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REMEMBERING AND APPRECIATING JUDGE ROBERT A. KATZMANN

Joseph White[†]

I was making my first vacation trip of the COVID era on June 10, 2021, when I received a call from a close friend, telling me that Bob Katzmann had died.

I imagine thousands of those calls were being made that day, because Bob touched so many people through his involvement in so many positions and projects. He was appointed to the Second Circuit Court of Appeals in 1999 and served as Chief Judge from September 1, 2013 to August 31, 2020. At the beginning of 2021, he announced that he was taking senior status. As judge and then Chief Judge, he was involved in many major cases and wrote hundreds of opinions, while continuing to write and edit books and articles. These included especially his brilliant book on statutory interpretation, *Judging Statutes*.¹ But he somehow made time to spearhead major initiatives to improve civic education about the judicial system and to provide legal representation for immigrants.

The first led to the Justice for All program, “to increase public understanding . . . of the courts and bring courts closer to the community.”² The program includes a multimedia civic education center at the Second Circuit’s courthouse, which hosts “groups of high school students, many of them racial minorities” who “learn how to do basic legal research online, take part in moot courts, and meet with judges,” in order to combat “ignorance about American government and its legal system.”³ To Bob the purpose was not just to “educate” but to encourage students to imagine participating. “When I’ve done moot courts,” he explained, “I take the students back to the robing room and I say, ‘Put on the robe[.]’ . . . And these are often kids of color. I say, ‘This could be your future.’ And you can really see in their faces, oh yes, this could be their future.”⁴

Judge Katzmann’s second major project was to improve representation for low-income immigrants facing immigration cases. In

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1. ROBERT A. KATZMANN, *JUDGING STATUTES* (2014).
2. *Our Mission*, JUST. FOR ALL, https://justiceforall.ca2.uscourts.gov/mission_home.html [<https://perma.cc/8DQA-F2XT>] (last visited Nov. 19, 2021) (describing the Justice for All program).
3. Jesse Wegman, Opinion, *A Humane Judge, Gone Too Soon*, N.Y. TIMES (June 11, 2021), <https://www.nytimes.com/2021/06/11/opinion/Robert-Katzmann-judge-dead.html> [<https://perma.cc/U7WB-W55S>].
4. *Id.*

a 2007 lecture, he called on major law firms to increase their pro bono contributions and organized a Study Group to find more permanent solutions that “resulted in several path breaking initiatives.” But, most significantly, he founded the Immigrant Justice Corps, a fellowship program that “hires, trains, and pays the salaries of recent law school and college graduates to provide high-quality legal assistance and paralegal assistance to immigrants in need. [It has] served over 80,000 clients with a success rate of 93%.”⁵

Before his judicial appointment, Bob had been Walsh Professor of Government at Georgetown University with major roles in what would become the McCourt School of Public Policy and in the Georgetown Law Center from 1992 to 1999; and first Research Associate and then Senior Fellow in the Governmental Studies Program of the Brookings Institution from 1981 to 1999. He founded the Governance Institute to organize his many projects on relationships between the judiciary and Congress in 1986 and had some other major responsibilities before he joined the bench.⁶

Bob came to Brookings after clerking with Judge Hugh H. Bownes of the First Circuit, having graduated from Yale Law School in 1980. Before Yale, Bob had first earned his B.A. from Columbia in 1973 (at age 20) and his M.A. and Ph.D. in Government at Harvard, with the doctorate awarded in 1978. He published *Regulatory Bureaucracy* in 1980—which means he turned his dissertation into a book while in law school.⁷

In short, Judge Katzmann was a superstar, with a remarkable intelligence and energy and discipline to use it. He would not slow down until pancreatic cancer took him. His passing was met by an outpouring of praise and appreciation from the mainstream press, legal journals, and institutions to which he had contributed.⁸ These appreciations

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5. *Immigrant Justice Corps Mourns the Loss of Judge Robert A. Katzmann*, IMMIGRANT JUST. CORPS (June 30, 2021), <https://justicecorps.org/news/immigrant-justice-corps-mourns-the-loss-of-judge-robert-a-katzmann/> [<https://perma.cc/KN7R-WH5H>].
 6. For the short version of his professional appointments, see *Katzmann, Robert A.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/katzmann-robert> [<https://perma.cc/39MJ-FSG5>] (last visited Nov. 19, 2021).
 7. ROBERT A. KATZMANN, *REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY* (1980).
 8. See, e.g., Sam Roberts, *Robert Katzmann, U.S. Judge With Reach Beyond the Bench, Dies at 68*, N.Y. TIMES (June 10, 2021), <https://www.nytimes.com/2021/06/10/us/robert-katzmann-dead.html> [<https://perma.cc/HC67-JQVD>]; Wegman, *supra* note 3; Martin Flumenbaum & Brad S. Karp, *Remembering Chief Judge Robert A. Katzmann*, N.Y.L.J. (June 22, 2021, 12:30 PM) <https://www.law.com/newyorklawjournal/2021/06/22/remembering-chief-judge-robert-a-katzmann/> [<https://perma.cc/6NUP-F9WD>]; *In Memoriam: Judge Robert A. Katzmann*, GEO. L. (June 11, 2011), <https://www.law.georgetown.edu/news/in-memoriam-judge-robert-a-katzmann/> [<https://perma.cc/KHK7-H4WW>]; *Yale Law School Mourns*

emphasized not only his wide range of contributions but his unique personality—a humility and recognition of the human frailty of others that was noted again and again in the appreciations of his life. There are myriad stories both in the published or posted appreciations and the comments on them about how he made time to help and mentor.

Those for whom he made time include one of my former students who was at NYU Law and deciding whether to follow in his footsteps and pursue a Ph.D. as well as his J.D. There could not be anyone better to ask about that; as far as is known, Bob was the first and only federal appeals court judge to also hold a Ph.D. in Political Science. His contributions were strongly related to that dual expertise—most evidently in his work on the place of the judiciary within the larger political system. That is one reason to ask a political science professor to pay tribute to Judge Katzmann for a law journal.

Among the thousands of people who knew, worked with, and learned from Bob, I'm part of the Brookings group. I came to Brookings as a graduate student in 1985, when he was already a distinguished scholar with his book *Institutional Disability* about to be released.⁹ I stayed on as a graduate student and then as a colleague in the Governmental Studies Program until I left in 1997. So I got to know him as colleague and friend, and two themes stand out to me as partial explanations of his legacy.

The first theme stands out for me as a political scientist. Bob was one of many superb students of James Q. Wilson, who provided many of the case studies that are the core of Wilson's magnum opus, *Bureaucracy*,¹⁰ and formed an identifiable cadre of scholars in the public administration field.¹¹ Wilson offers a “bottom-up view of the work of government agencies” as “a useful corrective to the perspective common

the Death of Judge Robert A Katzmann '80, YALE L. SCH. (June 9, 2021), <https://law.yale.edu/yls-today/news/yale-law-school-mourns-death-judge-robert-katzmann-80> [<https://perma.cc/9E6G-MWN4>]; *In Memoriam: Judge Robert Katzmann*, N.Y.U.L. (June 10, 2021) <https://www.law.nyu.edu/news/in-memoriam-judge-robert-katzmann> [<https://perma.cc/5D8M-LZJB>]; David Lat, *In Memoriam: Judge Robert A. Katzmann (1953-2021)*, ORIGINAL JURISDICTION (June 10, 2021), <https://davidlat.substack.com/p/in-memoriam-judge-robert-a-katzmann> [<https://perma.cc/6DKE-82DY>]; Announcement, United States Court of Appeals for the Second Circuit, (June 9, 2021), <https://www.ca2.uscourts.gov/docs/Katzmann.pdf> [<https://perma.cc/8E56-KC8K>].

9. ROBERT A. KATZMANN, *INSTITUTIONAL DISABILITY: THE SAGA OF TRANSPORTATION POLICY FOR THE DISABLED* (1986).
10. JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (1989).
11. Some of these scholars are represented in Symposium, *The Public Administration of James Q. Wilson: A Symposium on Bureaucracy*, 51 PUB. ADMIN. REV. 193 (1991).

in many political, legal, and academic circles.”¹² Neither Wilson nor any of his students claim it is the only view, but all make it a large part of their work.

Thus, for example, reviewers of *Regulatory Bureaucracy* emphasized Katzmann’s focus on the work done by FTC staff, and particularly the roles and contrasting perspectives of the attorneys in the FTC’s Bureau of Competition and the economists in the Bureau of Economics.¹³ The former look for violations of law that can be proven in a trial, as part of protecting small firms from unfair competition. The latter care more about general economic effects such as higher prices, and so protecting consumers from market distortions. This leads to different priorities and enforcement recommendations. The difference in perspectives would become a visible controversy when President Reagan appointed James C. Miller III as FTC Chair, drastically favoring the economic perspective,¹⁴ but Katzmann showed it was already part of the internal workings of the Commission.

In *Institutional Disability*, Katzmann showed that cleavages within the relevant agencies mirrored cleavages within Congress and between organized interests. He also highlighted the roles of the courts in trying to resolve the conflicts, and so the judicial role in public policy-making. The effect is not only to intervene in specific disputes, but to shape administrative processes. As he later stated, Wilson’s perspective challenges “those who study law and policymaking . . . to not simply be concerned with legal doctrines and constitutional development—though they are important—but also to understand the effects of those doctrines on administrative behavior.”¹⁵ And so, Wilson’s “framework allows us to understand the often-complicated relationships between bureaucracies and courts.”¹⁶

His focus on what was happening at ground level stands out in work that is likely more visible to the legal community. In one main line of work, he found that when circuit courts identify technical problems with statutes as part of their decisions, Congress rarely notices. In the 1980s he took the lead, along with Judge Frank Coffin, in defining the problem of “statutory housekeeping” (as Justice Ginsburg described

12. WILSON, *supra* note 10, at 13.

13. Donald C. Menzel & William F. West, *Economic Regulatory Policy*, 9 POL’Y STUD. J. 1085 (1981); Mary Gardiner Jones, Book Review, 15 J. CONSUMER AFFS. 175 (1981).

14. *See generally* Eleanor M. Fox, *Chairman Miller, the Federal Trade Commission, Economics, and Rashomon*, L. & CONTEMP. PROBS., Autumn 1987, at 33.

15. Robert A. Katzmann, *Wilson and the Study of Law and Policymaking*, in Symposium, *supra* note 11.

16. *Id.*

it)¹⁷ and developing procedures to communicate this information to relevant actors in Congress. The effort had some modest success but would not have happened at all without Bob's interest in looking carefully at how judges and legislators did their work.¹⁸

For the legal community, however, the most significant impact of Judge Katzmann's perspective as a political scientist is his assessment of decision-making by both courts and Congress in *Judging Statutes*. Here is not the place for a close analysis of Judge Katzmann's argument.¹⁹ Yet it seems vital to understand how it builds on the Wilsonian perspective on decision-making.

The book argues that, if there is ambiguity in the text, the courts have an obligation to try to resolve that by looking at how Congress (and the president) created the law. That raises the question of how to use sources other than the text. Bob was well aware that report language, for example, might be manipulated in ways that were not known to the legislators who voted for a bill.²⁰ Justice Scalia and his allies used such examples to dismiss report language as entirely useless. But that ignores the fact that, in major ways, the reports about bills are the basis on which legislators vote. They have to be.

Legislative language largely amends previous statutes and would be unintelligible without having both statutes in front of the reader—and a lot of time. Therefore, committee reports “have long been important means of informing the whole chamber about proposed legislation; they are often the primary means by which staffs brief their principals before voting on a bill.”²¹ In short, to treat committee reports (and sometimes other parts of legislative history) as meaningless ephemera is to create a concept of “intent” that ignores what most legislators can know and

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17. Ruth Bader Ginsburg & Peter W. Huber, Commentary, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1428 (1987).
 18. For two later accounts, see generally Robert A. Katzmann & Russell R. Wheeler, *A Mechanism for “Statutory Housekeeping”*: *Appellate Courts Working with Congress*, 9 J. APP. PRAC. & PROCESS 131 (2007); Jeff Simard, Note, *Stimulating Dialogue Between the Courts and Congress: Sprucing Up the “Statutory Housekeeping” Project*, 99 MINN. L. REV. 1195 (2015).
 19. And you shouldn't take that from me anyway. For better sources, see Brett M. Kavanaugh, *Fixing Statutory Interpretation* 129 HARV. L. REV. 2118 (2016); John Paul Stevens, *Law Without History? How Justice Scalia's Understanding of the Constitution is Wrong*, N.Y. REV. BOOKS, (Oct. 23, 2014) <https://www.nybooks.com/articles/2014/10/23/law-without-history/>; Peter Strauss, Book Review, 65 J. LEGAL EDUC. 443 (2015); Robert A. Katzmann, *Response to Judge Kavanaugh's Review of Judging Statutes*, 129 HARV. L. REV. F. 388 (2016).
 20. In fact, he reported on one example in KATZMANN, INSTITUTIONAL DISABILITY, *supra* note 9, at 52–54.
 21. KATZMANN, JUDGING STATUTES, *supra* note 1, at 19.

so could intend. It is no more reasonable than to study bureaucratic decision-making without looking at how bureaucrats decide.

Judging Statutes makes further important arguments, such as that the Constitution gives Congress full control of its internal procedures, and that the roles of committees, hearings, reports, and other parts of how Congress divides its labors have been made by Congress under that authority. The committee system, in particular, is a basic choice about how Congress will proceed.²² The heart of the argument, however, was that Judge Katzmann thought courts should take decision-making processes as seriously as Professor Katzmann would—in pursuit of the best approximation possible of truth.

The second theme stands out for me as a friend. So many people remembered him for his humility. I don't know—I think he had a pretty good idea of his own value. But he never shoved it at anyone. In fact, he could come across to people who did not know him as a bit of a nebbish. He did not walk in and take over a room. A close friend wrote to me that someone on Twitter referred to Bob as “socially awkward.” An easy thought to have.

He could seem that way. But, as this friend added, “the guy could read and work a room like nobody else I've ever known.” Not walk in and take it over, but work it. Person by person. As he added, “Bob made ambition look good. Which is not easy.” He connected, maybe with a little flattery, maybe a little gossip, certainly a lot of listening. He went out of his way to meet people who could help him as well as whom he could help. You don't end up being asked by Senator Moynihan to guide Judge Ruth Bader Ginsburg for her meetings with senators after her nomination to the Supreme Court by being a person who is bad at meeting people or socially awkward. You don't build the relationships involved in projects like his courts-and-Congress work and the Governance Institute and the Immigrant Justice Corps without being carefully attuned to the politics of human relations as well as the substance of policy.

Judge Katzmann was a highly successful serial policy entrepreneur. He had ideas and made them happen by bringing pieces and people together to build enterprises. My guess is that most people think of “entrepreneurs” as visibly outgoing, salesman personalities. One might also call him an “activist,” and that too calls to mind loud and demanding people. There are other modes.

Bob's humble and seemingly awkward self-presentation didn't prevent him from being persistent and strategic, and it likely added to his credibility. No one would think he was doing things for his own ego or interest. And that's because he wasn't. It wasn't about him. It was about Tikkun Olam: repairing the world.

22. *Id.* at 11–15.

“It’s wonderful,” our friend wrote to me, “to have known someone who truly wanted to leave behind a great legacy of good work and then . . . Actually. Pulled. It. Off.”

Amen.