

## Politics and Judicial Ethics: A Historical Perspective

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October 24, 2021

**ABSTRACT.** This Essay explores the ethics and politics of extrajudicial activities from a distinctly historical perspective. While others have written about judges and their political and extrajudicial endeavors, this Essay situates its discussion within the evolution of judicial ethics codes, beginning in antiquity and proceeding to the present.

### INTRODUCTION

The notion of a Supreme Court Justice running for President seems almost unthinkable today. Nothing could be more political than throwing one's hat in the ring for federal public office. Yet in the late 1940s, Justice Douglas did just that. While our current Justices certainly do not run for President, can it be said that the Court has become any less political? Justice Breyer argues that "it is wrong to think of the Court as a political institution. And it is doubly wrong to think of its members as junior varsity politicians."<sup>1</sup> But others disagree, arguing that the Court is, or at least has been, quite political. For example, the author of a recent opinion piece in the Washington Post opined that "[t]he Supreme Court used to be openly political [but] traded partisanship for power."<sup>2</sup> For its part, the Cato Institute sees no historical change: "Just Accept It: The Supreme Court Has Always Been Political."<sup>3</sup> Of course, it all depends on what "political" means.

This Essay explores the ethics and politics of extrajudicial activities from a distinctly historical perspective.<sup>4</sup> While others have written about judges and their political and extrajudicial endeavors,<sup>5</sup> this Essay endeavors to situate its discussion within the evolution of judicial ethics codes, as illustrated through historical examples. Part I traces the development of the ethics codes from the Romans to the current code for federal judges. Part II considers how Justices in the twentieth century both prompted and responded to the ethics codes, with a mix of faithful rhetoric and ethically adventurous conduct. Finally, Part III surveys the contemporary landscape,

observing that while judges and Justices no longer run for President, their activities now present more subtle but no less challenging ethical dilemmas.

## I. THE DEVELOPMENT OF JUDICIAL ETHICS CODES

Formal judicial ethics codes are a decidedly twentieth-century innovation.<sup>6</sup> But the concept of impartiality, which forms the centerpiece of judicial ethics, derives from ancient law.<sup>7</sup> As far back as the Roman Code of Justinian, parties could seek recusal of any judge considered to be “under suspicion.”<sup>8</sup> The same principle of impartiality appeared in the Statute of Edward III in 1346: “We have commanded all our justices, [t]hat they shall from henceforth do equal law and execution of right to all our subjects, rich and poor . . . .”<sup>9</sup> It is no surprise that impartiality was and is deemed important, given that it both affects the fundamental rights of the litigants and legitimizes the judiciary in the eyes of the public.

In the United States, the Judiciary Act of 1789 set out the judicial oath for Justices and judges, requiring a pledge to “do equal right to the poor and to the rich” and “faithfully and impartially” discharge the duties of the office.<sup>10</sup> Just three years later, Congress enacted the first federal disqualification statute, requiring recusal in cases where a judge has an interest in a proceeding or has previously served as counsel for a party.<sup>11</sup> Today, all federal judges, including Justices, are also bound by their oath of office and by 28 U.S.C. § 455, which provides that “[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”<sup>12</sup>

With the statutory requirement of impartiality as a starting point, United States judicial ethics codes have evolved to provide more specific guidance. Interestingly, the adoption of America’s first formal code has become the stuff of legal lore, involving the great national pastime of baseball. Eight Chicago White Sox players were accused of game fixing in the 1919 World Series against the Cincinnati Reds.<sup>13</sup> Facing allegations that a gambling syndicate supplied the money, Major League Baseball wanted to protect its integrity. To that end, it appointed the improbably named federal judge Kenesaw Mountain Landis as its Commissioner.<sup>14</sup> The question immediately arose as to whether Landis could serve both as Commissioner of Baseball and as a federal judge. No ethics code provided an answer, but public outcry forced Landis to make a decision. He chose the Commissioner position, which also netted him a substantial salary increase.<sup>15</sup> Although the accused players were acquitted of criminal charges at trial in what became known as the Black Sox Scandal, Landis permanently suspended them from professional baseball.<sup>16</sup>

In response to the conundrum posed by Landis’s appointment, the American Bar Association (ABA) formed the Committee on Judicial Ethics, headed by then-Chief Justice Taft.<sup>17</sup> Taft was

the embodiment of the crossover between the political and judicial worlds—he served as President of the United States from 1909 to 1913 and as Chief Justice of the United States from 1921 to 1930. Politics was in his bones and surely his experience in the executive branch and as an active participant in party politics informed the role he played on the Court. Indeed, while on the Court, Taft never quite left the world of politics. He remained involved in the Republican Party, working behind the scenes at conventions and advising presidents on topics ranging from clemency to labor unrest to foreign debt.<sup>18</sup>

With Chief Justice Taft at its helm, the Committee crafted the advisory ABA Canons of Judicial Ethics in 1924. The thirty-four canons “were broad and wide ranging and included a principle that remains in the code today: a judge should avoid both impropriety and the appearance of impropriety.”<sup>19</sup> In other words, a judge should eschew situations where impartiality is perceived to be in doubt, even where no direct conflict exists in reality. Although the “appearance” standard has been criticized as too vague,<sup>20</sup> its defenders argue that it fosters public confidence in the judiciary and augments judicial independence.<sup>21</sup>

Three provisions in the Canons that reference political activity are of particular interest to tracing modern ethics norms related to extrajudicial activity: Canons 28, 30, and 33. Canon 28 broadly counseled judges to avoid political contributions, speeches, or public endorsements for partisan office.<sup>22</sup> But it also preserved the judge’s right “to entertain his personal views or political questions” and noted that he was “not required to surrender his rights or opinions as a citizen.”<sup>23</sup>

This formulation of the judge as a “citizen” came shortly before the Supreme Court heard the 1939 case *O’Malley v. Woodrough*, which considered whether the Internal Revenue Service’s tax assessment on a federal judge’s salary was contrary to the constitutional provision guaranteeing that the compensation of federal judges “shall not be diminished during their Continuance in Office.”<sup>24</sup> In rejecting the judge’s claim, Justice Frankfurter wrote that “[t]o subject them to a general tax is merely to recognize that judges are also citizens.”<sup>25</sup> Justice Douglas later seized on this language as justification for his broad-ranging extrajudicial engagements: “I decided that, if you’re going to pay taxes like everybody else, that you should be a citizen like everybody else, except and unless the thing that you’re doing interferes with the work of the court.”<sup>26</sup>

Canon 30, meanwhile, acknowledged that a judge may be a candidate for a judicial position, but that a judge should decline nomination to other offices that could create “a suspicion or criticism that the proper performance of his judicial duties is prejudiced or prevented thereby.”<sup>27</sup> Despite this purported restriction, the Canon left leeway for political candidacy, so long as the judge did not “[use] the power or prestige of his judicial position to promote his candidacy or the success of his party.”<sup>28</sup>

Apart from political activities, the Canons endeavored to regulate all manner of extrajudicial activities, such as business promotions, solicitations for charity, and use of the office to advance “personal ambitions” or increase “popularity.”<sup>29</sup> But in a world of ambiguous social relations, it was Canon 33 that gave judges the widest discretion to fashion the contours of ethical behavior: “It is not necessary to the proper performance of judicial duty that a judge should live in retirement or seclusion; it is desirable that

. . . he continue to mingle in social intercourse, and that he should not discontinue his interest in or appearance at meetings of members of the Bar.”<sup>30</sup>

In truth, the Justices hardly hewed uniformly to Canons 28, 30, and 33.<sup>31</sup> Even so, Supreme Court scholar David J. Danelski suggests that the Justices “collectively agreed on standards of propriety that were more specific than the 1924 canons.”<sup>32</sup> According to Danelski, the Justices agreed to the following major prescriptions:

- No justice should be involved in any activity that even hints of corruption.
- No justice should participate in an electoral campaign.
- No justice should give advice to another branch of government in any matter that is likely to come before the Supreme Court.
- No justice should speak publicly on any matter that is likely to come before the Supreme Court.
- No justice should give advice on executive appointments unless requested to do so.<sup>33</sup>

But, “[c]onsidering that the justices’ conduct varied widely, it is hard to say they adhered to the collective principles that Danelski intimates, especially the constraint on electoral politics.”<sup>34</sup>

Over time, the Canons were adopted by various states, but it was not until much later that they were adopted by the federal judiciary.<sup>35</sup> Then, as with the development of the original Canons, a high-profile squabble provoked scrutiny of judicial ethics. In 1968, President Lyndon B. Johnson selected Justice Fortas to serve as Chief Justice of the United States.<sup>36</sup> Controversy surrounded the nomination, including claims about Fortas’s consultation with President Johnson on political matters and his receipt of fifteen-thousand dollars (about forty percent of a Justice’s salary at that time<sup>37</sup>) for speaking engagements.<sup>38</sup> Though President Johnson withdrew the nomination and Fortas remained on the Court, albeit not as Chief, a scandal the following year related to outside income from a foundation eventually forced his resignation.<sup>39</sup> Notably, in a similar vein, Justice Douglas’s receipt of payments from a foundation was one of the grounds for his attempted impeachment.<sup>40</sup>

The Fortas affair led Chief Justice Warren to “ask[] the Judicial Conference Committee on Court Administration to consider what might be done to offset the growing apprehension about the federal judiciary.”<sup>41</sup> Following his request, the Judicial Conference of the United States immediately took action to require reporting of compensation for nonjudicial services.<sup>42</sup> The federal judiciary also agreed to collaborate with the ABA’s newly created Committee on the Code of Judicial Conduct, headed by Chief Justice Traynor of California.<sup>43</sup> Acting on the Committee’s efforts, the ABA adopted the first major overhaul of the original thirty-four canons in 1972, reducing the number of canons to a mere seven.<sup>44</sup> The next year, the Judicial Conference approved the ABA Code with certain modifications, resulting in a final five-canon Code of Judicial Conduct for United States Judges.<sup>45</sup> But it was not until a 1990 ABA revision of the Model Code that the suggestive “should” language of 1972 was replaced with instructive “shall” language to reflect the mandatory nature of the standards for state judges. The federal Code of Conduct for United States judges retained the hortatory rather than the mandatory approach throughout this time, even surviving substantial revisions to the Code in 2009.<sup>46</sup>

The canons of the current federal code extend or otherwise continue the work of former Canons 28, 30, and 33. Canon 5 explicitly prohibits political activity—precluding judges from holding office in political organizations, making speeches on behalf of or otherwise endorsing candidates, soliciting funds for a candidate or organization, or “engag[ing] in any other political activity.”<sup>47</sup> The provisions in Canon 4, dealing with extrajudicial activities, carry on the tradition of federal judges being part of their communities.<sup>48</sup> Judges are permitted—in fact, encouraged—to engage in “law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects.”<sup>49</sup> Obviously, these activities cannot interfere with the dignity of the office or a judge’s work.<sup>50</sup>

The Supreme Court is not subject to the Code because, as a creature of the Judicial Conference of the United States, the Code applies only to “judges,” not Justices.<sup>51</sup> According to Article III of the Constitution, the judicial power of the United States is vested in the Supreme Court, whereas the lower courts are established by Congress. Unsurprisingly, this topic has spawned significant debate.<sup>52</sup> Even so, the Court has taken steps to follow the Code. Chief Justice Roberts emphasized this point in his 2011 Year-End Report. That year, Justices Thomas and Kagan were asked to recuse themselves from *National Federation of Independent Business v. Sebelius*, which questioned the constitutionality of Obamacare.<sup>53</sup> The two Justices faced criticism from both sides of the aisle for not recusing themselves—Thomas because of his wife’s position against the law, and Kagan because of her previous role defending the law as Solicitor General.<sup>54</sup> At the same time, many pointed to the fact that the Code of Judicial Conduct is binding for all federal judges except Supreme Court Justices.<sup>55</sup> Roberts responded to this commentary by referencing the advisory nature of the original 1924 Canons and noting that, although not binding, Justices

adhere to the Code. He stated: “All Members of the Court do in fact consult the Code of Conduct in assessing their ethical obligations . . . . It serves the same purpose as the 1924 Canons that Taft helped to develop, and Justices today use the Code for precisely that

purpose.”<sup>56</sup> In addition to citing the Code, Roberts noted that the Court is bound by 28 U.S.C. § 455, which requires recusal in “any case in which the judge’s impartiality might reasonably be questioned.”<sup>57</sup>

The judicial ethics codes, which were created and revised in response to various controversies, provide helpful guidance to many ongoing, pressing ethical questions. But they also leave many questions unanswered, giving judges leeway to test boundaries. This experimentation was on full display well into the twentieth century as Justices did more than dip their toes into political waters. Despite accepted constraints on political activity, the Justices played central roles as stealth political candidates, political advisors, and political appointees to positions outside the judiciary.

## II. MIXING LAW AND POLITICS IN THE TWENTIETH CENTURY

Justice Frankfurter compared the Supreme Court to a monastery: “When a priest enters a monastery, he must leave—or ought to leave—all sorts of worldly desires behind him. And this Court has no excuse for being unless it’s a monastery.”<sup>58</sup> He further preached that it was “inimical for good work on the Court . . . for a Justice to cherish political, and more particularly, Presidential ambition.”<sup>59</sup> In his view, such desires belonged beyond the “monastery” walls, and he termed this practice of abstaining from political activity “judicial lockjaw.”<sup>60</sup> Chief Justice Taft publicly shared this ecclesiastical vision, describing judges as “high-priest[s] in the temple of justice.”<sup>61</sup> But this vision—though professed—was mostly an illusion. The conduct of Justices in the early- to mid-twentieth century, at least with respect to their involvement in partisan politics, was far from priestly and monastic.

Perhaps the clearest evidence of this lies in the desire of many Justices for an even bigger job—that of President. As Justice Holmes quipped, “Lots of our judges have had the presidential bee.”<sup>62</sup> The nineteenth century is replete with examples: Justice McLean hoped to become President and was considered a likely candidate throughout the 1840s;<sup>63</sup> Justice Davis considered the Republican nomination in 1872, only to be elected a senator five years later;<sup>64</sup> and Chief Justice Chase actively campaigned for the Democratic presidential nomination in 1868.<sup>65</sup>

The trend continued into the twentieth century, but with a bit more sheepishness. Chief Justice Hughes rebuffed efforts to encourage him to run for President in 1912, claiming that “if men

were to step from the bench to elective office . . . the independence of the judiciary would be weakened along with the nation's confidence in its courts."<sup>66</sup> In an about face, four years later he won the Republican nomination for President, stepped down from the Court, and hit the campaign trail—only to lose to Woodrow Wilson and rejoin the Court.<sup>67</sup>

Justice Douglas also had his eye on the presidency, never quite letting go of a prophecy in his high-school yearbook that he would one day occupy the Oval

Office.<sup>68</sup> He tried to veil his ambitions but was largely unsuccessful. Justice Frankfurter caustically commented that “it was as plain as a pikestaff to me that [Douglas] was not consecrated to the work of this Court but his thought and ambitions were outside

it.”<sup>69</sup> Douglas's first chance at the presidency came in 1940, when it was predicted that he would be the Democratic nominee if President Roosevelt did not run for reelection.<sup>70</sup> President Roosevelt did run again, putting an end to Douglas's campaign. But Douglas had another chance of joining the ticket in 1944 when it was widely believed that he was President Roosevelt's preferred running mate.<sup>71</sup> This opportunity fell through as well when Harry Truman got the nod instead. Still, in the run-up to the 1948 election, “Justice Douglas for President” buttons began to appear, suggesting that he still had hope.<sup>72</sup> That effort fizzled out, though, and Douglas turned down the possibility of being President Truman's Vice President, venting that he “could not be a number two man to a number two man.”<sup>73</sup> In the end, his yearbook got it wrong.

These are just a few examples of a widespread phenomenon. According to Supreme Court scholar John Frank, “for at least one hundred and twenty-five years [prior to 1958], there has been no ten-year period in which a Supreme Court Justice has not seriously and soberly considered running for the presidential office.”<sup>74</sup> This is a striking statistic when set alongside the well-accepted and oft-recited principle that Justices should not run for office.

On top of pursuing the presidency themselves, Justices often donned the hat of presidential advisor and friend. Justice Scalia was correct to note that “from the earliest days down to modern times[,] Justices have had close personal relationships with the President and other officers of the Executive.”<sup>75</sup> Chief Justice Taft is perhaps the most infamous example of this practice, and it is well accepted that he rode roughshod over the Canons' injunctions. According to one commentator, Taft:

(1) lobbied a newspaper editor to editorialize against legislative changes to Coolidge's tax plan . . . ; (2) bluntly instructed the Executive Committee of the 1924 Republican Convention to pack the Resolutions Committee with supporters of the proposed world court; [and] (3) wrote to the New York Times praising the nomination of Calvin Coolidge for President.<sup>76</sup>

Indeed, “Taft’s lobbying has no precedent in Supreme Court annals.”<sup>77</sup> But if Taft takes first place in political involvement, many Justices share the silver medal. Justice Douglas moved from the executive branch to the Court—and he, too, never fully said goodbye to politics. Before joining the Court, he had served as Chairman of the Securities and Exchange Commission. Once on the Court, he kept his executive-branch ties and social calendar, which included poker nights with President Roosevelt at the White House, where he would offer political advice.<sup>78</sup>

Roosevelt also had another comrade on the Court—Justice Frankfurter—who became “an all-purpose legal adviser to the New Deal.”<sup>79</sup> In spite of his public claim that the Court was a cloister, Frankfurter was politically active, giving advice on foreign policy, weapons production, and War Department appointments.<sup>80</sup> He apparently had no trouble overcoming “judicial lockjaw.”<sup>81</sup> This conduct casts doubt on the veracity of his assertion that he had “nothing to say on matters that come within a thousand miles of what may fairly be called politics.”<sup>82</sup> Secretary of State Dean Acheson, a close friend, concluded that Frankfurter’s “intimate and notorious friendship with FDR did harm to the public reputation of both the Court and the Justice.”<sup>83</sup>

Perhaps the most memorable examples of Justices working with the executive branch were not the result of their proactive efforts, but rather of their acquiescence to presidential demands. In 1945, for example, President Truman appointed Justice Jackson as United States Representative and Chief of Counsel for the Nuremberg Trials.<sup>84</sup> This post required Jackson to shift his center of gravity from the judicial branch to the executive branch, change his role from judge to prosecutor, and move to Germany in the process.<sup>85</sup> Despite these dramatic changes, he remained on the Court throughout his Nuremberg assignment—from the summer of 1945 through October of 1946.<sup>86</sup> His absence left the Court with just eight Justices, requiring a number of four-four cases to be reargued upon his return.<sup>87</sup> None of these challenges gave Jackson pause in assuming the Nuremberg position. In fact, he quickly accepted the position without even consulting his colleagues.<sup>88</sup> Chief Justice Stone only learned about the appointment by reading the newspaper.<sup>89</sup>

Somewhat similarly and just shy of twenty years later, President Johnson appointed Chief Justice Warren to lead the official investigation into the death of President John F. Kennedy.<sup>90</sup> Warren initially declined, citing “the unhappy history of the justices’ involvement in special, nonjudicial assignments.”<sup>91</sup> But President Johnson did not give up, pleading that only someone of Warren’s stature could give the necessary credibility to the investigation.<sup>92</sup> Warren relented over the objections of his colleagues, Justices Douglas and Black, and took on the fraught nonjudicial assignment that came to bear his name: the controversial Warren Commission.<sup>93</sup>

In short, the story of extrajudicial political activity in the twentieth century is one of contradictions. As the examples above illuminate, inconsistencies emerged between the increasingly robust principles and rhetoric around ethics on the one hand, and the actual conduct



of the Justices on the other. It was not until later in the twentieth century and the dawn of the twenty-first century that many of the Justices endeavored more earnestly to harmonize their conduct with the professed norms and written codes discussed in Part I.

### III. TODAY'S LANDSCAPE

Despite the secret and not-so-secret efforts of Justices seeking to assume political positions throughout the early twentieth century, no contemporary Justice has followed in their footsteps. Indeed, as this Part describes, modern incidents of partisan extrajudicial conduct pale in comparison to the overt political entanglements discussed in Part II. While contemporary concerns about ethics should not be ignored, the ethical landscape has substantially shifted relative to that of the early to mid-twentieth century, as Justices and judges have moved ever closer to the ethical norms proffered through the Codes. Earlier controversies, mandated financial disclosures, increasing transparency from the courts and the press, public pressure, and recognition of the relationship between ethics and the legitimacy of the courts have all contributed to this transformation.

This shift does not mean that the contemporary Justices view their roles solely as dispensing opinions from the “monastery.” Instead, the Justices participate in a range of extrajudicial activities consistent with Canon 4 of the Code: “A judge may engage in extrajudicial activities that are consistent with the obligations of judicial office.”<sup>94</sup> Importantly, the Commentary to the Code acknowledges that judges are in “a unique position” to contribute to law-related activities and are “encouraged to do so,” along with permissible non-law-related activities.<sup>95</sup> Within these confines, Justices and judges are free to embrace the “citizen-justice” approach touted by Justices Frankfurter and Douglas, albeit in a more constrained fashion.

Yet despite this ethical leeway and the undisputed prohibition on judges engaging in partisan politics, two recent incidents brought scrutiny on the Court and spurred public debate. The first incident involved Justice Scalia. After Scalia accompanied Vice President Dick Cheney on a government jet during a duck-hunting trip in 2003, the Sierra Club moved for him to recuse himself from a case involving a White House energy task force headed by the Vice President.<sup>96</sup> Despite protests and criticism, Scalia refused to do so.<sup>97</sup> While it is unusual for a Justice to issue a lengthy explanation denying a recusal motion, it is even rarer for a Justice to respond with a twenty-one-page defense, as Scalia did.<sup>98</sup> In his memorandum, Scalia skillfully refuted the basis for recusal by explaining the importance of political connections to Supreme Court nominations and appointments. Invoking the rule of necessity,<sup>99</sup> he explained the consequences of a Justice recusing himself “out of an excess of caution,” which could leave the Court divided with a

four-four decision.<sup>100</sup> Scalia warned that requiring “[m]embers of th[e] Court to remove themselves from cases in which the official actions of friends were at issue would be utterly disabling,” noting that many “Justices have reached this Court precisely because they were friends of the incumbent President or other senior officials.”<sup>101</sup> He acknowledged that “the earlier rare phenomenon of a Supreme Court Justice’s serving as an advisor and confidant to the President” was incompatible with the separation of powers.<sup>102</sup> But he distinguished that type of relationship from the “well-known and constant practice of Justices’ enjoying friendship and social intercourse” with legislative- and executive-branch members.<sup>103</sup>

The second contemporary controversy involved Justice Ginsburg, though it was markedly different from the one that embroiled Justice Scalia. In a press interview, Ginsburg called then-candidate Donald Trump a “faker” and said, “I can’t imagine what the country would be . . . with Donald Trump as our president.”<sup>104</sup> Then-candidate Trump and others quickly shot back that her remarks were improper and called on her to resign.<sup>105</sup> Commentators, too, saw the remarks as unprecedented, especially in the midst of a presidential campaign.<sup>106</sup> The next day she apologized for her “ill-advised” remarks and wrote that “[j]udges should avoid commenting on a candidate for public office. In the future I will be more circumspect.”<sup>107</sup>

These two high-profile scenarios help explain why Justices typically stick to the mine-run of extrajudicial activities, such as writing books, producing legal scholarship, promoting law reform, teaching, appearing at law schools, talking with elementary- and high-school students, and attending community events. Although the nature of Justices as authors has changed over time, Justices have been writing books as long as they have been authoring opinions. Justice Douglas was a particularly prolific writer, authoring no fewer than fifty-one books.<sup>108</sup> He believed that “[b]ooks may serve as powerful agencies of social, economic, or political reform.”<sup>109</sup> In 1956, he appeared as a “mystery” guest on the television game show *What’s My Line*.<sup>110</sup> Trying to guess which Justice he was, a blindfolded contestant asked, “[a]re you the author of several best sellers?”<sup>111</sup> Douglas could have responded more than several, but he simply answered “yes,” at which point his identity became obvious: “Bill Douglas!”<sup>112</sup>

While no Justice has equaled Justice Douglas’s publishing lollapalooza, some have come close, and many others have written at least one book. Justice Story takes second place with thirty-three books, followed by Taft, who wrote thirty.<sup>113</sup> The Justices have tried their hand in every genre. Story, for example, published a book of poetry called *The Power of Solitude: A Poem in Two Parts*.<sup>114</sup> Justice Sotomayor recently published a best-selling children’s book, *Just Ask! Be Different, Be Brave, Be You*.<sup>115</sup> Other notable titles include Justice Brandeis’s *The Jewish Problem, How to Solve It*,<sup>116</sup> Justice Campbell’s *Reminiscences and Documents Relating to the Civil War During the Year*

1865,<sup>117</sup> and Justice Chase's *How the South Rejected Compromise in the Peace Conference of 1861*.<sup>118</sup> Two Justices (Warren and Gorsuch) even published separate books under the same title: *A Republic, if You Can Keep It*.<sup>119</sup>

A more modern phenomenon has been the publication of autobiographies. In 1974, when Justice Douglas published the first installment of his autobiographical trilogy, *Of Men and Mountains*, it was an outlier—considered at the time to be “the first attempt by a Justice to transform the raw material of his life into a resonant American myth of personal and professional transcendence.”<sup>120</sup> Now such efforts line the shelves in airports. Recent autobiographies include Justice O'Connor's *Lazy B: Growing Up on a Cattle Ranch in the American Southwest*,<sup>121</sup> Justice Thomas's *My Grandfather's Son*,<sup>122</sup> Justice Sotomayor's *My Beloved World*,<sup>123</sup> Justice Ginsburg's *My Own Words*,<sup>124</sup> and Justice Stevens's *The Making of a Justice: Reflections on My First 94 Years*.<sup>125</sup> The success of these books has brought the Justices significant royalties. According to financial-disclosure reports, since 2009, Justice Sotomayor has earned more than \$3.2 million, Justice Gorsuch has earned \$555,000, and Justice Breyer has earned \$337,000<sup>126</sup> from their books. Justice Barrett has received a \$2 million advance for her forthcoming book.<sup>127</sup>

These books tell a collective story about the role Justices play in society and how that role has evolved over time. It is not surprising that many discuss the law, nor is it surprising that the politically focused works of the twentieth century have been replaced by the autobiographical works of today. Perhaps this reflects the irony that, even as Justices have stepped back from overt political involvement, they themselves have become recognizable public figures and more salient political and public symbols.

Evidence of this transformation is reflected in the Justices' roles as lecturers, law professors, moot-court judges, and even occasional television guests. It appears that Justice Douglas was the first Justice to have a cameo on television. He was a guest on shows with Mike Wallace in 1958, with Eric Sevareid in 1972, and again on *Good Morning America* in 1975.<sup>128</sup> But fast-forward to more recent times, and television appearances have become commonplace for the Justices. Justice Scalia appeared on *CBS News*;<sup>129</sup> Justice Alito graced *Conversations with Bill Kristol*;<sup>130</sup> Justice Breyer dropped in on *The Late Show*;<sup>131</sup> Justice Thomas conversed with Laura Ingraham;<sup>132</sup> Justice Ginsburg was featured on *The Colbert Report*;<sup>133</sup> and Justice Sotomayor did a televised interview with former White House advisor David Axelrod.<sup>134</sup> Shortly after his confirmation, Justice Kavanaugh appeared on Fox to discuss the allegations against him.<sup>135</sup> On a lighter note, a host of Justices have participated in the Shakespeare Theatre Company's mock trials (including Justices O'Connor, Kennedy, Ginsburg, Breyer, Alito, Sotomayor, and Kagan).<sup>136</sup>

Notwithstanding the frequency of these TV appearances, they are not without controversy. When Justice Gorsuch appeared on Fox & Friends to promote his book, a CNN reporter asked, “[h]ow is it appropriate for a Supreme Court justice to try to goose sales of his three-month-old book by chatting on one of the most partisan shows on TV?”<sup>137</sup> As he came to learn, being a public figure can be a no-win situation.

That the Justices have adopted an increasingly international perspective is reflected by their increasing travel abroad. Justice Kennedy notably journeyed to Austria every year to teach for the McGeorge School of Law, a practice begun before his appointment to the Court.<sup>138</sup> Justice Scalia taught in France, Turkey, and Austria, as well as many other countries.<sup>139</sup> Justice Ginsburg, too, was a frequent traveler abroad for rule-of-law lectures and taught in locations such as China, Paris, Greece, and the Netherlands.<sup>140</sup> The more recent appointees appear poised to follow in their footsteps, though travel slowed remarkably beginning in 2020 due to COVID-19.<sup>141</sup>

Justice Souter was a modern-day outlier: rather than travelling, writing, and making public appearances, he spent his summers in his hometown in New Hampshire.<sup>142</sup> Indeed, he seldom left the country. After returning from his Rhodes Scholarship in the United Kingdom, he only left the country once more—for a reunion of Rhodes Scholars.<sup>143</sup> As he would say to his friends, “Who needed Paris if you had Boston?”<sup>144</sup> When he was appointed to the Court, it became apparent that in the twenty-two years prior, when he worked as a government lawyer, he had “not given a speech, written a law review article or, as far as anyone knows, taken a position on the correctness of the Supreme Court’s precedents on abortion or any other issue.”<sup>145</sup> Perhaps more than any other contemporary Justice, Souter embodies the monastic vision of the Court.

As has been the case with their television appearances, the increasing travel of the Justices (save Justice Souter) has come under scrutiny. In June of 2021, two members of the Senate Judiciary Committee asked the Justice Department to provide more information about where the Justices have traveled in the past decade and what security-related expenses they incurred.<sup>146</sup> Yet there is some irony in this request as the Justices, like all federal judges, file congressionally mandated annual disclosure reports that include information about travel reimbursed by outside entities, such as a law school, nonprofit, or similar organization.<sup>147</sup> These disclosures accompany other disclosures regarding teaching income, gifts, liabilities, and stock holdings.<sup>148</sup>

Controversy also surrounds the common practice of federal judges obtaining reimbursement for attendance at seminars, although this issue relates primarily to lower-court federal judges rather than the Justices. Participation in judicial seminars took on a political tinge in the early 2000s, when judges were criticized for attending privately funded seminars sponsored by organizations that some deemed biased or one-sided in their presentation of topics ranging from the

environment to law and economics.<sup>149</sup> ABC's 20/20 highlighted the controversy with a program titled "Junkets for Judges."<sup>150</sup>

In response, the Codes of Conduct Committee issued Advisory Opinion 116, titled Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups or Other Organizations Engaged in Public Policy Debates.<sup>151</sup> Recognizing that educational events "have become increasingly involved in contentious public policy debates," the Committee acknowledged that there was no longer a "'safe zone' for participation."<sup>152</sup> The upshot is that judges are now required to assess multiple ethics factors related to participation in privately funded seminars whose primary purpose is judicial education, and to disclose their participation within thirty days of the program.<sup>153</sup> Likewise, the providers must file an advance disclosure that includes the source of their funding.<sup>154</sup> Rather than banning the seminars, the judiciary's current approach mirrors a multifactor test of the sort often employed in judicial opinions, coupled with disclosure and transparency.<sup>155</sup>

Recent events exemplify the ongoing controversy over the scope of extrajudicial activity. The Federalist Society and the American Constitution Society (ACS) both sponsor seminars and invite lawyers to become members.<sup>156</sup> Conservative judges have long been associated with the Federalist Society, while liberal-leaning judges have participated in ACS events.<sup>157</sup> The Federalist Society emphasizes that it is a "group of conservatives and libertarians dedicated to reforming the current legal order,"<sup>158</sup> while ACS describes itself as a progressive legal organization and highlights its role in "defending democracy, justice, equality, and liberty."<sup>159</sup>

Although both groups claim to be nonpartisan, this has not shielded them from ethical controversy. In 2004, a judge on the Second Circuit attended an ACS event and asked a question that reflected a political position.<sup>160</sup> The judge quickly apologized.<sup>161</sup> A disciplinary committee, which reviewed the various ethics complaints that followed, concluded that "all of the purposes of the judicial misconduct provisions" were served by the judge's apology, the release to the public of the apology and the committee's memorandum, and "the Judicial Council's concurrence with the admonition in the Memorandum."<sup>162</sup>

Nevertheless, in early 2020, faced with continuing inquiries about judicial participation in the Federalist Society and ACS, the Code of Conduct Committee issued an Exposure Draft advising that holding leadership or membership in either organization "is inconsistent with the Code."<sup>163</sup> This draft set off a firestorm among judges, judicial ethics experts, academics, and others. The Committee received comments from three-hundred judges.<sup>164</sup> By the middle of 2020, the Committee withdrew the opinion.<sup>165</sup> Instead, it counseled judges to reference prior opinions as "the appropriate way to analyze membership decisions" and noted that "balancing these considerations is ultimately best left to the judgment of individual judges."<sup>166</sup> To be sure, the

Justices are not bound by the Committee's opinions. But as a practical matter, they take them seriously and follow the Committee's advice.<sup>167</sup> For now, the immediate controversy has cooled, but the debate over judicial participation in these organizations endures.

The question of the Supreme Court as a political institution certainly heated up during the recent election cycle. But now, even the Justices themselves are joining the debate with remarkable congruity for the proposition that the Court is not political.<sup>168</sup> I dare not comment on this debate but, like others, will sit back and watch it play out.

While such current debates are important and clearly engender passion across the legal profession, they appear relatively minor in the shadow of the ethics dilemmas of centuries past—Justices taking on formal and informal executive-branch positions and even running for President. This historical backdrop does not conflict with the continuing and genuine concerns about federal judges engaging in political activity. Rather, history should inform these concerns because, as scholars and commentators continue to point out, such conduct undermines the integrity of the judiciary.<sup>169</sup> Yet it is not pollyannaish to suggest that sensitivity about political involvement and the nature of extrajudicial activities in light of historical realities indicates an optimistic trend line.

## CONCLUSION

In the twentieth century and before, Supreme Court Justices engaged in activities that were quintessentially partisan and political. Their fascination with politics persisted even after the newly minted ethics codes seemed to clearly forbid it. Although such obviously partisan extrajudicial activity is largely a thing of the past, we now face subtler, more nuanced questions. Assuming a judge is not running for office, what counts as partisan? Can views set out in legal scholarship be termed partisan? Which organizations are *de facto* partisan? Which statements reveal partisan proclivities? And can mere attendance at an event constitute an expression of political preference?

Thankfully, judicial ethics permit participation in a wide range of civic, charitable, educational, religious, social, and other activities. While judges' primary undertaking is hearing and deciding cases, a judge need not live a monastic life isolated from society. Indeed, the value of judicial participation in civic life cannot be overstated, as it serves to legitimize the judiciary, educate the public on the importance of the separation of powers, provide expertise in the area of the administration of justice, and reinforce the judiciary as an independent branch of government. Ethics statutes, recusal standards, transparent reporting of outside teaching income and

reimbursements, and annual financial disclosures serve as important checks on these activities, along with the views of colleagues and the public. In the end, though limits are critical, personal integrity is paramount. Justice Frankfurter had it right: “[O]ne does not cease to be a citizen of the United States, or become unrelated to issues that make for the well being of the world that may never come for adjudication before this Court, by becoming a member of it.” Today, Justices and judges understand the scope of this proclamation and surely appreciate that, in making it, Frankfurter himself was not a model judicial citizen.