# Comments on Oral Argument in King v Burwell

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At yesterday's oral argument in King v. Burwell, the solicitor general made a surprisingly partisan quip about Congress. It caught many commenters' attention, including law professors [Michael Greve](http://www.libertylawsite.org/2015/03/05/obamacare-meets-rudy/) and [Josh Blackman](http://joshblackman.com/blog/2015/03/04/the-sg-should-not-have-said-well-this-congress-your-honor/). As the transcript reads:

JUSTICE SCALIA:  What about ­­ -- what about Congress?  You really think Congress is just going to sit there while -- ­­ while all of these disastrous consequences ensue. I mean, how often have we come out with a decision such as the -- ­­ you know, the bankruptcy court decision?  Congress adjusts, enacts a statute that -- that takes care of the problem. It happens all the time. Why is that not going to happen here?

GENERAL VERRILLI:  **Well, this Congress, Your Honor, I ­­ -- I --** ­­

(Laughter.)

GENERAL VERRILLI:  You know, I mean, of course, theoretically -- ­­ of course, theoretically they could.

That's quite a slap at Congress—the notion that the House and Senate are completely irrelevant at this point, completely incapable of legislating in the aftermath of King.

First of all, it's baseless: Congress could very well enact reforms, [as James Capretta and Yuval Levin note this week](http://www.weeklystandard.com/articles/be-prepared_867731.html?nopager=1). (They passed a Keystone XL bill, after all.)

But even more importantly, Solicitor General Verrilli's quip exemplifies the attitude that pervades the government's view of this case. As Greve [explains](http://www.libertylawsite.org/2015/03/05/obamacare-meets-rudy/), with characteristic flair:

In one single sentence, Mr. Solicitor General, you have just summed up your entire miserable theory of this case. We—you—the Court—must torture this misshapen statute until it confesses because we—you—must not return it to a Congress that has been, is, and forever will be a joke—but for a few blissful weeks back in 2010, when a bunch of accidentally elected Solons triumphed over the stupidity of the American voters and, after mature Madisonian deliberation, enacted a statute that none of them had ever read. That’s the government’s case; the rest is bells and whistles.

I'd add one further point. While it's a little underwhelming to see the administration pitching this line in Court, it is even more disconcerting to hear it coming from the Court itself.

And that is precisely what Justice Ginsburg has been saying -- repeatedly. Last month, she made headlines by [complaining](http://talkingpointsmemo.com/livewire/ginsburg-congress-not-equipped-anything) that "the current Congress is not equipped really to do anything ... Someday, we will go back to having the kind of legislature that we should, where members, whatever party they belong to, want to make the thing work and cooperate with each other to see that that will happen."

That wasn't the first time she bemoaned Congress. Last September, when Elle asked her, in [an extended interview](http://www.elle.com/culture/career-politics/interviews/a14788/supreme-court-justice-ruth-bader-ginsburg/), whether "the pendulum might swing back in a more progressive direction on women's rights in your lifetime," she answered, "I think it will, when we have a more functioning Congress." And a few weeks earlier, she [complained](http://gwtoday.gwu.edu/ruth-bader-ginsburg-law-needs-%E2%80%98statement-women%E2%80%99s-full-citizenship%E2%80%99) at a public event that, "sadly, the current Congress doesn’t pass anything."

I must admit, Justice Ginsburg's beef seems to be less with "Congress" or gridlock in general than with congressional Republicans -- at least, I don't recall her offering these complaints in, say, 2007 and 2008.

She wishes the Republicans would vote more like Democrats. As in 2013, for example: "Will Congress rise above partisan strife to amend the [Voting Rights Act]?" she [said at Stanford](http://news.stanford.edu/news/2013/september/ginsburg-law-talk-091813.html). "I wish I could predict yes. But it is not likely given the inability in the House to take bipartisan action." I've not yet found any speeches in which she blamed the Democratic-controlled Senate, let alone the president, for meeting House Republicans halfway.

Of course, I'd be glad for her to dispel such impressions. When the current Congress passes legislation, maybe she will complain about our "dysfunctional" White House that fails to "rise above partisan strife" and sign, say, comprehensive health care reform legislation, or a border security law. And it's not too late for her to complain about the president vetoing the Keystone XL bill. "Sadly," she might complain, "the current president doesn't sign anything."

Come to think of it, congressmen and presidents aren't the only ones who can "rise above partisan strife."

, and which I cannot accept.