Thomas Cites Failure to Disclose Wife's Job

By ERIC LICHTBLAU
Published: January 24, 2011

WASHINGTON — Under pressure from liberal critics, Justice Clarence Thomas of the Supreme Court acknowledged in filings released on Monday that he erred by not disclosing his wife's past employment as required by federal law.

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Matthew Cavanaugh/European Pressphoto Agency

Justice Clarence Thomas and his wife, Virginia Thomas.

Justice Thomas said that in his annual financial disclosure statements over the last six years, the employment of his wife, Virginia Thomas, was "inadvertently omitted due to a misunderstanding of the filing instructions."

To rectify that situation, Justice Thomas filed seven pages of amended disclosures listing Mrs. Thomas's employment in that time with the Heritage Foundation, a conservative policy group, and Hillsdale College in Michigan, for which she ran a constitutional law center in Washington.

The justice came under criticism last week from Common Cause, a liberal advocacy group, for failing to disclose Mrs. Thomas's employment as required under the 1978 Ethics in Government Act. While justices are not required to say how much a spouse earns, Common Cause said its review of Internal Revenue Service filings showed that the Heritage Foundation paid Mrs. Thomas $686,589 from 2003 to 2007.

The group also asserted that Justice Thomas should have withdrawn from deciding last year's landmark Citizens United case on campaign finance because of both Mrs. Thomas's founding of another conservative political group in 2009 and Justice Thomas's own appearance at a private political retreat organized by Charles Koch, a prominent conservative financier.

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Justices Thomas and Antonin Scalia said in a statement released by the court on Thursday that they had each spoken at dinners at the Koch retreat and that their expenses were paid by the Federalist Society, a conservative legal group.

The additional filings released by the court on Monday regarding Mrs. Thomas's employment put Justice Thomas in the odd position of issuing two formal statements in five days about his personal dealings.

Bob Edgar, president of Common Cause, said he found Justice Thomas's explanation about the omission to be "implausible."

As a Supreme Court justice who regularly hears complex legal cases, "it is hard to see how he could have misunderstood the simple directions of a federal disclosure form."

Deborah L. Rhode, a law professor at Stanford University who specializes in judicial ethics, said the recent episodes could do some harm to Justice Thomas's reputation. But she added that it was unlikely to have any lasting impact on him or on the disclosure requirements that give justices wide leeway to decide whether they have a financial conflict in hearing a case.

Professor Rhode noted, for instance, that it was still unknown who contributed a total of $550,000 to Liberty Central, the conservative legal group that Mrs. Thomas founded in 2009 in opposition to President Obama's policies. The amended disclosures filed by Justice Thomas, which do not include income in 2010, do not mention Liberty Central, and no regulation requires the group or the Thomases to disclose the source of the group's financial support. Mrs. Thomas left the group in the fall.

"There's no formal mechanism for review of conflicts among Supreme Court justices," Professor Rhode said. "Personally, I think issues like this are somewhat scandalous for the court, but from what we've seen when these issues have come up before, I don't see that changing."

A version of this article appeared in print on January 25, 2011, on page A16 of the New York edition.

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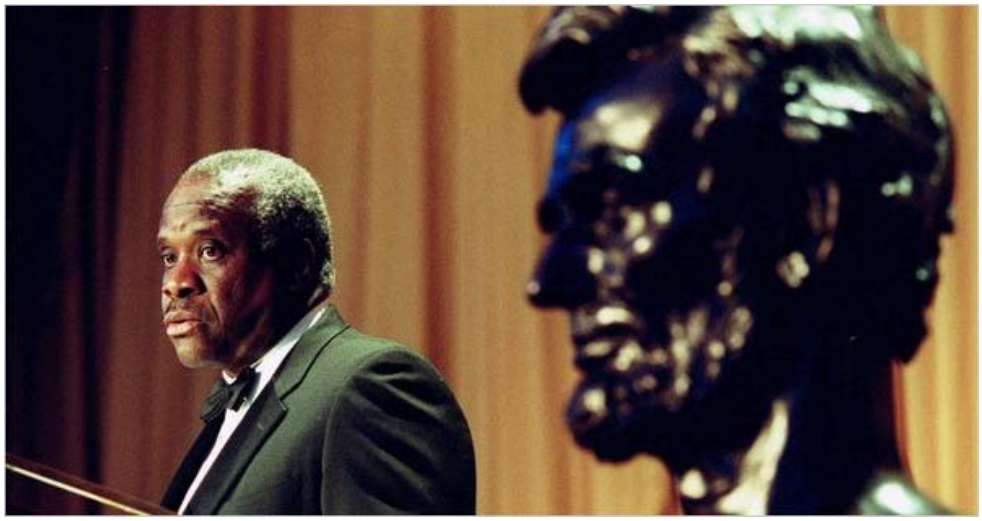

Kamenko Pajic/Associated Press

Justice Clarence Thomas was given a $15,000 bust of Lincoln in 2001 by a group for which a friend is a trustee.

By MIKE McINTIRE
Published: June 18, 2011

PIN POINT, Ga. — Clarence Thomas was here promoting his memoir a few years ago when he bumped into Algernon Varn, whose grandfather once ran a seafood cannery that employed Justice Thomas's mother as a crab picker.

Mr. Varn lived at the old cannery site, a collection of crumbling buildings on a salt marsh just down the road from a sign heralding this remote coastal community outside Savannah as Justice Thomas's birthplace. The justice asked about plans for the property, and Mr. Varn said he hoped it could be preserved.

"And Clarence said, 'Well, I've got a friend I'm going to put you in touch with,' " Mr. Varn recalled, adding that he was later told by others not to identify the friend.

The publicity-shy friend turned out to be Harlan Crow, a

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Stephen Morton for The New York Times

Algernon Varn, whose grandfather once ran a seafood cannery where Justice Clarence Thomas's mother worked, on the site of the old cannery. Mr. Varn said Justice Thomas put him in touch with a buyer to restore the property and build a museum.

Dallas real estate magnate and a major contributor to conservative causes. Mr. Crow stepped in to finance the multimillion-dollar purchase and restoration of the cannery, featuring a museum about the culture and history of Pin Point that has become a pet project of Justice Thomas's.

The project throws a spotlight on an unusual, and ethically sensitive, friendship that appears to be markedly different from those of other justices on the nation's highest court.

The two men met in the mid-1990s, a few years after Justice Thomas joined the court. Since then, Mr. Crow has done many favors for the justice and his wife, Virginia, helping finance a Savannah library project dedicated to Justice Thomas, presenting him with a Bible that belonged to Frederick Douglass and reportedly providing $500,000 for Ms. Thomas to start a Tea Party-related group. They have also spent time together at gatherings of prominent Republicans and businesspeople at Mr. Crow's Adirondacks estate and his camp in East Texas.

In several instances, news reports of Mr. Crow's largess provoked controversy and questions, adding fuel to a rising debate about Supreme Court ethics. But Mr. Crow's financing of the museum, his largest such act of generosity, previously unreported, raises the sharpest questions yet — both about Justice Thomas's extrajudicial activities and about the extent to which the justices should remain exempt from the code of conduct for federal judges.

Although the Supreme Court is not bound by the code, justices have said they adhere to it. Legal ethicists differed on whether Justice Thomas's dealings with Mr. Crow pose a problem under the code. But they agreed that one facet of the relationship was both unusual and important in weighing any ethical implications: Justice Thomas's role in Mr. Crow's donation for the museum.

The code says judges "should not personally participate" in raising money for charitable endeavors, out of concern that donors might feel pressured to give or entitled to favorable treatment from the judge. In addition, judges are not even supposed to know who donates to projects honoring them.

While the nonprofit Pin Point museum is not intended to honor Justice Thomas, people involved in the project said his role in the community's history would inevitably be part of it, and he participated in a documentary film that is to accompany the exhibits.

Deborah L. Rhode, a Stanford University law professor who has called for stricter ethics rules for Supreme Court justices, said Justice Thomas "should not be directly involved in fund-raising activities, no matter how worthy they are or whether he's being centrally honored by the museum."

On the other hand, the restriction on fund-raising is primarily meant to deter judges from using their position to pressure donors, as opposed to relying on "a rich friend" like Mr. Crow, said Ronald D. Rotunda, who teaches legal ethics at Chapman University in California.

"I don't think I could say it's unethical," he said. "It's just a very peculiar situation."

Justice Thomas, through a Supreme Court spokeswoman, declined to respond to a detailed set of questions submitted by The New York Times. Mr. Crow also would not comment.

Supreme Court ethics have been under increasing scrutiny, largely because of the activities of Justice Thomas and Ms. Thomas, whose group, Liberty Central, opposed President Obama's health care overhaul — an issue likely to wind up before the court. Mr. Crow's donation to Liberty Central was reported by Politico.

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A version of this article appeared in print on June 19, 2011, on page A1 of the New York edition with the headline: The Justice and the Magnate.

Friendship of Justice and Magnate Puts Focus on Ethics

Published: June 18, 2011

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In January, the liberal advocacy organization Common Cause asked the Justice Department to investigate whether Justices Thomas and Antonin Scalia should have recused themselves from last year's Citizens United campaign finance case because they had attended a political retreat organized by the billionaire Koch brothers, who support groups that stood to benefit from the court's decision.

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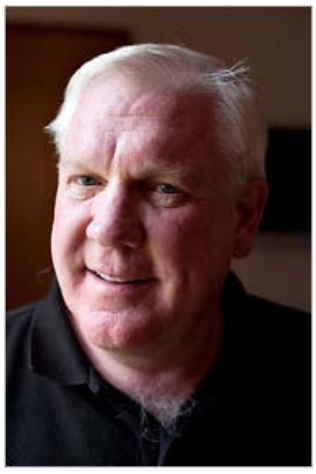

Brian Harkin

Harlan Crow, a Dallas real estate magnate, met Justice Thomas a few years after he joined the Supreme Court.

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A month later, more than 100 law professors asked Congress to extend to Supreme Court justices the ethics code that applies to other federal judges, and a bill addressing the issue was introduced.

It is not unusual for justices to accept gifts or take part in outside activities, some with political overtones.

Justice Stephen G. Breyer has attended Renaissance Weekend, a retreat for politicians, artists and media personalities that is a favorite of Democrats, including former President Bill Clinton. Justice Ruth Bader Ginsburg participated in a symposium sponsored by the National Organization for Women's Legal Defense and Education Fund, and a philanthropic foundation once tried to give her a $100,000 achievement award. She instructed that the money be given to charity.

But in the case of Justice Thomas and his dealings with Mr. Crow, the ethical complications appear more complex.

Conservative Ties

Mr. Crow, 61, manages the real estate and investment businesses founded by his late father, Trammell Crow,

once the largest landlord in the United States. The Crow family portfolio is worth hundreds of millions of dollars and includes investments in hotels, medical facilities, public equities and hedge funds.

A friend of the Bush family, Mr. Crow is a trustee of the George Bush Presidential Library Foundation and has donated close to $5 million to Republican campaigns and conservative groups. Among his contributions were $100,000 to Swift Boat Veterans for Truth, the group formed to attack the Vietnam War record of Senator John Kerry, the 2004 Democratic presidential candidate, and $500,000 to an organization that ran advertisements urging the confirmation of President George W. Bush's nominees to the Supreme Court.

Mr. Crow has not personally been a party to Supreme Court litigation, but his companies have been involved in federal court cases, including four that went to the appellate level. And he has served on the boards of two conservative organizations involved in filing supporting briefs in cases before the Supreme Court. One of them, the American Enterprise Institute, with Mr. Crow as a trustee, gave Justice Thomas a bust of Lincoln valued at $15,000 and praised his jurisprudence at an awards gala in 2001.

The institute's Project on Fair Representation later filed briefs in several cases, and in 2006 the project brought a lawsuit challenging federal voting rights laws, a case in which Justice Thomas filed a lone dissent, embracing the project's arguments. The project director, an institute fellow named Edward Blum, said the institute supported his research but did not finance the brief filings or the Texas suit, which was litigated pro bono by a former clerk of Justice Thomas's.

"When it came time to file a lawsuit," he said, "A.E.I. had no role in doing that."

Coming Up With a Plan

In addition to his interest in politics and policy, Mr. Crow is well known for his keen devotion to history.

A backyard garden at his $24 million Dallas residence is dominated by old statues of dictators he has collected from fallen regimes, including Lenin and Stalin. His private library is packed with 8,000 rare books and artifacts, including a Senate roll call sheet from Justice Thomas's confirmation and a "thank you" letter from the justice, according to local news reports.

There are a number of reasons Justice Thomas might be thankful to Mr. Crow. In addition to giving him the Douglass Bible, valued 10 years ago at $19,000, Mr. Crow has hosted the justice aboard his private jet and his 161-foot yacht, at the exclusive Bohemian Grove retreat in California and at his grand Adirondacks summer estate called Topridge, a 105-acre spread that once belonged to Marjorie Merriweather Post, the cereal heiress.

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Christopher Shaw, a folk singer who said he had been invited several times to perform at Topridge, recalled seeing Justice Thomas and his family "on one or two occasions." They were among about two dozen guests who included other prominent Republicans — last summer, the younger Mr. Bush stopped by.

"There would be guys puffing on cigars," Mr. Shaw said. "Clarence just kind of melted in with everyone else. We got introduced at dinner. He sat at Harlan's table."

Mr. Crow's $175,000 donation to the library in Savannah in 2001 started out anonymous, but it was eventually made public amid opposition to the project by some local black leaders who did not like Justice Thomas's politics. Similarly, Mr. Crow sought to keep his role in the museum quiet.

At first glance the Pin Point Heritage Museum, scheduled to open this fall, would seem an unlikely catalyst for an ethical quandary. That Pin Point's history is worthy of preservation is not in dispute.

Part of the Gullah/Geechee Cultural Heritage Corridor designated by Congress, it is representative of tight-knit Southern coastal settlements that trace their roots to freed slaves and were often based around fishing. In Pin Point, the Varn crab and oyster cannery, founded in the 1920s, was a primary source of jobs until it closed in 1985.

Mr. Varn and his wife, Sharon, said they had long hoped the property could be saved from commercial development but had little success coming up with a plan. That

changed after their chance encounter with Justice Thomas, who was visiting his childhood home with a television news crew.

Justice Thomas, 62, was born and raised near the cannery overlooking the Moon River, where it was not uncommon for babies to rock in bassinets made of crab baskets while their mothers shucked oysters. He sympathized with the Varns' wishes and said he had a friend who could help, Mr. Varn said.

The Varns eventually sold their property in April 2008. During a recent interview at their home near the cannery, they made it clear that they were "not supposed to say" who the buyer was, and a news release issued last November by a Savannah public relations firm said the museum was being "privately funded by an anonymous donor."

But the paper trail leads back to Mr. Crow, and in interviews at the project site, people working on it acknowledged that he was financing it. Property records show a company called HKJRS/Pinpoint bought the land for $1.5 million, and incorporation records say the company is controlled by a Dallas-based partnership run by Mr. Crow.

Project documents reviewed by The Times show a preliminary construction budget of $1.3 million, but it is unclear if that includes expenses related to the content and design of the museum.

Justice Thomas remains closely involved with the project. Emily Owens, a museum spokeswoman who works for Mr. Crow's company, said the justice "played a big part" in creating a video documentary that will be part of the museum experience. He hosted a design team from Dallas for a four-hour meeting at his Supreme Court offices in February.

And he has had a role in picking people to help with the museum. Barbara Fertig, a history professor at Armstrong Atlantic State University in Savannah, said that she was asked to meet with Justice Thomas last spring and that "by the end of the meeting, he said he would like me to work on this project."

She said she had "never been particularly curious" about why Mr. Crow is financing it, adding that costly preservation projects are often possible only because of philanthropy motivated by friendships. Justice Thomas and Mr. Crow would seem to fall into that category, Ms. Fertig said.

"I've been in the company of the two of them together," she said, "and they certainly really are friends."

The Code of Conduct

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That friendship is important to determining whether Justice Thomas's interactions with Mr. Crow conflict with the code, said Raymond J. McKoski, a retired state judge in Illinois who wrote a law review article on charitable fund-raising by judges. If Justice Thomas did not "misuse the prestige of office" in getting Mr. Crow to take on the project, it should not be a concern, he said.

"Some of it depends on the conversations that took place," Mr. McKoski said. "Who brought up the idea? How willing was Mr. Crow to do it? What exact questions were asked by Justice Thomas?"

Beyond the admonition against fund-raising, the code generally discourages judges from partaking in any off-the-bench behavior that could create even the perception of partiality. It acknowledges the value in judges' being engaged with their communities, lecturing on the law and doing charitable work, but draws a line where those activities might cause a reasonable person to worry that a judge is indebted to or influenced by someone.

"The code of conduct is quite clear that judges are not supposed to be soliciting money for their pet projects or charities, period," said Arn Pearson, a lawyer with Common Cause. "If any other federal judge was doing it, he could face disciplinary action."

The justices are not bound by the federal judiciary's conduct code, because it is enforced by a committee of judges who rank below the justices. Even so, Justices Breyer and Anthony M. Kennedy said in testimony before Congress in April that the

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justices followed the code.

Beyond the code, the justices must comply with laws applying to all federal officials that prohibit conflicts of interest and require disclosure of gifts. Justice Thomas's gift acceptances drew attention in 2004, when The Los Angeles Times reported that he had accumulated gifts totaling $42,200 in the previous six years — far more than any of the other justices.

Since 2004, Justice Thomas has never reported another gift. He has continued to disclose travel costs paid by schools and organizations he has visited for speeches and teaching, but he has not reported that any travel was provided by Mr. Crow.

Travel records for Mr. Crow's planes and yacht, however, suggest that Justice Thomas may have used them in recent years.

In April 2008, not long after Mr. Crow bought the Pin Point property, one of his private planes flew from Washington to Savannah, where his yacht, the Michaela Rose, was docked.

That same week, an item appeared in a South Carolina lawyers' publication noting that Justice Thomas was arriving aboard the Michaela Rose in Charleston, a couple of hours north of Savannah, where the Crow family owns luxury vacation properties. The author was a prominent lawyer who said she knew of the visit because of a family connection to Mr. Crow.

Justice Thomas reported no gifts of travel that month in his 2008 disclosure. And there are other instances in which Justice Thomas's travels correspond to flights taken by Mr. Crow's planes.

On Jan. 4, 2010, when Justice Thomas was in Savannah for the dedication of a building in his honor, Mr. Crow's plane flew from Washington to Savannah and returned to Washington the next day. Justice Thomas reported in his financial disclosure that his travel had been paid for by the Savannah College of Art and Design, which owned the building.

In his 2009 financial disclosure, Justice Thomas reported that Southern Methodist University in Dallas — Trammell Crow's alma mater — had provided his travel for a speech there on Sept. 30. Flight records show that Mr. Crow's plane flew from Washington to Dallas that day.

Among the questions The Times submitted to Justice Thomas was whether he was on any of those flights, and if so, whether the colleges reimbursed him or Mr. Crow. The colleges declined to comment.

One item not required to be reported in Justice Thomas's financial disclosures is the millions of dollars Mr. Crow is spending on the museum. That is because the money is not being given to the justice as a gift.

For Algernon and Sharon Varn, who said they were thrilled to see a cherished piece of local history being restored, the museum is a gift to the community. While it is about more than Justice Thomas, they said, he deserves credit for putting them together with someone who had the money and the interest to make the project a reality.

"He was instrumental in getting the process started, because he wanted it preserved to show that no matter where you came from, you can go where you want," Mr. Varn said. "He had a meager existence, and yet look where he is today. It's a great American story."

EDITORIAL

Cloud Over the Court

Published: June 22, 2011

The Supreme Court is not bound by the code of conduct for federal judges, but justices have said they follow it voluntarily. Justice Clarence Thomas, however, does not appear to believe that he needs to adhere to those rules.

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The code says judges "should not personally participate" in raising money for charitable endeavors lest donors feel pressured to give or feel entitled to special treatment if they do. Judges are not supposed to know who donates to projects honoring them.

On Sunday, The Times reported on Justice Thomas's conduct connecting a museum in his hometown, Pin Point, Ga., with a major donor to that project, Harlan Crow, a Dallas real-estate magnate who is a big contributor to conservative causes and a Thomas friend and benefactor. A company controlled by Mr. Crow's partnership paid $1.5 million for the site of the museum, which is scheduled to open this fall. Although the museum is not intended to honor Justice Thomas, his history will be part of it.

This case is the latest evidence that the Supreme Court's voluntary compliance with the judges' conduct code isn't enough to protect impartiality and credibility. Justice Thomas seems utterly unconcerned with those rules. In January, he acknowledged that, over the last six years, he had failed to disclose his wife's employment with conservative organizations, in violation of the 1978 Ethics in Government Act. The Supreme Court must adopt the rigorous code of conduct that applies to all other parts of the federal judiciary.

A version of this editorial appeared in print on June 23, 2011, on page A26 of the New York edition with the headline: Cloud Over the Court.

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Thomas, Clarence

EDITORIAL

The Thomas Issue

Published: February 17, 2011

When the Supreme Court hears arguments next week, it will mark the fifth anniversary of Justice Clarence Thomas's silence during oral argument — unless he chooses to re-enter the give-and-take. We hope he will.

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Times Topic: Clarence Thomas

This milestone has stirred a wide conversation about his effectiveness as a justice following another about his ethics. They are actually related. How Justice Thomas comports himself on the bench is a matter of ethics and effectiveness, simultaneously. His authority as a justice and the court's as an institution are at issue.

Last week, 74 Democrats in Congress cited the threat to the court's authority when they asked Justice Thomas to recuse himself from an expected review of the health care reform law. This came after an announcement by his wife, Virginia, a lobbyist, who said she will provide "advocacy and assistance" as "an ambassador to the Tea Party movement," which, of course, is dedicated to the overturning of the health care law.

The representatives based their request on the "appearance of a conflict of interest," because of a conflict they see between his duty to be an impartial decision-maker and the Thomas household's financial gain from her lobbying. If Mrs. Thomas were involved as a party in the litigation about the health law, or the litigation's outcome proved central to her professional life, those classic conflicts would require him to recuse himself. The annual requirement that the justice disclose the sources of his household income is designed to address that issue.

Still, the reputations of the justice and the court — which depend on public confidence — are at issue because of Mrs. Thomas's lobbying. Justice Thomas's attendance at a political event also seemed ill advised.

The court relies on each justice individually to judge whether he or she should not hear a case because of bias or the appearance of bias. It's a bad approach, but it underscores Justice Thomas's responsibility for his comportment and for acting in ways that contribute to the court's authority.

Taking part in oral arguments would be good for the justice and the court. In a landmark article about judging, the scholar John Leubsdorf said a justice should abide by three principles: avoid basing a vote on personal considerations; avoid basing a vote on facts learned outside the case; and consider both sides' arguments. Taking part in arguments is a way for Justice Thomas to convey that he honors the third principle. By

engaging with lawyers for both sides in cases and showing open-mindedness in exchanges with them, he would show his dedication to the court's impartiality and to its integrity as an institution.

A version of this editorial appeared in print on February 18, 2011, on page A30 of the New York edition.

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Common Cause Asks Court About Thomas Speech

By ERIC LICHTBLAU
Published: February 14, 2011

WASHINGTON — Discrepancies in reports about an appearance by Justice Clarence Thomas at a political retreat for wealthy conservatives three years ago have prompted new questions to the Supreme Court from a group that advocates changing campaign finance laws.

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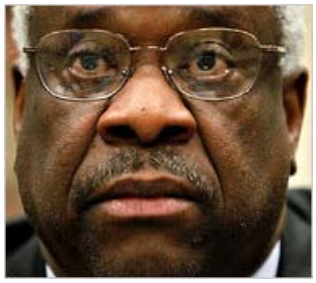

Alex Wong/Getty Images

Justice Clarence Thomas appeared at a political retreat in 2008.

When questions were first raised about the retreat last month, a court spokeswoman said Justice Thomas had made a "brief drop-by" at the event in Palm Springs, Calif., in January 2008 and had given a talk.

In his financial disclosure report for that year, however, Justice Thomas reported that the Federalist Society, a prominent conservative legal group, had reimbursed him an undisclosed amount for four days of "transportation, meals and accommodations" over th weekend of the retreat. The event is organized by Char and David Koch, brothers who have used millions of dollars from the energy conglomerate they run in Wicl Kan., to finance conservative causes.

Arn Pearson, a vice president at the advocacy group Common Cause, said the two statements appeared at odds. His group sent a letter to the Supreme Court on Monday asking for "further clarification" as to whether the justice spent four days at the retreat for the entire event or was there only briefly.

"I don't think the explanation they've given is credible," Mr. Pearson said in an interview. He said that if Justice

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Eric Thayer for The New York Times

Protesters showed up at another assembly last month in Palm Springs, Calif.

Thomas's visit was a "four-day, all-expenses paid trip in sunny Palm Springs," it should have been reported as a gift under federal law.

The Supreme Court had no comment on the issue Monday. Nor did officials at the Federalist Society or at Koch Industries.

Common Cause maintains that Justice Thomas should have disqualified himself from last year's landmark campaign finance ruling in the Citizens United case, partly because of his ties to the Koch brothers.

In a petition filed with the Justice Department last month, the advocacy group said past appearances at the Koch brothers' retreat by Justice Thomas and Justice Antonin Scalia, along with the conservative political work of Justice Thomas's wife, had created a possible perception of bias in hearing the case.

The Citizens United decision, with Justice Thomas's support, freed corporations to engage in direct political spending with little public disclosure. The Koch brothers have been among the main beneficiaries, political analysts say.

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A version of this article appeared in print on February 15, 2011, on page A17 of the New York edition.

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No Argument: Thomas Keeps 5-Year Silence

By ADAM LIPTAK
Published: February 12, 2011

WASHINGTON — The anniversary will probably be observed in silence.

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Win McNamee/Getty Images

Justice Clarence Thomas has given various reasons for declining to participate in oral arguments.

A week from Tuesday, when the Supreme Court returns from its midwinter break and hears arguments in two criminal cases, it will have been five years since Justice Clarence Thomas has spoken during a court argument.

If he is true to form, Justice Thomas will spend the arguments as he always does: leaning back in his chair, staring at the ceiling, rubbing his eyes, whispering to Justice Stephen G. Breyer, consulting papers and looking a little irritated and a little bored. He will ask no questions.

In the past 40 years, no other justice has gone an entire term, much less five, without speaking at least once during arguments, according to Timothy R. Johnson, a professor of political science at the University of Minnesota. Justice Thomas's epic silence on the bench is just one part of his enigmatic and contradictory persona. He is guarded in public but gregarious in private. He avoids elite universities but speaks frequently to students at regional and religious schools. In those settings, he rarely dwells on legal topics but is happy to discuss a favorite movie, like "Saving Private Ryan."

He talks freely about the burdens of the job.

"I tend to be morose sometimes," he told the winners of a high school essay contest in 2009. "There are some cases

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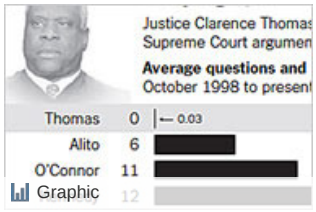

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Does Clarence Thomas's Silence Matter?

Can a Supreme Court justice effectively perform his duties without participating in oral arguments?

that will drive you to your knees."

Justice Thomas has given various and shifting reasons for declining to participate in oral arguments, the court's most public ceremony.

He has said, for instance, that he is self-conscious about the way he speaks. In his memoir, "My Grandfather's Son," he wrote that he had been teased about the dialect he grew up speaking in rural Georgia. He never asked questions in college or law school, he wrote, and he was intimidated by some fellow students.

Elsewhere, he has said that he is silent out of simple courtesy.

"If I invite you to argue your case, I should at least listen to you," he told a bar association in Richmond, Va., in 2000.

Justice Thomas has also complained about the difficulty of getting a word in edgewise. The current court is a sort of verbal firing squad, with the justices peppering lawyers with questions almost as soon as they begin their presentations.

In the 20 years that ended in 2008, the justices asked an average of 133 questions per hourlong argument, up from about 100 in the 15 years before that.

"The post-Scalia court, from 1986 onward, has become a much more talkative bench," Professor Johnson said. Justice Antonin Scalia alone accounted for almost a fifth of the questions in the last 20 years.

Justice Thomas has said he finds the atmosphere in the courtroom distressing. "We look like 'Family Feud,' " he told the bar group.

Justice Thomas does occasionally speak from the bench, when it is his turn to announce a majority opinion. He reads from a prepared text, and his voice is a gruff rumble.

He does not take pains, as some of his colleagues do, to explain the case in conversational terms to the civilians in the courtroom. He relies instead on legal Latin and citations to subparts of statutes and regulations.

His attitude toward oral arguments contrasts sharply with that of his colleagues, who seem to find questioning the lawyers who appear before them a valuable way to sharpen the issues in the case, probe weaknesses, consider consequences, correct misunderstandings and start a conversation among the justices that will continue in their private conferences.

By the time the justices hear arguments, they have read briefs from the parties and their supporters, and most justices say it would be a waste of time to have advocates merely repeat what they have already said in writing.

"If oral argument provides nothing more than the summary of the brief in monologue, it is of very little value to the court," Chief Justice William H. Rehnquist wrote in 1987.

Lawyers who appear before the court and scholars who study it are of mixed minds about Justice Thomas's current silence. His views can be idiosyncratic, and some say lawyers deserve a chance to engage him before being surprised by an opinion setting out a novel and sweeping legal theory.

Others say they are just as happy not to waste valuable argument time on distinctive positions unlikely to command a majority in major cases.

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Justice Thomas routinely issues sweeping concurrences and dissents addressing topics that had not come up at argument.

He asked no questions, for instance, in a 2007 case about high school students' First Amendment rights. In a concurrence, he said he would have overturned the key precedent to rule that "the Constitution does not afford students a right to free speech in public schools."

Neither side had advanced that position. The basis for and implications of his concurrence were not explored at the arguments, because, by asking no questions, Justice Thomas did not tip his hand.

No other justice joined Justice Thomas's opinion. "If Justice Thomas holds a strong view of the law in a case, he should offer it," David A. Karp, a veteran journalist and third-year law student, wrote in the Florida Law Review in 2009. "Litigants could then counter it, or try to do so. It is not enough that Justice Thomas merely attend oral argument if he does not participate in argument meaningfully."

Justice Thomas's last question from the bench, on Feb. 22, 2006, came in a death penalty case. He was not particularly loquacious before then, but he did speak a total of 11 times earlier in that term and the previous one.

His few questions were typically pithy and pointed. He pressed a defense lawyer, for instance, in a 2005 argument about possible race discrimination in jury selection.

"Is there anything in the record to alert us to the race of the prosecutor?" he asked. "Would it make any difference? There seemed to be some suggestion that there are stereotypes at play."

Justice Thomas's most famous comments also came in a case involving race.

In a 2002 argument over a Virginia law banning cross burning, his impassioned reflections changed the tone of the discussion and may well have altered the outcome of the case. He recalled "almost 100 years of lynching" in the South by the Ku Klux Klan and other groups.

"This was a reign of terror, and the cross was a symbol of that reign of terror," he said. "It was intended to cause fear and to terrorize a population."

The court ruled that states may make it a crime to burn a cross if the purpose is intimidation.

A version of this article appeared in print on February 13, 2011, on page A1 of the New York edition.

OP-ED CONTRIBUTOR

Sometimes, Justice Can Play Politics

By NOAH FELDMAN
Published: February 12, 2011

Cambridge, Mass.

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Graham Roumieu

WHAT is it about those robes? They are only flimsy bits of wools, enlivened in a few cases by some very European lace at the collar. Yet the moment our Supreme Court justices put them on, a segment of the concerned public imagines that they have become priests consecrated to the sacred order of the Constitution.

Recently, Justice Antonin Scalia has been criticized for meeting with a group of (gulp) conservative members of Congress and accused of participating in an event organized by the conservative billionaire Charles Koch. Justice Clarence Thomas has been excoriated because his wife, Virginia, last year took a leading role in organizing Liberty Central, a Tea Party offshoot that received anonymous, First Amendment-protected donations (she has since stepped down). He also belatedly amended 13 years' worth of disclosure reports to include details of his wife's employment.

Justices are required to disclose their income sources and those of their spouses. But the core of the criticisms against Justices Thomas and Scalia has nothing to do with judicial ethics. The attack is driven by the imagined ideal of the cloistered monk-justice, innocent of worldly vanities, free of political connections and guided only by the gem-like flame of inward conscience.

It was not ever thus. John Marshall, undoubtedly the greatest chief justice ever, spent his first month on the court as the secretary of state of the United States. That's right,

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the chief justice and the secretary of state were the same person — an arrangement permitted by the Constitution, which only prohibits members of Congress from holding other offices. Marshall's most famous decision — Marbury v. Madison, which established the principle of judicial review — arose from Marshall's own failure as secretary of state to deliver the obscure William Marbury his commission as justice of the peace in the waning hours of the Adams administration. No one cared.

The political activities of the justices increased over time. Charles Evans Hughes, who would later become another great chief justice, resigned from his first stint as associate justice on June 10, 1916, to run for the presidency on the Republican ticket. Although this represented a separation from his judicial role, the Republican convention had begun at the Chicago Coliseum on June 7; Hughes did not resign until the nomination was in the bag.

In 1948, Americans for Democratic Action tried to draft Justice William O. Douglas as a Democratic presidential candidate. In their political literature, they used excerpts from his Supreme Court opinions, which (his colleagues noted privately) sounded suspiciously like stump speeches. (In the end, he decided against a run.)

Equally important, in the pre-monastic age, justices often took on politically charged government responsibilities when the world needed them. Their experiences in public service not only helped the country, but informed their subsequent jurisprudence.

Justice Robert Jackson, a valued player in Franklin Delano Roosevelt's regular poker game (and a hero to many court observers today), took a year away from the court to serve as the chief prosecutor at Nuremberg, a presidential appointment. Later, when the Supreme Court had to decide whether German detainees convicted by United States war crimes tribunals were entitled to habeas corpus rights, Jackson did not recuse himself. Instead, he wrote the opinion in Johnson v. Eisentrager, the case that formed the precedent for the extension of habeas rights to the detainees at Guantánamo Bay.

Justice Owen Roberts was chosen by Roosevelt to head the commission investigating the attack on Pearl Harbor. What he learned made him one of only three justices to defy Roosevelt and dissent from the court's shameful decision to uphold the wartime internment of more than 100,000 Japanese-Americans who had been convicted of no crime at all.

The 1970s saw the beginning of a retreat by the justices from public engagement with national affairs. Some of this was defensive. In 1969, Justice Abe Fortas, one of Lyndon Johnson's closest advisers on Vietnam even while on the court, had to resign after revelations that he had been on retainer to a financier under investigation for securities violations. The next year, Gerald Ford, then the House minority leader, sought unsuccessfully to impeach Douglas for taking money from a nonprofit foundation.

Yet, probably the greater reason for the justices' growing circumspection by the early 1970s was that the Supreme Court was taking its most active role ever in running the nation's affairs: when the court ruled against Richard Nixon in the Watergate tapes case, it effectively forced a president from office. Empowered to break a president (making one had to wait until Bush v. Gore in 2000), the justices sought to deflect attention from the obvious fact that they were political.

The disengagement from public life that followed has had real costs. Isolated justices make isolated decisions. It is difficult to imagine justices who drank regularly with presidents deciding that a lawsuit against a sitting executive could go forward while he was in office, or imagining that the suit would not take up much of the president's time. Yet that is precisely what the court did by a 9-to-0 vote in the 1997 case of Clinton v. Jones. The court's mistaken practical judgment opened the door to President Bill Clinton's testimony about Monica Lewinsky and the resulting impeachment that

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preoccupied the government for more than two years as Osama bin Laden laid his plans.

Noah Feldman, a professor at Harvard Law School, is the author of "Scorpions: The Battles and Triumphs of F.D.R.'s Great Supreme Court Justices."

A version of this op-ed appeared in print on February 13, 2011, on page WK9 of the New York edition.

OP-ED CONTRIBUTOR

Sometimes, Justice Can Play Politics

Published: February 12, 2011

(Page 2 of 2)

Today, even the justices' minimal extrajudicial activities come in for public condemnation — some of it suspiciously partisan. Does anyone seriously think Justice Thomas would become more constitutionally conservative (if that were somehow logically possible) as a result of his wife's political activism? It is true that Justice Thomas voted to protect the anonymity of some corporate contributions in the Citizens United case. But this vote reflected his long-established principles in favor of corporate speech. The personal connection was nowhere near close enough to demand recusal, any more than a justice who values her privacy should be expected to recuse herself from a Fourth Amendment decision.

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After all, Martin Ginsburg, a model of ethical rectitude until his death last year, was for many years a partner in an important corporate law firm. But surely no one believes that his career made his wife, Justice Ruth Bader Ginsburg, more positively inclined toward corporate interests on the court than she would already be as a member in good standing of America's class of legal elites.

Justice Antonin Scalia, for his part, naturally spends time with like-minded conservatives including Representative Michele Bachmann and Charles Koch. But when the brilliant, garrulous Justice Scalia hobnobs with fellow archconservatives, he is not being influenced any more than is the brilliant, garrulous Justice Stephen Breyer when he consorts with his numerous friends and former colleagues in the liberal bastion of Cambridge, Mass.

A FEW years ago, many insisted that Justice Scalia should not sit in judgment of Vice President Dick Cheney's claims to enjoy executive privilege, noting that the two had been on the same duck-hunting trip. Justice Scalia memorably explained that the two men had never shared the same blind. He could as easily have pointed out that before

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President Harry Truman nationalized the steel mills, he asked Chief Justice Fred Vinson, a poker buddy and close friend, if the court would find the action constitutional. (Vinson incorrectly said yes.)

The upshot is that the justices' few and meager contacts with the real world do little harm and perhaps occasionally some good. Justice Anthony Kennedy makes an annual trip to Salzburg, Austria, to discuss ideas with European and other global judges and intellectuals. This contact is often invoked to explain why Justice Kennedy occasionally cites foreign law (a taboo for Justice Scalia) and why his jurisprudence has been relatively liberal on such matters as gay rights and Guantánamo.

It is absurd for conservatives to criticize the cosmopolitan forums where judges from around the world compare notes. And it is absurd for liberals to criticize the conservative justices for associating with people who share or reinforce their views. The justices are human — and the more we let them be human, the better job they will do. Let the unthinkable be said! If the medieval vestments are making people think the justices should be monks, then maybe, just maybe, we should to do away with those robes.

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Noah Feldman, a professor at Harvard Law School, is the author of "Scorpions: The Battles and Triumphs of F.D.R.'s Great Supreme Court Justices."

A version of this op-ed appeared in print on February 13, 2011, on page WK9 of the New York edition.

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Justice Thomas's Wife Sets Up a Conservative Lobbying Shop

By ERIC LICHTBLAU
Published: February 4, 2011

WASHINGTON — The wife of Justice Clarence Thomas, who has raised her political profile in the last year through her outspoken conservative activism, is rebranding herself as a lobbyist and self-appointed "ambassador to the Tea Party movement."

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Charles Dharapak/Associated Press
Virginia Thomas.

Virginia Thomas, the justice's wife, said on libertyinc.co, a Web site for her new political consulting business, that she saw herself as an advocate for "liberty-loving citizens" who favored limited government, free enterprise and other core conservative issues. She promised to use her "experience and connections" to help clients raise money and increase their political impact.

Ms. Thomas's effort to take a more operational role on conservative issues could intensify questions about her husband's ability to remain independent on issues like campaign finance and health care, legal ethicists said.

Justice Thomas "should not be sitting on a case or reviewing a statute that his wife has lobbied for," said Monroe H. Freedman, a Hofstra Law School professor specializing in legal ethics. "If the judge's impartiality might reasonably be questioned, that creates a perception problem."

Ms. Thomas's founding of her own political consulting shop, Liberty Consulting, was first reported Thursday by Politico, which said she had begun reaching out to

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freshmen Republicans in Congress.

The move comes a few months after she gave up the top spot at Liberty Central, a conservative Web site that she founded in 2009 and that has strong links to the Tea Party movement.

An anonymous $500,000 donation to start up Liberty Central came from Harlan Crow, a Dallas real estate investor and Republican financier, Politico reported.

Mr. Crow, reached by phone Friday, would not say whether he was the source of the money. “I disclose what I’m required by law to disclose,” he said, “and I don’t disclose what I’m not required to disclose.”

Ms. Thomas did not respond to telephone and e-mail requests for an interview on Friday. The Daily Caller reported in December that she had said in an interview that she was looking forward to a new role involving “lobbying on Capitol Hill” and a variety of other hands-on operational duties.

Arn Pearson, a vice president at Common Cause, a liberal group that has been critical of potential conflicts at the Supreme Court caused by Ms. Thomas’s work, said her new position, combined with Justice Antonin Scalia’s recent address before a closed-door seminar of the Tea Party Caucus, provided further evidence of “the politicization of the court.”

“The level of bias we’re seeing is really troubling,” Mr. Pearson said.

A version of this article appeared in print on February 5, 2011, on page A11 of the New York edition.

EDITORIAL

Politics and the Court

Published: February 4, 2011

When it comes to pushing the line between law and politics, Justices Antonin Scalia and Clarence Thomas each had a banner month in January.

Justice Scalia, who is sometimes called "the Justice from the Tea Party," met behind closed doors on Capitol Hill to talk about the Constitution with a group of representatives led by Representative Michele Bachmann of the House Tea Party Caucus.

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Justice Thomas, confirming his scorn for concern about conflicts of interest and rules designed to help prevent them, acknowledged that he has failed to comply with the law for the past six years by not disclosing his wife's income from conservative groups.

In Supreme Court opinions, they showed how their impatience for goals promoted in conservative politics is infecting their legal actions. They joined in an unusual dissent from a court decision not to take a case about the commerce clause that turned into polemic in favor of limited government. In an important privacy case, NASA v. Nelson, they insisted the court should settle a constitutional issue it didn't need to.

Constitutional law is political. It results from choices about concerns of government that political philosophers ponder, like liberty and property. When the court deals with major issues of social policy, the law it shapes is the most inescapably political.

To buffer justices from the demands of everyday politics, however, they receive tenure for life. The framers of our Constitution envisioned law gaining authority apart from politics. They wanted justices to exercise their judgment independently — to be free from worrying about upsetting the powerful and certainly not to be cultivating powerful political interests.

A petition by Common Cause to the Justice Department questioned whether Justices Scalia and Thomas are doing the latter. It asked whether the court's ruling a year ago in

the Citizens United case, unleashing corporate money into politics, should be set aside because the justices took part in a political gathering of the conservative corporate money-raiser Charles Koch while the case was before the court.

If the answer turns out to be yes, it would be yet more evidence that the court must change its policy — or rather its nonpolicy — about recusal.

One possible reform would be to require a justice to explain, in a public statement and in detail, any decision to recuse or not. It would be even better to set up a formal review process. A group of other justices — serving in rotation or randomly chosen — could review each decision about recusal and have the power to overrule it.

In the NASA case, the two justices issued opinions on a unanimous ruling that NASA can require background checks for contract workers. Six justices (Justice Elena Kagan was recused) said the court didn't need to decide whether there is a right to informational privacy.

Justices Scalia and Thomas, on the other hand, insisted that the Constitution doesn't protect such a right and the court should settle the issue. The Scalia opinion is a rambling, sarcastic political tirade. The Thomas opinion is short but caustic. This is the sort of thing that gets these justices invited to gatherings like Mr. Koch's.

About Justice Scalia, the legal historian Lucas Powe said, "He is taking political partisanship to levels not seen in over half a century." Justice Thomas is not far behind.

Both seem to have trouble with the notion that our legal system was designed to set law apart from politics precisely because they are so closely tied.

A version of this editorial appeared in print on February 5, 2011, on page A16 of the New York edition.

Protesters Take On Conservative Retreat

By IAN LOVETT and ERIC LICHTBLAU
Published: January 30, 2011

RANCHO MIRAGE, Calif. — So much for a quiet little weekend getaway.

An invitation-only political retreat for rich conservatives, run out of the spotlight for years by a pair of Kansas billionaires, became a public rallying point for liberal outrage on Sunday, as 11 busloads of protesters converged on a resort in the Southern California desert.

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Eric Thayer for The New York Times

Protesters in California on Sunday outside a political retreat run by the billionaire Koch brothers.

An estimated 800 to 1,000 protesters from a spectrum of liberal groups vented their anger chiefly at Charles and David Koch, brothers who have used many millions of dollars from the energy conglomerate they run in Wichita to finance conservative causes. More than two dozen protesters, camera crews swarming around them, were arrested on trespassing charges when they went onto the resort grounds.

Organizers depicted the Koch brothers as symbols of the "unbridled corporate power" that they maintain was loosed by last year's Supreme Court ruling in the Citizens United campaign finance case, which lifted a ban on corporate spending in elections.

"You don't very often get a chance to be across the street from a bunch of billionaires who are scheming to do things against our democracy," said Kathy Clearly, 63, a retired schoolteacher who arrived by bus from Los Angeles and brandished a protest sign at the rally.

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The political retreat, held at the Rancho Las Palmas Resort and Spa about 130 miles east of Los Angeles, amounted to a victory lap for the Koch brothers, who helped finance conservative candidates in the fall campaigns through their company's political action committee, which spent $2.5 million, as well as through advocacy groups like Americans for Prosperity.

Many candidates they supported, including a number backed by the Tea Party, gained election as part of the Republican takeover of the House.

The Koch brothers themselves and their guests — Representative Eric Cantor of Virginia, the House majority leader, was expected to attend — were nowhere to be seen near the protest Sunday and made no public statements. Sport utility vehicles with tinted windows shepherded attendees in and out of the complex, and two dozen Riverside County sheriff's deputies in riot gear, their batons out, guarded the entrance to keep out anyone not registered as a guest.

Liberal groups have begun a calculated political and legal strategy in recent weeks to make the Koch brothers a target of their efforts to stop the Republican momentum.

Common Cause, a liberal advocacy group that helped organize the rally and a panel discussion nearby on the brothers' influence, filed a petition with the Justice Department this month challenging the Citizens United ruling and arguing that Justices Antonin Scalia and Clarence Thomas should not have taken part in the case because they had attended the Koch brothers' retreat as speakers and were biased. It was not known if the justices attended Sunday's gathering.

"This is a critical moment for us," Mary Boyle, vice president for communications at Common Cause, said in an interview. "The Koch brothers embody this ability to tap vast corporate profits and influence policies that undermine the public welfare."

She said the Citizens United case had given the Koch brothers and others license to create "shadowy networks" of well-off but largely anonymous donors to further their agenda.

But some conservatives said they considered the protest a misguided attempt to stanch the bleeding from the November elections.

The protest was "an open assault on rights of association," said Bradley A. Smith, a professor at Capital University Law School, whose writings on easing campaign finance restrictions have been influential among conservatives.

The Koch retreat "will harm no one," Professor Smith said. "They are not going to do any more than talk and listen to speakers. That this alarms these protesters is an ironic commentary on their lack of faith in the American electorate and the power of their own ideas."

Ian Lovett reported from Rancho Mirage, Calif., and Eric Lichtblau from Washington.

A version of this article appeared in print on January 31, 2011, on page A10 of the New York edition.

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OP-ED CONTRIBUTOR

Should Justices Keep Their Opinions to Themselves?

By JEFF SHESOL
Published: June 28, 2011

Washington

ARE there really only nine Supreme Court justices?

It seems that everywhere you look, you see one popping up: giving speeches, signing books, leading workshops, posing for pictures at charity functions. This is what law professors call “extrajudicial activity,” and we have seen a spate of it lately, not only during the court’s summer recesses, when justices fly the marble coop, but throughout the term that began last October and ended this week.

“Extrajudicial” is a term that covers most of what judges do when they are not judging. Of course, in the public sphere, there is really no such thing as purely extrajudicial activity for a Supreme Court justice, any more than there is extrapresidential activity for Barack Obama. Virtually everything the nine do and say — whether in robes, suits or leisure wear — has potential bearing on the reputation of the court.

Which helps explain why the justices’ activities have aroused so much controversy during this past term, perhaps more so than in recent years. As much as any string of decisions, this has been a central story line of the term. The complaint — expressed mostly on the left about justices on the right — centers on activities with a strong ideological inflection or an obvious, if unacknowledged, partisan bent.

This, recall, was the term in which Justice Antonin Scalia delivered a tutorial on the Constitution to the House Tea Party caucus; Justice Samuel A. Alito Jr. went to The American Spectator’s annual fund-raising dinner, where he had previously given the keynote speech; and Justices Scalia and Clarence Thomas each drew fire for attending separate meetings hosted by the conservative Koch brothers. Justice Thomas has also been made to defend the political activism of his wife, Virginia, and, in recent weeks, faced questions about his entanglement with Harlan Crow, a benefactor of conservative

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causes.

This flurry of judicial fraternization at the front lines of the biggest political battles of our time gives new life to some very old questions. Namely, is there something wrong with extrajudicial activity? And if so, can anything be done about it?

Surely there is nothing new or unnatural about justices holding political views and seeking the company of others who share them. It is to be expected that when one believes that right-thinking Americans are locked in an existential struggle with home-grown "Bolsheviki," as Chief Justice William Howard Taft did in the 1920s, one would invite the patriots, not the Reds, to Sunday brunch. It is hardly scandalous that justices are more likely to speak to friendly audiences than hostile ones. The court's history, moreover, is filled with political machinations, like Justice William O. Douglas's attempts to lead or at least join the Democratic presidential ticket; justices' back-channel consultations with presidents, from F.D.R. to L.B.J.; and speechmaking about subjects far and (sometimes too) wide.

Yet there are few, if any, precedents for the involvement of Justices Thomas and Scalia with the fund-raising efforts of the Koch brothers. In an invitation to a meeting earlier this year in Palm Springs, Calif., Charles Koch cautioned financial contributors that "our ultimate goal is not 'fun in the sun.' This is a gathering of doers." The meeting's objective was "to review strategies for combating the multitude of public policies that threaten to destroy America as we know it." Last summer's sessions included "Framing the Debate on Spending" and "Mobilizing Citizens for November." The invitation listed Justices Scalia and Thomas first among the "notable leaders" who had attended past meetings.

Organizers describe the dinner for The American Spectator, which Justice Alito attended last fall and previously, as a benefit for the nonprofit magazine, which is dedicated to "holding elected officials' feet to the fire." Yet it is hardly coincidental that all the feet in question seem to be left feet, belonging to Democrats like Nancy Pelosi. The magazine, for its part, urges readers to "just say no to liberal vulgarity," and an ad on its home page sends you to Web sites that boast of "back-handing the Left into submission." Indeed, when Justice Alito delivered the keynote address in 2008, just a few weeks after the presidential election, he made a running joke out of the past plagiarism of the incoming vice president, Joseph R. Biden Jr.

Of course, it's also true that the more liberal justices speak to liberal audiences. As conservative critics have pointed out, Justice Ruth Bader Ginsburg has taken part in Aspen Institute seminars, which receive some financing from George Soros, the bête noire of Glenn Beck. Justice Stephen G. Breyer has turned up at Renaissance Weekend, the conclave that the Clintons put on the map in the 1990s. But programs for these events reveal a greater emphasis on policy ideas than on political strategy, in contrast to the Koch retreat. If conference materials tell us anything, it's that liberals ponder, conservatives plot.

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Jeff Shesol, a former speechwriter for President Bill Clinton, is the author of "Supreme Power: Franklin Roosevelt vs. The Supreme Court."

A version of this op-ed appeared in print on June 29, 2011, on page A23 of the New York edition with the headline: Should Justices Keep Their Opinions to Themselves?.

OP-ED CONTRIBUTOR

Should Justices Keep Their Opinions to Themselves?

Published: June 28, 2011

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The conservative confabs are what the corporate world calls "team-building exercises." They are, by design, circles of self-reinforcement and mutual affirmation, where the same familiar gospels — of low taxation, deregulation and strict construction — are preached, and where the high priests of American law sometimes deliver homilies. "We are focused on defending liberty," Justice Thomas said in a recent speech to conservative law students, aligning himself with his wife and "the people around me." In an obvious reference to the health care law, Justice Thomas wondered aloud whether the "fundamental changes that are going on now" were "reversible in any way." He conceded that he did not know, but added that "they're so big" that he thought it was worth trying.

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Comments like these raise an important, if somewhat metaphysical, question: if a justice delivers a speech to conservative law students and virtually nobody else listens, does he make a sound? Judge Richard A. Posner, of the United States Court of Appeals for the Seventh Circuit, in Chicago, is not so sure. "The justices' antics do little harm — or good," he wrote recently. He cited a paradox: "The justices have become more public," he said, "... without being much noticed by the public." A recent Pew Research Center study called "The Invisible Court" — a title that speaks for itself — confirms that view, revealing (if this counts as a revelation) that most Americans cannot name the man now serving as chief justice.

All the same, the justices live in an era of increased scrutiny. Outside the Spectator dinner, Justice Alito was accosted by a blogger with a camera phone shooting video. "It's not important that I'm here," the justice said. There will surely be more of this, coming soon to the screen in your hand. And appearances have consequences. It's not for nothing that "the appearance of impropriety" is a core ethical standard in the code of conduct for United States judges — that is, all federal judges other than Supreme Court justices, who are ostensibly exempt from its strictures. The test in the code is not

whether an activity is actually improper; it is whether "reasonable minds" might think that it is. And reasonable minds could well conclude it improper for a justice to bestow his imprimatur on a gathering that aims to drive a political party into oblivion.

We are not naïve. Americans no longer imagine, as a renowned lawyer insisted in 1932, that "the Supreme Court is above and beyond politics." We do not ask our justices to retreat into a monastery or convent and take a vow of silence. All of us gain something meaningful from their willingness to engage with the public. Presumably the justices do, too, albeit less so when they step from their judicial chambers into echo chambers like the Koch or Spectator events, trading one kind of isolation for another — physical for intellectual.

The public's faith in the rule of law depends, to no small degree, on the idea that judges try, as best they can, to maintain a judicial temperament — that they keep a certain distance from public and even private events that appear, in the truest sense of the word, partisan, and that they maintain an open mind. Not a blank mind, devoid of a judicial philosophy, but an open mind — a certain receptiveness to reason, argument and fact. It's not that we need justices without political impulses; we need justices who can keep them in check. "We need to believe in Santa Claus a little bit," said a former Supreme Court clerk, "and these guys aren't making it easy."

During this past term, editorial boards, law professors and others have come forward with proposals to curb the court in various ways — changing the guidelines for recusal, for example, or holding justices accountable to the code of conduct. Whatever their virtues, none of these ideas are likely to take root. For more than a century, every meaningful attempt at Supreme Court reform has collapsed, and not for lack of ingenuity. The founders gave us a court that makes its own rules. As Justice Harlan Fiske Stone wrote in the 1930s, sternly rebuking some of his brethren, "the only check upon our own exercise of power is our own sense of self-restraint."

In the face of criticism, the court's conservatives may be doubling down. Justice Thomas, in particular, has lashed back, refusing to disclose activities and relationships that have been called into question. Stone's admonition, clearly, is as relevant as ever. Over its history, the Supreme Court has faced periodic threats to its legitimacy and has survived with its powers intact, thanks in large part to its public esteem. At some point, another challenge will come. And the court, next time, may find fewer Americans on its side if its members allow themselves to be perceived, in Justice Breyer's words, as "junior-varsity politicians" who possess, but do not merit, the last word.

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EDITORIAL

So No One's Responsible?

Published: June 14, 2011

With Justice Clarence Thomas writing for a 5-to-4 majority, the Supreme Court has made it much harder for private lawsuits to succeed against mutual fund malefactors, even when they have admitted to lying and cheating.

The court ruled that the only entity that can be held liable in a private lawsuit for "any untrue statement of a material fact" is the one whose name the statement is presented under. That's so even if the entity presenting the statement is a business trust — basically a dummy corporation — with no assets, while its owner has the cash.

The facts of Janus Capital Group v. First Derivative Traders are outrageous. Janus Capital Group created and manages the Janus mutual funds through a business trust. For years, Janus Capital Group, through the Janus funds, worked with at least 10 hedge funds to "market time" — letting them trade rapidly in and out of Janus funds to benefit from delays in updates of asset prices and enjoy guaranteed profits. In 2004, Janus Capital Group admitted its wrongdoing and made a $225 million settlement.

While Janus Capital Group engaged in this improper trading through the Janus funds, the funds' prospectuses assured that they had policies to prevent market timing. When a complaint from the New York State attorney general became public, the price of Janus Capital Group's stock dropped by 23 percent. Some shareholders sued Janus Capital Group and Janus Capital Management, which oversees the business trust and funds, for making false statements that led to the drop.

Justice Thomas's opinion is short and, from the mutual fund industry's perspective, very sweet: Janus Capital Group and Janus Capital Management were heavily involved in preparing the prospectuses, but they didn't "make" the statements so they can't be held liable. Only the business trust set up to hold the funds can be held liable, though it has no assets of its own to compensate plaintiffs in the lawsuit. Which means that there is no one to sue for the misleading prospectuses.

There is no doubt that Janus Capital Group is responsible. It used legal ventriloquism to

speak through the business trust and Janus funds. Janus Capital Management does everything for the funds, which have no employees. As Justice Stephen Breyer writes in dissent, “The relationship between Janus Management and the Fund could hardly have been closer.” For the majority, though, it is far enough apart to let the mutual fund industry and possibly others off the hook.

A version of this editorial appeared in print on June 15, 2011, on page A26 of the New York edition with the headline: So No One’s Responsible? If mutual funds want to lie, the Supreme Court’s conservatives have given them a way to do it.

Sotomayor Got $1.175 Million for Memoir, Forms Reveal

By ADAM LIPTAK
Published: May 27, 2011

WASHINGTON — Justice Sonia Sotomayor received a $1.175 million advance last year to write a memoir, according to financial disclosure forms released on Friday for the nine Supreme Court justices.

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It was known that Justice Sotomayor was at work on a book, which was described in July by its publisher, Alfred A. Knopf, as a "coming-of-age memoir by an American daughter of Puerto Rican immigrants." But the size of the advance had not been disclosed.

The payment brightened Justice Sotomayor's financial picture. A debt for dental work in the range of $15,000 to $50,000 listed last year is not mentioned on this year's form. Still, Justice Sotomayor was the only justice to list credit card debts, on four different accounts, all for less than $15,000 each.

Two other justices reported book royalties this year. Justice Stephen G. Breyer made about $60,000, and Justice Antonin Scalia about $40,000.

Justice Clarence Thomas received more than $1 million for his memoir, "My Grandfather's Son," which was published in 2007. He did not disclose any book royalties this year.

But he did say that his wife, Virginia, last year received "salary and benefits" from Liberty Central, a conservative group she founded with ties to the Tea Party movement. Ms. Thomas also received money, the forms said, from Liberty Consulting, a lobbying

firm she started last year, and from Hillsdale College in Michigan, for which she ran a constitutional law center in Washington.

Ms. Thomas's connections to each group were known, and the forms require the justices only to identify the sources of their spouses' income, not how much they made. Justice Thomas did list Liberty Consulting separately in a section of the form for "investments and trusts," saying that it was worth less than $15,000.

In previous years, Justice Thomas had failed to note the sources of Ms. Thomas's income. After the watchdog group Common Cause raised questions, he issued amended forms in January.

A court spokeswoman said at the time that the information had been "inadvertently omitted due to a misunderstanding of the filing instructions."

Chief Justice John G. Roberts Jr. makes $223,500 a year, while the other justices make $213,900.

While books are one of the few permissible sources of outside income for the justices, they are also allowed to accept money for teaching. Justice Samuel A. Alito Jr., for instance, reported receiving about $27,000 for teaching at programs sponsored by the law schools of Pennsylvania State and Duke Universities.

Many of the justices have busy public schedules, at home and abroad. Justice Breyer listed 23 out-of-town events for which his travel expenses were reimbursed, often in connection with his recent book, "Making Our Democracy Work."

He specified that he had taken a "private plane" for a "speaking event with Justice Scalia" in Lubbock, Tex. The event appears on Justice Antonin Scalia's form, too, but he notes only that he was reimbursed for "transportation."

The events on Justice Breyer's schedule may have started to blur together. He spoke at Yale Law School in New Haven in February, but the form, while correctly noting the name of the school, said he was in Hartford.

A majority of the justices took trips abroad last year. Chief Justice Roberts spoke in Australia; Justice Scalia in Rome; Justice Thomas in Trinidad and Tobago; Justices Sotomayor and Alito in Paris, at separate events; Justice Ruth Bader Ginsburg in London; and Justice Breyer in several places in Europe.

The justices' expenses for the trips were generally borne by educational institutions or the government. But Justice Alito's trip to Paris was paid for by the Federalist Society, a conservative legal group.

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EDITORIAL

Failure of Empathy and Justice

Published: March 31, 2011

When President Obama listed empathy as a valuable trait for a justice during his 2009 search to replace David Souter, the idea drew scorn from some conservatives who saw it as an excuse for being soft. But a Supreme Court ruling this week provides evidence of how useful empathy is, and of how not using it can lead to glaring injustice.

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$14 Million Jury Award to Ex-Inmate Is Dismissed (March 30, 2011)

Connick v. Thompson is about the wrongful conviction of John Thompson for robbery and murder after prosecutors in New Orleans withheld evidence from Mr. Thompson that would have cast serious doubt on his guilt. He spent 18 years in prison and came close to being executed. He was exonerated after a prosecutor fessed up.

After Mr. Thompson sued, a federal trial court found the office liable for failing to train its prosecutors about their constitutional duty to turn over evidence favorable to the defense and awarded Mr. Thompson $14 million in damages. Now, by a 5-to-4 vote, the conservative majority of the Roberts court has overturned that ruling, saying the offic can't be held liable for a sole incident of wrongdoing.

The important thing about empathy that gets overlooked is that it bolsters legal analy That is clear in the dissent by Justice Ruth Bader Ginsburg. Her empathy for Mr. Thompson as a defendant without means or power is affecting. But it is her understanding of the prosecutors' brazen ambition to win the case, at all costs, that is key.

After detailing the "flagrant indifference" of the prosecutors to Mr. Thompson's rights, she makes clear how critically they needed training in their duty to turn over evidence and why "the failure to train amounts to deliberate indifference to the rights" of defendants.

The district attorney, Harry Connick Sr., acknowledged the need for this training but

said he had long since “stopped reading law books” so he didn’t understand the duty he was supposed to impart. The result, Justice Ginsburg writes, was an office with “one of the worst” records in America for failing to turn over evidence that “never disciplined or fired a single prosecutor” for a violation.

For the majority, Justice Clarence Thomas asserts that Mr. Thompson failed to prove that the office “disregarded a known or obvious consequence” of its inaction. That doesn’t reckon with the “culture of inattention,” as Justice Ginsburg calls it, which made deplorable breaches far too predictable. Justice Ginsburg’s dissent is the more persuasive, focused on the problem at the heart of the case and at the heart of a legal system that too often fails to see defendants, guilty or not, as human beings.

A version of this editorial appeared in print on April 1, 2011, on page A26 of the New York edition.

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