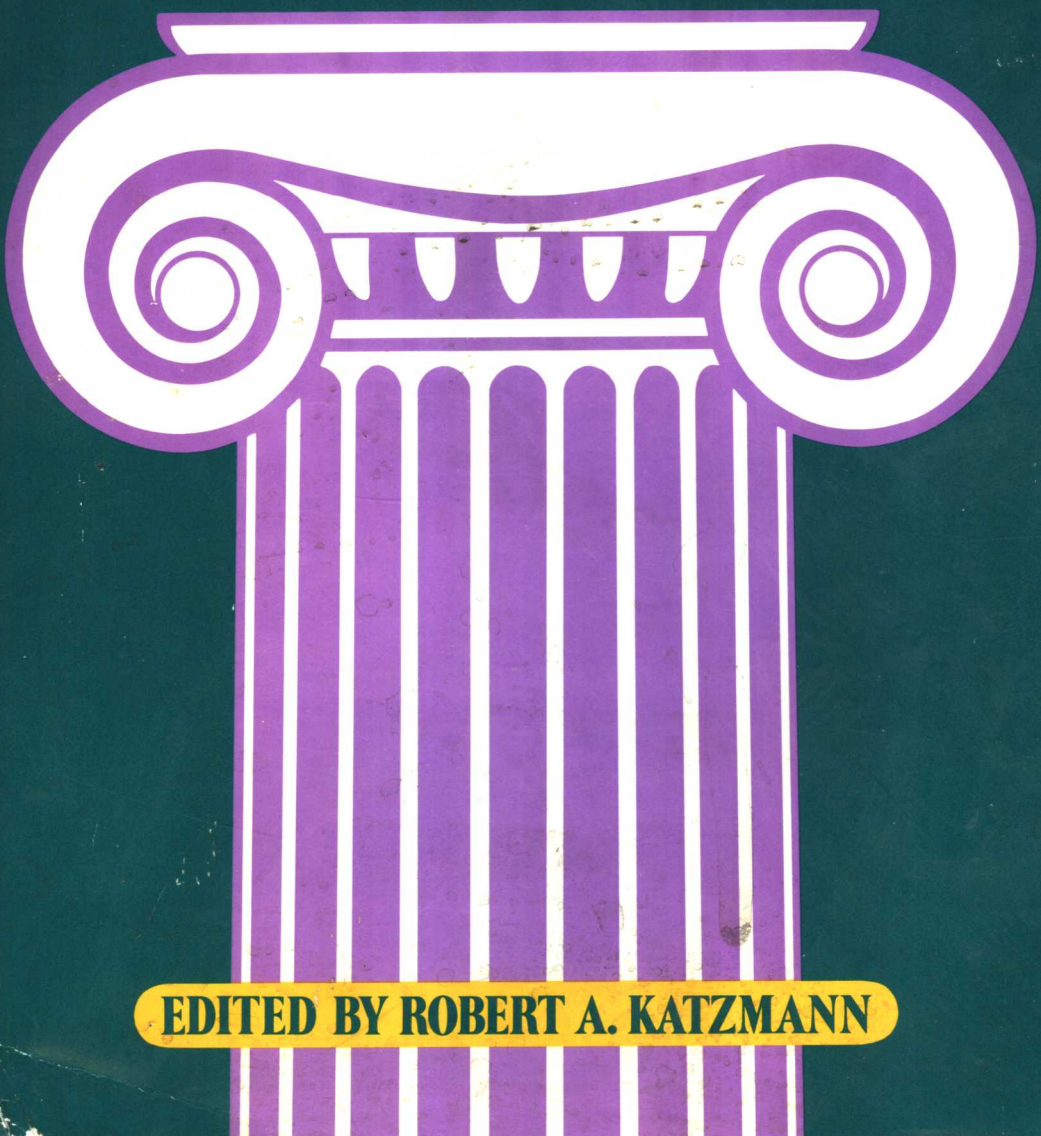
JUDGES AND LEGISLATORS

TOWARD INSTITUTIONAL COMITY



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editor

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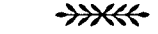
Foreword



Reasoned policymaking depends in part upon understanding among the branches of government of one another's problems and processes. There is no shortage of commentary suggesting the need for better communications between Congress and the executive branch. Yet the judicial branch, which has increasingly played a critical role in our system, has generally been neglected in discussions about interbranch relationships.

This book seeks to help redress this imbalance by focusing on the critical linkage between the federal judiciary and Congress. The consequences of the lack of understanding between the judiciary and Congress are becoming ever more acute. The legislature's inattention to the institutional well-being of the judiciary has made it increasingly difficult to attract able candidates to the federal bench and to retain those already on it. The gap has also made it harder for the courts to discern legislative meaning whenever they interpret statutes. Courts are thus often accused of distorting congressional will.

As this volume details, some of these long-standing problems can be mitigated by developing ground rules for communications between judges and legislators, ascertaining ways for Congress to better signal its legislative intent to the courts, and developing institutional mechanisms to improve relations between the branches.

This volume is part of a major project, begun at the invitation of the U.S. Judicial Conference Committee on the Judicial Branch, that seeks to determine how relations between the legislative and judicial branches can be improved. The papers in this volume are the product of a colloquium held at Brookings that brought together scholars from a variety of disciplines, members of the judiciary and Congress, and other interested persons. Robert A. Katzmann, editor of the volume and director of the project, has contributed a summary of the proceedings and an agenda for improvements between the branches.

The editor is grateful to the colloquium participants. For their critical and useful comments on the manuscript, he owes a special debt to Judge Frank M. Coffin, Judge Abner Mikva, Professor A. Leo Levin, Warren I. Cikins, Thomas E. Mann, and R. Shep Melnick. At the colloquium, Donna M. Dezenhall of the Brookings Center for Public Education and Maureen Weston were helpful. Brookings interns Daniel Hall, Kimberly Reed, and Jack Zorman

aided the editor in various ways. William J. Brennan IV, then of the Federal Judicial Center, assisted in gathering data for one chapter.

The editor is very thankful to Nancy D. Davidson, who edited the manuscript with the help of Brenda B. Szittya. Richard Aboulafia verified its contents. The index was prepared by Margaret Lynch. Sandra Z. Riegler, Eloise Stinger, and Pamela Whelan provided administrative support, and Renuka D. Deonarain supplied secretarial skills as the manuscript was turned into a book. Louis Holliday and Michael Doleman provided assistance in preparing the manuscript and research materials. Laura Walker and the Brookings library staff also were most helpful.

The Brookings Institution is grateful to the Charles E. Culpeper Foundation, the Earhart Foundation, and an anonymous foundation for grants to support work on this volume.

The views ascribed to this book are those of the authors and should not be attributed to the trustees, officers, or other staff members of the Brookings Institution, or to the various funding sources.

Bruce K. MacLaury
PRESIDENT

JULY 1988
WASHINGTON, D.C.

Editor's Acknowledgments

I have many thanks to spread about, not only to those who helped produce this volume, but also to those who have lent their energies to this ongoing project. Foremost among these is Judge Frank M. Coffin, the chairman of the U.S. Judicial Conference Committee on the Judicial Branch, without whose vision this project would not have been undertaken. The wise counsel of Gilbert Y. Steiner, senior fellow in the Brookings Governmental Studies program, has been indispensable from the outset. I am grateful to the directors and officers of the Governance Institute, whose backing assured that this project could be pursued.

I appreciate the support at Brookings of President Bruce K. MacLaury; Thomas E. Mann, the director of the Brookings Governmental Studies program; and Warren I. Cikins, senior staff member of the Center for Public Policy Education and the organizer of the Brookings' Administration of Justice conferences, who introduced the panelists at the colloquium.

The members of the U.S. Judicial Conference Committee on the Judicial Branch provided valuable suggestions about the project. I benefited from the advice of the planning committee for the colloquium, consisting of Judge Coffin, Judge Abner J. Mikva, Judge Thomas J. Meskill, Judge J. Clifford Wallace, Professor A. Leo Levin, Dean Paul D. Carrington, Warren I. Cikins, Roger H. Davidson, Jeffrey W. Kampelman, William C. Kelly, Jr., and Gilbert Y. Steiner. In addition, discussions about various aspects of the project have been helpful with the following people: Judge Hugh H. Bownes, Judge John R. Brown, Judge James L. Buckley, Judge Warren Eginton, Judge Irving Hill, Judge Kenneth W. Starr, William R. Burchill, Jr., Benjamin L. Cardin, Robert Feidler, Kenneth Feinberg, Louis Fisher, Hillel Fradkin, Leonard Garment, Mark A. Goldberg, Stephen Hess, Mary Jane Hickey, Stephen Horn, Robert W. Kastenmeier, Herbert Kaufman, Leslie Lenkowsky, Paul C. Light, Thomas Main, Daniel P. Moynihan, William K. Muir, Jr., Gerald D. Rapp, Michael J. Remington, Steven R. Ross, Martin M. Shapiro, Thomas Thornburg, William Weller, and Russell R. Wheeler.

I am particularly grateful for the continuing support of Francis J. McNamara, Jr., and Helen D. Johnson, so necessary for the birth and continued life of this project.

A. Leo Levin and Charles P. Nihan, the former director and deputy director of the Federal Judiciary Center, respectively, provided a stimulating environment for my work over a period of several months.

I also extend thanks to the Judicial Conference of the District of Columbia Circuit for inviting me to participate at its meeting and to test various ideas about this project with the judges of the circuit. In that regard, I especially acknowledge the kindness of Chief Judge Patricia M. Wald, Judge James L. Buckley, and Judge Ruth Bader Ginsburg.

In addition to the aid provided by various foundations to the Brookings Institution, I appreciate the grants to the Governance Institute that contributed to the completion of this book from the M. D. Anderson Foundation, the Lynde and Harry Bradley Foundation, the Charles E. Culpeper Foundation, the Robert J. Kutak Foundation, the Henry Luce Foundation, the Mead Corporation Foundation, and an anonymous foundation.

Robert A. Katzmann
EDITOR

JULY 1988
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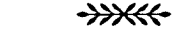
Contents

Introduction

Robert A. Katzmann



This study of judicial-congressional relations is rooted in the premise that the two branches lack appreciation of each other's processes and problems, with unfortunate consequences for both and for policymaking more generally. This colloquium volume can perhaps best be understood as an effort by the judiciary to bridge the distance with Congress, to ascertain the sources of tension, and to find pragmatic solutions to ameliorate them. It is the first immediate product of a long-term project examining the full range of relationships between the judiciary and Congress, begun under the auspices of the Brookings Institution and continuing in conjunction with the Governance Institute. The purpose of the inquiry is not to propose a radical restructuring of arrangements, but rather to determine if, how, and under what circumstances the judicial-congressional relationship might be improved. Such work may be especially timely as our Constitution enters into its next hundred years and we rededicate ourselves to the effort to realize its objectives.

Origins

A critical examination of judicial-congressional affairs, with the hope of improving relations between the branches, became part of the long-term agenda of the U.S. Judicial Conference Committee on the Judicial Branch in 1984. The U.S. Judicial Conference is the policymaking body of the federal judiciary, concerned with the administration of justice and charged by statute with making recommendations to Congress.[1] A key committee of the conference is the Committee on the Judicial Branch, responsible in part for advising and making recommendations to the Judicial Conference on matters

1. Created in 1922, with the vigorous support of Chief Justice William Howard Taft, the "Conference of Senior Circuit Judges," as it was then known, was to provide the federal judiciary with a centralized policymaking administrative and management capacity. It consists today of the chief justice of the United States, who serves as its chairman, the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit. 28 U.S.C. sec. 331.

relating to the viability of the judicial office as a lifetime calling—salaries, benefits, and other perquisites. It is to disseminate such information and promote interest throughout the federal judiciary.

Chaired by Circuit Judge Frank M. Coffin, the fourteen-person committee is a diverse group, drawn from across the country and rich in experience. A distinctive dimension of the committee's profile is that many of its members have served in Congress.[2]

Upon assuming the chair of the committee, at the request of then Chief Justice Warren Burger, Judge Coffin proposed that its focus should include, in addition to its traditional concerns, a long-range program devoted to the increased understanding of and respect for the judiciary. At the core of such an agenda would be an examination of past, present, and future relations between Congress and the judiciary. As a former member of Congress and a federal circuit judge, Coffin had reached the view that the interaction of the two branches of government festered with enough misunderstandings and friction to impede the most effective functioning of both. The judiciary could not hope to strengthen its well-being without congressional support—and that depended upon a mutual appreciation of each branch's responsibilities, processes, and problems. With the backing of the chief justice and the approval of his committee, Judge Coffin moved to launch an inquiry, of which this colloquium volume is but a part.[3] Thus the idea for this project is directly traceable to Judge Coffin and the Committee on the Judicial Branch; their support has been a vital, sustaining force.

At the invitation of Judge Coffin, I began work with the Committee on the Judicial Branch to help create a process for considering important questions affecting relations between the courts and Congress. As presently envisioned, the project has three principal components: a book, which I will be writing throughout the duration of the enterprise, assessing relations

2. Since the project began, the roster from the House of Representatives has consisted at various times of Judge Coffin (elected from Maine), Judge Abner J. Mikva of the U.S. Court of Appeals for the District of Columbia Circuit (Illinois), Judge Thomas J. Meskill of the U.S. Court of Appeals for the Second Circuit (Connecticut), Senior District Judge James Harvey of the U.S. District Court for the Eastern District of Michigan (Michigan), Senior District Judge Oren Harris of the U.S. District Court for the Eastern District of Arkansas (Arkansas), and District Judge William L. Hungate of the U.S. District Court for the Eastern District of Missouri (Missouri). Former senators include Senior Judge Jack R. Miller of the U.S. Court of Appeals for the Federal Circuit (Iowa) and Judge Donald S. Russell of the U.S. Court of Appeals for the Fourth Circuit (South Carolina).

3. Indeed, the responsibility to "study and report to the Judicial Conference on past, present, and possible future relationships with Congress" became an explicit part of the committee's work in 1987. Executive Committee of the Judicial Conference, "Judicial Conference of the United States Report on Committee Jurisdiction," November 6, 1987.

between the judiciary and Congress; a preliminary colloquium identifying critical issues (the results of which are contained in this volume); and a series of workshops bringing together judges, legislators, scholars, members of the bar, and other interested citizens with the objective of achieving pragmatic solutions. From the outset, the project has benefited from the advice of a panel drawn from the Committee on the Judicial Branch. Apart from Judge Coffin, it has consisted of Judge Thomas J. Meskill of the U.S. Court of Appeals for the Second Circuit, Judge Abner J. Mikva of the U.S. Court of Appeals for the D.C. Circuit, and Judge J. Clifford Wallace of the U.S. Court of Appeals for the Ninth Circuit. In addition, a planning committee was created to provide counsel as to the project's early direction.[4]

From the beginning, our planning group recognized that the success of the enterprise would depend upon the continuing involvement of representatives of both branches. Thus we concluded that it would be desirable, as soon as practicable, to hold a preliminary colloquium, at which officials from each branch could present their views of the problems confronting them.

The Colloquium

Some forty-five people—including a Supreme Court justice, federal judges, a key member of Congress, legislative staffers, a state Supreme Court justice, representatives from the judicial branch, scholars, and members of the private bar—gathered in November 1986 for an all-day meeting at the Brookings Institution. The core of the session consisted of three panel discussions exploring (1) the constitutional and prudential reasons for the absence of communication between the branches; (2) the institutional arrangements through which each branch presents its views and assesses the problems of the other—including a preliminary examination of such topics as how the judiciary interprets legislative history and the way Congress addresses (or fails to address) the concerns of the federal courts; and (3) the kinds of practical steps that might be taken to improve judicial-legislative relations. This volume presents the papers prepared in conjunction with the colloquium,

4. The members of that planning group have included, in addition to the representatives of the Committee on the Judicial Branch, Professor A. Leo Levin, director of the Federal Judicial Center (who at times was represented by deputy director Charles Nihan); Roger H. Davidson of the Congressional Research Service; Johnny H. Killian of the Congressional Research Service; senior fellow Gilbert Y. Steiner of the Brookings Institution; senior staff member Warren J. Cikins of the Brookings Institution; William C. Kelly, Jr., of the law firm of Latham and Watkins; and Jeffrey W. Kampelman of the law firm of Shaw, Pittman, Potts and Trowbridge. Dean Paul D. Carrington of the Duke University School of Law also participated in one meeting of the planning group.

with a summary of the proceedings and a blueprint for the next phase of activity in the concluding chapters.

The keynote essay, written by Judge Coffin, poses the central issues that give rise to our work and identifies the fundamental questions for examination in the long term. Exploring changes in the institutional tapestry of the Republic over the last 200 years, Judge Coffin examines the areas of estrangement between the branches and calls for "all feasible reconciliation," specifying fruitful topics of inquiry.

The next contribution looks to history to provide a key to understanding the sources of friction. Conceivably, the seeds of the present circumstances might be found in the early American experience. In their study, covering the period from 1789 to 1800, historians Maeva Marcus and Emily Van Tassel show that in the absence of guidance from the Constitution, judges and legislators sought to find appropriate ways to communicate; indeed, the legislature encouraged the third branch to assume a rôle beyond adjudicating cases, to work more broadly with Congress and the executive to promote effective government. Thus events in the first years of the nation do not compel today's rigid separation and general lack of communication between the federal judiciary and Congress. This conclusion has important ramifications for our current effort to improve relations between the branches.

That historical inquiry provided a fitting ground for the first preliminary discussion of the colloquium, concerning the reasons for the lack of regular communication between the judiciary and Congress (the central points of which are distilled in a later chapter). Whatever the appropriate boundaries for interaction might be, it is necessary for each branch to understand the workings of the other. Each vitally affects the other, but without a clear recognition of the other's institutional processes and problems. The need to remedy such deficiencies in knowledge prompted the commissioning of two papers. One examines what legislators need to know about the judicial process; the second explores what judges should know about Congress. The authors of the former work, Representative Robert W. Kastenmeier, Democrat of Wisconsin, who has been for many years the chair of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, and subcommittee counsel Michael Remington, provide a unique perspective from Capitol Hill. As they attempt to offer "a judicious legislator's lexicon" to the federal courts, Kastenmeier and Remington allude to the formidability of their task; they observe that "as participants in the legislative process, we are struck by the simple fact that few in Congress know much about or pay attention to the third branch of government."

In his essay, congressional scholar Roger H. Davidson seeks to provide

judges with a basic understanding of Congress—a "critical tourist's survey of the legislative process." He starts from the premise that in order to understand today's congressional enactments, one must know something about lawmakers—their objectives, working conditions, and procedures by which they process bills and regulations. The paper offers judges a look into the institutional milieu of a branch whose product they are often called upon to interpret, but with whose day-to-day environment they have virtually no contact. The work provides not only judicial understanding of the congressional experience, but also background for another facet of the project's mandate (discussed more fully in the last chapter): to explore ways to augment the judiciary's understanding of legislative history and determine how Congress might signal statutory intent more clearly to the courts. Too often discussions of statutory interpretation and legislative drafting take place in a vacuum. Knowledge of Congress is obviously useful in the search for, and assessment of, possible remedies to specific problems of statutory interpretation.

As will be described in the chapter summarizing the proceedings, consideration of problems of institutional capacity led to a lively exchange of views. But that examination was only a prelude to the colloquium participants' discussion of possible improvements. That preliminary search focused on the federal courts and the Congress (with some attention to the executive, too). As part of the investigation, an effort was made to ascertain what could be learned from other experiences.

In that regard, the contributions of Justice Hans A. Linde of the Oregon Supreme Court and Patrick S. Atiyah of Oxford University offer insights from the perspectives of the states and the British system, respectively. From the vantage point of a jurist and scholar, Linde notes that certain characteristics common to state courts and state legislatures distinguish their problems from those of the federal courts and Congress. At the same time, however, the pattern of institutional relations in the states casts doubt upon the shibboleths invoked to bar judicial involvement in legislative affairs at the national level. Indeed, for reasons that he explains, Linde observes that the "active participation of state judges in the policy process is much more taken for granted and much less controversial than the involvement of federal judges in the national government."

Examining judicial-legislative relations in England, Atiyah shows how institutional differences between Britain and America influence the nature of the interaction between judges and lawmakers in the interpretation of statutes. He argues that the different role of the executive in the two countries is key to understanding the largely dissimilar character of relations between the judiciary and the legislature in the United States and England. If the English

model suggests that little borrowing is possible, it also highlights, by contrast, the unique sources of tension between the legislative and judicial branches in the American system.

With these essays as background, colloquium participants engaged in three panel discussions, which are summarized. The volume concludes with an examination of the challenge ahead—an agenda that calls for research, workshops (focusing on ground rules for communication, understanding the legislative process, and mechanisms to improve judicial-congressional relations), and recommendations with the hope of facilitating practical results.

The Underlying Concerns

Robert A. Katzmann

Congress is largely oblivious of the well-being of the judiciary as an institution, and the judiciary often seems unaware of the critical nuances of the legislative process. But for occasional exceptions, each branch stands aloof from the other.[1] "The judiciary and Congress not only do not communicate on their most basic concerns; they do not know how they may properly do so," declared Judge Frank M. Coffin in his paper in this volume. "The condition," he continued, "is that of a chronic, debilitating fever."

It is the perception of many in the federal court system and on Capitol Hill that this state of affairs has had adverse effects not only on relations between the two branches, but also on public policy in general.[2] Consider the following examples.

—In the waning days of the 1986 legislative session, Congress tacked on to a childhood vaccine protection law a provision that could greatly increase the judicial work load, but did not provide federal courts with the necessary additional resources. Judges were charged with determining whether claimants are eligible for compensation due to illness or death resulting from vaccination.[3] One official of the court system estimated that the judiciary would have to hire and train 300 or 400 special masters to handle these cases. Courts would still have to decide the flood of expected appeals, running perhaps in the thousands. In spite of the obvious impact on the courts, Congress did not consult with the judiciary when it considered the legislation. A year of considerable uncertainty passed before the district courts secured relief from the legislature.[4]

1. The Senate's consideration of a controversial judicial nominee is such an exception. See Robert A. Katzmann, "Approaching the Bench: Judicial Confirmation in Perspective," *Brookings Review*, vol. 6 (Spring 1988), pp. 42–46.

2. See Robert A. Katzmann, "Needed: Congress-Judiciary Dialogue," *New York Times*, October 10, 1987, p. 31.

3. 100 Stat. 3743, 3755–3784.

4. Included in the mammoth continuing resolution that Congress enacted at the end of