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Christopher E. Smith

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*Christopher E. Smith**

I. INTRODUCTION

The United States Constitution employs the concept of "separation of powers" in order to prevent the accumulation of excessive power within a single branch of government.[1] As the Supreme Court observed in *Immigration and Naturalization Service v. Chadha*,[2] "[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility."[3] Because the Consti-

* Associate Professor of Political Science, University of Akron, A.B., Harvard University, 1980; M.Sc., University of Bristol (England), 1981; J.D., University of Tennessee, 1984; Ph.D., University of Connecticut, 1988.

1. According to James Madison, one of the authors of the Constitution and a central figure in the process of designing the American national government, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47 (JAMES MADISON).

2. Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).

3. *Id.* at 951.

tution grants to Congress the exclusive power to raise revenue and enact spending programs,[4] an inevitable consequence of the governing system's division of authority is that all of the branches of government are dependent upon the legislative branch for the allocation of resources and the creation of institutional structures and programs. In the federal system, for example, only the U.S. Supreme Court was established by Article III of the Constitution.[5] Congress shapes the organization and authority of other components of the judicial branch because, according to the Constitution, lower courts are the "inferior courts [that] the Congress may from time to time ordain and establish."[6] Thus federal judicial officers must attempt to persuade or influence Congress in order to gain sufficient resources and to insure that court organization and procedures fulfill judicial actors' needs and expectations.

How do judicial officers attempt to influence the legislative branch? What are the consequences of judicial officers' political tactics aimed at shaping legislative actions that affect the courts? Because of the secrecy that shrouds activities 'behind the purple curtain' of the judiciary, it can be difficult for outsiders to assess the nature and results of judicial lobbying.[7] The limited research on this topic has focused primarily upon federal judges.[8] For example, interviews with judges and government officials have provided insights on federal appellate judges' strategic activities that affected the congressional decision

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4. For example, the Constitution's discussion of congressional power includes the following: "The Congress shall have power to lay and collect taxes." U.S. CONST., art. I, § 8, cl. 1; "The Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution [the subjects under legislative authority]." U.S. CONST., art. I, § 8, cl. 18; "No money shall be drawn from the treasury, but in consequence of appropriations made by law." U.S. CONST., art. I, § 9, cl. 7.

5. "The judicial power of the United States shall be vested in one Supreme Court . . . ." U.S. CONST., art. III, § 1.

6. *Id.*

7. *See, e.g.*, CHRISTOPHER E. SMITH, UNITED STATES MAGISTRATES IN THE FEDERAL COURTS: SUBORDINATE JUDGES 9 (1990).

> Because their legitimacy within the American governing system is dependent upon the maintenance of the judicial myth that judges act without political motivations by adhering to neutral principles of law, judges have a great incentive to protect their discretionary actions from external scrutiny and evaluation. Opportunities for observation of the behind-the-scenes behavior and interactions of judicial officers are relatively rare.

8. *See, e.g.*, PETER G. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 301-05 (1973) (Judicial Conference of the United States serves as legislative liaison for the federal judiciary's communications to Congress.).

to divide the old Fifth Circuit Court of Appeals into two circuits.[9] That study, however, has been criticized for failing to analyze judicial lobbying "in particular depth [and] with . . . attention given to problems such lobbying can entail."[10] Thus, much remains to be learned about judicial officers' tactics in seeking to influence legislative enactments.

Appointees to Article III judgeships tend to have close connections to members of Congress and leaders within political parties:

> If politics enlarges the career opportunities of American lawyers, so it restricts eligibility for high judicial office. Judgeships normally are rewards for political service. As a distinguished federal judge observed: "You can't get on the federal bench in this country without a political claim. I had a political claim, and so did every one of my colleagues."[11]

Unlike the Article III judges who possess "well-developed relationships with one or more legislators . . . [because they] were active politically prior to assuming a position on the federal bench,"[12] other judicial actors do not possess such advantages for lobbying legislators.[13] The United States magistrate judges,[14] for example, receive their appointments as subordinate judicial officers from district judges rather than from connections to political parties, members of Congress, and the

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

10. Stephen L. Wasby, *A Rich Historical Account*, 72 JUDICATURE 306, 307 (1989).

11. J. WOODFORD HOWARD, COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM 90 (1981).

12. BARROW & WALKER, *supra* note 9, at 260.

13. Because United States senators are so deeply involved in the process of selecting federal judges, aspiring judges frequently need to demonstrate close connections with, and loyal service to, the political party of both the President and a senator from the jurisdiction which has the judicial vacancy.

> On the occasion of a vacancy on a federal district court, the attorney general, usually through his deputy attorney general, undertakes a search for possible nominees. At this early stage, the senators of the president's party are usually brought into the process. They may have their own nominee or slate of nominees, or they may elect at this point to reserve judgment, preferring to react to the deputy attorney general's nominees. In any case, [the senators'] role is crucial, some say determinative. Through the custom of senatorial courtesy, the relevant senators may exercise a virtual veto over the president's choice.

HARRY P. STUMPF, AMERICAN JUDICIAL POLITICS 192 (1988).

14. The Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified at 28 U.S.C. § 1 (Supp. 1991)), changed the subordinate judicial officers' title to "United States magistrate judge." In order to set the stage for a discussion of the new title, this article will use the old title, "United States magistrate," in discussing the history and development of the judicial office prior to the passage of the 1990 Act.

President.[15] Full-time magistrates are appointed to eight-year renewable terms in office by the district judges for whom they will work.[16] Because the office of magistrate judge has evolved rapidly during the two decades since its creation[17] and because magistrate judges' precise roles were not clearly defined by Congress,[18] these subordinate judicial

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15. Prior to statutory revisions in 1979, U.S. magistrates were appointed directly by the district judges for whom they would work. As a result, many of the first magistrates were relatively inexperienced former law clerks who gained a new title and term in office, but who continued to work for district judges in a law clerk-like capacity. Christopher E. Smith, *Who Are the U.S. Magistrates?*, 71 JUDICATURE 143, 145 (1987). After 1979, magistrates were appointed and reappointed through a "merit selection process" in which citizens committees solicit applications and make recommendations to the district judges about the most qualified candidates for appointment. *See* Christopher E. Smith, *Merit Selection Committees and the Politics of Appointing United States Magistrates*, 12 JUST. SYS. J. 210 (1987).

16. Part-time magistrates are appointed for renewable four-year terms by the district judges. SMITH, UNITED STATES MAGISTRATES, *supra* note 7, at 4.

17. *See infra* notes 54-71 and accompanying text. Although the role of magistrates within the federal district courts was initially conceptualized as that of a limited assistant to the judges, Congress gradually expanded the magistrates' authority so that these subordinate judicial officers can now undertake virtually any duties undertaken by district judges except for trying and sentencing felony defendants. *See* Christopher E. Smith, *Assessing the Consequences of Judicial Innovation: U.S. Magistrates' Trials and Related Tribulations*, 23 WAKE FOREST L. REV. 455 (1988). Magistrates can even preside over complete civil trials with the consent of the litigants. According to the Magistrates Act.

> Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.

28 U.S.C. § 636(c)(1) (1988).

18. Because the precise role for magistrates was left intentionally undefined by Congress, district judges can use magistrates according to the needs of their district and their own personal preferences. For example, one study found that magistrates were used according to three distinctive models. Some magistrates were "Additional Judges" who handled their own civil cases and other matters for the district courts. Other magistrates were "Team Players" who assisted judges with evidentiary motions and other matters in preparing cases for trial before the district judges. In addition, some magistrates were "Specialists" whose work was primarily confined to processing Social Security disability appeals and prisoners' petitions. *See* Carroll Seron, *Magistrates and the Work of the Federal Courts: A New Division of Labor*, 69 JUDICATURE 353 (1986). The development of magistrates' particular roles within specific districts depends upon organizational characteristics of the districts and the judges' conceptions of the district courts' functions. *See* Carroll Seron, *The Professional Project of Parajudges: The Case of The U.S. Magistrates*, 22 LAW & SOC'Y REV. 557 (1988). In particular, a magistrate's precise role within a district court will be determined by a number of specific factors: district judges' conceptualizations of magistrates' roles; familiarity and communication between judges and magistrates; expectation of magistrates about their roles within the district courts; practicing attorneys' expectations about appropriate roles for magistrates; established patterns for magistrate utilization within a specific district court; methods employed to assign tasks to magistrates; and the nature of the district's caseload. SMITH, *supra* note 7, at 115-46.

officers have been keenly interested in encouraging legislative developments that will enhance their status and authority within the federal courts.[19] This article examines the issue of judicial lobbying on court reform legislation by analyzing the magistrate judges' self-interested efforts to protect and expand their status and authority during the enactment of the Judicial Improvements Act of 1990.[20]

II. JUDICIAL LOBBYING

Judges have a special interest in court reform legislation[21] and, because of their positions within the courts, they can have tremendous influence over the development and success of court-reform initiatives.[22] For example, if legislators attempt to impose new procedures with which judges disagree, because of the fragmentation of power within the judicial system,[23] individual judges may thwart the implementation

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19. For example, the magistrates have their own national association, the National Council of U.S. Magistrates, which works to improve the status, authority, salary, and benefits of the federal courts' subordinate judicial officers. The National Council engaged in typical "interest group" behavior by keeping its membership informed about issues and by attempting to influence the Judicial Conference of the United States and Congress on behalf of the magistrates. SMITH, UNITED STATES MAGISTRATES, *supra* note 7, at 168. Even magistrates who are not active in the National Council display a strong interest in protecting and expanding their status and authority: "Although not all magistrates agree that judicial officers should act as an interest group and many magistrates do not participate in the national organization, the magistrates generally manifest many characteristics of any occupational interest group that undertakes planned, political actions on behalf of the group's collective interests." *Id.*

20. Pub. L. No. 101-650, 104 Stat. 5089 (1990).

21. Because judges supervise the administration of the judicial process, they have good reason to be concerned about how reform legislation will affect the courts. For example, when Congress considered legislation during the 1970s to require "speedy trials" in criminal cases, judges evinced strong concerns about how the proposed reforms would affect both the administration of justice and judges' traditional authority over the judicial branch: "Judges complained that the bill's planning provisions encroached upon their management prerogatives, and that requiring prosecutors, clerks, and other nonjudicial members of the criminal justice system to take part in planning violated separation of powers." M. FEELEY, COURT REFORM ON TRIAL 164 (1983).

22. For example, judges played an influential role in the decision to divide the old Fifth Circuit U.S. Court of Appeals into a smaller Fifth Circuit (including Texas, Louisiana, and Mississippi) and a new Eleventh Circuit (including Alabama, Georgia, and Florida):

> [T]he large Fifth Circuit was overloaded with cases and needed to be split into two new circuits. This . . . was extremely controversial, because civil rights supporters feared that splitting the Fifth Circuit and adding new judges would dilute important civil rights gains made during the 1950s and 1960s. Congress took no early action. But, with all of the judges in the Fifth Circuit supporting the split, Congress complied in 1980.

HENRY P. GLICK, COURTS, POLITICS, AND JUSTICE 41 (2d. ed. 1988).

23. Because so many interests have a stake in court reform, it can be extremely difficult for reform proposals to avoid alteration or dilution in the legislative process. One scholar has characterized state court reform processes as producing inevitable compromises that do not achieve the

of new practices within their courthouses.[24] Such judicial influence over the effects of legislative enactments is an inevitable result of the autonomy and discretionary authority necessarily vested in judges.[25] By contrast, when judicial officers seek to initiate or to influence the formulation of legislation, the judges' dependence upon legislative action forces them to engage in the kinds of political strategies, such as lobbying and persuasion, that other interested parties employ when seeking beneficial legislation.[26]

When judicial officers seek to influence the content of court-reform legislation, they are governed by the ethical rules which constrain judges' behavior. Under federal law, judges may not attempt to influence Congress by using public funds.[27] According to the ethical proscriptions directed at judges in the American Bar Association's Code of Judicial Conduct, judges may testify before and consult with other branches of government concerning the administration of justice.[28] Federal law mirrors this invitation for limited communications between judges and legislators by declaring that the prohibition on the use of

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reformers' initial goals: "Most compromises follow a familiar political pattern. Reformers propose a far reaching package of judicial changes, but various legislators, lawyers, and judges criticize and lobby against them. Finally, the reformers agree to withdraw some reforms, publicly stating regret, but they also are pleased at what they could get."
Henry P. Glick, *The Politics of State-Court Reform, in* THE POLITICS OF JUDICIAL REFORM 25 (Phillip L. DuBois ed. 1982).

24. For example, judges thwarted efforts to reform bail and sentencing policies in the criminal justice system: "A great many judges quite simply do not regard liberalized pretrial release or mandatory sentences as desirable and [thus the judges] thwart [the new policies'] implementation." FEELEY, *supra* note 21, at 198.

25. In regard to criminal cases, the Supreme Court has acknowledged the importance of judicial officers' discretion: "Implementation of [criminal justice] laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused." McCleskey v. Kemp, 481 U.S. 279, 297 (1987).

26. Interest groups and their lobbyists "wield their vast resources—money, personnel, information, and organization—to bend the course of legislation." R. DAVIDSON & W. OLESZEK, CONGRESS AND ITS MEMBERS 349 (2d ed. 1985).

27. No part of money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress. . . .
18 U.S.C. § 1913 (1988).

28. Canon Four (B) of the A.B.A.'s Code of Judicial Conduct states: "[A judge] may appear at a public hearing before an executive or legislative body on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice."

public funds for lobbying "shall not prevent officers . . . of the United States . . . from communicating to Members of Congress, through proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business."[29] Although there are opportunities for limited interbranch communications, the concerns about the impropriety of judicial lobbying lead judges to act cautiously when communicating with Congress. Judge Frank Coffin, for example, believes that formal prohibitions on judicial lobbying have detrimentally inhibited necessary communications between the branches of government.

> The essence of the problem can be summed up by saying that the overarching and simplistic commandment, "thou shalt not lobby," does not begin to recognize the multiple levels and purposes of desirable communication in both directions between the two great branches. Worse, the negative nature of the commandment and its criminal sanction chill any effort to explore ways of meeting perceived needs.[30]

Scholars have echoed Coffin's position that communications between judges and Congress are not merely beneficial, but are indeed essential.[31] Despite the concerns that useful interbranch communications are hindered, the United States Attorney General has actually interpreted the statutory prohibition on lobbying by judges relatively loosely. The Attorney General's interpretation permits relevant communications between judges and members of Congress without narrowly construing the requirement that such communications pass through "official channels."[32]

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29. 18 U.S.C. § 1913 (1988).

30. Frank Coffin, *The Federalist Number 86: On Relations between the Judiciary and Congress*, *in* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 26-27 (R. Katzman ed. 1988).

31. The idea of judicial lobbying is anathema to many. It somehow seems inappropriate for federal judges, whose adjudicative role requires neutrality rather than advocacy, to urge the passage or defeat of proposed legislation. In spite of its negative connotations, however, lobbying is nothing more than communicating information and considered opinion to the appropriate decisionmakers. No one has more accurate information on matters of judicial administration or is in a better position to comment on conditions facing the courts than the federal judge. . . . It is both proper and essential for this communication process to function effectively.

BARROW & WALKER, *supra* note 9, at 258.

32. The Department of Justice has interpreted the "official channels" exception as allowing judges to expend appropriated funds for the purpose of contacting members and congressional committees to express their views on legislation. Because federal judges do not have direct superiors, the attorney general concluded that it was inappropriate to engage in legalistic arguments as to whether federal judges speak through "proper offi-

Although there are no strenuously-enforced, precise regulations on judicial lobbying, judges must be concerned about the propriety of their behavior in expressing their views about legislation. As characterized in one study: "[J]udicial lobbying must occur under certain restraints and limitations. Mindful of the proper judicial role, judges cannot roam the corridors of Congress buttonholing members and pleading the case of the courts."[33] Thus, federal judges must act carefully when they lay the groundwork for effective, strategic communications with Congress concerning the administration of the federal courts. As one subtle strategy, for example, the Budget Committee of the Judicial Conference of the United States seeks to enhance its influence with Congress by being comprised of judges "having ability, legislative experience, and congressional associations."[34] By exploiting preexisting relationships between judges who were appointed through the political process and the members of Congress who helped to have them appointed, the judiciary can presumably improve the efficacy of the communications that it initiates with the legislative branch about matters of self-interest, such as the judicial budget and court reform.

A. The Role of the Judicial Conference and the Chief Justice

Because judicial officers cannot behave like other lobbyists who prowl the corridors of Congress and donate money to political campaigns, "articulating the views of the courts normally occurs through well-established, institutionalized channels."[35] Thus, the Judicial Conference of the United States serves as the legislative liaison between the federal judiciary and Congress.[36] The Judicial Conference is "[t]he central administrative policy-making organization of the federal judicial system . . . composed of the Chief Justice of the Supreme Court as the presiding member, the chief judges of each of the judicial circuits, one district judge from each of the twelve regional circuits, and the chief judge of the court of international trade."[37] Although there

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cial channels" whenever they take a position with respect to matters of judicial concern. Robert A. Katzmann, *The Underlying Concerns, in* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 14-15 (R. Katzman ed. 1988).

33. Thomas G. Walker & Deborah J. Barrow, *Funding the Federal Judiciary: The Congressional Connection*, 69 JUDICATURE 43, 46 (1985).

34. *Id.* at 50.

35. *Id.* at 46.

36. *See* FISH, *supra* note 8, at 301-05.

37. ROBERT A. CARP & RONALD STIDHAM, THE FEDERAL COURTS 64, (2d ed. 1991).

have been criticisms of the Judicial Conference's effectiveness in persuading Congress about the needs of the judiciary,[38] Congress often defers to judges or seeks the Judicial Conference's endorsement when considering court-reform legislation. For example, "[v]irtually all major legislation affecting the [Supreme] Court's jurisdiction was drafted by Justices and was the result of their lobbying."[39]

Chief Justices who are keenly interested in court administration can use the Conference's position and resources to educate and influence Congress.[40] According to scholars who study the judiciary, "[c]hief justices have a number of . . . ways of co-opting congressmen and mobilizing support."[41] A Chief Justice can "set[] the issue agenda and provid[e] information" for Congress.[42] Former Chief Justice Warren Burger, in particular, used his leadership position on the Judicial Conference as a means to influence Congress on behalf of the judiciary.

> After [Chief Justice William Howard] Taft, Burger was the most active in lobbying Congress and getting the assistance of the ABA in promoting his proposals. Beginning in 1978, Burger, his administrative assistant, and the directors of the Administrative Office [of the United States Court] and the Federal Judicial Center met with the attorney general and representatives of the Department of Justice, as

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38. For example, the Judicial Conference relies upon the Administrative Office of the United States Courts to gather statistics and to assist the judges in keeping Congress aware of the judicial branch's needs. However, although the Administrative Office "is the official representative of the Judicial Conference in Congress, . . . it is out of the mainstream of political party and interest group politics and has not been very effective in obtaining money for the courts or congressional support for court proposals." GLICK, *supra* note 22, at 44.

39. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 128 (2d ed. 1990).

40. The creation of the Judicial Conference itself as well as the Administrative Office of the U.S. Courts is attributable to the effective lobbying efforts of a Chief Justice, William Howard Taft: "[T]he leadership of Chief Justice Taft is usually said to have been the most immediate catalyst for administrative reform [of the federal courts]. He, more than any other single individual, was responsible for persuading Congress to have a new look at the organization of the federal judiciary." STUMPF, *supra* note 13, at 142.

> [Chief Justice Taft] loved being a judge and making difficult choices in hard controversies, but he was also a politician, a mover and shaker, and he held tenaciously to the view that his office called for leadership across a broad spectrum of activities, and he did not hesitate to use his prestige, his influence and his powers to achieve a more efficient judicial system. Always Taft remembered that successful lobbying requires strong personal involvement, attending committee hearings and keeping in touch with sympathetic souls in high places who could wield influence over others.

ROBERT J. STEAMER, CHIEF JUSTICE: LEADERSHIP AND THE SUPREME COURT 186 (1986).

41. O'BRIEN, *supra* note 39, at 30.

42. JOHN BRIGHAM, THE CULT OF THE COURT 99 (1987).

> well as members of the House and Senate Judiciary Committees . . . at a "Seminar on Judicial Administration" sponsored by the Brookings Institution. The occasion allowed Burger and his staff to press for legislative changes. By delegating more of the congressional liaison work to his administrative assistant and the legislative affairs office, Burger was able to pursue a broad range of projects and devote his own time to "hardsell" luncheons and to more personal appeals to pivotal congressmen and presidential advisers.[43]

Burger's persistence paid dividends for the judiciary's efforts to influence court-reform legislation.[44]

Because the Chief Justice, as the formal head of the Judicial Conference, does not possess the exclusive authority to communicate with Congress on behalf of the federal judiciary, there are opportunities for other communication emanating from the judges which may give Congress "mixed signals." In one example, Chief Justice Rehnquist received an unusual public rebuke from a majority of the judges on the Judicial Conference for submitting recommendations to Congress for streamlining death penalty appeals without first receiving the approval of the other judges on the Conference.[45] The judges sent a letter to the Senate Judiciary Committee to disassociate themselves and the Judicial Conference from the proposal submitted to Congress by Rehnquist.[46] On other occasions, "[j]udges and judicial employees who have lost or fear the loss of their cause in the Conference arena continue to carry their case to Congress without Conference authorization."[47] Thus, because the federal judiciary is not a monolithic entity with uniform interests, the contradictory persuasive communications directed at Congress by federal judicial officers may harm the judiciary's image and prestige in the eyes of Congress and thereby generate intra-judicial conflicts.

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43. O'BRIEN, *supra* note 39, at 130.

44. Burger conferred regularly with the President and Congress on the needs of the judiciary to such an extent that in 1977 a resolution was introduced in the Senate inviting the Chief Justice to address a joint session of Congress on the state of the judiciary. Congress has also considered delegating to the Chief Justice special authority in areas such as the promulgation of regulations with respect to the judicial branch on the matter of garnishing of wages of federal employees.

BRIGHAM, *supra* note 42, at 98.

45. Linda Greenhouse, *Judges Challenge Rehnquist's Action on the Death Penalty*, N.Y. TIMES, Oct. 6, 1989, at A1.

46. *Id.*

47. FISH, *supra* note 8, at 306.

B. The Risks of Judicial Lobbying Strategies

Judicial officers' strategies for communicating with Congress may not be limited to direct advice and lobbying. When federal judges sought to have their salaries raised in 1989, for example, the Judicial Conference authorized Chief Justice Rehnquist to hold an unprecedented press conference at the Supreme Court[48] in order to publicize "the most serious threat to the future of the Judiciary and its continued operations that [the judges] have observed."[49] Such hyperbole directed at the public may diminish the judiciary's credibility when judges seek to persuade Congress that some other problem also requires immediate legislative attention.[50] Moreover, by appealing for the public's assistance in pushing Congress to act, legislators may believe that the judges have stepped beyond the proper established framework for direct inter-branch communications. Thus, there may be a risk that Congress will become less receptive to further requests and suggestions from the judiciary.

Although judicial lobbying is a recurring aspect of the relationship between Congress and the federal judiciary, such activities are not without their risks. Fundamentally, because of widespread perceptions that judicial lobbying clashes with the traditional image of proper judicial behavior,[51] strategic political activity by judges aimed at influencing legislation "may [negatively] influence popular respect for, and

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48. According to the *New York Times*, "it was the first news conference any Supreme Court Justice has ever held at the Court to discuss any subject other than his own imminent retirement." Linda Greenhouse, *Rehnquist, in Rare Plea, Asks Raise for Judges*, N.Y. TIMES, Mar. 16, 1989, at 1.

49. Statement of Chief Justice William H. Rehnquist (March 15, 1989) (press release provided by the Administrative Office of the United States Courts on behalf of the Judicial Conference of the United States).

50. At the time of Rehnquist's press conference, federal judges' salaries placed them well within the top 7 percent of families' incomes in the United States and fewer than 6 of the more than 700 federal judges resigned each year—and only a portion of those resignations were attributable to dissatisfaction with salaries. *See* Christopher E. Smith, *Federal Judicial Salaries: A Critical Appraisal*, 62 TEMPLE L. REV. 849 (1989).

51. Judges and others are very concerned that the judiciary maintains the appearance of being removed from "politics." As Justice Harry Blackmun wrote in an opinion, "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." Mistretta v. United States, 488 U.S. 361, 407 (1989). Although there are questions about whether the judiciary's image and "legitimacy" are so essential to its functional effectiveness, *see* Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, judicial officers consistently speak about the importance of the courts' image. *See* Christopher E. Smith, *The Supreme Court in Transition: Assessing the Legitimacy of the Leading Legal Institution*, 79 KY. L. J. 317, 322-26 (1990-91).

confidence in, courts."[52] There is also the potential for confusion and conflict when judicial officers pursue contradictory legislative goals or deviate from the established lines of communication between the Judicial Conference and Congress. Because the magistrate judges' interests have diverged from those of many Article III federal judges, their legislative goals and lobbying activities have sometimes generated opposition from other actors within the federal judiciary.[53]

III. THE U.S. MAGISTRATE JUDGES WITHIN THE FEDERAL COURTS

Beginning in 1793, the federal courts employed lay "commissioners" who assisted judges with minor tasks such as handling petty offenses and warrants.[54] Because of problems that stemmed from using officials who lacked training in law, members of Congress began to advocate reform of the commissioner system in 1940.[55] The increasing caseload pressures upon the federal courts during the 1960s helped to place court reform upon the Congressional agenda.[56] In 1968, Congress

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52. John W. Winkle, III, *Judges as Lobbyists: Habeas Corpus Reform in the 1940s*, 68 JUDICATURE 263, 265 (1985).

53. *See infra* notes 86-103 and accompanying text.

54. Richard W. Peterson, *The Federal Magistrates Act: A New Dimension in the Implementation of Justice*, 56 IOWA L. REV. 62, 66 (1970).

55. Reformers cited the following principal defects [in the commissioner system]: (1) the lack of a requirement of bar membership for appointment as a commissioner; (2) the unchecked freedom of the district courts to appoint and remove commissioners at will; (3) the part-time status of virtually all the commissioners; (4) the lack of guidance given to commissioners in the conduct of proceedings; (5) the basic impropriety of a fee system for compensating judicial officers; (6) the inadequacy of the existing compensation levels; and (7) the insufficiency of support services provided to commissioners.

Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343, 347 (1979).

56. The impetus for the reforms embodied in the creation of the office of United States Magistrate derived from the substantial increases in the number of cases filed in the federal courts during the 1960s. This increased caseload quickly exacerbated the extensive backlog problems with pending cases. For example, the federal courts had a backlog of 2,200 pending cases during 1960, but by 1966 the backlog had grown to 5,387. During that same period, civil appeals increased by 96 percent; criminal appeals increased by 130 percent; and actions filed by prisoners increased by 280 percent. Because of the increase in litigation, members of Congress recognized that the federal courts were overburdened and in need of additional resources.

SMITH, UNITED STATES MAGISTRATES, *supra* note 7, at 16.

According to a thorough empirical study of the federal district courts, the caseload increases stemmed from changes occurring in American government and society: "During the 1960s and 1970s, . . . we witness again an increase in litigation due to the social and political protest movements of these decades as well as to the 'due process revolution' spawned by the social and procedural legislation of the 1960s."

WOLF HEYDEBRAND & CARROLL SERON, RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF

passed the Federal Magistrates Act[57] which replaced the commissioners with "U.S. magistrates," a newly created class of subordinate judicial officers trained in law.[58] The magistrates were empowered to handle the minor tasks previously performed by commissioners as well as to assist district judges with other case processing tasks.[59] Congress avoided providing a precise definition for the magistrates' role and authority because district judges were supposed to utilize these innovative, new judicial officers according to each court's particular needs.[60] The district judges retained control over the magistrates not only through their power to assign tasks to these judicial subordinates, but also through their power to select the lawyers who would be appointed to eight-year renewable terms as full-time magistrates or four-year renewable terms as part-time magistrates.

The vague statutory language authorizing magistrates to perform "such additional duties as are not inconsistent with the Constitution and laws of the United States"[61] led to drastic differences in the manner in which these judicial officers were utilized within different districts because "[t]he creation of a new judicial position . . . inevitably creates uncertainty about exactly what role the new judicial officer is to play."[62] For example, the General Accounting Office found that "magistrates in [the Northern District of Ohio] generally performed only duties which would have been handled previously by commissioners, whereas 42 percent of the matters handled by magistrates in [the District of] Massachusetts were beyond the jurisdiction of former commissioners."[63] Congress responded by amending the Magistrates Act in 1976 to invalidate court decisions[64] interpreting the statute that had

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FEDERAL DISTRICT COURTS 49 (1990).

57. 28 U.S.C. § 631-39 (1988).

58. *See* Joseph F. Spaniol, Jr., *The Federal Magistrates Act: History and Development*, 1974 ARIZ. ST. L. J. 565.

59. *Id.* at 568-70; Peterson, *supra* note 54, at 71-99.

60. As described by one former magistrate, "Under the 1968 Act, the functions of magistrates were primarily defined by district court judges, who were constrained by governing statutory authority." J. Vincent Aug, Jr., *The Magistrate Act of 1979: From a Magistrate's Perspective*, 49 CIN. L. REV. 363, 363 (1980).

61. 28 U.S.C. § 636(b) (1968).

62. Smith, *Who Are the U.S. Magistrates?*, *supra* note 15, at 145.

63. GENERAL ACCOUNTING OFFICE, THE U.S. MAGISTRATES: HOW THEIR SERVICES HAVE ASSISTED THE ADMINISTRATION OF SEVERAL DISTRICT COURTS; MORE IMPROVEMENTS NEEDED 9 (1974).

64. *See, e.g.*, Wingo v. Wedding, 418 U.S. 461 (1974) (district judges lack authority under the Magistrates Act to delegate to magistrates the responsibility for overseeing evidentiary hearings in habeas corpus cases).

limited the duties which magistrates could perform.[65] The new legislation sought to "affirm[] the broad range of duties which were already being performed by magistrates in many districts[s]."[66] In 1979, Congress broadened the power of magistrates by authorizing magistrates to preside over complete civil trials with the consent of litigants.[67] In fact, magistrates had already been supervising civil trials in some courts,[68] so Congress merely endorsed and specified procedures for a practice already in existence in thirty-six districts.[69]

After the expansion of magistrates' authority in the 1979 amendments to the Magistrates Act, these subordinate judicial officers could undertake virtually any task performed by district judges except for specific aspects of felony criminal cases.[70] By 1990, after only two decades in existence, the magistrates were important components of the federal district courts. There were 484 magistrates, including 323 full-timers, who disposed of 418,711 matters for the federal courts, including 45,201 civil pretrial conferences, 4,220 civil and criminal evidentiary hearings, and 1,008 civil trials.[71]

A. The Struggle for Status and Authority

Although Congress periodically expanded their formal authority, "the magistrates confront an uphill battle to assert their professional autonomy."[72] Because district judges within each courthouse control the number and types of tasks assigned to magistrates, not all magistrates enjoy opportunities to exercise the complete range of their statutory authority. A study of the magistrates sponsored by the Federal

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65. McCabe, *supra* note 55, at 351-55.

66. McCabe, *supra* note 55, at 354.

67. Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.

28 U.S.C. § 636(c)(1)(1988).

68. H.R. Rep. No. 1364, 95th Cong., 2d Sess, pt.____, at 4 (1978).

69. If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of the court. 28 U.S.C. § 636(c)(2)(1988).

70. *See* Gomez v. United States, 490 U.S. 858, 872 (1989) ("additional duties" language in statute did not authorize magistrates to supervise the selection of jurors in felony cases).

71. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 25, 43 (1990).

72. Seron, *The Professional Project*, *supra* note 18, at 569.

Judicial Center found that they could be divided into three general roles within the various district courts:[73] "Additional Judge" overseeing a docket of complete civil cases; "Team Player" handling preliminary stages of civil and criminal cases; and "Specialist" processing specific categories of cases, primarily from prisoners and Social Security disability claimants.[74] Differences in magistrates' roles within different courthouses stem from judges' divergent conceptions of the appropriate tasks to be performed by a subordinate judicial officer[75] as well as other factors, such as the composition of each district's caseload, the communication between judges and magistrates within each district, and judges' knowledge about how magistrates are utilized in other districts.[76]

1. *Magistrates' Aspirations and Strategies*

Magistrates cannot control the definition of their status and authority as judicial officers. Their roles within the courts are primarily determined by their supervising district judges:

> The judges of the district court directly control the range of duties and responsibilities of the magistrates whom they appoint, as well as the procedures to be followed by the magistrates. Except for certain duties formerly handled by United States commissioners under direct authority of a statute or federal rule, all jurisdiction exercised by a United States magistrate must be specifically delegated to him by a district judge or court. This relationship was clearly summarized during Senate hearings on the 1968 Act. . . .[77]

Because they are acutely aware that colleagues in other districts enjoy high status and broad authority,[78] the magistrates formed a pro-

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73. CARROLL SERON, THE ROLES OF MAGISTRATES: NINE CASE STUDIES 35-46 (1985).

74. The "Specialist" role, in particular, creates risks that magistrates will not apply considered judgments to all of the cases before them: "A study of U.S. magistrates indicates that although some magistrates have a special interest in Social Security cases, many other consider such cases boring and burdensome." CHRISTOPHER E. SMITH, COURTS AND THE POOR 69 (1990).

75. Seron, *The Professional Project*, *supra* note 18, at 565-67.

76. SMITH, UNITED STATES MAGISTRATES, *supra* note 7, at 115-44.

77. McCabe, *supra* note 55, at 369.

78. Magistrates learn about the level of status and authority possessed by their peers in other districts from workload statistics from various districts gathered by the Administrative Office of the U.S. Courts, publications from the Federal Judicial Center, meetings and publications of the National Council of U.S Magistrates, and conversations with other magistrates at annual circuit council meetings and Federal Judicial Center training conferences. SMITH, UNITED STATES MAGISTRATES, *supra* note 7, at 125.

Magistrates' awareness of the status and authority enjoyed by their colleagues in other dis-

fessional association, the National Council of U.S. Magistrates, to advance collectively their shared goal of expanding their role and importance within the federal courts. In 1988, 86 percent of the 292 full-time magistrates were members of the Council and 60 percent of the 169 part-time magistrates were members.[79] Individual magistrates often have little hope of changing the role conceptions held by the district judges for whom they work. Magistrates may gain status and authority through communication with judges and through judicial performance that increases "[t]he district judges' familiarity with the personal qualities and skills of the magistrates."[80] However, the ability of magistrates to prove themselves to judges is limited because "[t]he contact and communication between [individual] magistrates and judges are affected by the different levels of status and authority possessed by the two judicial officers."[81] When joined with other magistrates under the auspices of a national organization, however, the magistrates can seek beneficial actions by Congress or by the Judicial Conference which will encourage district judges to recognize the magistrates as genuine federal judicial officers and to delegate to magistrates the complete range

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tricts was illustrated by a description of a training session for magistrates sponsored by the Federal Judicial Center:

> When magistrates . . . see th[e] level of respect granted their peers [in other districts], they recognize the potential of their office. . . . At an annual training conference for magistrates from three federal circuits, one magistrate addressed his colleagues about the potential for obtaining litigants' consent for magistrate-supervised civil trials through the use of the title "judge." He concluded his remarks by shaking his head with an expression of sad disbelief, saying "there are still judges out there who won't allow magistrates to be called 'judge'." Whereupon a magistrate, from a district noted for its conflicts between judges and magistrates, yelled from the audience, "No kidding!" Although the magistrates at the conference laughed in commiseration with their colleague, the emphasis given to the subject by the speaker and the abrupt interjection by the magistrate in the audience indicated the heartfelt importance which title and other aspects of status have for subordinate judicial officers.

Christopher E. Smith, *The Development of a Judicial Office: United States Magistrates and the Struggle for Status*, 14 J. LEGAL PROF. 175, 182-83 (1989).

79. Seron, *The Professional Project*, *supra* note 18, at 558 n.2.

80. SMITH, UNITED STATES MAGISTRATES, *supra* note 7, at 119.

81. SMITH, UNITED STATES MAGISTRATES, *supra* note 7, at 120.

> It can be very difficult for magistrates to forthrightly express opinions and concerns to judges because of the magistrates' subordinate position and because the magistrates do not wish to tarnish their images and relationships with [the judges]. . . . [M]agistrates may have legitimate and valuable suggestions about how to improve the administration of justice within a particular courthouse, yet [they may] fear that any suggestion [to the judges] will be misperceived and tarnish the [magistrates'] reputation for diligence and productivity.

Id. at 120-21.

of authoritative tasks that the Magistrates Act permits these subordinate judges to perform.

One primary goal of the magistrates' National Council was to improve the salary and benefits of magistrates. The National Council expended funds to secure the services of a professional lobbyist to assist their efforts to gain greater material benefits.[82] They succeeded in gaining Congressional action to upgrade their benefits and peg their salary at 92 percent of district judges' salaries.[83] Subsequently, during the Article III judges' successful campaign to gain a salary increase in 1989,[84] the judges included the magistrates' "need" for a salary increase among their arguments to Congress about the importance of increasing compensation for federal judicial officers.

> [Magistrates] contribute significantly to the administration of justice in the United States and are an integral part of the Federal judicial system. When their ranks suffer the debilitating effects of inadequate compensation—in terms of ebbing morale, premature departures and recruitment difficulties—the Judiciary as a whole suffers as well.[85]

As illustrated by the salary issue, when the magistrates succeeded in linking their interests with those of the Article III judges, they benefitted from the judges' influence with Congress. By contrast, when the magistrates' goals clash with those of the Article III judges, it is much more difficult for the magistrates to succeed in influencing Congress.

2. *Conflicts With District Judges Over Status and Authority*

On two particular issues, the definition of magistrates' status and the effectuation of their broad statutory authority, the goals of these judicial subordinates have been at odds with those of many district judges. For these issues, the magistrates have faced their greatest difficulties in seeking to improve their position within the federal judiciary.

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82. SMITH, UNITED STATES MAGISTRATES, *supra* note 7, at 168.

83. Administrative Office of the United States Courts, *Bankruptcy Judges, Magistrates Gain New Benefits; New Bankruptcy Judgeships Created*, 20 THE THIRD BRANCH, Nov. 1988, at 3.

84. Administrative Office of the U.S. Courts, *Congress Passes Bill to Increase Salaries, Limit Outside Income*, 21 THE THIRD BRANCH, Nov. 1989, at 1, 1-2. ("The bill provides federal judges, senior members of the executive branch, and members of the House of Representatives with a 7.9% salary increase effective January 1990. Judges and justices will gain a 25% increase in January 1991."). *Id.* at 1.

85. COMMITTEE ON THE JUDICIAL BRANCH OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, SIMPLE FAIRNESS: THE CASE FOR EQUITABLE COMPENSATION OF THE NATION'S JUDGES 81-82 (1988).

In seeking to influence Congress and the Judicial Conference, the magistrates have been forced to overcome or to bypass the district judges who oppose them. Without the unified support of the influential Article III judges, it is much more difficult for the magistrates to be effective in their judicial lobbying. When seeking to lobby Congress, magistrates possess the same disadvantages as other judicial officers because of their inability to contribute to the legislators' primary goal, namely reelection, through campaign contributions and other tactics available to non-judicial lobbyists. Moreover, the magistrates also lack the political connections that Article III judges possess from their pre-appointment partisan activities which led to their positions on the federal bench. Because the magistrates are appointed by the district judges through a "merit selection" process,[86] they lack the Article III judges' personal relationships with party leaders and members of Congress.

a. Concerns About Appropriate Status

Magistrates' concerns about their proper status within the federal courts have focused upon their dissatisfaction with their title. Many magistrates view the title "Judge" as a functional necessity for effective performance when presiding over trials, evidentiary hearings, settlement conferences, and other contexts in which judicial officers need to assert their official authority:[87]

> The magistrates recognize the value of high status. The title "Judge" creates a clear image in the minds of lawyers and parties about expected deference and appropriate formal behavior in the presence of an identifiable judicial officer. Magistrates have, in effect, a more authoritative voice when ruling on motions, guiding settlement negotiations, and undertaking other judicial tasks within their authority as federal judicial officers.[88]

The initial decision by Congress to call the newly created judicial officers "Magistrates" caused serious problems in some states. Although "Magistrate" is a generic term for judicial officer and is a respected title in the British legal system, its use in the American fed-

86. *See* Smith, *Merit Selection Committees*, *supra* note 15, at 213-14.

87. "One magistrate described correcting his secretary when she occasionally slipped and referred to him as 'the magistrate' instead of 'the judge' because he believed that consistent reinforcement of his judicial status, especially to lawyers who are not familiar with magistrates and federal court procedures, helped to enhance his effectiveness." SMITH, UNITED STATES MAGISTRATES, *supra* note 7, at 81.

88. SMITH, UNITED STATES MAGISTRATES, *supra* note 7, at 80-81.

eral courts "invite[s] comparisons to odious experiences with 'magistrates' and justices of the peace in judicial systems of some states."[89] Because several states use "Magistrate" as the title for low-level judicial officers,[90] many attorneys who are unfamiliar with the federal courts erroneously believe that U.S. magistrates are also lay judges who possess only narrow authority over minor matters.[91] Magistrates in some districts have always been addressed as "Judge [X]" because the district judges in those courts endorsed their subordinates as full-fledged federal judicial officers and insisted that attorneys give magistrates the complete measure of respect that any federal judicial officer is entitled to receive.[92] By contrast, district judges in other courts insisted that magistrates *not* be addressed as "Judge" because they wanted to distinguish themselves from their judicial subordinates. Thus, "these judges have instructed staff members to ensure that magistrates are never addressed as 'judge'."[93] Although the magistrates' National Council and magistrates within specific circuits and districts sought to encourage an official change in title, with "Associate Judge" the most frequently mentioned alternative,[94] officials at the Administrative Office of the United States Courts attempted to downplay the title controversy for fear that certain district judges would become antago-

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89. THE FEDERAL MAGISTRATES SYSTEM: REPORT TO CONGRESS BY THE JUDICIAL CONFERENCE OF THE UNITED STATES 60 (Dec. 1981).

90. In one survey, nearly half of the members of the Federal Bar Association indicated that they would prefer a new title for the U.S. magistrates:

> Those who would prefer a change in title state that the term "magistrate" has traditionally referred to a low-level local official who performs a narrow range of functions in criminal case, *i.e.*, a justice of the peace. They point out that this traditional association of the term is inaccurate when applied to the full-time United States magistrates. They also note that many state magistrates are not well regarded and some have been prosecuted for wrongdoing.

Id. at 62.

91. Supportive district judges have attempted to educate the bar about magistrates' status and authority as federal judicial officers through formal meetings, conversations during litigation conferences, and letters to litigants in specific cases. Smith, *Assessing the Consequences*, *supra* note 17 at 472.

92. SMITH, UNITED STATES MAGISTRATES, *supra* note 7, at 80-81.

93. Smith, *The Development of Judicial Office*, *supra* note 78, at 181. Judges may express their status concerns in several ways: "Several judges . . . complained . . . that magistrates improperly think they are judges. Another judge became angry when a memorandum addressed to the district's judges was sent to the district's magistrates and when magistrates' names were included on a list of judges." *Id.* at 180.

94. "The titles 'Associate Judge' and 'Deputy Judge' were among the alternatives to 'Magistrate' that had been discussed when the office was created." SMITH, UNITED STATES MAGISTRATES, *supra* note 7, at 185.

nized, and thereby oppose other aspects of magistrates' status and authority.

> One official at the Administrative Office, a strong supporter of broad authority for magistrates, made the difficulties of this issue quite clear when, upon being told that magistrates in at least one district answer their telephones with the words "Judge [X]'s office," visibly cringed and expressed the hope that certain district judges would not learn of this practice.[95]

Magistrates tried without success to get the Judicial Conference and the Chief Justice to assist with their efforts to secure a title that would more effectively convey their appropriate status and authority within the federal courts.[96]

In addition to the controversy over the appropriate title for their judicial office, magistrates in several districts have sought other attributes of status that are accorded to their colleagues elsewhere. For example, magistrates in a few districts have not been permitted to wear the traditional black robe that indicates to attorneys and litigants that they are indeed authoritative judicial officers.[97] Other petty actions by judges in several districts heightened the magistrates' desire to gain

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95. Smith, *The Development of a Judicial Office, supra* note 78, at 183.

96. [I]n what could be regarded as a minor symbol of rebellion, the magistrates in one circuit voted to recommend to the Judicial Conference that U.S. magistrates henceforth be known as "Associate Judges." . . . Because many judges vigorously oppose any title change that might reduce the differentiation between district judges and magistrates and, moreover, because the magistrates also sought other goals related to pay and benefits, leaders of the [National Council] persuaded the circuit group to rescind their resolution. Instead the national leaders attempted to utilize less formal means to improve the status of magistrates, such as having friendly district and circuit judges attempt to persuade the Chief Justice of the United States to issue an internal memorandum to the federal judiciary permitting the use of the title "Judge" for magistrates. According to some magistrates, former Chief Justice Burger insisted on the title "Magistrate," but they hope[d] that Chief Justice Rehnquist [would] be less rigid.

SMITH, UNITED STATES MAGISTRATES, *supra* note 7, at 185.

> A recent photograph in the monthly newsletter of the federal courts showed Chief Justice Rehnquist standing with three magistrates, the chief of the Administrative Office's Division of Magistrates, and the judge who chairs the Judicial Conference's Magistrates Committee after this small group met to "discuss items of mutual interest concerning the operation of the federal magistrate system." Although one can only speculate on the precise content of the discussions in this meeting, the composition of the group indicates that they probably used the occasion to educate the Chief Justice on the concerns of magistrates.

Smith, *The Development of a Judicial Office, supra* note 78, at 195, *citing* 20 THE THIRD BRANCH 3, July 1988, at 3.

97. SERON, THE ROLES OF MAGISTRATES, *supra* note 73, at 63.

greater status through actions by Congress or the Judicial Conference:

> An official at the Administrative Office stated that the biggest continuing problem within the magistrate system involves those districts in which judges will not permit the magistrates to park in the courthouse parking lot, eat in the judges' lunchroom, or do other things which, although sometimes minor in a practical sense, embody a significant symbolic message about an individual's status within a courthouse.[98]

b. Concerns About Exercising Full Authority

Magistrates also sought to gain the full authority granted to them by Congress in the Magistrates Act. In particular, magistrates want to supervise complete civil trials with the consent of litigants.[99] However, many district judges believe that judicial subordinates should not have such broad authority:

> In order for a district's judges to designate magistrates to handle complete civil cases by consent of the litigants, the judges not only must view the magistrates as competent to handle such cases but also must be willing to share the status and prestige of a presiding federal trial officer with the magistrates.[100]

As indicated by the foregoing discussion of magistrates' concerns about status, many district judges are unwilling to acknowledge that magistrates are authoritative judicial officers. Thus, magistrates in many districts are assigned only a limited range of tasks by their supervising judges.[101] Because Congress placed magistrates under the control of district judges in order to avoid constitutional concerns about excessive judicial authority reposed in non-Article III officials,[102] the magis-

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98. Smith, *The Development of a Judicial Office*, *supra* note 78, at 184.

99. By refusing to enable magistrates to preside over at least some civil trials, district judges can cause morale problems within their courts. In one district court,

> several magistrates were appointed who have substantial experience and, most importantly, high expectations and ambitions about the role of the magistrate. As the magistrates continued to be assigned limited tasks, disappointment, frustration, and disenchantment were plainly evident. . . . Several magistrates accepted the position because they [had] expected that the judges would eventually designate them to handle trials . . . .

SMITH, UNITED STATES MAGISTRATES, *supra* note 7, at 72.

100. Smith, *Assessing the Consequences*, *supra* note 17, at 467.

101. SERON, The Roles of Magistrates, *supra* note 73, at 69-92.

102. There were concerns expressed in Congress that judicial officers, such as magistrates, who lacked the attributes of Article III judges (i.e., presidential appointment, Senate confirmation, and protected tenure and salaries) should not exercise judicial authority. Congress sought to avoid any constitutional problems by placing the magistrates under the supervision and control of

trates sought to have the Judicial Conference and the Chief Justice encourage district judges to use the full extent of magistrates' statutory authority.[103]

IV. Court Reform Initiatives Affecting Magistrates

A. The Magistrates and Senator Biden's Proposed Legislation

In the late 1980s, Senator Joseph Biden, the chairman of the Senate Judiciary Committee, actively joined the current policy trend toward advocating court reform legislation that would reduce the costs and delays that plague the growing litigation caseloads within the federal courts.[104] In order to identify specific desirable reforms and to place court reform on the legislative agenda, Biden asked the respected Brookings Institution to undertake a study of civil litigation in the federal courts. When the Brookings Institution's Task Force published its

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Article III district judges. According to the congressional report on magistrates' expanded authority to supervise civil trial by consent, the exercise of judicial authority by non-Article III judicial officers passed constitutional muster for three reasons:

> First, the magistrate is an adjunct of the United States District Court, appointed by the court and subject to the court's direction and control. When the magistrate tries a case, jurisdiction remains in the district court and is simply exercised through the medium of the magistrate.
>
> Second, both parties must consent to trial before a magistrate and must consent to entry of final judgment by the magistrate for the district court.
>
> Third, in all instances an appeal from a magistrate's decision lies in an Article III court.

H.R. Rep. No. 1364, *supra* note 68, at 11.

103. *See supra* note 96 and accompanying text.

104. Because there is a perception that the United States is burdened by too much litigation which serves to increase the costs of legal services, medical insurance premiums, and general expenses for business operations, *see* Jethro K. Lieberman, The Litigious Society (1981), there have been many legislative proposals to place caps on civil damage awards, encourage alternative dispute resolution, and otherwise reduce costs and delays in litigation:

> Courts began to find themselves inundated with new filings, triggering cries of alarm from the judicial administration establishment. At the same time, judicial congestion, with its concomitant delay, led to claims of denial of access to justice.
>
> One response to these problems was a demand for more judges and more courtrooms; another was a search for alternatives to the courts.

Stephen B. Goldberg, et al., Dispute Resolution 6 (1985).

The third alternative to increasing judicial resources and moving cases out of the court system is the reform of court procedures themselves. Senator Biden was not alone in seeking court reform. Vice President Dan Quayle issued a controversial report in 1991 arguing for litigation reform as a means to increase the competitiveness of American business by reducing the burden of legal costs upon business. *See* President's Council on Competitiveness, Agenda for Civil Justice Reform in America (Aug. 1991).

recommendations,[105] Biden used the Brookings report as the basis for proposed legislation to reduce costs and delays in federal civil litigation. The report's recommendation concerning the U.S. magistrates directly threatened the subordinate judicial officers' aspirations and lobbying efforts for greater status and authority: "Procedural Recommendation 11: Ensure in each district's plan that magistrates do not perform tasks best performed by the judiciary."[106] This recommendation presented an ominous threat to both of the magistrates' primary goals. "Tasks best performed by the judiciary" seemed to imply quite directly that district judges rather than magistrates should preside over civil trials. Thus, if embodied in legislation, the magistrates' aspirations for broad authority could be jeopardized. Moreover, the reference to "the judiciary" as an entity separate from the magistrates implied that magistrates were not genuine, authoritative officials who deserve the status of judicial decision makers within the federal courts.

In January of 1990, Senator Biden submitted to Congress a bill entitled the "Civil Justice Reform Act of 1990"[107] that embodied the recommendations of the Brookings Task Force. Biden's bill contained several proposals to limit the permissible range of authoritative tasks to be undertaken by magistrates. One provision contained "[a] requirement that . . . a mandatory discovery-case management conference, presided over by a judge and not a magistrate, be held in all cases within 45 days following the first responsive pleading."[108] From the magistrates' perspective, the net effect of this provision would be not only to forbid magistrates from overseeing an important step in the civil litigation process, it would also involve district judges more intimately in *every* civil case and thereby reduce the likelihood that magistrates would assume complete control over any civil cases. Another provision would have had similar limiting effects upon magistrates' goal of expanding their authoritative responsibilities: "[F]or cases assigned to the track designated for complex litigation, calendar a series of monitoring conferences, presided over by a judge and not a magistrate, for the purpose of extending stipulations, refining the formulation of issues

105. *See* BROOKINGS INSTITUTION TASK FORCE, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION (1989); Robert E. Litan, *Speeding Up Civil Justice*, 73 JUDICATURE 162 (1989).

106. BROOKINGS INSTITUTION TASK FORCE, *supra* note 105, at 28.

107. S. 2027, 101st Cong., 2d Sess. (1990).

108. *Id.* at § 471(b)(3).

and focusing and pacing discovery."[109] This proposed provision explicitly sought to diminish magistrates' authority over and participation in key phases of civil litigation. Thus, if judges were required to participate in scheduling conferences and to monitor the course of discovery in every case, there would be little incentive for the litigants to consent later to have the trial heard by a "stranger" to the case, namely a magistrate.

Biden compounded his threat against the magistrates' aspirations by denigrating their potential independence and effectiveness as judicial officers in his statement introducing the legislation:

> [T]he [pretrial] conference may lose some of its significance in the minds of the attorneys if presided over by a magistrate, since the unfortunate fact is that many attorneys seem to be far more willing to take frivolous positions before a magistrate. . . . [M]agistrates may themselves be more reluctant than judges to frame the contours of litigation, limit discovery, establish a date certain briefing schedule and address the full panoply of discovery-case management conference issues.[110]

Whether or not Biden's comments accurately describe specific magistrates in some districts, magistrates generally regard themselves as full-fledged judicial officers and do not hesitate to assert their authority over attorneys.[111]

B. The Magistrates' Reaction

Within days of the introduction of Biden's bill in Congress, the National Council of United States Magistrates leaped into action to consider tactics for counteracting the undesirable aspects of the proposed legislation. As indicated by a letter sent by one National Council officer to all of the leaders within the organization, the magistrates quickly identified potential lobbying strategies and useful allies:[112]

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109. *Id.* at § 471(b)(3)(I).

110. 136 CONG. REC. S414, S418 (daily ed. Jan. 25, 1990) (statement of Sen. Biden).

111. One observational study of magistrates describe their assertive, authoritative behavior during hearings, conferences, and other contexts of interaction with lawyers and litigants. For example, in one incident after an attorney was late for the third time in coming to a conference with the magistrate, "[t]he magistrate, in robe, went on the bench in the courtroom when the attorney arrived and went 'on the record' to discuss the attorney's tardiness . . . . While the attorney was simultaneously apologizing and fumbling for a new, more original excuse, . . . the magistrate sternly announced, "if you [arrive late] again, there will be a price to be paid. Do we understand each other?" SMITH, UNITED STATES MAGISTRATES, *supra* note 7, at 93.

112. The official who provided a copy of the letter to the author granted permission for it to

> Should we take an activist or passivist role? If we ignore [the Brookings Task Force report], might it go away? Should we rely on others, such as the Magistrates Division [of the Administrative Office] and the Judicial Conference to protect our interests?
>
> Should we send an immediate response to the Task Force? . . . As our members find out about the report, we must be prepared to tell them what the Council is doing about it and why.
>
> . . . [O]ne of the first things we should do is find out as many details as we can about the proposed legislation. Here we should call on [the lobbyist we employed to work for us previously to gain better benefits]. . . .
>
> I suggest we should attempt to marshal as much support as we can. Possibly we should contact the Federal Judges Association and coordinate with them. . . . Our most persuasive support would appear to be the trial bar. If there are other bar association groups like the Iowa State Bar which would openly support us, that should be very helpful. If [we] can obtain support from the ABA, that should be helpful too.
>
> I am concerned about relying on support from the Judicial Conference since we have been told that Senator Biden plans fast action on the bill. The Judicial Conference is generally slow to react.

As indicated by the letter, because the magistrates themselves have only a limited ability to lobby Congress effectively, they attempted to identify potential allies who could influence legislators on their behalf. Article III judges, who "carried the ball" for the magistrates when successfully obtaining increased judicial salaries,[113] and private attorneys, who have the ability to apply traditional political pressure to elected officials through their campaign contributions and their votes, stood out as potential allies that might have the greatest influence over Congress. Interestingly, the magistrates indicated skepticism about the effectiveness of the institutionalized channel for communicating with Congress, namely the Judicial Conference, and therefore immediately considered their other strategic options for protecting their interests against threatening legislative proposals. The leaders of the National Council also acknowledged in the letter that they had to prepare to keep their constituents (i.e., the magistrates nationwide) informed and involved as lobbying strategies developed.

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be quoted but asked that the individuals who sent and received the letter not be identified by name.

113. *See supra* note 84.

C. Simultaneous Developments Favoring Magistrates' Aspirations

Fortunately for the magistrates, the timing of the Brookings Task Force Report and the Biden legislation coincided with other developments aimed at pressuring Congress to expand the magistrates' status and authority. In 1989, the Magistrates Division of the Administrative Office of the U.S. Courts and the Magistrates Committee of the Judicial Conference issued jointly a report recommending, among other things, that the magistrates' title be changed and that litigants be given more encouragement to consent to have civil trials supervised by magistrates.[114] In a manner analogous to the executive branch agencies that, according to traditional political science literature, are "captured" by the interest groups that they supposedly supervise and regulate, the Magistrates Division serves as a supportive advocate for the aspirations of the magistrates.[115] Theoretically, the Administrative Office of U.S. Courts, of which the Magistrates Division is a component, serves the Article III judges on the Judicial Conference.[116] By openly supporting the magistrates' aspirations, officials in the Magistrates Division did not follow the expectations of the many Article III judges who demanded that magistrates be given only limited status and authority.

In addition, in 1989 Chief Justice William Rehnquist appointed a separate "blue ribbon commission" comprised of federal judges and lawyers that examined practices and procedures in the federal courts in order to consider potentially beneficial court reforms. The Federal Courts Study Committee's 1990 report made recommendations that contradicted those by the Brookings Task Force by advocating that "Congress . . . allow district judges and magistrates to remind the parties [in civil litigation] of the possibilities of consent to civil trials

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114. *U.S. Magistrates: Part of the Problem or a Key to the Solution?*, 4 INSIDE LITIGATION 1, 17 (Feb. 1990).

115. During a Federal Judicial Center training conference for magistrates from several circuits, it was apparent that magistrates exhibit many of the characteristics one would expect from any interest group. Virtually all of the magistrates scheduled to address the conference on relevant developments in case law devoted significant portions of their speeches to discussion of status, salary, and pension issues affecting magistrates. These talks were so explicitly addressed to magistrates as a group that they even included reports on lobbying expenditures and political activities by the magistrates' national association. Throughout these digressions, as well as in other portions of the conference, it was apparent that the representatives of the Federal Judicial Center and the Administrative Office were "captured" bureaucrats who support the goals and aspirations of the interest group that they are responsible for managing (footnote omitted).

Smith, *The Development of a Judicial Office*, *supra* note 78, at 194-95.

116. GLICK, *supra* note 22, at 44.

before magistrates."[117] In effect, the Committee recommended a statutory change that would support magistrates' aspirations for broader authority by encouraging the creation of more opportunities for magistrates to preside over complete civil trials.

V. JUDICIAL LOBBYING AND THE JUDICIAL IMPROVEMENTS ACT OF 1990

A. Convergence of Judges' and Magistrates' Interests

When faced with the threat from Biden's proposed legislation, the magistrates benefitted from a convergence of their interests with those of the Article III judges. Biden's bill not only proposed limiting magistrates' participation in certain pretrial conferences, it simultaneously attempted to *require* that district judges follow a particular case-management procedure.[118] Biden sought to require district judges to preside over certain pretrial conferences. Thus, district judges were motivated to oppose the bill because it would interfere with their autonomy and authority in the management of litigation rather than because it would limit the authority of magistrates.

Prominent district judges testified in opposition to the bill by arguing that limitations on magistrates' tasks and authority would hamper the proposed legislation's underlying purpose of improving case-processing efficiency: "[T]he proposed diminution of the role of magistrates would reverse improvements made in civil case management through the increased use of magistrates, and would result in a vastly greater need for more life-tenured judges."[119] The judges also refuted Senator Biden's assertions which implied that magistrates were not sufficiently independent and powerful as judicial officers to control the course of civil litigation:

> [Magistrates] have informed me that it is a rare occasion indeed, that any attorney ever takes a frivolous position when appearing before them. If that should occur in some districts, I suspect that it is more of a reflection of how the magistrates are perceived by the Article III judges, and what duties or powers those judges have permitted the

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117. FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 79 (Apr. 2, 1990).

118. *See supra* notes 107-11 and accompanying text.

119. Aubrey Robinson, *Prepared Statement of the Hon. Aubrey Robinson, Jr., Chief Judge of the U.S. District Court, District of the District of Columbia, Presented in Testimony Before the Senate Judiciary Committee During Consideration of S. 2027, The Civil Justice Reform Act of 1990* 4 (Mar. 6, 1990).

> magistrates to perform. If that suspicion be true, one way to address the concerns of the [Brookings] Task Force is to leave the matter of who presides at the conference to the discretion of the district court in adopting its plan.[120]

Although the National Council of United States Magistrates feared that the Judicial Conference would react too slowly to influence Congress concerning the proposed legislation, in fact, the Conference acted swiftly at its March 1990 meeting by voting to oppose Biden's bill.[121] Thus, the federal judiciary was united in opposition to the legislation and, as indicated by studies of judicial lobbying, Congress is especially receptive to communications from judicial officers when the judges appear to speak with a unified voice.[122] Congress scrapped Biden's proposal and proceeded to work with the federal judiciary to develop alternative court-reform legislation. As a result, Congress eventually passed the Judicial Improvements Act of 1990[123] instead of Biden's Civil Justice Reform bill.

B. Judicial Lobbying and Interbranch Conflict

In the Judicial Improvements Act that was ultimately passed by Congress, the unified federal judiciary achieved its goals of gaining newly created judgeships and avoiding "micro-management" instructions from Congress on how to conduct pretrial hearings.[124] Although the judicial lobbying effort was ultimately successful in derailing Biden's proposals and replacing them with the judiciary's desired alternatives, the judges' tactics during the formulation of the legislation irri-

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120. Richard Enslen, *Prepared Statement of the Hon. Richard Enslen, U.S. District Judge for the Western District of Michigan, Presented During Testimony Before the Senate Judiciary Committee During Consideration of S. 2027, The Civil Justice Reform Act of 1990* 45 (Mar. 6, 1990).

121. Administrative Office of the U.S. Courts, *Judicial Conference Acts on Habeas Corpus/Civil Reform*, 22 THE THIRD BRANCH 1 (Apr. 1990).

122. BARROW & WALKER, *supra* note 9, at 255; FISH, *supra* note 8, at 324.

123. *See supra* note 20.

124. Instead of imposing precise requirements upon the district judges for their participation in pretrial conferences and other case management matters that have traditionally been controlled by judges' autonomous discretionary decisions, the Act required all districts to develop their own plans for improving case-processing efficiency: "There shall be implemented by each United States district court, in accordance with this title, a civil justice expense and delay reduction plan." 28 U.S.C. § 471 (1991); "In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group . . . , shall consider and may include . . . litigation management and cost and delay reduction techniques [listed in the statute]." 28 U.S.C. § 473(b) (1991).

tated members of the Senate Judiciary Committee because it appeared that the judges' viewpoints and priorities changed abruptly as the legislation was being shaped to suit the judiciary. In particular, the members of the Senate Judiciary Committee believed that a specific four-member task force of federal judges appointed by Chief Justice Rehnquist contained the spokespersons for the judiciary. After working closely with the judges on the task force, the senators were annoyed when the Judicial Conference subsequently voiced formal opposition to Senator Biden's legislative proposals and pushed the legislators to make further alterations in the court-reform bill. The Senate Judiciary Committee's report on the legislation described the "[n]egotiation between the [C]ommittee and the [Judicial Conference's four-member] task force [that] proceeded for several months, often on a daily basis."[125] The report raised strong criticisms of the judiciary's lobbying tactics and expressed concern that the judges had harmed the relationship between the judiciary and Congress:

> The [Senate Judiciary] [C]ommittee complied with the request of the Judicial Conference to work with one body [i.e., the four-judge task force appointed by Chief Justice Rehnquist], only to have the Conference seemingly defer to another body [i.e., the Conference's Committee on Judicial Improvements]—which had no role whatsoever in the discussions and negotiations—at the point of decision. Such actions only serve to undermine the cooperative relationship between Congress and the judicial branch that our citizens rightly expect and deserve.[126]

The senators' frank acknowledgement of their negotiations and cooperation with the judges in shaping the legislation confirms the power possessed by the Judicial Conference for influencing Congress on matters of court reform. Moreover, the senators' relatively strong expression of anger at the contradictory signals communicated by the judiciary concerning the proposed court-reform provisions indicates that the judges' effectiveness and credibility may be at risk when their judicial lobbying appears to the legislators to be inconsistent.

C. The Judicial Improvements Act and Magistrates' Goals

Although the magistrates initially began their judicial lobbying strategies as a defensive effort to stave off proposed legislation that

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125. S. REP. No. 416, 101st Cong., 2d Sess. 4 (1990).
126. *Id.* at 5.

threatened their authority,[127] they ultimately exceeded their most optimistic expectations for expanding their status and authority.

1. *Magistrates' Improved Status*

The Judicial Improvements Act of 1990 enhanced the magistrates' status as authoritative judicial officers. The Act's "definitions" section clearly endorsed the status and legitimacy of magistrates within the federal judiciary. Unlike the Brookings Task Force report that distinguished magistrates from "the judiciary,"[128] the Judicial Improvements Act stated emphatically that magistrates are officially members of the federal judiciary: "As used in this chapter, the term 'judicial officer' means a United States district court judge *or a United States magistrate*" (emphasis supplied).[129]

More importantly, the magistrates obtained their long-sought title change through a provision which was added as a noncontroversial amendment that was never the subject of legislative hearings. As a result of the enactment of the Judicial Improvements Act in December 1990, the subordinate judicial officers shall henceforth be known as "United States magistrate judge[s]."[130] Although many of these judicial officers wanted to disassociate themselves completely from the term "Magistrate," the new compromise title permits them to begin calling themselves "Judges" and they have begun to do so even in courts in which district judges had previously forbidden them from calling themselves anything other than "Magistrates." The new title may give the magistrate judges more respect and credibility in the eyes of litigants and lawyers who do not understand the full breadth of magistrate judges' authority as federal judicial officers. In addition, the new title may help to increase magistrate judges' authority by encouraging more litigants to consent to have their civil cases heard by the district courts' subordinate judicial officers. The previous title, "Magistrate," may have deterred litigants from trusting magistrate judges' authority and effectiveness as trial judges: "Many litigants may automatically prefer to have their cases decided by someone bearing the title 'judge.' As a

127. *See supra* notes 112-13 and accompanying text.

128. "Procedural Recommendation 11: Ensure in each district's plan that magistrates do not perform tasks best performed by the judiciary." BROOKINGS INSTITUTION TASK FORCE, *supra* note 105, at 28.

129. 28 U.S.C. § 482 (1990).

130. Judicial Improvements Act of 1990, Pub. L. No. 101-650 § 321, 104 Stat. 5089, 5117 (1990).

result, the magistrates los[t] opportunities to gain visibility and build their reputations as judicial officers, and the potential flexibility and judicial economy of the magistrate system [were] diminished."[131]

2. *Magistrates' Enhanced Authority*

Biden's original proposal to exclude magistrates from pretrial case-management conferences[132] was scrapped in favor of a more flexible provision requiring district courts to study their own procedures in order to develop plans for implementing effective case management practices.[133] In addition, the legislation ultimately enacted by Congress in December 1990 advanced magistrates' goal of gaining greater actual authority by amending the Magistrates Act to permit district judges and magistrates to "advise the parties of the availability of [a] magistrate" for civil consent trials.[134] The statute previously prevented judicial officers from mentioning the consent trial option to litigants because of a fear that litigants might feel pressured to consent.[135] Any communications regarding consent to a magistrate's jurisdiction were supposed to be exclusively between the clerk of court and the litigants.[136] However, because clerks in some districts did not diligently fulfill their responsibilities for informing litigants about magistrates'

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131. Smith, *The Development of a Judicial Officer*, *supra* note 78, at 182,

132. *See supra* notes 107-11 and accompanying text.

133. *See supra* note 124.

134. 28 U.S.C. § 636(c)(2) (1990).

135. By requiring all communications concerning consent to flow between the clerk of court and the litigants, Congress sought to prevent any coercion of litigants by district judges who did not wish to hear a particular case or by magistrates who were eager to gain consents that would enable them to preside over trials. According to the House Report on the 1979 Magistrates Act that created magistrates' authority over consent trials:

> The consent procedure is to be handled by the clerk of court. The response of the party is not to be conveyed to the district judge, and the district judge is not to attempt any inducement, subtle or otherwise, to encourage magistrate trials. This language is an important safeguard against what has been characterized as the "velvet blackjack" problem. Some judges may be tempted to force disfavored cases into disposition before magistrates by intimations of lengthy delays manufactured in district court if the parties exercise their rights to stay in that court.

H.R. REP. No. 1364, *supra* note 68, at 13-14.

136. The statute's previous wording made congressional intentions clear:

> [T]he clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate.

28 U.S.C. § 636(c)(2) (1982).

authority over consent trials, under the statute's previous wording, many litigants never even learned that they had the option of having their trial date accelerated by consenting to have a magistrate preside over the case.[137] The new statutory language will make it more likely that litigants will consent to have magistrates preside over their civil trials because there will be more opportunities for court personnel, including judges and magistrate judges, to inform litigants about their options. If the enhanced ability to provide information to litigants results in more magistrate-supervised trials, the magistrates who enjoy more opportunities to conduct trials will feel that they have moved closer to fulfillment of their complete authority under the Magistrates Act.

3. *Continuing Limitations*

The magistrate judges have now attained the primary goals that motivated their National Council's lobbying interests. The title "Magistrate Judge" is probably the best that they could hope for in light of historic and continuing opposition by many district judges to proposals that would permit the judicial subordinates to be called "Judges." The increased opportunities to educate litigants about the availability of magistrate judges for civil cases will certainly lead to more of the consent trials which represent the most significant and desired exercise of broad judicial authority by the subordinate judicial officers. In addition, because magistrate judges' salaries and benefits are now nearly equal to those of district judges,[138] Congress has effectively conferred upon the lower tier of judicial officers the benefits, status, and authority that the magistrate judges strove to attain through their judicial lobby-

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137. The example of one district illustrates how clerks of court failed to inform litigants about the option of consenting to a magistrate's civil trial authority:

> A 1985 addendum to the district's local court rules, entitled "Order Regarding Civil Jurisdiction of United States Magistrates," outlined in detail the steps to be taken by litigants in order to consent to have a magistrate preside over a civil case. The addendum included the statement that the "clerk of court shall notify parties in all civil cases that they may consent to have a magistrate conduct any or all proceedings in the case and order the entry of a final judgment." The author asked the court clerk's office why routine universal notice had not led any parties to consent. "What notice?" came the reply from the clerk's office. The personnel in the clerk's office had never even heard of the two-year-old addendum to the local court rules . . . . Apparently the judges had adopted standard language regarding consent jurisdiction for magistrates, but no one had ever followed through by notifying the concerned parties.

SMITH, UNITED STATES MAGISTRATES, *supra* note 7, at 84-85.

138. *See supra* notes 83-84 and accompanying text.

ing. Despite their success in achieving their legislative goals, however, the magistrate judges continue to face practical problems beyond the control of legislation that harm their status, authority, and effectiveness.

As "adjuncts" of the Article III judges, the magistrates will continue to have their task assignments controlled by the district judges for whom they work. The National Council and its organized lobbying strategies will have little effect upon the individual district judges who continue to believe that it is improper for magistrate judges to exercise judicial authority because they are not Article III judicial officers. This view is regularly reinforced through articles published by both judges[139] and law professors.[140] Because district judges are empowered to supervise the assignment of tasks to magistrates, it is perfectly proper and understandable for district judges to limit the assignments available for magistrates, including consent trials, if the judges possess principled concerns about the preservation of judicial power exclusively in the hands of Article III officials.

In addition, the magistrate judges' task assignments will continue to be influenced by the caseload needs of their specific district courts.[141] For example, because a steadily increasing number of criminal offenders are incarcerated in prisons,[142] there may be a concomitant increase in the number of habeas corpus petitions and civil rights actions filed by prisoners.[143] Although they formally possess broad judicial author-

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139. *See* Richard A. Posner, *Coping with the Caseload: A Comment on Magistrates and Masters*, 137 U. PA. L. REV. 2215 (1989).

140. *See* Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581 (1985).

141. One important uncontrollable factor, namely the quantity and composition of case filings within a district, can significantly affect the magistrates' roles. The nature of the caseload can limit task assignments in particular ways regardless of the judges' expectations and magistrates' aspirations for a broad role. . . .

. . .[S]ubstantial caseloads in [specific] categories of cases can determine the magistrates' roles. For example, magistrates in districts near federal land may find their time inevitably consumed by a steady stream of petty offense and misdemeanor cases. Depending upon the assignment system used within a district, a magistrate in a courthouse near several prisons may be similarly occupied by habeas corpus and civil rights cases.

SMITH, UNITED STATES MAGISTRATES, *supra* note 7, at 140-41.

142. Federal courts receive habeas corpus petitions from inmates in both state and federal prisons. Between 1980 and 1990, the number of prisoners incarcerated in state and federal correctional institutions increased from 329,821 to 771,243. *Prisoners in 1990*, BUREAU OF JUSTICE STATISTICS BULLETIN 1, 1 (May 1991).

143. For example, the number of prisoners' petitions filed in the federal courts increased from 33,765 in 1986 to 42,630 in 1990. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS 140 (1990).

ity, magistrate judges who work in courthouses near the many increasingly overcrowded state and federal prisons may find their time absorbed by the same crushing burden of routine and repetitive prisoners' filings.[144] Prisoners' cases as well as Social Security disability cases frequently consume the working lives of magistrate judges who perform in the limited "Specialist" role.[145] There remains serious risks that magistrate judges will engage in routinized decision making if inundated with such cases because "[t]he usual response to continuing caseloads of routine, unsuccessful complaints seems to be a degree of cynicism about all cases in that category."[146]

VI. CONCLUSION

When their interests were threatened by legislative proposals, the magistrate judges reacted quickly by identifying potential allies and lobbying strategies that might effectively influence congressional actions on court reform. As subordinate judicial officers, the magistrate judges have limited resources for judicial lobbying. They share all judicial officers' inability to feed legislators' primary goal of reelection through campaign contributions and constituent mobilization. In addition, they lack the political connections and personal relationships with members of Congress that many Article III judges utilized in order to gain appointment to judicial office. Moreover, because the Judicial Conference is the institutionalized representative of the federal judiciary for communications with Congress, the magistrate judges do not possess credibility and legitimacy as judicial spokespersons. As indicated by the events surrounding the development of the Judicial Improvements Act, the magistrate judges were ready and willing to employ their lobbying resources, but their legislative success stemmed primarily from the convergence of their interests with those of Article III judges and the Judicial Conference who opposed Biden's original legislation because it would have interfered with district judges' autonomy. While the members of the Senate Judiciary Committee were preoccupied by their negotiations with the Judicial Conference aimed at developing a bill that would be acceptable to both the judges and the court reformers within Congress, the magistrate judges' allies suc-

144. SMITH, UNITED STATES MAGISTRATES, *supra* note 7, at 141. *See* Christopher E. Smith, *United States Magistrates and the Processing of Prisoner Litigation*, 52 FED. PROBATION 13 (Dec. 1988).

145. SMITH, UNITED STATES MAGISTRATES, *supra*, note 7, at 131-32.

146. Smith, *Assessing the Consequences*, *supra* note 17, at 485.

ceeded in adding specific provisions to the bill that advanced the subordinate officials' goals for attaining greater status and authority.

The magistrate judges constitute a separate, self-interested group within the judicial branch with specific interests that have often been separate from those of Article III judicial officers.[147] The magistrate judges' efforts to gain expanded status and authority during the first two decades of their existence led to clashes with Article III judges who believed that the judicial subordinates should have limited authority. The magistrate judges' behavior as a judicial interest group was predictable because of their shared goals. Despite the predictable basis for their collective interests and judicial lobbying, the consequences of the magistrate judges' behavior for the judicial branch may appear to be detrimental or "dysfunction[al] [because] [i]nterest group thinking and behavior can exacerbate conflicts" within the judiciary.[148] However, in light of the magistrate judges' coordinated efforts with the Judicial Conference concerning the Judicial Improvements Act, the subordinates' self-interested tactics may actually have beneficial consequences for the judicial system. The expansion of magistrate judges' status and authority has increased the flexibility and extent of the judiciary's case-processing resources in an era of increasing caseload demands upon the federal courts. The possibility of more consent trials, in particular, creates new opportunities for the federal courts to process more civil cases during an era in which district judges are increasingly burdened by high-priority criminal cases.[149] Moreover, as the magistrate judges come closer to Article III judges in terms of status, authority, and benefits, they increase the likelihood that the interests of all federal judicial officers will converge when court reform issues arise. Some judges who possess principled objections to the exer-

147. "The magistrates' formation of an active interest group is understandable in terms of their shared interests and collective disappointment in regard to expectations about status, authority, and material benefits. The activities of such a group, however, can generate problems within the judicial system." SMITH, UNITED STATES MAGISTRATES, *supra* note 7, at 168-69.

148. SMITH, UNITED STATES MAGISTRATES, *supra* note 7, at 168-69.

149. [T]he 1974 Speedy Trial Act and 1979 Speedy Trial Act amendments set time limits for processing criminal cases. [18 U.S.C. § 3161] Thus criminal trials must frequently leap ahead of other cases on the district judges' trial dockets. As a result, civil trials can be delayed indefinitely if a judge gets several criminal cases. This extra pressure on judges can make magistrates particularly attractive as a resource for processing civil cases. Litigants may recognize that because magistrates' time is not absorbed by felony cases, definite dates for civil trials may be secured by consenting to have cases heard by these subordinate judicial officers.

Id. at 25.

cise of judicial authority by non-Article III subordinates will continue to resist and oppose the gains achieved by the magistrate judges. However, the net effect of the subordinates' lobbying efforts and of the convergence of their interests with those of Article III judges may be to increase the integration, acceptance, and, hence, effectiveness of the magistrate judges within the federal court system.