

CLARENCE THOMAS'S DISGRACEFUL SILENCE



BY JEFFREY TOOBIN: February 21, 2014

As of this Saturday, February 22nd, eight years will have passed since Clarence Thomas last asked a question during a Supreme Court oral argument. His behavior on the bench has gone from curious to bizarre to downright embarrassing, for himself and for the institution he represents.

This point was especially apparent on January 13th, when the Court considered the case of *National Labor Relations Board v. Noel Canning*, which raises important questions about the President's ability to fill vacancies when the Senate is in recess. It was a superb argument—highly skilled lawyers engaging with eight inquisitive judges. The case also offered a kind of primer on the state of the Court in action, with Thomas's colleagues best viewed in pairs.

Antonin Scalia and Ruth Bader Ginsburg. The two oldest Justices (and the Court's senior New Yorkers) usually jump in first with questions. Scalia, who is seventy-seven, often takes a barbed tone with the lawyers, and Ginsburg, who is eighty, is more polite, if no less insistent. Both of them set the tone with their ideologically opposed positions. They offer an early clue as to whether the Court will divide along familiar left-right grounds.

Anthony Kennedy and Stephen Breyer. Oddly, these two, both Northern Californians, are starting to resemble each other physically in their eighth decades. Both sit in similar ways, hunched forward, with the fingers of their right hands splayed between forehead and bald head. Kennedy asks questions in a tone of grave concern; Breyer, in his twentieth year on the Court, is still having the time of his life. He laughs at all the jokes, especially his own.

Samuel Alito and John Roberts. Alito sits like a sphinx: his face gives away nothing, but his questions invariably tease out the weak parts of an opposing argument. Roberts looks like the earnest Midwesterner he remains, but he, too, has a litigator's gift for eviscerating an adversary. It is wise to listen closely to these two; they are rarely on the losing side.

Sonia Sotomayor and Elena Kagan. The Court's youngest members (and junior New Yorkers) sit on opposite ends of the bench, and both take aggressive tones with the lawyers. Sotomayor leans forward, her right forearm aimed skyward and nearly covered in bracelets; she burrows into the facts of cases in extraordinary detail. Kagan takes the opposite tack. Her early trademark question is about the big picture, and it's usually a refined version of "Counsel, let's cut the crap. Isn't this case really about ... ?" Neither Sotomayor nor Kagan has ever heard Thomas ask a question in the courtroom. (Yes, Thomas did break his silence last year to utter a single stray wisecrack, but that hardly counts as participation.)

As for Thomas, he is physically transformed from his infamous confirmation hearings, in 1991—a great deal grayer and heavier today, at the age of sixty-five. He also projects a different kind of silence than he did earlier in his tenure. In his first years on the Court, Thomas would rock forward, whisper comments about the lawyers to his neighbors Breyer and Kennedy, and generally look like he was acknowledging where he was. These days, Thomas only reclines; his leather chair is pitched so that he can stare at the ceiling, which he does at length. He strokes his chin. His eyelids look heavy. Every schoolteacher knows this look. It's called "not paying attention."

Thomas has a part to play, if he wants to take it. The Noel Canning case, for example, raises a profound issue in constitutional law. Noel Canning, a bottling company, is challenging a ruling of the National Labor Relations Board on the ground that some of its members were appointed illegitimately. All Presidents have used recess appointments, often without much controversy; Obama did so in this case because Congress had refused to act on his nominations, to the point that the N.L.R.B. didn't have a quorum. But a close, literal reading of the Constitution's text suggests that the practice may be unconstitutional except in narrow circumstances. Does the meaning of the Constitution evolve over time, or is there only a single, immutable understanding of what it says?

Questioning the lawyer for Noel Canning, Breyer noted that Presidents have made thousands of recess appointments over the decades. Even if the Constitution could be read as prohibiting the practice, wasn't it clearly legal now? "It isn't unheard of that over time language in the Constitution takes on a somewhat different meaning," Breyer said, noting that the definitions of "due process" and "interstate commerce" had clearly changed. "I mean, probably different judges have different approaches," Breyer went on. "But if I'm concerned about the basic practicality and the basic objective here, why would I agree with you?"

As the lawyer, Noel Francisco, hedged, Scalia jumped in. "The two examples that Justice Breyer gives are examples where we gave it a meaning that was different from what it said." The audience, worldly in such matters, laughed. Breyer, the proponent of the living, changing Constitution, and Scalia, the originalist, have been having this argument for years.

No one, however, has been more outspoken about this conflict, at least on paper, than Thomas, the most extreme originalist on the Court. Scalia believes that the Court owes some deference to its own precedents, even if they differ from the original meaning of the text. Thomas is happy to lay waste to decades, even centuries, of constitutional law. Clearly, then, Thomas could have contributed to this spirited, important debate. Instead, on this day he was, as usual, checked out.

For better or worse, Thomas has made important contributions to the jurisprudence of the Supreme Court. He has imported once outré conservative ideas, about such issues as gun rights under the Second Amendment and deregulation of political campaigns, into the mainstream. Scalia wrote *District of Columbia v. Heller*, which restricted gun control, and Kennedy wrote *Citizens United v. Federal Election Commission*, which undermined decades of campaign-finance law, but Thomas was an intellectual godfather of both decisions.

Still, there is more to the job of Supreme Court Justice than writing opinions. The Court's arguments are not televised (though they should be), but they are public. They are, in fact, the public's only windows onto the Justices' thought processes, and they offer the litigants and their lawyers their only chance to look these arbiters in the eye and make their case. There's a reason the phrase "your day in court" resonates. It is an indispensable part of the legal system.

But the process works only if the Justices engage. The current Supreme Court is almost too ready to do so, and sometimes lawyers have a hard time getting a word in edgewise. In question-and-answer sessions at law schools, Thomas has said that his colleagues talk too much, that he wants to let the lawyers say their piece, and that the briefs tell him all he needs to know. But this—as his colleagues' ability to provoke revealing exchanges demonstrates—is nonsense. Thomas is simply not doing his job.

By refusing to acknowledge the advocates or his fellow-Justices, Thomas treats them all with disrespect. It would be one thing if Thomas's petulance reflected badly only on himself, which it did for the first few years of his ludicrous behavior. But at this point, eight years on, Thomas is demeaning the Court. Imagine, for a moment, if all nine Justices behaved as Thomas does on the bench. The public would rightly, and immediately, lose all faith in the Supreme Court. Instead, the public has lost, and should lose, any confidence it might have in Clarence Thomas.
