

AFJ NOMINEE REPORT

AMUL THAPAR



U.S. Court of Appeals for the Sixth Circuit

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INTRODUCTION

On August 16, 2013, Judge Boyce F. Martin Jr. of the Court of Appeals for the Sixth Circuit retired. On March 16, 2016, President Barack Obama nominated Kentucky Supreme Court Justice Lisabeth Tabor Hughes to fill the vacancy. Despite the fact that the American Bar Association unanimously rated her well qualified,¹ Senate Majority Leader Mitch McConnell refused to allow President Obama to fill the seat.² The Senate did not act on her nomination, and on January 3, 2017, pursuant to Senate rules, Justice Hughes's nomination was returned to the President.³

On March 21, 2017, President Donald Trump nominated Judge Amul Thapar of the Eastern District of Kentucky to fill the Sixth Circuit vacancy. This decision was readily foreseeable: Judge Thapar was on the list of 21 names then-candidate Trump publicized for the Supreme Court vacancy, and he was one of only a few individuals Trump interviewed for the position. Judge Thapar's appearance on Trump's Supreme Court short list is very concerning. During his campaign, Trump promised that his judicial nominees would "all [be] picked by the Federalist Society."⁴ He emphasized that the list would be developed by the Heritage Foundation and the "Federalist people."⁵ The president also laid out clear litmus tests. Among other things, his nominee would "automatically" overturn *Roe v. Wade* and said "we need a Supreme Court that, in my opinion, is going to uphold the

Second Amendment."⁶

It is no surprise that Judge Thapar was included on President Donald Trump's short list. Thapar had been active in efforts to elect Republicans, including as a member of the Commonwealth Political Action Committee.⁷ In fact, Judge Thapar's father characterized his son as so conservative he "nearly wouldn't speak to me after I voted for Barack Obama."⁸ President Trump nominated Judge Thapar to a seat Senator McConnell held open. And, Senator McConnell has called Thapar his "friend"⁹ (not a surprise given that Judge Thapar's most notable decision is one that would have further eroded campaign finance restrictions, a passion of the Senator's). As this report makes clear, key cases throughout Judge Thapar's career demonstrate that he is a conservative judge willing to push the boundaries of the law to achieve certain results, including denying individuals access to federal court.

Given these facts, it is particularly critical that the Senate closely scrutinizes Judge Thapar—a nominee who will, if confirmed, have a lifetime seat on the Sixth Circuit Court and who will impact the lives of millions of individuals in Michigan, Ohio, Kentucky and Tennessee. To aid the Senate in its task of evaluating this nomination, this report examines critical decisions throughout Judge Thapar's career. We focus in particular (albeit not exclusively) on a number of decisions where he has been overturned by the Sixth Circuit. These cases provide an objective basis to conclude that a case could have come out differently and thus

¹ See American Bar Association, *Rating of Article III and Article IV Vacancies (Jan. 3, 2017)*, <http://www.americanbar.org/content/dam/aba/un categorized/GAO/WebRatingChart14.auth-checkdam.pdf>.

² See Joseph Gerth, *McConnell Rejects Obama Choice of Ky Judge*, COURIER-JOURNAL (Mar. 18, 2016), <http://www.courier-journal.com/story/news/politics/2016/03/18/mcconnell-says-he-kill-6th-circuit-nomination/81971446/>. It bears noting that in supporting Neil Gorsuch's confirmation to the Supreme Court, Mitch McConnell explicitly highlighted the ABA's rating in advocating for Judge Gorsuch's elevation to the Supreme Court. See Mitch McConnell, *Gorsuch's confirmation worth the fight*, COURIER-JOURNAL (Apr. 7, 2017), <http://www.courier-journal.com/story/opinion/contributors/2017/04/07/gorsuchs-confirmation-worth-fight-mcconnell/100169058/>. This apparently did not matter for Justice Hughes.

³ See Zoe Tillman, *Mitch McConnell Announced Trump's First Lower Court Nominee Before The White House Did*, BUZZFEED (Mar. 21, 2017), https://www.buzzfeed.com/zoetillman/mitch-mcconnell-announced-trumps-first-lower-court-nominee?utm_term=.etb6eXayq#syqBQBn8o.

⁴ Lawrence Baum & Neal Devins, *Federalist Court*, SLATE (Jan. 31, 2017), www.slate.com/articles/news_and_politics/jurisprudence/2017/01/how_the_federalist_society_became_the_de_facto_selector_of_republican_supreme.html.

⁵ *Id.*

⁶ Dan Mangan, *Trump: I'll appoint Supreme Court justices to overturn Roe v. Wade abortion case*, CNBC (Oct. 16, 2016), <http://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html>; see also Christine Wang, *Trump comes out hard for the Second Amendment*, attacks Justice Ginsburg, CNBC (Oct. 20, 2016), <http://www.cnbc.com/2016/10/19/trump-comes-out-hard-for-the-second-amendment-attacks-justice-ginsburg.html>.

⁷ The Commonwealth Political Action Committee, of which Judge Thapar was a member, worked to get Republicans elected to state government positions. See, e.g., *Patrick Crowley, N. Ky. GOP ready to do battle for secretary of state seat*, The Cincinnati Enquirer, Dec. 15, 2002, at 1B; *Patrick Crowley, N. Ky. PAC has a plan*, The Cincinnati Enquirer, Feb. 7, 2002, at 1B.

⁸ Andrew Wolfson, *Ky Judge on Trump's short list for high court*, USA TODAY (Dec. 9, 2016), <http://www.indystar.com/story/news/politics/2016/12/09/ky-judge-trumps-short-list-high-court/95139578/>.

⁹ Tillman, *supra* note 3.

are especially useful for identifying the ideology of a specific judge. We do not analyze every case, for example those where Judge Thapar applied clear facts to equally clear law. See, e.g., [*Solis v. Freedom Mining Energy Co.*, 756 F. Supp. 2d 835, 836 \(E.D. Ky. 2010\)](#) (permitting the Labor Department to bring suit against mining companies); [*Barnette v. Grizzly Processing, LLC*, 809 F.Supp.2d 636 \(E.D. Ky. 2011\)](#) (granting in part and denying in part a company's summary judgment motion against plaintiffs that alleged black dust from the company's plant interfered with their ability to use and enjoy their homes). While Judge Thapar, over the course of his near-decade on the bench, has few cases on contentious and controversial issues, we do focus on three areas of his record that we believe illuminate the type of appellate judge Judge Thapar would be: (1) his propensity to erect barriers, not compelled by law, to access federal court; (2) his decision in *Winter v. Wolnitzek*, concerning money in politics; and (3) a harshness with respect to criminal justice, again beyond dictates of law.

BIOGRAPHY

Amul Thapar was born in Detroit, Michigan, the son of two Indian immigrants. In 1991, he earned a B.S. from Boston College. In 1994 he earned his J.D. from the University of California, Berkeley, Boalt Hall School of Law. He then served as a law clerk to Judge S. Arthur Spiegel of the Southern District of Ohio and Judge Nathaniel R. Jones of the Sixth Circuit.

Following his clerkships, Thapar worked as an associate at Williams & Connolly in Washington, D.C. After two years at the firm, in 1999, Thapar became an Assistant U.S. Attorney in the District of Columbia. From 2000-2001, Thapar was the General Counsel for a small startup known as Equalfooting.com before moving to the firm Squire, Sanders & Dempsey in 2001. After another short law firm stint, Thapar became an Assistant U.S. Attorney in the Southern District of Ohio from 2002 to 2006.¹⁰

¹⁰ See CONG. REC. S2047-48 (2006), available at <https://www.congress.gov/crec/2006/03/13/>

President Bush then nominated Thapar to become the United States Attorney for the Eastern District of Kentucky. The Senate confirmed him on March 13, 2006.

Thapar also taught a number of classes. He served as an adjunct professor at the University of Cincinnati College of Law between 1995 and 1997 and again from 2002 to 2006. He worked as a trial advocacy instructor at Georgetown University Law Center from 1999 to 2000. Finally, he taught classes as an adjunct professor while on the bench at Northern Kentucky University (2011-2012), Vanderbilt Law School (2011), and University of Virginia School of Law (2012).¹¹

As an attorney, Thapar was affiliated with the American Bar Association, the D.C. Bar Association, and the Kentucky Bar Association. He was also associated with the Becket Fund for Religious Liberty and the Conservative Forum, and was a member of the Commonwealth Political Action Committee. Judge Thapar was a member of the Federalist Society before his appointment to the bench and has continued to actively attend Federalist Society events over the last decade.¹² He has moderated panels or introduced speakers for a number of Federalist Society panels and debates, including: "Immigration Restrictions and the Constitution" at the University of Virginia and "Justice Thomas and Criminal Procedure" at Yale Law School. He has also participated in events about sentencing issues, and gave a talk entitled "Can Judges Speak: First Amendment and the Courts" at Columbia Law School.¹³

On May 24, 2007, President Bush nominated

[CREC-2006-03-13-pt1-PgS2047-3.pdf](#)

¹¹ See Sen. Comm. on the Judiciary, 115th Cong., Amul Thapar: Questionnaire for Judicial Nominees—Public 2–5, (2017), <https://www.judiciary.senate.gov/imo/media/doc/Thapar%20SJC%20Public.pdf>

¹² See *id.* at 9.

¹³ See Amul Thapar, *Can Judges Speak? The First Amendment and the Courts*, COLUMBIA LAW SCHOOL (Oct. 24, 2016), <http://www.law.columbia.edu/content/can-judges-speak-first-amendment-and-courts>. Some of these talks are available online, others are not.

Thapar to be a judge on the United States District Court for the Eastern District of Kentucky. The Senate confirmed him in December 2007 and he received his commission on January 4, 2008. Upon joining the bench, Judge Thapar became the first American of South Asian descent to become a federal judge.

JUDICIAL OPINIONS

I. ACCESS TO JUSTICE

A troubling pattern in Judge Thapar’s jurisprudence is his propensity to erect barriers to individuals having their day in court. Whether through inappropriate use of summary judgment, making it more difficult for attorneys to obtain attorney’s fees, or using extraordinary procedural tools (like the abstention doctrine), his opinions demonstrate that he looks for reasons to dismiss potentially meritorious lawsuits.

Sours v. Big Sandy Regional Jail Authority

In [*Sours v. Big Sandy Regional Jail Authority \(Sours I\)*](#), 946 F. Supp. 2d 678 (E.D. Ky. 2013), James Sours, a pretrial detainee, died in jail two days after he was booked. Sours had diabetes, and he began showing symptoms of ketoacidosis (a preventable complication of diabetes) shortly after he was arrested. Sours told the only medical professional at the jail—Nancy Allison, the jail house nurse—that he was diabetic and did not have his insulin with him. Sours also told her he had liver problems, high blood pressure, had not seen his doctor in two months, and had not taken his insulin for over a month because he was out of insulin. Allison also noted that Sours’s blood sugar was 283 mg/dl, well above the normal range of 65-100 mg/dl. A medical expert testified that this was “quite high

and definitely indicating the need for insulin treatment.” [*Sours v. Big Sandy Reg’l Jail Auth. \(Sours II\)*](#), 593 F. App’x 478, 480 (6th Cir. 2014) (internal quotation marks omitted).

Allison neither administered insulin kept at the jail nor tried to get insulin for him, which was available through overnight mail. Instead, she left for the night after putting Sours on a special diet.

The next morning, Sours’s blood sugar level was 254 mg/dl. That day, a doctor reviewed notes on Sours which indicated Sours was “clearly a sick man.” *Id.* at 481 (internal quotation marks omitted). The doctor faxed a diagnosis of diabetes and indicated she would see Sours on her next visit in four or five days. It was the doctor’s “understanding that Allison would use the standard sliding scale to administer insulin . . . until the consultation.” *Id.*

Later that day, Sours’s blood sugar was 327 mg/dl. The doctor was “never made aware that Sours’s blood sugar rose to 327 mg/dl but asserts that if she had, she would have told Allison to contact Sours’s pharmacy to find out his regular insulin dose and to administer it immediately.” *Id.*

Thereafter, guards informed Allison that Sours was “acting up.” *Id.* Sours complained of nausea and vomiting and had tremors – “all signs of ketoacidosis” but the nurse “still did not believe Sours was at risk.” *Id.* Instead, according to the Sixth Circuit,

Allison did not administer insulin kept at the jail, did not call Sours’s pharmacy to find out his regular dose, and did not order insulin for his use. Nor did she send Sours to the emergency room, though [the doctor] stated she expected Allison would have done so. Instead . . . she placed Sours in a medical observation cell, left instructions for the guards to monitor his blood sugar,

and left for a long weekend with the knowledge that no medical professionals would be at the jail for five days, until the following Monday. The last time she saw Sours, he was wrapped in a blanket and lying down. Allison testified that she also knew weakness and sleepiness to be common symptoms of diabetic ketoacidosis.

Id. After Allison left for the weekend, multiple guards “observed Sours’s worsening condition, including chest pain and nausea, but did little to help him. Unlike Nurse Allison, they were not fully aware of Sours’s potentially life-threatening condition.” *Id.* at 482. Over the next day, Sours’s condition continued to deteriorate until a deputy jailer found Sours lying in his cell breathing but unresponsive. Three guards discussed taking Sours to the hospital, “but decided against it. It is unclear why not, as the hospital was only four-to-five minutes’ drive away.” *Id.* at 482–83. Twelve minutes after Sours was discovered, an ambulance was called, but by the time it arrived Sours was not breathing and died of diabetic ketoacidosis.

His family brought suit against the nurse under 42 U.S.C. § 1983, alleging that the nurse acted with deliberate indifference toward Sours’s serious medical needs. But Judge Thapar granted her motion for summary judgment and denied Sours’s family the opportunity to present its case to a jury.

Judge Thapar held that Allison did not act unreasonably because she took “some actions in response to Sours’s condition, including placing him in a medical observation cell and instructing the guards to monitor his blood sugar.” *Sours II*, 593 F. App’x at 486.

Though the supervising physician explained that the nurse “could have called her” or “taken Sours to the hospital,” and Judge Thapar conceded she “may have chosen poorly here,” he still granted the nurse qualified immunity after she failed to treat Sours or to notify a medical doctor of Sours’s dangerous symptoms. *Sours I*, 946 F. Supp. 2d at 692.

A unanimous panel on the Sixth Circuit, including Judge Deborah Cook, who is a George W. Bush appointee, disagreed and reversed Judge Thapar’s decision. The court’s opinion listed the nurse’s litany of errors: failing to order insulin, deciding not to contact a physician, leaving without giving instruction to the guards if Sours’s insulin levels rose, and knowingly departing with no contingency plans when she knew no medical staff would be in the jail for five days.

The Sixth Circuit also emphasized testimony that Judge Thapar omitted, namely that “expert testimony indicated that . . . Allison’s actions were not reasonable within the bounds of standard nursing practice; and . . . reasonable care would have included insuring that Sours was under the care of medical staff.” *Sours II*, 593 F. App’x at 486.

The Sixth Circuit was particularly critical of Judge Thapar: “Our holding that medical care that is so cursory as to amount to no treatment at all constitutes deliberate indifference does not support the district court’s conclusion that there is no deliberate indifference unless the treatment amounted to no treatment at all.” *Id.* It added, “a jury could find that Allison consciously exposed Sours to an excessive risk of serious harm by failing to arrange for insulin injections or medical care.” *Id.*

Turner v. Astrue

In [*Turner v. Astrue* \(Turner I\)](#), [764 F. Supp. 2d 864 \(E.D. Ky. 2010\)](#), Judge Thapar’s ruling would have made it more difficult for attorneys to collect certain types of fees, thereby making it more challenging for individuals with limited means to secure representation and to pursue claims in court.

Wolodymyr Iwan Cybriwsky served as John Turner’s attorney in an action to obtain social security disability benefits. Turner and

Cybriwsky agreed that Turner was relieved of the obligation to pay Cybriwsky if they “d[id] not win the case,” but assigned to Cybriwsky any fees that the court may award Turner under the Equal Access to Justice Act (EAJA). *Id.* at 866. After Turner’s disability benefits were denied, Turner appealed to the district court, which reversed the decision and remanded the case to the Social Security Commissioner. Thereafter, Turner filed a motion for attorney’s fees pursuant to the EAJA.

Judge Thapar held that no fees were required where a contingency fee arrangement required payment only where a plaintiff had “incurred” attorney’s fees—when he either paid them or has a legal obligation to pay them. And, here, because the district court had remanded the case without awarding benefits, Judge Thapar held that Turner did not incur attorney’s fees. *Id.* at 868.

The Sixth Circuit—in an opinion joined by Judge David McKeague (a George H.W. Bush appointee) and Judge Paul Zatkoff (a Reagan-appointed district court judge sitting by designation)—reversed. The court concluded that “litigants ‘incur’ fees under the EAJA when they have an express or implied legal obligation to pay over such an award to their legal representatives.” [*Turner v. Comm’r of Soc. Security \(Turner II\)*, 680 F.3d 721, 725 \(6th Cir. 2012\)](#). The Sixth Circuit highlighted “[c]ase law from multiple circuits establishes that the plain meaning of ‘incurred’ does not require the plaintiff to have paid counsel or to have a legal obligation to pay counsel.” *Id.* at 723. It added that it is “well-settled” that the existence of an unsatisfied contingency or pro bono representation agreement does not preclude a fee award. *Id.* at 724. Moreover, the court said, “this uniformity in precedent creates the clear and unambiguous meaning of ‘incurred’ necessary to find a waiver of sovereign immunity that includes contingency-fee actions.” *Id.* Finally, it explained, allowing fee awards in this situation “further[s] the EAJA’s purpose” of “eliminating for the average person the financial disincentive to challenge unreasonable governmental actions through fee shifting.” *Id.* (internal quotation marks omitted).

Had Judge Thapar’s opinion (one which ignored “uniformity in precedent”) prevailed, fewer persons would have been able to challenge government illegality. In fact, the Sixth Circuit noted that 90 percent of favorable district court judgments in favor of claimants—some 5,500 cases per year—are remand orders, not benefit awards. See *id.* “Interpreting the EAJA to require a benefits award as a precondition for awarding fees to contingency-fee attorneys would prevent these attorneys from receiving EAJA fee awards.” *Id.* “[S]uch an interpretation would effectively preclude EAJA fee awards for work at the district-court level and ‘the financial deterrent that the EAJA aims to eliminate would be resurrected.’” *Id.*

Hill v. Lappin

Demetrius Hill, a federal prisoner, alleged that prison staff placed him in segregated housing and threatened to transfer him to the lock-down unit in retaliation for grievances he had filed against the prison staff. He also feared for his life if he was transferred to Lewisburg prison, where he had previously served time and where, he alleged, staff members had “viciously assaulted him” and told other prisoners that “Hill was a rat and should be stabbed.” [*Hill v. Lappin \(Hill I\)*, No. 09-07-ART, 2009 U.S. Dist. LEXIS 33138 \(E.D. Ky. Apr. 17, 2009\)](#) (internal quotation marks omitted). Relying on *Bivens*, Hill filed a pro se civil rights lawsuit.

Judge Thapar dismissed Hill’s complaint as “frivolous” because, he wrote, a prisoner does not have an “inherent constitutional right to avoid a transfer from one prison to another, [or] to remain free of security classifications that would place them in segregation or specialized housing units.” *Id.* at *6. Judge Thapar also found that Hill’s allegations that the Lewisburg staff would have assaulted and possibly killed him lacked an arguable basis in fact because it

was conjectural and lacking in specificity.

The Sixth Circuit, in an opinion joined by Judge Richard Griffin and Thomas Rose—both George W. Bush appointees—reversed. [*Hill v. Lappin* \(Hill II\), 630 F.3d 468, 470 \(6th Cir. 2010\)](#). The court emphasized that the allegations in Hill’s complaint, “although inartfully pled,” “sufficiently state a First Amendment retaliation claim, especially in light of the indulgent treatment that courts are instructed to give . . . to the inartfully pleaded allegations of pro se prison litigants.” *Id.* at 472 (internal quotation marks omitted). While Hill did not explicitly argue that he was making a First Amendment retaliation claim, he did allege that the prison staff placed him in segregated housing and recommended he be transferred in retaliation for grievances he filed against prison staff.

And, at the motion to dismiss stage, “because Hill’s allegation” that the prison staff “were being abusive is at least plausible, his complaint should not be dismissed as frivolous.” *Id.* at 472.

The Sixth Circuit highlighted the flaws in Judge Thapar’s analysis. First, Judge Thapar reasoned that because prisoners do not have an inherent constitutional right to avert a transfer from one prison to another or avoid specialized housing units, Hill could not establish a constitutional violation by alleging that he was placed in segregated housing or threatened with a prison transfer in retaliation for filing grievances. As the Sixth Circuit explained, “the problem with this analysis is that its premise – that a prisoner does not have an inherent constitutional right to avoid segregated housing or prison transfers – is too narrow.” *Id.* at 473. Even if no right exists, the prison cannot act “as a means of retaliating against him for exercising his First Amendment rights.” *Id.* at 473.

The Sixth Circuit continued that the “district court’s analysis went astray . . . in focusing on the wrong constitutional right; i.e. the nonexistent right to avoid segregated housing and prison transfers versus the existing right to avoid retaliation for

exercising the First Amendment right to file grievances against prison officials.” *Id.* at 473. It emphasized that “[b]eing threatened with a transfer to a more restrictive living environment with fewer privileges would deter a person of ordinary firmness from exercising the constitutional right to file grievances.” *Id.* at 476.

Stiltner v. Hart

On May 12, 1986, Roy Stiltner pleaded guilty to murder and a Kentucky state court sentenced him to life in prison. In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA), and included a one year period of limitations for habeas petitions brought by prisoners challenging state-court judgments. Prisoners whose convictions were finalized before Congress enacted AEDPA—like Stiltner—had one year to file petitions. Stiltner missed the deadline, filing his petition nearly sixteen years after the deadline had passed. In his petition, Stiltner argued that his counsel had been ineffective for advising Stiltner to plead guilty and for failing to inform Stiltner of his right to appeal. See [*Stiltner v. Hart* \(Stiltner II\), 657 F. App’x 513 \(6th Cir. 2016\)](#).

Stiltner acknowledged that his petition was untimely, but argued that he was entitled to a waiver of the deadline under the legal principle of equitable tolling due to “mental retardation.” *Id.* at 515.

At an evidentiary hearing, a doctor testified that Stiltner’s IQ was 62—most adults score between 85 and 115—which is “within a range that is typically associated with what [clinical psychologists previously] called ‘mental retardation’ and currently refer to as ‘intellectual disability.’” *Id.* at 516. The doctor also tested Stiltner’s logical reasoning skills by asking him to explain relationships between objects, such as how a boat and a car are similar. “Stiltner could not answer any of [the doctor’s] questions correctly.” *Id.*

at 516. On a vocabulary test, Stiltner scored in the third percentile, which meant Stiltner “would be expected to do better than only three of the 100 in terms of understanding words spoken to him.” *Id.* at 516. Stiltner also “evinced a very limited short-term memory” and “had difficulty doing things that by in [sic] large we would expect normal people to be able to do.” *Id.* at 516 (internal quotation marks omitted).

Two of Stiltner’s fellow prisoners also testified. Stiltner’s former roommate in prison testified that “Stiltner has the mental capacity of a 2 or 5-year old.” *Id.* at 517. He said that Stiltner genuinely believed that John Wayne movies he watched on television were real life. He also testified that Stiltner could not read or write and that he had a “real short attention span.” *Id.* at 517. In fact, Stiltner could not even fill out a canteen sheet, and he could not identify items on the canteen sheet, like coffee, that he ordered every single month for a year. *Id.* at 518.

Judge Thapar adopted the Magistrate Judge’s recommendations, dismissing Stiltner’s petition as untimely. Specifically, Judge Thapar held that Stiltner was not “otherwise diligent” in attempting to file his petition. [Stiltner v. Brown \(Stiltner I\), No. 13-203-ART, 2015 U.S. Dist. LEXIS 159844 \(E.D. Ky. Nov. 30, 2015\)](#). Judge Thapar ruled equitable tolling was not available to him because Stiltner had three individuals helping him during the statute of limitations period—a jailhouse lawyer and two attorneys—and yet he did not file on time.

On appeal, the Sixth Circuit reversed. It made clear that while equitable tolling should be applied “sparingly . . . we have also recognized the need for flexibility in equitable procedures.” *Stiltner II*, 657 F. App’x at 520. It emphasized that “although our application of equitable tolling is restrained, we avoid rigid rules and consider equitable tolling claims on a case-by-case basis.” *Id.* at 520. The court also noted that “mental incompetence can constitute an extraordinary circumstance” justifying tolling. *Id.* at 521. The court noted that Stiltner’s evidence “shows that he is mentally incompetent—

that he is unable rationally or factually to personally understand the need to timely file and unable personally to prepare a habeas petition and effectuate its filing.” *Id.* at 522.

The Sixth Circuit also noted that Stiltner established that “his mental incompetence caused his failure to comply with AEDPA’s statute of limitations.” *Id.* at 522. The evidence, the Sixth Circuit noted, “shows that Stiltner barely understood his claims, if he understood them at all.” *Id.* at 523. The evidence further demonstrated that his “intellectual disability is severe.” *Id.* at 523. The court added that “it is unfathomable that [Stiltner] would be able to conceive of the need to timely file a habeas petition, and then, given his extremely short attention span and poor memory, that he would be able to monitor the legal assistance provided for him by a fellow prisoner or an attorney to make sure that they met the relevant deadline.” *Id.* at 524.

Wasek v. Arrow Energy Services

In [Wasek v. Arrow Energy Services, 682 F.3d 463 \(6th Cir. 2012\)](#), Judge Thapar, sitting by designation on the Sixth Circuit, authored the majority opinion rejecting an oil-rig worker’s sexual harassment and retaliation claims. There, Harold Wasek alleged that one of his coworkers, Paul Ottobre, made unwanted sexual advances and repeatedly touched him in a sexual way. The two men worked on a four-man crew on an oil rig in Pennsylvania. According to Wasek, Ottobre told him “you’ve got a pretty mouth,” “boy you have pretty lips,” and “you know you like it sweetheart.” *Id.* at 465. Ottobre also grabbed Wasek’s buttocks and simulated intercourse by poking Wasek in the buttocks with a hammer handle and a long rod. See *id.* Moreover, Ottobre told Wasek sexually explicit jokes, stories, and fantasies. See *id.* Wasek reported Ottobre’s conduct to his supervisor, who discouraged Wasek from filing a complaint and threatened to dismiss

him from the job if he complained. See *id.* Wasek finally did complain to higher level management, but they declined to take any action. Unable to stand the harassment any longer, Wasek walked off the job. See *id.* at 466. The company told Wasek that they wouldn't terminate him, but said that they would not assign him to any jobs in Pennsylvania, forcing Wasek to wait for a job opening in another state. See *id.* at 466–67.

Wasek sued under Title VII, alleging that he had been subjected to sexual harassment and retaliation when he reported the abuse. The district court granted summary judgment in favor of the company, and Judge Thapar agreed that no reasonable juror could find in Wasek's favor. Applying [*Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 \(1998\)](#), Judge Thapar concluded that in order to sustain a claim of same-sex sexual harassment under Title VII, Wasek had to show that Ottobre's actions were because of Wasek's gender, which he could only do in this case by producing "credible evidence that the harasser was homosexual." *Wasek*, 682 F.3d at 468. And Wasek's statement that he thought Ottobre was "possibly bisexual" was not sufficient evidence to survive summary judgment and have his case heard by a jury. *Id.*

Judge Thapar's application of *Oncale* inappropriately restricted same-sex sexual harassment claims and has been rejected by several other circuits. See [*Redd v. N.Y. State Div. of Parole*, 678 F.3d 166 \(2d Cir. 2012\)](#); [*Cherry v. Shaw Coastal, Inc.*, 668 F.3d 182 \(5th Cir. 2012\)](#); [*Shepherd v. Slater Steels Corp.*, 168 F.3d 998 \(7th Cir. 1999\)](#). Under very similar facts in *Redd*, the Second Circuit concluded that there was "no principled reason why a jury, considering the evidence of repeated touching of such gender-specific body parts, would not be permitted to draw the inference" that the harassment was because of the employee's sex. 678 F.3d at 179. The Fifth Circuit in *Cherry* explained that "if a plaintiff presents evidence that he was harassed by a member of the same sex, and that the harassment was sexual rather than merely humiliating in nature, that evidence is sufficient to

support a verdict in the plaintiff's favor." 668 F.3d at 188. And in *Shepherd*, the Seventh Circuit concluded that in the absence of any evidence that the harasser was gay, "the connotations of sexual interest in [the plaintiff] certainly suggest that [the harasser] might be sexually oriented toward members of the same sex," which "leaves ample room for the inference" that the harasser engaged in the harassment because of the plaintiff's sex. 168 F.3d at 1010.

Watson v. Kentucky

In [*Watson v. Kentucky, No. 15-21-ART, 2015 U.S. Dist. LEXIS 86998 \(E.D. Ky. July 6, 2015\)*](#), Stephanie Watson, a registered nurse who was addicted to opiates, had been charged in state court with "taking drug remnants from a medical center's bio hazard disposal box." *Id.* at *2. While she was awaiting trial, the state court put her on monitored conditional release. One of the requirements of her release was that she not take any narcotic medication to assist with the treatment of her opioid addiction without a note from her physician saying that it was medically necessary. She challenged the condition in state court, arguing that administration of certain narcotic medication was necessary for her treatment, but the state court judge sustained the condition.

The state court's application of the condition represented a pattern in Kentucky state courts at the time: Against the weight of medical science, judges in Kentucky were requiring abstinence-only treatment for people addicted to opiates. This practice proved to be dangerous and ineffective and resulted in the federal government threatening to withhold funding from drug courts that prevented people from using medication-assisted treatment to opioid addiction.¹⁴

Watson then raised constitutional (and other)

¹⁴ See Jason Cherkis, *Kentucky Reforms Drug Court Rules to Let Heroin Addicts Take Prescribed Meds*, THE HUFFINGTON POST (Apr. 17, 2015), http://www.huffingtonpost.com/2015/04/17/heroin-addiction-kentucky_n_7088270.html.

challenges to the condition in federal court. Judge Thapar dismissed her claims, reasoning that the *Younger* doctrine established in an earlier Supreme Court decision prevented him from meddling in a parallel state court criminal proceeding. *Id.* at *4–5.

The case represents an extremely broad application of *Younger v. Harris*, 401 U.S. 37 (1971), in a way that harmed a vulnerable person trying to exercise her rights. It demonstrates how Judge Thapar abused procedural hurdles to turn a blind eye to claims from a defendant that the state was violating the Constitution.

Indeed, in *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584 (2013), Justice Ginsburg, writing for a unanimous court, explained that *Younger* abstention should be invoked sparingly: “Jurisdiction existing, this Court has cautioned, a federal court’s ‘obligation’ to hear and decide a case is ‘virtually unflagging.’ Parallel state-court proceedings do not detract from that obligation.” *Id.* at 591 (internal citation omitted). As for meddling in state court criminal proceedings, Justice Ginsburg said the following: “When there is a parallel, pending state criminal proceeding, federal courts must refrain from enjoining the state prosecution.” *Id.* at 588. But Watson’s request in the district court, that one of her conditions of conditional release be removed, would not have had the impact of “enjoining” the state prosecution from proceeding. Indeed, resolving the issue of whether Watson’s condition of supervision violated her constitutional rights would not affect the merits of the ongoing criminal prosecution. See, e.g., *Gilbertson v. Albright*, 381 F.3d 965, 977-78 (9th Cir. 2004) (“[W]e are convinced that *Younger* abstention involves only such interference as the Supreme Court described in *Samuels*—that which would have the same practical effect on the state proceeding as a formal injunction.”).

Lawrence v. 48th District Court

A federal court must entertain an application for a writ of habeas corpus on behalf of a person who is “in custody pursuant to the judgment of

a State court” if the person is “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). In *Lawrence*, the petitioner was subject to a stayed sentence of non-reporting probation and community service. The Sixth Circuit concluded that “together, probation and an onerous community service requirement imposes [sic] significant restraints of liberty. In addition, should Lawrence have violated the terms of probation or community service, the court could revoke his probation and incarcerate him.” *Lawrence v. 48th Dist. Court*, 560 F.3d 475, 481 (6th Cir. 2009). As a result, these restraints of liberty were sufficient to satisfy the “in custody” requirement.

Sitting by designation on the Sixth Circuit, Judge Thapar concurred. He felt bound by circuit precedent, but opined that the words “in custody” were being read too broadly and that there is a need to “rein in” the definition of “in custody.” *Id.* at 485 (Thapar, J., concurring). He wrote, “[a]s these words have a plain meaning that clearly does not stretch so far as to cover individuals who are not in custody, but are merely subject to personal recognizance bonds, it would seem that the petitioner does not fit within the class of people who are capable of bringing a habeas petition.” *Id.* at 485. He proclaimed “that Congress or the Supreme Court should restore the proper definition by clarifying what exactly is meant by ‘in custody.’” *Id.* at 485. If Judge Thapar’s reasoning were adopted, fewer persons would be able to challenge unconstitutional practices in federal court.

II. MONEY IN POLITICS

In *Winter v. Wolnitzek (Winter I)*, 186 F. Supp. 3d 673 (E.D. Ky. May 13, 2016), Judge Thapar enjoined enforcement of eight rules of judicial conduct that Kentucky had enacted to keep judges nonpartisan and judicial candidates out of partisan politics. The Sixth Circuit, in an opinion by George W. Bush appointee

Jeffrey Sutton, reversed his decision with respect to three provisions: rules prohibiting candidates from making a contribution to or campaigning with a political organization; making pledges, promises, or commitments with respect to issues; and making misleading statements. See [Winter v. Wolnitzek \(Winter II\)](#), 834 F.3d 681 (6th Cir. 2016).

Judge Thapar’s consideration of the rule prohibiting candidates from “mak[ing] a contribution to a political organization or candidate” is particularly noteworthy. Judge Thapar was willing to strike down ethical rules to permit state judges to engage in hyperpartisan activities via financial contributions. He went further than judges on the Sixth Circuit could countenance, which also raises serious concerns about his attitude toward money in politics.

In analyzing the rule, Judge Thapar concluded that while the state has an interest in preventing “bias against parties,” by limiting campaign contributions to political parties Kentucky had gone too far in violating the candidates’ rights. *Winter I*, 186 F.3d at 693. He wrote that “there is simply no difference between ‘saying’ that one supports an organization by using words and ‘saying’ that one supports an organization by donating money.” *Id.* And, relying on [Buckley v. Valeo](#), 424 U.S. 1 (1976), and [Citizens United v. FEC](#), 558 U.S. 310 (2010), Judge Thapar reasoned that “financial contributions count as speech” and “thus strict scrutiny applies.” *Winter I*, 186 F.3d at 693. He added that “Kentucky may limit a judicial candidate’s contribution to a political organization or candidate, therefore, only if that restriction is narrowly tailored to serve a compelling interest.” *Id.* (internal quotation marks omitted).

Applying strict scrutiny, Judge Thapar found that the state’s restriction on campaign contributions was not narrowly tailored, even if preventing bias in the judiciary was a compelling state interest:

If a judge or candidate can tell people explicitly that he is a Republican, then it is hard to see how

it would advance the state’s interest—in preventing bias against litigants—to forbid a candidate to donate to the Republican Party. After all, the fear is presumably that a Republican judge might be biased against Democratic litigants, or at the very least that he might appear to be so biased. But after a judge has already made clear that he is a Republican, which he is at total liberty to do under *Carey*, forbidding him to donate to the Republican Party does nothing to assuage that fear. The horse has already escaped the paddock at that point; closing the gate after him does very little. Thus, the Canon is not narrowly tailored toward promoting a governmental interest.

Id. at 694. Therefore, Judge Thapar continued, Kentucky could not prohibit judicial candidates from making financial contributions to a political organization or candidate.

But the Sixth Circuit disagreed. While noting that financial contributions “amount to speech,” the Sixth Circuit emphasized that there is a difference between a contribution to a political organization and a candidate’s own speech: “A contribution to a political organization or a candidate in a different campaign is less a judge’s communication about his qualifications and beliefs than an effort to affect a separate political campaign, or even more problematically, assume a role as a political powerbroker.” *Winter II*, 834 F.3d at 690 (internal quotation marks omitted). Thus, “[w]hile judicial candidates have a First Amendment right to speak in support of their campaigns, they do not have an unlimited right to contribute money to someone else’s campaign.” *Id.* The distance between a contribution to someone else’s campaign “and speech about a judge’s own campaign justifies a more deferential approach to government prohibition” of contributions. *Id.*

The Sixth Circuit next determined that

the “contributions clause narrowly serves the Commonwealth’s compelling interest in preventing the appearance that judicial candidates are no different from other elected officials when it comes to *quid pro quo* politics.” *Id.* at 691.

Beyond the Sixth Circuit’s criticism of Judge Thapar’s decision, Judge Thapar (without any analysis or even reference to key cases) misapplied precedent by requiring the contribution ban in this case to survive the strictest scrutiny. In so doing, he evidenced a belief that political financial contributions should qualify as a highly protected form of free speech, a significant step beyond what has been established in legal precedent.

Unlike Judge Thapar—who wrote that “there is simply no difference between ‘saying’ that one supports an organization by using words and ‘saying’ that one supports an organization by donating money”—the Supreme Court has never treated donating money as the equivalent of pure speech. *Winter I*, 186 F.3d at 693. In *Buckley*, the Court distinguished between *spending money* to advocate for or against a candidate and *contributing money* to that candidate’s campaign, explaining that a limitation upon contributions “entails only a marginal restriction upon the contributor’s ability to engage in free communication.” 424 U.S. at 20. And, the Court has reaffirmed this distinction, emphasizing that “[c]ontributions lie closer to the edges than to the core of political expression.” *FEC v. Beaumont*, 539 U.S. 146, 161 (2003). Thus, the Supreme Court has explicitly declined to apply the strictest form of scrutiny to limits on campaign contributions, instead striking down contribution limits under the “closely drawn” test articulated in *Buckley*. See *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014). And, while *McCutcheon* dealt with a contribution limit as opposed to a ban, the Supreme Court upheld a ban on corporate contributions in *Beaumont*. Indeed, as the D.C. Circuit has noted, “the Supreme Court has repeatedly applied this ‘closely drawn’ standard to challenges to campaign contribution restrictions. And it has repeatedly (and recently) declined invitations to revisit *Buckley*’s

distinction between contributions and expenditures and the corollary distinction in the applicable standards of review.” *Wagner v. FEC*, 793 F.3d 1, 5 (D.C. Cir. 2015) (internal citations and quotation marks omitted); see also *Riddle v. Hickenlooper*, 742 F.3d 922, 931 (10th Cir. 2014) (Gorsuch, J., concurring) (noting “[t]he [Supreme] Court has yet to apply strict scrutiny to contribution limit challenges”).

Judge Thapar’s campaign finance opinion in *Winter* is particularly significant when one considers that his friend and supporter, Senate Majority Leader Mitch McConnell, has fiercely opposed campaign finance reform throughout his career. For example, McConnell was the named plaintiff in *McConnell v. FEC*, which challenged the bipartisan McCain-Feingold Act regulating money in politics.¹⁵ While McConnell lost that case, the Supreme Court later overturned the reasoning when it decided *Citizens United*.

III. CRIMINAL JUSTICE

In a Federalist Society speech at Columbia Law School, Judge Thapar spoke in favor of strict sentencing policies. He stated that he believes current sentencing policies do not do enough to punish offenders and that “the way to stop recidivism is to keep recidivists in jail.”¹⁶ Judge Thapar’s long and clear record on the bench clearly demonstrates troubling opinions concerning the criminal justice system.

United States v. Walli

Over the course of his career, no case Judge Thapar has ruled on has received more media attention than *Walli*. On July 28, 2012, Greg Boertje-Abed, Michael Walli, and Megan Rice broke into a highly-secure US government facility. Boertje-Abed (56) and Walli (62) were army veterans, and Rice (82) was a nun. All

¹⁵ David Firestone, *Mitch McConnell Praises Citizens United*, NEW YORK TIMES (May 3, 2012), <https://takingnote.blogs.nytimes.com/2012/05/03/mitch-mcconnell-praises-citizens-united/>.

¹⁶ *Booking After Booker*, COLUMBIA LAW SCHOOL (Nov. 2015), <http://www.law.columbia.edu/pt-br/node/91351>.

three were Christian pacifists.¹⁷

The facility they broke into in Oak Ridge, Tennessee stored uranium that was used to make nuclear weapons. The trio cut through fences and multiple layers of security, whereupon they hung banners with peace slogans, spray-painted the facility with pacifist messages, and splashed human blood upon the wall of the facility. The three surrendered to a guard without incident when they were finally caught two hours later. See [United States v. Walli \(Walli II\)](#), 785 F.3d 1080 (6th Cir. 2015).

Judge Thapar found all three guilty of harming the national defense under 18 U.S.C § 2155(a). See [United States v. Walli \(Walli I\)](#), 976 F. Supp. 2d 998 (E.D. Ky. 2013). He also imposed stiff sentences: over five years for the men, and 35 months for Rice. On appeal, the Sixth Circuit reversed and overturned the convictions, in an opinion by Judge Raymond Kethledge, a George W. Bush appointee. The Sixth Circuit held that Judge Thapar had erred in his reading of the statute, holding that the protesting pacifists had not harmed the national defense. See [Walli II](#), 785 F.3d at 1087.

United States v. Zorn

While sitting by designation on the Sixth Circuit, Judge Thapar joined a panel opinion that determined that a federal district court did not have the authority to reduce a federal sentence for time spent in state custody while awaiting a sentence in state court for the same conduct.

Soon thereafter, the Supreme Court, in an opinion by Justice Scalia, held that a district court does have the discretion to make a federal sentence either concurrent with or consecutive to any sentence yet to be imposed in state-court proceedings; and the Court vacated the Sixth Circuit decision which Judge Thapar had joined. [United States v. Zorn](#), 461 F. App'x 493 (6th Cir. 2012), *vacated and remanded by* [Setser v. United States](#), 566 U.S. 231 (2012).

¹⁷ Duane W. Gang, *Nun sentenced to 35 months in nuclear plant break-in*, USA TODAY (Feb. 18, 2014), <https://www.usatoday.com/story/news/nation/2014/02/18/nun-nuke-protest-sentencing/5577947/>.

United States v. Carr

Judge Thapar's refusal to hold government officials accountable for their unlawful actions is exemplified in two appeals, [United States v. Carr \(Carr I\)](#), 355 F. App'x 943 (6th Cir. 2009) and [United States v. Carr \(Carr II\)](#), 674 F.3d 570 (6th Cir. 2012). Sitting by designation on the Sixth Circuit, Judge Thapar applied a theory to deny suppression of evidence that neither of his colleagues endorsed. Judge Thapar's dissent in Carr I articulated an extremely narrow view of the exclusionary rule and would have enabled the government to use evidence against a criminal defendant that was obtained as the result of an unlawful stop.

At around 10:00 pm, three police officers saw an SUV parked in a car wash bay. The car wash was located in a high-crime area and officers had been told by an anonymous source that drug deals had taken place there in the past. No one was washing the car and the officers could not tell if it was occupied. The officers passed the car wash and turned around. As they approached the car wash a second time, about three minutes later, they still saw no one washing the car. Wanting to check on the safety of the vehicles' occupants, the officers pulled into the car wash, parked at an angle in front of the SUV, and flashed their emergency lights. The officers got out of their car and approached the SUV. Inside the vehicle, the officers saw a bag of marijuana and the defendant, Joey Carr, making furtive movements. The officers ordered Carr out of the SUV and arrested him. Upon searching the SUV, officers found more drugs and a gun. See [Carr I](#), 355 F. App'x at 945.

In the district court, Carr moved to suppress the drugs and gun because, he argued, they were obtained as the result of an unlawful stop under [Terry v. Ohio](#), 392 U.S. 1 (1968). The district court denied Carr's motion to suppress, concluding that there had been no *Terry*

stop and, even if there had been, the officers had reasonable suspicion to stop Carr. Carr appealed.

In a majority opinion authored by Judge John Rogers, the Sixth Circuit vacated the district court's denial of Carr's motion to suppress and remanded with instructions to conduct further factual findings on the issues of whether or not a Terry stop had occurred, and if so, whether officers had reasonable suspicion to conduct it. See *Carr I*, 355 F. App'x at 945–46. While she joined the majority opinion, Judge Karen Nelson Moore wrote a separate concurrence explaining her view that the record was sufficiently well developed to conclude that the evidence had to be suppressed. Judge Moore argued that a *Terry* stop had occurred because no reasonable person in Carr's shoes would have felt free to leave once the officers partially blocked his ability to exit the car wash bay and flashed their emergency lights. See *id.* at 948–49 (Moore, J., concurring). And, Judge Moore reasoned, the stop had been unlawful because the officers did not have reasonable suspicion that criminal activity was afoot. See *id.* at 949. The fact that the car was parked in a high-crime area at night, standing alone, was insufficient to create reasonable suspicion. See *id.* at 949. And, Judge Moore said, the officers had only witnessed the car for a maximum of three minutes, which was not long enough to raise questions about why someone had not yet begun to wash the car. See *id.* at 949.

Judge Thapar dissented. He argued that even if an unlawful stop had occurred, suppression of the evidence was not necessary. See *id.* at 950 (Thapar, J., dissenting). Judge Thapar explained that the purpose of the exclusionary rule, which serves to keep certain illegally collected evidence out of court, was to deter police misconduct and to ensure that the benefits of exclusion outweighed the costs to society. See *id.* at 950–51. Here, Judge Thapar said, the police had not engaged in any purposeful misconduct. See *id.* at 951. In fact, Judge Thapar continued, there was no benefit to suppression here. See *id.* Rather, it was society that benefitted when police officers went out of their way to “help

someone” that they thought might be in trouble and conduct like that should be encouraged. *Id.* But Judge Thapar's interpretation of the exclusionary rule is extremely narrow and, arguably, restricts it even further than the Supreme Court's recent articulation of the rule in [Utah v. Strieff](#), 136 S. Ct. 2056 (2016). Neither of his colleagues on the Sixth Circuit agreed with his reasoning.

On remand, the district court again denied the motion to suppress. On appeal, Judge Thapar joined the majority opinion of Judge Rogers affirming the denial of the motion to suppress. This time, Judge Thapar dropped his reliance on the exclusionary rule and joined Judge Rogers's conclusion that a *Terry* stop had not occurred and, even if it had, the officers had reasonable suspicion to conduct it. The majority concluded that the encounter between Carr and the officers had been consensual because the police car did not completely block all of Carr's escape routes and the police officers' flashing of emergency lights would have been understood by a reasonable person as merely a means of identifying themselves, not as a command to stay put. See *Carr II*, 674 F.3d at 572–74. And, even if a stop had occurred, the SUV's presence in a high-crime area, coupled with the fact that it was not being actively washed in the car wash, gave officers reasonable suspicion to perform a stop. See *id.* at 574–75.

Once again, Judge Moore dissented. Relying on her previous arguments, she pointed out that the majority was misapplying circuit precedent both as to whether a stop had occurred and whether officers had reasonable suspicion. See *id.* at 575–78 (Moore, J., dissenting).

United States v. Williams

Judge Thapar's tendency to favor the government in criminal prosecutions was also

on display in his concurrence in [*United States v. Williams*, 641 F.3d 758 \(6th Cir. 2011\)](#). In that case, Marshall Williams had been convicted of mailing a threatening communication to a federal judge. On appeal, Williams challenged several aspects of his trial and sentence. Judge Thapar joined the majority opinion concluding that Williams's sentence had to be vacated because the district court had conducted the sentencing hearing without Williams's physical presence, opting instead to conduct the hearing via video conference.

Judge Thapar wrote separately, however, to note his disagreement with the standard of review applied by the majority and mandated by Sixth Circuit case law. Williams had never raised his objection to the video conferencing before the district court, so ordinarily the appellate court would review his claim under a very narrow standard of review, reversing only if the district court had committed plain error. Williams had asked the appellate court, however, to review his claim under the more deferential *de novo* standard of review and the government did not object. Accordingly, the Sixth Circuit concluded, the government forfeited any argument that the plain error standard applied. Judge Thapar argued in his concurrence that plain error review should always apply to claims, like Williams's, that were not raised in front of the district court regardless of whether the government asked for the heightened plain-error standard. This approach conflicts with several other circuit courts and gives the government the benefit of heightened review even when it intentionally or unintentionally fails to ask for it. See [*United States v. Murguia-Rodriguez*, 815 F.3d 566 \(9th Cir. 2016\)](#); [*United States v. Encarnacion-Ruiz*, 787 F.3d 581, 586-87 \(1st Cir. 2015\)](#); [*United States v. Salem*, 597 F.3d 877, 884 \(7th Cir. 2010\)](#).

CONCLUSION

Like Justice Neil Gorsuch before him, Judge Thapar arrives at his nomination as the beneficiary of an

extraordinarily cynical campaign by Senate Majority Leader Mitch McConnell to prevent confirmations to scores of federal judgeships, until such time as a Republican president could fill them. In addition, Judge Thapar's history of partisan activity, and his appearance on the well-known "List of 21" potential judicial nominees provided to President Trump by right-wing organizations, point to the conclusion that he is a political actor wholly at home with the partisan process that has elevated him.

Among the substantial causes for concern in Judge Thapar's record are the constraints he consistently imposes on everyday people's access to the courts, his willingness to equate political spending with political speech to an exceptional degree, and his inclination toward harsh rulings in criminal justice matters. All of these have been outlined in this report; additional information about Judge Thapar's career and philosophy will likely come to light during the course of Senate consideration. We urge senators to subject all of the information available to them to the utmost scrutiny. While Supreme Court nominations understandably attract the highest level of attention, Circuit Court appointments are equally durable and, arguably, nearly as influential.