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# Partisan Judicial Speech and Recusal Procedure

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## Partisan judicial speech and recusal procedure

Dmitry Bam\*

Associate Professor Appleby has written a thoughtful comment criticizing the Supreme Court's self-recusal procedure.<sup>1</sup> She and I are in complete agreement that permitting a potentially biased judge to assess her own bias is indefensible. In fact, I have previously gone so far as to argue that the self-recusal procedure is unconstitutional, violating the common-law tenet that no person should be a judge in his own case.<sup>2</sup>

But even though I agree wholeheartedly with the substance of Associate Professor Appleby's claim, I find the context somewhat puzzling. Ginsburg's comments raise a host of interesting and challenging ethical questions. To take just a few: Are such blatantly political and partisan comments by Supreme Court Justices appropriate? What are the harms (and benefits) when Supreme Court justices 'speak their mind' about their political views? Should the Code of Judicial Conduct's ban on 'publicly endors[ing] or oppos[ing] a candidate for public office' or 'engag[ing] in any other political activity,'<sup>3</sup> apply to Supreme Court justices? And is that Canon of the Code normatively justified?

Associate Professor Appleby focuses on the implications of Ginsburg's comments for the recusal process at the Supreme Court. But even when it comes to recusal, I draw an entirely different lesson from the Ginsburg versus Trump kerfuffle. For me, the incident serves as a reminder that recusal cannot, and will not, be an adequate remedy for many kinds of judicial bias, no matter what procedure we use.<sup>4</sup>

To understand why, I want to start with Ginsburg's apology. After receiving a barrage of criticism, from the left and the right, for what she said, Justice Ginsburg acknowledged that she regretted making her comments. Next time, she told us, she would 'be more circumspect' and 'avoid commenting on a candidate for public office.'<sup>5</sup> But notice what she did not say: there is no suggestion that her comments do not reflect her actual opinion of Donald Trump, or that the statement did not accurately describe her hopes for the outcome of the presidential election, or that in the future she would try to remain more open-minded and altogether avoid developing an opinion about the presidential candidates. In other words, while Ginsburg regrets telling us what she thinks – and in the future, none of us will know for certain what she thinks – she will continue thinking it nonetheless.

None of this should come as a big surprise. Supreme Court justices are not only human beings, but are also political beings. They are selected to the Court based on their lifetime of achievement and having strongly held (and reliable) views about the law. They are confirmed

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<sup>1</sup>Gabrielle Appleby and Stephen McDonald, 'Pride and Prejudice: A Case for Reform of Judicial Recusal Procedure' (2017) *Legal Ethics* <<http://dx.doi.org/10.1080/1460728x.2017.1261521>> accessed 23 May 2017.

<sup>2</sup> See Dmitry Bam, 'Our Unconstitutional Recusal Procedure' (2015) 84 *Mississippi Law Journal* 1135.

<sup>3</sup> Code of Conduct for United States Judges.

<sup>4</sup> That is not to say that recusal is always inadequate.

<sup>5</sup> Michael D Shear, 'Ruth Bader Ginsburg expresses regret for criticizing Donald Trump' *N.Y. Times* (14 July 2016) <[http://www.nytimes.com/2016/07/15/us/politics/ruth-bader-ginsburg-donald-trump.html?\\_r=0](http://www.nytimes.com/2016/07/15/us/politics/ruth-bader-ginsburg-donald-trump.html?_r=0)> accessed 18 May 2017.

and nominated through a highly partisan appointment process.<sup>6</sup> They decide difficult legal questions often tinged with political overtones, and their decisions often align closely with their political ideologies. This is particularly true when judges interpret the Constitution. Nobody is shocked when the most closely watched and controversial cases at the Court – cases involving the government’s power under Article I, abortion, affirmative action, same-sex marriage, and many others – are decided along the Court’s ideological divide. Supreme Court justices have always been involved in politics. Some, like Earl Warren and Sandra Day O’Connor, had been politicians themselves before joining the bench. Others, like Abe Fortas, served as unofficial advisors to the president, even during their time on the bench. Numerous studies have shown that judicial decisions, especially decisions in constitutional cases, are heavily influenced by the justices’ ideologies.<sup>7</sup> And despite the efforts of some judges to insist that they are no more than umpires, a number of judges have admitted that law and politics are often intertwined in judicial decision-making.<sup>8</sup> Some scholars have even gone so far as to argue that the Supreme Court is not a court.<sup>9</sup>

Given the nature of what Supreme Court justices do, attempts to separate law from politics at the Supreme Court are futile. And that is precisely why recusal – whether self-recusal or disqualification by the full court – plays virtually no role when it comes to the judges’ political or partisan biases. After all, recusal for bias is required regardless of whether a justice speaks out about her biases. For example, if Justice Ginsburg’s comments show that she is biased against Donald Trump, her recusal in the election-related cases Associate Professor Appleby discusses would be mandated if she merely held those biases privately, without letting the world know.<sup>10</sup> No party needs to seek her recusal; the rules require a biased judge to step aside *sua sponte*.<sup>11</sup> But for such a political court, recusal on the basis of political bias seems largely unworkable.

Imagine Justice Ginsburg could go back in time to 10 July, before she made all her comments about Trump. This time, she follows the advice of her future self. She is still convinced that Trump has ‘no consistency about him,’ is a ‘faker’ who ‘says whatever comes into his head at the moment,’ and the mere thought of Trump’s presidency makes Justice Ginsburg contemplate a move to New Zealand. But now, Justice Ginsburg stays silent. As an election-related dispute – even a momentous *Bush v. Gore* type case – reaches the Supreme Court, would there even be a call for her recusal? Of course not. Even though we all know which presidential candidate she privately supports and we can all guess what she thinks about Trump (just as we could all guess what Justice Scalia thought about Barack Obama), recusal is not an option. Why? Because every

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<sup>6</sup> The appointment process is the same for Supreme Court justices as it is for any other political officer.

<sup>7</sup> See, for example, Jeffrey A Segal and Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge 2002).

<sup>8</sup> Richard Posner, *Reflections on Judging* 83 (‘The 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’). Of course, not only do some judges continue to insist that they play no law-making or policy-making role, but many politicians insist that that is a mark of a good judge.

<sup>9</sup> See Eric Segall, *Supreme Myths: Why the Supreme Court Is Not a Court and Its Justices Are Not Judges* (Praeger 2012).

<sup>10</sup> In this essay, I take no position whether recusal is indeed required.

<sup>11</sup> I do not take Associate Professor Appleby’s position to be that the mere act of expressing her views made her biased. Such an argument is not frivolous. Merely expressing one’s view has the potential of strengthening or reinforcing those views. However, for a Supreme Court justice whose views on many controversial issues are well known and well established, it is unlikely that the fact that she expressed her views publicly strengthened her convictions about Donald Trump’s candidacy. At most, perhaps recusal would be required because Ginsburg’s comments create the appearance of bias. That may be, and I agree that another justice (or the full court) is in better position to evaluate whether Ginsburg’s comments create such an appearance.

judge has political biases. And recusal procedure is altogether irrelevant. In fact, if a litigant sought Ginsburg's recusal because she clearly must support Clinton, there is a good chance that litigant would have been sanctioned for the frivolous motion.

Associate Professor Appleby concludes her comment by asking whether a Supreme Court justice alone should determine whether her recusal is required. I have no qualms with her answer – 'no' – but I wonder if that is the right question to be asking.<sup>12</sup> The question I would ask is: Are we better off if Justice Ginsburg stays quiet, as she promises to do going forward, or if she speaks out and tells Americans what she is thinking. Not only is that an important (and I think difficult) question, but answering that question may also help us understand how to approach recusal in this situation. For example, if Justice Ginsburg's comments cause little harm or have significant benefits, then perhaps recusal rules should be designed to encourage such judicial speech. And if Ginsburg's comments indeed exposed a bias that we are unwilling to tolerate from our judges, we should acknowledge that recusal is an inadequate remedy to address that bias and consider other reforms that can ensure impartiality and neutrality at the Supreme Court.

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<sup>12</sup> Having said that, I worry that Associate Professor Appleby dismisses too quickly the concern about gamesmanship in recusal but other justices. Imagine a Bush v Gore type challenge arising preceding the 2016 election. If the Court looks like it will deadlock, the four conservative justices (or the four liberal justices) can gang up on a justice with a different ideology to get him or her off the case. For that reason, it may make sense to have the recusal motion decided by another, impartial observer.