

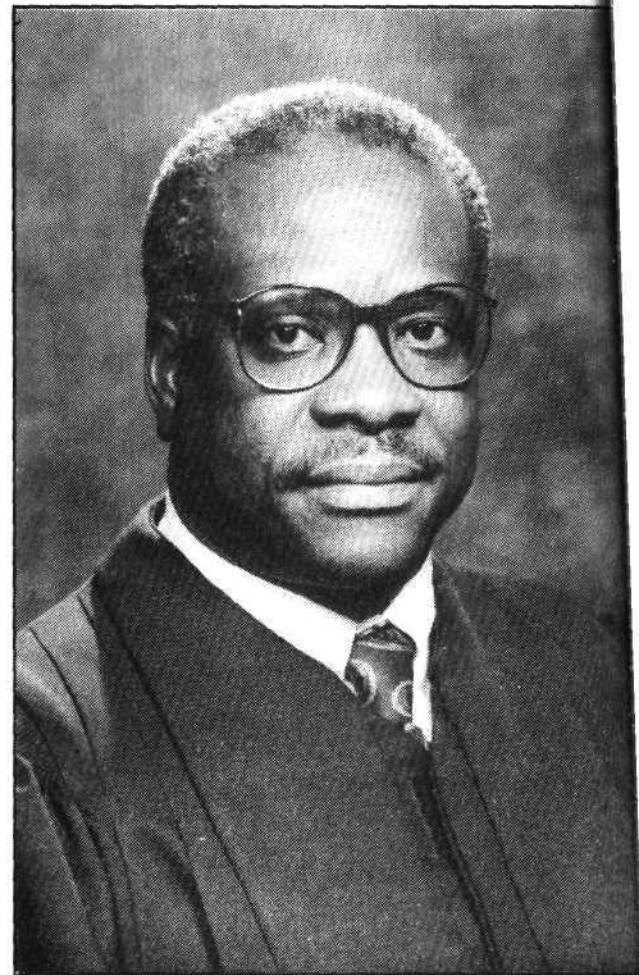
Can America Trust Clarence Thomas?

The pseudo-moderate nominee of 1991 has become the ultra-conservative Justice of 1993.

by Heath Cline

In the fall of 1991, Clarence Thomas was confirmed as an Associate Justice of the United States Supreme Court. The hearings on his nomination featured a public confrontation over the issue of sexual harassment, from which repercussions are still being felt. The mention of Justice Thomas's name prompts visceral reactions from all sides of the political spectrum. Most of these reactions deal with the dispute between Thomas and Anita Hill, not with the work Thomas has done on the bench. His actions since joining the Court, while much less publicized, are still troubling. Some of these actions make it appear that Thomas lied outright to the Senate Judiciary Committee to gain confirmation, while others reveal him as more ultraconservative than even his supporters may have anticipated.

One of the most astonishing moments in the Thomas confirmation hearings came when the nominee was questioned regarding the *Roe v. Wade* decision, which overturned state laws against abortion rights. Thomas maintained that he had never discussed or debated the decision in any way, although he was in law school at Yale when *Roe* was decided. He claimed to have no views on *Roe*, one of the most controversial cases of the last quarter century. These assertions by Thomas not only shocked opponents of the Thomas nomination, they also angered supporters who hoped Thomas might vote to reverse the 1973 Court ruling. Some of these supporters even felt that Thomas was being untruthful. Paul Weyrich, a well-known conservative activist and one of Thomas's earliest supporters, later states, "My recollection would seem to indicate he had a point of view." That point of view became clear seven months after Thomas was confirmed, when he voted with the minority of the 5-4 decision in *Casey v. Planned Parenthood* and



Associate Justice Clarence Thomas

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called for the overturning of the *Roe v. Wade* precedent. One of his clerks told the author of a *New Yorker* article about Thomas that there was never any debate in his chambers about the decision (*New Yorker* 46). Thomas was instantly on the *anti-Roe* side of the issue. At best, Americans have a sitting Supreme Court Justice who was able to make a decision about the most highly debated case in decades without asking questions during conference argument or consulting any legal resources to analyze the issue. At worst, that same Supreme Court Justice knowingly lied to the United States Senate in an attempt to advance himself. Neither of these possibilities is encouraging.

Roe v. Wade is not the only precedent for which Justice Thomas has demonstrated disdain since joining the Court. During his confirmation hearings, he professed to have "no quarrel with the *Lemon* test," which provides the standard for dealing with government involvement with religion. Since confirmation, Thomas's opinion of *Lemon v. Kurtzman* has changed. He now feels that the 1971 ruling, which the Court has announced it will review this term, should be overturned (*Newsweek* 59).

Thomas's apparent deceptions at the hearing may have included a serious breach of judicial ethics as well. According to the *Legal Times*, during his confirmation hearing Thomas delayed releasing an Appeals Court opinion dealing

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with affirmative action to prevent himself from being questioned about the issue. The opinion, which *Legal Times* reported had been circulated in the Appeals Court in June before Thomas was nominated, overturned the Federal Communication Commission's grant of a radio station to a woman over a man. The Thomas opinion ignored a similar Supreme Court decision that had been

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made the year before. When questioned before the Senate, Thomas said he had "no reason to disagree with that precedent", another apparent falsehood in light of his eventual ruling. In February, after he was confirmed, Thomas finally released the Appeals Court decision, which did overturn the precedent of the Supreme Court (Phelps 223).

Clarence Thomas's views, which he worked so hard to camouflage during his confirmation hearings, have placed him solidly in the far right wing of the Court as a justice. His most frequent partner in cases is ultraconservative Justice Antonin **Scalia**, with whom he has voted 85.9 percent of the time. According to a *Baltimore Sun* article, when Chief Justice Rehnquist asks in conference how Thomas is voting, Thomas often replies, "I'm with Nino," referring to Justice Scalia (Phelps 429). This is the most common pairing of any two current justices. Thomas rarely asks questions during oral argument, but produces an above average number of opinions for a young justice. Those opinions, however, are considered by Court observers to be heavily clerk-written. This is not good news for liberals because Justice Thomas is believed to have had the most conservative group of clerks on the Court the last two years. His first head clerk was a former Scalia clerk and a member of the conservative

Federalist Society. This clerk then brought three more members of the Society to fill Thomas's staff. The second year brought to the Court a former editor of the *Dartmouth Review*, one of the most hard-line conservative newspapers in the country. The charge that Thomas's opinions are clerk-written stems in part from the presence of the former Scalia clerk. Justice Scalia frequently uses quotations from English common law in his opinions. Since hiring the former Scalia clerk, Justice Thomas has revealed in his opinions a previously undiscovered knowledge of English common law (*New Yorker* 45).

NON STARE DECISIS

One of the most disturbing characteristics about Justice Thomas's first two years on the Supreme Court is the complete lack of regard he has shown for Court precedent. In addition to his hostility toward *Roe* and *Lemon*, he has taken positions questioning rulings that have been considered settled for years. An example of this is the decision in *Graham v. Collins*, a case dealing with the death penalty. In this decision, Justice Thomas took the position that states may have a mandatory death penalty for certain crimes, a direct repudiation of the 1976 Court decision in *Gregg v. Georgia* which ruled such sentences unconstitutional. While Thomas's opinion had no force of law, the fact that he is readily willing to overturn what had previously been considered a settled argument conveys a general lack of respect for the principle of *stare decisis* (Latin for "to stand with the decision"), a principle that another Bush appointment to the Court, Justice David Souter, has described as "essential to preserve the legitimacy of this court" (Savage 471).

Some of Thomas's decisions rely on a view of the Constitution that borders on bizarre. In the case of *Fottclia v. Louisiana*, the court faced the question of whether someone acquitted of a crime by reason of insanity could be detained by the state after they were diagnosed as no longer mentally ill. The state's argument was that indefinite confinement of former mental patients was acceptable because they might be dangerous to the public after their release. Justice Byron White pointed out that criminals who are not mentally ill cannot be detained past their sentence just because they might pose a danger to the public. As such, the Court ruled that the former mental

patients must be released. Thomas dissented, presenting a remarkable interpretation of what due process means. According to Justice Thomas, the "freedom from bodily restraint" protected by due process means "quite literally freedom not to be physically strapped to a bed with shackles" (*New Republic* 21). On the other hand, being confined in a mental facility indefinitely without cause is perfectly acceptable in Clarence Thomas's view of the Constitution.

Still another incredible Thomas dissent came in the case of *Hudson v. McMillan*, in which a prison inmate sued for damages by claiming cruel and unusual punishment under the Eighth Amendment to the Constitution. Keith Hudson, the inmate, had been handcuffed, shackled, and held by one guard while another punched him in the eyes, mouth, chest, and stomach. As a result, Hudson suffered loosened teeth, a cracked dental plate, bruises, and swelling. He sued the two officers who beat him and their supervisor, who stood and watched while advising the pair "not to have too much fun." Seven justices, including the notoriously unsympathetic to criminals Chief Justice William Rehnquist, ruled that Hudson's claim was valid and affirmed his award of eight hundred dollars. Thomas, however, saw what was done to Hudson as a "use of force that caused only insignifi-

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cant harm." On the other hand, Justice Thomas did concede that the guards' treatment of Thomas "may be immoral." The claims of cruel and unusual punishment were ruled invalid by Thomas, who feels that the Eighth Amendment does not cover actual conditions in prisons but only the sentences imposed upon those convicted of crimes. During his confirmation hearings, Thomas told senators that he would look out of the window of his Appellate Court office and see prisoners "and say to myself almost every day, 'there but for the grace of God go I.'" Apparently, this sympathy for prisoners does not often translate into sup-

port from the justice. When Justin Lee May, a man scheduled to be executed in Texas whose accuser had recanted at the last minute, appealed to the Court to stay his execution until he could present the accuser's testimony at an appeal, Thomas voted to allow him to be executed anyway. Later, Thomas voted to allow another Texas man to be executed even though the Supreme Court had agreed to hear arguments in his case later in the term (Phelps 430-1).

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JUDICIAL PROPRIETY

One of the most noteworthy differences between Clarence Thomas and the other justices on the Supreme Court has been in the amount of difficulty Thomas has had with adapting to the standard of judicial propriety since being appointed. One of the unique characteristics of the Supreme Court is that its lifetime tenure affords its members the ability to vote their conscience about cases without considering the political ramifications of their actions. As such, once on the Court, the justices make an effort to avoid becoming entangled in the nation's political affairs. Clarence Thomas, however, has been politically active like no other justice in recent memory. Since joining the Court, he has made an address to the Georgia Public Policy Foundation, which calls itself "Georgia's Conservative Voice." He has scheduled a speech before Concerned Women for America, one of the most conservative women's groups in the country. Most controversial, though, is Justice Thomas' relationship with a group called the Free Congress Foundation, which is headed by Paul Weyrich. One month after confirmation, Thomas appeared on the group's television show and thanked its members for their support during the hearings. He answered audience questions as well (Phelps 418). In terms of inappropriate

conduct, that was nothing compared to his next appearance before the group. On April 26, 1993, Thomas spoke at the fifteenth anniversary tribute to Weyrich and the Free Congress Foundation. He pledged his "loyalty and friendship" to the conservative group and was followed on the dais by Senator Jesse Helms (R-NC), Rush Limbaugh, and Lt. Col. Oliver North (*New Yorker* 48). This type of behavior by Justice Thomas appears to violate both Canon 5 and Canon 7 of the Code of Judicial Conduct. According to Canon 5, a judge "should not be a speaker or the guest of honor at an organization's fund raising events," while Canon 7 states a judge should not "make speeches for a political organization." This code is binding only on judges below the Supreme Court, but Court spokeswoman Toni House says, "The Justices do follow the Code of Judicial Conduct even though it doesn't apply to them. They adhere to it, and they take it very seriously." Regardless, it should be readily apparent that a Justice of the United States Supreme Court should not be a keynote speaker for a group like Concerned Women for America which argues cases before the Court. Last year, the group argued two cases before the Court, garnering the vote of Justice Thomas both times (*New Yorker* 48).

Thomas's troubles with proper judicial behavior are not merely limited to speaking engagements. After he was confirmed, Thomas and his wife appeared cheek to cheek on the cover of *People* magazine under the headline "How We Survived." Among the quotes in the article was one from Virginia Thomas, Justice Thomas' wife. She stated, "I feel he doesn't owe any of the groups that opposed him anything." Later, Thomas's wife planned a birthday party for him at the Court and invited some political figures who were less than welcome guests. As one clerk told the *New Yorker*, "Inviting Ed Meese to the Court was viewed as being in questionable taste." This disregard for the Court and its rituals has been emblematic of Clarence Thomas since he was confirmed (*New Yorker* 48).

OUTLOOK AND FINAL THOUGHTS

Thomas has clearly defined his ideology, voting with the conservatives over 90 percent of the time. In conference, Thomas almost always takes the

most extreme conservative position when a dispute arises (Phelps 429). As such, many of the Democratic senators who supported Thomas during confirmation have either privately or publicly shown regret for their votes. Even Thomas's mentor and chief advocate Senator John Danforth (R-MO) has expressed his disappointment over Thomas's record on the Court. Senator Danforth announced his retirement from the Senate recently without any explanation. One of the most telling reviews of Thomas' performance as a justice came from the late Justice Thurgood Marshall, whose seat on the Court was taken by Thomas. When asked to assess Thomas's presence on the Court, Marshall stated, "We've gone from chicken salad to chicken shit" (Phelps 436).

At this point in his tenure, Clarence Thomas has had little impact on the Court. He tends to be either part of a larger block of conservative support or a dissenter with Scalia and Rehnquist. In the beginning of his career, William Rehnquist also was a dissenter who made little impact on the Court. It took him fifteen years to be moved up to Chief Justice and begin to lead a conservative revolt against the Warren Court rulings he had loathed for so long. Clarence Thomas could easily be on the Court for forty years if he so desires. He has no use for liberal rulings of the Supreme Court, and he has plenty of time to wait for his role to change. •

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