JUDGES AND LEGISLATORS: ENHANCING THE RELATIONSHIP

DEANELL REECE TACHA*

TABLE OF CONTENTS

INTRODUCTION

Every elementary civic student who studies the federal government learns that a basic premise of our constitutional system is the separation of powers among the three branches of government. The framers of the Constitution set forth in Articles I, II, and III the principle that the republic would be best served by a national government in which each branch held powers over the others. The doctrine of separation of powers has formed the backdrop for almost all national decisionmaking for more than two centuries; it is essential to our system of government as we know it today. The irony of modern American politics, however, is that what was clearly intended to be a separation of the *exercise* of power has effectively become a

* Circuit Judge, United States Court of Appeals for the Tenth Circuit. B.A., University of Kansas, 1968; J.D., University of Michigan, 1971. I wish to thank my law clerk, Brad Joondeph, for his helpful suggestions and editing assistance on this Article.

division that, in my view, impedes thoughtful consideration of important policy issues that affect all three branches of government.

Perhaps the hallmark of this irony is that the very speed and impact of modern telecommunications have, to some extent, actually impeded interbranch communication. With the advent of instantaneous national communication systems, Americans increasingly view political issues as "national" problems as soon as they emerge in the public domain. As a result, Americans form their own opinions before the relevant political actors have had an opportunity to discuss the problems amongst each other. The imperative for politicians to respond quickly to these national concerns diminishes the opportunity for constructive and informed development of solutions to the problems affecting the judiciary (as well as other important issues). This Article focuses on the relationship between the federal judiciary and Congress, examining events of the past decade that suggest the importance of enhanced dialogue between the two branches, and considers models that might enhance that dialogue.

I. A HISTORICAL PERSPECTIVE

Although the Constitution established the federal judiciary as a separate branch of government, there clearly was significant interaction between judges and legislators during the Framers' era. For example, many of the first federal judges participated in the debates at the Constitutional Convention.[1] Several of the early Supreme Court justices also served in Congress.[2] Moreover, many federal judges gave formal and informal advice to Congress on a regular basis in the 1790s regarding the Judiciary Act.[3]

Federal judges of the early period also served in numerous extrajudicial governmental capacities, such as Inspector of the United States Mint, Commissioner of the Sinking Fund, and overseers of contested congressional elections.[4] Private letters exchanged by

---

1. Deanell Reece Tacha, *Judges and Legislators: Renewing the Relationship*, 52 OHIO ST. L.J. 279, 285 (1991).

2. *See generally* COMMISSION ON THE BICENTENNIAL OF THE U.S. CONSTITUTION, THE SUPREME COURT OF THE UNITED STATES: ITS BEGINNINGS & JUSTICES 1790-1991 (1992). Chief Justice John Jay (1789-1795) was a delegate to both the First and Second Continental Congresses before his elevation to the Supreme Court in 1789. *Id.* at 26. Oliver Ellsworth, Chief Justice from 1796-1800, was earlier a Senator in the First Federal Congress. *Id.* at 30. Among others, Associate Justices James Wilson (1789-1789) and Samuel Chase (1796-1811) served in both Continental Congresses, *id.* at 60, 72, and Associate Justice William Patterson was a Senator in the First Federal Congress, where he participated in the drafting of the Judiciary Act of 1789. *Id.* at 70.

3. *See* Tacha, *supra* note 1, at 286-89.

4. *See* Tacha, *supra* note 1, at 286.

federal judges and federal and state legislators demonstrate a high level of communication and considerable mutual advice. The letters also illustrate a more intangible, informal relationship between federal judges and members of Congress; many knew each other personally, had worked with each other on earlier endeavors, and were even family friends. They visited regularly, exchanged correspondence, and worked together formally on committees and commissions. It is this camaraderie of a bygone era that suggests that something is missing from today's dialogue.

Judges and legislators of that day were from limited geographic areas and exclusive segments of society. They shared common bonds of personal communication that assisted them in discharging their official functions. Although these relationships epitomized the problems inherent in an "old boy network," they nevertheless contained a positive value from which modern judges and members of Congress could learn. These public servants saw communication with one another as necessary to their jobs. While they probably were not appropriately constrained by current understandings of conflicts of interest and ethical norms, those early judges and legislators proceeded with a sense of mutual responsibility. Although we have rightfully discarded the exclusive sources of those relationships, we can no doubt learn something from the benefits of those interactions.

II. THE CONSTRAINTS ON INDIVIDUAL JUDGES

Today's judges, both federal and state, are appropriately reticent about interacting with political officials. Judges place great importance on maintaining the highest degree of professional integrity and protecting the judiciary's independence and the appearance of fairness. The Constitution, various statutes, the Code of Judicial Conduct, and advisory ethics opinions all place limits on judges' communications with members of the legislative and executive branches.[5] None of these sources, however, significantly limits judges' ability to speak on matters related to the law, the legal system, or the administration of justice so long as the communications are not related to a pending judicial proceeding, ex parte with parties to litigation, or reasonably expected to compromise the judge's

5. *See generally* MODEL CODE OF JUDICIAL CONDUCT (1990). The Model Code contains various guidelines for judges, most of which aim at preserving the judges' and judiciary's integrity and impartiality while avoiding an appearance of impropriety or actual impropriety. *See id.* at Canons 1, 2. Canon 4 of the Model Code seeks to prevent conflicts between a judge's duties on the bench and his extrajudicial activities, but does allow judges to testify and to appear at certain public hearings. Canon 4(C)(1).

appearance of impartiality.[6] In an earlier article, I wrote extensively on the limitations on individual judges, and suggested a model for communication between judges and members of Congress.[7] That article concluded that under existing legal and ethical constraints, judges can appropriately maintain open and active dialogues with members of the legislative branch.[8] I wish here to examine the mechanisms and approaches that the judiciary has adopted and might adopt in the future to enhance the quality of that dialogue. Although this Article will focus on the federal judiciary and Congress, many of the same principles inhere in state governmental relationships as well.

III. THE PAST DECADE

One might ask whether efforts to develop closer institutional relationships between the judiciary and Congress are necessary at all. It may be that lawmakers should respond as they think best to national political concerns and judges should remain quiet during the policymaking process and intervene only to adjudicate cases and controversies that come before them. Concluding as I do that the law and judicial codes of conduct allow judges to interact on a regular basis with legislators, is it advisable for the judiciary to attempt to work with Congress on an institutional level? One need only examine the events of the last decade to conclude that the nation and government itself are far better served when the judiciary is, to a limited extent, involved in discussions leading to important national legislation.[9]

In the mid-1980s, lawyers and civil litigants became increasingly concerned about delays in the federal courts for civil cases. These concerns were at least partly legitimate, given the increasing criminal

---

6. *See* MODEL CODE OF JUDICIAL CONDUCT, *supra* note 5, at Canon 4(C)(1)-(2).
7. *See* Tacha, *supra* note 1, at 286.
8. *See* Tacha, *supra* note 1, at 297.
9. As we pay tribute in this issue to Director Ralph Mecham's tenth anniversary as Director of the Administrative Office, it is not coincidental that his time as Director has been marked with increasing evidence of the importance of institutional relationships between the federal judiciary and the Congress of the United States. Director Mecham came to the Administrative Office with extensive experience in working in the political milieu of Washington. The wisdom of that appointment and the importance of those qualifications quickly became evident. It is a credit to the Chief Justice and those involved in the appointment of Mr. Mecham that they saw with rather startling prescience the importance of the judiciary having a representative in its chief administrative capacity who could understand and work with our counterparts in the legislative and executive branches at the national level. Though some of those involved may have disagreed with particular approaches or positions, I suspect that there are very few who would deny the importance over the past decade of attempting to provide the judiciary leadership in its efforts to establish appropriate dialogues with Congress. Mr. Mecham was instrumental in pushing the judiciary in this direction.

caseload that plagued the federal courts.[10] In part, however, the perceptions were based on a host of complex issues, differing expectations, and adjustments by the judiciary to an ever-increasing docket. In response to this public outcry, the Brookings Institution sponsored a study[11] that led to the enactment of the Judicial Improvements Act of 1990.[12]

The Judicial Improvements Act, as introduced, contained numerous provisions relating to civil case management and provoked significant concerns among members of the judiciary. The debate during the development of that bill often put the two branches in juxtaposed positions, even though they shared common goals. Regardless of the merits of any particular position, or of the legislation itself, hindsight suggests that an earlier discussion between the judiciary and the bill's proponents might have enhanced the understanding of both branches about their concerns, and better accommodated the concerns of both. Pragmatically, such advance discussions on this legislation might have saved significant time in both branches. More importantly, the public would not have been exposed to the apparent divisions between Congress and the judiciary. In a day when public confidence in government is so deeply eroded, it is incumbent on all government actors to enhance the level of professional debate on important public issues, and to minimize the trivialization of important problems by appearing to "protect our turf." Although I am unsure how much this occurred in the debate over this particular bill, the public clearly perceived Congress and the judiciary as seriously disagreeing rather than cooperatively pursuing the goal of improving the justice system.

A more recent example provides guidance on the positive and constructive potential for judicial-congressional interaction. The national outcry about crime, drugs, and guns resulted in a bipartisan effort in the 103d Congress to pass major crime legislation.[13] The proposals for the bill varied widely.[14] Several groups interested in

---

10. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 13-14 (1988).

11. BROOKINGS INSTITUTION, JUSTICE FOR ALL: REPORT OF A TASK FORCE (1989).

12. Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended in scattered sections of 28 U.S.C.). The civil justice reform part of the Judicial Improvements Act of 1990, *id.* §§ 101-105, began as Senate bill no. 2027, *see* S. 2027, 101st Cong., 2d Sess. (1990).

13. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of 42 U.S.C.). The 1994 Omnibus Crime Bill incorporated a $22 billion, 5-year package of crime related legislation, and at one point congressional members had offered 180 amendments to the proposed bill. *See* Janet Quist, *Congress Puts Off Action on Omnibus Crime Bill*, NATION'S CITIES WKLY., Mar. 28, 1994, at 1, *available in* LEXIS, News Library, Curnws File).

14. *See generally* Otto G. Obermaier & Laraine Pacecho, *Crime Legislation of the 103d Congress*, N.Y. L.J., Oct. 6, 1994, at 1 (discussing major elements of crime bill and noting that 103d

the legislation contacted the federal judiciary early in the process, seeking input concerning the impact of the various proposals on the federal courts and federal law generally.

The Judicial Conference of the United States,[15] particularly the Conference's Committee on Federal-State Jurisdiction, which is chaired by Judge Stanley Marcus, and the Committee on Criminal Law, which is chaired by Judge Maryanne Trump Barry, spent many hours discussing the impact of the various proposals with the Senate and House judiciary committees. This exchange of ideas and concerns between the judiciary and Congress improved the resulting legislation. The Violent Crime Control and Law Enforcement Act of 1994[16] was crafted within a framework of dialogue that allowed judges to participate collectively in considering various proposals that would directly affect the judicial branch.

Although members of Congress and the judiciary may disagree over various aspects of the legislation, their efforts to discuss matters affecting the future of the federal criminal law and its litigation in the federal courts have been in the best interest of the nation. Judge Marcus, Judge Barry, their committees, the Executive Committee of the Judicial Conference, Senator Biden, and Senator Hatch and their committee, Representative Hughes and his committee, Representative Brooks, Representative Fish, Representative Schumer, and a host of others in both branches devoted extraordinary amounts of time to shaping a bill with appropriate attention to both political and judicial concerns. This is how the system should work.

An area of particular concern, in which congressional-judicial relationships are critical, is the judiciary's budget. Through its appropriations power, Congress controls the judiciary's budget and its ability to serve the public. Budgetary requests for judiciary needs take two general forms. One category consists of needs for staff, equipment, facilities, automation, jury fees, criminal defense funds, and the host of other items necessary for the judiciary to function effectively. The judiciary, largely through the efforts of Chief Judge Richard Arnold and the Judicial Conference's Budget Committee, has worked closely with Congress in trying to make certain that the judiciary operates in a cost efficient but effective manner. As a result of this

---

Congress passed over 75 statutes containing criminal provisions).

15. The Judicial Conference is composed of the Chief Justice, who serves as the Conference's Chair, the chief judges of the 13 federal circuit courts, one elected district court judge from each of the 12 circuits with geographical jurisdiction, and the chief judge of the Court of International Trade. *See* 28 U.S.C. § 331 (1990).

16. Pub. L. No. 103-322, 108 Stat. 1796 (1994) (to be codified at 42 U.S.C. § 13701 note).

interaction, the appropriations committees and the full House and Senate have demonstrated a thoughtful and committed understanding of the significance of maintaining an efficient judicial system that can accommodate an ever-increasing caseload.

The second category of judiciary appropriation requests involves an issue troubling for both the judiciary and Congress—the pay and benefits for federal judges. I had the privilege of chairing the Judicial Conference's Committee on the Judicial Branch from 1990 to 1994. In that capacity I worked with members of Congress to address the needs of the judiciary. An especially noteworthy achievement during that period resulted from my ongoing dialogue with Chairman William Hughes of the House Subcommittee on Intellectual Property and Judicial Administration about important changes in the Judicial Survivors' Annuities Fund.[17] Through the strong and effective leadership of Chairman Hughes, Congress responded with much needed amendments to that system. I often reflect on the personal telephone conversations that I had with Chairman Hughes in trying to accommodate the interests of both of our branches of government, to be fair to the taxpayers, and to provide an equitable survivorship system to the judges. We came to know and respect each other personally. We spent a memorable holiday on the telephone debating the details of the numerical computations that would be used in the proposed amendments. I shall, on behalf of the entire judiciary, always be indebted to Chairman Hughes for the personal attention that he gave to that important issue.

A more difficult issue for both the judiciary and Congress is the question of fair compensation. Historically, the salaries of federal judges and members of Congress have been set at the same level. This linkage rightfully symbolizes the equal status of the two branches of government. At the same time, however, it indirectly ties judges, individuals who are professionally committed to lifetime government service, to the political vagaries of public sentiment about compensation for elected officials. The current political climate makes even routine cost-of-living adjustments for elected officials and judges nearly impossible to enact. Congress inevitably responds by denying themselves any pay raise. This denies judges the equity of at least staying even with inflation.

The long-term effects of this situation on the quality of the judiciary could be significant. Most judges are deeply committed to public service and to their lifetime appointments, but as their real compensa-

17. 28 U.S.C. § 376 (1988 & Supp. V 1993).

tion falls, more judges will consider whether the opportunity costs in foregoing other jobs is too high. Further, lawyers considering service in the federal judiciary may look carefully at the pattern of cost-of-living adjustments. Almost every judge I know recognizes that he or she sacrifices a measure of financial benefit for the substantial rewards of service in the judiciary. Repeated denials of cost-of-living adjustments, however, can have a demoralizing effect on the morale and long-term vitality of the federal judiciary that, though difficult to quantify, is quite real.

Congress and the judiciary have a difficult time reaching common ground on this topic. Congress must inevitably listen to the electorate. Understandably, and no less appropriately, members of Congress should be on equal financial footing with members of the judiciary; members of Congress bear such heavy responsibility for the affairs of the nation that they too sacrifice inordinately for the privilege of public service. At some point, the electorate is ill-served by its insistence that public officials be denied the cost-of-living adjustments that are enjoyed by most American wage earners. This is not an issue that can be resolved through a dialogue solely between Congress and the judiciary. It is, however, one in which the self-interest in both branches seems to cloud the public's understanding of the longer-term issues for the nation. Dialogue among all three branches about the best approaches to this issue and levels of compensation for public service in the senior levels of all three branches is essential to serving the long-term interests of the nation.[18]

Other legislation has also been jointly discussed by the judiciary and Congress. I am reminded particularly of an ongoing inquiry into the automation needs of the Judicial Branch. Since the late 1980s, there has been an explosive growth in the use of automation in all aspects of federal court operations, from chambers to clerks' offices.[19] Judge J. Owen Forrester, the present chair of the Judicial Conference's Automation and Technology Committee, recounts the history of the

---

18. *See* COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE U.S., PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 116 (Recommendation 99) (1995) [hereinafter 1995 PROPOSED LONG RANGE PLAN] (recommending communication between judicial branch and executive and legislative branches).

19. *Cf.* JUDICIAL CONFERENCE OF THE U.S., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 51-52 (1991) (discussing various automation efforts and pilot projects, including video conferencing of oral arguments and installation of Telecommunication Devices for the Deaf (TDD) in court offices); JUDICIAL CONFERENCE OF THE U.S., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 65 (1987) (addressing Committee on Court Administration's report on progress of "various automation projects . . . official automation/data communications . . . [and] computer-assisted legal research").

federal judiciary's developing automation program in another Article in this issue.[20]

In short, the experiences of the last decade highlight the importance of establishing and maintaining an institutionalized dialogue between Congress and the judiciary. Articulating this broad goal, however, is far easier than developing workable mechanisms for accomplishing it. The press of demanding schedules, the intermittent convergence of interests, and the limitations of geography and structure are natural impediments to regularized interaction. Recent progress in establishing frequent meetings between the Department of Justice and the judiciary on matters of mutual concern, particularly issues of crime and criminal law, indicates not only that interbranch cooperation is possible, but that it could produce constructive results for the development of public policy.

IV. THE INFLUENCE OF INSTANTANEOUS TELECOMMUNICATION

The advances in modern telecommunications technology have also played an important role in reducing the opportunity for communication between Congress and the judiciary on matters of mutual concern. This reference is no more than a mere "hunch," but I think it bears examination. The last decade saw the advent of *CNN, USA Today*, the Internet, nationally syndicated talk shows, and several other by-products of our telecommunications era. As a result, elected officials have been propelled into a maelstrom of national political controversy and pressure often before they have had a chance to consider an issue. There is little time for the legislator to consider all aspects of the problem, let alone consult others, like the judiciary, who are affected. Thus, the imperative of instant reaction and the presentation of that reaction in the national media sometimes captures policymakers before they have an opportunity to fully consult others that they, in more reflective circumstances, otherwise might.

An additional problem is that political issues instantly become national when they previously may have been seen as local or state problems. The predominance of national news sources propels local problems into the national political spotlight in a sound bite, particularly in the area of crime. Over the past decade, there has been an increasing awareness that we all are vulnerable to the fear that results in any local community when a terrible crime occurs. Our

20. *See generally* J. Owen Forrester, *The History of the Federal Judiciary's Automation Program*, 44 AM. U. L. REV. 1483 (1995).

vulnerability is accentuated as we become more aware of the number of incidents and scope of activities throughout the nation.

I recite these examples not by way of criticism of the media but rather to point out two dramatic effects on the judiciary. The result of the "instantaneous response" is that matters that significantly affect the federal courts often require legislative attention much more quickly than the judiciary is able to respond given its very decentralized governance and the independence of its actors. The problem of "nationalization of the news" tends to bring to the desks of Congress—and therefore ultimately to the federal courts—a host of issues that once were viewed as local or state political issues. Both of these effects have been evident in the relationships between Congress and the federal judiciary in the last decade.

V. THE OPERATION OF THE JUDICIAL CONFERENCE AND ITS IMPACT ON THE JUDICIARY'S INTERACTION WITH CONGRESS

Congress established by statute the Judicial Conference and the Administrative Office of the United States Courts to administer the federal court system.[21] The Judicial Conference is chaired by the Chief Justice of the United States and is composed of the chief judge of each federal circuit, the chief judge of the Court of International Trade, and one elected district court judge from each circuit.[22] It is through the Judicial Conference and its administrative arm, the Administrative Office of the United States Courts, that the judiciary and Congress officially communicate with each other. The Conference establishes policy for the federal courts and, when appropriate, develops responses to legislative inquiries about pending legislation. It also studies issues relevant to the administration of the federal courts, meets with appropriate congressional representatives, and testifies formally on behalf of the judiciary on matters that the Conference deems appropriate.

Although no formal data exists, it appears that official exchanges between Congress and the judiciary have increased over the last decade. This is due in part to a growing understanding on the part of the judiciary that Congress is open to, and sometimes encourages, communications about the viewpoint of the federal judiciary on pending legislation or initiatives. It is also due to the fact that many of the issues that Congress has confronted in recent years have directly affected the administration of justice in the federal court

21. 28 U.S.C. § 331 (Supp. V).
22. *Id.*

system. For example, the recently enacted Crime Bill will add an estimated thirty-nine million dollars annually to the costs of the federal judiciary.[23] This has obvious implications for access to the federal justice system.

The Judicial Conference confronts the same dilemmas that face individual judges concerning the propriety of speaking out about legislative or policy issues. Guided generally by the Model Code of Judicial Conduct,[24] the Judicial Conference addresses the merits of policies aimed at improving the legal system and the administration of justice. Canon 4C of the Code allows judges to appear at public hearings or 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 their judicial experience would provide special expertise in the area.[25] Although I have never served on the Judicial Conference, as a committee chair I was often involved in the development of the judiciary's position prior to its presentation to the Conference. I found that the Judicial Conference and the Administrative Office, which acts at the behest of the Conference, are painstakingly careful to limit official positions to those topics that fall within the general authorization of Canon 4C.

Some subjects are obviously within the scope of permissible activity of an individual judge or of the judiciary as a whole. Issues such as the budget for the judiciary, staff, facility, and support needs, and compensation and benefits for judicial officers clearly fall within the ambit of appropriate topics. Related matters such as jury fees, the federal rules, indigent representation, and other issues concerning court administration also are topics on which judges are particularly well-qualified to speak. The difficulty lies in determining the appropriate limits on those topics permissible for discussion by the Conference, which collectively represents federal judicial officers. Certainly, all of the other Canons suggest limitations on the activities of any individual judge and, by inference, the Conference itself. On the other hand, the Conference as a whole can speak on a broader range of topics than any individual judge because each judge must make personal determinations about discussing particular topics that might be the subject of a pending or impending case.

---

23. JUDICIAL IMPACT OFFICE, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL IMPACT STATEMENT, VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994 1 & tbl. 1 (1995) [hereinafter JUDICIAL IMPACT STATEMENT].

24. MODEL CODE OF JUDICIAL CONDUCT (1990).

25. *Id.* at Canon 4(C).

The formal mechanism for Judicial Conference interaction with Congress takes many forms. With respect to budgetary issues and recurring concerns of the judiciary, the process occurs on an annual basis corresponding to the congressional appropriations process. Members of the Budget Committee and the Executive Committee work directly with the Administrative Office, congressional staff members, and members of Congress in developing the budget requests for the judiciary and presenting it to the Congress. In recent years, the able leadership of Chief Judge Arnold has charted a thoughtful and careful course of stewardship of resources requested by and appropriated to the judicial branch. Chief Judge Arnold and the Conference's Budget Committee develop budget requests that are first considered by the entire membership of the Conference and then presented to Congress. Because of the current and predictable nature of budget requests and appropriations, the Conference has a regularized timetable and procedure for considering and presenting these budget requests.

In recent years, because of shortfalls in the judiciary's budget, this regularized process has been supplemented by mid-year emergency requests to meet pressing needs. Discussions regarding supplemental appropriations have revealed a constructive give-and-take between Congress and the judiciary, resulting in Congress being more fully informed about the pressing needs of the judiciary and the judiciary being more aware of the difficult budget stringencies under which Congress operates. This exchange on budget matters informs both branches about the concerns and interests of each other.

Other issues develop in a less orderly manner. The national "crisis of the day" phenomenon often compels Congress to act rapidly on particular issues without any prior consultations with the judiciary. These issues emerge intermittently, and the Judicial Conference has responded with varying degrees of success. For instance, the Civil Justice Reform Act[26] had little judicial input prior to its consideration. Most of the judicial input occurred after the bill was introduced in the form of testimony. Even then, the judicial input was a reaction to the bill rather than dialogue prior to the introduction of its main proposals.

The Judicial Conference participated to some extent in the discussions of the Crime Bill that was ultimately enacted during the 1994 session of the Congress. Certainly many judges, including Judge

26. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, §§ 101-105, 104 Stat. 5089-98 (1990) (codified as amended at 28 U.S.C. §§ 471-482 (Supp. V 1993)).

Marcus and Judge Barry, were actively involved in discussions relating to the impact of various proposals on the federal judiciary. The resulting Crime Bill contained some provisions that reflected the judiciary's concerns. This interaction between the legislative and judicial branches on such an important piece of legislation will hopefully have a beneficial effect in the future when the legislation is implemented, enforced, interpreted, and litigated.

The development of the 1994 Crime Bill, as well as other pressing political issues, required Judicial Conference committees and the Executive Committee to act more rapidly than is normally possible for the full Judicial Conference. With respect to controversial issues, no Conference position is established without the action of the entire Judicial Conference. Special committees work on issues in an attempt to develop proposals for the Conference to consider as quickly as possible. Inherent in this process is a significant amount of delay that may impede the ability to respond rapidly to the changing legislative scene. Although the Conference's committee chairpersons often are intricately involved in the legislative process as a bill proceeds through Congress, most judges are not and cannot be "in the loop" of the lawmaking process. On the other hand, this very dynamic precludes meaningful consultation with the Judicial Conference on some issues where such input would be quite helpful.

The Director of the Administrative Office has been a leader in speaking for the interests of the judiciary. At times, even the current Chief Justice has played a role in addressing legislative issues of paramount importance to the judiciary. For example, in 1990 Chief Justice Rehnquist publicly addressed the impact of inadequate pay for judicial officers on the federal judiciary, at the first press conference ever held on a legislative matter by a Chief Justice of the United States.[27] The topic was clearly one appropriate for the Conference to speak on, given its extraordinary importance to judges.

The Director of the Administrative Office and the Chief Justice, as well as the Executive Committee and committee chairs of the Judicial Conference, are assisted greatly by an able legislative staff in the Administrative Office. These staff members are responsible for keeping the leadership in the Judicial Conference fully informed about

---

27. *See* Judith Haremann, *Rehnquist Urges Raise for Judges*, WASH. POST, May 4, 1989, at A4 (reporting that Rehnquist appealed to Congress for 30% pay increase for federal judges); David G. Savage, *Rehnquist Speaks Out on Death Row Appeals Executions: The Chief Justice Lobbies for a Tough GOP Bill. He also launches an attack on Biden's measure*, L.A. TIMES, May 16, 1990, at A12 (mentioning that Rehnquist has commented publicly in support for higher pay for federal judges).

legislative developments on issues relating to the administration of justice and the judiciary. They assist in the preparation of testimony and facilitate meetings between Judicial Conference representatives and members of Congress. This office is essential to any effective, ongoing relationship between the judiciary and Congress. Judges simply cannot fully carry out their judicial responsibilities and remain actively abreast of congressional activity without extensive staff support from the Office of Legislative and Public Affairs.

As the Judicial Conference works to represent the judiciary in its relationships with Congress, one dilemma it faces is the difficulty of "speaking with one voice." Judges, by their very nature, have well-developed views on a host of legislative topics that the Judicial Conference addresses. Not surprisingly, their views differ significantly. The fact that a position is reached on behalf of the judiciary in the Judicial Conference admittedly does not mean that it is shared by all judges. But, those represented on the Judicial Conference certainly represent the leadership and some of the strongest spokespersons for the judiciary. Anecdotally, my experience has been that the Conference reflects in substantial and significant ways the views of an overwhelming number of the judges on whose behalf the Conference acts. Nonetheless, there is the occasional frustration in Congress when the Judicial Conference says one thing and an individual judge has said another to his or her representative in Congress.

This difficulty of speaking with one voice should not obfuscate the importance of the judiciary's development of an institutional voice. It is appropriate that individuals within the judiciary exercise their rights to speak to members of Congress as individual constituents. Nonetheless, it is clear that most positions taken by the Conference have served the judiciary and have provided Congress with a clear sense of the effect of legislation on the administration of justice. The occasional dissent is the prerogative of every judge and does not diminish the strength of the institutional voice or the importance of its articulation.

VI. TOWARD ENHANCING RELATIONSHIPS BETWEEN CONGRESS AND THE JUDICIARY IN THE FUTURE

The politically intense atmosphere of the recent election, as well as the obvious concerns of the public about the integrity of its public servants, suggest that it has never been more important for each branch of the federal government to work together to address public concerns. Even though judges act independently of the political process, they are both targets of, and contributors to, whatever public

disaffection may exist as it relates to the broad scope of governmental activities. Thus, whether the issue is crime or any of the host of other important political concerns, the landscape of the late 1990s seems clear—the federal judiciary and the functioning of the federal courts will be greatly affected by many of the issues that are of pressing political concern in the halls of Congress and the voting booths of the nation.

The experience of the last decade provides the momentum for enhancing these relationships with an eye toward serving the nation in a mutually cooperative fashion. Some natural tensions will always exist—indeed, they are constitutionally mandated to exist—between the two branches. Despite this tension, Congress and the judiciary can, in my view, continue to construct formal and informal ties characteristic of the open communication between judges and legislators that existed during the early days of the Republic. Much progress has been made in this direction over the past decade, but the nurturing of this ever-changing relationship requires vigilance. Even as I write this Article, congressional committee chairs have changed, staffs are different, and the outlook for issue priorities is significantly revised. Thus, I suggest that the Judicial Conference, as the institutional voice of the judiciary, not only continue its developing efforts, but consider strengthening various aspects of its institutional relationship with Congress.[28]

One promising model that began during my tenure as Chair of the Committee on the Judicial Branch was to bring members of Congress into courthouses nationwide on a regular basis. Federal judges were asked in March 1993 to invite their Senators and Representatives to visit federal courthouses in their districts. Ideally, these visits would include a sentencing proceeding, or some other short but instructive court proceeding, that would assist members of Congress in understanding the practical issues facing judges. Although the agenda might vary considerably depending on the interests of the members of Congress and the judges, the underlying purpose is to acquaint Congress with the courts in a style reminiscent of an earlier era.

Many district and circuit court judges participated in the project, and members of Congress were receptive. The topics ranged widely, but each judge reported that the member of Congress showed a keen interest in the federal judiciary and a heartening resonance to the concerns of the judges. Similarly, each member developed a more

28. *See* 1995 PROPOSED LONG RANGE PLAN, *supra* note 18, at 98 (Recommendation 96: Communications with Other Branches of Government and the Public).

complete understanding of the issues about which he or she had particular concerns. Issues such as courthouse utilization, staffing patterns, and caseload management were frequently raised.

While some members of Congress are lawyers with considerable experience in federal court, most are not. It is therefore helpful to both Congress and the judiciary for elected representatives to have a good working knowledge of the daily demands of a federal judge and the concerns of the judiciary. Although the courthouse visit project seems simplistic, it echoes the style of interaction that characterized the relationship between judges and legislators before the country was so large, the news so instantaneous, and the problems so national in scope.

Congressional staff members can also be important players in the development of legislative proposals. The Committee on the Judicial Branch found the assistance of staff members of the appropriate committees and members of Congress invaluable. We began the practice of convening a working session with appropriate staff members principally to get acquainted with the staff people but also to share information about ongoing legislative initiatives. An elementary but essential element of any efforts to cultivate communication between two branches of government requires that the communication occur on as many levels as the decisionmaking occurs.

Another frequent form of interaction with Congress is the Judicial Impact Statement, which is prepared for legislation expected to have a significant impact on the federal courts.[29] The decision to prepare an impact statement can come from a variety of sources. Most frequently, the legislative liaison office of the Administrative Office requests an impact statement based on either informal requests from Congress or the need to share this information with congressional staff members. Requests have also come directly from members of Congress, the Congressional Budget Office, Judicial Conference committees, and individual judges. Since 1991, when the statements were first formalized, the Administrative Office has prepared seventy-six statements, thirteen of which analyzed laws either prior to or after their enactment. Every impact statement is distributed to the Judicial Conference.

Judicial Impact Statements are valuable in illustrating the potential effect of various legislative proposals and they represent another

29. *See generally* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FACT SHEET: BACKGROUND INFORMATION ON JUDICIAL IMPACT ANALYSIS (1995).

important way of communicating with Congress.[30] Often, however, the Judicial Impact Statements are cumbersome and detailed, frequently containing substantial amounts of statistical information and analysis. This format is useful for detailed analyses, but it may not serve the needs of members of Congress, who are extremely busy and tend to be "big picture" policymakers. Thus, although we should continue to present formal Judicial Impact Statements, the judiciary should also make certain that they capture the significance of the judiciary's message in a forceful and concise fashion. The judiciary may wish to consider a form of executive summary that has a "broad brush" impact of its own. A hard look at the crafting and effect of all of our printed material would be, in my judgment, an additional method of enhancing the judiciary's institutional voice in Congress.

Recently Judge Charles Clark and Judge Jack Gerry, former chairs of the Executive Committee of the Judicial Conference, established informal, ad hoc task forces to address particular issues. These "legislative working groups" were composed of the chairs of the Conference's committee with jurisdiction over the issue in question, the chair of the Executive Committee, and the head of the Office of Legislative and Public Affairs. These task forces informed judges and members of the Administrative Office's Legislative Staff about each other's concerns. On more than one occasion, when I was testifying before a congressional committee on a subject for which my committee had responsibility, I was asked about a subject within the jurisdiction of an entirely different committee. Unless such information is shared on a regular basis, one might appear unprepared on issues of substantial importance to the judiciary. In my view, members of Congress tend to view judges somewhat interchangeably as they speak for the Judicial Conference. If the judiciary is to have a meaningful dialogue with Congress, those institutional speakers must be prepared to respond to any congressional concerns, not just those relevant to their own areas of committee responsibility. In addition, the legislative working group has the benefit of sharing information about the dynamics of the legislative process with other judges who are unable to follow the process closely, given their other judicial responsibilities.

One of the most difficult impediments to effective interbranch communication is that the issues that are the most important to the

30. *See* 1995 PROPOSED LONG RANGE PLAN, *supra* note 18, at 30 (Recommendation 12) ("When legislation is considered that may affect the federal courts directly or indirectly, Congress should take into account the judicial impact of the proposed legislation, including the increased caseload and resulting costs for the federal courts.").

judiciary are also those that Congress must respond to most rapidly. The Judicial Conference, through its dispersed committee structure and the Administrative Office, often cannot respond as quickly as issues crystallize. Certainly, rapid reaction from the Legislative Affairs Office and the Administrative Office is important to ensuring that the Judicial Conference committees are functioning as quickly as possible. But even the most rapid response by the Administrative Office cannot fill the vacuum when the Judicial Conference has not already taken a position on the issue at hand.

A major step in improving the Conference's "reaction time" was to allow the Executive Committee of the Conference to make some critical legislative decisions when contacting the entire Conference would be difficult. In addition, the Chair of the Executive Committee was helpful to me on matters when it was difficult even to obtain a sense of my own committee's inclinations in time to react to dynamic changes in congressional action. Efforts to improve our dialogue with Congress must take into account the speed with which some legislative proposals develop. The Conference will be unable to influence the legislative process if its spokespersons are unable to respond in a rapid manner. Currently, the Conference's Ad Hoc Committee on Legislative Relations and Coordination is exploring this issue. This Committee should examine its procedures and take any appropriate measures that would further enhance the Conference's responsiveness.

For several years, the Brookings Institution sponsored an annual retreat at which judges, legislators, and members of the executive branch discussed topics of common concern. The 1993 meeting addressed topics of federalism; one focused on crime and several have highlighted the importance of ongoing cooperative efforts among the three branches of government. While the Brookings Institution no longer sponsors such events, the Attorney General has created a similar meeting. In March 1994, Attorney General Reno hosted the Three-Branch Roundtable on State and Federal Jurisdiction, which, like the Brookings events, was attended by judges, legislators, and members of the executive branch. Such meetings are valuable informal opportunities to exchange ideas and perspectives. They are only valuable, however, to the extent that the principal operatives are able to attend and fully participate. Unfortunately, members of Congress have found it difficult to attend recent conferences. The idea is, nevertheless, a good one and deserving of careful attention. We should look to design similar formats that encourage full participation and encourage the parties to continue meaningful dialogue.

No discussion of enhancing the relationship of the judiciary with Congress would be complete without recognizing the importance of judges' coming to understand the constraints and pressures placed on members of Congress. Judges are frequently viewed by Congress as enviably insulated from the requirements of running for office and all of the pressures of elected office. Similarly, members of Congress must cope daily with the constraints of the federal budget and the competing demands of many pressing needs. The judiciary and the Congress, if they are to be equal players in the business of giving life to the first three Articles of the Constitution, must accord each other the respect, tolerance, and understanding that signifies equality. Certainly that kind of respect must come from dialogue in which members of each group listen carefully and respond to the other's perspectives.

CONCLUSION

I have been privileged to be part of an important and enriching dialogue among the three branches of government. I strongly urge my successors to continue this effort. In my judgment, the endeavor is critical to restoring the faith of the public in their government and to preserving the vitality of a flourishing judiciary.