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ARTICLE

SEEN AND HEARD: A DEFENSE OF JUDICIAL SPEECH

Dmitry Bam[†]

I. INTRODUCTION

The ethical code for federal judges,¹ just like its state counterparts,² prohibits judges from engaging in political activities, including endorsing or opposing candidates for public office.³ These restrictions on judicial politicking, intended to preserve both the reality and the appearance of judicial integrity, independence, and impartiality, have been in place for decades.⁴ This ban on political activity reflects more than a mere ethical rule. Although the Code of Conduct for United States Judges does not apply to the Supreme Court,⁵ Supreme Court Justices have long followed the norm that they do not take sides, at least publicly,⁶ in partisan political elections. Civics courses across the country teach students that the judiciary is not a political branch,⁷ and senators continue to insist in confirmation

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1. See CODE OF CONDUCT FOR U.S. JUDGES (JUDICIAL CONFERENCE OF THE U.S. 2014).

2. State judicial ethics rules, just like the federal Code of Conduct for United States Judges, generally mirror the ABA Model Code of Judicial Conduct. Nearly every state has adopted its own version of the ABA Model Code. MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS'N 2007). For the purposes of this Article, there are no relevant differences between the Model Code and the Code of Conduct for United States Judges.

3. See, e.g., MODEL CODE OF JUDICIAL CONDUCT Canon 5A(1)(b) (AM. BAR ASS'N 2007); MODEL CODE OF JUDICIAL CONDUCT r. 4.1(A)(3) (AM. BAR ASS'N 2007).

4. See MODEL CODE OF JUDICIAL CONDUCT Canon 7 (AM. BAR ASS'N 2007) (“A Judge should refrain from political activity inappropriate to his judicial office.”).

5. Louis J. Virelli III, *The (Un)constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181, 1188 (2011) (discussing the proposals to extend the Code of Conduct to the Supreme Court).

6. As will be discussed in greater detail below, Justices have certainly taken sides on the outcomes of elections in private. For example, following the 2000 election when Al Gore was thought to have won the presidency, Justice O'Connor allegedly remarked that “this is terrible.” Michael Isikoff, *The Truth Behind the Pillars*, NEWSWEEK (Dec. 24, 2000), <http://www.newsweek.com/truth-behind-pillars-155985> (quoting two witnesses).

7. See, e.g., Susan D. Rozelle, *Daubert, Schmaubert: Criminal Defendants and the Short End of the Science Stick*, 43 TULSA L. REV. 597, 604 (2007) (“Although we tell our seventh-grade civics students that the judiciary is the independent branch of government—the one branch that is free to exercise its own judgment without navigating the shifting plates of

hearings that they are looking for judges who do not bring their politics into their judicial decision-making.⁸ Of course, the Justices may be called to decide cases involving candidates for office,⁹ but their opinions in those cases are official judicial statements on the legal merits of the candidates' claims rather than informal expressions of their own personal views. And while elected state judges¹⁰ have some leeway to engage in limited political activities associated with their own candidacy,¹¹ the Justices of the United States Supreme Court have consistently remained on the sidelines in contested partisan elections. Sure, the average voter could hypothesize about what Justice Scalia thought of then-candidate Barack Obama when he was running for the presidency in 2008 and 2012, but we were ultimately left to reach our own conclusions.¹²

That is why the events of July 2016 were so surprising. With the 2016 presidential election less than four months away, Supreme Court Justice Ruth Bader Ginsburg shocked everyone when she bluntly spoke out against the Republican presidential nominee, and the ultimate winner of the

political tectonics that move the executive and legislative branches—the truth is that whether judges are appointed or elected, becoming a judge ‘takes political support.’”).

8. See, e.g., Eugene Volokh, *Sen. Orrin Hatch on the Supreme Court: ‘Activist Justices Have Rewritten Our Laws’*, WASH. POST (Jan. 30, 2017), www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/30/sen-orrin-hatch-on-the-supreme-court-activist-justices-have-rewritten-our-laws/?utm_term=.963df1f594ec (“It is not a Justice’s role to make or change laws by imposing his own policy preferences instead of what Congress actually passed. It is not her role to prejudge issues by looking beyond the text of the law to consider her personal views and feelings.”).

9. See, e.g., *Ohio Democratic Party v. Donald J. Trump for President, Inc.*, 137 S. Ct. 15 (Nov. 7, 2016) (order denying application to vacate stay); *Bush v. Gore*, 531 U.S. 98 (2000).

10. Approximately ninety percent of American judges face the electorate either to attain, or to keep, their jobs. See JED HANDELSMAN SHUGERMAN, *THE PEOPLE’S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 3 (2012) (summarizing the prevalence of judicial elections in the United States).

11. See MODEL CODE OF JUDICIAL CONDUCT Rule 4.2(B), (C) (AM. BAR ASS’N 2007) (permitting elected judges, among other things, to “attend political gatherings” and “contribute to a political organization”). Just like their federal counterparts, even elected state judges may not endorse candidates for office. See MODEL CODE OF JUDICIAL CONDUCT r. 4.1(A)(3) (AM. BAR ASS’N 2007).

12. Justice Scalia was highly critical of the Obama administration in his opinions. See, e.g., S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 ARIZ. ST. L.J. 1431, 1482 (2012) (discussing Justice Scalia’s criticism of President Obama’s immigration policies). Judge Posner described Scalia’s comments as “inflammatory.” *Id.* However, as far as I am aware, none of the justices on the current court ever supported or opposed a candidate for office in the course of an election.

election, Donald Trump.¹³ On multiple occasions, she expressed her disdain for Trump in no uncertain terms, calling Trump a “faker,” criticizing Trump’s failure to release his tax returns, and even joking that her husband would have suggested moving to New Zealand if Trump were to be elected president.¹⁴ Given the ethical rules and the long-standing norms of judicial behavior, these were jarring statements from a sitting Supreme Court Justice; we are not used to hearing Justices make such blatantly political (and partisan) remarks. After all, despite volumes of evidence to the contrary, judges and Justices continue to refer to themselves as the “apolitical” branch of government¹⁵—as mere “umpires” in a political game played by the elected branches.¹⁶

Immediately, there was a near-unanimous outcry against the propriety of Ginsburg’s comments, ultimately leading her to apologize.¹⁷ The chorus of critics included pundits, the press, numerous politicians, and Donald Trump himself.¹⁸ It was not just conservatives who rebuked her statements.¹⁹ Despite her near-mythical status in progressive circles,²⁰ among the critics were some of Justice Ginsburg’s biggest supporters on the

13. See *infra* Part II.

14. See *infra* Part II.

15. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 385 (1989) (contrasting the “judiciary and the two political branches”); see also Judith S. Kaye, *Safeguarding A Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 711 (1997) (“While the judiciary, as part of government, is fully accountable to the public, in this respect there are crucial differences between the judiciary and the other two ‘political’ branches of government.”).

16. Chief Justice Roberts famously used the umpire analogy during his confirmation hearing. Many scholars have rejected the umpire analogy. See, e.g., Aaron S.J. Zelinsky, *The Justice Commissioner: Benching The Judge-Umpire Analogy*, 119 YALE L.J. ONLINE 113 (2010) (critiquing the umpire analogy).

17. See *infra* Part II.

18. See *infra* Part II.

19. Many conservatives did rebuke her. See Ed Whelan, *Ginsburg Continues to Slam Trump*, NAT’L REVIEW (July 12, 2016), <http://www.nationalreview.com/bench-memos/437717/ginsburg-trump>; Josh Blackman, *Inglorious RBG*, JOSH BLACKMAN’S BLOG (July 10, 2016), <http://joshblackman.com/blog/2016/07/10/inglorious-rbg/> (“Ruth Bader Ginsburg has lost it. Her recent comments are absolutely beyond the pale—even for her outrageous self. The other justices should hold an intervention, and tell her to be quiet or step down. This isn’t funny anymore.”).

20. Justice Ginsburg’s cult-like status among liberals is exemplified by the adoption and use of the “Notorious RBG” memes. See Dahlia Lithwick, *Justice LOLZ Grumpycat Notorious R.B.G.: How a Gentle Supreme Court Justice Became a Badass Gansta Internet Meme*, SLATE (Mar. 16, 2015), http://www.slate.com/articles/double_x/doublex/2015/03/notorious_r_b_g_history_the_origins_and_meaning_of_ruth_bader_ginsburg_s.html.

left.²¹ Reliably leftist Supreme Court commentators, legal academics, and other Ginsburg admirers suddenly sided with Donald Trump,²² perhaps for the first time in the entire election cycle. In an election that saw little bipartisan agreement on almost anything, nearly everyone seemed to agree that Justice Ginsburg's statements violated ethical rules and norms.²³ And to many, this was not even a close call, with commentators describing the ethical question as "a softball" that left no doubt that "Ginsburg's . . . [statements] were inappropriate."²⁴

This Article examines whether Ginsburg's many critics were right. I conclude that Justice Ginsburg's comments indeed violated long-established judicial norms, as well as the canons of judicial ethics.²⁵ But contrary to conventional wisdom, I suggest that the norms themselves may be built on a shaky foundation and grounded in long-abandoned myths about the judicial role and judicial decision-making. The traditional restraints on Supreme Court Justices expressing their own strongly-held political views does not further, or at least does not significantly further, any of the important goals generally served by the ethics codes.²⁶ While Justice Ginsburg's comments, and comments like hers, may change the way the people view the Court and its Justices, their mere utterance causes little damage to the reputation and standing of the federal judiciary generally, or the Supreme Court in particular. In addition, stifling judicial speech disservices the American people by misleading them about judges and

21. See *infra* Part II.

22. See *infra* Part II.

23. Erwin Chemerinsky was one of the few high-profile defenders of Justice Ginsburg. See Erwin Chemerinsky, *Ruth Bader Ginsburg Has Nothing to Apologize For in Her Criticism of Donald Trump*, L.A. TIMES (July 16, 2016), www.latimes.com/opinion/op-ed/la-oe-chemerinsky-ginsburg-trump-comments-20160718-snap-story.html. But his defense focused on Ginsburg's First Amendment right to express views rather than on the ethical propriety of her statements. *Id.* In this Article, I set aside the First Amendment issues, as a number of other scholars have considered whether judges have a First Amendment right to engage in political speech. See, e.g., Wendy R. Weiser, *Regulating Judges' Political Activity After White*, 68 ALB. L. REV. 651 (2005).

24. See Roger Parloff, *Justice Ruth Bader Ginsburg Did Step In It – Now Get Over It*, FORTUNE (June 14, 2016), www.fortune.com/2016/07/14/ruth-bader-ginsburg-donald-trump-comments/.

25. As I explain below, the Code of Judicial Conduct does not apply to Supreme Court Justices, although the Justices treat the Code as strongly persuasive authority and generally follow its mandates.

26. I focus here on such statements by Supreme Court Justices only. As I show below, not only are political statements by Supreme Court Justices less problematic, but political statements by Supreme Court Justices have greater value than similar statements by lower courts judges. See *infra* Part III; Part IV.

judging and concealing potentially important heuristic information from the electorate. When judges speak, people listen, and judicial speech, even political or partisan judicial speech, can educate and inform the public about constitutional meaning and the role of the judiciary. In other words, I suggest that we lose more than we gain when ethical rules muzzle Justices from expressing their sincerely-held political views.²⁷

This Article proceeds in three parts. In Part II, I begin by briefly summarizing the context and the nature of Justice Ginsburg's statements, as well as her subsequent apology. Parts III and IV then set out the two primary ethical objections to Ginsburg's comments.²⁸

Part III examines the first critique, which relates to judicial impartiality and the appearance of impartiality. Critics accused Justice Ginsburg of showing bias (or the appearance of bias) against Donald Trump. But upon closer examination, I conclude that the impartiality concerns stemming from such judicial speech are minor. In fact, as the Court itself has explained, mere expression of strongly-held political beliefs (even about issues that judges are likely to face on the bench) does not implicate judicial

27. In this Article, I do not address whether society has a general interest in creating a judiciary without strongly held political views. Whether such a system is feasible or commendable are beyond the scope of the Article. Rather, my focus is solely on the ban of political speech by judges—the mere expression of what judges are already thinking.

28. There is a generic critique that Ginsburg's actions create the appearance of impropriety. See, e.g., Times Editorial Board, *Ginsburg's Criticism of Trump is Understandable but Injudicious*, L.A. TIMES (June 14, 2016), www.latimes.com/opinion/editorials/la-ed-ginsburg-trump-20160713-snap-story.html (describing the ethical code's "general statement that judges should 'avoid impropriety and the appearance of impropriety'"). However, a close look at this objection makes it clear that the impropriety is based largely on the partisan nature of her comments or the appearance of impartiality. See, e.g., *id.* (arguing that the appearance of impropriety is created because the public may perceive that Ginsburg is not impartial towards Trump in litigation involving Trump). Therefore, I focus on the specific ban on judges engaging in partisan activity rather than the general requirement that judges avoid conduct that creates the appearance of impropriety. A related objection, although one I have not seen made in this context, may be that Ginsburg's comments are inappropriate because she is lending the prestige of her office of a candidate in the election. See MODEL CODE OF JUDICIAL CONDUCT CANON 2(B) (AM. BAR ASS'N 2007); Steve Lubet, *Chemerinsky on Ginsburg*, FACULTY LOUNGE (July 12, 2016), www.thefacultylounge.org/2016/07/chemerinsky-on-ginsburg-2.html ("Ginsburg speaks with the authority of a Supreme Court justice, and she might therefore influence voters."). That too, I believe, is a species of the partisan-political nature of Ginsburg's comments. In fact, Steve Lubet, after setting forth this problem, explains that "[t]his compromises the neutrality of the Court, and threatens to reduce it to another political branch of government." *Id.* In addition, as I will explain in Part IV, the heuristic function of her comments should be viewed as a positive rather than as a negative.

impartiality.²⁹ And although here Ginsburg spoke about a specific person rather than an issue, she did nothing more than tell us what was on her mind. To the extent that simply holding those views alone demonstrates bias and requires recusal, litigants benefit from the public expression of those views because this expression can offer them the information they need for a potential recusal motion against the judge.

Part IV looks at the second criticism, which centers on the political and partisan nature of Justice Ginsburg's comments. Indeed, it is hard to see Ginsburg's comments as anything other than an endorsement of a candidate for political office. This is the stronger of the two accusations. Long-established norms counsel against judicial comment on elections, candidates in those elections, or blatantly partisan statements endorsing (or criticizing) an individual running for office. And if judges are supposed to remain non-partisan and apolitical, then Ginsburg's comments would appear to be indefensible. But once again, on closer examination, these purported harms are largely illusory, at least with respect to Supreme Court Justices. After all, much of the Court's work is political in nature.³⁰ The Justices are selected through a highly partisan process—a process focused in large part on the ideology of the candidate—and arrive at the Court with (and maybe even because of) strongly-held political and ideological views. Ginsburg's comments only confirm the reality that Supreme Court Justices already have strongly-held political views that go along with their long-established political connections and relationships.³¹ Scholars across many disciplines have shown that politics, ideology, and many other factors play a role in judicial decision-making.³² Thus, the norm prohibiting judges from expressing their political viewpoint merely conceals from the people the political nature of serving as a Supreme Court Justice. In light of these factors, the Court is unlikely to suffer significant harm if Justices confirm that they are human beings with partisan leanings (or disabuse those people who continue to believe that politics and law occupy entirely separate

29. *Republican Party of Minn. v. White*, 536 U.S. 765, 776-77 (2002).

30. See generally ERIC SEGALL, *SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES* (2012).

31. For example, see Justice Scalia's opinion explaining his non-recusal following a duck hunting trip with Vice President Cheney while a lawsuit against Cheney was pending before the Court. *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 124 S. Ct. 1391 (2004) (Scalia, J., mem.). Justice Scalia explained that the Justices are Washington insiders who have many friends within the other branches of government. *Id.* at 1394-95. This is particularly true for Justices who served in the other branches of government before joining the federal judiciary.

32. See *infra* Part IV.

spheres). Part IV also highlights some of the benefits of judicial speech, including the educational and heuristic value that partisan judicial speech can serve.

Not only do Ginsburg's comments cause little real harm to the judiciary, but judicial speech may have significant educational benefits for the public. Therefore, I conclude that while Justice Ginsburg's actions violated the ethical rules and the ethical norms, such restrictions on judicial speech, at least judicial speech by Supreme Court Justices, may do more harm than good.

II. THE COMMENTS

In a span of three days, in three separate interviews, Justice Ginsburg expressed her views on the presidential election. It started when the New York Times published a story on July 11, 2016, quoting Ginsburg as saying: "I can't imagine what this place would be — I can't imagine what the country would be — with Donald Trump as our president For the country, it could be four years. For the court, it could be — I don't even want to contemplate that."³³ In the same interview, she also hinted that were her husband still alive, he might have suggested moving to New Zealand if Trump won the election.³⁴

Was this a momentary lapse in judgment? Justice Ginsburg quickly made clear that this was not merely an off-the-cuff comment. In a second interview with the Associated Press, Ginsburg lamented that she did not want to even consider the possibility of a Trump presidency.³⁵ She also said that she believed her fears would not come to fruition because Hillary Clinton would likely be our next president.³⁶

Finally, in an interview with CNN on July 12, Ginsburg did not back down. Instead, she doubled down with the most pointed attack yet. "He is a faker," she said. "He has no consistency about him. He says whatever comes into his head at the moment. He really has an ego How has he gotten

33. Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES (July 10, 2016), www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html?_r=0.

34. *Id.*

35. Joan Biskupic, *Justice Ruth Bader Ginsburg Calls Trump a 'Faker,' He Says She Should Resign*, CNN (July 13, 2016), www.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-faker/ ("I can't imagine what this place would be—can't imagine what the country would be—with Donald Trump as our president.").

36. *Id.*

away with not turning over his tax returns? The press seems to be very gentle with him on that.”³⁷

Her comments unleashed a torrent of criticism. Criticism from the left.³⁸ Criticism from the right.³⁹ Criticism from the media.⁴⁰ Criticism from legal academics.⁴¹ Criticism from politicians.⁴² In short, in a rare moment of bipartisan solidarity, Ginsburg managed to unite those who are usually her biggest supporters and her most ardent opponents in excoriating her statements.

Donald Trump himself responded in the signature Donald Trump style: on Twitter. The day after Ginsburg’s remarks on CNN, Trump tweeted, “Justice Ginsburg of the U.S. Supreme Court has embarrassed all by making

37. *Id.*

38. For example, Jeffrey Toobin, CNN’s legal analyst, said that Ginsburg’s remarks were “very inappropriate for a Supreme Court Justice.” Interview with Jeffrey Toobin, CNN’s Senior Legal Analyst, CNN (July 13, 2016), available at <http://transcripts.cnn.com/TRANSCRIPTS/160713/cnr.01.html>. See also Jeffrey Toobin, *Ruth Bader Ginsburg’s Slam of Trump*, CNN (July 13, 2016), <http://www.cnn.com/2016/07/12/opinions/ruth-bader-ginsburg-trump-toobin/>.

39. Prominent conservative analyst Ed Whelan said that Ginsburg’s comments were indefensible. “I think this exceeds the others in terms of her indiscretions . . . I am not aware of any justice ever expressing views on the merits or demerits of a presidential candidate in the midst of the campaign.” See Aaron Blake, *In Bashing Donald Trump, Some Say Ruth Bader Ginsburg Just Crossed a Very Important Line*, WASH. POST (July 11, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/07/11/in-bashing-donald-trump-some-say-ruth-bader-ginsburg-just-crossed-a-very-important-line/?utm_term=.0e4aa16b25ed.

40. The New York Times Editorial Board published its opinion that Ginsburg’s comments were inappropriate. See Times Editorial Board, *Donald Trump is Right About Ruth Bader Ginsburg*, N.Y. TIMES (July 13, 2016), www.nytimes.com/2016/07/13/opinion/donald-trump-is-right-about-justice-ruth-bader-ginsburg.html?_r=0.

41. There are countless example here, including leading voices in election law (Rick Hasen) and legal ethics (Steve Lubet, Stephen Gillers). See Stephen Gillers, *It’s Clearly Not Right for Justices to Say Which Candidate They Support*, N.Y. TIMES (July 12, 2016), www.nytimes.com/roomfordebate/2016/07/12/can-a-supreme-court-justice-denounce-a-candidate/its-clearly-not-right-for-justices-to-say-which-candidate-they-support; Rick Hasen & Dahlia Lithwick, *The Real Reason Why Judges Should Keep Quiet About Elections*, SLATE (July 19, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/07/ruth_bader_ginsburg_s_trump_remarks_will_have_long_lasting_effects.html; Steve Lubet, *Chemerinsky on Ginsburg*, THE FACULTY LOUNGE (July 12, 2016), www.thefaculty lounge.org/2016/07/chemerinsky-on-ginsburg-2.html.

42. Among the many political figures that criticized Ginsburg’s comments were Paul Ryan, Marco Rubio, and Mitch McConnell. See, e.g., Manu Raju & Theodore Schleifer, *Top Republicans Criticize Ruth Bader Ginsburg But Don’t Back Trump’s Call for Her to Resign*, CNN (July 13, 2016), <http://www.cnn.com/2016/07/12/politics/ruth-bader-ginsburg-reaction/>. See *infra* Part II.

very dumb political statements about me. Her mind is shot - resign!"⁴³ Following Justice Ginsburg's lead, he, too, doubled down the following day, tweeting, "Is Supreme Court Justice Ruth Bader Ginsburg going to apologize to me for her misconduct? Big mistake by an incompetent judge!"⁴⁴ In the *New York Times*, Trump said, "I think it's highly inappropriate that a United States Supreme Court judge gets involved in a political campaign, frankly . . . I think it's a disgrace to the court, and I think she should apologize to the court. I couldn't believe it when I saw it."⁴⁵

In response to the criticism, Justice Ginsburg did, indeed, apologize. On July 14, she issued a statement saying that "[o]n reflection, my recent remarks in response to press inquiries were ill-advised and I regret making them . . . Judges should avoid commenting on a candidate for public office. In the future I will be more circumspect."⁴⁶ She also told Nina Totenberg: "I did something I should not have done."⁴⁷ And with that apology, the controversy disappeared from public view.⁴⁸ Despite limited pockets of

43. Donald J. Trump (@realDonaldTrump), TWITTER (July 13, 2016, 12:54 AM), <https://twitter.com/realdonaldtrump/status/753090242203283457?lang=en>.

44. Donald J. Trump (@realDonaldTrump), TWITTER (July 13, 2016, 3:26 PM), <https://twitter.com/realdonaldtrump/status/753354905897668608?lang=en>. In two later tweets, Trump said "Even the @NYTimes and @WashingtonPost Editorial Boards condemned Justice Ginsburg for her ethical and legal breach. What was she thinking?" and "If I win the Presidency, we will swamp [sic] Justice Ginsburg with real judges and real legal opinions!" See Donald J. Trump (@realDonaldTrump), TWITTER (July 13, 2016, 3:28 PM), <https://twitter.com/realdonaldtrump/status/753355507721646080>.

45. Michael D. Shear & Maggie Haberman, *Donald Trump Calls Ruth Bader Ginsburg's Remarks a 'Disgrace to the Court'*, N.Y. TIMES (July 12, 2016), www.nytimes.com/2016/07/13/us/politics/ruth-bader-ginsburg-donald-trump-criticism.html?hp&action=click&pg_type=Homepage&clickSource=story-heading&module=first-column-region®ion=top-news&WT.nav=top-news&_r=0.

46. See Robert Barnes, *Ginsburg Expresses Regret for Remarks Criticizing Trump*, WASH. POST. (July 14, 2016), https://www.washingtonpost.com/politics/ginsburg-expresses-regret-over-remarks-criticizing-trump/2016/07/14/f53687bc-49cc-11e6-bdb9-701687974517_story.html?utm_term=.b01648d9eabd.

47. Nina Totenberg, *Supreme Court Justice Ginsburg Apologizes for Trump Comments*, NPR (July 15, 2016), <http://www.npr.org/2016/07/15/486130165/supreme-court-justice-ginsburg-apologizes-for-trump-comments>.

48. Donald Trump once more brought up Ginsburg's comments during the third presidential debate. He said: "Something happened recently where Justice Ginsburg made some very inappropriate statements toward me and toward a tremendous number of people, many, many millions of people that I represent, and she was forced to apologize and apologize she did. But these were statements that should never ever have been made." See full transcript of the third presidential debate at *Third Presidential Debate Live Transcript Clinton Trump*, VOX (Oct. 20, 2016), www.vox.com/policy-and-politics/2016/10/19/13336894/third-presidential-debate-live-transcript-clinton-trump.

support for Ginsburg's comments, the near-unanimous consensus seems to be that Ginsburg stepped over the line and that her comments were inappropriate.

III. THE IMPARTIALITY CRITIQUE

Why did so many people find Ginsburg's comments problematic, setting off a torrent of controversy? Despite the large number of critics, most of the criticisms fall into one of two categories. The first critique is that Ginsburg's comments were improper because they violated the rule that judges must remain impartial, or at the very least preserve the appearance of impartiality. The second critique is that Ginsburg's comments were improper because she engaged in blatantly political and partisan behavior, contrary to the requirement that judges remain independent and nonpartisan.

A. *Actual Bias*

One of the primary accusations against Ginsburg is that her statements evidence bias against Donald Trump. For example, the New York Times Editorial Board wrote that Ginsburg's comments "call her own commitment to impartiality into question."⁴⁹ Louis Virelli, an expert on judicial recusal, said that Ginsburg's comments "could be seen as grounds for her to recuse herself from cases involving a future Trump administration."⁵⁰ Rick Hasen, one of the nation's preeminent election law scholars, similarly examined whether the "comments would cause a reasonable person to question the impartiality of the justice."⁵¹ House Speaker Paul Ryan got right to the heart of the impartiality concern, saying that "[f]or someone on the Supreme Court who is going to be calling balls

49. See James Bennet et al., *Donald Trump Is Right About Justice Ruth Bader Ginsburg*, N.Y. TIMES (July 13, 2016), www.nytimes.com/2016/07/13/opinion/donald-trump-is-right-about-justice-ruth-bader-ginsburg.html.

50. See Aaron Blake, *In Bashing Donald Trump, Some Say Ruth Bader Ginsburg Just Crossed a Very Important Line*, WASH. POST. (July 11, 2016), www.washingtonpost.com/news/the-fix/wp/2016/07/11/in-bashing-donald-trump-some-say-ruth-bader-ginsburg-just-crossed-a-very-important-line/?utm_term=.b31188764c11. I, too, made a similar suggestion. See Cristian Farias, *Did Ruth Bader Ginsburg Cross The Line With Her Donald Trump Comments?*, HUFFINGTON POST (July 11, 2016), www.huffingtonpost.com/entry/ruth-bader-ginsburg-donald-trump_us_5783af3de4b01e4dea78ea5c8 (comments added by Dmitry Bam).

51. Rick Hasen, *Do Justice Ginsburg's Comments on Donald Trump Require Recusal in a Clinton v. Trump Case?*, ELECTIONLAWBLOG.ORG (July 10, 2016), www.electionlawblog.org/?p=84177.

and strikes in the future based upon what the next president and Congress does, [Ginsburg's remarks] strike[] me as inherently biased."⁵² Because of Ginsburg's demonstrated bias, these critics suggest that she would need to recuse herself in future litigation involving Donald Trump, Trump's electoral prospects, and, potentially, the Trump administration.

These are serious charges. Judicial impartiality is one of the core tenets of a justice system, and the importance of judicial impartiality has been recognized for centuries in American and British law.⁵³ As I have written previously, "in an adversarial system like ours, where both parties are expected to vigorously present their own cases from their own individualized perspective, judges must remain impartial to produce a fair result."⁵⁴ The importance of impartiality has long been a central feature of codes of judicial conduct. The Code of Conduct for United States Judges and the Model Code of Judicial Conduct (upon which most state judicial conduct codes are based) both require judges to remain impartial and to recuse themselves if their impartiality could reasonably be challenged.⁵⁵ Biased judges must step aside on their own accord, without awaiting a motion from the parties.⁵⁶ In short, judicial impartiality is an ethical value of the highest order. In fact, judicial impartiality is not just an ethical rule; it is a constitutional requirement and the foundation of the American legal system. One of the core principles of due process is that litigants are entitled to a neutral, impartial judge to resolve their dispute.⁵⁷ If, by commenting as

52. Benjamin Siegel, *Paul Ryan Criticizes Ruth Bader Ginsburg 'Bias' in Trump Comments*, ABC NEWS (July 13, 2016), www.abcnews.go.com/Politics/paul-ryan-criticizes-ruth-bader-ginsburg-bias-trump/story?id=40535979.

53. See RICHARD E. FLAMM, *JUDICIAL DISQUALIFICATION* (1996) (discussing the history of judicial disqualification as a key tool to preserve judicial impartiality in England and the United States).

54. Dmitry Bam, *Our Unconstitutional Recusal Procedure*, 84 *MISS. L.J.* 1135, 1156 (2015).

55. See, e.g., *MODEL CODE OF JUDICIAL CONDUCT* Canon 2, r. 2.11 (AM. BAR ASS'N 2007) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned."); *CODE OF CONDUCT FOR U.S. JUDGES* Canon 3(C) (JUDICIAL CONFERENCE OF THE U.S. 2014) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.").

56. *United States v. Story*, 716 F.2d 1088, 1091 (6th Cir. 1983) ("[S]ection 455 is self-executing, requiring the judge to disqualify himself for personal bias even in the absence of a party complaint."); see also Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 *HASTINGS L.J.* 657, 675 (citing *Taylor v. O'Grady*, 888 F.2d 1189, 1200 (7th Cir. 1989)).

57. Bam, *supra* note 54, at 1157 ("[T]here is little dispute that the Due Process Clause guarantees to each person an impartial tribunal in all legal proceedings, and in all phases of a legal proceeding.").

she did, Justice Ginsburg demonstrated the kind of bias that these ethical rules and constitutional mandates seem to prohibit, Ginsburg's comments would raise very serious concerns.

Fortunately, this is not the case. At the outset, it is important that the question to be answered is framed properly. The question is not whether Justice Ginsburg has a bias against Donald Trump in some generic sense, or whether, in her own mind, Justice Ginsburg is predisposed against Trump or would have preferred that Hillary Clinton won the presidential election. Rather, the real question is whether Justice Ginsburg's *comments* are problematic—whether her expression of what she was thinking raises a separate impartiality concern. For the following reasons, the answer to that question is no.

First, Ginsburg did nothing more than express her sincere views on Donald Trump. To the extent that those views accurately represent her opinions of Trump, the statements themselves do not change that reality. When it comes to *actual* bias, what matters most is the judge's state of mind, not what the litigants know about the judge's state of mind. After all, judges must recuse themselves if they have a personal bias against a party without awaiting a recusal motion.⁵⁸ And recusal for bias is one of the primary criteria that requires judicial recusal. Therefore, if Ginsburg's statements are evidence of her personal bias, then the fact that she made the statements publicly is irrelevant. If merely believing that Donald Trump is a "faker" or believing that he would make an unthinkable poor president requires recusal, telling the world those thoughts does not change the analysis. This is consistent with the Supreme Court's rejection of the notion that mere expression of one's views—even views on legal issues that the judge is likely to decide on the bench—creates impartiality concerns.⁵⁹

In fact, one might argue that Ginsburg's comments will help litigants root out judicial bias more effectively than if she had concealed her thoughts from the public. For example, in a Supreme Court case involving Donald Trump, Trump's lawyers may try to rely on her comments to seek Justice Ginsburg's recusal. Of course, under the Supreme Court's current recusal procedure, Justice Ginsburg herself will decide whether recusal is

58. Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543 n.2 (1994) ("The language of the Code leaves no doubt that, in the first instance, the recusal process is to be self-executing, without the need for a judge to wait for a recusal motion to be filed.").

59. *Republican Party of Minn. v. White*, 536 U.S. 765, 778 (2002) (striking down as unconstitutional a provision of Minnesota's Code of Judicial Conduct prohibiting judicial candidates from announcing their views on legal issues likely to arise in the course of future litigation).

appropriate,⁶⁰ but at the very least, the litigant who questions the Justice's impartiality can point to concrete evidence of perceived bias. Just as learning that a judge received a campaign contribution from a party can help the opposing party seek the judge's recusal,⁶¹ learning that a judge has a strong dislike of a party can help that party seek recusal.

Second, at the time of Ginsburg's comments, Donald Trump had no pending cases before the Court. The impartiality rule has generally been invoked when the judge in question demonstrates bias against a particular litigant or lawyer. For example, a number of judges have been disciplined for being biased in favor of certain attorneys or litigants,⁶² but generally only for bias that affected the judge's decisions. Some scholars have critiqued extrajudicial speech about impending or pending cases,⁶³ but remarks and comments made by a judge about specific individuals, when no case involving that individual is pending in front of the judge, have generally not been grounds for reprimand.⁶⁴ While Ginsburg's remarks are unusual, they do not suggest that she has predetermined any cases involving Donald Trump.⁶⁵

Of course, no case involving Donald Trump was pending at the time of Ginsburg's comments, but it was at least foreseeable that a case involving

60. Each Justice decides for himself or herself whether recusal is necessary. Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535, 1547 (2012) (explaining that each Justice makes the initial and final decision on their own recusal).

61. A number of scholars have argued that more transparency is needed as to the sources of funding in judicial elections. The public has the right to know, the argument goes, whether the judge in question may be predisposed to rule in favor of the donor because the judge owes a debt of gratitude to that donor. See, e.g., Debra Erenberg & Matt Berg, *The Dark Night Rises: The Growing Role of Independent Expenditures in Judicial Elections After Citizens United*, 49 WILLAMETTE L. REV. 501, 518 (2013).

62. GEYH, ALFINI, LUBET, & SHAMAN, JUDICIAL CONDUCT AND ETHICS 2-47 (2010).

63. See Mark I. Harrison & Keith Swisher, *When Judges Should Be Seen, Not Heard: Extrajudicial Conduct*, 64 N.Y.U. ANN. SURV. AM. L. 559 (2009).

64. Of course, if the judge's comments manifest improper prejudice (e.g., racial prejudice), a judge may be reprimanded. *Phillips v. Joint Legislative Comm. on Performance & Expenditure Review*, 637 F.2d 1014, 1021 (5th Cir. 1981); see also *In re Judicial Misconduct*, 751 F.3d 611, 623 (U.S. Jud. Conf. 2014).

65. Cf. GEYH, *supra* note 62, at 4-19 (4.07(2)) ("[W]hen a judge's remarks are so extreme that they show that his or her decision has been predetermined, improper bias or prejudice will be found to exist."). For example, Justice Scalia recused himself from a case involving a challenge to the word "God" in the Pledge of Allegiance after making disparaging comments about the case. See Charles J. Russo & Ralph D. Mawdsley, *Trumped Again: The Supreme Court Reverses the Ninth Circuit and Upholds the Pledge of Allegiance*, 192 ED. L. REP. 287, 287 n.3 (2004) (discussing the reasons for Justice Scalia's recusal).

Donald Trump would come before the Court in the near future; judges should strive to preserve their impartiality for foreseeable cases to avoid needless recusals. At least three kinds of cases involving Donald Trump could emerge. First, the Court could have heard a *Bush v. Gore* type challenge,⁶⁶ where the Court would be asked to decide the outcome of the presidential election. This was unlikely, but possible. In a case like this, recusal would almost certainly be required.⁶⁷ Second, one of the candidates could have challenged an election administration or voting rights issue that might affect election procedure (and perhaps the results) in a particular state. Such a suit was highly likely—after all, Voter ID, early voting, long lines at the polls, and a myriad of other election administration issues have generated a great deal of litigation.⁶⁸ In a case like this, depending on the nature of the case, recusal would arguably be required.⁶⁹ Finally, the Court could hear a case involving the Trump administration, should Donald Trump win the election. This, at the time of Ginsburg's comments seemed relatively unlikely, but foreseeable, whatever odds one put on the election.

Regardless, recusal would almost certainly not be required in all future cases involving the administration. Ginsburg's views on Donald Trump, the person, would not lead a reasonable person to question her impartiality in a case nominally involving Donald Trump in his official capacity, or relating to his executive policy.⁷⁰ After all, no reasonable person could believe that

66. *Bush v. Gore*, 531 U.S. 98 (2000).

67. See Cristian Farias, *Did Ruth Bader Ginsburg Cross The Line With Her Donald Trump Comments?*, HUFFINGTON POST (July 11, 2016), www.huffingtonpost.com/entry/ruth-bader-ginsburg-donald-trump_us_5783af3de4b01edea78ea5c8 (comments added by Dmitry Bam).

68. Dale E. Ho, *Voting Rights Litigation After Shelby County: Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 675, 684 (2014) (discussing extensive litigation in voting rights cases, especially in recent years).

69. I am not certain that Justice Ginsburg would have to recuse herself in every such challenge, but at least some scholars have argued that her statements demonstrate that she is biased in any case where Trump is a party and the Court's decision could sway the results of the election. See, e.g., Jonathan Adler, *Justice Ginsburg Fails an Important Test of Judicial Ethics*, WASH. POST (Nov. 7, 2016), www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/07/justice-ginsburg-fails-an-important-test-of-judicial-ethics/?utm_term=.3fe5e578a753 ("Ginsburg participated in a case in which she repeatedly disparaged one of the parties and expressed a strong preference for that party's defeat in the very election that was the subject of the case. This was unethical of her to do. She should have recused.").

70. In denying the motion for recusal in the duck-hunting case involving Dick Cheney, Justice Scalia emphasized that the suit against Cheney was only in his official capacity, and therefore Justice Scalia's personal relationship with Cheney should not provide a basis for recusal. *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 541 U.S. 913, 915-18 (2004) (Scalia, J., mem.).

Justices Thomas and Scalia held no views on President Obama. Yet nobody called for recusal of those Justices in every case involving Obama. Justice Ginsburg's thoughts on Donald Trump's qualifications to be president are likely not going to create bias, or even the appearance of bias, in cases involving the Trump administration. Of course, given the nebulous recusal standard, reasonable people can disagree with my assessments in all three situations. But note that in all three circumstances, whether recusal is required or not, the result does not depend on Ginsburg's comments, but rather on her personal bias against Donald Trump. The words themselves add little to the analysis.

Even if Ginsburg's statements alone were legally significant and could create bias, the ethics rules offer a remedy: recusal.⁷¹ Recusal is not a perfect solution of course. It is inefficient and can potentially leave the Court short-staffed to decide important cases. Recusal can also leave the Court with an even number of justices and thus without a decision on potentially important cases.⁷² In addition, recusal may fail to eliminate the appearance of bias created by the speech since it may fail to undo the damage created by the original comments.⁷³ Recusal is particularly problematic in the case of the Supreme Court because the Justices decide their own recusal motions.⁷⁴ And to make matters worse, there is no appellate review of Supreme Court decisions, meaning that each Justice's decision on their own bias is the final decision. But despite all the doctrinal shortcomings, recusal is at least a partial remedy to address impartiality concerns that result from judicial speech.⁷⁵

It is plausible that whatever Ginsburg may think of Trump, the statements themselves may actually make her more biased. Perhaps merely expressing her views makes those views stronger. If partisan judicial speech actually *reinforces* or *strengthens* the judge's views, then Ginsburg's comments become more problematic. In that case, the very act of speaking creates the bias. And studies have shown that expressing an opinion often

71. See *supra* note 55 (discussing the impartiality provisions in the Code of Conduct for U.S. Judges and the Model Code of Judicial Conduct).

72. At the time Ginsburg made her comments, the Court was already down to eight members with the recent passing of Justice Scalia. Were Ginsburg to recuse herself, the Court would once again have been down to an odd number of justices.

73. Dmitry Bam, *Making Appearance Matter*, 2011 B.Y.U.L. REV. 943 (2011).

74. Bam, *supra* note 54, at 1136-38.

75. In *Republican Party of Minn. v. White*, Justice Kennedy suggested that states may use more stringent recusal rules to address impartiality concerns that arise from judicial speech announcing views on legal issues. *Republican Party of Minnesota v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring)

solidifies it.⁷⁶ Therefore, there is a risk that when judges express their views about an individual, they will tend to stick to them even in the face of evidence to the contrary.⁷⁷ To make matters worse, the judge in question might feel the pressure to demonstrate her impartiality, thus being unduly predisposed to rule against her earlier comments.

While these arguments have some merit these concerns are minor for Supreme Court Justices generally, and Justice Ginsburg in particular. After all, Supreme Court Justices come to the Court with a lifetime of experience and well-established views; they are selected for their seats largely because of their experience and expertise.⁷⁸ For individuals with such strongly-held views, concern about anchoring is minimized. Justice Ginsburg, for example, had spent her career fighting against many of the things for which Donald Trump stands. She was appointed by a Democratic president and has consistently been one of the most liberal justices on the Court. All these factors suggest that the risk of her cementing her views by speaking out against Trump is minimal. Her partisan ideology was already well-cemented at the time that she made her comments, and it seems unlikely that the mere expression of her thoughts (rather than the thoughts themselves) on this occasion would influence her decisions in any future case.

B. Appearance of Bias

So far, this Article has discussed whether Ginsburg's comments violated the ethical requirement that judges remain impartial. But even if Ginsburg's comments are not problematic when it comes to actual bias, the concern about the appearance of bias still looms. A number of scholars have pointed

76. For example, psychologists have identified a commitment bias, which is "the tendency to be consistent with what we have already done or said we will do in the past, particularly if this is public." *Commitment Bias*, THE ASSOCIATION FOR QUALITATIVE RESEARCH, <https://www.aqr.org.uk/glossary/commitment-bias> (last visited Feb. 19, 2017). Because nobody wants to appear inconsistent, the concern is that Justice Ginsberg would feel the obligation to decide cases in accordance with previously expressed views. See also Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (And Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 142 (1997).

77. Justice Stevens made similar arguments in his Republican Party of Minn. v. White dissent. He argued that when judges announce their views in the course of judicial election campaigns, they then feel a duty to follow those announcements. See *Republican Party of Minn. v. White*, 536 U.S. 765, 799-801 (2002) (Stevens, J., dissenting).

78. *Laird v. Tatum*, 409 U.S. 824, 830, 831, 835 (1972) ("Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in the interpretation of the sweeping clauses of the Constitution and their interaction with one another.")

out that appearances are important for the judiciary.⁷⁹ In fact, the Court has hinted that even the appearance of impartiality may fall within the ambit of the Due Process Clause.⁸⁰ Some of Ginsburg's critics have emphasized just this point: "[The] illusion of impartiality has long been crucial to how the Supreme Court operates."⁸¹ Truly appearances are important, but Ginsburg's comments did not damage the "illusion of impartiality." In fact, Ginsburg's comments may have even strengthened the "illusion of impartiality."

Suppose that Ginsburg's comments demonstrate that she is *actually* biased. If that is the case, then the appearance-based argument largely collapses. After all, as mentioned above, statements demonstrating the judge's actual bias benefit litigants and the public.⁸² Appearance of impartiality is important to further the reality of impartiality, not to conceal true bias. There is no compelling (or even legitimate) reason to create an appearance of impartiality solely to cover up actual bias by a judge.

While there is no bright-line test to determine whether a reasonable person would consider Ginsburg to be biased against Donald Trump in a future case involving Trump, it is at least questionable whether expressing her views about Trump's qualifications for the presidency creates an appearance of bias. As explained earlier, this is particularly true because there were no cases involving Trump before the Court when the comments were made. Furthermore, recusal would still have been an option if such a case arose. Judges must not appear biased towards a litigant or a lawyer in a case.⁸³ Trump was neither.⁸⁴

Finally, the appearance-based standard considers the views of "a reasonably informed person." And a reasonably informed person would (or

79. Thomas R. Phillips & Karlene Dunn Poll, *Free Speech for Judges and Fair Appeals for Litigants: Judicial Recusal in A Post-White World*, 55 *DRAKE L. REV.* 691, 709 (2007) (discussing the importance of the appearance of impartiality).

80. Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned: Moving Beyond A Failed Standard*, 56 *ARIZ. L. REV.* 411, 432 (2014) ("It may be that by ensuring an impartial judge in fact, the Due Process Clause fosters the appearance of impartiality and thereby builds public confidence in the judiciary.").

81. Libby Nelson, *The Controversy Over Ruth Bader Ginsburg Attacking Donald Trump, Explained*, *VOX* (July 14, 2016), <http://www.vox.com/2016/7/12/12160862/ginsburg-trump-controversy>.

82. See *supra* Part III.A.

83. See *supra* note 55.

84. It is important to distinguish the "appearance of impartiality" argument from the appearance of impropriety argument we will address in II.B, below. When it comes to appearance of impropriety, judges must avoid impropriety and the appearance of impropriety "in all the judges' activities." GEYH, *supra* note 62, § 1.04.

should) know that Justice Ginsburg, a reliable left-leaning voice on the Court, a trailblazer for women's rights, and an icon in progressive circles, likely supported Hillary Clinton over Donald Trump in the presidential election. To the extent that this fact would be obvious to any reasonable observer, Ginsburg's statements do nothing more than confirm that intuition. In addition, a reasonable person should recognize that judges have strongly-held political views, and that those views may influence judicial decisions. Term after term, the Court has decided a number of controversial cases by a 5-4 margin, with the two blocs—liberal and conservative—uniformly voting together.⁸⁵ In a sense, this challenge is very much like the challenge to Justice Scalia's impartiality following his duck-hunting trip with Dick Cheney.⁸⁶ At the time, Cheney was a named party in a case pending at the Supreme Court.⁸⁷ Justice Scalia rejected calls for his recusal.⁸⁸ In a 21-page memorandum, he concluded that no "reasonable observer who is informed of all the surrounding facts and circumstances" would conclude that he was biased towards his good friend and acquaintance.⁸⁹ Scalia made an important distinction between his personal friendship with Cheney and his appearance in the lawsuit in his official capacity.⁹⁰ Just as a close friendship between a Justice and a President (or a presidential candidate) may not create the appearance of bias, the absolute opposite—a dislike of a President or a presidential candidate—may also not suffice to establish an appearance of bias.⁹¹

85. See, e.g., Joshua B. Fischman, *Do the Justices Vote Like Policy Makers? Evidence from Scaling the Supreme Court with Interest Groups*, 44 J. LEGAL STUD. 269, 285 (2015) ("The sharp divide between the two blocs reflects the fact that 13 of the 26 nonunanimous cases were decided by the standard 5-4 split with the conservatives supporting the Chamber or 5-3 with one liberal justice recused.").

86. For a summary of the incident, including a discussion of the ethical issues raised, see Monroe H. Freedman, *Duck-Blind Justice: Justice Scalia's Memorandum in the Cheney Case*, 18 GEO. J. LEGAL ETHICS 229 (2004). See also Timothy J. Goodson, *Duck, Duck, Goose: Hunting for Better Recusal Practices in the United States Supreme Court in Light of Cheney v. United States District Court*, 84 N.C. L. REV. 181, 182 (2005).

87. Goodson, *supra* note 86, at 182.

88. *Id.* at 182-83.

89. *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 924 (2004) (Scalia, J., mem.). In his memorandum, Justice Scalia offered his own factual account of the events, as well as his legal argument for why recusal was not necessary. *Id.* at 914-15.

90. *Id.*

91. This analysis assumes that Justice Scalia decided the recusal issue correctly. I take no sides on whether this is the case. Instead, this paragraph is intended to show that under the Supreme Court's current jurisprudence, there is a strong argument that Justice Ginsburg's comments do not create an appearance of bias.

Finally, I want to point out that Justice Ginsburg, later in the election cycle, decided a case involving Donald Trump as a litigant.⁹² In that case, the Ohio Democratic Party sought to enjoin the Trump campaign from improper voter intimidation.⁹³ After Ohio courts denied the injunction, the Supreme Court heard the Ohio Democratic Party's application to reinstate the injunction.⁹⁴ While some have argued that her participation in the case was improper,⁹⁵ Justice Ginsburg rejected the Ohio Democratic Party's appeal and even wrote separately to explain her vote *in favor of Donald Trump*.⁹⁶ Arguably, such a vote against her own political views actually improves public confidence in her impartiality and the respect for judicial impartiality more generally. It shows to a reasonable observer that judges do not simply vote according to their partisan views. In other words, Ginsburg's comments, and comments like hers, may actually foster, not undermine, the public's view of the Court as an impartial institution once the public sees that judges do not simply decide cases according to their political preferences.

Overall, partisan judicial statements, like the ones made by Justice Ginsburg, raise some impartiality concerns. This is particularly true if the statements create a "commitment bias" effect solidifying the Justice's views, thus making it more difficult for a judge to rule for (or against) a litigant. In addition, to the extent that some members of the public question any future decision against the litigant, regardless of the legal correctness of the ruling, this appearance of bias leads to a loss of confidence in the court. There is no denying that these are legitimate concerns. But for the reasons discussed above, I believe that these impartiality-based concerns are fairly minor. So let us now turn to the second criticism.

92. *Ohio Democratic Party v. Trump*, 137 S. Ct. 15 (2016) (mem.).

93. *Ohio Democratic Party v. Ohio Republican Party*, No. 16-CV-02645, 2016 WL 6542486, at *1 (N.D. Ohio Nov. 4, 2016).

94. *Ohio Democratic Party v. Trump*, 137 S. Ct. 15 (2016) (mem.).

95. See Jonathan Adler, *Justice Ginsburg Fails an Important Test of Judicial Ethics*, WASH. POST (Nov. 7, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/07/justice-ginsburg-fails-an-important-test-of-judicial-ethics/?utm_term=.fa116c103ea3.

96. See Adam Liptak, *Justices Won't Revive Order Barring Voter Intimidation in Ohio*, N.Y. TIMES (Nov. 7, 2016), https://www.nytimes.com/2016/11/08/us/politics/supreme-court-donald-trump-ohio.html?_r=0.

IV. THE POLITICS CRITIQUE⁹⁷

In addition to prohibiting judicial speech that raises questions about judicial impartiality, the rules restrict judges from engaging in political speech and association.⁹⁸ The most relevant ethical canon bans judges from publicly supporting or opposing a candidate for non-judicial office.⁹⁹ And this is precisely the rule that Justice Ginsburg's leading critics cite. For example, Stephen Gillers, one of the top legal ethics experts in the nation, wrote that Justice Ginsburg's comments would have violated the rule that judges should not "make speeches for a political candidate, or publicly endorse or oppose a candidate for public office" or "engage in any other political activity."¹⁰⁰ Just as with the impartiality critique, there are two variants on the "politics critique." First, the politics critique argues that partisan judicial speech detracts from the apolitical, independent role that judges are expected to play. Second, the politics critique posits that partisan speech erodes the public's respect for the Court and its judgments by gutting the appearance of nonpartisanship. Once again, I will discuss both arguments in turn.

A. *Actual Politics at the Court*

The first variant of this critique is that judges should remain apolitical at all times.¹⁰¹ Justice Ginsburg's comments enmesh her, and the Supreme

97. In this section, I also consider the general critique that Justice Ginsburg's statements create the appearance of impropriety. Ultimately, I believe the appearance of impropriety critique is just the politics critique under another name. Likewise, somebody may criticize Justice Ginsburg for lending the prestige of judicial office to oppose a candidate in the election. This, too, is nothing more than the politics critique in disguise.

98. See Michael Richard Dimino, Sr., *Counter-Majoritarian Power and Judges' Political Speech*, 58 FLA. L. REV. 53, 54 (2006). Additional rules regarding the way that judges run their campaigns restrict the political speech of elected judges. *Id.* at n.6.

99. See MODEL CODE OF JUDICIAL CONDUCT CANON 5(A)(1)(b) (AM. BAR ASS'N 2011).

100. Stephen Gillers, *It's Clearly Not Right for Justices to Say Which Candidate They Support*, N.Y. TIMES (July 12, 2016), <http://www.nytimes.com/roomfordebate/2016/07/12/can-a-supreme-court-justice-denounce-a-candidate/its-clearly-not-right-for-justices-to-say-which-candidate-they-support> (quoting MODEL CODE OF JUDICIAL CONDUCT CANON 5). Gillers acknowledges, and laments, that the Canons do not apply to Supreme Court Justices. *Id.*

101. Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 391 (1997) ("[C]ourts should deliver authoritative interpretations because they, unlike Congress or the executive, are apolitical."); Geoffrey C. Hazard, Jr., "Announcement" by Federal Judicial Nominees, 32 HOFSTRA L. REV. 1281, 1287

Court, in politics.¹⁰² As a result, Justice Ginsburg either violated a direct prohibition on engaging in politics, or a more general rule that judges must act properly and protect public confidence in the courts.¹⁰³ There is no denying that Justice Ginsburg's speech is political and partisan in nature, and that it essentially amounts to an endorsement of Hillary Clinton in the presidential election. Accepting these premises, let us explore whether such speech should be prohibited.

First, contrary to the assertions of many scholars¹⁰⁴ and often the Justices themselves,¹⁰⁵ the Supreme Court was not designed to be an apolitical institution. Unlike the requirement that judges remain impartial, there is no constitutional dimension to judicial nonpartisanship. In fact, the constitutional structure belies the argument that the judiciary is apolitical. For example, the Justices are appointed via an intensely political process by the President and through the Senate.¹⁰⁶ This appointment process is exactly the same as the process for appointing other political officers.¹⁰⁷ And although judicial appointments have been political since the founding,¹⁰⁸ in

(2004) (discussing the norm that judges do not make campaign speeches in order to preserve the apolitical nature of the judiciary).

102. In this Article, I do not discuss whether the ban on political activity violates the First Amendment. First, because the Code of Conduct does not apply to Supreme Court Justices, Justice Ginsburg could not be reprimanded or punished for her speech. Second, the more interesting question I seek to address is whether such restrictions are normatively proper and beneficial, rather than whether they are constitutional. Recent cases have addressed the constitutionality of endorsement clauses. See *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010) (upholding the Wisconsin endorsement clause); *Wersal v. Sexton*, 674 F.3d 1010 (8th Cir. 2012) (upholding Minnesota's endorsement clause).

103. See MODEL CODE OF JUDICIAL CONDUCT CANON 1 (AM. BAR ASS'N 2011) ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.").

104. For example, Stephen Gillers argues that "the structure of the U.S. Constitution makes the judiciary the nonpolitical branch of government. The executive and legislature are the political branches. Members of Congress and presidents have constituents and seek votes. Federal judges do not." Stephen Gillers, *It's Clearly Not Right for Justices to Say Which Candidate They Support*, N.Y. TIMES (July 12, 2016), <http://www.nytimes.com/roomfordebate/2016/07/12/can-a-supreme-court-justice-denounce-a-candidate/its-clearly-not-right-for-justices-to-say-which-candidate-they-support>.

105. See generally Hazard, *supra* note 101 (suggesting that the judiciary is the apolitical branch).

106. See generally U.S. CONST. art. II, cl. 2; STEPHEN L. CARTER, *THE CONFIRMATION MESS* (1994).

107. See THE FEDERALIST NO. 78 (Alexander Hamilton).

108. For example, following the election of 1800, John Adams and the federalists created a number of new judgeships and appointed federalists into those seats.

recent years judicial appointments have become even more politicized.¹⁰⁹ In fact, the Supreme Court was explicitly made an election issue by Donald Trump himself when he argued that the voters will decide who replaces Justice Scalia on the Court.¹¹⁰ This political nature of the Court is no bug—it is a feature of the system. The Court was designed to play a critical check on the other branches of government, and in that sense, the Court is just as representative of the people as the other two branches, standing between the people and their representatives.¹¹¹ The President and the Senate understand that judges do not just call balls and strikes (since the identity of the umpire matters less) but actually write the rules. Judges time their retirement to coincide with their political party being able to appoint and confirm a replacement.¹¹² A constitutional system where Justices are appointed through a political process and strategically retire to allow a President from their preferred party to make a new appointment is no model of an apolitical judiciary. Thus, the assumption that underlies Stephen Gillers’s argument—the assumption that we must keep judges out of politics—is wrong. To the contrary, we have created and retained a political judiciary.

Second, not only is the process of appointing judges a political one, but the Justices are not apolitical when they are on the Court. Some scholars have even argued that the Supreme Court is not a court, in part because the Justices’ decisions are often not constrained by the “law.”¹¹³ As Judge Richard Posner explains, the idea that the other two branches are political but the Court is apolitical is nonsense.¹¹⁴ Proving that ideology and politics play a role in judicial decision-making is beyond the scope of this Article,

109. David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1033 (2008); see NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 1 (2005) (demonstrating the politicization of the appointment process for even lower court judges in the last few decades).

110. See Donald Trump, Acceptance Speech at the Republican National Convention (July 21, 2016) (transcript available at <http://www.politico.com/story/2016/07/full-transcript-donald-trump-nomination-acceptance-speech-at-rnc-225974>) (“The replacement for Justice Scalia will be a person of similar views and principles. This will be one of the most important issues decided by this election.”).

111. See THE FEDERALIST NO. 78 (Alexander Hamilton).

112. There is little question that Justices Stevens and Souter would not have retired under a Republican president, for example, or that Justice O’Connor would not have retired under a Democratic president.

113. See ERIC SEGALL, SUPREME MYTHS ix, 187 (2012).

114. Richard Posner, *What is Obviously Wrong With the Federal Judiciary, Yet Eminently Curable*, 19 GREEN BAG 2D 187, 200 (2016).

and it has been the subject of a long and vigorous debate in the academic literature.¹¹⁵ But in this day where everyone is a legal realist,¹¹⁶ we have generally accepted that judicial decisions are not “law all the way down.”¹¹⁷ Judges’ ideology and political beliefs play a critical role in judicial decisions.

An overwhelming amount of legal scholarship supports that partisanship is an important factor in judicial decisions.¹¹⁸ This is particularly true in constitutional litigation, where judges are even more likely to advance their own ideology because the constitutional text offers so few constraints.¹¹⁹ Almost no view of the Constitution is “off the wall” today.¹²⁰ And because the Supreme Court chooses its own docket, the Court hears many constitutional cases (and ultimately decides them along party lines). Constitutional cases do not have a clear “legal” answer.¹²¹ Either due to the vagueness of the language typically used in constitutional texts, or the antiquity of the constitutional text, constitutional cases are often “indeterminate”—in other words, they cannot be answered by mere recourse to text, history, or precedent. As a result, these decisions are especially likely to turn on the judges’ ideology, background, politics, and other factors. Even in non-constitutional cases, the Court is more likely to pick difficult cases that have divided lower courts and have no clear “right”

115. See *infra* note 118.

116. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 385 (1990) (“[W]e are all legal realists.”).

117. This phrase was famously used by Justice Kagan during her confirmation hearings. See Todd E. Pettys, *Judicial Discretion in Constitutional Cases*, 26 J.L. & POL’Y 123, 135 (2011).

118. See, e.g., RICHARD POSNER, *HOW JUDGES THINK* 369 (2008); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 430 (2002); Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1514-15 (2003) (concluding that political factors influence judicial decisions, although legal factors having the greatest impact); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 761-62 (2008) (presenting empirical evidence showing that political preferences influence judicial review of agency decisions); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1717-19 (1997) (demonstrating that ideology influences judicial decisions).

119. See, e.g., Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 324-26 (1992). See generally Jeffrey R. Lax & Charles M. Cameron, *Bargaining and Opinion Assignment on the U.S. Supreme Court*, 23 J.L. ECON. & ORG. 276, 292 (2007).

120. Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 OSGOODE HALL L.J. 353 (1986).

121. Eric Berger, *The Rhetoric of Constitutional Absolutism*, 56 WM. & MARY L. REV. 667, 672 (2015) (“The Constitution’s text is famously underdeterminate.”).

answer.¹²² It is not just American scholars who recognize that judging and politics are often bedfellows.¹²³ And a number of judges have admitted that many cases cannot be decided without at least some reference to ideology.¹²⁴

The idea that judging occupies an entirely distinct sphere than politics is belied by the nation's history. Early in this nation's history, Federalist Justices campaigned for John Adams.¹²⁵ Chief Justice Burger discussed legal matters with President Nixon,¹²⁶ as had Justice Fortas with President Johnson.¹²⁷ President Franklin Roosevelt and President Truman also had close ties to the Court.¹²⁸ In addition, many Justices had political careers before joining the bench.¹²⁹ In other words, judging and politics have long gone hand in hand.

The idea that judging would be sullied if politics entered the equation ignores the reality that judges are very high-level government officers who often make decisions based on values and political judgments. This is especially true for Supreme Court Justices whose decisions are not even reviewed by any other judges. The Supreme Court has changed course many times throughout its history, often based merely on the change in membership of the Court. And with the confirmation of now Justice Gorsuch, the law will almost certainly go in a different direction than it

122. In fact, that's one of the criteria for granting certiorari. See Ryan Stephenson, *Federal Circuit Case Selection at the Supreme Court: An Empirical Analysis*, 102 GEO. L.J. 271, 274 (2013) (discussing the criteria governing the certiorari process).

123. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 34 (2005) ("What matters for the reality of legal life is who decides.").

124. See, e.g., POSNER, *supra* note 118.

125. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. Rev. 333, 368 n.135 (1998) (citing Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 12 STUD. AM. POL. DEV. 229 (1998)).

126. See Fred Barbash, *Ehrlichman Tells of Nixon, Burger Talks*, WASH. POST (1981), www.washingtonpost.com/archive/politics/1981/12/10/ehrllichman-tells-of-nixon-burger-talks/3cb9f15f-432f-4de3-99e0-fc705ce873b8/?utm_term=.511b5fe6b870.

127. LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* 293-320, 351 (1990).

128. Andrew Kent, *Judicial Review for Enemy Fighters: The Court's Fateful Turn in Ex Parte Quirin, the Nazi Saboteur Case*, 66 VAND. L. REV. 153, 218 (2013) ("All of Roosevelt's appointees had significant ties to the President."); David Rudenstine, *The Irony of A Faustian Bargain: A Reconsideration of the Supreme Court's 1953 United States v. Reynolds Decision*, 34 CARDOZO L. REV. 1283, 1381-82 (2013) (discussing the relationship between President Truman and Justice Vinson).

129. For example, Justice Warren previously served as the Governor of California, and Justice Black served as a Senator. A. E. Dick Howard, *The Constitution and the Role of Government*, 6 CHARLESTON L. REV. 449, 460 (2012) (discussing the political experiences of a number of Justices).

would have under a Justice Garland. In other words, the politics of affirmative action, abortion, campaign finance, immigration, and many other core political topics depends on the politics of our President, the politics of the Senate, and ultimately, the politics of the Supreme Court Justices themselves.

In addition, judges are not historians, sociologists, or anthropologists. This means that their decisions are not typically constrained by science or facts. As Judge Posner explains, “[t]he perception of the Court as a political court in most constitutional cases and many nonconstitutional ones derives from the fact that the Justices form confident views without any empirical basis for them.”¹³⁰ This again goes back to how we select judges and the background of the Supreme Court Justices. “In default of empirical or otherwise objective knowledge people rely on their intuition, which is shaped by ideology [], temperament, race and sex, upbringing, and other personal characteristics.”¹³¹ These concerns are amplified because the Court decides fewer cases than it had for most of its history. As a result, the Court makes more grand announcements that are more and more legislative in nature.¹³² This means that the line between the judicial and other branches has become more blurred than ever before.

Steve Lubet, an author of the leading treatise on judicial ethics,¹³³ accepts that judges may have political views, but says that we still expect judges to put their political opinions aside when they decide cases.¹³⁴ This is likely true, although many scholars and judges agree that many of the decisions at the Supreme Court are influenced by the Justices’ politics.¹³⁵ But even putting that aside, nothing that Justice Ginsburg said indicates that she would not decide cases, even those involving Donald Trump, fairly. After all, other Justices have been able to set aside their feelings about the individual holding office to decide cases fairly and impartially. Lubet, in fact, offers his own examples of Justices doing so, including Justice Roberts’s vote to uphold the constitutionality of the Affordable Care Act.¹³⁶ If we believe Justices can put aside their political views, the mere fact that

130. RICHARD POSNER, REFLECTIONS ON JUDGING 83 (2013).

131. *Id.*

132. POSNER, *supra* note 118, at 270-71.

133. See generally CHARLES GERDNER GEYH, JAMES J. ALFINI, STEVEN LUBET, & JEFFREY SHAMAN, JUDICIAL CONDUCT AND ETHICS (5th ed. 2013).

134. See Steve Lubet, *Tushnet -- and Feldman -- on Ginsburg*, FACULTY LOUNGE (July 13, 2016), www.thefacultylounge.org/2016/07/tushnet-on-ginsburg.html.

135. See Stras, *supra* note 109, at 1033.

136. See Lubet, *supra* note 134. (“If you don’t believe that judges can put politics aside, at least now and then, how do you explain Justice Roberts’s vote in the ACA cases?”).

those views have been spoken does not mean that they cannot be cabined just as they would otherwise have been.¹³⁷

B. *Appearance of Politics*

For the same reason that judges must appear to be impartial, judges must also appear to behave properly.¹³⁸ Appearances are at the heart of the judicial codes of conduct because of the rules' concern about the public's faith and confidence in the judiciary. "The public will not support institutions in which they have no confidence. The need for public support and confidence is all the more critical for the judicial branch, which by virtue of its independence is less directly accountable to the electorate and, thus, perhaps more vulnerable to public suspicion."¹³⁹ So did Justice Ginsburg's statements harm that perception of the judiciary? Did her statements create an appearance of impropriety?

The strongest version of this argument was made by Rick Hasen and Dahlia Lithwick. Hasen and Lithwick acknowledge that "judges have political opinions," but claim that "it is better for their own legitimacy and the integrity of our elections to keep the judicial and political roles separate."¹⁴⁰ And in fact, when candidates for judicial office have challenged the ban on judges endorsing or opposing other candidates for office, lower courts have upheld such bans.¹⁴¹ Their chief concern, then, is not that such political speech turns judges into politicians, but rather about the legitimacy of the judiciary when judges engage in such political activity.¹⁴² While the concerns about appearances are an important consideration, there are a few reasons to believe that those concerns are overblown when it comes to Justice Ginsburg's comments.

137. Lubet argues that "[w]hen a [J]ustice begins campaigning for or against a candidate . . . it means that she has stopped trying [to put politics aside.]" *Id.* But it is unclear why this is necessarily the case. Perhaps the fact that Justice Ginsburg chose to express her views shows how strongly she believes in them, but I do not read Ginsburg's comments to suggest that she would not set those views aside to decide cases on their merits.

138. Alfred P. Carlton, Jr., *Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary*, AM. BAR. ASS'N 10 (July 2003), <http://www.americanbar.org/content/dam/aba/migrated/judind/jeopardy/pdf/report.authcheckdam.pdf>.

139. *Id.*

140. Hasen & Lithwick, *supra* note 41.

141. See *Wolfson v. Concannon*, 811 F. 3d 1176 (9th Cir. 2016).

142. Hasen & Lithwick, *supra* note 41 (arguing that the ban is necessary to "preserve the impression that judges can rise above politics for a larger interest: the interest in a neutral, independent judicial branch") (emphasis added).

First, as mentioned above, Justice Ginsberg did nothing more than tell us what she was thinking, and perhaps nothing more than what we already knew. There is an important difference between merely expressing your own political views and engaging in partisan activity. For example, a number of Justices have been criticized for attending partisan or semi-partisan events like meetings of the Federalist Society or the American Constitution Society or partisan fundraisers.¹⁴³ There, the concern is that the Justices are becoming exposed to a one-sided view, or further cementing their connection to a particular partisan belief. Judges should not be engaged in partisan or political groups because that involvement can actually change their world-view and approach in cases. But mere expression has much less risk.¹⁴⁴ Is there a compelling need to preserve the appearance of nonpartisanship and the “legitimacy of the Court” when judges have strong partisan views? Arguably, the answer is no. If judges are silent because they have no strongly held political views, or because their strongly held views do not influence their decisions, then such imposed silence is important. But appearances are only important insofar as they further reality and should not be used to deceive the public. And as we discussed earlier, judges do have strongly held views and those views indeed play a role in judicial decision-making.

Take, for example, the use of appearances in Part III to preserve the appearance of impartiality. There, appearances are important to ensure the judges are not only actually unbiased but do not appear to be biased. But appearances are not used to conceal actual bias by judges; biased judges are also required to recuse, and I am not aware of any scholar arguing that the appearance of impartiality is important so that litigants are not aware that judges are actually not impartial. Similarly, in the election context, the Court has suggested that government can regulate campaign finance to eliminate the appearance of corruption.¹⁴⁵ The reason is that the appearance of corruption can lead to a general distrust in the political process and our elected officials. But the Court has never suggested that appearance of purity is important to conceal the reality of actual corruption.

Most constitutional scholars have accepted that Supreme Court Justices are influenced by their politics, upbringing, experiences, family, and many

143. See *Justices Thomas and Scalia Violate Judicial Ethics by Headlining Right Wing Fundraisers*, POLITICUS USA (Nov. 16, 2013), www.politicususa.com/2013/11/16/justices-thomas-scalia-violate-judicial-ethics-headlining-wing-fundraisers.html.

144. The risk is still present. See *supra* Part III.B.

145. See *Buckley v. Valeo*, 424 U.S. 1 (1976).

other factors.¹⁴⁶ Yet they continue to insist that judges cannot tell the people what's on their minds.¹⁴⁷ This use of appearances seems particularly problematic, especially because the judiciary is, in a sense, representative of the people.¹⁴⁸ We have generally rejected the notion that public opinion of a government institution must be preserved at all costs, even by concealing reality from the people.¹⁴⁹

Admittedly, without comments like those made by Justice Ginsburg, the only people who will be aware that judges have strong political inclinations are those that closely follow the work of the court, or those who read the academic literature on judicial decision-making. To that extent, the ethical restrictions on judicial speech may, in fact, further the goal of maintaining the impression for a majority of the population that judges have no strong political leanings. But there is no compelling interest in preserving the appearance of an apolitical judiciary if that does not reflect reality. Justice Ginsburg's comments can educate a generally uninformed electorate that judges are human beings and have strong political leanings.

The best way to demonstrate that those political beliefs are not the sole motivating factor for judicial decisions is not to hide the beliefs, but to show the public that judges frequently decide cases contrary to their own beliefs. Understanding that judges have strongly, passionately-held political views may even affirm the public's understanding that the judiciary is, in some ways, different from the other branches. Judges do not just decide cases solely according to their politics. Sure, their politics are relevant, but not to all cases. There are many other factors that often enter their analysis. Thus, while a politician may generally vote according to his political beliefs, a judge will often vote against his political beliefs.¹⁵⁰ Knowing that a judge is

146. See Stras, *supra* note 109, at 1078.

147. See *supra* Part II.

148. See THE FEDERALIST NO. 78 (Alexander Hamilton).

149. That notion was not always and universally rejected. For example, England's seditious libel laws punished even true libelous speech that damaged the reputation of the government. See 5 GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 3-5 (2d ed. 2003) ("If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it.").

150. John C. Yoo, *In Defense of A Political Court*, 98 MICH. L. REV. 1436, 1467 (2000) (reviewing TERRI J. PERETTI, IN DEFENSE OF A POLITICAL COURT (2000)) ("Some cases where Justices probably voted against their preferences on the merits of the public policy issues at stake include Justice Scalia in *Texas v. Johnson*, 491 U.S. 397 (1989) (concerning flag burning), Chief Justice Rehnquist in *Morrison v. Olson*, 487 U.S. 654 (1988) (concerning the authority of independent counsel), and Justices Kennedy and O'Connor in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (concerning abortion).").

doing so helps reaffirm the view that judges are not entirely driven by their partisanship.

Second, while the public is generally ignorant about judges,¹⁵¹ they are not so ignorant as to entirely accept the notion that judges are apolitical, nonpartisan creatures. For example, judges in most states are elected officials and run in increasingly competitive judicial election campaigns.¹⁵² They have seen political decisions from *Bush v. Gore*,¹⁵³ to *Roe v. Wade*,¹⁵⁴ to *Citizens United v. FEC*.¹⁵⁵ In fact, most high-profile issues today are decided along party lines. In addition, the public sees the politicized nomination process. They see that judges leave the bench for Presidents they like and stay on the Court for Presidents they disagree with. These battles for Court seats also show that political involvement is not inconsistent with the traditional judicial role. Admittedly, the founders adopted life tenure in large part to insulate judges from politics and ensure judicial independence. But Justice Ginsburg's statements do not make her less independent. And we now know that no selection mechanism—or at least no mechanism used in the United States—can completely insulate judges from politics.

Third, in recent years, Supreme Court Justices have become more outspoken about political issues. Many have expressed their political views in their opinions.¹⁵⁶ Justices are often invited to speak at events sponsored by quasi-partisan organizations like the Federalist Society and the American Constitution Society.¹⁵⁷ Justice Ginsburg's comments are perhaps different in degree, but not necessarily in kind from what Justices have done in recent years.

151. See, e.g., ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE* (2016).

152. See generally JED SHUGERMAN, *THE PEOPLE'S COURTS* (2012) (discussing the prevalence of judicial elections throughout the United States).

153. See generally David Margolick, *The Path to Florida*, *VANITY FAIR* (Mar. 19, 2014), <http://www.vanityfair.com/news/2004/10/florida-election-2000>.

154. See *Roe v. Wade*, 410 U.S. 113 (1973).

155. See *Citizens United v. FEC*, 558 U.S. 310 (2010).

156. See, e.g., E.J. Dionne, Jr., *Scalia Must Resign*, *WASH. POST* (June 27, 2012), www.washingtonpost.com/opinions/ej-dionne-jr-justice-scalia-should-resign/2012/06/27/gJQApkO06V_story.html.

157. Richard L. Hasen, *Celebrity Justice Supreme Court Edition*, 19 *GREEN BAG* 2d 157 (2016) ("Supreme Court Justices are in the news more than ever, whether they are selling books, testifying before Congress, addressing a Federalist Society or American Constitution Society event, or just talking to a Muppet on Sesame Street.").

Fourth, perhaps the concern about appearance itself is overvalued. There is also little threat that the courts will collapse.¹⁵⁸ Legitimacy of the Court does not depend on appearance that it is completely apolitical.¹⁵⁹ The Court has a reservoir of good will, and its legitimacy is judged by its decisions and processes.¹⁶⁰ “The Court’s overall support thus remains high, not because the public exempts the Court’s decisions from its political value judgments, but rather because the Court issues decisions that satisfy the political preferences of enough different groups at different times.”¹⁶¹ To the extent that the Court’s reputation may be damaged by the public’s greater knowledge that judges have political viewpoints and that those viewpoints may influence decisions, (a) that is not necessarily a bad thing, and (b) it may also be helped by this knowledge.¹⁶² Nonetheless, a rich literature, in law and political science, has shown that the support for the judiciary is strong despite the fact that many people perceive Justices as being strongly motivated by politics.¹⁶³

V. CONCLUSION

I want to conclude by looking at the implications of my argument. If judicial speech by Supreme Court Justices is not as problematic as the reaction to Justice Ginsburg’s comments suggests, perhaps it is time we reconsider our ethical rules and norms, if not for all judges, but for Supreme Court Justices. The idea that ethics rules should be tailored to the Court has received little attention, but the Supreme Court is a much different institution than that of a federal district court, so perhaps speech rules for

158. Michael Dimino, *Public Confidence and Judicial Campaigns*, 56 WAYNE L. REV. 705, 713-14 (2010).

159. James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 L. & SOC’Y REV. 469, 471 (1989); Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 L. & SOC’Y REV. 621, 621-22 (1991).

160. See generally Lori A. Ringhand & Paul M. Collins, Jr., *Functioning Just Fine: The Unappreciated Value of the Supreme Court Confirmation Process*, 61 DRAKE L. REV. 1025 (2013).

161. *Id.* at 1045.

162. Or Bassok, *The Supreme Court’s New Source of Legitimacy*, 16 U. PA. J. CONST. L. 153 (2013).

163. But see James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 L. & SOC’Y REV. 195, 213 (2011); Adam Liptak & Allison Kopicki, *Approval Rating for Justices Hits Just 44% in New Poll*, N.Y. TIMES (June 7, 2012), <http://www.nytimes.com/2012/06/08/us/politics/44-percent-of-americans-approve-of-supreme-court-in-new-poll.html?pagewanted=all>.

Supreme Court Justices should be different as well. And if partisan speech by Supreme Court Justices indeed causes little harm and has some potential benefits, perhaps the ethics rules should encourage judges to speak their mind.