

## Working with the Congress of the Future

(Remarks of U.S. Circuit Judge Frank M. Coffin of the Court of Appeals for the First Circuit at the Bicentennial Conference of Judges of the United States Courts of Appeals, Washington, DC, October, 26, 1988)

It is safe to say that the happiness, effectiveness, stability, and independence of the federal judiciary depend to a very large extent on Congress. If it is sensitive and responsive to our needs we shall remain one of the most durable legacies of the Founders of this nation. If it is not, long continued suspicion, underfunding, petty harassment, minute oversight, and capricious additions to workload can be the equivalent of a constitutional amendment repealing Article III. Our budget; our conditions of work -- including workload, salary, fringe benefits, restrictions, and discipline; our structural organization, jurisdiction, and procedures -- all are at the disposal of our 535 elected compatriots.

All that is safe to say. What is not safe to say is precisely how we should try to live and work with this sister branch that means so much to us. Our Committee on the Judicial Branch of the United States Judicial Conference recently sponsored, with the Brookings Institution, a colloquium on judiciary-congressional relations. The papers and proceedings of that event have been, with assistance from the Governance Institute, collected, and presented in a book, edited by Robert Katzmann, Judges and Legislators: Toward Institutional Comity. That book underscores the obstacles to communication and understanding that have made the present state of health between our two branches, to quote my own words, "if not an acute crisis, ... a chronic, debilitating fever."<sup>1</sup> This book is a beginning. It charts the areas of our inquiry. It asks the broad questions.

What I want to do now is to carry the inquiry a step farther and deeper by hazarding a look into the future. Addressing the focus of this conference, we ask: what kind of Congress will we be living with in the next decade or so and what does our preview suggest as guides for our dealings with it? At the outset let me disavow any special credentials. My own Congressional experience is already three decades in the past, when life was simple. A staff of five or six, incoming mail of a hundred or so letters a week, service on one committee, one subcommittee, and one joint committee, a monthly constituent newsletter and some occasional tapes for home radio stations, a campaign budget of \$25,000. And generally a not unhappy willingness to follow the benign but firm leadership of Speaker Rayburn and his "Board of Education," which made room for bipartisan support of President Eisenhower's foreign policy.

Since those halcyon days there has been a major revolution and a minor counterrevolution. There was first the era of decentralization, reforms, onslaughts against seniority and party discipline, and the openness of the 1970s. This was followed, in the 1980s, by the onset of practices trending back toward centralization, leadership, and discipline. The former revolution was centrifugal; the latter counterrevolution was, and is, centripetal. What complicates matters is that both movements coexist, something like the various shiftings of the tectonic plates underlying the continents. To help me understand what has been going on, I have consulted books like Vital Statistics on Congress 1987-1988, published papers, articles in periodicals, and Congressional scholars in the Library of Congress, Brookings and in

---

<sup>1</sup> Judges and Legislators: Toward Institutional Comity, ed. Robert A. Katzmann, Frank M. Coffin, "The Federalist Number 86," 21, 22. The Brookings Institution: Washington, DC, 1988.

Congressional offices.

## I. The Centrifugal Congress

Here is the profile of the centrifugal Congress, measured by workload, dispersion of authority, reliance on staff, loss of institutional memory and vague legislation.

Workload. A casual appraiser of statistics might conclude that Congress is working less than it did in the days of LBJ's flood of Great Society legislation. There are fewer bills introduced today than in the late 1960s or even in the 1950s;<sup>2</sup> only forty percent as many bills pass into law as in the 1950s;<sup>3</sup> the number of committees in both houses was drastically reduced by the 1946 Legislative Reorganization Act and while subcommittees in the House have leaped up, particularly in the 1970s, the Senate has managed to cut back its total committee numbers to a figure comparable to that in the 1950s<sup>4</sup>; and the length of a Congressional session has stabilized at about three hundred days.<sup>5</sup>

These facts conceal the hard truth that the workload of Congress has inexorably increased in both quantity and complexity. First, much of the supposed decrease in bills introduced is, especially in the House, attributable to a change of rules allowing an unlimited number of cosponsors for any bill. The year after this rule change, the number of bills introduced into the House fell from 16,000 to 9,000.<sup>6</sup> Second, the nature of the legislation has changed from freestanding, single subject measures to complex, omnibus, multiple subject, vast scale authorizations, continuing appropriation resolutions, and budget reconciliation bills. New ideas of members are likely to appear (or be hidden) in such vehicles. The average length of today's statute occupies over nine pages of close printed text, compared to less than two pages in the mid-fifties.<sup>7</sup> Third, though total numbers of hearings have eased off since the 1970s the quantity of transcript pages of testimony and submissions has been rising.<sup>8</sup> Moreover, with the budgetary crunch foreclosing much programmatic legislation, committees are spending increasing time in oversight and investigation -- activity not revealed by numbers of bills passed.<sup>9</sup> Fourth, more indicative of workload than numbers of committees and subcommittees is the average number of assignments per member. In the mid-fifties in the House, the total average number of assignments per member was three; this exactly reflected my own involvement. I was a member of the Foreign Affairs Committee, its Europe Subcommittee, and the Joint Economic Committee. Today the average is 6.4<sup>10</sup> assignments per member, while that in the Senate -- even after the 1984 retrenchment effort -- is eleven.<sup>11</sup> Fifth, hours of floor activity in both houses have shot up. In the House, the average day has increased from 4.1 hours in 1955-56 to 6.4 hours in 1985-86,

---

<sup>2</sup> Norman J. Orstein, Thomas E. Mann, Michael J. Malbin, Vital Statistics on Congress 1987-1988. American Enterprise Institute: congressional Quarterly, Inc., Washington, DC, 1987, pp. 165, 167 (hereinafter Vital Statistics).

<sup>3</sup> Id.

<sup>4</sup> Roger H. Davidson and Thomas Kephart, Indicators of Senate Activity and Workload, Congressional Research Service Report 85-133S (June, 1985): 9 (hereinafter 133S).

<sup>5</sup> Vital Statistics, pp. 165, 167.

<sup>6</sup> Roger H. Davidson and Thomas Kephart, Indicators of House of Representative Workload and Activity, Congressional Research Service Report No. 85-136S (June 25, 1985): 5 (hereinafter 136S); Vital Statistics, p. 165.

<sup>7</sup> 136S, pp. 21-22.

<sup>8</sup> Id., p. 13.

<sup>9</sup> Id., p. 24.

<sup>10</sup> Id., p. 25.

<sup>11</sup> 133S, p. 10.

an increase of fifty percent.<sup>12</sup> Over the same period, the Senate's day has increased by thirty percent from 6.1 hours to 8.1 hours.<sup>13</sup> Finally, the number of recorded votes has dramatically increased. In the House, there has been more than a fourfold expansion, from one hundred forty seven in 1955-56 to eight hundred ninety in 1985-86.<sup>14</sup> In the Senate, in the same span of time, there has been a threefold increase from two hundred twenty four to seven hundred forty.<sup>15</sup>

Workload has other dimensions than legislation. One is constituent service and relations. Take mail, for example. When I was a Congressman, in the mid-fifties, annual Congressional mailings were about sixty million pieces; in 1986, such mailings had reached seven hundred fifty eight million, a twelvefold increase.<sup>16</sup> I used to go to my home district every other month or so; it is a rare Senator or Representative who does not return home at least every other week, if not every week. Still another formidable component of workload must be considered -- fundraising. From 1974 to 1986 the consumer price index rose 220 percent; in the same period spending for congressional campaigns quintupled. In 1974 only ten House candidates spent \$200,000 or more on their campaigns; by 1986 the number rose to three hundred seventy, with one hundred and five of them exceeding half a million dollars.<sup>17</sup> Constituent demands and fundraising exacerbate an already awesome workload.

Decentralization. The reform wave sweeping Congress and reaching its climax in 1975 succeeded in diminishing the importance of seniority, ousting three committee chairmen, increasing openness of the legislative process and widening participation. But it also resulted in increasing the powers of subcommittee chairs and ranking members to hire their own staffs. Committee staffs doubled in the 1970s. And personal staffs of members, totalling 3,556 in the late 1960s, stood at nearly 12,000 in 1986.<sup>18</sup> This growth has meant that daily dealings between members have been replaced by extensive rules and procedures, complex organizational arrangements, and layers of staff aides. Negotiations are between staffs who alone have hopes of mastering the details of huge committee reports and compendious bills. Special interest groups and their PAC (Political Action Committee) contributions are a force of their own, often cutting across party lines. PACs have increased sevenfold from six hundred and eight in 1974 to four thousand one hundred and fifty seven in 1986;<sup>19</sup> their contributions increased from \$8,500,000 in 1972 to \$132,000,000 in 1986.<sup>20</sup>

The result of all this is that, as one leading observer concluded, "Lawmakers were seen not as role players in a complex system of interactions in equilibrium, but as individual entrepreneurs in a vast open marketplace ...."<sup>21</sup> Or, as Hedrick Smith put it in his new book, The Power Game, quoting Brooklyn Congressman Charles E. Schumer, "In the [H]ouse we are 435 little atoms bouncing off each other, colliding and influencing each other but not in a very coherent way. There used to be much more structure. But now there is no bonding that holds the atoms together."<sup>22</sup>

---

<sup>12</sup> Vital Statistics, Table 6-1, p. 165.

<sup>13</sup> Id., Table 6-2, p. 167.

<sup>14</sup> Id., Table 6-1, 165.

<sup>15</sup> Id., Table 6-2, p. 167.

<sup>16</sup> Id., Table 6-8, p. 174.

<sup>17</sup> Vital Statistics, pp. 67-68.

<sup>18</sup> Vital Statistics, p. 136.

<sup>19</sup> Id., Table 3-15, p. 103.

<sup>20</sup> Id., Table 3-16, p. 104.

<sup>21</sup> Roger H. Davidson, "The New Centralization on Capitol Hill," University of Notre Dame Review of Politics, Summer 1988, 345, 351 (hereinafter "The New Centralization").

<sup>22</sup> Hedrick Smith, The Power Game: How Washington Works, NY: Random House, 1988, p. 39. Quoted in

Discontinuity. One veteran Senate staffer I have talked with said that the biggest problem is the erosion of institutional memory in the legislative branch. Although this is counterintuitive, Senators are proving more vulnerable and insecure than House members. For example, in 1986, seven of twenty eight Senators seeking reelection, or 25 percent, were defeated, while only six of three hundred ninety one Representatives, or 1-1/2 percent, were defeated.<sup>23</sup> Today any Senate seat is of national significance; the possibility of a serious challenge will have little difficulty attracting a substantial war chest. The House, however, loses far more members from retirement. In the 1960s, retirements averaged twenty five a years; in the 1970s and 1980s, the average was thirty eight,, a 90 percent increase.<sup>24</sup> The greatest turnover is in staff, particularly in the personal staff of members, but also in committee staffs. One is impressed, in walking the halls of the six congressional office buildings, in seeing, with few exceptions, a parade of young men and women staffers -- people enjoying their exciting way station with long hours and low pay before launching their own professional careers at home or in downtown Washington. Although the staffs of the Library of Congress, the General Accounting Office, the Congressional Budget Office, and the Office of Technology Assessment are more stable, increasingly inadequate pay levels threaten that stability.

So, when we see a child vaccine amendment or a veterans' appeals proposal that threaten a flood of new appeals a year (without being referred to a judiciary committee), a bill to create a special court to consider the deportation of alien terrorists, an internally inconsistent statute, legislative history that is inadequate, opaque, or suspect, or a staggering budget slash of over a hundred million dollars to be somehow absorbed without jeopardizing justice, we must remember we are dealing with members who have little time to reflect on our problems, a combination of changing staff and decentralized, almost autonomous, power centers where reinventing the wheel and fixing things that aren't broken are not unfamiliar phenomena.

## II. The Centripetal Congress

If we were to stop here, we would have only two thirds of the picture. For there is beginning to emerge another view -- that of a centripetal Congress. If what I have described so far is a Congress produced by the revolution of the 1970s, what we are about to see is the workings of a counterrevolution of the 1980s. It is a movement that tends to stress a centralizing establishment leadership, party discipline, a limitation on substantive legislation and the diminished power of authorizing committees in favor of the appropriating and fiscal committees.

This other side of Congress is the product of a time of deficits and intense budgetary pressure, a time when the focus is on refining or reducing existing programs, not on creating new ones. Joe White writes in the Brookings Review, "[B]udgeting discord and fiscal stress push the system toward some process that reduces the number of players to a few who arrange a comprehensive bargain that the remaining players then sanction."<sup>25</sup>

The process started with the 1974 Budget Act, a sort of "treaty among suspicious and competing committees and factions."<sup>26</sup> It became even more sophisticated, if not Byzantine, with the 1985 Gramm-Rudman-Hollings agreement on a revenue freeze, spending cease-fire and a

---

Davidson, "The New Centralization," see n. 21, at p. 346.

<sup>23</sup> Vital Statistics, p. 43.

<sup>24</sup> Id., Table 2-9, p. 58.

<sup>25</sup> Joe White, "The Continuing Resolution: A Crazy Way to Govern?" The Brookings Review, Summer, 1988, 28, 35 (hereinafter "The Continuing Resolution").

<sup>26</sup> "The New Centralization," p. 355.

further "set of rules, deadlines, and procedural restraints."<sup>27</sup> For example, rules were changed in both Senate and House to permit points of order against amendments to reconciliation bills that would violate Gramm-Rudman-Hollings. The budget committees have come front and center.

Another device, this one strengthening the appropriations committees, is the omnibus continuing resolution. From 1980 on, the continuing resolution metamorphosed from a stopgap measure to keep a program or agency afloat after lapse of the last annual appropriation into systematic packaging of many appropriations bills into massive omnibus, multi-title bills, usually passed late in a session. This process was exemplified by the "summit" agreement between the President and congressional leaders after the October 1988 stock market crash. White describes the implication: "All appropriations, all tax hikes, and all entitlement reductions had to be produced together -- taxes and entitlement in a reconciliation bill and appropriations in a CR -- so that all parties could see the deal had been kept."<sup>28</sup> It remains to be seen whether the feat of Congress last month in meeting its deadline for the new fiscal year without resort to a continuing resolution is a rare event or an augury for the future. I suspect the former is more likely.

There are several by-products of this stringency era omnibus approach to legislation. One is that power has reverted to leaders of the two houses. A corollary is that partisanship invariably colors the steps leading to final legislation. Another is that power also has shifted from the authorizing to the budget, tax, and appropriations committees. The power of the latter is indicated by the fact that the rules forbidding authorizations on appropriations bills are not applicable to continuing resolutions. While the views of substantive committees are sought and are not unimportant, they have diminished in influence. Still another byproduct is that the omnibus measure is a haven of blame avoidance for members.<sup>29</sup> Not only avoidance of blame for cutting one program when all are cut but blunting criticism of particular substantive legislation which is a minute part of a global package.

In addition to the centralization fostered by omnibus budget-induced packaging, there are a number of other centripetal forces working, particularly in the House of Representatives. Paradoxically, as Roger Davidson notes, the reforms of the 1970s that clipped the wings of the committee barons enlarged the power of the Speaker and the majority party caucus.<sup>30</sup> The Speaker nominates and the caucus approves all majority members of the Committee on Rules. In turn, the Committee fashions restrictive rules governing the floor consideration of legislation; these rules now constitute almost half of all rules.<sup>31</sup> Moreover, the device of multiple referrals to House committees, authorized since 1975, gives the speaker the crucial power of scheduling -- of assigning a bill to two or more committees jointly, sequentially, or part of each. Davidson characterizes this multiple referral authority as a closer tie to committee decision-making than any seen since the 1910 revolt against Speaker Cannon.<sup>32</sup> The power can be used to arbitrate jurisdictional fights, to impose deadlines on committees, to coordinate committees and integrate public policy, and to speed or delay action.

Such powers do not yet exist in the Senate, where leaders have far less scheduling power and are subject to each Senator's power to put a "hold" on legislation, to introduce a nongermane amendment and to launch a filibuster. But, Davidson tells us, "[S]enators seem receptive to

---

<sup>27</sup> Id.

<sup>28</sup> "The Continuing Resolution," p. 31.

<sup>29</sup> "The New Centralization," p. 354.

<sup>30</sup> Id. p. 357.

<sup>31</sup> Id. p. 358.

<sup>32</sup> Id. p. 359.

stronger leadership and tighter management."<sup>33</sup> And all three candidates for the majority leadership post in the Senate have voiced their support for streamlining procedures.<sup>34</sup>

### III. Implications for the Judiciary

This, then, is the binary Congress that exists today and is likely to continue for our foreseeable future -- with openness, dispersion of much power, prerogatives for individual members, reliance on staff, considerable turnover on the one hand coexisting with centralized authority in the leadership on all important fiscal and budgetary issues, power flowing to the money committees and gigantic end-of-session packaging legislation considered under restrictive rules. What does this teach us as we try to achieve a legislative environment favoring the most effective functioning of the judiciary? This question will serve as the focus of an upcoming workshop of the Governance Institute following up on its Judges and Legislators book. In the meantime, here are some tentative thoughts.

The picture of Congress teaches us, I think, that we should explore new ways of communicating and associating with both the decentralized and the centralized Congress. The former requires relationships across a wide spectrum. One Senate staffer gave us this advice: (1) don't confine contacts to the chairman of a subcommittee, for every member can initiate legislation; and (2) have ongoing relations with members, not just when we have our own parochial interests, for every member appreciates people with ideas. This raises the questions: when should the judiciary speak with one voice and when should judges be able to speak their individual minds?

My instinct is that we gain more by encouraging broader communication even if this means that occasionally we reveal differing views. I doubt that the mere fact that some judges may have expressed contrary views would weigh heavily against a deliberate Judicial Conference position conveyed to a particular committee of Congress. One institutional innovation seems promising. It is the familiar suggestion that the Chief Justice deliver an annual State of the Judiciary Address to Congress. This would not be so much the personal views of the Chief Justice, but, analogously to the President's State of the Union Address, would draw on the Judicial Conference and its committees to present an institutional perspective.

Another objective, underlying much of what I have said, would be to refine and clarify the law and the general understanding relating to lobbying so that judges, legislators, and staffs will know what kind of communications are encouraged and what are not. Finally, recognizing that legislators at bottom are accountable to their constituents, not judges, we may need our own lay support group. While the organized bar is an obvious candidate, I would like to see leaders from other walks of life join in an enduring effort to preserve the independence, the quality, and the stability of the federal judiciary.

The centrifugal congress also invites systematic and repeated communication with staff. Despite turnover, as one staffer has reminded us, key personal aides to members are likely to endure. In any event, records of communications are kept. Since members cannot always be available, judges should cultivate staff relationships at all levels. Another staffer emphasized that our task was that of constant reeducation. Here it seems to me, is an opportunity for institutionalizing education and reeducation of legislative staff in the work and life of the judiciary through annual or biennial lectures, seminars, workshops, videotapes, visits to courts

---

<sup>33</sup> Id. p. 360.

<sup>34</sup> Christian Science Monitor, "On Capitol Hill Creative Tension turns to Gridlock," April 15, 1988, p. 7.

and chambers, periodical papers on particular problems. Since this should not be a one-way street, we should also recognize the need for judges and appropriate court personnel to develop a deeper understanding of the work of Congressmen, their committees and staffs. Over time we might expect to develop a continuing community of interest in such matters as legislative drafting, legislative history, and the varying impact of legislation on the judiciary.

Coming to the centralized, establishment, centripetal Congress, it seems to me there exists a corollary to the State of the Judiciary Address. With the reorganization of the Judicial Conference, its Executive Committee is developing into a body with far more intimate and comprehensive knowledge of what is going on within the judiciary than ever before. If this group could occasionally meet informally with key leaders of House and Senate, I believe better relations would result. One result might well be staking out judiciary-Congress relations as one of the few remaining areas of bipartisanship in an increasingly partisan atmosphere. I believe that leaders on both sides of the aisle would welcome such an enclave of bipartisan effort. Another might be the creation of a climate for a rules change that would require new legislation to be subjected to a judicial impact analysis, something presently discounted as merely a Judiciary Committee grab for power.

With budgetary problems now dominating the agenda of Congress, we find ourselves wrestling with new ways to deal with budgetary restraints. Our own budget committee of the Judicial Conference has always been in the forefront in cultivating a close relationship with Congress. Now that relationship must be even closer. And ultimately we must address the structural problem of assuring that the independence and quality of the judiciary are not victims of squeezing macro budgetary decisions. One staffer has pointed out our unhappy position in the Congressional appropriation subcommittee structure. Our budget is determined by the subcommittee that also deals with the giant Departments of Justice, Commerce and State. This coming year will see Justice facing a need for more prisons and Commerce a massive increase for the 1990 census. We are in the position of a mouse trying to sleep with three elephants; the slightest change of position of his bedfellows may work catastrophe on it. Though our budget is only a tiny fraction of the total, the health of an entire branch of our government is at stake. Perhaps seeing a better structure for this critical decision-making would be at the top of the agenda of any meeting with Congressional leadership.

\* \* \*

The Founding Fathers wrought soundly and, despite some foreshadowing by Montesquieu, contributed an original concept to government, separation of powers. But in our complex age, for each power to fulfill what was originally expected of it, there must be communication, the sense of a community of interest, and sensitivity toward the needs and problems of each other. This offers to us, as we enter our third century, a challenge to ingenuity, patience and understanding.