

It's up to judges to restore public trust
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For the last two years, Chief Justice Rehnquist has used his year-end reports to warn of the growing deterioration in relations between Congress and the federal judiciary. In urging the restoration of comity between the two branches, he has quoted Chief Justice Hughes' admonition to the Congress of his day that "in the great enterprise of making democracy workable we are all partners. One member of our body politic cannot say to another — 'I have no need of thee.'"

Lately, however, Congress has been saying precisely that. In bill after bill, many of my colleagues have been calling to strip the courts of jurisdiction over issues where they believe the courts have erred — or might err — and arguing we have no need of them.

Bills have now been passed or introduced to strip the courts of jurisdiction over the pledge of allegiance, over marriage, over the Ten Commandments, and "the acknowledgement of God as the sovereign source of law." The sheer number and breadth of these proposals prompted me to ask in Judiciary Committee whether we should simply strip the courts of jurisdiction over the First Amendment and be done with it.

The proposed sanction for judges who tread on this prohibited ground — and a word spoken in the halls of Congress with less and less restraint — impeachment. Indeed, one federal judge who had the temerity to accept a Congressional invitation to testify on the sentencing guidelines and expressed an opinion at odds with the majority now finds himself the subject of endless committee investigation. Some constituent groups and Congressional leaders now encourage or entertain fantasies of impeaching Justice Kennedy.

The independence of the judiciary, a matter so fundamental to our separation of powers, seems suddenly a matter of great contention. Even those at the highest levels of leadership in Congress are threatening to "look at an unaccountable, arrogant, out-of-control judiciary that thumbed their nose at Congress and the President" and are warning that "the time will come for the men responsible for this to answer for their behavior . . ."

Although these comments and others like them have been retracted or dismissed as merely "inartful," there is no disguising the growing hostility towards the courts from Congressional leadership and the adverse effect on the judiciary. As a result of this disharmony, the federal caseload continues to increase, courthouse funding and judicial compensation are woefully inadequate and judicial confirmations continue to be mired in political brinksmanship.

This hostility has taken many forms beyond that of defunding the courts and court stripping, and includes resolutions condemning the judiciary for the citation of international precedent and still other measures that would split circuits out of a dislike for their jurisprudence. One proposed constitutional amendment recently circulated on the House floor would end life tenure for the lower courts and replace it with retention elections.

Perhaps the single greatest example of the magnitude of the challenge to the independence of the courts, though, came with Congress's extraordinary intervention in the case of Terry Schiavo. This heartrending private tragedy became the focus of efforts to overturn the Florida courts' interpretation of Florida law regarding end of life decisions. When the federal courts rejected this private bill and its effort to provide jurisdiction to courts that could not properly exercise it, the reaction among many in Congress was one of wrath.

The same Congressional leaders who had spent the last several months trying to strip the federal courts of jurisdiction were now trying to extend it where it did not belong. If this irony was lost on its authors, it was for good reason — a higher principle of consistency applied: Some members of Congress want to dictate results to the courts regardless of the separation of powers, principles of federalism or other obstacles. They have decided that the independence of the judiciary is an inconvenient impediment to a results-at-all-costs philosophy.

Judges bear partial responsibility for the loss of confidence in the judicial branch. Some recent high-profile rulings in the Courts of Appeal and Supreme Court have not been well reasoned and invite derision. Others smack of a desire to reach a particular result at odds with clear Congressional intent, notwithstanding precedent or plain statutory language.

Judges also spend little time interacting with members of Congress. Sound ethical canons prevent judges from lobbying, but judges can have good relationships with legislators and can help them understand the challenges and duties of the bench. The vast majority of those appointed to the court have risen to the bench due in part to a relationship with a senator, a member of Congress, or the president himself. The need for good relationships with the legislative and executive branches does not end after appointment, but a dialogue with Congress — once a staple of judicial life — has become a rarity.

It is not just the members of Congress who need to be reacquainted with the judiciary and its unique constitutional role. Judges must also work to educate the public about their power to review a law's consistency with constitutional standards and their decision-making process. Some eight years ago, an ABA Commission reported "mounting evidence" of a loss of confidence in our courts and "a diminished understanding of the role of an independent judiciary in protecting the rights of the people." I seldom see judges at the local Rotary, Kiwanis or Lyons club meetings and other civic organizations that give me the opportunity to explain my job and my actions to my constituents. In the end, only judges themselves can restore public confidence in the courts, and it is too big and too personal a job to be done from the detached loft of the bench.

Chief Justice John Marshall once warned that, "the greatest scourge an angry heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent judiciary." Efforts by the Congress to force the courts to look at our transient wishes, rather than the Constitution, will damage the courts and undermine our own integrity. In the end, we cannot expect to belittle the courts without belittling ourselves. But while I would certainly welcome a better relationship with the bench, as to a dependent judiciary, well, "I have no need of thee."