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SYMPOSIUM

FEDERAL COURTS AND PARTISAN CONFLICT*

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I was wondering exactly how I was going to begin this, but Professor Graber's¹ final recommendation not to take the constitutional work of the courts seriously has given my segue. My job is to take the constitutional work of the Supreme Court seriously—whether I like it or not. That includes *Obergefell*,² it includes *Citizens United*,³ and it includes various other cases in between. I'll mention a few favorites and not-so-favorites as I go along.

Before getting into those issues, however, I would like to say thank you. It's a privilege to be here at the Indiana University Robert H. McKinney School of Law, and I would like to thank the school for its hospitality. It has been a privilege to share this event with scholars whose work I have admired from a distance. I want to note in particular our host, Professor Orentlicher, and Dean Graham, both scholars who have worked in the messy, smelly sausage factories of state and federal government. I have learned a great deal today. I also want to thank you, the audience, for having the stamina to stick this out to the end of the day. I should warn you that my wife has observed that from time to time I fall asleep in the middle of my own sentences. I just had some coffee, though, and I will try to earn your attention here for the rest of the afternoon.

At academic events examining the judiciary, I always feel a little bit like one of the little creatures in the microscope slide that everybody else has been examining. Last night I was asked, regarding the work of other scholars you have heard today, "How does it feel to be a data point?" I am used to that, but it feels a little odd to be asked to swim away from the microscope slide and to look at things from a bit of a distance. I cannot guarantee you objectivity, but I will aim

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1. Professor Mark Graber also presented at the *Partisan Conflict, Political Structure, and Culture* symposium. His presentation is published elsewhere in this issue.

2. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

3. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

at least for candor.

Partisanship in our federal government, as we have heard today, is about as strong as it has ever been in terms of presidential voting patterns and in Congress. Party loyalties and identifications have become more akin to those we see in the parliamentary system, except that in the United States political system, those features come with divided governments and presidential vetoes, and without the habits of compromise and coalition-building that are more familiar to us from multiparty parliamentary systems, especially those that have proportional representation.⁴

In the abstract, I am not troubled by strong parties that present reasonably coherent and contrasting approaches to the issues that face our nation. Well-informed voters can think through the issues for themselves, participate in dialogue, vote for their choices, and so on. That, at least, is the theory. But today when we talk about partisanship, too often we are talking about simply a climate in our political life in which the ability to find compromise between parties in our divided government is treated not as a political virtue, not even as a political necessity, but as a betrayal of party, of principle, and most especially of the primary voters. As a citizen, that is troubling, to say the least. Under our Constitution, as we all know, it is supposed to be difficult to pass national legislation.⁵ It is not supposed to be hard to pay our bills or to keep the government carrying out its essential functions. Now things have gotten to such a state that in just the last couple of weeks, it has been a major cause for celebration and self-congratulation in Washington that we have a temporary agreement to keep paying our bills and to keep the federal government open for business, although there are doubts about whether even that may fall apart in the coming weeks.⁶

When I have welcomed new citizens in naturalization ceremonies, I have often pointed out that representative government is an experiment, and that it is an experiment that could still fail. We have our checks and balances in our constitutional system, but they work only as long as they are not pushed to their extremes.⁷

The United States is not immune, not historically immune and not genetically immune, from extremism and failure in our political systems. It is worth remembering a story that I was never taught in school about American

4. For a positive view of this situation, see Pietro S. Nivola, *In Defense of Partisan Politics*, BROOKINGS (Apr. 8, 2009), <https://www.brookings.edu/opinions/in-defense-of-partisan-politics/> [<https://perma.cc/2ZTL-DFXM>].

5. See generally Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).

6. David M. Herszenhorn, *Senate Passes Budget Bill and Sends It to Obama*, N.Y. TIMES (Oct. 30, 2015), http://www.nytimes.com/2015/10/31/us/politics/senate-clears-way-for-final-passage-of-budget-bill.html?_r=0 [<https://perma.cc/SPE5-5SEY>]. After this talk was delivered, a comprehensive budget for fiscal year 2016 was enacted.

7. See generally THE FEDERALIST NO. 51 (James Madison) (“Ambition must be made to counteract ambition.”).

history—how the American Revolution came dangerously close to ending—as most revolutions in world history have—with a military coup. In the early winter of 1783, an unpaid Continental army in Newburgh, New York, was on the verge of mutiny.⁸ They were ready to march to Philadelphia to take over Congress and the nation's treasury and to pay themselves the money that they were long overdue. George Washington, at least as the story has come down to us in history, was able by dint of his personal leadership and character to convince the officers and men not to take that awful step. But it was a very near miss at the very founding of our Republic.

I was not asked here, however, to share my views just as a citizen, though I appreciate your patience in listening to them. I want to focus on one of the true national treasures that our generation of Americans has inherited—the federal judiciary. It is admired across the globe for its combination of independence, competence, and fairness. As you know, many countries have constitutions that promise individual rights and limits on government powers.⁹ But without an independent, competent, and fair judiciary, those promises are simply hollow. I should say in particular that I have learned a great deal from Professor Graber. It is worth remembering that the independence Chief Justice Marshall claimed in *Marbury v. Madison*¹⁰ was not actually exercised—the power of judicial review—and if I recall my constitutional history correctly, the first exercise of judicial review to strike down national legislation was the *Dred Scott* decision. We all know how well that worked out for everyone.¹¹

Nevertheless, over a period of generations, the federal judiciary was able to build a reputation for competence and fairness, and eventually became able to exercise the power of judicial review in ways that are generally accepted by most people in our society. Rare and extreme responses, for example, in the early years to *Brown v. Board of Education*¹² and to *Roe v. Wade*¹³ and now to *Obergefell v. Hodges*¹⁴ help remind us how most exercises of judicial review are simply accepted based on the overall reputation of the federal judiciary.

Some good news in our era of partisanship is that the federal judiciary continues to work away at our jobs. We decide nearly 400,000 cases a year in district courts and more than 50,000 appeals every year, and the Supreme Court is unanimous in most of its decisions.¹⁵ When it divides, it often divides on lines

8. See, e.g., Richard H. Kohn, *The Inside History of the Newburgh Conspiracy: America and the Coup d'Etat*, 27 WM. & MARY Q. 187, 199-213 (1970).

9. Tom Ginsburg, *Written Constitutions Around the World*, INSIGHTSONL. & SOC'Y (2015), http://www.americanbar.org/publications/insights_on_law_and_society/15/spring-2015/written_constitutions.html [<https://perma.cc/L3C7-5JGK>].

10. 5 U.S. 137 (1803).

11. See generally *Scott v. Sandford*, 60 U.S. 393 (1856); JAMES MCPHERSON, *BATTLE CRY OF FREEDOM* (1988).

12. 347 U.S. 483 (1954).

13. 410 U.S. 113 (1973).

14. 135 S. Ct. 2584 (2015).

15. *Federal Judicial Caseload Statistics 2015*, U.S. COURTS, <http://www.uscourts>.

that confound political scientists who seek to predict votes based on partisan considerations. So yes, the facts and the law really do matter, at least in the vast majority of cases.¹⁶ In addition, public approval ratings for the Supreme Court are far above those for the other branches of government.¹⁷ Yet a small number of high profile cases each year, most in the Supreme Court and a few in the lower courts, support the narrative of judges deciding partisan issues based on their own political and policy preferences or allegiances.¹⁸ There are some other signs of what might be called a crisis in the federal courts. In those public opinion polls, the Supreme Court looks great compared to the other branches of government, but in 2015 it has actually reached historic lows, especially among those who identify themselves as Republicans.¹⁹ Overall approval ratings are about forty-five percent, with a disapproval rate of fifty percent right now, which is as poorly as the Supreme Court has been regarded since they've been doing polls about it.²⁰ And there is a strong partisan divide in those opinion polls. In the summer of 2015, those polls indicated self-identified Democrats gave the Supreme Court a seventy-six percent approval rating, while among self-identified Republicans, the approval rating was only eighteen percent.²¹

We also know that partisan and ideological polarization in Supreme Court voting patterns is real. It is not constant and it is not universal, but it is real. It has reached new levels with the current Court, where essentially all of the justices appointed by Democratic presidents are “measurably to the left” of all the justices appointed by Republican presidents.²² That situation has crystallized as Justices

gov/statistics-reports/federal-judicial-caseload-statistics-2015 [https://perma.cc/36PV-5LZ5] (last visited Oct. 13, 2016).

16. See, e.g., WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE (Charles Gardner Geyh ed., 2011).

17. Lydia Saad, *Americans' Confidence in Government Takes Positive Turn*, GALLUP (Sept. 19, 2016), http://www.gallup.com/poll/195635/americans-confidence-government-takes-positive-turn.aspx?utm_source=twitterbutton&utm_medium=twitter&utm_campaign=sharing [https://perma.cc/QG9M-RMVQ].

18. Jeffrey M. Jones, *Trust in U.S. Judicial Branch Sinks to New Low of 53%*, GALLUP (Sept. 18, 2015), http://www.gallup.com/poll/185528/trust-judicial-branch-sinks-new-low.aspx?g_source=executive%20branch%20approval%20rating&g_medium=search&g_campaign=tiles [https://perma.cc/NWW6-Q5FR].

19. *Id.*

20. *Do You Approve or Disapprove of the Ways the Supreme Court Is Handling Its Job?*, GALLUP, <http://www.gallup.com/poll/4732/supreme-court.aspx> [https://perma.cc/863S-D6Y5] (last visited Oct. 13, 2016).

21. Jeffrey M. Jones, *Republicans' Approval of Supreme Court Sinks to 18%*, GALLUP (July 16, 2015), <http://www.gallup.com/poll/184160/republicans-approval-supreme-court-sinks.aspx> [https://perma.cc/YV4J-CYBD].

22. Lawrence Baum & Neal Devins, *Ideological Imbalance: Why Democrats Usually Pick Moderate-Liberal Justices and Republicans Usually Pick Conservative Ones*, SLATE (Mar. 17, 2016, 2:33 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/03/democrats_always_pick_moderates_like_merrick_garland.html [https://perma.cc/7VLS-666T], and

Souter and Stevens, both appointed by Republican presidents, retired and were replaced by Justices Sotomayor and Kagan, appointed by President Obama.²³ The nomination and confirmation process has gotten more and more contentious, not only for the Supreme Court,²⁴ but also for most circuit positions and sometimes even district court positions. During the Republican presidential debates over the 2016 nomination, we have seen attacks on Chief Justice Roberts, an extraordinary and disturbing scene, in my opinion.²⁵ We also see polarized news coverage of the work of the federal courts in general, especially the Supreme Court, where the decisions are described in ways that promote the idea that judges act as a kind of junior varsity team of politicians who try to hide their politics underneath their robes.²⁶

I do not mean to sound like a victim of unfair news coverage. There is certainly a factual basis for that kind of reporting, and federal courts sometimes inflict wounds on their own reputation for competence and fairness. It is worth noting that in the wake of *Bush v. Gore*,²⁷ the Supreme Court's public approval rating in 2001 among Republicans was about eighty percent and among Democrats only forty-two percent.²⁸ Times have changed but polarization has not. Sometimes the damage is genuine, as I think it was in that infamous case. And sometimes it has been inflicted by what spinmeisters might call poor optics, where the courts do a poor job of explaining what we are doing and where we fail to appreciate how we are perceived. To me, all those things do not add up necessarily as signs of crisis, but there is a problem. It is serious, and it is getting worse. What is most troubling to me is that I do not see a promising path for improvement, and I have not heard one as of today. The problem threatens this national treasure that we have inherited.

sources cited there; William Saletan, *Unbecoming Justice Blackmun*, 2005 LEGAL AFF. 35, 37 (2005).

23. Baum & Devins, *supra* note 22.

24. This speech was delivered three months before the sudden death of Justice Antonin Scalia. As of November 2016, the stalemate in the Senate over the nomination of his successor, Chief Judge Merrick Garland of the United States Court of Appeals for the District of Columbia Circuit, has now reached an unprecedented duration, and we are still counting.

25. Jim Newell, *Ted Cruz Owes John Roberts Almost Everything*, SLATE (Sept. 17, 2015, 6:06 PM), http://www.slate.com/articles/news_and_politics/politics/2015/09/ted_cruz_attacks_chief_justice_john_roberts_the_texas_senator_wouldn_t_have.html [https://perma.cc/5289-3HSW].

26. See Megan Garber, *The U.S. Supreme Court is Acting Like Congress*, ATLANTIC (June 27, 2015), <http://www.theatlantic.com/politics/archive/2015/06/9-angry-judges/396989/> [https://perma.cc/79K4-S4YJ]; Eric Segall, *Why Do We Pretend Supreme Court Justices are Anything But Political Officials?*, NEW REPUBLIC (Feb. 22, 2016), <https://newrepublic.com/article/130280/pretend-supreme-court-justices-anything-political-officials> [https://perma.cc/ZCG7-CCSP].

27. 531 U.S. 98 (2000).

28. Jeffrey M. Jones, *Slim Majority Approves of Supreme Court Following Partial-Birth Ruling*, GALLUP (May 15, 2007), <http://www.gallup.com/poll/27592/slim-majority-approves-supreme-court-following-partialbirth-ruling.aspx#!mn-topics> [https://perma.cc/LP23-GHQ3].

So I want to talk about three questions. The first two I think I can answer; the third is much tougher. The first is how does partisanship in the other branches of the federal government affect the judiciary? Second, what can the federal judiciary do to protect itself from these effects? And third, what can the judiciary do, if anything, to avoid making things worse in the other branches of government?

First, effects on the judiciary. The most dramatic and most visible effect is on appointments. We have a nomination and confirmation process that is threatening to become dysfunctional.²⁹ It has become slower and more contentious. It discourages potential nominees who do not have a salaried day job from subjecting themselves to the process. Consider the prospect if you are a lawyer in private practice and you think you might want to become a federal judge. How are you going to persuade new clients to hire you after your interest or your nomination becomes public? Even if you are ultimately nominated by the President, how do you pay your bills or contribute your fair share to the firm for the year or two while you wait for Senate action . . . that may never come?

As we think about this process, it is important to recognize that, as much as those of us in the legal profession and courts get excited about judicial appointments, they are not used by Senators as great opportunities to shape the law. Senators tend to view these sorts of opportunities as nothing but trouble. There's an old cliché about patronage appointments that applies in spades to judicial appointments: Every appointment produces ten enemies and one ingrate.³⁰ That is the central truth of the patronage tradition and that is how a lot of elected leaders approach the problem of judicial appointments. Nevertheless, they do have to come up with somebody, eventually, to fill these vacancies.

I would also like to talk, at least briefly, about the tools of partisanship as we see them in the current judicial appointment process. First, there is a Senate tradition of the blue slip, under which a judicial nominee will not even receive a hearing before the Senate Judiciary Committee unless both senators from the home state return a literal blue slip—it really is a piece of blue paper—to the chair of the Judiciary Committee signaling their approval of, or at least their lack of objection to, the nominee.³¹ It started as an old tradition of personal courtesy among senators—we do not want to confirm anybody to a position in your state who is personally offensive to you. Imagine a presidential nomination of a person in your home state who has campaigned against you, in personal and vicious terms.

But there are now signs that the blue slip practice is being used for

29. See generally Michael Teter, *Rethinking Consent: Proposals for Reforming the Judicial Confirmation Process*, 73 OHIO ST. L.J. 287, 290-99 (2012).

30. JAMES Q. WILSON ET AL., *AMERICAN GOVERNMENT: INSTITUTIONS AND POLICIES* 383 (14th ed. 2014).

31. BETSY PALMER, CONG. RESEARCH SERV., RL31948, *EVOLUTION OF THE SENATE'S ROLE IN THE NOMINATION AND CONFIRMATION PROCESS: A BRIEF HISTORY* 7-8 (2009), http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270E%2C*P%5C%3F%3F%20P%20%20%0A [<https://perma.cc/U46G-W8TW>].

ideological and partisan reasons. It does not actually have to be used that often now because the White House is ordinarily seeking senators' informal, but decisive, views before even making the nomination.³² So now just the threat of the denial of the blue slip can make the difference.

So if you are sitting in the office of the Counsel to the President now, you have, by my count (in November 2015), fifteen states that have two Democratic Senators, so there are thirty-five states where you cannot fill a judicial vacancy without the consent of one or two home-state Senators from the Republican Party. And when the party alignments are different, you still face that kind of a problem. In the Judiciary Committee, of course, the chairman controls the scheduling of hearings on nominees and decides what pace will be followed; the chairman is now Senator Chuck Grassley, Republican of Iowa. If there is no hearing, there is no movement toward confirmation. And even when the President and the Senate are controlled by the same party, committee procedures provide innumerable opportunities to slow the process down, as I experienced in 2009.

Then of course we have the issue of filibusters, and the mere threat of the filibuster has produced long delays. Excellent lawyers and judges nominated by Presidents of both parties have been blocked either by the threat of a filibuster or in some cases by actual votes. As you probably all know, in November 2013, frustrated Senate Democrats finally invoked the so-called nuclear option, to provide a means of closing debate with fewer than sixty votes on judicial nominations and executive nominations.³³ The result was that eighty-nine Article III judges were confirmed in 2014.³⁴ The Senate then switched hands. This year, according to the last inquiry I made, we went from eighty-nine confirmations in 2014 to eleven in 2015.³⁵ We also do not know what will happen with the next Supreme Court nomination; there is a long tradition of not filibustering Supreme Court nominees but the nuclear option rule change did not by its terms apply to Supreme Court nominations. Who knows what to expect if President Cruz or President Sanders make nominations to courts as they have promised in their campaigns.³⁶

32. BARRY J. McMILLION, CONG. RESEARCH SERV., R44235, SUPREME COURT APPOINTMENT PROCESS: PRESIDENT'S SELECTION OF A NOMINEE 6 (2016), <https://www.fas.org/sgp/crs/misc/R44235.pdf> [<https://perma.cc/LSJ5-JG8P>].

33. Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html [<https://perma.cc/5W85-XRDZ>].

34. *Status of Article III Judgeships - Judicial Business 2014*, U.S. COURTS, <http://www.uscourts.gov/statistics-reports/status-article-iii-judgeships-judicial-business-2014> [<https://perma.cc/4GDA-R54Y>] (last visited Nov. 8, 2016).

35. *New Judges: Confirmations*, FED. JUDGES ASS'N (Jan. 28, 2016), <http://www.federaljudgesassoc.org/egov/apps/document/center.egov?view=item;id=204> [<https://perma.cc/GF68-6Q8M>].

36. That is what I said orally in November 2015. By now we know, of course, that neither won the nominations they sought in 2016, but we also know that after Justice Scalia's death,

And suppose a vacancy—this is one of the concerns I had, given the Supreme Court’s approach to granting certiorari in the same-sex marriage cases in the fall of 2014—suppose a nomination had been needed while the same-sex marriage cases were pending. You can imagine what the confirmation hearings would have been like, with the pressure to extract commitments and the cry that I think both parties have learned: “No more Souters.”³⁷

In the Seventh Circuit, where I work, these concerns are very real. We have eleven seats on our court to manage our caseload.³⁸ We have two vacancies at this point out of eleven. If you are doing the math, that means our man- and womanpower is down eighteen percent. One vacant seat is in Wisconsin, and in a couple months it will be six years that seat has been vacant without a successful nomination. We also have a seat in Indiana. Judge Tinder gave the other branches well over a year’s advance notice of his intention to take senior status. Almost two years after that notice was given, there is still no nomination.³⁹

The shifts in the ways we handle nominations and appointments have also, I think, increased the temptation for judges and justices to make strategic decisions about when they will retire or take senior status. I do intend to follow up with Jack Balkin about how we get to the eighteen-year terms on the Supreme Court without a constitutional amendment,⁴⁰ but a measure that would provide a kind of predictable turnover in the Court has a lot of appeal, at least from my perspective.

Next, I would like to shift gears from the appointment process to some other aspects of interbranch relations and the processes of both judicial review of statutes and statutory interpretation. One side effect of the partisanship we see has been an erosion of respect and civility between branches of government that is deeply corrosive to our government over the long term. Some of you are no doubt familiar with Pam Karlan’s article famously titled “Democracy and Disdain,” published in 2012.⁴¹ Disdain is the attitude she attributes to the Supreme Court, with good evidence, toward the elected branches of government. Nobody

President Obama’s nomination of Chief Judge Garland to replace him has been met with an unprecedented refusal even to hold hearings in the Senate Judiciary Committee. After the November 8, 2016 election, the situation changed even more dramatically.

37. *After Justice Souter, President Obama’s Supreme Court Pick*, WASH. POST (May 2, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/01/AR2009050103445.html> [https://perma.cc/LS4V-JUYU].

38. 28 U.S.C. § 44(a) (2012).

39. In January 2016, President Obama nominated Donald Schott for the Wisconsin seat and Myra Selby for the Indiana seat. As of November 2016, the Senate Judiciary Committee had sent Mr. Schott’s nomination to the Senate floor, where it awaited action; no hearing was held on Ms. Selby’s nomination.

40. Jack Balkin, *Supreme Court Justices Have it Too Good*, GUARDIAN (May 6, 2009, 2:30 PM), <https://www.theguardian.com/commentisfree/cifamerica/2009/may/04/supreme-court-david-souter> [https://perma.cc/E2ZR-LMKB].

41. *See generally* Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1 (2012).

currently on the Supreme Court has held elective office.⁴² Only Justice Breyer has significant experience on Capitol Hill, as a senior staffer.⁴³ Chief Justice Roberts and Justice Kagan both spent time as junior lawyers in the White House.⁴⁴ This state of affairs is very, very different from the Court of the past. It provides some advantage in terms of appointing skilled and brilliant lawyers whose experience has been in judging. But we also experience the loss of perspectives. For example, I would suggest that a good deal of our modern campaign-finance jurisprudence is based on a lack of first-hand connection to, experience with, and understanding of how politics and money actually mix.

In addition, judges and justices more familiar with the operation of elected branches of government know that writing statutes is a complicated and messy process. David Orentlicher, I suspect, would agree with that point based on his experience in three terms in the Indiana legislature. It is easy for judges who have never tried working in that environment to look down their noses at the process and to think that the need for judicial interpretation of a statute is a sign of legislative failure. In fact, most of the kinds of issues that the courts worry about are not those that are most important to legislators. The need for interpretation does not necessarily show a failure of the legislative process so much as it shows different institutional roles and priorities.

If you take major legislation, say the Americans with Disabilities Act of 1990,⁴⁵ about ninety percent of the effects of that legislation, I will submit, brushing with broad strokes, are clear and powerful. But the cases courts wind up seeing are the other ten percent at the vague and messy margins, where it looks as if Congress was not doing a very good job and the Supreme Court says so. The Court says this sort of thing with respect to a host of cases and statutes. These criticisms are not helpful. During the messy process of writing statutes, we also know that mistakes are made, often in hasty and difficult compromises. Take the Class Action Fairness Act of 2005,⁴⁶ or massive omnibus bills like the Affordable Care Act,⁴⁷ where the now famous reference to “an Exchange established by the State” was litigated in *King v. Burwell*,⁴⁸ as well as all the other litigation we have seen to try to torpedo the legislation entirely. Congressional polarization and gridlock mean that even such obvious mistakes in drafting cannot be fixed by new legislation that can survive the bi-cameral process and presidential scrutiny.

42. *Id.* at 5.

43. *Biographies of Current Justices of the Supreme Court*, SUP. CT. U.S., <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/2KFB-TMSB>] (last visited Oct. 13, 2016).

44. *Id.*

45. Pub. L. 101–336, 104 Stat. 327 (1990).

46. Pub. L. No. 109–2; 119 Stat. 4; *see also* Spivey v. Vertrue, Inc., 528 F.3d 982, 984 (7th Cir. 2008) (declining to read “less” as “more” in CAFA time limit for filing interlocutory appeal from grant or denial of class certification, though Seventh Circuit sits in building designed by Ludwig Mies van der Rohe, whose motto was “less is more”).

47. Patient Protection and Affordable Care Act, Pub. L. No. 111–148; 124 Stat. 119 (2010).

48. *See* 135 S. Ct. 2480, 2482 (2015).

That gridlock adds a good deal to the attraction of pragmatic, problem-solving approaches to statutory interpretation, as opposed to the more rigid forms of textualism.

I would also like to talk briefly about other threats to judicial independence and authority that can stem from this era of partisanship. Jurisdiction-stripping legislation becomes more attractive, though it may become more difficult to pass. It also means that congressional control, in the form of the people who control veto points in Congress affecting judicial budgets and administrative issues, can be tempted to try to use those powers to influence judicial behavior. In recent years, the judiciary has been treated fairly well by congressional budget committees, at least as compared to executive branch agencies and other so-called “discretionary” federal spending. But we cannot take that for granted.

There also are issues of administrative oversight, where Congress as a whole or particular committees or members decide to put pressure on the judiciary in various ways. One current initiative is an effort by Chairman Grassley to impose an outside Inspector General on the judiciary rather than use impeachment processes or internal disciplinary processes to deal, he says, not with the substantive outcomes of cases but with judicial misconduct issues.⁴⁹ That issue is, as you might imagine, extremely sensitive within the judiciary, and it gets our attention.

Those are some of the principal ways the partisan environment is affecting federal courts today. My second question is what federal courts can do to protect themselves from the worst of those effects. At the risk of sounding mundane about this, the best things we can do are to do our jobs well, to do our best to show that we are doing our jobs well, and to try to avoid self-inflicted wounds to our collective reputation. With respect to matters of internal administration and discipline, for example, we can show we are good stewards of public money. The judiciary’s budget is about 0.2% of the federal budget.⁵⁰ If you’re counting, that’s about twenty cents out of every hundred dollars being spent by the federal government, but it still adds up to close to seven billion dollars a year. Over the past fifteen years, we have been fairly effective in controlling our budget growth, but it’s always a challenge. We must go to Congress every year, and we must do a good job with the money we spend. When we seek new courthouse construction around the country, for example, we have to go to Congress, and we have to be

49. See 162 CONG. REC. S1624-26 (daily ed. Apr. 4, 2016) (statement of Sen. Grassley), <https://www.congress.gov/crec/2016/04/04/CREC-2016-04-04.pdf> [<https://perma.cc/DBB2-2B9Z>].

50. *FY 2016 Funding Meets Judiciary Needs*, U.S. COURTS (Dec. 21, 2015), <http://www.uscourts.gov/news/2015/12/21/fy-2016-funding-meets-judiciary-needs> [<https://perma.cc/P643-QG2F>] (stating the total amount appropriated to the federal judiciary for fiscal year 2016 was \$6.78 billion); *2016 United States Budget Estimate*, INSIDEGOV.COM, <http://federal-budget.insidegov.com/1119/2016-Estimate> [<https://perma.cc/5L8R-XQVH>] (last visited Oct. 13, 2016) (stating the total amount of the federal budget for fiscal year 2016 was \$3.95 trillion). \$6.78 billion (the amount appropriated to the federal judiciary for fiscal year 2016) divided by \$3.95 trillion (the total amount of the federal budget for fiscal year 2016) is 0.2%.

responsible in what we ask for and how we use what we get.⁵¹

With respect to judicial discipline, especially in conflicts of interest and off-the-job conduct, we have to do a better job. Even the best-intentioned people can overlook conflicts of interests at times, and judges are sometimes just tone-deaf to how our actions sound to the public. Note, for example, the festering controversy over judges attending privately funded educational seminars at luxury resorts, where the funding comes at least indirectly from people and institutions that are very interested in how the federal courts are going to decide some of the issues before them.⁵² And then we also need to make sure we provide effective discipline when there is a problem, which I hope will diminish the perceived need for an inspector general.

My next suggestion may sound mundane to you, but I submit it is terribly important to the way we operate. It has to do with collegiality within the federal judiciary. We have to work hard at it. We heard Representative Brooks talk today about the experience of members of Congress—how difficult it is for members of Congress to get to know each other as genuine colleagues across the aisle, since they no longer know and socialize with each other, and do not seem to have the time or desire to do so, except in a few cases.⁵³

Let me compare the situation with judges on federal circuit courts. When one of my colleagues was welcomed to the court, she was told she had just joined a new family where everybody is an in-law—and there is no divorce. We do not get to pick our colleagues, and our relationships are for life. We have to work together. We often disagree because we are products of different backgrounds, different values, and different expertise, but we have to try to work for common ground. We work to avoid us-versus-them dichotomies, separate camps on particular courts.

How are we doing? We have different levels of success on different courts. The Seventh Circuit is a small court; we see each other often, and I am learning these processes as I go. I am still the junior member because President Obama has not been able to get anyone else confirmed. But it means that when there is communication, it should usually be with the entire panel, not one-to-one, excluding the third judge. Email is so much better than telephone for that reason. Collegiality also means we break bread together often, including right after we have talked through who is voting how and who is dissenting on what. For a long time, I have urged young lawyers to get into the habit of breaking bread or sharing drinks with opposing counsel. That works. That pattern of breaking bread

51. *Judiciary Transmits Fiscal Year 2017 Budget Requests to Congress*, U.S. COURTS (Feb. 12, 2016), <http://www.uscourts.gov/news/2016/02/12/judiciary-transmits-fiscal-year-2017-budget-request-congress> [<https://perma.cc/997Q-NC9A>].

52. After years of controversy, the Judicial Conference of the United States adopted a policy effective in 2007 on attendance at and disclosure of privately funded educational programs. See *Privately Funded Seminars Disclosure System*, www.uscourts.gov/judges-judgeships/privately-funded-seminars-disclosure-system [<https://perma.cc/69CG-VU69>] (last visited Nov. 8, 2016).

53. Susan Brooks, U.S. Representative, Address at the Indiana Law Review Symposium: Partisan Conflict in Congress: An Insider's Perspective (Nov. 6, 2015).

together or sharing a drink together works in our world as well.

Procedural fairness is also an important part of that collegiality. It may include, for example, holding off on a vote to grant or deny en banc rehearing until all the issues have been aired fully, or waiting to join what you think is likely to be a majority opinion until you have at least read the draft dissent that has been promised. Perhaps most important in terms of collegiality, though, is actually engaging with one another's views, whether that occurs in oral argument, conference, or exchanges in draft opinions and comments. I want to be clear—when I refer to collegiality in the federal courts, I am not talking about a kind of false, fabricated bonhomie, or a practice of going along to get along, where everyone is trying to be friends and minimize dissent. True collegiality is a matter of doing our jobs in both speaking and listening—trying to persuade our colleagues and being willing to be persuaded. It is a difficult mindset to maintain. That is especially true when you have worked hard to learn the case, and when you know you are right, right? We always know that, but we have to work at it.

A corollary to civility, to collegiality, is avoiding what I will call rhetorical incivility. Excessively harsh rhetoric, especially from dissenting opinions, is corrosive. I say this as someone who writes dissenting opinions fairly often. I do not think I pull my punches substantively in terms of the facts and legal analysis, but these are not personal disputes. I do not use rhetoric to try to delegitimize my colleagues or a decision with which I disagree. Over-the-top rhetoric in judicial opinions demeans the courts and undermines the appearance of fairness. It also provides additional ammunition for those who want to portray our decisions as purely political. I am delighted to see my friend, retired Justice Ted Boehm, here. Justice Boehm made this point in a painful series of decisions involving attorney discipline in the state of Indiana, such as *In re Wilkins*, where an attorney was disciplined for rhetoric in a brief in which he was local counsel for out-of-state lawyers.⁵⁴ The brief contained language that was harshly critical of the Indiana Court of Appeals. But it was not nearly as harsh, Justice Boehm pointed out, as rhetoric that Justice Scalia and others have used in dissent in describing the work of their colleagues on the Supreme Court of the United States.⁵⁵ It was a perfectly valid point. What was troubling was that there was so much material to work with to make that point about the over-the-top corrosive rhetoric from the Supreme Court of the United States, the most visible model for judicial behavior in our system, which sets examples both good and bad. We need to address our points of disagreement and engage with one another, not just out-vote one another.

That is why the facts and the law are so important. Addressing our points of disagreement squarely, but with dispassionate rhetoric and analysis, shows the parties, the public, and the legal profession that we know what we are doing and that their cases have been heard and decided fairly, even if plenty of people disagree with the result. At the risk of sounding a little bit Pollyannish, what I am

54. 777 N.E.2d 714, 715-16 (Ind. 2002), *modified on reh'g*, 782 N.E.2d 985 (Ind. 2003).

55. *Id.* at 720 (Boehm, J., dissenting) (citing *Atkins v. Virginia*, 536 U.S. 304, 338 (2002) (Scalia, J., dissenting), and *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring)).

talking about is simply adhering to the rule of law and to the processes of legal decision-making. This is what makes the judiciary different from the other branches: we make public decisions based on public records for reasons that are stated openly. The identities of the parties do not matter; we apply rules we are willing to apply consistently in future cases for reasons that we state publicly and that will pass the harshest standards of our professional norms. With rare exceptions, that is what we do and that is what we have to try our best to do. I also submit, at least in light of the quality of recent political debate, that we are the branch of government where the facts continue to matter—real facts.

My third question: Is there anything we can do to help other branches of government? I think the obvious answer has to do with doctrines I have mentioned that directly affect our political system: campaign finance, including reporting on contributions and expenditures; voting rights; the extent of the political question doctrine; and redistricting issues. I will simply say that for a long time I have been a believer in John Hart Ely's view of trying to keep open the channels of political change.⁵⁶ That is one of the core missions of the federal courts in our system. I will probably demur on saying anything more substantive about those particular doctrinal areas, since they come before our court often. As we approach those kinds of issues, though, we judges need to stay humble. We also need to keep in mind the law of unintended consequences, as well as the hydraulic pressure of money, which always seems to find a way to influence our political system.

56. *See generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).