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OPINION | COMMENTARY

The Case for Ginsburg to Recuse Herself

Unlike Sotomayor, she has shown bias against Trump by publicly characterizing him as unfit for office.

By Michael J. Broyde

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Supreme Court Associate Justice Ruth Bader Ginsburg speaks in Washington, Feb. 10.

PHOTO: PATRICK SEMANSKY/ASSOCIATED PRESS

President Trump recently lashed out at Justices Sonia Sotomayor and Ruth Bader Ginsburg. “Both should recuse themselves on all Trump, or Trump related, matters!” he tweeted. He’s wrong about Justice Sotomayor but has a point about Justice Ginsburg.

In a lone opinion dissenting from the court’s order in *Wolf v. Cook County*, Justice Sotomayor said she wouldn’t stay a lower court’s injunction against a Trump immigration policy. “Claiming one emergency after another,” she wrote, “the Government has recently sought stays in an unprecedented number of cases, demanding immediate attention and consuming limited Court resources in each.” (Three other justices dissented without issuing opinions.)

Justice Sotomayor’s opinion doesn’t disparage Mr. Trump. She criticizes the government’s position, but she’s harsher on her colleagues in the majority, writing that their “recent behavior on stay applications has benefited one litigant over all others.” Mr. Trump is the one personalizing a legal dispute, and it would pervert justice if litigants could force judges to remove themselves from cases simply by denouncing them publicly.

Justice Ginsburg is a different case. In public interviews in 2016 she called Candidate Trump a “faker” and said: “I can’t imagine what this place would be—I can’t imagine what the country would be—with Donald Trump as our president.” She even mused about fleeing the country: “Now it’s time for us to move to New Zealand.” She apologized—kind of: “Judges should avoid commenting on a candidate for public office.” She admitted her remarks were “ill advised,” and that “in the future I will be more circumspect.”

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The controversy died down, in part because hardly anyone expected Mr. Trump to become president. Now that he’s raised the matter again, is he right? The answer seems to be yes. Litigants—including Mr. Trump—have a right to appear before judges who have not prejudged the case or the person.

In *Cheney v. U.S. District Court* (2004), Justice Antonin Scalia rejected a petition to recuse himself from a case involving the vice president, with whom he had gone on a hunting trip. “While friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally *not* been a ground for recusal where *official action* is at issue,” Scalia wrote.

But Justice Ginsburg’s antagonism toward Mr. Trump wasn’t personal. In effect she campaigned against him on the grounds that he was unfit for office. The Code of Conduct for Federal Judges directs that no judge should “publicly endorse or oppose a candidate for public office.”

The code doesn’t apply to Supreme Court justices, but they are expected to police their own ethics. In this untraditional era, Mr. Trump has ignored decades of ethical norms. But is it a good idea for Justice Ginsburg to follow his lead?

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