Author's Note: Lest the following be deemed a fraud and a hoax, let me assure the reader that it is not an actual communication recently received from Messrs. Madison, Jay, and Hamilton. It is, rather, what I am quite sure they would say if I but had a better ability to hear them.

Frank M. Coffin[1]

The Federalist
No. LXXXVI

On the Relations Between the
Judiciary and the Congress

Almost two hundred years ago, when the youngest of our trio was 30 and the oldest 42, we seized with alacrity the opportunity to respond to Constitution doubters with a series of 85 essays called "The Federalist" under the name of Publius. Although some claim that the luminous presences of our elders, Washington and Franklin, had more to do with ratification, we have always felt that the Federalist did its part.

Now by some eccentric dispensation, as the nation ends its first two centuries, we are given the privilege of adding one more essay -- only one. This of course makes us feel like Tantalus: when we stoop to drink, the water recedes, as does the fruit above when we reach for it. We have reached a decision not to recommend any change in the old charter. This was never our mission. And, remembering the tribulations the 55 of us had during four torrid months in Philadelphia when the country had fewer than four million inhabitants, we are loath to see the nation become Tantalus today.

Our focus therefore is not a change in the Constitution but ways of improving its workings between the two branches of government that make the laws and possess the greatest continuity -- or inertia -- in the conduct of their business. The institution of the Presidency has been richly studied and written about. But the interrelation of the Congress and the Judiciary remains as unexplored as the western territories in our time. We wrote in No. XLVI of the Separation of the branches and in No. XLVII of the Connection that should exist among them. But neither Montesquieu nor the British or colonial governments gave us more than the foundation.

The lack of any superstructure of thought has produced the following state of affairs. The two branches not only do not communicate with each other on their most basic concerns; they do not know how they may properly do so. Legislators enact laws without considering either the burden on courts or the effect of their applying the statutes; the paradox is that the very powers so thrust upon the Judiciary make it reviled as power-hungry. Legislators, ever insecure, are suspicious of, antagonistic to, and ever ready to restrain and humble their secure, life-tenured colleagues. The judges, for their part, facing increasing responsibilities along with criticism for exercising them, and sensitive to ever accreting restrictions and diminishing standards affecting their life and work, are in danger of forfeiting the respect, serenity, and independence which the Constitution sought to vouchsafe. The condition we describe, if not an acute crisis, is that of a

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chronic, debilitating fever.

We therefore dedicate this 86th chapter to both branches and their happier coexistence. We begin with recalling our earlier pronouncements, to examine to what extent, if at all, they are relevant to the current predicament of the country. Then we review what has changed, essentially, to affect the relationships between the two law-making branches. We next identify what we discern as symptoms of an unnecessary institutional estrangement. We end by prescribing, not a solution, but a method of inquiry which gives promise of ameliorating the present tensions.

Our Earlier Pronouncements

In No. XLVII we made so bold as to criticize some of our colonial forerunners for being wary only of the danger to liberty of a grasping hereditary magistrate. We warned of the equal danger from Legislative usurpation, pointing out that in addition to its broad powers, "The legislative department alone has access to the pockets of the people", thus creating a dependence on the part of the other branches.

In contrast, in No. LXXVIII, we perceived that "The judiciary . . . will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them .... [having] no influence over either the sword or the purse. ..." We explained that permanent tenure was necessary both to attract the most able judges and to assure "uniform adherence to the rights of the Constitution, and of individuals". And in No. LXXIX we wrote that the parallel guarantee, the Constitution's provision barring any diminution in judges' compensation, "put it out of the power of [the Legislative] to change the condition of the individual for the worse."

We now see that we were imperfect prophets. We would not change what we said about the power of the legislative department. But we misdescribed the nature of the Judiciary. We underestimated the extent of the influence on the society at large of judicial decisions applying the Constitution and statutes. In the eyes of many this influence has made the Judiciary a source of danger. Others view it as the last bastion of liberty. We recognize the existence of this deeply felt division of opinion. We should, therefore, not have called the Judicary "the least dangerous" but the most vulnerable branch. For, unlike persons in the Executive and Legislative branches, judges commit their lives to their position and have given up any opportunity for a private career. The vulnerability of the Judiciary has also been revealed in something else we did not anticipate: the long continued depreciation of the value of money. In such a circumstance, the very inaction of the legislature cannot fail to "change the condition of the individual for the worse." Second, although we devoted No. LXXII to "The Compensation of the President" and No. LXXIX to that of the Judiciary, we had no paper on the compensation of the Congress. We now see this as perhaps the most important subject, for if the Congress were to prove incapable of adjusting its own compensation, it could hardly, in this world of fallible humans, be expected to deal fairly with the other two branches.

What Has Changed

In viewing the progress of our Republic over these two centuries we have seen with both humility and pride how well the Constitution has served and still serves its people. What we see is not a cause for basic Constitutional change, but rather a need to address non-Constitutional means of improving the institutional relations between the Congress and the Judiciary.

To begin with the Judiciary, we realize more than we ever could have imagined how the

development of the country and of civilized life has placed the Judiciary in the vortex of the individual's and the society's conflicting values. A ten-fold increase in the population; the tensions between sectors of the economy; the encroachments on the liberty of the individual necessitated by the interest of all in regulating space, commerce, labor, consumption, the environment; all the complications introduced not only by the industrial revolution but by the post-industrial age; the change in the mores of the people and their varying attitudes -- as deeply held and violently expressed as ever -- on desegregation, abortion, religion, pornography, capital punishment -- all the forces of change have at some point forced a court of one or more judges to resolve bitter disputes, interpret our old Constitution, and in the process advantage or disadvantage either the majority or minorities and individuals.

If the Judiciary has been affected by two centuries of change, the lineaments of its traditional work are still prominently in place: the highly trained and experienced lawyer-judge, respecting time-honored professional disciplines, deciding actual cases on the basis of his own research and thinking, aided now by a small staff. True, it now is also aided by its own bureaucracy, the Administrative Office of the United States Courts. But this is still a small support staff in a world of giants, handicapped both by limited resources and, more particularly, by the absence of clear boundaries of its permissible range of operations.

How different is the work, the pace and pressures of the Senator and Representative! The catalogue is both depressing and cataclysmic: the volume, complexity, and variety of new legislation, the proliferation of committees, the growth and escalation in importance of the staffs of Members and of committees, the lack of time to read and reflect, the power of special interests and single issue groups, the costs of attaining and retaining office, the distorting demands of television, the increasing rate of turnover and resignations among the Members, the near disappearance of the revered veteran statesman, and, most alarming, the erosion of respect for the legislature itself.

These conditions, keenly felt no doubt by all Members, have the following insidious effects on the relationship between the Judiciary and the Congress. Harried Members can all too easily be goaded to anger by those whose ox a judge has gored. They feel vulnerable to the demagogic criticism of those who would lead an all too willing but unthinking electorate to castigate any effort to improve Congressional compensation. Any such considerations can only be strengthened by a factor we may not have fully anticipated in providing for permanency of judicial tenure -- the human tendency of an elected official whose lease on office must be painfully renewed periodically on the hustings to consider a permanently tenured judge so highly favored as to need or deserve no further consideration.

The tensions of the times, it seems clear to us, have thus created an estrangement between the two branches. This has been brought to pass despite the facts that most federal judges have been at one time intimately associated with Congressmen and at least one Senator whose sponsorship was a key to his or her appointment as judge, that a number of judges have served in the Congress, and that various committees of the Judiciary and of Congress perform discrete functions together harmoniously. The estrangement, therefore, is an institutional one, and one whose speedy amelioration is in the best interests of this Republic.

Areas of Estrangement

It is not difficult for the interested observer to discern the signs of unnecessary estrangement. We stress "unnecessary", for we realize that the underpinning of our doctrine of separation of powers is a recognition of man's inherent self-aggrandizing nature and the necessity

of invoking the different interests of the three branches to check and restrain each other -- a condition of permanent tension. But just as tensions and disagreements in a workable and enduring marriage do not normally foreshadow estrangement, so need they not in our Constitutional structure.

Here, then, are some of the points of abrasion we have noted. In the torrential floods of new legislation, laws are passed without regard to their impact on judicial resources. Sometimes laws are passed which are solely directed to changing part of the judicial establishment with no timely inquiry of judges. Sometimes when complex legislation affecting the Judiciary occupies years of deliberation, the contribution of thinking from the Judiciary may reflect only the earliest stages.

In pointing to such lack of pre-enactment opportunity to give views, we do not for a moment exhume the idea of a Council of Revision -- which would require judges to commit themselves to a view of a law's validity before enactment. Short of so pronouncing, however, there is, we sense, considerable uncertainty as to how far the Judiciary may properly go in giving its views on the policy of a proposed law, as distinguished from its sheer workability. Issues of policy and issues of workability tend to merge.

At the other end of the legislative spectrum, there would seem to be room for a more systematic and effective way for the Legislature to obtain the post-enactment views of the Judiciary. Often these views are contained as holdings or dicta in judicial opinions. But as yet these nuggets, if such they are, are nowhere systematically collected and analyzed. Moreover, there may be other ways in which the experience of the judges who have dealt with legislation may be made available to the Congress.

On occasion legislative efforts are launched to "restrain" or otherwise monitor judges. We do not write of the plethora of efforts to limit the jurisdiction of courts; such efforts have always been made and no doubt will continue to be made so long as there exist differences of views as to what courts should do. What we now refer to are efforts to specify how courts should conduct their deliberations, when they should be disqualified from hearing a case, how judges should be disciplined (short of impeachment) for malconduct. In initiating such legislation there seems to us to be a fine line, not infrequently overstepped, between the kind of oversight that is proper for Congress and the kind that encroaches on the ability of judges to practice their calling with independence. Even if saner heads prevail, the very mounting of such efforts seems an unnecessary and corrosive harassment.

We have already noted how our earlier pronouncements on judicial emoluments now seem to us defective in failing to anticipate chronic inflation and the difficulty the Congress faces in increasing its own compensation or that of the other two branches. The most glaring evidence of the malfunctioning of the compensation function is the failure of the system of quadrennial salary reviews and recommendations to begin to keep pace with inflation in the past sixteen years, the real compensation of Members of Congress, Judges, and top Executive Branch officials having eroded by over one third.

We wrote in the first "Federalist" of the limited reservoir of persons endowed with the mind and character to perform complex judicial labors "with utility and dignity". We see a present danger of limiting new judicial appointments to those who have earned a marginal income in the law and are content with such, those who are independently wealthy, those whose rare sense of public service persuade them to sacrifice their prior standard of living, and those who have raised a family and who in their twilight years can afford to be judges.

This dangerous narrowing of the most qualified candidates is less true of the other two

branches. First, legislators and executive officials are not pledging a lifetime to their office. Second, their time in office most often proves a valuable stepping stone to other positions of higher compensation. Nevertheless, even here, to the extent that inadequate emoluments discourage long commitments of public service, the nation is deprived of some of its best talent.

Parsimony, or, more accurately, deliberate neglect has characterized Congressional action or lack thereof in adjusting benefit levels for spouses and dependent children who survive a judge. These levels have remained in a condition of patent inadequacy for many years. A niggardly ritual seems to have attended the awarding of minor annual cost-of-living allowances to judges. Because of admittedly understandable resentment at a successful lawsuit brought by many judges to secure some revoked pay increases, Congress has now forced the judges -- alone among federal employees -- to beg for supper; that is, while legislators and executive branch officials receive cost-of-living increments automatically according to formula, judges must wait for six months or more until both houses affirmatively approve the increase. When such time has elapsed, the allowance provision is attached to some other legislation and rides through the legislative mill without a murmur. The point has been made: the judges have paid their penance.

Another area, shrouded by the fog of uncertainty, is that of the kind and manner of communications which should be encouraged between the Congress and the Judiciary. Just as we wrote in No. XLVII that the principle of separation of powers "does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other", so also we would say that the departments should, consistent with their own mission, seek ways to communicate effectively with each other.

This advice was unneeded when we drafted the Constitution. The entire national government was a small community. The Senate consisted of 26; the House of 65; the Judiciary of 19 (in 1789); the Department of State of 9 (in 1770). Often the limited lodging arrangements in our new Capital meant that officials of all three branches ate from the same table. With time and growth and increased specialization, communication, except in the most formal sense, has become a greater problem for the Judiciary and the Congress than it has for the Executive, whose platoons of liaison representatives regularly walk their beat on Capitol Hill.

The essence of the problem can be summed up by saying that the overarching and simplistic commandment, "Thou shalt not lobby", does not begin to reflect the multiple levels and purposes of desirable communication in both directions between the two great branches. Worse, the negative nature of the commandment and its criminal sanction chill any effort to explore ways of meeting felt needs.

The anomalous result is that in an age when Congress is inundated by information and opinion from every group, entity, and individual with an interest in getting a law passed, it hears from the Judiciary chiefly on two occasions: (1) when a legislative committee has formally asked the Judicial Conference of the United States for its views on a specific piece of legislation, and (2) when a legislative committee has asked a judicial committee or a judge to testify before it.

But limiting permissible communication to these two channels disserves the Judiciary, the Congress, and the Citizenry. What if, for example, one or many judges have views on legislation contrary to those expressed by the Judicial Conference? Should a judge be permitted to send his views to a Committee or to ask to testify before it as to new legislation? Should the Conference itself be permitted to communicate its views even though no request has come from a legislative committee? Should a judge or the Judicial Conference be permitted to send views critical of existing legislation? If so, what are the limits of propriety?

Issues of communicability are not confined to judges and legislators. May judges prevail

on a third party to present their views on, for example, the adequacy of their emoluments and other benefits? May judges consult and cooperate with groups of citizens who themselves are committed to working for a judiciary of quality and independence? If so, what ought to be the ground rules of permissible association and representation?

Turning the coin to its other side, should a legislator ever be permitted to express a concern or view in a litigated case of public importance on trial or on appeal? If so, under what conditions and restraints? How should a Senator or Representative communicate any complaint he or she has received or has of possible misconduct by a judge? Should a legislator and a judge be permitted to communicate with each other on legislation, new or old? On the repair or construction of court facilities? On candidates for judicial office? Should legislators and judges within a state or region be encouraged to meet formally and informally? If so, how can the boundaries of propriety best be preserved?

Finally, in the critical forum of judicial confirmation hearings, is it possible to arrive at a consensus as to what kinds of questions from legislators and answers from judges properly serve the legitimate interests of the interrogators without trenching upon the dignity, impartiality, and independence of the judicial nominee. A consensus in this forum would serve not only to ensure fairer and more expeditious hearings but might also help discourage the Executive Branch from engaging in dangerously precise catechism — an inquiry which, at least during any administration practicing it, would adversely affect both the quality and the independence of judges.

An Approach to All Feasible Reconciliation

Our brief survey instills us with concern, but it is not of the same magnitude as prompted the first "Federalist". For we see in the area of this paper no need for recourse to Constitutional changes. Instead we see a subject of deserving inquiry which, if sensitively, patiently, and objectively studied by knowledgeable and committed scholars, lawmakers, and judges over time, ought to yield fruitful suggestions of greater or lesser import tending to more respectful and mutually useful communications between the two branches.

The building blocks of such an enterprise are at hand. There exists a most useful type of institution with which we were entirely unfamiliar when we were engaged in our great Constitution-making enterprise, a Foundation, The Brookings Institution, where scholars can reflect, write and meet with others sharing their interest. Other philanthropic foundations, The Smith Richardson and the Culpeper Foundations have supplied the funds necessary to produce a basic written survey of past practices, present problems, and future possibilities. The formal and genuine interest of the Judiciary is evidenced by the sponsorship of its Committee on the Judicial Branch, with its members representing all circuits of the country.

Brookings' Senior Fellow, Robert Katzmann, both a political scientist and a lawyer, has already commenced a structural research program calculated to take more than a year. What remains to be done is critical. It also represents the workstyle for which Brookings is noted -- the assembling of a small but critical mass of persons experienced in the ways of the Congress and the Judiciary who would bring their wisdom to bear on the development of new ideas. Senior Staff Member Warren Cikins is at work on this objective. This small community of scholars, practititioners, and thoughtful citizens would be prepared not merely to assemble once but on a succession of occasions, reflecting on reactions to what has been suggested, and ultimately to persuade those with power to act of the wisdom of their findings.

As we view this task of finer tuning of the organs of our government, we hark back to the

words of the philosopher Hume with which we closed our last appeal to the public in No. LXXXV:

> "To balance a large State or society, whether monarchical or republican, on general laws is a work of so great difficulty that no human genius, however comprehensive, is able by the mere dint of reason and reflection, to effect it. The judgments of many must unite in the work; experience must guide their labor; time must bring it to perfection, and the feeling of inconveniences must correct the mistakes which they inevitably fall into, in their first trials and experiments."

After two hundred years it is not too early to let "the feeling of inconveniences" help correct mistakes. We wish you well.

Publius

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