 930.31(a) (defining federal activity); 15 CFR § 930.52 (requiring applicant for federal license). Thus, we find Cross-Sound's reliance on Water Carriers inapposite.

V.

We conclude that the Commission has not changed its policy with respect to the ferry exemption, and find that its comprehensive discussion of the exemption in Viking II satisfies this court's mandate in Cross-Sound I, as well as the more general standards for reasoned decisionmaking. We further conclude that the Commission appropriately found Viking's operations to be exempt under section 10544(a)(4), and we reject Cross-Sound's allegations of procedural error. Finally, we conclude that the Commission's finding that it lacked jurisdiction over Viking's services did not trigger environmental review responsibilities under either NEPA or CZMA. For the foregoing reasons, Cross-Sound's petition for review is denied.

It is so ordered.

FOR MR. JUSTICE THOMAS (In Part)

FOR MR. JUSTICE THOMAS (In Part)

FOR MR. JUSTICE CLARENCE THOMAS, Circuit Judge, concurring in part and concurring in the denial of the petition for review:

Although I join the majority in rejecting Cross-Sound's claims under the Interstate Commerce Act, I do not join the majority [*27] in reviewing Cross-Sound's claims under the National Environmental Policy Act (NEPA) and the Coastal Zone Management Act (CZMA). Before this court may review the merits of any of Cross-Sound's claims, we must decide whether we have the authority to do so. See *FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 607 (1990) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984))). Having examined our own jurisdiction over Cross-Sound's environmental claims, I conclude that we have none: Cross-Sound does not have article III standing. This court thus has no power to judge the merits of Cross-Sound's claims under NEPA and CZMA.

I.

The statute that gives this court the power to hear ICC cases limits our jurisdiction to petitions brought by a "party aggrieved." 28 U.S.C. § 2344. Cross-Sound has participated aggressively at every level in all of the proceedings in this case, and no one suggests that Cross-Sound has not achieved rank as a "party." See *Water Transp. Ass'n v. ICC*, 819 F.2d 1189, 1192-93 & n.27 (9th Cir. 1987). [*28] The question instead is whether, with respect to

he Commission's decision that it did not bear certain obligations under NEPA and CZMA, Cross-Sound has been "aggrieved." We answer this question by 'e'ngaging in traditional standing analysis.'" Id. at 1193 (citation omitted). n ller to establish constitutional standing, Cross-Sound must show "that it as suffered an injury in fact traceable to the Commission's ruling and edressable by a decision in [Cross-Sound's] favor." Id. In order to establish rudential standing, Cross-Sound must show "that the interest thereby abridged as arguably within the zone protected or regulated by the constitutional or tatutory guaranty in question." Id.

Cross-Sound alleges that the Commission's decision has aggrieved it both as icking's competitor and as a landowner. I acknowledge that the Commission's ecision might ultimately affect Cross-Sound's fiscal health. And though the ecord does not reveal whether Cross-Sound owns any waterfront buildings, or ulkheads, or other littoral property, I assume that the Commission's decision ill lower the value of the company's land. Cross-Sound would thus have suffered njuries-in-fact [*29] both as a competitor and as a landowner. But ross-Sound would still not have attained article III standing. Cross-Sound ould have us order the Commission to prepare an environmental impact statement nder NEPA and a consistency determination under CZMA, both of which ostensibly ould provide the Commission with information on the environmental consequences f its choices. Cross-Sound suggests that the Commission would do well to ponder he effects of its actions on the "'increasingly fragile'" waters of the Long sland Sound. Brief for Petitioner at 38 (citation omitted); see also id. at 38 .13 (citing L.I. Sound Is So Polluted It Faces Long-Term Damage, N.Y. Times, uly 6, 1990, at A1). I agree that as a matter of policy, it probably should. As matter of law, however, the Commission has no power to regulate ferries for nvironmental reasons. Therefore, neither of the alleged injuries could be ssed by a decision in Cross-Sound's favor on its NEPA and CZMA claims, and ross-Sound thus has no standing to bring them. n1

- - - - -Footnotes- - - - -

n1 In its claims under the Interstate Commerce Act, in contrast, Cross-Sound eeks an order requiring the Commission to regulate Viking's ferry service. That ededy, if we were to direct it, would redress the injuries-in-fact that ross-Sound asserts. I therefore agree with the majority's implicit conclusion hat Cross-Sound has standing to bring its Interstate Commerce Act claims.

- - - - -End Footnotes- - - - -

*30]

The Interstate Commerce Act deprives the Commission of jurisdiction over ansportation "by a ferry," "except to the extent the . . . Commission finds it ecessary to exercise jurisdiction to carry out the [national] transportation olicy." 49 U.S.C. @ 10544(a)(4). n2 In defining the word "ferry," the ommission properly took into account the specific transportation criteria - irectness of route, character and frequency of service - that "flow from the tatus of a ferry as a 'floating section of highway.'" Viking Starship, Inc., 6 .C.C.2d 228, 235 (1989) (common carrier application) (quoting J. Perry, merican Ferryboats 171 (1957)) [hereinafter Viking II]; see ante at 4-8 ndorsing Commission's definition). The Commission did not consider vironmental criteria in defining the word "ferry," and no one seriously ontends that it could have.

-Footnotes-

Section 10544(a) provides:

Except to the extent the Interstate Commerce Commission finds it necessary to exercise jurisdiction to carry out the [national] transportation policy of section 10101 of this title, the Commission does not have jurisdiction under this subchapter over transportation by water carrier when the transportation is provided -

. . . .

(4) by a ferry.

9 U.S.C. @ 10544(a).

-End Footnotes-

*31]

Nor could the Commission have taken the environment into account at the second stage of its proceeding, when it decided whether it should regulate King's ferry service in order to carry out the national transportation policy. The national transportation policy comprises several separate congressional concerns, such as safety and labor conditions in the transportation industry and relations between state and federal transportation authorities. See 49 U.S.C. @ 10101(a)(1). Each is meant to further Congress's ultimate goal: "to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States." Id. @ 10101(a) (emphasis added).

-Footnotes-

n3 Section 10101(a) provides:

To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, . . . it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and -

(1) in regulating those modes -

(A) to recognize and preserve the inherent advantage of each mode of transportation;

(B) to promote safe, adequate, economical, and efficient transportation;

(C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices;

(E) to cooperate with each State and the officials of each State on transportation matters; and

F) to encourage fair wages and working conditions in the transportation industry.

9 U.S.C. @ 10101(a).

----- -End Footnotes-----

*32]

Conspicuous in its absence from the national transportation policy is any allusion to our nation's environmental needs, and the Commission would be hard pressed to fit environmental concerns as such within the language of the statute. The majority suggests that the Commission might be able to squeeze the environment into Congress's charge that the Commission promote "efficient transportation." 49 U.S.C. @ 10101(a)(1)(B); see ante at 12. This reading seems to me flawed for two reasons. First, notwithstanding the majority's advice, the Commission itself reads the national transportation policy, as I do, to exclude environmental matters - a point that the Commission made both in its opinion below and in its brief to this court. See Viking II, 6 I.C.C.2d at 249 n.33 ("We doubt that we have authority to use the [national transportation policy] exception as a basis for addressing environmental issues associated with otherwise exempt ferry services, since the [policy] makes no reference to environmental issues."); Joint Brief of Respondents Interstate Commerce Commission and United States of America at 29 ("Neither section 10101 nor section 10544(a) mention [sic] [*33] environmental impacts. Thus, the Commission is to be guided by transportation and economic principles in deciding whether the regulation of ferriage is necessary. Environmental impacts play no part in determining whether certain transportation is ferry service, or whether the Commission should exercise its authority to override [sic] the exemption in a particular case.").

Second, it is axiomatic that in construing a statute, "the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (emphasis added). The majority here plucks one word, "efficient," from a comprehensive statute that in language and design deals solely with our country's "transportation needs," and suggests that the word is malleable enough to cover the "environment." But the Interstate Commerce Act includes words that are far more elastic, and the Supreme Court has rejected attempts to stretch those words as thinly as the majority proposes the Commission do here. In *New York Central Securities Corp. v. United States*, 287 U.S. 12 (1932), [*34] for example, a unanimous Court construed a section in the Act that gives the Commission the power to regulate on behalf of the "public interest." Chief Justice Hughes wrote:

The term "public interest" as thus used [in the statute] is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred.

at 25; cf. *NAACP v. FPC*, 425 U.S. 662 (1976) (authority to promote "public interest" does not give Federal Power Commission (now FERC) warrant to try to remedy employment discrimination without regard to effects on utility rates).

When Congress wants the Commission to make decisions for environmental reasons, it explicitly tells the Commission to do so. See, e.g., 49 U.S.C. @ 10362(c)(4) (Rail Services Planning Office must consider "the cost to the environment"); n4 of 49 U.S.C. @ 10101a(15) (under national rail transportation policy, Congress intends to "encourage and promote energy conservation"). When Congress formally codified the national transportation policy, fifty-one years ago, see Transportation Act of 1940, Pub. L. No. 76-785, @ 1, 54 Stat. 899, 899, it surely did not mean to give the Commission license to regulate ferries in order to promote ecological consciousness-raising - or any other "externalities" unconnected to Congress's narrow focus on fields within the Commission's traditional realm of expertise, the economics of transportation.

-Footnotes-

n4 Section 10362(c) provides:

... rail properties are suitable for rail transportation continuation subsidies if the cost of the required subsidy to the taxpayers for the properties each year is less than -

... (4) the cost to the environment measured by damage caused by increased pollution.

49 U.S.C. @ 10362(c) (emphasis added).

-End Footnotes-

In this case, Cross-Sound wants the Commission to prepare both an environmental impact statement, see 42 U.S.C. @ 4332(2)(C), and a consistency determination, see [*36] 16 U.S.C. @ 1456(c)(1); 15 C.F.R. @ 930.4(a), (b), with respect to its finding first, that Viking is a ferry and second, that Viking is not subject to the Commission's control. Both environmental impact statements and consistency determinations are meant to disseminate information on the environmental consequences of government action. But as far as Cross-Sound is concerned, more information is not any better than less information, or, for that matter, than no information at all. Neither an environmental impact statement nor a consistency determination can affect the Commission's decision whether Viking is or is not a ferry, and if it is, the decision whether to regulate Viking nonetheless. In this case, the environment simply is not on the Commission's agenda.

A favorable result for Cross-Sound on its environmental claims could not redress Cross-Sound's injuries-in-fact. Cross-Sound thus has no article III standing to bring those claims, and we thus have no authority under the Constitution to hear them. See Public Citizen v. NHTSA, 848 F.2d 256, 262-63 & 27 (D.C. Cir. 1988); Natural Resources Defense Council, Inc. v. Berklund, 609 F.2d 553, 558 (D.C. Cir. 1979) [*37] (per curiam). n5 I express no opinion on the majority's discussion of the merits. With respect, though, I do offer a few words on the majority's decision to assert jurisdiction without deciding whether it has any and then to proceed to rule in this case on the merits of Cross-Sound's environmental claims.

-Footnotes-

Since competitors are not within the zone of interests that NEPA and CZMA protect, I doubt, in addition, that Cross-Sound meets the requirements of prudential standing. See *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 83-84 (D.C. Cir. 1988) (per curiam) ("When we grant standing to a party with only an oblique relation to the statutory goal, we run the risk that the outcome would, even assuming technical fidelity to law, in fact thwart the congressional goal. Further, of course, technical fidelity to law cannot be assumed; judges err."), cert. denied, 490 U.S. 1106 (1989); cf. *Churchill Truck Lines, Inc. v. United States*, 533 F.2d 411, 416 (8th Cir. 1976) (footnote and citations omitted):

petitioners, whose sole motivation . . . was their own economic self-interest and welfare, are singularly inappropriate parties to be entrusted with the responsibility of asserting the public's environmental interest in proceedings concerning the issuance of operating authority to motor carriers. . . . [NEPA] is not designed to prevent loss of profits but was intended to promote governmental awareness of and action concerning environmental problems.

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II.

Federal courts are courts of limited jurisdiction. When federal jurisdiction does not exist, federal judges have no authority to exercise it, even if someone - judges, parties, members of the public - wants the dispute resolved. E.g., *CFTC v. Schor*, 478 U.S. 833, 850-51 (1986); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 & n.4 (1986); *Sosna v. Iowa*, 419 U.S. 393, 408 (1975); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 & n.17 (1951); *Anglo Am. Provision Co. v. Davis Provision Co. No. 2*, 191 U.S. 376, 377 (1903) (Holmes, J.); *Mansfield, Coldwater & Lake Mich. Ry. v. Swan*, 111 U.S. 9, 382-84 (1884); *People's Bank v. Calhoun*, 102 U.S. 256, 260-61 (1881); *Sturges v. Fla. Bank v. Rae*, 48 U.S. (7 How.) 765, 767 (1849); *Jackson v. Ashton*, 33 U.S. (8 Pet.) 93, 94 (1834) (Marshall, C.J.); *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 72 (1804). It follows that federal courts have a "'special obligation'" to praise at the outset their own jurisdiction, even when the parties, [*39] the lower courts, have not raised any jurisdictional questions themselves. *PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 607 (1990) (citation omitted). This tenet is as solid as bedrock and almost as old. See, e.g., *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 306 (1989); *Bender*, 475 U.S. at 541 & n.4; *Judice v. Vail*, 430 U.S. 327, 331-32 (1977); *Liberty Mut. Ins. Co. v. Wetzell*, 424 U.S. 7, 740 (1976); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 588 (1939); *United States v. Corrick*, 298 U.S. 435, 440 (1936); *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934) (Brandeis, J.); *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908); *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453-54 & n.1 (1900); *Mansfield*, 111 U.S. at 382-84; *Jackson*, 33 U.S. (8 Pet.) at 94; *Capron*, 6 U.S. (2 Cranch) at 72; see also, e.g., *Citizens for the Abatement of Aircraft Noise, Inc. v. Metropolitan Washington Airports Auth.*, 917 F.2d 48, 53 (D.C. Cir. 1990) [*40] ("As a threshold matter, we must consider whether this case is justiciable. Although the [defendant] has not pressed the issue on appeal, it is well established that a court of appeals must first satisfy itself of its own jurisdiction, sua sponte if necessary, before proceeding to the merits."), cert. granted on other grounds, 111 S. Ct. 750 (1991); *Rubins*

Contractors, Inc. v. Lumbermens Mut. Ins. Co., 821 F.2d 671, 673 (D.C. Cir. 1987) ("Before addressing the merits of this dispute we must find jurisdiction or not. . . . Although [the defendant] sought to waive the issue at oral argument, we have an independent obligation to determine whether jurisdiction is proper."); Reynolds v. Sheet Metal Workers, Local 102, 702 F.2d 221, 223 (D.C. Cir. 1981) ("Federal courts are courts of limited jurisdiction, and are obliged always to ascertain whether they have subject matter jurisdiction over the litigation before them, even when the parties prefer to ignore the question.").

The truistic constraint on the federal judicial power, then, is this: A federal court may not decide cases when it cannot decide cases, and must determine [*41] whether it can, before it may. The majority here changes this fundamental precept to read, in effect, that under certain circumstances a federal court should decide cases regardless of whether it can, and need not determine whether it can, before it does. This revision seems to me difficult to square with the Supreme Court's regular warnings to the federal courts to fulfill their "special obligation" to inquire into their own jurisdiction at the outset. Originally stated in 1804, in *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 127, 172, the rule was articulated most forcefully in *Mansfield, Coldwater & Lake Michigan Railway v. Swan*, 111 U.S. 379 (1884). In *Mansfield*, a unanimous Court explained that this rule, "springing from the nature and limits of the judicial power of the United States, is inflexible and without exception." *Id.* at 382.

The rule . . . requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all the other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise [*42] of that power, it is called to act. . . . The first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.

1.

The Supreme Court reiterated this principle twice last Term. In reviewing the respondents' citizenship in *Carden v. Arkoma Associates*, 110 S. Ct. 1015 (1990), the Court held that "since diversity of citizenship is a jurisdictional requirement, the Court is always 'called upon to decide' it." *Id.* at 1021; see also *Id.* ("The failure of parties to urge objections [to diversity of citizenship] cannot relieve this court from the duty of ascertaining from the record whether the Circuit Court could properly take jurisdiction of this suit.") (quoting *Great Southern Fire Proof Hotel*, 177 U.S. at 453). In *FW/PBS*, the Court ordered dismissal of a claim for lack of article III standing, even though neither the parties nor the lower courts had addressed the issue. The Court stressed that the federal [*43] courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of the [jurisdictional] doctrines.'" 110 S. Ct. at 607 (citation omitted).

Every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it. *Mitchell v. Maurer*, 3 U.S. 237, 244 (1934). See *Juidice v. Vail*, 430 U.S. 327, 331-32 (1977) (holding). 'And if the record discloses that the lower court was without

jurisdiction this court will notice the defect, although the parties make no attention concerning it.' [United States v. Corrick, 298 U.S. 435, 440 97 .]"

. (quoting Bender, 475 U.S. at 541).

To require that a court resolve jurisdictional questions before addressing non-jurisdictional ones raises the difficult question of how to distinguish the two. The rule of Mansfield might be reduced to tautology if jurisdiction were defined to encompass grounds that the court, on its own motion if necessary, [44] must establish at the threshold. The term "jurisdiction," however - "an all-purpose word denoting adjudicatory power" - bears different meanings in different contexts. Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1077 (11th Cir. 1987), cert. dismissed, 485 U.S. 901 (1988). Sometimes, for example, characterizing a provision as "jurisdictional" implies that a court cannot imper the application of the provision through otherwise available equitable doctrines such as waiver, tolling, and estoppel. See, e.g., Irwin v. Veterans Admin., 111 S. Ct. 453, 455-58 (1990). Other times, characterizing a provision as bearing on an inferior tribunal's "jurisdiction" might signify that on appeal, that tribunal's interpretation of the provision is not entitled to deference. See, e.g., Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 386-89 (1988) (Brennan, J., dissenting).

Given the woolliness of the concept, it is hardly surprising that there exists a significant gray area between grounds of decision that clearly are jurisdictional and grounds that clearly are not. In a sense, all [45] applicable rules limit the authority of the relevant adjudicative tribunal; for that reason, proponents of deferring to reasonable agency interpretations of "jurisdictional" provisions have argued that deference is necessary because an intelligible distinction can be drawn between jurisdictional and non-jurisdictional provisions of statutes entrusted for their administration to the agency. See Mississippi Power, 487 U.S. at 380-82 (Scalia, J., concurring in the judgment). In contexts where distinctions between jurisdictional and non-jurisdictional provisions are made routinely, the distinctions can prove elusive. Compare, e.g., Irwin, 111 S. Ct. at 457 (deeming a provision that "an employee . . . may file a civil action" within a certain time to be non-jurisdictional for tolling purposes) with, e.g., Soriano v. United States, 427 U.S. 270, 273-77 (1957) (deeming a provision that "every claim . . . shall be barred unless . . . filed" within a certain time to be jurisdictional for tolling purposes). To complicate matters further, some provisions - the eleventh amendment, for example - can be jurisdictional in some [46] contexts, and non-jurisdictional in others. Compare Patsy v. Board of Regents, 457 U.S. 496, 506 n.19 (1982) (stating that the eleventh amendment is not "jurisdictional in the sense that it must be raised and decided by this Court on its own motion") with Edelman v. Jordan, 415 U.S. 651, 678 (1974) ("The Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court."). Finally, and most importantly for present purposes, it is well-settled that at some point a claim becomes sufficiently frivolous on the merits as to justify a dismissal for lack of jurisdiction. See, e.g., Bell v. Hood, 327 U.S. 678, 682-83 (1946) (dismissal from district court when the claim is "wholly insubstantial and frivolous"); Licht v. King, 260 U.S. 174, 176-77 (1922) (dismissal from Supreme Court when the claim is not "sufficiently substantial").

the Mansfield rule is violated only if the ground passed over is jurisdictional and the ground rested upon is non-jurisdictional, for courts rarely rest on one jurisdictional ground instead of another, or [*47] on one ground instead of another. In cases where either ground is difficult to characterize, it is difficult to determine whether the rule has been violated. Arguably, moreover, the rule might not apply at all if the ground passed over sufficiently, though not entirely, "partakes of the nature" of a jurisdictional ground, or if the ground rested upon "sufficiently," though not entirely, "partakes of the nature of a jurisdictional bar," Jordan, 415 U.S. at 678. Here, however, the ground passed over - whether there exists a case or controversy within the meaning of article III - is unambiguously jurisdictional, see, e.g., *Wright v. Wright*, 468 U.S. 737, 750-51 (1984), and the ground rested upon - whether the Commission took "major Federal actions" or engaged in "Federal activities" sufficient to trigger duties under NEPA or CZMA - is unambiguously jurisdictional. In this situation, no Supreme Court case authorizes the holding of the Mansfield rule that the majority today commits. n6

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The policies of avoiding constitutional questions for non-constitutional issues, see, e.g., *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring), apply with equal force to jurisdictional determinations. In this case, however, the constitutional questions go to jurisdiction and the non-constitutional ones go to the merits, and the prudential concerns of the majority cannot override a rule that is "inflexible and without exception," *Field*, 111 U.S. at 382. Thus, in *Judice v. Vail*, 430 U.S. 327 (1977), the Court raised and decided a question of constitutional standing, see *id.* at 328, before holding that the district court erred in not abstaining under *Harris*, 401 U.S. 37 (1971) - a non-constitutional ground of decision that was treated as non-jurisdictional, see, e.g., *Ohio Bureau of Employment v. Hodory*, 431 U.S. 471, 480 (1977) (permitting states to waive a Younger estoppel); *Ellis v. Dyson*, 421 U.S. 426, 435 (1975) (instructing district court to remand article III issues before reaching Younger issues).

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Between 1969 and 1976, the Supreme Court decided four cases that are sometimes cited in support of assuming jurisdiction arguendo and rendering a judgment on the merits: *United States v. Augenblick*, 393 U.S. 348 (1969); *Secretary of the Navy v. Egan*, 398 U.S. 74 (1970); *Secretary of the Navy v. Egan*, 418 U.S. 676 (1974) (per curiam); and *Norton v. Mathews*, 427 U.S. 524 (1975). In *Augenblick*, however, the ground passed over was at least arguably jurisdictional, and in *Chandler, Avrech, and Norton*, the ground rested upon was at least arguably jurisdictional. Upon close examination, therefore, none of these cases authorizes the practice undertaken by the majority.

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Augenblick involved actions for back pay brought in the Court of Claims by soldiers challenging the constitutionality of their prior court-martial convictions. See 393 U.S. at 348-49. The Court of Claims had "jurisdiction to render judgment against the United States on any claim 'founded . . . upon the Constitution.'" *Id.* at 349 n.2 (quoting 28 U.S.C. § 1491). Thus, one issue in *Augenblick* was whether the soldiers were barred from recovery in the Court of Claims by the preclusive effect of their convictions in the court-martial. The Supreme Court declined to address this issue: "Assuming,

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quendo, that a collateral attack on a court-martial judgment" could be made, the Court held that the attacks before it were without merit. See id. at 351-52.

A defense of claim or issue preclusion, which can be waived if not properly reserved, is almost always considered non-jurisdictional. See, e.g., Fed. R. Civ. P. 8(c) (requiring res judicata to be pleaded as an affirmative defense); *Boyer v. Bowen*, 817 F.2d 865, 869 & n.37 (D.C. Cir. 1987) ("Failure to so plead constitutes a waiver of the defense."); see also 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1278, at 481-82 & n.9 (2d ed. 1990). Although the argument for preclusion in *Augenblick* was statutory, the statute on which it is based gives little hint of a more jurisdictional flavor than the common-law doctrine that the statute codifies. See 10 U.S.C. § 876 (providing that military convictions shall be "final [*50] and conclusive" and binding upon all . . . courts . . . of the United States"). To the extent that *Augenblick* bypassed a preclusion defense to reject the claims against which that defense was asserted, it simply rested on one merits ground as opposed to another, and provides no basis for dodging jurisdiction to reach the merits. n7

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n7 Norton bypassed the question whether a statute prohibited collateral attack in the district court upon an administrative adjudication by the Secretary of Health, Education, and Welfare. The Court correctly characterized that question as jurisdictional, because the preclusion statute at issue in *Norton* was written in expressly jurisdictional terms. See 42 U.S.C. § 405(h), quoted in 427 U.S. at 529 n.5.

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Despite the general rule that questions of claim or issue preclusion are non-jurisdictional, they are at least jurisdiction-like in two senses: first, they can usually be determined as a matter of law at the outset, simply by examining the face of the [*51] new pleadings in light of the prior proceeding; second, because they touch upon the comity owed by one tribunal to the judgments and orders of another, they implicate institutional concerns that go beyond the rights of individual litigants. It is not surprising, therefore, that the Supreme Court occasionally has cast preclusion questions in expressly jurisdictional terms. See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). In those cases, which involved the preclusive effect of state-court judgments in subsequent federal-court litigation, the Supreme Court reasoned that if a district court issues a judgment on a matter "inextricably intertwined" with a state-court judgment, then "the district court is in essence . . . reviewing the state-court decision," 460 U.S. at 483-84 n.16 - "an exercise of appellate jurisdiction" unauthorized by statute, 263 U.S. at 416.

Jurisdictional recasting of preclusion questions has occurred only rarely. The general rule remains that preclusion questions are non-jurisdictional. Thus, when determining the preclusive [*52] effect to which state-court judgments are entitled, the Court usually eschews the theory of *Rooker-Feldman* for the more conventional approach of simply applying the substantive preclusion law of the state, see 28 U.S.C. § 1738, on the merits. See, e.g., *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985); *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). See generally P. Bator, D. Meltzer, P. Mishkin &

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Augenblick, the Court at times spoke in terms reminiscent of Rooker and n pating Feldman. Instead of consistently framing the issue in terms of hetner "a collateral attack on a court-martial judgment" was appropriate, 393 .S. at 351 (emphasis added), it also questioned the "jurisdiction" of the Court f Claims to "review" court-martial convictions, id. at 349. In Schlesinger v. ouncilman, 420 U.S. 738 (1975), however, another case involving [*53] the reclusive effect of a court-martial judgment, the Court returned to the more raditional, non-jurisdictional idiom. Councilman held that 10 U.S.C. @ 876, the ame preclusion statute at issue in Augenblick, merely "defines the point at hich military court judgments become final and requires that they be given res udicata effect." Id. at 749. The Court expressly rejected the argument that ection 876 divests the district courts of original jurisdiction to entertain ollateral attacks on court-martial judgments, see id. at 748-53, and it at east implicitly rejected the alternative jurisdictional theory that any istrict court so doing would effectively be engaging in direct review without a tatutory grant of appellate jurisdiction. See id. at 753 ("The district court ad subject-matter jurisdiction . . .").

In light of this background, Augenblick cannot plausibly be read as uthorizing courts to sidestep jurisdiction. Interpreted that broadly, ugenblick would stand without precedent or progeny, breaching an otherwise ntact phalanx of Supreme Court authority spanning almost two centuries [*54] hile "offering not a single word of analysis or justification" for so doing. omment, Assuming Jurisdiction Arguendo: The Rationale and Limits of ypothetical Jurisdiction, 127 U. Pa. L. Rev. 712, 713 (1979). To save ublick from that dubious distinction, one need only posit that the Court, te occasional rhetoric to the contrary, viewed the preclusion question in stomary, non-jurisdictional terms, presaging its later, express holding in ouncilman. n8

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In light of this background, Augenblick cannot plausibly be read as authorizing courts to sidestep jurisdiction. Interpreted that broadly, Augenblick would stand without precedent or progeny, breaching an otherwise intact phalanx of Supreme Court authority spanning almost two centuries [*54] while "offering not a single word of analysis or justification" for so doing. Comment, Assuming Jurisdiction Arguendo: The Rationale and Limits of Preemptive Jurisdiction, 127 U. Pa. L. Rev. 712, 713 (1979). To save Augenblick from that dubious distinction, one need only posit that the Court, despite occasional rhetoric to the contrary, viewed the preclusion question in customary, non-jurisdictional terms, presaging its later, express holding in Councilman. n8

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entitled to so extraordinary a remedy because he had failed to exhaust the other avenues of relief available to him. See 398 U.S. at 86-89; see also Coalition for the Preservation of Hispanic Broadcasting v. FCC, No. 87-1285, slip op. at 10 (D.C. Cir. Apr. 23, 1991) (en banc) (avoiding standing question and dismissing petitioners' claim for failure to exhaust administrative remedies); Campaigne v. Schlesinger, 506 F.2d 979, 982 (7th Cir. 1974) ("Exhaustion is a quasi-jurisdictional problem . . .").

Similarly, in Avrech and Norton, the Court rested on essentially jurisdictional grounds - "the inability of the federal judiciary 'to review moot cases,'" DeFunis v. Odegaard, 416 U.S. 312, 316 (1974) (per curiam) (citation omitted). On [*56] the merits, Avrech and Norton involved constitutional challenges to, respectively, a court-martial conviction and an administrative adjudication denying entitlement to certain benefits. In addition, each case presented a threshold question, cast in jurisdictional terms, n9 whether the prior judgment could be collaterally attacked in the district court. While Avrech was pending, the Supreme Court decided another case presenting the identical merits issue, rejecting the position advocated by the plaintiff in Avrech. The same thing happened in Norton. In both cases, the Court refused to decide the pending jurisdictional question, but issued a conforming merits decision nonetheless.

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n9 See supra notes 7, 8.

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Avrech, the Court decided that the intervening decision had rendered the jurisdictional question so insubstantial that it effectively prevented the Court from receiving the requisite adversary presentation on the threshold, jurisdictional question. Faithful to the Mansfield rule, the Court [*57] had ordered supplemental briefing on the jurisdictional question, but had yet to hear oral argument on it. The Court reasoned that deciding the jurisdictional question would be inappropriate under the circumstances, because "even the most diligent and zealous advocate could find his ardor somewhat dampened in arguing a jurisdictional issue where the decision on the merits is thus foreordained." 418 U.S. at 678. n10

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n10 Since the jurisdictional issue was under consideration only because the Court raised it on its own initiative after hearing oral argument on the merits, it is especially ironic that Avrech has come to be cited in support of prestepping jurisdiction altogether.

- - - - -End Footnotes- - - - -

Norton involved a similar situation, except that the jurisdictional question had been fully briefed and argued before the intervening decision was handed down. Nonetheless, the Court made clear that the effect of the intervening decision was to render the merits issues so "insubstantial" as "not even to support the jurisdiction [*58] of a three-judge district court to consider them] on remand." 427 U.S. at 531 (emphasis added); see id. at 530-31 ("The position [in the intervening case] renders the merits in the present case a

decided issue" - foreordained - "and thus no longer substantial in the jurisdictional sense.").

Even the mooting effect of the intervening decision in both Avrech and Norton, a more fastidious Court might have either dismissed the appeals or vacated the lower court judgments and remanded with instructions to dismiss, or alternative dispositions that would have left the pending jurisdictional questions undecided by the Court. Cf. *United States v. Munsingwear*, 340 U.S. 36, 38 (1950) (generally endorsing the latter course when a civil case becomes moot pending appeal). Instead, without deciding the jurisdictional questions, the Court reversed on the merits in Avrech and affirmed on the merits in Norton, reasoning that "whichever disposition we undertake, the effect is the same." 427 U.S. at 532. Notwithstanding the Court's merits dispositions, it is clear from the supporting reasoning that Avrech [*59] and Norton permit this approach only when an intervening decision renders a pending claim so "foreordained" or "insubstantial" that under cases like *Bell v. Hood* or *Zucht v. King*, the claim would not even have supported federal jurisdiction had the intervening decision been decided beforehand. The majority might well be correct that the jurisdictional questions in this case are easier to resolve than are the standing questions, but the majority's answer is hardly so "foreordained" as to make the claims insubstantial in a jurisdictional sense.

In sum, not a single Supreme Court case authorizes federal courts to shuffle around unambiguously jurisdictional problems in order to issue judgments ambiguously on the merits. As one defender of this approach candidly admits, there is . . . no Supreme Court opinion unequivocally holding that it is permissible to assume justiciability and rule on the substantive merits." Comment, *supra*, 127 U. Pa. L. Rev. at 745.

I recognize, of course, that the majority's approach finds support in the precedents of this court decided after *Augenblick*. See, e.g., *Adams v. Vance*, 60 F.2d 950, 953-55 & n.7 (D.C. Cir. 1978); [*60] *Chinese Am. Civic Council v. Attorney Gen.*, 566 F.2d 321, 325-26 & n.9 (D.C. Cir. 1977). Given only those precedents, I would of course be bound to accept this court's judgment that cases such as *Augenblick* implicitly overruled cases such as *Capron* and *Mansfield* and a host of others. But if such venerable precedent can be implicitly overruled with not a single word of analysis or justification," Comment, *supra*, 127 U. Pa. L. Rev. at 713, it can also be revived through express reaffirmation - as happened twice last Term. However valid this circuit's cases once might have been, in my view they do not survive the Supreme Court's most recent pronouncements in *FW/PBS* and *Carden*. Since *FW/PBS* and *Carden* were decided, the only precedent from this court even arguably bypassing jurisdiction is *Coker v. Sullivan*, 902 F.2d 84 (D.C. Cir. 1990). In *Coker*, we assumed article III standing *arguendo*, resting instead on the ground that the challenge to the agency's enforcement decision was unreviewable under *Heckler v. Chaney*, 470 U.S. 1 (1985). See *Coker*, 902 F.2d at 90. [*61] *Coker* provides at best weak support for the majority's approach, however; there, we explained that "the alternative rationale on which we rely is also a jurisdictional limitation." *Id.* at 88 (emphasis added); see also *Hispanic Broadcasting*, No. 87-1285, slip op. at 1 (citing *Coker* as having "dismissed case on non-constitutional jurisdictional grounds to avoid problematic Article III inquiry").

n11 That concession, of course, would still not oblige me to endorse the majority's approach in this case:

My colleague - apparently of the view that the standing issue is too difficult to resolve - believes we should pass on to the merits without deciding whether we have the constitutional authority to hear the case. To be sure, this court has on occasion followed that course, although not often in recent times, but we are unaware of any case where a panel was criticized for not employing that technique; in other words, for assuming its constitutional obligation. Here the parties have briefed the standing issue and we have done our best to answer the jurisdictional question raised. It is hard to understand why, under these circumstances, it could be thought a judicial virtue not to do so.

United Transp. Union v. ICC, 891 F.2d 908, 911 (D.C. Cir. 1989), cert. denied, 10 S. Ct. 3271 (1990).

- - - - -End Footnotes- - - - -
*62]

Read in light of one hundred and eighty-seven years of other precedents, the Supreme Court's opinions in FW/PBS and Carden confirm that federal courts must first assure themselves that they have the authority to hear a dispute before they may decide the dispute on the merits. See FW/PBS, 110 S. Ct. at 607-08; Carden, 110 S. Ct. at 1021. Federal courts simply may not assume jurisdiction hypothetically. Some cases might cry out for decision on the merits; some might pose difficult jurisdictional problems. Our threshold duty to examine our own jurisdiction is no less obligatory in either instance.

II.

"If there were no jurisdiction, there was no power to do anything but strike the case from the docket. In that view of the subject the matter was as much *coram non iudice* as anything else could be" *The Mayor v. Cooper*, 73 U.S. 6 Wall.) 247, 250 (1868). In my view, this court has no jurisdiction to hear Cross-Sound's environmental claims. I would therefore strike those claims from the docket and stop before reaching the merits. Because the majority here goes further, I respectfully decline to join parts IV [*63] and V of the majority's opinion and join only parts I, II, and III.

UNITED STATES COURT OF APPEALS

Eleventh Circuit

DENIALS OF REHEARING EN BANC

denial of rehearing en banc. Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

Denials after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Denials on the Court's own motion after a poll requested by a member of the panel or a Circuit Judge in regular active service.

	Docket Number	Date of Denial	Citation of Panel Decision
GROUP 1			
.....	89-8359	6/20/90	M.D.Ga., 899 F.2d 1136
ing	89-8407	6/19/90	N.D.Ga., 900 F.2d 266
rmers Home Admin.	89-8359	6/20/90	M.D.Ga., 899 F.2d 1136

UNITED STATES of America,
Appellant,

v.

BAKER HUGHES INC., Eimco Secoma,
S.A., and Oy Tampella AB, Appellees.

No. 90-5060.

United States Court of Appeals,
District of Columbia Circuit.

Argued May 16, 1990.

Decided July 6, 1990.

United States brought action to enjoin Finnish manufacturer's proposed acquisition of French manufacturer of hardrock hydraulic underground drilling rigs. The United States District Court for the District of Columbia, Gerhard A. Gesell, J., 731 F.Supp. 3, denied injunction, and appeal was taken. The Court of Appeals, Clarence Thomas, Circuit Judge, held that evidence justified district court's conclusion that acquisition would not substantially lessen competition in United States.

Affirmed.

1. Monopolies ⇄24(12)

When Government presents evidence showing that transaction involving merger or acquisition will lead to undue concentration in market for particular product in particular geographic area, Government establishes presumption that transaction will substantially lessen competition in violation of Clayton Act, and burden then shifts to party seeking acquisition or merger to rebut such presumption. Clayton Act, § 7, 15 U.S.C.A. § 18.

2. Monopolies ⇄24(12)

If party seeking merger or acquisition rebuts presumption that transaction will substantially lessen competition, burden of producing additional evidence of anticompetitive effect shifts to Government, and merges with ultimate burden of persuasion, which remains with Government at all times. Clayton Act, § 7, 15 U.S.C.A. § 18.

3. Monopolies ⇄24(13)

Rebuttal of prima facie case that acquisition or merger will lessen competition in relevant market does not require clear showing that entry into market by competitors will be "quick and effective," rather, evidence on variety of factors can rebut prima facie case. Clayton Act, § 7, 15 U.S.C.A. § 18.

4. Monopolies ⇄24(13)

Misleading nature of statistics underlying Government's prima facie case that merger or acquisition would have effect of lessening competition, and sophistication of consumers purchasing hardrock hydraulic underground drilling rigs, provided support for district court's conclusion that Government's prima facie case of lessening of competition was rebutted; market for such drilling rigs was so minuscule that every sale of rig increased seller's market share by two to five percent, and consumers who generally purchased such rigs, for thousands of dollars, closely examined available options and typically insisted on receiving multiple, confidential bids for each order. Clayton Act, § 7, 15 U.S.C.A. § 18.

5. Monopolies ⇄24(13)

District court's determination that entry into United States hardrock hydraulic underground drilling rig market would likely avert any anticompetitive effects of acquisition of one drilling rig manufacturer by second manufacturer, together with determination that market share statistics were misleading and sophistication of consumers was likely to foster competition, was sufficient to rebut Government's prima facie case that acquisition would lessen competition. Clayton Act, § 7, 15 U.S.C.A. § 18.

6. Monopolies ⇄24(13)

Antitrust defendant seeking to rebut presumption of anticompetitive effect of acquisition or merger must show that prima facie case inaccurately predicts relevant transaction's probable effect on future competition. Clayton Act, § 7, 15 U.S.C.A. § 18.

Appeal from the United States District Court for the District of Columbia (Civil Action No. 89-03333).

David Seidman, Atty., Dept. of Justice, with whom James F. Rill, Asst. Atty. Gen., Michael Boudin and Judy L. Whalley, Deputy Asst. Attys. Gen., and Catherine G. O'Sullivan, Robert B. Nicholson and Andrea Limmer, Attys., Dept. of Justice, were on the brief, for appellant.

David Marx, Jr., with whom Ronald A. Bloch, Lizbeth R. Levinson and Amy E. Hancock, for Oy Tampella AB and Eimco Secoma, S.A., and William J. Baer, with whom Randal M. Shaheen for Baker Hughes Inc., were on the joint brief, for appellees.

Before RUTH B. GINSBURG, SENTELLE, and THOMAS, Circuit Judges.

Opinion for the Court filed by Circuit Judge CLARENCE THOMAS.

CLARENCE THOMAS, Circuit Judge:

Appellee Oy Tampella AB, a Finnish corporation, through its subsidiary Tamrock AG, manufactures and sells hardrock hydraulic underground drilling rigs (HHUDRs) in the United States and throughout the world. Appellee Baker Hughes Inc., a corporation based in Houston, Texas, owned a French subsidiary, Eimco Secoma, S.A. (Secoma), that was similarly involved in the HHUDR industry. In 1989, Tamrock proposed to acquire Secoma.

The United States challenged the proposed acquisition, charging that it would substantially lessen competition in the

United States HHUDR market in violation of section 7 of the Clayton Act, 15 U.S.C. § 18.¹ In December 1989, the government sought and obtained a temporary restraining order blocking the transaction. See *Temporary Restraining Order, United States v. Baker Hughes Inc.*, No. 89-03333 (D.D.C. Dec. 15, 1989). In February 1990, the district court held a bench trial and issued a decision rejecting the government's request for a permanent injunction and dismissing the section 7 claim. See *United States v. Baker Hughes Inc.*, 731 F.Supp. 3 (D.D.C.1990). The government immediately appealed to this court, requesting expedited proceedings and an injunction pending appeal. We granted the motion for expedited briefing and argument, but denied the motion for an injunction pending appeal. The appellees consummated the acquisition shortly thereafter.

[1, 2] The basic outline of a section 7 horizontal acquisition case is familiar. By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area,² the government establishes a presumption that the transaction will substantially lessen competition. See *United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 120-22, 95 S.Ct. 2099, 2118-19, 45 L.Ed.2d 41 (1975); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363, 83 S.Ct. 1715, 1741, 10 L.Ed.2d 915 (1963). The burden of producing evidence to rebut this presumption then shifts to the defendant. See, e.g., *United States v. Marine Bancorporation*, 418 U.S. 602, 631, 94 S.Ct. 2856, 2874-75, 41 L.Ed.2d 978 (1974);

Although the appellees quibble with the court's product market definition, they conclude that "the [district] court's product market definition presages its finding that the extent of present competition and ease of entry preclude finding a violation of Section 7." Brief for Appellees at 10 (emphasis added). If the appellees believe that the court's product market definition contributed to their victory, we see no reason to address their halfhearted and contradictory challenges to that definition.

- Section 7 prohibits mergers and acquisitions the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18.
- The parties in this case do not seriously contest the district court's definition of the relevant markets. The court defined the geographic market as the entire United States, see 731 F.Supp. at 5-6, and the relevant product as three types of HHUDRs: face drills ("jumbos"), long-hole drills, and roof-bolting drills, as well as associated spare parts, components, and accessories, and used drills. See *id.* at 4, 6-8.

United States v. General Dynamics Corp., 415 U.S. 486, 496-504, 94 S.Ct. 1186, 1193-97, 39 L.Ed.2d 530 (1974); *Philadelphia Bank*, 374 U.S. at 363, 83 S.Ct. at 1741. If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times. See *Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1340 & n. 12 (7th Cir.1981).

By presenting statistics showing that combining the market shares of Tamrock and Secoma would significantly increase concentration in the already highly concentrated United States HHUDR market, the government established a prima facie case of anticompetitive effect.³ The district court, however, found sufficient evidence that the merger would not substantially lessen competition to conclude that the defendants had rebutted this prima facie case. The government did not produce any additional evidence showing a probability of substantially lessened competition, and thus failed to carry its ultimate burden of persuasion.

[3] In this appeal, the government assails the court's conclusion that the defendants rebutted the prima facie case. Doubtless aware that this court will set aside the district court's findings of fact only if they are clearly erroneous, see Fed. R.Civ.P. 52(a), the government frames the issue as a pure question of law, which we review de novo. The government's key contention is that the district court, which

did not expressly state the legal standard that it applied in its analysis of rebuttal evidence, failed to apply a sufficiently stringent standard. The government argues that, as a matter of law, section 7 defendants can rebut a prima facie case only by a clear showing that entry into the market by competitors would be quick and effective. Because the district court failed to apply this standard, the government submits, the court erred in concluding that the proposed acquisition would not substantially lessen future competition in the United States HHUDR market.

We find no merit in the legal standard propounded by the government. It is devoid of support in the statute, in the case law, and in the government's own Merger Guidelines. Moreover, it is flawed on its merits in three fundamental respects. First, it assumes that ease of entry by competitors is the only consideration relevant to a section 7 defendant's rebuttal. Second, it requires that a defendant who seeks to show ease of entry bear the onerous burden of proving that entry will be "quick and effective." Finally, by stating that the defendant can rebut a prima facie case only by a clear showing, the standard in effect shifts the government's ultimate burden of persuasion to the defendant. Although the district court in this case did not expressly set forth a legal standard when it evaluated the defendants' rebuttal, we have carefully reviewed the court's thorough analysis of competitive conditions in the United States HHUDR market, and we are satisfied that the court effectively applied a standard faithful to section 7.⁴

- From 1986 through 1988, Tamrock had an average 40.8% share of the United States HHUDR market, while Secoma's share averaged 17.5%. 731 F.Supp. at 6. In 1988 alone, the two firms enjoyed a combined share of 76% of the market. (The district court inaccurately calculated this figure as 66%. See *id.* at 10; Brief for Appellant at 10 n. 10; Brief for Appellees app. A.) The acquisition thus has brought about a dramatic increase in the Herfindahl-Hirschman Index (HHI)—a yardstick of concentration—for this market. The Department of Justice's Merger Guidelines characterize as "highly concentrated" any market in which the HHI exceeds 1800. See United States Dept of Justice, Merger Guidelines § 3.1 (June 14, 1984),

reprinted in 4 Trade Reg.Rep. (CCH) ¶ 13,103, at 20,561-64 (1988). This acquisition has increased the HHI in this market from 2878 to 4303. Brief for Appellant at 5 n. 3, 12 (calculated from 1986-1988 figures; see 731 F.Supp. at 6).

- Even if we found more impressive the argument that the district court did not clearly articulate the legal standard applicable to a section 7 rebuttal, it would remain open to us to affirm that court's judgment. Cf. *Nelson v. United States*, 838 F.2d 1280, 1285 (D.C.Cir.1988) ("[W]e may affirm a trial court's decision on a basis not relied on by the district court where that ground finds support in the record.") (citation omitted).

Concluding that the court applied this legal standard to factual findings that are not clearly erroneous, we affirm the court's denial of a permanent injunction and its dismissal of the government's section 7 claim.

I.

It is a foundation of section 7 doctrine, disputed by no authority cited by the government, that evidence on a variety of factors can rebut a prima facie case. These factors include, but are not limited to, the absence of significant entry barriers in the relevant market. In this appeal, however, the government inexplicably imbues the entry factor with talismanic significance. If, to successfully rebut a prima facie case, a defendant *must* show that entry by competitors will be quick and effective, then other factors bearing on future competitiveness are all but irrelevant. The district court in this case considered at least two factors in addition to entry: the misleading nature of the statistics underlying the government's prima facie case and the sophistication of HHUDR consumers. These non-entry factors provide compelling support for the court's holding that Tarmock's acquisition of Secoma was not likely to lessen competition substantially. We have concluded that the court's consideration of these factors was crucial, and that the government's fixation on ease of entry is misplaced.

Section 7 involves *probabilities*, not certainties or possibilities.⁵ The Supreme Court has adopted a totality-of-the-circumstances approach to the statute, weighing a variety of factors to determine the effects of particular transactions on competition. That the government can establish a prima facie case through evidence on only one factor, market concentration, does not negate the breadth of this analysis. Evidence of market concentration simply provides a convenient starting point for a broader in-

5. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 323, 82 S.Ct. 1502, 1522-23, 8 L.Ed.2d 510 (1962) ("Congress used the words 'may be substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed

quiry into future competitiveness; the Supreme Court has never indicated that a defendant seeking to rebut a prima facie case is restricted to producing evidence of ease of entry. Indeed, in numerous cases, defendants have relied entirely on non-entry factors in successfully rebutting a prima facie case.

In *United States v. General Dynamics Corp.*, 415 U.S. 486, 94 S.Ct. 1186, 39 L.Ed.2d 530 (1974), for instance, the Supreme Court rejected the government's argument that a merger between two leading coal producers would violate section 7. Although the transaction would result in the two largest firms controlling about half of all sales in an industry that was already highly concentrated because of a rapid decline in the number of competitors, the defendants produced considerable evidence that the merger would not substantially lessen competition. One of the parties to the merger owned only minimal reserves of coal, an irreplaceable raw material, and had already committed these reserves through long-term contracts. This evidence led the Court to conclude that the government's statistics regarding concentration in the wake of the merger inaccurately portrayed the post-merger company's weak competitive stature, and that the defendants had therefore rebutted the prima facie case. *Id.* at 503-04, 94 S.Ct. at 1196-97. Nowhere did the Court consider barriers to entry.

Indeed, the Court in *General Dynamics* emphasized the comprehensive nature of a section 7 inquiry, quoting at length from its decision a decade earlier in *Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). See *General Dynamics*, 415 U.S. at 498, 94 S.Ct. at 1194. In *Brown Shoe*, the Court applied section 7 stringently, holding that a merger that created a company with a 5% share of a highly fragmented market violated the statute. In arriving at this result, how-

for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act.") (footnote omitted) (emphasis added).

ever, the Court stressed that a transaction must

be functionally viewed, in the context of its particular industry. That is, whether the consolidation was to take place in an industry that was fragmented rather than concentrated, that had seen a recent trend toward domination by a few leaders or had remained fairly consistent in its distribution of market shares among the participating companies, that had experienced easy access to markets by suppliers and easy access to suppliers by buyers or had witnessed foreclosure of business, that had witnessed the ready entry of new competition or the erection of barriers to prospective entrants, all were aspects, varying in importance with the merger under consideration, which would properly be taken into account.

370 U.S. at 321-22, 82 S.Ct. at 1521-22 (footnote omitted).⁶ All these factors are relevant in determining whether a transaction is likely to lessen competition substantially, but none is invariably dispositive. See Note, *Horizontal Mergers After United States v. General Dynamics Corp.*, 92 Harv.L.Rev. 491, 500 (1978).

In the wake of *General Dynamics*, the Supreme Court and lower courts have found section 7 defendants to have successfully rebutted the government's prima facie case by presenting evidence on a variety of factors other than ease of entry. See, e.g., *Citizens & Southern*, 422 U.S. at 121-23, 95 S.Ct. at 2119-20 (no lessening of competition, and thus no violation of section 7, where acquired banks were already associated with acquiring bank; no discussion of ease of entry); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 276 (7th Cir. 1981) (acquired company's deteriorating market position both before and after acquisition rebutted prima facie case), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 (1982); *FTC v. National Tea Co.*, 603 F.2d 694, 699-700 (8th Cir.1979) (weak market position of acquiring compa-

6. See also *id.* at 322 n. 38, 82 S.Ct. at 1522 n. 38 ("Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further ex-

ny made substantial lessening of competition unlikely); *United States v. International Harvester Co.*, 564 F.2d 769, 773-79 (7th Cir.1977) (company successfully rebutted prima facie case by showing, among other things, financial weakness of acquired company, de facto independence of acquired company from acquiring company, strong level of competition in relevant market, and tendency of the market toward even stronger levels of competition).

Indeed, that a variety of factors other than ease of entry can rebut a prima facie case has become hornbook law. See, e.g., P. Areeda & H. Hovenkamp, *Antitrust Law* ¶¶ 919', 920.1, 921', 925', 934', 935', 939', at 813-23 (Supp.1989) (other factors include significance of market shares and concentration, likelihood of express collusion or tacit coordination, and prospect of efficiencies from merger); H. Hovenkamp, *Economics and Federal Antitrust Law* § 11.6, at 307-11 (1985) (other factors include supply of irreplaceable raw materials, excess capacity, degree of product homogeneity, marketing and sales methods, and absence of a trend toward concentration); L. Sullivan, *Handbook of the Law of Antitrust* § 204, at 622-25 (1977) (other factors include industry structure, weakness of data underlying prima facie case, elasticity of industry demand, inter-industry cross-elasticities of demand and supply, product differentiation, and efficiency). See generally Antitrust Section, ABA, *Horizontal Mergers: Law and Policy* 162-75, 201-04, 219-63 (Monograph No. 12, 1986).

It is not surprising, then, that the Department of Justice's own Merger Guidelines contain a detailed discussion of non-entry factors that can overcome a presumption of illegality established by market share statistics. See United States Dept. of Justice, Merger Guidelines (June 14, 1984) [hereinafter Guidelines], reprinted in 4 Trade Reg.Rep. (CCH) ¶ 13,103, at 20, 561-64 (1988). According to the Guidelines, these factors include changing mar-

amination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.".)

ket conditions (§ 3.21), the financial condition of firms in the relevant market (§ 3.22), special factors affecting foreign firms (§ 3.23), the nature of the product and the terms of sale (§ 3.41), information about specific transactions and buyer market characteristics (§ 3.42), the conduct of firms in the market (§ 3.44), market performance (§ 3.45), and efficiencies (§ 3.5).

Given this acknowledged multiplicity of relevant factors, we are at a loss to understand on what basis the government has decided that "[t]o rebut the government's prima facie case, the defendants were required to show that entry would be both quick and effective in preventing supra-competitive prices." Brief for Appellants at 11-12 (emphasis added). If the district court in this case had focused exclusively on entry, it might be understandable that the government would mirror that focus in attacking the court's conclusion. The district court, however, canvassed a number of non-entry factors that contributed to its conclusion that the defendants had rebutted the prima facie case. By ignoring these factors, the government's arguments against that conclusion fall wide of the mark.

[4] The district court's analysis of this case is fully consonant with precedent and logic. The court reviewed the evidence proffered by the defendants as part of its overall assessment of future competitiveness in the United States HHUDR market. As noted above, the court gave particular weight to two non-entry factors: the flawed underpinnings of the government's prima facie case and the sophistication of HHUDR consumers. The court's consideration of these factors was not only appropriate, but imperative, because in this case these factors significantly affected the probability that the acquisition would have anticompetitive effects.

With respect to the first factor, the statistical basis of the prima facie case, the court accepted the defendants' argument that the government's statistics were mis-

leading. Because the United States HHUDR market is minuscule, market share statistics are "volatile and shifting." 731 F.Supp. at 11, and easily skewed. In 1986, for instance, only 22 HHUDRs were sold in the United States. In 1987, the number rose to 43, and in 1988 it fell to 38. Every HHUDR sold during this period, thus, increased the seller's market share by two to five percent. A contract to provide multiple HHUDRs could catapult a firm from last to first place. The district court found that, in this unusual market, "at any given point in time an individual seller's future competitive strength may not be accurately reflected." *Id.* at 9. While acknowledging that the HHUDR market would be highly concentrated after Tamrock acquired Secoma, the court found that such concentration in and of itself would not doom competition. High concentration has long been the norm in this market. For example, only four firms sold HHUDRs in the United States between 1986 and 1989. *Id.* at 5-6.⁷ Nor is concentration surprising where, as here, a product is esoteric and its market small. Indeed, the trial judge found that "[c]oncentration has existed for some time [in the United States HHUDR market] but there is no proof of overpricing, excessive profit or any decline in quality, service or diminish innovation." *Id.* at 12.

The second non-entry factor that the district court considered was the sophistication of HHUDR consumers. HHUDRs currently cost hundreds of thousands of dollars, and orders can exceed \$1 million. *Id.* at 8. These products are hardly trinkets sold to small consumers who may possess imperfect information and limited bargaining power. HHUDR buyers closely examine available options and typically insist on receiving multiple, confidential bids for each order. *Id.* This sophistication, the court found, was likely to promote competition even in a highly concentrated market. *Id.* at 11.

which HHI exceeds 1800 as "highly concentrated").

7. See also *supra* note 3 (HHI of United States HHUDR market before merger was 2878; Department of Justice regards any market in

The government has not provided us with any reason to suppose that these findings of fact are unsupported in the record or clearly erroneous, see Fed.R.Civ.P. 52(a). We thus accept them as correct. These findings provide considerable support for the district court's conclusion that the defendants successfully rebutted the government's prima facie case. Because the defendants also provided compelling evidence on ease of entry into this market, we need not decide whether these findings, without more, are sufficient to rebut the government's prima facie case. The foregoing analysis of non-entry factors is intended merely to underscore that, contrary to the government's assumption, these factors are relevant, and can even be dispositive, in a section 7 rebuttal analysis.

II.

The existence and significance of barriers to entry are frequently, of course, crucial considerations in a rebuttal analysis. In the absence of significant barriers, a company probably cannot maintain supra-competitive pricing for any length of time. See, e.g., *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 532-33, 93 S.Ct. 1096, 1100-01, 35 L.Ed.2d 475 (1973); *United States v. Syufy Enters.*, 903 F.2d 659, 664 (9th Cir.1990); *California v. American Stores Co.*, 872 F.2d 837, 842 (9th Cir.1989), *rev'd on other grounds*, — U.S. —, 110 S.Ct. 1853, 109 L.Ed.2d 240 (1990); *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins.*, 784 F.2d 1325, 1335-36 (7th Cir.1986). The district court in this case reviewed the prospects for future entry into the United States HHUDR market and concluded that, overall, entry was likely, particularly if Tamrock's acquisition of Secoma were to lead to supra-competitive pricing. The government attacks this conclusion, asserting that, as a matter of law, the court should have required the defendants to show clearly that entry would be "quick and effective." We reject this novel and unduly onerous standard. The district court's factual findings amply support its determination that future entry into the United States HHUDR market is likely. This determination, in turn, supports the

court's conclusion that the defendants successfully rebutted the government's prima facie case.

As authority for its "quick and effective" entry test, the government relies primarily on *United States v. Waste Management, Inc.*, 743 F.2d 976, 981-84 (2d Cir.1984). This reliance is misplaced. Neither *Waste Management* nor any other case purports to establish a categorical "quick and effective" entry requirement. The Second Circuit in *Waste Management* simply noted that the defendant had successfully rebutted the government's prima facie case by showing that entry into the Dallas/Fort Worth trash collection market was "easy." *Id.* at 983. That a defendant may successfully rebut a prima facie case by showing quick and effective entry does not mean that successful rebuttal requires such a showing. We are at a loss to understand how the government derived from *Waste Management* (where, lest the irony be missed, the government lost) the proposition that "a defendant arguing supposed ease of entry can rebut the government's prima facie case only by clearly showing that entry will be both quick and effective at preventing supra-competitive pricing." Brief for Appellant at 14 (emphasis added).

That the "quick and effective" standard lacks support in precedent is not surprising, for it would require of defendants a degree of clairvoyance alien to section 7, which, as noted above, deals with probabilities, not certainties. Although the government disclaims any attempt to impose upon defendants the burden of proving that entry actually will occur, see Reply Brief for Appellant at 13 n. 13, we believe that an inflexible "quick and effective" entry requirement would tend to impose precisely such a burden. A defendant cannot realistically be expected to prove that new competitors will "quickly" or "effectively" enter unless it produces evidence regarding specific competitors and their plans. Such evidence is rarely available; potential competitors have a strong interest in downplaying the likelihood that they will enter a given market. When the government sarcastically "wonders how slow and ineffec-

tive entry rebuts a prima facie case," *id.* at 12, it misses a crucial point. If the totality of a defendant's evidence suggests that entry will be slow and ineffective, then the district court is unlikely to find the prima facie case rebutted. This is a far cry, however, from insisting that the defendant must *invariably* show that new competitors will enter quickly and effectively.

Furthermore, the supposed "quick and effective" entry requirement overlooks the point that a firm that *never* enters a given market can nevertheless exert competitive pressure on that market. If barriers to entry are insignificant, the *threat* of entry can stimulate competition in a concentrated market, regardless of whether entry ever occurs. See *Falstaff Brewing*, 410 U.S. at 532-33, 93 S.Ct. at 1100-01 (potential for defendant Falstaff to enter the market might induce brewers in the Northeast to maintain competitive prices); *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 581, 87 S.Ct. 1224, 1231-32, 18 L.Ed.2d 303 (1967) ("It is clear that the existence of Procter at the edge of the industry exerted considerable influence on the market. . . . [The] industry was influenced by each firm's predictions of the market behavior of its competitors, actual and potential.") (emphasis added); cf. *Byars v. Bluff City News Co.*, 609 F.2d 843, 851 n. 19 (6th Cir.1979) ("If entry barriers are low, the threat of potential competition operates as a significant check on monopoly power since competitors will quickly enter the market if prices are raised significantly."). If a firm that *never* enters a market can keep that market competitive, a defendant seeking to rebut a prima facie case certainly need not show that any firm *will* enter the relevant market.

The final flaw in the proposed "quick and effective" standard is its manipulability. The adjectives "quick" and "effective" are not self-defining, and have not traditionally been used in the section 7 context. The government's Merger Guidelines do not use the words when discussing entry, noting only that

[i]f entry into a market is so easy that existing competitors could not succeed in raising price for any significant period of

time, the Department is unlikely to challenge mergers in that market. . . . In assessing the ease of entry into a market, the Department will consider the likelihood and probable magnitude of entry in response to a "small but significant and nontransitory" increase in price.

Guidelines § 3.3, reprinted in 4 Trade Reg.Rep. (CCH) at 20,562. In its brief, moreover, the government fails to state its own standard consistently, insisting at one point that a defendant show that entry will be "sure, swift, and substantial." Brief for Appellant at 16. Our uncertainty over the meaning and implications of "quick and effective" entry makes us all the more resistant to the imposition of such a requirement. Nor has the government shown that current section 7 law is so confused as to warrant the invention of a new standard.

The government's insistence on a "quick and effective" entry standard only reaffirms our doubts, raised in section I of this opinion, about the government's approach to section 7 analysis. Predicting future competitive conditions in a given market, as the statute and precedents require, calls for a comprehensive inquiry. The government's standard would improperly narrow the section 7 inquiry, channelling what should be an overall analysis of competitiveness into a determination of whether a defendant has shown particular facts.

[5] Having rejected the "quick and effective" entry standard itself, we turn briefly to the government's more general argument that the district court's findings regarding ease of entry failed to support its conclusion that the defendants had rebutted the prima facie case. The district court in this case discussed a number of considerations that led it to conclude that entry barriers to the United States HHUDR market were not high enough to impede future entry should Tamrock's acquisition of Secoma lead to supracompetitive pricing. First, the court noted that at least two companies, Cannon and Ingersoll-Rand, had entered the United States HHUDR market in 1989, and were poised

for future expansion.⁸ 731 F.Supp. at 9, 10, 11. Second, the court stressed that a number of firms competing in Canada and other countries had not penetrated the United States market, but could be expected to do so if Tamrock's acquisition of Secoma led to higher prices. *Id.* at 10-11.⁹ Because the market is small, "[i]t is inexpensive to develop a separate sales and service network in the United States." *Id.* at 8. Third, these firms would exert competitive pressure on the United States HHUDR market even if they never actually entered the market. *Id.* at 10-11. Finally, the court noted that there had been tremendous turnover in the United States HHUDR market in the 1980s. Secoma, for example, did not sell a single HHUDR in the United States in 1983 or 1984, but then lowered its price and improved its service, becoming market leader by 1989. *Id.* at 9, 10. Secoma's growth suggests that competitors not only can, but probably will, enter or expand if this acquisition leads to higher prices. The district court, to be sure, also found some facts suggesting difficulty of entry,¹⁰ but these findings do not negate its ultimate finding to the contrary.

In sum, we see no error—legal or factual—in the district court's determination that entry into the United States HHUDR market would likely avert anticompetitive effects from Tamrock's acquisition of Secoma. The court's determination on entry, considered along with the findings discussed in section I of this opinion, suffices to rebut the government's prima facie case.

8. As the Guidelines note, "Entry" may occur as firms outside the market enter for the first time or as fringe firms currently in the market greatly expand their current capacity." Guidelines § 3.3, reprinted in 4 Trade Reg.Rep. (CCH) at 20,562 n. 20 (emphasis added).

9. Some of these firms have already tried, but failed, to penetrate the United States HHUDR market. As the district court correctly noted, however, failed entry in the past does not necessarily imply failed entry in the future: if prices reach supracompetitive levels, a company that has failed to enter in the past could become competitive. See 731 F.Supp. at 11; cf. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 119 n. 15, 107 S.Ct. 484, 494 n. 15, 93 L.Ed.2d 427 (1986) ("In evaluating entry barriers . . . a court should focus on whether significant entry barriers

III

Finally, we consider the strength of the showing that a section 7 defendant must make to rebut a prima facie case. The district court simply reviewed the evidence that the defendants presented and concluded that the acquisition was not likely to substantially lessen competition. The government argues that the court erred by failing to require the defendants to make a "clear" showing. See Brief for Appellant at 13. The relevant precedents, however, suggest that this formulation overstates the defendants' burden. We conclude that a "clear" showing is unnecessary, and we are satisfied that the district court required the defendants to produce sufficient evidence.

The government's "clear showing" language is by no means unsupported in the case law. In the mid-1960s, the Supreme Court construed section 7 to prohibit virtually any horizontal merger or acquisition. At the time, the Court envisioned an ideal market as one composed of many small competitors, each enjoying only a small market share; the more closely a given market approximated this ideal, the more competitive it was presumed to be. See *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 280, 84 S.Ct. 1283, 1289, 12 L.Ed.2d 314 (1964) ("It is the basic premise of [section 7] that competition will be most vital 'when there are many sellers, none of which has any significant market share.'") (quoting *United States v. Philadelphia*

ers would exist after the merged firm had eliminated some of its rivals, because at that point the remaining firms would begin to charge supracompetitive prices, and the barriers that existed during competitive conditions might well prove insignificant.").

10. The court, for instance, noted that HHUDRs are custom-made, and thus are not readily interchangeable or replaceable. Buyers, therefore, tend to return to sellers from whom they have purchased in the past. 731 F.Supp. at 8. The court also found that HHUDR customers typically place great importance on assurances of product quality and reliable future service—considerations that may handicap new entrants. *Id.* It also noted the significant economies of scale involved in manufacturing HHUDRs. *Id.*

Nat'l Bank, 374 U.S. 321, 363, 83 S.Ct. 1715, 1741, 10 L.Ed.2d 915 (1963)).

This perspective animated a series of decisions in which the Court stated that a section 7 defendant's market share measures its market power, that statistics alone establish a prima facie case, and that a defendant carries a heavy burden in seeking to rebut the presumption established by such a prima facie case. The Court most clearly articulated this approach in *Philadelphia Bank*:

[Th]e intense congressional concern with the trend toward concentration [underlying section 7] warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

374 U.S. at 363, 83 S.Ct. at 1741 (emphasis added). *Philadelphia Bank* involved a proposed merger that would have created a bank commanding over 30% of a highly concentrated market. While acknowledging that the banks could in principle rebut the government's prima facie case, the Court found unpersuasive the banks' evidence challenging the alleged anticompetitive effect of the merger. See *id.* at 366-72, 83 S.Ct. at 1743-46.

In *United States v. Von's Grocery Co.*, 384 U.S. 270, 86 S.Ct. 1478, 16 L.Ed.2d 555 (1966), the Court further emphasized the weight of a defendant's burden. Despite evidence that a post-merger company had only a 7.5% share of the Los Angeles retail grocery market, the Court, citing anticompetitive "trends" in that market, ordered the merger undone. The Court summarily

11. Justice Stewart, in dissent, emphasized the considerable amount of evidence in the record indicating the market's competitiveness. 384 U.S. at 290-301, 86 S.Ct. at 1489-95 (Stewart, J., dissenting).

dismissed the defendants' contention that the post-merger market was highly competitive. *Id.* at 277-78, 86 S.Ct. at 1482.¹¹ Noting that the market was "marked at the same time by both a continuous decline in the number of small businesses and a large number of mergers," the *Von's Grocery* Court predicted that, if the merger were not undone, the market "would slowly but inevitably gravitate from a market of many small competitors to one dominated by one or a few giants, and competition would thereby be destroyed." *Id.* at 278, 86 S.Ct. at 1482; see also *United States v. Pabst Brewing Co.*, 384 U.S. 546, 550-52, 86 S.Ct. 1665, 1668-69, 16 L.Ed.2d 765 (1966) (acquisition producing brewer accounting for 4.49% of nationwide beer sales violates section 7; brewer's rebuttal evidence virtually ignored).

Although the Supreme Court has not overruled these section 7 precedents, it has cut them back sharply. In *General Dynamics*, 415 U.S. at 498-504, 94 S.Ct. at 1194-97, the Court affirmed a district court determination that, by presenting evidence that undermined the government's statistics, section 7 defendants had successfully rebutted a prima facie case. In so holding, the Court did not expressly reaffirm or disavow *Philadelphia Bank's* statement that a company must "clearly" show that a transaction is not likely to have substantial anticompetitive effects. The Court simply held that the district court was justified, based on all the evidence, in finding that "no substantial lessening of competition occurred or was threatened by the acquisition." *General Dynamics*, 415 U.S. at 498, 94 S.Ct. at 1194.

General Dynamics began a line of decisions differing markedly in emphasis from the Court's antitrust cases of the 1960s. Instead of accepting a firm's market share as virtually conclusive proof of its market power, the Court carefully analyzed defendants' rebuttal evidence.¹² These cases dis-

12. Judge Posner has elucidated this point: The most important developments that cast doubt on the continued vitality of such cases as *Brown Shoe* and *Von's* are found in other cases, where the Supreme Court, echoed by

carded *Philadelphia Bank's* insistence that a defendant "clearly" disprove anticompetitive effect, and instead described the rebuttal burden simply in terms of a "showing." See, e.g., *United States v. Marine Bancorporation*, 418 U.S. 602, 631, 94 S.Ct. 2856, 2874-75, 41 L.Ed.2d 978 (1974) (after government established prima facie case, "the burden was then upon appellees to show that the concentration ratios, which can be unreliable indicators of actual market behavior, did not accurately depict the economic characteristics of the [relevant] market") (citation omitted) (emphasis added); *United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 120, 95 S.Ct. 2099, 2118, 45 L.Ed.2d 41 (1975) (after government established prima facie case, "[i]t was ... incumbent upon [the defendant] to show that the market-share statistics gave an inaccurate account of the acquisitions' probable effects on competition") (emphasis added). Without overruling *Philadelphia Bank*, then, the Supreme Court has at the very least lightened the evidentiary burden on a section 7 defendant. See generally Note, 92 Harv.L.Rev. at 491 (describing impact of *General Dynamics* on section 7 jurisprudence).

[6] In the aftermath of *General Dynamics* and its progeny, a defendant seeking to rebut a presumption of anticompetitive effect must show that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition. See *American Stores*, 872 F.2d at 842 (defendant can rebut prima facie case "through evidence demonstrating that statistics on market share, market concentration, and market concentration trends portray inaccurately the merger's probable effects on competition") (emphasis added); cf. *Waste Management*, 743 F.2d at 981 (defendant can rebut prima facie case "by a demonstration that the merger will not have anticompetitive ef-

fects") (emphasis added). The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully. A defendant can make the required showing by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor.

By focusing on the future, section 7 gives a court the uncertain task of assessing probabilities. In this setting, allocation of the burdens of proof assumes particular importance. By shifting the burden of producing evidence, present law allows both sides to make competing predictions about a transaction's effects. If the burden of production imposed on a defendant is unduly onerous, the distinction between that burden and the ultimate burden of persuasion—always an elusive distinction in practice—disintegrates completely. A defendant required to produce evidence "clearly" disproving future anticompetitive effects must essentially persuade the trier of fact on the ultimate issue in the case—whether a transaction is likely to lessen competition substantially. Absent express instructions to the contrary, we are loath to depart from settled principles and impose such a heavy burden. See *Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1340 & n. 12 (7th Cir.1981); cf. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-56, 101 S.Ct. 1089, 1093-95, 67 L.Ed.2d 207 (1981) (applying similar production-burden-shifting analysis to employment discrimination suits under title VII, and noting that "[t]he ultimate burden of persuading the trier of fact ... remains at all times with the plaintiff," *id.* at 253, 101 S.Ct. at 1093); 9 J. Wigmore, *Evidence* § 2489, at 300 (J. Chadbourn rev.ed. 1981) (burden of persuasion "never shifts" away from plaintiff).

the lower courts, has said repeatedly that the economic concept of competition, rather than any desire to preserve rivals as such, is the lodestar that shall guide the contemporary application of the antitrust laws, not excluding the Clayton Act.... Applied to cases brought under Section 7, this principle requires the district court ... to make a judg-

ment whether the challenged acquisition is likely to hurt consumers, as by making it easier for the firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level. *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1386 (7th Cir.1986), cert. denied, 481 U.S. 1038, 107 S.Ct. 1975, 95 L.Ed.2d 815 (1987).

Imposing a heavy burden of production on a defendant would be particularly anomalous where, as here, it is easy to establish a prima facie case. The government, after all, can carry its initial burden of production simply by presenting market concentration statistics. To allow the government virtually to rest its case at that point, leaving the defendant to prove the core of the dispute, would grossly inflate the role of statistics in actions brought under section 7. The Herfindahl-Hirschman Index cannot guarantee litigation victories.¹³ Cf. *Ball Memorial Hosp.*, 784 F.2d at 1336 (explaining that "[m]arket share is just a way of estimating market power, which is the ultimate consideration," and noting that "[w]hen there are better ways to estimate market power, the court should use them"). Requiring a "clear showing" in this setting would move far toward forcing a defendant to rebut a probability with a certainty.

The appellees in this case presented the district court with considerable evidence regarding the United States HHUDR market. The court credited the evidence concerning the sophistication of HHUDR consumers and the insignificance of entry barriers, as well as the argument that the statistics underlying the government's prima facie case were misleading. This evidence amply justified the court's conclusion that the prima facie case inaccurately depicted the probable anticompetitive effect of Tamrock's acquisition of Secoma. Because the government did not produce sufficient evidence to overcome this successful rebuttal, the district court concluded that "it is not likely that the acquisition will substantially lessen competition in the United States either immediately or long-term." 731

13. We refer the government to its own Merger Guidelines, which recognize that "[i]n a variety of situations, market share and market concentration data may either understate or overstate the likely future competitive significance of a firm or firms in the market." Guidelines § 3.2, reprinted in 4 Trade Reg.Rep. (CCH) at 20,561. Although the Guidelines disclaim "slavish[] adherence" to such data, *id.*, statement, reprinted in 4 Trade Reg.Rep. (CCH) at 20,552, we fear

F.Supp. at 12. The government has given us no reason to reverse that conclusion.

For the foregoing reasons, the judgment of the district court is

Affirmed.



**COMMUNITY FOR CREATIVE
NON-VIOLENCE, et al.,
Appellants,**

v.

**Manuel LUJAN, Jr., Secretary of the
Interior, et al.**

No. 89-5218.

United States Court of Appeals,
District of Columbia Circuit.

Argued May 16, 1990.

Decided July 17, 1990.

Action was brought challenging denial by the National Park Service of request for inclusion of a sculpture of a homeless family in Christmas pageant of peace on the ellipse, behind the White House. Plaintiff's motion for preliminary injunction was denied, and Park Service's motions for protective order and summary judgment were granted by the United States District Court for the District of Columbia, Louis F. Oberdorfer, J., and plaintiff appealed. The Court of Appeals, Sentelle, Circuit Judge, held that: (1) the Park Service did not abuse its discretion or act in an arbitrary and capricious fashion; (2) the Park Service adequately explained its conclusion that the

that the Department of Justice has ignored its own admonition. The government does not maximize its scarce resources when it allows statistics alone to trigger its ponderous enforcement machinery. Cf. *Syufy Enters.*, 903 F.2d at 672 ("It is a tribute to the state of competition in America that the Antitrust Division of the Department of Justice has found no worthier target than this paper tiger on which to expend limited taxpayer resources.")

sculpture failed to address the theme and format; (3) the decisionmaker was not the National Park Service's submission; (4) the Park Service's submission did not justify the decision; and (5) the decision was to be taken from the record. *Affirmed.*

1. **United States** 507

The National Park Service abused its discretion in a capricious fashion without regard to the nature, that sculpture of a homeless family was not a Christmas symbol that accorded with the format of the Christmas pageant on the ellipse, behind the White House, thus refused to include the sculpture in the Christmas pageant. 5 U.S.C.A.

2. **Administrative Law** 507

United States 507
The National Park Service explained the basis of its decision to exclude the sculpture of homeless family from the Christmas pageant on the ellipse, behind the White House, that it did not depict a Christmas symbol. *Id.* seq.

3. **Federal Civil Procedure**

In litigation concerning the National Park Service's decision to exclude the sculpture from the Christmas pageant, submission by the National Park Service of a Christmas pageant sculpture to be displayed in the Christmas pageant was an inappropriate litigation tactic. The National Park Service adequately justified allowing a decision from the regional director of the National Park Service adequately justified the decision. *Id.* seq., 706(2)(A).

4. **Federal Civil Procedure**

Discovery of appropriate process is allowed in cases where there has been a showing of bad faith or improper conduct. The examination of decision-making process is one of the few possibilities for effective

THE WALL STREET JOURNAL.

On *Brown v. Board of Education*, Call Him Thurgood Thomas

The NAACP board is scheduled to decide today whether to join the interest groups that oppose a black Supreme Court nominee. Benjamin Hooks has said his group would have preferred another Thurgood Marshall. The NAACP should know that when it comes to the Supreme Court's

Rule of Law

By L. Gordon Crovitz

most important civil-rights case. Clarence Thomas is another Thurgood Marshall.

With all the smoke cooked up by Judge Thomas's critics, no one seems to have noticed that he takes precisely the same broad view of the constitutional promise of equality that Mr. Marshall as the lawyer arguing *Brown v. Board of Education* tried—unsuccessfully—to persuade the Supreme Court to adopt.

The 1954 case was a great victory for the civil-rights movement and especially for the NAACP where Mr. Marshall worked. The justices finally declared that separate but equal facilities were unconstitutional. A filibuster in the Senate perpetuated Jim Crow segregation, so it was appropriate that the court struck down these racist laws.

The problem is that *Brown* is a classic example of a correct result reached by lousy reasoning. The opinion by Chief Justice Earl Warren was based almost entirely on dubious sociological data on how much better black students supposedly learn when they study in the same classrooms as whites. A famous footnote cites behavior studies in publications such as the *International Journal of Opinion and Attitude Research*. It's now clear that this case was the beginning of an era of judicial activism that substituted shadows, penumbras and judicial social engineering for adherence to constitutional text and original intent.

There are nearly identical arguments about what the *Brown* opinion should have said in Mr. Marshall's legal briefs in the case and Judge Thomas's recent speeches and law-review articles. They agreed that the court should have based its decision on legal and constitutional sources, not sociologists. They both referred to the Declaration of Independence's self-evident truth that "all men are created equal," which finally applied to blacks after the Civil War through the Fourteenth Amendment.

Mr. Marshall's brief and Judge Thomas's writings both cited Justice Har-

lan's dissent from the 1896 case that established the doctrine of separate but equal, *Plessy v. Ferguson* (see excerpts nearby). Justice Harlan would instead have given the Fourteenth Amendment its commonsense reading, which is that it was intended to replace slavery with equality by forbidding the government from treating people differently by race. The amendment promised blacks all the privileges and immunities of citizenship and equal protection of the laws.

Judge Thomas wrote that if the opinion in *Brown* had adopted this broader view of

the Fourteenth Amendment, separate but equal could have been invalidated without citing "Kenneth Clark's controversial doll studies, which could just as easily have been used in support of segregation as against it."

The court missed the forest for the trees. "The *Brown* focus on environment overlooks the real problem with segregation, its origin in slavery, which was at fundamental odds with the founding principles. Had *Brown* done so, it would have been forced to talk about slavery, which it never mentions," Judge Thomas wrote. He

No Disagreement Here

Thurgood Marshall

(As the NAACP lawyer in *Brown v. Board of Education* in 1954 arguing for a broad constitutional rejection of the separate-but-equal doctrine):

While the majority opinion sought to rationalize its holding on the basis of the state's judgment that separation of races was conducive to public peace and order, Justice Harlan knew all too well that the seeds for continuing racial animosities had been planted.... "Our Constitution," said Justice Harlan, "is colorblind, and neither knows nor tolerates classes among citizens." It is the dissenting opinion of Justice Harlan, rather than the majority opinion in *Plessy v. Ferguson*, that is in keeping with the scope and meaning of the Fourteenth Amendment.

Clarence Thomas

(Writing in the *Howard Law Journal* in 1987):

The great flaw of *Brown* is that it did not rely on Justice Harlan's dissent in *Plessy*, which understood well that the fundamental issue of guidance by the Founders' constitutional principles lay at the heart of the segregation issue.... Justice Harlan's *Plessy* opinion is a good example of thinking in the spirit of the Founding. His arguments can be fully appreciated only in light of the Founders' intentions. Largely as a result of the dubious reasoning of the post-*Plessy* Court, and a national indifference to the rights of all Americans, Justice Harlan's argument that the Constitution is "colorblind" did not rally supporters.

said that a better understanding of the "first principles of equality and liberty" would "lead us above petty squabbling over 'quotas,' 'affirmative action' and race-conscious remedies of social ills."

Once on the Supreme Court, Mr. Marshall supported quotas, but he made some of the same points about a colorblind Constitution in his brief in *Brown*. "The roots of our American egalitarian ideal extend deep into the history of the Western world," the brief said. "Philosophers of the seventeenth and eighteenth centuries produced an intellectual climate in which the

equality of man was a central concept. Their beliefs rested upon the basic proposition that all man are endowed with certain natural rights."

Mr. Marshall's reference to natural rights is important because Judge Thomas's critics accuse him of weirdness for using similar terms. For different reasons, it's important reassurance for both liberals and conservatives to understand why Judge Thomas wrote about natural rights. The reason was his search as head of the Equal Employment Opportunity Commission for a more enduring guarantee of equality than the fleeting legal standards in *Brown*.

Liberals should know that Judge Thomas is not on a goose chase for penumbras or emanations from the Constitution into which he can insert his conservative policy preferences—as Justice Marshall too often did to enact his liberal views. Conservatives should know that he invokes natural rights in the service of original-intent jurisprudence. His law review article, "Toward a 'Plain Reading' of the Constitution—The Declaration of Independence in Constitutional Interpretation," stressed that terms must be read according to their original meaning. Individual liberty is constitutionally protected, but group rights are not; discrimination must be punished, but not by mandating quotas.

The NAACP's Mr. Hooks recently noted this distinction. Judge Thomas is "not without some good points," he said, adding that "if a black or a woman has been individually discriminated against or mistreated he'll go to the ends of the earth to correct it."

Now it turns out there's not much difference between Justice Marshall and Judge Thomas on the broadest issues of civil rights. It will be fascinating to see if the NAACP has the courage to abandon its usual liberal allies who hope to do to Judge Thomas what they did to Robert Bork.

✓ Charles Krauthammer

Look Who's Discovered Judicial Restraint

The life of a columnist is a feast of ironies, but rarely is one served a meal quite as sumptuous as the one just cooked up by Laurence Tribe, Harvard Law School professor and leading liberal constitutional scholar. On Monday, Tribe took to the *New York Times* to share with us his anxieties about Supreme Court nominee Clarence Thomas.

Thomas, it seems, is not a traditional conservative, meaning a judicially restrained one who believes that a judge's job is to interpret the law, not make it. It seems that Thomas is a more radical kind of conservative. Instead of just sticking to the Constitution and nothing but, Thomas believes in "natural law" as another

source of rights beyond the Constitution. And as a guide to understanding natural law, Thomas invokes the Declaration of Independence, which, for example, speaks of life, liberty and the pursuit of happiness as inalienable rights. Under such a theory of natural rights, Tribe warns, a judge could ban everything from abortion counseling to anal sex to minimum wage laws. Nothing less than the "fate of self-government in the U.S.," it seems, is threatened by Thomas's kind of judicial activism.

The first oddity of this critique is that today, for the purposes of the Thomas nomination, a traditional conservative seems to be a good conservative. Of course, the last time a principled judicial restraint conservative, Robert Bork, was nominated for the court, Tribe led the pack that savaged him. But never mind.

The greater curiosity is the charge of judicial activism. Coming from Tribe, this is hilarious. Tribe is one of the great defenders of the idea of reading the Constitution, shall we say, expansively. When the liberal court of the '60s and '70s—that Edison of the rights industry—minted new rights, year in, year out, with Menlo Park efficiency, he applauded. When, for example, *Roe v. Wade* purported to find the right to abortion in the Constitution—or, to be more precise, in the penumbral emanations of the Constitution—that was good constitutionalism because it fit nicely with Tribe's view that "to conscript a woman to carry a fetus to term within her . . . is a unique and most fundamental invasion of her constitutional liberty."

As Judge Richard Posner writes, Tribe's "method is to use the skills of a lawyer to make political choices for society in the name of a fictive constitution, as if the Supreme Court really were a superlegislature and government by lawyers had, at last, arrived."

Liberal lawyers, that is. Now that liberals have lost control of the court they are shocked—shocked!—that judges might go beyond the letter of the Constitution and apply concepts like natural law through which they might legislate. Now that the tables are turned, liberals would like us to believe that only constitutional literalism is permitted.

It gets funnier. Tribe's concern is that Thomas "might seek to replace *Roe* not with a system that strengthens states' rights," but one that denies the states' right to permit a legal abortion. Tribe is terribly concerned that "Thomas has already dismissed talk of states' rights as a 'constitutional sideshow.'"

It has been a while since a champion of liberal jurisprudence stood up for the notion of states' rights, the old segregationist cry, but it is refreshing. And late. Where was Tribe's concern for states' rights under *Roe*, which effectively deprived the 50 states of any say in the matter of abortion?

Tribe, born again defender of states' rights, warns darkly that with the Thomas nomination "the power of Congress and of every state and local legislature [is] hanging in the balance." It is touching that Tribe should be so concerned with judicial encroachment on legislative powers. Only four years ago he was ridiculing the idea of "judicial restraint" as a "political buzzword."

The history of the liberal jurisprudence he has spent his career justifying is the history of one judicial usurpation after another, each made over and above and against "the power of Congress and of every state and local legislature." For liberals now to champion the power of every state and local legislature, after having spent 40 years championing the right of the unelected judiciary to force states and localities to raise taxes, reform prisons, bus children, hire by race and permit abortion is world class chutzpah.

And what exactly is Thomas's offense? Whether a judge calls what he believes natural law or something else, every justice brings a certain intellectual structure and understanding of rights to his interpretation of the Constitution. Thomas is simply more ingenious than most: He spells out what it is he appeals to—the classical tradition of natural law and the explicit words of the Declaration of Independence. The nation is far safer entrusting its future to such a justice than to the kind that pulls new rights out of a hat and declares them penumbral emanations.

ceptional AFL-CIO's plea to be heard on the merits in this case. For failure to meet a mandatory time limit, one our precedent impels us to apply on our own initiative, *see Microwave Communications*, 515 F.2d at 390 n. 25, AFL-CIO's petition for review is *Dismissed*.



UNITED STATES of America

v.

Keith D. LONG, Appellant.

UNITED STATES of America

v.

Sonia E. MAYFIELD, Appellant.

Nos. 89-3096, 89-3105.

United States Court of Appeals,
District of Columbia Circuit.

Argued April 16, 1990.

Decided June 22, 1990.

Defendants were convicted in the United States District Court for the District of Columbia, Stanley S. Harris, J., of drug offenses and they appealed. The Court of Appeals, Clarence Thomas, Circuit Judge, held that: (1) ministerial act of docketing defendant's tardy notice of appeal was not an implicit grant of extension of time by the district court for taking the appeal; (2) evidence was insufficient to sustain conviction for use of a weapon in connection with a drug offense; and (3) testimony concerning telephone call received by officers at apartment while arrests were being made was not hearsay.

Affirmed in part, reversed in part, and remanded.

Sentelle, Circuit Judge, filed a concurring opinion.

1. Criminal Law ⇐1081(6)

District court's ministerial act of docketing tardy notice of appeal was not an implicit grant by the district court of an extension of time to file the notice of appeal. F.R.A.P. Rule 4(b), 28 U.S.C.A.

2. Criminal Law ⇐1181.5(3)

Where notice of appeal was untimely, court would remand case to district court for determination of whether defendant should be granted 30-day extension of period for filing notice of appeal. F.R.A.P. Rule 4(b), 28 U.S.C.A.

3. Criminal Law ⇐1144.13(3), 1159.2(1, 7)

Overtaking a jury's determination of guilt on the ground of insufficient evidence is not a task which court will undertake lightly; appellate court owes tremendous deference to jury verdict, and must consider the evidence in the light most favorable to the Government and affirm the judgment if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

4. Weapons ⇐17(4)

Defendant's conviction for using a weapon in connection with drug offense was not supported by evidence that defendant was arrested in room in which drugs were found and in which a revolver was found some 10 to 15 feet away from him, in the absence of evidence that defendant owned the gun or knew of its existence or that he leased or lived at the premises. 18 U.S.C.A. § 924(c)(1).

5. Weapons ⇐17(4)

Defendant's conviction for use of a gun in connection with a drug transaction could not be supported on evidence which connected defendant to the drugs and showed that the distribution of the drugs was facilitated by the gun, on theory that defendant derived benefit from the gun and thus "used" it. 18 U.S.C.A. § 924(c)(1).

See publication Words and Phrases for other judicial constructions and definitions.

6. Weapons ⇐4

Although defendant can use a firearm without actively employing it, Government, at a minimum, must show that a particular defendant has actually or constructively possessed a firearm in order to prove that he has used it in connection with drug transaction. 18 U.S.C.A. § 924(c)(1).

7. Conspiracy ⇐41

Defendant involved in conspiracy can be punished as a principal of the offense of use of a firearm in connection with a drug offense, regardless of whether he has possessed firearm, based on the rule of vicarious liability for coconspirators. 18 U.S.C.A. § 924(c)(1).

8. Weapons ⇐4

Where Government proves that defendant has aided or abetted another person's use of firearm in connection with drug offense, defendant may be punished as a principal regardless of whether the defendant has himself actually or constructively possessed the firearm. 18 U.S.C.A. §§ 2, 924(c)(1).

9. Criminal Law ⇐419(2.10)

Evidence that person who called apartment while officers were conducting search and making arrests asked whether a particular person "still had any stuff" and stated that she was looking for "a fifty" was not evidence of an assertion, so that evidence of that telephone call was not hearsay. Fed. Rules Evid. Rule 801(c), 28 U.S.C.A.

10. Criminal Law ⇐1169.1(9)

Officer's testimony regarding telephone call which was received at apartment while officers were searching it and making arrests was not unfairly prejudicial on theory that it was unreliable because the officer testified from memory and because the declarant was unavailable for cross-examination. Fed. Rules Evid. Rule 403, 28 U.S.C.A.

11. Criminal Law ⇐622

Judicial system has strong and legitimate interest in efficient and expeditious

1. Both Mayfield and Long were charged with possessing in excess of fifty grams of cocaine base with intent to distribute, 21 U.S.C.

proceedings and thus favors joint trial of codefendants.

12. Criminal Law ⇐622.2(11)

Interest in efficient and expeditious proceedings must never be allowed to eclipse the defendant's right to a fair trial, and a joint trial is inappropriate when the evidence against one defendant is far more damaging than the evidence against the other.

13. Criminal Law ⇐1166(6)

In view of abundant evidence implicating defendant, such as the fact that he was surrounded by narcotics and related paraphernalia when he was arrested, he was not prejudiced by joint trial on theory that evidence against codefendant was much greater.

Appeal from the United States District Court for the District of Columbia (Criminal Nos. 88-00444-02 and 88-00444-01).

Nicholas G. Karamelas with whom Steven R. Kiersh was on the brief, for appellant in 89-3096.

Ronny E. Jones, for appellant in 89-3105.

Eric M. Acker, Asst. U.S. Atty., with whom Jay B. Stephens, U.S. Atty., John R. Fisher, Helen M. Bollwerk, Elizabeth Trosman, and Geoffrey Bestor, Asst. U.S. Atty., were on the brief, for appellee.

Before SILBERMAN, SENTELLE, and THOMAS, Circuit Judges.

Opinion for the court filed by Circuit Judge THOMAS.

Concurring opinion filed by Circuit Judge SENTELLE.

CLARENCE THOMAS, Circuit Judge:

Sonia Mayfield and Keith Long appeal their convictions for possessing in excess of five grams of cocaine base with intent to distribute, 21 U.S.C. §§ 841(a), 841(b)(1)(B)(iii), and using or carrying a

§ 841(b)(1)(A)(iii). The jury, however, convicted them of the lesser included offense of pos-

firearm during and in relation to a drug trafficking crime, 18 U.S.C. § 924(c)(1). In addition, Mayfield appeals her conviction for knowingly opening or maintaining a place for the purpose of distributing or using a controlled substance, 21 U.S.C. § 856(a)(1). Mayfield's appeal is not properly before this court. Thus, we do not consider the merits of her arguments, and remand her case to the district court. Long raises three challenges to his convictions. First, he asserts that there is insufficient evidence to support his conviction for using or carrying a firearm in relation to a drug trafficking crime. Second, he contends that the trial judge erred in admitting into evidence the substance of an incriminating telephone conversation. Finally, he asserts that the trial judge abused his discretion by declining to sever Long's trial from Mayfield's. We are persuaded by Long's first argument and reverse his firearms conviction. Finding no merit in his second and third contentions, however, we affirm his narcotics conviction.

I.

The Federal Rules of Appellate Procedure require that parties wishing to appeal in criminal cases file a notice "in the district court within 10 days after the entry of the judgment or order appealed from." Fed.R.App.P. 4(b). The district court docketed the judgment against Mayfield on June 5, 1989; she filed notice of this appeal on June 16, 1989, eleven days later. Citing rule 4(b), and stressing that it is "mandatory and jurisdictional," *United States v. Robinson*, 361 U.S. 220, 226, 80 S.Ct. 282, 287, 4 L.Ed.2d 259 (1960), the government urges us to dismiss Mayfield's appeal outright.

sessing in excess of five grams with intent to distribute.

2. There may be cases in which an implicit finding of excusable neglect would be less of a fiction than here. When a trial judge takes some explicit action with respect to a tardy appeal, the judge at a minimum is aware of the appeal; under these circumstances, his action could arguably be construed as an implicit finding of excusable neglect. See, e.g., *United States*

As Mayfield correctly notes, however, rule 4(b) does not absolutely bar criminal appeals in which the required notice is filed more than ten days after entry of the judgment. The rule allows the district court, with or without motion and notice, to extend the period for filing a notice of appeal for an additional thirty days "[u]pon a showing of excusable neglect."

Mayfield concedes that the district court did not explicitly grant her a thirty-day extension to file her notice of appeal. She urges us, however, to hold that the district court implicitly granted the extension by "accepting" her untimely notice of appeal. She notes that the Eighth Circuit has, on occasion, followed this approach. See *United States v. Williams*, 508 F.2d 410, 410 (8th Cir.1974) (per curiam) ("We construe the district court's acceptance of the notice of appeal as a grant of additional time to file pursuant to Fed.R.App.P. 4(b) even though no formal order is entered to that effect."); *United States v. Mills*, 430 F.2d 526, 528 (8th Cir.1970) (same), cert. denied, 400 U.S. 1023, 91 S.Ct. 589, 27 L.Ed.2d 636 (1971).

[1] We decline Mayfield's invitation to equate the ministerial act of docketing a tardy notice of appeal with an implicit grant of an extension of time by the district court. Docketing a notice of appeal is a clerical task, and does not require the approbation of the trial judge. It thus presents no occasion for a party to make a showing of excusable neglect, which is a prerequisite for obtaining the thirty-day extension contemplated by rule 4(b). Adopting the fiction that the district court implicitly granted the extension of time would undoubtedly expedite the final adjudication of Mayfield's case. But the unambiguous language of the rule forecloses this shortcut.³ The time limits specified in the rules

v. *Gibson*, 568 F.2d 111, 112 (8th Cir.1978) (per curiam) (concluding that trial judge implicitly found excusable neglect when he granted motion for leave to appeal in forma pauperis during thirty-day discretionary period). Because Mayfield has not specified any action taken by the district judge in her case that might constitute an implicit extension of time, we need not consider the merits of the *Gibson* approach.

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serve vital interests of efficiency and finality in the administration of justice, and are not designed merely to ensnare hapless litigants. As this court has noted when considering a civil appeal time-barred by rule 4(a): "The Federal Rules of Appellate Procedure impose strict requirements for the timely filing of appeals.... [W]e decline to... subvert the plain words and meaning of the federal rules. This court has never had the authority to revamp these rules." *Polylok Corp. v. Manning*, 793 F.2d 1318, 1322 (D.C. Cir.1986).³

[2] We therefore remand this case to the district court for a determination of whether Mayfield should be granted the thirty-day extension permitted by rule 4(b). Mayfield will thus have an opportunity to present to the district court whatever evidence of excusable neglect she can muster. This resolution places us squarely in line with the majority of appellate courts that have considered this issue. See, e.g., *United States v. Golding*, 739 F.2d 183, 184 (5th Cir.1984) (per curiam); *United States v. Lucas*, 597 F.2d 243, 245-46 (10th Cir.1979) (per curiam); *United States v. Stolarz*, 547 F.2d 108, 111-12 (9th Cir.1976), cert. denied, 434 U.S. 851, 98 S.Ct. 162, 54 L.Ed.2d 119 (1977).⁴ Even the Eighth Circuit has cut back significantly on its earlier, permissive attitude toward rule 4(b). See *United States v. Anna*, 843 F.2d 1146, 1147 (8th Cir.1988) (terming the Circuit's earlier practice "discretionary" and declining to follow it, instead remanding case to district court for decision on excusable neglect).

II.

Consideration of Long's first claim, that his firearms conviction was not supported

3. But cf. *United States v. Hove*, 548 F.2d 1271, 1273 (6th Cir.1977) (per curiam) ("[W]here a document is filed within the 40-day period which represents a clear assertion of an intent to appeal, courts of appeals have the power to overlook irregularities where fairness and justice so require."). Having no idea of the source of this alleged "power to overlook" the clear language of rule 4(b), we reject the *Hove* approach.

4. The Fourth Circuit, in one case, took a novel approach to this question. After noting the option of remanding an untimely appeal to the district court for a decision on excusable ne-

by sufficient evidence, requires some elaboration of the pertinent facts. On the evening of November 16, 1988, pursuant to a valid search warrant, several officers of the D.C. Metropolitan Police Department forced their way into a one-room basement apartment where Mayfield lived. They found Long emerging from behind a curtain that separated the back of the room from the front. Tr. I at 23-24, 25, 68; Tr. II at 8. The police arrested Long and three other individuals, including Mayfield,⁵ and began a search for evidence of drug-related activity.

The search was hardly arduous; the one-room apartment brimmed with evidence. In the front part of the apartment, the police found rock cocaine, a razor blade, and a butane torch lying on a table. They found more rock cocaine and a scale on a table behind the curtain. The search also yielded a large amount of cash, cocaine in powder form, several pipes, a number of butane torches, packaging materials, and a significant supply of dextrose, a cutting agent. Finally, the police found a functional but unloaded .22 caliber revolver between the cushions of a sofa in the front part of the room. Although the barrel of the gun was hidden, the handle protruded from the cushions. The police found no other firearms or any ammunition in the apartment.

In addition to his narcotics conviction, Long was convicted of violating 18 U.S.C. § 924(c)(1). This statute, in pertinent part, provides that "[w]hoever, during and in relation to any... drug trafficking crime

glect, the court concluded that "based on the facts present here the district court would find excusable neglect," and proceeded to consider the merits of the case. See *United States v. Reyes*, 759 F.2d 351, 354 (4th Cir.), cert. denied, 474 U.S. 857, 106 S.Ct. 164, 88 L.Ed.2d 136 (1985). Because Mayfield has proffered no excuse for her delay, the *Reyes* approach, even assuming that it can be squared with the language of rule 4(b), is not available to us here.

5. The other two individuals, indicted with Long and Mayfield, pleaded guilty to possession of a controlled substance, 21 U.S.C. § 844(a).

... uses or carries a firearm, shall, in addition to the punishment provided for such crime ..., be sentenced to imprisonment for five years." *Id.* (emphasis added). Long argues that the evidence adduced at trial was insufficient to support a jury finding that he "use[d] or carrie[d]" a firearm within the meaning of section 924(c)(1). We agree.

[3] Overturning a jury's determination of guilt on the ground of insufficient evidence is not a task that we undertake lightly. 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, *see Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), and affirm the judgment if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). We do not, however, fulfill our duty through rote incantation of these principles followed by summary affirmance. We must ensure that the evidence adduced at trial is sufficient to support a verdict as a matter of law. A jury is entitled to draw a vast range of reasonable inferences from evidence, but may not base a verdict on mere speculation.

[4] Having carefully reviewed the record in this case, we conclude that the government failed to provide any evidence to support a reasonable inference that Long "used" the revolver.⁶ When arrested, Long was ten to fifteen feet away from the revolver, and was emerging from behind the curtain that divided the room.

6. There is no evidence that Long ever actually or constructively "carried" the revolver, and hence we are not called upon to construe that word. Instead, we focus exclusively on the statutory term "use," which we believe is properly susceptible of a broader interpretation than "carry." *Cf. United States v. Feliz-Cordero*, 859 F.2d 250, 253-54 (2d Cir.1988) (legislative history of section 924(c)(1) does not suggest that "carry" should be construed as having any meaning beyond its literal meaning, and "[t]herefore, a person cannot be said to 'carry' a firearm without at least a showing that the gun is within reach during the commission of the drug offense").

There is no evidence suggesting that Long was headed for the gun, or that he even knew of its existence. The gun itself was unregistered, and yielded no fingerprints. Nor did Long own, lease, or live at the premises on which the gun was found.⁷ There was no evidence, in short, that the firearm was ever either actually or constructively in Long's possession. Although the gun was partially visible between the sofa cushions, its visibility, without more, does not establish that any particular person either actually or constructively possessed the gun.

[5] The government argues that Long "used" the gun because he committed a drug offense facilitated by the gun. The logic, in essence, is this: Long was connected to the drugs; the distribution of the drugs was facilitated by the gun; since Long thus derived benefit from the gun, he "used" it. We reject the notion that a loose, transitive relationship of this type is sufficient to show that a person "used" a gun. This approach would obliterate any remaining limits on the meaning of the word "use" in section 924(c)(1).

[6-8] The word has been losing its conventional, active connotation for some time, as courts have held that narcotics offenders can "use" guns simply by possessing them in the vicinity of drugs. Although a defendant can "use" a firearm without actively employing it, the government, at a minimum, must show that a particular defendant has actually or constructively possessed a particular firearm in order to

7. Mayfield testified at trial that Long visited her apartment two to three times per week. Tr. II at 92. Long did not live there, however. Even assuming that he visited the apartment to carry out drug transactions, there was no evidence that he exercised the degree of dominion and control over the premises that would support an inference of constructive possession over their contents. This court has emphasized that constructive possession "should not be lightly imputed to one found in another's apartment or home." *United States v. Holland*, 445 F.2d 701, 703 (D.C.Cir.1971).

prove that he has "used" it.⁸ *Cf. United States v. Joseph*, 892 F.2d 118, 126 (D.C. Cir.1989) (violation of section 924(c)(1) possible "[w]hen a person 'has a present ability to exercise dominion and control over' a firearm") (emphasis added) (quoting *United States v. Evans*, 888 F.2d 891, 895 (D.C.Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 1325, 108 L.Ed.2d 500 (1990)); *United States v. Henry*, 878 F.2d 937, 944 (6th Cir.1989) (violation of section 924(c)(1) possible "if it reasonably appears that the firearms found on the premises controlled or owned by a defendant and in his actual or constructive possession are to be used to protect the drugs or otherwise facilitate a drug transaction") (emphasis added); *United States v. Meggett*, 875 F.2d 24, 29 (2d Cir.) ("Possession of a gun, even if it is concealed, constitutes 'use' if such possession is an integral part of the predicate offense and facilitates the commission of that offense.") (emphasis added), *cert. denied*, — U.S. —, 110 S.Ct. 166, 107 L.Ed.2d 123 (1989); *United States v. Matra*, 841 F.2d 837, 840-41 (8th Cir.1988) ("[N]one of the guns was in the actual possession of the defendant, but all were under his control.") (emphasis added); *United States v. Stewart*, 779 F.2d 538, 540 (9th Cir.1985) (violation of section 924(c)(1) possible "[i]f the firearm is within the possession or control of a person who commits an underlying crime as defined by the statute") (emphasis added); *United States v. LaGuardia*, 774 F.2d 317, 321 (8th Cir.1985) ("Section 924(c)(1) reaches the possession of a firearm which in any manner facilitates the execution of a felony.") (emphasis added). Upholding the con-

8. This analysis assumes a situation in which the government prosecutes a defendant for violating the statute as a principal. A defendant who has not actually or constructively possessed a firearm, of course, might nevertheless be punished as a principal if the government can prove that he has conspired in or aided or abetted a section 924(c)(1) offense.

Thus, a defendant involved in a conspiracy, regardless of whether he has possessed a firearm, can be punished as a principal based on the rule of vicarious liability for coconspirators. *See United States v. Rosado*, 866 F.2d 967, 968 n. 1, 970 (7th Cir.) (defendant liable under section 924(c)(1) where coconspirator used firearm during drug trafficking offense), *cert. denied*, —

viction of a defendant in the absence of any indicia of possession would stretch the meaning of "use" beyond the breaking point. We readily acknowledge that the word "use" is expansive, but the difficulty of pinpointing the outer limits of its meaning does not imply that no such limits exist. To affirm Long's conviction for "using" the revolver in the sofa would be to concede that the word "use" has no discernible boundaries. That prospect is particularly troubling where, as here, we are construing a criminal statute.

The government has cited numerous cases in which this court and its sister circuits have upheld the firearms convictions of defendants found to have "used" guns in a vast array of circumstances. These cases are inapposite. Our problem here is not with the notion that there are many ways in which a defendant can "use" a firearm in relation to a drug trafficking crime, but rather with the notion that in order to prove such "use," the government need not show any nexus at all between a particular drug offender and the firearm that he allegedly "used." As noted above, the record in this case is devoid of any evidence linking Long to the revolver found in the sofa, other than his presence in the apartment and involvement with the narcotics. In all the cases cited by the government, some nexus was established through an explicit or implicit showing of actual or constructive possession.

In *United States v. Anderson*, 881 F.2d 1128 (D.C.Cir.1989), for example, we upheld the firearms conviction of appellant Green-

U.S. —, 110 S.Ct. 117, 107 L.Ed.2d 79 (1989); *see also Pinkerton v. United States*, 328 U.S. 640, 646-48, 66 S.Ct. 1180, 1183-85, 90 L.Ed. 1489 (1946) (coconspirator liable for all foreseeable substantive offenses committed in furtherance of the conspiracy).

Similarly, where the government proves that a defendant has aided or abetted another person's "use" of a firearm, the defendant may be punished as a principal regardless of whether the defendant himself has actually or constructively possessed the firearm. 18 U.S.C. § 2.

In this case, the government has not proved a conspiracy or aiding or abetting. Long's potential liability for using the gun is based entirely on his own actions.

wood, who was arrested inside the closet of a room adjoining a second room where guns were found. Our holding, however, was premised on our conclusion that "there was substantial evidence connecting Greenwood to the bedroom in which the guns were found." *Id.* at 1141. Of paramount importance, the government had introduced evidence that Greenwood lived in the apartment; this evidence justified an inference that Greenwood constructively possessed the apartment's contents. In addition, there was testimony that Greenwood had the keys to the particular bedroom in which the guns were found, and that the police found Greenwood's wallet and photographs in that bedroom. *See id.* at 1141. *Anderson*, thus, stands for the unexceptional proposition that a jury can reasonably infer that a person who exercises dominion and control over given premises constructively possesses contraband found on those premises. *See also United States v. Alvarado*, 882 F.2d 645, 654 (2d Cir.1989) (affirming section 924(c)(1) conviction where guns were found in defendant's residence), *cert. denied*, — U.S. —, 110 S.Ct. 1114, 107 L.Ed.2d 1021 (1990); *United States v. Robinson*, 857 F.2d 1006, 1010 (5th Cir.1988) (same); *United States v. Matra*, 841 F.2d 837, 840-41 (8th Cir.1988) (same).

Similarly, we have held that evidence regarding a past connection between a defendant and a firearm establishes a sufficient nexus to support a conviction under section 924(c)(1). In *United States v. Evans*, 888 F.2d 891 (D.C.Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 1325, 108 L.Ed.2d 500 (1990), we upheld the firearms conviction of a drug trafficker arrested across town from the apartment where the relevant guns were found.⁹ In that case, however, the government introduced testimony that the defendant had brought the guns and drugs to Washington from New York and

had kept them overnight in an apartment, "within reach and available to protect him during his ongoing crime of possession with intent to distribute cocaine." *Id.* at 895 (emphasis added). This evidence allowed the jury to infer constructive possession: "An object is 'accessible' or 'within reach,' as commonly understood, if a party is not just near it, but has a present ability to exercise dominion and control over it.... [T]here was sufficient evidence from which the jury could conclude that [the appellant] had something approaching actual possession of the gun during the commission of the predicate drug offense." *Id.* at 895.

Other courts have upheld section 924(c)(1) convictions where the nexus was established in a variety of ways. *See, e.g., United States v. Munoz-Fabela*, 896 F.2d 908, 911 (5th Cir.1990) (firearm, registered in another person's name, was on floorboard of defendant's car, within view and reach of defendant); *United States v. Grant*, 545 F.2d 1309, 1311-12 (2d Cir.1976) (firearms were found in rooms of social club; defendant lived there, managed the club, and had keys to the rooms), *cert. denied*, 429 U.S. 1103, 97 S.Ct. 1130, 51 L.Ed.2d 554 (1977). A common theme unites these cases and distinguishes them from the present one. In each case, the defendant's actual or constructive possession of a firearm was indicated by one or more of several factors: close physical proximity to the firearm, possessory interest in the firearm, or dominion and control over the premises on which the firearm was located.

Lest this opinion foster confusion in an already unsettled area, we emphasize its narrowness: we reverse Long's conviction because the government failed to adduce any evidence suggesting that Long actually or constructively possessed the revolver.¹⁰ We simply cannot accept the proposi-

tion that an individual can be convicted for "using" a gun that he neither actually nor constructively possessed. Evidence of possession, or evidence from which possession can reasonably be inferred, is a prerequisite to a conviction for "use" under section 924(c)(1).

tion that an individual can be convicted for "using" a gun that he neither actually nor constructively possessed. Evidence of possession, or evidence from which possession can reasonably be inferred, is a prerequisite to a conviction for "use" under section 924(c)(1).

We decline to decide the case so narrowly, however, as to reveal no principle applicable beyond these facts. The concurrence argues that we should hold only that "[o]n the present facts, the government did not offer evidence of possession or any other evidence that Long had used the firearm." Conc. op. at 1582 (emphasis modified). This analysis, however, begs the central question in the case: was there sufficient evidence to show that Long "used" the gun? The government obviously thought there was. It argued strenuously in this appeal that Long's connection to the drugs and his presence in the room with the gun amounted to "use" of the gun. Deciding whether there was sufficient evidence to support Long's conviction for "using" a gun necessarily entails some decision about what it means to "use" a gun. Despite the concurrence's qualms about setting a minimum threshold for finding "use" within the meaning of section 924(c)(1), this case forces us to set such a threshold, either explicitly (as we have done) or implicitly.

III.

Having reversed Keith Long's conviction on the firearms charge, we now consider his two remaining challenges, which pertain to the narcotics charge.

[9] During the search of Mayfield's apartment, the telephone rang, and a police officer answered it. An unidentified female voice asked to speak with "Keith." The officer replied that Keith was busy. The caller then asked if Keith "still had any stuff." The officer asked the caller what she meant, and the caller responded "a fifty."¹¹ The officer said "yeah." The caller then asked whether "Mike" could

not used during or in relation to drug trafficking offense).

11. A "fifty" refers to a bag of crack worth fifty dollars. *See* Tr. I at 90; Tr. II at 50, 56.

come around to pick up the "fifty." Again, the officer answered yes. Tr. I at 80-81.

Before trial, Long's counsel moved in limine to exclude evidence of this telephone conversation as inadmissible hearsay. The trial judge denied the motion. *See* Transcript of Suppression Hearing (Tr. Supp. Hrg.) at 11. At trial, the police officer who had taken the call testified about the conversation. Tr. I at 80-81. In this appeal, Long renews his hearsay challenge to the introduction of the officer's testimony.

Although Long concedes that the caller did not expressly assert that he was involved in drug distribution, he argues that her questions contain implicit assertions about his involvement. Long contends that it is irrelevant that these alleged assertions were couched in question form, since the questions plainly revealed assumptions that are the functional equivalent of direct assertions. Long maintains that the caller, through her questions, in effect asserted that "Keith has crack and sells it out of Mayfield's apartment." He argues that the government introduced this testimony to prove the truth of precisely these assertions, and that the testimony, thus, should have been excluded as hearsay.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted in the statement. Fed.R.Evid. 801(c). As a threshold matter, then, Long must show that the evidence he seeks to exclude as hearsay is a "statement," which the rule defines as "an oral or written assertion." Fed.R.Evid. 801(a)(1). Although the rule does not define "assertion," the accompanying advisory committee note stresses that "nothing is an assertion unless intended to be one." Fed.R.Evid. 801 advisory committee note (emphasis added).

The caller's words, thus, cannot be characterized as an "assertion," even an implied one, unless the caller intended to make such an assertion.¹² While Long's criticism

12. The advisory committee note's discussion of the intent requirement focuses on situations in which an implied assertion arises from conduct, as opposed to words. The note appears to as-

9. Although *Evans* construed the "carry" component of the "use [] or carry [y]" requirement, its analysis applies equally to the term "use."

10. We do not mean to imply that possession of a firearm by a drug trafficker is invariably sufficient for a conviction under section 924(c)(1). The statute requires that the defendant (1) use

the firearm (2) during and in relation to a drug trafficking crime. A person can possess a gun without either "using" it or using it "during and in relation to" a given crime. *See, e.g., United States v. Feliz-Cordero*, 859 F.2d 250, 254 (2d Cir.1988) (firearm found in dresser drawer was not accessible to drug traffickers and thus was

of a rigid dichotomy between express and implied assertions is not without merit, it misses the point that the crucial distinction under rule 801 is between intentional and unintentional messages, regardless of whether they are express or implied. It is difficult to imagine any question, or for that matter any act, that does not in some way convey an implicit message. One of the principal goals of the hearsay rule is to exclude declarations when their veracity cannot be tested through cross-examination. When a declarant does not intend to communicate anything, however, his sincerity is not in question and the need for cross-examination is sharply diminished. Thus, an unintentional message is presumptively more reliable. See *United States v. Groce*, 682 F.2d 1359, 1364 (11th Cir.1982); 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶801(a)[01] (1988). Evidence of unintended implicit assertions is "[a]dmittedly . . . untested with respect to the perception, memory, and narration (or their equivalents) of the actor," but "these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds." Fed.R.Evid. 801 advisory committee note.

[10] With our inquiry focused on the intent of the caller, we have little trouble disposing of Long's theory about implied assertions. Long has not provided any evi-

sume, in circular terms, that any communication made in words is an assertion: "It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence verbal assertions readily fall into the category of 'statement.'" Fed.R.Evid. 801 advisory committee note. The note also acknowledges the possibility of "nonassertive verbal conduct," however, and suggests that intent determines whether such "verbal conduct" is hearsay. We are persuaded that the note's intent analysis applies with equal force to messages implied from words and to messages implied from conduct.

13. Long further argues that, even if testimony about the telephone call is not hearsay, it should have been excluded as unfairly prejudicial. Rule 403, in pertinent part, provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Fed.R.Evid. 403 (emphasis added).

Long argues that the officer's testimony regarding the phone call was unreliable because

dence to suggest that the caller, through her questions, intended to assert that he was involved in drug dealing. The caller may indeed have conveyed messages about Long through her questions, but any such messages were merely incidental and not intentional. See *United States v. Zenni*, 492 F.Supp. 464, 469 (E.D.Ky.1980) (phone calls from bettors, answered by police during raid of illegal gambling establishment, were not assertions and therefore were outside scope of hearsay rule). Long thus fails to satisfy the intent component of rule 801, which "place[s] the burden upon the party claiming that the intention existed." Fed.R.Evid. 801 advisory committee note; accord *United States v. Hensel*, 699 F.2d 18, 31 (1st Cir.), cert. denied, 461 U.S. 958, 103 S.Ct. 2431, 77 L.Ed.2d 1317 (1983). Because the caller's questions were nonassertive, they fall outside the scope of the hearsay rule, and the trial judge did not err in admitting the testimony concerning the questions.¹³

IV.

Long and Mayfield were tried jointly. Asserting that the evidence against Mayfield was far more damning than that against him, Long argues that the district court abused its discretion in denying his motion to sever his trial from hers.¹⁴ We find no merit in this claim.

she testified from memory, and because the declarant was unavailable for cross-examination. But this is invariably true whenever a witness testifies about words spoken outside the courtroom; Long has not explained why the prejudice inherent in this testimony is unfair. In no way has Long shown the "grave abuse" of discretion that is required before we will disturb the delicate balance struck by the trial court under rule 403. See *United States v. Payne*, 805 F.2d 1062, 1066 (D.C.Cir.1986).

14. The government contends that Long did not present this argument to the district court, and that consequently he has waived it on appeal. The record, however, shows otherwise. In advance of trial, Long filed a motion to sever his trial from that of his (then three) codefendants, on the ground that the evidence against him was much weaker than the evidence against them. The government opposed this motion, and both sides filed briefs. When one of the codefendants pleaded guilty, Long's attorney conceded that the severance motion had become moot

[11, 12] The judicial system has a strong and legitimate interest in efficient and expeditious proceedings, and hence the system favors the joint trial of codefendants. See *United States v. Manner*, 887 F.2d 317, 324 (D.C.Cir.1989), cert. denied, — U.S. —, 110 S.Ct. 879, 107 L.Ed.2d 962 (1990); *United States v. Hines*, 455 F.2d 1317, 1334 (D.C.Cir.1971), cert. denied, 406 U.S. 975, 92 S.Ct. 2427, 32 L.Ed.2d 675 (1972). Of course, this interest must never be allowed to eclipse a defendant's right to a fair trial. A joint trial is inappropriate "when the evidence against one defendant is 'far more damaging' than the evidence against the moving party." *United States v. Bruner*, 657 F.2d 1278, 1290 (D.C.Cir.1981) (quoting *United States v. Mardian*, 546 F.2d 973, 977 (D.C.Cir.1976) (en banc)); see also *United States v. Slade*, 627 F.2d 293, 309-10 (D.C.Cir.), cert. denied, 449 U.S. 1034, 101 S.Ct. 608, 66 L.Ed.2d 495 (1980). In such situations, the jury may not be able to compartmentalize the evidence introduced against each defendant, and the spillover may jeopardize one defendant's right to a fair trial. See *United States v. Sampol*, 636 F.2d 621, 647 (D.C.Cir.1980) (per curiam); *Mardian*, 546 F.2d at 979.

[13] Striking the balance between the system's interest in joint trials and a defendant's right to a fair proceeding is peculiarly within the province of the trial court, and we will not reverse the balance that court strikes absent a clear abuse of discretion. *United States v. Hernandez*, 780 F.2d 113, 119 (D.C.Cir.1986); *United States v. Haldeman*, 559 F.2d 31, 72 (D.C.Cir.1976) (en banc) (per curiam), cert. denied, 481 U.S. 938, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977). In this case, to be sure, there was

with respect to that codefendant, but noted that he "would just like to preserve [the motion] in the event that disparity issues present themselves at trial with respect to the remaining defendants." Tr. Supp. Hrg. at 5. Long thus complied with Fed.R.Crim.P. 12(b)(5), which requires that severance motions be raised before trial.

At the close of all the evidence at trial, Long's attorney renewed his call for a severance, arguing that the disparity between the evidence against Long and the evidence against Mayfield

no dearth of evidence against Mayfield. She lived in the apartment where the drugs were found, which at a minimum suggests some connection to the drugs and the firearm discovered there. There was, however, abundant evidence implicating Long as well: when arrested, he was surrounded by narcotics and related paraphernalia. This case involves nowhere near the "gross disparity" of evidence required before we will hold that a district court has abused its discretion in denying a motion to sever. *Haldeman*, 559 F.2d at 72.

For the foregoing reasons, we remand Sonia Mayfield's case to the district court to determine whether her tardiness in filing a notice of appeal resulted from excusable neglect and, if so, whether to accept her notice of appeal, which was filed within the thirty-day discretionary period. We reverse Keith Long's conviction for using or carrying a firearm during and in relation to a drug trafficking crime, 18 U.S.C. § 924(c)(1), but affirm his conviction for possessing in excess of five grams of cocaine base with intent to distribute, 21 U.S.C. §§ 841(a), 841(b)(1)(B)(iii).

It is so ordered.

SENTELLE, Circuit Judge, concurring:

While I am in total agreement with the conclusion of the Court and in substantial agreement with the reasoning of Judge Thomas' careful opinion, I write separately, if briefly, for a distinct, finite purpose. I find the opinion entirely correct as to the facts of this case and the law applied thereto. But, by stating that in the general case charging "use" of a firearm in violation of Title 18 U.S.C. § 924(c)(1), "the government, at a minimum, must show that a

was overwhelming. See Tr. II at 114-15 ("[H]ad there been a separate trial, none of this evidence with respect to Mr. Long on trial would have come in against him. . . . It's a spillover; the prejudice is overwhelming; coupled with the fact that this would not have come in had there been a separate trial."). The court denied Long's severance motion. *Id.* at 116. It is disingenuous, at best, for the government now to contend that Long "did not argue this ground to the District Court." Brief for Appellee at 26.

particular defendant has actually or constructively possessed a particular firearm in order to prove that he has 'used' it." Maj. op. at 8, the Court has gone beyond the holding necessary to determine this case. On the present facts, the government did not offer evidence of possession or any other evidence that Long had used the firearm, as the Court's opinion well establishes. That, however, is all that is necessary to decide the controversy before us. There may be other cases in which evidence sufficient to support a jury verdict of "use" would appear without fitting the technical rubric of possession. The majority's opinion at footnote 8 points out the

acting in concert possibilities, and there may be other ways in which a defendant engaged in a drug transaction can "use" a firearm possessed by some other person to protect the defendant's own drug enterprise. What the quantum of evidence necessary for such other concept of use might be, I would leave for the case that presents the question.



ACCORD AND

↔2(2). Matters covered by receipt.

C.A.10 (Okla.) 1990. Contractor's agreement accord and satisfaction claims against owner to late supply deliveries by evidence that parties order to discharge answer Constructors, Inc. Corp. v. Grand River 1413.

ACCOU

↔8. — Performance and liabilities.

C.A.D.C. 1990. No between alleged deficit auditor's annual audits financial problems; although auditor failed to specify failure to pass on will stated value of certain "ing concern" qualification corporation was in very and corporation's direct that condition.—Drabka Co., 905 F.2d 453.

↔9. Duties and liabilities.

C.A.10 (Utah) 1990. Active negligence defense tor's malpractice action ness in absence of evidence conduct contributed to form his work or to furnish information; allegations have discovered precarious business and would have many of their losses proper attention and the actions with business manner did not establish defense.—Fullmer v. W 1394.

Under Utah law, audit the negligent preparatory financial statements to third corporation, inasmuch those who could reasonably audited statements.—Id

↔10. Actions.

C.A.10 (Utah) 1990. sufficient evidence that with business in relation were loans, rather than ests, that investors relied prepared by auditor in and that such reliance awarding damages to ir transactions for auditor financial statements.—Id Beck, 905 F.2d 1394.

Thomas Praised for Demeanor, Scholarship on Bench

By RICHARD CARELLI, Associated Press Writer

WASHINGTON (AP) — Lawyers who appeared before Clarence Thomas in his brief federal appeals-court tenure praised on Tuesday his judicial demeanor, "good, probing questions" from the bench and his scholarship.

"He looks, sounds and acts like a judge," said Washington lawyer Richard J. Leighton of the man President Bush wants on the Supreme Court to replace the retiring Thurgood Marshall.

None of the lawyers contacted used words such as "brilliant" or "erudite" — often-cited adjectives when Supreme Court nominees are discussed — but all said he was, in their cases, well-prepared, a good listener or fair.

Leighton was involved in one of the 18 cases in which Thomas wrote an opinion during his 15 months on the U.S. Circuit Court of Appeals here. Leighton, who represented Alpo Petfoods in a false-advertising dispute with competitor Ralston Purina, remembers being impressed with Thomas when the case was argued in April 1990.

"He asked good, probing questions, and from his follow-ups I could tell the questions weren't just coming from some law clerk's memo," Leighton said. "He really ran me through my tricks." The ruling went against Alpo on a key point, and against Ralston Purina on another.

"Judge Thomas' decision in the case has been cited often, and is being discussed in all the seminars on the Lanham Act (a federal law on false advertising)," Leighton said. "It's an extraordinarily clear opinion that's written in a scholarly fashion. This was a weighty decision, no piece of fluff."

Michael Olshonsky, a Washington criminal defense lawyer, remembers being favorably impressed with Thomas when Olshonsky represented a client whose drug conviction was upheld by a Thomas-authored decision.

A three-judge panel ruled that forcing three defendants to stand trial together did not violate their rights, and that all three correctly were convicted of possessing a weapon found on one of them.

"My impression during arguments was that the judge was thoroughly prepared," Olshonsky said. "The decision itself was consistent with the general trend in this circuit."

George Davies, a Birmingham, Ala., lawyer who represented the United Mine Workers union before Thomas and two other judges in a mine-safety dispute earlier this year, has one standout memory of oral arguments in the case — "He didn't like our position very much."

Davies said Thomas' questions focused on the "highly technical points" of the relevant federal law.

"It was evident he had read the briefs and been through the record. Although I was disappointed with the decision," said Davies, "I do think he did look hard at the case. He did his homework."

When Washington lawyer James Davenport heard of Thomas' selection for the Supreme Court, he had trouble remembering that Thomas was on a three-judge panel that upheld a client's criminal conviction last August.

"To the best of my recollection, he didn't ask a single question during arguments."

But Thomas wrote the decision in the case. Davenport's assessment: "I obviously was not pleased by the result, but it was a reasoned opinion."

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EEOC

How EEOC Thrived During Thomas's Tenure as Chairman

The nomination of Clarence Thomas to the Supreme Court has evoked a great deal of productive and enlightened discussion. Unfortunately, it has also resulted in the repetition, however innocent, of unfounded criticisms of his record as chairman of the Equal Employment Opportunity Commission.

Clarence Thomas vigorously and effectively enforced the laws against employment discrimination. I marvel at the willingness with which generally intelligent and skeptical individuals have accepted bare assertions to the contrary. The record establishes that the EEOC came of age under the leadership of Judge Thomas. As his chief of staff, I witnessed it.

Why would the Republican chairman of the EEOC ask me, a Democrat and a career federal employee, to be his chief of staff? And why would a "politically correct" civil servant accept the position? Because we shared a commitment to equal employment opportunity and the full protection and vindication of the rights of women, minorities, older Americans, and workers with disabilities.

We were dedicated to the goal of making the EEOC a credible and aggressive law enforcement agency. Thomas concentrated on my law enforcement experience, ignored my party affiliation, and did not

Roll Call - August 1, 1991

Why would the Republican chairman of the EEOC ask me, a Democrat and a career federal employee, to be his chief of staff?

question me as to my philosophical views; my strict and single mandate from him was to help make the EEOC effective.

During his tenure as chairman, the EEOC went to court on behalf of workers 60 percent more often than in previous years and collected more than \$1 billion on behalf of American workers, more than during any other comparable period.

For the first time, policies were adopted requiring thorough investigation of all charges of discrimination and full redress for its victims. Workers unlawfully deprived of a livelihood were to receive a job and full backpay. Those who discriminated had to take such additional affirmative steps as discharging offending supervisors and posting notices to employees to assure them that their rights would not again be violated.

In the past, field offices made unreviewable determinations to litigate only a few of the many cases found to have merit. Under Thomas, all meritorious cases were submitted to the Commission for litigation.

Some have mistakenly assumed that the increased efforts on behalf of individual workers constituted a shift away from concern about the existence of broad-based discrimination stemming from employment patterns and practices.

To the contrary. In 1981 the EEOC had only one broad systemic pattern and practice case in litigation; in 1988 the Commission had 16 such cases in active litigation.

Pamela Talkin is a member of the Federal Labor Relations Authority.

Guest Observer

By Pamela Talkin

Moreover, the EEOC, on its own initiative, actively prosecuted as broad, pattern and practice actions hundreds of cases that had been filed as individual claims.

In accordance with precedent, Thomas voted to approve settlements involving the use of goals and timetables, despite his now well-publicized personal views on the efficacy of such measures.

Reasonable people can and do differ with his views on this matter. However, the potential use of goals and timetables was involved in less than one-half of one percent of the more than 60,000 cases filed annually. A difference of opinion over the utility of this one form of affirmative action cannot serve as a legitimate basis for cavalier assertions that Thomas did not enforce

the laws ensuring equal opportunity and prohibiting discrimination.

Judge Thomas was committed to identifying and eliminating all arbitrary obstacles to equal opportunity. Employers were required to recruit actively minorities and women and to set aside millions for the training of minority and woman employees and the establishment of scholarship funds for minority students.

Federal agencies were required to submit affirmative action plans identifying barriers to the full employment of all employees and detailing the steps to be taken to remove those obstacles.

When he became chairman in 1982, Thomas found an EEOC in disarray. Clarence Thomas not only built the infrastruc-

ture, but he also succeeded in transforming the EEOC into a respected and highly professional agency.

No one was more dismayed than Clarence Thomas when the evolving EEOC did not, on occasion, live up to its own enhanced expectations. As he often stated, we built our wagon while we were riding in it and, with 50 offices and 3,000 employees, mistakes occurred. Thomas took full responsibility for any shortcomings and redoubled his efforts to make the EEOC a formidable opponent of those who would violate the laws prohibiting discrimination.

Today's EEOC is a fitting and lasting tribute to Clarence Thomas's vision and his unwavering commitment to upholding the laws protecting American workers.

'He Is Nothing If Not an Independent Thinker'

PERSONAL PERSPECTIVE

By R. Gail Sliberman

When Clarence Thomas stepped onto the national stage last Monday in Keanetownport, Md., cheers erupted at the Equal Employment Opportunity Commission, the agency he headed for eight years. That longtime employee of the often beleaguered commission cheered Thomas' nomination to the Supreme Court as a rarity to itself.

Immediately after President George Bush introduced Thomas, members of the press started calling the commission "Who is this Clarence Thomas?"

For those of us who were his colleagues, the answer is quite simple. He is dignified, reflective, direct, careful, courteous—a friendly, funny man with a hearty laugh. The Clarence Thomas you see is the Clarence Thomas you get.

Everyone at the EEOC remembers that his arrival in May, 1982, aroused a good measure of skepticism from a staff weary of uncertainty and leery of this Reagan-appointed black man. They, too, asked, "Who is this Clarence Thomas?"

This past week, I've been reminiscing with some of the men and women of the EEOC about then-Chairman Thomas. One theme stands out: Thomas profoundly influenced the commission and the men and women who work for it. At his recommendation hearings in 1987, the line to get into the committee room wound around the corridors of the Dirksen Building, so many commission employees had taken annual leave to go down and support their leader.

And lead he did. Clarence challenged his staff to do better, convinced them that he and the agency needed their best. He told them that tough times were ahead (he was right), that they were going to have to break some crockery, but, legally or, they would pick up the pieces and create a revitalized agency of which they could all be proud. And he did just that—when he left the commission, the new building for which he had fought so hard was named the Thomas Building.

There were cheers that day as well.

Clarence loves to tell the story of the day he arrived at the EEOC. His predecessor had left him the title of "chair," but when he finally gained admittance to his office—he had trouble convincing the new chairman of the EEOC—no chair sat behind his desk. Neither chair, system, nor semblance of organization was in place. Clarence got himself a chair and a desk. Clarence put his grandfather's and his son's pictures on his desk (it at least remained) and went to work.

Much has been written about Myra Anderson, Clarence's grandfather, the most profound influence on his life. When I first came to the commission in late 1984, Anderson had only died recently. When Clarence talked about him, his eyes welled up. Anderson's injunctions to his grandson to "make something of yourself," that "Mr. Carl is dead, I hope—bury him" because the rallying cry for an agency in which "Mr. Carl" had been

very much alive.

The men and women of the EEOC love Clarence because, in a real sense, he is one of them. I

In the early days of his chairmanship, he would get down to the finance section so often that he

had his own chair there. The supervisors were not sure that the chairman's frequent, unannounced visits were necessarily a good thing. But as staffer Mary Strager remembered this week, "We cleaned the books on Sept. 30th and if we were here 'til two in the morning, Clarence was here."

"Fog" Tall, once junior, now roving EEOC jack-of-all-trades, is keeping a scrapbook of everything that's being written about his friend, Judge Thomas. "Fog" never quite understood how anyone who lived in Washington could root for the Dulles Cowboys, but Clarence is making it not an independent thinker.

Clarence does not uncritically accept orthodoxy of any stripe. He questions clichés like "color-blind society," "knowing full well that color and race are factors of life, factors in life. You can make them a plus, make them a minus, but you can't erase them."

Clarence publicly questioned the Reagan Administration's seeming reluctance to broaden the Republican Party. He insisted that his party had room for people of all colors, faiths, conditions and classes. That's why he was an inspiring head of the EEOC. His liberating message to all who know him is: You count because of who you are and what you do, not because of what goods you possess or to what race (or religion) you belong.

And that's the significance of his appointment. Clarence Thomas' confirmation hearings present a historic opportunity to reassure the people of this country that the American dream lives. The men and women of the United States Equal Employment Opportunity Commission are getting ready to cheer again.



Initiatives of Judge Clarence Thomas
at the U.S. Equal Employment Opportunity Commission
(Tenure: May 1982 to March 1990)

"Overall, it seems clear that he left the [EEOC] in better condition than he found it." (U.S. News and World Report, July 15, 1991).

ENFORCEMENT

Charge Processing

Before Thomas

In April 1981, the General Accounting Office found, "The rapid charge process has over-emphasized obtaining settlement agreements with the result that EEOC has obtained negotiated settlements for some charges on which GAO believes there was no reasonable cause to believe that the charges were true. The settlement agreements for these charges have little substance . . . and they distort the results of the rapid charge process by inflating the number of settlements."

The GAO report found that these negotiated settlements "undermine EEOC's credibility because . . . charging parties and employers said they were pressured into settlements they disagreed with [and] charging parties were led to believe that, since the charges were resolved with settlement agreements, their charges had merit but EEOC handled them ineffectively." (GAO, Further Improvements Needed in EEOC Enforcement Activities, (April 9, 1981).

Thomas Initiative

Under Judge Thomas' leadership in 1983, the Commission unanimously adopted a resolution to shift its presumption in favor of rapid charge processing to one of case-by-case decisions on appropriate methods for resolving administrative charges, so that adequate evidence could be obtained to ensure strong cases for conciliation and litigation. This resulted in more full investigations and ultimately, in more cases being considered by the Commission for litigation. (EEOC).

The Thomas Commission adopted a remedies policy which calls for a full remedy to be sought in every case where discrimination is found, including elimination of the discriminatory practices. (EEOC, Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination, Feb 5, 1985).

Litigation

Before Thomas

Cases were selectively litigated. (EEOC).

Thomas Initiative

An enforcement policy was adopted which called for every case of discrimination which fails conciliation to be presented to the Commission for litigation consideration. (EEOC, Statement of Enforcement Policy, Sept. 11, 1984. This resulted in a dramatic increase in the number of lawsuits filed by EEOC. (EEOC Statistics).

Systemic Cases

Before Thomas

Before Clarence Thomas arrived at EEOC, the agency had no viable systemic program. Many systemic charges were never investigated or resolved. (EEOC).

Thomas Initiative

In 1985, Judge Thomas reorganized the systemic function so that investigations and litigation of systemic cases were placed respectively into the two offices best equipped to conduct these specialized functions. (EEOC). In 1988, 103 systemic cases were investigated and 16 were in active litigation. Of the \$131 million in relief obtained in FY 1988, over \$48 million was awarded in large class action/pattern and practices cases. (Vice Chairman R. Gaul Silberman, EEOC).

Lawsuits

Before Thomas

In 1981, EEOC filed 444 lawsuits on behalf of discrimination victims. (EEOC Enforcement Statistics).

Thomas Initiative

By 1986, the agency was routinely filing more than 500 lawsuits each year. Altogether during Thomas' tenure, EEOC filed more than 3,300 lawsuits and obtained nearly \$1 billion in monetary benefits for victims of discrimination. (EEOC Enforcement Statistics).

FEDERAL SECTOR ENFORCEMENT

Federal EEO Appeals

Before Thomas

EEOC's Office of Review and Appeals, which reviews federal agency decisions on employee EEO complaints, in 1982 was understaffed and ineffectively managed. Unassigned cases were placed in cardboard boxes stacked in a room from floor to ceiling; most were 2 or 3 years old before being assigned to an attorney, some were 6 to 8 years old before being completed. ORA decisions were not indexed or recorded for attorneys; GAO in 1982 reported that ORA decisions were inconsistent, even on separate appeals filed on the same case. (EEOC).

Thomas Initiative

EEOC under Clarence Thomas established a viable case filing system for federal appeals, assigned more attorneys to ORA, computerized case indices and a tracking system, a library was established for the staff and the average case processing was reduced to 130 days by 1989. (EEOC). In 1982, ORA completed 3,488 cases. In 1988, it completed 6,380. (EEOC, EEOC: 1982 to the Present, Dec. 1988).

Federal EEO

Before Thomas

When Clarence Thomas arrived at EEOC, no "management directives" to federal agencies had been issued on the employment of minorities and women, no information or statistics existed on the status of minorities, women and disabled individuals employed by the federal government, mail was backlogged and paperwork was in boxes. (EEOC).

Thomas Response

Under Thomas, Management Directives 707 and 707A, for minorities and women, were issued for 1982 - 1987; Management Directive 714 for minorities and women and 713 for persons with disabilities were issued for 1988 - 1992. Reports on the employment of minorities, women and disabled individuals were issued on an annual basis since 1982 and the agency became a model employer of persons with disabilities. By the end of Chairman Thomas' tenure, all mail was answered within 30 days and all files were organized and computerized.

Thomas at EEOC

FINANCIAL MANAGEMENT

Before Thomas

In May 1982, GAO reported to Congress that EEOC had not maintained accurate and up-to-date financial records, had not implemented adequate audit controls, had engaged in a questionable "loan" program to finance private Title VII discrimination suits and that the financial disarray of EEOC forced senior staff to make unsupported and improper manual adjustments to the year-end reports for fiscal years 1980-81. (GAO, Continuing Financial Management Problems at the Equal Employment Opportunity Commission, May 17, 1982). More than \$1 million in outstanding employee travel debts remained uncollected and in fiscal 1981, the agency underwent a reduction in force, which according to a former budget official was directly related to the agency having returned to the Department of Treasury unspent more than \$10 million of its \$140 million appropriation due to poor financial management. (EEOC Fact Sheet).

Thomas Initiative

As Chairman, Judge Thomas improved the agency's financial management. By the time he left EEOC, the agency was regularly obligating more than 99 percent of its appropriation and is able to monitor all funds in its various offices. In 1984, for the first time, EEOC's financial accounting systems met GAO standards. (EEOC Fact Sheet).

PERSONNEL

Before Thomas

In 1982, the Office of Personnel Management described the EEOC work environment as "beset by acrimony, improper employee conduct, poor performance and favoritism." (The Washington Times, July 5, 1991). In 1982, 60 jobs at EEOC were audited -- 53 were subsequently downgraded (of those, 42% were found to be overgraded by three or more grades); there was no accurate count of agency employees; employee pay records frequently contained errors. (EEOC Fact Sheet).

Thomas at EEOC

Thomas Initiative

Chairman Thomas implemented employee training and recruitment programs to upgrade and train the existing work force and to recruit and attract high quality employees. For the first time in 1987, virtually all investigators received comprehensive investigative training. Equal Opportunity Specialist positions were converted to Investigators in 1988, reflecting EEOC's commitment to more full investigations. Federal sector Hearing Examiner positions were upgraded to Administrative Judges and given more authority. Incentive programs were implemented. (EEOC Fact Sheets).

Without additional resources, the personnel system was centralized and linked to the payroll system; by the end of Clarence Thomas' tenure the error rate was .01 percent. By the time Thomas left the agency, EEOC's personnel organization was routinely commended and consulted by other small agencies and the Office of Personnel Management for its excellent personnel practices.

In 1988, EEOC received the Office of Management and Budget's Productivity Improvement Award for quality, effectiveness and efficiency. (EEOC News Release, July 1, 1988).

After a July 1991 visit to EEOC, Senator John C. Danforth said, "While at the headquarters, I had the opportunity to speak with a wide variety of individuals The clear message of those I visited was that Clarence Thomas had transformed the EEOC from the dregs of the federal bureaucracy to an efficiently operating agency which was effectively performing the duties Congress had assigned to it." (Sen. John C. Danforth, July 16, 1991, Floor Statement).

COMPUTERIZATION

Before Thomas

When Clarence Thomas arrived at EEOC, the only automated equipment for case management was two outdated mainframe computers with keypunch equipment. There were outmoded and incompatible word processors; the agency did not own even one personal computer. (EEOC Fact Sheet).

Thomas at EEOC

Thomas Initiative

Under Judge Thomas' guidance, EEOC began to automate by purchasing its first personal computer in 1983. The agency was computerized without any additional funding from Congress. As a result of Thomas' initiatives, an integrated charge data system was installed in all 50 field office which connected to a national database containing nationwide enforcement data on more than a million cases by the end of Thomas' tenure, more than 1,000 compatible personal computers were installed throughout EEOC and virtually every program at EEOC was computerized, including financial management, personnel, and federal sector appeals, in addition to enforcement. (EEOC Fact Sheets).

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PRESS

What Clarence Thomas Knows

By Guido Calabresi

I am a Democrat. Since the President and others have started to throw mud on liberals, I have proudly asserted that I am a liberal. I despise the current Supreme Court and find its aggressive, willful, statist behavior disgusting — the very opposite of what a judicious moderate, or even conservative, judicial body should do.

I think it strange that these strict destructionists should be allowed to get away with the claim that they are following the Constitution when, instead, they persistently reach well beyond the issues before them to impose their misguided values on the Great Charter and on all of us.

Yet I support the nomination of Clarence Thomas to that Court. Why?

First, because I know him and know he is a decent human being who cares profoundly for his fellows. He is not the caricature that some of his opponents have put forth. It is true that he has come to believe that some things we liberals have espoused to help African-Americans (and many other people, too) are counterproductive. I think that on the whole he is wrong.

But his conclusion is not so important as the fact that he does not deny that such measures helped him or that the people whom these remedies seek to help are deserving and often desperately need help. He has not turned his back on those in need, and

Guido Calabresi is dean of Yale Law School.

especially not on African-Americans. If he had, he would be unworthy to sit on the Supreme Court. What he has done is to conclude, with many others and probably wrongly, that certain measures have done more harm than good. I wish I could convince him otherwise. Maybe some day someone will.

What matters most, though, is that, unlike many on the Court, he does know the deep need of the poor and especially of poor blacks, and wants to help. That will keep him open to argument as a Justice should be.

The second reason I support him derives from this direct knowledge of what it is like to be in need. This Court

He may stand up
against a willful,
statist Court.

is outrageously homogeneous. It is overwhelmingly made up of gray Republican political hangers-on of virtually identical backgrounds. They all bring to the Court the same life experience and lack thereof.

How can they know what discrimination really means? How can they understand what fear of police, prosecutorial or state abuse and brutality is? When they babble that coerced confessions need not make trials unfair; that discrimination must be proved in individual cases and not through statistics, or that a single appeal is adequate even if a defend-

ant is served by a lousy lawyer, they sound like what they are: people who neither through personal experience nor academic thought could ever imagine themselves erroneously crushed by the power of the state.

Clarence Thomas, at least, knows better, and someday, in some case, that knowledge will make itself felt.

Of course, there are others as able as Clarence Thomas who also know this. And if I were President I would name someone like that who also shared my views. But it is a gross illusion to think that this Administration will do anything like that any more than the Reagan White House did when Robert Bork was cruelly caricatured and defeated. What we got then, what we would get now, is someone less able, with less life experience, a gray follower of all that is worst in the Court today.

And now, as then, The New York Times and eminent scholars who defeated the nominee will join the bandwagon of support for the nonentity. For in such a person the "offending" views will not stand out against the grayness of his background.

No, I would much rather have someone who does stand out, who holds his or her own views, with which I deeply disagree but who has somewhere, some time, experienced life and has been willing to stand up against the pack. Better such a one than someone who will readily blend in and be another anonymous vote for the activist and virulent views now so dominant on the Court.

For there is just a chance that such a one may stand up to the pack again, and remind us all of what it is like to be poor and friendless and to be facing a hostile state. □

JULY 28, 1991

Is Thomas' belief in natural law unnaturally odd?

Opponents of Clarence Thomas have discovered that on occasion he has invoked something known as "natural law." From their reaction you would think they had found him at the airport in a Hare Krishna robe.

Harvard law professor Laurence Tribe depicts him as a scary medieval relic, "the first Supreme Court nominee in 50 years" to draw on natural law. Thomas, he suggests, may return us to the time when the Supreme Court said women could be prohibited from becoming attorneys because the law of nature consigned them to the job of wife and mother.

He was seconded by Robert Alley, an adviser to Americans United for Separation of Church and State: "If he develops an agenda of declaring

Stephen Chapman

"unnatural" things as immoral, I'm frightened."

The logic is that since natural law has been used to defend oppressive practices, it can be used only to defend oppressive practices. This is like saying that since (a) the Nazis had moral principles, and (b) the Nazis were bad, (c) moral principles are bad. Tribe doesn't mention one modern proponent of natural law, Martin Luther King Jr., who wrote that "an unjust law is a human law that is not rooted in eternal law and natural law."

Natural law is essentially the broad idea, which traces back to Thomas Aquinas, that human nature defines how people should live, and that some actions are wrong regardless of law or custom. The term is also sometimes used to refer to the belief that people have inherent ("natural") rights that others have a duty to respect. Sometimes these are viewed as God-given, but not always: Novelist and philosopher Ayn Rand, a vociferous atheist, fervently believed in natural rights.

Far from being eccentric, this general belief is widely accepted. Says Randy Barnett, a professor at IIT-Kent College of Law: "Americans believe they have rights that the government didn't create and can't take away. Thomas is right in the mainstream of what Americans think."

Thomas is also in harmony with one Joseph Biden, chairman of the Judiciary Committee, who during Robert Bork's confirmation hearings said of constitutionally protected rights: "What has been protected ... [are] important and fundamental liberties that, in my view, predate the Constitution. I have them because I exist."

In fact, liberal interpreters take a similar approach to the Constitution, arguing that certain transcendent values and moral principles, like human dignity and equal respect for all, deserve protection even though they aren't mentioned in the text. Tribe himself thinks it should be read imaginatively to guarantee the right to "a decent level of affirmative governmental protection in meeting the basic human needs of physical survival and security, health and housing, work and schooling."

Yes, that's hypocrisy you smell. "There is not a fundamental or significant difference between using natural law and using moral principles to interpret the Constitution," says University of Minnesota law professor Suzanna Sherry, a self-described liberal.

The critics suggest that Thomas will analyze the Constitution by trying to make it conform to Aquinas' *Summa Theologica*. They might be forgiven if he hadn't taken such trouble to specify what he means when he refers to natural law.

What he means is the ideals of the Declaration of Independence, which says, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness." It is impossible to make sense of the Constitution, Thomas argues, without understanding that its authors intended it as an expression of these "self-evident truths."

Referring to the Declaration, Thomas has written: "Here, as Lincoln put it, lies 'the father of all moral principle' in Americans. Equality means equality of individual rights, an equality resting on the laws of nature and of nature's God. ... Because no man is the natural ruler of another, government must proceed by consent. And that, in turn, requires representation, elections and the separation of powers. These are the requirements of free government, and they rest on a moral conception of human worth, based on human nature."

Thomas agrees with the Framers that rights don't exist because the Constitution protects them; the Constitution protects them because they exist. He shares the view of most Americans that liberties are not something created by government that can be repealed by government, but the undeniable birthright of every individual.

If Thomas' critics want to turn his confirmation hearings into a debate over those propositions, it isn't Thomas who will end up looking scary.

THE BRIEF ON CLARENCE THOMAS

The more one learns about Clarence Thomas, the more compelling he becomes as a nominee to the Supreme Court—and as a fresh hope in breaking America's paralyzing deadlock over race. In recent days, his life story has already been turned into the stuff of legend: a young man who lifted himself from the hardscrabble of rural Georgia, so dark-skinned that other blacks in Savannah called him ABC ("America's Blackest Child"); nurtured by a grandfather who could barely read, but knew enough to instill the old values of hard work, self-reliance and religious faith; taught by nuns, but taunted by classmates in an all-white high school; persevering up the ladder through Yale Law School, onto the staff of John Danforth in Missouri, then to Washington, and always, always, a lonely, personal struggle to be his own man.

Yet Thomas offers far more than inspiring biography. "What Clarence is all about," says his friend, Republican Senator Danforth, "is that in this country you should have the freedom to think what you want to think, whether you're black, white, or anything else." Just as he has cut his own career path, he has plowed his own mental furrow, catching hell from all sides. Many civil-rights groups believe

he betrays blacks because he refuses to march in lock-step with their agenda. From his days running the Equal Employment Opportunity Commission, when he opposed racial quotas, they dismiss him as a black conservative doing the white man's bidding. In truth, Thomas doesn't fit into any political box; he is, as Washington political writer Juan Williams described him four years ago in *The Atlantic*, "ideologically *sui generis*."

Drawing heavily upon his life and his readings, Thomas believes that under natural law (and America's Declaration of Independence), all men and women are created equal, and that the U.S. Constitution provides legal guarantees. Government's role is to protect the rights of the individual but not to advance the interests of any group, black or white; it is up to the individual to make it on his own. Yes, whites tilted the game unfairly in their direction for generations, but rather than compensating blacks for past sins, government should start

the game over, ensuring that it is now played with absolute fairness. To insist upon preferences or quotas for blacks may grant them temporary gain but cost them their own self-confidence and white respect. Stop robbing us of our manhood, he says angrily.

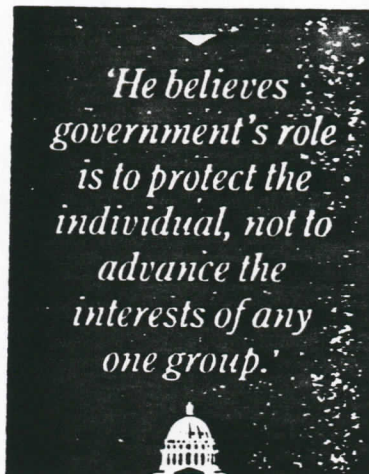
Thomas does not walk away from disadvantaged blacks: indeed, he has invested years trying to help them. But he thinks the proper role for government is to clear away the hurdles of *all* poor people—the drugs, crime and malnutrition that plague inner cities—without regard to race. Nor is he a lackey for white bigots. At the EEOC, he sought much tougher penalties against

whites who discriminate: He wanted to fine them heavily and toss them in jail. As a Reagan appointee, he attacked the administration for dragging its feet on voting rights, for granting a tax exemption to all-white Bob Jones University and for failing to offer a positive vision to blacks. He is not even certain about the merits of integration. Just to sit next to a white child in school solves nothing, he believes. First, the black child must learn to believe in himself.

In donning judicial robes, Thomas has pledged that his personal views will not matter. So strong is his allegiance to law and precedent that his closest admirers believe he is more

likely to fit the Felix Frankfurter than the William Rehnquist mold, refusing to join conservative activists eager to strike down rulings from the Warren court. We won't know for sure how he will come out on abortion, school prayer or crime until he actually sits on the court.

What we do know is that, as George Bush said, this new nominee is "fiercely independent," and in today's climate, his voice is welcome. America has wound up in a terrible cul-de-sac over race: Most whites, blacks and browns now believe in equality, but we are hung up in arguments and in government programs that aren't working to bring it about. Too many black activists insist that all blacks are victims and need special preferences throughout life; too many whites have given up trying to find answers and suspect a black underclass will be with us forever. Now comes Clarence Thomas insisting that if both races shape up, blacks can still make it on their own. He should know. ■



SUNDAY, JULY 7, 1991

A Man for This Season

In politics, timing is almost as important as substance.

Without the legacy of retiring Supreme Court Justice Thurgood Marshall, Clarence Thomas might not be the likely next justice of the Supreme Court. But just as Thurgood Marshall was a man for his time, leading the charge for the basic civil rights of black Americans, so Judge Thomas may be the right man for this time, keeping the pendulum from swinging too far in the direction of policies of racial preference that could threaten the social fabric.

Sadly, many black leaders see Judge Thomas as a threat to their turf. A campaign of disinformation about him has already begun similar to that waged against Judge Robert Bork. There appear to be three main areas of criticism: his conservative "ideology," his record as chairman of the Equal Employment Opportunities Commission and his apparent opposition to abortion.

We don't know how Mr. Thomas would vote on the matter of *Roe vs. Wade*. We do know the premise on which abortion rights folks are now attacking him is false, namely that he is, as Virginia Gov. Douglas Wilder said the other day, "a devout Roman Catholic."

It is true that Judge Thomas was schooled by Roman Catholic nuns and attended Holy Cross University. Now, it is worth noting that some of the strongest pro-choice voices in America are Catholic, including Sen. Joseph Biden, chairman of the Judiciary Committee which will sit in judgment on Judge Thomas. But the fact is, as Judge Thomas pointed out in an interview last week, he is not a Catholic. "Currently I am attending the Episcopal Church," he said, which tends to leave questions of abortion to individual conscience.

That does not settle the question of how he might rule on abortion as a judge, but it does underline the fact that his opponents are likely to show no great regard for the truth in their campaign against him. And the fact that "liberals," who not so long ago had to defend John F. Kennedy from anti-Catholic bigotry, would seek to hold a man's religion against him is a sign of the extent to which liberalism has degenerated as a principled political creed.

Mr. Thomas also is being attacked for his allegedly "insensitive and questionable enforcement record" at the Equal Employment Opportunity Commission. What is overlooked here is that when Clarence Thomas took over this agency, it was in chaos. It's no accident that one of Mr. Thomas' most strident critics is D.C. Delegate Eleanor Holmes Norton, who was his predecessor at the EEOC. The nonpartisan General Accounting Office in 1982 concluded that the internal record-keeping of that agency under Ms. Norton was so bad that "EEOC faces a formidable task in correcting the operational deficiencies that allowed the unreliable records to develop."

Under Mr. Thomas the EEOC was for the first time fully computerized. Management also was streamlined. And Mr. Thomas put the emphasis on prosecuting individual cases of discrimination

rather than laying burdensome new rules on employers.

As a result, court actions filed on behalf of plaintiffs rose from less than 250,000 in 1982 to more than 560,000 a year under Mr. Thomas. From 1980-82, EEOC collected \$320 million in fines from employers. From 1984 through 1986, EEOC collected \$381 million. That hardly strikes us as the actions of a man who lacks "sensitivity" to employment discrimination. Moreover, the Thomas rules have continued in force to this day, another indication that he was hardly a rogue ideologue when it came to fair play in the workplace.

The one area in which Mr. Thomas' performance has been most severely questioned is in age discrimination cases. The backlog of these cases reached a new high in 1987, and many were allowed to lapse. This precipitated an investigation by a Senate subcommittee. But at least part of that backlog was found attributable to the fact that Congress



Clarence Thomas

itself repeatedly appropriated less for EEOC operations than even the Reagan administration requested.

How about the charge that Judge Thomas is a hardline conservative who is "out of touch" with the American mainstream?

That charge should have been laid to rest by Mark Gitenstein, a liberal former Senate Judiciary counsel, who now heads the Foundation for Change, a Washington think tank. He told the *Legal Times* in October 1989, during Mr. Thomas' confirmation as an Appeals Court judge, "In my view, in the context of this administration Mr. Thomas is a moderate, pragmatic, reasonable nominee."

And as Detroit Judge Damon Keith, a Carter appointee to the 6th Circuit Court of Appeals, said at the time of Judge Thomas' nomination to the D.C. Court of Appeals: "If I or a member of my family were in trouble, he is the kind of person I'd like to appear before." For making this statement, repeated in a *Wall Street Journal* article last week, Judge Keith says he has been the target of some angry phone calls from other civil rights leaders. But he says he stands by his earlier statement.

One of the ironies of this line of attack is that Mr. Thomas was accused of being too "moderate" by members of the Reagan administration. The main reason: He opposed race-based remedies such as quotas, but he deeply believed in affirmative action for qualified individual minorities. There are ambiguities in such a position, but polls consistently show that this is where the American people are, too.

Judge Thomas stands as living proof that even the poorest black American can rise out of a Georgia sharecropper background to the highest court in the land. That should be taken not as a rejection of the vision of a Justice Marshall, but as affirmation of the courageous struggle for equality before the law in which Thurgood Marshall played such a formative role.

Just as Thurgood Marshall was a man for his time, Clarence Thomas appears to be a man for this season.

The Atlanta Journal

THE ATLANTA CONSTITUTION

SUNDAY, JULY 7, 1991

Thomas an asset to bench

He offers strong values,
keen intellect to court

By Larry D. Thompson

Because I practiced law with Judge Clarence Thomas some 14 years ago, many people have asked me, "Do you think he will be confirmed?" The simple answer is a resounding yes.

While some may disagree with Judge Thomas's views on several issues, I do not believe that many who may differ with him on these issues, but who have had an opportunity to know him, will oppose his nomination.

A graduate of Yale Law School, Judge Thomas is a legal scholar with valuable hands-on experience in the public policy arena. As chairman of the Equal Employment Opportunity Commission, he led the agency in removing a backlog of discrimination cases that served to unfairly deny relief to individuals who suffered employment discrimination. The EEOC under his leadership became a more effective advocate for individuals who were victims of discrimination, and it averted dehumanizing litigation and policies that led to minorities simply being treated as numbers. For example, the number of discrimination charges considered for litigation authorization by the EEOC rose from 401 in 1982, when Judge Thomas became chairman, to 764 in 1988 and approximately 800 in 1989.

An outstanding role model

Judge Thomas is a warm and engaging person. He is, as they say, down to earth. He is also very wise and, because of his background, will serve as an outstanding role model for our nation's youth, especially those who are poor or black.

Over the years, we have exchanged speeches and articles each of us wrote and, quite frankly, I benefited more from this practice than did Judge Thomas. Judge Thomas is a prolific and insightful writer. In a commencement address at Syracuse University Law School this year, Judge Thomas offered the following advice to the graduates:

"I encourage you to focus first on those who are nearest you, your parents, siblings, children, friends — your com-

munity. Wouldn't it be ironic if, in your haste to conquer the world, you lost those closest to you? Or, in looking beyond the horizons, you fell down a mine shaft?"

These observations of Judge Thomas as a lawyer of keen intellect with strong values are all part of my simple response to questions regarding his confirmation.

But, there is another, more complex reason why I believe he should be confirmed. Judge Thomas, who is black, has said that we cannot simply dismiss race as a factor in our society. His confirmation, I believe, may

signal the beginning of the acceptance of new ideas and values for a generation of black Americans.

The wrong approach

Judge Thomas, who is almost half the age of Justice Marshall, has, through intellect and hard work, been able to take advantage of the opportunities made possible for our generation by the work of Justice Marshall and other black leaders. Yet, obvious problems remain.

When we were working together, Judge Thomas and I would once a week leave our corporate law offices and go to our favorite Chinese restaurant and

talk about the problems of the day. We would discuss the problems black people were experiencing and our dismay over some black leaders who continued to preach the "politics of despair."

These leaders stressed the status of black people as victims and advocated more government assistance as the only way of overcoming our problems. They ignored other problems facing the black community: drug use, lack of respect for the law, kids having children too soon and fathers who were not taking their responsibilities seriously.

We noted the pernicious effects of group politics. We each knew many outstanding, highly

trained and capable black professionals and business people who were frustrated because they were viewed only as members of a group who got their positions through quotas rather than because of their qualifications as individuals. Their true achievements were being devalued and masked.

Yet, many black leaders continued to advocate more government and private programs based on racial quotas.

Ostracized by black liberals

Judge Thomas was an early, courageous advocate of so-called conservative positions. He was ostracized, often quite bitterly, by many black liberal leaders.

Judge Thomas was never obsequious. He was always his own person and was never a shill for anyone or any cause. He has criticized the national Republican Party for what he saw as tant indifference" toward voters and criticized the administration for its posture at the Bob Jones University when it tried to grant tax status to that institution charges that it practiced discrimination.

In a speech at Suffolk University, he expressed the frustration of many black conservatives.

"It often seemed that to be accepted within the conservative ranks and to be treated with some degree of acceptance, a

black was required to become a caricature of sorts, providing side shows of anti-black quips and attacks. But there was more — much more — to our concerns than merely attacking previous policies and so-called black leaders. The future, not the past, could be influenced."

While genuinely appreciative and respectful of the important contributions and sacrifices of leaders of the past, many believe that a new generation of black leaders with new ideas will advance black Americans and this nation even more. With this in mind, Judge Thomas once told me, "Our day will come." With his nomination to the United States Supreme Court, perhaps it has.

Borking Begins, but Mudballs Bounce Off Judge Thon

"Among the inadvertent benefits which followed from the timing of the Bork nomination was the coincidence of the regularly scheduled July annual meetings of mass membership organizations, including Planned Parenthood, the NAACP, the National Education Association, the National Organization for Women and the National Abortion Rights Action League. These were followed by the August conventions of the Southern Christian Leadership Conference and the national board meetings of

Rule of Law

By L. Gordon Crovitz

Common Cause, the AFL-CIO and the ACLU."

This reminiscence is from "The People Rising," a book celebrating how special interest groups defeated Robert Bork's nomination. This past July 1, four years to the day after the Bork nomination, many of the same groups went into high gear when President Bush nominated another conservative. Will Clarence Thomas also die the death of a thousand interest groups?

"We're going to Bork him," Florence Kennedy said of NOW's game plan. "We're going to kill him politically. . . . This little creep, where did he come from?" The script calls for throwing up endless ears; if there's enough smoke, there's excuse. Recall how Alabama Sen. Howell Heflin explained that he voted against Mr. Bork because "He had a strange life-style." Senators representing the liberal plantation must see a conservative black as the very definition of a strange life-style. The attempted smears so far:

He's Catholic. Judge Thomas's Catholic upbringing is code for the assumption that he finds no constitutional right to abortion. The abortion issue has already returned to the state legislatures following the *Webster* decision but, fresh from his grudge match with Chuck Robb, Virginia Gov. Douglas Wilder asked, "How much allegiance does [Judge Thomas] have to the pope?" The John Kennedy precedent aside, the Constitution says "no religious test shall ever be required as a qualification to any office." This non-issue may be moot. Judge Thomas attends the *Truro Episcopal Church* in Virginia.

He's Not Black. Derrick Bell, a Harvard law professor, declared that Judge Thomas "doesn't think like a black." Columnist Carl Rowan said, "If you gave Clarence Thomas a little flour on his face, you'd think you had David Duke talking." Ugly, but nothing new. "Here's a strange black," Judge Thomas says about how people see black conservatives. "Let's go see if he has two heads and a tail."

He Is Black. When Sen. George Mitchell declared that Judge Thomas was nominated only because of his race, President Bush wondered if he "accused Lyndon Johnson of a quota" for nominating Thurgood Marshall. On what grounds is Judge Thomas unqualified? He's written more law review articles than David Souter, has more law-enforcement experience than Justice Marshall and his years at Monsanto would make him the only justice with experience working as a corporation lawyer. Admittedly, there is a single most-qualified nominee; maybe President Bush should send up Robert Bork's name if Judge Thomas is defeated.

He's an Affirmative Action Ingrate. Judge Thomas represents a generation of minorities who have felt both sides of the affirmative-action sword. At Yale Law School, he sat in the back of classrooms in the hope that professors would not notice his race and assume he was less qualified. One of his happiest experiences at Yale was when he went to pick up his blindly graded final exam in tax law. The secretary handed him a copy of the best exam while she looked for his. He was thrilled to see that the model exam was his.

He ran into a double standard when law firms recruited him. Instead of discussing his favorite legal subjects—tax and corporate law—lawyers would only tell him about their minority hiring and public-interest work. This is why Judge Thomas instead became assistant attorney general in Missouri under John Danforth, who agreed to treat him like anyone else.

Only Liberals Can Cite Natural Rights. The hypocrisy award goes to Harvard's Laurence Tribe. After a career of urging liberal judges to look beyond the Constitution, he criticized Judge Thomas for writing about natural rights, which he hasn't invoked as a judge. He had a narrow purpose for thinking about natural rights when he ran the Equal Employment Opportunity Commission. This is that he thought *Brown v. Board of Education* did not go far enough because it relied on sociological evidence more than legal principle to overrule the separate-but-equal doctrine.



Clarence Thomas

Judge Thomas wrote that a more enduring opinion would have reflected the original intent of the post-Civil War amendments, which fulfilled the promise of equal rights in the Declaration of Independence. *Brown*, he said, was a "missed opportunity . . . 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." A close understanding of the Founders' background in natural-rights theory is important in interpreting the original intent of the document they left behind.

He's an Anti-Semite. Critics dug out a 1983 speech where he praised Louis Farrakhan's message of self-help for blacks. Once Mr. Farrakhan's anti-semitism became widely known, Judge Thomas gave speeches criticizing him—more than Rep. Gus Savage and others in the Black Caucus can say. Mr. Thomas internationalized the EEOC by demanding rights for Soviet Jews. He was also the 1986 winner of the Humanitarian Award from the Union of Orthodox Jewish Congregations of America, recognized for his "commitment to the right of all Americans to live free from discrimination based on race, religion or national origin and your support for the rights of Sabbath observers."

He Has a Weird Personal Life. There was a leak about Judge Thomas using marijuana in college, which he disclosed when he was appointed to the appeals court. Then there were reports that Mr. Thomas and his first wife had a bitter divorce. His former father-in-law said the two "were congenial and have remained so," telling the *Boston Herald* that "I'm very proud of Clarence, my whole family is." It's been reported that Judge Thomas hung a Confederate flag in his Missouri office, but the flag was the Georgia State flag, which Judge Thomas displayed in mischievous patriotism for his home state. Perhaps trying to repeat the infamous scoop of the videotapes Mr. Bork had rented, reporters perused the books Judge Thomas stores in his garage. They found such lascivious material as books by Ayn Rand, Alexander Solzhenitsyn and Alexander Pope.

These mudballs have not stuck, but the interest groups know they have until the September hearings. Judge Thomas and the country deserve a debate on the Constitution, original-intent jurisprudence and judicial restraint. Instead, we will get endless smears that liberals hope will postpone their greatest fear—a conservative black justice who will help legitimize a competing social and legal view.

William Raspberry

Thomas and the Black Mainstream

The speaker, having recounted his own humble, race-restricted origins, urged his NAACP audience to take "pride in endeavor and accomplishment, discipline of mind and body . . . not succumbing to those who talk about taking shortcuts." The young people in the audience, he counseled, shouldn't be afraid to accept menial jobs or to say "yes, sir" and "yes, ma'am," if that is what it takes to get where they want to go. "If you know you have to be doubly prepared, be doubly prepared, and then get on with doing the job."

He cautioned against race-specific approaches to solving the problems that confront black people. "Only when America understands that they are not problems but *American* problems will we be able to solve them." Three things about that speech, delivered five years ago and greeted with near-unanimous enthusiasm:

First, the speaker was a lawyer working for the government, not a nominee for the Supreme Court. Second, it wasn't Clarence Thomas; it was Doug Wilder, then lieutenant governor of Virginia. And third, the remarks were well within the mainstream of black thought. A full decade earlier, Jesse Jackson was warning against the rhetoric that leads black youngsters to see themselves as society's victims rather than as human beings capable of controlling their own destinies. "Nobody can save us from us—but us," he used to say.

Why is it that when a Wilder or a Jackson says these things they are taken as necessary, if uncomfortable, truth, but when a Thomas says them they are taken as evidence of personal smugness, of his lack of interest in the plight of his own people?

The reaction, it seems to me, is less to what is said than to who says it. We know who Jackson and Wilder are—both for their battles waged on behalf of blacks and for their allegiance to Democratic politics, which has become the black political orthodoxy.

But we don't know black conservatives—we doubt that it is legitimate even to be a black conservative. What Thomas *is* speaks so loudly to us that we cannot hear what he says.

None of this, I should note, speaks to Thomas's fitness for the Supreme Court. He wouldn't have been my choice. But then no one likely to be appointed by a conservative Republican president would be my choice. I believe the court is too conservative already—too devoted to the privileges of authority and too uncaring about the rights of ordinary people, too wrapped up in governmental theory and too innocent of experience as outsiders in a society dominated by white men.

Given an unfettered choice, I'd opt for a liberal whose bona fides include a history of concern for the underdog.

But the choice isn't unfettered. We're playing "Let's Make a Deal" with a host who offers us a choice between a serviceable Chevrolet and a goat, and we're holding out for a curtain that conceals (we hope) a Mercedes Benz with an interior designed by Thurgood Marshall. Well, there's no Benz behind any of the curtains. If we're not prepared to deal with the goat, we'd better take the Chevy.

Granted it's a strange Chevy. We don't know many black Americans in high places who will dismiss affirmative action out of hand, or who will argue against government catch-up programs for blacks or who will align themselves with conservative politicians. We've seen conservatism and racism wearing the same garb so often that we've come to believe you can't have one without the other.

Well, I'm not convinced. At least some of Thomas's conservatism finds echoes in black America, including the black establishment. Note the remarks of Jackson and Wilder. And the rest of it, no matter how much I might reject it, is inevitably tempered by his experience as a black man whose own opportunities have been blunted by racism.

As a friend of mine puts it, "Given a choice between two conservatives, I'll take the one who's been called 'nigger.'"

I believe with this friend that Thomas is sufficiently acquainted with racism to recognize it when it comes before him on the Supreme Court, that he is independent enough not to see the critical issues in the light of his own experience and that he is smart enough to find in the Constitution protection against the presumptions of white privilege.

Maybe he really does believe that there's nothing the government can or should do about entrenched racism, but I doubt it. I hear him the same way I hear Wilder and Jackson and scores of other plain-spoken blacks. I hear him saying with Wilder that blacks are foolish to wait for whites to deliver us, that we must return to the old values that worked for us in harsher times than these, that we must "redig the wells our fathers dug."

And I hear him saying with Jackson that whatever succor may exist in bigger budgets and greater concessions from the larger society, there will remain work that only we can do, that "nobody can save us for us—but us."

SUNDAY, JULY 28, 1991

3B

The Clarence Thomas I Know

His Life Is The Embodiment Of The Values Our Nation Prizes

By Alex V. Netchvolodoff

Clarence Thomas is a black man from rural Pinpoint, Ga. He was born to an impoverished family with an absentee father, an overworked mother, a home without plumbing and a very bleak future. Yet Clarence Thomas has just been nominated by President Bush to serve as associate justice of the U.S. Supreme Court.

At an early age, Clarence was sent to live with his maternal grandparents. For him, it was a turning point. He became the object of his grandfather's unrelenting attention and expectations, "work hard . . . and then work even harder; be self-reliant; get a decent education; be faithful to your vision of personal achievement and, by example, to your own people's struggle." Clarence has been living up to his grandfather's expectations ever since.

Thomas' growing up was stark. He had more than a full-time job on his grandfather's truck, but nevertheless, he excelled at his all-black parochial school. There was little time and money for diversion. Even so, Clarence disdained Savannah's segregated movie theaters and restaurants. Instead, he satisfied his appetite for books at an all-black library.

Clarence left Savannah for Holy Cross College with his wits and a few dollars in the sole of his shoe. He founded the Black Students' Union and began to consider how blacks could succeed in a white society. He graduated with honors and went on to Yale Law School, where he served as a student volunteer at the New Haven Office of Legal Assistance.

I first met Clarence Thomas in 1974 when I flew him to Jefferson City as part of an effort to recruit him as an assistant attorney general. He had to know how every gauge and every control worked on that plane. His exuberant curiosity and penetrating mind were striking. By the time we arrived, he was practically flying the plane, and he was great company in the process.

At his job interview, Clarence interviewed us! He wanted to be assigned the toughest litigation and a heavy workload. He got his wish — and he delivered. As Thomas was leaving state government for the climes of a corporate law practice at Monsanto, Robert Dowd, presiding judge of the Missouri Court of Appeals, noted that Clarence was one of the best prepared and most effective lawyers to appear in his court.

Thomas was also a person of great self confidence and integrity. He once told the attorney general (who had suggested that Clarence show a bit more political sensitivity) that if the attorney general wanted a political opinion instead of a legal opinion, then he should go find a politician rather than a lawyer to write it. The opinion was issued as Thomas had drafted it.

Clarence was a great conversationalist. Because he had literally grown up with discrimination, I was particularly interested in his views on civil rights. He had absorbed the thinking of America's black leaders through the prism of his grandfather's values. Clarence applauded Booker T. Washington's emphasis on black education. From W.E.B. DuBois, he borrowed an aggressive and unbending contempt for discrimination and social injustice. From Martin Luther King, he advocated nonviolence and social reconciliation. From Malcolm X, he embraced the imperatives of black independence, pride and self-help. And from Thomas Sowell, he accepted free markets

and hard work as the best path to economic justice. While arguing that the full force of the law and the moral authority of society should be marshaled against racial discrimination, he rejected as counterproductive numerical goals and quotas in schools and the work place.

As chairman of the Equal Employment Opportunity Commission, Clarence had a chance to put these values into action. He had inherited a demoralized, directionless agency. Several years later, Clarence proudly showed me around. Despite congressional budget cuts, he had reorganized EEOC's finances, personnel and docket. The staff was upbeat and proud of its accomplishments. New enforcement records had been set. Upon Thomas' departure to the U.S. Court of Appeals, the new EEOC headquarters was named after him.

Clarence Thomas is an authentic American hero. His life is the embodiment of the values that our nation prizes. He has developed, with singleness of purpose, an inquiring and penetrating mind. He has pursued, with equal tenacity, his vision of

self-improvement. He has served loyally as a role model for his own people. He has refused to bend to bigotry and discrimination. He has turned the other cheek. He has advocated a vision for social and economic justice that is focused on education and self-reliance, rather than on condescension and reprisal.

He is open-minded, but he calls things as he sees them. He is forever linked by history and by personal memory to those in our society who are weak, fragile or different. Who better to represent us in the Supreme Court of the United States of America than Clarence Thomas?

I, for one, am proud to tell his story, and I look forward to his service on the court — for the challenge to us and the surprises for us that I know it will bring.



Nothing Is Ever Simply Black and White

Outspoken author **SHELBY STEELE** defends Clarence Thomas and argues that too many African Americans see themselves as victims

By **SYLVESTER MONROE** MONTEREY

Q. Why are so many African Americans concerned about Clarence Thomas' nomination to the Supreme Court?

A. On the deepest level, he touches the very soul of the debate in black America, which is a debate between using the

A. Clarence Thomas is considered a conservative *today* because of the context, and the context is that for the past 25 years civil rights organizations have focused one-dimensionally on our oppression and demanded redress based on that. Well, here comes a man in 1991 who stands for self-help, and so he is anathema. The principle



ANDY FREIBERG FOR TIME

"I don't say racial preferences have never done a bit of good for anybody. All I've tried to do is point out the down side and that we've probably come to the point where they are doing more harm than good."

principle of self-sufficiency as a means to power as opposed to using our history of victimization. We have taken our power from our history of victimization, which gave us an enormous moral authority and brought social reforms, to the neglect of self-reliance and individual initiative. And now, any time you talk about self-reliance in relation to black problems, you are automatically considered a conservative.

Q. You don't consider yourself a conservative?

A. No. I think of myself more as a classical liberal. I focus on freedom, on the sacredness of the individual, the power to be found in the individual.

Q. But other black thinkers from Booker T. Washington to Malcolm X to Jesse Jackson have preached self-reliance, and nobody called them conservatives.

of self-reliance seems to devalue victimization as a source of power. I don't think it necessarily does, but it seems to. And so Thomas seems to be against the interests of black people merely by standing for self-reliance. He's not remotely anti-black. He's just asking that we develop another source of power.

Q. You have said that you are against preferential treatment, not affirmative action per se. But the widespread perception is that you are anti-affirmative action, and so is Clarence Thomas.

A. What I've tried to say, and I think Clarence Thomas stands for pretty much the same thing, is that by opposing racial preferences we stand for black strength rather than weakness. The thing that disturbs me about affirmative action, about preferences, is that they can and will be taken away. They will diminish over time.

And in the interim they encourage us to believe that redress is our power. I don't take any simpleminded black-and-white view and say racial preferences have never done a bit of good for anybody. All I've tried to do is point out the down side and that we've probably come to the point where they are doing more harm than good.

Q. Are you letting white people off the hook?

A. I don't mean in any way to let white people off the hook. I think as American citizens, they have a profound responsibility to black Americans. I favor every form of affirmative action except preferences. I favor the government improving the education system in the inner cities. I favor programs that go down to the teenage mother and try to break that cycle of poverty by teaching her parenting skills.

The most important thing that people who have been victimized can understand, whether it is fair or unfair, and it certainly is not fair, is that change will have to come from themselves. Thomas and I are not hardhearted people who are simply saying, "Get up off your butt, pull yourself up by your bootstraps." We need government intervention to help us. But we've also got to help ourselves. Opportunity follows struggle. It follows effort. It follows hard work. It doesn't come before.

Q. You once said that liberals are no friends of blacks. What did you mean?

A. Watch out that your closest friend may be your greatest enemy, is my feeling about liberals, because they encourage us to identify with our victimization. It is one thing to be victimized; it is another to make an identity out of it. I am not willing to be a boy because I am inferior, and I am not going to be a boy because I am a victim. I reject both avenues to being a boy. The one thing a white liberal can never do with a black is be honest and tell him what he tells his own children.

Q. Which is what?

A. Which is that you have to work hard and your life in many ways will reflect the amount of effort you put into it. They teach that every day to their own children, but then they come out in public and talk about blacks as just victims who need redress. This is racial exploitation by white liberals, who transform this into their own source of power. We're being had by them, and we really need to know that.

Liberals are screaming for racial preferences. But as soon as they give you the preference, they hold it against you. "Hey, you were helped by affirmative action," they say about Clarence Thomas. "You wouldn't be where you are if it was not for affirmative action." That's one reason I have a problem with preferences. How can he win? He can't.

Seldane®

(terfenadine; 60 mg Tablets)

BRIEF SUMMARY

CAUTION: Federal law prohibits dispensing without prescription.

DESCRIPTION

Seldane (terfenadine) is available as tablets for oral administration. Each tablet contains 60 mg terfenadine. Tablets also contain, as inactive ingredients, corn starch, gelatin, lactose, magnesium stearate, and sodium bicarbonate.

INDICATIONS AND USAGE

Seldane is indicated for the relief of symptoms associated with seasonal allergic rhinitis such as sneezing, rhinorrhea, pruritus, and lacrimation.

CONTRAINDICATIONS

Seldane is contraindicated in patients with a known hypersensitivity to terfenadine or any of its ingredients.

PRECAUTIONS

General: Terfenadine undergoes extensive metabolism in the liver. Patients with impaired hepatic function (alcoholic cirrhosis, hepatitis), or on ketoconazole or itraconazole therapy, or having conditions leading to QT prolongation (e.g. hypokalemia, congenital QT syndrome) may experience QT prolongation and/or ventricular tachycardia at the recommended dose. The effect of terfenadine in patients who are receiving agents which alter the QT interval is not known. These events have also occurred in patients on macrolide antibiotics, including erythromycin, but causality is unclear. The extent may be related to altered metabolism of the drug, to electrolyte imbalance, or both.

Information for patients: Patients taking Seldane should receive the following information and instructions. Antihistamines are prescribed to reduce allergic symptoms. Patients should be questioned about pregnancy or lactation before starting Seldane therapy, since the drug should be used in pregnancy or lactation only if the potential benefit justifies the potential risk to fetus or baby. Patients should be instructed to take Seldane only as needed and not to exceed the prescribed dose. Patients should also be instructed to store this medication in a tightly closed container in a cool, dry place, away from heat or direct sunlight, and away from children.

Drug Interactions: Preliminary evidence exists that concurrent ketoconazole or macrolide administration significantly alters the metabolism of terfenadine. Concurrent use of Seldane with ketoconazole or itraconazole is not recommended. Concurrent use of other macrolides should be approached with caution.

Carcinogenesis, mutagenesis, impairment of fertility: Oral doses of terfenadine, corresponding to 63 times the recommended human daily dose, in mice for 18 months or in rats for 24 months, revealed no evidence of tumorigenicity. Microbial and micronucleus test assays with terfenadine have revealed no evidence of mutagenesis.

Reproduction and fertility studies in rats showed no effects on male or female fertility at oral doses of up to 21 times the human daily dose. At 63 times the human daily dose there was a small but significant reduction in implants and at 125 times the human daily dose reduced implants and increased postimplantation losses were observed, which were judged to be secondary to maternal toxicity.

Pregnancy Category C: There was no evidence of animal teratogenicity. Reproduction studies have been performed in rats at doses 63 times and 125 times the human daily dose and have revealed decreased pup weight gain and survival when terfenadine was administered throughout pregnancy and lactation. There are no adequate and well-controlled studies in pregnant women. Seldane should be used during pregnancy only if the potential benefit justifies the potential risk to the fetus.

Nonteratogenic effects: Seldane is not recommended for nursing women. The drug has caused decreased pup weight gain and survival in rats given doses 63 times and 125 times the human daily dose throughout pregnancy and lactation. Effects on pups exposed to Seldane only during lactation are not known, and there are no adequate and well-controlled studies in women during lactation.

Pediatric use: Safety and effectiveness of Seldane in children below the age of 12 years have not been established.

ADVERSE REACTIONS

Experience from clinical studies, including both controlled and uncontrolled studies involving more than 2,400 patients who received Seldane, provides information on adverse experience incidence for periods of a few days up to six months. The usual dose in these studies was 60 mg twice daily, but in a small number of patients, the dose was as low as 20 mg twice a day, or as high as 600 mg daily.

In controlled clinical studies using the recommended dose of 60 mg b.i.d., the incidence of reported adverse effects in patients receiving Seldane was similar to that reported in patients receiving placebo. (See Table below.)

ADVERSE EVENTS REPORTED IN CLINICAL TRIALS

Adverse Event	Percent of Patients Reporting			
	Controlled Studies* Seldane N=781	Placebo N=665	Control N=626**	All Clinical Studies** Seldane N=2462
Central Nervous System				
Drowsiness	9.0	8.1	18.1	8.5
Headache	6.3	7.4	3.8	15.8
Fatigue	2.9	0.9	5.8	4.5
Dizziness	1.4	1.1	1.0	1.5
Nervousness	0.9	0.2	0.6	1.7
Weakness	0.9	0.6	0.2	0.6
Appetite increase	0.6	0.0	0.0	0.5
Gastrointestinal System				
Gastrointestinal Distress (Abdominal distress, Nausea, vomiting, Change in bowel habits)	4.6	3.0	2.7	7.6
Eye, Ear, Nose and Throat				
Dry Mouth, Nose, Throat	2.3	1.8	3.5	4.8
Cough	0.5	0.3	0.5	1.7
Sore Throat	0.5	0.3	0.5	3.2
Epistaxis	0.0	0.8	0.2	0.7
Skin				
Eruption (including rash and urticaria) or itching	1.0	1.7	1.4	1.6

*Duration of treatment in CONTROLLED STUDIES was usually 7-14 DAYS.

**Duration of treatment in ALL CLINICAL STUDIES was up to 6 months.

***CONTROL DRUGS: Chlorpheniramine (291 patients), 4-Chlorpheniramine (189 patients), Clemastine (146 patients).

Rare reports of severe cardiovascular adverse effects have been received which include arrhythmias (ventricular tachycardia, torsades de pointes, ventricular fibrillation), hypotension, palpitations, and syncope. In controlled clinical trials in otherwise normal patients with rhinitis, at doses of 60 mg b.i.d., small increases in QTc interval were observed. Changes of this magnitude in a normal population are of doubtful clinical significance. However, in another study (N=20 patients) at 300 mg b.i.d., a mean increase in QTc of 10% (range -4% to +30%) (mean increase of 46 msec) was observed without clinical signs or symptoms.

In addition to the more frequent side effects reported in clinical trials (See Table), adverse effects have been reported at a lower incidence in clinical trials and/or spontaneously during marketing of Seldane that warrant listing as possibly associated with drug administration. These include: alopecia (hair loss) or thinning, anaphylaxis, angioedema, bronchospasm, confusion, depression, paresthesia, insomnia, menstrual disorders (including dysmenorrhea), musculoskeletal symptoms, nightmares, paresthesia, photosensitivity, seizures, sinus tachycardia, sweating, tremor, urinary frequency, and visual disturbance.

In clinical trials, several instances of mild, or in one case, moderate transaminase elevations were seen in patients receiving Seldane. Mild elevations were also seen in placebo-treated patients. Marketing experiences include isolated reports of jaundice, cholestatic hepatitis, and hepatitis. In most cases available information is incomplete.

OVERDOSAGE

Information concerning possible overdosage and its treatment appears in Full Prescribing Information.

DOSE AND ADMINISTRATION

One tablet (60 mg) twice daily for adults and children 12 years and older.

Product information as of July, 1990

MARION MERRELL DOW INC.

Prescription Products Division

Kansas City, MO 64114

SELAE 302/A1895

613081

INTERVIEW

Q. How much impact does racism have on the lives of black Americans?

A. I think being lower class has a much greater impact. You and I both know, as a middle-class black you can send your kid to any school you want. But if you and I were on the South Side of Chicago and not doing very well economically, then clearly you would not be able to send your kid to whatever school you wanted. At this point, class, poverty and isolation are far more difficult variables for blacks than racism. That does not mean racism is gone; I think you'll meet it wherever you go. But it does not have the power to contain your life that it used to have.

Q. According to you, there is a great deal of opportunity that blacks are simply not taking advantage of. Many blacks disagree with you.

A. It depends on how you define opportunity. I don't see opportunity in a one-dimensional sense as something that is simply there either waiting or not waiting for somebody to come and grab it. I think of opportunity as something that one creates, that you generate opportunities for yourself.

A Jewish woman told my brother something I think is absolutely vital for black people to understand. It was a simple phrase: "Don't wait for people to love you." We are too preoccupied with whether white people love us or not, whether they are racist or not, what they think about the color of our skin or the texture of our hair. Who cares? We have to go forward and make our own opportunities.

Q. You've told me that you admired your father and that he saved your life, taking you to the YMCA when other black parents said it was too far to go or too expensive. Clarence Thomas talks much the same way about his grandfather. How do you duplicate that experience for less fortunate blacks?

A. This is one of the heartbreaking things about the politics of victimization. We have always had the tradition of self-reliance in the black community, but this tradition gets squashed because it conflicts with victimization. We think we are here because of affirmative action, but we are not. We are here because of those people who let us get into a position to be able to take advantage of what society was trying to do for us. But this victimology causes us to denounce as a race our greatest source of strength, which is people like that, who ought to be held up as role models.

Clarence Thomas ought to be held up as a role model. But no, we say, he made it by himself too much. He's not a victim. We don't want him.

Q. But one major criticism of Thomas is that he thinks he did make it all by himself.

A. This is the shortsightedness of victimology. You're goddam right he made it by

himself. Now you are going to take that away from him and say he made it because of affirmative action. He didn't have affirmative action back there in Pin Point, Ga. His grandfather made him go to school and study hard, and then he gets into the position where, yes, maybe he could benefit. But if all that early work had not been done, we wouldn't know Clarence Thomas today.

Q. What are you telling young blacks?

A. The most important thing for young black people to do is what you and I did—become educated. If you are educated, then at least you have some kind of chance. Learn to think, to read, to be in touch with the larger world. One of the saddest things I see is black students who say to me, "I only read black writers." And what they really mean is they are reading people like Don L. Lee and Louis Farrakhan. I say, Have you ever read any Jean-Paul Sartre? Have you ever read any Ralph Ellison or Albert Murray or James Baldwin? Nope. But they read Don L. Lee's tract on what a black man should be, as though this is different from what any man should be. And so there's this sort of intellectual segregation that I think is absolutely a death knell for our future.

Q. Many blacks accuse you of allowing yourself to be used by white neoconservatives, who are no longer willing to deal with the problems of race and poverty.

A. Some of them do use me, and I think some of them do not have the best interests of black Americans at heart. But if everybody is hip enough to ask me this question, then my use to the neoconservatives is neutralized.

In many ways, the fear that I'm being used by neoconservatives reflects a paranoia that has always been part of black life, and it is part of the life of any oppressed group, a paranoia about what you say in front of the Man because he'll use it against you. One of the things I stand for more deeply than anything else is that I do not see the white man as all that powerful, all that smart. Blacks really need to begin to understand that these people do not control our fate as much we think they do.

Q. What has this debate and being labeled a black conservative done to Shelby Steele?

A. It has put a lot of stress on me. It's not fun to be labeled when you know that it's very shortsighted. On the other hand, overall I am very, very happy because I think the terms of the debate have been really opened up. I don't think things will ever be the same again. And I think Clarence Thomas' nomination drives that nail home. There will now forever more be diversity of opinion in the black community. People will think about these things a great deal more than they did when we were a sort of one-party system. I feel very good about that.

The Washington Post

Judge Thomas (Cont'd.)

SINCE JUDGE Clarence Thomas's nomination to serve on the Supreme Court, a host of interest groups and prominent individuals have weighed in with their opinions. While most of the offerings from both sides have been thoughtful and judicious, a few uninformed, silly comments have crept into the discussion. To speculate about Judge Thomas's fate were he white (he's not) or to argue that he is a "quota" candidate is a good political shot to take at anti-quota George Bush, but off the mark so far as the nominee is concerned. What matters are his qualifications and fitness to serve on the court. On that score, more voices will be heard from in the weeks leading up to his September confirmation hearings. As the smoke clears from this initial volley, however, Judge Thomas's nomination seems to us to have taken no disqualifying blow.

It's not as if he were a total stranger. His record of government service, particularly the civil rights enforcement record at the Equal Employment Opportunity Commission, is there for examination. Having covered much of that territory only a year and a half ago during the confirmation process for his position on the appellate court, the Senate, which approved him then, will be revisiting familiar ground. His qualifications, judicial philosophy and views on that body of constitutional law and statutory rights that protect individual freedoms will be scrutinized once more, as they should be. Again, based on the totality of what is known about Judge Thomas, it is quite a reach if not unfair to brand him a "reactionary" and one whose "confirmation would be inimical to the best interests of African Americans" as the NAACP did this week.

Some excerpts from a speech he gave in 1985 to the graduates of Savannah State College, a historically black institution, which were printed in the New York Times, add a useful dimension

to the profile of the man that has emerged in the debate so far. "There is a tendency among young, upwardly mobile, intelligent minorities to forget," he said. "We forget the sweat of our forefathers. We forget the blood of the marchers, the prayers and hope of our race." In that speech, Judge Thomas decried the erosion of those positive values that have enabled generations of African Americans to endure and overcome the worst this nation has had to offer. His warning was directed particularly toward the younger generation in our inner-cities who must bear the burden of broken homes, joblessness, crime and dependency.

But his was not a message of hopelessness. "Do not become obsessed with all that is wrong with our race," he said. "Rather, become obsessed with looking for solutions to our problems. Be tolerant of all positive ideas; their number is much smaller than the countless number of problems to be solved. We need all the hope we can get."

From this and other speeches and writings, our sense is that Judge Thomas understands the America in which he lives and well knows that much of what this nation offers is conditioned on skin color and that discrimination is found across the length of the land. It is not so much his conservative political ideology as his personal and public life experiences that have made him less sanguine about the ability of law and social policy to solve by themselves those problems that weigh most heavily on black America. That, it seems, is the genesis of his frequent pitches for reliance on hard work and discipline, pride, self-respect and acceptance of responsibility by black Americans for their own destiny. His record will and should get a closer look next month. But it is important now not to caricature his views.

AUGUST 5, 1991

QUOTES ABOUT JUDGE THOMAS

WHAT OTHERS ARE SAYING ABOUT JUDGE THOMAS

Alvarez, Fred. (former Commissioner, EEOC) "He totally turned around the management and reputation EEOC had." Los Angeles Times: July 7, 1991. . . "The commission [EEOC] became a much stronger government agency in the years he was there." Miami Herald: July 11, 1991

Ashcroft, Governor John. (Governor, Missouri) "Thomas possesses the highest standards of honesty, integrity, and ethical conduct. His judicial intellect is superb. His life serves as an inspiration for all Americans." St. Louis Post-Dispatch: July 2, 1991

Bell, Griffin. (former United States Attorney General) "The people who think that we're entitled to have a black on the Supreme Court but only a liberal black, they will vote against him. But I can't imagine that there are too many senators like that. Whoever heard of such an argument that only a liberal black can be on the Supreme Court. What kind of country do we have where people would take that position?" Associated Press: July 9, 1991

Boicourt, Michael. (Chief Counsel, Office of the Missouri Attorney General) "Personally, there is a great dignity and self-confidence about him. He wore a sense of purpose about him that was almost overwhelming. He charmed and conquered everyone of all kinds of persuasions." Chicago Tribune: July 2, 1991

Civiletti, Benjamin. (former United States Attorney General) "I think the President made a good choice. I think he put quality and qualifications ahead of minority quotas." Baltimore Evening Sun: July 2, 1991

Danforth, Senator John. (United States Senator, Missouri) "[Thomas] would have great empathy for the ordinary person. In many ways, Clarence Thomas is the people's nominee for the Supreme Court." St. Louis Post-Dispatch: July 9, 1991. . . "The clear message from those I visited was that Clarence Thomas had transformed the EEOC from the dregs of the federal bureaucracy to an efficiently operating agency, which was effectively performing the duties Congress had assigned to it." St. Louis Post-Dispatch: July 17, 1991. . . "If anyone thinks that Clarence Thomas is a pre-determined vote on any particular issue, that individual does not know Clarence Thomas. He is fiercely independent." St. Louis Post-Dispatch: July 9, 1991

DeConcini, Senator Dennis. (United States Senator, New Mexico) "I'm impressed with him. He has a lot of experience. He's a good writer. He's a conservative. That's positive as far as I'm concerned." Associated Press: July 7, 1991.

Goldstein, Barry. (former attorney, NAACP Legal Defense Fund) "The EEOC policy seeking full relief for victims of intentional

discrimination was a positive step." St. Louis Post-Dispatch: July 2, 1991

Hatch, Senator Orrin. (United States Senator, Utah) "This man is highly qualified and very, very capable." Boston Herald: July 2, 1991

Heflin, Senator Howell. (United States Senator, Alabama) "He has a good academic background." United Press International: July 11, 1991

Hooks, Benjamin. (Executive Director, NAACP) "When it comes to individual discrimination, his record is pretty clear. If a black or woman has been individually discriminated against or mistreated he'll go to the ends of the earth to correct it." Associated Press: July 24, 1991

Jackson, Alphonso. (Executive Director, Dallas Housing Authority) "Clarence has the greatest appreciation for Thurgood Marshall, for Martin Luther King. He knows, he truly knows, that without them we would not be where we are. And that's why he believes people must be judged on merit and not on the color of their skin. We've all had experiences with racism, but he did not use those experiences as a crutch. He used them as a propeller." Dallas Morning News: July 2, 1991

Keith, Judge Damon. (Judge, United States Court of Appeals, 6th Circuit) "If I or a member of my family were in trouble, he is the kind of person I'd like to appear before. Our judicial philosophy may not be the same, but he is a bright and reflective man who believes passionately in fairness. I say this without reservation, and in full knowledge of all the people who complain about him." Wall Street Journal: July 2, 1991

Kemp, Evan J. (Chairman, EEOC) "He made the EEOC a first-rate law enforcement agency where people were proud to say they worked." Associated Press: July 2, 1991.

Lecraft Henderson, Judge Karen. (Judge, United States Court of Appeals, DC Circuit) "Clarence Thomas is the American dream personified." Associated Press: July 1, 1991

Leighton, Richard J. (attorney who argued case before Judge Thomas) "Judge Thomas' decision in the case [Alpo Petfoods v. Ralston Purina] has been cited often, and is being discussed in all the seminars on the Lanham Act (a federal law on false advertising). It's an extraordinarily clear opinion that's written in a scholarly fashion. This was a weighty opinion, no piece of fluff." Associated Press: July 2, 1991

Lits, Judge Arthur. (Judge, Circuit Court of St. Louis County) "I have known Judge Thomas for over 15 years. He first appeared before me as Assistant Attorney General of Missouri in an important case having statewide effect. I immediately was struck

not only by his demeanor, superior knowledge and presentation of the law, but his fine personality and warmth. The country will greatly benefit from the acumen, knowledge, and attitude of such a fine gentleman, lawyer, and judge." Letter of Recommendation to President Bush: June 28, 1991

Mikva, Judge Abner. (Chief Judge, United States Court of Appeals, DC Circuit) "He has been a very good colleague." Wall Street Journal: July 2, 1991

Nunn, Senator Sam. (United States Senator, Georgia) "My intention right now is to support him, and I'll be having warm words of support at the hearings." Atlanta Constitution: July 17, 1991... "Clarence comes from a background of a segregated society, and I think over a period of time, if he is on the court, he will be very sensitive to discrimination." Washington Times: July 17, 1991

Quevedo, Frank. (former Chairman, Mexican-American Legal Defense and Education Fund) "[Thomas] made this agency (EEOC) responsible to the concerns of Hispanics, in word and in deed." Associated Press: July 25, 1991

Richey, Judge Charles R. (Judge, United States District Court for the District of Columbia) "I like Clarence Thomas. He's knowledgeable about the law. I think that he has all the sensitivities required to be a great justice." Associated Press: July 1, 1991.

Robinson, Judge Aubrey. (Chief Judge, United States District Court for the District of Columbia) "[Thomas is] a very hardworking person... He'll be very conscientious." Savannah Morning News: July 5, 1991

Santaniello, Judge Angelo. (Justice, Connecticut Supreme Court) "How would I describe him? He's a very warm person. Humble, personable, intense, straightforward with no airs. Clarence Thomas is a real fair guy. He shouldn't be stereotyped, because he won't walk a stereotyped line. Clarence calls it as he sees it, not as someone wants him to see it." New York Newsday: July 17, 1991

Silberman, R. Gaul. (Vice-Chairman, EEOC) "He walked in the door, rolled up his sleeves and went to work and turned the agency around. Under Clarence Thomas' leadership, the agency found its mission as a law enforcement agency and it attained a credibility that it had never had before." Los Angeles Times: July 7, 1991.

Spradling, James. (former Chairman, Missouri Department of Revenue) "He's one of the best lawyers I ever ran into." St. Louis Post-Dispatch: July 2, 1991

THE WHITE HOUSE

WASHINGTON

July 25, 1991

MEMORANDUM FOR EDE HOLIDAY

FROM: GARY BLUMENTHAL *GB*
SUBJECT: Clarence Thomas Update

We do not have much to report at this time.

- 1) Connie Newman's speech to the National Federation of Business and Professional Women's Clubs on July 22 reportedly went very well. Nonetheless, they passed a resolution opposing him (see attached).
- 2) Bobbie told me yesterday that Gwen King was connecting with the National Association of Blacks in Government and that it should work out for their July 29 - August 4 meeting.
- 3) Just to repeat, Secretary Sullivan is likely to appear at the Catholic Golden Age Conference on August 15.
- 4) We are still awaiting word whether Roger Wallace will do the Texas Hispanic Chamber of Commerce convention on July 27. Thus far, we have failed with Carla Hills, John Negroponce, Mike Farren, and Jules Katz. It is Roger's last day as Dep. Und. Sec. before he heads for his new position as commercial counselor in Mexico City. Therefore, it is a real inconvenience from a personal standpoint. I called Shiree yesterday to check what she thought of Lujan or Madigan, but I haven't heard back from her.
- 5) Both Alexander and Sullivan are working on the HBCU resolution. Remember that the goal is made just slightly more delicate by the ambition of the HBCU Board to be physically located at the White House.

IDEAS FOR THE FUTURE

Dan Casse of course claims the news in the next few weeks will be dominated by the William Kennedy Smith trial and the Milwaukee mass murder case. Nonetheless, a few wild thoughts for future activities:

- a. Alexander has found it very effective to challenge audiences to read the 1985 Clarence Thomas piece from the New York Times in which he explains the basis for his philosophy in life. Others may try a similar tack since reading Clarence Thomas is more persuasive than listening to pressure groups.

Page Two

b. The President may attend the September 11 Stan Scott dinner. The presence of many Black leaders could make it an opportune time to mention Judge Thomas.

c. We can remind the Cabinet of the President's discussion of the nomination at the July 23 Cabinet meeting and suggest they be prepared for him to possibly raise it again at the September 4 Cabinet meeting (e.g. follow what he wants).

Please call if you have questions.

RESOLUTION #10
SUPREME COURT NOMINATION

WHEREAS, the National Federation of Business and Professional Women's Clubs, Inc. (BPW/USA) has traditionally supported and sought to protect individual rights and freedoms for all and has promoted and supported said individual rights for women in particular, and;

WHEREAS, the retirement of Justice Thurgood Marshall has created a vacancy on the United States Supreme Court and Judge Clarence Thomas of the U.S. Court of Appeals has been nominated for this position by President George Bush, and;

WHEREAS, Judge Clarence Thomas has limited experience in the Judiciary, opposed most affirmative action plans as the former head of the Equal Employment Opportunity Commission, and appears reluctant to clearly state his position on basic individual rights, including a woman's right to reproductive freedom, and failed to provide full and fair interpretation and enforcement of existing civil rights laws, and;

WHEREAS, there are many qualified and experienced members of the Judiciary who aggressively support individuals' rights and freedoms provided under the Constitution of the United States, now, therefore, be it

RESOLVED that BPW/USA strongly opposes the appointment of Judge Clarence Thomas to the Supreme Court, and endorses the appointment and confirmation of a qualified, experienced Justice to the Supreme Court of the United States, who aggressively supports and promotes the preservation of individual rights and freedoms for all, and be it further

RESOLVED that BPW/USA ask all state federations and all other women's organizations to request their U.S. Senators to vote against ratification of the appointment of Clarence Thomas.

THE WHITE HOUSE

WASHINGTON

October 1, 1991

MEMORANDUM FOR SECRETARY ALEXANDER

FROM: EDE HOLIDAY *EH*
ASSISTANT TO THE PRESIDENT
AND SECRETARY OF THE CABINET

SUBJECT: Calls placed on behalf of Judge Clarence Thomas

As you know, the confirmation vote of Judge Clarence Thomas is nearing. We are asking for your help in ensuring his confirmation by contacting the below listed Members of the Senate on his behalf:

- * Senator Graham
- * Senator Pell

Please place these calls no later than Wednesday, October 2 and contact Fred McClure, Assistant to the President for Legislative Affairs (456-2230), with your evaluations. Your help with this very important nomination is greatly appreciated.

THE WHITE HOUSE

WASHINGTON

October 1, 1991

MEMORANDUM FOR SECRETARY MOSBACHER

FROM: EDE HOLIDAY 
ASSISTANT TO THE PRESIDENT
AND SECRETARY OF THE CABINET

SUBJECT: Call placed on behalf of Judge Clarence Thomas

As you know, the confirmation vote of Judge Clarence Thomas is nearing. We are asking for your help in ensuring his confirmation by contacting Senator Bill Cohen.

Please place this call no later than Wednesday, October 2 and contact Fred McClure, Assistant to the President for Legislative Affairs (456-2230), with your evaluation. Your help with this very important nomination is greatly appreciated.

THE WHITE HOUSE

WASHINGTON

October 1, 1991

MEMORANDUM FOR SECRETARY BRADY

FROM: EDE HOLIDAY *EH*
ASSISTANT TO THE PRESIDENT
AND SECRETARY OF THE CABINET

SUBJECT: Call placed on behalf of Judge Clarence Thomas

As you know, the confirmation vote of Judge Clarence Thomas is nearing. We are asking for your help in ensuring his confirmation by contacting Senator Lloyd Bentsen.

Please place this call no later than Wednesday, October 2 and contact Fred McClure, Assistant to the President for Legislative Affairs (456-2230), with your evaluation. Your help with this very important nomination is greatly appreciated.

THE WHITE HOUSE

WASHINGTON

October 1, 1991

MEMORANDUM FOR SECRETARY MADIGAN

FROM: EDE HOLIDAY ~~WA~~
ASSISTANT TO THE PRESIDENT
AND SECRETARY OF THE CABINET

SUBJECT: Call placed on behalf of Judge Clarence Thomas

As you know, the confirmation vote of Judge Clarence Thomas is nearing. We are asking for your help in ensuring his confirmation by contacting Senator Richard Shelby.

Please place this call no later than Wednesday, October 2 and contact Fred McClure, Assistant to the President for Legislative Affairs (456-2230), with your evaluation. Your help with this very important nomination is greatly appreciated.

THE WHITE HOUSE

WASHINGTON

October 1, 1991

MEMORANDUM FOR SECRETARY SKINNER

FROM: EDE HOLIDAY 
ASSISTANT TO THE PRESIDENT
AND SECRETARY OF THE CABINET

SUBJECT: Call placed on behalf of Judge Clarence Thomas

As you know, the confirmation vote of Judge Clarence Thomas is nearing. We are asking for your help in ensuring his confirmation by contacting Senator Wendell Ford.

Please place this call no later than Wednesday, October 2 and contact Fred McClure, Assistant to the President for Legislative Affairs (456-2230), with your evaluation. Your help with this very important nomination is greatly appreciated.

THE WHITE HOUSE

WASHINGTON

October 1, 1991

MEMORANDUM FOR SECRETARY LUJAN

FROM: EDE HOLIDAY 
ASSISTANT TO THE PRESIDENT
AND SECRETARY OF THE CABINET

SUBJECT: Call placed on behalf of Judge Clarence Thomas

As you know, the confirmation vote of Judge Clarence Thomas is nearing. We are asking for your help in ensuring his confirmation by contacting Senator Jeff Bingaman.

Please place this call no later than Wednesday, October 2 and contact Fred McClure, Assistant to the President for Legislative Affairs (456-2230), with your evaluation. Your help with this very important nomination is greatly appreciated.

THE WHITE HOUSE

WASHINGTON

October 1, 1991

MEMORANDUM FOR SECRETARY DERWINSKI

FROM: EDE HOLIDAY *Ede Holiday*
ASSISTANT TO THE PRESIDENT
AND SECRETARY OF THE CABINET

SUBJECT: Calls placed on behalf of Judge Clarence Thomas

As you know, the confirmation vote of Judge Clarence Thomas is nearing. We are asking for your help in ensuring his confirmation by contacting the below listed Members of the Senate on his behalf:

- * Senator Dodd
- * Senator Pryor

Please place these calls no later than Wednesday, October 2 and contact Fred McClure, Assistant to the President for Legislative Affairs (456-2230), with your evaluations. Your help with this very important nomination is greatly appreciated.

THE WHITE HOUSE

WASHINGTON

October 1, 1991

MEMORANDUM FOR SECRETARY KEMP

FROM: EDE HOLIDAY 
ASSISTANT TO THE PRESIDENT
AND SECRETARY OF THE CABINET

SUBJECT: Calls placed on behalf of Judge Clarence Thomas

As you know, the confirmation vote of Judge Clarence Thomas is nearing. We are asking for your help in ensuring his confirmation by contacting the below listed Members of the Senate on his behalf:

- * Senator Moynihan
- * Senator Lieberman
- * Senator Shelby

Please place these calls no later than Wednesday, October 2 and contact Fred McClure, Assistant to the President for Legislative Affairs (456-2230), with your evaluations. Your help with this very important nomination is greatly appreciated.

7/11/97

MEMORANDUM TO ALL ASSOCIATE DIRECTORS

FROM: GARY BLUMENTHAL *Gary*

SUBJECT: JUDGE THOMAS

First, please call your contacts and ask that they seek all opportunities for their Cabinet member to plug Judge Thomas. They should keep a tally of all the times their boss does a plug and report them to you.

Second, you need to review all major addresses by your Cabinet members between now and mid-October. By COB tomorrow, I want to present to Ede this separate calendar with a recommendation as to those speeches where we think the Cabinet member could make it a major address on behalf of Judge Thomas.

Thank you for your help on this. Please call with questions!