

Judicial Independence: Theory and Practice

PANEL DISCUSSION*

PROF. JOHN NEWMAN¹ (CO-MODERATOR): I'd like to start us off with one question, then we'll open it up to all of you. But before I launch into that question, I'd like to start with a quote from, presumably, our newest Supreme Court Justice, Neil Gorsuch—the Senate confirmed his nomination this morning. In a case called *Kay Electric Cooperative v. City of Newkirk*, Judge—then-Tenth Circuit Judge Gorsuch wrote: “Our lot as a lower court isn't to choose between the Supreme Court's holdings, but to apply them.” So, we've heard a lot today, I think, about external threats to the judicial fortress, to judicial independence. Possible threats posed by the executive branch, or by the legislature.

What I'm curious to hear your thoughts about are—well, is an idea I'd like to call intrajudicial independence. I think about this from the perspective of an antitrust attorney and professor. In antitrust, particularly—and maybe this is unusual—you often see intermediate, appellate judges kind of ignoring what the Supreme Court has said on a given topic. So my question is this: Do we, as attorneys, as scholars, as judges, do we truly value precedent and do we truly obey it and follow it, or do we pay it lip service? Or is it somewhere in the middle?

* The panel discussion was held as the last session of the University of Memphis Law Review Symposium, *The Fragile Fortress: Judicial Independence in the 21st Century*, on April 7, 2017. The transcript has been edited for clarity and to avoid repetition. Judge Donald and Professor DiPippa were unable to participate in the panel discussion.

1. Assistant Professor of Law, University of Memphis Cecil C. Humphreys School of Law; B.A., Iowa State University of Science and Technology, 2007; J.D., University of Iowa College of Law, 2011.

Now, that's a descriptive question. Normatively, should we place more value on precedent, or less value?

PROF. ALENA ALLEN² (CO-MODERATOR): Any takers?

HON. MICHAEL B. MUKASEY³: In part it depends on the nature of the issue. If it's something that involves, say, the interpretation of a statute, and you think the Court got it wrong the last time, the legislature can always correct that. But if there are decisions that can't be corrected, and it turns out you have a good reason for believing that somebody got it wrong, then there may be a better reason to break with precedent than there might be otherwise.

That's not to say that if some graduate student came running in with a newly discovered note from James Madison that said he really never intended for judges to review acts of the legislature, that we would scrap *Marbury v. Madison*. You don't go that far. But the question is whether you—nonetheless whether if there is a good and sufficient reason for breaking from precedent that can't be remedied in any other way—whether you should consider doing it judicially.

PROF. ALLEN: Any other takers?

HON. ZARELA VILLANUEVA⁴: This is a decision of the system. In the Costa Rican system, jurisprudence—that's to say case law—is not binding. Clearly, it is typically followed, because jurisprudence is based on right, on the foundation in law. And what must prevail is the foundation in law. And for that reason, the jurisprudence will be followed in other courts, because the decision was based on the law. However, it is also quite possible that in the decision of a court there will be minority opinions which, in the course of time, may well become majority opinions.

2. Associate Professor of Law, University of Memphis Cecil C. Humphreys School of Law; B.A., Loyola University, 1999; J.D., Yale Law School, 2003.

3. Former United States District Judge, Southern District of New York; former United States Attorney General; B.A., Columbia University, 1963; J.D., Yale Law School, 1967.

4. Chief Justice, Supreme Court of Justice of Costa Rica; Licenciada en Derecho, Universidad de Costa Rica, 1977; Especialista en Derecho Agrario, Universidad de Costa Rica, 1984; Master en Violencia Social y Familiar, Universidad Estatal a Distancia, 2003. Chief Justice Villanueva spoke in Spanish through an interpreter, Symposium Editor Pablo J. Davis, Certified Court Interpreter for the Language of Spanish (Tennessee Administrative Office of the Courts).

HON. R. DAVID PROCTOR⁵: Let me weigh in. We expect people outside the judiciary to follow the rule of law. That's one of our hallmarks: we are a nation of laws. I think it's tremendously critical that the judiciary recognize that we're a nation of laws and we should be a judiciary that's controlled by the rule of law and, therefore, precedent is not a suggestion or guideline. It's the rule. And, of course, you know the difference if you've seen *Ghostbusters*. Sigourney Weaver's coming on to Bill Murray and he tells her, "As a general rule, I don't get involved with women who are possessed by an evil spirit." She grabs him, throws him on the bed and he says, "Well, come to think of it, it's more of a guideline than a rule."

[Laughter]

JUDGE PROCTOR: So, I'm afraid that sometimes judges are humans. We treat the rule of law as a guideline sometimes, and steer away from it. We wear black robes for a reason and that is so that we block out our personal views and biases. When's the last time someone at a nomination hearing before the United States Senate Judiciary Committee said, "I will follow the law so long as it comports with my personal views and what I think the law ought to be"? That just doesn't happen. So, I emphatically say you have to follow the rule of law. I don't know if you're talking about *Topco* and *Sealy* when you're saying that sometimes we follow the law and sometimes we don't but—

PROF. NEWMAN: Those were the cases I had in mind.

JUDGE PROCTOR: Yes. OK. If you're not an antitrust aficionado, he'll explain those later.

PROF. NEWMAN: Over a stiff drink.

PROF. ALLEN: Any questions from the audience? Shy group?

PARTICIPANT 1: Can you treat us as a Torts class?

[Laughter]

PROF. ALLEN: I don't think they'd appreciate it.

PARTICIPANT 2: Thank you all for being here. I have a question. As a former law clerk myself and it's related to the first question about precedent. In terms of being judicially independent and precedent, where do you feel that—and I think that this came up too—with the truck driver/Justice Gorsuch situation and I think it's an interesting

5. United States District Judge, Northern District of Alabama; B.A., Carson-Newman College, 1983; J.D., University of Tennessee College of Law, 1986.

discussion that came up and it made me curious about how you would react to something similar.

When you are looking at a case and you see precedent that seems to say one thing but your gut or your feelings say that that's not the right outcome and there's a different outcome. In terms of the independence of your court or, in the federal system, the independence of your particular part of the court, how do you feel that that independence for you as a judge—as a jurist—plays into precedent that you may feel is incorrect or wrong with a certain set of facts.

HON. TIMOTHY J. CORRIGAN⁶: Well, just speaking for myself, I think under our system—and I think Judge Proctor was alluding to this as well—I think that oftentimes judges make decisions that, if they could do it the way they wanted to do it, it would be the opposite decision. And I think that's probably what we mean by the rule of law. That is, if the statute says this or if the Eleventh Circuit, in my case, which is my governing circuit, or the Supreme Court says this is the way it ought to be, then I have to rule that way.

Now, oftentimes, there's not clear precedent or there is some ability to make an interpretation or—and I don't think we have to be so hidebound that we can't look at the justice of a situation in certain circumstances because that's what we're about, too. But, I mean, I don't think there's any judge around that doesn't on a weekly basis have to make a decision that they would prefer not to—whether it's to impose a minimum mandatory sentence that they wish they didn't have to impose or whether it's to apply a circuit precedent that they wish had come out the other way.

But, as Judge Proctor said, if you don't have—if you're not bound by precedent or bound by the law then you really are kind of lost. You can even—and I do this every once in a while, I don't do it very often—you can even in your opinion admit of your doubt or your hope or your wish that it could come out in another way because, as Judge Donald said [in her presentation], maybe someday somebody will think you're right. Maybe, someday, somebody in authority will come around to that way of thinking. That's the way I would look at it.

6. United States District Judge, Middle District of Florida; B.A., University of Notre Dame, 1978; J.D., Duke University School of Law, 1981.

HON. MICHAEL B. MUKASEY: Along the lines of Judge Corrigan, in connection with the sentencing, I wrote a decision saying that this is the sentence I was imposing, but that I felt that it was longer than was necessary. When the case went up to the court of appeals they said, “Well, if you felt that way then this is the way you could have sentenced to less.” And they remanded it and I resentenced. So, yes, occasionally some good can be achieved.

JUDGE CORRIGAN: And precedent, especially in the sentencing area, has been very dynamic in the federal system since the *Booker* decision and sometimes what the rule is at the time you’re imposing it isn’t the rule by the time it gets up to the court of appeals. Sometimes the court of appeals wants to know what you thought about it. They’ll look to see if you said something like, “If I had the opportunity I would do something different.” That can sometimes have an influence on how they view it.

PARTICIPANT 3: I have a question. This is actually for everyone—but directed first at Judge Mukasey. Thank you for coming, Judge Mukasey. And all of you, of course. I was curious about your comments about the so-called travel ban. You seemed to indicate that the President’s comments—his motivation or intent—weren’t relevant to interpreting the order. Is that right? I was confused why this wouldn’t be relevant. You seemed to put blame on the courts rather than the President for making the comments.

JUDGE MUKASEY: I think if you have a facially valid order that recites reasons for why it should be put in place, then you apply them. You don’t start reading newspaper reports about what somebody said on a nighttime television commentary program and apply them to the executive order. Any more than you would an act of Congress.

PARTICIPANT 3: Well, they’re not just newspaper reports. I mean, they’re the President’s comments.

JUDGE MUKASEY: I understand they’re the President’s comments. And you can have comments by members of Congress about what statutes mean. Those are interesting for historians. They don’t mean anything when it comes to what’s on the face of the statute.

PARTICIPANT 3: So the President’s intent or motive is completely irrelevant to interpreting it?

JUDGE MUKASEY: Yes.

JUDGE PROCTOR: Well, let me weigh in. And I have to be more careful than Judge Mukasey because I do not currently graze in the green fields of private practice.

[Laughter]

JUDGE PROCTOR: Do you think it would be important to cite the statute on which the executive order was based?

PARTICIPANT 3: For who to cite?

JUDGE PROCTOR: The court.

PARTICIPANT 3: Yes, indeed.

JUDGE PROCTOR: Would it surprise you to find out that none of the three courts that we're dealing with analyzed the statute under 8 U.S.C. § 1182(f)?

PARTICIPANT 3: It would surprise me, but my question is really—

JUDGE PROCTOR: But I'm getting to your question. So, let me do that. Let's say, instead of an executive order involving President Trump, the case involves a Title VII action in which the plaintiff wishes to be reinstated to the job because of egregious discrimination. And on day one, the plaintiff comes in and presents extra-judicial comments that are of public record, made by the employer, and says, "On that basis, I deserve to be put back to work today." How many cases in the history of our courts have granted a preliminary injunction under those circumstances?

PARTICIPANT 3: I'm not sure about a preliminary injunction but I think—

JUDGE PROCTOR: Or a TRO.

PARTICIPANT 3: Employer comments that show their motive in treating employees in a certain way are relevant evidence in Title VII—

JUDGE PROCTOR: They're relevant evidence, but the question is, do you credit those as opposed to other, alternative evidence on day one? All I'm saying is this. We have a very interesting approach to how we've taken on this whole travel ban issue, in my view. And I'm coming to Judge Mukasey's defense a little bit here, and being devil's advocate a little bit here at the same time. I think that this points to an issue where the judiciary can sometimes shoot themselves in the foot when it comes to judicial independence.

We have to make sure that we put forth opinions that do not appear to be politically—what was the term, political functionaries?

Now I'm not saying that any of the courts did that. But what I am saying is this. If my law clerk had brought me that opinion without any analysis of 1182(f) in it and with only—in one of the opinions, only a single sentence that said “I find there's a substantial likelihood of success on the merits,” we would probably have a discussion about whether that law clerk was going to continue employment. So my position would be, we have to be very careful in the judiciary not to be pulled into the political force and I probably have said too much already. Having said that, I do think that it's an important discussion that we need to have about where the limits of judicial authority are. So with that said, I'm sure I'll get a couple questions.

PARTICIPANT 3: And I'm playing devil's advocate, too, just to get some questions going so—with all due respect to Judge Mukasey. So let me ask you this same question then. The question is, do you consider the President's comments about the executive order—that motivated the executive order that he signed to be irrelevant, which Judge Mukasey, I think, was saying?

JUDGE PROCTOR: I probably shouldn't comment that far on it, but I'll say this. I gave you an analogy that I think takes some of the politics out of it and puts into a real life application of a TRO setting. And I'm suggesting that I think, under those circumstances, the court probably would not grant a TRO based upon an employer's extra-judicial comments that tend to suggest motive. Bear in mind, the Ninth Circuit did not grant the TRO—did not uphold the TRO based on Establishment Clause grounds; it was Due Process. The Hawaii district judge did not grant the TRO based on Due Process, as I understand it, but Establishment Clause. So there's not exactly a huge consistency about what was decided and how it was decided. All I'm saying is this: I think we judges have to be very careful to behave as judges and not something else.

PARTICIPANT 4: Judge Proctor's comments segue nicely into a question I'd like to ask. Specifically, to Judge Mukasey but hopefully to all of the panel. I imagine that you've either read or heard about the Seventh Circuit's decision in *Hively* that Title VII protects homosexuals from discrimination under sex clauses as [inaudible]. And Judge Posner wrote a separate concurrence—I can't remember the specific words that he uses, but basically stating that judges should look to how things have changed in the United States since the enactment of Title VII in interpreting it. I'm wondering whether you all

think that his candor might have gone too far. That he might have been too candid.

JUDGE MUKASEY: That was addressed to me? I don't think he was too candid. I have kind of a different mindset when it comes to statutes as opposed to a constitution. Statutes, being statutes, can change and be changed. It's in the large not as potentially damaging to the political fabric to decide that a statute has changed because the setting in which it's being applied has changed, as it is to decide the same thing about a constitution. So, I understand that Judge Posner tends to produce quite a lot of stuff. Some people think it's prolific; some people think it's incontinent.

[Laughter]

JUDGE MUKASEY: I think he—I don't think he went too far in that case.

PROF. ALLEN: Any other takers?

HON. STERLING JOHNSON, JR.⁷: Somebody up there.

PARTICIPANT 5: I'm a second year student. Thank you all for being here. I think it was in his dissent in *Obergefell v. Hodges* that Justice Scalia said something to the effect of, "If we nine unelected judges continue to make this up as we go along, the people may remind us how truly irrelevant we are." He seemed to be inviting a complete—not a revolution, but some sort of reform of the court, and that afternoon, Senator Ted Cruz, I think, had a piece in the *National Review* proposing a system of judicial retention. Since then, other proposals have emerged for, sort of, hard-cap term limits for judges. And I'm curious how—what members of the panel think, I guess, if you had to rate the threat level of these proposals to judicial independence, where would you place those?

PROF. ALLEN: Don't jump all at once.

JUDGE PROCTOR: Well, I take it that would take a constitutional amendment and given that we can't get a health care bill—

[Laughter]

JUDGE PROCTOR: I'm not sure that's a great way up on the threat level. I think Justice Scalia intended that as, kind of, rhetorical argument as to what he viewed as an unnecessary or inadvisable step

7. United States District Judge, Eastern District of New York; B.A., Brooklyn College, 1963; LL.B., Brooklyn Law School, 1966.

by the majority. I just want to return to one thing I'd said. And I don't want anyone to misunderstand what I'm suggesting.

Let me read 8 U.S.C. § 1182(f) to you and you see if you think this is significant to a travel ban discussion. "Whenever the President finds evidence that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or non-immigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate."

Seems like an important part of the discussion if we're going to be analyzing whether the President overstepped authority or acted unlawfully. And I'm only pointing out that none of the three courts that upheld the travel ban gave even lip service, much less—I'm sorry, that *overturned* the travel ban, thank you—gave even lip service, much less any analytical discussion, to that provision. And I'm just simply saying that I think we have to be careful as the judiciary to make sure that we ground our decisions in the rule of law. So, I felt like I left the hula hoop out too far out from my hips; I was trying to pull it back.

[Laughter]

PROF. ALLEN: Yes, ma'am.

PARTICIPANT 6: Good afternoon to all, and *buenas tardes*, Dr. Villanueva. [Inaudible] It was interesting [Inaudible] earlier panelists discussed the—I guess the angst with the concept of legislatures wanting to intrude on the judiciary's independence by perhaps enacting ways to legislatively overturn judicial decisions. And yet, there's not that equal angst for the judiciary to invade the legislative process. And I'm trying to understand that imbalance, that seeming imbalance, that somehow it's OK for the [judiciary] to lead and invade legislative independence, but it's not OK for the legislature to invade and disrupt judicial independence. [Inaudible]

JUDGE JOHNSON: I think the Constitution details the function of each branch of government. The executive is to create policy and execute laws. The legislature is to pass laws. And it is the judiciary to interpret the laws. I don't think that the judiciary is a proactive branch of government; and the other two *are* proactive branches of government.

PARTICIPANT 6: And yet, though, it seems—in some of the opinions that we have just discussed, there has been some proactive

activity, and, in a sense, as one panelist discussed [Inaudible] one can see some proactive work on the judiciary's part.

JUDGE JOHNSON: The courts can tell you that a law you pass is unconstitutional, the act that you committed was wrong. But they can't tell you what law to pass or they can't tell you what to do—is the right act. Courts can only interpret the laws—or tell you when the laws are not being done correctly.

JUDGE CORRIGAN: And, of course, unless you're talking about constitutional interpretation, the legislature always retains the right to change the law. So if a court invalidates a legislative act, for some reason, the legislature can pass a new law. And that happens quite—a decent amount. And so, it's only in a case in which a court holds a law unconstitutional and it can't be fixed that the legislature is bound by that decision. And then, of course, even then, admittedly an unwieldy process—but there is a process for amending the constitution. So, in the way the system is set up, there's always a way to do something. Now, whether it's too hard to do it or it's never going to happen—that's a different question.

JUDGE JOHNSON: That's the beauty of a constitution—checks and balances.

JUDGE PROCTOR: And I would remind us that Hamilton, who was a staunch proponent of a strong judiciary and favored lifetime tenure, favored non-reduction of compensation—favored all the things that I support personally—

JUDGE MUKASEY: And that support you.

JUDGE PROCTOR: And that support me. Exactly. Also, he predicted and said that the judiciary should be the least dangerous of the three branches of government. The idea being that we—the judiciary only deals with matters brought to us. And I think that this goes to Judge Johnson's view that we're not pro-active. We don't reach out. We don't make policy decisions unnecessarily. Having said that, we do, oftentimes, stand as the only guardian between a problematic government initiative and a citizen who would be endangered by it.

CHIEF JUSTICE VILLANUEVA: Well, of course, I'm prudent and I have no intention of referring to matters that are internal to your country; I'm absolutely clear about that. What I would like to underscore is that the binding character of cases, of jurisprudence, has as its ultimate goal the certainty of the citizenry. So that the law, so that justice, may be predictable. But for us, the task of following the

law, enforcing the law but at the same time adjusting the law to changing times and conditions, is part of our system. That is the task of the judiciary, within the framework of law.

And I will say that as a justice I have defended the idea that I interpret the law and I strive to do justice. And that's why I have always been of the belief that it's not simply the parties who are the determinants of the truth. It is the active role of the judge to discover what is true. Our system operates, then, in a way that makes it possible for case law to bring about very important changes.

But I'd like to refer to another subject, too. The Costa Rican system also has the mechanism of legislative consultation of the Supreme Court as to the constitutionality of the measures it is considering. After a bill is passed, but before it becomes law, ten members of Congress consult with the Supreme Court's Constitutional Chamber, so that it renders a decision as to the constitutionality of the bill. And this has been a problem for the judiciary, actually, because it has introduced politics into the judiciary. And it's done it at a time when the two-party system has been breaking down in our country.

And there has been a problem throughout Latin America, with the proliferation of political parties in Congress. The two-party system is now a thing of the past—in my country, that happened some time ago. Reaching agreement has become difficult, and that has seeped into the judiciary. And this creates a series of problems, and a questioning of the judiciary. That's what we're in the midst of.

PROF. ALLEN: Other questions?

PARTICIPANT 7: I'm a current law clerk. Judge Donald spoke a little bit about judicial independence and how she sees that having to fit on a three-judge panel. I am interested in—the judges who are here as district court judges who probably don't have that same kind of situation. But I do wonder what kind of pressure that you feel as single judges but—so I think that Judge Corrigan talked about this about how sometimes the law isn't clear. And maybe there is a circuit split and you have to adopt—you have to decide an issue or first impression for the circuit in which you sit.

What influences, I guess, do you have in those situations as far as wanting to be unified with other district court judges on your court? Or pressure from not being overturned on appeal—which I know is a common concern? So, in what way do you think that—in a sense your own personal feelings when the law is unclear on a discretionary issue?

I guess there is more room for your personal ideals to make decisions there. So, what influences, what other external factors in those situations where there is no clear route to follow?

JUDGE CORRIGAN: Well, no judge likes to get reversed, and if you were suggesting it's a common problem for me, I don't know.

[Laughter]

JUDGE CORRIGAN: You've probably been reading my decisions. But, I'll tell you truly, I don't worry about it. And the reason I don't worry about it is that it is not my job to worry about it. It's their job to worry about it when it gets up there. I just do the best I can. I apply the law the best I can. If I have conflicting authorities, I try to reconcile them and if I am able to do so, I take what I consider to be the best reasoned result. And it does give you some flexibility, but it also imposes some burdens on you.

But to be honest with you, one of the reasons I don't worry about it is that you just don't know what the circuit's going to do. In the absence of a circuit precedent or a case on point, to try to handicap what you think they might do as a way to try to decide what you're going to do is really kind of a fool's errand, as far as I'm concerned.

I think you just have to do the best you can. You have to write the best decision you can. You have to apply either canons of statutory interpretation or whatever other tools you have, and try to come to the best decision. Another reason is that most things don't get appealed. So, if you worry so much about what the circuit's going to do, it may be that the case doesn't get appealed anyways. So that's my answer.

JUDGE JOHNSON: I also—I don't worry about the appeals. I recall going to several functions and there was this senior—chief judge of the circuit and they would always introduce me to him. And I would always give him the same story: “I know you, sir, and it's been my privilege to have been reversed by you several times.”

[Laughter]

JUDGE JOHNSON: I also get particular satisfaction when you are reversed by the circuit and then the Supreme Court reverses the circuit.

[Laughter]

JUDGE JOHNSON: And I remember one of the chief judges—there was a decision that I had made in a case, and it was reversed by this judge. And he was a wonderful judge and a wonderful person. And I used to see him at social functions all the time and he'd always

say, “Hello, how are you, Sterling? How’s the family?” He never mentioned that case. The case went to the Supreme Court; they reversed the circuit. And I used to see him, and I’d say, “How are you? How’s the family?”

[Laughter]

JUDGE JOHNSON: You can’t worry about those things. You do what you think is the right thing to do.

JUDGE PROCTOR: The other thing I’d add is there are certain panels on the Eleventh Circuit that when they affirm me, I say, “I still think I was right.”

[Laughter]

JUDGE PROCTOR: Just kidding. Just kidding. That’s an old district court joke.

[Laughter]

JUDGE MUKASEY: I used to—I had a rule in my chambers. It was a firing offense for any of my law clerks to attend the oral argument in an appeal of one of my decisions, for precisely that reason: you don’t worry about it, and you don’t try to suggest that you are worried about it. Because if some circuit judge sees one of your law clerks in the court room, or some circuit clerk knows that one of your law clerks in the court room, that suggests that maybe you’re afraid about the result. And I will tell you that circuit judges, like horses and children, can smell fear.

[Laughter]

PROFESSOR ALLEN: Any other questions?

PARTICIPANT 8: I’m a 3L, for a few more weeks. I had a question about yesterday’s news. And I apologize, because unfortunately, I missed the morning speakers. This is really for everyone, but I am particularly interested in the Poli Sci perspective that Professor Kasper might have, if his internet connection allows. I was just wondering to what degree you all think that ending the filibuster for SCOTUS nominations will make the nominees more political—more susceptible to the political process. Personally, I’ve been thinking about it and I’m kind of back and forth. Formal confirmation hearings are relatively new, anyway. But I’m interested in what you all think about it.

JUDGE JOHNSON: That’s a political question, not a judicial question.

[Laughter]

PARTICIPANT 8: My question is about the impact on the judges—justices that are nominated to the Supreme Court. I wonder if it will encourage federal circuit judges to author more politically charged opinions in the hopes that they will be picked for—by whatever party is in office at the time.

PROF. NEWMAN: Professor Kasper, did you hear that question?

PROF. ERIC KASPER⁸: Yes. Well, historically what we have with regards to the use of the filibuster—I mean, it's been relatively rare. It's only been something that's come up in the last half-century. It's only been employed successfully once, with Abe Fortas in 1968. And although we've seen a greater use of it, and we've seen the need for these cloture votes in some of the more recent nominations with Chief Justice—for Chief Justice Rehnquist when he was being elevated to that position, as well as with Justice Alito—I think it is really an open question as to whether this is going to have an impact or its going to change the nature of who is going to be appointed.

I mean, there is a possibility that we may see some more ideologically left- or right-of-center nominees because of that. But on the whole, because of its infrequent usage, I don't know that it's going to have a huge impact one way or the other. This will certainly make it easier to get nominees confirmed. But because we haven't seen much of that—be a problem historically, and in most cases historically the party in power in the presidency and the party in power in the Senate when they're the same, obviously that's when you are going to tend see the easiest position of getting a nominee confirmed.

I think we're going to continue to see what we have seen which is that it is going to be difficult for the President—or more difficult—to get a nominee through when the Senate is controlled by the other party. It's similar to what we saw last year. The impact of the filibuster on that, I think, is probably going to be relatively minor.

PROF. ALLEN: Any other questions?

8. Associate Professor, Department of Political Science, and Director, Center for Constitutional Studies, University of Wisconsin–Eau Claire; B.A., University of Wisconsin–Eau Claire, 2000; M.A., University of Wisconsin–Madison; J.D., University of Wisconsin–Madison, 2007; Ph.D., University of Wisconsin–Madison, 2007. Prof. Kasper participated via remote video connection from Chicago.

PARTICIPANT 9: I'm a 3L here. I invite the input of the entire panel for this question, but I'm particularly keen on Judge Mukasey. While I appreciate the necessity and importance of judicial independence, my question focuses on what happens when judges become too independent. What I mean by that is when judges become activists and use their position on the bench to make law and say what the law should be instead of what the law actually is. So, the question is, how do we address that?

JUDGE JOHNSON: What is your determination of "activist"? Because it usually is whose ox is gored. If the decision goes against you, you are an activist.

[Laughter].

JUDGE JOHNSON: Both Republican and Democrats, so I don't know what you mean by "activist."

PARTICIPANT 9: What I mean is—obviously you all know this—but the point of the judiciary is to say what the law is based on what it is, not on what the judge thinks the law should be. And so I define being an activist as a judge being in a position with a red pen and practically trying to change the law [Inaudible] that they want. I appreciate your opinion that both sides do it—I'm not trying to say that it is one-sided. What I'm saying is that there is no [Inaudible] reason for judges to take a red pen in their opinions to amend the laws that are in place.

JUDGE JOHNSON: Well, they call it "inferior courts." Anything lower than the Supreme Court must follow the law, whatever the law is. And following the law—if that makes you an activist, I guess, then at all times, all judges are activists. It's the Supreme Court who can—they have to follow the law too, but I guess they can change the law. I guess you could call *them* activists.

PARTICIPANT 10: Just a follow-up to that. I hear this term "activist judge" used a lot, and I don't know what that means, either. [Inaudible] if somebody could name one. Are any of y'all activists?

[Laughter]

PARTICIPANT 10: It's hard to tell on any of your colleagues. [Inaudible] I can tell from the look on your face, you're not.

JUDGE JOHNSON: Who, me?

[Laughter]

PARTICIPANT 10: We hear that a lot. What's your take on it?

JUDGE JOHNSON: I don't know. If you—

PARTICIPANT 10: An activist judge, my definition of it has always been that it's the losing party.

JUDGE JOHNSON: That's what I say—the losing party.

PARTICIPANT 10: So—but how does that affect you on a daily basis, writing your opinions? Are you concerned you are going to be labeled that, or [Inaudible]?

JUDGE JOHNSON: I have been called names all my whole life; there's no name that I haven't been called. Many of them unmentionable.

[Laughter]

PARTICIPANT 10: But none of them are true.

JUDGE JOHNSON: I wouldn't say that.

[Laughter]

PROF. NEWMAN: It does seem like a tough sell to get a sitting judge to rat on their colleagues. But I wonder if we can get our academics to weigh in on this. Has activism become more or less prevalent—if it exists?

PROF. JUSTIN WALKER⁹: I'll jump in just a little bit, and push back a little bit against a couple—maybe some of the assumptions in the two questions. One of the things the first questioner mentioned is that it seems like it's a recent phenomenon, activist judges. And then you asked for a kind of example of an activist judge. When I think of the most activist, the worst—one of the worst opinions in U.S. history is also one of the most activist opinions. The *Dred Scott* decision, 1857 or so, invalidated a statute that had been on the books for 37 years, the Missouri Compromise, based on an extremely aggressive reading, not of the text of the Constitution, but of some inferences that the Court may have arrived at for political reasons in order to achieve political ends.

So I'm not sure that the idea of activist judges, is—I agree it can be a problem. It certainly was a problem there. Not necessarily a recent problem. I think, though, I'd also push back a little bit on the notion that an activist judge is a judge who strikes down a statute as unconstitutional. Because judges have a choice-of-law decision to

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make when the Constitution says one thing and the statute says another. To side with the Constitution over a statute is not to be an activist; it's to make the correct choice of law that is required, because one is supreme to the other.

You also hear activism as being contrasted with being a kind of “minimalist” judge. And I think sometimes that can be abused, too. Someone can be a minimalist judge in a somewhat political, activist way. To give an example here, imagine that a judge is presented with whether a statute is constitutional or not. The judge concludes it's unconstitutional. I would suggest that if the judge just strikes down that statute, that is not an act of activism.

But what if the judge does this: what if the judge creatively interprets the statute in a way that changes the meaning of the statute but avoids a constitutional question? Is that judge being a minimalist? Well, I think the judge would say so because they are avoiding this big, antidemocratic, constitutional question; but I think when you start re-writing the meaning of a statute, that's acting in a legislative way, not in a judicial way. And that's a fairly activist approach.

So I think these terms, “activist,” “minimalist,” these can be kind of misinterpreted or thrown out, as Judge Johnson mentioned, in a way that's sometimes, you know, “You're wrong if you disagree with me, you're right if you agree with me.” I think—I say this from the cheap seats, as an amateur on a panel with a lot of people who have experience doing it—but, try to figure out what the Constitution means; try to figure out if the statute is inconsistent with that. If it is, strike down the statute. That doesn't make you an activist; that just makes you a good judge.

PARTICIPANT 10: So it isn't a current problem? Or is it just political?

PROF. WALKER: Is the problem—is activism?

PARTICIPANT 10: Do you see there are activist judges out there? It appears to me that a trial court federal judge, if he's an activist judge, the first thing he's going to get is he's going to get reversed. It just doesn't have—[Inaudible] it won't withstand appeal. I just, you know—is it a real problem or is it just political spin that you hear about in the last decade? I've heard it, I've just never seen anyone point to one and say, “This person is an activist judge.” Other than Scalia.

[Laughter]

PROF. WALKER: Let me give a couple reasons why it is something that is improving rather than getting worse. Then I'd invite anyone to disagree with me.

Someone mentioned earlier that you would never imagine a judge at a confirmation hearing admitting that if I see a law that I don't like I'm just going to do what I like. This is by hearsay, I never went back and read the transcripts: several decades ago, a judge who is very talented in many ways, Judge Pregerson out of the Ninth Circuit was asked a similar question at a confirmation hearing and again this is based on hearsay, he said, actually, if it was really, really, really, really, really bad, I wouldn't do what that statute says.

It is an inconceivable answer for a judge in today's textual environment to say. You know, don't file a slander suit against me if this isn't what he said in his confirmation hearing. Again, I haven't checked the record.

To the extent that existed before, I don't think you see that now. Here is another example, Justice Scalia in his book *A Matter of Interpretation* talks about a brief he once read back before textualism was as embraced as it is now. When it was more permissible for judges and you might call them activists to try to figure what the right policy is, what was Congress's purpose instead of looking at the text. He says this is what the brief said—because the legislative history is unclear, we are forced to turn to the text of the statute.

[Laughter]

PROF. WALKER: There has been a revolution since then. Justice Kagan has said to a degree we are all originalists, to a degree we are all textualists now. Now there's still a spectrum. Not everyone approaches everything the exactly same way. If you are concerned about judges ignoring texts and imposing their politics and their policy. I think it's less of a problem in 2017 than it was a generation ago. But, again, I'll be happy to invite disagreement.

PROF. ALLEN: You had a question.

PARTICIPANT 11: I'm a law school alum and current law clerk for a district court judge. My question is a little more specific on an issue. There have been a lot of changes to the Sentencing Guidelines and a lot of rulings on specific relief in the Sentencing Guidelines. [Inaudible] I'm curious if those sorts of change and flux in law allow you to have more independence in sentencing low or up in the Guidelines.

And how you address more generally when one section of the law is changing regularly—does it allow you more independence in your rulings or in your sentencing when you know those things can change by the time they reach the court of appeals?

JUDGE JOHNSON: I think that the Guidelines invite judges to sentence above or below the guidelines. They invite you. However, when you do that you must articulate your reasons for doing that, and your reasons for doing that must be consistent with the law and with the authority to do that.

JUDGE MUKASEY: You're also supposed to articulate reasons if you depart up or down. I think that you also have to consider the fact that the Guidelines, as originally crafted, were supposed to embody the collective experience of judges going back eons, and there's a certain amount of deference that's due to that. That said, you depart.

JUDGE PROCTOR: Yes. Judge Johnson, earlier today on his talk had some very true statements about why the Guidelines came into place in the first instance. I clerked on the Fourth Circuit in 1986–87. Judge Wilkins, who was the initial chair of the Sentencing, was gone basically the whole year drafting the Guidelines along with other judges and members of the Commission.

But before then, judges had unfettered discretion. I mean, it's real interesting to talk to our older judges who are pre-Guidelines judges. Because what would happen is they'd take a guilty plea, they'd go back into chambers, they'd bring back in the prosecutor and the defense attorney and maybe the probation officer. And they'd sit around and talk, and walk out and announce the sentencing decision right after the plea was taken. There was no pre-sentencing report unless the judge asked for one in advance of the guilty plea or it was a rare case where the judge decided to delay sentencing.

So with this unfettered discretion that judges had, it turns out we had sentencing disparities. Not only would a defendant with a similar criminal background and a similar offense conduct get a different sentence, perhaps, in Arkansas and Pennsylvania but maybe a difference sentence on the sixth floor of Hugo Black Court House in Birmingham and the seventh floor of Hugo Black Court House in Birmingham.

One of the factors in section 18 U.S.C. § 3553(a), the sentencing statute, is that we want to avoid unwarranted disparities in sentences involving similar defendants. The Guidelines are, I think, a very strong

attempt to do just that. Now, again, as it relates to independence, I don't think it's a surrender of judicial independence to acknowledge that the same Guidelines ought to control their sentencing so that we can have avoidance of unwarranted sentencing disparities. There are some judges pre-*Booker*, and even post-*Booker*, that were more antagonistic to the Guidelines than others.

I always—I like the system now, because it gives some sentencing discretion to judges, but as Judge Johnson said, it makes us articulate the reason why we are varying or departing—and there's many more variances than departures now. And it also, hopefully, starts us off on the same page because the Guidelines are just that—a starting point for sentencing. We try to make a determination about sentencing; at least we're all starting at the same place. And then the unique characteristics of a defendant or case might take over from there.

I think the Guidelines are very healthy. So I think it helps with judicial independence, it doesn't hurt it.

PARTICIPANT 12: That segues nicely into the decision the Supreme Court handed down this week that basically now gives you district judges the option, if you think a mandatory minimum, is enough of a penalty to impose basically, the mandatory minimum plus one day as a sentence rather than running them consecutively and potentially sentencing someone to sixty years, but would—what some people might consider to be—you know, a crime that doesn't warrant such a long punishment. How does—so I'm curious to know if the panel—the district judges on the panel think whether mandatory minimums have hamstrung you, more so than the Guidelines.

JUDGE JOHNSON: I have personally always been against mandatory minimums. That really ties a judge's hands. The mandatory minimums came in because Congress thought that judges were soft on crime, and crime was rising, and they wanted to punish the defendant.

Take for instance the disparity between sentencing with crack cocaine and powdered cocaine—there is a 100 to 1 differential. The sentence that you get for, say, 5 ounces of crack would be as great as 5 kilos, or 10 pounds, of powdered cocaine. And there was no reason for that, no logical reason I could think of, and I think the federal government was the only jurisdiction that differentiated between powdered cocaine and crack cocaine.

When I was on the Commission, we recommended that they equal the punishment for powdered and crack, or at least come down from the 100 to 1 ratio. And eventually they did come down. How much was it?

JUDGE PROCTOR: Substantially. It was by statute and by retroactive amendment to the Guidelines too.

JUDGE JOHNSON: Yes, but they did come down. It's not equal, but they did come down.

PARTICIPANT 13: I believe it's either 9 or 18 to 1.

JUDGE MUKASEY: I think it's 18 to 1, but the argument for any disparity at all was that crack—speaking up for the disparity—that crack was instantly addictive, whereas powdered cocaine was not. It was accompanied by enormous amounts of violence in its distribution, largely because of the instant addictive quality.

JUDGE JOHNSON: And the argument against it was the fact that to get crack cocaine, you would have the powdered cocaine. And, in fact, I remember cases coming in to me where a police officer would ask for an ounce of cocaine, and when the seller would come back with an ounce of cocaine, and the cop would say, "No, I wanted crack." And then the seller would go back and put a little—you know, do his thing to make the crack cocaine, which is easy to do. And that really increased the penalty, and then they would come to federal court. I'd throw it out.

JUDGE PROCTOR: I sat with the Eleventh Circuit a couple years ago, and we took up the propriety of the Sentencing Commission's delaying retroactivity by a year of Amendment 782 of the Sentencing Guidelines. I'm good friends with Bill Pryor on the Eleventh Circuit and Chuck Pryor on the Northern District of California—that's Justice Pryor's younger brother, who's a district judge in San Francisco. Both of them were then currently serving on the Commission. I relish the fact of reversing them. That's a joke.

But it was interesting just to see the briefing on the change that was made, the decision to delay it by a year to allow for processing of a retroactive application of the Amendment, and all that went into the Sentencing Commission's hearings and decisions about that. It was very impressive.

PROF. ALLEN: Any other questions?

PROF. NEWMAN: Or other panelists who want to weigh in?

PROF. WALSH¹⁰: Sure. Just to look at this from the other perspective, I remember being a young Assistant U.S. Attorney recently out of law school, and charging indictments and marveling to myself that we have created a system where a young, recent law school graduate who was given a job by one person, could make the decision on sentencing, when the alternative would be gentlemen like the ones that we have in front of us who were appointed by the President of the United States and vetted by the United States Senate.

Because that's what mandatory minimums do: they give the decision to the young version of me, as opposed to the experienced federal judges we have, and even as an AUSA, that's an uncomfortable decision that our society has made.

JUDGE MUKASEY: Just taking the dark side again—
[Laughter]

JUDGE MUKASEY: —the point of mandatory minimums is that sentencing has a legislative component and a legislature has a responsibility—Congress has a responsibility—to determine what maximums are, and if necessary—if Congress deems it necessary—to determine what minimums are.

The trouble, in my view, with the mandatory minimums is that they drive the Guidelines. You can't have a Guidelines computation that comes out lower than the mandatory minimum. That, I think, is the major flaw in the system. But so far as having mandatory minimums at all, I think legislatures have a responsibility for what kind of punishment people face for violating the laws that they pass, just as judges do. And, for that to express itself occasionally, in a mandatory minimum, I don't—isn't something I find offensive.

JUDGE CORRIGAN: And I understand that, but the problem with minimum mandatories is that one size doesn't fit all. I have imposed mandatory minimum sentences where I was convinced that if the 535 members of Congress were sitting in my courtroom they would say, "No way. No way you're giving that much time to this person, they don't deserve it." But that's what the law was, and that's what I

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had to give. It's just too much. It just—it doesn't take into account individual circumstances, and there's too many vagaries in it.

For example, one way to bust through a minimum mandatory is if you cooperate with the government, but the government gets to decide whether you've cooperated enough or not, and there can be all kinds of problems with that.

So, it's—I understand, of course I'm bound by them, and I follow them when I have to, but I really do think, as Judge Mukasey said, especially in a system where you have advisory Guidelines, to also have to then deal with minimum mandatories, which put a floor on that, and—it just, to me, very often it just isn't the right solution, but the law's the law. But as a matter of policy, I wish we had less of it.

JUDGE JOHNSON: Mandatory minimums is a good example of the right to do it, which Congress has the right to do, but is it the right thing to do? And I think there's an effort gradually to get away from it, at least some mandatory minimums. They have a provision called the "safety valve." When the defendant comes in and they proffer and they tell the truth, they can get a safety valve and they're not exposed to the mandatory minimum.

JUDGE MUKASEY: Also, there's a bill that's gained a lot of support in Congress—I don't know if it is going to pass or not—but that lowers mandatory minimums substantially, and I think properly. So, there's hope.

JUDGE PROCTOR: Judge Johnson, I've got a question for you. I've heard through the grapevine—

JUDGE JOHNSON: It's not true.

[Laughter]

JUDGE PROCTOR: —probably not—that those who have some influence on the sentencing commission in Congress have floated a proposal where Congress reduces or eliminates, reduces the number of mandatory minimums and judges agree to have a more rigorous guideline structure that they are required to follow. Take away some sentencing discretion on the Guidelines. Curious if you have any views on that, since you used to sit on the Sentencing Commission.

JUDGE JOHNSON: I haven't heard that, and if there was such an agreement I don't think it is binding on individual judges and I don't know whether they would go along with it or not. Because when you sentence an individual, you take that individual before you with all of

the aggravating factors and mitigating factors, so I don't think a blanket agreement would—I wouldn't be bound by it.

JUDGE PROCTOR: Right. Well, the context of this was an agreement that was legislative in purpose. Congress rolls—gives up on some of the mandatory minimums, but strengthens the Guidelines. They were soliciting some views of the judiciary and some others regarding something like that.

JUDGE JOHNSON: They've done that now?

JUDGE PROCTOR: Someone's asked me about that.

JUDGE JOHNSON: Nobody asked me about it.

[Laughter]

JUDGE PROCTOR: They might know your answer.

[Laughter]

JUDGE JOHNSON: I'd like to ask one question before we conclude, and I ask the floor. Judge Corrigan, when you had your security detail for the 45 days, did you get a bill from the Marshals?

JUDGE CORRIGAN: I heard I was going to, but I never did. So, I didn't get a bill.

JUDGE MUKASEY: Interestingly, I had a detail for quite a bit longer than that. I was given attributed income—that is a chart, attributed \$3 a day to every day that they took me back and forth to the courthouse, and we did a computation of the days I went back and forth to the courthouse, and I wrote a letter to the Administrative Office asking whether I had attributed income based on that, and the Constitution provided that a Federal judge was to receive a salary that was not to be diminished during his good behavior—did that mean that I was going to get driven to the courthouse for the rest of my life? I got no response.

[Laughter]

JUDGE JOHNSON: I've also had details like that and received a bill from, I don't know if it was the Marshals or the IRS, and I said, "Hell, no!"

[Laughter]

JUDGE JOHNSON: "If you want it, sue me." Haven't heard anything.

[Laughter]

PROF. NEWMAN: So, maybe one question to close on—and this goes out to the whole panel. But it seems that one more existential threat to the judiciary, and really to the entire governmental system, is

the breakdown in civil discourse. I think most would agree there has been a lot more discord, maybe in the last ten or so years, than in the past. Maybe not. But I'm wondering, what can we all, as judges and professors, do in our courtrooms, in our chambers, and in our classrooms to attempt to heal that divide, at least within our own profession?

JUDGE CORRIGAN: Well, I think we do try to hold lawyers and parties to a level of civility. I think that it's important because it is part of the temperature cooling that's necessary to have a civil justice system. It's kind of the whole reason we have the system is to resolve disputes in a calm, dispassionate way. So, I do think it is important. I think that judges sometimes, in their opinions, can get a little carried away. I've sometimes thought that if I had a lawyer who said something in a brief to me that a judge said in an opinion I probably would call him out on it.

So I think we have a role to play as well. But I think it's vitally important that we maintain that. Unfortunately now, with the social media and the emails that people send back and forth to each other, they say hateful things or they say things they shouldn't say, and then it gets attached to a pleading and the lawyer looks bad and the system looks bad. So, I think it's really something we need to be focused on. Because if we lose that, we're going to lose something really important.