

“IT’S CALLED LUNCH”: JUDICIAL ETHICS AND THE POLITICAL AND LEGAL SPACE FOR THE JUDICIARY TO “LOBBY”

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It has long been known that governments build partnerships with, and lobby, other governments for resources, for public policy changes, and to fight off encroachments on their power. The independence of U.S. courts is related to its perception of impartiality, fairness in decision-making, and isolation from politics. To some, this means that it is important that court officials remain above politics and resist urges to become entangled in political battles. As an independent branch of government, how do courts enter the political process, interact with other branches, and participate equally in the political process, if they must also remain impartial and appear “apolitical”?

Past research demonstrates that court officials may indeed behave conservatively in their political work out of fear of political entanglement. However, as with any governmental body, the need of resources, creation of policy beneficial to the branch, and to fight off attacks on independence necessitate active and powerful participation in our pluralist, competitive, federalist system of government. I also argue that what judges and court officials know about law and the justice system is imperative for our elected leaders to hear. The judicial voice is important to the creation of good public policy in so many areas of law like family, torts, criminal justice, and how businesses relate to consumers. When lawmakers pursue legal reforms, judicial officials can shed light on unintended positive and negative consequences.

Court personnel are said to face additional constraints on their ability to behave openly and politically in the political process. Some of these constraints are legal

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and ethical. Some constraints are formal and some are norms of behavior adopted and followed over time as customs. This paper explores past research on how courts lobby the other branches and what we can learn from doing more research on this particular topic. Past research demonstrates that courts lobby other branches informally and formally and that they sometimes do so in a sophisticated manner. Of specific attention here is what state codes of judicial conduct tell us about the ability of judges to engage the other branches and the public on political issues. After assessing state codes, I argue that there is significant political and legal “space” for judges to participate more actively in the political system on topics permitted in the codes like “law” and “judicial administration.” In the end, informal lobbying over “lunch” needs a shift of focus to building lobbying capacity and political institutions inside and outside of courts to do this work.

TABLE OF CONTENTS

| | |
|--|-----|
| INTRODUCTION | 385 |
| I. AN INTERGOVERNMENTAL RELATIONS CONUNDRUM | 388 |
| II. WHAT DO WE KNOW ABOUT HOW COURTS LOBBY? | 390 |
| A. Federal and State Courts Do Lobby and Work with the Other Branches ... | 391 |
| B. Efforts to Improve Interbranch Relations and Engagement | 392 |
| III. WHAT ARE THE POLITICAL, LEGAL, AND ETHICAL CONSTRAINTS ON COURT LOBBYING? | 394 |
| A. Political Norms Undermine Efforts at Political Engagement | 394 |
| B. Economic and Political Capacity Is Needed to Lobby Effectively | 395 |
| C. What Political Conduct or Engagement Do Law and Ethics Prevent? | 396 |
| IV. STATE JUDICIAL CONDUCT CODES AND THE ABILITY TO LOBBY | 398 |
| A. The Model Code of Judicial Conduct | 399 |
| B. Judicial Conduct Codes of the 50 States and the District of Columbia | 400 |
| 1. Communication with the Public | 400 |
| 2. Communication with Other Branches | 401 |
| 3. Communication in Civic, Political, Charitable, and Government-Related Activities | 402 |
| V. POLITICAL SPACE EXISTS FOR JUDICIAL OFFICIALS TO ENTER POLICY DISCUSSION | 403 |
| VI. THE POLITICAL “SPACE” TO LOBBY AND ITS BOUNDARIES | 405 |
| VII. THE IMPORTANCE OF LOBBYING AND THE JUDICIAL VOICE IN POLICYMAKING | 406 |
| CONCLUSION: REFORM EFFORTS AND WHAT IS NEXT | 407 |
| AN EPILOGUE: WWMS? | 410 |

INTRODUCTION

This Article culminates many years of research on how courts might effectively lobby the other branches. The title of this Article comes from a rather playful remark by a colleague of mine after my first presentation of these ideas at the 2009 Meetings of the Law and Society Association in Denver, Colorado. After my presentation, I spoke with Malcolm Feeley of the University of California, Berkeley and he started our conversation with “it’s called lunch, Roger.” By this, Malcolm meant that judicial leaders have always lobbied the other branches of government to get the things they need. They just do it rather informally, perhaps carefully, quietly, and without invoking the overtly political images conjured by the term “lobbying.”

The terms “lobbying” and “lobbyists” evoke images of slick, well-dressed, and high-paid “mouthpieces” for various political causes arguing for changes in law that only benefit their clients. Many people are unsettled by the highly political nature of lobbying. Common images include interest groups fighting for lawmakers’ attention using political action committees’ campaign donations, using networks of powerful friends to gain access to legal decision-makers, and trading favors for lawmakers’ consideration of issues. These unflattering portrayals of lobbying, however, miss the importance of the exchange of information that occurs during the process, the competition necessary to obtain resources, and the necessity of strongly advocating for important legal reforms designed to benefit society.¹

Lobbying is an important reality and necessity of our pluralist democracy. The Constitution’s framers constructed a federalist system that envisioned the competitive nature of interests.² They created a system that necessitated persuading multiple and divided sources of power to create legal change and obtain the resources needed to get things done.³ Because of this, one must *effectively* participate and communicate in the political process—*actively and openly*—in order to advance legislative reforms that might benefit an institution and its constituents. Communication, sometimes called “lobbying,” is needed to advance interests, and to educate and respond to lawmakers regarding the unintended positive and negative consequences of policies that impact an institution. Lobbying is also needed to head off attempts to rein in the power of institutions and respond to attacks on the legitimate sovereignty of an agency or branch. Much of the budgeting process is extremely political; there is a need to request resources, negotiate funding levels, and advocate for approval of funding.

The necessity of participation in the political process is rather obvious. Governments “lobby” other governments.⁴ Evidence suggests that, in the policy process, government lobbyists are perceived as similar to private political interests

1. See generally INTEREST GROUP POLITICS (Allan J. Cigler & Burdett A. Loomis eds., 8th ed. 2011).
2. THE FEDERALIST No. 10 (James Madison).
3. THE FEDERALIST No. 51 (James Madison).
4. INTERGOVERNMENTAL RELATIONS IN THE 1980S v (Richard H. Leach ed., 1983).

because they behave similarly.⁵ States formally and informally lobby the federal government (and each other) for resources, and for or against laws that impact them.⁶ Cities and counties have offices of intergovernmental affairs that formally and informally “lobby” states, the federal government, and each other for resources, and for or against laws that impact them.⁷ Cities, counties, and states also form “associations,” “councils,” or acquire other allies to advance their needs. For example, the International City Management Association, the National Council of State Legislatures, the National Governors Association, and the National Center for State Courts are organizations that frequently perform research and work together to advance the needs of their respective constituents. There are also state versions of these organizations representing local and regional governments, like the North Carolina League of Municipalities.

What is called “lobbying” by private interests is sometimes more carefully and cautiously crafted linguistically by governments as “intergovernmental relations,” “government affairs,” or “interbranch relations.” This terminology is in part because state law and ethics rules prohibit political activity by some government employees, perhaps because the term is loaded with baggage. Whatever it is called, lobbying is of critical importance to the health and vitality of institutions and especially governments existing in a federal system. It is as important for U.S. judicial systems to “lobby” as it is for cities, counties, and states. The work of judicial lobbying may be as informal as “lunch,” as Malcolm playfully suggested, but scholars have learned that it can also be quite formal and very strategic. Governments lobby each other in complex and nuanced ways, involving formal planning and implementation efforts that are internal to the organization, collaboration with external associations and partners that support the governmental organization, and important informal efforts and partnerships to advance governmental needs.

While there has been relatively little scholarship on how courts do intergovernmental relations work, we do know that significant efforts exist to advance the needs of courts that are formal and informal, internal and external to court organizations, and political in nature.⁸ For example, like associations of cities

5. INTEREST GROUP POLITICS IN THE SOUTHERN STATES I (Ronald J. Hrebenar & Clive S. Thomas eds., 1992); Beverly A. Cigler, *The County-State Connection: A National Study of Associations of Counties*, 54 PUB. ADMIN. REV. 3, 5 (1994); Patricia K. Freeman & Anthony J. Nownes, *Intergovernmental Lobbying in the States*, 27 SE. POL. REV. 619, 620 (1999); Troy Smith, *Intergovernmental Lobbying: How Opportunistic Actors Create a Less Structured and Balanced Federal System*, in INTERGOVERNMENTAL MANAGEMENT FOR THE TWENTY-FIRST CENTURY 310, 321–22 (Timothy J. Conlen & Paul L. Posner eds. 2008).

6. See Smith, *supra* note 5.

7. See Freeman & Nownes, *supra* note 5; Cigler, *supra* note 5; INTEREST GROUP POLITICS IN THE SOUTHERN STATES, *supra* note 5.

8. See, e.g., Ellen Baar & Carl Baar, *Judges as Middlemen?*, 2 JUST. SYS. J. 210, 210 (1977) (employing a network-analysis system to explore the relationships between the states’ judges and legislatures); Jeremy Buchman, *Judicial Lobbying and the Politics of Judicial Structure: An Examination of the Judiciary Act of 1925*, 24 JUST. SYS. J. 1, 11–13 (2003); Justin Crowe, *The Forging of Judicial Autonomy: Political Entrepreneurship and the Reforms of William Howard Taft*, 69 J. POL. 73, 77–80 (2007); James W. Douglas & Roger E. Hartley, *State Court Budgeting and Judicial Independence: Clues from Oklahoma and*

and counties, there are also formal associations of judges and court administrators that do intergovernmental relations work (or lobbying).⁹ Scholarship also notes, however, that the intergovernmental relations work of courts is different than it is for other governmental agencies and that judges face institutional and legal constraints that make this work more difficult.¹⁰ There are also, of course, limitations to government employees' ability to advocate, lobby, support candidates, and donate to campaigns, among other limitations. These ethical rules also hinder nonjudge court employees from effectively advocating for court needs.

Despite legal and ethical restrictions, judicial representatives participate in intergovernmental relations and lobbying. This is necessary to advocate for the needs of judicial administration in the federal political system. In a previous paper, I argued that these legal and ethical concerns—coupled with the independent and impartial role of judges—may make judicial actors approach critical political action efforts more conservatively than other agencies.¹¹ What is somewhat normal behavior for other organizations may be outside the norms of the judiciary. This conservative behavior may make courts less competitive with other agencies and private interests. On the other hand, my work and recent work at the National Center for State Courts encountered some quite sophisticated political efforts by some state judiciaries. Others have noted that there is considerable room for the judiciary to participate in the political system at the federal level. Very little work, however, has

Virginia, 33 ADMIN. & SOC'Y 54, 68–72 (2001); Roger E. Hartley, *State Budget Politics and Judicial Independence: An Emerging Crisis for the Courts as a Political Branch*, 18 CT. MANAGER 16, 16-23 (2003); Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269, 287–90 (2000) (using Chief Justice Rehnquist's involvement in the Violence Against Women Act as indicative of the federal judiciary's political development in the twentieth century); Russell R. Wheeler & Robert A. Katzmann, *A Primer on Interbranch Relations*, 95 GEO. L.J. 1155, 1157–63 (2007) (analyzing the five principles that define legislative influence on judicial decision-making); John W. Winkle III & Robert H. Oswald, *The Role of Trial Judges in State Court Reform: The Case of Mississippi*, 91 JUDICATURE 288, 288–89 (2008) (recognizing the importance of gaining the legal community's support through lobbying in judicial reform); John W. Winkle III, *Interbranch Politics: The Administrative Office of U.S. Courts as Liaison*, 24 JUST. SYS. J. 43, 50 (2003) [hereinafter *Interbranch Politics*] (detailing a systematic study on the contemporary role of the Federal Administrative Office's role in judicial lobbying); John W. Winkle III, *Judges Before Congress: Reform Politics and Individual Freedom*, 22 POLITY 443, 453 (1990) [hereinafter *Judges Before Congress*]; John W. Winkle III, *Judges as Lobbyists: Habeas Corpus Reform in the 1940s*, 68 JUDICATURE 263, 263–64 (1985) [hereinafter *Judges as Lobbyists*] (noting continued practice of judicial lobbying of the legislature in the absence of clear, constitutional authority).

9. For example, see the work of the National Center for State Courts. Also, most states have active judges associations that lobby for court reforms, salaries, and other judicial needs. See Winkle & Oswald, *supra* note 8 (on the work of the Mississippi judges association).

10. See James W. Douglas & Roger E. Hartley, *State Court Strategies and Politics During the Appropriations Process*, 21 PUB. BUDGETING & FIN. 35, 35–37 (2001); Roger E. Hartley, *Moving Past Crisis . . . Promoting Parity: How Effective Intergovernmental Relations Can Help Build a More Co-Equal Branch*, 47 NEW ENG. L. REV. 541, 549–55 (2013).

11. See Hartley, *supra* note 10.

examined what ethical and legal constraints exist at the state level. Do judicial conduct codes permit advocacy for issues related to judicial administration similar to those at the federal level? And if so, might state judiciaries behave less conservatively than they do now?

This Article explores what boundaries limit state judicial officials from “lobbying” at the state level. Is there space for judicial officials to lobby for court needs more openly and politically, as some have suggested at the federal level? By “space” I mean the ability, within constraints of legal interpretation, politics, or economics, to adequately advance the needs of the judiciary before the other branches. For example, ethical rules and laws limit the political behavior of judges under the interest of protecting the appearance of impartiality of the branch. But federal judges are able to speak openly on issues related to judicial administration, which is a broad term. There is, then, political “space” to lobby openly on many issues depending upon how specifically the law is defined, how actively it is enforced, and the penalties awaiting those who do not comply.

The literature, for the most part, only addresses the barriers and opportunities for political engagement by courts at the federal level. Little has been written about the barriers that face state courts and what state courts are able to do in the political process. This Article concludes by analyzing regulations on political behavior in state Codes of Judicial Conduct. What provisions exist in these codes that restrict courts and what might empower them? Are there variations among the states? Of course, conduct codes are only one set of rules that might impact judicial involvement in politics. Other laws may govern court administrative staff at the state and local level, and this Article does not explore these other rules.

In an effort to answer the above questions, this Article explores past scholarship about some of the problems unique to court intergovernmental relations efforts, what we know about how courts do this work, and recent efforts by the judicial community to improve interbranch relations. I examine judicial conduct codes (and other legal constraints) across the United States to determine if there is variation in what state judicial officials can do from state to state. I argue that courts do have this political space and that they should attempt to improve their work in the political process to educate parties on court needs. I also consider what reforms might be made in law (or in political custom) to focus state lawmakers on the courts’ needs so that the experience and wisdom of the judicial “voice” can be heard in the policymaking process.

I. AN INTERGOVERNMENTAL RELATIONS CONUNDRUM

In a previous article, I argued that the judiciary faces a conundrum as it enters intergovernmental relations work.¹² Briefly, the norms of impartiality and the need to protect judicial independence may lead court officials to be more passive in their political engagement with others. Concerns exist that active or aggressive political behavior and involvement by the judiciary in political issues might invite efforts by the other branches to rein in powers granted to courts through what is

12. *Id.*

known as “court curbing” legislation.¹³ In an excellent piece, William Vickrey, Joseph Dunn, and J. Clark Kelso respond to my previous works with James Douglas calling for more political involvement by court officials,¹⁴ and expressed important concerns about the judiciary behaving too aggressively:

There are major risks inherent in this engagement with political processes, and the risks all come down to the same issue: [I]f you play on the political field, you must expect to be treated as a full-fledged political player and to be subject to the same rules of political engagement. In politics, it is common to retaliate against enemies, to find oneself in the middle of crossfire between different groups (such as labor and big business), and to be used as a political football in partisan political battles.¹⁵

It might also be unseemly to some to have judges or court officials engage in “lobbying” or participating in the policy formulation process.¹⁶ Vickrey, Dunn, and Kelso go on to discuss a more measured approach to working with the other branches. They discuss how courts in California built effective partnerships and working relationships with the other branches to create reforms that expand access to justice.¹⁷

On the other hand, intergovernmental relations are common and important to the health of democracies—as well as the health of the judiciary. Most governmental institutions and agencies have intergovernmental relations staff (or lobbyists) to work with the other branches and levels of governments. Many government agencies partner with other agencies as well as for-profit and nonprofit organizations to create policy to solve problems and lobby for the resources needed to solve those problems. In contrast with the views of Vickrey, Dunn, and Kelso, some are concerned that court officials might engage too passively with the other branches of government.¹⁸

Courts have needs that they must secure by working with the other branches of government (e.g., legislatures, officials in executive agencies, and agencies), other levels of government (federal, state, and local), and they must interact internally with officials from other levels of the judiciary (e.g., judges and administrators at the local level must work with judges and administrators from the state level). The very nature of legislative and executive processes necessitates and rewards active, and sometimes aggressive, political participation. Judicial lobbying is necessary to secure needed resources, to build support for legislation that might

13. William C. Vickrey, Joseph L. Dunn & J. Clark Kelso, *Access to Justice: A Broader Perspective*, 42 LOY. L.A. REV. 1147, 1182–84 (2009); see also CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM* 52, 111, 253–54 (2006); Resnik, *supra* note 8.

14. Roger E. Hartley & James W. Douglas, *Budgeting for State Courts: The Perceptions of Key Officials Regarding the Determinants of Success*, 24 JUST. SYS. J. 251, 260 (2003); see also James W. Douglas & Roger E. Hartley, *Making the Case for Court Funding: The Important Role of Lobbying*, 43 JUDGES' J. 35 (2004).

15. Vickrey, Dunn & Kelso, *supra* note 13.

16. *Id.*

17. *Id.*

18. Hartley & Douglas, *supra* note 14; Douglas & Hartley, *supra* note 10.

favorably impact courts, and to sometimes fight off legislation that might harm the power of courts and the work of judges. It is important for policymakers to hear the judicial “voice” on policy matters related to judicial administration, and it might also be important to hear from the judiciary on other matters.

Judges and court officials have direct knowledge of policy matters in every area of the law. Policymakers at every level of government may benefit from the knowledge of judges and court staff on issues such as domestic relations, domestic violence, adult and juvenile crime, probate, elder abuse, and the ordinary law of torts, contracts, and corporations. The judiciary is a linchpin in the interpretation of law and the implementation of policy. With their values of independence, isolation, and impartiality, it may be more difficult, but nonetheless of critical importance, for courts to participate in the political process or lobby the other branches of government for the aforementioned needs.¹⁹

So, while active political participation by judicial officials might draw courts into political battles and harm perceptions of impartiality, it is nonetheless necessary for such participation to occur. This raises questions about how passively or aggressively court leaders should behave politically. What do we know about how courts conduct intergovernmental relations work under constraints of law, ethics, and norms? If court officials behave more passively or conservatively than other governments, agencies, or private organizations, what does it mean for their ability to be successful in the very competitive, democratic, political process? Legislators and executives may expect a certain brand of lobbying. Some tactics may be more persuasive than others and may do more to build the salience of policy issues before those who set the policy agenda, formulate policy, vote to approve it, and to those who later implement it. It is important to consider if constraints limit the ability of courts to do what others do. If there is political space to do intergovernmental relations work, then researchers must turn to what others do, how they do it, and consider “best practices” for courts.

II. WHAT DO WE KNOW ABOUT HOW COURTS LOBBY?

It is probably not of great surprise to court officials and some scholars that courts lobby. Courts have been lobbying for a very long time and some are quite successful at building relationships and arguing for their needs.²⁰ There are concerns that courts may not be doing as good a job at intergovernmental relations work as other agencies.²¹ In fact, the need to improve interbranch relations and to create “best practices” for lobbying has been a subject of great interest to court officials and to those who support courts.²²

19. See Hartley, *supra* note 10.

20. See *supra* note 8.

21. Hartley & Douglas, *supra* note 14 (Noting that courts appear to play it conservative in the budget process and not ask for as much funding as they could justify).

22. For example, improving intergovernmental relations work in state judicial systems was a major subject at the Annual Joint Meetings of the Conference of Chief Justices and Conference of State Court Administrators in Burlington, Vermont in July 2013.

A. Federal and State Courts Do Lobby and Work with the Other Branches

Past research clearly demonstrates that judges and their intermediaries routinely work through nonjudicial means in the political arena to influence policymakers.²³ Court officials regularly work in the political arena with other governmental organizations to lobby for resources (e.g., budget requests and new facilities), to comment on legislation that might have effects on the judiciary, and to promote legal and administrative reforms that might improve the judicial branch (e.g., unification of courts).

Research finds that state courts employ lobbying staff at the federal and state levels and dedicate time to plan and lobby for court legislative agendas.²⁴ Additional scholarship demonstrates that chief justices, other judges, and court staff regularly testify on matters that might impact judicial administration and that they lobby for the passage of court funding.²⁵ In states, there are also judges associations that organize lobbying activities.²⁶ These associations identify issues of importance to the judiciary, as well as for judges specifically (e.g., advocacy for judicial pay raises). In some states, like Washington, judicial associations are organized as nonprofit advocacy organizations and dues may be used for political action, such as hiring a professional lobbyist.²⁷ Judges may make informal contacts with local or state legislators, county officials, or other government officials to advocate for or against passage of laws of interest to the judiciary. This may be done via “lunch” or over coffee.

My work with James Douglas on court budgeting found that court officials rarely hired professional lobbyists, and that they typically behaved less acquisitively than other agencies. For example, executive agencies asked for more resources than they needed and, after cuts by funders, were left with more than they needed. State courts were less likely to behave this way and more often asked for only what they needed. Those surveyed in the other branches tended to rate the effectiveness of court strategies for budget success lower than court officials did. Douglas and I also note the importance of allies and building coalitions to assist in political advocacy.²⁸ Our survey work in the 2000s on how courts advocate for budgets found few allies and minimal partnering by courts (e.g., with State Bar Associations) to achieve funding. A more recent work, however, notes that courts may indeed partner with others on legislation on a case-by-case basis.²⁹ In Washington, courts have been very active and strategic in finding partners to lobby for courts when court officials are uncomfortable doing the political work themselves. For instance, court officials in

23. See *supra* note 8.

24. See *Interbranch Politics*, *supra* note 8; *Judges Before Congress*, *supra* note 8; *Judges as Lobbyists*, *supra* note 8; Hartley, *supra* note 10; NAT'L CTR. FOR STATE CTS., *FUNDING JUSTICE: STRATEGIES AND MESSAGES FOR RESTORING COURT FUNDING* (2012) (suggesting improving lobbying for the purpose of court funding), available at <http://www.ncsc.org/~media/Files/PDF/Information%20and%20Resources/fundingjustice.a.shx>.

25. Douglas & Hartley, *supra* note 10; NAT'L CTR. FOR STATE CTS., *supra* note 24.

26. See, e.g., Winkle & Oswald, *supra* note 8.

27. Hartley, *supra* note 10.

28. Douglas & Hartley, *supra* note 10.

29. Hartley, *supra* note 10.

Washington created a nonprofit group of business leaders, academics, nonprofit leaders, state bar leaders, and former legislators to advance important judicial reforms at the state level. Among these was an effort to achieve more court funding. The group was able to raise funds and even donate to candidates.

Building coalitions with other agencies and mobilizing them as judicial allies to advance legislative issues of interest to courts is an important effort to demonstrate that a political need has broad support. If, as is noted later, courts have little political salience to lawmakers, then partnering (when appropriate) with agencies that have political support might increase the importance of judicial needs.

B. Efforts to Improve Interbranch Relations and Engagement

It may be a stretch from this research and these arguments to say that courts are not lobbying or advocating sufficiently, but recent meetings in the judicial and legal communities suggest that this might be the perception of judicial leaders and court allies. Recent symposia and meetings of judicial leaders focused on strained interbranch relations and crises facing the courts, such as budget cuts and court-curbing efforts. These meetings focused on efforts to improve intergovernmental relations as a step toward alleviating crises and promoting an atmosphere where court leaders and the leaders of the other branches can work together. The U.S. Chief Justice's Year-End Report on the Federal Judiciary, made to Congress, repeatedly mentions improving communications as a necessary policy focus.³⁰ In addition, Justice Sandra Day O'Connor has spent much of her retirement writing and speaking about the importance of judicial independence and the need for improved relations between the courts and the other branches of government.³¹ There is evidence that these calls have been heard.

Improving intergovernmental relations has been the subject of judicial conferences, a recent law school symposium, and judicial and court association commissions. For example, improving intergovernmental relations was the primary subject of a national policy summit, "Justice is the Business of Government: The Critical Role of Fair and Impartial State Courts," sponsored by the American Bar Association's Presidential Commission on Fair and Impartial State Courts and the

30. JOHN G. ROBERTS, 2007 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5-7 (2007) (addressing improving intergovernmental relations in general, specifically on subjects like pay). Justice William Rehnquist's 2003 and 2004 reports focused specific attention on recent policy actions affecting the judicial branch and congressional bypassing of norms to consult with the judiciary on items that might impact the courts. He called specifically for improved consultation between Congress and the Judiciary on the impact of bills. WILLIAM H. REHNQUIST, 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY 2-3 (2004); WILLIAM H. REHNQUIST, 2003 YEAR-END REPORT ON THE FEDERAL JUDICIARY pt. II (2003).

31. See, e.g., Sandra Day O'Connor, *Fair and Independent Courts: Remarks by Justice O'Connor*, 95 GEO. L.J. 897, 897-98 (2007); Sandra Day O'Connor, *How to Save Our Courts*, PARADE (Feb. 27, 2008), available at http://lists.ajs.org/pipermail/ajs_board/2008-February/000722.html; ABA News Release, *Sandra Day O'Connor Cites the State Budget Crises as Most Pressing Problem Confronting State Courts* (May 8, 2009), http://apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=657.

National Center for State Courts.³² In 2012, the New England Law School in Boston held a symposium on the topic of "Crisis in the Judiciary" that focused on state court threats and potential solutions.³³ Improving court interactions with the other branches of government was among the solutions discussed. The National Center for State Courts has also worked with the American Bar Association Task Force on Preservation of the Justice System on a project to remedy crises facing the judiciary.³⁴ One of the key recommendations of the Task Force was "Communicating and Advocating for a Stable and Effective Justice System."

The National Center for State Courts (NCSC) has also published an important guide in response to the funding crisis facing state court systems.³⁵ Based on past research regarding court budget strategies, NCSC offers important advice for court leaders when they engage, or lobby, the other branches. Some of the ideas include: (a) a two-tiered approach that makes the best case for funding needs to those that fund them and a long-term strategy to build public support; (b) sticking to a core message that justifies court needs and exemplifies the impacts of cuts; (c) using different "messengers," such as retired judges, business leaders, and other allies to lobby for court needs; (d) educating and appealing to the public for support; and (e) targeting budget policymakers wisely by building long term-relationships and a process that addresses engagement year-round.³⁶

Most recently, and significantly, the importance of improving interbranch relations was a primary discussion at the 2013 annual Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) in Burlington, Vermont.³⁷ The meeting had several speakers and panels addressing best practices for working with the other branches, lobbying, and building collaborative networks

32. The Summit was held in Charlotte, North Carolina on May 7–9, 2009. Sponsors invited judicial, legislative, and executive branch representatives from each state to attend working sessions designed to identify challenges facing state courts and to jointly propose agendas for efforts on such topics as improving budgets, public attitudes about the courts, and intergovernmental relations. Edward W. Madeira Jr., *Justice is the Business of Government: State and Local Government Branch Roles in Delivering Justice*, 36 HUMAN RIGHTS 8 (2009).

33. See New England Law Review, *Crisis in the Judiciary—New England Law Review's Fall 2012 Symposium*, ON REMAND, http://newenglev.com/symposia/vol_47_fall_symposium/ (last visited Jan. 31, 2014) (explaining that the *New England Law Review* provided a forum in which panelists could discuss the financial problems facing the judiciary and offer creative solutions to those problems); see also webpage of the New England Law School Symposium on "Crisis in the Judiciary" at <http://www.nesl.edu/media/news.cfm?newsDetailID=4146>. (Last visited on January 16, 2014).

34. PETER T. GROSSI, JR., JOHN L. MILLS & KONSTANTINA VAGENAS, *CRISIS IN THE COURTS: RECONNAISSANCE AND RECOMMENDATIONS* (2012), available at http://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/Better-Courts/~media/Microsites/Files/Future%20Trends%202012/PDFs/Crisis_Grossi.ashx.

35. NAT'L CTR. FOR STATE CTS., *supra* note 24.

36. *Id.* at 1.

37. CCJ-COSCA Conference 2013 (July 27–31, 2013), <http://ccjcosca2013.org>; Rich Cassidy, *Conference of Chief Justices Meets in Burlington: Judicial Funding and Access to Justice Are the Lead Issues*, ON LAWYERING (Aug. 2, 2013), <http://onlawyering.com/2013/08/conference-of-chief-justices-beats-in-burlington-judicial-funding-and-access-to-justice-are-the-lead-issues/>.

to support judicial needs from state legislatures and governors. Another important effort of the meeting was advocating a plan to create partnerships between the CCJ and COSCA with the National Center for State Legislatures (NCSL) and the National Governors Association (NGA).³⁸

In each of the symposia and meetings above, it was clear that judicial leaders were accustomed to advocating for their needs. However, it was also apparent that there were great concerns about deteriorating relationships between the branches in some states and about whether the efforts employed by state courts were adequate to effectively communicate the importance of court needs. That some state judicial officials were called on to essentially teach examples of effective intergovernmental relations practices to others exemplifies recognition of the need to improve efforts. The issue of building better relations with the other branches and increasing the salience of the judiciary to others are of clear significance to court leaders. Larger questions exist about how aggressively this work is performed and if it might taint the image of courts, as noted in the aforementioned conundrum.³⁹

III. WHAT ARE THE POLITICAL, LEGAL, AND ETHICAL CONSTRAINTS ON COURT LOBBYING?

Court leaders face several perceived constraints in their efforts to lobby that may not be faced by the other branches of government. Political norms of impartiality and judicial independence, economic and political capacity, as well as ethical codes and laws may all present some barriers. Some of these constraints restrict activity more than others. I argue that ethics rules and laws provide significant space for political activity by judges, court officials, and their allies. The public perception of a politically active judiciary is a concern to some, but it is unclear what the costs of political activity actually are to the branch. Finally, it may be that political and economic capacity to lobby and the strategies and tactics used might be a larger barrier to effective efforts to advance the needs of the branch.

A. Political Norms Undermine Efforts at Political Engagement

The preservation of the norm of impartiality provides one constraint. For judges to enter the political process, it means taking positions that are, in fact, political or that create political disagreements. Judicial actors who speak on political issues important to the judiciary risk having their interests associated with those of one party or political interest over another. There are concerns that judges are viewed as taking sides on controversial issues and that this might do larger harm to the impression that elected leaders and the public have of the branch. As members of the other branches associate judges with particular political positions, courts can

38. ROGER E. HARTLEY, FINAL REPORT: DEVELOPING NATIONAL LEADERSHIP COLLABORATION: HOW MIGHT CCJ, COSCA, NGA, AND NCSL WORK TOGETHER TO FORGE BETTER PUBLIC POLICY? (Sept. 6, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2379564.

39. See GEYH, *supra* note 13; Resnik, *supra* note 8; see also Vickrey, Dunn & Kelso, *supra* note 13.

come under attack and invite efforts to rein in their power. The independence of the judiciary can, thereby, erode.⁴⁰

My past research with James Douglas provides some additional evidence that courts are acting too conservatively in the political process and that they may have other political limitations that harm their ability to do as well as other agencies.⁴¹ For example, in the budget process, courts appear to behave less acquisitively than other agencies with respect to asking for funds. They also appear to be less likely to partner with outside “allies” (e.g., other government agencies, nonprofits, or private sector agencies) when working for legislative change or to provide additional political support for court needs. The results also suggest that those in the legislature or governor’s office do not have the same positive perception of the usefulness of court lobbying tactics.⁴² Some courts, then, are underselling themselves in the political process, and they may have more to learn from “best practices” of other courts and agencies. As reported earlier, judicial leaders and bar associations are focusing on how to improve interbranch relations and are working to create best practices.

Because of these political constraints, courts’ needs are not perceived to be as salient as the needs of other federal and state agencies. Courts do not provide much direct political benefit to legislators and governors with respect to public interest, voters, interest groups, and campaign contributions. They do not command the same type of attention as agencies, such as the departments of highways or education, law enforcement, corrections, and prosecution. These agencies command more political interest because the issues are more relevant to the public at large (e.g., fighting crime) or because they have private sector partners financially dependent on the budgets of the agencies (e.g., road builders and transportation). The aforementioned norms against political behavior and lack of political prominence harm the judiciary’s political engagement efforts.

B. Economic and Political Capacity Is Needed to Lobby Effectively

A lack of resource capacity, political capacity building, and perhaps political skills also constrain courts and harm intergovernmental relations work.⁴³ For example, the size and cuts to court budgets may limit courts’ ability to hire intergovernmental relations staff or establish organizational capacity to do this work effectively. Previous research, although there is not much, notes that at the state and federal levels, there are few judicial staff dedicated to intergovernmental relations.⁴⁴ Staff may consist of one or two legislative liaisons dedicated to organizing these responsibilities in a state’s Administrative Office of Courts. These persons occasionally form committees to create a legislative agenda, circulate it for comment, advocate for it, and track important legislation and rule changes.⁴⁵

40. GEYH, *supra* note 13; Resnik, *supra* note 8.

41. See Douglas & Hartley, *supra* note 10; Douglas & Hartley, *supra* note 14.

42. Douglas & Hartley, *supra* note 10.

43. See Hartley, *supra* note 10.

44. See *id.* (state courts); *Interbranch Politics*, *supra* note 8 (federal courts).

45. Hartley, *supra* note 10, at 124–25 (noting the legislative relations process of New York State).

In other parts of the country and other levels of the judiciary, the advancement of court needs is the primary responsibility of judicial leaders like the Chief Justice, State Court Administrator, or Presiding Judge and Court Administrator at the trial court level. Of course, these judicial leaders have other important responsibilities, and intergovernmental relations may not be as important as other tasks. Judicial leaders often use support staff to help with these tasks where other governmental agencies have larger staff, more funds, and other advantages that courts do not.

On the political skill and capacity of the judicial branch, I suggest that court officials may not have the same type of political training or interest as officials in other agencies. While many appointed and elected judges do indeed have political backgrounds, the education and training backgrounds of judges or court administrators may not include training on the policy process, political tactics, organizational management, strategic planning, or other skills found in educational programs like public policy, public affairs, public administration, or business. While law schools create effective legal advocates, they may not be as likely to create effective political advocates or policymakers. Our judicial leaders, then, may not have the same skill sets or political advocacy backgrounds as leaders in agencies such as transportation or health and human services. Of course, there are examples throughout the states of notable exceptions to this “rule.” Choosing judicial leaders with excellent managerial and policy skills is a key issue in federal and state court systems that go beyond building sufficient capacity to lobby in the organization. Another important suggestion is to consider lengthening the tenure of leadership positions and creating succession plans to develop and transition younger judicial leaders into these posts.

C. What Political Conduct or Engagement Do Law and Ethics Prevent?

In addition to political and capacity barriers to effective intergovernmental relations work, there is also the important “shadow” of ethical and legal barriers that prevent certain political activity. There are ethics rules and laws that constrain judicial officials from some types of political work. Some of these boundaries are similar to those placed on other public officials, such as the inability to use state, city, or county resources to advance a political position. State and federal laws and rules of judicial conduct provide boundaries for judges’ political behavior. Some of the boundaries include prohibitions on the use of appropriated funds to lobby Congress or influence legislation and require oaths that they will not testify before Congress or discuss policy with other branches unless the policy matter directly affects judicial administration.⁴⁶ The U.S. Code allows judges to use “proper official channels” to communicate judicial requests to Congress.⁴⁷ Canon 4 of the Code of Judicial Conduct allows judges to lobby as long as they aim to improve the law, the legal system, and the administration of justice.⁴⁸

46. Smith, *supra* note 5.

47. 18 U.S.C. § 1913 (2012).

48. *Interbranch Politics*, *supra* note 8, at 43 n.2 (citing VIRGINIA CANONS OF JUDICIAL CONDUCT Canon 4).

Professor Charles Geyh provides an excellent discussion of the constraints facing the federal judiciary as it interacts with Congress on legal reforms, and also argues that there are no significant ethical limitations on increased interbranch interaction on matters of mutual concern, or lobbying.⁴⁹ Some of the constraints facing the judiciary include:

- Constitutional boundaries from separation of powers principles
- Statutory boundaries, like the Organic Statute of the Judicial Conference requiring the Chief Justice to submit an annual report to Congress; prohibitions on lobbying with appropriated money; and appropriations restrictions on use of appropriated funds for “publicity or propaganda purposes”
- Ethical constraints found in the Judicial Conference of the United States’ Code of Conduct for United States Judges.⁵⁰

In discussing these constraints, however, Geyh points out many opportunities within these constraints for federal judges and the judiciary to participate in the legislative process. Geyh draws a boundary that is more prudential than one based on ethical prohibitions:

Consistent with the views that there is nothing inherently suspicious about judges participating in the legislative process, Canon 4 requires only that judges avoid comments to the effect that their views on particular legislative proposals are so strongly held that they could not decide cases arising under the legislation fairly. This is not to suggest that a judge’s law reform activities are appropriate merely because they do not violate the Code of Conduct. Conduct falling short of a Canon 4 violation may nevertheless cause long-term damage to the judiciary’s credibility and reputation. That is an issue better characterized as a prudential constraint, however⁵¹

At the federal level, then, political behavior is prohibited in some ways, but is permitted when speaking on issues of improving law and judicial administration. Given the breadth of what law and judicial administration covers, there appears to be great opportunity for judges and court officials to lobby formally and informally. Indeed, Judith Resnik notes that there is a long history of judicial lobbying, especially throughout the twentieth century and through the use of the Judicial Conference of the United States.⁵² She makes a compelling case that judges “have long been engaged in shaping legislation affecting the jurisdiction of the courts,” that they have had a major impact on federal jurisdiction through adjudication, and that individual Justices have had their own “long range plans” to shift constitutional doctrine and law.⁵³

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

50. *Id.* at 1192–99; see also Russell R. Wheeler, *A Primer on Regulating Federal Judicial Ethics*, 56 ARIZ. L. REV. 479 (2014).

51. *Id.* at 1203–04.

52. Resnik, *supra* note 8.

53. *Id.* at 283.

Distinctions have been drawn, however, between representing the institution politically—for reforms that impact the branch or caseloads—and judges lobbying as individuals for legal change (like changing constitutional doctrine) on subjects like civil rights or tort reform. Resnik has an excellent discussion of the difference between judges speaking as individuals to Congress about their opinions on individual rights and speaking as the institution on issues about judicial administration.⁵⁴ Political activities like these are not prohibited by law or the judicial conduct code, but there is a question about whether these political activities are prudent. Resnik argues:

What constitutes a matter related to “judicial administration” rather than “legislative policy” has a sponginess reminiscent of distinctions drawn between “procedure” and “substance.” The views of judges—individual and institutional—on matters ranging from whether to increase the number of judgeships, to create subordinate levels of judges, to alter rules of procedure and evidence, or to reshape sentencing or jurisdictional grants can all be seen as having substantive effects. I propose to create a presumption of a boundary, not cast as “administrative” versus “policy” (all of it is policy), but serving to provide an institutional hesitancy to comment on what rights should exist (often, but not only, translated in terms of when Congress should create causes of action).⁵⁵

Resnik notes, however, that judges should not go as far to argue to legislators what rights should or should not exist, as was done by Chief Justice Rehnquist in the Violence Against Women Act.⁵⁶ It does not appear to be an ethical *rule* that prohibits this behavior, but more of an ethical issue of impropriety which might harm judicial interests in impartiality and lead to attacks on the branch by others.

In summary, there appears to be a lot of room for the courts as institutions—and judges as individuals—to lobby the other branches of government. Federal rules appear to leave a lot of political space to lobby or engage on issues related to “judicial administration.” What is and is not related to judicial administration is a matter of interpretation. Like Resnik and Geyh, I agree that the breadth of this term provides extensive room for federal court officials to interact, speak, and even advocate on many issues of law. In other words, it does not prevent much when one considers that every area of law and policy ultimately ends up before courts. The impact of most legal changes by the other branches may have intentional and unintentional consequences on courts, as well as positive and negative impacts on judicial administration.

IV. STATE JUDICIAL CONDUCT CODES AND THE ABILITY TO LOBBY

While several pieces have been written about constraints on judicial lobbying, very little literature discusses state provisions limiting the ability of state

54. Resnik, *supra* note 8.

55. *Id.* at 292.

56. See GEYH, *supra* note 13.

judges and court officials to lobby.⁵⁷ In this section, I add to this knowledge by examining the Model Code of Judicial Conduct and Codes of Judicial Conduct for all 50 states and the District of Columbia. Like the discussion about federal Codes of Conduct, I discuss what state codes tell us about the ability of judges to ethically lobby the other branches for the needs of courts and what significant variations might exist between states' conduct codes.

A. The Model Code of Judicial Conduct

The American Bar Association created the Model Code of Judicial Conduct in 1990.⁵⁸ This document provided advice to states on adopting state codes of conduct to govern the behavior of judges. The Preamble includes a statement of purpose that reads:

The Code is intended, however, to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies.⁵⁹

The current edition of the Model Code of Judicial Conduct consists of four canons that state “overarching principles of judicial ethics that all judges must observe.”⁶⁰ The operative section of the Code related to judicial lobbying and political activity is Rule 3.2. Canon 3 generally reads that a “judge shall conduct the judge’s personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.”⁶¹ Rule 3.2, more specifically, regulates, “Appearances before Governmental Bodies and Consultation with Government Officials.” The rule reads:

A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except:

(A) in connection with matters concerning the law, the legal system, or the administration of justice;

(B) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge’s judicial duties; or

(C) when the judge is acting pro se in a matter involving the judge’s legal or economic interests, or when the judge is acting in a fiduciary capacity.⁶²

Section A of Rule 3.2 essentially authorizes judges to “consult with” an executive or legislative body or official “in connection with matters concerning the law, the legal system, or the administration of justice.” Section B adds additional language that appears to permit judges to also “consult with” an executive or

57. *But see* Hartley, *supra* note 10, at 109–14.
 58. MODEL CODE OF JUDICIAL CONDUCT (2011).
 59. *Id.* Preamble, section 3.
 60. *Id.* Scope, sections 1–2.
 61. *Id.* Canon 3.
 62. *Id.* Canon 3, R. 3.2.

legislative body on “knowledge and expertise” that judges have that may be of use in crafting better public policy. The judicial “voice” in the policy process, then, appears legitimate under the Model Code. Similar to the federal ethical rules noted earlier, sections A and B leave significant room for judges to lobby and participate in the political process for many legal and judicial administration issues. Geyh argues that the oft-articulated warning that judges should lobby through their judicial conferences rather than individually is a strategic rather than ethical issue.⁶³ He notes that Rule 3.2 authorization remains subject to other restrictions, such as Rule 1.2 of the Model Code, which directs judges to “avoid impropriety and the appearance of impropriety” and to act at all times in a manner that promotes public confidence in the judiciary.⁶⁴ Additionally, like at the federal level, other laws at the state level similarly prevent political activity by state government employees using state resources.

B. Judicial Conduct Codes of the 50 States and the District of Columbia

Individual states have their own codes of conduct for judges. While many are likely influenced by the Model Code, they may also vary in language and strength from state by state. This Article examines the constraints on judicial lobbying and political activity in the 50 States and the District of Columbia.⁶⁵

In general, judicial conduct codes of all 50 states and the District of Columbia allow the forms of communication identified in the Model Code, with slight differences in wording. The common language in the codes focus on three areas: (1) communication with the public; (2) communication with the other branches; and (3) communication in civic, political, charitable, or government-related activities. The descriptions below assess general themes, noting slight differences across states. The vast majority used identical wording, particularly the portions of the codes devoted to communications with the other branches of government.

1. Communication with the Public

In all of the codes reviewed, judges are not only allowed to communicate with the public, but are expected to educate the public about the judicial system and office. For example, in Alaska, Canon 4(b) states, “Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary, and the integrity of the legal profession (either independently or through a bar association, judicial conference, etc.).”⁶⁶ Similarly, Canon 4(B)(1) of the Texas Code of Judicial Conduct states that judges may “speak, write, lecture, teach and participate in extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this

63. Email from Charles Geyh to author (Jan. 15, 2014) (on file with author).

64. *Id.*; MODEL CODE OF JUDICIAL CONDUCT Canon 1, R. 1.2.

65. Thanks again to my graduate research assistant at Western Carolina University, Zachary Barth, for his help in identifying and analyzing the state Codes of Judicial Conduct.

66. ALASKA CODE OF JUDICIAL CONDUCT, Canon 4(B), cmt.

Code.”⁶⁷ Delaware’s Code is a bit more explicit. Canon 3.1(C) states that a judge may “engage in activities to improve the law, the legal system, and the administration of justice.”⁶⁸ All codes reviewed permitted this form of communication and/or engagement with only slight differentiation in wording.

2. *Communication with Other Branches*

Another common provision found in state codes of conduct addresses how judges should work with the other branches of government. The most common language, as noted below, begins by prohibiting a judge’s appearance at a hearing and/or consulting with legislative and executive body members. Like in the federal canons, however, the exceptions are enormous and provide a wide space in which to lobby. An example of one of the most common provisions is Alaska’s:

A Judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official EXCEPT on matters of the law, the legal system, or the administration of justice, or except when acting pro se in a matter involving the judge or the judge’s interests.⁶⁹

According to the published commentary on the Alaska Code of Conduct, “Administration of Justice” refers to matters including seeking funding for public service organizations that provide or seek increased access to justice, so long as the organization is not identified with a particular cause that may come before the courts. In addition, the Alaska Code of Conduct includes provisions instructing judges to avoid activity that might provide improper influence⁷⁰ or that might “cast reasonable doubt on the judge’s capacity to act impartially as a judge.”⁷¹ Finally, similar to others, Alaska’s Code generally prohibits judges from participating on a government committee, commission, or activity unless it relates to the “improvement of the law, the legal system, or the administration of justice.”⁷²

The codes of conduct of other states offer similar language with slight variations. For example, states like Indiana, Nebraska, and North Dakota add additional language that also allows judges a voice on matters with respect to the judges’ acquired knowledge or expertise and on matters involving a judge’s legal or economic interests.⁷³ The latter may allow the judge to lobby for increases in judicial salaries. Nebraska, for example, states:

A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except: in connection with matters concerning the law, the legal

67. TEX. CODE OF JUDICIAL CONDUCT Canon 4(B)(1).

68. JUDICIAL CONDUCT CODES OF DEL. Canon 3.1(C).

69. ALASKA CODE OF JUDICIAL CONDUCT, Canon 4(C)(1) (emphasis added). For similar provisions, see the JUDICIAL CONDUCT CODES OF DELAWARE, Canon 3.2(A); MASS. CODE OF JUDICIAL CONDUCT, Canon 4(B); N.D. CODE OF JUDICIAL CONDUCT R. 3.2(A).

70. ALASKA CODE OF JUDICIAL CONDUCT Canon 2(B), 4(C), cmt.

71. *Id.* Canon 4(A)(1).

72. *Id.* Canon 4(B), cmt.

73. See NEBRASKA CODE OF JUDICIAL CONDUCT § 5-303.2(B); IND. CODE OF JUDICIAL CONDUCT Rule 3.2(B); N.D. CODE OF JUDICIAL CONDUCT R. 3.2(B).

system or the administration of justice; in connection with matters about which the judge's acquired knowledge or expertise in the course of the judge's judicial duties; or when the judge is acting pro se in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary capacity.⁷⁴

While this discussion is not completely exhaustive, there is, like in the federal Code of Judicial Conduct, a wide range of political activity that is allowed, where judges can speak freely and lobby on issues of interest for improving the judiciary and judicial process. There are prohibitions in codes of inappropriate partisan political activity⁷⁵ and requirements that judges avoid impropriety and its appearance.⁷⁶ So on one hand political activity is prohibited or discouraged, and on another lobbying is very much allowed on issues of law and judicial administration.

3. Communication in Civic, Political, Charitable, and Government-Related Activities

The third component common to all of the codes reviewed are provisions that provide for the participation of judges in groups and government entities concerned with the law and justice system, civic groups, and charities. For example, in most states a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit. Activities may include, but are not limited to: (1) assisting in planning related to fundraising or participating in management/investment of funds; (2) soliciting contributions; (3) soliciting membership; (4) appearing or speaking, being featured in a program, and permitting his or her title to be used in connection with an event; and (5) making recommendations to such a public or private fund-granting organization in connection with its programs and activities (only if concerning the law, legal system, or the administration of justice). In addition, codes like Alaska's require that judges "uphold the integrity and independence of the judiciary"⁷⁷ and permit them to participate in a host of educational activities that include participation in efforts to improve the justice system and protect judicial independence.⁷⁸

In the Model Code and Codes of the 50 states, like the federal code, there is considerable room for judges to educate the public, participate in public forums, work with and lobby the other branches of government, and participate in government, civic and charitable groups. With respect to lobbying the other branches, the codes raise similar issues as with the federal Code of Conduct. Judges appear to have considerable latitude with respect to communicating with the other branches on matters that deal with law, the justice system, and the administration of justice. Some state codes contain language that notes concerns with judges

74. NEB.. CODE OF JUDICIAL CONDUCT § 5-303.2.

75. *E.g.*, ALASKA CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(a) (prohibiting a judge from holding a leadership or office position in a political party).

76. *See id.* Canon 2.

77. *Id.* Canon 1.

78. *Id.* Canon 4(B).

identifying with a political cause that could come before the court, or with judges' activity that might damage perceptions of impartiality. The decision to balance these somewhat competing messages may, however, lead to norms where some judicial officials avoid open political activity where it is very much allowed. Judicial officials might be more passive given the importance of impartiality and the value of protecting judicial independence. When judges take a passive approach to communicating for judicial needs and commenting on important policy formulation efforts, they might be doing a disservice to the judiciary, especially when the activity is not prohibited and those who are being lobbied encounter competitive political activity from other interests.

V. POLITICAL SPACE EXISTS FOR JUDICIAL OFFICIALS TO ENTER POLICY DISCUSSION

Court officials interact with and lobby other branches as other government institutions do. It appears that there is considerable political space in light of legal and ethical rules for judicial officials to do so. Along with this ability to lobby, however, scholars and some court officials have called on the courts to be prudent and careful—stressing that court leaders should mind the norms of impartiality and independence of the branch.⁷⁹ How they should do this work raises questions about tactics, approach and “best practices,” and style of communication.

Scholars have noted that courts may be playing it safe in their lobbying work. First, court officials may fear behaving in openly political ways because it might tarnish the image of the bench as apolitical, fair, and impartial.⁸⁰ Norms (and even Judicial Conduct Codes) suggest that decisions should be made without external pressures or dictates, or without even the appearance of these pressures. This has isolated the judiciary, and some have suggested that this hesitance to lobby conceals real judicial administration problems from the public and the other branches.⁸¹ Research supports that court officials have traditionally behaved conservatively in their political behavior.⁸² Mark Cannon notes the reluctance of judges to lobby the other branches, but discusses agendas built by Chief Justice Warren Burger to improve intergovernmental relations.⁸³ There are examples throughout history of federal judicial efforts to reform courts and inform legislation.⁸⁴

Some scholars suggest that court officials *should* play it safe, with concerns in mind that active politics might invite attacks by the other branches of

79. See Geyh, *supra* note 49; Resnik, *supra* note 8.

80. See Mark W. Cannon, *Innovation in the Administration of Justice, 1969–1981: An Overview*, 10 POL. STUD. J. 668, 670–73 (1982).

81. See Mark W. Cannon & Warren I. Cikins, *Interbranch Cooperation in Improving the Administration of Justice: A Major Innovation*, 38 WASH. & LEE L. REV. 1, 4 (1981).

82. Cannon, *supra* note 80; Douglas & Hartley, *supra* note 10.

83. Cannon, *supra* note 80.

84. See Buchman, *supra* note 8; Crowe, *supra* note 8; see also GEYH, *supra* note 13; Resnik, *supra* note 8.

government.⁸⁵ Professor Stephen Burbank notes that court powers, and protections against intrusion on court power, are minimal.⁸⁶ However, in his book *When Courts and Congress Collide*, Charles Geyh argues that customs of judicial independence evolved over time and created an equilibrium of respect among federal courts and the other branches.⁸⁷ While other branches can use many weapons against courts (e.g., impeachment, budget power, changes in jurisdiction), these are rarely used because of the custom of protecting judicial independence.⁸⁸ Geyh later cautions that this equilibrium is fragile, especially in light of the recent political attacks on judges for “activism” by elected leaders, political parties, and interest groups.⁸⁹ For example, he argues that the federal judiciary went too far when it lobbied against enactment of the Violence Against Women Act (VAWA).⁹⁰ The Judicial Conference of the United States (with Chief Justice Rehnquist at the helm) argued that the VAWA could have a striking impact on the administration of the federal courts by increasing caseload and that these causes of action were better left to the states.⁹¹ When Congress passed the VAWA anyway, Rehnquist wrote the opinion of the Court striking the VAWA down as unconstitutional and drew criticism for the decision.⁹² His point, however, was whether the actions of the Judicial Conference, while legal and ethical, were prudent political behavior. Instead, Geyh’s concern was that actions like the Judicial Conference’s and Chief Justice Rehnquist’s stance against VAWA might embroil courts in partisan controversies that invite attacks by the other branches.

Similarly, Resnik sheds some light on when the judicial voice might be appropriate versus not:

The collective voice ought to be stilled so as to be agnostic about *which* claimants ought to be before the federal courts or sent by Congress to state, Indian, or administrative courts without rights whatsoever. The special insights that judges may have from their role as judges need not be lost to public debate; Congress can create commissions on which individual judges sit to offer advice. Ad hoc groups of judges may also come together to debate the merits of a particular piece of legislation, and individual members of the judiciary—including its chief justice—can as individuals (informed by their professional roles) testify before Congress and in other fora about the needs and roles of the federal judiciary⁹³

85. See also GEYH, *supra* note 13; Resnik, *supra* note 8; Vickrey, Dunn & Kelso, *supra* note 13.

86. Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L.J. 909, 914–15 (2007).

87. GEYH, *supra* note 13.

88. *Id.*

89. *Congressional Control Over the Courts? History Says No, But It Could Happen*, IND. UNIV. BLOOMINGTON (Apr. 6, 2006), <http://info.law.indiana.edu/news/page/normal/3254.html> (last visited January 31, 2014).

90. GEYH, *supra* note 13, at 243–51.

91. *Id.*

92. *Id.*

93. Resnik, *supra* note 8, at 291–92.

How conservative or open courts should be when they lobby the other branches is open for debate. The limitations and pressures courts face when deciding how to proceed with lobbying are very real, and most judges seem to behave in a rather conservative way politically. Of course, there are several important points to raise with respect to ethics rules and the consideration of formal and informal lobbying. How the rules are written, and why they are written, "teach" the proper course of action for judicial actors. While passive behavior provides some safety in that court officials refrain from advocating on topics that might appear before the court later, it may also mean that court needs (like budgets) are not effectively and competitively communicated. That said, the rules at the federal and state level appear to be written in such a way that provides political "space" to behave more actively. Of course, while not the subject of this Article directly, how the rules are interpreted matter, how they are enforced matter, and what real penalties exist also matter a great deal as to their impact on political activity. In other words, with all the space that appears to exist for judicial lobbying, there may also be a reluctance to enforce the provisions, and the penalties may be of such a nature that judicial officials do not fear the enforcement of the rules either.

VI. THE POLITICAL "SPACE" TO LOBBY AND ITS BOUNDARIES

This Article concludes that there is plenty of space for judges and judicial officials to bring items of importance to the judiciary before elected leaders. The "space" provided to lobby with exceptions using terms such as "law," "judicial administration," and "justice" is frankly enormous. Evidence demonstrates judges and judicial officials have always lobbied the other branches of government and have participated in efforts to improve interbranch relations for these purposes.

Scholars have noted that there is significant opportunity for court officials to lobby the other branches of government and that rules generally permit this activity. That said, there is a concern generally that although this activity may be legal and ethical, it may not be prudent. Unlike some, I have come to the conclusion that lobbying is not only permitted, but that it is necessary for courts in the political environment of the United States. To not do so, in such a competitive political environment as our federalist system, may lead to a passive, even weak, political approach that does not allow courts to effectively seek and get what they need in the political process. A passive approach to politics may also make it more difficult for courts to defend themselves and fend off attacks on their enumerated and inherent constitutional powers.

What is legal is not always wise, nor is it necessarily ethical. Vickrey, Dunn, and Kelso present real concerns about harming the impartial image of the courts and worry about entangling judges and the institution into partisan fights that might lead to attack by the other branches. Resnik and Geyh raise concerns about attempts by judges to communicate in an extrajudicial fashion what rights should be and what rights can be claimed by litigants. Expressing these sentiments about legislation, like the Violence Against Women Act, and then later striking down that legislation is an example of this concern. Geyh worries about the eroding of important norms that prevent the other branches from reining in the power of courts. Two questions are worth exploring in future research that follows from these points. First, how often do these examples of judicial lobbying lead to such attacks? And

second, to what extent are communications by judges about policy matters enriching the policy process by adding to discussions of agenda setting, policy formulation, and policy implementation? The expertise of the judiciary on matters of law and judicial administration is quite useful as lawmakers attempt to pass legal reforms brought to them by other self-interested groups.

There is a lot of space between the extremes of aggressive, hard-nosed lobbying and the passive nature that has been the subject of discussion at the conferences noted earlier and among scholars. Myself in 2013; Vickrey, Dunn and Rosen in 2009; and the NCSC in 2013 provide some important ideas that court leaders might consider as they seek to improve political engagement.⁹⁴ Building long-term relationships with leaders from the other branches, building public support for court needs, building coalitions with other parties and using these allies as “surrogates” to lobby for court needs, building lobbying processes and institutions that help advance courts, and devoting more resources to lobbying capacity are among many ideas for court leaders to consider. These tactics all address the importance of having the wisdom and voice of the judiciary at the table in policymaking.

VII. THE IMPORTANCE OF LOBBYING AND THE JUDICIAL VOICE IN POLICYMAKING

This Article examines a wide variety of topics, including what we know and do not know about the ability of court officials to lobby the other branches of government. As court leaders nationally tackle crises like budgeting and the so-called “attacks” on the independence of courts, there have been more efforts to improve interbranch relations within the court community, improve how courts lobby the other branches, and build allies that might lobby for the branch. There appears to be extensive political space for judges and court officials to interact with the other branches and to engage in lobbying efforts to improve the law and judicial administration. At the same time, some scholars have concerns that engaging the other branches might inject the judiciary into politics and upset the customs that protect judicial independence. If political efforts upset that balance, or put the branch on one side or the other of partisan issues, it might invite attacks from the other branches. These concerns are important, but too much caution and conservative approaches to political advocacy may have harmed the judiciary in the past. Courts may appear less salient to legislators, may not do as well in budget discussions, and may be on the losing end of legislative efforts to change laws that impact the work of the courts. Courts may be left retreating from politics at times that the judicial voice is needed the most.

The judicial voice is necessary for effective problem solving in times of crisis, like facing shrinking budgets and courts’ caseload capacity. Good data or evidence of the impact of crises must be paired with clear and effective communication of the impact of crises on courts. It also takes political effort and

94. Hartley, *supra* note 10; NAT’L CTR. FOR STATE CTS., *supra* note 24; Vickrey, Dunn & Kelso, *supra* note 13.

well-planned advocacy to convince elected leaders to remedy these problems. That takes mobilization and power.

The judicial voice is also necessary to repel attacks on courts. This may be done directly through judicial lobbying but also indirectly by building political allies that respect the courts and will fight for judicial independence and court needs when under attack by those who wish to rein in their power. Powerful court leaders who are well liked, respected, and trusted may be more effective at this work. Effort needs to be invested in building excellent relations and ties between members of the other branches. This takes time and investment in resources and human capital.

Of course, policymaking is an enterprise that involves setting agendas, analysis of alternatives, and the negotiation of language of what will be law. The policy formulation process, the passage of laws, and a law's later implementation may profit greatly by having the voice of experienced jurists and court leaders at the table. Interestingly, the codes of conduct do not prohibit that voice at all. The concern of ethics and scholars is that judges not get associated with partisan stances or advocate for what rights should be when they will later decide cases that might have to interpret the law. Even this, however, is debatable to some degree, as all policymaking is political and there is a risk that a party will be associated with one side or the other. Judges, however, have vast knowledge on such subjects as torts, contracts, probate matters, domestic violence, and the impacts of criminal and civil laws. The cases judges hear, the volume of cases, and the nature of issues that courts consider provide a valuable viewpoint that could raise important questions about the impact of well-intentioned legislation and regulatory rulemaking. When that voice is absent, I believe our efforts to improve society and our law suffers.

The balance of engaging in the political process in an effective way and not appearing partisan is tricky, but I argue that improving engagement efforts and behaving less conservatively is necessary. The public needs to hear more of the judicial voice and what it uniquely knows about the problems facing society. Here are some possible steps in the right direction. We need more research and we need to create best practices for this engagement, detailing how active political engagement works, how conservative approaches to engagement might hurt, and what mistakes occur where courts might have overreached. These efforts might help find the balance between effective political advocacy and the concerns that courts may get mixed up too much in politics.

CONCLUSION: REFORM EFFORTS AND WHAT IS NEXT

Like other government institutions, courts lobby other branches of government regarding their needs. If not done as formally and as aggressively as other agencies, we know that, at the very least, it is informal. As Malcolm Feeley quipped, "it's called lunch." If anyone inside or outside of the judiciary is concerned that court officials are not allowed to lobby more formally, they are wrong. While judicial officials may not be able to use public resources for political activity or engage in other political activities for partisan gain, it is permissible to lobby on a wide range of issues that impact the law, the judiciary, and judicial administration.

With the ability to lobby in mind, the real questions courts must address are: How formally should it be done? How professionally should it be done? And

how aggressively should it be done? We know some of what might work from research and past efforts to improve interbranch relations by the court community. Some of the things worth doing are as follows:

Investing in political engagement. While budgets are tight and the needs of adjudication come first, courts need to build capacity to effectively lobby like other agencies and “model” courts in other states. We know that state chief justices, state court administrators, and local presiding judges and court managers lobby. In prior work, I suggest that the selection and tenure of court leaders needs to be rethought in some states.⁹⁵ Courts need to pay close attention to political, advocacy, and management skills when selecting chief justices. Short tenure or rotation of court leaders is also a problem, as courts might lose important political capital and relationships built by effective court leaders over time.

We do not know much about the amount of staff and resources dedicated to this work. A research effort should begin to explore the capacity to lobby, looking for variations (and best practices) in activity among state judiciaries. What portion of court budgets are devoted to intergovernmental relations activity? How much court staff (and staff time) is devoted to lobbying? And what do other governments and agencies invest in comparison? The answers to these questions might help assess what needs to be devoted to lobby more effectively, and knowledge of what other agencies invest might help assess the competitive political environment into which courts enter.

Build institutions and processes for lobbying that exists over time. Research efforts should focus on the processes state and local court judges and managers use for budget requests and lobbying efforts for court needs. What is the planning process like across states? How is legislation advanced and monitored? What tactics are used to lobby during and beyond the legislative session? There is some evidence of this in works by Winkle, myself, and others. There is also a great publication by the NCSC that offers advice on how to do intergovernmental work more effectively with attention to examples and best practices.⁹⁶

Efforts should be made to build coalitions. If courts are not noticeable to legislators when they lobby on their own, coalitions that advance the needs of courts and other agencies simultaneously could improve salience. Douglas and I note that courts rarely come to the budget process with allies, and in another article, I note the importance of building coalitions as an effective lobbying tactic.

Building coalitions can be done issue by issue by circulating a court agenda formally or informally to potential partners and opponents as is done in New York.⁹⁷ Effectiveness might also be institutionalized with the creation of commissions formed with agency partners that meet regularly throughout the year to discuss policy issues and needs. The Council of Chief Justices and the Conference of State Court Administrators are considering a national effort to work with the other branches.⁹⁸

95. Hartley, *supra* note 10, at 113–14.

96. NAT'L CTR. FOR STATE CTS., *supra* note 24.

97. *See* Hartley, *supra* note 10.

98. *Id.*

Some states have already done what is being considered at the national level. For example, in 2013 the Tennessee Supreme Court formed a group of justice system partners called the Tennessee Judicial Branch Alliance.⁹⁹ The Alliance included representatives of the Tennessee Judicial Conference, the Tennessee Trial Judges Association, the Tennessee District Attorneys General Conference, and the Tennessee District Public Defenders Conference to regularly meet and discuss needs and issues that might impact them together or separately. These partners met in a retreat in August 2013, another day-long retreat in November, and participated together in several teleconferences throughout the year. As the year went along, other judicial partners were added, including representatives of general session judges and juvenile court judges. The meetings were used to discuss important issues facing the courts and their partners.

Once issues were identified, they worked together to make an agenda for the 2014 legislative session. They focused primarily on needs where all members of the alliance could help each other and put aside needs that might be in conflict. For example, they focused on issues such as salaries and additional resources like the addition of a public defender and district attorney per district. The meetings were said to help build trust among justice system partners, share information, and “sing from the same sheet” in the legislative process. While any of the partners alone may not have been able to command significant attention from lawmakers, together they could reinforce the needs of each other when communicating with public officials. At the time of the writing of this paper, the legislative agenda is before the Governor and legislature, but there is not yet evidence of how well the strategy has worked.

Creating institutions, like commissions with diverse representation of agencies and interest groups, can open lines of communication among those with similar interests. It is also an effective way of making what was once a “judicial issue” a “justice system” issue. By this, I mean that some issues like pay, cuts to budgets, and policy reforms may impact not only courts but also their justice system partners like prosecution, public defense, probation, and parole. Ongoing communication and even partnership of these justice system organizations might draw more attention from legislative and executive branch officials. Efforts like these, as noted earlier, exist in states like Washington, New York, and Tennessee.

In the end, the discussion of what court officials should do to become equal players in our system of government will continue. When discussing the important roles of separation of powers and independence of the judiciary, it is critical to have a better understanding of how the branches can work together and on more equal footing. The conundrum facing courts is that they face a struggle of balancing how to be impartial and apolitical in the eyes of others but to participate in the process of governing. Complicating this matter are the boundaries that ethical rules present for judges. The bottom line, however, is that these rules do not really provide much of a real boundary against engaging the other branches. Scholars and court leaders caution to be prudent. But prudence should not make court leaders passive or conservative. For the judiciary to participate equally as a separate branch of government and to improve policy that advances our society, involvement in politics

99. Phone interview with Mike Catalano, Clerk of the Tennessee Supreme Court, February 10, 2014.

is necessary. The continued work of court leaders to discover newer and better ways to improve interbranch relations is fantastic. Developing and investing in political skill and capacity are a necessity.

AN EPILOGUE: WWMS?

As this is a memorial issue dedicated to my friend Mark Hummels, I want to reflect back on what I knew of my friend and ask, WWMS?—or, What Would Mark Say? The leadership and staff of the *Arizona Law Review* should be congratulated, and I thank you personally as a friend of Mark's, for this symposium on the very important issue of Judicial Ethics, which was so important to Mark in his legal career. Mark was a colorful, vibrant, exciting, and playfully goofy person whose energy and zeal for life was cut short by the anger of a gunman. Mark was extremely intelligent, loved ideas, loved arguments, and loved education. As a journalist, prior to his law career, he dedicated his professional life to news, educating the public, asking those tough questions of public and private officials that shed light on darkness, and he generated debate. I had the opportunity to memorialize Mark in my own way in a piece I wrote about Mark's passing and gun violence.¹⁰⁰ The opportunity to talk about gun violence continues and will continue for decades, I think. It is something that I will never again be a shrinking violet about when I get the opportunity to talk about it.

WWMS about this symposium? About my article? I am uncertain. I wish I had the chance to discuss it with him now, but I do know he would argue with me. He would want to read and pull all the articles in this symposium apart by the seams. He would do it very good-naturedly, as a law professor might in a classroom, and respectfully in a way that showed his intelligence. Because he was so competitive, I think he would want to win whatever debate would materialize from the discussion, as a lawyer would, no matter what tenable or untenable position he had originally taken. The result of what Mark would say would leave whoever was embroiled in that discussion or observing it, thinking and considering, what next? And that is what I hope that this piece, rightly or wrongly worded, right or wrong in content or support of my arguments, might do . . . for some judge, some court manager, some scholar . . . somewhere. It is why I write and it is why Mark wrote. It is this kind of reasoned, competitive, and honest discussion in this special issue that I hope will also advance our culture and attitudes surrounding judicial ethics, but also gun violence, which took the life of my friend. There can be no change in law or force behind its implementation without a culture that supports it and drives it. That is the most difficult and most lasting ingredient for change. It is an ingredient born of history, of news, of learning, of the courage of taking a stab at an argument, of being quite prepared to be wrong in the resulting debate, and of knowing that the very process of that debate can be educational for others. This is something I would say to Mark today if I could, it's something I think he believed in, and it's something I think he'd argue with.

—Dr. Roger E. Hartley, Asheville, North Carolina.

100. Jim Nintzel, *Reflections on Mark Hummels, Tucson and Gun Violence*, TUCSON WEEKLY (Feb. 1, 2013), <http://www.tucsonweekly.com/TheRange/archives/2013/02/01/reflections-on-mark-hummels-tucson-and-gun-violence> (quoting Roger E. Hartley).