JUDICIAL REFORM FROM THE INSIDE OUT

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The Judiciary Act of 1925, the subject of this Symposium, is known as "the Judges Bill" for a reason. The Justices of the Supreme Court, and Chief Justice Taft in particular, produced the Act and persuaded Congress to enact it. To modern eyes, such efforts seem indecorous, perhaps even scandalous. But in fact, Supreme Court Justices and other federal judges have been extensively involved in judicial reform throughout American history. This Essay examines participation by federal judges in judicial reform efforts—what we call judicial reform from the inside out.

We survey examples of judges participating in reform debates from across different historical eras and different levels of the federal judiciary. We then use our descriptive account as a platform for a theoretical and normative analysis. We begin by drawing some general lessons from the historical narrative. We then identify the overarching costs and benefits of judicial participation in reform, as well as the many factors for which one must account in normatively assessing any one instance of inside-out judicial reform. Relying on that framework, we offer some tentative recommendations for how inside-out judicial reform can be appropriately channeled.

Studying judicial reform from the inside out can help us understand court administration, the judicial role, and the relationship between the judiciary and the political branches—as well as shedding light on the contemporary debates over reform of the Supreme Court.

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INTRODUCTION

The Judiciary Act of 1925,[1] the subject of this Symposium, is known as "the Judges' Bill"[2] for a reason. The Justices of the Supreme Court, and Chief Justice Taft in particular, played an "unprecedented" role in producing the Act and persuading Congress to enact it.[3] Chief Justice Taft induced colleagues to draft the bill; testified on its behalf before Congress; lobbied legislators, the President, and the bar; and throughout made highly political strategic choices in pursuit of his aims.[4]

To modern eyes, Chief Justice Taft's efforts seem indecorous, perhaps even scandalous.[5] Indeed, today a mere comment by a Supreme Court Justice about proposed judicial reform can spark controversy. For example, in 2023 Justice Alito provoked an uproar when, in response to calls for a statute to impose an ethics code on the Justices, he declared in an interview with the *Wall Street Journal* that "[n]o provision in the Constitution gives [Congress] the authority to regulate the Supreme Court—period."[6]

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1 Judiciary Act of 1925, ch. 229, 43 Stat. 936.

2 *See, e.g.*, Felix Frankfurter & James M. Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 40 HARV. L. REV. 834, 839 (1927) (describing how "the Court's proposal to Congress," which ultimately was enacted into law, "became known as the Judges' Bill"). *See generally* Edward A. Hartnett, *Deciding What to Decide: The Judges' Bill at 75*, 84 JUDICATURE 120 (2000).

3 Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1648 (2000).

4 *See id.*; *see also* ROBERT C. POST, THE TAFT COURT: MAKING LAW FOR A DIVIDED NATION, 1921–1930, at 480–85 (2024).

5 *See, e.g.*, Donald F. Anderson, *Building National Consensus: The Career of William Howard Taft*, 68 U. CIN. L. REV. 323, 353–54 (2000) (observing that Chief Justice Taft "behaved in ways that were more appropriate for a politician than for a judge" and "overstepped the line of judicial propriety as Chief Justice, at least by contemporary standards"); Peter Alan Bell, *Extrajudicial Activity of Supreme Court Justices*, 22 STAN. L. REV. 587, 590 (1970) (arguing that political activities like Taft's "threaten to detract in some measure from the impartiality, enforceability, or quality of the Supreme Court's decisions"); Robert Post, *Judicial Management and Judicial Disinterest: The Achievements and Perils of Chief Justice William Howard Taft*, 1998 J. SUP. CT. HIST. 50, 67 (describing some of Taft's efforts as "ethically suspect").

6 David B. Rivkin Jr. & James Taranto, Opinion, *Samuel Alito, the Supreme Court's Plain-Spoken Defender*, WALL ST. J. (July 28, 2023, 1:57 PM ET), https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7 [https://perma.cc/R8PX-W8A3]; *see, e.g.*, Press Release, U.S. Senate Comm. on the Judiciary, Durbin, Judiciary Committee Dems Urge Chief Justice to Address Justice Alito's Wall Street Journal Interview That Violates the Court's Statement on Ethics (Aug. 3, 2023), https://www.judiciary.senate.gov/press/releases/durbin-judiciary-committee-dems-urge-chief-justice-to-address-justice-alitos-wall-street-journal-interview-that-violates-the-courts-statement-on-ethics [https://perma.cc/EK8L-FVT3]; Press Release, Sheldon Whitehouse, Sen., Senate, Whitehouse Lodges Ethics Complaint Against Supreme Court Justice Samuel Alito (Sept. 5, 2023), https://www.whitehouse.senate.gov/news/release/whitehouse-

But just how unprecedented are interventions like Justice Alito's, or even Chief Justice Taft's, in broader context? In fact, Supreme Court Justices and other federal judges have been extensively involved in judicial reform throughout American history. They have testified before Congress; lobbied lawmakers both publicly and behind closed doors; spoken directly to the public in speeches and published writing; and implemented reforms on their own initiative. Many of these efforts have produced meaningful reform or played a significant role in reform debates.

This Essay examines participation by judges in judicial reform efforts—what we call *judicial reform from the inside out*. This phenomenon has by no means gone wholly unnoticed.[7] But scholars have never given it a name, let alone a general descriptive and normative account. That is our goal here. We seek to identify, describe, theorize, and assess inside-out judicial reform. When and how has it occurred? What are its upsides and downsides? And should it be encouraged, limited, or even flatly prohibited?

Studying judicial reform from the inside out can help us understand court administration, the judicial role, and the relationship between the judiciary and the political branches. But it also has immediate practical relevance. Recent years have seen a robust debate over Supreme Court reform in both the scholarly literature[8] and in the

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lodges-ethics-complaint-against-supreme-court-justice-samuel-alito/ [https://perma.cc/JEK2-34MQ]; Michael Waldman, *Alito vs. History, Again*, BRENNAN CTR. FOR JUST. (Aug. 1, 2023), https://www.brennancenter.org/our-work/analysis-opinion/alito-vs-history-again [https://perma.cc/M4ZZ-AGM2]. While much of the criticism focused on the substance of his remarks, other critics—such as Senator Whitehouse's ethics complaint cited above—contended it was inappropriate for Justice Alito to comment on the topic at all. *See* Press Release, Sheldon Whitehouse, *supra*.

7 For discussions of judicial lobbying efforts, see CHRISTOPHER E. SMITH, JUDICIAL SELF-INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION 15–39 (1995), and J. Jonas Anderson, *Judicial Lobbying*, 91 WASH. L. REV. 401, 419–42 (2016).

8 *See generally, e.g.*, William Baude, *Reflections of a Supreme Court Commissioner*, 106 MINN. L. REV. 2631 (2022); Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747 (2020); Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *Designing Supreme Court Term Limits*, 95 S. CAL. L. REV. 1 (2021); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021); Daniel Epps, *Nonpartisan Supreme Court Reform and the Biden Commission*, 106 MINN. L. REV. 2609 (2022); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019); Daniel Epps & Ganesh Sitaraman, *Supreme Court Reform and American Democracy*, 130 YALE L.J.F. 821 (2021); Daniel Epps & Alan M. Trammell, *The False Promise of Jurisdiction Stripping*, 123 COLUM. L. REV. 2077 (2023); David H. Gans, *Court Reform and the Promise of Justice: Lessons from Reconstruction*, 27 LEWIS & CLARK L. REV. 825 (2023); Daniel Hemel, *Can Structural Changes Fix the Supreme Court?*, 35 J. ECON. PERSPS. 119 (2021); Marin K. Levy, *Packing and Unpacking State Courts*, 61 WM. & MARY L. REV. 1121 (2020); Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 YALE L.J.F. 93 (2019); Christopher Jon

political sphere.[9] Those discussions, however, have largely centered around *externally* imposed reform: potential statutory and constitutional measures designed to change the way the Court operates.[10] Yet as we show, reform from the inside out has a venerable history, and the Court can, perhaps should, and almost inevitably *will*, participate in the Court reform debate and processes more than is typically assumed. Indeed, it already has.

The Essay proceeds in two Parts. Part I describes many episodes of inside-out judicial reform throughout American history. While our account does not purport to be comprehensive, we survey examples from across different historical eras and different levels of the federal judiciary.

Part II then uses our descriptive account as a platform for theoretical and normative analysis. We begin by drawing some general lessons from the historical narrative. One broad conclusion is that judicial reform from the inside out—and, particularly, direct engagement with the political branches—has been surprisingly common since the dawn of the Republic.

Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778 (2020).

9 In just the last few years, a number of political figures have called for various methods of Supreme Court reform. *See, e.g.*, Joe Biden, Opinion, *Joe Biden: My Plan to Reform the Supreme Court and Ensure No President Is Above the Law*, WASH. POST (July 29, 2024), https://www.washingtonpost.com/opinions/2024/07/29/joe-biden-reform-supreme-court-presidential-immunity-plan-announcement/ [https://perma.cc/7K4H-B7BR] (advocating for term limits and an enforceable code of conduct); *What Senators Have Said About Supreme Court Term Limits*, FIX THE CT. (Nov. 30, 2023), https://fixthecourt.com/2023/11/senatorsonscotustermlimits/ [https://perma.cc/6Z44-Y8TC] (listing the opinions of Senators who had commented on Supreme Court term limits); Alexander Bolton, *Senate Dems Divided over Expanding Supreme Court*, THE HILL (July 13, 2022, 5:20 AM ET), https://thehill.com/homenews/3556733-senate-dems-divided-over-expanding-supreme-court/ [https://perma.cc/D94L-5SE9]; Pema Levy, *How Court-Packing Went from a Fringe Idea to a Serious Democratic Proposal*, MOTHER JONES (Mar. 22, 2019), https://www.motherjones.com/politics/2019/03/court-packing-2020/ [https://perma.cc/RZK4-Z3XC] (detailing how Pete Buttigieg mainstreamed court-packing as an option during the 2020 presidential primary); Grace Segers, *Republicans Propose Amendment to Limit Supreme Court to 9 Justices*, CBS NEWS (Mar. 19, 2019, 5:17 PM EDT), https://www.cbsnews.com/news/republicans-propose-amendment-to-limit-supreme-court-justices-to-9/ [https://perma.cc/R45A-G79N]. President Joe Biden appointed a blue-ribbon commission to study Supreme Court reform, which issued its final report in 2021. *See* Maegan Vazquez & Allie Malloy, *White House Commission on the Supreme Court to Release Draft Materials Thursday*, CNN (Oct. 13, 2021, 5:07 PM EDT), https://www.cnn.com/2021/10/13/politics/supreme-court-commission-white-house/index.html [https://perma.cc/2ZRJ-52K9]; PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT (2021).

10 For a brief discussion of "voluntary reform" by the Supreme Court itself, see Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398, 409–11 (2021).

Next, Part II tries to identify the overarching costs and benefits of judicial participation in reform, as well as the many factors for which one must account in normatively assessing any one instance of inside-out judicial reform. We then rely on that framework to offer some tentative recommendations about how inside-out judicial reform can be appropriately channeled.

We conclude by applying our Essay's insights to contemporary debates about Supreme Court reform. Recognizing the judiciary's longstanding role in reform debates suggests that the Justices have perhaps been unduly reticent to participate in the reform conversation—and they should be welcomed if they choose to weigh in further.

One caveat at the outset. Our inquiry is limited to the federal judicial context. Inside-out judicial reform in the states surely deserves study; indeed, examples of participation in judicial reform by state court judges abound. Nonetheless, state courts pose distinct issues compared to the federal context, given that state judges are on the whole much less insulated politically than are federal judges.[11] It may be more appropriate for elected judges—and particularly in jurisdictions where judges run on partisan tickets—to play a more active role in political debates over court reform. Whatever the answer to that question, it must await future work.

I. TYPES OF JUDICIAL PARTICIPATION IN REFORM

Despite the modern sense that judges and Justices should remain "above the fray," from the earliest days of the judiciary they have very much entered into it. Starting with lobbying Congress to relieve them of their circuit riding duties, the Justices (and later other judges) have repeatedly, and consistently, communicated to and coordinated with the political branches about various court reform measures—of which Taft's effort on behalf of the Judges' Bill is merely one example.

But the judiciary's efforts have not been directed solely at Congress. Judges and Justices have also communicated directly with the public about court reform, via speeches, law review articles, and interviews. Finally, the federal judiciary sometimes engages in its own court

11 Most states rely at least in part on elections for judicial selection. *See Significant Figures in Judicial Selection*, BRENNAN CTR. FOR JUST. (Apr. 14, 2023), https://www.brennancenter.org/our-work/research-reports/significant-figures-judicial-selection [https://perma.cc/NBH9-VU8D] ("Most states use elections as some part of their selection process — 39 states use some form of election at some level of court."). Only one state (Rhode Island) mirrors the federal system in granting life tenure to judges. *See id.* (Unlike any other state, judges in Rhode Island "are appointed by the governor to a life term with no age limit."); *see also* 8 R.I. GEN. LAWS § 8-16.1-7 (2024) ("The justices of the supreme court, the superior court, the family court, the district court, the workers' compensation court, and the traffic tribunal shall hold office during good behavior.").

reform measures—a form of "self-help" at times when Congress had not yet stepped in and at times to prevent Congress from stepping in. This Part, which is descriptive in its goals, traces each of these three categories in turn.

A caveat at the outset. Many of the examples here concern Supreme Court Justices' participation in reform debates, but that focus is not meant to imply that only reform targeting the Supreme Court is worthy of study. It reflects only that Supreme Court reform efforts attract more scholarly attention than do reforms targeted at the "lower" federal courts.

Indeed, more generally, finding examples of judicial reform from the inside out poses distinct challenges. As Arthur Hellman put it,

> Any historian faces difficulties in determining "what really happened," but the problems are magnified when the task is to trace the origins of a reform in the judicial system. . . . [P]roposals for judicial reform almost invariably are initiated and shaped by the judges; and among judges there is a strong commitment to confidentiality. This commitment is strongest in the context of deciding cases and writing opinions, but it spills over into administrative and legislative matters as well.[12]

Thus, though this Part identifies many examples of inside-out judicial reform—and there are many more we have chosen to omit in the interest of space—there are surely other efforts that have never seen the light of day.

A. Communication (and Coordination) with the Political Branches

From the first days of the federal judiciary, judges have been in direct communication with the political branches about possible judicial reform. Famously, the Judiciary Act of 1789 (primarily drafted by future Chief Justice Ellsworth) established the original makeup of the Supreme Court;[13] less famously, it created district courts in the eastern, middle, and southern "circuits" of the country and required two Justices to sit on circuit courts for each such district (along with one

12 Arthur D. Hellman, *Deciding Who Decides: Understanding the Realities of Judicial Reform*, 15 LAW & SOC. INQUIRY 343, 348 (1990); *see also* SMITH, *supra* note 7, at 15 ("Because of the secrecy that shrouds activities 'behind the purple curtain' of the judiciary, it can be difficult for outsiders to assess the nature and results of judicial lobbying.").

13 Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73. The Act's principal drafter was Senator Oliver Ellsworth—the very same Oliver Ellsworth who would later become the third Chief Justice of the United States. *See, e.g.*, James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1, 18 n.88 (2008); John F. Kennedy & William R. Castro, *Oliver Ellsworth*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/Oliver-Ellsworth [https://perma.cc/H73Q-JFPY] (last visited Mar. 30, 2025).

district judge).[14] Thus Congress established the practice of circuit riding—and with it, an unhappy set of Justices.[15] The six members of the Court were loath to take up the extensive travel that circuit riding required[16]—the perilous southern circuit required two thousand miles of travel each year[17]—and displeased that they had to foot their own travel bills.[18] And so, the Justices lobbied Congress to abolish their circuit-riding duties starting in their very first Term.[19] Indeed, the Justices "regularly exchanged correspondence with political figures" in an effort to "persuade Congress to eliminate or overhaul the circuit riding system."[20]

Congress, though not yet persuaded, was not completely impervious to the Justices' pleas.[21] Justice Iredell was dismayed by his assignment to the treacherous Southern Circuit and his colleagues' unwillingness to share that responsibility.[22] And so, he lobbied Senator Samuel Johnston of North Carolina (conveniently his brother-in-law[23]) to alter the Justices' arrangement.[24] Justice Iredell's lobbying efforts were successful; the Judiciary Act of 1792 provided that "no judge, unless by his own consent, shall have assigned to him any circuit which he hath already attended, until the same hath been afterwards attended by every other of the said judges."[25]

With circuit riding still in place (and with more Justices now facing the Southern Circuit), the Justices formally petitioned Congress via a letter sent to President George Washington, who delivered it on the Justices' behalf in November of 1792.[26] Emphasizing the hardships

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14 Judiciary Act § 4, 1 Stat. at 74.

15 *See, e.g.*, David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1718 (2007) ("To say that most Justices disliked circuit riding would be an understatement.").

16 *See* Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1814–15 (2003).

17 Stras, *supra* note 15, at 1718.

18 *See* Glick, *supra* note 16, at 1769–70.

19 *See id.* at 1766–67 (describing how "[s]tarting in the first term of the Supreme Court, the justices complained bitterly about their circuit duties," *id.* at 1766).

20 *Id.* at 1767.

21 *Id.* at 1768.

22 *See* Wythe Holt, *"The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects": The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793*, 36 BUFF. L. REV. 301, 311 (1987).

23 *See* Glick, *supra* note 16, at 1771.

24 Holt, *supra* note 22, at 330.

25 Judiciary Act of 1792, ch. 21, § 3, 1 Stat. 252, 253. Senator Johnston apparently "got the Senate to agree to instruct a committee 'to bring in a clause to establish such rotation in the attendance of the judges at the circuit courts as may best apportion the burthen'" and "[t]he bill so drafted was approved by the Senate the next day." Holt, *supra* note 22, at 330 (quoting S. JOURNAL, 2d Cong., 1st Sess. 413 (1792)).

26 Holt, *supra* note 22, at 333–34; Glick, *supra* note 16, at 1775.

posed by the current arrangement, the Justices asked to be "releived [sic] from their present painful and improper situation."[27] With no quick word from Congress, Justice Johnson resigned his commission and informed President Washington that the cause was circuit riding: "I cannot resolve to spend six Months in the Year of the few I may have left from my Family, on Roads at Taverns chiefly and often in Situations where the most moderate Desires are disappointed . . . ."[28] Congress eventually heeded the Justices' words and responded with the Judiciary Act of 1793, which reduced the circuit riding responsibilities of the Justices by requiring only one Justice—instead of two—to sit on each circuit court.[29]

Fast forward several decades (and glossing over the brief abolition of circuit riding in 1801, before its reinstatement in 1802[30]), circuit riding became particularly burdensome once again as the Supreme Court's docket rapidly grew.[31] As a result, through the 1830s the Justices made certain that their unhappiness "was known by Congress and the President."[32] Congress responded in 1844 by limiting the amount of circuit riding each Justice was required to undertake in a given year.[33]

The Justices would have to wait several more decades for complete relief from their circuit-riding duties[34]—relief that once again they had

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27 Glick, *supra* note 16, at 1775 (alteration in original) (quoting Letter from Justices of the Supreme Court to the Congress of the United States (Aug. 9, 1792), *in* 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: THE JUSTICES ON CIRCUIT: 1790–1794, at 290 (Maeva Marcus ed., 1988)).

28 Letter from Thomas Johnson, J., Sup. Ct., to George Washington, President (Jan. 16, 1793), *in* 12 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 1, 2 (Christine Sternberg Patrick & John C. Pinheiro eds., 2005)

29 Judiciary Act of 1793, ch. 22, § 1, 1 Stat. 333, 334. This change, while welcome, did not solve all of the problems associated with circuit riding. According to Glick's account, "[i]n 1797 justices continued their perennial reform effort," and "[t]heir letters suggest that they may have drafted the Circuit Court Act of 1797, which revised and streamlined the order of circuit riding in the Eastern, Middle, and Southern Circuits." Glick, *supra* note 16, at 1778 (footnote omitted).

30 *See, e.g.*, Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1124 (2001) (describing the 1802 repeal of the 1801 Judiciary Act).

31 *See* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 34–50 (1928) (detailing the growth in the Supreme Court's caseload between the early 1800s and the early 1840s).

32 Glick, *supra* note 16, at 1804.

33 An Act of June 17, 1844, ch. 96, 5 Stat. 676. Specifically, Justices would no longer have to attend "more than one term of the circuit court within any district of such circuit in any one year." *Id.* § 2.

34 Various efforts were made at different times to relieve the Justices of their circuit riding duties. For example, in 1876, Representative George McCrary sponsored a bill that would have created an intermediate court of appeals and ended "compulsory attendance" on the circuit courts—a bill that passed in the House but died in the Senate. Glick, *supra*

a hand in producing, after years of false starts.[35] In 1890, Chief Justice Fuller hosted a dinner party with the other Justices and members of the Senate Judiciary Committee, including Senator William Evarts—the Senate's "leading advocate" for abolishing the circuit courts in favor of a dedicated set of federal appellate courts.[36] The Chief Justice spoke about the Court's backlog at the dinner; within weeks, the Committee sought "the views of the Justices" on various bills under consideration to reduce Court's caseload.[37] Justice Gray was deputized to write to the Senate Judiciary Committee in March of 1890, recommending (with the unanimous consent of the Justices) the creation of intermediate appellate courts.[38] Those courts were formally established in the spring of 1891 via the Circuit Court of Appeals Act[39] (known informally as the Evarts Act, after its sponsor[40]). Although the Evarts Act did not formally abolish the circuit courts, it shrunk their docket considerably and essentially ended the practice of circuit riding.[41]

Though this reform was a necessary step in reducing the workload of the Justices, it quickly proved insufficient. When William Howard Taft became Chief Justice, the Court was once again behind on its cases.[42] As Chief Justice Taft himself declared, "[a]fter thirty-five years . . . [the Supreme] Court's business had again grown beyond its capacity, and a hearing could not be had for cases not advanced out of their order until more than a year after their filing."[43] Chief Justice Taft was convinced that the solution lay in giving the Court further say

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note 16, at 1820. And in 1882, former Justice Davis, by then a senator, proposed a similar bill, which passed the Senate but died in the House. *Id.* at 1820–21.

35 *See* FRANKFURTER & LANDIS, *supra* note 31, at 70–102 (describing attempts to bring attention to the workload strain on the Court for years).

36 *See* Glick, *supra* note 16, at 1825 (citing WILLARD L. KING, MELVILLE WESTON FULLER: CHIEF JUSTICE OF THE UNITED STATES 1888–1910, at 150 (1950)).

37 *Id.* (quoting KING, *supra* note 36, at 150).

38 *See id.*

39 Circuit Court of Appeals Act, ch. 517, 26 Stat. 826 (1891).

40 *U.S. Circuit Courts of Appeals*, FED. JUD. CTR., https://www.fjc.gov/history/timeline/us-circuit-courts-appeals [https://perma.cc/Z39N-Q4KY] (last visited Mar. 30, 2025).

41 *See* Circuit Court of Appeals Act § 3; Marin K. Levy, *Visiting Judges*, 107 CALIF. L. REV. 67, 96 (2019). Congress formally abolished circuit riding when it abolished the old circuit courts in 1911. *See* Judicial Code of 1911, ch. 231, 36 Stat. 1087.

42 *See* POST, *supra* note 4, at 478 fig.III-9, 480, 481 fig.III-10.

43 William Howard Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1, 2 (1925). On the reason for the increase, Jonathan Sternberg writes, "two major events dramatically increased the number of cases before federal courts: World War I and the dual passage of the Eighteenth Amendment and the Volstead Act, which implemented nationwide Prohibition." Jonathan Sternberg, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33 J. SUP. CT. HIST. 1, 8 (2008) (footnote omitted).

over what cases to take up. For its first hundred years, the Court had no such discretion[44]—a state that changed somewhat with the Evarts Act, which authorized the Court to decide via the discretionary *writ of certiorari* which cases it would decide from the newly-established appellate courts.[45]

As Professor Robert Post describes it, the former President sprang into "judicial reformer" mode upon becoming Chief Justice in 1921.[46] Chief Justice Taft created a committee composed of Justices Day and McReynolds, and soon after Justice Van Devanter, with the express charge of drafting a bill to "reform" the Court's jurisdiction.[47] The committee drew up what would become known as the Judges' Bill by the spring of 1922.[48] Its key innovation was making the Court's discretionary jurisdiction far greater than its mandatory jurisdiction, with most cases receiving consideration only after a party had successfully petitioned for review.[49]

In what may be another shock to our modern sensibilities, Chief Justice Taft personally presented the draft bill to the House Judiciary Committee.[50] The bill eventually became law in 1925 and laid the foundation for the modern Supreme Court.[51] Speaking decades later of Chief Justice Taft's legacy, Chief Justice Warren said: "His outstanding contribution is, perhaps, his constant advocacy of judicial reform and Court reorganization, giving it discretionary power to take up only the most important cases."[52] In short, the Judges' Bill proved to bring about transformational Court reform—and was orchestrated by the Justices, themselves, with Chief Justice Taft chief among them.

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44 *See, e.g.*, Hartnett, *supra* note 3, at 1649–57 (providing a history of the Court's discretionary jurisdiction). Of course, it has long been recognized that the Court has various doctrinal tools at its disposal to avoid deciding certain matters before it. *See, e.g.*, Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42 (1961).

45 *See* Circuit Court of Appeals Act § 6; Marin K. Levy, *The Invention of the Judicial Administration State*, 123 MICH. L. REV. 1051, 1059 (2025) (book review); POST, *supra* note 4, at 477.

46 POST, *supra* note 4, at 477.

47 *See* Hartnett, *supra* note 3, at 1662. Though there was some question about whether Justice Van Devanter was also a member of the initial committee, Post notes that he was not. POST, *supra* note 4, at 483 ("Contradicting Van Devanter's 1927 recollection, Taft does not refer to Van Devanter as involved in the bill's initial formulation."). That said, Justice Van Devanter soon joined the drafting effort. *See id.*

48 POST, *supra* note 4, at 483.

49 *Id.* at 484.

50 *See* Hartnett, *supra* note 3, at 1663.

51 *See* Judiciary Act of 1925, ch. 229, 43 Stat. 936; POST, *supra* note 4, at 484; Levy, *supra* note 45, at 1052.

52 Earl Warren, *Chief Justice William Howard Taft*, 67 YALE L.J. 353, 361 (1958).

Little more than a decade later, the Court's workload was again a topic of intense discussion as President Franklin Delano Roosevelt used it as a public justification to expand the Court.[53] FDR's infamous "court-packing plan" is known as a story of sparring between the political branches over judicial reform (with the executive suffering a lasting defeat). What is less well-known is that the Justices once again had a hand in the outcome.

While the court-packing plan was under consideration, key Senators—Burton Wheeler of Montana, Warren Austin of Vermont, and William King of Utah—called Chief Justice Hughes to ask if he would testify against the bill before the Senate Judiciary Committee.[54] The Chief Justice apparently entertained the idea but ultimately suggested that Justice Brandeis go in his stead.[55] (Justice Brandeis, for his part, declined to testify and informed the Chief Justice that he did not think anyone else from the Court should testify either.[56]) But what the Chief Justice *did* do was author a lengthy letter—a move approved by Justices Brandeis and Van Devanter—to be read before the Committee, detailing how the Court was current on its caseload and denying that additional Justices were needed.[57] The letter was described in a newspaper account as a "cannonball" through FDR's claims that the Justices were overworked and thus in need of additional colleagues.[58] And though there were numerous factors that led to the demise of the court-packing plan, in the view of Professor James F. Simon, the Chief Justice's letter to the Judiciary Committee was "instrumental in [the plan's] defeat."[59]

As eyebrow-raising as it may be today to see Justices so hands-on with judicial reform efforts (both pushing for and against them), there

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53 *See* FRANKLIN D. ROOSEVELT, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES: A RECOMMENDATION TO REORGANIZE THE JUDICIAL BRANCH OF THE FEDERAL GOVERNMENT, H.R. DOC. NO. 75-142, at 1–3 (1937); *see also* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 283 (2017) (noting how FDR's purported reasons for Court expansion were "disingenuous").

54 JAMES F. SIMON, FDR AND CHIEF JUSTICE HUGHES: THE PRESIDENT, THE SUPREME COURT, AND THE EPIC BATTLE OVER THE NEW DEAL 319–21 (2012).

55 *See id.* at 321.

56 *See id.*

57 *See id.* at 322–24; *see also* LEONARD BAKER, BACK TO BACK, THE DUEL BETWEEN FDR AND THE SUPREME COURT 158 (1967); LAURA KALMAN, FDR'S GAMBIT: THE COURT PACKING FIGHT AND THE RISE OF LEGAL LIBERALISM 158–66 (2022); Richard D. Friedman, *Chief Justice Hughes' Letter on Court-Packing*, 1997 J. SUP. CT. HIST. 76, 79–83; WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 140–41 (1995); JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 394–401 (2010).

58 SIMON, *supra* note 54, at 330.

59 *Id.* at 341; *see also* SHESOL, *supra* note 57, at 400–01.

are other, more recent examples. When the Justices felt burdened by their caseload in the 1980s, their focus again turned to their mandatory jurisdiction—this time to how they could eliminate nearly all of its remaining elements.[60] Indeed, when the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice took up the matter, the Justices submitted letters, with Chief Justice Rehnquist writing that abolishing mandatory jurisdiction "has for many years been the primary legislative goal of the Court."[61] (The primary legislative goal!) News accounts reveal that the resulting bill from Congress "needed an unusual push" from the Chief Justice "to get the Reagan Administration's full support, according to sources at the Court and in Congress."[62] The particular push? The Chief Justice apparently "complained to Attorney General Edwin Meese 3d after a Justice Department official had urged Congress not to give the Court quite as much freedom as it sought in choosing which appeals to decide."[63] The Justice Department then changed its position and backed the particular proposal favored by the Supreme Court—which went into law in 1988.[64] As Justice Kennedy later said at the House appropriations hearings in 1996, "We told the Congress, please take those cases away from us, and the Congress did."[65]

Judges and Justices further collaborated with Congress on matters of court reform in the intervening years by serving on various commissions dedicated to the subject. The caseload crisis that affected the Supreme Court by the time Chief Justice Taft assumed the role of Chief Justice hit the lower courts several decades later. A variety of committees and commissions were then created to study the problem. These commissions saw judges and members of Congress working closely together to examine the pressing problems of the day and exploring—and then sometimes recommending—substantial court reform.

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60 *See, e.g.*, Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1244 (2012).

61 Stuart Taylor Jr., *Supreme Court Is Expected to Gain Wide Freedom in Selecting Cases*, N.Y. TIMES, June 9, 1988, at A25 (quoting Letter from William Rehnquist, C.J., Sup. Ct., to Robert. W. Kastenmeier, Chairman, House Subcomm. on Cts., C.L. and & the Admin. of Just. (May 11, 1988), *in* 134 CONG. REC. 13511 (1988)).

62 *Id.*

63 *Id.*

64 *Id.*; Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662; Linda Greenhouse, *Case of the Shrinking Docket: Justices Spurn New Appeals*, N.Y. TIMES, Nov. 28, 1989, at A1 (noting that the Act arose "[a]t the Justices' urging").

65 Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 409 (quoting transcript based on *U.S. Supreme Court Appropriations*, C-SPAN, at 46:25 (Mar. 28, 1996), https://www.c-span.org/program/house-committee/us-supreme-court-appropriations/141096 (recording of hearing before the House Appropriations Subcommittee)).

Specifically, following calls for reform from Chief Justice Burger, the chief judges of the courts of appeals, and the Judicial Conference of the United States (among others),[66] Congress created the Commission on Revision of the Federal Court Appellate System to study the federal courts of appeals in 1972.[67] Chaired by Senator Roman Hruska (and thus subsequently known as the Hruska Commission), the Commission was deliberately "cross-branch" in membership, with appointees by the President of the Senate, the Speaker of the House of Representatives, the President, and the Chief Justice of the United States.[68] (There were three judge members in all.[69]) The Commission ultimately made several recommendations, including the splitting of the (then) two biggest courts of appeals—those for the Fifth and the Ninth Circuits.[70] It also recommended that Congress establish a national court of appeals, to be composed of seven judges, to help resolve circuit splits and generally reduce the burden on the courts of appeals and the Supreme Court.[71] In another move that may seem surprising today, the final report of the Commission also collected "The Views of the Justices of the United States Supreme Court."[72]

And the Justices were not shy in sharing those views. Chief Justice Burger noted that while the Commission was tasked with focusing on the courts of appeals, he was not so constrained and felt duty bound to assess the federal courts as a whole.[73] After commenting upon the proposed split of the aforementioned circuits (he was in favor), he stated that "if no significant changes are made in federal jurisdiction, including that of the Supreme Court, the creation of an intermediate appellate court in some form will be imperative" and hoped that the

66 Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform*, 108 CALIF. L. REV. 789, 815 (2020). These calls were on the heels of the publication of a not-so-well-received report by a committee of scholars and lawyers to study the Court's workload—the Study Group on the Caseload of the Supreme Court (also known as the Freund Committee after its chair, Professor Paul Freund of Harvard Law School). *See* Thomas E. Baker, *A Generation Spent Studying the United States Courts of Appeals: A Chronology*, 34 U.C. DAVIS. L. REV. 395, 399-400 (2000).

67 *See* Act of Oct. 13, 1972, Pub L. No. 92-489, § 1, 86 Stat. 807, 807 (1972) (codified as amended at 28 U.S.C. § 41 (2018)).

68 Menell & Vacca, *supra* note 66, at 815–16, 816 n.168 (2020) (citing 1 COMM'N ON REVISION OF THE FED. CT. APP. SYS., HEARINGS: SECOND PHASE 1974–1975, at iii (1974)).

69 *See* COMM'N ON REVISION OF THE FED. CT. APP. SYS., THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE, at i (1973).

70 *See id.* at 4.

71 *See* COMM'N ON REVISION OF THE FED. COURT APP. SYS., STRUCTURAL AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, at v–viii (1975).

72 *Id.* app. D at A-221, A-221 to 44.

73 *Id.* app. D at A-222.

Commission's study would "stimulate Congressional action."[74] Congress eventually did act by splitting the Fifth Circuit in two—the present Fifth Circuit and the Eleventh Circuit.[75] (The Ninth Circuit would stay as is, and the national court of appeals would not come to pass.)

Other commissions followed. The Federal Courts Study Committee was established in 1988 under the Judicial Improvements and Access to Justice Act to examine problems facing the federal courts.[76] The fifteen-member Committee, appointed primarily by the Chief Justice, was composed of several judges alongside members of Congress and prominent lawyers.[77] That Committee's final report contemplated numerous reforms but retreated from the more significant ones, noting "[w]e take no position on whether the Ninth Circuit should be split"[78] and forgoing any "radical" proposals such as creating another court in the judicial hierarchy.[79] The Commission on Structural Alternatives for the Federal Courts of Appeals—established by Congress in 1997[80] as a compromise after a circuit-splitting bill failed[81]—was similarly modest in its recommendations. That Commission, created to study the existing configuration of the courts of appeals with a particular focus on the Ninth Circuit, was chaired by then-retired Justice White and was composed of the President of the American Bar Association and three federal judges (all appointed by Chief Justice Rehnquist).[82] It concluded that splitting the Ninth Circuit would be "impractical" and "unnecessary," though the courts of appeals would benefit from having regional divisions.[83]

Judges have also frequently testified before Congress, including on the topic of court reform.[84] For example, in 2005, the Senate Judiciary Committee held a hearing on "Revisiting Proposals to Split the

74 *Id.* app. D at A-228 to 29, A-227 to 29.

75 *See* Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (codified as amended at 28 U.S.C. § 41 (2018)).

76 *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 102, 102 Stat. 4642, 4644 (1988).

77 FED. CTS. STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 31, app. B at 193–98 (1990).

78 *Id.* at 123.

79 *Id.* at 10, 12.

80 Act of Nov. 26, 1997, Pub. L. No. 105-119, § 305(a), 111 Stat. 2440, 2491.

81 *See* Carl Tobias, *An Analysis of Federal Appellate Court Study Commissions*, 74 DENV. U.L. REV. 65, 65 (1996).

82 *See* COMM'N ON STRUCTURAL ALTS. FOR THE FED. CTS. OF APPEALS, FINAL REPORT, at ix, 1, app. B at 92 (1998).

83 *Id.* at iii.

84 *See generally* BARRY J. MCMILLION & JENNIFER E. MANNING, CONG. RSCH. SERV., IN12155, APPEARANCES BY SITTING U.S. SUPREME COURT JUSTICES AT CONGRESSIONAL COMMITTEE AND SUBCOMMITTEE HEARINGS (1960–2022) (2023).

Ninth Circuit: An Inevitable Solution to a Growing Problem."[85] The Committee heard from several judges of the Ninth Circuit Court of Appeals. In their written testimony, the judges did not hold back their views. Judge O'Scannlain, for example, stated that "I remain steadfast in my belief that it is inevitable that Congress must restructure the Ninth Circuit."[86] His colleague Judge Sidney Thomas, by contrast, "oppose[d] restructuring the present Ninth Circuit to create two or more circuit courts. Division of the Ninth Circuit at this time would have a devastating effect on our Court."[87]

Judges have offered similar testimony over the years on a different solution to workload concerns and docket pressure—expanding the size of the bench. In the early days of the Biden administration, for example, the House Judiciary Committee held a hearing on creating new judgeships.[88] Several of the witnesses were judges in districts that were in particular need. One was the Chief Judge of the Eastern District of California, whose written statement began by noting that "for 20-years-plus we have been in a judicial emergency" and "[w]e cannot fulfill our obligations without congressional action creating new judgeships."[89] (The Senate eventually approved a bill to create over sixty new judgeships—a bill that the Speaker allowed the House to pass only after Donald Trump had won the election, and that President Biden later vetoed.[90])

But at times judges have used invitations to testify as an opportunity to push back on Congress's involvement in the matter. One example comes from the debate provoked by the appellate courts' increased use of unpublished opinions. As the lower courts faced growing dockets in the middle of the last century, the Judicial Conference provided in 1964 that going forward, only opinions of "general precedential value" needed to be formally published in the *Federal Reporter*.[91] This choice meant that the courts could dispose of their remaining cases via (often) shorter and less time-consuming opinions

85 *Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem: Hearing Before the Subcomm. on Admin. Oversight & the Cts. of the S. Comm. on the Judiciary*, 109th Cong. 1 (2005).

86 *Id.* at 90 (written testimony of Hon. Diarmuid F. O'Scannlain).

87 *Id.* at 168 (written testimony of Hon. Sidney R. Thomas).

88 *The Need for New Lower Court Judgeships, 30 Years in the Making: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 117th Cong. (2021).

89 *Id.* at 7 (statement of Hon. Kimberly J. Mueller).

90 *See* Anthony Adragna, *Biden Vetoes Bill That Would Have Created Dozens of New Federal Judge Slots*, POLITICO (Dec. 23, 2024, 10:27 PM EST), https://www.politico.com/news/2024/12/23/biden-vetoes-bill-federal-judge-slots-00195981 [https://perma.cc/MM7F-EM9H].

91 WARREN OLNEY III, ADMIN. OFF. OF THE U.S. CTS., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964).

that would be "unpublished" and therefore not citable as precedent in many circuits.[92] In the wake of this decision, critics suggested that unpublished opinions were leading to a decline in judicial accountability,[93] as well as undermining the country's common law tradition.[94] A subcommittee of the House Judiciary Committee held hearings on the topic in June 2002.[95]

The Chief Judge of the Ninth Circuit, Alex Kozinski, was one of two judges to testify (alongside then-Judge of the Third Circuit and Chair of the Advisory Committee on the Federal Rules of Appellate Procedure, Samuel Alito).[96] Chief Judge Kozinski emphasized the importance of unpublished opinions to the sound administration of the courts,[97] and then turned to question Congress's involvement:

> While I welcome this subcommittee's interest in the matter and the opportunity to address the issue, I do want to raise a red flag about the appropriateness and wisdom of congressional intervention. What lies at the heart of this controversy is the ability of appellate courts to perform one of their core functions, namely, overseeing the development of the law within their jurisdiction.[98]

These comments clearly made an impression, as Representative Howard Berman observed that "[i]t appears that the issue of unpublished judicial decisions is one that naturally lends itself to resolution by judges themselves."[99] And indeed, after the hearings were concluded, Congress seemed content to let the matter rest. (And in 2006, the Federal Rules of Appellate Procedure were formally amended to include a new rule, 32.1(a), which prohibited the courts from restricting the citation of unpublished opinions issued on or after January 1, 2007.[100])

Finally, in at least one instance a member of the judiciary has pushed back against Congress's involvement by refusing to testify at all—a different sort of communication with the political branches. As concerns grew in the spring of 2023 around some of the Justices' out-of-Court behavior and the Court's lack of an ethics code, the Senate Judiciary Committee sent a request to Chief Justice Roberts to testify at

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92 *See* William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORN. L. REV. 273, 279 n.15, 281–86 (1996).

93 *See id.* at 282–83.

94 *See* Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 759 (2003).

95 *See Unpublished Judicial Opinions: Hearing Before the Subcomm. on Cts., the Internet & Intell. Prop. of the H. Comm. on the Judiciary*, 107th Cong. 14 (2002).

96 *Id.* at 5, 9.

97 *Id.* at 10–15.

98 *Id.* at 15–16.

99 *Id.* at 3.

100 *See* FED. R. APP. P. 32.1(a).

a hearing on ethics rules and potential reforms to them.[101] In a letter back to Senator Richard Durbin, the Chair of the Senate Judiciary Committee, the Chief Justice, citing separation of powers concerns, "respectfully decline[d]" the invitation.[102]

B. Appeals to the Public

In addition to communicating with the political branches, members of the judiciary have also frequently shared their thoughts directly with the public in various media.

Justices have, for example, spoken out about docket-related concerns, particularly at key inflection points. In 1881, Justice Strong—who had left the Court only a year prior—published an article entitled *The Needs of the Supreme Court*.[103] Justice Strong advocated for ending circuit riding and reorganizing the federal judiciary.[104] A few years later, Chief Justice Waite spoke about the Court's workload, and backlog, in an address:

> [I]t cannot admit of a doubt that something should be done . . . . It is not for me to say what this relief shall be . . . . My present end will be accomplished if the attention of the public is called to the subject, and its importance urged in some appropriate way to Congress.[105]

Though he did not call explicitly for the creation of intermediate appellate courts, his words seem to suggest that course. What is clear was that he was using his address to the public to put pressure on Congress.

Perhaps no Justice was as vocal about court reform as Chief Justice Taft. As Post writes, "Taft began his program of mobilizing the bar almost immediately upon taking office" to back his court reform proposals.[106] This mobilization included speaking to the Chicago Bar Association to garner support for the creation of the Judicial Conference

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101 Letter from Richard J. Durbin, Chair, Senate Comm. on the Judiciary, to John G. Roberts, Jr., C.J., Sup. Ct. (Apr. 20, 2023), https://www.judiciary.senate.gov/imo/media/doc/chair_durbin_invitation_to_chief_justice_roberts_to_testify_before_sjc.pdf [https://perma.cc/RRM8-8Q3F].

102 Letter from John G. Roberts, Jr., C.J., Sup. Ct., to Richard J. Durbin, Chair, Senate Comm. on the Judiciary 1 (Apr. 25, 2023), https://www.govinfo.gov/app/details/GOVPUB-JU6-PURL-gpo212369 [https://perma.cc/K2H3-4ZSH].

103 *See* Glick, *supra* note 16, at 1818 & n.471 (citing William Strong, *The Needs of the Supreme Court*, 132 N. AM. REV. 437 (1881)).

104 *Id.* at 1818.

105 *See id.* at 1821–22 (second omission in original) (quoting Note, *Docket of the Supreme Court of the United States*, 22 AM. L. REV. 292, 292 (1888) (reprinting an address by Chief Justice Waite)).

106 *See* POST, *supra* note 4, at 504.

and the (eventual) Judges' Bill.[107] Notably, Chief Justice Taft was seen as so vocal an advocate that some began questioning his tactics as Chief Justice. Indeed, as Post notes, the Washington correspondent of the *United News* asked Chief Justice Taft by letter "whether the old custom of justices of the supreme court not entering into discussions . . . has been abandoned and, if so, what if any procedure was employed in effecting the change."[108]

There was even pushback from members of the political branches. Senator William Harris of Georgia stated that "the judiciary is going to be injured, and the people will not have the same high respect for it if the Chief Justice and associate justices of the Supreme Court of the United States make speeches in public not in their line of duty."[109] But Chief Justice Taft made his opposition clear. In yet another address—this time to the New York County Bar Association—he declared:

> I venture to think that there are some things that a judge may speak of and may discuss in public and not use a judicial opinion for the purpose. The subject is that of law reform. From the earliest traditions of the English bench from which we get our customs, the judges of the highest courts of Great Britain have taken an interest in and a part in the formulation of legislation for bettering the administration of justice.[110]

Not only did Chief Justice Taft communicate directly to the public (particularly the bar) about his various court reform ideas, but he further communicated to them about the propriety of communicating to them—and defended his line.

Though not all of Chief Justice Taft's successors in the role of Chief Justice were vocal about court reform, Chief Justice Burger in the run-up to the 1988 bill certainly used the bully pulpit. As noted earlier, he strongly advocated for some kind of change to federal jurisdiction and even signaled an openness to the creation of a national

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107 *Id.* at 504–05.

108 *Id.* at 505 (omission in original) (quoting Letter from Robert J. Bender, Washington Correspondent, United News, to William Howard Taft, C.J., Sup. Ct. (Jan. 4, 1922) (on file with the Library of Congress, the William H. Taft Papers: Series 3: General Correspondence and Related Material, 1877–1941; 1921 Dec. 10 H-Z-1922 Jan.5, images 1110)).

109 *Id.* (quoting 62 CONG. REC. 2583 (Feb. 15, 1922) (statement of Sen. William Harris)). This was not Senator Harris's first time criticizing a Justice for speaking out. Around the same time, he spoke out against Justice Clarke's speech advocating the cancellation of foreign war debt—"I do not think it is the part of wisdom for a Supreme Court Justice to publicly discuss matters to be decided by Congress." *Id.* at 508 n.29 (quoting 62 CONG. REC. 2525 (Feb. 14, 1922) (statement of Sen. William Harris)).

110 *Id.* at 505 (quoting William Howard Taft, C.J., Sup. Ct., Address to the New York County Bar Association 2 (Feb. 18, 1922) (on file with the Library of Congress, the William H. Taft Papers: Series 9: Speeches, Articles, and Messages. 1850–1929; Subseries 9C: 1874–1929; 1921 Dec. 27–1929 Sept. and Undated A-AM, images 286–94)).

court of appeals in his letter to the Hruska Commission.[111] But he took to other outlets to share these views. In the Chief Justice's Year-End Report on the Judiciary covering 1984, Chief Justice Burger called for abolishing the Supreme Court's mandatory appellate jurisdiction and advanced the idea of a temporary Intercircuit Tribunal to sit just below the Supreme Court—with a five-year life to start that Congress could then extend.[112] The Chief Justice did not stop there. In an interview with the *American Bar Association Journal* at the same time, Chief Justice Burger proposed creating a tenth Justice of the Court (whom he would appoint) to help manage the courts and ease the administrative burdens of his office.[113] (As we know, the proposal to reduce the Court's mandatory jurisdiction was ultimately successful; the proposals to create a national court of appeals and a tenth Justice were not.)

In addition to speaking out about the particular challenges facing the Supreme Court, Justices and judges have also spoken about related challenges in the lower federal courts and detailed various solutions to help. In 1872, Justice Miller published an article called *Judicial Reforms*, in which he stressed caseload pressures in the courts.[114] He then laid out various proposals for reform, including increasing the amount in controversy requirement for federal suits and limiting appeals in admiralty cases.[115] As Joshua Glick writes, "[t]hree years later, two of Miller's points would be taken up by Congress in an effort to lighten the Court's work load"—the Act of February 16, 1875 increased the

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111 *See supra* notes 66–75 and accompanying text. It is worth noting that at least one other Justice—Justice Brennan—had publicly weighed in on the debate over creating a national court of appeals. As he put it in a law review article:

> Several years ago I came to appreciate the wisdom of some of my distinguished predecessors who believed that a Justice of the Supreme Court should speak only through his published opinions. . . . Moreover, those of my predecessors who declined to make speeches nevertheless believed, as I do, that a Justice should make known his views on proposals that would fundamentally alter the functions and procedures of the Court.

William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 473 (1973). As to the proposal in question, Justice Brennan stated that it "seems to me fundamentally unnecessary and ill-advised, and I strongly hope that Congress will reject it." *Id.* at 474.

112 Linda Greenhouse, *Burger Urges Congress to Help Cut Court Load*, N.Y. TIMES, Dec. 31, 1984 (§ 1), at 7. It is worth noting that the Year-End Report is itself a form of lobbying as it provides the Chief Justice an opportunity to share publicly (and to Congress) the problems faced by the judiciary. Indeed, Chief Justice Roberts noted in the 2009 Year-End Report on the Federal Judiciary that Chief Justice Burger started the tradition of the report in 1970 "to discuss the problems that federal courts face in administering justice." JOHN G. ROBERTS, JR., 2009 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1 (2009).

113 Opinion, *A 10th Justice*, N.Y. TIMES, Jan. 5, 1985 (§ 1), at 20.

114 *See* Glick, *supra* note 16, at 1820 n.480 (citing Samuel Miller, *Judicial Reforms*, 2 U.S. JURIST 1 (1872)).

115 *Id.*

amount in controversy requirement from $2,000 to $5,000 and limited appeals in admiralty cases.[116]

As the caseload of the lower courts grew precipitously in the second half of the last century, more judges weighed in with suggestions for limiting their jurisdiction. In his article pointedly titled *Averting the Flood by Lessening the Flow*, Judge Friendly made numerous proposals for cutting down on the cases coming into federal court.[117] Specifically, Judge Friendly called for (among other things), the "[e]limination of diversity of citizenship jurisdiction,"[118] "[a] harder look at the ever increasing use of the federal criminal process,"[119] "[r]eversal of the recent legislative trend whereby the executive branch can seek immediate enforcement of regulatory statutes by the courts without prior executive or administrative fact-finding,"[120] limits on collateral attacks on judgments of conviction, and the transfer of jurisdiction over patent cases from ordinary federal courts to a new Patent Court.[121] Judge Friendly summed up his call as one "not [for] complex institutional change but legislation that will concentrate all levels of the federal judiciary on their proper tasks."[122]

Judge Friendly's Second Circuit colleague, Judge Newman, agreed that the high volume of federal court cases necessitated "new approaches to structuring federal jurisdiction."[123] His approach fifteen years later was to create "discretionary access to federal courts" by granting federal judges the power to choose whether to hear cases within predetermined categories (such as diversity cases brought by in-state plaintiffs).[124] Around this same time, Judge Posner wrote of the "challenges" facing the federal courts and potential reforms, including limiting or abolishing diversity jurisdiction.[125] Within a few years, Chief Justice Rehnquist made a similar call in a speech, later published as a law review article.[126] Chief Justice Rehnquist did not mince words: "Simply put, time and again the nation has looked to the federal courts

116 *Id.*; Act of Feb. 16, 1875, ch. 77, 18 Stat. 315.

117 *See* Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORN. L. REV. 634, 640–46 (1974).

118 *Id.* at 640.

119 *Id.* at 641.

120 *Id.* at 642.

121 *Id.* at 643.

122 *Id.* at 657.

123 *See* Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 761 (1989).

124 *Id.* at 772, 771–73.

125 *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 221, 210–21 (1985).

126 William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1.

to handle a larger and larger proportion of society's problems. . . . [A]s a result of people looking to the federal courts those courts have become overburdened and the system has become clogged."[127] Seemingly addressing Congress, Chief Justice Rehnquist then spoke of diversity jurisdiction and how it is "important to consider legislative changes which create a more rational allocation of judicial business."[128]

More recently, Justices have spoken out about possible ethics reforms in interviews and at events including circuit conferences. As noted earlier, Justice Alito, in an interview published in the *Wall Street Journal*, questioned Congress's power to enact ethics legislation concerning the Court: "I know this is a controversial view, but I'm willing to say it. . . . No provision in the Constitution gives [Congress] the authority to regulate the Supreme Court—period."[129] Justice Kagan seemingly responded the following month at the Ninth Circuit Judicial Conference, saying "[i]t just can't be that the Court is the only institution that somehow is not subject to any checks and balances from anybody else. I mean, we're not imperial."[130] Justice Kagan declined to say more, noting that the Court might eventually hear a case concerning Congress's powers in this realm.[131] One year later, and back at the Ninth Circuit Judicial Conference, she made her own suggestion for ethics reform at the Court. She suggested that the Chief Justice could appoint a committee of "highly respected judges with a great deal of experience with a reputation for fairness" to enforce ethical rules for the Justices.[132]

In short, there is a longstanding tradition of judges and Justices speaking out to the public about various concerns, and reforms,

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127 *Id.* at 3.

128 *Id.* at 8. Other members of the judiciary during this time publicly advocated for other approaches to solving the rising caseload. *See, e.g.*, Stephen Reinhardt, *A Plea to Save the Federal Courts: Too Few Judges, Too Many Cases*, 79 A.B.A. J. 52, 53 (1993) (providing a proposal to double the size of the federal appellate bench).

129 Rivkin & Taranto, *supra* note 6.

130 United States Court of Appeals for the Ninth Circuit, *Conversation with the Justice*, YOUTUBE, at 34:46 (Aug. 3, 2023), https://youtu.be/jkj7ZhmTEZE?si=JC9yIbqHCfEXqVyp; *see also* Josh Gerstein, *Kagan Enters Fray over Congress' Power to Police Supreme Court*, POLITICO (Aug. 3, 2023, 6:22 PM EDT), https://www.politico.com/news/2023/08/03/kagan-enters-fray-over-congress-power-to-police-supreme-court-00109770 [https://perma.cc/6DZU-NJML].

131 *Conversation with the Justice*, *supra* note 130, at 36:12; Gerstein, *supra* note 130.

132 *Justice Elena Kagan Speaks at U.S. Court of Appeals Ninth Circuit Conference*, C-SPAN, at 48:21 (July 25, 2024), https://www.c-span.org/program/public-affairs-event/justice-elena-kagan-speaks-at-us-court-of-appeals-ninth-circuit-conference/645164; *see also* Russell Wheeler, *Fleshing Out Justice Kagan's Modest Idea for Supreme Court Ethics Enforcement*, BROOKINGS (Aug. 21, 2024), https://www.brookings.edu/articles/fleshing-out-justice-kagans-modest-idea-for-supreme-court-ethics-enforcement/ [https://perma.cc/LKJ3-WRND].

related to the judiciary—even if the propriety of such speaking out has been questioned at times. These observations and proposals have found their way into addresses, interviews, books, and even law review articles. And while the audience was the public in general (or the bar in particular), one would be hard-pressed to say that Congress was not an intended audience as well. Such moves can, at least in some instances, be understood as a way to draw Congress's attention to a problem and encourage (or discourage) legislative action.

C. Internal Reforms

Rather than working with Congress or speaking to the public, sometimes judges have simply implemented reforms on their own initiative. Returning to the earlier days of the Court, as the docket grew and Congress was doing little about it, the Court "had to resort to self-help."[133] Without many tools in its toolkit at the time, in 1849, the Court created a rule that limited oral arguments to two hours per side.[134] (Prior to that point, there was no time limit.[135]) Felix Frankfurter and James Landis noted that this rule "did something, but not much."[136]

Judges have long undertaken reforms of this sort—changing various court rules and practices to respond to problems (problems that, again, Congress was often not resolving or not resolving completely). As noted earlier, when the lower courts were facing a caseload crisis of their own in the middle of the last century, the Judicial Conference in 1964 supported a new way of disposing cases by advising that only opinions of "general precedential value" need to be formally published in the *Federal Reporter*.[137] This meant that cases that did not warrant such opinions could be decided by more succinct (unpublished) orders—a reform that has transformed the way in which cases are disposed today.[138]

The courts of appeals implemented a similar change with respect to oral argument—again, in an effort to save time as filings were climbing, and Congress was not providing relief.[139] Beginning in 1968, the United States Court of Appeals for the Fifth Circuit, later followed by

133 Glick, *supra* note 16, at 1810.

134 *See id.*

135 *Id.*

136 *Id.* (quoting FRANKFURTER & LANDIS, *supra* note 31, at 52).

137 OLNEY, *supra* note 91, at 11.

138 Marin K. Levy, *Judging Justice on Appeal*, 123 YALE L.J. 2386, 2395–96 (2014) (reviewing WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS (2012)).

139 *See* Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 322–23 (2011).

others, began to limit the number of cases that would receive argument time.[140] The Advisory Committee on the Federal Rules of Appellate Procedure sanctioned this move with a 1979 amendment to Federal Rule of Appellate Procedure 34, which authorized resolving an appeal without oral argument when a three-judge panel unanimously determined that the appeal was "frivolous," the dispositive issue had already been "authoritatively decided," or the decision-making process "would not be significantly aided by oral argument."[141] The combined significance of these reforms has led some scholars to argue the courts of appeals have effectively bestowed upon themselves certiorari-like discretionary jurisdiction.[142]

Courts have adopted internal reforms for reasons other than caseload pressures. After public pressure on the Supreme Court following a series of ethics scandals, the Justices promulgated a "Code of Conduct" in order to "set out succinctly and gather in one place the ethics rules and principles that guide the conduct of the Members of the Court."[143] Perhaps seeking to short-circuit the risk that Congress might impose rules on the Court, the Justices acted on their own initiative.[144]

That said, disagreement among judges can also thwart possible reforms. As discussed, reforms can originate with an individual judge, an individual court, a rules committee, or the Judicial Conference. Recently—and responding to more public pressure—the Judicial Conference announced guidance to curb case-assignment practices of district courts that were especially prone to judge-shopping.[145] But not every court was willing to follow the guidance.[146] Such dissent has hobbled

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140 JOE S. CECIL & DONNA STIENSTRA, FED. JUD. CTR., DECIDING CASES WITHOUT ARGUMENT: A DESCRIPTION OF PROCEDURES IN THE COURTS OF APPEALS 2 (1985).

141 FED. R. APP. P. 34.

142 *See, e.g.*, Richman & Reynolds, *supra* note 92.

143 SUP. CT. OF THE U.S., STATEMENT OF THE COURT REGARDING THE CODE OF CONDUCT 1 (2023).

144 *See* Epps & Sitaraman, *supra* note 10, at 409 (arguing that the Court "voluntarily adopt[ing] ethics rules . . . might undercut efforts in Congress to impose an ethics code on the Justices").

145 *See Conference Acts to Promote Random Case Assignment*, U.S. CTS. (Mar. 12, 2024), https://www.uscourts.gov/news/2024/03/12/conference-acts-promote-random-case-assignment [https://perma.cc/43XS-MCDS]; JUD. CONF. COMM. ON CT. ADMIN. & CASE MGMT., GUIDANCE FOR CIVIL CASE ASSIGNMENT IN DISTRICT COURTS (2024); *see also* Mattathias Schwartz, *New Federal Judiciary Rule Will Limit "Forum Shopping" by Plaintiffs*, N.Y. TIMES (Mar. 12, 2024), https://www.nytimes.com/2024/03/12/us/judge-selection-forum-shopping.html [https://perma.cc/7ZEE-TJPZ]; Nate Raymond, *US Federal Judiciary Moves to Curtail "Judge Shopping" Tactic*, REUTERS (Mar. 12, 2024, 7:05 PM EDT), https://www.reuters.com/world/us/us-federal-judiciary-adopts-policy-curtail-judge-shopping-2024-03-12/ [https://perma.cc/4SZT-TV7Y].

146 Letter from David C. Godbey, C.J., Dist. Ct. for the N. Dist. of Tex., to Charles E. Schumer, Majority Leader, Senate (Mar. 29, 2024), https://www.govinfo.gov/app/details

efforts to promote random case assignment across the federal courts (and means almost certainly that if this reform is to be brought about, Congress will have to act). In short, though the judiciary has been known to implement its own court reforms when it deems necessary, the judiciary, like Congress,[147] is a "they" and different members of the judiciary may disagree as to when reform is appropriate.

* * *

This Part has illustrated how judges have long weighed in on court reform proposals on matters ranging from transforming dockets to expanding courts—and shown how the Chief Justice's role with respect to the Judges' Bill is part of that larger story. We have not covered every episode—there are yet more in which judges played a role, including with respect to multidistrict ligation[148] and bankruptcy courts.[149] But these examples suffice to show that the federal judiciary has been anything but passive. The next Part takes up what lessons we can draw from this story.

II. ASSESSING INSIDE-OUT JUDICIAL REFORM

Having offered a descriptive account, we now turn to our normative evaluation. We first draw some overarching lessons from the examples we recount. Then, we try to theorize the benefits and risks of judicial participation in reform. Third, we offer some tentative recommendations about how to channel inside-out judicial reform to maximize its benefits and minimize its costs.

A. Lessons from History

What lessons can be drawn from the examples recounted in Part I? Given that our descriptive account is not fully comprehensive, our takeaways are tentative. Nonetheless, some observations stand out.

The most important is how surprisingly common judicial reform from the inside out has been throughout American history—and particularly, how much judges (and Supreme Court justices in particular) have directly engaged with the political branches. In this light, Chief

/GOVPUB-Y1_3-PURL-gpo230056 [https://perma.cc/G86F-7Z9H] (stating that 28 U.S.C. § 137(a) (2018) provides considerable latitude to individual courts to determine their own case assignment practices and that his own court declined to change its practices at this time).

147 *See* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

148 *See, e.g.*, Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831 (2017).

149 *See, e.g.*, Menell & Vacca, *supra* note 66, at 824–25.

Justice Taft's "unprecedented efforts" on behalf of the Judges' Bill[150] are not quite as unprecedented as they seem. Justices have lobbied senators, representatives, Presidents, and Attorneys General.[151] They have testified before Congress.[152] They have made appeals to the public in speeches, interviews, and articles.[153] It overstates things to say that "[v]irtually all major legislation affecting the [Supreme] Court's jurisdiction was drafted by justices and was the result of their lobbying"[154]—but perhaps not by much.

Indeed, a longer view suggests that what is unusual may be how *little* collaboration there has been between the Court and the political branches in recent years. Chief Justices Burger and Rehnquist—the immediate past holders of that office—were both, as documented above, deeply involved in efforts to persuade Congress to enact, and the executive branch to support, changes to the jurisdiction of the Supreme Court and other reforms to the federal judiciary.[155] In that period, the judiciary's political engagement appeared to be on the rise; as one scholar noted in 1996, "[o]ver the course of the past twenty-five years . . . the judiciary's participation in statutory reform [of the courts] has increased dramatically."[156]

That trend seems to have reversed course, at least with respect to the Supreme Court. Unlike the Rehnquist and Burger Courts, the Roberts Court appears less engaged in seeking legislative reforms. The most notable recent interactions the Justices have had with Congress have been at least uncooperative: Justice Alito's assertion that Congress lacks power to regulate the Court,[157] and Chief Justice Roberts's refusal to appear before the Senate Judiciary Committee.[158]

If this observation is correct, what might have changed? For one, our conception of the judicial role has evolved since the Republic's first days. At earlier points, the walls between the judiciary and the political branches were much more permeable. For much of American history, Supreme Court Justices angled for the Presidency while others served as confidantes and advisors to Presidents while on the bench.[159]

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150 Hartnett, *supra* note 3, at 1648.

151 *See supra* notes 21–41 and accompanying text.

152 *See supra* notes 84–100 and accompanying text.

153 *See supra* Section I.B.

154 DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 99 (10th ed. 2014).

155 *See supra* notes 61–83, 126–28 and accompanying text.

156 Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1169 (1996).

157 *See* Rivkin & Taranto, *supra* note 6.

158 *See supra* notes 101–02 and accompanying text.

159 *See* M. Margaret McKeown, *Politics and Judicial Ethics: A Historical Perspective*, 131 YALE L.J. F. 190, 200–01 (2021); *see also* Cheney v. U.S. Dist. Ct., 541 U.S. 913, 916 (2004)

(And of course, to return once more to Chief Justice Taft, one actually *was* President before joining the Court.) Many others joined the Court after federal or state legislative service.[160] But since Justice O'Connor left the Court, none of the serving Justices has held elected office.[161] It is also exceedingly rare for former legislators to become judges on the lower federal courts.[162] A related consequence of this development is that judges and Justices may be somewhat less likely to have close friendships and working relationships with officials in Congress.

Second, our politics have changed as well. Our political culture is much more polarized. So are courts and judges themselves.[163] Any reform to the courts, and to the Supreme Court in particular, is likely to be perceived with a political valence. And indeed, a rare bipartisan bill to expand the lower federal courts was vetoed by President Biden to deny President Trump the chance to appoint new judges.[164]

Other explanations surely play a role. Perhaps the Supreme Court simply wants less from Congress by way of affirmative legislation. The Court's mandatory appellate jurisdiction has been all but eliminated, it now has nearly total discretion over its docket, and the Justices have not had to ride circuit for more than a century. Moreover, some political engagement that might have once been done by judges and Justices directly has been channeled through the bureaucracy of the Judicial Conference of the United States.[165] And finally, to the extent the

(Scalia, J.) ("Many Justices have reached this Court precisely because they were friends of the incumbent President or other senior officials—and from the earliest days down to modern times Justices have had close personal relationships with the President and other officers of the Executive.").

160 *See* Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 FLA. L. REV. 1137, 1155 (2012).

161 *See id.* at 1155 n.65 ("The trend away from elected office as an experience for Supreme Court Justices has been marked since the Burger Courts, but has accelerated recently," *id.* at 1155).

162 Recently, a former U.S. Representative was confirmed to the federal bench—"the first former member of Congress to join the federal bench in over two decades." Nate Raymond, *US Senate Confirms Former Democratic Congressman to Judgeship*, REUTERS (Dec. 5, 2024, 11:38 AM EST), https://www.reuters.com/legal/government/us-senate-confirms-former-democratic-congressman-judgeship-2024-12-04/ [https://perma.cc/SX52-FDCX].

163 *See generally* LAWRENCE BAUM & NEAL DEVINS, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT (2019).

164 *See* Adragna, *supra* note 90. To underscore the change, following the passage of the Evarts Act, "[o]ver the next hundred years, Congress authorized new judgeships both frequently and consistently, with nearly thirty such authorizations, spread out across every decade save one." *The Need for New Lower Court Judgeships, 30 Years in the Making: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 117th Cong. 75 (2021) (prepared statement of Prof. Marin K. Levy).

165 *See generally* PETER GRAHAM FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 301–39 (1973) (discussing the Judicial Conference's interactions with Congress).

Court is facing declining public support,[166] the Justices may feel like they have less political capital to spend pushing for reform.

Whatever the explanation, recognizing the pervasiveness of judicial participation in judicial reform throughout American history has some implications for the present. In navigating the parameters of their relationships with the political branches, the Court has relied on precedent. For example, Chief Justice Roberts defended his refusal to appear before the Senate Judiciary Committee by resting in part on precedent.[167] Without quarreling with that particular decision, the long history of judicial involvement in the legislative process suggests that, perhaps, the judiciary could today take a more active role in reform conversations than is currently assumed to be appropriate.

This is not the only lesson one could draw. Another is that, in many instances, judges and Justices urging or opposing reform appear to have had mixed motives. Abolishing circuit riding may have been in the country's best interests, in order to free up the Justices to focus on their more important duties. But one doubts the Justices would have pushed so hard to end the practice if they did not find it so personally onerous. This suggests the political branches should not merely defer to judges' views on the appropriateness of reform.

That is especially important given a related observation: The federal judiciary has been remarkably successful in its reform efforts, especially so at the Supreme Court level. While Congress has not invariably given the Justices everything they have asked for, the Court today—after the removal of most of the remaining categories of mandatory appellate jurisdiction in 1988[168]—enjoys even more "absolute and arbitrary discretion" than Chief Justice Taft himself was able to achieve.[169] Perhaps this is because the reforms sought by the Justices are all for the best. But perhaps it is because the political branches have found it expedient to appease the Justices.

This is also true on "defense." For example, thus far, the Court has avoided having a Code of Ethics imposed upon them by Congress. As another example, while over American history politicians have proposed jurisdiction-stripping efforts at many junctures, few have actually been enacted into law.[170]

166 *See, e.g.*, Noah Feldman, Opinion, *The Supreme Court Tanked Its Reputation. This Is the Way Back.*, BLOOMBERG (Oct. 2, 2024), https://www.bloomberg.com/graphics/2024-opinion-supreme-court-data-partisan-politics-lost-trust/ [https://perma.cc/AH4Y-A5VE].

167 *See* Letter from John G. Roberts, Jr. to Richard J. Durbin, *supra* note 102, at 1.

168 *See* Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662.

169 *See* Hartnett, *supra* note 3, at 1661 (quoting William H. Taft, *The Attacks on the Courts and Legal Procedure*, 5 KY. L.J. 3, 18 (1916)).

170 *See* Epps & Trammell, *supra* note 8, at 2097–102.

Results on the lower courts are more mixed. As mentioned above,[171] despite calls from the Judicial Conference to expand the courts for years,[172] only recently did Congress heed the call—only for the legislation to be vetoed by President Biden. Surely there are mixed stories here about the sorts of reforms being sought and the politics around appeasing or resisting the judiciary's requests.

B. Tradeoffs and Relevant Considerations

The examples of inside-out judicial reform recounted in Part I are varied and complex; it would be unwise to try to reach any kind of bottom line on the practice writ large. Instead, the value of judicial participation in reform will be highly contextual. Here, we try to identify some of the overarching costs and benefits as well as the considerations relevant to weighing them in any given instance.

Start with the relevant costs and benefits. Perhaps most significant is the inherent tension between expertise and self-interest. As Charles Geyh puts it:

> The judiciary . . . must be a part of the legislative and rulemaking processes because its day-to-day experience with court administration and procedure makes it a uniquely competent and qualified source of information indispensable to intelligent decisionmaking. When the judiciary participates in such processes, however, the information it imparts may be discounted or ignored because the judiciary's day-to-day experience with court administration and procedure makes it a self-interested, and therefore potentially unreliable, source.[173]

Indeed, one can point to many examples where judges' interventions were "not motivated by high-minded theoretical ideas about the ideal structure of a properly functioning court system" but rather "reflect[ed] concerns about specific factors that make judges' jobs more

171 *See supra* note 88–90 and accompanying text.

172 *See, e.g.*, *Judicial Conference Asks Congress to Create New Judgeships*, U.S. CTS. (Mar. 14, 2017), https://www.uscourts.gov/data-news/judiciary-news/2017/03/14/judicial-conference-asks-congress-create-new-judgeships [https://perma.cc/W2YC-MT3J]; *Judicial Conference Approves Package of Workplace Conduct Reforms*, U.S. CTS. (Mar. 12, 2019), https://www.uscourts.gov/data-news/judiciary-news/2019/03/12/judicial-conference-approves-package-workplace-conduct-reforms [https://perma.cc/Q44M-D943]; *Judiciary Seeks New Judgeships, Reaffirms Need for Enhanced Security*, U.S. CTS. (Mar. 16, 2021), https://www.uscourts.gov/data-news/judiciary-news/2021/03/16/judiciary-seeks-new-judgeships-reaffirms-need-enhanced-security [https://perma.cc/5FSJ-6SXQ]; *Federal Judiciary Seeks New Judgeship Positions*, U.S. CTS. (Mar. 14, 2023), https://www.uscourts.gov/data-news/judiciary-news/2023/03/14/federal-judiciary-seeks-new-judgeship-positions [https://perma.cc/82DW-RFXU].

173 Geyh, *supra* note 156, at 1170–71.

onerous or less satisfying in some way."[174] We have mentioned already the Justices' push to eliminate circuit riding. As another example, the Justices' successful drive to remove their mandatory appellate jurisdiction may have made for better judicial decisionmaking, but it also may have been driven by the Court's "natural bias in favor of reducing its caseload."[175] Another example is the Article III judiciary's efforts to dissuade Congress from expanding the independence of bankruptcy courts, which in Professor Eric Posner's account was motivated by life-tenured judges' fears that "they would lose their appointment power over bankruptcy judges" and "their status would be diluted through the vast increase in the number of federal judicial positions."[176]

The problem of potential self-interest is no reason to categorically exclude judges from reform conversations because it is undeniable that federal judges have critical expertise when it comes to questions about the structure of the judicial system. They see the cases that come before their courts every day; they know their own capacities, what tasks consume their time, and what reforms might improve efficiency. In their study of the breakup of the Fifth Circuit, Deborah Barrow and Thomas Walker argue that "federal judges clearly are in the best position to detect institutional problems that warrant attention."[177] And as Chief Justice Taft himself said in the face of criticism about the "active" role the Justices played regarding legislation, "[w]ith their attention constantly directed toward the workings of the machinery of the administration of justice, [judges] are at a more advantageous point of observation and . . . are better able to make recommendations with respect to law reform than any other class in the community."[178] These points may go too far because who is in the best position turns on what, precisely, the relevant institutional problem is. If it is excessive power wielded by the judiciary—which some proponents of Supreme Court reform emphasize[179]—federal judges are not in the best position to detect *that* problem. That said, there are surely many issues for which Barrow and Walker's claim holds true.

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174 Jeremy Buchman, *Judicial Lobbying and the Politics of Judicial Structure: An Examination of the Judiciary Act of 1925*, 24 JUST. SYS. J. 1, 4 (2003).

175 Mark Tushnet, *The Mandatory Jurisdiction of the Supreme Court—Some Recent Developments*, 46 U. CIN. L. REV. 347, 350 (1977); *see also, e.g.*, Owens & Simon, *supra* note 60, at 1244 (citing "anecdotal evidence . . . that the Justices themselves viewed the 1988 Act as a tool to decrease their workload").

176 Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 77 (1997).

177 DEBORAH J. BARROW & THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM 249 (1988).

178 POST, *supra* note 4, at 505 (quoting Taft, *supra* note 110, at 3).

179 *See, e.g.*, Doerfler & Moyn, *supra* note 8.

Moreover, excluding judges from the reform conversation entirely could bar the only group with sufficient motivation to pursue reform. Professor Adrian Vermeule describes this as the tradeoff "between information and motivation" in the context of veil-of-ignorance rules, which shield decisionmakers from information about the likely beneficiaries of their decisions.[180] As he explains, "[r]emoving the spur of self-interest threatens to reduce decisionmakers' activity below acceptable levels, to the point where constitutional designers might plausibly prefer to lift the veil and spur more activity, even if the price is that some fraction of that increased activity is self-regarding."[181] Likewise, here, some risk of self-aggrandizement may be the necessary price for ensuring input from those most motivated to pursue reform of the judicial system.

There are other potential costs to judicial participation in reform. One oft-voiced concern is that judges might tarnish their public image, and thus their legitimacy.[182] That risk seems real, and a recent example might be Justice Alito's intervention, discussed above, in the debate over Congress's power to impose ethics rules on the Justices.[183] When judges seem to be directly cooperating with, or combating, elected officials, such collaboration could cause the public to see them as "politicians in robes."[184] That said, judges may feel some obligation to respond to attacks from political actors—and their failure to respond could, under some circumstances, validate the criticism from their opponents.

A related concern is the risk—noted by Justice Kagan in the context of the ethics debate—that a judge might opine on a reform whose constitutionality might ultimately come before the court.[185] That risk seems quite plausible when it comes to congressionally imposed ethics rules—one premise of an ethics complaint filed against Justice Alito by

180 *See* Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 402 (2001).

181 *Id.*

182 *See, e.g.*, John W. Winkle, III, *Judges as Lobbyists: Habeas Corpus Reform in the 1940s*, 68 JUDICATURE 263, 265 (1985) (explaining lobbying for court reform is "contrary to the public image of [a] judge," and that such "perceptions may influence popular respect for, and confidence in, courts" (quoting WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 178 (1964)) (quote corrected)).

183 *See supra* note 129 and accompanying text.

184 *See, e.g.*, Bruce A. Green & Rebecca Roiphe, *Public Confidence, Judges, and Politics on and Off the Bench*, 87 LAW & CONTEMP. PROBS. 183, 185 (2024) (discussing the meaning of the charge that judges are "politicians in robes").

185 *See supra* note 131 and accompanying text; *see also* CODE OF CONDUCT FOR U.S. JUDGES Canon 3A(6) (JUD. CONF. OF THE U.S. 2019) ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

Senator Sheldon Whitehouse.[186] However, given the stakes and the significant challenges in passing major reforms to the Court,[187] it could be particularly useful to know the Justices' view of the constitutionality of a possible reform before significant political capital is spent enacting one.

For example, given many proposals to enlarge the Supreme Court and have the Court hear cases in panels, it is a relevant and useful data point that at least two Justices thought that course inconsistent with Article III's establishment of "one supreme Court."[188] True, one might say the same thing about any legislation that could face constitutional challenge—but one could conclude that the separation-of-powers considerations tilt more in favor of judicial prejudgment in the judicial reform context than elsewhere—particularly given the risk that the Supreme Court striking down a Court reform could provoke a constitutional crisis.[189]

Next, consider some variables that are relevant when trying to analyze any particular example of judicial participation in reform. The first is who the judicial *speaker* is: It could be an individual judge on his or her own behalf, as in the debate between different Ninth Circuit judges on the potential breakup of that court.[190] It could be a court as a whole—such as when the Supreme Court announced its code of conduct.[191] Or it could be the federal judiciary as a whole acting through the Judicial Conference of the United States, or a class of federal judges, such as when the National Council of U.S. Magistrates lobbied to increase the pay and perquisites for the position of magistrate.[192]

Another variable is the relevant *audience* of any particular judicial intervention: Congress as a whole? The executive? The bar? The public? Third, one must identify the *channel* of judicial activity. Is a court

186 *See* Letter from Sheldon Whitehouse, Chairman, Senate Judiciary Subcomm. on Fed. Cts., Oversight, Agency Action & Fed. Rts., to John G. Roberts, Jr., C.J., Sup. Ct. 2–4 (Sept. 4, 2023), https://www.whitehouse.senate.gov/wp-content/uploads/imo/media/doc/2023-09-04_complaint_from_senwhitehouseenclosure.pdf [https://perma.cc/BD35-3DSY].

187 *See generally* Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154 (2006).

188 U.S. CONST. art. III, § 1; *see* William J. Brennan, Jr., *State Court Decisions and the Supreme Court*, 31 PA. BAR ASS'N Q. 393, 405–06 (1960); Friedman, *supra* note 57, at 81 (describing how Chief Justice Hughes wrote that the Constiution "does not appear to authorize" dividing the Supreme Court into panels—a statement that *The New Republic* criticized as "an advisory opinion run riot" (citations omitted)).

189 That said, it is possible that some Justices might flag constitutional concerns in the hopes of smothering a reform under consideration, but they would actually uphold the law if Congress ignored the Justices' reservations—perhaps to avoid a constitutional crisis.

190 *See supra* notes 84–87 and accompanying text.

191 *See supra* notes 143–44 and accompanying text.

192 *See* SMITH, *supra* note 7, at 26–27.

making a formal statement published on its website or in an official reporter? Or is a judge offering formal testimony? Speaking off the cuff in a public gathering, writing an article, or sending a private letter? And the specifics may matter—if the judge is giving a speech, what is the venue? The Federalist Society or American Constitution Society National Convention? A law school? A meeting of the Supreme Court Historical Society? To return yet again to Justice Alito's comments, his intervention might have seemed more problematic because his venue was the archconservative opinion section of the *Wall Street Journal*[193] than if he had made a similar argument in a speech to a neutral audience or in, say, formal testimony before a Senate Committee. Likewise, Justice Gorsuch's warning that supporters of Court reform like President Biden should "be careful" might have been more persuasive were it not offered on Fox News.[194]

Another reason why channel and venue matter is that some modes of participation—such as public testimony—are highly transparent, and others, like backroom lobbying of individual senators or executive branch officials, are concealed from public view. Here, too, tradeoffs can cut both ways. Transparency is not an unalloyed good. Depending on the context, it can enable the public to police self-interested behavior by its agents, but it can also permit interest groups to mobilize to block welfare-improving government actions.[195]

A final consideration may be the posture of the judge or court. As history has shown, there are some instances in which the judges or Justices have pleaded that they are overworked and need assistance of some kind from Congress. And as much as they can resort to some methods of self-help, the most powerful tools—adding judgeships and adding circuits—are at Congress's disposal. Such public interventions may generate more sympathy than other sorts of public comment. (As part of this consideration, it may matter how much the speaker has attempted other channels. For example, it may be more appropriate for judges to speak out in interviews when they have already tried and failed to get Congress's attention in other ways.)

In short, judicial participation in reform debates can be neither praised nor condemned as a general matter. Rather, inside-out

193 *See* Rivkin & Taranto, *supra* note 6.

194 *See* Alexandra Marquez, *Justice Neil Gorsuch Warns Biden to 'Be Careful' with Supreme Court Reforms*, NBC NEWS (Aug. 4, 2024, 5:14 PM EDT), https://www.nbcnews.com/politics/supreme-court/justice-neil-gorsuch-warns-biden-careful-supreme-court-reforms-rcna165085 [https://perma.cc/HLW8-NCM8].

195 *See, e.g.*, Elizabeth Garrett & Adrian Vermeule, *Transparency in the U.S. Budget Process*, *in* FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY 68, 83–87 (Elizabeth Garrett, Elizabeth A. Graddy & Howell E. Jackson eds., 2008); Note, *Mechanisms of Secrecy*, 121 HARV. L. REV. 1556, 1565–66 (2008).

judicial reform presents both risks and benefits, and how the relative balance works out will be highly context-dependent.

C. Drawing Lines

Despite our view that it is impossible to reach a bottom-line normative judgment on judicial reform from the inside out as a general matter, here we try to offer a few broad normative prescriptions. Our conclusions are tentative, but we are comfortable offering a few generalizations.

The first is that any attempt to curtail judicial participation in reform debates with the political branches seems destined to fail. Judges have many channels through which to push for reform—some of which, such as privately lobbying individual officials in the political branches, are concealed from public view. Given that, and given the apparent stakes for the judiciary, the notion that judges can be completely excluded from the conversation seems fanciful—and undesirable given that judges obviously have expertise and information highly relevant to reform conversations, even considering the problem of potential self-interest.

Moreover, the judiciary will always retain tools to engage in "self-help" even if formally forbidden from lobbying for (or against) reform.[196] One clear example, as earlier discussed, is the way in which the judiciary responded to rising workloads by permitting cases to be decided by unpublished order and then by abandoning the default that all cases would receive oral argument.[197] That is, without the ability to add judgeships or to formally strip their own jurisdiction, the courts altered their way of adjudicating many cases (again, in the eyes of some, creating a quasi-discretionary docket).

Another example is *Beer v. United States*.[198] After Congress barred pay increases for federal judges that would have otherwise gone into effect under the Ethics Reform Act of 1989,[199] a group of federal judges sued for backpay in the Court of Federal Claims.[200] After the Federal Circuit rejected the challenge based on its own precedent,[201] the Supreme Court vacated and remanded the decision in a brief, cryptic

196 *See generally* David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2 (2014).

197 *See supra* notes 91–100 and accompanying text.

198 Beer v. United States, 361 F. App'x 150 (Fed. Cir. 2010), *vacated*, 564 U.S. 1050 (2011) (mem.), *remanded to* 696 F.3d 1174 (Fed. Cir. 2012) (en banc), *cert. denied*, 569 U.S. 947 (2013) (mem.).

199 Ethics Reform Act of 1989, Pub. L. No. 101-194, § 704, 103 Stat. 1716, 1769.

200 *Beer*, 361 F. App'x at 150.

201 *Id.* at 151–52.

order instructing the Federal Circuit to decide the question de novo.[202] The Federal Circuit got the hint and ruled in favor of the plaintiffs,[203] after which the Court denied certiorari,[204] after which the Executive Branch decided to not contest the issue further.[205] The net result? To a cynic's eyes, the Court may have manipulated the "shadow docket" to give themselves, and every other federal judge, a significant pay raise—without having to admit what they were doing.[206]

Beer shows that the judiciary has tools to fight back when Congress refuses to accept judges' demands for reform. The courts also can subvert reforms by Congress. One prominent example is the way in which the Supreme Court has found ways to preserve opportunities for review in the face of rare congressional attempts to strip its jurisdiction.[207] Given these possible responses, it seems preferable to give the judiciary an open outlet for its reform efforts rather than encouraging it to rely on more questionable tactics.

But this is not to say that the Court's efforts cannot be appropriately constrained to maximize its benefits and minimize its costs. Current ethics rules for federal judges do not directly address judicial participation in reform,[208] but one can imagine a set of more specific ethics rules or best practices governing such efforts. Here we offer a few possibilities.

One is that judges could be encouraged to limit their reform activities to certain venues. To the extent that judges want to participate in a reform conversation, the appropriate fora could include on-the-

202 *See Beer*, 564 U.S. at 1050 ("The Court considers it important that there be a decision on the question, rather than that an answer be deemed unnecessary in light of prior precedent on the merits.").

203 *See Beer*, 696 F.3d at 1177.

204 *Beer*, 569 U.S. 947.

205 *See* Letter from Eric H. Holder, Jr., Att'y Gen., Dep't of Just., to John Boehner, Speaker, House of Reps. 1 (Oct. 29, 2013), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/10-29-2013.pdf [https://perma.cc/N25Q-7MXD].

206 *See Judicial Compensation*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/about-federal-judges/judicial-compensation [https://perma.cc/38XS-BQUV] (last visited Feb. 24, 2025).

207 *See generally* Epps & Trammell, *supra* note 8.

208 In the CODE OF CONDUCT FOR UNITED STATES JUDGES, the only Canon that would seem to limit a judge's participation in judicial reform activities is Canon 5, which states that "[a] judge should not engage in any other political activity." CODE OF CONDUCT FOR U.S. JUDGES Canon 5C (JUD. CONF. OF THE U.S. 2019). However, Canon 4 explicitly states that "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 that "[t]o 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." *Id.* at Canon 4. Participation in judicial reform seems plausibly encompassed in the permitted activities in Canon 3. *See id.* at Canon 3.

record testimony or official statements. Interviews with media outlets—especially ones perceived as having partisan affiliations—seem more likely to contribute to perceptions of judges as political actors.

A related takeaway is that there is reason to be wary of judges having undisclosed back-channel communications with the political branches. Such communications can be risky because to some observers they will suggest a too-cozy relationship between a judge and politicians—and raise questions about what might have been discussed behind closed doors. For example, Justice Alito faced a minor uproar when it was revealed that he had a private phone call with President-elect Trump, ostensibly about one of the Justice's former clerk's qualifications for government service.[209]

The risks of such ex parte communications seem especially pronounced with reforms that raise the prospect of self-interested motivations by judges. Chief Justice Rehnquist's private lobbying of Attorney General Meese to support limiting the Court's mandatory appellate jurisdiction, for example, seems problematic. The Attorney General at any given time is representing the United States before the Court in dozens or hundreds of cases, and there is reason to worry that someone in Meese's position might be seen as going along with the Chief Justice's lobbying in order to curry favor with the Court in some of those cases. At the least, such exchanges should take place in the open so that the public has all the relevant information to evaluate motives underlying the Attorney General's (or another elected official's) support of a reform measure.[210]

Judges should make clear when they are speaking in their capacity as individual judges and when they are acting on behalf of their court as an institution. Supreme Court Justices seem to have been less than scrupulous in this regard in ways that might mask dissensus within the Court on the wisdom of particular reforms. Turning back to the Judges' Bill, Hartnett notes that Chief Justice Taft declined to have Justice Brandeis testify on the bill's behalf because Brandeis "had his doubts about the bill."[211] Ensuring that only committed supporters

209 *See* Alexander Bolton & Al Weaver, *Democrats Fume over Alito-Trump Call*, THE HILL (Jan. 10, 2025, 6:00 AM ET), https://thehill.com/homenews/senate/5077798-trump-justice-alito-call-democrats/ [https://perma.cc/D7V5-AEHS].

210 Even here, we are wary of reaching too firm a conclusion. Precisely because judges' and Justices' activities attract so much public attention and involve such high political stakes, transparency requirements would encourage partisan denunciation even in instances where the judge in question has valuable information to offer. Private communications—if they remain private—will not provoke outrage on MSNBC or Fox News (as the case may be).

211 Hartnett, *supra* note 3, at 1675. To be sure, Justice Brandeis could have voiced his concerns, but chose to let Chief Justice Taft speak for the Court in deference to Chief Justice Taft's role as Chief Justice and the views of his colleagues. *See id.* at 1684.

testified may have let Chief Justice Taft present an image of a Court unified in its support when the reality was more nuanced. Similarly, Chief Justice Hughes's letter to the Senate Judiciary Committee led the press to believe it spoke for all the Justices on the Court, when in reality some of Chief Justice Hughes's colleagues, who had not been consulted, were furious about the false impression they felt Chief Justice Hughes had created.[212]

One advisable course might be a norm that only statements published by a Court—such as the "Statement of the Court" published with the Supreme Court's Code of Conduct[213]—should be understood as representing the views of a court qua court. A corollary is that if the views of the Justices are formally solicited (as happened with the Hruska Commission[214]), the ask should be for their individual views.

Our final recommendation is process-based. As noted in Part I, there was a rich history in the second half of the last century of creating commissions to study the problems of the federal judiciary. Many were deliberately designed to bring together judges and lawmakers. Such commissions seem important—not only for providing regular opportunities to conduct "checkups" on the courts but also as a means of productively channeling the views of judges. Indeed, when the Justices were asked to provide their views on the findings of the Hruska Commission, Chief Justice Burger stood back to make the process point:

> The creation of the Commission manifests an attitude on the part of the Congress to try to anticipate problems by enlisting the skills and experience of a body of highly qualified lawyers and judges. I hope the Commission's final Report will suggest consideration of a continuing commission that would report directly to the Congress . . . so that examination of the problems of the courts could be on a comprehensive and continuous rather than a "single shot" basis.[215]

Chief Justice Burger's suggestion seems as apt today as it was fifty years ago.

CONCLUSION

What can understanding judicial reform from the inside out tell us about contemporary Supreme Court reform debates? We see a couple of significant implications. First, the long tradition of judicial involvement in judicial reform suggests that the Justices and the Court,

212 *See* SHESOL, *supra* note 57, at 398–99.

213 *See* SUP. CT. OF THE U.S., *supra* note 143, at 1.

214 *See supra* notes 66–72 and accompanying text.

215 *See* COMM'N ON REVISION OF THE FED. COURT APP. SYS., *supra* note 71, at app. D at A-222.

could, and perhaps even should, be bigger participants in the reform conversation than today is thought appropriate.

That might even extend to encouraging Justices to weigh in on specific reform measures, notwithstanding the risk that such a reform might come before the Court if ultimately enacted—a risk that normally requires judges to refrain from comment.[216] Regulated parties can weigh in on proposed legislation affecting their interests; it is arguable that the same should be true of courts, despite the normal rule that a judge should avoid commentary on an issue that might come before his or her court. A deviation from that rule could be particularly justified if early input from courts might head off a constitutional crisis before it starts.

Another implication of our analysis is that voluntary, internal reforms by courts deserve more attention. Judges have many tools at their disposal by which they can make significant changes to their own institutions. And using such tools can obviate the need for Congress to step in—often in ways that might serve a court's own interests. The Supreme Court's creation of its own Code of Conduct made Congress less likely to impose its own ethics rules, which might have been more restrictive than the Justices' relatively toothless Code.

We end by returning to Chief Justice Taft and the Judges' Bill. Though Chief Justice Taft's efforts are seen as sui generis, history produces numerous examples of judges' involvement in conceiving of and helping to push through (or, sometimes, pushing back on) judicial reform. And for good reason—it is the judges who feel acutely the needs of the courts and have the motivation to want to enact change. That is true even with the accompanying risk of judicial self-aggrandizement. Once one recognizes the larger phenomenon, the challenge becomes how best to maximize the benefits and limit the risks of judicial reform from the inside out—all, as Chief Justice Taft said, "for bettering the administration of justice."[217]

216 *See* CODE OF CONDUCT FOR U.S. JUDGES Canon 3A(6) (JUD. CONF. OF THE U.S. 2019) ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

217 POST, *supra* note 4, at 505 (quoting Taft, *supra* note 110, at 2).