

**THE BLOG**

Mr. Justice Whoop-dee-damn-doo

By Marty Kaplan

09/30/2007 03:32 pm ET | Updated May 25, 2011

We're working our way backward through the '90s. With OJ Simpson again on the national stage, it was inevitable that Clarence Thomas would follow. The Thomas confirmation hearings were a milestone in real-time mass-mediated American psychodrama. Before the Juice, there was Long Dong Silver. Before the bloody glove, there was the pubic-hairy Coke can. Before the suicidal white Bronco driver, there was the victimized black conservative martyr. Before there was OJ's jury nullification, there was Thomas' "high-tech lynching," which acquitted him right onto the Supreme Court.

I still recall being so obsessed by the Judiciary Committee hearings that I listened to them through an earphone while pushing a baby stroller through the mall. I remember watching Arlen Specter and Orrin Hatch hard at work, attempting to destroy Anita Hill, and finally understanding what the Salem Witch Trials must have been like. I remember being torn between awe at Chairman Joe Biden's pomposity and amazement at the goings-on in his scalp. I remember calling my friend Jack Rosenthal, then the editor of the editorial page of the *New York Times*, nearly every day, haranguing him to stiffen the Senate's opposition. To this day, I recall my revulsion at George H.W. Bush's cynically gleeful, preposterous attempt to frame the Thomas nomination as a filling of the Thurgood Marshall seat.

It turns out, of course, that the alarming character traits Anita Hill observed in her boss Clarence Thomas were nothing compared to the nutcase judicial temperament he has since revealed. At his confirmation hearing, Thomas — like Marshall before him, and Roberts and Alito after him — paid tribute to *stare decisis*, the importance of precedent in guiding Supreme Court decisions. But no less an authority than arch-conservative fellow Associate Justice Antonin Scalia told Thomas' biographer, [Ken Fosskett](#), that Thomas "doesn't believe in *stare decisis*, period." If you think nutcase is too strong a word to summarize that view, listen again to Scalia, as quoted in this Terry Gross [interview](#) with Jeff Toobin about his new Supreme Court book, *The Nine*:

Mr. TOOBIN: Clarence Thomas is not just the most conservative member of the Rehnquist court or the Roberts court. He's the most conservative justice to serve on the court since the 1930s. If you take what Thomas says seriously, if you read his opinions, particularly about issues like the scope of the federal government, he basically thinks that the entire work of the New Deal is unconstitutional. He really believes in a conception of the federal government that hasn't been supported by the justices since Franklin Roosevelt made his appointments to the court. You know, I went to a speech that Justice Scalia gave at a synagogue here in New York a couple of years ago, and someone asked him, 'What's the difference between your judicial philosophy and Justice

Thomas?’ I thought a very good question. And Scalia talked for a while and he said, ‘Look, I’m a conservative. I’m a textualist. I’m an originalist. But I’m not a nut.’ And I thought that...

GROSS: Meaning that he thinks Thomas is one.

Mr. TOOBIN: Well, that was certainly the implication.

GROSS: Mm-hmm.

Mr. TOOBIN: It was pretty amazing. I mean, Thomas is well outside the mainstream, even of the conservatives on the court.

The Roberts-Scalia-Thomas-Alito-and-sometimes-Kennedy fivesome on the Court today is the closest the country has come to the domination of the third branch of government by the same ideology that gave us the Bush administration and its Congressional and Fourth Estate enablers. If Justice Stevens can hang on, and if Democrats can nominate and confirm his successor, there is a chance that the Constitution can continue to rely on the better angels of Justice Kennedy’s nature. But even so, I fear that the first Monday in October has lost an essential element of its grandeur for years to come. When Justice Souter wept after the *Bush v. Gore* decision, he was not only mourning the naked politicization of justice; he was anticipating the tragic abrogation of the Constitution that we have experienced in the seven years since. No reaction to that silent coup is more appallingly prescient than what Justice Thomas now tells us in his memoir was his reaction when his wife came to him in his bath to say that the Senate had confirmed him 52 to 48: “Whoop-dee-damn-doo.”

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Marty Kaplan 

USC Annenberg professor and Norman Lear Center director