

# Washington Law Review

---

Volume 91 | Number 2

---

6-1-2016

## Judicial Lobbying

J. Jonas Anderson

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Judges Commons](#), and the [Jurisdiction Commons](#)

---

### Recommended Citation

J. J. Anderson, *Judicial Lobbying*, 91 Wash. L. Rev. 401 (2016).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol91/iss2/2>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact [cnyberg@uw.edu](mailto:cnyberg@uw.edu).

# JUDICIAL LOBBYING

J. Jonas Anderson \*

*Abstract:* Judges who lobby Congress for legal reform tread into an ethical gray area: lobbying is legally permissible, but generally frowned upon. Currently, there are no legal or ethical constraints on judges speaking publicly regarding proposed legislative changes, only an ill-defined norm against the practice. Scholars have largely dismissed judicial lobbying efforts as the result of haphazard, one-off events, driven by the unique interests, expertise, or ideology of the individual judge involved. According to scholars, there is nothing that should be done—not to mention little that *could* be done—to restrict judges from lobbying.

Judicial lobbying occurs, in large part, when Congress proposes jurisdictional changes: judges lobby when the scope of their review may change. Yet, jurisdictional issues raise concerns about the judiciary’s biases when it comes to lobbying. To further explore this point, this Article explores the case of specialized courts’ involvement in legislative lobbying efforts. Specialized courts have more opportunities to lobby Congress on jurisdiction because any legislative change to the subject matter under the specialized court’s purview is likely to alter the court’s jurisdiction.

This Article argues that in certain instances lobbying by specialized judges ought to be curtailed. Lobbying by specialized courts raises unique issues that may not be present when judges on generalized courts lobby. Namely, specialized court lobbying may sacrifice long-held judicial virtues, including due process and impartiality, virtues which are fundamental to the legitimacy of the judiciary. This Article examines potential solutions to check such lobbying, and offers a partial solution that leverages the wisdom of the judicial branch, as a whole, to minimize those concerns.

INTRODUCTION .....	402
I. THE COUNTER-MAJORITARIAN DIFFICULTY AND LIMITS ON JUDICIAL LOBBYING .....	408
A. Constitutional and Statutory Limits on Judicial Lobbying ..	411
B. Formal Ethical Limits on Judicial Lobbying.....	414
C. Informal Restrictions on Judicial Lobbying.....	416
II. JUDICIAL LOBBYING .....	419
A. Judicial Lobbying, Historically .....	421
B. Modern Judicial Lobbying .....	424
1. Article III Issues .....	426

---

\* Associate Professor, American University Washington College of Law. Special thanks for thoughtful comments on this project to Michael Burstein, Mike Carroll, T.J. Chiang, Jorge Contreras, Amanda Frost, John Golden, Paul Gugliuzza, Tim Holbrook, Will Hubbard, Sapna Kumar, Megan LaBelle, Amanda Leiter, Ben Leff, Peter Lee, Amanda Leiter, Jake Linford, Irina Manta, David Olsen, Lisa Larrimore Ouellette, Sarah Rajec, Janewa Osei-Tutu, Andres Sawicki, Chris Seaman, Sean Seymore, David Taylor, Lindsey Wiley, and faculty workshops at Florida State University and Indiana University.

a.	The Creation of New Federal Circuit Courts.....	426
b.	Defining Article III “Judge” .....	429
2.	Judicial Administration .....	430
3.	Policy Issues .....	431
a.	Patent Law .....	432
b.	Surveillance Law .....	435
c.	Bankruptcy Law .....	437
d.	Military Law .....	438
C.	Specialization’s Impact on Judicial Lobbying .....	440
III.	REGULATING JUDICIAL LOBBYING BY SPECIALIZED JUDGES.....	442
A.	What (If Anything) Is Wrong with Judicial Lobbying? .....	442
B.	Specialization’s Role in Judicial Lobbying.....	446
1.	Expertise .....	446
2.	Specialized Docket .....	448
3.	Conflation of Judicial Administration and Policy .....	449
C.	Placing Limits on Lobbying Activities by Judges.....	451
1.	Change Ethical Standards.....	453
2.	Centralize Judicial Lobbying Activities .....	455
3.	Checking Lobbying by Specialized Courts .....	456
	CONCLUSION .....	460

## INTRODUCTION

In 2014, federal district judge John Bates wrote three unsolicited letters to Congress opposing the USA FREEDOM Act.<sup>1</sup> The Act would have imposed new limits on the U.S. government’s ability to monitor email and phone communications of American citizens.<sup>2</sup> In Judge Bates’s view, the USA Freedom Act suffered from three fundamental problems: it would have limited the government’s ability to “pursue potentially valuable intelligence-gathering activities,”<sup>3</sup> it would have

---

1. Letter from John Bates, Chief Judge, FISA Court, to Dianne Feinstein, Chairman, Senate Comm. on Intelligence (Jan. 13, 2014); Letter from John Bates, Chief Judge, FISA Court, to Mike Rogers, Chairman, Permanent Senate Comm. on Intelligence (May 13, 2014); Letter from John Bates, Chief Judge, FISA Court, to Patrick Leahy, Chairman, Senate Comm. on the Judiciary (Aug. 5, 2014), <http://online.wsj.com/public/resources/documents/Leahyletter.pdf> [<https://perma.cc/3P6H-TDPG>].

2. USA FREEDOM Act, H.R. 3361, 113th Cong. (1st Sess. 2013). The distinctly modified USA Freedom Act was passed in June 2015. USA FREEDOM Act, Pub. L. No. 114-23, 129 Stat. 268 (2015). The new act renews all provisions of the Patriot Act, except for the mass collection of data under § 215. See Jennifer Steinhauer & Jonathan Weisman, *U.S. Surveillance in Place Since 9/11 Is Sharply Limited*, N.Y. TIMES, Jun. 2, 2015, at A1.

3. Letter from John Bates to Patrick Leahy, *supra* note 1.

needlessly complicated the work of the Foreign Intelligence Surveillance Court (FISA Court),<sup>4</sup> and it was “potentially unconstitutional.”<sup>5</sup> The propriety of Judge Bates’s efforts to persuade Congress was controversial, challenged by both academic commentators and federal judges.<sup>6</sup> Controversy swirled around the fact that, at the time Judge Bates urged Congress to kill the USA Freedom Act, he was the Presiding Judge of the FISA court—the court given responsibility for enforcing the law.<sup>7</sup> Judge Bates was expressing his views on the substantive merits of a bill, before a case challenging that bill had been filed.<sup>8</sup> However, such “lobbying” of Congress by Federal judges is permitted, although traditionally it has been disfavored.<sup>9</sup>

The tension inherent with judges lobbying for or against bills that they will eventually interpret has not been overlooked by academics.<sup>10</sup>

---

4. *Id.* at 4–5 (arguing that it would impede the courts’ ability “to complete their work in a timely fashion”).

5. *Id.*

6. For example, the Chief Judge of the Ninth Circuit wrote to Congress expressing his disapproval of Judge Bates’s actions. Letter from Alex Kozinski, Chief Judge, Ninth Circuit Court of Appeals, to Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary (Aug. 14, 2014), [http://images.politico.com/global/2014/08/20/kozinski\\_to\\_leahy.html](http://images.politico.com/global/2014/08/20/kozinski_to_leahy.html) [https://perma.cc/XZ9G-5NEM].

7. Stephen I. Vladeck, *Judge Bates (Unintentionally) Makes the Case for FISC Reform*, JUST SECURITY BLOG (July 22, 2015, 2:57 PM), <https://www.justsecurity.org> [https://perma.cc/YC86-QJX7]; see also Stephen I. Vladeck, *The Case for a FISA “Special Advocate,”* 2 TEX. A&M L. REV. (forthcoming 2015) (manuscript at 17–18) (detailing Judge Bates’s criticism of the special advocate).

8. Just such a challenge was brought three days after the bill was signed. Motion in Opposition to the Government’s Imminent or Recently-Made Request to Resume Bulk Data Collection Under Patriot Act § 215, *Kucinelli v. Obama*, No. 15-01 (FISA Ct. June 5, 2015).

9. See, e.g., *Flast v. Cohen*, 392 U.S. 82, 97 (1968) (“Federal judicial power is limited to those disputes which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.”).

10. See, e.g., WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 181–82 (1964) (examining limits on judicial speech); Charles G. Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary’s Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1241–48 (1996) (proposing ways to enable judicial lobbying); Neal K. Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1723–53 (1998) (arguing for a role (both historic and contemporary) for judges as “advicegivers”); Nathaniel L. Nathanson, *The Extra-Judicial Activities of Supreme Court Justices: Where Should the Line Be Drawn?*, 78 NW. U. L. REV. 494 (1983) (reviewing BRUCE A. MURPHY, *AN INQUIRY STIMULATED BY THE BRANDEIS/FRANKFURTER CONNECTION—THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES* (1982)); Christopher E. Smith, *Judicial Lobbying and Court Reform: U.S. Magistrate Judges and the Improvements Act of 1990*, 14 U. ARK. LITTLE ROCK L. REV. 163, 189–91 (1991) (detailing judicial lobbying efforts). While the topic of individual courts and lobbying has been canvassed, less work has been done on the broader question of which courts lobby and why. See, e.g., Roger E. Hartley, “It’s Called Lunch”: *Judicial Ethics and the Political and Legal Space for the Judiciary to “Lobby,”* 56 ARIZ. L. REV. 383, 386 (2014) (“[T]here has been relatively little scholarship on how courts do intergovernmental relations

Judicial lobbying can be viewed as merely a way for the judicial branch to communicate with Congress, part of the long history of dialogue between Congress and the courts.<sup>11</sup> Ever since Alexander Bickel's groundbreaking work on the dialogic nature of the court-Congress relationship, scholars have exhaustively examined the ways that judges influence congressional law-making.<sup>12</sup> In this vein, scholars have identified a host of ways in which judges engage in constitutional dialogue with Congress: by declaring statutes unconstitutional, by interpreting statutory language, and by exercising what Bickel called "the passive virtues" that enable courts to avoid deciding constitutional questions.<sup>13</sup>

But a dialogic account of judicial lobbying must account for the fact that, in certain instances, judges urging a certain action by Congress may sacrifice any judicial claim of neutrality.<sup>14</sup> Judge Bates's recent actions serve as a cautionary tale demonstrating the pitfalls inherent with judicial lobbying.<sup>15</sup> But the phenomenon of judges lobbying Congress is not unique to Judge Bates. For instance, in 2010, while Congress was debating significant reforms to the U.S. patent system, Chief Judge

---

work . . ."); John W. Winkle III, *Interbranch Politics: The Administrative Office of the U.S. Courts as Liaison*, 24 JUST. SYS. J. 43, 43 (2003) ("Lobbying by the judiciary and its intermediaries remains a topic of low salience on research agendas.").

11. See generally Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990) (analyzing Congress's and the Supreme Court's respective powers when it comes to federal jurisdiction); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953) (discussing the congressional power to limit jurisdiction); Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537 (1997) (debating Congress's and courts' relative powers); Mark Tushnet & Jennifer Jaff, *Why the Debate over Congress' Power to Restrict the Jurisdiction of the Federal Courts Is Unending*, 72 GEO. L.J. 1311 (1983) (discussing the unending debate about courts' power to determine jurisdiction); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965) (discussing the relative power of the courts and Congress).

12. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 186 n.10 (1981) (developing an approach for reconciling judicial review and democracy); J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* 5–17 (2012) (arguing against a comprehensive constitutional theory); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3–10 (1971) (defending originalist approaches to constitutional interpretation as a means of defining the proper role for unelected judges in a democratic system).

13. The "passive virtues" receive a thorough treatment in Bickel's work. See, e.g., Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42–47 (1961) (discussing the different matters in which the courts avoid constitutional questions).

14. See Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1649–52 (1985) (discussing obstacles to achieving judicial fairness and balance).

15. See *supra* note 8 and accompanying text.

Michel of the U.S. Court of Appeals for the Federal Circuit wrote to the Senate Judiciary Committee, urging Congress to eliminate various aspects of the pending legislation.<sup>16</sup> Chief Judge Michel was arguing that Congress need not act; instead, Chief Judge Michel suggested that his court could handle the heavy lifting of reforming the patent system.<sup>17</sup> Like Judge Bates, Chief Judge Michel was lobbying Congress about a law that had yet to be enacted, but would have been reviewed by his court if enacted.

The reality that active judges often lobby Congress on legislation which will be interpreted by their courts raises three primary constitutional and ethical questions. First, do judicial lobbying efforts impinge upon the Constitution's separation of powers? Second, to what degree do judicial lobbying efforts violate judicial ethics, both formal and informal? Third, does judicial lobbying undermine fairness and equity in the administration of justice?

As to the first question, there are sound reasons to think that the Constitution does not preclude judicial lobbying. Despite the Constitution's delegation of separate powers to the legislature and the judiciary, the branches do not persist in what Benjamin Cardozo called "proud and silent isolation."<sup>18</sup> For example, lobbying does not appear to involve any use of the "legislative power" that is reserved for Congress alone; lobbying is not the power to legislate<sup>19</sup> Furthermore, although lobbying is likely outside the scope of Article III's judicial power, individual judges can engage with legislation outside of their court duties.<sup>20</sup>

The second question—concerning the formal ethical limits on judicial lobbying—is more difficult to answer. There is active disagreement about the extent to which the Code of Conduct for United States Judges curtails judges' ability to lobby Congress.<sup>21</sup> Despite this debate, the

---

16. See J. Jonas Anderson, *Patent Dialogue*, 92 N.C. L. REV. 1049, 1069–76 (2014) (describing in detail Chief Judge Michel's actions).

17. *Id.*; see also J. Jonas Anderson, *Secret Inventions*, 26 BERKELEY TECH. L.J. 917 (2011) (discussing courts and patent reform).

18. Benjamin Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 114 (1921).

19. See Geyh, *supra* note 10, at 1193 ("When judges propose, draft, testify on, and lobby for or against legislative reform, they do not usurp a legislative power that the Constitution vests in Congress alone.")

20. See, e.g., Maeva Marcus & Emily F. Van Tassel, *Judges and Legislators in the New Federal System, 1789-1800*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 41–42 (Robert A. Katzmann ed., 1988) (distinguishing permissible individual consultations between Congress and judges with impermissible institutional pronouncements on pending legislation).

21. See *infra* Section III.B.

Judicial Conference has interpreted the limits on judicial lobbying quite liberally, resulting in few formal ethical restrictions on the practice.<sup>22</sup> Informally, however, judges have developed strong norms against lobbying on issues that do not directly touch on the practice of judging, norms that are often flouted in practice.<sup>23</sup>

As for the last question, when judges lobby they run the risk of sacrificing the neutrality and even-handedness that is critical for the judicial branch's legitimacy.<sup>24</sup> Federal judges who comment on policy matters invariably run the risk of prejudicing, or appearing to prejudice, future cases.<sup>25</sup> Thus, additional checks on the excesses of judicial lobbying ought to be established. Any such checks, however, should not silence judicial voices on policy. Judicial input is often an invaluable insight into the administration of proposed laws.<sup>26</sup> Judges often represent unbiased, informed opinions, as demonstrated by the frequency with which lawmakers adopt judicial suggestions on legislative matters.<sup>27</sup> Furthermore, absolute limits on judicial lobbying would likely violate the First Amendment.<sup>28</sup> A more surgical approach is required.

Towards that end, this Article examines ways to oversee lobbying efforts, particularly by specialized courts. Specialized courts are particularly influenced by repeat litigants and can suffer from tunnel vision on policy matters, vulnerabilities that are exacerbated when judges lobby.<sup>29</sup> Specialized courts may be more incentivized to lobby for policy changes because the administrative impacts of legislative policy changes are greater for specialized courts than they are for courts of general jurisdiction.<sup>30</sup> This phenomenon is well illustrated by Judge

---

22. *Id.*

23. *See infra* Section II.C.

24. *See generally* Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643 (1992) (debating the myriad ways in which judicial review of political fairness can be categorized).

25. Justice Harry Blackmun wrote, “[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.” *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

26. *See Smith, supra* note 10, at 190 (“Congress is especially receptive to communication from judicial officers when the judges appear to speak with a unified voice.”).

27. *See* CHRISTOPHER E. SMITH, JUDICIAL SELF-INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION 38–39 (1995) (concluding that “Congressional deference” to judicial thoughts on legislation can be explained by a lack of knowledge and interest in court administration).

28. *See* J. Clark Kelso, *Time, Place, and Manner Restrictions on Extrajudicial Speech by Judges*, 28 LOY. L.A. L. REV. 851, 851–55 (1995) (applying the First Amendment to judicial speech).

29. *See* Rochelle C. Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377, 380 (discussing capture of specialized courts).

30. *See id.* at 381 (stating that specialized courts' jurisdiction, combined with their isolation, put

Bates, a generalist federal district judge who lobbied Congress only after appointment to a specialized court.<sup>31</sup>

Judges have traditionally been involved in congressional debates about court jurisdiction and reform.<sup>32</sup> For specialized courts, the traditional division between lobbying on judicial reform measures and lobbying on general policy reform measures is meaningless; substantive legal change inevitably impacts the administration of specialized courts.<sup>33</sup> Specialization blurs the already amorphous boundary between substantive and procedural legislative changes: for specialized courts policy and jurisdiction are essentially indistinguishable.<sup>34</sup> Thus, to the degree one is troubled by judicial lobbying, specialized courts represent an important focus for any reform proposal.

This Article's argument proceeds in four parts. Part I frames the inquiry by briefly describing scholarly approaches to court-Congress dialogue, of which lobbying plays a significant, if underappreciated role. Part II illustrates that judges engage in lobbying on substantive policy issues. This Part also examines the case of specialized courts as lobbyists to better understand the phenomenon.

Part III explores the practical and theoretical limits on federal judges who attempt to influence legislators. It examines possible Constitutional, statutory, and formal ethical restrictions on the practice, as well as informal norms. Ultimately, the primary restrictions on judicial lobbying are practical in nature: judges are commonly thought to be free to lobby about issues impacting the judiciary, but are discouraged from lobbying about general policy issues out of respect for the legislature.

Part IV turns to the central normative and theoretical issues underlying judicial lobbying. First, this Part theorizes specialized courts' interest in lobbying. Second, it asks the fundamental questions of whether we should be concerned with judicial lobbying, and if so, how we should reduce the amount of lobbying that judges undertake. After analyzing various arguments for regulating judicial lobbying, this Part concludes that judicial lobbying on policy matters can be problematic for the effective administration of justice. It suggests various ways to

---

them at risk of group-think).

31. One will note that his contemporaries on the court had an opposite reaction; they lobbied that the bill imposed constructive boundaries on the FISA Court. *See infra* Section II.B.3.b.

32. *See* Geyh, *supra* note 10, at 1187–91 (discussing the judiciary's elevated role in procedural reform).

33. *See* Anderson, *supra* note 16, at 1090–93 (analyzing how the Federal Circuit was impacted by patent reform).

34. *Id.*



improve oversight of judicial lobbying.

## I. THE COUNTER-MAJORITARIAN DIFFICULTY AND LIMITS ON JUDICIAL LOBBYING

Modern constitutional scholarship has paid particular attention to resolving the tension between democracy and judicial review.<sup>35</sup> The so-called “counter-majoritarian difficulty” has spawned numerous books and articles attempting to reconcile the reality of unelected judges reviewing, and at times invalidating, democratically-created legislation.<sup>36</sup> Scholars have looked for means by which judges can reduce the tension created by undemocratic judicial review.<sup>37</sup> One of the most well-known solutions is Alexander Bickel’s suggestion that courts employ the “passive virtues” of judicial reasoning<sup>38</sup>—refusing to decide cases on substantive grounds if narrower grounds for a decision exist. Scholars have also identified a host of ways in which judges engage in constitutional “dialogue” with Congress: by declaring statutes unconstitutional, by interpreting statutory language, and by exercising “the passive virtues” that enable courts to avoid deciding constitutional questions.<sup>39</sup> These scholarly attempts to decipher the contours of the judicial-legislative relationship have focused almost exclusively on formal interactions: dialogue via official duties.<sup>40</sup> In other words, scholars have focused on the dialogue that occurs when judges judge and when legislators legislate.

Some scholars, though, have studied the informal channels of

---

35. Katyal, *supra* note 10, at 1709 (“Contemporary constitutional law is preoccupied with the antidemocratic nature of judicial review.”).

36. *See, e.g.*, ELY, *supra* note 12, at 186 (developing an approach for reconciling judicial review and democracy); WILKINSON, *supra* note 12, at 17–28 (arguing against a comprehensive constitutional theory); Bork, *supra* note 12, at 3–10 (defending originalist approaches to constitutional interpretation as a means of defining the proper role for unelected judges in a democratic system).

37. *See, e.g.*, ELY, *supra* note 12, at 186 (developing an approach for reconciling judicial review and democracy); WILKINSON, *supra* note 12, at 17–28 (arguing against a comprehensive constitutional theory); Bork, *supra* note 12, at 3–10 (defending originalist approaches to constitutional interpretation as a means of defining the proper role for unelected judges in a democratic system).

38. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111 (2d ed. 1986).

39. *Id.*

40. *See, e.g.*, Hartley, *supra* note 10, at 386 (noting that “there has been relatively little scholarship” on courts lobbying); John W. Winkle III, *Judges as Lobbyists: Habeas Corpus Reform in the 1940s*, 68 *JUDICATURE* 263, 263 (1985) (“Judicial influence outside of adjudication, however, is an understudied but nonetheless important phenomenon.”).

communication between the branches.<sup>41</sup> The study of “extrajudicial” speech by judges and the restrictions on such speech have greatly enhanced understanding of judicial-congressional dialogue.<sup>42</sup> Generally, scholars have concluded that judicial lobbying is unsightly.<sup>43</sup> Walter Murphy, a scholar of the judicial role, has said that lobbying “is contrary to the public image of a judge.”<sup>44</sup> Judicial lobbying, it is thought, is only appropriate when an issue is “of such gravity” that it demands judicial intervention.<sup>45</sup> Taking this view, judges are thought to lobby on issues of particular interest to the judiciary. Thus, commentators have looked approvingly upon judicial lobbying efforts in areas such as lower court reorganization proposals,<sup>46</sup> the use of magistrate judges,<sup>47</sup> and judicial salary increases.<sup>48</sup> Judicial lobbying is perceived by most scholars to be both reasonable and rare, with judges appropriately lobbying about judicial administration while refraining from commenting on more general legislative policy. Judges are thought to lobby Congress over issues that directly impact the performance of the judiciary’s duties, and no others.<sup>49</sup>

But this perception of judicial lobbying is far from complete. Judges routinely testify before Congress about matters related to pending

---

41. There have been some treatments of particular lobbying efforts, including Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269, 287–90 (2000) (examining Chief Justice Rehnquist’s involvement in the Violence Against Women Act). Some work has been done on the institutions that the judiciary employs to perform lobbying. See Winkle, *supra* note 10, at 50 (detailing the Administrative Office of the U.S. Courts’ role in judicial lobbying).

42. See CHRISTOPHER E. SMITH, JUDICIAL SELF-INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION 131 (1995) (concluding that judges are “well positioned” to shape legislation that “will affect court administration”); Geyh, *supra* note 10, at 1168, 1234–49 (detailing the judiciary’s role in statutory reform and rulemaking); Kelso, *supra* note 28, at 851–55 (describing extrajudicial speech); Katyal, *supra* note 10, at 1711 (arguing that “advicegiving” to Congress is a role embraced by judges).

43. See Katyal, *supra* note 10, at 1711; Winkle, *supra* note 40, at 272–73 (detailing the role judges played in “court reform”).

44. MURPHY, *supra* note 10, at 178.

45. *Id.* at 179.

46. SMITH, *supra* note 42, at 18 (citing judicial lobbying for the creation of the Eleventh Circuit as an example of “tremendous influence” that judges can wield over the court reform process).

47. See, e.g., Smith, *supra* note 10, at 164–67 (describing judicial officers attempt to influence the legislative branch).

48. See, e.g., *id.* at 173.

49. Cf. Kelso, *supra* note 28, at 863 (arguing for restrictions on judicial speech); William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 GEO. J. LEGAL ETHICS 589, 623–24 (1989) (proposing limits on extra-judicial speech).

legislation.<sup>50</sup> They also, at times, reach out to Congress in their individual capacities to urge Congress to act in a particular policy area.<sup>51</sup> In fact, lobbying is such an institutionalized practice of the federal judiciary that an entire organization, the Judicial Conference of the United States, exists with the explicit goal of lobbying for judicial interests.<sup>52</sup> Indeed, judges often lobby Congress over policy issues that have merely tangential, if any, impact on the judiciary.<sup>53</sup> This calls into question the value that this more informal dialogue—judges opining on potential legislation—has on judicial-congressional relations. If the neutrality of the judiciary is sacrificed through lobbying, should judges be restrained from lobbying members of Congress?

At this point, a definition of what constitutes lobbying is appropriate. “Lobbying” can be a broad concept that encompasses any actions intended to influence decisions made by government officials.<sup>54</sup> However, this Article adopts a narrower view of what constitutes lobbying activities. First, this Article focuses only on lobbying activities by judges outside of their official duties of deciding cases. Judges frequently write opinions that are meant to influence legislators, but such official dialogue has been well-chronicled in the legal and political science literature.<sup>55</sup> Second, it considers only uninvited lobbying efforts. Oftentimes judges are requested by Congress to provide input on a particular policy debate, whether through congressional testimony, written statements, or other forms of communication.<sup>56</sup> Conversely, this Article is focused on what motivates judges to spontaneously engage in

---

50. See *infra* Part II.

51. For example, judges from the U.S. Court of Appeals for the Fifth Circuit actively lobbied Congress to split the old Fifth Circuit into two. See DEBORAH J. BARROW & THOMAS G. WALKER, *A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM*, (1988).

52. See Thomas G. Walker & Deborah J. Barrow, *Funding the Federal Judiciary: The Congressional Connection*, 69 *JUDICATURE* 45, 47 (1986) (describing the role of the Judicial Conference).

53. See *infra* Part II.

54. This discussion relies generally on DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS* (1951).

55. See Katyal, *supra* note 10, at 1727–1800 (listing instances in which judges give advice to the legislature); J. Jonas Anderson, *Congress as a Catalyst of Patent Reform at the Federal Circuit*, 63 *AM. U. L. REV.* 961, 981–1004 (2014) (detailing how the Federal Circuit interacted with Congress regarding patents through its opinions).

56. See Harvey Rishikof & Barbara A. Perry, “*Separateness but Interdependence, Autonomy but Reciprocity*”: *A First Look at Federal Judges’ Appearances Before Legislative Committees*, 46 *MERCER L. REV.* 667, 669–75 (1995) (finding that Congress nearly always took the advice of judges when lobbying on issues of judicial functioning).

policy debates outside of their official capacities; thus, invitations to address Congress are less relevant to that discussion. This rather narrow definition of lobbying limits that term to a judge's unsolicited views about pending legislative action which occurs outside of his or her role as judicial decision-maker.

A. *Constitutional and Statutory Limits on Judicial Lobbying*

This section examines the restrictions on judicial lobbying by examining potential constitutional, statutory, ethical, and norms-based restraints on judges speaking about legislation. Ultimately, it concludes that there are no legal restrictions, just a judicial norm against the practice. This freedom can be a good thing, providing breathing room for constructive dialogue. But the lack of formal restrictions can lead to lobbying that threatens judicial neutrality.

One of the most commonly invoked arguments against judges attempting to influence legislation is that such judicial lobbying efforts violate constitutional principles of separation of powers.<sup>57</sup> There is no explicit separation of powers clause within the Constitution, rather the separation is implied within the Constitution's structure.<sup>58</sup> The first three articles of the Constitution vest "all" legislative powers with Congress, "the executive [p]ower" in the President, and "the judicial [p]ower" with the courts.<sup>59</sup> Scholars have debated the limits placed on each branch by the separation of powers, developing a rich and extremely thorough literature on the topic.<sup>60</sup>

Regardless of one's viewpoint on the separation of powers, there are at least two sound reasons to think that the Constitution does not preclude judicial lobbying. First, discussing legislation with members of Congress—in an official capacity or otherwise—does not involve any use of the "legislative power."<sup>61</sup> Courts and judges do not impinge upon

---

57. See Geyh, *supra* note 10, at 1192 ("The separation of powers is often identified as an impediment to interbranch cooperation in legislative reform.").

58. See, e.g., Malcolm P. Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385, 395–99 (1935) (describing the doctrine as part of the fabric of American society).

59. U.S. CONST. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

60. The literature is too immense to summarize. As a more recent example of the kinds of separation of powers concerns that are inviting to scholars, see generally Neal K. Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 100 (2006) (questioning whether the executive branch should be regulated from within).

61. See U.S. CONST. art. I, § 1; Geyh, *supra* note 10, at 1193 ("When judges propose, draft, testify on, and lobby for or against legislative reform, they do not usurp a legislative power that the Constitution vests in Congress alone.").

the legislature's delegated power when they publically announce their views on public policy.<sup>62</sup> They, like other members of the public, are merely seeking to influence Congress in its law-making role.<sup>63</sup> Such attempts to influence do not usurp the legislative branch's designated role.<sup>64</sup>

Second, Article III of the Constitution does not forbid judges from engaging with legislation outside of their duties as a judge. The executive and legislative branches regularly comment on and critique the work of the judicial branch; the President and Congress often suggest that the Supreme Court should decide important cases in particular ways.<sup>65</sup> In fact, the executive branch is a regular litigant in federal court, not only as a defendant but often as a plaintiff.<sup>66</sup> Scholars have suggested that Congress is not restricted in using the courts and should engage more directly with the judicial branch in court.<sup>67</sup> While engaging with the judicial branch is not a constitutional requirement, it certainly does not violate the separation of powers for Congress to do so.<sup>68</sup> In the same way, judges do not violate their constitutionally-granted duties by engaging with the legislature outside of official duties.

The absence of constitutional restrictions on judicial lobbying does not end the inquiry into the legal limits of the practice, however.<sup>69</sup> 18 U.S.C. § 1913 forbids government employees from lobbying Congress using "money appropriated by any enactment of Congress."<sup>70</sup> On first glance, this would appear to preclude judicial lobbying because judges are clearly governmental employees. There are two exceptions to this prohibition, however, which greatly remove any barriers for Article III judges who wish to lobby Congress. The first of these exceptions permits government employees to engage with Congress if a member of

---

62. See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 678–83 (1993) (addressing the separation of powers conflict that arises when judges lobby Congress).

63. *Id.*

64. *Id.*

65. See Louis Fisher, *Congressional Checks on the Judiciary*, in CONGRESS CONFRONTS THE COURT: THE STRUGGLE FOR LEGITIMACY AND AUTHORITY IN LAWMAKING 21, 21–28 (Colton C. Campbell & John F. Stack, Jr. eds., 2002).

66. See Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 917 (2012) ("As matters stand today, however, the executive branch plays the dominant role in federal litigation.").

67. *Id.*

68. *Id.*

69. See Marcus & Van Tassel, *supra* note 20, at 41–42 (distinguishing permissible individual consultations between Congress and judges with impermissible institutional pronouncements on pending legislation).

70. 18 U.S.C. § 1913 (2012).

Congress requests advice.<sup>71</sup> Thus, any congressional request for input from a particular judge, court, or the entire judicial branch frees judges to respond to the request. In fact, the Judicial Conference strictly adheres to this first exception, communicating with Congress only when requested to do so by a member of Congress.<sup>72</sup>

The second exception to the limitation on government employee lobbying is the “proper official channels” exception.<sup>73</sup> For legislation that is deemed “necessary for the efficient conduct of the public business,” governmental employees may lobby Congress only via “proper official channels.”<sup>74</sup> On its face, this exception appears to limit judicial lobbying to activities carried out by the Judicial Conference—the formal lobbying arm of the judiciary—and then only on court-specific matters that are necessary for the efficient administration of justice. As noted above, the Judicial Conference rarely invokes this exception, however, choosing instead to wait for Congress to solicit the judiciary’s input on legislation.<sup>75</sup>

Despite the apparent restrictions of 18 U.S.C. § 1951, the Comptroller General (C.G.) of the United States has interpreted the statute’s exceptions quite broadly. The C.G. has ruled that judicial communications with Congress always fall within the “official channels” exception because individual Article III judges have no direct supervisor and are “arguably” their own “agency spokesperson.”<sup>76</sup> Thus, according to the C.G., individual judges are limited in lobbying Congress only insofar as the issues to which they address their efforts “would have an impact on the judiciary.”<sup>77</sup> Thus, according to the C.G., in nearly every imaginable case, judicial lobbying is not subject to statutory limitation.<sup>78</sup> Every potential policy issue has an “impact,” no matter how small, on the judiciary. Thus, in practice, judges are only limited to lobbying on

---

71. *Id.*

72. Geyh, *supra* note 10, at 1196 (critiquing the Judicial Conference’s “utterly unnecessary” requirement to participate in the legislative process only when invited to do so).

73. For a more thorough discussion of this topic, see Smith, *supra* note 10, at 167–70.

74. Geyh, *supra* note 10, at 1195 (quoting 18 U.S.C. § 1913).

75. *See* Resnik, *supra* note 41, at 278–82 (reciting the history of the Judicial Conference’s reluctance to comment on pending legislation absent a directive from Congress).

76. *See* Letter from Comptroller Gen. of the U.S. to Jeremiah Denton, Senator (Sept. 26, 1984), in U.S. GEN. ACCOUNTING OFFICE, 63 DECISIONS OF THE COMPTROLLER GENERAL OF THE UNITED STATES 626 (1985) [hereinafter Letter to Jeremiah Denton].

77. *Id.*

78. *See* Smith, *supra* note 10, at 169 (stating that the interpretation of the rule allows courts and Congress to communicate “without narrowly construing the requirement that such communications pass through ‘official channels’”).

issues that would “impact . . . the judiciary”: a threshold that is easily met in virtually every case.<sup>79</sup>

### B. *Formal Ethical Limits on Judicial Lobbying*

The behavior of federal judges is regulated not only by constitutional and statutory limitations, but also by formal ethical rules. In 1973, the Federal Judicial Conference adopted a Code of Conduct for United States Judges (“Judicial Code of Conduct”).<sup>80</sup> Although the Judicial Code of Conduct is non-binding, it is widely followed and regularly consulted by the Judicial Conference when determining whether a judge has violated his or her ethical obligations and when determining whether to institute corrective measures.<sup>81</sup>

Canon 2 of the Judicial Code of Conduct states that judges should “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”<sup>82</sup> This general provision provides a standard for judicial lobbying activities, but it does not provide specific limits on such activities. Similarly, Canon 3 of the Judicial Code of Conduct provides that a “judge should not make public comment on the merits of a matter pending or impending in any court.”<sup>83</sup> Judge Calabresi of the Second Circuit recently drew criticism when he commented publically that it “would be too bad” if the Supreme Court reversed his decision in *Town of Greece v. Galloway*,<sup>84</sup> a case examining whether a prayer prior to a city meeting violated the Establishment Clause.<sup>85</sup> If a judge were to comment publically on a pending case while lobbying Congress, he would be in clear violation of Canon 3 of the Judicial Code of Conduct.

Canons 2 and 3 of the Judicial Code of Conduct set out the basic scope of judicial ethical limits on extrajudicial speech. But they are

---

79. See Letter to Jeremiah Denton, *supra* note 76, at 626.

80. ADMIN. OFFICE OF THE U.S. COURTS, CODE OF CONDUCT FOR UNITED STATES JUDGES (2009).

81. FED. JUDICIAL CTR., JUDICIAL CONDUCT AND DISCIPLINE IN THE UNITED STATES FEDERAL COURTS (2010), [http://www.fjc.gov/public/pdf.nsf/lookup/Judicial-Conduct-and-Discipline--English--2.19.14.pdf/\\$file/Judicial-Conduct-and-Discipline--English--2.19.14.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Judicial-Conduct-and-Discipline--English--2.19.14.pdf/$file/Judicial-Conduct-and-Discipline--English--2.19.14.pdf) [https://perma.cc/5SNR-BKRS].

82. Admin. Office of the U.S. Courts, Guide to Judiciary Policy, Vol 2.: Ethics and Judicial Conduct, ch. 2, Canon 2(A) (2014).

83. *Id.* at ch. 2, Canon 3(A)(6).

84. \_\_\_ U.S. \_\_\_, 134 S. Ct. 1811 (2014).

85. Ed Whelan, *Judge Calabresi's Flagrant Ethical Violation*, NAT'L REV. ONLINE (Mar. 31, 2014), <http://www.nationalreview.com/bench-memos/374615/judge-calabresi-flagrant-ethical-violation-ed-whelan> [https://perma.cc/N6U8-QLL7].

unhelpfully broad in defining limits on judicial speech. Canon 4 of the Code of Conduct is perhaps more helpful. It provides that:

A judge may engage in extrajudicial activities, including law-related pursuits . . . . However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, [or] lead to frequent disqualification . . . .

*A. Law-related Activities*

1. *Speaking, Writing, and Teaching.* A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

2. *Consulting.* A judge may consult with or appear at a public hearing before an executive or legislative body or official

(a) on matters concerning the law, the legal system, or the administration of justice;

(b) to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area; or

(c) when the judge is acting *pro se* in a matter involving the judge or the judge's interest.<sup>86</sup>

Canon 4 of the Judicial Code of Conduct clearly permits judicial lobbying about issues for which a "judge's judicial experience provides special expertise in the area."<sup>87</sup> One can debate about whether Canon 4 permits judicial lobbying in legal areas that do not directly touch on matters directed at the judiciary, but an amendment to the ethical rules in 2008 (which added section 4(A)(1)) removed any doubts that may have existed as to the propriety of judicial lobbying. In the commentary to Canon 4, judges are encouraged to opine on legislation:

As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the law.<sup>88</sup>

---

86. Admin. Office of the U.S. Courts, *supra* note 82, at ch. 1, Canon 4(A)(1)–(2).

87. *Id.* at Canon 4(A)(2)(b).

88. *Id.* at Canon 4, Commentary.



Thus, there appear to be few formal ethical restrictions on judicial lobbying activity. Of course, judges should not comment on pending cases under Canon 3, but they face few restrictions in commenting on legislation. What questions remained regarding judicial speech were entirely laid to rest with the adoption of Canon 4(A)(1). As long as judges refrain from commenting about current cases, they may lobby Congress.

C. *Informal Restrictions on Judicial Lobbying*

Although there appear to be few formal constitutional, statutory, or ethical restraints on judicial lobbying, a strong norm has developed which limits judicial lobbying efforts to a single subject: judicial reform.<sup>89</sup> Chief Justice Rehnquist acknowledged the reasons for such restraint in his 1993 Year-End Report for the Federal Judiciary:

[W]hat is an appropriate sentence for a particular offense, and similar matters, are questions upon which a judge's view should carry no more weight than the view of any other citizen. In such cases I do not believe that the Judicial Conference . . . should take an official position.<sup>90</sup>

While the specifics of Justice Rehnquist's statement have been questioned (some believe that sentencing is an area of "special expertise" for the judiciary), his broader point that individual judges should avoid commenting on statutes that do not concern judicial administration—even if not ethically or legally prohibited—is almost universally accepted.<sup>91</sup> Chief Justice Burger noted the demarcation between judges advising on broad policy matters and judges advising on court-specific matters:

Justices have come to realize that they should avoid advising Presidents and the Congress on substantive policy questions but on matters relating to the courts there must be joint consultation.

---

89. BARROW & WALKER, *supra* note 46, at 258 ("The idea of judicial lobbying is anathema to many. It somehow seems inappropriate for federal judges, whose adjudicative role requires neutrality rather than advocacy, to urge the passage or defeat of proposed legislation. In spite of its negative connotations, however, lobbying is nothing more than communicating information and considered opinion to the appropriate decisionmakers. No one has more accurate information on matters of judicial administration or is in a better position to comment on conditions facing the courts than the federal judge.")

90. CHIEF JUSTICE WILLIAM REHNQUIST, 1994 YEAR-END REPORT ON THE FEDERAL JUDICIARY (Dec. 30, 1994).

91. See Kelso, *supra* note 28, at 852 (stating the universal acceptance of informal restrictions on extrajudicial lobbying); Winkle, *supra* note 40, at 273 (arguing judges should provide input to Congress, as long as they do not "subvert" judicial ideals).

The separation of powers does not preclude such consultation . . . . To be sure, there is a great and necessary tradition of insulation of judges from political activities generally. But participation in legislative and executive decisions which affect the judicial system is an absolute obligation of judges.<sup>92</sup>

This norm against pronouncements of general policy by the judiciary has developed in response to two primary concerns about overbroad judicial lobbying. First, commentators have worried that excessive judicial lobbying undermines the neutrality of the judicial office.<sup>93</sup> If judges are engaged in legislative battles, how can they then coldly review the resulting legislation from those battles? Second, commentators have worried that widespread judicial lobbying would undermine the legitimacy of the federal judiciary.<sup>94</sup> The public's confidence in the judiciary and Congress's respect for the finality of judicial review could both be undermined if judges are unfettered in their lobbying activities.<sup>95</sup>

An obvious objection to judicial lobbying is the prohibition on judicial advisory opinions. The restriction on advisory opinions has a long, nearly unbroken pedigree in the United States.<sup>96</sup> In 1793, then-Secretary of State Thomas Jefferson requested legal advice from the Supreme Court regarding certain treaty matters with France.<sup>97</sup> In response, Chief Justice John Jay declined to advise the President.<sup>98</sup> Citing separation of powers concerns and the Court's status as a "court of last resort," he argued "against the propriety of . . . extra-judicially

---

92. See Katyal, *supra* note 10, at 1815–16 (quoting Warren E. Burger, Accepting the Fordham-Stein Award (Oct. 25, 1978)).

93. See Kelso, *supra* note 28, at 852 ("Many—I hope most—would agree that something is wrong with supreme court justices actively opposing a ballot proposition in an attempt to influence the vote.").

94. See Abner K. Mikva, *Why Judges Should Not Be Advicegivers: A Response to Professor Neal Katyal*, 50 STAN. L. REV. 1825, 1829 (1998) ("The closer the judicial decision-making process comes to the political process, the more suspect the particular decision becomes.").

95. *Id.*

96. The one exception appears to be President Monroe's request from the Supreme Court for an opinion on whether the federal government could use federal money for internal improvements. The Court answered in the affirmative. E. F. Albertsworth, *Advisory Functions in Federal Supreme Court*, 23 GEO. L.J. 643, 644 (1935).

97. Letter from Thomas Jefferson to John Jay (July 12, 1793), in 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, 744 (Maeva Marcus et al. eds., 1998); see also William R. Casto, *The Early Supreme Court Justices' Most Significant Opinion*, 29 OHIO N.U.L. REV. 173, 174–85 (2002) (detailing the history of the John Jay letter).

98. *Id.*

deciding the questions.”<sup>99</sup> Jay’s refusal to provide an advisory opinion was formally acknowledged over a century later in *Muskrat v. United States*,<sup>100</sup> with the Court holding that it was unable to provide “opinions in the nature of advice concerning legislative action.”<sup>101</sup>

When judges engage in lobbying for particular bills, their actions may be seen as akin to advisory opinions. Lobbying exposes a judge’s opinion on the merits (or lack thereof) of legislative action before that action has been formally challenged in court.<sup>102</sup> Opponents of such bills may rightly feel that a judge could not objectively evaluate the constitutionality of a bill for which he or she has previously voiced support or opposition.

Concerns about judicial fairness are raised even when actions by a judge do not rise to the level of an advisory opinion. Merely voicing support or disfavor for a particular policy action, even if not directed at a specific piece of legislation, could undermine the appearance of judicial neutrality.<sup>103</sup> For example, if a judge were to write an op-ed in favor of eliminating all obscenity laws, a prosecutor bringing an obscenity case might legitimately question that judge’s ability to even-handedly adjudge his or her case.<sup>104</sup>

Many commentators are troubled by the erosion of public goodwill that might occur when judges engage in lobbying.<sup>105</sup> Legislators are elected by the people to craft policy.<sup>106</sup> They actively debate policy goals while running for election.<sup>107</sup> After being elected, they solicit the views of experts, constituents, lobbyists, and other interest groups.<sup>108</sup> A

99. Letter from John Jay to George Washington (Aug. 8, 1793), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488–89 (Henry P. Johnston ed., 1890).

100. 219 U.S. 346 (1911).

101. *Id.* at 362.

102. *See* Katyal, *supra* note 10, at 1804–05 (stating “[t]here are good reasons” to have a case or controversy requirement, including legislative interference).

103. *See* Stephen Reinhart, *Judicial Speech and the Open Judiciary*, 28 LOY. L.A. L. REV. 805, 805 (1995) (“Concerns about fairness and the appearance of fairness far outweigh any benefits that might result from such speech . . .”).

104. Consider the case of Judge Alex Kozinski, who recused himself in an obscenity trial after sexually explicit material was found on his website. Scott Glover, *U.S. Judge in Obscenity Trial Steps Down*, L.A. TIMES (June 14, 2008), <http://articles.latimes.com/2008/jun/14/local/me-kozinski14> [<https://perma.cc/A24N-7DDY>].

105. *See* Winkle III, *supra* note 40, at 265 (“Lobbying . . . may impair the adjudicative function, jeopardize impartiality, or compromise the integrity of the court.”).

106. *See* Mikva, *supra* note 94, at 1828–29 (comparing the legislative decision-making process to the judicial decision-making process).

107. *Id.*

108. *Id.*

deliberative process of drafting, voting, and redrafting of legislative provisions occurs in committee and then in the congressional chambers.<sup>109</sup> The same process occurs in the other congressional chamber before a bill is sent along to the President.<sup>110</sup> The deliberative, democratic nature of the legislative process is what legitimizes the laws that Congress ultimately adopts.<sup>111</sup>

In contrast, the judicial decision-making process is designed to severely limit the types of information and viewpoints that can be consulted.<sup>112</sup> Judges are generally precluded from relying on information found outside of the official record of a case.<sup>113</sup> Legal decisions are not meant to be policy decisions.<sup>114</sup> They are intended to be insulated, to some degree, from the influences of outside interests. To the extent that judges step outside of their roles as judges and enter into the legislative realm, they may be sacrificing the virtues that separate them from their legislative colleagues.<sup>115</sup>

## II. JUDICIAL LOBBYING

Judges frequently promote or challenge legislative proposals—they lobby.<sup>116</sup> Their lobbying efforts have not been limited to issues of judicial administration, either.<sup>117</sup> As this Part will demonstrate, judges have been very active in lobbying on a broad range of policy matters. For instance, judges have played key roles in matters of court organization, including actively lobbying for and against splitting the Fifth and Ninth Circuit Courts of Appeal.<sup>118</sup> The Fifth Circuit was eventually split, largely on the basis of unanimous support from the circuit’s judges while the Ninth Circuit has yet to be split due to

---

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 1829.

113. *See id.*

114. *See id.*

115. *Id.*

116. *See* Winkle III, *supra* note 40, at 264–72 (chronicling the lobbying efforts around habeas corpus reform).

117. *See infra* section II.B.

118. *See generally* BARROW & WALKER, *supra* note 51 (discussing, in general, the Fifth Circuit divide); Thomas E. Baker, *On Redrawing Circuit Boundaries—Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit Is Not Such a Good Idea*, 22 ARIZ. ST. L.J. 917 (1990) (arguing against dividing the Ninth Circuit).

widespread opposition from the judges in that circuit.<sup>119</sup> Judges have also been heavily involved in debates about sentencing reform.<sup>120</sup> But judges have also been active on policy questions that have little to do with judicial efficiency or issues that involve judicial discretion, including patent reform, bankruptcy reform, and tax reform, among others.<sup>121</sup>

This Part briefly describes historical judicial lobbying efforts. Then, it analyzes modern judicial lobbying campaigns by grouping lobbying efforts into three categories: Article III issues, judicial administration issues, and general policy issues.

Article III issues include one of two types of legislative proposals based on Congress's constitutionally-provided powers: attempts to establish "inferior [c]ourts" or attempts to alter the judicial branch's jurisdiction over certain "cases" or "controversies."<sup>122</sup> For instance, congressional debate about splitting established federal judicial circuits has attracted spirited debate from judges.<sup>123</sup> Similarly, congressional debate about the creation of new courts, such as the bankruptcy courts, has met fierce criticism from judicial officers.<sup>124</sup> Judges have also attempted to restrict the types of decision-makers protected by Article III's safeguards.<sup>125</sup> Congressional attempts to limit federal court jurisdiction have also been subject to intense lobbying from judges.<sup>126</sup>

But judicial lobbying has not been limited to constitutional questions or debates about the nature of judging. Much judicial lobbying effort has been focused on matters of judicial administration—the day to day management of federal cases.<sup>127</sup> Federal judges have not shied away from opining on the need for increased administrative assistance in the

---

119. *Id.*

120. See Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 N.Y.U. L. REV. 1389 (2008) (promoting state sentencing reform).

121. See *infra* section II.C.

122. U.S. CONST. art. III, § 1.

123. See, e.g., BARROW & WALKER, *supra* note 51 at 153–83 (detailing the politics that ultimately led to the splitting of the Fifth Circuit).

124. See Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 88–99 (1997) (detailing the judicial role in the Bankruptcy Reform Act of 1978).

125. Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 995 (2000) ("As a lobbying organization, the federal judiciary has chosen to oppose creation of new federal rights, to support retrenchment of the roles of life-tenured judges, and to propose delegation of many of their tasks to other judges.").

126. *Id.*

127. See, e.g., Smith, *supra* note 10, at 164–67 (describing judicial officers' attempts to influence the legislative branch).

judicial process.<sup>128</sup> They have lobbied for increased roles for magistrate judges, bankruptcy judges, and other non-Article III decision-makers.<sup>129</sup> Federal judges have also been involved in sustained, organized campaigns for increased judicial salaries.<sup>130</sup>

The third category of judicial lobbying is the most intriguing, yet least studied. Despite the norms against judicial lobbying on policy matters, federal judges have repeatedly lobbied Congress on legislative matters with little direct impact on the judicial branch.<sup>131</sup> The range of issues on which judges have lobbied is vast: from patent law to criminal sentencing, from unemployment benefits to governmental wiretapping.<sup>132</sup> Judicial lobbying on policy matters is the most problematic sort of lobbying from an ethical standpoint. Although currently permitted by the Judicial Code of Conduct, lobbying the legislature outside of the formal dialogue spaces of cases and statutes may expose judges to accusations of bias and partisanship. By weighing in on controversial policies, judges sacrifice the veneer of impartiality that sustains confidence in the justice system.<sup>133</sup> Thus, it is logical to ask why judicial lobbying in policy matters is so prevalent. Why would judges potentially undermine the legitimacy of their office by engaging in public lobbying efforts? After describing the history of judicial lobbying, this Part offers some potential answers to that question.

#### A. *Judicial Lobbying, Historically*

There is a long history of judges engaging with legislators.<sup>134</sup> Since the United States was founded, judges, particularly Supreme Court Justices, have played an active role in crafting and advising on legislation that directly impacts the judicial branch.<sup>135</sup> Over the first

---

128. *Id.*

129. *Id.*

130. *See, e.g.,* SMITH, *supra* note 42, at 62–64 (summarizing the history of judicial lobbying about judicial salaries).

131. *See, e.g.,* Anderson, *supra* note 16, at 1069–76 (detailing judicial lobbying efforts in the patent field).

132. *Id.*

133. *See, e.g.,* Kevin D. Swan, Comment, *Protecting the Appearance of Judicial Impartiality in the Face of Law Clerk Employment Negotiations*, 62 WASH. L. REV. 813, 814–15 (1987) (stating that public support of judicial decisions requires the appearance of impartiality).

134. Early Supreme Court Justices traveled widely and interacted with state legislatures thru the grand jury process. For more on the early process of grand jury instructions, see Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 750–55 (1972).

135. *See* Katyal, *supra* note 10, at 1741–53 (discussing the role of early Supreme Court Justices

century of this nation's history, the judiciary's interactions with statutory reform were largely ad hoc, however. Neal Katyal, a scholar of the early American experience with judicial speech, finds that "[t]hroughout the first decades of the Republic, judges, acting in their individual capacities, provided Congress with advice about legislative matters."<sup>136</sup> Katyal notes that courts have advised legislators by "private letter" and "back-room discussion," among other methods.<sup>137</sup> Charles Geyh has described the period from 1789–1922 as one of "unstructured interaction" between Congress and the courts.<sup>138</sup> Peter Fish has chronicled numerous examples of judges engaged in the legislative work of testifying about, drafting, and publically supporting court-related legislation in the nineteenth century.<sup>139</sup> Indeed, while Congress was debating amendments to the 1789 Judiciary Act, two United States Supreme Court Justices authored an alternative bill for Congress's consideration.<sup>140</sup>

The historical record of judges attempting to influence congressional decisions is not limited to the early days of the Republic. Chief Justice Taft successfully fought against the Caraway Bill which would have prevented federal judges from commenting to jurors about a witness' credibility.<sup>141</sup> Similarly, Chief Justice Hughes sent a letter to a prominent senator opposing, and ultimately helping to defeat, President Roosevelt's court-packing plan.<sup>142</sup> In short, despite the generally-accepted norms against extra-judicial advice-giving, judges have, periodically, openly lobbied Congress.

One of the greatest Supreme Court lobbyists, Chief Justice William Howard Taft, successfully lobbied Congress to create what would become the Judicial Conference of the United States in 1922.<sup>143</sup> This effort would move judicial lobbying out of the era of backroom

---

in advising the president and Congress).

136. *Id.* at 1741.

137. *Id.* at 1742–43.

138. Geyh, *supra* note 10, at 1171–72.

139. PETER G. FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 11, 14–17 (1973) (describing judicial lobbying efforts on judicial-reform legislation).

140. Katyal, *supra* note 10, at 1741.

141. MURPHY, *supra* note 10.

142. Katyal, *supra* note 10, at 1751–52.

143. *See* Act of Sept. 14, 1922, ch. 306, § 2, 42 Stat. 837, 838 (codified as amended at 28 U.S.C. § 331 (1994)); *see* FISH, *supra* note 139, at 30–32 (describing Chief Justice Taft's role in the legislative effort); Geyh, *supra* note 10, at 1172 (same). The Judicial Conference was originally named the Conference of Senior Circuit Judges. Its name was changed in 1948. *See* Act of June 25, 1948, ch. 636, § 331, 62 Stat. 869, 902 (codified as amended at 28 U.S.C. § 331 (1994)).

individual conversations and into a more open era. The Judicial Conference serves as the governing body of the federal judiciary and is headed by the Chief Justice. Since 1939, the Judicial Conference has been supported by the Administrative Office of the United States Courts (“AO”).<sup>144</sup> The AO assists the Judicial Conference in drafting legislation. The AO staff also monitors judicially-focused legislative activity on Capitol Hill and frequently testifies before congressional committees.<sup>145</sup> In 1967, in response to a suggestion from the Judicial Conference, Congress created the Federal Judicial Center to provide judicial education and to improve the judiciary’s research capabilities.<sup>146</sup>

All of these newly-formed organizations created a formalized structure for direct judicial lobbying of Congress. The Judicial Conference sends annual reports to Congress.<sup>147</sup> Those reports have, since the inception of the Judicial Conference, included recommendations for legislation.<sup>148</sup> In addition, the AO submits annual reports to Congress concerning the workload of the courts.<sup>149</sup> But the AO and the Judicial Conference also serve as conduits for interbranch communications between Congress and the courts. Congress regularly asks the director of the AO to testify concerning legislative proposals and the impact those proposals might have on judicial case management.<sup>150</sup> Furthermore, Congress often asks for specific input on legislation from the Judicial Center.<sup>151</sup>

---

144. Geyh, *supra* note 10, at 1175.

145. *Id.* In 1991, the Judicial Conference created the Office of Judicial Impact Assessment (OJIA) within the AO to evaluate the potential impact on the judiciary of proposed legislation.

146. See Russell Wheeler, *Empirical Research and the Politics of Judicial Administration: Creating the Federal Judicial Center*, 51 L. & CONTEMP. PROBS. 31, 31 (1988) (describing the creation of the FJC).

147. See Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEGIS. 1, 42–45 (1985) (questioning the role played by the Chief Justice and the Judicial Conference in the bankruptcy amendments of 1984).

148. Geyh, *supra* note 10, at 1173 & n.27 (noting policy recommendations of the Judicial Conference); see also REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (Mar. 10, 2015), <http://www.uscourts.gov/about-federal-courts/reports-proceedings-judicial-conference-us> [<https://perma.cc/3TPW-TW74>] [hereinafter 2015 JUDICIAL CONFERENCE REPORT].

149. Administrative Office Act of 1939, § 305, 53 Stat. 1223, 1224 (codified as amended at 28 U.S.C. § 332 (1994)).

150. See, e.g., MARK C. MILLER, THE VIEW OF THE COURTS FROM THE HILL: INTERACTIONS BETWEEN CONGRESS AND THE FEDERAL JUDICIARY 25 (2009) (“[J]udges often allow the Administrative Office of the United States Courts . . . to speak for them on legislative matters.”).

151. *Id.* (“[T]he Judicial Conference will sometimes seek invitations to comment on legislative proposals.”).



But the creation of more formalized judicial lobbying organizations has left some dissatisfied. Scholars have disputed whether the courts should engage as thoroughly with Congress as they have in the past.<sup>152</sup> Despite the historical precedent for judicial involvement with legislation, Katyal is not persuaded that history is the best normative guide.<sup>153</sup> For him, “[e]xtrajudicial advice raises troublesome issues about judicial propriety and smoky, back-room deals.”<sup>154</sup> But Katyal argues that judges do have a role to play as “advicegivers” in the legislative process.<sup>155</sup> He advocates for “advicegiving via written opinions in cases and controversies,” not in extra-judicial forums.<sup>156</sup> Thus, he is not arguing in favor of judicial lobbying as defined in this Article.

### B. *Modern Judicial Lobbying*

Despite the presence of an organized administrative complex for judicial lobbying centered at the Judicial Center, ad hoc judicial lobbying continues to this day. Yet some common concerns about judicial lobbying should be noted. First, widespread judicial lobbying threatens the legitimacy of the judiciary. If judges are perceived as biased decision-makers, the judiciary sits on precarious ground with both the public and the other branches of government.<sup>157</sup> No other branch depends so heavily on the perception of impartiality in its actions.<sup>158</sup>

Second, judges are discouraged from lobbying on general legal matters because such lobbying might be seen as unfair to litigants.<sup>159</sup> If a judge is asked to review the legality of a statute for which the judge has previously lobbied, it is reasonable to think that such action might influence a future decision. Litigants would likely feel that such a judge would not be able to give a fair decision about the statute’s validity.

---

152. See Katyal, *supra* note 10, at 1752 (claiming that past judicial precedent does not provide cover for judicial advicegiving).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. See, e.g., James M. Scheppele, *Are We Turning Judges Into Politicians?*, 38 LOY. L.A. L. REV. 1517, 1521 (2005) (“As both a coequal branch of government and an impartial arbiter of disputes, it would be inappropriate for the judiciary to solicit money.”).

158. See, e.g., Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 315 (1999) (“Concern about judicial independence has been a recurrent feature of American history . . .”).

159. See Margaret Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, 51 B.C. L. REV. 363, 373–79 (2009) (describing the right to an “unbiased judiciary”).

Consider the case of *Williams-Yulee v. Florida Bar*,<sup>160</sup> which dealt with whether judges could solicit money for their election.<sup>161</sup> In finding that such solicitation was forbidden, the Supreme Court recognized “a compelling interest in preserving public confidence in their judiciaries.”<sup>162</sup> Judicial lobbying makes judges look more like politicians and less like neutral arbiters.

A third concern about judicial lobbying involves the value of such lobbying. While federal judges are well-educated and qualified individuals, there is little reason to think that judges are experts on most policy questions.<sup>163</sup> Thus, we may not want judges lobbying because they are not very good at selecting a policy position that benefits the public. The value of judicial input in the legislative process is likely to be outweighed by the potential downsides of judicial lobbying.

Lastly, judicial lobbying risks alienating congressmen who may, rightly or wrongly, view such actions as a breach of the separation of powers.<sup>164</sup> There is always some risk that any judicial action will anger some faction of Congress, but judicial lobbying efforts seem to be extremely troubling to various congressmen.<sup>165</sup> Each branch of government desires to maintain its particular sphere of influence and judicial lobbying may be threatening to the legislative branch.

This section attempts to make sense of those continued efforts by examining the circumstances in which they occur. It focuses on three types of lobbying efforts: Article III issues (creation of new courts and judges, for example); judicial administration issues (issues that directly impact the judiciary, but which do not implicate constitutional concerns); and policy issues (issues that have little or no connection to the functioning of the court).

---

160. \_\_\_ U.S. \_\_\_, 135 S. Ct. 1656 (2015).

161. *See id.* *Williams-Yulee* dealt with campaign contributions for elected state officials, but the issue of judicial integrity applies with equal force to federal judges.

162. *Id.* at 1673.

163. *See* Barbara A. Spellman, *On the Supposed Expertise of Judges in Evaluating Evidence*, 156 U. PENN. L. REV. PENNUMBRA 1, 6–7 (2007) (“There is no good reason to conclude that, by virtue of qualities, training, or experience, trial judges should be considered experts at weighting evidence or at fact-finding”); *but see* Robin Jacob, *Knowledge of the World and the Act of Judging*, 2 OSGOODE HALL REV. L. & POL’Y 22, 22–28 (2014) (arguing that knowledge of general matters is essential to good judging, or at least the perception of good judging).

164. *See* John Conyers, *Conyers: Patent System Needs Updating*, ROLL CALL (June 8, 2010), [http://www.rollcall.com/features/Technology\\_Telecommunications/tandt/-48169-1.html](http://www.rollcall.com/features/Technology_Telecommunications/tandt/-48169-1.html) [<https://perma.cc/T3QW-HM57>] (“Congress, not the courts, must clarify and update patent law.”).

165. *See id.*; Winkle III, *supra* note 40, at 265 (“Lobbying . . . may . . . compromise the integrity of the court.”).

1. *Article III Issues*

a. *The Creation of New Federal Circuit Courts*

The Constitution vests the judicial power in the Supreme Court and “such inferior Courts as the Congress may from time to time ordain and establish.”<sup>166</sup> Judges have been very active in lobbying for and against Congress’s creation of such courts. From an informational perspective, it makes sense that the legislative process required to create new courts would include judicial involvement: judges are experts at judging, and can inform lawmakers about optimal arrangements of judges.

Within the past forty years, Congress has seriously considered splitting two federal judicial circuits: the Fifth and the Ninth Circuits. In the 1960s, the increasing number of civil rights cases being filed in the Fifth Circuit Court of Appeals—which covered the states of Texas, Louisiana, Mississippi, Alabama, Florida, and Georgia—threatened to overwhelm the circuit’s judges.<sup>167</sup> In response, Chief Justice Warren authorized a special committee to make recommendations about the workload of the Fifth Circuit.<sup>168</sup> The resulting Biggs committee advised that the Fifth Circuit needed fifteen judges to efficiently handle its caseload: six more than were currently on the court.<sup>169</sup> Thus, the committee recommended splitting the circuit into two, dividing the circuit along the Mississippi River.<sup>170</sup> Such a division entailed serious political consequences, however. Separating the judges based in Texas and Louisiana from the rest of the circuit would effectively dilute the influence of the four liberal judges on the court.<sup>171</sup> Some of those liberal judges campaigned publicly against the division, arguing that it would undermine civil rights gains in the South.<sup>172</sup> Despite the warnings of the Biggs committee, political opposition to any circuit division had effectively killed all proposals by 1964.<sup>173</sup>

Instead of splitting the circuit, Congress authorized new judgeships for the Fifth Circuit. By 1978, the court had swelled to twenty-six

---

166. U.S. CONST. art. III, § 1.

167. BARROW & WALKER, *supra* note 51, at 64.

168. *Id.* at 8.

169. *Id.* at 64.

170. *Id.* at 65.

171. Each newly created circuit would have contained only two liberal judges. *Id.*

172. *Id.* at 65, 88.

173. *Id.* at 63–68, 121.

judges.<sup>174</sup> In response, all of the judges on the circuit wrote a letter to Congress urging division.<sup>175</sup> Political concerns remained, however, and the judges were forced to take on even more active roles in the legislative process. Thus, they encouraged civil rights activists to join their lobbying efforts.<sup>176</sup> They also encouraged judges who were racial minorities to voice their approval to members of Congress.<sup>177</sup> Furthermore, they alleviated political concerns by proposing to include Mississippi in the reformed Fifth Circuit.<sup>178</sup> Finally, in October 1980 the judges' efforts proved successful when Congress divided the circuit and created the Eleventh Circuit Court of Appeals.<sup>179</sup>

Similar proposals to split the Ninth Circuit have encountered resistance from that circuit's judges. The Ninth Circuit is the largest, most congested circuit court in the country, covering the states of California, Hawaii, Alaska, Oregon, Washington, Arizona, Idaho, Montana, and Nevada as well as the territories of Guam and the Northern Mariana Islands. Its twenty-eight active judges dwarf all other circuit courts, the second largest of which has seventeen judgeships.<sup>180</sup> The court's size and massive caseload has led to delays in adjudication,<sup>181</sup> the abandonment of *en banc* review in favor of the problematic "limited *en banc*" review,<sup>182</sup> and a notoriously high reversal rate at the Supreme Court.<sup>183</sup> Various legislative proposals have been put

---

174. *Id.* at 1, 64.

175. *Id.* at 236.

176. *Id.* at 237–38.

177. *Id.*

178. *Id.*

179. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (codified at 28 U.S.C. § 41 (2012)).

180. *Legislative Proposals to Split the United States Court of Appeals for the Ninth Circuit: Hearing on S. 1845 Before the S. Comm. on the Judiciary*, 109th Cong. 2 (2006) (statement of Rachel L. Brand, Assistant Att'y Gen. for Legal Policy).

181. *Examining the Proposal to Restructure the Ninth Circuit: Hearing on S. 1845 Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Diarmuid O'Scannlain, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit) ("The Ninth Circuit's enormous size . . . creates problems for our litigants. In my court, the median time from when a party activates an appeal to when it receives resolution is over 15 months—four months longer than the average for the rest of the Courts of Appeals.").

182. 9TH CIR. R. 35-3 ("[A limited *en banc* hearing] shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court. In the absence of the Chief Judge, an 11th active judge shall be drawn by lot, and the most senior active judge on the panel shall preside."). Such limited *en banc* review has been criticized. See Peter S. Menell & Ryan Vacca, *Reconsidering En Banc Review: A Circuit Stewardship Theory* (work in progress) (on file with author).

183. Kevin M. Scott, *Supreme Court Reversals of the Ninth Circuit*, 48 ARIZ. L. REV. 341, 345

forward that would split the circuit into two (or in one case, three) circuits.<sup>184</sup>

Despite the size of the circuit, as of 2005 only three judges on the circuit favored any of the various legislative proposals designed to split the court.<sup>185</sup> In fact, many of the judges on the circuit have publicly lobbied for the Ninth Circuit to remain in its present state. As was the case in the debate surrounding proposals to split the Fifth Circuit, much of the debate about *how* to divide the Ninth Circuit has centered on politics. The Ninth Circuit is one of the most reliably liberal circuits in the country, despite presiding over some of the most conservative-leaning states in the union (e.g., Arizona, Idaho, Montana).<sup>186</sup> Ninth Circuit judges have nearly unanimously lobbied against splitting their circuit.<sup>187</sup> In part due to deference to those judges' views, Congress has yet to act and legislation splitting the Ninth Circuit appears unlikely to pass in the near term.<sup>188</sup>

---

(2006) (“[O]ver the past twenty-one Supreme Court terms (since the Fifth Circuit was split), the Ninth Circuit has been reversed an average of 14.48 times, with the next closest circuit (the ‘new’ Fifth) reversed 5.14 times per term over the same time period.”).

184. See Circuit Court of Appeals Restructuring and Modernization Act of 2007, S. 525, 110th Cong. (proposing splitting the Ninth Circuit into two with California, Guam, Hawaii, and the Northern Mariana Islands remaining in the Ninth); Circuit Court of Appeals Restructuring and Modernization Act of 2005, S. 1845, 109th Cong. (proposing splitting the Ninth Circuit into two, with California, Hawaii, Guam, and the Northern Mariana Islands remaining in the Ninth Circuit); Ninth Circuit Judgeship and Reorganization Act of 2005, H.R. 211, 109th Cong. (proposing splitting the Ninth Circuit in three, with California, Hawaii, Guam, and the Northern Mariana Islands in the Ninth, Arizona, Nevada, Idaho, and Montana in the Twelfth, and Alaska, Oregon, and Washington in the Thirteenth); Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003, H.R. 2723, 108th Cong. (proposing splitting the Ninth Circuit into two, with Arizona, California and Nevada remaining in the Ninth Circuit); Ninth Circuit Court of Appeals Reorganization Act of 2003, S. 562, 108th Cong. (proposing splitting the Ninth Circuit into two, with California and Nevada remaining in the Ninth Circuit and all other jurisdictions being assigned to a new Twelfth Circuit).

185. *Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Alex Kozinski, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit) [hereinafter Kozinski].

186. Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405, 408 (1998) (“One reads about a court that is ‘big, feisty and liberal,’ a ‘renegade court’ that includes ‘one of the last unabashed liberals,’ and many ‘colorful’ judges . . . .”); see also Matt Ford, *Arizona v. Ninth Circuit Court of Appeals*, THE ATLANTIC (Feb. 4, 2016) (highlighting proposals from Arizona politicians to split the Ninth Circuit).

187. See Kozinski, *supra* note 185.

188. See Diarmuid O’Scannlain, *A Ninth Circuit Split Is Inevitable, but Not Imminent*, 56 OHIO ST. L. REV. 947, 950 (1995) (urging Congress to take it slow in dividing the Ninth Circuit).

b. *Defining Article III “Judge”*

Another area of proposed legislation that has attracted the attention of the judiciary involves bills that would increase the number of Article III judges. For instance, in 1973 after several years of study, the Commission on Bankruptcy Laws of the United States proposed legislation to Congress that would have created fifteen-year terms for bankruptcy judges.<sup>189</sup> Unhappy with the proposal, the National Conference of Bankruptcy Judges drafted a separate bill that would have conferred Article III status on bankruptcy judges.<sup>190</sup> Elevating bankruptcy judges to Article III judges would have granted those judges life tenure, among the other benefits that accompany Article III status.

Prior to the National Conference’s proposal, the Judicial Conference of the United States had largely been silent on bankruptcy reform.<sup>191</sup> However, once the House produced a legislative proposal that would have conferred life tenure on bankruptcy judges, the Judicial Conference undertook lobbying efforts to keep bankruptcy judges as Article I judges.<sup>192</sup> Chief Justice Burger was heavily involved in the lobbying efforts coordinated by the Judicial Conference. He made numerous phone calls to key senators and congressmen as well as Attorney General Griffin Bell in an effort to limit the bankruptcy court’s jurisdiction and tenure.<sup>193</sup> Those lobbying efforts ultimately proved successful as Congress passed bankruptcy reform bills that established bankruptcy courts in every jurisdiction, but designated bankruptcy judges as Article I judges who serve fourteen-year terms.<sup>194</sup>

Judith Resnik has summarized the organized lobbying by the Judicial Conference as “a lobby against federal jurisdiction.”<sup>195</sup> To her, the lobbying efforts of the Judicial Conference have coalesced around keeping cases out of federal court, keeping Article III judges separate from non-tenured “federal” judges, and reducing litigants’ rights.<sup>196</sup> This less-than-flattering take on judicial lobbying deftly explains the efforts of the judicial conference during the period of bankruptcy reform.

---

189. Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978 Part Three: On the Hill*, 81 AM. BANKR. L.J. 341, 341 (2007).

190. *Id.* at 341–42.

191. *Id.* at 342.

192. *Id.* at 365–70.

193. *Id.*

194. Bankruptcy Judgeship Act of 1992, Pub. L. No. 102-361, 106 Stat. 965 (codified at 28 U.S.C. § 152 (2012)).

195. Resnik, *supra* note 125, at 930.

196. *See id.* at 929–30.

## 2. *Judicial Administration*

Federal judges have also actively lobbied for statutory improvements related to the administrative aspects of judging. While the Constitution guarantees judicial salaries will not be reduced, it provides no guidance on what salaries are appropriate and when they should be raised: “The Judges, both of the supreme and inferior Courts . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”<sup>197</sup> Thus, during various periods of U.S. history, judges have lobbied Congress to increase judicial salaries.<sup>198</sup>

At times, this lobbying for increased salaries has occurred through the official channels of the Judicial Conference.<sup>199</sup> At other times, however, it has taken a more ad hoc approach. For instance, Chief Justice Rehnquist conducted a press conference and called judicial salaries the most pressing issue facing the legal system.<sup>200</sup> His successor, Chief Justice Roberts, characterized the judicial pay issue as a “constitutional crisis” in his 2006 annual report to Congress.<sup>201</sup> Ultimately, the issue was decided by the courts, not the legislature. In 2012, the U.S. Court of Appeals for the Federal Circuit decided *Beer v. United States*,<sup>202</sup> in which six federal judges challenged the constitutionality of Congress’s repeated decisions to deny promised cost-of-living to federal judges over a fifteen-year period.<sup>203</sup> The court held that Congress had impermissibly withheld judicial pay.<sup>204</sup>

When it comes to judicial salaries, judges have also looked to organizations beyond the Judicial Conference for lobbying assistance. In 1981, a group of several hundred federal judges formed the Federal

---

197. U.S. CONST. art. III, § 1.

198. See 2015 JUDICIAL CONFERENCE REPORT, *supra* note 148, at 16–17 (“The Judicial Conference adopted a number of legislative positions over the last two decades to address a crisis in judicial compensation resulting from the denial to federal judges of many annual pay adjustments under the Ethics Reform Act of 1989.”).

199. See SMITH, *supra* note 27, at 45–46 (“Chief Justice Rehnquist’s public lobbying for salary increases [for judges] was unanimously supported by the Judicial Conference of the United States . . .”).

200. See Smith, *supra* note 10, at 45 (recalling Rehnquist’s news conference).

201. CHIEF JUSTICE JOHN ROBERTS, 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1–8 (Jan. 1, 2007), <http://www.supremecourt.gov/publicinfo/year-end/2006year-endreport.pdf> [<https://perma.cc/RP3L-NUSM>].

202. 696 F.3d 1174 (Fed. Cir. 2012).

203. See *id.*

204. *Id.*

Judges Association (FJA).<sup>205</sup> The FJA is a private organization dedicated to lobbying Congress on behalf of judicial compensation issues—such as salary and benefits—as well as on judicial administration issues.<sup>206</sup> The creation of the FJA unnerved many congresspersons, who asked the Government Accountability Office (GAO) to examine the propriety of private judicial lobbying.<sup>207</sup> The GAO found, among other things, that, as “a private, voluntary membership organization with no official connection to the federal government,” anti-lobbying restrictions would not apply to activities of the FJA.<sup>208</sup>

More recently, the chief judges from eighty-seven of the ninety-four federal district courts signed a letter to Congress detailing the impact that sequestration of funds was having on the judiciary.<sup>209</sup> The letter expressed concern about the ability of courts to continue to dispense timely justice, to continue funding public defenders, and to maintain safety and security in federal courthouses.<sup>210</sup> While the letter appeared to be an ad hoc movement by the district courts, it may have been coordinated with the Judicial Center, which followed up with a similar request shortly thereafter.<sup>211</sup>

### 3. *Policy Issues*

The most common (not to mention intriguing) area of judicial lobbying efforts concerns matters of general policy. Justice, it is thought, is best served by having judicial officers avoid extrajudicial speech concerning matters of general policy and statutory reform.<sup>212</sup> Despite

---

205. See LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 160–61 (1988) (describing the creation of the Federal Judges Association).

206. *Id.*

207. See generally U.S. GOV'T ACCOUNTABILITY OFFICE, B-129874, REQUEST FOR GAO DETERMINATION CONCERNING JUDICIARY'S USE OF FEDERAL FUNDS TO LOBBY CONGRESS (1984).

208. *Id.*

209. Letter from Loretta A. Preska, Chief Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Joseph R. Biden, President, U.S. Senate (Aug. 13, 2013), <http://news.uscourts.gov/sites/default/files/Chief-Judges-Letter-to-Joseph-Biden.pdf> [<https://perma.cc/7KA7-ZD4Q>].

210. *Id.*

211. Letter from John D. Bates, Sec'y, Judicial Conference of the U.S., to Barack Obama, President, United States (Sept. 10, 2013), [http://news.uscourts.gov/sites/default/files/Letter-President-FY14-Funding\\_0.pdf](http://news.uscourts.gov/sites/default/files/Letter-President-FY14-Funding_0.pdf) [<https://perma.cc/YDT2-7S9G>]; see also CHIEF JUSTICE JOHN ROBERTS, 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY (Dec. 31, 2010), <http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf> [<https://perma.cc/56EM-KDFH>] (calling “budgetary constraints” one of two obstacles that impedes the courts from achieving their goals).

212. See Winkle III, *supra* note 40, at 265 (stating that lobbying is contrary to the public image of a judge).



this concern, judges have, from time to time, been active lobbyists on general policy. This section will detail some recent instances of such lobbying in the areas of patent law, surveillance law, bankruptcy law, and military law.

a. *Patent Law*

Patent law has experienced extensive judicial lobbying, mostly from judges on the specialized appellate court that handles patent appeals.<sup>213</sup> In the late-1970s, Congress began considering the creation of specialized courts to handle patent cases.<sup>214</sup> As a result, Congress created the U.S. Court of Appeals for the Federal Circuit in 1982.<sup>215</sup> Since its creation, the judges of the Federal Circuit have been active in legislative affairs.<sup>216</sup> During the four-year debate about patent reform between 2004 and 2008 (culminating in the passage of the America Invents Act<sup>217</sup>), the court made numerous attempts to influence the shape of the ultimate legislation.

On May 3, 2007, while the Patent Reform Acts of 2007<sup>218</sup> were

---

213. For more on the appeal of lobbying in the patent space, see Robert P. Merges, *The Trouble with Trolls: Innovation, Rent-Seeking, and Patent Reform*, 24 BERKELEY TECH. L.J. 1583, 1607–14 (proposing a greater delineation of “patent trolls” by both the courts and Congress).

214. A number of existing, specialized courts were combined to create the Federal Circuit. U.S. JUDICIAL CONFERENCE COMM. ON THE BICENTENNIAL OF THE CONSTITUTION OF THE U.S., UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT: A HISTORY 1982–1990, at 1 (1991).

215. See Rochelle C. Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 3 (1989) (referring to creation of the Federal Circuit as “a sustained experiment in specialization”); Melissa F. Wasserman, *The Changing Guard of Patent Law: Chevron Deference for the PTO*, 54 WILL. & MARY L. REV. 1959, 2001–05 (2013) (rejecting two arguments for denying the PTO *Chevron* deference based on the Federal Circuit’s creation).

216. Perhaps unsurprisingly, the last three Chief Judges of the court have extensive legislative experience. Chief Judge Michel was chief counsel for Senator Arlen Specter. See Kristina Peterson, *Retiring Chief Federal Patent Judge May Start Think Tank*, WALL ST. J. (Nov. 27, 2009), <http://www.wsj.com/articles/SB125934593867466659> [<http://perma.cc/8U2C-3JRB>]. Chief Judge Rader served as legislative director of the House Ways and Means Committee before serving as counsel to the Senate Judiciary Committee from 1980–1988. He has also served as counsel for the Subcommittee on Patents, Trademarks, and Copyrights. See Tony Dutra, *Judge Randall Rader Will Step Down as Federal Circuit Chief Effective May 30*, BLOOMBERG BNA (May 29, 2014), <http://www.bna.com/judge-randall-rader-n17179890796/> [<https://perma.cc/PN6Y-JW3W>]. Judge Prost served as Chief Counsel of the Senate Judiciary Committee immediately before her elevation to the bench, and prior to that served as the Chief Counsel for the Senate Committee on Labor and Human Resources. Ryan Davis, *New Federal Circuit Chief Has Deep Patent Background*, LAW360 (May 28, 2014), <http://www.law360.com/articles/542118/new-fed-circ-chief-has-deep-patent-background> [<https://perma.cc/5ZDE-CT66>].

217. Leahy–Smith America Invents Act, Pub. L. No. 112-29, § 3(o), 125 Stat. 284 (2011) (codified at 35 U.S.C. § 100 (2012)).

218. Patent Reform Act of 2007, H.R. 1908, 110th Cong.

pending before House and Senate committees, the Federal Circuit's Chief Judge Michel sent a letter to Senators Leahy and Hatch.<sup>219</sup> In that letter, Chief Judge Michel expressed his opposition towards two aspects of the proposed legislation.<sup>220</sup> Specifically, Chief Judge Michel argued that the provisions on damage apportionment and claim construction interlocutory appeals were unnecessary and incapable of being implemented by the courts.<sup>221</sup> As for damages, he argued that judges were not economic experts and would have difficulty making fine economic decisions.<sup>222</sup> Making such damage determinations, he claimed, would inundate courts with extra work and invite battles between competing experts.<sup>223</sup>

Regarding claim construction, Chief Judge Michel argued that many claim construction decisions quickly led to summary judgment and therefore were not in need of interlocutory review.<sup>224</sup> Requiring interlocutory review, he argued, would simply prolong patent disputes.<sup>225</sup> “[T]he courts as presently constituted,” Chief Judge Michel wrote, “simply cannot implement the provisions in a careful and timely manner.”<sup>226</sup>

Just one month later, Chief Judge Michel sent another letter to Shanna Winters, Chief Counsel to the House Subcommittee on Courts, the Internet, and Intellectual Property.<sup>227</sup> In this letter, Chief Judge Michel argued that damages law was “highly stable and well understood by litigators as well as judges.”<sup>228</sup> He suggested that Congress should “do nothing” concerning damages.<sup>229</sup>

---

219. See Letter from Paul R. Michel, Chief Judge, U.S. Court of Appeals for the Fed. Circuit, to Patrick Leahy & Orrin G. Hatch, Senate Comm. on the Judiciary (May 3, 2007), <http://www.fr.com/files/uploads/attachments/patentdamages/05-03-07Michelletter.pdf> [<https://perma.cc/G6VL-UJ5X>] (questioning whether these provisions, “if enacted, . . . could be effectively and efficiently administered by the courts, particularly the Federal Circuit”).

220. *Id.*

221. *Id.*

222. *Id.* at 2.

223. *Id.*

224. *Id.* at 1.

225. See *id.* at 1–2 (indicating that “[t]he new provision could double” already long delays in patent cases).

226. *Id.* at 2.

227. Letter from Paul R. Michel, Chief Judge, U.S. Court of Appeals for the Fed. Circuit, to Shanna A. Winters, Chief Counsel, House Subcomm. on Courts, the Internet, & Intellectual Property (June 7, 2007), <http://www.intellectualpropertylawblog.com/wp-content/uploads/sites/98/2007/06/Michel-letter-to-Winters.pdf> [<https://perma.cc/XVH7-GQBH>].

228. *Id.* at 1.

229. *Id.*

Chief Judge Michel's lobbying effort against patent reform was not limited to a senatorial letter-writing campaign. Chief Judge Michel also gave speeches to practicing attorneys in which he suggested that the proposed changes to damages and claim construction would adversely impact the work of the courts.<sup>230</sup> Chief Judge Michel repeatedly urged IP litigators and patent holders to lobby Congress to remove the damages and claim construction portions of the bill.<sup>231</sup> Further, he wrote various op-eds suggesting that Congress need not interfere in patent litigation reform.<sup>232</sup>

Chief Judge Michel's lobbying efforts urging legislative inaction on damages and claim construction received mixed results. His suggestion to do nothing on damage reform was initially ignored by Congress, as Congress made changes to the damage portions of the bills despite Chief Judge Michel's criticisms.<sup>233</sup> Ultimately, however, both claim construction and damages reform were dropped from the final bill.<sup>234</sup>

Chief Judge Michel's predecessor, Chief Judge Rader, has also been eager to express his views on patent reform. He has written op-eds expressing the lack of need for congressional action in the area of fee shifting, a subject that Congress continues to debate.<sup>235</sup> Chief Judge Rader, even more so than Chief Judge Michel, has been quite vocal about the role that Congress and even the Supreme Court should play in setting patent policy, urging both institutions to let his court take the lead in patent reform.

It is not surprising that the Federal Circuit is interested in patent reform legislation. While the court hears other types of cases, it is best

---

230. Paul R. Michel, Chief Judge, U.S. Court of Appeals for the Fed. Circuit, Address Before the Association of Corporate Patent Counsel (Jan. 28, 2008), [http://patentlyo.com/media/docs/2008/02/transcript\\_michel.pdf](http://patentlyo.com/media/docs/2008/02/transcript_michel.pdf) [<https://perma.cc/FML7-UU6E>].

231. *See id.* at 13 (urging attendees "to assure that whatever the Congress [does] . . . reflects the best input . . . from all of the best minds" after repeatedly critiquing the damages and interlocutory review provisions of draft legislation and suggesting that Congress is overburdened with other issues).

232. *See, e.g.*, Kristina Peterson, *Q&A: Judge Michel on Patent Law*, WALL ST. J. (Nov. 27, 2009), <http://blogs.wsj.com/washwire/2009/11/27/qa-judge-michel-on-patent-law/> [<https://perma.cc/P8Q8-7VFQ>] (arguing that "the management of ongoing litigation [including damages is] inherently judicial" in nature).

233. H.R. 1908, 110th Cong. § 5 (2007) (demonstrating modifications to damages in both House and Senate versions of reform despite Chief Judge Michel's warning).

234. *See* Sean B. Seymore, *Foresight Bias in Patent Law*, 90 NOTRE DAME L. REV. 1105, 1105–06 (2015) (stating that much "attention in the patent reform debate has focused on the substantive standards for patentability," which do not include claim construction or damages).

235. Randall R. Rader et al., *Make Patent Trolls Pay in Court*, N.Y. TIMES, June 5, 2013, at A25 (arguing that congressional proposals on fee shifting in patent cases are unnecessary because judges "already have the authority to curtail" trolls by making them "pay for abusive litigation").

known for and spends most of its time deciding patent appeals.<sup>236</sup> Substantial changes to the patent act—like those of the America Invents Act—have the potential to substantially change the day-to-day workings of the court. What is perhaps surprising is the way in which the Federal Circuit has approached legislative reform of the patent statute. Instead of passively waiting for the results of the legislative process, the court (through the chief judge) has actively lobbied Congress, usually urging Congress to do nothing and to leave the messy job of legal reform to the court.

*b. Surveillance Law*

On January 10, 2014, Judge Bates, Chief Judge of the FISA Court, sent the first of a series of letters to members of the Senate Judiciary Committee expressing his views on the merits of proposed reforms of the U.S. surveillance program.<sup>237</sup> Judge Bates viewed the Senate's proposed USA Freedom Act as unduly burdensome for his court to implement. He suggested that the proposed inclusion of a special advocate in FISA Court proceedings was "potentially inconsistent with the requirements of Article III."<sup>238</sup> In his last letter, Judge Bates proposed specific changes to the bill. He suggested that the court should have discretion in appointing privacy advocates, because the court often hears simple cases in which an advocate would be unnecessary.<sup>239</sup> He also suggested that publically releasing FISA Court opinions would be unhelpful.<sup>240</sup>

In the first of his letters, Judge Bates indicated that his opposition to the USA Freedom Act represented that of the "Judiciary."<sup>241</sup> This claim is likely to have carried weight with Congress because at the time of his

---

236. See U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, YEAR-TO-DATE ACTIVITY, AS OF FEBRUARY 28, 2015 (2015), [http://www.cafc.uscourts.gov/images/stories/the-court/statistics/ytd\\_activity\\_february\\_2015.pdf](http://www.cafc.uscourts.gov/images/stories/the-court/statistics/ytd_activity_february_2015.pdf) [<https://perma.cc/DB2R-EXTK>] (tallying year-to-date caseloads).

237. JOHN D. BATES, COMMENTS OF THE JUDICIARY ON PROPOSALS REGARDING THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (2014), <http://www.lawfareblog.com/wp-content/uploads/2014/01/1-10-2014-Enclosure-re-FISA.pdf> [<https://perma.cc/U4T4-8DW5>]; Letter from John D. Bates, Director, Admin. Offices of the U.S. Courts, to Dianne Feinstein, Chairman, Senate Select Comm. on Intelligence (Jan. 13, 2014), <http://www.lawfareblog.com/wp-content/uploads/2014/01/1-13-2014-Ltr-to-DFeinstein-re-FISA.pdf> [<https://perma.cc/2R5Y-RMVG>]; USA FREEDOM ACT, H.R. REP. NO. 113-452, pt. 2 (2014).

238. Letter from John D. Bates to Patrick J. Leahy, *supra* note 3, at 6.

239. *Id.*

240. *Id.*

241. Letter from John D. Bates to Dianne Feinstein, *supra* note 237, at 1.

letters, Judge Bates also served as the Director of the Administrative Office of the United States Courts.<sup>242</sup> Judge Bates's subsequent letters explained that the Judicial Conference was not consulted on his stance.<sup>243</sup> He continued, however, to refer to his views as those of the Judiciary.<sup>244</sup>

Judge Bates's actions have come under criticism from legal scholars<sup>245</sup> and legal reporters.<sup>246</sup> They have also been questioned by other judges. In an August 2014 letter, Ninth Circuit Judge Alex Kozinski stated that the Judicial Conference had not considered the matters addressed by Judge Bates and therefore did not endorse his comments.<sup>247</sup>

But Judge Bates is not the only judge to have publically taken a position on government surveillance. Indeed, two other judges on his court, Judges Carr and Robertson, have opined on their views of the proper role of surveillance by the government. Both judges have taken positions contrary to those of Judge Bates. After stepping down from the court, Judge Robertson (who remained a district court judge in the district of the District of Columbia) called for greater transparency in the court's proceedings and an advocate to argue against the government, much like that found in the proposed USA FREEDOM Act.<sup>248</sup> Judge Carr went even further, outlining in an op-ed in the *New York Times* a proposal to have court-appointed lawyers assist the court with novel legal questions.<sup>249</sup>

The lobbying efforts of the judges on the FISA Court provide an interesting insight into the motives behind judicial lobbying efforts. All of the judges on the FISA Court are federal judges, usually (but not always) generalist judges from geographic district courts before their

---

242. See Michael Lipkin, *Former FISA Court Judge Cautions Against Some Reforms*, LAW360 (Jan. 14, 2014), <http://www.law360.com/articles/501238/former-fisa-court-judge-cautions-against-some-reforms> [https://perma.cc/RT68-XMAP].

243. Letter from John D. Bates to Patrick J. Leahy, *supra* note 3, at 6.

244. *Id.*

245. Vladeck, *supra* note 7.

246. Siobhan Gorman, *U.S. Judge Blasts Bill to Revamp Surveillance*, WALL ST. J. (Aug. 6, 2014), <http://www.wsj.com/articles/usjudgeblastsbilltorevampsurveillance1407367365> [https://perma.cc/A6LW-Z6NQ].

247. Letter from Alex Kozinski to Patrick J. Leahy, *supra* note 6.

248. Pema Levy, *Former FISA Court Judge: Secret Court Needs Reform*, INT'L BUS. TIMES (July 9, 2013), <http://www.ibtimes.com/former-fisa-court-judge-secret-court-needs-reform-1338671> [https://perma.cc/TMC8-5RUN].

249. James G. Carr, Opinion, *A Better Secret Court*, N.Y. TIMES, July 23, 2013, at A21.

temporary appointment to FISA Court.<sup>250</sup> Such generalist district court judges rarely lobby Congress; in fact, as far as I can tell, Judges Bates, Robinson, and Carr have not publically advocated for policy positions when serving as district court judges. But once on the FISA Court, all three judges have felt compelled to interact with Congress on pending legislation.

*c. Bankruptcy Law*

When the House was considering the Bankruptcy Abuse Prevention and Consumer Protection Act of 2003,<sup>251</sup> Fifth Circuit Judge Edith Jones, who was a former member of the National Bankruptcy Review Commission, wrote a letter to the chairman of the House Committee on the Judiciary.<sup>252</sup> In the letter, she explained that she supported the bill, but wanted Congress to get rid of Section 414, which would have altered the “disinterested person” standard for bankruptcy professionals.<sup>253</sup> In Judge Jones’ view, the disinterested person standard protected the integrity of the bankruptcy process and avoided conflicting loyalties between bankruptcy professionals, debtors, and creditors.<sup>254</sup> Jones’ letter was cited by both Congressman Bachus and Congressman Nadler during floor debates on January 28, 2004.<sup>255</sup> The letter was again cited in 2005 in the Senate by Senator Leahy and Senator Sarbanes.<sup>256</sup>

Jones has also advocated for bankruptcy reform via legal publications. In 1999 she published a law review article urging Congress to adopt means testing as a gatekeeping rule before consumers could file for bankruptcy.<sup>257</sup> At the time of the article, means testing was a hotly contested congressional issue.<sup>258</sup> It ultimately became part of the law in

---

250. See *Current Membership – Foreign Intelligence Surveillance Court*, UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT, <http://www.fisc.uscourts.gov/current-membership> [<https://perma.cc/HK3H-V6QL>].

251. Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, 150 CONG. REC. 148, 150 (2004).

252. See Nancy B. Rapoport, *Enron and the New Disinterestedness—The Foxes are Guarding the Henhouse*, 13 AM. BANKR. INST. L. REV. 521, 525–26 (2005) (quoting from Judge Jones’ letter).

253. *Id.*

254. *See id.*

255. *See* 150 CONG. REC. H150–51 (daily ed. Jan. 28, 2005) (statement of Rep. Bachus); *id.* at H219 (daily ed. Jan. 28, 2004) (statement of Rep. Nadler).

256. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 151 CONG. REC. 2306 (2005).

257. Edith H. Jones & Todd J. Zywicki, *It’s Time for Means-Testing*, 1999 BYU L. REV. 177, 179–81 (1999).

258. *Id.* at 178 (“The most contentious reform that has been suggested . . . has been the

2005.

Bankruptcy cases are heard before specialized federal bankruptcy judges.<sup>259</sup> Bankruptcy judges have also frequently engaged with Congress on bankruptcy reform, but usually only upon the request of Congress to do so.<sup>260</sup> Judge Jones's interest in reform may be personal—before her appointment to the bench, she was in private practice specializing in bankruptcy cases.

*d. Military Law*

Judges from the Court of Appeals for the Armed Forces have been relatively restrained in their lobbying efforts. The one notable exception concerns the United States' implementation of the Geneva Convention.<sup>261</sup> The United States ratified the Geneva Convention in 1955, but in 1996 had yet to implement the treaty through legislation. The aim of House Bill 2587 in 1996 was to remedy this lack of implementation by establishing penalties for certain war crimes, including murder and torture against members of the U.S. armed forces or U.S. nationals.<sup>262</sup> H.R. 2587 would have added a provision to the U.S. Code providing that

whoever, whether inside or outside the United States, commits a grave breach of the Geneva Conventions where the victim of such breach is a member of the Armed Forces of the United States or a citizen of the United States shall be fined or imprisoned or both, and if death results to the victim, shall also be subject to the penalty of death.<sup>263</sup>

Judge R.O. Everett of the CAAF expressed his support for the proposal, but was of the opinion that Congress should go further. Everett believed that Congress should make clear that the provision should leave jurisdiction for prosecuting violators with military tribunals and not with

---

imposition of means-testing for upper-income debtors.”).

259. 28 U.S.C. § 152(a)(1) (2012).

260. See *Hearings Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, pt. 2, 97th Cong., 1st Sess. 19, at 146 (Oct. 29, 1981) (statement of Judge Lee) (testifying before Congress about the bankruptcy reforms of 1978).

261. *War Crimes Act of 1995: Hearing on H.R. 2587 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 20 (1996) (statement of the Hon. Robinson O. Everett, U.S. Court of Appeals for the Armed Forces).

262. *Id.* at 1 (statement of the Hon. Lamar Smith, Chairman, Subcomm. on Immigration and Claims).

263. *Id.* at 2.

other federal courts.<sup>264</sup> Everett suggested specific language that would have clarified that the statute was not a repeal of the jurisdiction enjoyed by courts-martial and military commissions under articles eighteen and twenty-one of the Uniform Code.<sup>265</sup> According to Everett, repeal of the court's jurisdiction would result in some cases lacking jurisdiction in any court.<sup>266</sup>

Everett also encouraged Congress to expand the reach of the law. He proposed replacing the word "citizen" with the more inclusive "national."<sup>267</sup> He suggested including not only violations of the Geneva Convention but also violations of several other major treaties entered into by the United States, including the Hague Convention and various treaties concerned with land mines. In addition, he argued for the creation of universal jurisdiction:

If the heinousness of a crime and its impact on the international community have been recognized by treaties into which our countries and many others have entered, American courts should have jurisdiction over that crime.<sup>268</sup>

Judge Everett also suggested that articles eighteen and twenty-one of the Uniform Code of Military Justice be amended specifically to empower courts-martial and military commissions to try anyone accused of a "grave breach" of any treaty to which H.R. 2587 may refer.<sup>269</sup> Finally, even though he made clear that he was not opposed to the death penalty, he explained that as practical matter in the international context, including potential death penalty cases would "create[] more problems than it's worth."<sup>270</sup>

Judge Everett's lobbying efforts are consistent with the lobbying efforts that have come from other specialized courts: courts seek to consolidate their power by maintaining or expanding their jurisdiction or by increasing their influence on the types of reform that are implemented. In this way, specialized courts resemble executive

---

264. *Id.* at 20–21 (statement of J. R. O. Everett, U.S. Court of Military Appeal for the Armed Forces).

265. *Id.* at 20–23.

266. *Id.* at 20–24.

267. *Id.* at 23.

268. *Id.*

269. *See* H.R. 3680, 104th Cong. (1996) (making it a federal offense to "commit[] a grave breach of the Geneva Conventions").

270. *War Crimes Act of 1995: Hearing on H.R. 2587 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary, supra* note 261, at 1 (statement of the Honorable Lamar Smith, Chairman, Subcomm. on Immigration and Claims).



administrative agencies, which are thought to seek increased responsibilities as a way of maximizing power and influence.<sup>271</sup>

### C. *Specialization's Impact on Judicial Lobbying*

The frequency and depth of lobbying efforts from judges on specialized courts is worth studying. To be sure, there are examples of generalist judges lobbying on policy matters. For example, as described in Section II.B.3.c, Judge Jones (a Fifth Circuit judge) has lobbied extensively on bankruptcy reform. Prior to joining the bench, Jones was in private practice and specialized in bankruptcy, but as a judge she hears a wide range of cases. But the depth of specialized jurist involvement in legislative affairs is striking. The Federal Circuit's judges have been, perhaps, the most obvious example of this. Both Chief Judge Michel and Chief Judge Rader have been extremely vocal in commenting on proposed legislation that would alter the patent statute.

But specialization's impact on lobbying is perhaps best exemplified by the lobbying of the FISA Court judges. FISA Court judges have been extremely active in debating the merits of governmental surveillance.<sup>272</sup> Three judges from the court have spoken out strongly on proposed legislation, with all three judges disagreeing about the best way to approach the issue.<sup>273</sup>

As to why specialization leads to lobbying, history might provide a clue. In 1910, Congress created the Commerce Court of the United States.<sup>274</sup> The court was a specialized court with jurisdiction over cases arising from orders of the Interstate Commerce Commission.<sup>275</sup> The court, while specialized, did not consist of specialized judges, however. The judges on the court were appointed for five-year terms, but during their service on the court, they simultaneously served as at-large circuit judges, sitting as appointed by the Chief Justice.<sup>276</sup> Upon the completion of their terms, they were assigned to one of the circuit courts.<sup>277</sup> In this

---

271. See generally Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 575–84 (1984) (summarizing arguments for administrative enlargement).

272. See *supra* section I.B.2.

273. See *supra* note 1 (listing three letters from Judge Bates urging strengthening the court's powers); Levy, *supra* note 248 (recommending modifications to the FISA Court's jurisdiction); Carr, *supra* note 249 (proposing drastic changes to the surveillance court).

274. Mann-Elkins Act, 61st Cong., ch. 309, 36 Stat. 539 (June 18, 1910).

275. *Id.*

276. *Id.*

277. George E. Dix, *The Death of the Commerce Court: A Study in Institutional Weakness*, 8 AM.

way, the court is similar to the FISA Court in that the judges come from non-specialized judicial backgrounds and return to generalist positions at the end of their terms.

The Commerce Court only remained in existence for three years, so judges were not offered many opportunities to lobby Congress.<sup>278</sup> However, Judge Martin Knapp made two statements, both relating to the Erdman Act, an 1898 law that pertained to railroad disputes and which provided the bulk of the Commerce Court's cases. Judge Knapp made suggestions about proposed alterations to the Erdman Act in 1912.<sup>279</sup> Judge Knapp suggested three main changes to the act.<sup>280</sup> First, he proposed broadening the scope of the law.<sup>281</sup> Second, he suggested simplifying the law by leaving out anything not deemed essential to the accomplishment of its purpose.<sup>282</sup> This included minor changes of procedure, designed to give the law greater flexibility, so that it could be more readily adapted to varying conditions and different controversies. Lastly, he suggested replacing the court's mediators with a board of mediation and conciliation so constituted as to be able to meet the increased demand that would result from the proposed extension of the law.<sup>283</sup> In essence, Knapp proposed increasing the jurisdiction of his court, simplifying the procedural aspects of the law, and increasing administrative positions for his court. He made similar proposals the following year.<sup>284</sup> After the termination of the Commerce Court in 1913, he served on the Fourth Circuit until his death in 1923.<sup>285</sup>

Thus, the Commerce Court provides a historical example of specialized adjudication resulting in increased judicial lobbying. Like other specialized courts, the lobbying efforts from the Commerce Court were focused on jurisdictional expansion: specialized courts tend to seek to increase the types of cases that the court hears. Chief Judge Rader of

---

J. LEGAL HIST. 238 (1964).

278. *Id.*

279. *The Erdman Act: Hearing on H.R. 22012 Before the H. Comm. on Interstate and Foreign Commerce*, 62d Cong. 3 (1912) (statement of C.J. Martin A. Knapp, Commerce Court).

280. *Id.* at 6–21.

281. *Id.* at 7–10.

282. *Id.* at 7–13.

283. *Id.* at 3.

284. *Arbitration in Controversies Between Employers and Employees: Hearing on S. 2517 Before the S. Comm. on Interstate Commerce*, 63d Cong. 18–31 (1913) (statement of C.J. Martin A. Knapp, Commerce Court).

285. See *Biographical Directory of Federal Judges, Knapp, Martin Augustine*, FEDERAL JUDICIAL CENTER, HISTORY OF THE FEDERAL JUDICIARY, <http://www.fjc.gov/servlet/nGetInfo?jid=1293&cid=999&ctype=na&instate=na> [<https://perma.cc/N7J7-7ASK>].

the Federal Circuit has also followed this pattern, repeatedly suggesting that his court should hear all types of intellectual property disputes, not just patent cases and scattered trademark cases.<sup>286</sup> Section III.B, *infra*, begins to explain how specialization incentivizes judicial lobbying.

### III. REGULATING JUDICIAL LOBBYING BY SPECIALIZED JUDGES

#### A. *What (If Anything) Is Wrong with Judicial Lobbying?*

Although judicial lobbying has its detractors, not all commentators believe that it is problematic. James Douglas and Roger Hartley have argued that “courts are acting too conservatively in the political process.”<sup>287</sup> They have argued that norms against judicial lobbying have hindered the judiciary in the legislative budgetary process.<sup>288</sup> For Douglas and Hartley, judicial lobbying is an unalloyed good because it provides valuable information for legislators about the realities of interpreting legislation.<sup>289</sup>

Neal Katyal takes an intermediate approach with regards to the optimal level of judicial lobbying. He urges judges to embrace their role as “advice-givers,” but suggests that this role be confined to active cases or controversies.<sup>290</sup> Although Katyal explicitly avoids the question of whether judges should weigh in on policy matters,<sup>291</sup> he does suggest that judges have some limited role to play vis-à-vis Congress. He labels such judicial advice-giving on policy matters as “prescription.”<sup>292</sup> For him, prescription should be limited:

The advantage of prescription is that it permits relatively intellectual federal judges with life tenure to impart their

---

286. See Dennis Crouch, *An Open Letter from Judge Rader*, PATENTLYO (June 30, 2014), <http://patentlyo.com/patent/2014/06/letter-judge-rader.html> [https://perma.cc/UGY5-JPG3] (publishing Chief Judge Rader’s statement that he regrets not offering an amendment including copyright and trademark cases within the Federal Circuit’s jurisdiction).

287. Hartley, *supra* note 10, at 395; see also Roger E. Hartley & James W. Douglas, *Budgeting for State Courts: The Perceptions of Key Officials Regarding the Determinants of Budget Success*, 24 JUST. SYS. J. 251, 260 (2003).

288. See Hartley & Douglas, *supra* note 287, at 258–60.

289. *Id.*

290. Katyal, *supra* note 10, at 1716–19 (giving three examples of judicial advice-giving—“clarification,” “self-alienation,” and “personification”—all of which take place through judicial opinion writing).

291. *Id.* at 1719 (stating that judges commenting on “policy issues” is not the concern of his article).

292. *Id.* at 1719.

nonbinding wisdom to politicians. Many prescriptive matters are routine, such as the annual tradition whereby some Supreme Court justices go before Congress and testify about the Court's budget and similar matters. Recommendations to Congress about the asbestos litigation crisis may be a less obvious but equally valid example of legitimate prescription because courts have a special expertise in understanding the nature of the crisis and recommending specific solutions. The most tenuous prescriptive situations occur when judges expound on matters of general policy when they have no structural expertise in the subject matter.<sup>293</sup>

Katyal is concerned here with expertise. If judges have no relevant expertise to add to legislative debates, their lobbying efforts do little to further interbranch dialogue.<sup>294</sup>

Despite Douglas's and Hartley's views that judicial lobbying is nearly universally beneficial, Katyal's intermediate view of the value of such lobbying strikes the correct balance between productive congressional information-gathering and troublesome judicial overreach. The closer that judges get to law-makers, the more tenuous the legitimacy of judicial decisions becomes.<sup>295</sup> Judges who lobby against particular laws for which they have little expertise are likely to be viewed skeptically when required to interpret those laws in court. For example, many critics chided Chief Justice Rehnquist for his lobbying efforts against the passage of the Violence Against Women Act.<sup>296</sup> But even more strident criticism arose when the court he chaired later struck down portions of that Act.<sup>297</sup>

But specialized courts would seem to overcome Katyal's concern about judicial expertise, at least superficially. Such courts, almost

---

293. *Id.*

294. See Mikva, *supra* note 94, at 1827 (complaining that judges "don't have that kind of know-how" when it comes to selecting between competing policy choices).

295. See *id.* at 1829; Scheppele, *supra* note 157, at 1521 ("As both a coequal branch of government and an impartial arbiter of disputes, it would be inappropriate for the judiciary to solicit money.").

296. See, e.g., Judith Resnik, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195, 2201 (1992) (arguing that the Chief Justice's actions were inappropriate).

297. See, e.g., Benjamin Black, *Note: The Strange Career of VAWA: Chief Justice Rehnquist and the Shift from "Political" to "Constitutional" Federalism 1990–2000*, 16 J.L. & POL. 499, 515–17 (2000) (arguing on federalism grounds that the Chief Justice overstepped his jurisdiction); Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Uses and Abuses of Federalism*, 71 FORDHAM L. REV. 57, 70–75 (2003) (same); Resnik, *supra* note 41, at 275–78 (arguing that the Chief Justice lobbied against the Violence against Women Act).

assuredly, have expertise in their given subject matter.<sup>298</sup> Objections to specialized judicial lobbying therefore must rely on something more than critiques of the value of judicial input. But specialized court lobbying may pose even greater risks than generalized court lobbying. The Federal Circuit experience again provides an example. In a closely watched case—referred to as the *Myriad*<sup>299</sup> case—the Southern District of New York invalidated a patent on the BRCA1 gene, a gene mutation that greatly increases a woman’s risk of breast cancer. The district judge in *Myriad* invalidated the patent for lacking the requisite “patent-eligible subject matter”—essentially that genes were not patentable because they were laws of nature.<sup>300</sup>

Before oral argument at the Federal Circuit, Chief Judge Rader sat on a panel of the Biotechnology Industry Organization (BIO), an industry organization that often features Federal Circuit judges.<sup>301</sup> During the panel discussion, Chief Judge Rader critiqued the law of patent-eligible subject matter, suggesting that it was “subjective, and, to be frank, it’s politics. It’s what you believe in your soul, but it isn’t the law.”<sup>302</sup> The winning plaintiffs in the *Myriad* case filed a motion to have Chief Judge Rader recused from the appellate panel (which had yet to be assigned).<sup>303</sup> They argued that Chief Judge Rader’s comments “expressed his views on this specific case,” and “did so in front of an audience that was heavily biased in favor of one party.”<sup>304</sup> The Federal Circuit denied the motion, but Chief Judge Rader did not ultimately appear on the panel that reversed the district court’s decision.<sup>305</sup>

Federal judges that comment on policy matters invariably run the risk of prejudicing, or appearing to prejudice, future cases. But that risk is much higher for specialized courts that hear a high volume of cases in

---

298. The Federal Circuit is less of a specialized court and more of a centralized court. Ultimately, the expertise of a centralized court should exceed that of a generalist court.

299. *Ass’n for Molecular Pathology v. U.S. Patent & Trademark Office (Myriad)*, 702 F. Supp. 2d 181 (S.D.N.Y. 2010).

300. *Id.* at 183.

301. John T. Aquino, *Finding Gene Patents Unpatentable Too Blunt an Approach, Panelists Say*, BNA’S PAT., TRADEMARK & COPYRIGHT J. 47 (May 14, 2010).

302. *Id.*

303. Motion by Plaintiffs-Appellees for Recusal of Chief Judge Randall R. Rader at 6, *Ass’n for Molecular Pathology v. U.S. Patent & Trademark Office*, 689 F.3d 1303 (Fed. Cir. 2010) (No. 2010–1406).

304. *Id.*

305. *See Ass’n for Molecular Pathology v. U.S. Patent & Trademark Office*, 653 F.3d 1329 (Fed. Cir. 2011), *vacated*, 132 S. Ct. 1794 (2012), *remanded to* 467 Fed. App’x 890 (2012) (J. Lourie, Bryson, and Moore).

their specialized subject area. Indeed, Chief Judge Michel's letter to Congress urging restraint on patent damage reform greatly impacted the outcome of pending cases.<sup>306</sup> He repeatedly urged Congress to leave damages reform to the court, while simultaneously urging litigants to challenge particular sorts of damage calculations.<sup>307</sup> Congress delayed debate on damage reform pending the then-upcoming case of *Microsoft v. Lucent*.<sup>308</sup> With such a highly watched case—both by litigants and congressmen—the Federal Circuit took the opportunity to do precisely what Chief Judge Michel had promised: update the law of patent damages in the court rather than legislatively.<sup>309</sup> In an opinion authored by Chief Judge Michel, *Lucent* significantly altered the evidence required to award damages in patent cases.<sup>310</sup> Of course, using individual cases as vehicles for achieving political goals comes at a cost. Commentators, not to mention *Lucent*, whose jury damage award was overturned, felt that case was largely a political decision, not a legal one.<sup>311</sup> These sorts of quasi-legislative judicial actions threaten the judiciary's reputation for fairness and evenhandedness.

Furthermore, lobbying by the judiciary implicates concerns of capture.<sup>312</sup> Judges are very successful when they lobby Congress about pending legislation, especially specialized judges with specialized expertise.<sup>313</sup> For example, the America Invents Act was shaped, in large part, by judicial lobbying efforts.<sup>314</sup> The success of judicial lobbying is likely to attract special interests. To the extent that the judiciary engages

---

306. See Letter from Paul R. Michel to Patrick Leahy & Orrin G. Hatch, *supra* note 219; Letter from Paul R. Michel to Shanna A. Winters, *supra* note 227.

307. See Michel, *supra* note 219 at 2.

308. *Lucent Techs., Inc. v. Gateway, Inc. (Microsoft v. Lucent)*, 580 F.3d 1301, 1308 (Fed. Cir. 2009).

309. *Id.* at 1327–31. For more on patent injunctions (as opposed to money damages), see Sarah W. Rajec, *Tailoring Remedies to Spur Innovation*, 61 AMERICAN U. L. REV. 733, 751–58 (2012).

310. *Id.* at 1327–35.

311. See Mark A. Lemley, *Distinguishing Lost Profits from Reasonable Royalties*, 51 WM. & MARY L. REV. 655, 662 n.34 (2009) (critiquing the *Lucent* case as “confus[ing] the entire market value rule with the question of royalty base”).

312. For a full treatment of the topic of capture of courts, see J. Jonas Anderson, *Court Capture* (forthcoming 2017) (unpublished manuscript) (on file with author).

313. See Harvey Rishikof & Barbara A. Perry, “*Separateness but Interdependence, Autonomy but Reciprocity*”: *A First Look at Federal Judges’ Appearances Before Legislative Committees*, 46 MERCER L. REV. 667, 669–75 (1995) (finding that Congress nearly always took the advice of judges when lobbying on issues of judicial functioning).

314. See J. Jonas Anderson, *Congress as Catalyst of Patent Reform at the Federal Circuit*, 63 AM. U. L. REV. 961, 962–69 (2014) (arguing that the Federal Circuit’s lobbying efforts shaped Congress’s approach to patent reform).

in lobbying on substantive policy matters, they risk being coopted by private lobbying organizations. This risk is heightened for specialized courts, which are already thought to be more prone to capture than generalist courts.<sup>315</sup>

### B. *Specialization's Role in Judicial Lobbying*

Why do judges, particularly specialized judges, lobby? This section theorizes three key differences between the ways that specialist judges and generalist judges view the legislative process. These differences may help explain the prominent role that specialized judges often take in legislative battles.

#### 1. *Expertise*

The concept of specialization is often conflated with expertise. While the two terms are not synonyms, there are good reasons to suspect that specialized judges gain valuable expertise in their subject matter.<sup>316</sup> Judges who hear hundreds of cases within a particular field are more likely to develop strategies for effectively adjudicating disputes than judges who hear only a handful of such cases. This adjudicative expertise can prove extremely valuable for legislators, particularly when proposed legislation involves aspects of judicial procedure. Indeed, Congress nearly always seeks input from the judiciary when considering statutory changes to the judicial system.<sup>317</sup> Judges are often called to testify during legislative debates surrounding changes to the judicial system.<sup>318</sup> Also, they are frequently appointed by Congress to sit on committees or commissions to review court reform proposals.<sup>319</sup>

In addition to the generalized adjudicatory knowledge that judges develop, Congress tends to view judges on specialized courts as experts in the substantive policy that those courts review.<sup>320</sup> This is less true for

---

315. See Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984?: An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 775–91 (1983).

316. See John M. Golden, *The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-Specialized Courts*, 78 GEO. WASH. L. REV. 553, 555 (2010) (describing the Federal Circuit's "exclusive hold" over its specialized caseload).

317. See Rishikof & Perry, *supra* note 313, at 669–75 (finding that Congress nearly always took the advice of judges when lobbying on issues of judicial functioning).

318. *Id.*

319. *Id.*

320. Consider that Congress often calls bankruptcy judges to testify about proposed reform. See, e.g., J. Jonas Anderson, *Court Competition for Patent Cases*, 163 PENN. L. REV. 631, 636 (2015) (chronicling the formation of the Federal Circuit and how Congress intended the court to function as

generalist courts. Congress often seeks input from specialized judges when reviewing the statutory regime governed by those judges. Conversely, generalist judges are usually called to testify before Congress about more court-specific matters.<sup>321</sup>

Congressional reliance on specialized judicial input is not unique to Article III judges. Congress is quite open to hearing from bankruptcy judges about substantive changes to the bankruptcy statute.<sup>322</sup> Similarly, tax court judges are often called to testify about updates of the tax code.<sup>323</sup> These are not examples of judges testifying about the impact of legislation on the courts. Instead, these are instances of Congress looking to the courts for substantive policy guidance.<sup>324</sup> Clearly, Congress views specialized judges (whether administrative courts or not) as having valuable insight not only about the process of adjudication, but about the substantive goals of legislation in their jurisdictional area.<sup>325</sup>

Judges on specialized courts tend to view themselves as policy specialists as well.<sup>326</sup> Opinions from the Federal Circuit routinely refer to Congress's mandate to the court to "promote a uniform interpretation" of the patent laws.<sup>327</sup> Former Chief Judge Rader has been known to criticize the Supreme Court for misunderstanding patent law.<sup>328</sup> Thus,

---

"an expert" court).

321. Rishikof & Perry, *supra* note 313, at 679–80 (finding that of 275 known instances of judicial testimony, 125 addressed "court administration").

322. For instance, in March of 2014, Judge Sontchi testified before Congress regarding two issues. He testified that the safe harbor for derivatives was too broad and also urged Congress to eliminate the safe harbors for repurchase agreements. *Subcomm. on Regulatory Reform, Commercial and Antitrust Law, H. Comm. on the Judiciary* (Mar. 26, 2014) (statement of the Honorable Christopher S. Sontchi, U.S. Bankruptcy Judge for the District of Delaware).

323. If judged by number of appearances, the judges of the tax court are particularly useful to Congress. *See, e.g., Review of the Civil Penalty Provisions Contained in the Internal Revenue Code: Hearings on Recommendations for Civil Tax Penalty Reform and H.R. 2528 Before the Subcomm. on Oversight of H. Comm. on Ways & Means*, 101st Cong. 1 (1989).

324. *Id.*

325. *See* ROBERT A. KATZMANN, *COURTS AND CONGRESS* 67–68 (1997) ("[I]t might be useful for judges with experience in interpreting statutes to testify as to the technical difficulty in discerning congressional meaning.").

326. Laura G. Pedraza-Farina, *Understanding the Federal Circuit: A Model of Expert Decision-Making*, BERKELEY TECH. L.J. (forthcoming), [http://www.law.berkeley.edu/files/Pedraza-Farina\\_Laura\\_IPSC\\_paper\\_2014.pdf](http://www.law.berkeley.edu/files/Pedraza-Farina_Laura_IPSC_paper_2014.pdf) [<https://perma.cc/NQ98-R9U7>].

327. *See* Hyatt v. Doll, 576 F.3d 1246, 1273 (Fed. Cir. 2009) ("Congress created this court to promote a uniform interpretation of the patent laws.") (citing *C.R. Bard, Inc. v. Schwartz*, 716 F.2d 874, 878 (Fed. Cir. 1983)); *but see* Lisa L. Ouellette, *Patent Experimentalism*, 101 VA. L. REV. 65, 111–12 (2015) (critiquing patent law's goal of uniformity and proposing that the patent system embrace more "patent experimentalism").

328. *See* Gene Quinn, *Chief Judge Rader on the Supreme Court and Judge Posner*, IPWATCHDOG (June 28, 2015, 11:21 AM), <http://www.ipwatchdog.com> [<https://perma.cc/E3R3->



the perception—shared by Congress and the court—of specialized courts’ policy expertise likely drives much of specialized judicial lobbying. While most judges are not experts in any particular area other than adjudication, specialized judges come to be viewed and to view themselves as experts in their specialized field.<sup>329</sup> Indeed, the judges on the FISA Court who have lobbied for surveillance reform have engaged in very little lobbying as district judges. It would appear that being a member of a specialized court bestows a perception of specialized knowledge on judges.

The difference in perceived value of specialized versus non-specialized judicial input also helps explain the relative dearth of lobbying by generalist judges. Generalist courts have played prominent roles in lobbying for and against changes to circuit court boundaries and legislation about court administration.<sup>330</sup> Judges rightly consider themselves experts on such matters. No one has more experience with court organization and procedural rules than judges. Congress has also been very responsive when judges weigh in on such matters.<sup>331</sup> Such responsiveness indicates that Congress shares the judges’ view of themselves as experts in adjudication.

## 2. *Specialized Docket*

Beyond specialization, specialized courts may also lobby for legislative change because the impact of that change is more acutely felt on specialized courts. For example, the Federal Circuit was very active in legislative lobbying during the recent legislative patent reform precisely because of the potential impact that legislation would have had on the workings of the court.<sup>332</sup> Legislative changes to the patent system fundamentally impact the members of the federal circuit.<sup>333</sup> For example, legislative changes to damages law would have impacted a great number

---

4ATQ].

329. For proof, look no further than the Tax Court judges, who often are called to testify before Congress as experts. See Timothy R. Holbrook, *The Expressive Impact of Patents*, 84 WASH. U. L. REV. 573, 600–07 (2006) (discussing patent cases dealing with subject matter from juice machines to biological research at the Federal Circuit).

330. See *supra* section II.B.

331. Smith, *supra* note 10, at 190.

332. See Anderson, *supra* note 314, at 1014–17 (arguing that the Federal Circuit was interested in patent reform because such reform would have an impact on the court).

333. See Michel, *supra* note 227, at 2 (stating that proposed changes would “require[] a massive damages trail in every case” and “the meaning of various phrases in the bills would be litigated for many years”).

of the court's cases.<sup>334</sup> Thus, lobbying makes sense for a court looking to protect its domination over patent law.

The same is less true of generalist courts. Those courts usually do not feel the same impact when legislative changes occur because their docket is much more diverse than the docket of specialized courts.<sup>335</sup> For generalist judges, it is usually not worth the effort to lobby for statutory change because the number of cases an individual judge receives in any particular legal area is relatively small. Thus, a judge with strong views about copyright law is unlikely to put forth the effort required to influence Congress because he or she will only see a handful of copyright cases, if any, in a given year.<sup>336</sup> Of course, this is less true in areas in which generalist courts see a large number of cases. And it is often in those areas that produce large volumes of cases that generalist courts actively lobby Congress.<sup>337</sup> For instance, generalist judges hear hundreds of criminal drug cases every year and have thus made sentencing guidelines for criminal cases—particularly for drug offenses—a lobbying priority.<sup>338</sup>

### 3. *Congflation of Judicial Administration and Policy*

For specialized courts, altering the scope of the law implicitly alters the administrative burden of judging. New laws can lead to special administrative burdens for specialized courts as they struggle to handle a greatly enhanced caseload.<sup>339</sup> In this way, the traditional dividing line between “judicial-” and “policy-” based legislation, while always blurry, completely evaporates for specialized courts.<sup>340</sup> Changes in policy can

---

334. *Id.*

335. See Douglas A. Ginsburg & Joshua D. Wright, *Antitrust Courts: Specialists Versus Generalists*, 36 *FORDHAM INT'L L.J.* 788, 789–90 (2013) (comparing the United States, where fewer than one percent of court cases involve questions of antitrust, to India, where all antitrust disputes are heard by specialist judges).

336. The exception to that generally applicable rule is the case of Judge Wiley Y. Daniel, who had 298 copyright filings in 2013 and 197 filings in 2014. This appears to be the result of various suits against people accused of illegally downloading movies. For more information about copyright litigation, see generally Matthew Sag, *Copyright Trolling, an Empirical Study*, 100 *IOWA L. REV.* 1105 (2015); Matthew Sag, *IP Litigation in U.S. District Courts: 1994 to 2014*, 101 *IOWA L. REV.* (forthcoming).

337. See, e.g., Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 *COLUM. L. REV.* 1276, 1281–86 (2005) (listing those lobbying for and against sentencing reform).

338. See *id.*

339. See *supra* note 325 and accompanying text.

340. For examples in which policy-based reforms have a jurisdictional affect, see Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 *GEO. L.J.* 1437, 1495–1500 (2012). For an example of how the Supreme Court can alter the power of a specialized court, see J. Jonas

also result in jurisdictional changes for specialized courts.<sup>341</sup>

The conflation of administration and policy on specialized courts can also insulate those courts' lobbying actions from criticism. Specialized judges couch their critiques of policy in administrative terms. Consider the Federal Circuit's Chief Judge Michel writing to the Senate Judiciary Committee about patent reform.<sup>342</sup> Although many of the issues he was concerned about were fundamentally about policy choices—i.e. how patent damages should be calculated and whether claim construction should be appealable before final judgment—he framed his concerns as administrative ones.<sup>343</sup> In his view, allowing claim construction appeals would overwhelm the Federal Circuit with new appeals.<sup>344</sup> This is an administrative complaint, but it goes to a fundamental policy issue about how and when claim construction is conducted and reviewed on appeal. Similarly, he argued that judges were administratively incapable of calculating damage awards under Congress's proposed regime.<sup>345</sup> This is a critique about the basic calculation of patent damages, framed in the language of administration.

Similarly, Judge Bates's critiques of the USA Freedom Act were, on their face, administrative ones. In his view, allowing a third-party advocate to take a position opposite the government in every case would have been wasteful and led to unnecessarily prolonged trials.<sup>346</sup> This is an administrative complaint. But the legislative debate is about a key policy issue: how much discretion the government should have to monitor its citizens' communications. At specialized courts, these policy issues overlap with administrative concerns. Thus, the norms against judicial lobbying rarely, if ever, apply for specialized courts.

Similar overlaps exist in legislative debates about jurisdiction and

---

Anderson, *Specialized Standards of Review*, 18 STAN. TECH. L. REV. 151 (2015).

341. *See id.*

342. *See* notes 219–227 and accompanying text.

343. *See* Letter from Paul R. Michel to Shanna A. Winters, *supra* note 227, at 2 (suggesting that changes to damages law would be “extremely costly and time-consuming”); Letter from Paul R. Michel to Patrick Leahy & Orrin G. Hatch, *supra* note 219, at 1 (suggesting that altering the law regarding claim construction would bog the court down in new cases).

344. *See* Letter from Paul R. Michel to Patrick Leahy & Orrin G. Hatch, *supra* note 219, at 1–2 (arguing against changes to claim construction doctrine because they would slow down the Federal Circuit's work).

345. *See* Letter from Paul R. Michel to Shanna A. Winters, *supra* note 227, at 2 (suggesting that changes to damages law would be “extremely costly and time-consuming”).

346. *See* Letter from John Bates to Dianne Feinstein, *supra* note 1, at 2 (claiming that the proposed legislation was unnecessary); Letter from John Bates to Patrick Leahy, *supra* note 1, at 2 (same); Letter from John D. Bates to Barack Obama, *supra* note 211 (same).

policy. Congress usually engages with the judiciary when it considers changes to jurisdictional rules.<sup>347</sup> Jurisdictional rules define which sorts of disputes are appropriate to bring within a particular court, and which are not.<sup>348</sup> For specialized courts, like the Federal Circuit, jurisdiction is defined by subject matter, not geography.<sup>349</sup> Thus, when Congress contemplates altering substantive law in an area supervised by a specialized court, it simultaneously must contemplate the jurisdictional consequences of such an action. Indeed, recent changes to the patent statute have seriously altered the types and number of cases that arrive at the Federal Circuit.<sup>350</sup> This change in the court's docket is the result of the America Invents Act creating a host of new post-issuance proceedings at the Patent and Trademark Office.<sup>351</sup> These proceedings have proven exceedingly popular with litigants and have diverted some litigation from the courts.<sup>352</sup> Thus when Congress threatens to make jurisdictional decisions, specialized courts may rightly feel that they must lobby Congress if those decisions threaten the court's docket.

### C. *Placing Limits on Lobbying Activities by Judges*

The success of judicial lobbying has not been ignored by academics.<sup>353</sup> When judges lobby—particularly when the judicial branch

---

347. See generally Larry Kramer, *The One-Eyed Are Kings: Improving Congress' Ability to Regulate the Use of Judicial Resources*, 54 LAW & CONTEMP. PROBS. 72, 79 (1991) (referring to the Administrative Office's mission as "seeking to advance the particular agenda of . . . the judicial branch[ ]"); Winkle III, *supra* note 40, at 264–68 (1985) (chronicling a case of jurisdictional reform that was guided by judges); John W. Winkle III, *Judges Before Congress: Reform Politics and Individual Freedom*, 22 POLITY 443, 446–53 (describing judicial testimony before Congress on jurisdictional reform legislation).

348. For example, the Federal Circuit's jurisdiction is defined at 28 U.S.C. § 1295 (2012).

349. *Id.*

350. Consider that an "explosion" in patent suits (if not individual defendants, see Christopher A. Cortropia et al., *Unpacking Patent Assertion Entities*, 99 MINN. L. REV. 649 (2014) (finding that the explosion was due to a change in joinder rules)) occurred after the America Invents Act. See GOV'T ACCOUNTABILITY OFFICE, INTELLECTUAL PROPERTY, ASSESSING FACTORS THAT AFFECT PATENT INFRINGEMENT LITIGATION COULD HELP IMPROVE PATENT QUALITY, GAO 13–465 (2013), <http://www.gao.gov/assets/660/657103.pdf> [<https://perma.cc/WQG2-YCJV>] (finding a thirty-one percent increase in patent infringement filings from 2010 to 2011).

351. See Paul M. Janicke, *Overview of the New Patent Law of the United States*, 21 TEXAS INTEL. PROP. L.J. 63, 67–72 (2013) (providing an overview of the changes to the post-grant review procedures).

352. See Coleen Chien & Christian Helmers, *Inter Partes Review and the Design of Post Grant Review*, STAN. TECH. L. REV. at \*3–\*4 (forthcoming) (finding that the first year of post-grant review saw a 130-fold increase in filings over the last years of inter partes reexamination).

353. See Smith, *supra* note 10, at 190 (discussing the effectiveness of the unified judiciary before Congress).

lobbies with one voice—Congress listens.<sup>354</sup> Judges hold a special prestige among lawmakers; they are often asked to testify on matters of congressional interest.<sup>355</sup> The judiciary's view on legislative reform influences Congress for a number of reasons. First, federal judges have life tenure and are restricted in their sources of income.<sup>356</sup> Thus it is thought that views of the judiciary are generally less biased than other lobbying entities that might be seeking financial gain or improved career prospects.<sup>357</sup> Second, judges are considered experts in statutory interpretation; therefore, their input on statutory language is often welcomed.<sup>358</sup> Third, a judge's job naturally exposes the judge to areas of the law that may be in need of modification.<sup>359</sup>

Despite the appeal of judicial input, given the potential downsides of judicial lobbying, discussed in section IV.A, *supra*, there may be instances in which judicial lobbying should be restricted.<sup>360</sup> This section will analyze three potential avenues of limiting judicial lobbying: changing the ethical standards for judges as lobbyists, centralizing judicial lobbying in judicial organizations, and centralizing only specialized courts' lobbying efforts.<sup>361</sup>

Ultimately, this section concludes that the potential benefits of judicial input in the legislative process outweigh the costs of such lobbying.<sup>362</sup> However, there is one area of judicial lobbying in which some restrictive measures are advisable: that of specialized courts.

---

354. *Id.*

355. *Id.*

356. See Richard A. Posner, *Judicial Behavior and Performance: An Economic Perspective*, 32 FLA. ST. U. L. REV. 1259, 1269 (2005) ("Moreover, not only is the judicial salary the same for all district judges—there are no bonuses for outstanding performance—but a judge's ability to cash in on his judicial reputation by moonlighting as a teacher or lecturer is very limited . . .").

357. *Id.* ("It seems, then, that the federal judicial career has been carefully designed to insulate the judges from the normal incentives and constraints that determine the behavior of rational actors . . .").

358. See generally Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 866–71 (1930) (debunking the myth that judges are proficient at statutory interpretation); Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 357 (1990) (contrasting "traditional" statutory interpretation from the "unique" interpretation done in *United States v. Jin Fuey Moy*, 241 U.S. 394 (1916)).

359. See Geyh, *supra* note 10, at 1222–24 (discussing the exposure to federal issues that federal judges enjoy).

360. See Kelso, *supra* note 28, at 855 ("Once it is admitted that *some* extrajudicial speech by judges on legal topics is both permissible, desirable, and necessary, but that not *all* such speech is advisable, it becomes problematic to draw a line to distinguish the acceptable from the unacceptable." (emphasis in original)).

361. *Id.*

362. See Hartley, *supra* note 10, at 405–06 (discussing the advantages of lobbying).

Specialized courts face unique bureaucratic pressures that incentivize lobbying by judges in ways that are harmful to the legal system.<sup>363</sup> Specialized court lobbying also frequently occurs without opposing viewpoints from non-specialized courts.<sup>364</sup>

Specialized courts often have expertise in particular legal areas, however.<sup>365</sup> Therefore completely eliminating specialized lobbying is less than ideal. Instead, this section outlines a means of funneling judicial lobbying to a centralized body, such as the Judicial Conference. Directing lobbying efforts through to a centralized body provides a check on specialized court lobbying while still leveraging the beneficial input that a specialized judiciary can provide to legislators.

### 1. *Change Ethical Standards*

Perhaps the most obvious way to reign in judicial lobbying is to change the ethical standards which regulate extra-judicial speech.<sup>366</sup> Commentators have argued that Canon 4 of the Judicial Code of Ethics restricts judges from opining on legislative issues that are unrelated to the judiciary, but the Comptroller General has not agreed.<sup>367</sup> Canon 4 could easily be amended to more explicitly restrict extra-judicial speech by judges.<sup>368</sup> Modifying Canon 4(A)(2) could be done thusly, with the proposed modifications appearing in bold:

2. *Consulting*. A judge may consult with or appear at a public hearing before an executive or legislative body or official, **but only when invited to do so or**

- (a) on matters **of direct relevance to the judiciary as a whole;**
- (b) to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area; or
- (c) when the judge is acting pro se in a matter involving the judge or the judge's interest

---

363. See Dreyfuss, *supra* note 215, at 5–7 (listing the potential drawbacks to specialized courts).

364. See, e.g., Diane P. Wood, *Generalist Judges in a Specialized World*, 50 S.M.U. L. REV. 1755, 1766 (1997) (finding that the Federal Circuit does not face intellectual competition).

365. See Golden, *supra* note 316, at 557 (acknowledging the Federal Circuit's and the D.C. Circuit's expertise).

366. See *supra* section III.B.

367. See, e.g., Geyh, *supra* note 10, at 1203–04 (highlighting the Comptroller General's role in lobbying restrictions).

368. For instance, it could be amended to explicitly outlaw certain types of judicial speech that was found to endanger fairness.

Such explicit restrictions on judicial speech, however, encounter two primary counter-arguments: one constitutional and one practical. Any restriction on speech is likely to be challenged on First Amendment grounds.<sup>369</sup> Judges enjoy the same First Amendment speech rights as regular citizens.<sup>370</sup> Thus, completely forbidding judicial speech on political matters appears to be a clear violation of those rights.<sup>371</sup>

Constitutional problems aside, using ethical standards to restrict judicial lobbying poses a practical problem: blanket restrictions on judicial input in legislative matters limit one of the most effective sources of information for lawmakers.<sup>372</sup> Judges often have keen insights into the operation of the law, even in areas unrelated to management of the judicial system.<sup>373</sup> Because judges regularly encounter thorny issues of statutory interpretation and are forced to infer the legislature's intent in drafting statutes, they can readily identify problematic legal areas for Congress to consider amending. Oftentimes, this dialogue about lawmaking occurs through the formal processes of law-creation (legislating) and law-interpretation (judging).<sup>374</sup> But this dialogue need not always be formal. There may be occasions where a more informal process of dialogue could serve the law-making process more effectively.<sup>375</sup>

Thus, blanket restrictions on judicial lobbying are likely to lead to less effective law-making. Judges provide unique insights into the American legal system.<sup>376</sup> Eliminating their input would severely hamper legislative efforts to improve the administration and functioning of the law. Judges also often provide Congress with less-partisan input than do private lobbyists.

---

369. See Leonard E. Gross, *Judicial Speech: Discipline and the First Amendment*, 36 SYRACUSE L. REV. 1181, 1190–99 (1986) (discussing the various implications of restricting judicial speech).

370. *Id.* at 1261.

371. See *id.* at 1196–97; Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 309–12 (1978) (proposing restrictions on political speech).

372. See Reinhart, *supra* note 103, at 805 (urging judges to “educate” the public about matters of particular expertise).

373. *Id.*

374. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 13 (1970).

375. See Anderson, *supra* note 16, at 1097–1106 (listing examples of less formal dialogue between the branches).

376. See Reinhart, *supra* note 103, at 805 (urging judges to “educate” the public about matters of particular expertise).

## 2. *Centralize Judicial Lobbying Activities*

As an alternative to absolute or partial limitations on the amount of judicial lobbying that can take place, there are good reasons to consider centralizing judicial lobbying activities in a single organization. The most logical organization would be the Judicial Conference, which currently engages in lobbying activities for the judiciary and is headed by the Chief Justice of the Supreme Court.<sup>377</sup> The Judicial Conference has a long history of dialogue between the judicial and legislative branches.<sup>378</sup>

Among the advantages of centralizing judicial lobbying is that it would force the judiciary to speak with one voice on issues that impact federal judges. Currently, the judiciary uses the Judicial Conference to voice its opinion on matters that directly impact judicial pay, jurisdiction, and institutions.<sup>379</sup> For example, the Judicial Conference has been on the forefront of lobbying for increased judicial salaries, going so far as to bring a suit against the United States government.<sup>380</sup>

Going a step further and restricting judicial lobbying activities to those of the Judicial Conference would require the judiciary to focus its lobbying efforts on those issues that are of particular importance. Controversial policy positions would be unlikely to garner enough support to be pushed through the Judicial Center.<sup>381</sup> Furthermore, individual spats between judges (even judges on the same court) would largely be shielded from the public's view.<sup>382</sup>

But there are a number of downsides to consolidating lobbying power. First, doing so elevates the power and status of the Judicial Center, an organization which is not subject to direct voter oversight. Granting veto power over lobbying to the institution might increase the bureaucratic tendency to increase power and control at the expense of

---

377. Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989 (1996).

378. *Id.* at 993–95 (describing the interactions that take place between the judiciary and Congress as a result of the Judicial Conference's activities).

379. See Richard L. Vining & Teena Wilhelm, *The Chief Justice as Advocate-in-Chief*, 95 JUDICATURE 267, 268–75 (2012) (reviewing Chief Justice Robert's time as head of the judicial conference).

380. *Beer v. United States*, 696 F.3d 1174 (Fed. Cir. 2012) (finding that federal judges were entitled to back pay and cost-of-living adjustments).

381. Compare that to the situation in which Judge Kozinzki and Judge Bates were publically in disagreement. Compare Letter from John Bates to Patrick Leahy, *supra* note 1, with Letter from Alex Kozinski to Patrick Leahy, *supra* note 6.

382. As occurred on the FISA court recently. See Carr, *supra* note 249; Levy, *supra* note 248.



sound policy.<sup>383</sup>

Second, the Judicial Center is largely controlled by the Supreme Court, in particular by the Chief Justice.<sup>384</sup> Previous Chief Justices as well as the current one have come under attack for their use of the Judicial Center's lobbying function.<sup>385</sup> If all judicial lobbying were centralized, there would be more opportunity for judicial grand-standing and politicking.

But perhaps most troubling would be the potential elimination of the feedback loop between the judiciary and the legislature. Because judges are familiar with various aspects of the law, their insight is very valuable to lawmakers across the political spectrum.<sup>386</sup> Silencing individual judges under the larger Judicial Center bureaucracy threatens the less formal conversations that take place between the legislative and judicial branches.<sup>387</sup> While it certainly may be beneficial to limit the instances in which judges engage in judicial lobbying, any such limitations should be done on a more fine-grained level. Policy makers should seek to limit judicial lobbying in the instances in which there are significant downsides to such lobbying, while encouraging judicial-legislative dialogue in all other instances.<sup>388</sup>

### 3. *Checking Lobbying by Specialized Courts*

A more sensible approach to restrictions on judicial lobbying involves a means of ensuring that specialized courts speak for the judiciary as a whole, and not just for their court's interests. Lobbying by specialized judges has numerous benefits. Specialized judges are thought to possess specialized legal knowledge in ways that generalist judges are not.<sup>389</sup>

---

383. Russell Wheeler, *Empirical Research and the Politics of Judicial Administration: Creating the Federal Judicial Center*, 51 *LAW & CONTEMP. PROBS.* 31, 44 (1988) ("With its increased size, however, the Conference became in many ways a non-deliberative body to validate committee recommendations, giving the committees considerable power to shape Conference policy on matters such as legislation.").

384. *Id.* at 44–45 (describing the increased influence of the Chief Justice during Earl Warren's tenure).

385. Vining & Wilhelm, *supra* note 379, at 268–75 (detailing Chief Justice Roberts' role with the Judicial Center); Resnik, *supra* note 41, at 270–75 (chronicling Chief Justice Rehnquist's impact on VAWA); Goldfarb, *supra* note 297, 70–75 (criticizing Chief Justice Rehnquist's conduct with regards to VAWA).

386. Rishikof & Perry, *supra* note 313, at 669–75.

387. Hartley, *supra* note 10, at 405–06 (discussing the advantages of judicial-legislative dialogue).

388. *Id.*

389. *See, e.g.,* Wood, *supra* note 364, at 1766 (assuming that specialized judges are more knowledgeable in their subject matter than generalist judges).

Specialized judges oversee a diverse range of legal areas, including tax, patents, bankruptcy, governmental employee benefits, and military justice.<sup>390</sup> That expertise can prove very valuable to legislators who have little experience with a particular area of the law.<sup>391</sup>

But lobbying by specialized judges has drawbacks that threaten judicial legitimacy. These drawbacks center on perhaps the primary concern of any specialized court: capture.<sup>392</sup> Opponents of specialized courts have long noted the potential for specialized court capture.<sup>393</sup> Capture in this sense refers to a court aligning its interests with those of its constituents.<sup>394</sup> Capture concerns are greater for specialized courts than for generalist ones because the litigants in specialized courts are often repeat players who have a long term interest in gaining influence at the court.<sup>395</sup> At the same time, courts may feel the need to please those repeat players in order to justify the court's existence and to expand (or maintain) the court's jurisdiction and power.<sup>396</sup>

Concerns about specialized judicial capture raise doubts about both the even-handedness of the court's lobbying efforts as well as the true source of the policy opinions expressed during lobbying. Specialized courts may be encouraged by frequent litigants to assert a particular policy position publically, a position that may benefit the litigant more than the public.<sup>397</sup> Interestingly, specialized courts may do the reverse as well: employing litigants to lobby on behalf of the court. Such was the case when the Federal Circuit asked the patent bar to urge Congress to leave patent reform to the court.<sup>398</sup> Such a symbiotic lobbying relationship between bar and bench is symptomatic of the capture worries expressed by specialized court skeptics.

---

390. Some of those judges, obviously, are Article I judges, including tax, military affairs and bankruptcy judges. See 26 U.S.C. § 7441 (2012) (establishing the tax court); 28 U.S.C. §§ 1295(a)(4), (a)(9) (giving the Federal Circuit control over patent appeals and government employee appeals); 28 U.S.C. § 1334 (stating that bankruptcy judges hear cases filed in federal district court).

391. See Rishikof & Perry, *supra* note 313.

392. See Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1147–53 (1990) (discussing capture as the preeminent concern in the creation of specialized courts).

393. *Id.*

394. *Id.*

395. *Id.*

396. *Id.*

397. See RICHARD POSNER, *THE FEDERAL COURTS* 156–57 (1985) (discussing capture concerns).

398. See J. Jonas Anderson, *Congress as a Catalyst of Patent Reform at the Federal Circuit*, 63 AMER. U. L. REV. 961, 999–1000 (detailing Chief Judge Michel's effort to use the bar to lobby Congress).

Furthermore, because the scope of specialized courts is defined by subject matter and not geography, policy pronouncements from specialized courts are indistinguishable from efforts to increase the court's jurisdiction and power.<sup>399</sup> Thus, skepticism is appropriate when specialized courts argue for expanded legal protections in the areas over which the court has jurisdiction. For example, a substantive change in the bankruptcy law fundamentally impacts the workings of the bankruptcy courts.<sup>400</sup> Similarly, wholesale changes to the patent statute have clear and direct consequences at the Federal Circuit.<sup>401</sup> This marriage of the administration of justice with substantive policy allows specialized judges to couch their lobbying efforts in the acceptable language of judicial efficiency.<sup>402</sup> For specialized courts, jurisdiction and policy overlap in ways that muddy the already murky distinctions between lobbying on policy issues and lobbying on judicial issues. Such a conflation of policy-type debates with judicial-efficiency-type debates is endemic in specialized courts.

Moreover, specialized court lobbying is much less likely to be checked by other judges. When generalist judges lobby for substantive policy changes, they are often rebuked by other judges or contradicted in their views.<sup>403</sup> These alternative judicial viewpoints provide members of Congress with valuable counter-arguments which may help in determining the best policy solution. On the other hand, specialized courts often have no competing court with which to debate policy.<sup>404</sup> For instance, since all military appeals are funneled through the Court of the Armed Forces, no federal judges outside of that court have expertise handling such appeals.<sup>405</sup> Thus, lobbying efforts from centralized appellate courts often lack the critical review of other judges.

Perhaps most troubling, judicial lobbying by specialized judges poses an increased risk that lobbying efforts will bias the judicial process.<sup>406</sup> Lobbying efforts often entrench parties in their policy views. Taking

---

399. See Paul R. Gugliuzza, *The Federal Circuit as a Federal Court*, 54 WM. & MARY L. REV. 1791, 1864 (2013) (speculating that the Federal Circuit has unique incentives to enhance its powers in certain areas).

400. See Countryman, *supra* note 147, at 42–45 (expressing skepticism that the bankruptcy courts could handle the changes brought about by the 1984 amendments to the Bankruptcy Code).

401. Anderson, *supra* note 16, at 1075–76.

402. See *supra* section III.C.

403. Compare the experience of the Ninth Circuit debating proposals to divide the circuit. See *supra* section II.B.1.a.

404. Wood, *supra* note 364, at 1766.

405. 10 U.S.C. §§ 810–946 (2012).

406. See, e.g., Tarkington, *supra* note 159, at 373–79 (discussing the downsides of judicial bias).

positions that might impact or signal the outcome of future cases is the primary concern of opponents of judicial lobbying.<sup>407</sup> But for specialized courts, lobbying about policy is almost certain to impact future cases.<sup>408</sup> By the very nature of specialized courts, judges encounter a large number of specific cases and gain expertise in that area.<sup>409</sup> When judges weigh in on the particular policy debates of the day, those judges almost necessarily will see cases that contain those issues in short order.<sup>410</sup> Thus, judicial lobbying by specialized courts raises numerous concerns about the potential for bias and capture.

At the same time, input from specialized judges is extremely valuable when Congress is considering alterations to the statutes that such courts oversee.<sup>411</sup> Therefore, it is necessary to constrain problematic lobbying by specialized judges without eliminating the input that such judges can provide.<sup>412</sup> A mechanism for providing judicial perspective on potential statutory updates that simultaneously checks capture and bias concerns is the best solution for regulating specialized judicial lobbying.

Lobbying by specialized judges should therefore be conducted more formally than the ad hoc manner in which most current judicial lobbying occurs.<sup>413</sup> The Judicial Conference could bring a semblance of organization to judicial lobbying efforts. The Judicial Conference enjoys broad participation by judges from all over the country.<sup>414</sup> These judges serve on a “network of committees” which could be utilized in vetting specialized court lobbying proposals.<sup>415</sup>

Some sort of oversight from the judiciary as a whole (not necessarily from the Judicial Center) is needed. First, oversight ensures that judicial lobbying will take into account the larger legal universe in which the

---

407. See Kelso, *supra* note 28, at 856–57 (arguing that judges shouldn’t speak publicly on issues that may arise in order to avoid “hopelessly compromis[ing] the integrity and impartiality of the court for which she works”).

408. See Anderson, *supra* note 16, at 1069–76 (discussing changes to the Patent Act and implications for the Federal Circuit).

409. See Golden, *supra* note 316, at 557.

410. See Anderson, *supra* note 16, at 1083–87 (giving as an example of reform the court getting a case one month after proposed reform).

411. See Rishikof & Perry, *supra* note 313, at 688–89 (noting the workings of the judicial and legislative branches).

412. See Hartley, *supra* note 10, at 405–06 (proposing creating “space” for judges to lobby).

413. See Rishikof & Perry, *supra* note 313, at 687 (referring to judicial lobbying as “ad hocism”).

414. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (2015), <http://www.uscourts.gov/file/18176/download> [<https://perma.cc/H3P8-6JR7>].

415. *Id.*

proposed legal changes operate.<sup>416</sup> Because specialized courts often operate without checks from other courts, this check on lobbying activities would permit review of the lobbying proposals from other judges with less personal investment in the outcome. Such oversight is likely to check lobbying that could potentially bias a court; such as when a court is contemplating commenting on legislation that the court will have to review at a later date. Additionally, it would provide increased input to specialized courts about the impact of their proposed changes.

A check on judicial lobbying would also serve as a relevance test for specialized courts' lobbying activities. Oversight will help filter out those efforts that have minimal impact on the judiciary.<sup>417</sup> Conversely, for those efforts that the judiciary supports, Congress and the general public are likely to view the lobbying effort as representing the views of the entire judiciary.<sup>418</sup> Indeed, oversight of lobbying maintains the valuable insight that specialized courts can provide to Congress. When the judiciary speaks with one voice, Congress can more confidently rely on the assertions of the judicial branch; a confidence that is necessary for efficient and productive judicial-congressional dialogue.

## CONCLUSION

The relationship between the judicial and legislative branches is perhaps the most studied inter-branch relationship. The dialogue that occurs between judges and congressmen occurs across the formal spaces of law-making and opinion-writing, but it also occurs in the informal interstices of the modern American political state. Judicial lobbying is a vibrant part of our political system and one that is worth maintaining to a large degree. Judicial input on statutory and constitutional questions is vital at every stage of the law-making process. Encouraging judges to provide input to legislators on the functioning of the judicial branch (and encouraging congressmen to listen) should be the priority of any potential legal or ethical modification to the process of judicial lobbying.

But judicial lobbying can have deleterious effects on the fairness of the adjudicatory process, particularly at specialized courts. Lobbying by judges on specialized courts can potentially lead to biased decisions and

---

416. See FISH, *supra* note 139, at 330–35.

417. The Center is governed by the nine-person Board of the Federal Judicial Center. See FEDERAL JUDICIAL CENTER: ANNUAL REPORT 2013, [http://www.fjc.gov/public/pdf.nsf/lookup/AnnRep13.pdf/\\$file/AnnRep13.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/AnnRep13.pdf/$file/AnnRep13.pdf) [https://perma.cc/Y893-PZVF]. The Board is a diverse set of judicial stakeholders (usually judges) that have a wide variety of interests and concerns. *Id.*

418. See Rishikof & Perry, *supra* note 313, at 687–89 (summarizing judicial lobbying effort as “ad hoc”).

special interest capture. Therefore, special concern should be paid to lobbying efforts that originate from specialized judges. Specialized courts face unique bureaucratic pressures that incentivize lobbying by judges in ways that are harmful to the legal system.<sup>419</sup> Judges risk appearing biased when reviewing statutes that they have personally lobbied against. Ultimately, the United States legal system is benefitted when legislators have input from judges, but restrictions on lobbying (particularly by specialized judges) are needed.

---

419. See Dreyfuss, *supra* note 215, at 5–7 (listing the potential drawbacks to specialized courts).