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Political Hay

Doubting Thomas

By W. James Antle, III on 10.31.11

The latest liberal campaign to discredit the most conservative Supreme Court justice.

The Supreme Court could decide how it will handle the health care reform lawsuits as early as November 10. Supporters of the law are busy filing amicus briefs, making legal arguments -- and trying to disqualify justices likely to find President Obama's signature legislation unconstitutional.

Liberals have disliked the idea of Clarence Thomas voting on the Supreme Court for 20 years now. The current drumbeat began in February when 73 House Democrats demanded the justice recuse himself from any case involving the health care law because of his wife's work as a lobbyist and conservative activist. The ringleader of this effort was that ethical giant, then Rep. Anthony Weiner (D-NY).

"As members of Congress, we were surprised by recent revelations of your financial ties to leading organizations dedicated to lobbying against the Patient Protection and Affordable Care Act," the Democrats wrote in a letter. "We write today to respectfully ask that you maintain the integrity of this court and recuse yourself from any deliberations on the constitutionality of this act."

Evidently untroubled by Justice Elena Kagan's work as solicitor general for the Obama administration, Weiner's warriors continued, "Given these facts, there is a strong conflict between the Thomas household's financial gain through your spouse's activities and your role as an Associate Justice of the United States Supreme Court."

Weiner is gone, but apparently not forgotten. This fall a group of 20 House Democrats excoriated Thomas for filing disclosure forms that failed to mention his wife's tenure as a senior fellow at the Heritage Foundation. Wags might be tempted to joke that this could actually bias Thomas **in favor** of the individual mandate, but the Democrats weren't in a joking mood.

"Due to the simplicity of the disclosure requirements, along with Justice Thomas' high level of legal training and experience, it is reasonable to infer that his failure to disclose his wife's income for two decades was willful, and the Judicial Conference has a non-discretionary duty to refer this case to the Department of Justice," they wrote, calling for "possible criminal or civil legal sanctions."

Ginni Thomas's affiliation with the Heritage Foundation wasn't exactly a closely guarded state secret. Since the ties are clearly noted on the conservative think tank's [website](#) and Mrs. Thomas' [Wikipedia page](#), it might be more reasonable to infer that the non-disclosure was an accident. As it turns out, 14 of the 20 Democrats calling for the justice's head had to file amendments correcting errors and omissions in their own ethics reports.

Rep. Jesse Jackson Jr. (D-IL) acknowledged in January 2009 that "due to a clerical oversight my previous financial disclosure statements inadvertently omitted information about my wife's outside income." Jackson's filings had to be amended from 2004 to 2006. Rep. Earl Blumenthal (D-OR) neglected to disclose his wife's income from 2006 through 2010. Rep. John Conyers (D-MI), a former chairman and current ranking member of the House Judiciary Committee, made an error listing his wife's assets in 2009 (her outside income seemingly included bribes from selling her votes as a member of the Detroit city council).

Nevertheless, calls for Thomas to recuse himself persist. But when a Pulitzer prize-winning political fact-checking [website](#) looked into the matter in March, most legal experts interviewed said there was no conflict of interest, in one case describing the charges as "entirely unmerited" and in another "completely wrong."

"In fact," the Cato Institute's Trevor Burrus told the website, "there is a better case to be made that upholding the law would give his wife more 'business' in the future when as-applied challenges are brought against Obamacare." Even legal experts who favored Thomas' recusal admitted it was unclear the law required it. Paul Campos of the University of Colorado Law School acknowledged, "It's not a clear-cut case," while Steven Lubet of Northwestern Law School allowed, "I think it is not correct to say that [Thomas] has a financial interest in the outcome of the proceeding."

For retired Justice John Paul Stevens, the longtime leader of the court's liberal bloc, the question comes up regularly in interviews about his new book. "I would say that I wouldn't think there's any possibility that any of the activities of Mrs. Thomas have had any impact on the analysis of Judge Thomas," Stevens said. "He has definite views; he's been consistent over the years."

Carrie Severino, chief counsel of the Judicial Crisis Network, thinks those definite views help explain why Thomas has been targeted instead of other conservative justices. "He's been the most consistent on the commerce clause," Severino, who clerked for Thomas, says. "They know how he's going to vote." She notes that

Thomas dissented in *Gonzales v. Raich*, which held that the commerce clause allowed Congress to criminalize the cultivation and use of home-grown marijuana, while Antonin Scalia voted with the majority.

Severino says that Thomas' critics hope to "devalue his vote" in one of the most important Supreme Court cases of the young century. Clarence Thomas has now been frustrating their hopes for two decades.