A Venture in Governance
Remarks of U.S. Circuit Judge Frank M. Coffin
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We are here today to engage in a dialogue and, tomorrow, in a venture in governance. In this city of mega-government we usually think in terms of laws and regulations, their enactment, their implementation, their interpretation.

But in using the word "governance," I think not of macro structure but of the manner, process, and even style of governing. The word connotes not so much the grand plans for the avenues, streets, and plazas of Washington of a L'Enfant as figuring out the most sensible traffic pattern for the use of those spaces and how to achieve it. For example, seldom has something so useful and costless, so saving in time and frustration, been conceived as "right turn on red."

In a sense the Smithsonian Institution itself is an example of governmental fine tuning. The concept of an entity which over time would become the repository for the physical objects exemplifying our history, ways of living and working, and our culture added a significant gracenote to our nation. No, more important, an institutional memory critical to our evolving sense of identity.

And this series of dialogues hosted by the Woodrow Wilson Center for International Scholars is very much aimed at exploring underilluminated areas that hold promise of better performance of our societal obligations.

In looking back over my own meandering through life, I see a person who at the start of an adventure was an outsider looking in on something that seemed to need fixing, who then tried his hand at it, became for a time an insider, then moved on to become an outsider again ... a perennial pilgrim. I suspect that this is far from unique. It probably describes many of you.

As a young lawyer beginning in solo practice in Maine, I found myself giving talks criticizing severely the political party of my forbears for sloth, complacency, calculated ineptitude and suicidal inclinations. This led to criticism of me as a talker from the outside. So I soon found myself named to chair the platform committee -- a job usually done in the vortex of a convention evening. We changed the process radically, making it extend over months and involve people of all interests all over the state. This experience, combined with the principle that nature abhors a vacuum, led to my taking on the post of party chairman. Ordinarily this would have been a deadend in a one-party state where ours was not that party. But we did have the good fortune to help launch our standard bearer, Ed Muskie, on a considerable public career.

I soon became a candidate for office myself and a Member of the 85th and 86th Congresses, when I first came to know Congressman Kastenmeier. In my brief stay there, after rediscovering Canada in a study mission with the late great Brooks Hays of Arkansas, I joined forces with Senator Aiken in creating the U.S.-Canadian Interparliamentary Group, which provided a permanent vehicle for lawmakers of the two countries to work together.

My next real adventure began when, as Deputy Administrator of the Agency for International Development, I was flying back from a trip to the far east and fell to making notes on my airplane ticket envelope about how our national commitment to help the Third World could be well served by a private institution of research and education. I envisaged a building in Washington, Development House, which would house exhibits for school children and offices

for any cooperating enterprises. This particular idea never materialized but the essence of it later led to the work of a small group which created the Overseas Development Council (ODC), today a vital and thriving center of research, policy analysis, and seminal publications.

These then were three ventures in governance. The first was working to revivify a dormant institution, a political party; the second helped build a bridge between the parliamentaries of the two North American nations; and the third aimed to create a private institution which might improve our performance in an entire policy field. In a sense all this is prologue to the present story which began in the spring of 1983, after I stepped down as chief judge of my circuit after a decade in that position.

On October 13, 1983, my journal records the opening words of a call from Chief Justice Burger, "I understand, now that you're no longer chief, that you've got a lot of leisure time on your hands." He then asked me to chair the Committee on the Judicial Branch of the Judicial Conference of the United States, the federal judiciary's governing body. The charge to the Committee was about as broad as its title -- anything that would benefit the judiciary as an institution. I told him that I saw the committee as not only concerned with immediate bread and butter issues but also with "longer range matters of heightened understanding and respect."

It did not take me long to realize that underlying any particular request made of the Congress, just as tectonic plates underlie the shifting of the continents, was the substratum, the broad, open-ended, amorphous issue of the relations between the Congress and the judiciary. Having served in and developed a respect for the contributions and pressures in all three branches, I came to feel that these were the two branches, which over long reaches of time, had to learn to live with each other. There was considerable continuity in each branch. The judges by virtue of their constitutionally ordained tenure during "good behavior" and the Congress by virtue of the power of incumbency. Executives, on the other hand, come and go. Although the initiative and commitment of a President can be of utmost importance on specific issues, most issues most of the time depend upon Congressional receptivity. More to the point, any efforts to build better relations are not for the short winded; the predicate of such long-range efforts is a fairly high level of continuity among the membership of the putative parties to the relationships.

On November 16, 1983, I wrote this: "I finished a lengthy agenda 'talk paper' for the Committee on the Judicial Branch. My big new idea is that the Committee plan for a formal 'colloquium' to discuss just how and when and why judges should be expected to 'go public' with their needs. Today there is no clear, or accepted, ethic as to when or how judges should speak, urge, lobby. Whether this idea survives is a question. But the exercise would be a refreshing one for the Committee and the idea of a colloquium on one problem . . . might be a good precedent."

On December 12, I met with Chief Justice Burger. I wrote of that meeting: "I mentioned something not in any memo, the possibility of getting a foundation interested in doing a study of the judiciary and Congress." On January 19, 1984, I called Bob Katzmann, a young lawyer, political scientist, and soon to become Senior Fellow at Brookings, about Brookings' possible involvement in a colloquium on judiciary/Congressional relations. He was delighted to help. On February 21, Bob Katzmann, Warren Cikins, also of Brookings and Joe Spaniol (now Clerk of the Supreme Court, then Deputy Director of the Administrative Office of U.S. Courts), met over lunch at Brookings to discuss further steps. And on March 5 and 6, I chaired my first meeting of the Committee on the Judicial Branch.

Ultimately, as many of you know, a most stimulating and productive colloquium took place at Brookings on November 13, 1986, involving some forty-five people including Congressman Kastenmeier, staffers from the Hill, the press, scholars, judges, and Justice Scalia.

The result of this colloquium is the book, Judges and Legislators -- Toward Institutional Comity. Another is the series of small, sharply focussed workshops, the first of which is to be held tomorrow. Bob Katzmann will describe these in his own remarks.

Because we have come to appreciate that the work we have in mind is, as I have said, not for the short-winded, we have seen the need for a permanent vehicle. So in June of 1986 I, along with Bob Katzmann, scholars at Brookings and the Library of Congress, organized a small not for profit corporation, the Governance Institute. It is dedicated to the proposition that governance is a high art and, like any other such art, must be nourished by conscious effort. It does not flourish with neglect, benign or malign.

In this concern the Institute is similar to many higher institutions of learning, of public administration and civic training, of research, discussion, and publication. Where we may set ourselves apart lies in our level of ambition, focus, and method. As for the first, our level of ambition, we are disciples of the "small is beautiful" school. The institutions we target do not involve any basic restructuring. The solutions we envisage are not likely to be eye-catching. The groups we assemble and the subjects visited are both as small as we can manage to compress them.

Our focus is on relationships. The cant or camp word is "interface." We are interested in how one section, group, level, or branch of government can best work with another. Our curiosity is stimulated when someone brings us a problem created by two entities abrading or punishing each other or when, within an organization, a function impacting on several parts is not being carried out as well as it could be.

Finally, we strive not only for publications that will be read but for workable ideas that will be put in use. This is why we try to involve those whose work and function are involved, those who over time will have something to say about what changes will be made. This is also why we try whenever possible to experiment on a small scale in a pilot program.

As you begin to focus on the subject of tonight's dialogue, it is perhaps helpful to place yourself inside the skins of both a Congressman and a judge, but not at the same time. As a Congressman, your life is vastly more complicated than it was when both Congressman Kastenmeier and I arrived on the scene some thirty years ago. Statutes today average 9 pages; they used to average 2. Hearings today generate far more pages of transcript. Hearings are held not only on legislative proposals but also increasingly serve investigative and oversight functions. Committee assignments used to average 3 per House member; now the figure is 6.4, with 11 for a Senator. The House work day used to be 4.1 hours; it is now 6.4 hours -- a 50 percent increase. The Senate work day has gone from 6.1 hours to 8.1. Recorded votes in the House have jumped from 147 to 890; in the Senate, from 224 to 740. Outgoing mail has multiplied 12-fold, from 60 million pieces to 758 million. Visits to the home district, formerly once every month or so, are now weekly as a matter of course. Biennial campaign fundraising has also exploded, from 1974 when only 10 members were in the $200,000 class to 370 in 1986. Staffs have increased from 3,500 to over 12,000.

These are the external indicia of pressure. As the Senator or Congressman handles his mail and calls from home, talks to the press, tries to juggle various committee meetings, races to the floor for votes, plane trips home, and does a thousand other things, day after day, it is small wonder that he or she considers a judge with lifetime tenure, no elections to worry about; no constituents or special issue groups to reckon with, no press reports to answer ... to have a pretty soft life with no cause for complaint.

Now let's crawl inside the skin of a judge. If life has become complicated and pressurized

for the Congress, so has it for the judge. Looking back to the mid-sixties, when I became a judge, I see a trial judge's caseload doubling and an appellate judge's tripling. And, just as today's statutes are far more complex, so are today's cases. Moreover, the new statutes, scores of them, in every area of human activity, make enormous demands on the judiciary -- time limits for criminal proceedings, the meticulous findings required for sentencing, new causes of action, new channels of appeal. Like his legislative sibling, the judge these days has his committees -- for his court, his judicial circuit, and for the national Judicial Conference, requiring up to a third of his time. Ethical and disciplinary restraints have accumulated, requiring the judge to report minutely on his financial affairs, to participate in processing citizen complaints as investigator, decider, or accused, and to adhere to a rigorous, monastic Code of Judicial Conduct. The judge sees the federal judiciary at the bottom of the legal profession in monetary compensation. It is small wonder, then, that judges may consider a legislator insensitive to the legitimate needs of an entire branch of government, too ready to yield to every shift in public opinion whether informed or not, and legislating with cavalier disregard of the impact of a law on the already strained capacity of the judiciary.

What to do? The thought behind our workshops is that we are most effective if we chew on small chunks. Tomorrow we seek to lay open some smoldering problems in communication. For example, when is it appropriate for a judge to talk to a legislator and when not? When may a judge attempt to influence legislation? On matters specifically affecting the working conditions of judges? On matters concerning the administration of justice, such as rules of courts, rules of evidence, sentencing? Or, more broadly, on the wisdom or feasibility of criminal laws, such as the death sentence?

Similarly, when is it appropriate for judges or their representatives to speak to Congressional staff? Looking inward in the judiciary, where should the line be drawn between allowing individual judges to express their views and requiring deference to the judiciary's institutional voice, the Judicial Conference?

With recognition of the fact that Congress' ultimate responsibility is to the people, is it fitting for judges to be represented by some surrogate — with more potential power at the polls than judges can command?

By the same token, when may legislators attempt to influence judicial decision? Senators are in on the ground floor, when they are asked for their advice and consent on judicial nominations. Is there any limit which should be self-imposed on their interrogation of a judicial nominee? How about the second story, after an issue is in litigation? When should one or more legislators intervene in a law suit? Assuming that any ex parte conversation with a judge after a suit has been brought is forbidden, to what extent should judges and legislators discuss issues of the times, some of which will in the course of time become raised in law suits?

Beyond ground rules for communication are areas of possible action. I can think of several: judicial impact analysis, legislative drafting and history, and what has been called statutory housekeeping. First, how can Congress be apprised of the demands which proposed legislation will make on the judiciary? I have mentioned the impact of laws on the judiciary. In the past we have assumed that preparing a "judicial impact" statement was the function of Congress. But could not judges make this contribution? Second, in both drafting the language of a statute and the accompanying committee report, as well as in managing floor debate, how can legislators be more clear about the things they want to be clear about? And how can judges more faithfully discern and be faithful to authentic signs of legislative intent? Are periodic meetings on such matters among legislators, staff, and judges a good idea or not? Third, after laws have

been passed and interpreted and commented upon by judges, there ought to be a way of bringing, in a systematic way, suggested changes to the attention of the appropriate committees. Indeed, Bob Katzmann is working on an experiment with the D.C. Circuit in collecting, classifying, and routing such judicial comments to key committees.

Still another area of inquiry is whether there are structural innovations that are worth adopting. Should the Chief Justice make an institutional "state of the judiciary" report, reflecting, as does the President, the views of those responsible for various aspects of judicial work? Should other key leaders of the judiciary meet with the key leaders of the House and Senate? In view of the critical importance of Congressional committee staffs, should there be continuing workshops, back and forth visits to Congressional and judicial offices, publications on matters of common concern? Does it make sense to an entire branch of government, the judiciary, to have its budget determined by a subcommittee which also has to deal with three giants, the Departments of State, Commerce and Justice? If State suddenly sees a need to rebuild embassies, if Commerce must gear up for a census, or if Justice needs to build new prisons, the judicial branch may be in the position of a mouse trying to sleep with elephants.

Finally, there is the largely unexplored field of working together on an issue where the two branches share the same interest -- the obligation of a citizen to respect government and its officials when they earn it. Perhaps this is fanciful, but, since neither judge nor members of Congress can persuasively sing their own praises, why can't they sing the others'? Why can't we see a common cause in calling cheap shots against any branch, and acknowledging the demands on other branches, the good work done, the need to attract the best prepared and most committed to all? Unlike Great Britain, that small island, we do not have the advantage of personal acquaintance among the key officials of the various branches. As a substitute, may we not think of trying to inculcate a more positive outgoing and articulate attitude of respect toward our counterparts in the other branches? I wonder if this might not in the long run work a refreshing sea change.