THE CODE OF CONDUCT FOR U.S. JUDGES SHOULD BE APPLIED TO THE SUPREME COURT
About Alliance for Justice

Alliance for Justice is a national association of over 100 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society. AFJ works to ensure that the federal judiciary advances core constitutional values, preserves human rights and unfettered access to the courts, and adheres to the even-handed administration of justice for all Americans. It is the leading expert on the legal framework for nonprofit advocacy efforts, providing definitive information, resources, and technical assistance that encourages organizations and their funding partners to fully exercise their right to be active participants in the democratic process.

For more information on this report, contact AFJ’s Washington headquarters.

Alliance for Justice
11 Dupont Circle NW, Second Floor
Washington, DC 20036
202.822.6070

All material within this report is protected by copyright law and may not be reproduced without the express written consent of Alliance for Justice.

© 2011 Alliance for Justice
The Code of Conduct for U.S. Judges Should be Applied to the Supreme Court

The Supreme Court has recognized that ethical rules governing judges play a critical role in our democracy, holding in the recent *Caperton v. A.T. Massey Coal Co.* case that “these codes of conduct serve to maintain the integrity of the judiciary and the rule of law.” The Court added:

“Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen’s respect for judgments depends in turn upon the issuing court’s absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.”

Accordingly, federal judges are required to abide by the Code of Conduct for United States Judges – a set of ethical guidelines codified and enforced by the U.S. Judicial Conference. Unfortunately, the Code of Conduct covers every federal judge except the justices of the Supreme Court. While the justices apparently look to the Code of Conduct for “guidance,” at present the justices enjoy complete discretion to interpret – or ignore – its guidelines and to decide what extrajudicial activities are appropriate.

The policy advanced by the Code of Conduct – to protect public confidence in the judiciary – applies equally, if not in greater force, to members of the highest court in the land. Their decisions have the broadest impact, are frequently divisive, and can turn on the vote of a single justice. They also face the most public scrutiny. Supreme Court justices should therefore not be allowed to conduct themselves independent of ethical constraints. Given the allegations of misconduct by Supreme Court justices discussed below, a voluntary system of adherence to ethical guidelines – where each justice serves as his or her own judge – has proved insufficient.

Some justices appear to have engaged in political activity that would be prohibited by the Code of Conduct

The Code of Conduct contains five Canons, three of which have bearing on the appropriateness of extrajudicial activities of federal judges.

- Canon 2 states: “A judge should avoid impropriety and the appearance of impropriety in all activities.”
• Canon 4 states: “A judge may engage in extrajudicial activities that are consistent with the obligations of judicial office.”

• Canon 5 states: “A judge must refrain from all political activity.”

The commentary to Canon 4 enumerates several activities that federal judges are permitted and even encouraged to engage in, such as speaking, writing, and lecturing on the law, or associating with nonprofit and charitable organizations not likely to appear in litigation before the court. Canon 5, on the other hand, makes clear that judges are not to participate in political activities, including making speeches for political organizations, donating to political candidates or organizations, purchasing a ticket to events sponsored by political candidates or organizations, or engaging in “any other political activity.” Canon 2 forbids a judge from lending “the prestige of the judicial office” to advance private interests, and even allowing others to convey the impression that they are in a special position to influence the judge.

Allegations have recently surfaced implicating Justices Scalia and Thomas in political activity that arguably runs afoul of Canons 2 and 5. For example:

• Justices Scalia and Thomas reportedly have each attended at least one invitation-only retreat hosted by Charles and David Koch, co-owners of Koch Industries, the second largest private corporation in the United States. The purpose of the Koch retreats is overtly political. According to the invitation for the 2011 retreat: “At our most recent meeting … our group heard plans … to activate citizens against the threat of government over-spending and to change the balance of power in Congress this November.” The 2011 invitation letter touted: “Past meetings have featured such notable leaders as Supreme Court Justices Antonin Scalia and Clarence Thomas.” The Koch retreats are secretive and participants have been asked to abide by a confidentiality provision. The justices have not been forthcoming with information about the details and extent of their participation in the retreats, though a Supreme Court spokesperson has stated that the Justices spoke at dinners sponsored by the Kochs. The same spokesperson stated that Justice Scalia did not participate in the retreat’s political strategy sessions, and that Justice Thomas “dropped by” one of the retreat’s sessions.

The justices’ attendance at such a highly political event would almost certainly run afoul of Canon 5 if it applied. A primary purpose of the Koch retreats is to advance a specific political agenda, and advocate for the victory or defeat of political candidates. The 2011 Koch Industries retreat invitation – which attempts to woo would-be participants by making note of the past attendance of Justices Thomas and Scalia –
explicitly stated that the retreat’s purpose was planning how to “change the balance of power in Congress.”

While the Code of Conduct prohibits judges from attending political activities like a Koch retreat, judges are not prohibited from engaging in society, and even speaking to ideological organizations. Prominent legal ethicists like NYU Law Professor Stephen Gillers have made clear that it can be a “good thing” for judges to speak at events, so long as they are not political events or fundraisers.

Several justices appear to have engaged in fundraising activity prohibited by the Code of Conduct

The Code of Conduct directly addresses the propriety of a judge engaging in fundraising activities.

- Canon 4C states that “a judge should not personally participate in fundraising activities, solicit funds for any organization, or use or permit the use of the prestige of the judicial office for that purpose.”

The Canon creates a narrow exception for soliciting funds for certain civic organizations, but generally, soliciting funds is absolutely prohibited – even for apolitical organizations such as the Boy Scouts of America. Commentary to Canon 4C states a judge may not be “a speaker, guest of honor, or featured on the program” of a fundraising event. Advisory Opinion 2 elaborates on this prohibition by stating that “the use of the prestige” of the judge’s office may not be used for fundraising. Similarly, a judge’s name may be included on a list of an organization’s contributors only to the extent that the judge “is in no way specially emphasized.”

Several of the Supreme Court justices have participated in fundraising activities that could be prohibited by the Code if it applied to them. For example:

- Justice Alito attended the American Spectator’s annual fundraiser gala in 2010 and headlined the event in 2008. One conservative blogger who was in attendance gave Alito’s speech high marks, describing it as “worth many times the price of admission,” which ranged from $250 to $250,000. The American Spectator runs the “Conservative Action Project,” a lobbying group dedicated to opposing President Obama’s agenda. Its 2010 gala raised more than $245,000 and was attended by then-RNC Chairman Michael Steele and other Republican donors. When a journalist at the 2010 gala asked Alito whether he felt his attendance posed any ethical problems, Alito responded only that “it’s not important that I’m here.”
The Code of Conduct for U.S. Judges Should be Applied to the Supreme Court

In 2009, Justice Alito also headlined a fundraiser for the conservative Intercollegiate Studies Institute (ISI), which works for “limited government, individual liberty, personal responsibility, the rule of law, market economy, and moral norms.” The ISI is a Delaware-based ultra conservative think tank that employed Tea Party Senate candidate Christine O'Donnell, until she was terminated and filed a gender discrimination lawsuit against them in 2005, and in 2005 bestowed an “Honors Fellowship” on conservative prankster James O'Keefe.

Justice Thomas has also apparently participated in fundraising events. In 2009, he was featured at a fundraiser for the Heritage Foundation, which advocates for a number of conservative legislative initiatives. More recently, in 2010, Justice Thomas headlined a fundraiser for the National Association of Broadcasters, a lobby group that represents radio and television broadcasters.

In addition to attending fundraisers, Justice Thomas has also reportedly engaged in fundraising activities by helping to procure financing for the restoration of a seafood cannery in Pin Point, Georgia, where Clarence Thomas’s mother once worked. After learning that the cannery was in disrepair, Justice Thomas reportedly told the grandson of the cannery’s owner that he would put him in touch with a “friend,” who turned out to be Texas-based real estate developer and financier of conservative causes, Harlan Crow. Crow bought the property and has since invested approximately $3 million on the project, which includes a museum dedicated to the history of the cannery with a tribute to Justice Thomas’ legacy. Justice Thomas has been heavily involved in the museum project, choosing design staff, helping to compile a video documentary, and even hosting a design team for the project in his Supreme Court chambers. Crow also donated $500,000 of the $550,000 startup funds used to create to Liberty Central, the Tea Party lobbyist organization founded by Ms. Thomas. Crow has also hosted the Justice on his vacation properties, and flown him on his private jets and yacht – including some trips that may not have been listed by the Justice on his annual financial disclosure forms.

As discussed above, Justices Thomas and Scalia have each attended at least one retreat organized by the Koch brothers. The purpose of these events is for high-level, conservative donors to coordinate their election spending for various candidates and causes. The 2011 retreat invitation explicitly described a central goal of the retreat as “attracting principled leaders and investors” and touted the fact that participants of the 2010 retreat “committed an unprecedented level of support.” According to a story in the Washington
Post, Justice Thomas spoke at a dinner for the January 2008 Koch brothers’ retreat, and Scalia spoke at the 2007 retreat.29

Canon 4, which bars a judge from participating in fundraising activities, suggests that the type of conduct described above is prohibited by the Code. Commentary to Canon 4(C) spells out explicitly that a judge may not serve as a speaker or be featured on the program of a fundraising event. By headlining or speaking at events for American Spectator, ISI, NAB, the Heritage Foundation, and Koch Industries, Justices Thomas and Alito seem to have engaged in conduct that would be prohibited by the Code of Conduct if it applied to them.

The Code of Conduct should be applied to the Supreme Court

Justices Scalia, Thomas, and Alito all were required to abide by the Judicial Conference’s Code of Conduct when they served on federal courts of appeal. Once they were elevated to the Supreme Court, however, they were no longer subject to the Code’s provisions. When Supreme Court justices lend the prestige of their office to partisan political causes, or fraternize with and fund-raise on behalf of those who could have a financial stake in the outcome of the court’s decisions, public confidence in the integrity and impartiality of the Court suffers. Legislation has been introduced in Congress that would apply the Code of Conduct to the Court. However, the Court can and should take it upon itself to voluntarily adopt the Code.
The Code of Conduct for U.S. Judges Should be Applied to the Supreme Court

Notes

2 Id. at 2266-67 (quoting Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002)). “State” interest in this setting meant governmental interest.
4 The Conference is comprised of federal judges and headed by the Chief Justice of the Supreme Court. It is tasked with setting the ground rules for judicial discipline, publishing an ethical Code of Conduct for federal judges and hearing claims by parties who have suffered as a result of judicial bias or other unethical conduct on the part of federal judges. 28 U.S.C. § 331.
7 Canon 5 commentary defines a political organization as “a political party, a group affiliated with a political party or candidate for public office, or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office.”
8 Understanding and Addressing Threats to American Free Enterprise and Prosperity 13 (Sept. 24, 2010), available at http://images2.americanprogressaction.org/ThinkProgress/secretkochmeeting.pdf. According to Justice Thomas’s disclosure records, he was reimbursed for travel to Palm Springs, California for January 26-29, 2008, the same four days and place that the Koch brothers hosted their twice-annual retreat. The Federalist Society, which has received at least $1.4 million from the Kochs over the past decade, apparently paid the travel expenses, because it “knew the Justices were going to be out there” where the Koch retreat was held, and the attendees would be interested in what they had to say, according to Eugene Meyer, executive director of the Society. R. Jeffrey Smith, Professors ask Congress for an ethics code for Supreme Court, Wash. Post, Feb. 23, 2011. The Society also paid the travel expenses of Justice Thomas’s wife, Ginny Thomas, according to Supreme Court spokesperson Kathy Arberg. Ms. Arberg also said Justice Thomas spoke to the audience at a dinner and attended at least one of the seminars. Id.
9 See, e.g., Jane Mayer, Covert Operations: The billionaire brothers who are waging a war against Obama, THE NEW YORKER (August 30, 2010), available at https://www.newyorker.com/reporting/2010/08/30/100830fa_fact_mayer. Mayer’s exposé provides an extensive overview of the Koch brothers’ massive political spending on right-wing causes.
10 Understanding and Addressing Threats, supra note 8, at 1 (emphasis added).
11 Id. at 13.
12 Id. at 4 (emphasis added).
13 Tom Hamburger, Justice’s impartiality in campaign spending case questioned, Los Angeles Times, Jan. 21, 2011.
14 R. Jeffrey Smith, Professors ask Congress for an ethics code for Supreme Court, Wash. Post, Feb. 23, 2011.
15 See Threats, supra note 11, at 1. The Koch brothers funnel massive amounts of money into elections across the country, both through groups like Americans for Prosperity, which spent more than $45 million on political campaigns in 2010, and through direct contributions to conservatives like the union-busting Governor of Wisconsin, Scott Walker. Eric Lipton, Billionaire Brothers’ Money Plays Role in Wisconsin Dispute, New York Times (Feb. 21, 2011).
The Code of Conduct for U.S. Judges Should be Applied to the Supreme Court

21 See Program for the Fourth Annual Dinner for Western Civilization, Intercollegiate Studies Institute (April 30, 2009).
23 Kaplan, supra note 24.
26 Id.
27 Id.
28 Understanding and Addressing Threats, supra note 8, at 1, 4.
29 R. Jeffrey Smith, supra note 8.