



## Ex Ante

### Leaky Ethics

WOODWARD & ARMSTRONG'S *The Brethren*, then Lazarus's *Closed Chambers*, and now *Vanity Fair*'s "The Path to Florida." Each exposé featured law clerks telling tales about the inner workings of the Supreme Court, and each triggered expressions of outrage by those committed to preserving the confidentiality of the Court's deliberations.

Two more recent breaches – one involving the Court's most confidential function, the "Conference" that only the Justices attend and during which cases are actually decided – do not appear to have raised a single hackle. In *Judging Thomas: The Life and Times of Clarence Thomas*, author Ken Fosskett quotes Justice Ruth Bader Ginsburg on Justice Thomas's participation in the Conference: "He is at all

**Account Number Five**  
**(Anonymous Law Clerk, 1982)**

It was the only time in  
my adult life I had the  
misfortune to experience  
a 'purple nurple'.  
I left the law ~~room~~  
shortly there after.

In America (The Book) Jon Stewart and his colleagues at The Daily Show offer another anonymous clerical account of life at the Supreme Court.

times well-prepared for our conferences, and routinely presents well thought-out statements of his position.” And Foskett quotes a comment by Justice Antonin Scalia that might trigger an angry letter to *Legal Times* (e.g., “High Court Clerks @ Appellate Lawyers Decry *Vanity Fair* Article,” Sept. 27, 2004) if it had been made by an unnamed law clerk: “He does not believe in *stare decisis*, period. If a constitutional line of authority is wrong, he would say let’s get it right. I wouldn’t do that.”

Three innocent explanations for the languid response to these recent disclosures come to mind. First, Ginsburg and Scalia were saying nice things, on the record. Law clerks tend to say mean things, anonymously. Second, the Court is the third branch of the federal government. There is no reason to think that its institutional outlook on disclosures of internal information is different from the dominant view in the other branches: namely, that disclosures are wrong only when they are not controlled by those in power. In other words, politics as usual.

Third, the institutional confidentiality involved is made manifest in the Justice-clerk relationship – the clerks owe it to the Court, but it is implemented via their relations with the Justices. Which makes the Justices more like clients, who are generally free to talk, and the clerks more like counsel, who owe a duty of confidentiality to their clients, except under extraordinary circumstances. Which, in turn, makes one wonder either (a) how a clerk who felt honor-bound to disclose Supreme Court confidences when talking to *Vanity Fair* in 2004 could have failed to noisily withdraw back in December of 2000 or (b) how a clerk could speak to *Vanity Fair* without authorization from his or her Justice.

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CODE OF CONDUCT FOR LAW CLERKS OF THE SUPREME COURT OF THE UNITED STATES (1998) (*Blackmun papers*, Library of Congress, with a cover letter cautioning that the “[t]he Code of Conduct is an internal Court document and not for public release”); MODEL RULES OF PROFESSIONAL CONDUCT, 1.6, 1.16; Dennis J. Hutchinson, Book Review, CHI. TRIB., Sept. 5, 2004.