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## Note

### Stimulating Dialogue Between the Courts and Congress: Sprucing Up the “Statutory Housekeeping” Project

*Jeff Simard\**

Although the federal statutory housekeeping project has existed since the 1990s,<sup>1</sup> this little-known interbranch communication project has a great deal of untapped potential. The project calls for United States courts of appeals to voluntarily submit opinions from court decisions discussing technical flaws in statutes to Congress.<sup>2</sup> The circuit courts send the opinions themselves, without substantial commentary from their authors or court staff, to a variety of offices in the legislative branch that may then take whatever actions they see fit in response to the opinions.<sup>3</sup>

Professors Abbe R. Gluck and Lisa Schultz Bressman’s recent survey of legislative drafters suggests that judges and leg-

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\* J.D. candidate 2015, University of Minnesota Law School; B.A. 2012, Marquette University. I would like to thank Professor Brett McDonnell for his guidance in writing this Note, Professor Herbert Kritzer for his advice on putting together the Clerk of Court survey, and the court staff that took the time to respond to that survey. I would especially like to thank Russell Wheeler for providing recent data about the statutory housekeeping project and offering his thoughts about the project and this Note, and M. Douglass Bellis and Matthew Lee Wiener for their insights about the statutory housekeeping project. A special thanks also goes to the staff of the *Minnesota Law Review* for helping prepare this Note for publication, and to my brother, Justin, for his immensely helpful feedback throughout the researching, writing, and editing process. Finally, I would like to thank my family for all of their support during law school. Copyright © 2015 by Jeff Simard.

1. Robert A. Katzmann & Russell R. Wheeler, *A Mechanism for “Statutory Housekeeping”*: *Appellate Courts Working with Congress*, 9 J. APP. PRAC. & PROCESS 131, 133–36 (2007) (describing the procedure of the federal statutory housekeeping project).

2. *Id.* at 136–38 (same).

3. *Id.*

islative drafters read and understand statutes differently,<sup>4</sup> yet their study does not devote any time to the federal statutory housekeeping project,<sup>5</sup> one mechanism that already exists for improving interbranch communication. If used properly, the project stands to foster communication between judges and drafters, encourage forward-thinking draftsmanship, and improve statutory interpretation.

In its current form, however, the project is insufficient. Participation is weak and uneven among the circuits,<sup>6</sup> and recent attempts at revitalization have not led to broader participation.<sup>7</sup> Recipients of opinions submitted through the project find them helpful,<sup>8</sup> but they use them merely as a training tool rather than as a way to promote dialogue between the judiciary and Congress as was initially intended.<sup>9</sup>

This Note argues that the federal statutory housekeeping project can realize its potential as a tool for effective interbranch communication only if properly reformed and expanded. Part I introduces the federal statutory housekeeping project, tracing its development from the project's historical roots to its present day structure. Based partially on interviews with those affected by and involved in the federal project, Part II analyzes contemporary use of the project, ultimately arguing that its infrequent use and narrow focus limit its ability to promote communication and improve statutes. In Part III, this

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4. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 933–40 (2013) (describing how the commonly followed judicial statutory canon of the rule against superfluities, the whole act and whole code rules, and the judicial use of dictionaries to determine plain meaning usually do not reflect legislative drafting practice).

5. *See id.*

6. *See* Memorandum from Russell Wheeler, President, The Governance Inst., to author (Sept. 12, 2013) (on file with author) (providing a breakdown of court participation in the federal statutory housekeeping project since 2007).

7. *See, e.g., Feedback on Technical Matters Aids Legislation*, THIRD BRANCH, Feb. 2010, at 4, available at <http://www.uscourts.gov/News/TheThirdBranch/TTBViewer.aspx?doc=/uscourts/news/ttb/archive/2010-02%20Feb.pdf> [hereinafter *Feedback*] (publicizing the federal statutory housekeeping project).

8. Telephone Interview with M. Douglass Bellis, Senior Counsel, Office of the Legislative Counsel, United States House of Representatives (Sept. 24, 2013); E-mail from Russell Wheeler, President, The Governance Inst., to author (Sept. 19, 2013, 10:31 CDT) (on file with author).

9. Telephone Interview with M. Douglass Bellis, *supra* note 8 (discussing how the project helps develop legislative counsel drafting techniques rather than generate individual congressional legislative responses).

Note draws lessons from state interbranch communication programs. It proposes increasing two-way feedback between judges and legislators within the housekeeping project, formalizing it, and supplementing the project with educational programs. This Note concludes that a three-part solution would greatly help the federal statutory housekeeping project realize its potential, bridge the gap between judicial statutory interpretation and legislative drafting, and improve relations between the federal Judiciary and Congress.

## I. THE HISTORICAL ROOTS AND DEVELOPMENT OF THE FEDERAL STATUTORY HOUSEKEEPING PROJECT

The federal statutory housekeeping project draws inspiration from earlier work describing how weak interbranch communications exacerbate technical flaws in statutes.<sup>10</sup> This early work explains why the statutory housekeeping project exists and provides a way to measure its success. Section A of this Part notes how action by a single branch cannot solve the problem of gaps and defects in statutes. Section B traces the development of the D.C. Circuit pilot version of the housekeeping project, detailing how its founders envisioned and developed the project as a response to the issues discussed in Section A. Section C then describes the current structure of the housekeeping project, setting the stage for Part II's analysis of the project's usage and effectiveness today.

### A. IDENTIFICATION OF THE PROBLEMS OF STATUTORY DEFECTS AND LACKLUSTER INTERBRANCH COMMUNICATION

The federal statutory housekeeping project developed from prior attempts to improve interbranch communication.<sup>11</sup> As early as 1921, Benjamin Cardozo noted that “courts and legislatures work in separation and aloofness.”<sup>12</sup> Cardozo argued that when legislatures created ambiguous legislation, they invited judges to engage in their own sort of lawmaking to try to make sense out of confusing statutes.<sup>13</sup> According to Cardozo, the

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10. *E.g.*, Robert A. Katzmann, Madison Lecture, *Statutes*, 87 N.Y.U. L. REV. 637, 686–87 (2012); Katzmann & Wheeler, *supra* note 1, at 131–32.

11. *See supra* note 10.

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

13. *See id.* at 115–16 (discussing the idea that leaving statutory ambiguities to judges causes them to create judge-made law which can result in more uncertainties).

problem with this implicit delegation was not just that judge-made law itself can be difficult to shape, but also that the original “ugly or antiquated or unjust rule” that created the predicament in the first place remains even after judges try to make good of it.<sup>14</sup> Thus, while remedying this root issue requires legislative action, getting legislatures to fix statutory flaws is incredibly difficult because courts and legislatures isolate themselves from each other.<sup>15</sup>

Dean Roscoe Pound elaborated upon the problem of statutory defects, situating it within Congress’s modernized lawmaking environment. Pound noted that as laws grew increasingly complex, discovering and proposing a solution to a statutory defect became the province of experts, making reform harder.<sup>16</sup> Moreover, the incentives of modern lawmaking did not favor statutory reform. The revision of relatively low-key provisions of private law would neither garner legislators much publicity, nor generate favors from other legislators.<sup>17</sup> Since legislators were often focused on what appeared to be more pressing and timely concerns, they rarely considered how judges would interpret that legislation in the future.<sup>18</sup> Other times, legislation would pass without an in-depth review because of interest group pressure.<sup>19</sup> Pound, linking his analysis with Cardozo’s discussion, noted how this lack of legislative foresight encouraged judicial freewheeling in statutory interpretation.<sup>20</sup> Writing a decade after Pound, Judge Friendly explained how statutory gaps and defects obscure the boundaries of judicial action.<sup>21</sup> To the extent that statutes were intended to limit judicial discretion, or operate in its place, statutory flaws created a problem that judges were unequipped to solve.<sup>22</sup> In that sense, legislatures diminished the role of judges insofar as they “occup[ied]

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14. *Id.* at 116; see Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can’t and Legislators Who Won’t*, 63 COLUM. L. REV. 787, 798–99 (1963) (“Sometimes, when the ambiguity is confined, a court’s construction of a statute can set matters right for good and all. But generally, the best the judge can do is to keep the ship afloat, in better shape or worse, in the hope that rescue will arrive.”).

15. See Cardozo, *supra* note 12, at 113–14, 116.

16. Roscoe Pound, *A Ministry of Justice: A New Role for the Law School*, 38 A.B.A. J. 637, 638 (1952).

17. *Id.*

18. *Id.* at 703.

19. See *id.*

20. *Id.*

21. Friendly, *supra* note 14, at 792.

22. *Id.*

vast fields” of the law with statutes, but failed to “keep them ploughed” by addressing the problems caused by their plethora of statutes.<sup>23</sup> Indeed, many of these statutory problems were long-standing.<sup>24</sup> Yet, the reason for the absence of legislative improvement of statutes was not strong opposition, but a lack of time and attention.<sup>25</sup>

## B. THE D.C. PILOT STATUTORY HOUSEKEEPING PROJECT

Informed by the critiques of Cardozo, Pound, Friendly, and others, the federal statutory housekeeping project began as a pilot program initiated at the invitation of the D.C. Circuit.<sup>26</sup>

### 1. Genesis of the D.C. Pilot Program

A study conducted by Judge Frank Coffin, Robert Katzmann, and the Governance Institute<sup>27</sup> laid the groundwork for the D.C. Circuit pilot project.<sup>28</sup> The study focused on fifteen opinions selected by D.C. Circuit judges that described technical errors in statutes such as grammatical problems, misplaced commas, ambiguities, and gaps.<sup>29</sup> Coffin and Katzmann categorized these opinions and Katzmann sent them, along with related legislative history, to the relevant legislative staffers on various committees.<sup>30</sup> In interviews, Katzmann discov-

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23. *See id.* (“What I do lament is that the legislator has diminished the role of the judge by occupying vast fields and then has failed to keep them ploughed.”).

24. *See id.* at 793–95 (mentioning examples of statutes with long-standing technical flaws).

25. *Id.* at 793 (“Yet most of the questions involved, although debatable, are not of the sort as to which the opposing forces are so evenly balanced as to prevent legislative change; the problem is rather lack of time and attention.”).

26. Robert A. Katzmann & Stephanie M. Herseth, *An Experiment in Statutory Communication Between Courts and Congress: A Progress Report*, 85 GEO. L.J. 2189, 2192 (1997).

27. “The Governance Institute is a small non-profit, non-partisan organization that since its 1986 incorporation in Washington, D.C. has explored and sought to ease specific problems associated with both the separation and division of powers in the American federal system.” *About*, THE GOVERNANCE INST., <http://www.thegovernanceinstitute.org/about> (last visited Nov. 17, 2014). The Governance Institute largely focuses on problems in the administration of justice, particularly those related to relations between the courts and Congress, and problems of the administrative state. *Id.*

28. Proceedings of the Forty-Ninth Judicial Conference of the D.C. Circuit, 124 F.R.D. 241, 323–25 (1989); Katzmann & Herseth, *supra* note 26, at 2192–93.

29. 124 F.R.D. at 323; Katzmann & Herseth, *supra* note 26, at 2192.

30. 124 F.R.D. at 323.

ered that congressional staffers generally only paid close attention to major cases and were unaware of twelve out of the fifteen court decisions.<sup>31</sup>

After analyzing the results of the Governance Institute study, Katzmann, Coffin, and others at the Governance Institute came to understand that both branches supported some means of conveying relevant judicial opinions to Congress.<sup>32</sup> They envisioned that “transmission belt of sorts” as low-key.<sup>33</sup> In order to facilitate the correction of technical errors, the solution needed to be respectful of the prerogatives of both branches, relatively unburdensome, and technically sound.<sup>34</sup> With these concerns in mind, the D.C. Circuit and the Governance Institute worked together with key participants in the U.S. House to build an interbranch communication project<sup>35</sup> and launched it in 1992<sup>36</sup> to a warm reception by the Judiciary and Congress.<sup>37</sup> It would come to be informally known as the “statutory housekeeping” project based on then Judge Ruth Bader Ginsburg’s earlier description of the need to clean up statutory drafting flaws.<sup>38</sup>

## 2. An Early Progress Report

The D.C. Circuit pilot housekeeping project depended on participation from both the judicial and legislative sides.<sup>39</sup> As designed, the D.C. Circuit Court of Appeals would transmit opinions concerning grammatical errors,<sup>40</sup> ambiguities,<sup>41</sup> and

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31. *Id.* at 323–24.

32. Katzmann & Herseth, *supra* note 26, at 2193.

33. *Id.*

34. *Id.*

35. *Id.* at 2193–94.

36. The project was first launched by the House and was implemented by the Senate a few months later. *Id.* at 2194.

37. *Id.*

38. *Id.* at 2189–90 n.3 (quoting Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1428 (1987)).

39. See Katzmann, *supra* note 10, at 687–94 (discussing the statutory housekeeping project in the context of interbranch communication regarding statutes); Katzmann & Herseth, *supra* note 26, at 2190 (describing how the project was “committed to the view that improved communication between the branches would improve the work of both branches”).

40. M. Douglass Bellis, Commentary, *A View from the House of Representatives*, 85 GEO. L.J. 2209, 2210 (1997).

41. *Id.* at 2211–12. Bellis also noted that “[m]any ambiguities in statutory language arise from political compromises, which are inevitably part of the democratic process” and that the statutory housekeeping project “serves as a useful means for political actors to discover whose interpretation prevailed”

gaps in statutes<sup>42</sup> to Congress.<sup>43</sup> The program assigned responsibility not to judges but to the D.C. Circuit's clerk and staff attorneys to determine which opinions should be submitted to Congress.<sup>44</sup> Over time, the D.C. Circuit clerk of court and staff attorneys began to develop filtering mechanisms to make this process easier.<sup>45</sup> These filtering mechanisms resulted in the submission of a relatively small number of opinions discussing statutory defects.<sup>46</sup>

The chosen opinions were received and addressed by the Offices of Legislative Counsel in the House and Senate,<sup>47</sup> bodies that operate on an attorney-client relationship with legislators and legislative staff and assist in statute drafting.<sup>48</sup> The two Legislative Counsel offices used the opinions as case studies for the training of staff and as a basis for reviewing and redeveloping drafting rules.<sup>49</sup> The Legislative Counsel offices also sent the chosen opinions to relevant committees.<sup>50</sup>

Usage of the submitted opinions in Congress was limited: Members of Congress took no legislative action in response to

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when a provision was drafted with two competing interpretations in mind. *Id.* at 2211 n.10.

42. *Id.* at 2212–13.

43. *Id.* at 2209.

44. Mark J. Langer, Commentary, *Implementing the Project: A Court Administrator's Role*, 85 GEO. L.J. 2219, 2219 (1997).

45. *Id.* at 2219–20. For example, statutory construction cases featuring divided panels or a divided en banc court often would end up qualifying for the project, while cases where the Court deferred to an agency's interpretation were normally omitted from submission. *Id.*

46. *Id.* at 2220–21 (noting that implementing the project did not impose a heavy burden on staff attorneys and that relatively few opinions were submitted).

47. See Bellis, *supra* note 40, at 2210 (explaining how House legislative counsels were responsible for sending opinions to the appropriate committee staff); Frank Burk, Commentary, *Statutory Housekeeping: A Senate Perspective*, 85 GEO. L.J. 2217, 2217 (1997) (describing how the Senate Legislative Counsel's Office found the project helpful and played a role in transmitting opinions to the relevant committee staff).

48. See Burk, *supra* note 47, at 2218 (“Because the Senate Legislative Counsel's Office has an attorney-client relationship with the committees, it could report on the project only with the express consent of the committees involved.”).

49. *Id.* at 2217 (describing how the project prompted a two-year review of drafting rules used by the Senate Legislative Counsel's Office, led to the development of drafting manual, and provided case studies for the training of staff); see Telephone Interview with M. Douglass Bellis, *supra* note 8 (noting that the federal statutory housekeeping project was used for training staff in the House Legislative Counsel's Office).

50. See *supra* note 47 and accompanying text.



the D.C. Circuit opinions<sup>51</sup> and committee use of the opinions was varied and uneven.<sup>52</sup> In turn, key participants in the program recommended reevaluating the criteria for choosing opinions<sup>53</sup> and developing a more two-sided communication process.<sup>54</sup>

The Congressional Legislative Counsel offices, however, found the project helpful. They used the opinions to identify problems that past drafting had caused for judicial statutory interpretation and to improve drafting procedures.<sup>55</sup> For them, the project was not about “find[ing] ‘mistakes’ that Congress [had] made and should correct,” but rather opening communication so that “Congress can learn how the courts are reacting to and interpreting statutes.”<sup>56</sup> Observers of the D.C. pilot project found the relatively simple structure of the project appealing.<sup>57</sup> It neither consumed judges’ time nor distracted legislators from their most important duties.<sup>58</sup> Instead, the project was directed at those in the legislative branch most concerned with the technical details of statutes, the Legislative Counsels, who could give the opinions the time and attention they deserved.<sup>59</sup> Based on these perceived advantages of the pilot program, participants suggested expanding it to cover all of the U.S. courts of appeals.<sup>60</sup>

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51. Bellis, *supra* note 40, at 2213.

52. Burk, *supra* note 47, at 2217.

53. *See id.* at 2218 (“It may be time to reassess the project’s guidelines.”).

54. *See* Bellis, *supra* note 40, at 2214 (arguing that communication between the branches should be a two-way street); *see also* Proceedings of the Forty-Ninth Judicial Conference of the D.C. Circuit, 124 F.R.D. 241, 324 (1989) (explaining that legislative staff believed it would be helpful if the courts could be informed of any actions taken by Congress in response to submitted opinions).

55. *See* Bellis, *supra* note 40, at 2213; *see also* Burk, *supra* note 48, at 2217 (“From the perspective of the office responsible for much of the legislative drafting done in the Senate, the project has been a success, although perhaps not quite in the way those who developed the project expected.”).

56. Bellis, *supra* note 40, at 2213.

57. James L. Buckley, Commentary, *The Perspective of a Judge and Former Legislator*, 85 GEO. L.J. 2223, 2224 (1997) (“The [statutory housekeeping] project’s virtue is its simplicity.”).

58. *See id.* (describing how the structure of the project suits judges and members of Congress).

59. *See id.* (discussing how those in charge of drafting statutes, the two Legislative Counsel’s offices, were in favor of the project).

60. Bellis, *supra* note 40, at 2213–14 (listing examples of statutory flaws that judges encounter in other circuits to suggest that it would be helpful to expand the project); Buckley, *supra* note 57, at 2224 (“In light of the Judicial Conference’s recommendation that all circuits join the project, I would think

## C. CURRENT STRUCTURE OF THE PROJECT

Today, over fifteen years after the federal statutory housekeeping project was expanded, the project has retained a similar structure to that of the D.C. pilot program.<sup>61</sup> Depending on the circuit court, either the clerk of the court, staff attorneys, or judges identify appropriate opinions to be sent to Congress.<sup>62</sup> These individuals have flexibility in the identification process since there is no strict definition of which opinions may be submitted; rather, there is a general guideline that they address grammatical errors, ambiguities, or gaps in statutory provisions.<sup>63</sup>

Once identified, the clerk of the court sends the opinion to the Speaker of the House and President Pro Tempore of the Senate, and submits copies to the Judiciary committees, the House and Senate Offices of Legislative Counsel, the General Counsel of the Administrative Office of the U.S. Courts, and the Governance Institute.<sup>64</sup> The opinions are submitted without substantive commentary to avoid inappropriate extrajudicial action.<sup>65</sup>

The Legislative Counsel offices pay the most attention to the submitted opinions.<sup>66</sup> After receiving an e-mail with an opinion, a Senior Legislative Counsel reads the case and identifies the major statutory drafting issue or issues implicated by

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the time is ripe for other courts to consider participating.”); see Katzmann & Herseth, *supra* note 26, at 2195 (mentioning the Judicial Conference’s recommendation and noting that the First, Third, Seventh, and Tenth Circuits have also expressed interest in the project); Katzmann & Wheeler, *supra* note 1, at 134 (noting then Chief Justice Rehnquist’s endorsement of the pilot project in 1993).

61. Compare discussion of pilot project’s structure, *supra* Part I.B.2, with Katzmann & Wheeler, *supra* note 1, at 136–38 (explaining the federal statutory housekeeping project’s current procedure on the judicial side), and Bellis, *supra* note 40 (explaining the statutory housekeeping project’s current procedure on the legislative side).

62. Katzmann & Wheeler, *supra* note 1, at 136. For more information regarding the different methods of administering the project, see *infra* note 100 and accompanying text.

63. Katzmann & Wheeler, *supra* note 1, at 136–37.

64. *Id.* at 137.

65. One suggested letter template simply states, “Enclosed please find an opinion of the United States Courts of Appeals for XXX Circuit, which may be of interest to the Congress.” *Id.* at 137 (internal quotation marks omitted).

66. Telephone Interview with M. Douglass Bellis, *supra* note 8 (discussing how members of Congress rarely read judicial opinions and few members are particularly concerned with the intricacies of statutory language that are the domain of the Legislative Counsel’s offices).

it.<sup>67</sup> After confirming the drafting issue with the clerk of court,<sup>68</sup> the Senior Legislative Counsel gives the opinion to the Staff Legislative Counsel who specializes in the area of law at issue, and to the relevant subcommittee staff counsel for his or her consideration.<sup>69</sup>

Early articulations of the link between technical flaws in statutes and lackluster interbranch communication played a key role in shaping the purpose and structure of the federal statutory housekeeping project.<sup>70</sup> That project received largely positive feedback from Congress and the judiciary during its launch in pilot form in 1992 and from key participants in the project several years later.<sup>71</sup> Yet, shortfalls of the project pointed out during its pilot stage have largely been unaddressed even as it has been expanded to include all of the circuits. Low participation in the project suggests that the statutory housekeeping project is not serving the function of an interbranch “transmission belt”<sup>72</sup> today as its supporters hoped it would when it launched fifteen years ago.<sup>73</sup>

## II. THE FEDERAL STATUTORY HOUSEKEEPING PROJECT'S UNREALIZED POTENTIAL

The federal statutory housekeeping project's ability to address the problems associated with lackluster interbranch communications depends on the participation of the federal judiciary and Congress. Participation, however, has been weak and inconsistent, preventing the project from reaching its potential.

Section A of this Part evaluates recent judicial participation in the federal statutory housekeeping project, concludes that such participation is both low and uneven, and suggests several possible explanations for the lack of participation. Section B addresses usage of the project by legislators and legislative counsels, argues that legislative use of the project is fairly narrow in focus, and offers potential reasons for that narrow

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67. *Id.*

68. *Id.*

69. *Id.*

70. Katzmann, *supra* note 10, at 686–88 (linking earlier proposals regarding statutory revision and interbranch communication with the federal statutory housekeeping project).

71. *See supra* notes 36–37, 55–60 and accompanying text.

72. Katzmann & Herseth, *supra* note 26, at 2193.

73. *See infra* Part II.

usage. Section C then explains why low rates of participation are disconcerting by articulating the importance of interbranch communication. It argues, however, that the federal statutory housekeeping project could be an effective tool of interbranch dialogue if used properly.

#### A. JUDICIAL PARTICIPATION IN THE FEDERAL STATUTORY HOUSEKEEPING PROJECT IS LOW AND UNEVEN

The federal statutory housekeeping project does not enjoy broad judicial participation. Rather, judicial engagement in the project is low and uneven, likely because of a general lack of knowledge of the project and concerns about whether it is appropriate for judges to take part in it. This relative lack of judicial participation limits the project's reach and hinders its effectiveness.

##### 1. Participation Among the Circuits

From July 2007<sup>74</sup> to August 2014, nine courts of appeals submitted forty-six opinions to Congress through the federal statutory housekeeping project.<sup>75</sup> Of these forty-six opinions,<sup>76</sup>

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74. July 2007 represents the beginning of efforts to revitalize the statutory housekeeping project. Katzmann & Wheeler, *supra* note 1, at 134–35.

75. E-mail from Russell Wheeler, President, The Governance Inst., to author (Aug. 12, 2014, 14:57 CST) (on file with author); *see also* Memorandum from Russell Wheeler to author, *supra* note 6, at 1.

76. The submitted opinions discussed technical defects in statutes relating to immigration, bankruptcy, commerce and trade, criminal law, food and drug regulation, judicial procedure, and labor. Memorandum from Russell Wheeler to author, *supra* note 6, at 2–6. *See, e.g.*, *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 537–39 (7th Cir. 2012) (discussing whether violating subsection (d) of the Video Privacy Protection Act may give rise to civil actions authorized under subsection (c) of that statute); *Delrio-Mooci v. Connolly Props., Inc.*, 672 F.3d 241, 248–51 (3d Cir. 2012) (interpreting the breadth of a statute criminalizing encouraging or inducing aliens to illegally enter or reside in the United States); *United States v. Vasquez*, 611 F.3d 325, 327–29 (7th Cir. 2010) (determining whether a conviction for failure to register under the Sex Offender Registration and Notification Act requires evidence that the defendant knew of this federal obligation); *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 615–18 (9th Cir. 2010) (pointing out an ambiguity as to whether a copyright is registered when the Copyright Office receives a copyright application or when the Copyright Office issues a certificate of registration); *United States v. Hassan*, 542 F.3d 968, 978–80 (2d Cir. 2008) (discussing whether the Controlled Substance Act is unconstitutionally vague for failing to use khat's common name when prohibiting that substance); *Zedan v. Habash*, 529 F.3d 398, 403–05 (7th Cir. 2008) (highlighting a gap created by the Bankruptcy Code and the Bankruptcy Rules regarding the timing of an objection to a debtor's discharge).

thirteen mentioned gaps in statutes, twenty-eight addressed ambiguities, and one highlighted a grammatical error.<sup>77</sup>

According to a number of measures, forty-six submitted opinions is a low rate of judicial participation in the housekeeping project. First, the forty-six submitted opinions cited thirty other recent circuit court opinions discussing the same deficient provisions—opinions that the courts could have submitted through the project but did not.<sup>78</sup> These thirty non-submitted opinions are the clearest evidence for judicial underuse because the statutory issues they discussed were eligible for submission by other courts.

Second, the uneven submission of opinions suggests that participation in some circuits is low. The Seventh Circuit was responsible for slightly less than sixty percent of the submitted opinions.<sup>79</sup> Although judges in the Seventh Circuit generally write published opinions in a greater percentage of merit determinations than other courts of appeals,<sup>80</sup> the next two courts

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77. Memorandum from Russell Wheeler to author, *supra* note 6, at 2. The four most recent opinions have not yet been categorized. See E-mail from Russell Wheeler to author, *supra* note 75.

78. Memorandum from Russell Wheeler to author, *supra* note 6, at 1.

79. See E-mail from Russell Wheeler to author, *supra* note 75.

80. See ADMIN. OFFICE OF THE U.S. COURTS, TABLE S-3. U.S. COURTS OF APPEALS—TYPES OF OPINIONS OR ORDERS FILED IN CASES TERMINATED ON THE MERITS AFTER ORAL HEARINGS OR SUBMISSION ON BRIEFS DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2012 (2013), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/tables/S03Sep12.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, TABLE S-3. U.S. COURTS OF APPEALS—TYPES OF OPINIONS OR ORDERS FILED IN CASES TERMINATED ON THE MERITS AFTER ORAL HEARINGS OR SUBMISSION ON BRIEFS DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2011 (2012), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/tables/S03Sep11.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, TABLE S-3. U.S. COURTS OF APPEALS—TYPES OF OPINIONS OR ORDERS FILED IN CASES TERMINATED ON THE MERITS AFTER ORAL HEARINGS OR SUBMISSION ON BRIEFS DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2010 (2011), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/tables/S03Sep10.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, TABLE S-3. U.S. COURTS OF APPEALS—TYPES OF OPINIONS OR ORDERS FILED IN CASES TERMINATED ON THE MERITS AFTER ORAL HEARINGS OR SUBMISSION ON BRIEFS DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2009 (2010), available at <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/tables/S03Sep09.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, TABLE S-3. U.S. COURTS OF APPEALS—TYPES OF OPINIONS OR ORDERS FILED IN CASES TERMINATED ON THE MERITS AFTER ORAL HEARINGS OR SUBMISSION ON BRIEFS DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2008 (2009), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2008/tables/S03Sep08.pdf>; ADMIN.

by that measure, the First and D.C. Circuits, have submitted two and zero opinions respectively since 2007.<sup>81</sup> Even if for some reason the Seventh Circuit encounters more technical defects in statutes, it is still difficult to explain why its judges would see more than four times as many technical flaws in statutes than any other circuit.<sup>82</sup> If the other participating circuits see at least half as many of such cases as the Seventh Circuit does, and there is no clear reason why they would not,<sup>83</sup> a conservative estimate would be that there are potentially eighty or more eligible opinions that have not been submitted.

Finally, a comparison of the number of opinions submitted through the statutory housekeeping project from 2007 to 2014 to the number of opinions submitted through the pilot project from 1992 to 1997 suggests that the project is being underused. During the housekeeping project's pilot project period, thirty-seven cases were submitted from a single circuit, an average of over seven cases per eligible circuit per year.<sup>84</sup> From 2007 to 2014, forty-six cases have been submitted, a much lower average, about one half of one case per eligible circuit per year.<sup>85</sup> Even if one ignores the circuits that have not submitted any opinions since 2007, this comparison is still quite telling. The total number of opinions submitted through the project from 2007 to the present by nine circuits is nearly as many as were submitted by the D.C. Circuit alone during the project's six-year test run.<sup>86</sup> Although an optimist might attribute the decline in submission rate to greater efforts by drafters to clean up statutes, that possibility is unlikely. Statute-based law has only become more predominant and judges continue to encounter ambiguous statutes on a frequent basis.<sup>87</sup>

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OFFICE OF THE U.S. COURTS, TABLE S-3. U.S. COURTS OF APPEALS—TYPES OF OPINIONS OR ORDERS FILED IN CASES TERMINATED ON THE MERITS AFTER ORAL HEARINGS OR SUBMISSION ON BRIEFS DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2007 (2008), *available at* <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2007/tables/S03Sep07.pdf>.

81. E-mail from Russell Wheeler to author, *supra* note 75.

82. *See* E-mail from Russell Wheeler to author, *supra* note 8 (mentioning that one reason why the Seventh Circuit submits more opinions than any other circuit is probably “not because it encounters more drafting problems than other courts but rather because the chief judge is committed to the project as is the clerk of court”).

83. *Id.*

84. Katzmann & Herseth, *supra* note 26, at 2194–96.

85. E-mail from Russell Wheeler to author, *supra* note 75.

86. *Id.*; Memorandum from Russell Wheeler to author, *supra* note 6, at 1.

87. *See* Katzmann, *supra* note 10, at 640, 643–45 (describing the preva-

The uneven nature of judicial participation in the housekeeping project deserves greater attention because the effectiveness of the project is limited by both the low number of submitted opinions and the lack of meaningful participation by most circuits. As mentioned above, the Seventh Circuit currently submits the overwhelming majority of opinions in the project, behavior that can be explained more by the commitment of its chief judge and clerk of court to the project than to a disproportionate number of statutory issues in that particular court.<sup>88</sup> The Seventh Circuit's relatively high participation in the project contrasts sharply with the zero opinions that four of the thirteen federal courts of appeals have submitted since July 2007.<sup>89</sup> Even if one were to discount the lack of participation by the Federal Circuit based on its slightly different focus, there is no clear reason why the Sixth, Eighth, and D.C. Circuits would not have encountered any eligible statutory flaws.<sup>90</sup> The D.C. Circuit's failure to submit any opinions is particularly notable in light of its role in the creation of the federal statutory housekeeping project<sup>91</sup> and the Circuit's substantial administrative law jurisprudence.<sup>92</sup> Its lack of participation in the project today prevents many important decisions discussing statutory flaws in the context of administrative law from being transmitted to Congress.<sup>93</sup>

It is possible to argue that the participating circuits' opinions discuss many of the same statutory provisions and thus that the lack of participation by the Sixth, Eighth, and Federal Circuits does not hamper the effectiveness of the project overall. The aforementioned fact that forty-six submitted opinions cited at least thirty other non-transmitted circuit court opin-

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lence of statutory law and the frequency with which federal judges engage in statutory interpretation).

88. See *supra* note 82 and accompanying text.

89. E-mail from Russell Wheeler to author, *supra* note 75.

90. See *id.* (listing which circuits have participated in the statutory housekeeping project); E-mail from Russell Wheeler to author, *supra* note 8 (suggesting that the reason for a lack of submitted opinions is not due to a disparity in the number of encountered flaws).

91. Katzmann & Herseth, *supra* note 26, at 2194–96. See generally Langer, *supra* note 44 (detailing the D.C. Circuit's implementation of the pilot project).

92. See Telephone Interview with Matthew Lee Wiener, Exec. Dir., Admin. Conference of the U.S. (Sept. 17, 2013) (mentioning that the D.C. Circuit makes many decisions addressing administrative law issues).

93. *Id.* (noting that from an administrative law perspective, it would be helpful to include D.C. Circuit opinions in the statutory housekeeping project).

ions discussing the same statutory sections could be construed to support that argument.<sup>94</sup> However, it is difficult to claim that the housekeeping project is really an effective “transmission belt”<sup>95</sup> when only some of the circuits participate in it and even then only rarely.<sup>96</sup>

## 2. Possible Reasons for Limited Judicial Participation

The relatively low and uneven rates of judicial participation in the housekeeping project likely stem from three major factors: (1) lack of information about the project; (2) failure to prioritize participation; and (3) concerns about separation of powers and inappropriate judicial communication.<sup>97</sup> All of these factors, however, can be addressed with appropriate reforms.

Perhaps the most obvious reason for the lack of broad judicial participation in the statutory housekeeping project is the project’s obscurity. Despite a series of efforts to publicize the project since 2007,<sup>98</sup> there is some evidence that some judges simply are not acquainted with the project or knowledgeable about how it works.<sup>99</sup> In circuits where judges are primarily responsible for selecting which opinions are submitted,<sup>100</sup> this

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94. E-mail from Russell Wheeler to author, *supra* note 75; see also Memorandum from Russell Wheeler to author, *supra* note 6, at 1.

95. Katzmann & Herseth, *supra* note 26, at 2193.

96. E-mail from Russell Wheeler to author, *supra* note 75; see also Memorandum from Russell Wheeler to author, *supra* note 6, at 1.

97. See Dominick Vetri, *Communicating Between Planets: Law Reform for the Twenty-First Century*, 34 WILLAMETTE L. REV. 169, 177–78 (1998) (mentioning six obstacles to interbranch communication: “(1) ingrained negative attitudes toward each other’s branch; (2) limited knowledge of each other’s institutional roles and procedures; (3) lack of a designated judicial spokesperson; (4) conflict created by institutional checks and balances; (5) judicial caution in approaching the legislature; and (6) lack of clear guidelines for judicial participation”).

98. See, e.g., *Feedback*, *supra* note 7, at 4 (stating that judges received memos reminding them about the project).

99. See E-mail from Russell Wheeler to author, *supra* note 8 (suggesting that some judges may not be aware of the project); E-mail from Russell Wheeler, President, The Governance Inst., to author (Sept. 12, 2013, 11:53 EDT) (on file with author) (mentioning the existence of some misconceptions about the statutory housekeeping project’s purpose and operation).

100. Judges bear the primary responsibility for selecting opinions to submit through the project in the Second, Third, Fourth, Fifth, and Ninth Circuits. E-mail from Patricia Connor, Clerk of Court, U.S. Court of Appeals for the Fourth Circuit, to author (Dec. 6, 2013, 13:11 CST) (on file with author); Telephone Interview with Molly Dwyer, Clerk of Court, U.S. Court of Appeals for the Ninth Circuit (Dec. 16, 2013); E-mail from Thomas B. Plunkett, Chief Deputy Clerk of Court, U.S. Court of Appeals for the Fifth Circuit, to author



lack of attention to the project probably best explains low participation in it. That said, given the many obligations and demands upon appellate judges and their staff,<sup>101</sup> judicial unawareness or inattention to the project should not be considered proof of judicial negligence by any means.

The relative obscurity of the statutory housekeeping project can at least partly be attributed to its original design as a low-visibility “transmission-belt” for opinions.<sup>102</sup> The project’s low visibility may have the advantage of making judges who know about the project more comfortable with sending opinions because their participation is unlikely to be publicly perceived as criticism of Congress or as interference with that body’s legislative duties.<sup>103</sup> Yet, it also hampers the project’s effectiveness by reducing judges’ exposure to it, thereby making it less likely that the project will be meaningfully used by all of the circuits.<sup>104</sup> Despite some awareness-raising efforts,<sup>105</sup> there is some evidence that judges remain unfamiliar with the project.<sup>106</sup> This suggests that such awareness-raising efforts for the housekeeping project can be significantly improved and that any suggested change to the project must be sensitive to the many obligations and responsibilities of the federal judiciary.

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(Dec. 16, 2013, 15:34 CST) (on file with author); E-mail from Carol L. Trama, Admin. Assistant to the Clerk, U.S. Court of Appeals for the Third Circuit, to author (Dec. 9, 2013, 15:31 CST) (on file with author); Letter from Catherine O’Hagan Wolfe, Clerk of Court, U.S. Court of Appeals for the Second Circuit, to author (Dec. 16, 2013) (on file with author). Even in circuits where court staff may choose which opinions to submit, judges, especially the chief judge, usually have some input. *See, e.g.*, E-mail from Betsy Shumaker, Clerk of Court, U.S. Court of Appeals for the Tenth Circuit, to author (Dec. 10, 2013, 10:02 CST) (on file with author) (approval of three judge panel required before opinion may be submitted); E-mail from Annette B. Young, Exec. Assistant & Circuit Mediation Adm’r, U.S. Court of Appeals for the Federal Circuit, to author (Dec. 16, 2013, 12:38 CST) (on file with author) (Senior Staff Attorney selects with review by Chief Judge).

101. E-mail from Russell Wheeler to author, *supra* note 8 (“[A]ppellate judges have plenty else on their minds, and it doesn’t occur to them to submit relevant opinions.”).

102. *See* Katzmann & Herseth, *supra* note 26, at 2193 (describing the intended low-visibility of the project).

103. *See* Katzmann & Wheeler, *supra* note 1, at 138 (“The project puts minimal burdens on the courts.”).

104. *See* Memorandum from Russell Wheeler to author, *supra* note 6, at 1 (breaking down judicial participation in the statutory housekeeping project).

105. *See, e.g., Feedback*, *supra* note 7, at 4.

106. *See* E-mail from Russell Wheeler to author, *supra* note 8; E-mail from Russell Wheeler to author, *supra* note 99.

Moreover, the project appears to be a relatively low priority for judges and court staff. Although nearly every circuit clerk of court polled has a procedure for submitting opinions,<sup>107</sup> few seem to avail themselves of these procedures.<sup>108</sup> This seeming inconsistency may partly be explained by circuit clerks and staff attorneys narrowly interpreting the project's requirements in order to prioritize other court business. Several clerks of court mentioned that their circuits rarely encounter opinions that qualify for the project, suggesting that they read the statutory housekeeping project's guidelines to only apply to especially egregious statutory flaws.<sup>109</sup> These narrow interpretations of the project's guidelines may be a result of a lack of clarity in the project's guidelines or institutional pressures to limit time spent on the project in order to attend to other court business. Whatever the underlying reason, certain circuits' narrow view of the housekeeping project's scope demonstrates that even many of those aware of the project are rarely using it. This suggests that judicial underuse of the housekeeping project may be partially attributable to both a lack of prioritization and a lack of awareness of the project.

Separation of powers concerns probably also discourage participation.<sup>110</sup> Such judicial reservations would be grounded in "the combined force of constitutionally mandated separation of powers, [judicial] codes of ethics, and a general sense of insti-

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107. E-mail from Christie L. Cavanaugh, Admin. Specialist to Clerk of Court, U.S. Court of Appeals for the D.C. Circuit, to author (Dec. 9, 2013, 09:22 CST) (on file with author); E-mail from Patricia Connor to author, *supra* note 100; E-mail from Christopher Conway, Admin. Attorney, U.S. Court of Appeals for the Seventh Circuit, to author (Dec. 6, 2013, 09:48 CST) (on file with author); Telephone Interview with Molly Dwyer, *supra* note 100; Telephone Interview with Michael E. Gans, Clerk of Court, U.S. Court of Appeals for the Eighth Circuit (Dec. 16, 2013); E-mail from Stacy Kennon, U.S. Court of Appeals for the Eleventh Circuit, to author (Dec. 10, 2013, 14:39 CST) (on file with author); E-mail from Thomas B. Plunkett to author, *supra* note 100; E-mail from Betsy Shumaker to author, *supra* note 100; E-mail from Carol L. Trama to author, *supra* note 100; E-mail from Annette B. Young to author, *supra* note 100.

108. See *supra* notes 79–83, 88–93 and accompanying text.

109. See, e.g., Telephone Interview with Michael E. Gans, *supra* note 107; E-mail from Betsy Shumaker to author, *supra* note 100 (mentioning that the submission procedure does not come up often).

110. E-mail from Russell Wheeler to author, *supra* note 8 ("[S]ome [appellate judges] may be aware of the project but believe, despite its endorsement by the Judicial Conference and Administrative Office, that it's unseemly for judges to be communicating with Congress in a way that might be perceived as criticism.").

tutional propriety.”<sup>111</sup> The Constitution prohibits judges from issuing advisory opinions about potential bills, thereby limiting the kinds of communications judges can make to legislators about statutory defects.<sup>112</sup> The constitutional separation of powers doctrine also encourages judges to avoid making statements that might prejudice future issues that could later come before them.<sup>113</sup> The perceived importance of a wholly independent judiciary further encourages judges to avoid engaging in communication with Congress altogether, whether such communication is actually contrary to the constitutional principle of separation of powers or deliberately designed to avoid such a violation.<sup>114</sup>

Separation of powers concerns deserve greater attention because of the significant role they may play in discouraging participation in the housekeeping project. Critics of the project may believe that it upsets the well-defined constitutional roles of the judicial and legislative branches by encouraging judicial overreaching. A closer look at the housekeeping project reveals, however, that it raises no significant constitutional problems.<sup>115</sup>

The quintessential separation of powers violation involves an attempt by one branch to usurp the functions of another.<sup>116</sup> Critics of the statutory housekeeping project may argue that judges impermissibly intrude upon Congress’s domain when they submit opinions discussing statutory flaws through the project. According to this view of separation of powers, Con-

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111. Shirley S. Abrahamson & Gabrielle Lessard, *Interbranch Communications: The Next Generation*, in CONFERENCE ON ASSESSING THE EFFECTS OF LEGISLATION ON THE WORKLOAD OF THE COURTS: PAPERS AND PROCEEDINGS 11, 11 (A. Fletcher Mangum ed., 1995). For a brief history of interbranch communication between the judicial and legislative branches, see Deanell Reece Tacha, *Judges and Legislators: Renewing the Relationship*, 52 OHIO ST. L.J. 279, 279–90 (1991) (arguing that the framers of the United States Constitution anticipated interbranch dialogue, and pointing to early examples of that type of dialogue).

112. See *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792); ROBERT A. KATZMANN, *COURTS AND CONGRESS*, 85 (1997); see also *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947) (“[T]he federal courts, established pursuant to Article III of the Constitution, do not render advisory opinions.”).

113. KATZMANN, *supra* note 112, at 85; Abrahamson & Lessard, *supra* note 111, at 11.

114. KATZMANN, *supra* note 112, at 85; Abrahamson & Lessard, *supra* note 111, at 11.

115. See *infra* Part II.C.1.

116. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 726–27 (1986) (discussing the “dangers of congressional usurpation of Executive Branch functions”).

gress, and not the judiciary, is responsible for examining federal statutes and determining whether they have any flaws worth remedying.

The main problem with this criticism of the housekeeping project is that it is based on a misunderstanding of how the housekeeping project operates. Pursuant to their Article III authority to adjudicate cases, judges interpret statutes and write opinions discussing their reasoning for those interpretations.<sup>117</sup> The housekeeping project gives judges and judicial staff a way to transmit those reasoned judicial opinions to Congress; it does not provide them a means to editorialize about policy matters.<sup>118</sup> Judges and judicial staff participating in the project communicate about statutory issues of mutual concern. They do not propose bills, enact legislation, or otherwise act like legislators. Thus, to reject the housekeeping project on separation of powers grounds is to ignore both how the project actually works and its great potential to encourage interbranch understanding.

Judicial codes of conduct may also help explain low judicial participation. Ethical juridical codes generally prohibit *ex parte* communications,<sup>119</sup> limit the public comments a judge may make during a pending or impending proceeding,<sup>120</sup> and restrict extrajudicial activity.<sup>121</sup> Encouraging ethical behavior by judges is certainly not an unreasonable goal; supporters of the housekeeping project recognize the importance of ethical judicial conduct.<sup>122</sup> Moreover, as the comments to Rule 3.1 of the Model Code of Judicial Conduct point out, “Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice . . . .”<sup>123</sup> This judicial experience is especially apparent in the area of tech-

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117. See U.S. CONST. art. 3; KATZMANN, *supra* note 112, at 46 (“Among the tasks judges face . . . is to construe the meaning of statutes . . .”).

118. See Katzmann & Wheeler, *supra* note 1, at 137 (describing the process for submitting opinions through the statutory housekeeping project and noting how judicial opinions are sent to Congress without substantial commentary from judges or judicial staff).

119. Tacha, *supra* note 111, at 292–93.

120. *Id.* at 293.

121. *Id.* at 293–94.

122. See Katzmann & Wheeler, *supra* note 1, at 137–38 (describing how the statutory housekeeping project was structured to avoid the appearance of inappropriate communications by judges).

123. MODEL CODE OF JUDICIAL CONDUCT R. 3.1 cmt. 1 (2010).

nical statutory defects given that judges interpret statutes on a daily basis.<sup>124</sup>

Despite this room for interbranch communication within ethical behavior, judicial codes of conduct functionally discourage such communication by only giving vague guidelines for how to communicate with the legislative branch.<sup>125</sup> In the absence of specific guidelines for interbranch communication, “judges will continue to err on the conservative side by isolating themselves from public and private debate on current issues,”<sup>126</sup> even when those issues are “not impending or pending in a case before the courts.”<sup>127</sup> Thus, judicial codes of conduct simultaneously leave room for judicial participation in the statutory housekeeping project and discourage that participation by not providing clear guidelines for what types of judicial behavior are and are not appropriate in the realm of interbranch communication.

The low visibility of the project combined with a heavy judicial workload and institutional concerns with interbranch communications thus combine to discourage participation. Supplementation and expansion of the project can help deal with those problems, encourage greater judicial participation, improve interbranch communication, and help the project achieve both its intended goals and broader interbranch communication objectives.

#### B. LEGISLATIVE USE OF THE FEDERAL STATUTORY HOUSEKEEPING PROJECT IS NARROW IN FOCUS

On the legislative side, the federal statutory housekeeping project is mainly used narrowly by legislative drafters to improve their drafting skills. This limited use of the project in Congress is likely due to congressional members’ inattention to technical statutory matters and legislative drafters’ low visibility roles. The narrow legislative use of the housekeeping project limits its effectiveness as an interbranch communication tool.

##### 1. Use by Legislators

Since the housekeeping project’s launch, members of Congress aware of the project have generally been receptive to it

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124. Tacha, *supra* note 111, at 294.

125. *Id.* at 294–95.

126. *Id.*

127. *Id.* at 295.

and have publicly encouraged its use. Congressional leadership endorsed the project in the early 1990s when it began<sup>128</sup> and the attempted revitalization of the project in 2007 was spurred in part by the House and Senate Judiciary Committees.<sup>129</sup> Nevertheless, congressional response to problems highlighted by the statutory housekeeping project has been hard to find.<sup>130</sup> Congress enacted amendments to two of the provisions mentioned in three of the forty-six recently submitted judicial opinions.<sup>131</sup> However, it is not clear that the amendments were spurred by the project, and neither Congressional Legislative Counsel office is aware of any efforts by legislators to address other statutory flaws described in the submitted opinions.<sup>132</sup> Advocates of the housekeeping project do not see this lack of congressional response as a real cause for concern; in their view, the aim of the project is to transmit opinions highlighting technical flaws in statutes rather than to correct those flaws through statutory revision.<sup>133</sup>

However, limiting the project to the goal of highlighting technical flaws rather than correcting them hinders the project's ability to help fix gaps, ambiguities, and other technical flaws that currently exist and may continue to cause problems

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128. See Katzmann & Herseth, *supra* note 26, at 2193–94 (describing initial congressional endorsement of the statutory housekeeping project).

129. Letter from Representative John Conyers, Jr., Chairman, U.S. House Judiciary Comm., and Representative Lamar S. Smith, Ranking Member, U.S. House Judiciary Comm., to M. Pope Barrow, Jr., Legislative Counsel, U.S. House Office of Legislative Counsel (May 23, 2007) (on file with author); Letter from Senator Patrick Leahy, Chairman, U.S. Senate Judiciary Comm., and Senator Arlen Specter, Ranking Republican Member, U.S. Senate Judiciary Comm., to James Fransen, Legislative Counsel, U.S. Senate Office of Legal Counsel (Feb. 14, 2007) (on file with author).

130. Bellis, *supra* note 40, at 2213; see Memorandum from Russell Wheeler to author, *supra* note 6, at 2 (noting that it is unclear whether congressional amendments to two provisions mentioned in recently submitted opinions are attributable to the project).

131. See Memorandum from Russell Wheeler to author, *supra* note 6, at 2; see also E-mail from Russell Wheeler to author, *supra* note 76. This analysis of congressional action did not directly include the four most recently submitted opinions, but there is little reason to believe this trend of congressional inaction has not continued. See *id.*

132. Memorandum from Russell Wheeler to author, *supra* note 6, at 2.

133. Katzmann, *supra* note 10, at 692–93 (noting that the primary purpose of the statutory housekeeping project is “not to produce legislative change”); Telephone Interview with M. Douglass Bellis, *supra* note 8 (describing how individual congressional response is not realistic); E-mail from Russell Wheeler to author, *supra* note 8 (“[The statutory housekeeping project’s] goal is not and never was to achieve statutory revision.”).

for judges.<sup>134</sup> This limited transmission goal restricts the housekeeping project's usefulness as a tool of interbranch communication since it deemphasizes the two-way dialogue that could result from suggestion and correction.<sup>135</sup>

## 2. Use by Drafters

Before describing the housekeeping project's use by legislative drafters, it is important to distinguish between policymaking and drafting. Members of Congress typically focus on policy rather than the specific text of statutes.<sup>136</sup> The nonpartisan, specialized drafters in the Offices of Legislative Counsel are responsible for much of the statutory language that ends up becoming law.<sup>137</sup> Members of Congress and their staff may decide upon general policy concepts, outlines, or bullet points, but "the Legislative Counsels typically turn those ideas into statutory text."<sup>138</sup> This general rule similarly applies for committee staff who frequently have their statutes checked or completely drafted by the legislative drafters in the Offices of Legislative Counsel.<sup>139</sup>

Because the Offices of Legislative Counsel draft the majority of statutes, their participation in the housekeeping project is critical to its success. There is substantial evidence that legislative drafters appreciate the project.<sup>140</sup> They use opinions submitted through the project to help train staff attorneys and identify drafting issues to be avoided in future statutes.<sup>141</sup>

Although the statutory housekeeping project's positive impact on legislative drafting is important, the project's narrow focus limits its utility significantly. If the only goal of the

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134. See Cardozo, *supra* note 12, at 115–16 (discussing the necessity of legislative action to produce lasting resolutions of ambiguities).

135. See Bellis, *supra* note 40, at 2214.

136. Gluck & Bressman, *supra* note 4, at 908.

137. *Id.* at 967–68.

138. *Id.* at 968.

139. *Id.* at 1020.

140. Telephone Interview with M. Douglass Bellis, *supra* note 8 (explaining how the House Legislative Counsel Office finds the statutory housekeeping project very helpful); see E-mail from Russell Wheeler to author, *supra* note 8 (mentioning the Legislative Counsel Offices's continued support for the statutory housekeeping project).

141. Telephone Interview with M. Douglass Bellis, *supra* note 8 (describing the House Legislative Counsel Office's use of the statutory housekeeping project to train staff); see Burk, *supra* note 47, at 2217 (detailing the Senate Legislative Counsel Office's use of the statutory housekeeping project to train staff during its pilot project period).

housekeeping project were to train staff attorneys in the Offices of Legislative Counsel, then that goal could be furthered simply by finding judicial opinions discussing technical flaws in statutes on electronic legal databases and using them as teaching tools. If the housekeeping project only had that narrow goal of training drafters, it would be much more efficient to rely on those legal databases rather than involve courts and judges.

What sets the housekeeping project apart and gives it special significance is its ability to foster interbranch communication between Congress and the judiciary, something a simple search in a legal database cannot do. Thus, the housekeeping project should also focus on that broader goal through encouraging judicial submission of opinions and subsequent congressional response that would represent real two-way dialogue.

### 3. Reasons for the Project's Narrow Use

A lack of direct congressional response to flaws highlighted through the statutory housekeeping project stems largely from congressional inattention to judicial opinions and technical statutory matters. Members of Congress rarely read court cases.<sup>142</sup> When they do, they usually concern themselves with the substantive outcomes of judicial opinions rather than with technical drafting issues.<sup>143</sup> Legislators and their staff are therefore unlikely to pay attention to the kinds of opinions submitted through the project. Even if they do, they may be satisfied with the judges' interpretation, believing that they are "making good decisions in hard cases" and see no reason for congressional intervention.<sup>144</sup>

Moreover, for the reasons elucidated by Pound, drafting errors are unlikely to receive attention from Congress.<sup>145</sup> Since statutes revising flawed statutory language are incredibly technical and rarely excite legislators or constituents, they are significantly harder to pass, something especially true in the current Congress, where passing legislation in general is a significant challenge.<sup>146</sup> These institutional barriers to congress-

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142. Telephone Interview with M. Douglass Bellis, *supra* note 8 (stating that few people in Congress ever read court cases).

143. See Proceedings of the Forty-Ninth Judiciary Conference of the D.C. Circuit, 124 F.R.D. 241, 323–24 (1989) (describing how legislative staff tend to focus on the outcomes of court cases if they pay much attention to them at all).

144. Bellis, *supra* note 40, at 2213.

145. See Pound, *supra* note 16, at 638 (suggesting the Congressional attention to "[g]reat social questions" leaves little room for focus elsewhere).

146. Telephone Interview with M. Douglass Bellis, *supra* note 8 (mention-



sional participation in the housekeeping project limit the project's ability to actually fix the statutory problems it presents. Though such barriers are not completely insurmountable, their link to the culture of Congress may mean that a substantial shift would need to occur to overcome them.

The Offices of Legislative Counsel, the bodies that probably use the statutory housekeeping project the most of anyone in the legislative branch, are subject to a number of institutional constraints, such as their attorney-client relationship with legislators and technical roles,<sup>147</sup> which ultimately prevent them from ensuring the effectiveness of the housekeeping project as a two-way interbranch communication tool. Legislative drafters' behind-the-scenes roles restrict their ability to lobby for greater use of the project, encourage statutory revision, address more broad-ranging inconsistencies between legislative drafting and judicial interpretation of statutes,<sup>148</sup> or even track what happens to opinions once they reach subcommittee and committee staff.<sup>149</sup> As such, legislative drafters simultaneously have one of the best understandings of the housekeeping project and one of the worst abilities to do much to improve or expand it. Their narrow use of the project is limited even further by the low and uneven rates of participation by the judiciary<sup>150</sup> as fewer submitted opinions translates into fewer issues spotted and avoided in future drafting.

This is not meant to suggest that the institutional structure of the Offices of Legislative Counsel should be fundamentally changed. Rather, the earlier discussion highlights the room the statutory housekeeping project has to grow while demonstrating why legislative drafters are not well-situated to encourage that growth. The current legislative use of the federal statutory housekeeping project narrowly benefits certain future legislative drafting, but leaves a great deal of the project's

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ing how the current political environment in Congress has made it difficult to pass legislation).

147. See Burk, *supra* note 47, at 2218 (discussing how the attorney-client relationship between the Senate Legislative Counsel's Office and legislators limits actions that the office can take).

148. See Gluck & Bressman, *supra* note 4, at 930–33 (noting the inconsistency between a number of the canons of statutory construction judges use and how statutes are actually drafted).

149. See Burk, *supra* note 47, at 2218 (discussing how the attorney-client privilege between the Senate Legislative Counsel's Office and committees limits reporting and review).

150. See *supra* Part II.A.1 (reviewing uneven participation rates among the circuit courts).

potential untapped. Indeed, the “statutory housekeeping project” name is a misnomer given the lack of legislative action.<sup>151</sup> Since good housekeeping does not merely involve pointing out messes today in the hopes of preventing others in the future, it is difficult to conceive of the project today as “housekeeping” given that no statutes have actually been “cleaned up” because of it.<sup>152</sup>

### C. THE FEDERAL STATUTORY HOUSEKEEPING PROJECT HAS UNMET POTENTIAL WORTH EXPLORING

Although it has yet to cause the improvements in interbranch communication hoped for when it was launched, if used effectively, the statutory housekeeping project has substantial promise.

#### 1. Effective Interbranch Communication Benefits Both Statutory Interpretation and Drafting

Interbranch communication is not only a helpful way to keep each branch informed about the other, it can also diffuse tensions between the legislative and judicial branches. Recent scholarship indicates that courts have not kept pace with recent changes in legislative process, including developments in legislative procedure, the use of staff, committee reports, and lobbying practices.<sup>153</sup> These changes all have implications for statutory interpretation. Reliance on outmoded conceptions of Congress may lead judges to misunderstand statutes through the application of statutory interpretation techniques grounded in assumptions about the legislative process and legislative intent that are no longer accurate.<sup>154</sup> On the legislative side, members of Congress are still generally uninformed about the judiciary’s capacity to handle its workload or on the statutory interpretation problems that statutes can cause.<sup>155</sup> Keeping the

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151. *Supra* note 146 and accompanying text.

152. *See supra* note 56 and accompanying text (reviewing the original purpose of the project: improving the drafting process for future legislation).

153. Russell Carparelli, *Separate Powers—Shared Responsibility: Constructing Avenues of Interbranch Communication*, 85 DENV. U. L. REV. 267, 270 (2007) (highlighting the importance of communication regarding evolutions within the branches of government); Vetri, *supra* note 97, at 178.

154. Gluck & Bressman, *supra* note 4, at 933–40, 967–78 (reviewing inconsistencies between canons and the drafting process, as well as misperceptions regarding the use of legislative history).

155. Vetri, *supra* note 97, at 178 (noting that legislators are not kept informed about the judicial workload).

judicial and legislative branches well-informed encourages forward-thinking drafting and statutory interpretation that better captures legislative intent.

Aside from facilitating the sharing of information between the legislative and judicial branches, interbranch communication can also ease tensions. The relations between judges and legislators are especially tense today.<sup>156</sup> Recent criticism of controversial judicial decisions has been particularly harsh.<sup>157</sup> Rhetoric, “[r]eflecting anger, distrust, and misunderstanding of the judicial process . . . tends to increase the politicization of the judicial system . . . [and] promotes public disrespect for the rule of law,” discouraging recognition of the judiciary as a co-equal branch.<sup>158</sup> In this environment of intense criticism of the judiciary, building avenues of interbranch communication is crucial to encouraging cooperation and understanding between the legislative and judicial branches.<sup>159</sup> While the idea of the judicial and legislative branches as being wholly isolated has a long history,<sup>160</sup> judicial legitimacy is improved rather than hampered by interbranch communication because such efforts help to restore respect for that branch.<sup>161</sup>

The legislative and judicial branches have a shared responsibility for the quality of statutes,<sup>162</sup> a duty they can both better fulfill when they engage in healthy dialogue.

## 2. The Statutory Housekeeping Project Is a Worthwhile Tool for Enhancing Interbranch Communication

The federal statutory housekeeping project is well-situated to facilitate the interbranch communication that is so needed today. The housekeeping project already exists, has been endorsed by major figures from Congress and the federal judici-

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156. Russell R. Wheeler & Robert A. Katzmann, *A Primer on Interbranch Relations*, 95 GEO. L.J. 1155, 1156–57 (2007).

157. Carparelli, *supra* note 153, at 269.

158. *Id.* at 269–70.

159. *Id.* at 270.

160. *See, e.g.*, Cardozo, *supra* note 12, at 114 (discussing how the legislative and judicial branches move in “proud and silent isolation”).

161. *See* Carparelli, *supra* note 153, at 270 (“[T]he vehemence of current debate regarding the role of the courts increases the need for legislatures and courts to build more avenues of communication and to ensure that they are well used.”).

162. Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1047 (1991).

ary,<sup>163</sup> and has enjoyed some use.<sup>164</sup> Building upon the statutory housekeeping project is easier than starting a new program. The pre-existing project has also been specially tailored to avoid the separation of powers concerns that other programs may encounter.<sup>165</sup>

Critics of an expansion of the housekeeping project may argue that the project does not need to be expanded. The Offices of Legislative Counsel appreciate the housekeeping project in its current state and have not recently suggested a need for substantial change.<sup>166</sup> Moreover, advocates of the project have generally accepted its more limited scope and have not focused on seeking congressional response to the statutory flaws presented by it.<sup>167</sup> However, these arguments for keeping the statutory housekeeping project in its current state are difficult to reconcile with the low and uneven judicial participation in the project.<sup>168</sup> If the housekeeping project is somewhat helpful when it is used infrequently and unevenly by the legislative and judicial branches,<sup>169</sup> then supplementing and expanding the project to increase participation will likely make it even more useful.

It is also worth noting that the project still has not addressed some of its problems first recognized during the pilot project period, such as its unclear standards for submitting opinions<sup>170</sup> and lack of two-way communication.<sup>171</sup> Adjusting the statutory housekeeping project now may be a way to help further its goals. Since the framers of the housekeeping project developed it in the broader context of interbranch communication and statutory revision programs,<sup>172</sup> a more expansive project will not depart significantly from its original objectives and, in fact, will help achieve them.

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163. Katzmann & Herseth, *supra* note 26, at 2193–94.

164. Memorandum from Russell Wheeler, *supra* note 6, at 1; *see also* Katzmann & Herseth, *supra* note 26, at 2194–96 (discussing use of the project by the D.C. Circuit during its pilot period).

165. *See supra* note 122.

166. Telephone Interview with M. Douglass Bellis, *supra* note 8 (asserting that, from his perspective, there are no real deficiencies in the statutory housekeeping project).

167. *See supra* note 140 and accompanying text.

168. *See* Memorandum from Russell Wheeler, *supra* note 6, at 1; E-mail from Russell Wheeler to author, *supra* note 75.

169. *See supra* note 140 and accompanying text.

170. *See* Burk, *supra* note 47, at 2218.

171. Bellis, *supra* note 40, at 2214.

172. *See supra* note 10 and accompanying text.

### III. IMPROVING THE STATUTORY HOUSEKEEPING PROJECT: INSPIRATION FROM STATE PROGRAMS

The federal statutory housekeeping project's great deal of untapped potential as an interbranch communication tool calls for its modification and expansion, especially in light of today's crucial need for better communication between Congress and the federal judiciary.<sup>173</sup> Existing interbranch communication programs in the states offer ways to improve the federal housekeeping project.

Section A of this Part describes why state interbranch communication programs are fruitful sources of suggestions for improving the federal statutory housekeeping project despite the differences between state and federal legislatures and judiciaries. Section B draws on the state programs mentioned in Section A to propose a three-pronged approach to improve the statutory housekeeping project that involves: (1) increasing two-way feedback between the federal judiciary and legislative drafters within the federal project; (2) formalizing the project; and (3) supplementing it with educational programs. While each of these three proposals would also be helpful independently, they have the best chance of increasing the effectiveness of the statutory housekeeping project if they are implemented together.

#### A. STATE INTERBRANCH COMMUNICATION PROGRAMS ARE USEFUL SOURCES OF INSPIRATION FOR THE FEDERAL PROJECT

A number of interbranch communication and statutory revision programs, both formal and informal, exist in the states,<sup>174</sup> some of which predate the statutory housekeeping project.<sup>175</sup> These state interbranch communication programs, particularly those aimed at the discovery and revision of statutory flaws, provide helpful examples for the federal statutory

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173. See *supra* notes 157–63; see also *supra* Part II.C.1 (describing the benefits of interbranch communication).

174. Carparelli, *supra* note 153, at 270–75 (describing a number of state and regional interbranch communication programs implemented since 1989). For an earlier comprehensive examination of state programs of legislative discourse with the courts, see Abrahamson & Hughes, *supra* note 162, at 1045–93.

175. See, e.g., *About the Commission*, N.Y. ST. L. REVISION COMMISSION, <http://www.lawrevision.state.ny.us/index.php> (last visited Nov. 17, 2014) (noting that the New York State Revision Commission, created in 1934, “is the oldest continuous agency in the common-law world devoted to law reform through legislation”).

housekeeping project. Since state interbranch communication programs take slightly different approaches from one another,<sup>176</sup> they offer a variety of options already tested in the “laboratories of democracy.”<sup>177</sup>

Of course, the different constitutional, structural, and political realities of state legislative and judicial branches somewhat limit a state-federal analogy in the context of interbranch communication. For instance, some state constitutions give their judiciaries an express duty to improve the administration of justice that includes highlighting statutes that need to be revised,<sup>178</sup> while other states allow judges to give advisory opinions to legislators.<sup>179</sup> Concerns about judges delving too far into the political and legislative realms may be less serious in the many states that elect their judges<sup>180</sup> rather than appoint them as in the federal system.<sup>181</sup> State legislatures also possess more flexibility than Congress does to experiment with interbranch communication projects, particularly legislator-judge statutory revision committees, because they meet less often and thus legislators potentially have more time to devote to such activities.<sup>182</sup> Although some state interbranch communication programs may succeed because of the aforementioned unique state

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176. See Abrahamson & Hughes, *supra* note 162, at 1051–88 (discussing the nuances of state programs).

177. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting) (articulating the idea that states serve as laboratories of democracy).

178. *E.g.*, IDAHO CONST. art. V, § 25 (laying out the system whereby state district judges have a special duty to report “defects or omissions in the laws” to the justices of the Idaho Supreme Court who then make an annual report on the same topic to the governor and legislature); ILL. CONST. art. VI, § 17 (establishing an annual judicial conference for the Illinois Supreme Court justices to consider the work of the courts, suggest improvements in the administration of justice, and communicate those suggestions to the Illinois General Assembly).

179. See, *e.g.*, Jonathan D. Persky, “Ghosts That Slay”: A Contemporary Look at State Advisory Opinions, 37 CONN. L. REV. 1155, 1166–72 (2005) (providing an overview of state advisory opinion history and practice).

180. See *Methods of Judicial Selection*, AM. JUDICATURE SOC’Y, [http://www.judicialselection.com/judicial\\_selection/methods/selection\\_of\\_judges.cfm](http://www.judicialselection.com/judicial_selection/methods/selection_of_judges.cfm) (last visited Nov. 17, 2014) (describing the different methods of judicial selection in each state).

181. See U.S. CONST. art. II, § 2, cl. 2 (setting out the appointment process for federal judges); *id.* art. III, § 1 (stating that federal judges have life tenure and shall hold their offices during good behavior).

182. See Telephone Interview with M. Douglass Bellis, *supra* note 8 (noting that state legislatures are very different bodies from Congress, in part because they meet less frequently than Congress does).

circumstances or be unrealistic to implement on the federal level,<sup>183</sup> their general outlines are still useful. In fact, state programs influenced earlier proposed federal projects<sup>184</sup> and provided a foundation for the statutory housekeeping project itself.<sup>185</sup> These useful models, however, have been recently neglected by participants in the federal project.<sup>186</sup> Those involved in the housekeeping project have neither drawn upon state programs to improve the federal project nor have they formally suggested any alternative ways to improve the housekeeping project that rival the state-based suggestions set out below.<sup>187</sup>

## B. SUGGESTIONS FOR IMPROVING THE STATUTORY HOUSEKEEPING PROJECT

A three-part plan to boost two-way feedback within the federal statutory housekeeping project, increase the visibility and formality of the project, and supplement the project with educational programs can help the housekeeping project meet its original goal of being an effective “transmission belt”<sup>188</sup> and tool of interbranch communication.

### 1. Boosting Two-Way Feedback

In the current housekeeping project, two-way communication between the legislative and judicial branches is slight,<sup>189</sup> a

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183. It is unlikely that, for example, the U.S. Constitution would be amended to modify the separation of powers or expressly implement an interbranch communication program. *Id.* (discussing the difficulty of passing a constitutional amendment).

184. Friendly, *supra* note 14, at 802–04 (basing the proposed revision committee on the New York Law Revision Commission).

185. Proceedings of the Forty-Ninth Judiciary Conference of the D.C. Circuit, 124 F.R.D. 241, 317 (1989) (mentioning Maryland’s interbranch communication program).

186. See Telephone Interview with M. Douglass Bellis, *supra* note 8 (mentioning that state revision and interbranch communication programs are not participants’s major focus in the statutory housekeeping project); see also Telephone Interview with Matthew Lee Wiener, *supra* note 92 (mentioning that state programs are not really on the Administrative Conference’s radar).

187. The limited attention the housekeeping project has received in recent years focused on publicizing the project rather than formally proposing ways to change it. See, e.g., Katzmann & Wheeler, *supra* note 1, at 131; Katzmann, *supra* note 10, at 691–92.

188. See Katzmann & Herseth, *supra* note 26, at 2193.

189. See Burk, *supra* note 47, at 2217–18 (mentioning a lack of clarity about how committee staff used submitted opinions during the pilot project period); Telephone Interview with M. Douglass Bellis, *supra* note 8 (describing

problem noted during the project's early days.<sup>190</sup> Some state statutory revision programs encourage dialogue between judges and legislators through revision committees that include members of both branches.<sup>191</sup> Federal notions of separation of powers<sup>192</sup> and the many demands on judges' and federal legislators' time probably preclude the use of such panels,<sup>193</sup> at least in the context of statutory revision. Those state programs point, however, to the importance of making judges, court staff, legislative drafters, and legislative policymakers feel like they are valuable participants in an ongoing interbranch conversation.<sup>194</sup>

One way to encourage communication without deviating too wildly from the statutory housekeeping project's original focus as a "transmission belt"<sup>195</sup> would be to develop a second transmission system and make information about judicial participation in the project more accessible to both branches. Legislative drafters, committee staff, and other members of the legislative branch who choose to participate would submit information, briefly summarized on an annual or semi-annual basis, about what they did with opinions submitted through the statutory housekeeping project to the federal judiciary and to each other. This second transmission system would help shed light on how submitted opinions are handled. If reporting in the second transmission belt shows tangible results of submitting opinions it could also encourage judicial participation in and prioritization of the housekeeping project.<sup>196</sup> Even if the second transmission system reveals that legislative staff are not using the opinions or do not find certain aspects of the housekeeping project helpful, it could pinpoint areas for improvement in the

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how submitted opinions are transmitted to subcommittee staff).

190. Bellis, *supra* note 40, at 2214.

191. See, e.g., *Connecticut Law Revision Commission*, CONN. GEN. ASSEMBLY, <http://www.cga.ct.gov/lrc> (last visited Nov. 17, 2014); *Oregon Law Commission*, WILLAMETTE U. C. OF L., <http://www.willamette.edu/wucl/centers/olc> (last visited Nov. 17, 2014); *Welcome to the Alabama Law Institute*, ALA. L. INST., <http://www.ali.state.al.us> (last visited Nov. 17, 2014).

192. See Abrahamson & Lessard, *supra* note 111, at 11 (describing the influence of separation of powers on judges' concerns about the appropriateness of interbranch communication).

193. See E-mail from Russell Wheeler to author, *supra* note 8; *supra* notes 16, 145 and accompanying text.

194. Carparelli, *supra* note 153, at 270.

195. See Katzmann & Herseth, *supra* note 26, at 2193.

196. See *supra* notes 107–10 and accompanying text.



project that would otherwise be unknown to other participants in the project such as judges and judicial staff.<sup>197</sup>

Greater accessibility to information about which opinions have been submitted through the housekeeping project would assist this second transmission belt by better informing those in Congress. Thus, a second transmission system should be accompanied by reports about the nature of judicial participation in the housekeeping project by the Administrative Office of the U.S. Courts publicly available on its website.<sup>198</sup>

Those with knowledge of the low judicial and legislative participation in the housekeeping project may claim that a second transmission system would be unhelpful because it would add more work for potential participants without ensuring increased participation. In isolation, this might be true; however, the formal statute<sup>199</sup> and educational programs<sup>200</sup> discussed below would be aimed at boosting both the rate and quality of participation in the housekeeping project.

A second transmission system would capitalize on that increased participation by giving those on the legislative side a means to communicate with the federal judiciary on a more equal basis.<sup>201</sup> It would also help clarify what impact the submitted opinions do or do not have in Congress and improve the availability of information about the project.<sup>202</sup>

## 2. Increasing the Visibility and Formality of the Project

Further formalizing the housekeeping project through a statutory enactment of the project may help encourage judges

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197. Bellis, *supra* note 40, at 2214 (describing the lack of communication from Congress back to the judiciary).

198. The Administrative Office of the U.S. Courts is a natural choice for reporting on the housekeeping project on the judicial side since it already performs annual reports on the federal courts, including the judicial business of the U.S. Courts of Appeals. *See, e.g., Annual Report of the Director 2013*, ADMIN. OFF. OF THE U.S. CTS., <http://www.uscourts.gov/Statistics/JudicialBusiness/2013.aspx> (last visited Nov. 17, 2014) (describing the annual report on the judicial business of federal courts in 2013). Given that the General Counsel of the Administrative Office of the U.S. Courts receives opinions submitted through the project, it also should not be too difficult for it to make reports about judicial participation in the housekeeping project, especially if it enlists the help of the Governance Institute. *See Katzmann & Wheeler, supra* note 1, at 137 (describing the role of the Administrative Office of the U.S. Courts in the statutory housekeeping project).

199. *See infra* Part III.B.2.

200. *See infra* Part III.B.3.

201. *See supra* note 154 and accompanying text.

202. *See supra* note 189.

and court staff to participate by boosting its visibility and reassuring those who are uneasy about taking part. While a statute will not rid judges and court staff of their many responsibilities, it may help them prioritize the project by giving it more credibility and attention. Many state statutory revision and interbranch communication programs are based on statutory or constitutional authority,<sup>203</sup> to which administrators of those programs can point if their legitimacy or propriety is questioned.<sup>204</sup> A statute formally authorizing the statutory housekeeping project could encourage judges and court staff to participate by reassuring them that the project is a permitted form of communication with Congress. It also comes with the added benefit of clarifying often unclear rules about interbranch communication that tend to discourage judges from participating.<sup>205</sup>

Critics of such a broad authorizing statute may argue that the lack of judicial participation in the housekeeping project calls for a stricter statute that would include enforcement mechanisms for circuits that do not actively participate. Although such a statute would likely draw judicial attention to the project, sanctions against non-participating circuits would be against the spirit of free interbranch dialogue<sup>206</sup> and may present separation of powers issues not implicated by a voluntary project formalized through a flexible statute. The political reality of Congress today,<sup>207</sup> and legislators' general inattention to technical statutory matters,<sup>208</sup> may make the enactment of any statute difficult, especially one that would require significant enforcement efforts or sophisticated drafting.

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203. See *supra* notes 174, 178 and accompanying text.

204. The statutory authority for state interbranch communication and revision programs is often listed prominently on their websites. See, e.g., *Michigan Law Revision Commission*, MICH. LEGIS. COUNCIL, <http://council.legislature.mi.gov/CouncilAdministrator/mlrc> (last visited Nov. 17, 2014); *Connecticut Law Revision Commission*, *supra* note 191; *Oregon Law Commission*, *supra* note 191; *Welcome to the Alabama Law Institute*, *supra* note 191.

205. Tacha, *supra* note 111, at 295 ("Perhaps judges would be less wary [about interbranch communication] if specific interactions could be measured against guiding principles that take into account the relevant constraints but still encourage communication.").

206. For example, it is difficult to see how Congress's sanctioning of circuits that do not actively participate would ease tensions between the judicial and legislative branches. See *supra* notes 157–63 and accompanying text.

207. See *supra* note 146 (describing how difficult it is to pass legislation in the current Congress).

208. See *supra* note 145 (discussing how members of Congress tend to focus on more emotional and less technical issues).

Though the barriers to enacting a technical statute may make formally authorizing the statutory housekeeping project less feasible than the two other suggestions for reforming the housekeeping project, a statute would greatly help the other two reforms by boosting the project's visibility and credibility.

### 3. Supplementing the Project with Educational Programs

Though educational programs need not be expressly tied to the housekeeping project, federal legislative-judicial symposiums and trainings are a helpful way to improve each branch's understanding of the other's approach to statutes, thereby facilitating a more nuanced use of the federal project. Wisconsin has been a leader in interbranch relations educational projects on the state level, employing several different programs, including direct meetings between its Supreme Court and legislature's judiciary committees and legislative-judicial symposiums, one of which expressly discussed statutory interpretation.<sup>209</sup> The Chief Justice of the Wisconsin Supreme Court, the Director of State Courts, and the Supreme Court's Legislative Liaison have also spoken during legislator orientation sessions about how the court works and how judges interpret statutes<sup>210</sup> and some legislators have seen how judges operate firsthand through "Judicial Ride-Alongs."<sup>211</sup>

Interbranch educational programs on the federal level could be helpful even if they are less expansive than those in Wisconsin. Adding the topic of statutory drafting to the Federal Judicial Center's existing judge and court staff orientations<sup>212</sup> and developing trainings for legislative staff regarding how federal judges interpret statutes may go a long way toward increasing understanding without requiring major disruptions of either branch.<sup>213</sup> Such trainings would be especially useful for addressing gaps in knowledge about each branch if they fea-

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209. E-mail from Nancy Rottier, Legislative Liaison, Wis. Supreme Court, to author (Sept. 27, 2013, 17:34 CDT) (on file with author).

210. *Id.*

211. In the "Judicial Ride-Along" program, legislators spend half of one day on the bench with a circuit judge from their district. *Interbranch Communication: The Wisconsin Plan*, WISCONSIN COURT SYSTEM (Dec. 2012), <http://www.wicourts.gov/courts/resources/docs/communications.pdf>.

212. See *Educational Programs & Materials*, FED. JUD. CENTER, <http://www.fjc.gov> (last visited Nov. 17, 2014) (listing educational programs the FJC already organizes for federal judges and court staff).

213. The federal statutory housekeeping project's minimal burdens on its participants has been touted as one of its major strengths. See Katzmann & Wheeler, *supra* note 1, at 138.

tured either retired or current members of the other branch, just as a former justice of the Wisconsin Supreme Court led that state's legislative-judicial symposium on statutory interpretation.<sup>214</sup> Greater understanding on the part of both branches resulting from those educational programs would make them a useful supplement to the statutory housekeeping project that may help remedy problems of underuse.

Although such supplemental educational programs, a federal statute, and a two-way feedback mechanism each independently offer a way to improve and expand the federal statutory housekeeping project, they work best together. The increased visibility and credibility that a federal statute could bring would help boost participation in the second feedback mechanism, participation made more meaningful by education programs that allow participants to better understand the nuances of the other branch. As such, these three suggestions should ideally be implemented together as a three-part plan.<sup>215</sup>

#### CONCLUSION

Even though statutes dominate many areas of law today, legislators and judges are not on the same page. High tensions between the two branches merely compound that problem. In these circumstances the federal statutory housekeeping project's unique statutory communication focus gives it renewed and added importance. Yet, judicial and legislative participation in that project has not met the need for interbranch communication. Those who are familiar with the statutory housekeeping project tend to find the opinions submitted through the project helpful but few are using it. The project remains full of unrealized potential as a tool for interbranch communication.

An examination of a number of state interbranch communication and statutory revision programs offers a source of inspiration for how to improve the federal statutory housekeeping project. Modifying and supplementing that project through a second transmission system, an authority granting statute, and interbranch educational programs can help the statutory housekeeping project achieve its original goals and better bridge the gap between judicial and legislative understandings of statute drafting and interpretation. The benefits this three-

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214. E-mail from Nancy Rottier to author, *supra* note 209.

215. As noted above, the formalizing statute may be more difficult to implement than the other two proposals. *See supra* notes 207–09.

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part plan will bring are potentially far reaching; an effective federal statutory housekeeping project is well-situated to promote interbranch communication and understanding, which is of vital importance in a legal system dominated by statutes.