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“Separateness but Interdependence, Autonomy but Reciprocity”: A First Look at Federal Judges’ Appearances Before Legislative Committees

by Harvey Rishikof
and Barbara A. Perry

The Founding Fathers established judicial independence as a central tenet of the Constitution of the United States in order to insulate federal judges from the President, the Congress, and the electorate. Yet because of the complicated nature of the Constitution and overlapping powers, the judiciary has not remained totally isolated from the legislative process. Our research has discovered hundreds of instances of federal jurists testifying before congressional committees on subjects such as court administration, federal jurisdiction, budgetary policy, and pending legislation in a variety of fields. Indeed, our findings buttress a key argument of Justice Robert H. Jackson’s concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, from which we derive the main title of this article. In the Steel Seizure Case, Jackson asserted that “[w]hile the Constitution diffuses power the better to secure liberty, it also

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1. 343 U.S. 579 (1952).
contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.  

I. JUDICIAL INDEPENDENCE IN HISTORICAL CONTEXT

Despite Justice Jackson's assertion that the separation of constitutional powers would be tempered by inevitable and necessary cooperation among the branches, the historical record is replete with an emphasis on judicial autonomy. The Declaration of Independence railed against the British monarch who "had made judges dependent on his will alone, for the tenure of their offices, and the amount of their salaries." The Constitution directly addresses that grievance in Article III: "The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

More generally, as has often been noted, James Madison proclaimed in THE FEDERALIST that the "separate and distinct exercise of the different powers of government" among the three branches was "essential to the preservation of liberty." On the subject of the judicial branch, Madison was just as vigorous in defending its independence. He argued that "the permanent tenure by which the appointments are held in that department [the judiciary] must soon destroy all sense of dependence on the authority conferring them." Similarly, Alexander Hamilton vociferously supported the constitutional arrangement in Article III of the Constitution as an "excellent barrier to the encroachments and oppressions of the representative body."

Hamilton elaborated this concept with a reference to Montesquieu's SPIRIT OF THE LAWS: "[T]here is no liberty if the power of judging be not separated from the legislative and executive powers." Yet Hamilton worried that because the judiciary would be the weakest branch of government, it would be "in continual jeopardy of being

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2. 343 U.S. at 635 (Jackson, J., concurring).
6. Id.
7. Id. No. 78, at 465 (Alexander Hamilton).
8. Id. at 466 (quoting Montesquieu, SPIRIT OF LAWS, Vol. I, at 181).
overpowered, awed, or influenced by its co-ordinate branches." While Hamilton warned against encroachment upon the judiciary by the President and Congress, he was equally concerned that the judicial branch be protected from what he called "the effects of occasional ill humors in the society."10

II. CROSSING THE BOUNDARIES OF SEPARATION

The Framers, therefore, attempted to construct walls around the judiciary to protect it from interventions by the President, Congress, and public opinion. In practice, however, those barriers may resemble the winding serpentine walls designed by Thomas Jefferson for the University of Virginia. The constitutional protections established for the judiciary usually secure it from breaches by the other branches and the electorate, but the boundaries remain flexible enough to allow judges to move beyond them when necessary or desired.

Scholars, especially since the 1970s, have noted the willingness of judges to step out of their isolated roles as judges and assume other governmental duties. Professor Robert McKay catalogued what he termed "nonjudicial" activities of Supreme Court Justices and linked his findings to issues of judicial administration and ethical standards.11 He highlighted the precedent of the first Chief Justice John Jay serving concurrently as Secretary for Foreign Affairs and Chief Justice for three months.12 Moreover, Chief Justice Jay advised President George Washington and Secretary of Treasury Alexander Hamilton on a variety of matters throughout his tenure on the bench.13 In fact, Washington even appointed Jay to the diplomatic mission designated to settle the continuing British-American dispute.14 In the twentieth century, President Harry Truman named Justice Jackson chief American prosecutor at the Nuremberg war-crimes trials, which necessitated his absence from the work of the Court for nearly a year and a half.15 More recently, Chief Justice Earl Warren served as head of the

9. Id.
10. Id. at 470.
12. Id. at 27 (citing F. Monaghan, John Jay, Defender of Liberty 300, 304 (1935)).
13. Id. (citing F. Monaghan, John Jay, Defender of Liberty 347 (1935)).
14. Id. (citing F. Monaghan, John Jay, Defender of Liberty 367-87 (1935)).
commission that now bears his name to investigate the 1963 assassination of President John Kennedy.¹⁶

Scholarly books and articles have also tracked the political activity of Supreme Court Justices. Professors Henry Abraham and Bruce Murphy documented instances of Supreme Court Justices' involvement in presidential nominations to the highest court in the land.¹⁷ Murphy then followed up that study with extensive archival research, which he reported in his book on the secret political activities of Justices Louis Brandeis and Felix Frankfurter.¹⁸

Previous research has traced the twentieth century phenomenon of judges' involvement in lobbying for causes related to judicial administration. Professor Peter Fish devoted an entire book to the politics of administering the federal judiciary, which focuses on the establishment in 1922 of the Conference of Senior Circuit Judges and its evolution into the Judicial Conference of the United States.¹⁹ More recent publications have described case studies of particular issues that drew the attention of federal judges and prompted them to lobby Congress. Matters that jurists have addressed ranged from habeas corpus reform in the 1940s²⁰ to the role of magistrate judges and the Judicial Improvements Act of 1990.²¹

III. CATEGORIZING AND LABELLING JUDICIAL ACTIVITY

The literature on judges' professional activities beyond the bench uses a variety of labels for such phenomenon. "Nonjudicial" or "nonadjudicative" are the broadest categories used to denote a focus on judges acting outside the traditional process of deciding cases.²² But terms like "extra-judicial" and "quasi-judicial" have also found their way into descriptions of judges' activities. The former label has been applied to judges practicing law, participating in business and charitable activities, engaging in partisan politics or public service or both, and maintaining personal and social relationships. Quasi-judicial has been used to

¹⁶. Id.
¹⁸. Bruce A. Murphy, The Brandeis/Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices (1982).
²². See McKay, supra note 11, at 19-20, and Winkle, supra note 20, at 263-64.
include "those activities of judges that are not part of their assigned duties, but are related to the judicial function through efforts to improve judicial administration, to accomplish law reform, or to inform other judges, lawyers, or the general public about the nature of law . . . ."23

The American Bar Association ("ABA") has included appearances by judges under the rubric quasi-judicial in its Code of Judicial Conduct and has approved such activity as long as the judge "does not cast doubt on his capacity to decide impartially any issue that may come before him."24 The ABA Code specifies that a judge "may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice . . . ."25

Our Article adopts the ABA's categorization of judicial appearances before executive or legislative bodies as quasi-judicial activity. Thus, we have eliminated from consideration in this study the implications for judicial independence of extra-judicial activities as defined above. Furthermore, we acknowledge that a variety of techniques have been used by federal judges. These include both official and unofficial means of contacting legislators through direct and indirect methods. Official, direct contacts encompass testimony before congressional committees and official letters to individual legislators. Formal reports from the Judicial Conference or its various committees illustrate an official but indirect technique. For example, most recently the Judicial Conference adopted and reported in the summer of 1994 four core principles regarding the creation of judicial remedies that it thought should be included in any health care legislation enacted by Congress.26

The Conference's recommendations were as follows:

- There should be a full exhaustion of administrative remedies for benefit denial claims.
- Following exhaustion of administrative remedies, and consistent with general principles of federalism, state courts should be the primary forum for review of benefit denial claims.
- Traditional discrimination claims should be handled differently from benefit denial claims based on issues such as medical necessity.

To ensure the effectiveness of the enforcement provisions of any health care legislation, it is critical that sufficient resources be provided to the responsible administrative and judicial entities.\footnote{Id.}

Speeches and law review articles by judges in which they advocate a point of view on policy are other examples of official but indirect techniques. Unofficial, direct attempts at contacts include private phone calls and meetings between judges and legislators.

Recognizing that the topic of judicial/legislative relations is multifaceted, this Article narrows its scope to official appearances of Article III judges before legislative committees.

IV. GATHERING DATA ON JUDGES' TESTIMONY

We labelled this study a “first look” at federal judges’ testimony before legislative committees because to our knowledge no one has performed a comprehensive data search for incidences of judges’ appearances before congressional panels. Our method of data gathering was painstaking in its efforts to be as thorough as possible and merits a detailed description.

We relied on the Congressional Information Service’s (“CIS”) Congressional Masterfile (CM) databases. CM databases are essentially electronic transcriptions of the major congressional documents, including committee hearings, published by the CIS. The first of the two main CM databases, entitled Congressional Masterfile 1 v2.0 (CM1), is recorded on one CD ROM and covers the years 1789 through 1969. The second of the CM databases, known as Congressional Masterfile 2 v2.1 (CM2), splits its coverage into two CD ROMs, one which covers the years 1970 through 1983 and the other which covers the period 1984 through 1994.

Similar to a Lexis/Nexis search, the Congressional Masterfile finds every instance of selected search terms contained in its databases. There are a number of ways for users to refine their searches. Unless otherwise commanded, the database will search all fields (documents, notes, headings, hearings, evidence, etc.). Using field specifications, the user can limit the search to specific parts of the congressional record to refine the search results. Two helpful field specifications are the “witness name” ([in wil]) and “in witness” ([in wn]) notations. The “witness name” notation searches only the names of the witnesses who have testified before Congress. For example, the search “Goldberg, Arthur [in wil]” will find every instance in the database where “Goldberg, Arthur” testified (Witnesses are noted in the database by their last name first.). The “in witness” notation ([in wn]) searches the words in parentheses that follow the witness’s name and usually indicates the
witness's position and affiliation. A typical witness notation might appear as “Goldberg, Arthur (former Assoc Justice, US Supreme Court; US Ambassador to the UN).”

The databases, however, are not without their problems. A major failing is their inconsistent witness notation. One “hit” (or relevant result) may refer to a witness as “(Assoc Justice, Supreme Court)” while another may note a witness as “(Supreme Court)” while yet another may read “(US Supreme Court Assoc Justice).” Consequently, an improperly tailored search may unintentionally miss relevant records. For example, if the user searched “US Supreme Court [in wn],” the results would exclude the other two records. Yet if the search terms were only “Supreme Court [in wn],” the results would encompass both state supreme courts as well as the U.S. Supreme Court and produce an unmanageable number of results.

Unlike Lexis/Nexis, approximation searches are not available. The databases search words in the same order as they are written in the search box. Consequently, it was more effective to search individual terms than word groupings in order to ensure more accurate results.

Perhaps the most frustrating search limitation is the databases’ definition of “US” as a common word. In many cases, the federal courts are preceded by the phrase “US” in witness notation, which is intended to be an abbreviation for United States but is not written “U.S.” There is no efficient way to search the word “US” without the databases considering it a common word and producing a massive number of results (most of which refer to state courts). For example, by typing the phrase “US District Court [in wn]” the databases consider the phrase US as a common word “[common word] District Court [in wn].” Hence, the results would include all state district courts.

As a result, a comprehensive search strategy is essential to producing accurate results. The first step involves defining search terms broadly enough to encompass any possibly relevant “hit” without producing an unworkable number of documents. To accomplish this task, we first converted relevant parts of the databases to IBM DOS in order to make scanning the documents easier. We skimmed the files noting all the witness notation variations for the U.S. Supreme Court, the U.S. Courts of Appeals, and the U.S. District Courts. As a final check on “hits” for the U.S. Supreme Court, we searched under the names of all 108 justices who have served on the high court. Consequently, the search should have included virtually all of the appropriate testimony by completing a comprehensive, yet still focused, scan of the CM databases.

The next step involved printing out the “hits.” For this initial study we decided to limit the printout to the headings of relevant committee hearings, which contain, among other useful information, the hearing's
We first sorted the instances of judges' testimony into three categories: appropriations hearings, nomination hearings, and all other subjects. Given that appearances by judges at the first two types of hearings would be expected, we focused most of our analysis on the more interesting and revealing miscellaneous category. We tabulated by year the number of hearings in which Article III judges testified before Congress, and the total number of such jurists who testified each year. In addition, we have analyzed statistical trends and substantive changes in the subject matter of judges' testimony in United States history.

V. TRENDS IN SUPREME COURT JUSTICES' TESTIMONY

According to our data, Justices of the U.S. Supreme Court have usually appeared before congressional committees to discuss budgetary matters. Only two sitting Justices have testified at nomination hearings—Associate Justice Abe Fortas for his unsuccessful appointment to Chief Justice in 1968 and Associate Justice William Rehnquist for his promotion to Chief Justice in 1986. In 1923 Chief Justice William Howard Taft became the first member of the U.S. Supreme Court to testify before a congressional appropriations committee on the Court's budgetary needs. He did so again three years later. In that testimony, Chief Justice Taft, for the first time and at the suggestion of the Budget Director, General Lord, separated the funds out of which salaries and wages were to be paid from the funds out of which supplies would be allocated. The level of supervision by the Appropriations Committee even extended to the purchase of a law library for the federal libraries.


court building in Boston, a topic addressed in personal appearances before the committee by Associate Justices Oliver Wendell Holmes and Louis D. Brandeis, who accompanied Chief Justice Taft to the hearing. The pattern of periodic testimony continued until 1943 when it became an annual event. In 1930 and 1933, then Associate Justice Harlan Stone took the Court's budgetary request to the House Appropriations Committee. He was followed in that role by Associate Justice Stanley Reed in 1939.

Since 1943, at least one member of the highest court in the land has appeared before a congressional appropriations committee. Justice Hugo Black, who had served in the U.S. Senate, took on the duty between 1947 and 1961, in some years during that period he was replaced or joined by his colleague Associate Justice Harold Burton, who had also been a member of the Senate before coming to the Court. No Justice since Black has surpassed his record number of seventeen appearances before appropriations committees. Nevertheless, a pattern has emerged whereby junior Justices or those in mid-career serve as the Court's spokesperson before the congressional committees on appropriations. Justices Tom Clark, Byron White, Lewis Powell, and Sandra Day O'Connor acted in that capacity most frequently over the past two

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31. Second Deficiency Appropriation Bill, 1926: Hearing Before the House Comm. on Appropriations, 69th Cong., 1st Sess. 765-67 (statement of William Howard Taft, Chief Justice United States Supreme Court; Oliver Wendell Holmes, Associate Justice United States Supreme Court; Louis D. Brandeis, Associate Justice United States Supreme Court). See Fish, supra note 19, at 80.


33. CIS No. H855-2, Department of Justice Appropriation Bill for 1940, House Committee on Appropriations, 76th Cong., 1st Sess. (1939) (statement of Associate Justice Stanley Reed).


decades. Because Justices usually appear annually before both the House and Senate Appropriations Committees, the total number of hearings at which Justices testified on budget matters is 91 out of a total 120 committee meetings at which Justices appeared on any subject. Appropriations Committee appearances account for 76% of the total appearances of Justices before Congress.

In areas beyond nominations and appropriations, Supreme Court Justices have testified at 27 congressional hearings, over half of which have focused on matters related to judicial administration. (See Figures 1 and 2.) Not surprisingly, Chief Justice William Howard Taft, whose special concern during his tenure on the Court was administering the federal judiciary, was the most willing participant in congressional hearings on the subject. Between 1921 and 1928, he appeared thirteen times before congressional committees. In 1921 Taft testified before the House and Senate Judiciary Committees (“HJC” and “SJC”) on the need to increase the number of U.S. district court judges. Three years


37. Statistical analysis is based on information gathered in the data search described in Part IV of this article.


later the Chief Justice was before the HJC requesting additional judgeships for the Eighth Circuit. In 1926 Taft appeared at a hearing of the House Committee on Immigration and Naturalization to advocate the appointment of examiners to lighten the load of the district courts. Twice in 1928 he stressed to the HJC the need to create a Tenth Circuit. That same year Taft argued in front of the House Committee on Public Buildings and Grounds for the necessity of constructing a Supreme Court building. Taft also testified three times, twice in 1922 and once in 1924, before the HJC on jurisdictional issues. Each time, he stressed the desirability of altering the jurisdiction of the circuit courts and the Supreme Court.

Taft's successor in the center chair, Chief Justice Charles Evans Hughes, chose two colleagues (Justices Willis Van Devanter and Louis Brandeis) as a special committee of the Court to represent its membership and accompany him to a 1935 hearing of the SJC to voice opposition to Senator Hugo Black's proposed bill that would have enlarged the Supreme Court's appellate jurisdiction in cases involving injunctions against federal officials. The chairman of the SJC had sent a copy of Black's bill to Hughes and had invited him to testify before the committee at his convenience. Chief Justice Hughes accepted the invitation and argued before the Judiciary Committee that the proposed legislation was unnecessary because the Supreme Court already had "the power to bring before it by certiorari any case of the sort described in the

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note 28.
42. CIS No. H520-4, To Create a Tenth Judicial Circuit, House Committee on Judiciary, 70th Cong., 1st and 2d Sess. (1928) (statement of Chief Justice William Howard Taft).
45. Id.
46. According to Peter Fish, Hughes did not follow his predecessor's pattern of "congressional maneuvering" but sought to influence Congress indirectly by enhancing the prestige of the Judicial Conference and by calling on the Attorney General to perform the legwork on Capitol Hill. See Fish, supra note 19, at 82.
bill in advance of decision by the circuit court of appeals” under the 1891 act that had established the federal circuit courts.47

The next Chief Justice, Harlan Stone, who was promoted from his associate position on the Court by Franklin Roosevelt in 1941, appeared before the HJC in 1943 to discuss whether the Supreme Court’s quorum rule should be changed.48 The rule of six, established when the Court’s members numbered ten, was not revised when Congress reduced the number of justices to nine in 1869.

Although it was widely reported by the press in 1989 that Chief Justice William Rehnquist was the first sitting Chief Justice since Hughes to testify before Congress,49 the record reveals that Chief Justice Earl Warren had appeared before the Senate’s Post Office and Civil Service Committee to speak on the Salary Reform Act in 1964.50 Like Warren, Rehnquist went before the Post Office and Civil Service Committee (on the House side) to appeal for a salary increase for federal judges.61 Interestingly, Rehnquist’s immediate predecessor, Chief Justice Warren Burger, who was especially devoted to judicial administration, did not appear before Congress while he occupied the center chair. Even the issue of creating an Office of the Administrative Assistant (“AA”) to the Chief Justice, which was high on Burger’s agenda, did not draw him across the street to testify. Instead, he sent Associate Justice Potter Stewart before the HJC in 1971 to support the creation of an AA’s office.52 In fact, Justice Stewart was the last
Associate Justice to appear before a congressional committee other than for an appropriation or nomination hearing.

The decade of the 1950s witnessed the most appearances by Associate Justices before legislative panels. (See Figure 3.) On five occasions, Justices Robert Jackson, Harold Burton, Felix Frankfurter, and Hugo Black individually went before committees besides appropriations. Four such instances involved issues of judicial administration relating to ethics rules applied to federal employees, the civil service status of ex-law clerks and ex-secretaries of federal judges, and the preservation of historical publications. Justice Jackson also testified in a congressional investigation of the Katyn Forest Massacre (where Soviets executed Polish military officers), probably owing to the expertise Jackson had gained as the United States prosecutor at the Nuremberg trials.

VI. TRENDS IN CIRCUIT AND DISTRICT COURT JUDGES' TESTIMONY

Because we discovered nearly 500 hearings where U.S. Courts of Appeals judges testified before Congress, our analysis of the data, for reasons of space, will necessarily be more statistical than for the relatively few cases of the Supreme Court Justices' congressional testimony. Over one-third of the hearings at which courts of appeals judges testified were for nominations. These included appellate judges nominated for the U.S. Supreme Court and who testified at their own hearings, as well as the more frequent occasions when appellate


54. Id.

55. Id.

56. This figure is based on a comparision of all instances of testimony by courts of appeals judges with testimony regarding nominations. This figure was calculated after all of the data relevant to nomination hearings had been collected from the Congressional Information Service (CIS) Congressional Masterfiles. See explanation of data gathering in Part IV of this article.
judges appeared in support of friends and colleagues nominated to federal offices. A little over one tenth of the hearings at which courts of appeals judges testified were before appropriations committees. Excluding appropriation and nomination appearances, federal courts of appeals judges testified before nearly 300 legislative hearings in Congress.

We have categorized appearances at these hearings according to general topics. (See Figure 2.) The most numerous subjects addressed by courts of appeals judges before congressional committees are those related to court administration (labelled CA) and policies with direct impact on the courts (labelled CP). Out of 275 known instances of nonappropriation and non-nomination hearings at which federal circuit judges testified, 125 of the hearings addressed issues of court administration. These issues included personnel matters involving salary increases for federal jurists, additional federal judgeships, and retirement and removal by impeachment of Article III judges. Other subjects in the realm of judicial administration touched on the structure of the federal judiciary, for example, circuit realignment, creation of a National Court of Appeals, and the need for additional courthouses. Circuit judges also appeared before hearings to discuss support services, governance, and policy making for the federal judiciary, which included creation of the Administrative Office of the U.S. Courts in 1939, the role of the Judicial Conference, composition of Judicial Councils, and application of the Sunshine Act to the Conference and the Councils. The circuit jurists also provided congressional committees with information about revision of the bankruptcy courts and improvements in the pretrial service agencies. Ironically, court of appeals judges even appeared before a committee considering the nonjudicial activities of federal judges.

Federal courts of appeals judges have also testified at 84 congressional hearings where the subject was a policy that would likely have a direct, substantive impact on the courts. Most notable in this category were hearings considering reforms in criminal law and the judicial process. An illustrative list of topics addressed by circuit court judges reads like

57. For an example of the former, see CIS. No. 76-S521-12, Nomination of John Paul Stevens to be a Justice of the Supreme Court, 94th Cong., 1st Sess. (1975) (statement of John P. Stevens, Judge, U.S. Court of Appeals for the 7th cir.); for an illustration of the latter, see CIS. No. 82 SJ-T.17, On Confirmation of Nomination of Herman E. Moore, 82d Cong., 2d Sess. (1952) (statement of John Biggs, Jr., Judge, U.S. Court of Appeals for the 3rd Cir.).

58. Statistics are based on information gathered in the data search described in Part IV of this Article.
a litany of major issues in constitutional law that have found their way into the political arena: representation of indigent defendants, habeas corpus appeals, exclusionary rule modification, and judges' use of legislative history. Circuit judges also presented their views on various legislative proposals, such as the Juvenile Delinquency Prevention Act, amendments to the Criminal Justice Act of 1990, the Citizen's Right to Standing in the Federal Courts Act, the Bankruptcy Antifraud Act, the Violent Crime Control Act, and the Civil Justice Reform Act. Hearings on the substance and procedure of sentencing also attracted judicial participation. In addition, courts of appeals judges testified about the mass tort problems surrounding the asbestos litigation crisis.

At 40 congressional hearings, federal circuit judges addressed policies that were not directly related to the courts or their administration (labelled OP for Other Policy). Judges often appeared before committees to discuss proposed legislation in this diverse category, including the Interstate Commerce Act, the Industrial Innovation and Technology


67. 49 U.S.C. § 1 et seq. (1887).
Act, and the Independent Counsel Reauthorization Act. Judges also testified about general farm legislation and trade issues. In 1936, for example, Judge William Denman of the United States Court of Appeals for the Ninth Circuit appeared before the House Merchant Marine and Fisheries Committee to discuss the establishment of sardine trade regulations.

Occasionally, judges have appeared as representatives of a particular community. For instance, another jurist from the Ninth Circuit appeared to request relief for San Francisco after the 1906 earthquake. Judge Juan Torruella of the United States Court of Appeals for the First Circuit went before a 1990 House Interior and Insular Affairs Committee to discuss the political status of Puerto Rico. His Puerto Rican heritage and experience of serving on the U.S. District Court for Puerto Rico made him a likely witness. Circuit court judges also tackled subjects as varied as selective compulsory military service, tax rate revision, food additives, federal disaster relief, and cost benefit analysis in setting environmental priorities.

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70. CIS No. 74-H763-6, Sardine Fisheries, House Committee on Merchant Marine and Fisheries and Senate Committee on Commerce, 74th Cong., 2d Sess. (1936) (statement of William Denman, Judge, U.S. Court of Appeals for the 9th Cir.).
72. CIS No. 89-S311-64, Political Status of Puerto Rico, Senate Committee on Energy and Natural Resources, 101st Cong., 2d Sess. (1989) (statement of Juan R. Torruella, Judge, U.S. Court of Appeals for the 1st Cir.).
This Other Policy (OP) category covers such a wide range of topics that no pattern of judicial testimony emerges from them. Appearances by judges on these issues seems purely ad hoc. Perhaps in some instances judges have a particular expertise or interest in a subject and are therefore asked to appear. In the wake of the 1991 Rodney King beating by Los Angeles police officers, for example, the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights invited Judge Jon O. Newman of the United States Court of Appeals for the Second Circuit to testify. He had written a law review article in 1978 on strengthening the Section 1983 damage remedy for law enforcers' misconduct and had published an editorial on the same subject. Judge Newman appeared before the subcommittee to share his expertise and even offer a proposal for legislation to embody his ideas. In other circumstances, such as testifying to appeal for disaster relief, judges use their respected positions to represent their communities.

In historical context, the first instance of a circuit court judge testifying before Congress dates to 1906 and the request for relief of San Francisco after the earthquake. In counting by decades, we discovered a steady increase from the 1930s to the present in the number of courts of appeals judges who testified before committees on matters not related to appropriations or nominations. (See Figure 3.) Interestingly, U.S. district court judges have appeared at over 100 fewer congressional hearings than their colleagues on the federal circuit benches. Over one quarter of these hearings concerned nominations; another one seventh addressed appropriations. Excluding these two categories, federal district court judges appeared before 231 congressional committees. As was the case for circuit judges, district court jurists testified most frequently on topics related to court administration and substantive policies affecting the federal courts. Just over 160 hearings considered subjects from the CA and CP categories and were almost evenly divided between the two. (See Figure 2.)

77. CIS No. HAp 59-R, supra note 71.
78. Statistics are based on information gathered in the data search described in Part IV of this article.
Many of the judicial administration topics paralleled those on which the circuit judges testified. Judges from both these levels of the federal judicial system sometimes appeared before the same committees to express similar concerns about judicial salaries, retirement benefits, the number of federal judgeships, reconfiguration of districts or circuits, construction of court buildings, and the role of the Judicial Conference.79 In addition, district judges have testified on administrative issues related to the primary functions of the judicial process at the trial level, namely, establishment of a probation and parole system, appointment and tenure of bankruptcy referees, payment of fees to jurors and witnesses, compensation for U.S. Commissioners, improvements in bilingual court proceedings, and attorney compensation rates in criminal cases.80 Federal district judges have also discussed before congressio-


nal committees proposed legislation such as the Federal Magistrates Act and the U.S. Marshals Service Act. They testified on President Franklin Roosevelt's Supreme Court reorganization scheme in 1937 and the creation of the Federal Judicial Center thirty years later. From a personal perspective, a senior district court judge, Sarah T. Hughes, who first gained notoriety when she swore in President Lyndon Johnson after John Kennedy's assassination in 1963, testified on age discrimination in the selection of federal judges.

Topics in the CP category (substantive policies that have a direct impact on the courts) also overlap between circuit and district judges' testimony. Additional CP subjects commented on by district judges before congressional committees included the following criminal justice issues: modifications in the rules governing pleas, grand jury reform, revision of criminal defendant pretrial discovery rights, voir dire examination, and the Speedy Trial Act. Sentencing was an ever-


82. CIS No. 87-S521-33, S.2044, 99th Cong., 2d Sess. (1986).
present topic before congressional committees, with district judges testifying on appropriate penalties for drug violators.86 In the civil justice realm, district judges testified on arbitration of civil cases in their courts, and like their counterparts on the circuit courts, they commented before committees on multidistrict litigation.87

Federal trial judges also testified on policies not necessarily related to courts directly (the OP category). At 19 different hearings, district judges commented on issues as varied as the creation of a Bureau of Naturalization and Immigration, investigations into "rackets," the Justice Department's handling of white collar crime, control of the use of pesticides, the Panama Canal transition period, public buildings' accessibility for the handicapped, oversight of child welfare programs, and the establishment of flag protections.88

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Although district court judges have not been as active as circuit court judges in appearing before congressional committees, the subjects on which they have testified have been just as diverse. The first recorded testimony of a federal district court judge before a congressional panel, the Senate Judiciary Committee, occurred in 1845; however, routine appearances did not begin until the early twentieth century. From that point, however, judicial appearances before legislative committees escalated steadily. (See Figure 3.)

VII. CONCLUSION

Further investigation beyond this initial examination of the historical record may offer detailed correlations between historical factors and the remarkable increases in judicial testimony before Congress among circuit and district judges in the twentieth century. For now, we can conclude that such testimony by federal judges is marked by “ad hocism,” tends to address pressing issues of the day, often draws upon judges’ particular expertise, and frequently attempts to lend jurists’ prestige to legislative debates on complex policies.

In addition, our research indicates that the creation of the Conference of Senior Circuit Judges in 1922 contributed to the process by which invitations would be issued to the Chief Justice of the United States to testify on subjects that would be explored by the Appropriations

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89. CIS No. Sj 28-A, Reports Made By the Honorable John MacPherson Berrien, With Testimony Relating To the Violation of the Naturalization Laws, Senate Committee On the Judiciary, 28th Cong., 2d Sess. (1845) (statement of Archibald Randall, Judge, U.S. District Court for the Eastern District of Pennsylvania). To observe the routine nature of such appearances beginning in the second decade of the twentieth century, see Figure 3.
Committees. In testimony before the committee in 1923, a year after
the creation of the Conference, the Chief Justice not only requested
$300,000 for additional district courts but also reinforced his request for
$6,000 for a bust and portrait of former Chief Justice Edward D.
White. By 1926, the testimony before the appropriations hearings
became much more detailed, including Taft's discussion of the salary of
the Reporter at the Supreme Court. The next watershed that marked
testimony by Supreme Court Justices in the appropriations realm
concerned the creation in 1939 of the Administrative Office of the U.S.
Courts, which resulted in the separation of judicial administration from
the Department of Justice where it had been lodged since the Depart-
ment's founding in 1870.

Finally, we must note the demonstrable mixing between the judicial
and legislative branches. In fact, Mortin Grodzins's classic "marble
cake" description of the blurring of lines among the levels of govern-

90. As Kenneth Starr has noted,

. . . Supreme Court tradition had long prohibited the head of the United States
Judiciary, the Chief Justice, from taking his cause directly to Congress and
actively campaigning for reform. That tradition, however, stood in the way of the
Court fulfilling its constitutional mission. It was therefore, as far as Taft was
concerned, a tradition to be discarded.
See Starr, supra note 38, at 965-66.

91. Third Deficiency Appropriations Bill, 1923: Hearing Before the House Comm. on
Appropriations, 69th Cong., 1st Sess. 394-96 (1923) (statement of William Howard Taft,
Chief Justice Supreme Court of the United States).

92. Appropriations, Department of Justice, 1927: Hearing Before the House Comm. on
Appropriations, 69th Cong. 1st Sess. 224-27 (1926) (statement of William Howard Taft,
Chief Justice United States Supreme Court). Other issues related to the judicial branch
that were discussed at this appropriations hearing included salaries of the district, circuit,
and retired judges; the national park commissioners (because they were appointed
by the federal trial judges in whose district the park was located); territorial courts; and salaries,
fees, and expenses of federal marshals and their deputies.

93. According to Peter Fish,

[as the Washington-based administrator for the federal judiciary, the Attorney
General and the Department of Justice had contact with, if not direct responsi-
Bibility for, these officials of the court [i.e., marshals, clerks, probation officers, and
bankruptcy referees]. From the department's Division of Supplies came files,
furniture, sheet forms, dockets, and calendars not only for the marshals and
attorneys but also for the judges and clerks. The Division of Accounts in the
Office of the General Agent audited claims, accounts, and vouchers of all court
personnel from the judges to the messengers. It prepared and reviewed
authorizations for expenditures from funds allocated to the Attorney General.
Preparation of the budget estimates fell to this division as did the compilation of
statistical data on the volume of judicial business and the expenditure of the
appropriations by the Department of Justice and the courts.
See Fish, supra note 19, at 92-95.
ments in the federal structure is undoubtedly appropriate to this
discussion of the separation of powers among the branches of govern-
ment. Our research has illustrated that from time to time judges and
legislators have engaged in a discussion on issues not contemplated by
the Founders. Undoubtedly, this dialogue will continue, but the paradox
of maintaining "separateness but interdependence, autonomy but
reciprocity" must, by the very nature of the process, remain part of our
constitutional framework.

94. Morton Grodzins, Centralization and Decentralization in the American Federal
Figure 1
Instances of Congressional Testimony by Sitting Supreme Court Justices Other Than Appropriations and Nominations

<table>
<thead>
<tr>
<th>Year</th>
<th>Committee (House of Congress)</th>
<th>Justice(s)</th>
<th>Subject of Hearing</th>
<th>Category</th>
</tr>
</thead>
<tbody>
<tr>
<td>1909</td>
<td>Agriculture (House)</td>
<td>John Marshall Harlan I</td>
<td>Washington, D.C. higher education aid under the Morrill Act</td>
<td>DC</td>
</tr>
<tr>
<td>1921</td>
<td>Judiciary (House)</td>
<td>William H. Taft*</td>
<td>Increasing the number of federal district judges</td>
<td>CA</td>
</tr>
<tr>
<td>1921</td>
<td>Judiciary (Senate)</td>
<td>William H. Taft*</td>
<td>Increasing the number of federal district judges</td>
<td>CA</td>
</tr>
<tr>
<td>1922</td>
<td>Claims (House)</td>
<td>William H. Taft (former member of the War Labor Board)*</td>
<td>Claims of employees of Bethlehem Steel</td>
<td>M</td>
</tr>
<tr>
<td>1922</td>
<td>Judiciary (House)</td>
<td>William H. Taft*</td>
<td>Jurisdiction of current courts of appeals and U.S. Supreme Court and pay of Supreme Court reporters</td>
<td>CA/J</td>
</tr>
<tr>
<td>1922</td>
<td>Military Affairs (House)</td>
<td>William H. Taft*</td>
<td>Fort Hale and Lighthouse Point land transfer to New Haven, CT</td>
<td>M</td>
</tr>
<tr>
<td>1922</td>
<td>Judiciary (House)</td>
<td>William H. Taft*</td>
<td>Jurisdiction and judicial code revisions for the Supreme Court and the courts of appeals</td>
<td>J</td>
</tr>
<tr>
<td>1924</td>
<td>Judiciary (Senate)</td>
<td>Willis Van Devanter James C. McReynolds George Sutherland</td>
<td>Jurisdiction and procedure of the Supreme Court</td>
<td>CP</td>
</tr>
<tr>
<td>1924</td>
<td>Judiciary (House)</td>
<td>Willis Van Devanter James C. McReynolds George Sutherland William H. Taft*</td>
<td>The powers, jurisdiction, and regulation of the Supreme Court and the courts of appeals</td>
<td>J</td>
</tr>
<tr>
<td>1924</td>
<td>Judiciary (House)</td>
<td>William H. Taft*</td>
<td>Additional judgeships for the 8th Circuit</td>
<td>CA</td>
</tr>
<tr>
<td>1926</td>
<td>Immigration and Naturalization (House)</td>
<td>William H. Taft*</td>
<td>Relief of judges in naturalization cases</td>
<td>CA</td>
</tr>
<tr>
<td>1926</td>
<td>Claims (House)</td>
<td>William H. Taft*</td>
<td>War Labor Board award to employees of Minneapolis Steel and Machinery Co.</td>
<td>M</td>
</tr>
<tr>
<td>1928</td>
<td>Judiciary (House)</td>
<td>William H. Taft* Willis Van Devanter</td>
<td>Creation of the 10th Judicial Circuit</td>
<td>CA</td>
</tr>
<tr>
<td>1928</td>
<td>Public Buildings and Grounds (House)</td>
<td>William H. Taft* Willis Van Devanter</td>
<td>The selection and construction of the Supreme Court Building site</td>
<td>CA</td>
</tr>
<tr>
<td>1928</td>
<td>Judiciary (House)</td>
<td>Willis Van Devanter William H. Taft*</td>
<td>Creation of the 10th Judicial Circuit</td>
<td>CA</td>
</tr>
<tr>
<td>1935</td>
<td>Judiciary (Senate)</td>
<td>Charles E. Hughes* Willis Van Devanter Louis D. Brandeis</td>
<td>Opposition to Senator Hugo Black's bill enlarging the Supreme Court's appellate jurisdiction in cases involving injunctions against federal officials</td>
<td>J</td>
</tr>
<tr>
<td>1941</td>
<td>Judiciary (Senate)</td>
<td>Robert H. Jackson</td>
<td>Impeachment procedure of federal judges accused of unethical behavior</td>
<td>CA</td>
</tr>
<tr>
<td>1943</td>
<td>Judiciary (House)</td>
<td>Harlan F. Stone*</td>
<td>Changing the quorum of the Supreme Court</td>
<td>CA</td>
</tr>
<tr>
<td>1951</td>
<td>Labor and Public Affairs (Senate)</td>
<td>Robert H. Jackson</td>
<td>Establishment of the Commission on Ethics in Government</td>
<td>CA</td>
</tr>
<tr>
<td>Year</td>
<td>Event Description</td>
<td>Description</td>
<td>Committee</td>
<td></td>
</tr>
<tr>
<td>------</td>
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<td>-------------</td>
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<td></td>
</tr>
<tr>
<td>1951</td>
<td>Post Office and Civil Service (House)</td>
<td>Harold H. Burton</td>
<td>Civil service status of ex-law clerks and ex-secretaries of federal judges</td>
<td>CA</td>
</tr>
<tr>
<td>1952</td>
<td>Investigation of the Katyn Forest Massacre (House: select)</td>
<td>Robert H. Jackson</td>
<td>Soviet execution of Polish military officers</td>
<td>M</td>
</tr>
<tr>
<td>1957</td>
<td>House Administration (House)</td>
<td>Felix Frankfurter</td>
<td>National Historical Publications Committee</td>
<td>CA</td>
</tr>
<tr>
<td>1958</td>
<td>House Administration (House)</td>
<td>Hugo L. Black</td>
<td>Impact of restrictions on the political activities of federal employees included in the Hatch Act</td>
<td>CA</td>
</tr>
<tr>
<td>1963</td>
<td>Government Operations (House)</td>
<td>John Marshall Harlan II (representing the National Historical Publications Committee)</td>
<td>Federal grants for the collection of documentary source material</td>
<td>CA</td>
</tr>
<tr>
<td>1964</td>
<td>Post Office and Civil Service (Senate)</td>
<td>Earl Warren*</td>
<td>Salary Reform Act</td>
<td>CA</td>
</tr>
<tr>
<td>1971</td>
<td>Judiciary (House)</td>
<td>Potter Stewart</td>
<td>Creation of the Administrative Assistant to the Chief Justice; also allowing federal judges to head the Federal Judicial Center or the Administrative Office of the U.S. Courts without losing seniority</td>
<td>CA</td>
</tr>
<tr>
<td>1989</td>
<td>Post Office and Civil Service (House)</td>
<td>William H. Rehnquist*</td>
<td>Pay increases for federal Judges</td>
<td>CA</td>
</tr>
</tbody>
</table>

N: Nominations  
CA: Court administration  
CP: Policy directly affecting the courts  
OP: Policy that does not directly affect the courts  
J: Jurisdiction  
I: Investigations  
DC: Hearings concerning the District of Columbia  
M: Miscellaneous topics  
* Chief Justice
Figure 2
Catagorization of Testimony Before Congress of 
Article III Judges From 1789-1993

Justices of the Supreme Court of the 
United States

Judges of the United States District Courts
Figure 3
Number of Hearings Concerning Topics other than Appropriations and Nominations on Which Article III Judges Testified

Justices of the Supreme Court of The United States

Judges of the United States District Courts
Because Figure 3 charts the number of hearings per decade, data from 1990 through 1994 is omitted from these graphs but is discussed in the text.