INTRODUCTION: TRUST AND JURISDICTION—THE TUG-OF-WAR BETWEEN CONGRESS AND THE FEDERAL COURTS

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The Framers never thought that one branch of government should love another. Despite the old working definition of a federal judge as a lawyer who has friends in the Senate, a fairly high level of hostility is built into the relationship between Congress and the courts.

Current public opinion outside Washington, D.C., academe, and the courts views the appointments process as the main theater of perceived tension and hostility between these two branches.[1] Indeed, some tension exists, and critics have rightly suggested that the Senate does not proceed as expeditiously as it should to confirm the president's acceptable judicial nominees. As of early February, twenty-two seats lay vacant in the federal courts of appeals and sixty remained open among the district courts,[2] but senators have essentially said that too many judges already occupy the bench and that they sit too long for the amount of work they accomplish.[3] This debate over judicial vacancies is but a transient skirmish in a struggle that has deeper roots, larger history, and much more profound consequences.

In recent years, Congress has expressed, in various ways, its sense of disenchantment and even resentment about how the federal courts conduct judicial business. It has fired the heavy

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1. *See, e.g.*, STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS (1994).

2. *See* Joan Biskupic & Helan Dewar, *More Scuffling Over Judgeships*, WASH. POST, Feb. 12, 1998, at A21.

3. *See, e.g.*, Trent Lott, *Rehnquist's Rush to Judgment*, WASH. POST, Feb. 2, 1998, at A19 (defending the Senate's pace of confirming nominees and creating new positions).

guns of legislation in response to perceived judicial overreaching. A recent series of statutory restrictions on federal jurisdiction and on the discretion of federal judges has delivered an unmistakable message that Congress wishes to curtail the influence of federal court decisions.

If this phenomenon has a Taj Mahal, it is the federal Sentencing Guidelines. These guidelines represent a deep, widening distrust of the discretionary exercise of power by federal judges, and judges have not hesitated to criticize them in return. My colleague, Judge José Cabranes, has publicly called the guidelines a "dismal failure."[4] Judge Richard Posner has said that the guidelines often produce "loony" results[5] that violate defendants' rights to equal protection of the laws.[6]

In a more recent expression of congressional displeasure with the federal court system, Congress has significantly curtailed the courts' jurisdiction in the field of immigration law. In the mid-1980s, Congress offered amnesty to undocumented aliens who had continuously resided unlawfully in the United States since at least 1982.[7] The federal courts then took expansive views of the rights that accrued to aliens under that enactment,[8] and this policy generated a wave of litigation. Ten years later, in 1996, Congress amended the statute to sharply limit the jurisdiction of courts to hear these amnesty claims.[9]

Some new legislative measures seem designed to stop federal

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4. José A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, N.Y.L.J., Feb. 11, 1992, at 2 (stating that the federal sentencing guidelines are "a failure–a dismal failure, a fact well known and fully understood by virtually everyone who is associated with the federal justice system"). *See generally* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998) (criticizing the federal sentencing guidelines).

5. *See* United States v. Marshall, 908 F.2d 1312, 1332 (7th Cir. 1990) (Posner, J., dissenting).

6. *See id.* at 1331-38.

7. *See* 8 U.S.C. § 1255a (1990) (originally enacted as Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, § 201(a), 100 Stat. 3359, 3394) (repealed 1996).

8. *See, e.g.*, California Rural Legal Assistance, Inc. v. Legal Servs. Corp., 917 F.2d 1171, 1178 (9th Cir. 1990) (holding that federal legal services did not constitute "financial assistance" within the meaning of IRCA provision prohibiting "amnesty aliens" from receiving such assistance for a period of five years after gaining legal status); League of United Latin Am. Citizens (LULAC) v. Pasadena Indep. Sch. Dist., 662 F. Supp. 443, 449-52 (S.D. Tex. 1987) (issuing a preliminary injunction requiring the school district to reinstate "intending citizens" to custodial positions they occupied prior to their discharge for providing the district with false social security numbers).

9. *Compare* 8 U.S.C. § 1255a(f)(4) (Supp. II 1998), *with* 8 U.S.C. § 1255a(f)(4) (1990).

courts from regulating the business of states and cities. The Prison Litigation Reform Act of 1995,[10] an effort to put courts out of the business of administering the prison systems of states and municipalities, offers an example.

The 1996 amendments to the habeas corpus statute, reflecting a similar disposition, make it harder for federal judges to upset state court judgments based on a disagreement with the state court's legal reasoning.[11] One section prevents a federal court from issuing the writ unless the state court's legal conclusions reflect an unreasonable application of clearly established federal law as stated by the Supreme Court.[12] This section means that New York courts may now freely interpret the Constitution inconsistently with the law of the Second Circuit, so long as that interpretation does not contravene the laws expounded by the Supreme Court.

The cumulative effect of this trend toward limiting federal judicial influence could hurt the feelings of federal judges if judges were sensitive types. However, federal judges continue to have full dockets, and if anything, their overall jurisdiction is expanding.[13] Judges remind themselves of the inter-branch tension built into our constitutional system and take none of these manifestations of that tension personally.

The controversy surrounding the Religious Freedom Restoration Act (RFRA)[14] offers another example of the recent tug-of-war between Congress and the courts. The Supreme Court first tugged on this rope in its decision in *Employment Division v. Smith*,[15] in which the Court held that otherwise valid

10. 18 U.S.C. § 3626 (1998), 28 U.S.C. § 1932 (Supp. II 1998).

11. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1998) (codified in scattered sections of 8 U.S.C. and 28 U.S.C. (Supp. II 1998)). *See also* RICHARD H. FALLON, JR. ET AL., HART AND WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 89-108 (4th ed. Supp. 1997) (discussing the new habeas provisions and their effect upon federal courts).

12. *See* 28 U.S.C. § 2254(d) (1998).

13. Criminal law developments particularly evidence this expansion; Congress has persistently declared that an ever-broadening range of activities constitute federal crimes, and perpetrators of such crimes can be tried in federal court. For instance, in 1996, Congress repassed the Gun Free School Zones Act of 1990 with jurisdictional elements meant to evade the Supreme Court's recent invalidation of the statute in *United States v. Lopez*, 514 U.S. 549 (1995). *See* 18 U.S.C.A. § 922(q) (1998). For an examination and critique of Congress's drive to federalize criminal law, see Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1 (1997).

14. 42 U.S.C. §§ 2000bb (1994).

15. 494 U.S. 872 (1990).

neutrally-applicable laws apply equally even to people whose religious scruples and practices are thereby offended or curtailed.[16] Congress tugged back by enacting RFRA, which by its terms invalidated any act of government that imposed any substantial burden on an individual's religious exercise, unless the law employed the least restrictive means of furthering a compelling government interest.[17]

The latest and seemingly decisive tug in the skirmish is *City of Boerne v. Flores*.[18] There, the Supreme Court held that RFRA was unconstitutional, and by enacting it, that Congress exceeded the scope of its enforcement power under Section 5 of the Fourteenth Amendment. That provision merely gives Congress the power "'to enforce,' not the power to determine what constitutes a constitutional violation."[19]

Several of today's panelists review the contest over RFRA as a sort of case study, explaining the background, effects and lessons of this most recent struggle between Congress and the judiciary.

16. *See id.* at 884-90.

17. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141 (1993) (valid portions are codified as amended in 42 U.S.C. § 2000bb (Supp. II 1998).

18. 117 S. Ct. 2157 (1997).

19. *Id.* at 2164. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (holding that the judicial branch, not Congress, declares what the law is).