

The Baseless 'Recusal' Attack on Clarence Thomas | Opinion

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7–9 minutes

The legacy corporate media has [launched](#) an unprecedented [smear](#) campaign against Justice Clarence Thomas and his wife, Ginni, falsely claiming that Justice Thomas is violating ethics laws in light of his wife's political activities. Some have even advocated [impeaching](#) Justice Thomas for failing to recuse. They are, in effect, demanding a new standard for recusal that has no place in the law or in past practice.

Many judges are married to people who work in politics and public policy, and they frequently decide cases on which their spouses have opined. The [recusal statute](#) requires judges to recuse if their families could financially gain from a decision or if a reasonable observer might question their impartiality.

D.C. Circuit Judge Nina Pillard, for example, [voted](#) not to rehear a case rejecting President Trump's refusal to produce his tax returns in response to a congressional subpoena. That was exactly what her husband, the ACLU's litigation director, advocated in an [article](#) reviewing the lower court decision.

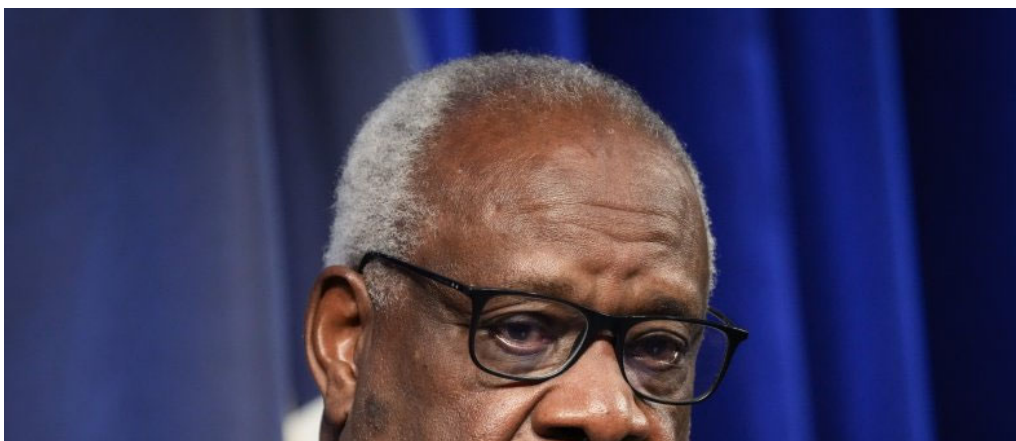
Ninth Circuit Judge Stephen Reinhardt, a liberal icon, participated in a case even after his wife—the chief of an ACLU chapter—[commented](#) on the lower court opinion. Her ACLU chapter even submitted a brief to the district court. Reinhardt defended his [decision](#) not to recuse, writing his wife's "views are hers, not mine, and I do not in any way condition my opinions on the positions she takes regarding any issues." Ethics experts [defended](#) Reinhardt's

decision, noting that "Judge Reinhardt is not presumed to be the reservoir and carrier of his wife's beliefs.... A contrary outcome would deem a judge's spouse unable to hold most any position of advocacy, creating what amounts to a marriage penalty."

The [Supreme Court](#) has long rejected this "marriage penalty." In light of the growing number of judges' spouses and family members practicing law, the Supreme Court issued a [Statement of Recusal Policy](#) in 1993, signed by seven Justices. Applying the recusal statute's criteria, the policy says a Justice should not recuse because of a family member who is not involved with the current litigation and who cannot receive compensation from the case's outcome.

While any lower court can substitute a recused judge with another judge, there is no one to replace a Supreme Court Justice who recuses. As reflected in the Court's recusal policy, "Even one unnecessary recusal impairs the functioning of the Court...deprives litigants of the nine Justices to which they are entitled [and] produces the possibility of an even division on the merits of the case."

Consistent with the Court's policy, even though Justice [Ruth Bader Ginsburg](#)'s husband, Marty Ginsburg, [practiced law](#) at a firm that [represented parties](#) before the Supreme Court, Justice Ginsburg never recused herself. Law professor Jane Ginsburg, the Justice's daughter, wrote an [article](#) about a case pending before the Supreme Court. The petitioner cited Jane's article in its [brief](#), and Justice Ginsburg [voted](#) for the result advocated by her daughter.





WASHINGTON, DC - OCTOBER 21: Associate Supreme Court Justice Clarence Thomas speaks at the Heritage Foundation on October 21, 2021 in Washington, DC. Clarence Thomas has now served on the Supreme Court for 30 years. He was nominated by former President George H. W. Bush in 1991 and is the second African-American to serve on the high court, following Justice Thurgood Marshall. Drew Angerer/Getty Images

Marty Ginsburg solved a complex tax problem for his client, Ross Perot's company EDS, and Perot [endowed](#) a chair named after Marty Ginsburg at Georgetown University Law Center. When [Perot](#) and [EDS](#) appeared several times before the Supreme Court, Justice Ginsburg did not recuse. Nor was she required to.

If reporters mean to tighten recusal standards, they should prepare to levy a marriage penalty on all judges' spouses, not just the Thomases.

But the press now singles out Justice Thomas, calling on him to recuse because of his wife's activities. Ginni Thomas is a longtime conservative activist who works with groups that take public positions on issues and sometimes even file amicus briefs at the Supreme Court. But unlike the spouses and children of other judges, Ginni does not practice law, much less write briefs. She merely builds conservative coalitions to pursue shared *political* aims. None of her activities require Justice Thomas to recuse.

Even so, the press [criticized](#) Ginni Thomas for honoring conservative leaders at an awards luncheon, because those individuals subsequently filed amicus briefs at the Supreme Court. Historically, this has not required recusal. Ginsburg once [donated](#) an autographed copy of her VMI opinion to the pro-abortion NOW Political Action Committee, which auctioned off the opinion at a fundraiser in 1997. Moreover, in 2004, she [spoke](#) at a lecture named after herself for the NOW Legal Defense Fund, on whose

board she served in the 1970s. Two weeks before that lecture, Justice Ginsburg voted in favor of a position advocated by the NOW Legal Defense Fund in an amicus brief.

None of those activities required Ginsburg to recuse, but the press has attacked Thomas for "[stok\[ing\] concerns of a hyperpartisan court](#)" by attending conservative events. Thomas' critics conveniently ignore the numerous instances of liberal Justices attending similar events, such as Justice Sotomayor [giving speeches](#) to the [liberal](#) American Constitution Society.

These recent stories have also ignored Justice Ginsburg's partisan [attack](#) on [Donald Trump](#) during the 2016 presidential campaign. The Justice called him "a faker" and criticized him for not disclosing his tax returns. She even voiced concerns about Trump being president. The day after he was elected, Ginsburg again objected by [wearing](#) a collar that traditionally signaled she would be dissenting in a case, though there were no cases handed down that day. Yet, she sat on a [case](#) challenging a congressional subpoena for President Trump's tax returns, and she decided plenty of other cases involving President Trump and his administration. No one talked of impeaching Justice Ginsburg for her conduct.

The media are weaponizing baseless ethics charges to smear a conservative black Justice. Thomas infuriates them because he expresses views they consider unacceptable for a black man to hold, and because an increasing number of Justices are aligned with those views and may be ready to issue rulings that undercut longstanding liberal precedents. But going after his wife is despicable. And it won't work.

Mark Paoletta served as a lawyer in the George H.W. Bush White House Counsel's Office and worked on Justice Thomas's confirmation. He most recently served as General Counsel for the Office of Management & Budget in the Trump Administration, and he worked on the confirmations for Justices Gorsuch and Kavanaugh. He is a partner at Schaerr Jaffe LLP. You can follow him on Twitter at @MarkPaoletta

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