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Justices Have Free Speech Rights Too



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Surely no one was surprised by any of the views expressed by Justice Ruth Bader Ginsburg in an interview with The New York Times reporter Adam Liptak, though it is surprising for a Supreme Court justice to be so candid. This, however, is part of a trend in the past several years where many of the justices have spoken publicly and I think this is a very good development. More speech, especially by thoughtful people, is almost always desirable in a democratic society.

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There was nothing surprising in Justice Ginsburg expressing pleasure at the abortion and affirmative action decisions from the last few weeks; she was in the majority in both cases. Nor was anyone shocked to learn that she thought that the court was wrong in *Citizens United v. Federal Election Commission*, in holding that corporations could spend unlimited money in election campaigns, or in *District of Columbia v. Heller*, in striking down a city's ban on

handguns. She dissented in both cases. Quite important, she did not comment on any case now pending before the court or say anything that could not already be inferred from her past votes.

Nor was it surprising that she praised President Obama's nominee for the Supreme Court, Judge Merrick Garland, and expressed her view that the court's work is hindered by the Senate's failure to consider him. I wish that more of the justices would explain that the Senate's refusal to consider this nomination, as well as nominations for lower federal court judgeships, is seriously interfering with the functioning of the courts.

Perhaps most surprising was her sharp criticism of Donald Trump and her worrying about what the country would be like with him as president. But she simply voiced what countless people, liberal and conservative, think about the possibility of a Trump presidency and no one should be surprised that Ginsburg thinks this too. The judicial code of ethics says that judges are not to endorse or oppose candidates for elected office. But these provisions do not apply to Supreme Court justices.

Nor do I believe that such restrictions are constitutional or desirable. The First Amendment is based on the strong presumption that more speech is beneficial because it means we are all better informed. I think it is valuable for people to hear what the justices have to say on important issues. As a lawyer and as a citizen, I'd always rather know what justices and judges think rather than have enforced silence and pretend they have no views. We are in a relatively new era of public statements by justices, and I applaud it.