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REMARKS — JUSTICE THOMAS, THE PERSON

Hon. David B. Sentelle*

I believe that far too little is known of Clarence Thomas as a person, even after his own excellent recent autobiography,[1] and I hope that I can add something to your understanding in the remarks that I am about to offer. In deference to the academic setting, I will in the end attempt to make some connection between the Clarence Thomas that I know, respect, and love like a brother and the Justice Thomas whom you study and whose work you read. Both are too little known and too often have been disparaged by people who have known little or nothing.

I first came to know Clarence Thomas in March of 1990, after President George H.W. Bush appointed him to the United States Court of Appeals for the District of Columbia Circuit, filling the seat of civil rights legend Spottswood Robinson[2] and displacing me as the most junior judge. I must say that I was most pleased to give up the duties of reviewing the minutes of the judicial meetings and

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[1] CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR (2007).

[2] Spottswood William Robinson III is best known for having been one of the plaintiffs' attorneys who argued one of the cases consolidated in *Brown v. Board of Education* before the United States Supreme Court. He later became the first African American to be appointed to the United States Court of Appeals for the District of Columbia Circuit, where he was ultimately raised to Chief Judge. *See* Eric Pace, *Spottswood W. Robinson 3d, Civil Rights Lawyer, Dies at 82*, N.Y. TIMES, Oct. 13, 1998, at B11.

gain the prospect of not being the first vote on every case. I was otherwise fairly neutral to the appointment of Clarence Thomas, as I had never met him and knew very little about him. I knew that he was Chairman of the Equal Employment Opportunity Commission and, by all reports, had done a fine job in that capacity. While that was not literally judicial experience, he was a distinguished graduate of Yale Law School, and—as head of an administrative agency—he had a valuable experience base for a court that spends much of its time reviewing the final decisions of such agencies. I looked forward to meeting him. But that meeting was delayed.

By custom on our court, the chief judge swears in each new judge in a private gathering in the chief's chambers, with the other judges present to meet the new guy. Because of a death in my family, I was out of town when new Judge Clarence Thomas was sworn in and therefore delayed the meeting through the rest of that week and until the following Monday. I had set aside on my calendar fifteen minutes to go down and meet my new colleague. The short version of what happened next is that, two hours later, our secretaries were reminding us that we both had other appointments and needed to break it up. The longer version is that we found much more in common with each other than either of us had with our other colleagues.

Although we had grown up on opposite sides of a segregation divide, we had both grown up in the old racially segregated South. We were each accustomed to gospel and country music and church every Sunday followed by fried chicken dinners with extended family, and each of us had relatives who were at least casually acquainted with whiskey unencumbered by tax stamps. We were both the first in our families to graduate from college, let alone finish law school, let alone achieve the federal bench. It seemed (and still does) that we found humor in the same sides of life. Our secretaries always said that when we were closeted together, that first time or any of the other many times during his year and a half on our court, all they could hear through the closed door was the frequent booming of big bass belly laughs. I mean by that big laughs, not laughs coming from big bellies.

I found that day, and found to be true over the years, that Clarence Thomas was a man of fundamental decency, egalitarian populism, and an enjoyment in the basic elements of life. I knew from the start and confirmed over and over that it was a good thing to have a colleague who knew that the people who gather to watch NASCAR

races are as valuable as those who sit in the boxes of the owners at other professional sports and, indeed, as sound as those who gather for operas, symphonies, and certainly for political speeches.

After a new judge is sworn in privately to the D.C. Circuit, within a few weeks the judge typically has a public investiture. At that investiture, a few people from the judge's professional circle come forward to offer the expected laudatory remarks, and then the new judge himself is expected to make remarks. Again I felt a warm kinship with Judge Thomas, based on his choice of authorities to quote in his investiture speech. At my investiture, I had quoted from the great American philosopher and poet Willie Nelson.[3] Clarence Thomas quoted from Waylon Jennings. That's plenty close enough.

My respect for Justice Thomas only grew as time went on. He was a collegial colleague, and that's not as redundant as it sounds. By no means are all of your colleagues equally collegial. This is not to say that Judge Thomas and I always agreed, although we usually did. But when Judge Thomas was in dissent, or writing a majority responsive to a dissent, no matter who the differing judge might be, how deep the disagreement over matters of law, Judge Thomas's writings were never personal. In his writings and in his personal relations, he always treated each colleague with respect and appreciation. In the D.C. Circuit courthouse, and since then in the Supreme Court, this respect and affection has extended beyond the judiciary to the people who make the court and building run. Secretaries, security guards, cleaning personnel, and anyone else working around Judge—later Justice—Thomas felt his respect and his humanity. He never lost the humility of the South Georgia child who grew up on the black side of the cruel segregation line of the old South, even when he made it to Yale Law School, the D.C. Circuit, and eventually the Supreme Court. I know of many Justices of the Supreme Court who have hosted gatherings of various sorts of distinguished people, accomplished and even renowned in the professions and the arts. I know of no

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[3] Hon. David B. Sentelle, Address at the Investiture Ceremony of David B. Sentelle (Dec. 7, 1987) (on file with the New York University Journal of Law and Liberty) ("It's been rough and rocky traveling, but I'm finally standing upright on the ground. After taking several readings, I'm surprised to find that my mind is still fairly sound." (quoting WILLIE NELSON, *Me and Paul*, *on* YESTERDAY'S WINE (RCA Records 1971))).

other Justice who hosted a Supreme Court dinner for RV owners—of which he proudly counts himself a member.

In June of 1991, barely over a year after Judge Thomas had become part of the D.C. Circuit, White House Counsel Boyden Gray invited me to lunch at the White House Mess. Boyden was an old friend and law school classmate, and we lunched together from time to time. I did not suspect any particular significance to the lunch. I did not immediately realize the significance after the lunch was over. However, during that meal, Gray had skillfully steered the subject of the conversation through my colleagues on the court to the newest Bush appointee. Among other things, I told Boyden that I thought that Judge Thomas would someday make an excellent appointee to the Supreme Court. I did not realize that that was what Boyden wanted to hear. The White House knew at that time, although it was not yet public, that Justice Thurgood Marshall was about to retire, and the White House was considering appointing Clarence Thomas to that seat. The announcement came in early July.

The hearings that ensued became a dark chapter in the history of the Senate Judiciary Committee.[4] I said then and I will say now that, knowing Clarence Thomas very well, I have no doubt that the personal attacks and negative allegations made against him were untrue. Over the years that I have known Clarence Thomas, I have found his conversations and his personal relations to be more like those of my acquaintances in the clergy than in politics or the law. He is a man of clean lips and clean living. To offer, I think, the best evidence I can of the sincerity of that statement, I will call upon the experience of those here who are parents or who honestly remember their own adolescent years. If you are very fortunate, when your child is an adolescent, there is some other adult to whom she will listen, because she is not going to listen to her parents. When my youngest daughter was going through those rough years, her mother and I were most thankful that she was blessed with the advice and counsel of Clarence Thomas and his wife Virginia. Among the teenage jobs that she undertook, the one from

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[4] For criticism of the Thomas confirmation hearings and the process generally, see, for example, Erwin Chemerinsky, *Gender, Race, and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings: October Tragedy*, 65 S. CAL. L. REV. 1497 (1992); Michael J. Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas*, 60 GEO. WASH. L. REV. 969 (1992).

which she learned the most was the daily dog care and occasional house sitting she performed for the Thomases. The 1990s in D.C. Metro were not a simple time or place to be a teenager. I do not know how many hours Clarence Thomas spent standing with my daughter on the pavement of his driveway talking with her about her choices in life. They formed a mutual admiration society that continues until this day. Her mother and I remain eternally thankful for that acquaintance.

Although I miss Justice Thomas on our court, our friendship and contact have continued over the intervening years. Some moments of that friendship stand out and, I think, shed light on the person of Clarence Thomas that most people do not know. In 1994, in addition to my regular duties as a judge of the D.C. Circuit, I was serving as the Presiding Judge of the Special Division for the Appointment of Independent Counsels. In 1994, the three-judge panel over which I presided appointed Kenneth Starr to conduct an investigation of allegations of criminal conduct against the President of the United States.[5] As it happens, by a not unlikely coincidence, not long before the appointment of Starr, I had lunch, as I often did, with my old friend Senator Lauch Faircloth from North Carolina in the Senate Dining Room. Senator Faircloth left the lunch to go for a floor vote and ran into our mutual friend Senator Jesse Helms, also of North Carolina. So three old friends from North Carolina had lunch in the Senate Dining Room that day. Although the Senate Dining Room is hardly a place for private conspiratorial machinations, the First Lady decided that three old friends having lunch proved that there was a vast right-wing conspiracy which was responsible for all of her husband's problems.[6] Far too many of the mass media were far too ready to accept this logic.[7]

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[5] *See* Susan Schmidt & Toni Locy, *Starr Says He Plans to Build on Fiske's Whitewater Work*, WASH. POST, Aug. 11, 1994, at A4.

[6] *See* Francis X. Clines, *The President Under Fire: The First Lady; First Lady Attributes Inquiry to 'Right-Wing Conspiracy,'* N.Y. TIMES, Jan. 28, 1998, at A1.

[7] *See, e.g.*, Paul M. Barrett, *Criticism Rises Over Starr Appointment as Some See GOP's Hand in Selection*, WALL ST. J., Aug. 15, 1994, at A12; David Johnston, *Appointment in Whitewater Turns into a Partisan Battle*, N.Y. TIMES, Aug. 13, 1994, at A1; Howard Schneider, *Judge Met Sen. Faircloth Before Fiske Was Ousted; Sentelle Says Special Counsel Wasn't Discussed*, WASH. POST, Aug. 12, 1994, at A1.

Within days, it seemed that every hack and flack in the media and political establishments, from James Carville[8] to Dan Rather,[9] had taken up this theme and begun to launch personal daily attacks on me. I fell into a habit which I admit persists to this day of checking the Web for news references to my name before I left the house in the morning. It is not pleasant to undergo that sort of daily attack. I seriously considered resigning as the presiding judge of the panel. In the midst of these attacks, I got a phone call one day. A familiar deep voice on the other end said, "Dave, you haven't been over to the house in a while. Why don't you come over and smoke a cigar?" I went to Clarence's house. We sat on his back porch and smoked that cigar. I drank a beer and he drank one of those non-alcoholic things that are supposed to taste like beer. We watched his dogs run. We talked about religion and history and music and family. We did not talk about the then-current controversy. But there was an unspoken message that I gathered from that man that day. He was saying to me in his own gentle way, "Dave, after what I went through in the confirmation hearings and their aftermath, what's happening to you is nothing. You can survive it and do just fine."

I know that the attacks on Thomas have hurt. But I know that his knowledge of the character of many of the people who have attacked him keep them from hurting nearly as much as they would if there were truth behind those attacks. To a lesser degree, I have been there. And during that time, I experienced, as I often have, the kindness of the Clarence Thomas that not very many people know. I'm sure it hurt him, and it vicariously hurt me, when his vote on a question of law caused some writers to refer to him as the "Youngest, Cruelest Justice."[10] He was the youngest, but there is not in his body a cruel bone or feeling.

Among the cruelest and most demonstrably false of the criticisms leveled at Justice Thomas are those charging that he has somehow cut himself off from his roots or left behind the black and deprived people

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[8] *See* JAMES CARVILLE, . . . AND THE HORSE HE RODE IN ON: THE PEOPLE V. KENNETH STARR (1998).

[9] *See, e.g.*, *CBS Evening News* (CBS television broadcast Aug. 12, 1994) (detailing the role of Judge Sentelle in the nomination of Kenneth Starr in the "Reality Check" segment).

[10] Editorial, *The Youngest, Cruelest Justice*, N.Y. TIMES, Feb. 27, 1992, at A24.

from whom he sprang.[11] There is even a completely false rumor that he does not hire black law clerks. Among others, he has hired two of my black former clerks, beginning as early as 1993, and those are by no means the only African Americans among his clerkships. This could have been easily ascertained by those who spread the false rumors, had they desired to do so. Less widely known is Justice Thomas's involvement in the administration and operation of the AnBryce Fellowship here at New York University School of Law, endowed by Justice Thomas's friend Anthony Welters.[12] That scholarship gives a free ride to deserving students who, like Justice Thomas, are the first in their families to graduate from college and pursue a law degree. Justice Thomas has not only served the scholarship program, he counts graduates of that program among his former clerks.

Also, while not everyone would recognize the significance of this fact, Justice Thomas hires from a broad range of law schools. Reflecting his egalitarian consciousness, he does not limit himself to the Ivy League or prestige schools. He has hired clerks from such varied backgrounds as George Mason, Creighton, and the University of Georgia. This is not to reflect upon those Justices who do limit their hiring, but it speaks much about the kind of person the unknown Clarence Thomas really is.

I promised at the beginning of these remarks that I would in the end attempt to tie some of what I know of the personal character of Clarence Thomas to what you are studying about his jurisprudence. I think it both unwise and unfair to judges at any level to identify their personal characteristics and then attribute to those characteristics the roots of their jurisprudence. I do not, however, think it unfair or unwise to at least suggest ways in which the jurisprudence demonstrates the judge to be a consistent person—including the ways in which the judge does not allow personal considerations to mar the quality of his

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[11] *See, e.g.*, Michael A. Fletcher & Thomas B. Edsall, *Black Conservatives Shunned as Heretics; Thomas, Other African Americans Ask: Is There Only One Way for Us to Think?*, WASH. POST, Aug. 1, 1998, at A3.

[12] *See* NYU Law, AnBryce Scholarship Program, http://www.law.nyu.edu/admissions/jdadmissions/scholarships/anbryce/index.htm (last visited July 30, 2009) (describing the AnBryce Scholars Program and noting that it was founded with the support of Anthony Welters).

jurisprudence. I submit that Justice Thomas's personal consistency and personal character is reflected in the consistency of his jurisprudence.

With that in mind, I suggest that at least two aspects of the jurisprudence of Justice Thomas are illustrative of the character of Clarence Thomas, the person. The first of two aspects of Justice Thomas's jurisprudence that I would stress as evidence of his consistency is his jurisprudence of judicial jurisdiction. Bearing in mind that the numbers that I give you are likely to be low, given the difficulty of searching for precisely the subject I'm describing, on at least twenty-five occasions, Justice Thomas has either written or joined a dissent or separate opinion in which the full Court held that the courts had jurisdiction and the dissenters concluded that the question before the Court was outside the jurisdiction of the Article III courts.[13] Again, without purporting to be exhaustive, I know of only one decision—*Elk Grove Unified School District v. Newdow*[14]—in which Justice Thomas wrote and joined in separate opinions (concurrences), concluding that the Court had jurisdiction when the majority held that it did not.

The cases in which Justice Thomas joined or wrote separate opinions rejecting the jurisdictional conclusion of the majority include such diverse decisions as *Boumediene v. Bush*, wherein the dissenters concluded that the suspension clause provides no basis for jurisdiction over enemy combatants held at Guantanamo;[15] *Massachusetts v. EPA*, in which the dissenters concluded that states, local governments, and environmental organizations had no standing to raise a justiciable challenge to the EPA's denial of a petition for rulemaking to regulate greenhouse gas;[16] and *Demore v. Kim*, in which Justice Thomas joined Justice O'Connor's view that the Immigration and Nationality Act deprived federal courts of jurisdiction to set aside

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[13] *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 678 (2006) (Thomas, J., dissenting) ("[I]t is clear that this Court lacks jurisdiction to entertain petitioner's claims . . . .").

[14] 542 U.S. 1 (2004).

[15] *See* 128 S. Ct. 2229, 2303–08 (2008) (Scalia, J., dissenting, joined by, inter alia, Thomas, J.).

[16] *See* 549 U.S. 497, 536–50 (2007) (Roberts, C.J., dissenting, joined by, inter alia, Thomas, J.).

any action or decision by the Attorney General in detaining criminal aliens while removal proceedings are ongoing.[17]

Why is this line of Justice Thomas's jurisprudence significant in relation to my estimation of Justice Thomas the person? I do not suggest that Justice Thomas's jurisdictional view derived from the kind of person he is. Like all his views of the law, his jurisdictional analysis derives from his keen intellect in applying the law derived from the proper sources of the Constitution, statute, and precedent. Nonetheless, his consistent refusal to expand the power of his branch of government, and therefore himself, beyond what he concludes are the due bounds of its authority is consistent with a person of humility and a person with great respect for the law.

I do not suggest that the majority of the Court has been invariably engaged in turf grabbing or empire building when Justice Thomas has dissented. I only think it self-evident that he has not. Whether you agree or disagree with his conclusion in each case, I think you must agree that Justice Thomas is not a man who has allowed power to corrupt his views of the limits of his own and the Court's authority.

The second aspect of his jurisprudence that I suggest reflects his character is his consistent pattern of construing statutes and constitutional provisions more strictly than some others, including on many occasions the majority of the Court. Again, without attempting to be exhaustive, I easily located fourteen diverse statutory and constitutional interpretations in which Justice Thomas wrote or joined separate opinions more strictly construing such provisions.[18] I do not purport that this is anywhere near a total number, given the difficulty of the search query, but I think it reflective of Justice Thomas's approach. Again, the variety of provisions is broad. For example, in *Small v. United States*,[19] the majority construed the words "any court" imposing firearm possession restrictions on a person who has been convicted to refer to the courts of the United States. Justice Thomas in dissent, joined by Justices Scalia and Kennedy, would have held that "any

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[17] *See* 538 U.S. 510, 533–40 (2003) (O'Connor, J., concurring, joined by, inter alia, Thomas, J.).

[18] *See, e.g.*, *Newdow*, 542 U.S. at 49–52 (Thomas, J., concurring in the judgment) (arguing that the Establishment Clause should not be incorporated against the states).

[19] 544 U.S. 385 (2005).

court" means "any court"—that is, any court anywhere in the world. In *Utah v. Evans*,[20] Justice Thomas, concurring and dissenting, along with three others, had no trouble concluding that the constitutional words "actual Enumeration" for the taking of the census meant there had to be an actual enumeration. The majority was not convinced that the words meant what they said. In *Morse v. Republican Party*, Justice Thomas, dissenting with Chief Justice Rehnquist and Justices Scalia and Kennedy, would have concluded that the Republican Party of Virginia is not a "state or political subdivision" within the meaning of section 5 of the Voting Rights Act.[21] Again, the majority was of another mind.

In probably the earliest and one of the most significant examples of Justice Thomas's jurisprudence of statutory and constitutional construction, *Hudson v. McMillian*,[22] Justice Thomas would have concluded that the majority's expansion of the Cruel and Unusual Punishment Clause to preclude the infliction of pain without significant physical injury went beyond the original intent of the framers of the Eighth Amendment. It was this dissent that was cited by those critics who called him the youngest and cruelest of the Justices.[23] It is perhaps this dissent that best illustrates how his interpretive jurisprudence reflects Justice Thomas's character. In all of these decisions construing statutes and constitutional provisions, Justice Thomas again evidences his eschewal of power grasping. It was the duty of the legislature or the constitutional framers to make the law. It was therefore their authority. It is the duty of the Court only to construe the law as made by the political branches and the framers. It is therefore not within the authority of the Court to make law.

Many of these cases, none more than *Hudson*, illustrate a further aspect of Justice Thomas's person. These cases, especially the *Hudson* case, caused him to be subjected once again to the criticism of the media and much of the legal academy.[24] We know that he knew that.

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[20] 536 U.S. 452 (2002).

[21] 517 U.S. 186, 253 (1996) (Thomas, J., dissenting).

[22] 503 U.S. 1, 17 (1992) (Thomas, J., dissenting).

[23] *See* Editorial, *supra* note 10 ("The Eighth Amendment forbids cruel and unusual punishments. Only Justices Thomas and Antonin Scalia refused to apply it to the case of Keith Hudson . . . ."); *see also supra* text accompanying note 10.

[24] *See, e.g.*, A. Leon Higginbotham, Jr., *Justice Clarence Thomas in Retrospect*, 45 HASTINGS L.J. 1405, 1423–27 (calling Thomas's position in many cases, including *Hudson*, either "racist" or "wretchedly conservative").

He had no reason to believe that the media or the legal academy would go light on him. They certainly had not in the past. And yet, he did what he knew would be an unpopular thing because, in his principled analysis of the law, he perceived it to be the correct thing to do. Justice Thomas the person and Justice Thomas the Justice has proven himself over and over to be a person who is willing to do the right thing without regard to the reaction of the media, the academy, or the rest of the chattering classes. You may or may not agree with him on a particular case, or on any cases, but I think you must concede that he has consistently done what he believed to be the right thing, even in the face of the knowledge that it will subject him to further criticism.

Some in the media and some in the academy have ridiculed the statement of President George H.W. Bush that Clarence Thomas was the best qualified nominee available for the Supreme Court.[25] Perhaps they just don't realize the qualifications President Bush was seeking. If he was seeking a person of character, intellect, and, most of all, courage of his convictions—if he was seeking a Justice who would be guided by his analysis of the law and not by any desire to please the opinion-formers of the press or the academy—then he would have a difficult time finding anyone more qualified than Justice Clarence Thomas.

I hope I have, in some small fashion, helped to make known the unknown Clarence Thomas. I realize that this is not the academic presentation that may have typified this symposium, but—for what it's worth—I have prepared an appendix for the benefit of the propounders of this academic occasion that list the Supreme Court decisions on which I have

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[25] *See, e.g.*, E. J. Dionne, Jr., *After the Brawl Was Over; Let's Stop Our Self-Righteous Infighting*, WASH. POST, Oct. 20, 1991, at C1 ("Absolutely no one believed Bush when he denied that Thomas's race had something to do with why he was chosen. Absolutely no one—including many who admire Clarence Thomas—thought Bush meant it when he said that the 43-year-old Thomas was simply the very best nominee available."); James Reston, *More Than Just Up or Down*, N.Y. TIMES, Oct. 15, 1991, at A25 ("One mystery of this avoidable scandal is why President Bush ever nominated Clarence Thomas in the first place. He said he never even considered Judge Thomas's race but sent his name to the Senate because he regarded Judge Thomas as the best qualified person for the job, and nobody even laughed. This was such an obvious misrepresentation of the facts (even Judge Thomas was surprised) that the nomination should have been examined against the President's claim and 'returned to sender.'").

drawn in my remarks on the consistency between Clarence Thomas the person and Clarence Thomas the Justice. I am grateful for the opportunity to share my personal knowledge of one of the great jurists of his generation.