# THE CHIEF JUSTICE ON CAPITOL HILL: EXTENDING THE HUMPHREY-HAWKINGS MODEL

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There is a growing feeling, reflected by the urge to hold this Conference, that relations between Congress and the federal courts are terribly strained. In a recent *Wall Street Journal* column, Justice Sandra Day O'Connor expressed concern about legislative assaults on judicial independence and stated that "the breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history."[1] During prior periods of interbranch tension, however, federal judges were impeached on partisan grounds,[2] the appellate jurisdiction of the Supreme Court was sharply restricted,[3] and Congress enacted (or threatened to enact) statutes to pack the courts and override judicial resistance.[4] Since nothing even close to these dramatic acts is being considered nowadays, Justice O'Connor's alarm about overt hostility towards the courts is almost certainly unwarranted.[5]

Nonetheless, all is not well between the legislative and judicial branches.

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1. Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18.

2. *See, e.g.*, WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 20-23 (1992) (discussing the impeachment of Justice Samuel Chase by the Jeffersonians for his pro-Federalist views).

3. *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 223-27, 241-42 (1998) (discussing Congress's removal of habeas jurisdiction to block litigation challenging the constitutionality of military arrest reconstruction); *see also Ex parte* McCardle, 74 U.S. 506, 513-15 (1869) (upholding this action, but reading the jurisdiction repeal narrowly).

4. *See* GERARD N. MAGLIOCCA, ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES 68 (2007) (stating that in 1837 Congress increased the number of circuits and Justices to give President Jackson additional appointments); *see generally* JOSEPH ALSOP & TURNER CATLEDGE, THE 168 DAYS (1938) (chronicling the failure of the more famous Court-packing plan proposed by Franklin D. Roosevelt one hundred years later).

5. Typically, friction between the elected branches and the courts reaches a peak during moments of transition between constitutional movements that are committed to different first principles. *See* ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS 315 (1941) ("The judiciary is . . . the check of a preceding generation on the present one; a check of a conservative legal philosophy upon a dynamic people, and nearly always the check of a rejected regime on the one in being. . . . This conservative institution is under every pressure and temptation to throw its weight against novel programs and untried policies which win popular elections."). These unusual political conditions, however, do not exist now and thus cannot explain the current discomfort with how Congress and the judiciary are interacting.

While Congress and the Supreme Court are getting along just fine, federal district and circuit judges are facing unprecedented burdens created by congressional neglect. As one judge told me in a private conversation, the courts can write opinions identifying flaws in federal statutes or administrative procedures that cry out for a legislative remedy, but the question is whether anyone in Congress reads them.[6] When the Justices speak, everybody listens. When a few federal judges out of hundreds raise issues, though, their views often cannot break through the din of public discourse.[7] The modern threat to judicial independence comes more from congressional inaction than from the familiar danger posed by legislative action to control the courts.

Though Congress's refusal to raise judicial salaries gets the most attention in this respect,[8] a more important example involves the ongoing crisis in immigration asylum appeals. Following the September 11, 2001, terrorist attacks, the Justice Department issued new regulations to curb the administrative review of deportation orders.[9] In particular, the Board of Immigration Appeals (the "Board") was cut in size, which forced the Board to start issuing summary affirmances in most cases because it lacked the resources to do more.[10] Since the next (and, for all practical purposes, final) level of review for asylum applications is in circuit courts, the Board's emasculation created an avalanche

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6. For one novel idea on what could be done about this, see Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1 (2007) (arguing that courts should be able to certify questions on ambiguous statutory issues to Congress and get a clarification before issuing a final decision).

7. The inability of judges to get their concerns heard is exacerbated because there are many more of them than there used to be (particularly when compared to the nineteenth century), and thus the power of each individual judge to reach the wider public is diluted. Moreover, the constitutional and statutory authority of the federal courts is much greater than before, which means that it is easier for judicial concerns to get lost in the shuffle than was the case when federal power was confined to a discrete set of topics.

8. *See* Robert Barnes, *Chief Justice Urges Pay Raise for Judges: Court's Viability at Stake, Roberts Says*, WASH. POST, Jan. 1, 2007, at A3 (quoting Chief Justice John Roberts's assessment that "the failure to raise judicial pay" has "reached the level of a constitutional crisis and threatens to undermine the strength and independence of the federal judiciary"). Article III, Section 1 of the Constitution tries to secure judicial independence by prohibiting Congress from reducing judicial salaries. *See* U.S. CONST. art. III, § 1 (stating that judges shall get "a Compensation, which shall not be diminished during their Continuance in Office"). Nothing requires Congress to raise their pay to keep up with inflation, however, even though a decline in the real value of judicial salaries over time presents a similar problem.

9. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed Reg. 54,878 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3).

10. *See* David S. Udell & Rebekah Diller, *Access to the Courts: An Essay for the Georgetown University Law Center Conference on the Independence of the Courts*, 95 GEO. L.J. 1127, 1148-49 (2007); *see also* Iao v. Gonzales, 400 F.3d 530, 534-35 (7th Cir. 2005) (blasting the "[a]ffirmances by the Board of Immigration Appeals either with no opinion or with a very short, unhelpful, boilerplate opinion").

of new cases that come directly from a single immigration judge and often have no record or analysis to examine.[11]

Across the ideological spectrum, circuit judges are using the most pointed language they can to expose this sorry state of affairs and seek relief from Congress or from the Executive Branch.[12] In the Seventh Circuit, Judge Richard Posner says "the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."[13] In a similar vein, the Ninth Circuit recently said that it was being asked to review "a literally incomprehensible opinion by an immigration judge (IJ),"[14] while the Third Circuit said in another case that "[t]he tone, the tenor, the disparagement, and the sarcasm of the IJ seem more appropriate to a court television show than a federal court proceeding."[15] In spite of these emphatic statements from the bench and a report from the Judicial Conference pleading for help, no action is being taken to ease this burden that effectively turns circuit courts into an arm of the Executive Branch.[16]

Something must be done to raise the profile of the challenges facing the federal courts, and my suggestion is that Chief Justice John Roberts should be asked to testify on a regular basis before Congress in his capacity as head of the

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11. *See* Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005) (stating that the result of this arrangement is that the Seventh Circuit reverses the Board about 40% of the time); Solomon Moore & Ann M. Simmons, *The Nation; Immigrant Pleas Crushing Federal Appellate Courts: As Caseloads Skyrocket, Judges Blame the Work Done by the Board of Immigration Appeals*, L.A. TIMES, May 2, 2005, at A1 ("The [Board of Immigration Appeals's] reliance on one-sentence opinions has forced circuit courts to spend more time researching and deliberating the immigration cases that come to them. . . .").

12. *See, e.g.*, N'Diom v. Gonzales, 442 F.3d 494, 500 (6th Cir. 2006) (Martin, J., concurring) (identifying "the significantly increasing rate at which adjudication lacking in reason, logic, and effort from other immigration courts is reaching the federal circuits"); Ming Shi Xue v. Bd. of Immigration Appeals, 439 F.3d 111, 114 (2d Cir. 2006) ("[T]he position of overburdened immigration judges and overworked courts has become a matter of wide concern."); *Benslimane*, 430 F.3d at 830 ("[T]he power of correction lies in the Department of Homeland Security, which prosecutes removal cases, and the Department of Justice . . . .").

13. *Benslimane*, 430 F.3d at 830 (citing Niam v. Ashcroft, 354 F.3d 652, 654 (7th Cir. 2004)); *see* Mece v. Gonzales, 415 F.3d 562, 572 (6th Cir. 2005) ("The Board's failure to find clear error in the immigration judge's adverse credibility determination leaves us, we are frank to say, more than a little puzzled."); *Niam*, 354 F.3d at 654 ("[T]he elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this as in other cases.") (quoting Galina v. INS, 213 F.3d 955, 958 (7th Cir. 2000))).

14. Recinos De Leon v. Gonzales, 400 F.3d 1185, 1187 (9th Cir. 2005); *see id.* at 1190 ("[W]e cannot tell what factual or legal determinations, if any, the IJ made. Accordingly, in many instances, we cannot determine what holdings of the IJ we should review.").

15. Wang v. Attorney Gen., 423 F.3d 260, 269 (3d Cir. 2005).

16. *See* Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1146 n.152 (2006) (stating that the Judicial Conference has requested more resources for immigration cases).

Judicial Conference.[17] In that forum, he would be ideally positioned to present the concerns of his Article III colleagues and to take questions about those points in a manner that is bound to attract plenty of media attention. Furthermore, there is an established model for this kind of hearing in the testimony that the Chairman of the Federal Reserve Board gives to Congress under the provisions of the Humphrey-Hawkins Act.[18] Extending this system to the Chief Justice would improve the dialogue between Congress and the courts while spurring action on matters of mutual concern.[19]

Twice a year, the Federal Reserve Chairman is required to testify to the Senate and House Banking Committees on the state of monetary policy. Since its inception in the 1970s as a way to lift the veil of secrecy from the central bank, these "Humphrey-Hawkins" hearings have become a much-anticipated event in financial circles because the Chairman's prepared statement offers useful insights into his views on the economy.[20] The hearings also allow members of Congress to question the Chairman and express their concerns about interest rates or other financial matters while letting the Federal Reserve give its views on the fiscal or regulatory issues that fall within Congress's authority. Naturally, there are informal ground rules on what topics are appropriate for discussion. The Chairman usually declines to answer questions that: (1) are highly partisan; (2) deal with subjects under the jurisdiction of the Treasury Department such as exchange rates; or (3) ask if interest rates are going up next month.[21] Despite these restrictions and the frequent mumbling of Alan

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17. *See* 28 U.S.C. § 331 (2000).

18. Full Employment and Balanced Growth Act of 1978, Pub. L. No. 95-523, 92 Stat. 1887 (codified as amended at 15 U.S.C. § 3101 (2000)); *see* Kelly H. Chang, *The President Versus the Senate: Appointments in the American System of Separated Powers and the Federal Reserve*, 17 J.L. ECON. & ORG. 319, 325 n.2 (2001) (describing the Federal Chairman's responsibility to testify under the Act).

19. A more direct approach (suggested by another panelist at this Conference) would be to create an interbranch commission that would propose reforms when necessary. *See* Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1234-40 (1996).

20. The formal name for this testimony is the Monetary Policy Report, but the hearing is still referred to as "Humphrey-Hawkins." *See Semiannual Monetary Policy Report to the Congress: Before the H. Comm. on Financial Servs.*, 110th Cong. 7-60, 71-117 (2007) (testimony of Federal Reserve Chairman Benjamin S. Bernanke).

21. *See* Greg Ip, *Blunt-Talking Bernanke Warns of Inflation Risks—Remarks to Congress Suggest Interest-Rate Boost Is Likely: Industrials Hit 5-Year High*, WALL ST. J., Feb. 16, 2006, at A1 (noting the Chairman's "refusal to comment on many politically contentious issues"); Paulette Thomas, *Higher Rates Are Expected by Greenspan—Fed's Chief Tells Congress Rise Will Come but He Refuses to Cite a Time*, WALL ST. J., Feb. 1, 1994, at A2 (explaining that the Chairman "warned Congress that the Fed would boost short-term interest rates 'at some point,' but he refused to speculate about when it might do so"); *see also* Anthony Barrett, *Reforming the Fed: Its Independence and Lessons from Humphrey-Hawkins*, 9 CONTEMP. POL'Y ISSUES 76, 80 (1991) (describing Chairman Volcker's refusal to comment on the wisdom of President Reagan's tax cuts).

Greenspan, this process has been quite successful in getting Congress and the Federal Reserve to share information and improve the transparency of monetary affairs.

While the Federal Reserve Chairman is not a constitutional officer, his role is analogous to the Chief Justice because each stands at the head of a powerful public institution that is independent from political control. Indeed, the Federal Reserve is sometimes described as the "fourth branch" of government because its autonomy is now settled as a constitutional custom.[22] Of course, one difference is that the Federal Reserve was created by statute and hence the Chairman can be compelled to appear as a witness. By contrast, separation-of-powers principles almost certainly prohibit Congress from forcing the Chief Justice to testify. Another relevant distinction is that while the Chairman only holds one vote on the Federal Reserve Board, in practice he runs monetary policy and can be held accountable by Congress for any statements he makes on that subject. The Chief Justice, on the other hand, does not run the federal judiciary (he does not even run the Supreme Court), thus he cannot make binding pledges in any testimony he may give.

Nonetheless, these distinctions do not undermine the central point, which is that if the Chief Justice testified in manner similar to the Humphrey-Hawkins model, it could improve relations between the branches. There is ample precedent for sitting Justices to provide voluntary testimony to Congress. In recent years, one or two Justices have come before a House subcommittee to explain the details of the Court's budget request.[23] During those hearings, the Justices do take questions about the Court, although they are usually not asked about the rest of the judiciary. And earlier this year, Justice Kennedy testified on a wide range of matters, including judicial salaries, before the Senate Judiciary Committee.[24] While these adhoc exchanges are useful and serve to educate the public, a more regular and formal arrangement would be better, especially if that process focused on the concerns of district and circuit courts.

If the Chief Justice were willing to take on the task of testifying before Congress, there would, of course, have to be limits on what he could be asked. Just as the Federal Reserve Chairman does not discuss future decisions on interest rates, the Chief Justice should not be expected to give his views on upcoming cases or provide opinions on pending legislation. Judicial confirmation hearings provide a template as to how far the question-and-answer

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22. *See, e.g.*, BERNARD SHULL, THE FOURTH BRANCH: THE FEDERAL RESERVE'S UNLIKELY RISE TO POWER AND INFLUENCE (2005). By a constitutional custom, I mean a practice that is so deeply ingrained that changing it would shatter the expectations of public and private actors and is, as a practical matter, impossible.

23. *See, e.g.*, Linda Greenhouse, *2 Justices Indicate Supreme Court is Unlikely to Televise Sessions*, N.Y. TIMES, Apr. 5, 2006, at A16 (describing the appearance of Justice Kennedy and Justice Thomas before a House subcommittee).

24. *Judicial Security and Independence: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 6-33, 69-80 (2007) (statement of the Honorable Anthony M. Kennedy, Associate Justice of the United States Supreme Court).

session should go. While members could certainly ask the Chief Justice about the Supreme Court (for example, television coverage of oral arguments), all participants should bear in mind that he would be appearing in his role as head of the Judicial Conference speaking for the judiciary as a whole, not in his capacity as the head of the Court speaking on behalf of the Justices.[25]

While Humphrey-Hawkins provides a sound process for the questioning of the Chief Justice, the substance of his statement would present more difficult issues. Critics might argue that among the diverse membership of the federal courts there is no consensus on anything except wanting more money. Likewise, there would be a concern that federal judges should not lobby Congress because that would create a conflict of interest if any desired statutory changes are later attacked on constitutional grounds in subsequent litigation. The answer to both points is the same—the Chief Justice should use his appearance as a bully pulpit to expose concerns that are shared by colleagues, but should not endorse any specific solutions.[26] This way, conflict-of-interest claims can be avoided, and it would be easier for the Chief Justice to forge a consensus, in consultation with the chief judges of each circuit or any other body of the Judicial Conference he might want to convene, on appropriate subjects for his testimony.

In sum, we face a subtler problem in congressional-judicial relations than was true during the intense confrontations of the past. Instead of restraining the excesses of judicial review and legislative action, we need to prod both sides into taking more action to prevent the slow decay of judicial independence. The regular appearance of the Chief Justice on Capitol Hill could help achieve this end and open a new era in interbranch dialogue.

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25. Another reason for the Chief Justice to testify is that he now possesses considerable administrative powers—unconnected to his duties as a judge—but is not subject to congressional oversight like all other agencies. *See* Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1585-86 (2006).

26. In essence, this would be no different from the content of the annual report on the judiciary that the Chief Justice currently gives to Congress. *See* 28 U.S.C. § 331 (2000).