

Interbranch Information Sharing: Examining the Statutory Opinion Transmission Project

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INTRODUCTION

Questions of judicial reform have begun once more to occupy a significant portion of our scholarly, legal, and political discourse.¹ From the projects for this Symposium to the platforms of major national politicians, scholars and policy-makers are considering myriad proposals to alter the structures and procedures of the federal courts. These proposals include increasing the size of the Judiciary or the Supreme Court, changing the criteria for selecting and retaining federal judges, and substantially altering the courts' dockets.²

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1. See, e.g., 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 (2020) (highlighting various moments for judicial reform over time).

2. E.g., Steven G. Calabresi, *Republicans Should Expand the Federal Courts*, NAT'L REV. (Nov. 15, 2017), <https://www.nationalreview.com/2017/11/gop-tax-bill-should-expand-federal-courts> [<https://perma.cc/SR5Y-7B9J>]; Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129

But the Judiciary does not, of course, stand alone. And so we think advocates for judicial reform should also consider how we might improve how that institution relates to, and interacts with, the other branches of government. This Essay begins to undertake that venture with one example—the modest but vital statutory opinion transmission project (the “Project”) directly connecting the work of the Judiciary with the work of Congress.³

Much of the courts’ work focuses on interpreting statutory text provided by Congress. So Congress might wish to keep tabs on that work in order to learn how its statutes are interpreted and applied (among other things). But the members of Congress and their staff are simply not able to read *every* opinion in the federal reporter in the hopes of drawing lessons on draftsmanship or identifying statutes in need of amendment.⁴ Indeed, in his landmark study on “congressional overrides,” William Eskridge noted that Congress has trouble effectively monitoring the work of the courts of appeals.⁵ This should not be surprising, given the sheer volume of output from the courts.⁶ In their study of all proposed legislation reported out of committee between 1990 and 1998, Stefanie Lindquist and David Yalof found that Congress proposed to respond to only 187 federal appellate decisions—a fraction of a percent of the hundreds of thousands of merits decisions issued by the courts of appeals over those years.⁷

YALE L.J. 148 (2019); *2020 Dems Warm to Expanding Supreme Court*, POLITICO, <https://www.politico.com/story/2019/03/18/2020-democrats-supreme-court-1223625> [<https://perma.cc/XC5T-XYVY>].

3. Robert A. Katzmann & Russell R. Wheeler, *A Mechanism for “Statutory Housekeeping”*: *Appellate Courts Working with Congress*, 9 J. APP. PRAC. & PROCESS 131, 134–35 (2007) [hereinafter Katzmann & Wheeler, *A Mechanism for “Statutory Housekeeping”*].

4. See Stefanie A. Lindquist & David A. Yalof, *Congressional Responses to Federal Circuit Court Decisions*, 85 JUDICATURE 61, 63–68, 64 tbl.1 (2001).

5. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 334, 416 (1991) (“Just as the present study shows impressive congressional activity in connection with Supreme Court decisions, it shows an unimpressive knowledge of and response to the far more numerous lower federal court statutory interpretation decisions.”).

6. According to the most recent report from the Administrative Office of the U.S. Courts, the twelve regional circuits collectively published 3,583 opinions in the twelve-month period ending September 30, 2019. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: TABLE B-12 (2019), https://www.uscourts.gov/sites/default/files/data_tables/jb_b12_0930.2019.pdf [<https://perma.cc/Z6VD-9VQC>].

7. See Lindquist & Yalof, *supra* note 4, at 63–68, 64 tbl.1. Lindquist and Yalof estimate that about twenty-six thousand cases were decided by the courts of appeals each year for the five-year period from 1992 to 1996. *Id.* The Administrative Office of the U.S. Courts computes even higher totals for 1997 and 1998. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: TABLE A-1 (1997), https://www.uscourts.gov/sites/default/files/statistics_import_dir/a01sep97.pdf [<https://perma.cc/RSU2-XE8V>]; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: TABLE B (1998), https://www.uscourts.gov/sites/default/files/statistics_import_dir/b00sep98.pdf [<https://perma.cc/8MEK-FLXV>]. Hence, even a conservative estimate would suggest that the denominator for this fraction is well above two hundred thousand decisions. Of course, not every

But when Congress's attention is drawn to the right places, it may be more able to respond to the courts' decisions. Indeed, of those 187 cases that merited attention, Congress eventually decided that over one-third (65 cases) warranted action of some kind—including amendments that either “overr[ode]” or “codif[ied]” the respective appellate court interpretation.⁸ In short, the vast and largely undifferentiated nature of the modern Judiciary's body of decisions creates a problem of attention for Congress: Which statutory interpretations merit a second look?

In 2007, in response to a request for assistance from Congress, the Director of the Administrative Office of the U.S. Courts (who functions under the direction of the Judicial Conference) issued a memorandum “revitaliz[ing]” a program—the Project—designed to “foster communication” between the judicial and legislative branches.⁹ That memorandum memorialized a protocol under which a federal appellate judge or panel might “send to Congress, without comment, opinions that describe possible technical problems in statutes,” so that Congress may respond as it sees fit.¹⁰

In our view, instituting such a program seems to be a sensible response to the overwhelming tide of decisions that flows from the federal appellate courts. This is due, in part, to the Judiciary's several distinct institutional advantages. The courts can, for example, identify potentially salient decisions *as they are issued*, so that congressional staff need not scour the volumes of the federal reporter. The Judiciary, that is, can send the needles to Congress, instead of into a haystack. Moreover, one of the most important functions of the federal courts is to interpret and apply federal statutes. Hence, federal judges—as consumers, rather than producers, of statutory text—are uniquely positioned to identify text that proves to be potentially buggy (whether due to a statutory gap, an ambiguous term, or some other drafting concern) *as applied to a particular dispute*. Stated simply, the Judiciary benefits from some specific context that Congress may have lacked at the time it drafted a given provision. Finally, the Judiciary can identify such issues *across a range of interests and industries*. The opinions selected by the courts may, for example, contain lessons that bear widely on statutory drafting across issue areas. Or an opinion transmitted by the courts may

decision results in a complete opinion, and this distinction accounts for the difference between the numbers in this note and the ones noted above, *supra* note 6.

Putting the precise numbers aside, we can confidently say that the Judiciary is a high throughput institution, no matter whether its volume of work is measured by decisions or by opinions. As a result, it seems likely that Congress finds it difficult to effectively monitor all of the courts' statutory interpretations, and hence responds to only a small fraction of the courts' decisions.

8. Lindquist & Yalof, *supra* note 4, at 64.

9. See Memorandum from Russell Wheeler, President, The Governance Inst. 1 (July 8, 2019) [hereinafter Wheeler Memo] (on file with authors). The impetus for the revitalization came from the legislative staff who draft statutes. Congressional leadership, principally the chairs and ranking members of the Judiciary Committees, endorsed the revitalized project, as they had the original undertaking. Katzmann & Wheeler, *A Mechanism for “Statutory Housekeeping,” supra* note 3.

10. Wheeler Memo, *supra* note 9, at 1.

happen to bear on a statute that disproportionately affects the politically underrepresented—that is, on a decision or statute that might not be brought to Congress’s attention by other means.¹¹ In short, the Project makes good sense because, among the many actors who may compete for Congress’s limited attention, the Judiciary is uniquely situated to timely identify potentially problematic text across the entire U.S. Code for Congress’s review.

Working out why this extant, modest project makes sense is only the beginning of our larger inquiry. We may ask, for example, about the institutional motives that gave rise to the Project: How did this program come to pass? And looking beyond the program’s history, we may also inquire how it has functioned since its institution: How often are opinions referred? Who is referring them? Certain circuits? Judges? And how have these figures changed, if at all, over time? Finally, it is natural to ask about what has happened next: What happens to these statutory provisions after they are flagged by the courts of appeals? How often does Congress “respond”? How often does a disputed matter of statutory interpretation find resolution within the Judiciary instead (through, say, Supreme Court review)?

Parts I and II of this Essay examine these descriptive questions. We begin by briefly setting out the history of this interbranch protocol. Chief Judge Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit has been instrumental in instituting and revitalizing this program. In the first half of the 1990s, then-Professor Katzmann helped to establish a “pilot project” whereby the D.C. Circuit’s chief staff counsel would send opinions describing a statute’s technical issues to officials in each house of Congress—a project that the other courts of appeals were soon encouraged to—and did—join.¹² And later, in 2007, with the help of Governance Institute President Russell Wheeler, the Administrative Office of the U.S. Courts formalized the program by transmitting the memo described above. That memo outlined the protocol, sanctioned by congressional leadership, whereby each federal appellate judge could refer judicial opinions to Congress.¹³ Though Chief Judge Katzmann and Russell Wheeler have both written about their efforts, this Project is otherwise largely understudied, having received only limited treatment in the academic literature.¹⁴

11. We do not mean to suggest, of course, that the courts are universally more accessible than Congress. Rather, our point is more modest: The incentives to litigate in court are sometimes different from the incentives to lobby Congress, and so the protocol described here helps to channel more statutory concerns to Congress across a wider range of private motives.

12. Katzmann & Wheeler, *A Mechanism for “Statutory Housekeeping,”* *supra* note 3, at 134.

13. *See generally* Wheeler Memo, *supra* note 9.

14. Relevant works by Chief Judge Katzmann and Russell Wheeler include *A Mechanism for “Statutory Housekeeping,”* *supra* note 3, and Robert A. Katzmann, Madison Lecture, *Statutes*, 87 N.Y.U. L. REV. 637 (2012) [hereinafter Katzmann, *Statutes*]. The only other in-depth study of the Project we have found is in a thoughtful student note: Jeff Simard, Note, *Stimulating Dialogue Between the Courts and Congress: Sprucing Up the “Statutory Housekeeping” Project*, 99 MINN. L. REV. 1195 (2015).

Second, we describe some statistics relating to the most recent phase of the Project. Between 2007 and 2019, nine of the thirteen federal appellate courts participated in the program (while the Sixth, Eighth, D.C., and Federal Circuits declined the opportunity), transmitting sixty-one opinions to Congress. Those sixty-one opinions identified fifty-nine discrete statutory issues (only two cases overlapped with another). The transmissions have not been evenly distributed across years; though the courts in the Project's early years sent an average of seven opinions per annum, that number has dropped to only one or two since 2016.¹⁵ As for potential responses, Congress has enacted four amendments resolving those issues—at least two of which seem to directly respond to the circuit courts of appeals' respective decisions, although we cannot say these transmissions, under the project, were the direct cause. Additionally, the Supreme Court has addressed six of these issues on its own. Part II describes these statistics and resolutions in more detail.

Finally, in Part III, we begin to evaluate the success of the Project. On its own terms, the Project appears to have achieved that which it set out to accomplish: It has given federal appellate judges a specific protocol by which to channel notable statutory interpretations to congressional leadership and staff and has thereby helped Congress identify both best practices for drafting, as well as specific statutes in need of correction or clarification. But is that the only metric of success? Should the Judiciary do more with this vitally important communication channel? We think so. To begin, we suspect that the Project is well below capacity. And so our proposal for judicial reform, though somewhat modest, is potentially important: We ask federal appellate judges to send more opinions to Congress. We aim to accomplish this in two ways. First, we think the Judiciary should further institutionalize the internal governance processes that led to the Project's "revitalization" in the first instance. As new judges are confirmed (or even as memory fades), it is worth doing more to remind the federal appellate Judiciary of this critical interbranch communication channel.¹⁶ Second, we suggest two criteria for identifying opinions that may be of particular interest to Congress: one, opinions that note a circuit split, or, two, opinions that contain a separate writing (such as a concurrence or dissent) on a matter of statutory interpretation. Just as an appellate judge may write an opinion to highlight a case for the Supreme Court's review, so too can a judge flag a matter of statutory interpretation for Congress's attention. And, as Justice John Paul Stevens once remarked, Congress's intercessions can be just as—if not more—important than the Supreme Court's.¹⁷

15. See *infra* Figure 1.

16. Our understanding is that the Administrative Office of the U.S. Courts has sent out a few reminders since the 2007 memo. See *infra* note 51.

17. See John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982) ("If the source of the conflict is ambiguity resulting from an omission in a statute, it would seem to make good sense to assign Congress the task of performing the necessary corrective lawmaking.").

We conclude by considering some of the forward-looking implications of our study. Ultimately, what lies at the heart of the Project is the recognition that the branches do well to share information with each other. It is worth further exploring these vital information flows across our government. The Administrative Conference of the United States (ACUS)—an independent agency—has recently instituted a close analogue to the project we study here. ACUS has agreed to “transmit” to Congress “judicial and agency adjudicative decisions” flagged by other agencies (or ACUS itself) “that identify technical and related problems of consequence in statutes dealing with administrative procedure.”¹⁸ Courts, moreover, sometimes receive information themselves from the executive branch, from Congress, and from other courts.¹⁹ Hence, as we enter this new moment for judicial reform, we hope to draw some attention to the Judiciary’s interbranch relations, with the aim of improving not only the Judiciary, but also the federal government as a whole.

I.

ESTABLISHING THE STATUTORY OPINION TRANSMISSION PROJECT

Judges, members of Congress, and scholars have long thought that the courts and the legislature need to improve their communication within the strictures of our tripartite system. Writing nearly a century ago, then-Judge Benjamin Cardozo famously lamented that “[t]o-day courts and legislature work in separation and aloofness” with the cost being both “wasted effort of production” and “lowered quality” of their respective products.²⁰ Working from the proposals of others before him—Jeremy Bentham, Lord Westbury, and Roscoe Pound—Cardozo suggested that a Ministry of Justice be formed to “mediate” between the two branches.²¹

18. *Statutory Review Program*, ADMIN. CONF. U.S., <https://www.acus.gov/research-projects/statutory-review-program> [<https://perma.cc/R3T6-WXR6>].

19. On the Executive, see, for example, *HP Inc. v. Berkheimer*, 139 S. Ct. 860 (2019) (mem.) (“The Solicitor General is invited to file a brief in this case expressing the views of the United States.”), and *Jaroslavic v. M&T Bank Corp.*, 912 F.3d 96, 104 (3d Cir. 2018) (“We invited the SEC to participate in the appeal as *amicus*. On July 13, 2018, we received a letter from David R. Fredrickson, Chief Counsel of the SEC’s Division of Corporation Finance, declining to participate as *amicus* but providing background information on the legal obligations imposed by the federal securities laws at issue in this case.”), *reh’g granted and judgment vacated*, 925 F.3d 605 (3d Cir. 2019). On Congress, see Neal Devins & Saikrishna B. Prakash, *Reverse Advisory Opinions*, 80 U. CHI. L. REV. 859, 883 (2013) (“Requests for the advice of the chambers of Congress date back to at least *Myers v. United States*, where the Court actively sought the advice of the Congress on whether the president had constitutional power to unilaterally remove a postmaster in the face of a statute that required the Senate’s concurrence.” (footnote omitted)). And on the courts, see, for example, 28 U.S.C. § 1292(b) (2018); 28 U.S.C. § 1254(2) (2018); SUP. CT. R. 19; and Amanda L. Tyler, *Setting the Supreme Court’s Agenda: Is There a Place for Certification?*, 78 GEO. WASH. L. REV. 1310, 1312 (2010).

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

21. *Id.* at 114 (first citing Roscoe Pound, *Juristic Problems of National Progress*, 22 AM. J. SOC. 721, 729, 731 (1917); then citing Roscoe Pound, *Anachronisms in Law*, 3 J. AM. JUDICATURE SOC’Y 142, 146 (1920); then citing 9 THE WORKS OF JEREMY BENTHAM 597–612 (1843); then citing 1

In the decades that followed, judges and scholars continued to voice concerns about the limited interbranch exchange of information, with varying suggestions for a cure. Of note, Judge Henry Friendly recommended the creation of an agency of “re-examination” or “legislative development of the laws” to help bridge the divide between Congress and the courts.²² Later, then-Judge Ruth Bader Ginsburg and Peter W. Huber proposed a standing “second look at laws’ committee”—one for each house or a joint committee—to reexamine and potentially repair particular statutes.²³ And in a slightly different vein, Judge Wilfred Feinberg suggested that the Judicial Conference of the United States designate a small number of law professors to identify “relatively noncontroversial conflicts” in statutory interpretation between the circuits and then alert Congress to the diverging opinions.²⁴ Despite these calls to enhance communication between the branches—particularly on the drafting of certain statutes—no such ministry, agency, or law professor assemblage followed.

What *did* emerge was a project, at the behest of the Judicial Conference Committee on the Judicial Branch, led by Judge Frank M. Coffin²⁵ along with now-Chief Judge Robert Katzmann, to “examine past, present and future relations between Congress and the Judiciary with the objective of improving interbranch understanding.”²⁶ The two set about establishing such an interbranch dialogue by founding, in 1986, the Governance Institute, “a not-for-profit organization concerned with exploring, explaining, and easing problems associated with the separation and division of powers in a democratic polity.”²⁷

Not long after, the D.C. Circuit Judicial Conference reached out to Judges Coffin and Katzmann to see, concretely, what could be done to “improve interaction between the two branches with regard to statutory revision.”²⁸ As a starting point, the Institute sought to learn what happens in Congress when the

THOMAS ARTHUR NASH, *THE LIFE OF RICHARD LORD WESTBURY* 191 (1888); and then citing *MINISTRY OF RECONSTRUCTION, REPORT OF THE MACHINERY OF GOVERNMENT COMMITTEE* (1918).

22. Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can’t and Legislators Who Won’t*, 63 *COLUM. L. REV.* 787, 805 (1963).

23. See Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 *HARV. L. REV.* 1417, 1432 (1987).

24. Wilfred Feinberg, Foreword, *A National Court of Appeals?*, 42 *BROOK. L. REV.* 611, 627 (1976). Judge Feinberg’s suggestion was offered as an alternative to a proposal being considered at the time of his article: a proposed National Court of Appeals that would sit between the Supreme Court and the regional courts of appeals. Feinberg was skeptical of the need for such a “fourth tier” and suggested instead that Congress could resolve any persistent conflicts. See Menell & Vacca, *supra* note 1, at 830 n.272.

25. Judge Coffin served as Chair of the U.S. Judicial Conference Committee on the Judicial Branch during this time. See Robert A. Katzmann & Russell R. Wheeler, *Project Seeks to Improve Communications Between Courts and Legislatures*, 75 *JUDICATURE* 45, 45 (1991).

26. Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 *GEO. L.J.* 653, 656 (1992) [hereinafter Katzmann, *Bridging the Statutory Gulf Between Courts and Congress*].

27. *Id.* at 656–57.

28. *Id.* at 656.

courts, in one of their opinions, note a “perceived problem[]” in a statute.²⁹ With Judge James L. Buckley’s help, the Institute identified approximately twenty cases that members of the D.C. Circuit thought “might warrant congressional attention.”³⁰

Moving from the Judiciary to Congress, the Institute conducted interviews with congressional staff to discern what Congress knew about these D.C. Circuit opinions, which noted particular matters of concern with various statutes.³¹ The results were striking: According to Chief Judge Katzmann, “the congressional staffs *were not aware* of the court’s decision” in the majority of these cases.³² (This was so even as the staffs were aware of decisions on “broad, policy-oriented issues of statutory interpretation”³³ and decisions that a losing party with “influence” had asked Congress to override.³⁴) Ultimately, staff members unanimously agreed that routinely receiving copies of decisions noting technical statutory issues would help them, among other things, determine “whether statutory revision was in order.”³⁵

In view of this interest shared by judges and congressional staff, the Institute formalized a pilot program whereby:

[T]he D.C. Circuit’s chief staff counsel [would send] complete opinions without comment to the Speaker, the minority leader, the Parliamentarian, the general counsel to the clerk, and the Legislative Counsel. . . .

The perceived statutory problems identified in the opinions would be largely technical and noncontroversial. The committees receiving opinions would be free to use them in any way they deemed appropriate, including not responding at all. Congress would ideally regard the opinions as simply another piece of information to consider in doing its work.³⁶

Chief Justice William Rehnquist, as the administrative head of the Judiciary, endorsed the program in his annual Year-End Report on the federal courts.³⁷ The Judicial Conference urged the twelve other circuits to institute

29. *Id.* at 657.

30. *See id.* at 657–58.

31. *See id.* at 662; *see also* Katzmann, *Statutes*, *supra* note 14, at 688; Katzmann & Wheeler, *A Mechanism for “Statutory Housekeeping,” supra* note 3, at 134.

32. *See* Katzmann, *Bridging the Statutory Gulf Between Courts and Congress*, *supra* note 26, at 662.

33. Katzmann & Wheeler, *A Mechanism for “Statutory Housekeeping,” supra* note 3, at 134.

34. Katzmann, *Statutes*, *supra* note 14, at 688.

35. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress*, *supra* note 26, at 662–63.

36. *Id.* at 666.

37. *Chief Justice Issues 1992 Year-End Report*, THIRD BRANCH (Admin. Office of the U.S. Courts, Washington, D.C.), Jan. 1993, at 1, 4.

similar projects.³⁸ And while most did, program participation slowly petered out by the early 2000s.³⁹ One explanation was that the program was not “fully institutionalized within the Judiciary.”⁴⁰

In 2006, the legislative counsels of both houses of Congress asked the Governance Institute, led by Russell Wheeler (after now-Chief Judge Katzmann’s 1999 judicial appointment), to revitalize the Project.⁴¹ The following year, the Administrative Office of the U.S. Courts issued a new memorandum to all circuit judges, emphasizing Congress’s request, urging the courts to participate, and explaining that the renewed project would be tracked and improved over time.⁴² The Project did indeed see a spike of new activity, with dozens of opinions transmitted in the years immediately following. The next Part considers this activity—both the numbers and types of cases transmitted from the courts, and the number and types of potential responses from Congress.

II.

EXAMINING THE STATUTORY OPINION TRANSMISSION PROJECT

A. Opinions Transmitted from 2007 to 2019

We turn first to some descriptive statistics about the Judiciary’s “statutory housekeeping” initiative since 2007, which we derive from the running list of opinions maintained by the Governance Institute.⁴³ Since the Administrative Office of the U.S. Courts announced the new phase of the program in 2007, most (but not all) of the courts of appeals have transmitted at least one opinion to Congress. Notably, despite the program’s origins as a “pilot project” at the D.C. Circuit, the judges of that court—along with those of the Sixth, Eighth, and Federal Circuits—have not transmitted any opinions to Congress.⁴⁴ Table 1 displays the total results on a per-circuit basis.

38. See Katzmann & Wheeler, *A Mechanism for “Statutory Housekeeping,”* *supra* note 3, at 134 (citing JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 127 (1995)).

39. See *id.*

40. *Id.* at 134–35.

41. Katzmann, *Statutes*, *supra* note 14, at 688.

42. Katzmann & Wheeler, *A Mechanism for “Statutory Housekeeping,”* *supra* note 3, at 134–35.

43. See Wheeler Memo, *supra* note 9, at 2 tbl.1. This memo is the latest in a running list maintained by the Governance Institute. It is periodically released for public review and is made available upon request. See, e.g., *Project on Statutory Construction Promotes Inter-Branch Communications*, U.S. CTS. (Sept. 10, 2015), <https://www.uscourts.gov/news/2015/09/10/project-statutory-construction-promotes-inter-branch-communications> [https://perma.cc/CNR9-RPEG].

44. Meanwhile, the Administrative Conference of the United States has identified three D.C. Circuit opinions meriting Congress’s attention in its own analogue to the Judiciary’s program. See Memorandum from Daniel Sheffner, Attorney Advisor, Admin. Conference of the U.S. to Office of the Legislative Counsel, U.S. House of Representatives, and Office of the Legislative Counsel, U.S. Senate (May 30, 2018), <https://www.acus.gov/sites/default/files/documents/Statutory%20Review%20Program%20Memorandum.pdf> [https://perma.cc/HY3K-J2CH].

Table 1: Opinions Transmitted (per Circuit)

Circuit	Count
1st	2
2nd	9
3rd	5
4th	3
5th	4
6th	0
7th	30
8th	0
9th	3
10th	4
11th	1
D.C.	0
Federal	0
Total:	61

Table 1 shows that, of the sixty-one opinions transmitted, the Seventh Circuit is responsible for nearly half: the Seventh Circuit has, over twelve years, transmitted thirty opinions to Congress. The Second Circuit (where Chief Judge Katzmann—one of the Project’s originators, recall—sits) takes second place with nine opinions. The remaining seven circuits transmitted between one and five opinions each over the entire twelve-year period.

This intercircuit variation presents a puzzle: What accounts for one circuit’s relatively active participation?⁴⁵ One possible explanation may be that the decision to transmit an opinion is made on a judge-by-judge or panel-by-panel basis. That is, circuit-level data may obscure preferences that really operate at the level of individual judges.⁴⁶ Some evidence suggests that this is so. Table 2 presents results on a per-judge basis, limited to those judges who sat on the panel

45. This, of course, is not the only puzzle. Another question is why some courts decided not to participate *at all*. Though we do not yet have a satisfactory answer, one possible explanation may lie in the distribution of judicial preferences: Those courts were comprised of judges that did not want to participate. But why not? Again, we do not (yet) have a satisfactory answer.

46. It is also possible that the Clerks’ and Staff Attorneys’ Offices make the decision in some of the courts, under policies set forth by the judges of the court or the Chief Judge. This arrangement, too, could cause some of the noted variation.

(excluding en banc panels) in more than one-third of the cases transmitted to Congress from their respective court.⁴⁷

Table 2: Opinions Transmitted (per Judge, selected set)

Judge	Circuit	Judge Count	Circuit Count
Easterbrook	7th	11	30
Flaum	7th	11	30
Pooler	2nd	4	9
Straub	2nd	4	9
Agee	4th	3	3
McKee	3rd	3	5
Fuentes	3rd	2	5
Holmes	10th	2	4
Kelly	10th	2	4
Owen	5th	2	4
Prado	5th	2	4
Reavley	5th	2	4
Sloviter	3rd	2	5
Smith	5th	2	4

Judge G. Steven Agee of the Fourth Circuit, for example, sat on the panel in every case transmitted to Congress from that court. This may suggest—though we cannot definitively say—that Judge Agee was the primary driver of the Fourth Circuit’s participation in the program.⁴⁸ Judge Theodore McKee similarly sat on the panel in 60 percent of the cases sent from the Third Circuit to Congress.

Likewise, in the Seventh Circuit, both Judge Joel Flaum and Judge Frank H. Easterbrook sat on the panel in eleven of the cases transmitted to Congress—more than one-third of the Seventh Circuit’s cases, and more than 15 percent of

47. In other words, only those judges where $\text{Judge Count} \div \text{Circuit Count} > 0.333$ are displayed.

48. One other possibility is that Judge Agee’s presence on the panel is pure circumstance. Perhaps three different judges each thought that an opinion merited congressional attention, and it was simply a coincidence that Judge Agee also happened to be on the panel in each of those cases. However, it seems to us more plausible that Judge Agee is responsible for the Fourth Circuit’s participation. Judge Agee authored the panel opinion in all three cases and, in one of those cases (discussed in more detail below), Judge Agee authored a separate opinion after consideration en banc.

More generally, it is possible that individual judges were drivers of their circuit’s participation in ways that do not reveal themselves in our data. For example, if a particular judge supported the program and was effective in encouraging his or her colleagues to participate, that judge’s referral rate may not seem relatively high.

the total cases, across all circuits, transmitted to Congress.⁴⁹ Moreover, Judge Easterbrook served as Chief Judge from 2006 to 2013. His leadership post at this critical moment for the revitalization of this program may, one might guess, have influenced his relatively active participation.

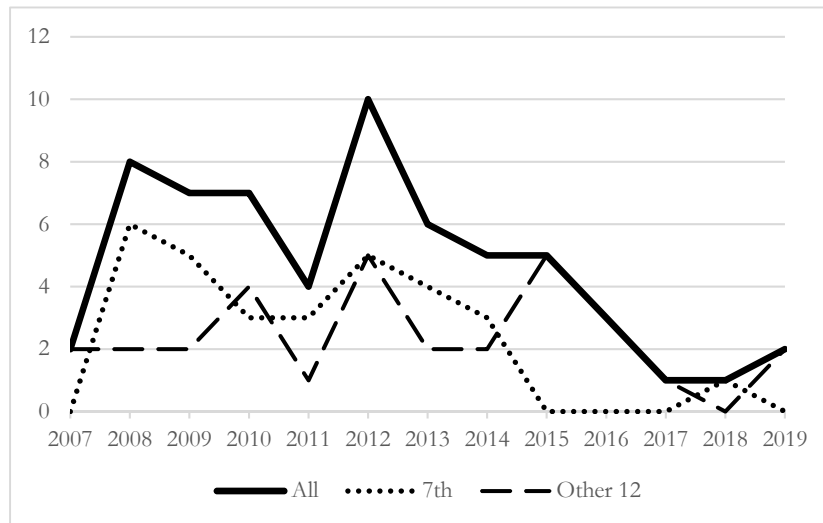
We also considered the possibility that knowledge about the program drove participation. We know that there was a push to inform judges about the program and to encourage their participation in 2007. Specifically, in that year, the Administrative Office sent a memo to all circuit judges outlining the then-newly-formalized protocol, and Chief Judge Katzmann and Russell Wheeler published an article describing the program and its virtues in the *Journal of Appellate Practice & Process*.⁵⁰ We have also learned that a few reminders of the program were sent in the following decade: The Administrative Office sent follow-up memos in 2015 and 2019, and the program was on the agenda of a meeting of the Chief Judges (when then-Chief Judge Easterbrook served as Chair).⁵¹ But by and large, it seems the most significant efforts at publicizing the Project occurred in 2007. And, after a closer look, we see that nearly every judge identified in Table 2—all except Judge Agee—was confirmed to the bench before the program was announced by the Administrative Office of the U.S. Courts in 2007. And every panel had at least one member who was confirmed before 2007.

This point seems confirmed by another notable finding from the data: Participation in the program has markedly declined in the past few years, as Figure 1 shows.

49. But Judge Easterbrook and Judge Flaum do not together account for more than two-thirds of the Seventh Circuit's cases. In five cases, Judge Flaum and Judge Easterbrook sat on the *same* panel, so simple addition would double-count these transmissions. Judge Flaum and Judge Easterbrook, sitting *separately*, thus sent only six cases each. Together, their seventeen cases (five shared plus six from Judge Flaum and six from Judge Easterbrook) are just slightly more than half.

50. See generally Katzmann & Wheeler, *A Mechanism for "Statutory Housekeeping,"* *supra* note 3.

51. See E-mail from Russell Wheeler to authors (Sept. 10, 2019) and E-mail from Russell Wheeler to authors (Sept. 11, 2019) (on file with authors).

Figure 1: Opinions Transmitted (2007–2019)

This is true across all judges, even judges who were once apparent enthusiastic opinion-transmitters, such as Judge Easterbrook.

Returning to the population of transmitted opinions as a whole, we found it contained more separate opinions—concurrences and dissents—on a per-opinion basis than the average court of appeals opinion. One study suggests that on average, circuit judges tend to write separately in about 8.4 percent of cases.⁵² But here, seventeen cases—over one-quarter—included a separate opinion. This, of course, may be no surprise: The Project depends on identifying those cases implicating difficult-to-interpret statutory language. Judicial disagreement over the interpretation of a particularly tricky provision may highlight statutes warranting a second look from Congress. The surprise, then, might be that the total number of opinions transmitted in the first place is so low,⁵³ a matter we revisit in Part III.

B. Subsequent Congressional and Judicial Action

But before turning to Part III, we move from the courts to Congress to discern what may have happened next. To be sure, the Governance Institute has emphasized that the Project’s primary purpose is *not* to “[a]chiev[e] statutory

52. See Lee Epstein et al., *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 106–07 & n.9 (2011) (explaining that circuit judges authored dissents in 7.8 percent of cases and concurrences in 0.6 percent of a random sample of 1,025 federal-appellate published opinions in the years 1989 through 1991). We recognize that this is an older statistic and treat it accordingly.

53. See *supra* Table 1.

change.”⁵⁴ Rather, Chief Judge Katzmann has explained that the program’s main value is informational.⁵⁵ Congress may, for example, after reviewing a circuit court of appeal’s construction of a statute, conclude that the court got it right—and so decide that no amendment is necessary. Moreover, legislative counsel, by reviewing a decision alongside the statutory language that the court found challenging to interpret, may improve statutory drafting practices in the future (particularly by using the decision as a teaching tool for staff), no matter whether it decides to revisit the statute at issue in that case.

We do not doubt that the Project serves this important informational function.⁵⁶ But it also stands to reason that if a court of appeals informs Congress that there is a problem with the drafting of a statute, Congress may eventually decide that it is worth amending the statute. And we suspect that federal appellate judges might sometimes write opinions—majority opinions, or separate opinions—to call Congress’s attention to a potentially problematic provision. Indeed, some judges have explained their separate opinion-writing practices accordingly.⁵⁷ Hence, we think it important to examine whether and how Congress subsequently revised the language identified in the transmitted opinions, even though the program may not have been designed primarily to instigate such amendments.

The sixty-one opinions transmitted to Congress implicate fifty-nine discrete statutory issues (as some opinions addressed the same statutory issue). We examined each of these statutory provisions with an eye toward answering two questions. First, we determined whether the provision at issue was amended in any way after the transmitted opinion was issued. Second, we determined whether the amendment (if there was one) addressed the ambiguity at issue in the transmitted opinion. With respect to the first question, we found that twenty-two of the fifty-nine relevant statutes were amended. And of those twenty-two amendments, four addressed the ambiguity highlighted by the circuit court of appeals. This total may be underinclusive: In cases where Congress decided that it agreed with the circuit court’s interpretation, enacting an amendment to

54. See Wheeler Memo, *supra* note 9, at 3. *But see* Katzmann, *Statutes*, *supra* note 14, at 687 (noting that the Project may “lead to statutory revision”).

55. See Katzmann, *Bridging the Statutory Gulf Between Courts and Congress*, *supra* note 26, at 666 (“Congress would ideally regard the opinions as simply another piece of information to consider in doing its work.”).

56. Indeed, Congress seems to have confirmed that this is so. See *Project on Statutory Construction Promotes Inter-Branch Communication*, *supra* note 43 (“The value of these submissions is even greater for their educational impact on future drafting than it is when they result in a contemporary change in the statutory text that gave rise to the submission Since the attorneys in the legislative counsel’s offices for each house of Congress normally have lifetime careers drafting legislation, we can benefit from the feedback the courts give us about verbal formulae. We try not to repeat the ambiguities in future legislative drafts.” (quoting then-Senior Counsel Douglass Bellis of the House of Representatives Legislative Counsel Office)).

57. See, e.g., Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CALIF. L. REV. 1445, 1451–55 (2012).

adjacent subsections (while leaving some language intact) may reflect an intent to preserve or codify this prevailing interpretation—we cannot know.⁵⁸

The nature of these four amendments varies substantially.

In one instance, both the Third and Seventh Circuits highlighted an apparent (and quickly realized) “typographical error by Congress” in the Class Action Fairness Act: Legislative history, practice, and policy suggested a congressional intent to require that putative appellants file their application for review within (i.e., “not more” than) seven days from the entry of the underlying order—but the statute read “not less.”⁵⁹ Congress corrected the typo, replacing “less” with “more” (and adding three days to the deadline).⁶⁰

Another similar example relates to jurisdictional time limits, namely the amount of time a defendant has to seek removal to federal court in cases with multiple defendants served at multiple times. In *Barbour*, the en banc Fourth Circuit held that a notice of removal must be filed within thirty days of service to the first-served defendants (each later-served defendant would have thirty days to join a timely notice of removal).⁶¹ Judge Agee, writing separately, noted that he would have given each defendant an independent thirty-day window to seek removal, no matter what the first-served defendant had done.⁶² The majority charged Judge Agee with implicitly modifying the statute: “[T]he separate opinion goes on at length about how its interpretation . . . adheres to the statute’s plain language and does not add words to the statute. But the separate opinion’s interpretation . . . does just that—it adds the word ‘each’ to the statute.”⁶³ That is exactly what Congress did next: Eleven months later, Congress “add[ed] words to the statute” to provide that “[e]ach defendant shall have 30 days . . . to file the notice of removal” (emphasis added).⁶⁴

Two other cases appear to have prompted substantive amendments to the statutes at issue. Indeed, here, a possible link between the cases’ transmission to Congress and Congress’s action might be found in the relevant amendments’ legislative history.

58. See, e.g., *Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, 586 U.S. ____ (2019), 139 S. Ct. 628; *Latimer v. United States*, 223 U.S. 501, 504 (1912) (“The words, having received such a construction under the act of 1883, must be given the same meaning when used in the tariff act of 1897, on the theory that, in using the phrase in the later statute, Congress adopted the construction already given it by this court.”).

59. See *Morgan v. Gay*, 466 F.3d 276, 278 (3d Cir. 2006); *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 983 (7th Cir. 2008).

60. Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, § 6, 123 Stat. 1607, 1608.

61. *Barbour v. Int’l Union*, 640 F.3d 599, 617 (4th Cir. 2011) (en banc), *superseded by statute*, Federal Courts Jurisdiction and Venue Clarification Act (JVCA) of 2011, Pub. L. No. 112-63, 125 Stat. 758 (codified in scattered sections of 28 U.S.C.), *as recognized in* *Wheeling Hosp., Inc. v. Health Plan of the Upper Ohio Valley, Inc.*, 683 F.3d 577 (4th Cir. 2012).

62. *Id.* at 618–38 (Agee, J., concurring).

63. *Id.* at 616.

64. See *id.*; JVCA § 103(b)(3)(B).

In *United States v. Schaefer*, the Tenth Circuit was tasked with construing the scope of statutes criminalizing the receipt and possession of child pornography.⁶⁵ Those statutes require an interstate nexus: In order to fall within the jurisdiction of the federal laws, the images must have been “transported in interstate . . . commerce” (including by way of a “computer”).⁶⁶ Schaefer obtained the images at issue over the internet.⁶⁷ But Schaefer contended that the internet transmission might have, like a local phone call, occurred entirely within one state.⁶⁸ And Schaefer further contended that it was the government’s burden—one unmet—to prove that Schaefer’s particular download crossed Kansas’s state lines.⁶⁹ The Tenth Circuit agreed and consequently vacated Schaefer’s conviction.⁷⁰

Congress amended the statute about one year later to include the transport of child pornography by “any means or facility of interstate or foreign commerce,” regardless of whether the image itself had demonstrably travelled across state lines.⁷¹ *Schaefer*’s influence appears evident from the legislative history. Representative Nancy Boyda of Kansas introduced the amending legislation, and in multiple speeches about the bill, Rep. Boyda referred to Schaefer’s case by name:

In September of this year, a man that I am sorry to say was from Kansas, William Schaefer, was found guilty of both “knowingly receiving” and “knowingly possessing” child pornography that had “been transported in interstate commerce, by any means including by computer.” Sadly, the 10th Circuit Court of Appeals overturned the decision and that offender was acquitted. The Court ruled that just because images are obtained on the Internet doesn’t mean that they were necessarily transmitted across State lines. The [Tenth Circuit] essentially then asked Congress to clarify its intent that the Internet is, in fact, interstate commerce, and we will do that with the passage of the Effective Child Pornography Prosecution Act of 2007. This legislation closes the judicial loophole that allowed a guilty man who hurt our children and was allowed to go free.⁷²

65. 501 F.3d 1197, 1199 (10th Cir. 2007), *overruled by* *United States v. Sturm*, 672 F.3d 891 (10th Cir. 2012).

66. *Id.* at 1199.

67. *Id.* at 1204.

68. *Id.* at 1205.

69. *Id.*

70. *Id.*

71. Effective Child Pornography Prosecution Act (ECPA) of 2007, Pub. L. No. 110-358, § 103, 122 Stat. 4001, 4002–03 (2008).

72. See 153 CONG. REC. 31,041 (2007); *see also id.* (“This bill responds to a recent decision by the 10th Circuit United States Court of Appeals in *United States v. Schaefer*, in which the court ruled that the transmission of child pornography on the Internet did not satisfy the interstate requirement in child pornography laws.”) (statement of Rep. Goodlatte); 154 CONG. REC. 21,796 (2008) (discussing the Effective Child Pornography Prosecution Act).

We do not claim that the Project definitively led to this amendment; Rep. Boyda, after all, may have learned about the case by her own study of the court with appellate jurisdiction over her district or from an outraged constituent. But it is possible that the transmission of the opinion helped draw attention to the limited scope of the statute’s language. And so Congress enacted this amendment—the Effective Child Pornography Prosecution Act of 2007—to clarify the scope not only of the statute at issue in *Schaefer*, but also of a range of other, related provisions using similar language.⁷³

Finally, in *United States v. Aleynikov*, the Second Circuit was asked to consider whether software’s source code—here, a secret, trading algorithm developed for Goldman Sachs—is a “product” “produced for” or “placed in” interstate commerce.⁷⁴ The Second Circuit said no:

Goldman’s [trading] system was neither “produced for” nor “placed in” interstate or foreign commerce. Goldman had no intention of selling its HFT system or licensing it to anyone. It went to great lengths to maintain the secrecy of its system. The enormous profits the system yielded for Goldman depended on no one else having it. Because the [trading] system was not designed to enter or pass in commerce, or to make something that does, Aleynikov’s theft of source code relating to that system was not an offense under the [Economic Espionage Act].⁷⁵

Judge Guido Calabresi concurred, “express[ing] the hope that Congress will return to the issue and state, in appropriate language, what I believe they meant to make criminal in the [Economic Espionage Act].”⁷⁶

Congress accepted that invitation. Eight months later, Congress amended the statute to encompass products and services “used in or intended for use in” interstate commerce.⁷⁷ The Journal of the House of Representatives reflected the Judiciary Committee’s receipt of the opinion in *Aleynikov* from the Second Circuit.⁷⁸ Speeches on the floors of both the House and the Senate referenced the case (and Judge Calabresi’s concurrence).⁷⁹ Senator Patrick Leahy of Vermont, for example, noted that he was “pleased that the Senate today [would] pass this simple, commonsense legislation to clarify a provision of the Economic Espionage Act” after “[a] recent decision of the Second Circuit in *United States*

73. ECPA § 3.

74. *United States v. Aleynikov*, 676 F.3d 71, 75 (2d Cir. 2012), *superseded by statute*, Theft of Trade Secrets Clarification Act (TTSCA) of 2012, Pub. L. No. 112-236, 126 Stat. 1627 (codified at 18 U.S.C. § 1832 (2018)).

75. *Id.* at 82 (citation omitted).

76. *Id.* at 83 (Calabresi, J., concurring).

77. TTSCA § 2.

78. See H.R. JOURNAL, 112th Cong., 2d Sess., 864 (2012).

79. See 158 CONG. REC. 17,303 (2012) (statement of Rep. Smith) (quoting from Judge Calabresi’s concurrence and further stating that “[t]he Second Circuit’s *Aleynikov* decision revealed a dangerous loophole that demands our attention”); 158 CONG. REC. 15,509 (2012) (statement of Sen. Leahy).

v. Aleynikov cast[] doubt on the reach of the statute.”⁸⁰ He went on to say that “[t]he clarifying legislation that the Senate will pass today corrects the court’s narrow reading to ensure that our federal criminal laws adequately address the theft of trade secrets related to a product or service used in interstate commerce.”⁸¹ And the House Report of a different but related statute described this amendment as a “response to the Second Circuit decision in *United States v. Aleynikov*.”⁸²

Moreover, the Defend Trade Secrets Act of 2016, enacted four years after the clarifying amendment following *Aleynikov*, recalls this same drafting lesson. The Defend Trade Secrets Act, like the Theft of Trade Secrets Clarifying Act of 2012, is careful to protect any “product or service used in or intended for use in” interstate commerce, as opposed to merely those secrets “included in a product that is produced for or placed in” such commerce.⁸³

In all, we found that Congress directly addressed four of the fifty-nine statutory issues identified by the courts of appeals, and Congress specifically addressed two of the sixty-one opinions transmitted by those courts. Again, we can’t—and don’t—say that the court’s decision to transmit the opinion to Congress sparked the relevant amendment; identifying the single but-for cause for any statutory provision or amendment is a difficult task. Interest groups, for example, could have played a role in putting this matter “onto the agenda.”⁸⁴ And it is also possible that the Project may, in these instances, have had some role to play.

And if this Project played some role in spurring Congress to action, two out of sixty-one (a response rate of just over 3 percent) may seem small—but it is an order of magnitude greater than the results identified by Stefanie Lindquist and David Yalof (a response rate of a fraction of a percent).⁸⁵ Moreover, Congress might actually have “addressed” more opinions than these numbers capture—if, as noted earlier, Congress agreed with the court’s interpretation of the statute and thus deliberately left the statute’s language untouched.

But we also do not mean to overstate the case. Congress’s low response rate left several ambiguities unaddressed, and those ambiguities sometimes metastasized into circuit conflicts. Hence, we also considered whether any of the ambiguities eventually received Supreme Court resolution. They did. In several

80. See 158 CONG. REC. 15,509 (2012) (statement of Sen. Leahy).

81. *Id.*

82. H.R. REP. NO. 114-529, at 4–5 (2016).

83. Compare TTSCA, Pub. L. No. 112-236 (replacing latter quoted language with former quoted language), with Defend Trade Secrets Act (DTSA) of 2016, Pub. L. No. 114-153, 130 Stat. 376 (codified in scattered sections of 18 U.S.C. (2018)) (same).

84. Victoria F. Nourse, Response, *Overrides: The Super-Study*, 92 TEX. L. REV. SEE ALSO 205, 214 (2014); see also Katzmann, *Statutes*, *supra* note 14, at 688 (noting how congressional staff were aware of some cases in which a losing party with “influence” had asked Congress to reverse a court’s interpretation).

85. See Lindquist & Yalof, *supra* note 4, at 63–68, 64 tbl.1.

cases, the statutory issue identified by the court of appeals in its transmitted opinion was eventually addressed by the Supreme Court.

In some of these cases, it was the transmitted opinion and accompanying judgment that served as the basis for the Supreme Court's review. *Lawson v. FMR LLC* offers one example.⁸⁶ There, the First Circuit considered whether the Sarbanes-Oxley Act's whistleblower protections extended to private contractors and subcontractors.⁸⁷ In a split decision, that court said no, concluding such protections were limited to "employees."⁸⁸ The First Circuit transmitted the opinion to Congress.⁸⁹ But the Supreme Court moved before Congress. Just over a year after the First Circuit's decision, the Court granted review in *Lawson* and reversed, holding that private contractors fell within the scope of that Act's protections.⁹⁰

In other cases, the statutory issue lingered for years before the Supreme Court stepped in. *Cosmetic Ideas v. IAC*, for example, asked the Ninth Circuit to decide when a copyright owner may sue for infringement: After she has applied to register her copyright, or after the Copyright Office has ruled on her application?⁹¹ There, the Ninth Circuit noted a longstanding circuit split on the question, dating to at least 1990.⁹² Congress did not step in to resolve the statutory ambiguity (and the ensuing circuit split)—and the Court did not resolve the question until its 2018 Term.⁹³

In all, the Supreme Court directly reviewed four of the sixty-one judgments explained in opinions transmitted by the courts of appeals to Congress.⁹⁴ The Supreme Court also addressed two statutory issues identified by the circuit courts of appeals in other (untransmitted) cases.⁹⁵

86. 670 F.3d 61, 79 (1st Cir. 2012), *rev'd*, 571 U.S. 429 (2014).

87. *Id.* at 79.

88. *Id.* at 62–63.

89. See Wheeler Memo, *supra* note 9.

90. *Lawson v. FMR LLC*, 571 U.S. 429, 432 (2014).

91. *Cosmetic Ideas, Inc. v. IAC/InterActiveCorp*, 606 F.3d 612, 614 (9th Cir. 2010), *abrogated by* *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019).

92. *Id.* at 615–16.

93. See *Fourth Estate*, 139 S. Ct. 881.

94. *Lawson v. FMR LLC*, 670 F.3d 61 (1st Cir. 2012), *rev'd*, 571 U.S. 429 (2014); *River Rd. Hotel Partners, LLC v. Amalgamated Bank* (*In re River Rd. Hotel Partners*), 651 F.3d 642 (7th Cir. 2011), *aff'd sub nom.* *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2012); *Ransom v. MBNA, Am. Bank, N.A.* (*In re Ransom*), 577 F.3d 1026 (9th Cir. 2009), *aff'd sub nom.* *Ransom v. FIA Card Servs., N.A. (Ransom II)*, 562 U.S. 61 (2011); *United States v. Dixon*, 551 F.3d 578 (7th Cir. 2008), *rev'd sub nom.* *Carr v. United States*, 560 U.S. 438 (2010). Each of these opinions were transmitted to Congress. See Wheeler Memo, *supra* note 9.

95. *Fourth Estate*, 139 S. Ct. at 887 (2019) (citing *Cosmetic Ideas*, 606 F.3d at 621); *United States v. Barnes*, 568 U.S. 6 (2012) (consistent with *Talley v. USDA*, 595 F.3d 754 (7th Cir. 2010), *reh'g en banc granted and opinion vacated*, No. 09-2123 (7th Cir. June 10, 2010)).

One slight complication bears mention. The Supreme Court reviewed *Ransom*, 577 F.3d 1026, which the Ninth Circuit transmitted to Congress. See Wheeler Memo, *supra* note 9. The Court did not, however, review *Ross-Tousey v. Neary* (*In re Ross-Tousey*), 549 F.3d 1148 (7th Cir. 2008), *abrogated by Ransom II*, 562 U.S. 61, which that court also transmitted to Congress. But both *Ransom*

III.

EVALUATING THE STATUTORY OPINION TRANSMISSION PROJECT

Having examined both the impetus for the Project and its operation over the past twelve years, we now evaluate its success. In view of the data discussed above, can we say that the Project has been successful? And what, exactly, does it mean for such a program to achieve success?

On its own terms, the Project seems to have achieved its primary aims. Chief Judge Katzmann, as we noted above, described the program's goal as enabling a federal appeals court to transmit "complete opinions without comment to the Speaker, the minority leader, the Parliamentarian, the general counsel to the clerk, and the Legislative Counsel" so that those congressional officials "would be free to use [those opinions] in any way they deemed appropriate . . . as simply another piece of information to consider in doing [their] work."⁹⁶ The Project has done exactly that. And congressional officials, for example, have confirmed that they benefit from these transmissions: "[W]e can benefit from the feedback the courts give us about verbal formulae[, and w]e try not to repeat the ambiguities in future legislative drafts."⁹⁷

We see this in practice, too. As noted above, the Defend Trade Secrets Act of 2016 embodies the drafting lesson learned from *Aleynikov*. Congress's response to *Schaefer* likewise clarified the intended scope of a range of provisions targeting the sexual exploitation of minors.⁹⁸

And while the Project has been successful at establishing (as it set out to do) a feedback mechanism for matters of statutory interpretation, we think this may be too modest a standard against which to measure its success. Indeed, both Congress and the Judiciary seem to have suggested—at least implicitly—that the existence of the channel is not enough if it is barely used; after all, it was the quiet on the line that prompted Congress in 2006 to ask the Judiciary to "revitalize" the Project.

As we described in Part II above, the line is quiet once again: The courts are transmitting fewer and fewer opinions to Congress—ten opinions in 2012, five in 2015, and only one or two in recent years.⁹⁹ Given the apparent benefits of such interbranch transmissions, this finding may be cause for concern, particularly since this channel is the main avenue for the courts to communicate with Congress about matters of statutory interpretation. Indeed, then-Senior Counsel Douglass Bellis of the House of Representatives Legislative Counsel

and *Ross-Tousey* present the same statutory issue. Here, we count the issue as one that the Court directly reviewed, as opposed to one that the Court addressed only in a later case.

96. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress*, *supra* note 26, at 666.

97. *Project on Statutory Construction Promotes Inter-Branch Communication*, *supra* note 43.

98. Effective Child Pornography Prosecution Act (ECPA) of 2007, Pub. L. No. 110-358, 122 Stat. 4001 (2008).

99. See Wheeler Memo, *supra* note 9.

Office noted that the program is “valuable” precisely because it offers “almost [the] only formal channel of communication” about statutory drafting between the Judiciary and Congress.¹⁰⁰ And such communications are themselves valuable because the Judiciary can provide information that may be difficult or costly for Congress to obtain on its own. For one, the Project allows the courts to highlight potentially salient decisions as they are issued, thereby relieving (in part) the burden on congressional staff to independently survey the work of the courts. Moreover, federal judges—as arbiters of statutory text in live cases or controversies—are uniquely positioned to identify text that proves to be potentially problematic in practice.¹⁰¹ *Aleynikov* suggests, for example, that Congress may not, in a relative legislative vacuum, be able to anticipate the complete range of products, services, or inputs that may require (from industry’s perspective) trade secret protection. But after the Second Circuit noted the possible mismatch between the statute’s text and Congress’s apparent intent, the provision was amended, and a drafting lesson learned.¹⁰² Stated simply, the Judiciary gains from some specific context that Congress may have lacked at the time it drafted a given provision. And finally, the Judiciary can identify such issues across a range of interest groups. While, for example, we may wonder about the relative political power of victims of child pornography,¹⁰³ the amendment following *Schaefer* helped to clarify Congress’s intent across a range of related criminal statutes.¹⁰⁴ In short, the Judiciary is uniquely situated to identify potentially problematic statutory text for Congress’s review, but it does so only rarely, notwithstanding an interbranch protocol for such critical feedback.

Hence, given that the program is once again well below capacity, one might ask what we might do to “revitalize” it once again.¹⁰⁵ The program’s history provides a useful guide: As we noted above, there was, prior to 2006, a decline in the initial program’s participation.¹⁰⁶ And at the time, the Judiciary had suggested that the program had not been properly institutionalized.¹⁰⁷ As Chief Judge Katzmann and Russell Wheeler noted, “there was no method in place for telling new judges, chief judges, and clerks of court about it.”¹⁰⁸ Part of the solution, therefore, was the memo from the Director of the Administrative

100. *Project on Statutory Construction Promotes Inter-Branch Communication*, *supra* note 43. To be sure, the Judiciary and Congress communicate about other topics in other ways, including through testimony and through responses to formal inquiries.

101. *See* U.S. CONST. art. III, § 2, cl. 1.

102. *See supra* notes 75–82 and accompanying text.

103. *Cf.* JOHN HART ELY, *DEMOCRACY AND DISTRUST* 135 (1980).

104. *See supra* notes 71–73 and accompanying text.

105. *See supra* note 41–42; *supra* notes 50–51 and accompanying text.

106. *See* Katzmann, *Statutes*, *supra* note 14, at 688.

107. *See* Katzmann & Wheeler, *A Mechanism for “Statutory Housekeeping,” supra* note 3, at 134.

108. *Id.*

Office, asking for the courts' participation,¹⁰⁹ after which there was a noted increase in transmissions. Likewise, after the Administrative Office's follow-up memorandum in 2015, many circuits seemed to have (temporarily) participated more actively (thereby helping to offset the Seventh Circuit's sharply declining participation, beginning in 2013).

While we recognize the dangers of information overload (and that competition for space on memos from the Administrative Office is likely fierce), this prior experience seems to suggest that reminders work.¹¹⁰ It could well be time to send one more. Moreover, we suggest that these attempts at institutionalization should be institutionalized themselves.¹¹¹ That is, awareness of a protocol like the Project may have a natural half-life, especially as some judges retire while other, new judges are confirmed. Hence, sending regular notices reminding judges of the program at annual circuit conferences and ensuring that new federal appellate judges learn of the program in their various orientations seems, to us, worthwhile.¹¹²

We also believe that participation might increase if there were some clear criteria that judges or court officials—such as clerks of court—could apply in order to decide whether an opinion is presumptively worthy of transmission to Congress. What, exactly, is Congress looking for from the courts of appeals, and is there a simple heuristic for judges and judicial officials to apply?

One candidate in particular stands out: courts of appeals ought to transmit, with greater frequency, opinions or cases that evince intrajudicial disagreement over the meaning of statutory language—either by way of a dissent or a concurrence, or by way of a circuit split. Circuit splits (which give rise to a “deplorable” disuniformity in federal law¹¹³) often result from ambiguous statutory language and the consequent judicial disagreement over that language's meaning. While the Supreme Court often steps in to resolve circuit splits—indeed, that is its primary criteria for granting certiorari—many splits linger for years, if not decades (as in *Cosmetic Ideas v. IAC*). But Congress, as the

109. *Id.* at 135.

110. We readily acknowledge that publicizing the Project may not lead to the increased participation of every court. As noted earlier, a few circuits—including the D.C. Circuit—did not transmit any opinions in this last iteration of the Project, including in the years directly after its revitalization. *See supra* text accompanying note 44.

111. *See* Simard, *supra* note 14, at 1226–27 (suggesting that Congress formally authorize the program by statute).

112. *See, e.g.*, Rubén Castillo, In Memoriam, *Remembrance of Judge Diana E. Murphy*, 103 MINN. L. REV. 13, 13 (2018); Robert H. Henry, Madison Lecture, *Living Our Traditions*, 86 N.Y.U. L. REV. 673, 674 (2011) (describing the introductory orientation known colloquially as “[B]aby [J]udges’ [S]chool”).

113. *See, e.g.*, *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 347–48 (1816) (Story, J.).

progenitor of such ambiguous text, can help, too (as Justice Stevens once wrote).¹¹⁴

Congress may, in some instances, preemptively forestall circuit splits by amending or codifying an interpretation of an existing provision, or by using different, clearer constructions in other, future statutes. Members of Congress (and their staff), we suspect, may welcome the chance to review statutory language that has caused divisions among the courts.¹¹⁵ This review could clarify the provision at issue to avoid such ambiguous constructions in the future. They may likewise welcome decisions that contain a dissenting (or concurring) interpretation, even absent an existing split, because such separate writings may foreshadow a future split.¹¹⁶ One judge's dissenting opinion may become the majority view in another circuit.

Moreover, we believe that the competing opinions that arise out of intrapanel dissention and intercircuit splits may be especially helpful to congressional staff. This is for several reasons. Most immediately, as *Barbour* suggests, the conversation between judges may help to directly guide Congress's revisions: Congress's amendment mimicked precisely the language that the majority implied that the dissent wanted, rather than the language that was then in the statutes.¹¹⁷ Moreover, the conversation among these opinions can help illuminate for Congress the practical consequences of its drafting decisions, which may otherwise be difficult to imagine in the legislative vacuum. By seeing how different judges approach such problems of interpretation, Congress can both better learn how to draft more precisely in the future and, if it so chooses, enact revised language that is more assured to achieve the outcomes it desires.

In short, the courts of appeals seem to us too quiet in flagging matters of statutory interpretation for Congress. As we noted above, the circuits have transmitted only sixty-one decisions, including only seventeen accompanied by separate opinions. But we estimate that the courts of appeals issue about three

114. See Stevens, *supra* note 17, at 183 ("If the source of the conflict is ambiguity resulting from an omission in a statute, it would seem to make good sense to assign Congress the task of performing the necessary corrective lawmaking.").

115. See Lindquist & Yalof, *supra* note 4, at 66.

116. Congress might also welcome the opportunity to review fractured decisions even absent the possibility of a future circuit split, as is typically true in patent cases, given the Federal Circuit's near-exclusive jurisdiction over such appeals. To the extent the Supreme Court's review of patent decisions has been largely limited to procedural matters, rather than core patent doctrines, see, e.g., Paul R. Gugliuzza, *How Much Has the Supreme Court Changed Patent Law?*, 16 CHI.-KENT J. INTELL. PROP. 330, 331 (2017), Congress may be the last hope for resolving questions of interpretation that have sharply divided members of the Federal Circuit. See *Athena Diagnostics v. Mayo Collaborative Servs.*, 927 F.3d 1333, 1337 (Hughes, J., concurring in denial of rehearing en banc); *id.* at 1363 (Moore, J., dissenting from denial of rehearing en banc); *id.* at 1373 (O'Malley, J., dissenting from denial of rehearing en banc).

117. See *Barbour v. Int'l Union*, 640 F.3d 599 (4th Cir. 2011) (en banc), *superseded by statute*, Federal Courts Jurisdiction and Venue Clarification Act (JVCA) of 2011, Pub. L. No. 112-63, 125 Stat. 758 (codified in scattered sections of 28 U.S.C.), *as recognized in* *Wheeling Hosp., Inc. v. Health Plan of the Upper Ohio Valley, Inc.*, 683 F.3d 577 (4th Cir. 2012).

hundred decisions that include concurrences or dissents each year.¹¹⁸ To the extent these opinions—like Judge Agee’s and Judge Calabresi’s above—evinced disagreement over the meaning of statutory text or contain appeals for congressional action, their authors should transmit them directly to Congress. And where even unanimous opinions identify persistent circuit splits in matters of statutory interpretation, the courts should write not only for the Supreme Court’s attention, but they should also transmit these opinions to Congress, who can resolve and forestall conflicts that give rise to disuniformity in federal law.¹¹⁹

CONCLUSION

The Project, revitalized in 2006, established a mechanism for courts to highlight matters of statutory interpretation for Congress’s attention. And though this protocol has had some success in drawing out lessons for the drafters of statutes, and perhaps even catalyzing some amendments to ambiguous provisions, the communication channel appears to be drying up. This experience raises questions about how we might revive this program—the only direct channel between the courts and Congress for matters of statutory interpretation—yet again.

It also raises questions about interbranch information flows more generally. Here, we have focused on one channel of information between two branches: the courts and Congress. These networks appear to be expanding. The Administrative Conference has recently instituted a similar program, transmitting to Congress “judicial and agency adjudicative decisions” of consequence to administrative law.¹²⁰ And, like the program under study here, ACUS has the advantage of transmitting opinions about statutory text as applied in specific administrative contexts and can do so as they issue. Courts, moreover, sometimes receive information themselves from the executive branch, from Congress, and from other courts.¹²¹ Some of these channels have been studied in isolation. But one of our goals here (and in future work) is to shed light on these interbranch information networks with, for the purposes of this Symposium on Judicial Reform, one eye on the lessons learned from these various communication channels to improve the whole network over time.

118. We are sensitive to the concern that there may be a point at which the courts of appeals are sending so many opinions to Congress such that the interbranch channel becomes crowded or noisy. But even if the courts were to double or triple their highest transmission rate, we think that Congress could still carefully consider each referred opinion. Therefore, our proposals are aimed at encouraging the courts to refer *more* opinions that may warrant Congress’s attention—without worrying (at least not yet) whether the courts could become overzealous in their use of this important communication channel. That is, we focus for now on the question of the lower bound, without concern yet for the upper bound.

119. Cf. James J. Brudney & Ethan J. Leib, *Statutory Interpretation as “Interbranch Dialogue”*?, 66 UCLA L. REV. 346, 354–56 (2019) (explaining that institutions often “communicat[e]” by “[s]ignaling to [d]ifferent [a]udiences” at once). *But see id.* at 352–53 (noting “several reasons to be skeptical that ‘interbranch dialogue’ is anything more than a slogan”).

120. *Statutory Review Program*, *supra* note 18.

121. *See* sources cited *supra* note 19.