JUSTICE THOMAS JOINS THE SUPREME COURT

GREGORY G. KATSAS

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The Honorable Gregory G. Katsas*

I am delighted to offer a few memories of the nomination, appointment, and first Supreme Court term of Justice Clarence Thomas. At that time, I served as one of his law clerks.

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At 3:25 P.M. on Sunday, June 30, 1991, the telephone rang in the D.C. Circuit chambers of Judge Clarence Thomas. I tensed up immediately. We almost never received weekend calls in chambers, and I had reason to hope this one would be special. I answered as calmly as I could: "Judge Thomas's chambers …." My hope was not in vain. "This is the White House operator in Kennebunkport," the caller began. "Is Judge Thomas available to speak with the President?"

Three days earlier, Justice Thurgood Marshall had announced his retirement from the Supreme Court. Media reports immediately identified the Boss, as we law clerks fondly called Judge Thomas, to be a leading candidate to succeed Justice Marshall. As he returned from a late lunch, the Boss had not yet heard news of the retirement. I told him excitedly, but he remained calm. He nodded, betrayed no emotion, and said nothing about his own candidacy. Nor, of course, was I going to raise that topic with him.

Judge Larry Silberman, now my colleague on the D.C. Circuit, was the Boss's mentor and best friend on the court at the time. On Thursday afternoon, Judge Silberman summoned the Thomas clerks to his chambers. The Boss would be

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seriously considered for the Marshall seat, Larry told us. And while he was under consideration, we would need "iron discipline" in preserving confidences and avoiding any chambers *faux pas*.

The Boss was away from the office late Thursday afternoon and all of Friday morning. The clerks hoped that was a good sign. We didn't know it at the time, but he spent Thursday afternoon at the Justice Department and Friday morning at the White House, interviewing for the vacancy. He returned to chambers on Friday afternoon, but still didn't mention anything. We still didn't want to ask.

By coincidence, I'd planned to attend an Orioles game on Friday night with two law-school classmates who were finishing up clerkships with Justice Marshall. As peers, the three of us could talk more openly. We speculated about possible successors, and my friends wished the Boss and me good luck.

Saturday passed with no announcement, as did Sunday morning. One news story claimed that the President had considered naming the Boss on Friday afternoon, but then pulled back. Over the weekend, several stories claimed that another judge had emerged as a front-runner. So by Sunday afternoon, I'd begun to fear that the opportunity had passed.

"Yes, let me get him for you," I said to the White House operator. The Boss and I were in the chambers alone, so that was the end of our don't-ask-don't-tell routine. I tried to appear calm, but apparently failed miserably.

"Kennebunkport is on the line," I clumsily tried to deadpan. Later, the Boss would write that I *ran* into his chambers and *blurted* this out "looking every bit as excited as he'd been when he told me of Justice Marshall's retirement."[1] He also

[1] CLARENCE THOMAS, *MY GRANDFATHER'S SON* 211 (2007).

took to joking that whenever a *place* is said to be trying to reach you by telephone, it's best not to take the call.

Fortunately, he did take this call. I waited outside his office, at the desk of our judicial assistant, watching intently as a red light on her phone marked the ongoing conversation. The Boss mostly listened and spoke softly. So I could not hear—well, overhear—the conversation, except for the Boss's final words: "See you tomorrow, Mr. President."

The Boss and I discussed next steps for the chambers. He'd not been offered the job, but would be flying up to Kennebunkport on Monday morning to meet with the President. We were to keep the chambers door locked all day—a common security precaution today, but rare at the time. We were to make no comments to the media. If any colleagues called for the Boss, as a few of them did, we were to say (truthfully) that he was in a meeting.

On Monday, we were optimistic. Things seemed promising when the White House scheduled a 2:00 press conference for the President to introduce his Supreme Court nominee from Kennebunkport. But then again, we wondered, maybe the President had interviewed more than one candidate on Monday morning before making his final decision. We didn't know for sure until President Bush began the press conference with the Boss at his side.

The Boss's remarks were short but compelling. He traced his rise from rural poverty in the segregated South to the brink of the Supreme Court. One comment particularly stuck with me. I quoted it 27 years later, at my judicial

investiture, to describe my own family's rise from refugee camps to the D.C. Circuit in two generations: "*Only in America* could this have been possible."[2]

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The Boss joined the Supreme Court under difficult circumstances. He was confirmed on October 15, 1991, after a grueling and bitter fight. The Chief Justice, whose wife had just died, could not administer the judicial oath until October 23, less than two weeks before the Court's November sitting. And until the Boss took the oath, nobody could begin working on the cases. Around the same time, the Boss had to orchestrate a White House event to thank hundreds of family, friends, and supporters; it took place on October 18. He had to orchestrate his Supreme Court investiture ceremony, which took place on November 1. Planning for a judicial investiture, which is roughly equivalent to planning for a wedding reception, normally takes several months. He did it in a week. Unable to do any judicial work over the summer, he had to finish up the last few D.C. Circuit opinions. He had to review a dozen petitions in which three of the eight sitting justices had voted to grant *certiorari*; in each of them, his vote would be decisive. And, of course, he had to staff up the new chambers. He was only 43 years old, and he'd been a judge for less than two years.

Justices typically pick their law clerks over the course of a few months; the Boss had only a few days to select his. The first pick was obvious: Chris Landau, who'd briefly clerked for him at the D.C. Circuit, and who'd just finished up a clerkship with Justice Scalia. The Boss wanted at least two clerks with past Supreme Court experience, so he recruited Steve McAllister, who'd just finished a

[2] Clarence Thomas, Judge, U.S. Ct. of Appeals for the D.C. Circuit, Remarks at News Conference Announcing Judge Thomas's Nomination to the Supreme Court (July 1, 1991); Gregory G. Katsas, Judge, U.S. Ct. of Appeals for the D.C. Circuit, Judicial Investiture (April 27, 2018).

two-year clerkship with Justice White. Steve could stay on only for the November and December sittings, but we were taking things one sitting at a time. The Boss later recruited Greg Maggs, who'd recently clerked for Justice Kennedy, to take over Steve's slot for the latter part of the term. For the last two positions, the Boss asked Arnon Siegel and me, who were clerking for him at the D.C. Circuit, to come along with him.

There are no set rules for running a chambers, so we made them up as we went along. The Boss let us divide up the cases among ourselves. Today a Supreme Court sitting typically consists of ten to twelve cases; in November 1991, we had 20. Like most judges, the Boss wanted bench memos to help him work through the cases. We had no set format for those, so each of us *ad-libbed*. By necessity, we wrote shorter memos because of the extremely limited time available. Steve mentioned that in his old chambers, opinion drafts were due twelve days after they were assigned. The Boss loved the rule and adopted it immediately. Some of us cursed Steve for bringing that up, but it was probably for the best.

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If any new justice could be forgiven for starting slowly, it was the Boss. Yet he took the Court by storm.

His first sitting began on November 4, 1991. Today, a justice can expect to write about two opinions per sitting—usually one majority and often one concurrence or dissent. From our November sitting alone, the Boss wrote *seven* opinions—two majorities, two concurrences, and three dissents. The majorities were relatively straightforward, as is normal for a justice's initial opinion assignments. The concurrences were more noteworthy. One of them called for

returning to the original understanding of the Confrontation Clause,[3] and it proved pivotal when the Court later did just that in *Crawford v. Washington*.[4] The other concurrence addressed the legal standards for desegregating state colleges and universities. While his colleagues stressed the need to eliminate vestiges of segregation, the Boss also worried about preserving historically black colleges, which had "succeeded in part because of their distinctive histories and traditions" catering to blacks during the era of segregation.[5] The themes struck in the Boss's opinion—on the importance of self-help within the black community and the risk that government intervention may prove counter-productive—are central to his thinking on issues of race.

The dissents were also noteworthy. In *Dawson v. Delaware*,[6] he argued that the First Amendment did not prohibit the government from introducing evidence, at the sentencing phase of a capital case, that the defendant belonged to the Aryan Brotherhood prison gang.[7] In *Hudson v. McMillian*,[8] he argued that the Eighth Amendment addresses only those punishments formally imposed in criminal sentences, not guards' tortious assaults on prisoners.[9] And in *Foucha v. Louisiana*,[10] he argued that the government may require an individual found not guilty by reason of insanity to prove that he is no longer dangerous in order to be released.[11] The United States Reports show these final tallies: five-to-four in *Foucha*, seven-to-two in *Hudson*, and eight-to-one in *Dawson*. They do not show

[3] White v. Illinois, 502 U.S. 346, 358–66 (1992) (Thomas, J., concurring in part and concurring in the judgment).
[4] 541 U.S. 36, 51–52, 60–61 (2004) (discussing *White* majority and concurrence).
[5] United States v. Fordice, 505 U.S. 717, 745–49 (1992) (Thomas, J., concurring).
[6] 503 U.S. 159 (1992).
[7] *See id.* at 169–80 (Thomas, J., dissenting).
[8] 503 U.S. 1 (1992).
[9] *See id.* at 17-29 (1992) (Thomas, J., dissenting).
[10] 504 U.S. 71 (1992).
[11] *See id.* at 102–26 (1992) (Thomas, J., dissenting).

something else reflected in the now-public papers of Justice Blackmun—at conference, the Boss was the *sole* dissenter in *each* of the three cases. His *Hudson* dissent persuaded Justice Scalia to change his vote.[12] And his *Foucha* dissent persuaded Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy all to change their votes.[13] From the outset, the Boss was willing to stake out repeated solo positions. He immediately had an outsized, albeit behind-the-scenes influence on his colleagues, including Justice Scalia. Many ignorant commentators speculated that the Boss must have been taking marching orders from Justice Scalia. The Boss did admire and often agreed with Justice Scalia. But from the outset, the two of them batted about ideas as intellectual equals, and the Boss pulled Justice Scalia as often as Justice Scalia pulled him.

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Time after time, the Boss shifts the Overton window. Short-term losses lay the groundwork for long-term gains. An obscure habeas case from the term, *Wright v. West*,[14] illustrates this point.

At first glance, the case was narrow and straightforward. On habeas corpus review, the Fourth Circuit held that there was legally insufficient evidence to sustain the state-court larceny conviction of a defendant found to possess (and to have no good explanation for possessing) a slew of recently stolen items.[15] All nine justices agreed that there was ample evidence to sustain the conviction. Of course, a sufficiency determination is the opposite of what the Court normally decides—legal questions with broad significance across a wide class of cases.

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[12] JAN CRAWFORD GREENBURG, *SUPREME CONFLICT* 119–20 (2007).
[13] *Id.* at 117.
[14] 505 U.S. 277 (1992).
[15] *Id.* at 283–84 (plurality opinion).

The Boss saw more to the case. Both the state trial court, and the Supreme Court of Virginia on direct review, had determined that there was sufficient evidence to support the conviction. So why did the habeas courts get to reassess that question *de novo*? According to conventional wisdom at the time, because *Brown v. Allen*[16] required federal habeas courts to conduct *de novo* review of all state-court decisions applying federal law to the facts of all criminal cases. And did so even though habeas retroactivity law effectively prevented innovation with respect to pure legal questions[17] and even though the habeas statute by its terms constrained review of pure factual questions.[18] To the Boss, this made little sense. So, while he ultimately concluded that there was plenty of evidence to sustain the conviction even if the sufficiency question were reviewed *de novo*, he also laid out his view that *Brown v. Allen* did not compel *de novo* habeas review and should be reconsidered if it did.[19]

The Boss's opinion generated significant internal divisions. Only two other justices joined it.[20] Three others wrote separately to argue that *Brown v. Allen* did compel *de novo* review of mixed questions on habeas.[21] One wrote separately to argue that retroactivity law cast no doubt on *de novo* habeas review for mixed questions of law and fact.[22] One wrote separately to contest that point.[23] And one wrote separately simply to say that the evidence in the case was enough to sustain the conviction.[24]

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[16] 344 U.S. 443 (1953).
[17] *See* Saffle v. Parks, 494 U.S. 484 (1990); Teague v. Lane, 489 U.S. 288 (1989).
[18] 28 U.S.C. § 2254(d) (1988) (current version at 28 U.S.C. § 2254(d)).
[19] *West*, 505 U.S. at 285–97.
[20] *See id.* at 280.
[21] *See id.* at 297–306 (O'Connor, J., concurring in the judgment).
[22] *See id.* at 307–310 (Kennedy, J., concurring in the judgment).
[23] *See id.* at 310–16 (Souter, J., concurring in the judgment).
[24] *See id.* at 307 (White, J., concurring in the judgment).

Although the 3-3-1-1-1 fracture was frustrating at the time, the Boss's opinion proved more popular with Congress than it did with his colleagues. Four years later, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[25] effectively codified the Boss's opinion, as the Supreme Court itself later recognized.[26] And thus began what has become the current conventional wisdom, that federal habeas courts only deferentially review state-court determinations of legal, mixed, or factual questions.

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For 30 years, the Boss has served the Supreme Court, and the Nation, with great distinction. As a former clerk, I've received from him a lifetime of advice, friendship, and inspiration. At a recent clerk reunion, we all received swag bags containing, among other items, a thin plastic bracelet inscribed with the letters WWCTD—what would Clarence Thomas do? I keep the bracelet prominently displayed in my chambers and, in my current job, I ask myself that question often.

[25] Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).
[26] Williams v. Taylor, 529 U.S. 362, 410–12 (2000).