

## NO COURT IS AN ISLAND

Robert A. Katzmann\*

Our subject today, “no court is an island,” with regard to the federal appellate courts, bespeaks the fundamental truth that governance in the United States is a process of interaction among institutions—legislative, executive, and judicial—with separate and sometimes clashing structures, purposes, and interests.<sup>1</sup> Constructive tension among those governmental institutions, the founders envisioned, would not only preserve liberty, but also promote the public good. No branch was to encroach upon the prerogatives of the others, yet, in some sense, each was dependent upon the others for its sustenance and vitality. And that interdependence would contribute to a process that was informed and deliberative. Governance, then, is premised on each institution’s respect for and knowledge of the others, and a continuing dialogue from which shared understanding and comity flow.

With respect to the federal appellate courts,<sup>2</sup> what is at issue in part is the very viability of the judiciary; courts, after all,

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\* Judge, United States Court of Appeals for the Second Circuit. This paper is a précis of Judge Katzmann’s presentation at the 2005 National Conference on Appellate Justice.

1. Some of this introductory material is drawn from Robert A. Katzmann, *Courts and Congress* (Governance/Brookings 1997). I would note also the continuing work of the Governance Institute on Interbranch Relations, headed by Russell Wheeler.

2. The ninety-four federal judicial districts in the United States are organized into twelve regional circuits, each of which has a United States court of appeals. A court of appeals hears appeals from the district courts located within its circuit, as well as appeals from decisions of federal administrative agencies. In addition, the Court of Appeals for the Federal Circuit has nationwide jurisdiction to hear appeals in specialized cases, such as those involving patent laws and cases decided by the Court of International Trade and the Court of Federal Claims. Nationwide, there are 169 positions for active appellate judgeships. (As of October 1, 2005, there were some twelve vacancies.) In addition, some ninety-one judges serve as senior judges. In fiscal year 2005, the Courts of Appeals received \$504 million or eleven percent of the total funding provided to the courts from the Salaries and Expenses account (\$4.528 billion). (All in all, total federal court appropriations at all levels constitute two-tenths of one percent of the total federal budget).

need to function in an environment respectful of their core values and mission, with the requisite resources, and the other branches seek a judicial system which faithfully interprets its laws and efficiently discharges justice. At issue in some sense is a matter even greater than the well-being of particular branches of government: It is the preservation of the means by which justice is dispensed fairly and efficiently.

A host of issues press upon the nerves of the relationship: the prospect of an ever-rising caseload; federalization of the law; resource constraints; compensation; concerns about the confirmation process; increasing legislative scrutiny of judicial decision making and the administration of justice; discussions about judicial decisions affecting congressional power; and debates about how the courts should interpret legislation.

While our subject today will, perforce, focus on legislative-judicial relations, it is important to recognize that federal courts are affected by other institutional forces as well. The federal appellate courts function within the context of a judicial system. The appellate courts are, of course, affected by the decisional jurisprudence of the Supreme Court. The impact of the High Court is felt not just in the context of isolated individual cases, but its decisions can have systemic effects—witness the impact of the Supreme Court's *Booker* and *Fanfan*<sup>3</sup> decisions in the area of sentencing on the appellate courts and district courts. The decisions of the Judicial Conference of the United States can also have consequences for the federal appellate courts. For example, the recent determination that summary orders can be cited by parties in litigation<sup>4</sup> will no doubt affect how courts of appeals write those orders. And circuit court funding, while ultimately determined by legislative action, is very much driven by the Judicial Conference funding formula.<sup>5</sup>

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3. *U.S. v. Booker*, 543 U.S. 220 (2005) (also deciding *U.S. v. Fanfan*).

4. New Rule 32.1 of the Federal Rules of Appellate Procedure is to take effect on January 1, 2007. Judicial Conference of the United States, <http://www.uscourts.gov/rules/> (noting that Rule 32.1 was approved on April 12, 2006) (accessed May 22, 2006; copy on file with Journal of Appellate Practice and Process).

5. See e.g. Judicial Conference of the United States, [http://www.uscourts.gov/judconf\\_jurisdictions.htm#Budget](http://www.uscourts.gov/judconf_jurisdictions.htm#Budget) (indicating that the Budget Committee of the Judicial Conference is charged with "assembl[ing] and present[ing] to Congress the budget for the judicial branch") (accessed May 22, 2006; copy on file with Journal of Appellate Practice and Process).

As to the executive branch, the president affects the federal appellate courts through the power to nominate judges. Executive branch policies can have substantial effects on the appellate judiciary—for instance, the determination of the Department of Homeland Security and the Department of Justice to drastically reduce the backlog of immigration cases has dramatically increased the workload of circuit courts,<sup>6</sup> forcing courts like my own to rethink time honored practices such as oral argument in every case for which it is sought. And the executive branch, through the General Services Administration, affects courthouse construction and renovation projects.<sup>7</sup>

Beyond other governmental institutions, a word about the media is appropriate. The work of the federal appellate judiciary is seldom the focus of media concern. It is the occasional high profile case that catches the media's attention. But when that sort of case arises, the public's understanding of the federal courts is filtered through news stories and editorials. And those representations may indirectly affect legislative responses to the federal appellate judiciary—not just in the instant case but more generally—because members of Congress are sensitive to public reactions.

The formal institutional ties between the federal courts and Congress are clear enough. In the exercise of its authority to advise and consent, the Senate confirms or rejects the president's judicial nominees to the appellate courts. Congress creates judgeships; determines the structure, jurisdiction, procedures (both civil and criminal), and substantive law of the federal courts; passes laws, affecting such disparate areas as judicial discipline and sentencing policy; and sets appropriations

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6. See e.g. *BIA Appeals Remain High in 2nd and 9th Circuits*, 37 Third Branch (Feb. 2005), <http://www.uscourts.gov/ttb/feb05ttb/bia/index.html> (accessed June 1, 2006; copy on file with Journal of Appellate Practice and Process); see also Administrative Office of the United States Courts, *Judicial Business of the United States Courts 2004* 13 chart (“Appeals of Board of Immigration Decisions”), <http://www.uscourts.gov/judbus2004/frontJudicialBusiness.pdf> (accessed May 22, 2006; copy on file with Journal of Appellate Practice and Process).

7. See e.g. U.S. General Services Administration Courthouse Programs, [http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA\\_OVERVIEW&contentId=8294&noc=T](http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_OVERVIEW&contentId=8294&noc=T) (indicating that GSA's Center for Courthouse Programs “is responsible for . . . general management of new federal courthouse construction and the modernization of existing courthouses”) (accessed May 22, 2006; copy on file with Journal of Appellate Practice and Process).

and compensation. The legislative branch adds to the judiciary's responsibilities whenever it enacts laws that result in court cases arising under the statutes. And the judiciary has an impact on the legislative process when it interprets statutes.

Congress's involvement in judicial administration is hardly a new phenomenon. To offer but one example, in 1891 Congress enacted the Evarts Act creating the United States Court of Appeals.<sup>8</sup> Over the last three decades, Congress has arguably taken a greater role in matters affecting judicial administration, with the passage of such major legislation as the Judicial Conduct and Disability Act<sup>9</sup> and the Sentencing Reform Act.<sup>10</sup> Today, congressional scrutiny of the federal judiciary appears to be more intense than ever. More concretely, one need only survey the last few legislative sessions in Congress to have a sense of the range of legislative interests affecting the judiciary. Passed in the most recent session of Congress, Section 106 of the REAL ID Act amends 8 U.S.C. § 1252 to deny any role for the district courts in the review of alien removal proceedings based on habeas corpus petitions by shifting the judicial review function to the courts of appeals. The law also provides for the transfer of any habeas petition challenging a final administrative order of removal, deportation, or exclusion from the district court to the appropriate court of appeals for disposition.<sup>11</sup> Section 1233 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 amends section 158 of the Judiciary Code to provide the circuit courts of appeal with discretion to accept bankruptcy appeals without an intermediate appellate decision.<sup>12</sup>

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8. Ch. 517, § 3, 26 Stat. 827 (1891), now codified as 28 U.S.C. § 43 (available at <http://wscode.house.gov/>).

9. Pub. L. No. 96-458, 94 Stat. 2035 (1980), now codified in various sections of Title 28 of the United States Code.

10. Pub. L. No. 98-473, 98 Stat. 1988 (1984), now codified as 28 U.S.C. §§ 3551-3556 (available at <http://wscode.house.gov/>).

11. 8 U.S.C. § 1252(b)(2) (LEXIS 2006) (providing that "[t]he petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings"); 8 U.S.C. § 1252(e)(2) (addressing judicial review in habeas actions brought under the act).

12. 28 U.S.C. § 158(d)(2) (LEXIS 2006) (providing that court of appeals may accept direct appeal if bankruptcy court, district court, bankruptcy appellate panel, or parties acting jointly certify that direct appeal is necessary to resolve a matter of first impression,

Recent Congresses have seen laws limiting the use of downward departures in sentencing,<sup>13</sup> requiring the Sentencing Commission to amend the guidelines to “substantially reduce” the incidence of downward departures and prohibiting the Sentencing Commission from promulgating additional grounds for downward departures until May 1, 2005;<sup>14</sup> class action legislation;<sup>15</sup> cost of living adjustments in recent years,<sup>16</sup> but some doubts about one for the upcoming year,<sup>17</sup> as well as failed bills to increase judicial compensation by 16.5 percent and by \$25,000.00;<sup>18</sup> bills to create additional Article III judgeships and convert temporary judgeships into permanent judgeships in the courts of appeals and the district courts;<sup>19</sup> substantial effective budgetary cutbacks, such that in fiscal year 2004, the federal courts lost six percent of their workforce,<sup>20</sup> while the workload of the courts increased by eighteen percent from fiscal year 2001 to fiscal year 2005;<sup>21</sup> a fiscal year 2005 appropriations measure

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conflicting decisions, or public importance, or a matter that would materially advance the progress of the case) .

13. See e.g. Child Obscenity and Pornography Prevention Act of 2003, H.R. 1161, 108th Cong. (Mar. 6, 2003) (providing for attorney general’s report to Congress within fifteen days of any downward departure).

14. See e.g. Child Abduction Prevention Act, Sen. 151, 108th Cong. (Jan. 13, 2003) (providing that “[o]n or before May 1, 2005, the Sentencing Commission shall not promulgate any amendment to the sentencing guidelines, policy statements, or official commentary of the Sentencing Commission that . . . adds any new grounds of downward departure”).

15. Class Action Fairness Act of 2005, Sen. 5, 109th Cong. (Jan. 25, 2005).

16. See e.g. Exec. Or. 13332 sched. 7, 69 Fed. Reg. 10891 (Mar. 3, 2004) (authorizing increases in judicial pay and making them retroactive to January 2004).

17. *Judiciary Calls for Funding to Maintain Course*, 38 Third Branch (Apr. 2006), [http://www.uscourts.gov/ttb/04-06/calls\\_for\\_funding/index.html](http://www.uscourts.gov/ttb/04-06/calls_for_funding/index.html) (accessed June 1, 2006; copy on file with Journal of Appellate Practice and Process).

18. Sen. 1023, 108th Cong. (May 7, 2003); H.R. 2118, 108th Cong. (May 15, 2003). A 16.5 percent increase would have “yield[ed] an average of approximately \$25,000 per judge across all levels of judicial offices.” Judicial Conference of the United States, *Fact Sheet: The Need for a Federal Judicial Pay Increase*, <http://www.uscourts.gov/newsroom/judicialpayincrease.htm> (accessed June 1, 2006; copy on file with Journal of Appellate Practice and Process).

19. See e.g. Federal Judgeship and Administrative Efficiency Act of 2005, H.R. 4093 109th Cong. (Oct. 20, 2005).

20. *Budget Cuts Leave 6 Percent of Federal Court Jobs Vacant*, Admin. Off. of the U.S. Cts. News Rel. (Nov. 17, 2004), [http://www.uscourts.gov/Press\\_Releases/LostJobs.pdf](http://www.uscourts.gov/Press_Releases/LostJobs.pdf) (accessed June 2, 2006; copy on file with Journal of Appellate Practice and Process).

21. See Judicial Conference of the United States, *Federal Judicial Caseload Statistics 2001* chart (“Judicial Caseload Indicators-12-month Periods Ending March 31, 1997, 2000,

that resulted in a 4.63 percent increase in salaries and expenses, preventing the further loss of staff, and in some instances backfilling some vacant positions;<sup>22</sup> appropriations to increase court security;<sup>23</sup> bills to federalize hate crimes;<sup>24</sup> bills to split the Ninth Circuit;<sup>25</sup> courthouse construction measures;<sup>26</sup> bills that would facilitate cameras in the courtroom;<sup>27</sup> resolutions that would constrain judicial reliance on international law in interpreting the Constitution;<sup>28</sup> legislation that provided a bill for the relief of the parents of Theresa Maria Schiavo so that they would have standing to bring suit in federal court;<sup>29</sup> and bills that would strip the jurisdiction of federal courts.<sup>30</sup>

In July 2003 a group of Republican House members formed a judicial accountability group to educate members of

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and 2001”), <http://www.uscourts.gov/caseload2001/front/highlights.pdf> (indicating that 56,067 new cases were filed in the courts of appeals, 63,473 new criminal cases were filed in the district courts, and 254,523 new civil cases were filed in the district courts) (accessed June 2, 2006; copy on file with Journal of Appellate Practice and Process); Judicial Conference of the United States, *Federal Judicial Caseload Statistics 2004* chart (“Judicial Caseload Indicators—Calendar Years 1995, 2000, 2003, and 2004”), <http://www.uscourts.gov/caseload2004/front/judbus03.pdf> (indicating that 60,505 new cases were filed in the courts of appeals, 70,746 new criminal cases were filed in the district courts, and 255,851 new civil cases were filed in the district courts) (accessed June 2, 2006; copy on file with Journal of Appellate Practice and Process).

22. *Judiciary Gets Funding Increase but Cuts May Still Come*, 37 Third Branch, <http://www.uscourts.gov/ttb/dec05ttb/cuts/index.html> (accessed June 1, 2006; copy on file with Journal of Appellate Practice and Process).

23. See e.g. Secure Access to Justice and Court Protection Act of 2005, H.R. 1751, 109th Cong. (Apr. 26, 2005).

24. See e.g. Local Law Enforcement Enhancement Act of 2005, Sen. 1145, 109th Cong. (May 26, 2005) (providing for the addition of a section prohibiting “hate crime acts” to Title 18 of the United States Code).

25. See e.g. Sen. 346, 107th Cong. (Feb. 15, 2001) (proposing new regional circuit to include Alaska, Guam, Hawaii, Idaho, Montana, the Northern Mariana Islands, Oregon, and Washington).

26. See e.g. H.R. 4426, 109th Cong. (Nov. 18, 2005) (proposing name for federal courthouse to be constructed in Jackson, Mississippi).

27. See e.g. Sen. 1768, 109th Cong. (Mar. 30, 2006) (providing for the televising of oral arguments in the Supreme Court).

28. See e.g. American Justice for American Citizens Act, H.R. 1658, 109th Cong. (Apr. 14, 2005).

29. Sen. 653, 109th Cong. (Mar. 17, 2005).

30. See e.g. Sanctity of Life Act of 2005, H.R. 776, 109th Cong. (Feb. 10, 2005) (removing matters relating to abortion and questions about whether human life begins at conception from jurisdiction of federal courts).

Congress and the public about “judicial abuse,”<sup>31</sup> and there have been calls to impeach federal judges.<sup>32</sup> Members of Congress have offered a variety of critiques of the judiciary and of individual judges<sup>33</sup> and have introduced bills that would limit federal jurisdiction to decide constitutional challenges to various kinds of government action.<sup>34</sup> A bipartisan Congressional Caucus on the Judicial Branch was launched by Representative Judy Biggert, Republican of Illinois, and Representative Adam Schiff, Democrat of California, to support a healthy independent judiciary.<sup>35</sup>

Tensions and differences in perspectives between the legislative and judicial branches are inherent in the constitutional design. But the very range of the ways in which the branches interact with and affect each other suggests the need for ongoing efforts to enhance the interbranch communication and understanding fundamental to the founders’ vision. I very much look forward to the opportunity to explore steps towards improved communication in the course of our informal discussions at this distinguished gathering of appellate judges and appellate lawyers.

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31. See e.g. *Judiciary under Attack*, 35 Third Branch (Aug. 2003), <http://www.uscourts.gov/ttb/aug03ttb/attack/index.html> (accessed May 31, 2006; copy on file with Journal of Appellate Practice and Process).

32. See e.g. Bob Egelko, *Schiavo Case Widens Divide between Congress and Courts*, S.F. Chron. A3 (Apr. 2, 2005) (reporting on “House Republican leader Tom DeLay’s threat of retaliation—even impeachment—against federal judges”); see also Editorial, *A Final Lesson for Graduates*, *Virginian-Pilot* (Norfolk, Va. May 18, 2006) (referring to a commencement speech in which Justice Sandra Day O’Connor mentioned attacks against judges, including threats of impeachment).

33. Linda Greenhouse, *Rehnquist Renews His Call for Judicial Independence*, 154 N.Y. Times A10 (Jan. 1, 2005) (referring to a number of resolutions and bills mentioned in the Chief Justice’s year-end report); see also e.g. *Judiciary under Attack*, *supra* n. 31; Egelko, *supra* n. 32.

34. See e.g. Pledge Protection Act of 2005, H.R. 2389, 109th Cong. (May 17, 2005) (providing that no federal court shall have jurisdiction to hear and decide questions related to the Pledge of Allegiance).

35. See William H. Rehnquist, *2004 Year-End Report on the Federal Judiciary*, 37 Third Branch (Jan. 2005) <http://www.uscourts.gov/ttb/jan05ttb/2004/index.html> (mentioning the Chief Justice’s meeting with Representatives Biggert and Schiff) (accessed June 1, 2006; copy on file with Journal of Appellate Practice and Process).

