# ROBERT W. KASTENMEIER LECTURE

# BRIDGING THE DIVIDE BETWEEN CONGRESS AND THE COURTS

BARBARA B. CRABB*

*The Robert W. Kastenmeier Lecture*
*University of Wisconsin Law School*
*September 16, 2011*

Most people give little thought to the relationship between Congress and the federal courts. It is the divide between Congress and the White House that provides headlines and engages pundits—and for good reason. The intransigent, in-your-face, high-stakes standoff between the two branches has all the elements of great drama. The divide between Congress and the courts is a much less visible but still consequential one. It is an appropriate topic for a lecture series honoring Robert Kastenmeier, United States Representative to Congress from Wisconsin's Second District from 1959 to 1991. Friend, ally, and conscience of the judiciary, he did as much as anyone in Congress has ever done to help the courts function effectively. A strong supporter of

---

* United States District Judge, Western District of Wisconsin. I am grateful to the many people who talked with me about Congress and the courts and provided insight into the topic: Sarah Evans Barker, Judge of the United States District Court for the Southern District of Indiana and former member of the Judicial Conference and its Long Range Planning Committee; Representative Judy Biggert from the 13th Congressional District of Illinois, co-founder of the Congressional Caucus on the Judicial Branch; Russell Feingold of Wisconsin, former senator and member of the Senate Judiciary Committee; Julia Smith Gibbons, Judge of the United States Court of Appeals for the Sixth Circuit and chair of the Judicial Conference Committee on the Budget; John Kaminski, founder and director of the Center for the Study of the American Constitution at the University of Wisconsin; Robert A. Katzmann, Judge of the United States Court of Appeals for the Second Circuit and former fellow of the Brookings Institution; Carolyn Dineen King, Judge of the United States Court of Appeals for the Fifth Circuit and former chair of the Executive Committee of the Judicial Conference; David Obey, former representative and former chair of the House Committee on Appropriations from the Seventh Congressional District of Wisconsin; Michael Remington, Partner, Drinker Biddle and former chief counsel of the Judiciary Subcommittee of the United States House of Representatives on Intellectual Property and Judicial Administration; and Russell Wheeler, former deputy director of the Federal Judicial Center and now visiting fellow, Governance Studies, Brookings Institution.

the independence of the judiciary, he worked to keep it accountable to its constitutional responsibilities.

The divides between and among the branches are a given in our system. The congressional-executive divide is a continuing struggle for supremacy, fueled by the constant pull of partisan politics, ideology, lobbyists, the media, financial influence, and the unrelenting focus on the next election. The judicial-legislative divide is marked by legislative indifference, broken intermittently by periods of anger provoked by controversial judicial decisions or the perception that judges are disregarding congressional directives. Partisan politics are at play in the relationship, particularly when Congress confirms, or refuses to confirm, judicial nominees and when it establishes, or refuses to establish, new judgeships, but these fights are essentially between Congress and the executive branch. The judiciary is the battlefield, not the army.

The fact is that "few in Congress know much about or pay attention to the third branch of government," as Congressman Kastenmeier observed in 1988.[1] He continued: "[i]n some respect, the judiciary for the Congress is . . . sort of tolerated by benign neglect."[2] Columnist Andrew Cohen made essentially the same point in a March 18, 2012, article on TheAtlantic.com, lamenting the slow pace of Senate confirmation of judicial nominees and the lack of understanding among some legislators of what federal judges do.[3] He noted in particular the legislative failure to appreciate the importance of judges to job creation "to the extent [that judges] bring certainty and finality to legal disputes" and to "the financial uncertainty that pending litigation brings."[4]

This lack of understanding is unfortunate, but not surprising. Senators and representatives are inundated with matters of importance to attend to. The old days in which long-serving legislators developed knowledge and experience in particular areas have largely faded away; legislators do not serve as long as they used to, even when they are not subject to term limits. The legislative week is shorter, because more members keep their homes in their districts, and the constant pressure

---

1. Robert W. Kastenmeier & Michael J. Remington, *A Judicious Legislator's Lexicon to the Federal Judiciary*, *in* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 54, 54 (Robert A. Katzmann ed., 1988).

2. Robert A. Katzmann, *Summary of Proceedings*, *in* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 162, 163 (Robert A. Katzmann ed., 1988).

3. Andrew Cohen, *Federal Judges Are, in Fact, 'Job Creators,'* ATLANTIC (Mar. 18, 2012, 1:42 PM), www.theatlantic.com/politics/archive/2012/03/federal-judges-are-in-fact-job-creators/254670/.

4. *Id.*

to raise reelection funds means less time for learning about legislation and providing oversight. Increasing partisanship makes it harder for legislators to agree on even routine matters. (And, to be fair, judges do not know all that much about the nuts and bolts of legislating.)

That there are divisions among the branches of our government is nothing new or unexpected. Quite the contrary. Such divisions are the natural, intended consequence of our system of government, which was designed be a *divided*, balanced, and limited national government. When the drafters of the Constitution set out to create a government that would not only control its constituents, but control itself, they gave each branch what they believed were the necessary constitutional powers and personal motives it would need to resist encroachment by the other branches.

Well, maybe not quite. The framers gave offsetting powers to the legislature and the executive branches. When it came to the judiciary, however, their efforts to achieve balance were less successful. Although the framers drafted three constitutional provisions intended to give the judiciary independence—housing the judicial power of the new national government exclusively in the judiciary; giving federal judges life tenure; and providing them a salary that could never be reduced[5]—they put off deciding whether the national government needed a system of lower courts. Instead they provided for "such inferior Courts as the Congress may from time to time ordain and establish."[6]

It is unlikely that when the framers agreed on this provision, they realized that they had failed to protect the judiciary from encroachment by the other two branches. It may be that by this point their energies and imaginations were depleted after long months of contentious debates about the powers of the legislature and the presidency. Equally likely, it was because they lacked experience with a judiciary independent of both the legislature and the executive. As colonists, they had known the judiciary as agent for the crown and dependent upon the crown for its tenure.[7]

It was only during the time of the Revolutionary War, when it became necessary for the newly formed state legislatures to raise armies, lay taxes, and regulate markets, that the legislative branch came to be seen as needing its own checks. Until then, the focus of concern

---

5. U.S. CONST. art. III, § 1.

6. *Id.*

7. Hence, the grievance incorporated into the Declaration of Independence that King George III "has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." THE DECLARATION OF INDEPENDENCE (U.S. 1776).

had been on the executive, with the legislature seen primarily as a check against the powers of executive.[8]

From the vantage point of the twenty-first century, we cannot begin to appreciate the audacity or the tentativeness of the constitutional project. Well-versed as the framers and other colonists were in history, philosophy of government, politics, and natural law,[9] they were designing a form of government that had never existed in fact. It is hardly surprising that they did not anticipate the difficulties the judiciary might face with so little practical independence to shore up its decisional independence.

The first Chief Justice, John Jay, discussed the complexity of the framers' task in his 1790 charges with the first groups of grand jurors assembled in the northeastern states. He admitted that among the difficulties was determining how to establish a national judiciary "with Powers neither too extensive, nor too limited; rendering it properly independent, and yet properly amenable."[10]

Whatever the framers' reason for writing Article III as they did, they established in two sentences a system in which the judges were to be independent, but the judiciary as an institution was not. If Congress could decide what inferior courts would be established, it followed that it could decide whether—and how—those courts would be housed, staffed, furnished, secured, and maintained. Congress would have the authority to create new judgeships, confirm new judges, determine the courts' jurisdiction, and decide most aspects of the courts' organization. And, because the Constitution said only that judges' salaries could not be diminished, Congress would decide whether those salaries would ever be increased. It was obvious that Congress would be responsible for passage of all the laws that the courts would be enforcing; it was less obvious that Congress would be responsible for the procedural rules the courts would apply.

The result was a judiciary that was both the least dangerous branch, as Hamilton famously described it in *The Federalist*, and the most vulnerable.[11] Hamilton explained that:

---

8. Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 GEO. L.J. 1061, 1065–66 (2007).

9. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 3–10 (1969).

10. THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 27 (Maeva Marcus ed., 1985).

11. THE FEDERALIST No. 78, at 465–66 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

> The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever.[12]

Charles Geyh, a federal courts scholar, University of Wisconsin Law School graduate and, interestingly enough, one-time staffer for Congressman Kastenmeier, has written about the difficulty of reconciling the idea of leaving the support of the judiciary to the legislature with the founders' widespread commitment to constitutional separation of powers.

> That the judiciary could be wholly dependent on the legislature and still be expected to exercise judicial power in ways that justified separating legislative from judicial power in the first place underscores how supremely trusting the fledgling states were of their legislatures and how little they had actually thought about separation of powers as it applied to the judicial branch.[13]

However it came about, the reality of the judiciary is this: decisional independence, institutional dependence.

Not that Congress did not care about the workings of the new judiciary. It made this its first order of business when it convened for its first session in 1789, creating a tri-level court structure headed by the Supreme Court, with a federal district court in each state and regional courts of appeals.[14] These regional courts of appeals bore little resemblance to today's courts of appeals, for which the judges are appointed solely for the purpose of hearing appeals from the district and bankruptcy courts. The early courts of appeals were an odd amalgamation: each was to be staffed by a local district judge (of whom there was to be at least one for each state) plus two Justices from the six making up the Supreme Court, who would ride out to one of the three

---

12. *Id.* at 465.

13. CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE 25 (2006).

14. *Id.* at 46–47.

circuits twice a year.[15] The district courts were trial courts, but so were the courts of appeals, although they also heard appeals from the district courts if the amount in controversy was more than fifty dollars.[16]

The arrangement seems impractical, if not delusional, 223 years later, but it has to be seen in the context of the times. The Constitution had not yet been ratified by all thirteen states; its value and purpose had to be proved to a citizenry not altogether sure about the wisdom of a national government. Having the Justices of the new Supreme Court ride circuit was a visible sign of the new government. It said to the public that it would not be isolated at the center of the government, but would operate throughout the country and be accountable to the people. And, as Chief Justice Jay realized astutely, the charges that the Justices could give to the various grand juries in their circuits could prove an excellent tool for educating the public about the new Constitution.[17]

As unworkable as the arrangement became with the inevitable expansion of the country and the increase in the Supreme Court's workload, it continued in place for more than 100 years, at least nominally. In the interim, the practice of the Justices' riding circuit was honored primarily in the breach. Even in the smallest circuits, nineteenth century travel was arduous, whether it was by horseback, carriage, paddleboat or steamer. Soon enough the original two Justices assigned to each court of appeals decreased to one, then to none in many instances, leaving the district judges to perform the work of the "courts of appeals."

Awkward as that double role may have been for the district judges, it does not seem to have caused much concern for the greater part of the nineteenth century. The nineteenth century federal courts had relatively little to do and few administrative needs. Generally, a district court consisted of nothing more than a judge and a clerk, working out of a more or less public space, such as a tavern or the judge's own residence. The courts' workloads were light; there was little federal legislation to provoke litigation and few cases in which litigants sought a federal forum. As Chief Justice John Roberts reminded us in a recent opinion, it was not until 1853 that the Attorney General's job became a full-time one.[18]

---

15. *Id.* at 47.

16. *See* ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 46–47 (1987).

17. *See* John P. Kaminski & C. Jennifer Lawton, *Duty and Justice at Every Man's Door: The Grand Jury Charges of Chief Justice John Jay, 1790-1794*, 31 J. SUP. CT. HIST. 235, 239–43 (2006).

18. *Filarsky v. Delia*, 132 S. Ct. 1657, 1663 (2012).

It took until 1891 for Congress to create the courts of appeals in their present form. This century-long delay might be attributed to legislative neglect, but Charles Geyh argues that the truth is more complicated.[19] Legislative statements after the Civil War reflect a reluctance to make any significant changes to the system that would undermine "the surest anchorage of our system of Government against the encroachments of the other departments."[20]

Another thirty years passed before the judicial system had the opportunity to become self-governing. In 1922, Congress authorized the establishment of what is now the Judicial Conference of the United States, to be made up of the chief judges of each circuit court of appeals, headed by the Chief Justice, and charged with the responsibilities of holding annual meetings to make policy, report on the condition of the dockets in each circuit, and submit recommendations for improving the administration of justice.[21] In 1939, Congress established the Administrative Office of the United States Courts, subject to the control of the Chief Justice and the Judicial Conference, and gave the office financial control of the lower federal courts and primary responsibility for the administration of the federal judiciary.[22] Among other things, this meant that for the first time, the courts were not in the questionable position of having to seek funding from the most frequent litigator in their courts, the Department of Justice.[23] In 1967, Congress authorized the establishment of the Federal Judicial Center, the judiciary's educational and research arm.[24] In 1980 and again in 2002, Congress enacted legislation giving the judicial councils of each circuit new responsibilities for judicial discipline.[25]

---

19. GEYH, *supra* note 13, at 48.

20. *Id.* at 72 (quoting CONG. GLOBE, 41ST CONG., 1ST SESS. 341 (1869) (statement of Rep. Michael Kerr)).

21. Act of Sept. 14, 1922, ch. 306, 42 Stat. 837 (1923). Today's conference has been expanded to include a district judge representative from each circuit and the chief judge of the Court of International Trade. 28 U.S.C. § 331 (2006).

22. Act of Aug. 7, 1939, ch. 501, 53 Stat. 1223.

23. For example, the 1930 Report of the Attorney General showed 24,934 civil cases to which the United States was a party for fiscal year 1930 in all the district courts, and 87,305 criminal filings by the Attorney General. The grand total of all cases and other proceedings commenced in all the district courts during fiscal year 1930 came to 198,455. ATT'Y GEN. WILLIAM D. MITCHELL, DEP'T OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE FISCAL YEAR 1930, at 100 (1930).

24. Act of Dec. 20, 1967, Pub. L. No. 90-219, 81 Stat. 664 (1968).

25. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1981); Judicial Improvements Act of 2002,

These major changes in court administration put the judicial branch on a firmer footing than it had been in the nineteenth century and gave it a larger measure of autonomy, but they did not change the basic relationship between the two branches. The judiciary remained dependent on Congress for the confirmation of new judges, the creation of new judgeships, funding for courthouses, their basic budgets, and procedural rules, just as it is today. The courts still have no independent source of funding. They have no right to be heard on congressional decisions to expand or restrict the scope of the courts' jurisdiction or to enact laws that will increase the courts' workload. In other words, when it comes to matters affecting institutional independence, the judiciary has no constitutional protection and its power is limited to persuasion. If Congress wanted to, it could retaliate against the courts by cutting the courts' funding; disestablishing individual courts; adding or taking away Justices from the Supreme Court; imposing crippling restrictions on the operations of the courts; narrowing their jurisdiction; impeaching individual judges and Justices; and refusing to confirm nominees to fill judicial vacancies.

The framers set up what could well be a recipe for disaster: giving the judiciary the last word on the law, with the inevitable controversies that authority will provoke, and then giving it no institutional protection. It is a little like giving a person a very old and very unpredictable gun for personal security. If used properly, the gun may perform its intended function, but it's just as possible that it will inflict great damage on its owner. Making the judiciary the final arbiter on the meaning of the law, with the authority to declare a law or practice unconstitutional gives it power, but a power that can be explosive and set off backlashes of varying proportions. By no means is it a power that can ward off encroachment by the other branches. When an entity has little power in a relationship, it behooves it to assess the sticking points between it and its protagonist, husband carefully what little power it possesses, employ diplomacy, look for areas in which the interests of both parties are in alignment, and seek ways to enhance what little power of persuasion it has.

Between Congress and the judiciary, the sticking points are legion. Consider the experience Representative Judy Biggert of Illinois described in a 2006 speech to the American Bar Association. She tried to persuade her colleagues to join her in co-sponsoring a bill to give judges a pay increase that would make up for six of the nine cost of

---

Pub. L. No. 107-273, 116 Stat. 1855 (adding chapter 16 to Part I of title 28, United States Code, Complaints Against Judges and Judicial Discipline).

living increases they had been denied in previous years.[26] She found it tough going. Her colleagues told her,

> "They aren't getting theirs until we get ours"; "Not until those judges leave the legislating to Congress"; and "Why should they automatically get a raise when their jobs are safe, while every two years we have to fight to get reelected and keep our jobs?" . . . [Other members] found some federal court rulings outrageous . . . . [or] just didn't care.[27]

As these comments show, the very idea of judicial review of legislation raises hackles among legislators. They envision self-righteous judges acting as the super-ego of another branch to keep it within its authorized limits. A scenario comes to mind of an elegant dinner, much fussed-over in advance. All menu, napkin colors, flowers, and china have been agreed upon. The night of the dinner arrives: the candles are lit, the doors are opened, but wait! In marches an uninvited guest, who takes a hard look at the table, the gleaming silver and starched linens, and whips the tablecloth out from under the feast.

The high-handedness of this, the nerve! Who would not react negatively when an outsider undoes the hard work of others, whatever its nature? Why then should we be surprised when legislators react negatively when an unelected judge calls a piece of legislation unconstitutional, undoing the efforts of many people? One can imagine legislators thinking to themselves or saying out loud that *the judge* did not do the heavy lifting of drafting the legislation, shepherding it through the committee hearings, sitting out the midnight sessions, or corralling party members to persuade them of the value of this particular piece of legislation. *The judge* has no idea what compromises were necessary.

Moreover, the judge is not required to consider the exigencies of compromise. She is free to make the decision she believes is the correct one, without fearing the loss of her job. No such luxury exists for legislators after they make tough decisions. And, adding salt to the wounds, legislators often share in the backlash of unpopular judicial opinions in which they played no part, just because of the public tendency to attribute the decision to *the government*, without distinguishing between the branches.

---

26. Representative Judy Biggert, Opening Statement at the American Bar Association Panel Discussion on Ways Judicial and Legislative Branches Can Communicate Better (Feb. 11, 2006) (transcript on file with author).

27. *Id.*

At such times, it may be hard for legislators and others to remember that the judge is simply carrying out her duty, not flaunting her power, and it may be easy to overlook the reality that the judge's decision is not unconstrained. The judge is bound by precedent, the terms of the Constitution, statutes, procedural rules, the factual record, and legal principles. And, unless the judge is a member of the Supreme Court, her power to overturn a statute is heavily circumscribed by the availability of appellate review. At least three judges of the court of appeals, and possibly all of the nine Justices of the Supreme Court, will review her decision.

Even when a judge upholds a statute, she may frustrate the will of Congress unknowingly by reading the statute in a way Congress never intended. It may be that Congress did not make its intention clear or the statute contains a drafting error or the judge simply makes a mistake. It is true, of course, that not every legislator feels a personal affront when a statute is ruled unconstitutional or when it is misread. Some were not in office when it was passed; others opposed its passage and are glad to see it overturned; others voted for it only because they anticipated it would not survive judicial review. Nevertheless, the fact that judges have this responsibility and exercise it is a source of irritation to members of Congress.

But it is not the only one. As Representative Biggert's colleagues pointed out, it is hard for many members of Congress not to resent the judges' situation: their guaranteed-for-life salaries; their life tenure, which frees them from the constant worries of reelection and the accompanying struggle for campaign contributions; and their opportunity to live and work in one place. Judge Frank Coffin, who served on the Court of Appeals for the First Circuit and was a former legislator, described the heavy price legislators pay in the form of a bifurcated life:

> [B]etween home and the Capitol, between public and private life; the frustrations of having to scatter one's energies, of never being able to know very much about anything, of having always to read on the run; and the haunting specter of the next election. Variety, breadth, respect, and influence on the one hand; lack of time, depth, privacy, security, and serenity on the other.[28]

If judges are ever to bridge the divide between the courts and Congress, they must be willing to consider the courts from Congress's

28. FRANK M. COFFIN, THE WAYS OF A JUDGE 5 (1980).

point of view and to appreciate the constraints and pressures under which Congress operates. Besieged as members are by demands upon their time and engaged with myriad difficult issues, they have little time to listen to judges seeking help for the judiciary. When they do meet with judges, the conversation can be strained. If judges view their entreaties to Congress as limited to matters necessary to strengthen the judiciary and maintain its ability to function effectively, Congress does not necessarily perceive them that way. Judges may promote requests for salary increases, for instance, as needed to keep talented judges on the bench and to encourage outstanding lawyers to apply for judicial vacancies. Congress is more likely to view those requests as self-serving. Judges ask to be treated as an independent, coequal branch when it comes to funding for operations, but Congress hears the request as a statement that judges believe the judiciary's needs are more important than those of any part of government. When judges oppose legislation that would add extensive new duties for the courts without providing adequate staffing and other resources, Congress may read the opposition as the complaint of lazy judges unwilling to pull their own weight. After all, members of Congress are overworked and under pressure too. In other words, it is hard for even a sympathetic legislator to view many of the requests from judges as anything other than special pleading.

It does not improve communication between the two branches that the members have almost no opportunities to meet except when judges want something from the legislature. Moreover, because judges are bound by the Canons of Judicial Ethics, they cannot help raise money for candidates, contribute to campaigns, endorse candidates, or hold fundraisers. In these times, one cannot overestimate the pressure legislators are under to raise funds. It is understandable that members of Congress ignore judges—seeing them as special pleaders—and choose instead to devote their limited time to meeting with their constituents or people who can help them in the next election.

The difficulties of this relationship make it all the more important that judges make the best use of what little power they have and employ it sparingly. Applying this principle of parsimony effectively requires the wisdom to determine those matters that are both critical to the judiciary *and* within its powers of persuasion. I would include within the ambit of "critical matters" judicial emergencies, such as the one that the judiciary took to Congress in 2002 in response to Congress's failure to appropriate any funds for the courts that would be enforcing comprehensive new measures to interdict drugs along the southwest

border and to crack down on illegal immigration.[29] Eight years after the interagency program Operation Gatekeeper was launched and the Department of Justice started focusing on immigration, drug trafficking, and alien smuggling along the southwest border,[30] it was becoming clear to the judiciary that the initiative would fail at the courthouse door unless the courts had new resources in the form of judges, courthouses, staffing, and detention facilities.[31] In a carefully concerted action and armed with fact sheets on such things as the inadequate number of federal detention cells to house the more than 1.5 million persons arrested annually by the United States Border Patrol,[32] judges from the affected courts met individually with members of Congress and convinced them of the need for adequate court staffing, new or expanded courthouses, more detention facilities, and additional auxiliary services to handle the flood of immigration and drug cases.[33]

One might ask why it was necessary for the judiciary to go to such lengths to obtain funding for this initiative. Why would Congress not

---

29. *See* Leonidas Ralph Mecham, 2001 ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. 9.

30. *Many Factors Influence Criminal Filings over 10-Year Period*, THIRD BRANCH (Admin. Office of the U.S. Courts, Office of Pub. Affairs, D.C.), Nov. 2001, at 1, 6–7; *Otay Mesa Prop. L.P. v. United States*, 86 Fed. Cl. 774, 782–84 (2009) (describing Operation Gatekeeper).

31. *Caseloads Swamp Border Courts*, THIRD BRANCH (Admin. Office of the U.S. Courts, Office of Pub. Affairs, D.C.), Oct. 1999, at 1, 4–5; *see also Southwest Border Courts' Situation Alarms Judiciary*, THIRD BRANCH (Admin. Office of the U.S. Courts, Office of Pub. Affairs, D.C.), Mar. 2000, at 1, 7; *Judicial Conference Asks Congress for New Judgeships*, THIRD BRANCH (Admin. Office of the U.S. Courts, Office of Pub. Affairs, D.C.), Aug. 2000, at 2, 2–3; *DOJ Increases Reflected in Judiciary Workload*, THIRD BRANCH (Admin. Office of the U.S. Courts, Office of Pub. Affairs, D.C.), Apr. 1997, at 5, 5 ("For 1998, DOJ is requesting a 13 percent increase in its budget to support stepped-up federal law enforcement activities along the Southwest border, increased removals of criminal aliens and enhanced enforcement against employers who hire illegal aliens. DOJ is also requesting 500 new border patrol agents . . . . and 168 new DEA agents to identify, investigate, and prosecute major drug trafficking organizations along the Southwest border . . . .").

32. *Drug Trafficking on the Southwest Border: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 107th Cong. 33 (2001) (statement of Royal Furgeson, U.S. District J., W.D. Tex.).

33. *Southwest Border Court Judges Tell Congress of Crisis*, THIRD BRANCH (Admin. Office of the U.S. Courts, Office of Pub. Affairs, D.C.), June 2000, at 1, 1–2; s*ee also* Leonidas Ralph Mecham, 2000 ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. 3 ("With more than a quarter of the federal criminal filings occurring in the Southwest border courts, we will continue to push for increased resources to meet the extraordinary needs of these five district courts."); Mecham, *supra* note 29, at 9 ("Administrative Office staff developed and produced a videotape on the border crisis to help explain the need for more judgeships in [the border] districts. The video was shown at a House hearing on the Judiciary's 2002 budget.").

have provided for the costs the courts would have to absorb when they passed the legislation? One reason is that the courts fall off the radar screen; they are taken for granted. Another is that there is no mechanism, no common practice, no incentive for Congress to take the courts into consideration. Often, bills that require funding will carry a mark to that effect; ideally, bills that will add extra work for the courts would have something similar. Had such a mechanism been in effect in 1996, when the border initiative was enacted, it might have reminded Congress of the need to include funding for the courts as well as for law enforcement agencies.[34] Of course, any kind of mark would be necessarily limited to an assessment of the effect of the law upon workload and resources because it is not generally appropriate for the judiciary to comment on the scope, purpose, or value of any particular piece of legislation.

Nevertheless, a judiciary "mark" on legislation might cause Congress to think harder about a particular bill's effect upon the judiciary. Will it require more judges and the increased funding that goes along with every new judge? If it will, does Congress want to increase the judiciary for this purpose? Certainly, when it comes to expanding the judiciary, Congress has reasons not to do so that go beyond funding: the principle that the national government is one of delegated powers in which the residual power remains in the states;[35] the accompanying concern that a large expansion of the judiciary would alter its character; and a reluctance to devote more of Congress's and the President's limited time to the increasingly divisive task of nominating and confirming judges to an increasing number of judgeships.

Perhaps in these times of deficits, such a mechanism would turn attention to the feasibility of alternatives to an ever-larger judiciary. As far back as 1979, Robert Kastenmeier and Michael Remington pointed out that the legislature has four options available when dealing with a finite resource, such as the judiciary: it can *expand* the resource; it can *substitute for the resource* by redirecting litigation to alternative dispute resolution institutions, which can include such entities as state courts, arbitrators, mediators, and administrative bodies; it can *conserve* the resource by eliminating inefficiencies or by simplifying procedures; and it can *ration* the resource by limiting its availability to all litigants or by

---

34. *See Otay Mesa Prop.*, 86 Fed. Cl. at 782–83.

35. ROBERT A. KATZMANN, COURTS AND CONGRESS 109–10 (1997) (quoting William H. Rehnquist, *1994 Year-End Report on the Federal Judiciary*, 18 AM. J. TRIAL ADVOC. 499, 503 (1995)); JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 21 (1995).

barring access altogether for specific groups of individuals.[36] These options merit study and action by legislators and judges. Otherwise, the result will be rationing by default, which is the least desirable outcome. If the answer is to make thoughtful reductions in the court's jurisdiction, rather than to expand the resource, Congress might consider whether diversity jurisdiction is still needed to protect the rights of out-of-state parties from local prejudice in the state courts, whether an invigorated form of administrative review would be adequate to protect the rights of unsuccessful Social Security claimants who now can seek judicial review from both the district court and the appellate court, and even whether the country should draw down its troops in the war on drugs.

When Congress responds to perceived problems, in the courts or elsewhere, by proposing legislation that the courts find threatening to their independence, there is little the courts can do. If the legislation is a true threat to decisional independence, the courts may be obliged by the Constitution to strike down the legislation. When the legislation is a threat only to institutional independence and therefore not prohibited by the Constitution, the courts must fall back on persuasion, diplomacy, and compromise. The Civil Justice Reform Act provides an example. The Act raised questions about judicial independence when it was proposed in 1990 for the purpose of reducing the cost of litigation.[37] To judges, the bill was overly intrusive: it attempted to prescribe exactly how courts should handle civil cases; when they should hold pretrial conferences; who should hold them (judges only; never magistrates); and how quickly judges were to get cases to trial.[38] In addition, it required analyses of caseloads and semiannual reporting of motions under advisement and cases that had been pending for more than three years.[39]

Congress had some grounds for its sudden concern about the courts' management of cases. The system had room for improvement; it was not as transparent as it could have been, and individual courts varied greatly in the support they provided judges for case management. But instead of meeting with the Judicial Conference to consider the judiciary's ideas about what they would need to implement better

---

36. Robert W. Kastenmeier & Michael J. Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEGIS. 301, 305–06 (1979).

37. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990).

38. Civil Justice Reform Act of 1990, S. 2027, 101st Cong. § 2 (1990).

39. § 476.

systems, such as increased funding for the technology to make the system work, the Senate Judiciary Committee simply announced what the federal courts must do. The judges greeted the proposal with all the enthusiasm that Congress would have mustered for a court decision holding some aspect of its committee structure unconstitutional. In the end, tactful overtures to the staffs of the Senate Judiciary Committee by a member of the Executive Committee of the Judicial Conference, together with a magistrate judge known for his negotiating skills, achieved modifications acceptable to the courts. They were helped by Robert Kastenmeier, whose work in modifying the bill made it more palatable to the judges.[40]

Several lessons can be learned from this episode, one being the importance for the judiciary of responding in a measured way to legislation that seems overreaching. Going head-to-head with the legislature is rarely effective. As one of my colleagues once told me, judges seem to have more success in their dealings with Congress if they proceed with the deference of an ambassador to another country. Another lesson is being realistic about what can be achieved. The courts' representatives did not obtain every change they wanted in the Civil Justice Reform Act, but they had the wisdom to recognize when further efforts would be counterproductive.

It follows from the parsimony principle that judges should put less effort into matters that are seen as special pleading, first among them, any increase in salaries. Much as judges might see stagnant salary levels and the constant denial of cost of living increases as deterrents to attracting and retaining qualified people on the federal bench, Congress has made it plain that it does not share that view.

Still another matter deserves mention. Communicating with Congress is more effective when the judiciary speaks with one voice. The chances of persuading Congress of the wisdom of any legislative initiative increase when the backers are united on its importance.

With only a limited power of persuasion with which to protect its institutional independence from the other branches, the judiciary needs to find other ways that it can strengthen its hand. In an article written in 1995, two scholars from the Federal Judicial Center, Russell Wheeler and Gordon Bermant, identified a not-so-obvious strategy that the

---

40. Editorial, *A Tribute to Robert W. Kastenmeier*, 74 JUDICATURE 176, 176 (1991); *see also S. 2648, the Judicial Improvements Act of 1990: Editor's Introduction*, 74 JUDICATURE 111 (1990); Diana E. Murphy, *S. 2648, the Judicial Improvements Act of 1990: The Concerns of Federal Judges*, 74 JUDICATURE 112 (1990); Robert S. Banks, *S. 2648, the Judicial Improvements Act of 1990: The Need for Reform*, 74 JUDICATURE 113, 113–16 (1990).

courts have since implemented in different ways. They observed that "neither Congress nor the Executive [really] *wants* to intervene in procedural and administrative judicial branch affairs," if only because there is little political capital to be gained by the intervention.[41] Thus, "[i]f the judiciary is perceived as imposing on itself very high standards of accountability for official conduct, fiscal prudence, and efficient operations, then the political branches have little incentive to initiate additional procedural and administrative interventions."[42]

The suggestion is eminently sensible. It also brings me back to the Civil Justice Reform Act. Despite the fears the legislation engendered among judges, their compliance with the modified Act reduced Congress's concern about their accountability for their dockets. Court dockets are now transparent to the public and to Congress. Similarly, the judges' implementation and enforcement of the judicial conduct and disability provisions of the 1980 and 2002 legislation have demonstrated that the judiciary can be trusted to police its own ranks and discipline judges who engage in acts of judicial misconduct. In doing so, the judiciary has responded to Congress's concern that some system, short of impeachment, was necessary for dealing with instances of judicial misconduct that do not arise to an impeachable offense. Before the enactment of this legislation, the chief judges of the circuits had to improvise ways of dealing with misconduct and disability, with varying degrees of success.

Under the 2002 Act, a successor to the 1980 Act sponsored by Robert Kastenmeier, it is easier for any person to file a complaint against a judge who has engaged in "conduct prejudicial to the effective and expeditious administration of the business of the courts" or who is physically or mentally incapable of fulfilling the duties of the office.[43] The Act allocates responsibilities to the chief judge and council of each circuit to review and act upon all complaints and to take specified actions in cases found to have merit.[44] In egregious cases, where it appears that a judge may have engaged in conduct that would constitute a ground for impeachment, the circuit council may refer the matter to the Judicial Conference of the United States, which may certify it to the House of Representatives.[45]

---

41. Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 MERCER L. REV. 835, 858 (1995).

42. *Id.*

43. 28 U.S.C. § 351 (2006).

44. §§ 351–64.

45. § 354–55.

In responding to legislative inquiries or proposed legislation, the Federal Judicial Center provides the judiciary the ability to respond to legislative initiatives with credible research on the issue under discussion. A few years ago, for example, Congress began asking whether it was necessary to build and maintain so many courtrooms. Rather than simply oppose Congress's effort to tell the judges how to use their courtrooms, the Judicial Conference enlisted the help of the Judicial Center to undertake a study of courtroom use.[46] The study's results led to productive discussions about the most effective allocation of courtrooms.[47]

Finally, on this theme of judicial accountability, it is worth noting that the judiciary has become an increasingly careful steward of the money allocated it by Congress. For the last eight years, it has been engaged actively in a broad cost-containment effort initiated by the Judicial Conference.[48] It has imposed new restrictions on the size and cost of courthouses, adopted measures to cut the costs of chambers staffs, cut the size and number of chambers libraries, and improved the courts' utilization of jurors.[49] This self-scrutiny and frugality have

---

46. FED. JUDICIAL CTR., THE USE OF COURTROOMS IN UNITED STATES DISTRICT COURTS: A REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION & CASE MANAGEMENT 1 (2008).

47. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 10–11 (2008), *available at* http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/2008-09.pdf; JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11, 13 (2007), *available at* http://www.uscourts.gov/judconf/proceedingsSept07.pdf.

48. *2010 Year-End Report on the Federal Judiciary*, THIRD BRANCH (Admin. Office of the U.S. Courts, Office of Pub. Affairs, D.C.), Jan. 2011, at 1, 2 (describing Chief Justice William Rehnquist's directive to the Judicial Conference "to develop an integrated cost containment strategy for fiscal year 2005 and beyond"); Admin. Office of the U.S. Courts, Office of Pub. Affairs, *Transcripts of Federal Court Proceedings Nationwide to Be Available Online*, THIRD BRANCH NEWS (Sept. 18, 2007), www.uscourts.gov/News/NewsView/07-09-18/Transcripts_of_Federal_Court_Proceedings_Nationwide_To_Be_Available_Online.aspx (discussing a series of cost-containment recommendations related to law clerks and to the judiciary's personnel system in general); Leonidas Ralph Mecham, 2004 ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. 1 (describing the launching of "an unprecedented system-wide cost-containment effort" under the leadership of the Executive Committee of the Judicial Conference and Chief Judge Carolyn King (Fifth Circuit) and with the approval of Chief Justice Rehnquist).

49. *Conference Adopts Recommendations on Law Clerks*, THIRD BRANCH (Admin. Office of the U.S. Courts, Office of Pub. Affairs, D.C.), Sept. 2007, at 1, 1–2 (discussing cost-containment measures for law clerks); Mecham, *supra* note 48, at 1–8.

become powerful factors in persuading Congress to give the judicial branch the full amounts of its budget requests in recent years.[50]

An obvious force multiplier is to have allies to speak on one's behalf. For the courts, the obvious allies are the various bar associations, because they have a stake in the effective functioning of the courts and the greatest knowledge about the health of the courts.[51] But the judiciary should not overlook the continuing need to educate the public about the importance of an independent judiciary. Judges have an easy opportunity to undertake this kind of public education when presiding over jury selection, and, to the extent their caseloads permit, they can look for opportunities to speak to school classes and other groups about the courts and why they matter. The judiciary cannot afford to assume that the idea of judicial independence is uniformly understood and appreciated.

Judges can build bridges with individual legislators by making them part of naturalization ceremonies, inviting them to a regular judges' meeting with no set agenda, including them as panelists or speakers in circuit conferences, and promoting other ongoing exchanges.

Of course, the best ally for the courts is a legislator who is a student of the third branch and cares about the effective functioning of the courts. As I noted at the outset, the judiciary had one of these in Robert Kastenmeier. For many years, he was the ranking majority member of the House Judiciary Committee and chaired the Subcommittee on Courts, Intellectual Property, and the Administration of Justice.[52] In that role, he helped create the State Justice Institute;[53]

---

50. *Federal Judiciary Funded to End of Fiscal Year*, THIRD BRANCH (Admin. Office of the U.S. Courts, Office of Pub. Affairs, D.C.), Apr. 2011, at 1, 1, 3 (quoting Administrative Office Director Jim Duff) ("We are grateful that in these times of serious budgetary concerns the Congress has recognized the cost-containment efforts of the federal Judiciary in recent years and has provided fair and sufficient funding to meet the Judiciary's most important needs."); Mecham, *supra* note 48, at 1 ("I am pleased that in its fiscal year 2005 funding bill Congress specifically recognized the leadership of the Administrative Office for cost-containment efforts.").

51. The American Bar Association's Law Day theme this year was "No Courts, No Justice, No Freedom." *Law Day History: Past Themes*, AM. BAR ASS'N, http://www.americanbar.org/groups/public_education/initiatives_awards/law_day_2012/history_and_archives/history_archives.html (last visited Sept. 7, 2012).

52. *See, e.g.*, STAFF OF J. COMM. ON PRINTING, 88TH CONG., OFFICIAL CONG. DIRECTORY 191 (Comm. Print 1963); STAFF OF J. COMM. ON PRINTING, 92ND CONG., OFFICIAL CONG. DIRECTORY 194, 297 (Comm. Print 1972); STAFF OF J. COMM. ON PRINTING, 96TH CONG., OFFICIAL CONG. DIRECTORY 304 (Comm. Print 1979); STAFF OF J. COMM. ON PRINTING, 101ST CONG., OFFICIAL CONG. DIRECTORY 396 (Comm. Print 1989).

53. Am. Judicature Soc'y, *A Tribute to Robert W. Kastenmeier*, 74 JUDICATURE 176, 176 (1991).

worked to reduce much of the mandatory jurisdiction of the Supreme Court, giving it far greater discretion over the appeals that it accepted;[54] and promoted and oversaw the establishment of the Court of Appeals for the Federal Circuit,[55] which, among other things, hears all appeals in patent cases. He was active in efforts to expand the federal magistrates system; he championed the federal defender program, which provides highly qualified criminal defense lawyers to represent persons charged with criminal offenses who are unable to retain private counsel; and he played a large role in reorganizing the bankruptcy courts.[56]

At least two things should be noted about Bob Kastenmeier's focus on the judiciary. The first is an observation made about him by the American Judicature Society in an editorial tribute upon his retirement: he was the judiciary's friend "but not its agent."[57] In his mind, accountability and judicial independence were not mutually exclusive goals.[58] As both an outsider and a careful student of the courts, Representative Kastenmeier's goal was to provide the judiciary the resources it needed to work more effectively so that it could work for the public good. At the same time, he advocated more accountability by the courts and increased openness: he supported the televising of court proceedings; he was in favor of financial reporting by judges; and he was the author of the Judicial Conduct and Disability Act of 1980,[59] a predecessor to today's Act of the same name, making it easier for citizens to complain about possibly unethical or illegal actions by judges.

The second point is that Bob Kastenmeier was unusual in his intimate knowledge of the federal courts. In all probability, he had a better understanding of court functions, their shortcomings, and their needs than most of the members of the judiciary, whose understanding is often limited to their own courts and caseloads. From that perspective, he was acutely aware of ways in which the system could be improved and strengthened, and he was tireless in acting on his ideas.

Without someone like Bob Kastenmeier in Congress today, the judiciary has to work much harder and more imaginatively on its communication with the first branch. We are dependent upon Congress (and the executive branch); we need its help and support. Robert

---

54. *Id.*

55. 126 Cong. Rec. 25,364-67 (1980).

56. *Id.*

57. *Id.*

58. Robert W. Kastenmeier, *Let Ideas Flourish: How We Can Improve Our Justice System*, 72 Judicature 122, 124 (1988).

59. Judicial Conduct and Disability Act, H.R. 6330, 96th Cong. (1980).

Katzmann (now a judge on the Court of Appeals for the Second Circuit) made a similar point. As he wrote, the judiciary cannot unilaterally resolve issues about matters of federal court jurisdiction, continued federalization of crimes, or the size of the judiciary; "the role of Congress is pivotal."[60] "[I]issues relating to court reform and access to justice are political questions" requiring congressional action.[61] As judges, dependent on Congress for the tools we need to perform our jobs, we have no choice but to continue trying to bridge the divide with Congress.

It remains the case that maintaining the delicate balance between the two branches is a matter of trial and error, advance and retreat, success and failure, overtures and rejection, incremental steps and small adjustments. Perhaps, after all, this is exactly how the framers of the Constitution would have wanted it to be.

60. KATZMANN, *supra* note 35, at 112.
61. Kastenmeier & Remington, *supra* note 36, at 339.