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CHAPTER FIVE

Building Bridges across the Communications Gulf

APART FROM writing judicial opinions, interpreting statutes, and enacting legislation, most judges and legislators are uncertain about the appropriate means of communication between the branches. One would think that direct communication would be expected and routine—indeed an essential element of governing—as it is between members of the legislative and executive branches. But for judges and legislators, such contact, when it is undertaken at all, is generally done gingerly.

To be sure, many judges had been involved in political life before donning their robes and may know the senators who sponsored their nominations, but these connections dissipate as those legislators leave office. Still other judges had no such association with members of Congress. For almost all judges, however, and for legislators too, an awkward unease about communications regarding substantive matters of policy and process characterizes relations between the first and third branches.

In one sense, distance is a product of a mutually shared view between the branches about what is proper. But from another perspective, the lack of communication can at times contribute to what Judge Frank M. Coffin has called an "estrangement" that can be costly for both branches and for public policy in general.[1] At least for some legislators, judges are special pleaders, who despite lifetime security, complain about—indeed are preoccupied by—salary and perquisites. And for at least some judges, legislators are unmindful of the institutional well-being of the courts, passing laws that result in more cases without providing the necessary

resources. These perceptions only exacerbate tension and heighten the difficulty of those in both branches with particular responsibilities for court-Congress relations.

What follows is an examination of the reasons for the lack of communication; an inquiry into the Constitution, statutes, and codes of conduct; a discussion of standards guiding communication; and, in the effort to probe the opportunities for and limits of communication, an exploration of a variety of circumstances in which judges and legislators can interact to facilitate the functioning of each branch.[2]

Affecting without Communicating

Long after the Senate has exercised its power of advice and consent, the judiciary and legislature affect each other in many ways. Congress can influence the "administration of justice" through laws having to do with the structure, function, and well-being of the courts. It is Congress, after all, that creates judgeships, provides appropriations, determines court jurisdiction, sets judicial compensation, enacts criminal and civil laws, and passes legislation affecting the way courts manage cases. Congress has given the federal courts jurisdiction in legislation covering more than three hundred subjects—from matters of great moment to such earthy ones as the Egg Products Inspection Act, the Horse Protection Act, and the Standard (Apple) Barrel Act.[3] In the last quarter century alone, the legislative branch, through more than two hundred pieces of new or amended legislation, has contributed to the expansion of the federal judicial workload.[4] Other times, sometimes because of a lack of forethought, Congress leaves unaddressed issues that later fall to the courts to confront, including such basic questions as attorneys' fees, private rights of action, and exhaustion of remedies. The judiciary, in turn, can shape the course of legislation whenever it is called upon to interpret statutes and discern legislative intent. Indeed, courts that have had to struggle with legislative intent may have much to contribute as Congress determines whether and how to change the laws; they may even be able to spot problems and bring them to the legislature's attention. All that depends upon routinized communications.

Without easy interaction with the judiciary, Congress often does not have the information needed to consider the courts' perspectives and problems. Partly because of the lack of direct communications, Congress

often considers bills that explicitly add to the courts' duties without first consulting the judiciary. So it was when Congress began thinking about whether to vest the regional courts of appeals with jurisdiction over veterans' cases.[5] Ultimately, the Judicial Conference of the United States—the judiciary's principal policymaking arm concerned with the administration of the federal courts—did press its views, but Congress should have consulted the judicial branch at the outset.

Congress also passes laws, not specifically about judicial administration, that affect the courts' workload without much thought to their impact on the judiciary. Take, for example, the landmark Americans with Disabilities Act of 1990, which seeks to protect an estimated 43 million people. Among other things, the law requires that businesses and employers in the private and public sectors make "reasonable accommodations" for people with disabilities, if those measures are "readily achievable," and unless they would cause "undue" financial "burdens." Although Congress struggled to provide meaning in committee reports for those terms—"reasonable accommodation," "readily achievable," and "undue burden"—the range of circumstances is so wide that businesses and disability groups are uncertain as to what is precisely required. The affected parties will inevitably turn to the courts to resolve the issue. But in passing the law, Congress did not concern itself with the volume of litigation the legislation might produce and did not explicitly provide resources for the judiciary to handle such cases.

As the process by which Congress enacts laws has become murkier and more complicated, courts have had increasing difficulty weighing the various parts of the legislative record. At times, in the good faith effort to make sense of the problems before them, they may interpret statutes in ways that Congress did not intend. Not infrequently, legislators respond that courts have mangled legislative intent in ways that impose their views on society. Still others contend that Congress at times sidesteps controversial choices by passing the buck to the courts and then blames judges for rendering decisions that it forced upon them.

Certainly, some friction between the branches, based in part on differing perspectives, is inevitable and likely to persist. But better communications could overcome some of those misunderstandings. Just as concern would rise if Congress and the executive did not maintain ongoing contact, so the legislature and the judiciary should communicate about matters of mutual concern.

Sources of Uncertainty

To some degree, courts are hesitant to play a greater role because of constitutional prohibitions against rendering advisory opinions about proposed bills in advance of their passage and because of the need to avoid prejudging issues that might come before them. The perception is that the courts' legitimacy is enhanced to the extent that the judiciary is viewed as being aloof from the political process.

Many judges are apparently so conscious of the need to remain above the political fray that they are hesitant to get involved even in matters strictly confined to the operations of the courts. In one case, a U.S. District Court judge said it would be wrong for him to telephone a senator indicating that his court had a vacancy that needed to be filled.[6] Even with respect to nonadjudicatory measures, some having directly to do with the administration of justice, judges are concerned about congressional reaction to the tenor of the judiciary's input. The Judicial Conference, for example, was anxious about what kind of recommendation to make to Congress about severe problems resulting from the 30,000 asbestos cases in federal courts. Ultimately, the conference voted that Congress "consider" providing a national approach that would compensate present and future victims of illness caused by exposure to asbestos. The draft had used stronger language, repeatedly exhorting Congress to "enact" a legislative solution. But the final report diluted the language because some judges believed it improper for the judiciary to make specific suggestions to Congress, except on questions of court procedure.[7]

The uncertainty about what kinds of communications are proper extends to legislators as well; indeed, they sometimes differ among themselves. In one example, Senator Paul Simon, Democrat of Illinois, wrote to federal District Court Judge Harold H. Greene asking for his views about proposed legislation to remove the manufacturing restrictions on the Regional Bell Operating Companies. The senator approached Greene, "given your obvious expertise in this subject," as the judge who had presided over the AT&T antitrust case. Judge Greene responded that "in view of the possibility of further litigation on the manufacturing restriction paralleling in some respects the issues presently before the United States Senate, commenting on the bill could create the appearance of impropriety." However, he drew attention to pertinent parts of published

opinions and summarized the principal points in them in ways directly relevant to Senator Simon's concerns. Differing with Senator Simon, Senator John B. Breaux, Democrat of Louisiana, remarked: "I think it is highly unusual, and I think it is probably improper, in this Senator's opinion, to have the views of a judge on legislation that is pending before the Congress of the United States that affects decisions that he has rendered in the past." Echoing Breaux, Senator Ernest F. Hollings, Democrat of South Carolina, stated:

> It seems our distinguished colleague from Illinois, Senator Simon, had written Judge Greene for his opinion on this bill. Judge Greene responded in the first few lines by stating he would not express an opinion on the bill but [Greene] will write on for the next six pages giving a legal brief and argument against S. 173. It is totally uncalled for and inappropriate.[8]

The absence of shared understanding within the branches about proper communications may compound the difficulty of communications between them.

Searching for Guidance

The quest for ways to bridge the chasm between courts and Congress begins with written sources: the Constitution, statutes, and codes of conduct.

The Constitution offers few clues about the character of relations between Congress and the courts; it certainly says nothing directly about communications. Of some relevance is article 3, section 2, which holds that the "judicial power shall extend to all cases"—language that the judiciary came to interpret as limiting its role to adjudicating cases and barring such other roles as issuing advisory opinions. But, as historians Maeva Marcus and Emily Field Van Tassel have written, judges in the early years of the American experience undertook legislatively assigned duties that did not involve the decision of cases or subordinate them as jurists to a nonjudicial administrative hierarchy.[9] Legislators and judges in the new republic assumed that, following English precedent, government would make "further use . . . of the judges," as George Mason stated, outside the resolution of cases and controversies.[10] However, that assumption was gradually abandoned.

The justices of the Supreme Court cited the separation of powers doctrine in declining President George Washington's request for their

opinions about the construction of treaties. Although that doctrine might prohibit one branch from infringing upon the functions unique to another or being made to assume tasks that weaken it within the constitutional scheme, that does not mean that complete separation is mandated. After all, the Constitution created "separated institutions *sharing* powers," not separate institutions.[11]

Apart from constitutional doctrine, statutes might inhibit communications between the branches. One law prohibits federal officers and employees from using federal funds for lobbying activities. It provides:

> No part of the money appropriated by any enactment of Congress, shall, in the absence of express authorization by Congress be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress . . .; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress, *through the proper official channels*, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.[12]

Interpreting the "official channels" exception, the Department of Justice has concluded that judges should be permitted to use appropriated money to contact legislators and congressional committees for the purpose of conveying their views on legislation. The attorney general reasoned that it was inappropriate to apply the "proper official channels" provision to judges, who do not have direct superiors.[13] The comptroller general responded similarly to an inquiry from three U. S. senators, noting further that the appropriations restriction applied to "grass roots lobbying campaigns" and was not intended "to prohibit government officials, including Federal judges, from expressing their views on pending legislation."[14]

Another source that might be tapped in the effort to ascertain appropriate communications between judges and legislators is the Code of Conduct for United States Judges, prepared under the auspices of the U.S. Judicial Conference and growing out of the American Bar Association's Model Code of Conduct.[15] Any review of its provisions, however, highlights its limited utility in the context of judicial-legislative relations.

Canon 2 states that "a judge should avoid impropriety and the appearance of impropriety in all activities" without defining what consti-

tutes impropriety. But a commentary to canon 2A notes that "the test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired." Moreover, that same commentary indicates that "a judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."[16] The nature and circumstances of those restrictions, however, are not discussed.

In furtherance of impartiality, canon 3A(6) holds that "a judge should avoid public comment on the merits of a pending or impending action," with the qualification that "this proscription does not extend to public statements made in the course of the judge's official duties, to the explanation of court procedures, or to a scholarly presentation made for purposes of legal education."

Of particular relevance is canon 4, which maintains that "a judge may engage in extra-judicial activities to improve the law, the legal system, and the administration of justice." Under its terms,

> a judge, subject to the proper performance of judicial duties, may engage in the following law-related activities, if in doing so the judge does not cast reasonable doubt on the capacity to decide impartially any issue that may come before the judge. . . . A judge may appear at a public hearing before, or otherwise consult with, an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area. A judge acting pro se may also appear before or consult with such officials or bodies in a matter involving the judge or the judge's interest.

The commentary to canon 4 recognizes that "a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice," and that he or she should be "encouraged to do so" to the extent that time permits.[17] What is left unclear, however, is whether a judge should participate in activities having to do with substantive legal changes not directly related to the administrative and procedural aspects of running a court system. Nevertheless, the spirit of canon 4 is

to promote extrajudicial activities that facilitate the strengthening of the legal system.

Those activities, canon 5 cautions, should be regulated to minimize the risk of conflict with judicial duties. Thus, "a judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of the judge's office or interfere with the performance of the judge's judicial duties." When such an activity would "detract from the dignity of the judge's office or interfere with the performance of the judge's judicial duties" is not discussed.

Finally, as to extrajudicial appointments, canon 5(G) declares:

> A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice, unless appointment of a judge is required by Act of Congress. A judge should not, in any event, accept such an appointment if the judge's governmental duties would interfere with the performance of judicial duties or tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary.

This canon, while recognizing that a valuable service has been performed by judges appointed by the executive to undertake important extrajudicial assignments, seeks to discourage activities "that may prove to be controversial" or "that could interfere with the effectiveness and independence of the judiciary."

However much the canons may stimulate thinking about judicial conduct, they are of limited utility with respect to the concerns at hand. They do not expressly deal with judicial interaction with Congress, with the full range of circumstances in which judges and legislators interact, directly and indirectly. The canons do not consider how such variables as substance and form, conjoining in a multiplicity of ways, affect the propriety of communication.

At the very least, it can be said that the Constitution, statutes, and code of conduct do not require the gulf that separates the courts and Congress.

Judging the Propriety of Communications

If we are to encourage and routinize communications between the branches, it would be useful to devise guidelines governing exchanges.

These guidelines will necessarily be prudential, subjective, and open to disagreement, but at least a few benchmarks would seem unobjectionable. First and foremost, judicial-legislative communication should not impinge upon the prerogatives of either branch, consistent with constitutional values, and should leave unimpaired both branches' institutional integrity. It should honor the sanctity of the judicial process, with its ideals of independence, impartiality, and absence of partisanship. It should preserve the reputation for judicial competence and credibility. As a kind of negative benchmark, judges and legislators should subject to the strictest prudential scrutiny any contemplated communications that to a reasonable, informed person could appear to run counter to those norms.

We can best understand the opportunities for and limits of communication by considering these benchmarks in the context of actual circumstances in which the subject and form of the exchange relate to each other, weighing the costs and benefits of possible judicial involvement.

As to subject, communication could be about judicial administration or housekeeping or about general legislation concerned with the whole range of laws that the judiciary might be asked to interpret. It could be about specific cases, or about nonjudicial subjects. Communication could be about subjects peculiarly within the competence of the judiciary, or a matter about which the judiciary does not have exclusive competence, or a subject outside the judiciary's institutional competence.

As to form, a number of possible avenues for judicial expression exist, both direct and indirect. Direct communication would include legal opinions, judicial testimony at legislative hearings, and telephone conversations and personal visits between judges and legislators or their staffs. Typically, the Judicial Conference of the United States conveys the judiciary's position on legislation, following a statute that declares, "The Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation."[18] But that does not preclude individual judges from expressing their own views. Indirect communication, meant at least in some measure for congressional consumption, would include a judge's article in a law review, a speech before a professional group or university, or a response to a media inquiry. Other means of communication include the use of such surrogates as the American Bar Association.

Such communication could have certain benefits: first, it brings judicial perspective and experience to the particular matter; second, it allows

judges, like other persons, to present ideas that contribute to reasoned discussion about policy. Such involvement also could have certain costs: first, comment on litigable questions could taint the judge's decisionmaking; second, such comment may create the impression of prejudice among various publics about the particular judge's decisionmaking, or the work of the branch in general; third, and relatedly, it may lessen the legitimacy of the third branch to the extent that courts are viewed as immersing themselves in matters not thought to be part of the judiciary's domain; and fourth, it may give the judge, by virtue of position and title, a greater influence on policy than the judge's actual expertise or personal knowledge justifies.[19]

Whether interaction is deemed prudential and whether it satisfies the criteria outlined above will likely depend upon the confluence of the variables of subject and form, taking into account the costs and benefits of judicial input.

These variables may relate to each other in a variety of ways, leading to different determinations about the advisability of the judicial communication. For instance, a judge may have competence as to the subject, but the form may present various difficulties. Consider the situation, to be discussed later at greater length, in which a judge testifies before a congressional committee about funds needed to implement a judicially imposed remedy. Among the possible dangers are the possibility that the judge will have to make commitments or bargains that run counter to the norms of the judicial process; that the judge will prejudge issues that might ultimately come before the court; or that legislators will take offense at the unwillingness of a judge to make commitments or to prejudge issues. In determining whether to appear before a congressional committee, if those dangers exist, a judge must ascertain whether such direct communication is essential or whether other means could be devised to convey the same message, either separately or in combination with other means—for example, through surrogates or law review articles.

To be sure, some things may be lost without direct communication, for example, the learning that comes from face-to-face contact. The hope is that some of the problems may lessen over time as each side reaches some understanding about the kinds of questions that are appropriate, thereby reducing judicial concerns about the dangers of making improper commitments or prejudging issues.

It is in the context of those actual circumstances in which judges and

legislators interact that the opportunities for and limits of communication can best be understood. What follows is an exploration of hypothetical examples of communication about judicial administration, cases, statutes, extrajudicial communications, congressional communication with the judiciary, conduits of communication, and promoting ongoing exchanges. In this discussion, I draw upon workshops of judges and legislators that I have conducted across the country, as well as a Governance Institute exercise, developed by Russell Wheeler and A. Leo Levin.

Judicial Administration

Because it concerns matters directly affecting the structure, function, and well-being of the courts, judicial administration—which includes such matters as the number of judgeships, salaries, appropriations for courthouses, jurisdiction of the courts, the rules of evidence, civil procedure and criminal procedure—is a domain in which the third branch has special competence.[20] When judicial involvement does not bear upon the courts' adjudicative functions, it does not rub against any of the traditional concerns—of prejudging issues or rendering advisory opinions—that might bar such communication. The judiciary can best represent its own interests before Congress on such matters. It is not simply that the courts and Congress alike would benefit from such input; it is also that the absence of judicial input in the legislative process would deprive Congress of the information necessary for its deliberations.

As Chief Justice William H. Rehnquist noted in his 1994 year-end report: "Judicial comment and proposals with respect to what might loosely be called 'wages, hours, and working conditions' seem obviously appropriate. Judges, being human, have a natural desire to see that their compensation is not eroded by inflation, and that the purchasing power of their salaries therefore keeps abreast of rising prices."[21]

Chief Judge Richard S. Arnold of the U.S. Court of Appeals for the Eighth Circuit—the widely respected long-time chair of the Budget Committee of the Judicial Conference—has reported that he has found the members of the appropriations subcommittees before whom he presents the budget request of the federal courts to be "both solicitous and knowledgeable about the administration of justice," and that subcommittee staff "are sympathetic to the courts' needs, knowledgeable about our operations, and properly inquisitive as to opportunities to save the taxpayers' money."[22]

As to justifying requests for increased resources, the chief justice noted that "the Administrative Office of the United States Courts has for some time collected statistics about increased docketings in various courts, and the Judicial Conference uses these statistics when submitting their requests to Congress for the creation of additional judgeships."[23]

The chief justice aptly observed that with regard to "largely procedural matters, the Judicial Conference has felt free to make its views known to Congress because of the experience acquired by judges in the administration of established procedures which might not be similarly available to members of Congress." Thus the Judicial Conference made available to Congress its recommendations about the review of state convictions by federal habeas corpus at a time when Congress was considering legislative changes. In still another example, the Judicial Conference opposed some of the mandatory minimum sentences that Congress proposed in crime legislation, taking advantage of judicial experience in sentencing.[24]

Third branch communication about judicial administration is almost certain to occur in nonadjudicative settings that are appropriate modes of expression: testimony at hearings, speeches, law review articles, and commissions concerned with the administration of justice. The judiciary should not feel constrained about initiating legislative proposals, given that the Judicial Conference is statutorily required to make recommendations to Congress about judicial work.

Interbranch interaction confined to matters about the administration of the federal courts would thus appear to satisfy criteria for communication. At times, however, proposed legislation cannot be neatly categorized; it may not be specifically concerned with the operations of the courts, although it may have important potential effects on the judiciary. For example, Congress could federalize particular crimes by expanding federal jurisdiction into areas that had been previously the domain of state courts enforcing state laws, or it could consider profound health care reforms. In both cases, the workload of the courts could increase substantially. Although Congress has the final word as to policy direction, the courts have a legitimate role in offering input about the effects of the proposed legislation on their operations and resources. Thus, when the Clinton administration's ambitious health care proposal was under consideration, the Judicial Conference appropriately advised Congress about the judicial consequences of the bill.[25] In its standard formulation, the conference states that questions about whether to enact legislation in a particular area are matters of legislative policy properly left to Con-

gress; however, the legislative branch should be aware, were it to pass such measures, that additional resources for the courts should be considered to handle consequent litigation.

The line between offering views about the effects of proposed legislation on the courts and on the merits of the measure is not always easily drawn; at times, the difficulty in drawing the line is unavoidable. An example involves the debate over the line item veto, which Congress enacted and the president signed into law in April 1996. In testimony before a joint hearing of the Senate Governmental Affairs Committee and the House Committee on Government Reform and Oversight, the chair of the Judicial Conference's Executive Committee, Gilbert S. Merritt (then chief judge of the U.S. Court of Appeals for the Sixth Circuit), stated that the line item veto authority that includes the judicial branch is a "serious threat to the even-handed administration of justice."[26] On behalf of the Judicial Conference, its secretary, Leonidas Ralph Mecham, indicated: "The Judiciary believes there may be constitutional implications if the President is given independent authority to make line-item vetoes of its appropriations acts. The doctrine of separation of powers recognizes the vital importance of protecting the Judiciary against interference from any President."[27] If the statement came close to offering an advisory opinion to the Congress, the Judicial Conference most certainly thought that the matter compelled such input.

What of the circumstance in which a federal judge, perhaps at a congressional hearing, is asked to offer views about a subject affecting not only the administration of federal courts but other institutions as well?

Some hypothetical examples illustrate the question. Diversity cases are suits between citizens of different states; a lively debate exists as to whether state, rather than federal, courts should handle such suits. It is undeniable that federal judges have expertise about the effect of diversity cases on their workload and on the administration of federal courts. They can help legislative consideration by providing their experience-based views as to whether diversity jurisdiction should be retained, modified, or abolished. Suppose that a judge testifies in support of a bill that would shift jurisdiction to state courts and goes on to say that Congress should find ways to increase federal revenues, perhaps through more aggressive tax collection, to provide compensatory support to state courts so that they can handle the increased jurisdiction. To argue in support of shifts of diversity jurisdiction will inevitably raise questions about the

effects of those changes in those courts. If given the choice, federal judges might prefer not to comment on the operation of the state courts, leaving it to state court judges to address those issues. But it would be unrealistic to assume that legislators would not raise the matter since the questions of whether to shift diversity cases and whether state courts are prepared to assume those cases are difficult to separate.

In this situation, the issue for federal judges is whether the integrity of the federal judiciary would be affected were they to address matters not particularly within their expertise as a judge. A separate question is whether the federal judges should consult with state judges and attempt to represent that perspective. Perhaps the federal judges should make every effort to consult with the state judiciary, and while not representing its views, present them to the extent they are known. Thus a federal judge might say that "it is my understanding, based on conversation with my colleagues in the state court systems, that . . . ."

Although it is no doubt proper for federal judges to discuss federal judicial administration, they must be attentive to the risks of crossing the line beyond which the judiciary has institutional competence. For example, although it would be appropriate for a judge who is discussing the administration of federal courts to project the costs of additional resources required to implement a federal judicial function (on the basis of figures supplied by the Administrative Office and the Judicial Conference leadership), the judiciary should be wary of advancing proposals about the means by which such funds should be secured. How to secure revenues is part of a complicated effort in which Congress assesses the full panoply of national needs, purposes, and programs; it is beyond the competence of the judiciary to make such determinations.

I have defined federal judicial administration in terms of the care and feeding of the federal courts. Some might argue that judicial administration also has to do with determinations about who should be the judges. In one circumstance, a congressional committee formally solicits a judge's view about the fitness of a particular judicial nominee. How should a judge respond? Quite obviously, any such inquiry requires a balancing of interests. On the one hand, having had experience on the bench, a judge could offer some insights about whether the candidate would be an appropriate choice. On the other hand, some considerations, mindful of the institutional integrity of the judiciary, would caution against such input: for example, the risk that judges will be perceived as politically self-interested actors, seeking to perpetuate a particular judicial perspec-

tive by lobbying for or against a particular appointment; or the problem that a judge who opposes the nominee will have difficulty maintaining amicable relations with the candidate if he or she is confirmed. In deciding whether to make his or her views known, the judge might determine whether other responsible individuals or groups are as equipped to provide the same information or perspective, for instance, members of the bar, professional colleagues, and clients.

In another circumstance, a congressional committee or senator, considering the elevation of a district court judge to the court of appeals, asks the chief judge of the district court for an evaluation. Although the same considerations would apply as in the previous scenario, the situation is different in that a chief judge would have relevant views about such factual, objective matters as to whether the prospective nominee disposes of his or her cases in a timely manner.

A third circumstance is one in which a sitting judge initiates contact with a senator or congressional committee to offer views about a prospective candidate. In this situation, the considerations arguing against such input are magnified, particularly the risk that the judge will be perceived as attempting to influence the legislature. The possibility of legislative backlash underscores the danger of such a step. Prudence would suggest that if a judge is to provide views about a nominee, then it should be done, if at all, at the request of legislators.

Cases

Apart from judicial administration, judges and judicial nominees might be asked about specific cases: those still before the court, those before courts in other jurisdictions, and those already decided. The problems faced by judicial nominees were discussed in chapter 2; the concern here will be with issues confronting sitting judges. The stricture against prejudgment prohibits a judge's commenting on a pending case. In some situations, the legislative concern might have more to do with the remedy redressing the harm—for example, restructuring prisons, schools, or mental health facilities—than with the judicial ruling as to liability itself. As such, the legislative inquiry or judicial communication might relate to an ongoing aspect of the case. Consider the following example, adapted from the Governance Institute exercise: "A judge has jurisdiction over a civil rights suit brought on behalf of prisoners in a correctional facility. The case is in the remedial stage. The judge is asked to testify before a

legislative appropriations subcommittee that is considering a bill to provide grants to correctional departments to fund capital improvements in the penal institutions. The judge is asked to discuss the types of grant categories that would be most beneficial."

On the one hand, a judge who has devoted much time to consideration of the problem may have much to say about remedies. On the other hand, the case is ongoing. The judge risks involvement in what could effectively become a bargaining session with legislators who may differ with the shape of the court's remedy. If a judge offers views about legislation bearing upon remedies of the sort the court promulgated, it is not unreasonable to assume that some legislators might raise questions about the judicial remedy. Once again, the judge must exercise prudence as to whether to testify; he or she must determine whether the costs of not testifying outweigh the benefits of testifying. Part of this examination involves a determination as to whether others might advance the same points as the judge with the same effect. For instance, it may be that the special master in the case could set forth the same kinds of arguments as effectively, in ways that do not place the court in an awkward position if the judge were to testify.

Statutory Drafting, Interpretation, and Revision

As was explored earlier, communications between the courts and Congress could have to do with statutory decisions that raise issues of interest to the legislature. As Congress revises a law, a judge who has wrestled with it might wish to contribute views about technical difficulties in the statute, perhaps through testimony.[28] Consider this example: Congress is revising the Clean Air Act, and a judge has decided several cases having to do with the act. The judge could make a contribution to the legislative deliberation by identifying problems of grammar and gaps in sections having to do with emission standards. However, it would not be prudent for the judge to offer substantive judgments about what the emissions standards should be. A judge who does the latter becomes a policy advocate in an area removed from judicial administration, in ways that arguably go beyond the judicial function.

As Congress considers how to improve drafting so as to better signal its meaning to the courts, judicial testimony about how judges make use of the legislative work product could be mutually beneficial. Indeed, in at least two instances, Congress has availed itself of that opportunity,

in hearings chaired by Robert W. Kastenmeier and Eleanor Holmes Norton.[29]

Communication on Nonjudicial Subjects

Judges come to the bench with a variety of professional experiences—in government, business, academia, and law—as well as personal interests beyond the courtroom. They share with all Americans an interest in the affairs of the country. Judge Deanell Reece Tacha, long active in a variety of community and professional activities, commented: "I am convinced that I am a better judge because I am involved in educational institutions, civic clubs, philanthropic organizations, and professional associations. I derive great benefit from these experiences and I try, in some small measure, to bring to their deliberations the perspective of the law as a backdrop for an ordered society."[30]

Do judges also share the right to make the legislature aware of their views? The nub of the matter is whether judges are restricted from or limited in communicating with the legislature about extrajudicial matters—something which they could unquestionably do but for their role.[31]

On the one hand, a judge who is particularly knowledgeable about a subject could add much to the legislative discussion; to prohibit such input could deprive the legislature of a useful perspective. According to this view, judges should be encouraged to become involved in the life of their community in ways that do not conflict with their judicial responsibilities. On the other hand, the danger exists that no matter how hard individual judges may try to shed their robes, the public will perceive them as presenting their own views not as private citizens but as members of the third branch; indeed, the issue may gain some prominence precisely because a judge has become involved. If so, the judiciary itself risks becoming implicated. Moreover, the institutional health of the judiciary may suffer if a judge is perceived as using his public position for private ends. Finally, a judge who testifies might have to recuse himself from matters that come before his court.

As a judge balances these considerations, a variety of factors might affect his calculus. First, a judge must determine whether it can be made clear that he is speaking as a private citizen, not as a federal judge. In a world where appearances are as important as reality, the judge should be certain that the institution of the judiciary is not perceived as taking a position if he communicates with the legislature. Second, the judge

should ascertain whether he has such an obvious claim to speak to the issue that no one would question his competence. Third, the judge should determine whether he is realizing any benefit other than that which is common to everyone. Fourth, a judge might assess the extent of possible controversy surrounding the subject in question.

Consider the following range of possibilities: a judge who is an avid archaeologist would like to testify before a congressional committee assessing legislation to regulate private digging on privately owned lands; a judge who is a committed environmentalist would like to discuss legislation that would declare a stretch of land a national wilderness; a judge who is an amateur marksman would like to testify about gun control legislation; a judge who served as assistant secretary of state for Latin American affairs wishes to talk about appropriate levels of foreign aid. Quite obviously, some of these subjects about which a judge might want to testify are more controversial than others; some are so visible that the risks for the judiciary might be increased if the public failed to understand that the judge was speaking in his capacity as private citizen. What is required of a judge is prudence, a sensitivity to perceptions.

Another factor that might affect the judge's thinking is whether another branch of government requests his appearance before a congressional committee or service on a special commission. Where another branch initiates the judge's input, then the danger that a judge or the judiciary will appear self-serving could be diminished. One could certainly conceive of extraordinary circumstances in which the presence of a nationally respected judicial figure might be important, for example, in the wake of a national tragedy; such was the situation when President Johnson asked Chief Justice Earl Warren to head a special commission investigating the death of John F. Kennedy.

Congressional Communication with the Judiciary

Communication, as Representative Kastenmeier observed, is a "two-way street."[32] Legislators should be able to convey their views to the judiciary, consistent with the foregoing criteria and discussion. An important question is how to do so. Are there ways beyond such formal mechanisms as the enactment of authorizing legislation, appropriations, committee reports, oversight, and exchanges at hearings for legislators to communicate with judges? Legislators can, of course, make speeches in Congress, which the judiciary might monitor. But that forum does not

involve the interactive communication that fosters mutual understanding. One way the judiciary facilitates such communication is to have key legislators address the Judicial Conference or circuit judicial conferences or for various committees of the Judicial Conference to invite legislators to offer their views about legislative matters at committee meetings.

One illustration of an effort to further legislative-judicial discussion about proposed legislation involved the civil justice system. Senator Joseph R. Biden Jr., then chair of the Senate Judiciary Committtee, directed his staff to meet regularly with a special subcommittee of the Judicial Conference Executive Committee to "negotiate with the Judicial Conference in general and with Judge Peckham's task force [the special subcommittee] in particular," to fashion civil justice legislation.[33]

A striking example of a congressional effort to secure information about virtually every facet of the operations of the judiciary was a questionnaire sent by Senator Charles E. Grassley to all circuit and district court judges in January 1996. Amid some initial judicial concerns that the survey "could amount to an unwarranted and ill-considered effort to micro-manage the work of the federal judiciary," Senator Grassley stated that the "survey was conducted in an attempt to directly communicate with, and elicit input from, the judiciary in order to better understand the needs of the federal judiciary, as well as to find cost efficiencies within the federal judicial system."[34] Upon release of the appellate survey, the director of the Administrative Office of the U.S. Courts termed it a "constructive contribution."[35]

Conduits of Communication

In considering interaction between courts and Congress, the question arises as to the conduit of communication. One such mechanism is the twenty-seven-member Judicial Conference, the arm of the judiciary that makes policy concerning the administration of the courts. The Judicial Conference meets twice a year and, among its tasks, can make recommendations to Congress on matters affecting the courts. The chief justice presides over the conference, which consists of the chief judges of the courts of appeals, one district judge from each circuit, and the chief judge of the U.S. Court of International Trade. The conference is further organized into more than twenty conference committees with jurisdiction over the full range of matters relating to the administration of justice.[36] Because the biannual schedule does not permit it to monitor legislative

developments on a daily basis, the conference relies upon an executive committee and the Administrative Office of the U.S. Courts, whose Office of Legislative Affairs is charged with monitoring legislative developments and facilitating the passage of the conference's proposals. In addition, the Federal Judicial Center undertakes studies in such areas as rules changes, court structure, and judicial attitudes on administration of issues that are important to legislators and congressional committees.[37]

The Judicial Conference comments on much legislation referred to it. Through its committee structure, the conference develops legislative recommendations. The chairs and other members of these committees, as well as the administrative office staff, testify before congressional committees and otherwise provide information to the legislative branch.

The executive committee suggests the agenda for Judicial Conference meetings and from time to time handles problems as they emerge between such gatherings. The chairs of the conference committees often represent the judiciary on the Hill. A useful step would be for members of the executive committee and relevant committee chairs to meet on a regular basis with the bipartisan congressional leadership and the chairs and ranking members of the appropriations and judiciary committees.

Beyond the formal structures of the judiciary, can individual judges offer their views to Congress, independently of the Judicial Conference or other entities or even in opposition to the Judicial Conference? Some in the legislative branch would prefer that the judiciary speak with one voice. As the conference's long-range plan recommended, "The officially adopted policies of the Judicial Conference represent the view of the judicial branch on all matters and should be respected as such by the Administrative Office and the Federal Judicial Center when dealing with members of Congress or the executive branch."[38] In this view, the effectiveness of the judiciary is diminished if all one thousand or more judges feel free to say what they want to Congress. On the other hand, is it not unrealistic to expect a highly decentralized group of life-tenured constitutional officers to conform to any formal prohibitions against communicating with the legislative branch?

When the Judicial Conference makes a recommendation about proposed legislation, it has special weight. As a tactical matter, it makes sense for a judge who wishes to advance a legislative proposal to first secure the support of the Judicial Conference. Certainly, institutional comity suggests such a course whenever possible. A judge who seeks conference endorsement generally submits the proposal to the director of

the Administrative Office, who refers it to the appropriate committee. When such a recommendation has the support of a court or circuit council, it may receive quicker scrutiny. Along the way, the idea might be sidelined. In some circumstances, the conference might choose not to take a position on a particular piece of legislation; in others, it might take one contrary to that of individual judges. In these situations, the judge who wishes to communicate his or her views to Congress may weigh a variety of factors, including the role of the Judicial Conference and the importance he or she attaches to the matter. Whether the judge succeeds will depend on the nature of the idea, his or her prestige, and legislative contacts.

In the final analysis, the federal judiciary is not a monolith; no institution within it can speak authoritatively for every judge. Because the Judicial Conference has special force, any judge who charts a course different from that body is not likely to do so lightly. But the Judicial Conference cannot compel adherence to its views with respect to legislative proposals about judicial administration or prevent any judge who would take issue with it from doing so. As judges communicate with Congress, they may want to draw upon staff in the Administrative Office of the U.S. Courts experienced in legislative affairs.

One method of communication worth exploring, proposed by Judge Coffin, among others, would be for the chief justice, drawing upon the institutional committees of the Judicial Conference, to deliver a "State of the Judiciary" address to a joint session of Congress.[39]

The judiciary has begun to use judicial impact statements to estimate the effects of proposed legislation on judicial resources. To do so, it has created an Office of Judicial Impact Assessment in the Administrative Office of the U.S. Courts. It would not be surprising if Congress, following Moynihan's Law of Emulation—that organizations come to resemble those with which they are in conflict—were to create its own capacity to produce such statements. Whether or not that happens, the judicial impact analysis—for all the difficulties in measurement and methodology—could have the salutary consequence of sensitizing lawmakers to the need to consider how proposed legislation could affect the administration of justice.[40]

From time to time, interbranch bodies, including both judges and legislators, could serve as valuable forums for the exchange of ideas about improving the administration of justice. For instance, in 1988 Congress

created within the Judicial Conference a fifteen-member Federal Courts Study Committee and charged it with analyzing the problems of the federal courts and making appropriate recommendations by April 1, 1990. The involvement of representatives of the first and third branches was critical to the effort.[41] Similarly, Congress established the National Commission on Judicial Discipline and Removal (known as the Kastenmeier commission after its chairman) in 1990 for the purpose of investigating and studying problems and issues related to the discipline and removal from office of life-tenured federal judges; evaluating the advisability of proposing alternatives to current arrangements for judicial disciplinary problems and issues; and making recommendations to Congress, the chief justice, and the president. The commission consisted of representatives appointed by the president, the chief justice, the Speaker of the House, the president pro tempore of the Senate, and the Conference of Chief Justices to the States. In its eighteen-month life, the commission offered a venue for dialogue between the branches on a thorny issue and produced a record that has become the standard resource on the subject.[42]

Support for other kinds of interbranch devices came from the highly respected Committee on Long Range Planning of the Judicial Conference, created in 1990 as "a recognition that the judiciary needs a permanent and sustained planning effort."[43] In its final report, following a suggestion from Judge J. Clifford Wallace, the committee recommended that "a permanent National Commission on the Federal Courts should be created, consisting of members from the executive, legislative, and judicial branches of the federal government, and members from the state judiciary and academic world, to study on a continuing basis and to make periodic recommendations regarding a number of issues concerning the federal courts."[44]

Another means by which judges could communicate with legislators is through surrogates, such as the bar, the media, and the executive branch. To be sure, the judiciary has the best sense of its own interests and whenever possible should be encouraged to present its case to the legislature. The risk that Congress will misunderstand the judiciary's message is arguably diminished when that communication is not refracted through the prism of surrogate institutions with their own interests, priorities, and agendas. Indeed, if the surrogate is the sole representative of the judiciary's position in a situation in which the surrogate

stands to realize some benefit, especially a material one, the danger is that the legislature will tend to slight the substantive merits of the views espoused. The focus of the legislators' attention will be less on the communication itself than on the messenger. Still another problem with depending exclusively on third parties is that they may be unwilling to serve as surrogates.

To note these cautions is not to say that surrogates do not have an important role to play; quite the contrary. It is only to argue that careful consideration should be given as to the circumstances in which the surrogates are called upon to perform a role.[45] The point is not to substitute surrogates for the courts, but to enlist their good offices as supplemental means for facilitating communication between the judiciary and other institutions.

Bar associations, for example, have been of invaluable service in supporting greater resources for the judiciary.[46] They have been at the forefront of efforts to better educate the media, other professional groups and businesses, and the public at large as to the workings of the legal system, and in so doing have generated greater understanding and support for the courts. In that joint venture, as Judge Coffin has called it, bar associations in some ways are in a better position to push for greater resources than the courts, which might be perceived as being special pleaders.[47] The media, through their reports, commentaries, and editorials, could also help bridge the gap of misunderstanding between the courts and Congress.

The executive branch, which gives thought to the problems of administering justice from the perspective of the whole legal system, could also be an invaluable ally of the courts. After all, it has an interest in ensuring that the judicial branch remains strong, that the courts attracts the best people, and that they have the resources to render justice. The Department of Justice played an important role as a convener of the first Three Branch Roundtable, which focused on issues of federalism and brought together representatives from all three branches as well as state and local governments; after that meeting, working groups were established to address some of the issues raised. The attorney general meets regularly with the executive committee of the Judicial Conference. An Office of Policy Development stands ready to help facilitate improved relations among the branches. Other steps might include requiring executive branch departments and agencies to keep in mind legislative checklists

when drafting bills and undertaking judicial impact analyses of proposed legislation, as feasible.[48]

Promoting Ongoing Exchanges

Today, the majestic structures of the Supreme Court and the Capitol, facing each other from a respectful distance, symbolize the physical and psychological separation between the two branches. Yet, between 1860 and 1935, the Supreme Court held session in the old Senate chamber of the U.S. Capitol, until it moved to its present building. During that period, justices and legislators could at least expect to see one another from time to time.

Courts and Congress are not only formal structures but also collections of human beings. If judges and legislators are to bridge the gulf between them, to overcome misunderstanding, then is there not some value in finding ways for them to come to know each other?

Some opportunities exist, such as the Three Branch Roundtable, begun in 1994, in which the executive, legislative, and judicial branches annually host a meeting on a rotating basis to discuss common problems. Earlier, the Brookings Institution sponsored an Administration of Justice conference at which representatives of the executive, legislative, and judicial branches spent a weekend together. Judges have invited legislators, back home in their districts, to meet informally over lunch—not to discuss cases, but to explore ways to open a dialogue about the administration of justice. The chair of the Judicial Conference's Committee on the Judicial Branch, Judge Barefoot Sanders, "wrote to chief judges to encourage them to invite their senators and representatives to visit their courthouses . . . to foster mutual understanding and establish lines of communication between the two branches." Commented Judge Sanders, "I don't believe separation was ever intended to mean alienation."[49]

Another opportunity for communication could be through a neutral forum—bringing together judges, legislators, and staff within each branch—that would sponsor dinners, lectures, and discussions. Finally, new members of Congress and their staffs could participate, as part of their orientation, in seminars on the judicial process, perhaps offered by those who work in the federal court system. In the same vein, new judges, law clerks, and staff attorneys could take part in workshops on congres-

sional lawmaking. A newsletter could be created, providing a venue for participants in both branches to exchange ideas.

Opening Doors

Communication between courts and Congress will not eliminate tensions rooted in different institutional roles. But, at the very least, it can break down those groundless fears and suspicions that distance spawns. The multiplicity of circumstances and the interplay of a host of variables affecting judicial-congressional interaction suggest the peril of prescribing absolute rules governing communication—a series of "thou shalts" and "thou shalt nots." Rather than promulgate strict rules, the better course may be to weigh the advantages and disadvantages, costs and benefits, of different types of communication and to monitor and assess the effects of such exchanges. The presumption in favor of expanding contact under appropriate conditions and continuing discussion among judges and legislators could have the practical effect of promoting not only the good faith upon which governance depends, but also the effective workings of government the Founders envisioned.[50]