



Justice Alito and Supreme Court Ethics

Alito's biting, political speech highlights the need for reform.

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On November 12, Justice Samuel Alito gave a controversial **speech** to the Federalist Society, an influential conservative legal group with close ties to the judiciary.

Bemoaning what he characterized as growing threats to free speech and religious liberty, Alito took aim at the Supreme Court's historic decision that same-sex couples have a right to marry, along with recent cases on abortion rights and restrictions imposed to prevent the spread of Covid-19.

It was an unusually political speech for a justice at a time of growing scrutiny about the Supreme Court's public legitimacy. His remarks didn't do the Court any favors in that regard — and it's time to hold the Court to a higher standard.

Alito began his speech by arguing that the Covid-19 pandemic “has resulted in previously unimaginable restrictions on individual liberty,” though he added that he was “not diminishing the severity of the virus's threat to public health.” Among other things, Alito criticized the Supreme Court's July **decision** to reject a Nevada church's challenge to state-imposed social distancing restrictions, arguing that Nevada “blatantly discriminated” against houses of worship because its restrictions on casinos were less strict.

The justice also pointed to constitutional strides for gay rights and abortion access as some of the greatest threats to the First Amendment. He argued that “now it is considered bigotry [to] say that marriage is the union between one man and one woman,” adding that Americans who don't believe in gay marriage are facing unjust restrictions on their free speech. And he criticized a state rule requiring a pharmacy to provide morning-after pills when the owners of the store had a religious objection to abortion.

It was an unusual speech in tone and content, and it drew widespread criticism from **legal scholars, advocacy groups, senators**, and others, who suggested that Alito exercised poor judgment and may have crossed ethical lines. Erwin Chemerinsky, the dean of Berkeley Law, **said** that he could not “think of any speech like this one that discussed so many issues and in a clearly ideological, partisan way.” Georgia State University law professor Eric Segall observed that “we're living in a very partisan moment” and that judges should recognize “this is not the time to stir this pot.” Constitutional law professor Daniel Epps **said** that Alito's speech

made a strong argument for court reform, because it demonstrated that there is “no good justification for a system that gives an angry partisan like this a veto on legislation.”

On the other hand, some legal commentators did not take issue with Alito’s comments. Ilya Shapiro of the Cato Institute, a libertarian think tank, **said** that he didn’t find Alito’s comments inappropriate because he doesn’t think that “we should keep judges out of the public sphere,” especially because the justice didn’t express views in his speech that were not covered in previous writings.

Alito is not the only Supreme Court justice to draw scrutiny for partisan-sounding statements. In 2016, the late Justice Ruth Bader Ginsburg **called** then-presidential candidate Donald Trump a “faker” and said she “can’t imagine what the country would be” with Trump as president. Her statements were denounced by **several legal scholars** as well as the editorial board of the *Washington Post* for being overtly political. Ginsburg later **apologized** for her remarks, calling the comments “ill-advised.”

Alito’s remarks occurred against the backdrop of new scrutiny about the politicization of the Supreme Court following the **unprecedented confirmation** of Amy Coney Barrett just days before the 2020 election. Progressive groups, members of Congress, and some legal experts have been discussing options for reform, including imposing **term limits** for the justices, **jurisdiction stripping**, and most notably, **expanding the size** of the Court.

These suggestions have clearly struck a chord with Alito. In his speech, he described a 2019 **friend-of-the-court brief** from five Democratic senators that called for a potential restructuring of the Court “an affront to the Constitution and the rule of law.”

However, the justice’s own speech underscores how few steps the Supreme Court itself has taken to shore up public confidence in its integrity as an institution. Alito weighed in on politically charged controversies — including ones that may appear before him in the future. Yet strikingly, Alito and his fellow justices are the only judges in the entire country who **do not have to adhere to a code of ethics** — something the Court could choose to adopt at any time.

The Supreme Court’s silence on this — and Justice Alito’s willingness to give a caustic and politically charged speech in the current moment — both speak volumes.