

The American Law Institute and Bolch Judicial Institute Joint Podcast Episode:
Judges Under Siege: Threats, Disinformation, and the Decline of Public Trust in the Judiciary

**The below transcript of this podcast episode has been edited for clarity.
Please excuse typos due to inaudible passages or transcription errors.**

David Levi:

Hello and welcome to *Reasonably Speaking* and *Judgment Calls*, a joint podcast of the Bolch Judicial Institute and the American Law Institute. I'm David Levi, president of the American Law Institute, and the former director of the Bolch Judicial Institute. It seems that we are experiencing a surge or at least an unprecedented level of attacks on judges and courts. Some of these attacks threaten physical violence. Others are a more corrosive level of rhetoric than at least I have seen in a long time, coming from all parts of the political spectrum, the academy and the media.

To be sure, it is certainly fair to criticize the courts or individual judicial rulings, but to dismiss them wholesale as corrupt or illegitimate is, at least in my view, destructive of the rule of law. We have a wonderfully distinguished panel of judges and one other to discuss this troubling trend in American culture and society.

Nathan Hecht is the 27th chief justice of the state of Texas. He's been elected to the Supreme Court seven times, the first in 1988 as a justice, and then in 2014 and 2020 as chief justice. He's a member of the Council of the American Law Institute.

Bridget McCormack is president and CEO of the American Arbitration Association-International Center for Dispute Resolution. Until the end of 2022, she was the chief justice of the Michigan Supreme Court. She's a member of the Council of the American Law Institute.

Thomas Griffith served as a judge of the U.S. Court of Appeals for the D.C. Circuit from 2005 to 2020. He was appointed by President George W. Bush. He is a fellow of the Wheatley Institute at Brigham Young University, and special counsel at the law firm of Hunton Andrews Kurth.

Paul Grimm is the, I blush to say, David F. Levi professor of the practice of law and director of the Bolch Judicial Institute at Duke Law School. From 2012 until 2022, he served as a U.S. district judge in the U.S. District Court for the District of Maryland.

Suzanne Spaulding is a senior advisor for Homeland Security, and director of the Defending Democratic Institutions Project at the Center for Strategic and International Studies. She served as the undersecretary for the Department of Homeland Security from 2011 to 2017, where she led the National Protection and Programs Directorate, which is now called the Cybersecurity and Infrastructure Security Agency.

I propose to start by asking each one of you to briefly describe the situation as you see it. Then we'll turn to what you suggest we may be able to do about what you've just described. So starting with you, Chief Justice Hecht, how do you see it? You're in the state courts and that is the dominant court in our country.

Nathan Hecht:

Yes. Thanks, David, and thanks to the Bolch Judicial Institute and the ALI for highlighting this in this discussion that we'll have. I feel more vulnerable. I'm in my 43rd year on the bench in Texas, and the worry, the concern of threats against the judiciary just continues to grow. Here in Austin, about four or five years ago, one of our state district judge's trial judge was shot going home from a high school football game.

She was 40 days in the hospital and she recovered and she's still on the bench. The fellow that shot her was a litigant in her court; he was convicted in federal court and is in prison. Those kinds of episodes are all over the country. Judge Wilkinson in Maryland, Judge Romer in Wisconsin, Judge Salas in New Jersey, there are just a lot of stories about this.

Then of course, recently, threats against the justices on the Supreme Court have been alarming as well. So that's part of it, but a big part of it these days is concern about cyber threats. We had a cyber-attack on the appellate courts in Texas several years ago, a couple years ago on the trial courts in Dallas. But there's stories like that all around the country.

I've been president of the Conference of Chief Justices, and so I hear all these things from my colleagues and it's quite alarming. It's disruptive, but then we also worry about the threat of personal information from family court dockets, from criminal court dockets, and this is a whole new world we live in. When I started, you'd have to steal three-by-five cards. Now, you punch a button from someplace-maybe outside the country.

Then, on the attacks that are not physical, but nevertheless just as difficult, maybe even more, threats against the judiciary, against its legitimacy. My favorite story is that it was when President Trump several years ago referred to a ruling that he didn't like as being from an Obama judge. Chief Justice Roberts responded and said there's no such thing. That we're all trying to do the right thing according to our oaths. Senator Whitehouse, who I think was probably considering himself the opposite of President Trump, said, "As much as I dislike the president, he's right about this. Judges all take sides."

When that's all the public hears all the time in this polarized, political environment we're in, then it really affects us at a basic level. You really want to go into divorce court and worry that the judge who's sitting up there, is not your friend or is not on your side, or not on your lawyer's side?

It's one thing to think that decisions from the highest court in the land, but it gets very real to people when it undermines their confidence in the judiciary. So, all of these things contribute to a very difficult environment in which the judiciary functions. You said, David, maybe more so than you remember. It's certainly more than I remember.

David Levi :

Thank you. Bridget, how do you see it?

Bridget McCormack:

Well, I agree with everything Chief Justice Hecht just said. He spoke quite eloquently about the threats on a personal level to individual judicial officers, but the ongoing threats to the confidence in what courts do is deeply troubling to me. I sat on a state court like Chief Justice Hecht, and we run in statewide elections. Even though we run on a nonpartisan ballot, parties nominate us, and that means parties take an oversized role in telling people what they think we're going to be about. It may never match with what in fact we're about, but that's how the elections are discussed and advertised and talked about on TV where most people get their information.

I wish everybody was getting their information today from this podcast, David. But my guess is the folks that listen to the podcasts that the ALI and Bolch is putting out, are already pretty sophisticated thinkers on this topic. It's a lot of others that I'm hoping we can reach, because public confidence is the only currency courts have.

When the public starts to lose faith in courts and what they do, we don't have an army and we don't have money to back up what we do, so it's deeply concerning. I do think the polarization of the rest of everything, I don't know how to put it any bigger than that, has seeped into people's views of the judiciary and certainly the way the media talks about the judiciary.

I can't remember ever reading an editorial about a decision my former court made where it didn't describe which party nominated us after our name. Even if we didn't line up in a way that made that make sense, they still seemed to think that that's what the public wanted to know. Democratically nominated so-and-so wrote the opinion for the court, and we very rarely had opinions that lined up along party lines.

Still, that's the way folks talked about it. I think in the last few years it has intensified in ways that other polarization has. In large part, because we're hurtling into this future where information travels so quickly. Courts and judges don't have the tools, and often even the freedom, to defend what they do and why they do it. That's another complicating part of this story, but we have so many important other people on this call, I'm going to take a breath and let us hear from them. I could go on and on.

David Levi:

You've touched on some very important topics and we'll come back to them. But I think two things that you just said that really strike me, one is that the ecology of judging, if I can call it that, in a very divided society. It's really difficult. You didn't say this, but I think it's on all of our minds, is that the worst thing that could happen

would be for this divisiveness to seep into the judicial culture itself. That would be really a terrible thing. I don't think it has, at least not to any significant degree, but it's something we want to watch out for.

Then the second thing is just that people are getting their information in so many different ways now. And judges, let's face it, judges aren't experts in communications, certainly not in modern communication. They're pretty good when they have a quill in their hand, but how do they do with social media? I think we know the answer to that.

We'll shift jurisdictions here and we'll move to Tom, who was on what they sometimes call the second-highest court in the land.

Thomas Griffith:

Yeah. That was the phrase my mother loved, but no judge on the D.C. Circuit would ever use that. You always say, "Was that in the coach's poll or the sports writer's poll?" Anyway, I can congratulate you, David and Paul, and the Bolch Institute and ALI for putting this on. I don't want to be a Chicken Little, but I am. I can think of nothing that's more serious in our country today than the sustained attack on the judiciary that we see.

Like many of you, I was one of those folks that went to Eastern Europe after the fall of the wall. We were all involved in these rule of law building projects with reformers in former communist countries, and that was invigorating, exciting work. It's obviously incomplete work. But to be with those reformers and to see what they thought of the judiciary, the American judiciary. This was the crown jewel of American democracy.

We would go there with some sense of pride. No, we're not perfect. We had a lot of uncompleted projects in the United States, but our judiciary was something that we were rightly proud of. Now, in 2024, to see that that work of building confidence in the judiciary needs to be taking place right here, is really something I would never have predicted, and is quite stunning and quite disturbing.

We all know the examples, but I'm going to mention a couple of them. When the democratic leader of the United States Senate goes on the steps of the Supreme Court and threatens Justices Gorsuch and Kavanaugh because of what was coming down on the Dobbs decision. The Chief Justice immediately responded to that, that's just remarkable.

He just wasn't criticizing the decision—hopefully, we always live in a country where we'll criticize our decisions—but, to threaten them, “The whirlwind that will come, you won't know what hits you.” Maybe that's a rhetorical device, but it's a rhetorical device that shouldn't be used by responsible Americans. Sure enough, not tying a direct link between the two. But it wasn't long thereafter, then the assassination attempt was made on a justice of the Supreme Court on Justice Kavanaugh.

We all know this, this is awful. I did a little bit of homework before our call and checked in on my former colleagues on the D.C. Circuit, at least at the district court levels. There have been recently mailings of fake anthrax to two judges on the district court. There's been the swatting of two judges on the district court; repeated threatening calls and letters, some of which require investigation because they're so threatening.

Several of the judges have full-time marshal protection. I went to visit one a couple of months ago, and could only get to this judge's chambers when I made my way past two fully armed marshals, who accompanied that judge wherever that judge goes. This is outrageous. Now, I think we know some of the causes, some of the root causes here.

I'll pick on one that, David, you and I countered repeatedly in the time of our service on President Biden's commission on the Supreme Court, which was a great experience, by the way. There were 35 or so of us invested, studying the history of the debate over the Supreme Court in our nation's history. Yet the battle that I was fighting most often, maybe I shouldn't use a marshal analogy, was when my colleagues would say, "The Roberts court is illegitimate."

“Illegitimate.” This is language coming from professors and responsible public thought leaders saying the court was illegitimate. My response to that was typically, "Well, as far as I remember, each of them was nominated by a president, confirmed by Senate, appointed by a president. They took the oath of office. They're not illegitimate. You disagree with their rulings, but let's get rid of the language of illegitimacy. Let's get back to the language of, "I disagree vehemently, they're wrong about this." But when public intellectuals and thought leaders call into question the legitimacy of the court, that only creates the type of environment that leads to irresponsible people making threats.

David Levi:

Thank you, Tom. Paul, this has been one of your topics, and you've been one of the leaders in trying to deal with this issue.

Paul Grimm:

Everything that has been said so far, I think, has been absolutely spot on in terms of the problem that we have and the importance of the problem that we have. I had reason to look at the Administrative Office of the U.S. Courts' website. There's a policy statement that the judicial conference approved in 2021, that acknowledged that for the rule of law to survive, there must be public trust and confidence in the judiciary.

That is the key and central thing, is that when you combine that with the fact that the overwhelming majority of Americans, they don't really have any contact with the judicial system—the National Center for State Courts has done some polling on this and most of them don't—maybe they had a traffic ticket, maybe they had a domestic relations issue or a juvenile court matter, a very small number of them serve on juries, but the overwhelming majority of the Americans don't have much contact with the legal system. So, they get their information, where do they get it? Well, we know that civic education has declined in terms of a priority in education, and so they're getting their information from other sources. If you think about where do they get it?

If you go to TV or movies or books, the judges that you see are very seldom the ones who are fair and impartial, and working weekends and nights, and doing their very best. They're corrupt or they're tyrants or they fall asleep, and so where do they get that information? That's an important point that Justice McCormack was making. They're getting it increasingly from social media and the people they're getting it from, are not judicial scholars. They may not be well-intentioned, they may have an ulterior motive. And as a result of that, what they hear and what they hear from those who they may give credence to, becomes important. Judge Griffith absolutely was correct when he said that when you have elected leaders, which is a troubling phenomenon, it's coming from both sides of the political spectrum. You have Democratic public figures and elected officials, and Republican public figures and elected officials using that kind of language, "It's an illegitimate court. It's a corrupt judge. It is a kangaroo court." When those kinds of phrases are used, they then get picked up and amplified through social media. This is where people get their information.

As Marshall McLuhan, the Canadian communications guru from the '70s said, "The medium becomes the message." When the message you get is consistently negative, talks about illegitimacy, the point that is very important, as Justice McCormack said and Judge Griffith said – when a judge is criticized for the specific performance that they had in a particular case, they can't go on TV or write a letter to the editor and say, "This is why I ruled that way." They can't. So, what happens is that as you get more and more frequent criticisms from people who are elected officials and who are using these divisive, rhetorical flourishes for the purposes of vilifying the institution, and the judge's underlying bonafides in terms of their goals, then that has a corroding effect within the public.

Then on top of that, when you use language that is highly charged emotionally, then what happens is you get the number of threats that are made against the judiciary. Just in terms of credible threats that the U.S. Marshals Service has found credible enough to investigate. In 2019, there were 179 of those threats. This is a year, and by 2023, there were 457. It almost tripled.

The number of threats that are less pervasive, just attacks on the motives and the impartiality, are in the thousands. This is something that happens with regard to state court judges and also to the federal court judges. The problem that we have is—as more and more public figures attack the legitimacy of the judicial system and the motivation of judges, what that does is it then degrades the public confidence in the ability of the judiciary to be fair and impartial. They then believe that judges are politicians in robes, which they manifestly are not. The judges can't speak in contradiction to this. Then the barrier is lowered with allowing more and more people to criticize along the same lines.

This is a trend, which if it's not something that is taken seriously, and if we don't take measures to address it, becomes a death spiral. Because what happens is, as Justice McCormack said, we all know from the famous Cherokee Nation's case when the Supreme Court ruled that dispossession of the Cherokee Nation from the state of Georgia was a violation of the law, the Constitution. Andrew Jackson famously said or infamously said, "John Marshall has made his decision. Now let him enforce it." When you have a threat, and I know that we'll hear from

Suzanne Spaulding in just a second, and she is so well-versed in this. Is that when you start to delegitimize the validity of an institution, then people do not believe that the rulings of those institutions are determinative of the issues before them.

That's why out of 60 of the 61 cases that challenged the legitimacy of the 2020 election, you had state judges and federal judges, judges appointed by Republican chief executives and by Democratic chief executives, unanimously rule that there was no fraud in the election, and yet a third of the nation believes that there was. They do not accept as determinative the outcome of that.

When the public no longer accepts as determinative the outcome of a case that they may disagree with. Then the fundamental protection of the rule of law, which is essential to our democratic principles, is in serious jeopardy.

David Levi:

That's so well said. Suzanne, you've been way ahead of the curve on that. You've seen this as a national security issue. Tell us how you see the situation.

Suzanne Spaulding:

Thank you, Judge Levi. It's an honor to be part of this conversation with these wonderful jurists here, and Judge Grimm is exactly right. What I have focused on, is really how our adversaries see this as a serious weakness that they can exploit, that they believe—that's what I think is really important to understand here—that it's one of the most effective things they can do to weaken us as a nation, is to undermine the public's trust and confidence in our judiciary and in our justice system. They have been doing that. I have focused, in my time at the Center for Strategic and International Studies, primarily on Russian information operations designed to undermine the public's trust in democracy and in democratic institutions.

The evidence that we compiled of this ongoing information operation by our adversary, is presented in a report that you can find at CSIS.org called "Beyond the Ballot. How the Kremlin Works to Undermine the U.S. Justice System." It details instances of these trolls and bots in St. Petersburg, Russia at the Internet Research Agency, for example, getting involved in undermining trust all across the country.

One of the cases we highlight is in Twin Falls, Idaho, where they pushed lies designed to provoke outrage against the justice system. We see this repeated over and over again. Again, you can disagree about the impact that this might have. But I will say in response, that the billions of dollars we see politicians putting into online advertising, is a pretty good indication of how incredibly powerful it can be in affecting the political discourse in minds in our country.

I always start with, three really important points. One is that while our research focused on Russia, because Russia is the most active in this democracy undermining information war against us. Other countries, including China, are taking a page from the Kremlin's playbook. Of course, domestic voices, as has been discussed here, are very important.

The second is that these adversaries take advantage of weaknesses of our own making. They are picking up on legitimate grievances with our justice system. We all know the justice system is not perfect, but it is picking up on those weaknesses. Instead of characterizing these as problems with the system that need to be changed, reformed, addressed, instead as emblematic of an inherently and irrevocably corrupt and broken justice system.

My friends who are judicial reform advocates, I believe are patriots. They are trying, they are using criticism of the courts to try to make the courts better, to make our country stronger, but it is clear that that is not Putin's goal. That is not our adversary's goal, and often sadly, that is not some of the voices we hear domestically. That is not their goal.

As Judge Grimm said, one of the things that I am most concerned about right now and that I know is on Putin's radar, is how undermining the public's trust and the legitimacy, as has been discussed, of the courts, will impact the courts' ability to assist in the peaceful transition of power with respect to the 2024 election. We know it's going to be a close election. We know that there will be cases again coming in our courts, they're already coming through our courts. The inevitable collision of the election in our courts is going to be a huge challenge. Losing sides on the left and the right are going to be tempted to conclude that the court's decision against them was purely political.

This discussion about whether the court is legitimate does, I think, raise some serious concerns about whether the courts' decisions will be viewed as determinative. I think that's an issue that we really need to hit hard. Those are direct attacks on the courts and why I think they are so incredibly troubling, but there are also these indirect attacks that can lead to violence. It's not well understood that the individual who attacked, who went after Judge Salas, murdered her son and injured her husband, was part of this active community online. This anti-feminism, anti-women community online, including incels, which is "involuntarily celibate". Red pill. There are all these misogynistic communities online. Russia is a big promoter of these communities and amplifying these messages. These kinds of messages can and have led to violence against women, and with a particular focus on women judges. There are these ways in which it may not be a direct attack on the justice system, but it is attacks on women, and particularly women judges, that can lead to violence. As Judge Grimm said, we've seen how these attacks on the public's confidence in the courts can play out in violence in the real world. We saw the death threats against Judge Robart, who ruled first on what was called the Muslim ban. We saw it on January 6th in the attacks on the Capitol in the face of those 60 cases. Yes, I think this is a very serious concern and I do think it is a national security issue.

David Levi:

So we seem to be in a state of emergency. I think that would be a fair description of what I'm hearing. I'd be interested [to hear] if you have any reflections on how long you think this has been building? I'll tell you what I have in mind. I remember that when I was a judge, that Justice O'Connor was very concerned about this. As you know, she was very concerned about the low level of civic understanding of what the courts do in our system. She told me once, that she and some of the other justices had met with a then Speaker of the House, Tom DeLay, from Texas. At some point during lunch, DeLay leaned over and said to her, "Justice O'Connor, what you don't understand is that you and I are enemies."

She said to me, "Can you imagine that the Speaker of the House considers that a Supreme Court justice is his enemy?" It reminds you of what Lincoln said, "We must not be enemies, we must be friends." So, this isn't brand new, but it's worse. Anybody have thoughts on this, because the roots here seem to have had time to grow fairly deeply?

Thomas Griffith:

Yeah, let me pitch in. When people believe that judges are politicians in robes, it gives them cause to attack the legitimacy of the courts. So, at one level, judges need to be careful not to do that, right? They need to be careful to keep their oath. I had a recent experience that was quite remarkable for me. I had the opportunity to interview Justices Sotomayor and Barrett at the National Governors Association. We had 41 of the nation's governors there, and it was on this topic, on this topic of tell us how you work as a court, and it was a remarkable event. For an hour, they talked about the way the Supreme Court works, the collegiality, the transparency. The theme that they sounded again and again was, "We're not politicians. We're struggling with law." The reaction they got from the nation's governors, who are very political, was remarkable.

They got a standing ovation that was exuberant. It wasn't just a pro forma sort of thing, it was exuberant. I believe it's incumbent upon the judiciary to get out there and to tell people how we do our jobs. If the people could see how the judiciary really operates, their confidence in it would increase. I think it's actually incumbent upon the judiciary to be proactive in this. Obviously, you can't talk about individual cases, but just to let the public know how the judiciary goes about its work. I think it's incumbent upon state bar associations and lawyers everywhere to stand up for the judiciary and to insist that no, they're not politicians. This is what Justice Breyer was talking about for the last couple of years before he stepped down.

He wrote a lot of dissents. He wrote a lot of dissents, and yet he insisted, he insisted that what you were seeing at the Supreme Court was not partisan politics, it was wrangling over difficult issues of law. That message needs to be pressed, and I think it needs to be pressed by the judiciary.

Paul Grimm:

Could I jump in on those excellent comments, those observations? David, to answer your specific question, I think it's been building for probably at least a decade, but probably closer to 20 years. There are a lot of things

that contribute to that. In one of your very insightful *Judgment Calls*, previously you spoke to some judicial officers about what their thoughts were. Part of it stems back to the fact that confirmation hearings have become so rancorous. The questions being asked of candidates don't seem to do much with their qualifications, and their ability to be impartial and to follow the law. But rather it deals with aspects of their lives that has never been pried into before.

We're also a very highly divided country, and so everything seems to line up with half the country going one way and half the country going another way. It's been developing for a long time, the lack of public understanding and contact with the courts. The realization that social media has exploded and has amplified the ability to do this. All this has been developing for a long time, and that means it's not going to change overnight. I posit that there are two things we need to do—we need to be both reactive, and we need to be proactive. Reactively means, and to pick up on something that Judge Griffith just said that I agree with completely, is Canon 8 of the American Bar Association's Model Code for Professional Conduct, Comment 3 says that the bar associations, the lawyers, are obligated ethically to defend the judiciary and judges that have been unfairly attacked. I stress *unfairly attacked* because no one here is saying you can't criticize a decision or a court. It's just that you don't criticize and vilify; you say, "It was wrong and it's going to go through the appellate process, and we think it's going to be changed on appeal."

So, we have to respond. The problem is that there are 1,300 bar associations in the United States and there's no coordination. One of the things that we're doing at the Bolch Judicial Institute is we've convened the Defending the Judiciary project. I'm extremely proud to say that all of the major bar associations in the United States have agreed to participate on this. I've been asked to speak at the ABA national headquarters in August at their annual conference, the National Association of State Bar Presidents.

One is to get the bar involved in a way that responds quickly in a neutral, nonpartisan, factually accurate way when there are individual attacks against the judiciary that can be responded to on a nationwide basis in a coordinated way, and we're trying to develop a playbook to assist that.

The other thing is exactly what Judge Griffith said, and that is that we've got to be proactive. The judges have got to get out there and they've got to engage with the public. The state court judges do that, because by virtue of the fact that 30 or so states elect their judges, they are interacting with the public, and that's so important.

We've got to do two things. We've got to engage with the public in a way that does not deal with individual courts, but that opens the windows and the shutters to see how judges actually operate in ways that can then restore public confidence. Then, of course, we as judges have got to behave. It's not great, it's not fair maybe in some cosmic sense. But we do live in goldfish bowls and we have to be aware of that. We have to be able to make sure that as we express our opinions, that we do so in the most neutral and respectful fashion, even if we disagree. That we show our work. That we explain and that we engage with the public in appropriate ways to be able to help understand what the judiciary does. And that there be educational programs that we can do.

One of the initiatives that we're trying to do, is to talk to judges about this is what you can do. These are examples, civic ed examples that you can do. All of that, if it's done on a sustained, continuous basis, will help us to be able to repair these things. But we have to. Except for the fact that we waited too long to start, we can't just do this in a half-hearted way. We've got to be full-throated in our support of what has to be done.

David Levi:

Nathan, you've been working on this for a long time. What can we do?

Nathan Hecht:

We can't talk about our cases, we can't talk about our decisions. We probably can't counter engage in the political dialogue, but what we can do is make the place run better. Suzanne alluded to this a little bit, so did Tom, so did Paul, but we can improve the court system. Chief Justice Roberts said a couple of year-end messages ago, that federal judges need to engage in civics courses in the community.

Just get out there and talk about the importance of these things. And be seen as not talking about a case, but talking about the importance of the institution. On the state side, oh my goodness, we have so many initiatives that we use to try to show the integrity of the justice system. Improving mental health in the justice system, the

opioid crisis, bail reform, juvenile justice reform, fixing guardianships. Texas has billions of dollars in guardianships that aren't seen very well.

All of these things, they just get under people's skin. They give them a cause to say, "Well, and besides that, I don't like what the court is deciding," it just adds to that. Legal aid to the poor, again, is something that we can [point to] to say, "See there, the justice system is really trying to promote justice."

Chief Justice McCormack, she wrote the Bible on this in her *Yale Law Journal* article several years ago, *Staying Off the Sidelines: Judges as Agents for Justice System Reform*. It just lays out not only that we really need to do this, but how we can do it, why it's ethical to do it in very productive, positive steps. So, that's what the 30,000 state judges in the country are trying to do, to counter both the propaganda that Suzanne refers to and the political dialogue at home.

David Levi:

Bridget, Nathan gave you an opening there. What's your view?

Bridget McCormack:

I was thinking, "I'm so glad Nathan read that article." I think it was just Nathan and my dad that read it, so maybe publishing it in *The Yale Law Journal* was not the right place. I should have done 10 short snippets for TikTok and then maybe we'd get somewhere. I think my fellow panelists have covered all of the angles. I do think it is imperative for judges to engage in their communities. And whether that's their local community because they serve a local community, or they're the legal community because that's the place where most people will show up and listen to them because they're on a court that no one's heard of. Whatever it is, I think there's an awful lot judges can do, can talk about, to grow public confidence in how judges work, and what they're doing and what they're up to.

I've studied carefully all of the ethical rules and there's no reason why judges can't engage that way. I also wrote a piece a couple of years ago about how judges should be on social media and why they should be on social media for the same set of reasons. Again, published it in a law review, so probably nobody ever read it. I'm learning here just by talking out loud.

But I do think that if we can help courts do the business that they do, and here, I mean state courts, no offense to my federal judicial colleagues here on this call, but cases happen in state courts. 95-96 percent of cases criminal and civil happen in state courts. State courts have been underwater for a couple of decades and reliant on the political branches of government to fund them to get their heads above water, and that's complicated in this highly partisan moment, But, we should all care about it. Because if state courts can deliver clear, better justice and resources to the people in their communities who need them, that's the single best thing we can do to grow the public's confidence in courts and their work. There's just unlimited ideas for how to do that. We should probably schedule another hour, David, because I got a lot to say on that topic.

But I do think there is an awful lot of room to do some good in that particular way, and I, for one, would focus on that. If you figure out how to respond to the eviction docket crisis, the debt collection docket crisis in a way that everybody thinks is fair and understandable. They understand why the court is doing what it's doing, and the court explains it to them and it all makes sense. It works as well as everything else works on their iPhone, say, we could do an awful lot to move the public's view of courts from a not great place to a much higher place.

David Levi:

Why don't you expand on that a little bit because you and I have discussed this before? COVID was kind of a wake-up moment, or at least an opportunity, maybe the judges were awake. But just to make the transition to a more accessible court system, it took this outside emergency. But to their credit, the courts all around the country just embraced the opportunity to get people justice during a pandemic. The courthouses were shut, employees were working from home, judges were working from home, but the courts actually, marvelously really pivoted and were open.

People who'd never would've showed up in the past, all of a sudden because they could get onto a speakerphone or onto a Zoom, they were showing up. They didn't want to be evicted and they wanted to be heard. How can we build on this?

Bridget McCormack:

I've said a million times that the pandemic gave us an opportunity to figure out how to do things that served our communities better than we were before. It's very hard when you've done one thing one way for a couple of centuries, to start thinking about how to do it a different way. But we had to, and it was a great learning experience for all of us.

We learned some facts that I think are hard to turn away from. Like you said, David, people who might not have shown up if their hearing was in a courthouse because they had transportation trouble, because they had childcare issues. Because they were at a job for which they had no time off, but they could go to a break room and appear on their phone. Our default rates in our largely self-represented dockets, which is a lot of dockets in state court, went down significantly. At the same time, because we were doing business online, most state courts put that business online so people could watch those hearings on a YouTube channel, or in some cases a Facebook Live channel.

That too grew public confidence, because then people besides my dad could watch what was happening in our courts and that actually grew public confidence. To this day, I have sent a letter every time Congress has asked me about cameras in federal courts. I know some federal courts do allow it, but the U.S. Supreme Court doesn't, and I think it would help if people could see the way the court does business. I will say to my disappointment, you would've thought that the lessons we learned would've impacted how courts charted their paths forward. But, there are very few state courts who have made remote participation the norm in those dockets where we've learned that it made a difference. I don't know what to do with that. Again, I think it takes more time. Sometimes it takes new skills and therefore, it probably takes more money, so that again, puts state courts, in particular, in a tough position.

But I would hope that we would take those lessons and then move forward with them, instead of backward now that we have the chance.

David Levi:

Suzanne, what do you recommend to people that want to preserve the courts?

Suzanne Spaulding:

Yes. Well, it's great to hear these, again, jurists talking about the importance of the institution itself looking inward and determining what it can do better to enhance the public's trust in its independence and impartiality, which is really at the end of the day, what it comes down to. I think the emphasis on transparency is critically important. Too many Americans really just don't understand how the justice system works. If you take the most recent example of the conviction of the former president and the discussions online that I'm seeing around the jury and how that whole thing was rigged—a lack of understanding about the jury selection process and how that works.

I do think that there's a lot of emphasis out there now on getting people to understand the jury process and to serve on juries. I do think that's an important way of enhancing Americans' understanding. There is a playbook that we worked on with the National Center for State Courts for judges who are looking for advice and guidance on how to prepare to respond to information operations, to disinformation, to unjust criticism that undermines the public's trust in our judiciary, and that is available through the National Center for State Courts. It's really important to be ready in advance, because if you wait until the disinformation is underway, you're never going to catch up. I think generally civics is really important.

As you know, Judge Levi, we have launched Civics at Work to try to increase the civic knowledge and skills and engagement of our adults by reaching them through the workplace. I think understanding our aspirations for our justice system and our judiciary, and the ways in which it can be held accountable is really important.

I often cite Timothy Snyder, who is a Russian historian and commentator, who wrote an essay, *On Tyranny: 20 Lessons from the 20th Century*, and he talks about defending institutions. He says, "It's institutions that help us to preserve decency. They need our help as well. Do not speak of our institutions unless you make them yours by acting on their behalf. Institutions do not protect themselves. They fall one after the other, unless each is defended from the beginning, so choose an institution you care about." He says, "A court, a newspaper, a law, a labor

union, and take its side." I think it's really important that all of us, as Americans, understand how much we depend on the rule of law.

I think it's critical that particularly over the next few months, the voices are out there talking to the American public about the importance of preserving this social compact in which we've all agreed that we will find a court's, we will accept a court's decision as determinative. Whether we like the decision, whether we think the court is legitimate or not, and remind Americans about how important that is to them in their lives.

It's that small business owner, if you sue a vendor for breach of contract and win, but the vendor decides that they don't like that decision. They don't think that judge is fair and they're not going to abide by it. If you sue your landlord for failing to provide heat or water in your apartment and you win, but the landlord just decides they don't have to abide by that decision.

That this is important to every American and that we need to reaffirm this and why that is, why that is so important. So, I think there is a lot that we need to do over the long term to improve the institutions, but also over the short term to improve American understanding about how important this is.

David Levi:

I'd like to go back to Nathan. I'm struck by one thing, which is that judges and judiciaries may not have the most sophisticated communications capabilities. If you think about corporate America or the universities, they have people that are tremendously well-trained in dealing with mass media, and they're on top of the changes that have occurred. Whereas courts tend not to have funding for this sort of thing. Even Supreme Court justices seem to be acting on their own when they're dealing with a crisis. Crisis management is something that institutions need to be able to do, because we live in that kind of a world where there's a crisis it seems every other day. I'm wondering, how can we up our game here, and how would we do that?

Nathan Hecht:

The National Center for State Courts that we've mentioned several times is convinced of that, and not to put it too bluntly, but we need to brag more. We need to toot our own horns. When we do accomplish some of these things or make important changes, then there needs to be some public awareness of that. During COVID, we wrote an op-ed piece in *The New York Times* about how we are trying to handle the eviction crisis during the pandemic, and got lots and lots of calls about that saying, "Well, thank goodness that you're doing that." When we developed a program with Chief Justice Rush in Indiana to deal with the opioid crisis, we took it on tour. We got the surgeon general involved. We had press conferences. We tried to show people this is what we're doing on. Legal aid for the poor—that's just a constant PR message in lots of states, certainly in our state, but lots of other states focusing on here's how the justice system actually helped this veteran, this domestic violence victim, these eviction cases. We are not good communicators, but we can find them.

Judges are famously great conveners, and if we don't have the help we need, we can get it. We just need to recognize that that's a path that we need to take. The National Center and the Conference of Chief Justices is very committed to that.

David Levi:

What about on judicial misconduct? This is something that Paul mentioned. Misconduct varies a great deal. It can be inadvertent, for example, failing to disclose that a spouse had a share of stock in a company and the things like that that drive judges crazy. But when they fall down on this, it's a big deal. *The Wall Street Journal* will have an expose and it's very damaging.

Then there's what I would call real misconduct where judges simply are not behaving properly. Yet, it seems most systems don't have a very swift and sure way of dealing with these things, probably because of a concern about judicial independence, at least in the federal system. I can speak about this, it's very hard to dis-appoint a judge. There's impeachment, but that's not easily done.

Thomas Griffith:

David, there's no question that's a concern. The American public has to be convinced that there's not corruption in that sense. But I'd say my greatest concern is with the perception that judges are partisans in robes, and that one is

tougher to get at, but it has to start with judges not being partisans in robes. But, I think it also includes the need for people to have a better understanding of how the judiciary actually works. That, I think, has got to come from the judges ourselves ... got to open up and describe the process by which decisions are made. Now in my stump speech on this, I make a statement that sounds a little outlandish.

But it's true that in 15 years on the D.C. Circuit, I never once saw a colleague cast a vote that I thought was tainted by his or her partisan priors. We had plenty of disagreements about all sorts of issues, but I never thought that one of my colleagues was trying to stick it to Obama or win one for Bush.

I didn't think that way. Yet when I describe that particularly to students that I teach, they don't believe it. They just don't believe it. So, in my mind, that's the deepest problem is that we've got to be able to show that we're not just partisans in robes.

David Levi:

We're coming to the end of our time, and you're all so thoughtful about this. I'd just like to go around the Zoom room and see if you have any parting reflections? If there's one thing you hope might be a takeaway, I'll just go back in the same order that we've been in. Nathan?

Nathan Hecht:

Well, I'll just say we've got to do better. There's nothing more critical than this. The rule of law is just essential to our democracy and our republic. I would mention one other thing on physical violence—the U.S. Senate passed a bill just two weeks ago to fund more training and protection for state court judges. It's getting attention even in the halls of Congress that it's never had before. Very important.

Bridget McCormack:

I think having this conversation. Thanks for organizing it and thanks to all of my fellow panelists for being here. I do think the more conversations we can have about [the] seven or eight subtopics to the top line topic, is a step in the right direction.

Again, public confidence is the whole ballgame. If the public loses confidence, that is what the rule of law is about. It's just a set of ideas. The set of ideas depends on that confidence. I think it's an all-hands-on-deck moment, and I wish every judge would sign up for the next podcast that they get invited to on this topic. Let's talk about it.

Thomas Griffith:

I couldn't agree more. To me, it's a call to all lawyers in America. I really think this is your primary obligation right now. Whoever you are as a lawyer is to stand up for the American judiciary, warts and all, but to stand up from these sorts of attacks from politicians.

Paul Grimm:

I echo everything that's been said. I think that the one glimmer of hope now is that I think that there is a widespread recognition that this is the time that we have to act. It's very tempting sometimes to say, "Well, what can I do?" Each of the participants in this podcast has great ideas about what we can do.

If we continue to have this dialogue and each of us collectively and then individually coordinate to try to do these things, then we'll hopefully get the bandwagon going and it will generate its own initiative, and we can accomplish some things. But we have to accept as the basic premise that we've waited too long and we can't wait any longer.

Suzanne Spaulding:

I think it's the message that I hope folks will take from this excellent conversation is that we are not calling for a blind faith trust in the justice system, but an appreciation for the critical importance of respect for the rule of law in our judiciary. That just as we ask people to have confidence in democracy, not because its current implementation is perfect, which it certainly is not, but because of its capacity to change. That change and that

reform of the justice system, to live up to our aspirations, will only come about if we are the informed, engaged agents of that change.

We must engage in this effort. I think that frankly is the challenge of “The Star-Spangled Banner” that we sing, I sing at so many baseball games as a big fan. I'm always struck, it starts with the question, “Can you see the flag?” It ends with that same question, the battle's over, but they don't know who won. They're asking, “Does the flag still wave over the land of the free and the home of the brave?” We are the ones who have to ensure that the answer to that question is yes.

David Levi:

I can't thank all of you enough. Really, it was certainly a sobering discussion, but from one point of view, but also inspirational too, because you are such great people and you care so deeply about this topic, and all of you in your own way are working on it, and that is a source of at least of comfort and hope.

This has been a podcast of the Bolch Judicial Institute and The American Law Institute. I'm David Levi, thank you for joining us.