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
Available at: https://digitalcommons.law.uw.edu/wlr/vol91/iss2/13

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.
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

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

A. Constitutional and Statutory Limits on Judicial Lobbying
B. Formal Ethical Limits on Judicial Lobbying
C. Informal Restrictions on Judicial Lobbying

II. JUDICIAL LOBBYING

A. Judicial Lobbying, Historically
B. Modern Judicial Lobbying
   1. Article III Issues

* 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 Seymour, David Taylor, Lindsey Wiley, and faculty workshops at Florida State University and Indiana University.
INTRODUCTION

In 2014, federal district judge John Bates wrote three unsolicited letters to Congress opposing the USA FREEDOM Act. The Act would have imposed new limits on the U.S. government’s ability to monitor email and phone communications of American citizens. 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,” 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].


3. Letter from John Bates to Patrick Leahy, supra note 1.
needlessly complicated the work of the Foreign Intelligence Surveillance Court (FISA Court),\(^4\) and it was “potentially unconstitutional.”\(^5\) The propriety of Judge Bates’s efforts to persuade Congress was controversial, challenged by both academic commentators and federal judges.\(^6\) 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.\(^7\) Judge Bates was expressing his views on the substantive merits of a bill, before a case challenging that bill had been filed.\(^8\) However, such “lobbying” of Congress by Federal judges is permitted, although traditionally it has been disfavored.\(^9\)

The tension inherent with judges lobbying for or against bills that they will eventually interpret has not been overlooked by academics.\(^10\)

\(^4\) 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 [https://perma.cc/XZ9G-5NEM].


\(^8\) 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.”).

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. 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. 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.

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. Judge Bates’s recent actions serve as a cautionary tale demonstrating the pitfalls inherent with judicial lobbying. 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

---


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).


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. 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. 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.” 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. 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.

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. Despite this debate, the

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.”).
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. 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.

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. Federal judges who comment on policy matters invariably run the risk of prejudicing, or appearing to prejudice, future cases. 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. Judges often represent unbiased, informed opinions, as demonstrated by the frequency with which lawmakers adopt judicial suggestions on legislative matters. Furthermore, absolute limits on judicial lobbying would likely violate the First Amendment. 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. 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. 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).
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).
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.\(^{31}\)

Judges have traditionally been involved in congressional debates about court jurisdiction and reform.\(^{32}\) 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.\(^{33}\) Specialization blurs the already amorphous boundary between substantive and procedural legislative changes: for specialized courts policy and jurisdiction are essentially indistinguishable.\(^{34}\) 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

\(^{31}\) 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. 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. Scholars have looked for means by which judges can reduce the tension created by undemocratic judicial review. One of the most well-known solutions is Alexander Bickel’s suggestion that courts employ the “passive virtues” of judicial reasoning—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. These scholarly attempts to decipher the contours of the judicial-legislative relationship have focused almost exclusively on formal interactions: dialogue via official duties. 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).
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. The study of “extrajudicial” speech by judges and the restrictions on such speech have greatly enhanced understanding of judicial-congressional dialogue. Generally, scholars have concluded that judicial lobbying is unsightly. Walter Murphy, a scholar of the judicial role, has said that lobbying “is contrary to the public image of a judge.” Judicial lobbying, it is thought, is only appropriate when an issue is “of such gravity” that it demands judicial intervention. 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, the use of magistrate judges, and judicial salary increases. 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.

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.

legislation. They also, at times, reach out to Congress in their individual capacities to urge Congress to act in a particular policy area. 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. Indeed, judges often lobby Congress over policy issues that have merely tangential, if any, impact on the judiciary. 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. 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. 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. 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).


53. See infra Part II.

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


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.57 There is no explicit separation of powers clause within the Constitution, rather the separation is implied within the Constitution’s structure.58 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.59 Scholars have debated the limits placed on each branch by the separation of powers, developing a rich and extremely thorough literature on the topic.60

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.”61 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.”).


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.62 They, like other members of the public, are merely seeking to influence Congress in its law-making role.63 Such attempts to influence do not usurp the legislative branch’s designated role.64

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.65 In fact, the executive branch is a regular litigant in federal court, not only as a defendant but often as a plaintiff.66 Scholars have suggested that Congress is not restricted in using the courts and should engage more directly with the judicial branch in court.67 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.68 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.69 18 U.S.C. § 1913 forbids government employees from lobbying Congress using “money appropriated by any enactment of Congress.”70 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


63. Id.

64. Id.


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).

Congress requests advice.\textsuperscript{71} 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.\textsuperscript{72}

The second exception to the limitation on government employee lobbying is the “proper official channels” exception.\textsuperscript{73} For legislation that is deemed “necessary for the efficient conduct of the public business,” governmental employees may lobby Congress only via “proper official channels.”\textsuperscript{74} 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.\textsuperscript{75}

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.”\textsuperscript{76} 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.”\textsuperscript{77} Thus, according to the C.G., in nearly every imaginable case, judicial lobbying is not subject to statutory limitation.\textsuperscript{78} Every potential policy issue has an “impact,” no matter how small, on the judiciary. Thus, in practice, judges are only limited to lobbying on

\begin{itemize}
\item \textsuperscript{71} Id.
\item \textsuperscript{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).
\item \textsuperscript{73} For a more thorough discussion of this topic, see Smith, supra note 10, at 167–70.
\item \textsuperscript{74} Geyh, supra note 10, at 1195 (quoting 18 U.S.C. § 1913).
\item \textsuperscript{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).
\item \textsuperscript{77} Id.
\item \textsuperscript{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’”).
\end{itemize}
issues that would “impact . . . the judiciary”: a threshold that is easily met in virtually every case. 79

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”). 80 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. 81

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.” 82 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.” 83 Judge Calebresi 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, 84 a case examining whether a prayer prior to a city meeting violated the Establishment Clause. 85 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.
82. Id. at ch. 2, Canon 2(A)(6).
83. Id. at ch. 2, Canon 3(A)(6).
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.86

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.”87 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.88

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.89 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.90

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.91 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.”).


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.\textsuperscript{92}

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.\textsuperscript{93} 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.\textsuperscript{94} 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.\textsuperscript{95}

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.\textsuperscript{96} In 1793, then-Secretary of State Thomas Jefferson requested legal advice from the Supreme Court regarding certain treaty matters with France.\textsuperscript{97} In response, Chief Justice John Jay declined to advise the President.\textsuperscript{98} Citing separation of powers concerns and the Court’s status as a “court of last resort,” he argued “against the propriety of... extra-judicially

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

\textsuperscript{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.”).

\textsuperscript{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.”).

\textsuperscript{95} Id.

\textsuperscript{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).


\textsuperscript{98} Id.
deciding the questions." Jay’s refusal to provide an advisory opinion was formally acknowledged over a century later in *Muskrat v. United States*, with the Court holding that it was unable to provide “opinions in the nature of advice concerning legislative action.”

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. 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. 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.

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

---


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).


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. 109 The same process occurs in the other congressional chamber before a bill is sent along to the President. 110 The deliberative, democratic nature of the legislative process is what legitimizes the laws that Congress ultimately adopts. 111 

In contrast, the judicial decision-making process is designed to severely limit the types of information and viewpoints that can be consulted. 112 Judges are generally precluded from relying on information found outside of the official record of a case. 113 Legal decisions are not meant to be policy decisions. 114 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. 115 

II. JUDICIAL LOBBYING

Judges frequently promote or challenge legislative proposals—they lobby. 116 Their lobbying efforts have not been limited to issues of judicial administration, either. 117 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. 118 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.\textsuperscript{119} Judges have also been heavily involved in debates about sentencing reform.\textsuperscript{120} 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.\textsuperscript{121}

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.”\textsuperscript{122} For instance, congressional debate about splitting established federal judicial circuits has attracted spirited debate from judges.\textsuperscript{123} Similarly, congressional debate about the creation of new courts, such as the bankruptcy courts, has met fierce criticism from judicial officers.\textsuperscript{124} Judges have also attempted to restrict the types of decision-makers protected by Article III’s safeguards.\textsuperscript{125} Congressional attempts to limit federal court jurisdiction have also been subject to intense lobbying from judges.\textsuperscript{126}

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.\textsuperscript{127} Federal judges have not shied away from opining on the need for increased administrative assistance in the

\textsuperscript{119}. Id.


\textsuperscript{121}. See infra section II.C.

\textsuperscript{122}. U.S. CONST. art. III, § 1.

\textsuperscript{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).


\textsuperscript{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.”).

\textsuperscript{126}. Id.

\textsuperscript{127}. See, e.g., Smith, supra note 10, at 164–67 (describing judicial officers’ attempts to influence the legislative branch).
judicial process.\textsuperscript{128} They have lobbied for increased roles for magistrate judges, bankruptcy judges, and other non-Article III decision-makers.\textsuperscript{129} Federal judges have also been involved in sustained, organized campaigns for increased judicial salaries.\textsuperscript{130}

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.\textsuperscript{131} The range of issues on which judges have lobbied is vast: from patent law to criminal sentencing, from unemployment benefits to governmental wiretapping.\textsuperscript{132} 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.\textsuperscript{133} 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.\textsuperscript{134} 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.\textsuperscript{135} Over the first

\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} See, e.g., SMITH, supra note 42, at 62–64 (summarizing the history of judicial lobbying about judicial salaries).
\textsuperscript{131} See, e.g., Anderson, supra note 16, at 1069–76 (detailing judicial lobbying efforts in the patent field).
\textsuperscript{132} Id.
\textsuperscript{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).
\textsuperscript{134} 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).
\textsuperscript{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.” 136 Katyal notes that courts have advised legislators by “private letter” and “back-room discussion,” among other methods. 137 Charles Geyh has described the period from 1789–1922 as one of “unstructured interaction” between Congress and the courts. 138 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. 139 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. 140

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. 141 Similarly, Chief Justice Hughes sent a letter to a prominent senator opposing, and ultimately helping to defeat, President Roosevelt’s court-packing plan. 142 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. 143 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.
140. Katyal, supra note 10, at 1741.
141. Murphy, supra note 10.
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”). 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. 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.

All of these newly-formed organizations created a formalized structure for direct judicial lobbying of Congress. The Judicial Conference sends annual reports to Congress. Those reports have, since the inception of the Judicial Conference, included recommendations for legislation. In addition, the AO submits annual reports to Congress concerning the workload of the courts. 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. Furthermore, Congress often asks for specific input on legislation from the Judicial Center.

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.
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.\textsuperscript{152} Despite the historical precedent for judicial involvement with legislation, Katyal is not persuaded that history is the best normative guide.\textsuperscript{153} For him, “[e]xtrajudicial advice raises troublesome issues about judicial propriety and smoky, back-room deals.”\textsuperscript{154} But Katyal argues that judges do have a role to play as “advicegivers” in the legislative process.\textsuperscript{155} He advocates for “advicegiving via written opinions in cases and controversies,” not in extra-judicial forums.\textsuperscript{156} Thus, he is not arguing in favor of judicial lobbying as defined in this Article.

\textbf{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.\textsuperscript{157} No other branch depends so heavily on the perception of impartiality in its actions.\textsuperscript{158}

Second, judges are discouraged from lobbying on general legal matters because such lobbying might be seen as unfair to litigants.\textsuperscript{159} 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.

\textsuperscript{152} See Katyal, \textit{supra} note 10, at 1752 (claiming that past judicial precedent does not provide cover for judicial advicegiving).

\textsuperscript{153} \textit{Id.}

\textsuperscript{154} \textit{Id.}

\textsuperscript{155} \textit{Id.}

\textsuperscript{156} \textit{Id.}

\textsuperscript{157} See, \textit{e.g.}, James M. Scheppele, \textit{Are We Turning Judges Into Politicians?}, 38 \textit{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.”).

\textsuperscript{158} See, \textit{e.g.}, Stephen B. Burbank, \textit{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 . . . .”).

\textsuperscript{159} See Margaret Tarkington, \textit{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*,\(^\text{160}\) which dealt with whether judges could solicit money for their election.\(^\text{161}\) In finding that such solicitation was forbidden, the Supreme Court recognized “a compelling interest in preserving public confidence in their judiciaries.”\(^\text{162}\) 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.\(^\text{163}\) 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.\(^\text{164}\) 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.\(^\text{165}\) 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).


\(^\text{161}\) 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.

\(^\text{162}\) Id. at 1673.

\(^\text{163}\) 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).


\(^\text{165}\) 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.” 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. In response, Chief Justice Warren authorized a special committee to make recommendations about the workload of the Fifth Circuit. 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. Thus, the committee recommended splitting the circuit into two, dividing the circuit along the Mississippi River. 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. Some of those liberal judges campaigned publicly against the division, arguing that it would undermine civil rights gains in the South. Despite the warnings of the Biggs committee, political opposition to any circuit division had effectively killed all proposals by 1964.

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

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. In response, all of the judges on the circuit wrote a letter to Congress urging division. 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. They also encouraged judges who were racial minorities to voice their approval to members of Congress. Furthermore, they alleviated political concerns by proposing to include Mississippi in the reformed Fifth Circuit. Finally, in October 1980 the judges’ efforts proved successful when Congress divided the circuit and created the Eleventh Circuit Court of Appeals.

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. The court’s size and massive caseload has led to delays in adjudication, the abandonment of en banc review in favor of the problematic “limited en banc” review, and a notoriously high reversal rate at the Supreme Court. Various legislative proposals have been put

174. Id. at 1, 64.
175. Id. at 236.
176. Id. at 237–38.
177. Id.
178. Id.
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’Scanlain, 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. 184

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. 185 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). 186 Ninth Circuit judges have nearly unanimously lobbied against splitting their circuit. 187 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. 188

(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.").


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.

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.189 Unhappy with the proposal, the National Conference of Bankruptcy Judges drafted a separate bill that would have conferred Article III status on bankruptcy judges.190 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.191 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.192 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.193 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.194

Judith Resnik has summarized the organized lobbying by the Judicial Conference as “a lobby against federal jurisdiction.”195 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.196 This less-than-flattering take on judicial lobbying deftly explains the efforts of the judicial conference during the period of bankruptcy reform.

190. Id. at 341–42.
191. Id. at 342.
192. Id. at 365–70.
193. Id.
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.” Thus, during various periods of U.S. history, judges have lobbied Congress to increase judicial salaries.

At times, this lobbying for increased salaries has occurred through the official channels of the Judicial Conference. 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. His successor, Chief Justice Roberts, characterized the judicial pay issue as a “constitutional crisis” in his 2006 annual report to Congress. 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*, 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. The court held that Congress had impermissibly withheld judicial pay.

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

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).
203. See id.
204. Id.
Judges Association (FJA).\textsuperscript{205} 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.\textsuperscript{206} The creation of the FJA unnerved many congresspersons, who asked the Government Accountability Office (GAO) to examine the propriety of private judicial lobbying.\textsuperscript{207} 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.\textsuperscript{208} 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.\textsuperscript{209} 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.\textsuperscript{210} 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.\textsuperscript{211}

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.\textsuperscript{212} Despite

\begin{itemize}
\item \textsuperscript{205} See LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 160–61 (1988) (describing the creation of the Federal Judges Association).
\item \textsuperscript{206} Id.
\item \textsuperscript{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).
\item \textsuperscript{208} Id.
\item \textsuperscript{210} Id.
\item \textsuperscript{212} See Winkle III, supra note 40, at 265 (stating that lobbying is contrary to the public image of a judge).
\end{itemize}
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. In the late-1970s, Congress began considering the creation of specialized courts to handle patent cases. As a result, Congress created the U.S. Court of Appeals for the Federal Circuit in 1982. Since its creation, the judges of the Federal Circuit have been active in legislative affairs. During the four-year debate about patent reform between 2004 and 2008 (culminating in the passage of the America Invents Act), the court made numerous attempts to influence the shape of the ultimate legislation.

On May 3, 2007, while the Patent Reform Acts of 2007 were


pending before House and Senate committees, the Federal Circuit’s Chief Judge Michel sent a letter to Senators Leahy and Hatch. In that letter, Chief Judge Michel expressed his opposition towards two aspects of the proposed legislation. 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. As for damages, he argued that judges were not economic experts and would have difficulty making fine economic decisions. Making such damage determinations, he claimed, would inundate courts with extra work and invite battles between competing experts.

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. Requiring interlocutory review, he argued, would simply prolong patent disputes. “[T]he courts as presently constituted,” Chief Judge Michel wrote, “simply cannot implement the provisions in a careful and timely manner.”

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. In this letter, Chief Judge Michel argued that damages law was “highly stable and well understood by litigators as well as judges.” He suggested that Congress should “do nothing” concerning damages.


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.


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. \(^{230}\) Chief Judge Michel repeatedly urged IP litigators and patent holders to lobby Congress to remove the damages and claim construction portions of the bill. \(^{231}\) Further, he wrote various op-eds suggesting that Congress need not interfere in patent litigation reform. \(^{232}\)

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. \(^{233}\) Ultimately, however, both claim construction and damages reform were dropped from the final bill. \(^{234}\)

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. \(^{235}\) 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


\(^{231}\) 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).


\(^{233}\) 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. 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. 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.” 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. He also suggested that publically releasing FISA Court opinions would be unhelpful.

In the first of his letters, Judge Bates indicated that his opposition to the USA Freedom Act represented that of the “Judiciary.” This claim is likely to have carried weight with Congress because at the time of his


239. Id.

240. Id.

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

Judge Bates’s actions have come under criticism from legal scholars and legal reporters. 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.

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. 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.

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
temporary appointment to FISA Court. 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, 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. 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. 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. Jones’ letter was cited by both Congressman Bachus and Congressman Nadler during floor debates on January 28, 2004. The letter was again cited in 2005 in the Senate by Senator Leahy and Senator Sarbanes.

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. At the time of the article, means testing was a hotly contested congressional issue. It ultimately became part of the law in


253. Id.

254. See id.


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.259 Bankruptcy judges have also frequently engaged with Congress on bankruptcy reform, but usually only upon the request of Congress to do so.260 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.261 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.262 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.263

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.”).

262. Id. at 1 (statement of the Hon. Lamar Smith, Chairman, Subcomm. on Immigration and Claims).
263. Id. at 2.
other federal courts. 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. According to Everett, repeal of the court’s jurisdiction would result in some cases lacking jurisdiction in any court.

Everett also encouraged Congress to expand the reach of the law. He proposed replacing the word “citizen” with the more inclusive “national.” 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.

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. 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.”

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.


administrative agencies, which are thought to seek increased responsibilities as a way of maximizing power and influence.\footnote{See generally Peter L. Strauss, \textit{The Place of Agencies in Government: Separation of Powers and the Fourth Branch}, 84 \textit{COLUM. L. REV.} 573, 575–84 (1984) (summarizing arguments for administrative enlargement).}

\textbf{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.\footnote{See supra section I.B.2.} 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.\footnote{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).}

As to why specialization leads to lobbying, history might provide a clue. In 1910, Congress created the Commerce Court of the United States.\footnote{Mann-Elkins Act, 61st Cong., ch. 309, 36 Stat. 539 (June 18, 1910).} The court was a specialized court with jurisdiction over cases arising from orders of the Interstate Commerce Commission.\footnote{Id.} 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.\footnote{George E. Dix, \textit{The Death of the Commerce Court: A Study in Institutional Weakness}, 8 AM.} Upon the completion of their terms, they were assigned to one of the circuit courts.\footnote{Id.} In this
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.\(^\text{278}\) 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.\(^\text{279}\) Judge Knapp suggested three main changes to the act.\(^\text{280}\) First, he proposed broadening the scope of the law.\(^\text{281}\) Second, he suggested simplifying the law by leaving out anything not deemed essential to the accomplishment of its purpose.\(^\text{282}\) 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.\(^\text{283}\) 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.\(^\text{284}\) After the termination of the Commerce Court in 1913, he served on the Fourth Circuit until his death in 1923.\(^\text{285}\)

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

\begin{footnotesize}
\begin{enumerate}
\item J. LEGAL HIST. 238 (1964).
\item \textit{Id.}
\item \textit{Id.} at 6–21.
\item \textit{Id.} at 7–10.
\item \textit{Id.} at 7–13.
\item \textit{Id.} at 3.
\item \textit{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).
\end{enumerate}
\end{footnotesize}
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. 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.” They have argued that norms against judicial lobbying have hindered the judiciary in the legislative budgetary process. For Douglas and Hartley, judicial lobbying is an unalloyed good because it provides valuable information for legislators about the realities of interpreting legislation.

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. Although Katyal explicitly avoids the question of whether judges should weigh in on policy matters, 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.” 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 (publishing Chief Judge Rader’s statement that he regrets not offering an amendment including copyright and trademark cases within the Federal Circuit’s jurisdiction).


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.293

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.294

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.295 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.296 But even more strident criticism arose when the court he chaired later struck down portions of that Act.297

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; Scheppelle, 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).
assuredly, have expertise in their given subject matter. 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 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.

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. 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.” 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). 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.” The Federal Circuit denied the motion, but Chief Judge Rader did not ultimately appear on the panel that reversed the district court’s decision.

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.


300. Id. at 183.


302. Id.


304. Id.

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.\(^{306}\) He repeatedly urged Congress to leave damages reform to the court, while simultaneously urging litigants to challenge particular sorts of damage calculations.\(^{307}\) Congress delayed debate on damage reform pending the then-upcoming case of *Microsoft v. Lucent*.\(^{308}\) 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.\(^{309}\) In an opinion authored by Chief Judge Michel, *Lucent* significantly altered the evidence required to award damages in patent cases.\(^{310}\) 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.\(^{311}\) 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.\(^{312}\) Judges are very successful when they lobby Congress about pending legislation, especially specialized judges with specialized expertise.\(^{313}\) For example, the America Invents Act was shaped, in large part, by judicial lobbying efforts.\(^{314}\) The success of judicial lobbying is likely to attract special interests. To the extent that the judiciary engages


\(^{307}\) 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).


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.\textsuperscript{315}

\section*{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.

\subsection*{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.\textsuperscript{316} 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.\textsuperscript{317} Judges are often called to testify during legislative debates surrounding changes to the judicial system.\textsuperscript{318} Also, they are frequently appointed by Congress to sit on committees or commissions to review court reform proposals.\textsuperscript{319}

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.\textsuperscript{320} This is less true for

\begin{thebibliography}{99}
\bibitem{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).
\bibitem{318} Id.
\bibitem{319} Id.
\bibitem{320} Consider that Congress often calls bankruptcy judges to testify about proposed reform. \textit{See}, e.g., J. Jonas Anderson, \textit{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.\(^{321}\)

Conessional 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.\(^{322}\) Similarly, tax court judges are often called to testify about updates of the tax code.\(^{323}\) 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.\(^{324}\) 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.\(^{325}\)

Judges on specialized courts tend to view themselves as policy specialists as well.\(^{326}\) Opinions from the Federal Circuit routinely refer to Congress’s mandate to the court to “promote a uniform interpretation” of the patent laws.\(^{327}\) Former Chief Judge Rader has been known to criticize the Supreme Court for misunderstanding patent law.\(^{328}\) Thus,

\(^{321}\) 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.”).


\(^{328}\) 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.\footnote{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).} 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.\footnote{See supra section II.B.} 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.\footnote{Smith, supra note 10, at 190.} 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.\footnote{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).} Legislative changes to the patent system fundamentally impact the members of the federal circuit.\footnote{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”).} For example, legislative changes to damages law would have impacted a great number
of the court’s cases. 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. 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. 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. 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.

3. Conflation 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. In this way, the traditional dividing line between “judicial-” and “policy-” based legislation, while always blurry, completely evaporates for specialized courts. Changes in policy can

334. Id.
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).
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.  

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.  

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. In his view, allowing claim construction appeals would overwhelm the Federal Circuit with new appeals. 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.  

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. 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


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.\textsuperscript{347} Jurisdictional rules define which sorts of disputes are appropriate to bring within a particular court, and which are not.\textsuperscript{348} For specialized courts, like the Federal Circuit, jurisdiction is defined by subject matter, not geography.\textsuperscript{349} 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.\textsuperscript{350} 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.\textsuperscript{351} These proceedings have proven exceedingly popular with litigants and have diverted some litigation from the courts.\textsuperscript{352} 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.\textsuperscript{353} When judges lobby—particularly when the judicial branch

\textsuperscript{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).

\textsuperscript{348} For example, the Federal Circuit’s jurisdiction is defined at 28 U.S.C. § 1295 (2012).

\textsuperscript{349} Id.

\textsuperscript{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).


\textsuperscript{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).

\textsuperscript{353} See Smith, supra note 10, at 190 (discussing the effectiveness of the unified judiciary before Congress).
lobbies with one voice—Congress listens. Judges hold a special prestige among lawmakers; they are often asked to testify on matters of congressional interest. 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. 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. Second, judges are considered experts in statutory interpretation; therefore, their input on statutory language is often welcomed. Third, a judge’s job naturally exposes the judge to areas of the law that may be in need of modification.

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. 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.

Ultimately, this section concludes that the potential benefits of judicial input in the legislative process outweigh the costs of such lobbying. 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. Specialized court lobbying also frequently occurs without opposing viewpoints from non-specialized courts.

Specialized courts often have expertise in particular legal areas, however. 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. 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. Canon 4 could easily be amended to more explicitly restrict extra-judicial speech by judges. 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).
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. Judges enjoy the same First Amendment speech rights as regular citizens. Thus, completely forbidding judicial speech on political matters appears to be a clear violation of those rights.

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. Judges often have keen insights into the operation of the law, even in areas unrelated to management of the judicial system. 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). 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.

Thus, blanket restrictions on judicial lobbying are likely to lead to less effective law-making. Judges provide unique insights into the American legal system. 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.

370. Id. at 1261.
372. See Reinhart, supra note 103, at 805 (urging judges to “educate” the public about matters of particular expertise).
373. Id.
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.\(^ {377}\) The Judicial Conference has a long history of dialogue between the judicial and legislative branches.\(^ {378}\)

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.\(^ {379}\) 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.\(^ {380}\)

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.\(^ {381}\) Furthermore, individual spats between judges (even judges on the same court) would largely be shielded from the public’s view.\(^ {382}\)

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

---


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).


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 Koziński and Judge Bates were publically in disagreement. Compare Letter from John Bates to Patrick Leahy, supra note 1, with Letter from Alex Koziński 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. 383

Second, the Judicial Center is largely controlled by the Supreme Court, in particular by the Chief Justice. 384 Previous Chief Justices as well as the current one have come under attack for their use of the Judicial Center’s lobbying function. 385 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. 386 Silencing individual judges under the larger Judicial Center bureaucracy threatens the less formal conversations that take place between the legislative and judicial branches. 387 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. 388

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. 389

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

But lobbying by specialized judges has drawbacks that threaten judicial legitimacy. These drawbacks center on perhaps the primary concern of any specialized court: capture. Opponents of specialized courts have long noted the potential for specialized court capture. Capture in this sense refers to a court aligning its interests with those of its constituents. 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. 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.

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 publicly, a position that may benefit the litigant more than the public. 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. Such a symbiotic lobbying relationship between bar and bench is symptomatic of the capture worries expressed by specialized court skeptics.

391. See Rishikof & Perry, supra note 313.
393. Id.
394. Id.
395. Id.
396. Id.
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. 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. Similarly, wholesale changes to the patent statute have clear and direct consequences at the Federal Circuit. 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. 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. 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. 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. 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. 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).
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.
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. But for specialized courts, lobbying about policy is almost certain to impact future cases. By the very nature of specialized courts, judges encounter a large number of specific cases and gain expertise in that area. 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. 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. Therefore, it is necessary to constrain problematic lobbying by specialized judges without eliminating the input that such judges can provide. 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. 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. These judges serve on a “network of committees” which could be utilized in vetting specialized court lobbying proposals.

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 publically on issues that may arise in order to avoid “hopelessly compromis[ing] the integrity and impartiality of the court for which she works”).


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”).


415. Id.
proposed legal changes operate.\textsuperscript{416} 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.\textsuperscript{417} 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.\textsuperscript{418} 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

\textsuperscript{416} See Fish, supra note 139, at 330–35.


\textsuperscript{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.\textsuperscript{419} 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.

\textsuperscript{419} See Dreyfuss, \textit{supra} note 215, at 5–7 (listing the potential drawbacks to specialized courts).