

Thomas Confirmation Hearings Had Ripple Effect

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Clarence Thomas
Retrospective by
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Twenty years ago Tuesday, the nation was spellbound by a political and sexual drama that played out before the Senate Judiciary Committee.



Following an NPR report, the committee was forced to hold a second round of confirmation hearings to examine allegations it had previously ignored about Supreme Court nominee Clarence Thomas.

University of Oklahoma law professor Anita Hill said she had been sexually harassed by Thomas when she worked for him at the Equal Employment Opportunity Commission; the hearings probing that charge would change America's political, judicial and cultural landscape forever.

But, while the Thomas confirmation hearings would have a profound effect on the country, Justice Clarence Thomas has proved to be a lightning rod, an enigma and, perhaps, a justice of prophetic vision.

Not A Traditional Conservative

Thomas is not just a member of the conservative block of Supreme Court justices. He is, without doubt, the *most conservative* justice, willing to regularly strike down long-accepted case law that has been in place for decades, in some cases for as much as a century



Clarence Thomas' Former Girlfriend Breaks Her Silence

Clarence Thomas' former girlfriend has broken her silence about the man she used to date.



Justice Thomas' Wife Asks Anita Hill To Apologize

Hill accused Clarence Thomas of sexually harassing her during confirmation hearings 19 years ago.

He is the only justice willing to allow states to establish an official religion; the only justice who believes teenagers have no free speech rights at all; the only justice who believes that it is unconstitutional to require campaign funders to disclose their identity; the only justice who believes that truthful tobacco advertising and other commercial speech may not be regulated, even when it is aimed at minors; the only justice who voted to strike down a key provision of the Voting Rights Act; the only justice to say that the court should invalidate a wide range of laws regulating business; and he is the only justice who voted to allow the

president to hold American citizens in prison indefinitely without charge and without review by the courts.

Thomas is not a traditional conservative, not the kind of justice who believes that law should be built up incrementally over time and that adhering to workable precedent means the law is predictable and can be relied on. Instead, he, more than any other justice, believes that the court over the past century has gotten large swaths of the law wrong, and that those rulings should be reversed.

Though his defenders shy from calling his views radical, they trumpet Thomas for being the only justice to so consistently return to what they see as the original meaning of the Constitution when it was adopted in 1789. UCLA law professor and academic blogger Eugene Volokh compares Thomas to the Supreme Court's most famous justices — Louis Brandeis, Oliver Wendell Holmes, John Marshall — in the sense that he has a clear vision of where he thinks the court should go.

"Thomas is somebody who's articulated the sharpest and clearest originalist vision on the court," declares Volokh.

But that vision is so far removed from modern constitutional law that critics see it as radical and anachronistic. "The theory that Justice Thomas represents is really to put us into a time machine and take us back in a number of areas literally 100 years," says Georgetown law professor Peter Edelman, who sees Thomas as "the Tea Party of the Supreme Court."

Even former Reagan administration Solicitor General Charles Fried, who admires Thomas, sees his views as off-kilter. Thomas' opinions are "high quality" in the sense that they are well-written and

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well-researched, observes Fried, but, he adds, "They are just completely out of the mainstream."

Scholars note that Thomas' views are in fact so extreme that he is considerably to the right of the court's most heralded conservative, Justice Antonin Scalia. Supreme Court advocate Tom Goldstein observes that Scalia balances purism and pragmatism, while Thomas is a purist. "Scalia has his foot hovering over the brake pedal. Justice Thomas' is firmly planted on the gas," Goldstein says.

Ed Whelan, president of the Ethics and Public Policy Center, a conservative think tank, says Thomas is the only justice who is willing to trust the Founding Fathers, even if that means, for instance, that states are free to prefer one religion over another. Whelan says that "you can call that unpragmatic if you want, but I think it reflects a deeper faith in the citizenry."

The Issue Of Race

Thomas, the second African-American appointed to the court, has proved to be the ideological opposite of the man he replaced, Justice Thurgood Marshall, the first African-American justice.

A stark example of their differences is in cases involving prisoners beaten or denied essential medical care. Marshall wrote key decisions declaring such treatment a violation of the Constitution's ban on cruel and unusual punishment. At his confirmation hearing, Thomas seemed to agree, noting that every day as an appeals court judge, he looked out the window at the federal courthouse to see busload after busload of criminal defendants being brought to court.

"And I say to myself every day," he told the Senate Judiciary Committee, "but for the grace of God, there go I. ... So I can walk in their shoes and I can bring something different to the court."

Two months later, Thomas, now a Supreme Court justice, dissented from a decision upholding an \$800 damage award to a prisoner who was beaten so severely by prison guards that his teeth and dental plate were broken. Thomas, joined only by Scalia, said "a use of force which causes only insignificant harm to a prisoner ... is not cruel and unusual punishment."

Perhaps no subject has engaged Thomas more on a personal level than race. He votes often against civil rights claims, and his own feelings of being underestimated because of his race come out most clearly in affirmative action cases.

Although Thomas is widely believed to have been the beneficiary of affirmative action programs when he went to the College of the Holy Cross and then to Yale Law School, he sees such programs as a scar, not a benefit. And when the Supreme Court reaffirmed the use of race as one factor that can be used in university admissions, Thomas railed that these programs were "nothing more than a facade, a cruel farce of continued racial discrimination that stamp minorities with a badge of inferiority."

Majority Opinions

Can someone who is so untethered to the big decisions of the past century be influential on the court? Yes and no.

Although Thomas last term wrote more majority opinions than any other justice in 5-to-4 cases, his assignments, for the most part, are not in high-profile cases.

Perhaps his most important majority opinion last term overturned a multimillion-dollar jury award to a New Orleans man who spent 18 years on death row because prosecutors had deliberately concealed physical evidence that eventually exonerated him. Thomas' opinion spent little time on how prosecutors had railroaded the defendant, and although the D.A.'s office had been caught burying evidence in several prior cases, Thomas concluded that there was no significant pattern of prosecutorial abuse that would justify a lawsuit.

The bottom line was to essentially immunize prosecutors from lawsuits even in cases of misconduct. Justice Ruth Bader Ginsburg was so outraged by the decision that she took the rare step of reading from the bench her opinion for the four dissenters.

Most of Thomas' majority decisions are in more obscure cases, however. For now, at least, it is his dissents that are the attention-grabbers.

"I think he's planting flowers in the garden that he thinks are going to bloom a long time from now," says Supreme Court advocate Goldstein. "And whether that is going to happen is going to depend on the court's membership."

Other scholars note that Thomas makes the other very conservative justices on the court look centrist by comparison. UCLA's Volokh observes that studies show people like to be seen as in the middle, which "means that if you influence what the extremes look like, then you can shift the middle." Indeed, he adds, by staking out a previously inconceivable position, Thomas, even if he's alone, makes that position plausible, setting up academic debate and future litigation.

Surrounded By Like-Minded People

Aside from his legal views, Clarence Thomas is something of a contradiction, a person characterized by both soul-shaking anger and hostility, as well as great charm and a booming laugh; indeed, within the walls of the Supreme Court, he is, by many accounts, the most well-liked justice. He knows all the janitors, cafeteria workers, everyone. He knows their names, the names of their family members, where they are in school, and he is viewed by the law clerks of all the justices as the most accessible of the court's members.

And yet, his autobiography reeks of rage, even for a time at the grandfather who raised him, and with whom Thomas eventually reconciled.

In a recent appearance at Stetson University College of Law, Thomas talked about his own law clerks as his "little family," but in discussing how he runs his chambers, he adopted the same stern tone he rebelled against in his grandfather. "I give them my rules," he bristled. "Zero

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tolerance for mistakes. Zero tolerance for excuses. Zero tolerance for tardiness. I want my stuff done. I want it done my way."

Thomas, unlike his colleagues on the court, hires only law clerks who share his basic constitutional views. Doing otherwise would be "like trying to train a pig," he told a Dallas group. "It wastes your time and it aggravates the pig." He takes pride in hiring from non-Ivy League schools. Indeed, he refuses to speak at his alma mater, Yale Law School, or any other Ivy League school.

Harvard Law Professor Charles Fried, who served with Thomas in the Reagan administration, says the justice increasingly fraternizes only with people who agree with him. Thomas' friends include talk show hosts Rush Limbaugh and Mark Levin.

"The effect has been to harden his point of view and to make him more and more extreme and isolated in his ideas, because he more and more talks only to people who agree with him," says Fried, who adds: "That's a shame."

The Silent Justice

To the public, this very complicated man often is seen as a caricature, as the only justice who does not ask questions. He sits in court, often leaning back in his chair, his eyes closed, and people can attribute anything they want to his demeanor, with many seeing his silence as brooding, others as boredom and others as concentration.

As for the justice himself, he has given a variety of explanations for his silence, but most recently he has said he views the fast-paced back and forth as "unnecessarily intense," suggesting it is rude to the lawyers and declaring that he "won't participate."

For those who remember Thomas 20 years ago when he was nominated by President George H.W. Bush to the court, there is quite a contrast. His hair is white now, his frame much heavier, but he is just 63 years old and reasonably could be expected to serve another 20 years.

His wife's vociferous advocacy for the Tea Party and against the Obama health care law has put Thomas in the cross hairs of controversy. The ethics controversy intensified when liberal groups found that Thomas for 13 years had failed to report his wife's employment, as required by law. He quickly amended his financial disclosure forms. But the omission gave his critics new ammunition, and last week, 45 Democratic members of Congress asked the House Judiciary Committee to investigate Thomas' conduct on a variety of ethical questions. Chances of that happening in a Republican-controlled House are somewhere between nil and zero. But ethics questions continue to pop up.

Thomas' defenders dismiss these ethics questions outright. "It's a testament to him that he's made a lot of the right enemies, and those enemies look for any opportunity, whether or not sound, to attack him," says conservative Whelan. "In part, I think that Justice Thomas is seen by many as a leading figure in the war over the Supreme Court, and that war can sometimes get personal."

Confirmation Hearings

The "war over the Supreme Court" was never more intense than at Thomas' confirmation hearing 20 years ago.

The first round of hearings might be termed "the war of passive aggression," while the second round of hearings was as brutal as politics can get.

Thomas was accused of violating the very laws he was charged with enforcing as chairman of the EEOC.

Right out of the starting gate, the hearing was white hot, as Anita Hill, a black 35-year-old law professor, described how her one-time boss had pressured her to go out with him and how he subjected her to sexually explicit conversations when the two were alone in the office. "He spoke about acts that he had seen in pornographic films involving such matters as women having sex with animals, and films showing group sex or rape scenes," Hill testified.

Porn films with names like *Long Dong Silver* were for the first time the fare of a confirmation hearing.

In one of the iconic moments of the hearing, Hill described how Thomas had looked at a Coke can from which he was drinking, and asked, "Who has put pubic hair on my Coke?"

Before the first day of hearings was over, Thomas demanded to be heard. His eyes blazing with fury, he categorically denied the charges, and accused the all-white, all-male committee of conducting an ambush aimed at cutting down a black conservative nominee.

"It is a high-tech lynching for uppity blacks who in any way deign to think for themselves, and it is a message that unless you kowtow to an old order, this is what will happen to you," said Thomas, whose testimony was steeped in emotion.

"If someone wanted to block me because they don't like the composition of the court, that's fine. But to destroy me, senator, I would have preferred an assassin's bullet."

The testimony of the accuser and the accused, and their supporting witnesses, went on for three days, lasting one night into the early hours of the next day.

So riveting were the hearings that they were carried live by every news broadcast network, and parodied by *Saturday Night Live*, *Designing Women* and *Murphy Brown*. People were sharply divided as to who told the truth, and not just in this country. The new CNN TV network carried the hearings to viewers all over the world, where they were watched with equal fascination.

Women's Equality

In the end, there was no Perry Mason moment to establish who told the truth. Thomas was confirmed 52-to-48, the narrowest margin in a century. But the effects of those hearings extended well beyond Thomas and Hill.

Before the hearings, women didn't talk about their harassment experiences. Often, they were embarrassed and blamed themselves, says Ruth Mandel, director of the Eagleton Institute of

Politics' Center for American Women and Politics. There "was a beast out there," Mandel says. "But it was invisible and it hadn't been named."

According to University of Colorado law professor Melissa Hart, "the hearings certainly brought this issue into the public eye, and people started being willing to say, 'This happened to me.' "

In the year after the hearings, the number of sexual harassment claims filed with the EEOC nearly doubled, then nearly tripled by 1997 and kept growing until 2001.

The hearings also broke a barrier for women in the political arena. The Eagleton Institute's Mandel notes that women had made some inroads in elected office by 1991, but almost exclusively at the lower levels.

In 1991, there were just two female senators. But after the Thomas-Hill hearings, nearly a dozen women secured major party nominations to the U.S. Senate, and five were elected. Among them was Washington state's Patty Murray, the self-described "mom in tennis shoes," who listened to the hearings and decided she could do a lot better than that as a senator. Murray is now co-chairwoman of the supercommittee charged with solving the debt crisis.

The Senate Judiciary Committee would not be the same, either. It has not been all-male since that time, and every confirmation hearing has included a behind-closed-doors session in which senators can ask questions about personal matters or about an FBI file.

The 'Say-Nothing' Precedent

There were other effects, too, on the political culture, ultimately paving the way for the Clinton impeachment, says historian Noah Feldman of Harvard Law School. "That really broke a kind of a barrier, which I think previously could have been thought of as a barrier of silence or a barrier of public politeness, quite possibly both," Feldman says. "This really culminated in the Clinton and Monica Lewinsky period when still more intimate details of their relationship ended up being broadly discussed in the public eye."

Before Anita Hill, though, the first round of confirmation hearings on the Thomas nomination had established another precedent — a "say-nothing" pattern intended to avoid the controversy that had consumed the nomination of conservative Robert Bork four years earlier.

Bork had detailed his conservative views at length and been rejected. Now Thomas asserted he had no opinion on such landmark cases as *Roe v. Wade*, the court's 1973 abortion ruling, and among those expressing incredulity was Vermont Democrat Patrick Leahy.

"You're not suggesting that there wasn't any discussion at any time of *Roe v. Wade*?" asked Leahy.

"Senator," responded Thomas, "I cannot remember personally engaging in those discussions."

According to Feldman, many people doubted Thomas' assertion.

"Most people had trouble believing that someone who had been to Yale Law School [and] had

spent a public career in jobs connected to law, could possibly have no opinion on the most controversial legal topics of his generation," he says. "And yet somehow those answers not only did not stand in the way of Justice Thomas' confirmation, but were seen in some way as good politics."

Such good politics, in fact, that every nominee since then, Republican or Democrat, has followed that example to one degree or another.

Humble Beginnings

The Thomas hearings also established what came to be known as "the Pinpoint strategy," named for the tiny Georgia town where Thomas was raised. At his confirmation hearing, Thomas spoke of the grim poverty of his early childhood, describing how he and his family "lived in one room in a tenement And we shared a common bathroom in the backyard, which was unworkable and unusable."

At Sonia Sotomayor's confirmation, she spoke of a similar background, saying, "I grew up in modest circumstances in a Bronx housing project." Samuel Alito discussed his immigrant roots, focusing on the fact that his "father was brought to this country as an infant. . . . He grew up in poverty." Even John Roberts, the son of an upper-middle-class Indiana family, found a way to eulogize his roots by describing the golden fields of his home state and how as he "grew older those endless fields came to represent for me the limitless possibilities of our great land."

So today, when we talk about the drama of Supreme Court confirmation hearings, what we have in mind is the Hill-Thomas hearings, and when we talk about the kabuki, set-piece nature of Supreme Court confirmation hearings, what we have in mind are the first Thomas hearings, when everything seemed scripted and was. Just as all the hearings since then have been.

As much as we focus on the Thomas-Hill hearings and how much they changed society, the Supreme Court confirmation process has been shaped more by what happened at the first round of Thomas hearings, before the world ever heard of Anita Hill.