

**LOBBYING LANGUAGE:  
HOW SUPREME COURT OPINIONS INVITE LEGISLATIVE CHANGE**

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**Introduction**

At the end of June 2023, the Supreme Court denied certiorari review in [McClinton v. United States](#) (2023), declining to revisit [precedents](#) that permit judges to enhance defendants' sentences based on conduct of which they were acquitted at trial. This was no garden-variety cert denial. Four Justices—[enough](#) to grant review—expressed concern with this practice, signaling that they could address it if the [U.S. Sentencing Commission](#) failed to do so. As Justice Sonia Sotomayor put it, the Commission had “announced that it will resolve questions around acquitted-conduct sentencing in the coming year,” but if it “cho[se] not to act, . . . this Court may need to take up the constitutional issues presented.” Justices Brett Kavanaugh, Neil Gorsuch, and Amy Coney Barret appeared to agree. Yet Justice Samuel Alito made clear that he did not. Breaking with his colleagues, Justice Alito insisted that “no one should misinterpret [their] statements as an effort to persuade the Sentencing Commission to alter its longstanding decision that acquitted conduct may be taken into account at sentencing,” since “[t]his Court does not lobby government entities to make preferred policy decisions.”

Or does it? Justice Alito's assertion raises an empirical question: How often do Supreme Court opinions include what might be called “lobbying language,” which endorses a policy position while calling for another government entity to realize it? *McClinton* highlights a convenient sample to explore this question: the Supreme Court's sentencing cases since his confirmation in 2006. Reviewing those cases, this Essay finds that they include at least a dozen examples of lobbying language, sometimes directed at the Sentencing Commission, but more often at Congress; this accounts for roughly one out of every five cases in the sample. As it turns out, lobbying is not so unusual for the Supreme Court.

If hardly shocking, that finding still amounts to much more than a “gotcha.” The relative frequency of lobbying language in sentencing cases illuminates how the Supreme Court itself engages in the [“iterative, cooperative institutional effort](#) to bring about a more

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uniform and a more equitable sentencing system.” More broadly, these cases provide a snapshot of broader dynamics that can be hard to pin down, including how the Justices understand the distinction between law and policy and how they negotiate the separation of powers.

## I. A Snapshot of Lobbying Language from SCOTUS’s Sentencing Cases

To “lobby” [means](#) “to conduct activities aimed at influencing public officials and especially members of a legislative body on legislation.” Scholarship [has addressed](#) the potential for lobbying in “extrajudicial” environments, as the Justices engage with political causes and audiences beyond the bench.<sup>1</sup> But what of judicial opinions themselves? Surprisingly, there have been few attempts—with one notable [exception](#)—to explore how the Supreme Court lobbies Congress or other policymaking bodies from the bench, perhaps because this phenomenon seems hard to quantify.

Before quantifying lobbying language, we first must define it. My working definition has two prongs. First, a Justice must have endorsed or advocated for a policy view that is at odds with the Court’s holding. Merely extolling or bemoaning the pragmatic consequences of a holding does not satisfy this requirement. For instance, a [dissent](#) that criticizes the majority’s interpretation of a statute for introducing uncertainty into sentencing raises a policy argument. But lobbying language is more explicit—it does not merely discuss the policy consequences of a legal decision but asserts the merit of a policy position independent of the case at hand. Second, a Justice deploys lobbying language only when she suggests that another government entity with the authority to enact the policy should do so. Crucially, the Justice must lobby not her colleagues on the Court, but an external policymaker. This will typically entail naming the policymaker, as when the Court [flags](#) that “[t]he ball now lies in Congress’ court.”<sup>2</sup>

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<sup>1</sup> See also William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 GEO. J. LEGAL ETHICS 589 (1989).

<sup>2</sup> This line comes from *United States v. Booker* (2005), which preserved the constitutionality of the Federal Sentencing Guidelines by rendering them advisory rather than mandatory. While *Booker* falls outside of the sample of cases reviewed here, this line is cited in multiple cases within the sample. See, e.g., *Cunningham v. California*, 549 U.S. 270, 293–94 (2007); *Dillon v. United States*, 560 U.S. 817, 844–45 (2010). I count such quotes as separate instances of lobbying language so long as, taken in the context of each opinion in which they appear, the quoted words meet the two criteria discussed above.

Here, the suggestion that Congress should take action is implicit but nonetheless clear.

Of course, even with these criteria in place, coding instances of lobbying language involves some discretion because they can be more or less explicit. Consider three examples (emphasis added):

- Justice David Souter, concurring, in [\*Gall v. United States\*](#) (2007): “[T]he *best resolution* of the tension between substantial consistency throughout the system and the right of jury trial *would be a new Act of Congress* [ ] reestablishing a statutory system of mandatory sentencing guidelines . . . , but providing for jury findings of all facts necessary to set the upper range of sentencing discretion.”
- Justice Sotomayor, concurring, in [\*Terry v. United States\*](#) (2021): “There is no apparent reason that career offenders sentenced under [21 U.S.C. § 841(b)(1)(C)] should be left to serve out sentences that were unduly influenced by the 100-to-1 ratio [of sentences for crack and powder cocaine]. . . . Unfortunately, the text will not bear that reading [making retroactive relief more broadly available]. *Fortunately, Congress has numerous tools to right this injustice.*”
- Justice Gorsuch, concurring in part and concurring in the judgment, in [\*Sessions v. Dimaya\*](#) (2018): “*Congress remains free at any time to add more crimes to its list* [of those that will render a lawful permanent resident subject to removal]. . . . Congress might, for example, say that a conviction for any felony carrying a prison sentence of a specified length opens an alien to removal. *Congress has done almost exactly this in other laws. . . . What was done there could be done here.*”

These examples differ with respect to how clearly the Justice indicates that Congress *should* (rather than just *could*) enact a given policy. Justice Gorsuch’s statement in *Dimaya* admittedly sits close to this line, providing a roadmap for Congress to legislate around the Court’s constitutional holding while not out-and-out inviting Congress to do so. Because the statement comes in the context of Justice Gorsuch’s approving discussion of the statute at issue, it seems fair to say that he provided the roadmap with a view to it being taken up by legislators. Still, this example anchors the more debatable end of the sample.

With the definition and coding rules established, I turned to the sample of fifty-eight Supreme Court merits cases on sentencing issues since 2006 that the Sentencing Commission identified in a [recent publication](#) as being most legally significant. To target my analysis of

these cases, I conducted keyword searches for common terms the Justices could use to address the targets of their lobbying: “Congress,” “representatives,” “legislators,” “lawmakers,” “policymakers,” the “Commission,” and common variants of those terms. Then, I applied the coding rules to the search results.

This rough-and-ready method revealed lobbying language in at least<sup>3</sup> twelve opinions, accounting for about 20% of the cases. The table [linked here](#) lists these opinions and provides citations to the relevant language. It also categorizes the findings along two dimensions—whether the lobbying language appeared in a majority opinion (including concurrences) or in a dissent, and whether it appeared in a case with a pro-defendant or anti-defendant outcome.

Several observations jump out. First, lobbying language appeared with the same frequency in pro- and anti-criminal defendant cases. Justices were just as likely to advocate for Congress to enact harsher sentencing policies as they were to advocate for more lenient ones. Second, lobbying language appeared in only one majority opinion, six concurrences, and five dissents. It is not just that Justices encourage legislators to correct their colleagues’ mistakes about the law; they also write separately to flag that, though they agree that a statute mandates a particular result, the legislature ought to amend the statute as a matter of policy. Finally, there does not appear to be a clear ideological valence among Justices who deploy lobbying language. Notably represented in the table are Justices Antonin Scalia and Gorsuch, champions of a [formalist](#) philosophy that draws a bright line between law and policy in order to limit judicial [discretion](#). The view that judges should eschew normative judgments about good policy when interpreting statutes might seem to stand in some tension with the ostensive purpose of lobbying language—to spur policy change. It is at least clear that a methodological commitment to cabining policy considerations when working through a question of statutory interpretation does not preclude a Justice from stepping back to also assess the question from a lawmaker’s perspective.

## II. Zooming Out: What, and Who, Is Lobbying Language Really For?

What can these observations tell us about lobbying language more broadly? On one hand, sentencing cases might not be typical of the broader merits docket because, as Justice Kennedy put it in

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<sup>3</sup> I say “at least” because I was conservative with the coding rules and because I may not have found unusually phrased or formulated language.

*Blakely v. Washington* (2004), “[s]entencing guidelines are a prime example of [the] collaborative process” between courts and legislatures. But on the other hand, some of the most famous examples of lobbying language come from other domains of law. Perhaps the most famous example of all is Justice Ruth Bader Ginsburg’s dissent in the Title VII wage discrimination case *Ledbetter v. Goodyear Tire & Rubber Co.* (2007); her invitation that “the Legislature may act to correct this Court’s parsimonious reading of Title VII” prompted Congress to override the *Ledbetter* Court with [eponymous legislation](#).<sup>4</sup> So, lobbying language is hardly limited to sentencing cases. It is exactly because the examples of lobbying language are *so widespread*, however, that the snapshot from the sentencing cases proves helpful for pinning down what and who such language is for.

First and most obviously, lobbying language addresses the legislature. In sentencing and other areas of the law, this language functions as part of an [interbranch dialogue](#) whereby laws develop iteratively, with Congress indicating its policy ends and the Court indicating the (un)available legal means. Indeed, *stare decisis* is [seen to have](#) “special force” in the context of statutory interpretation, where the Court’s decisions are “balls tossed into Congress’s court, for acceptance or not as that branch elects.” As Professor William Eskridge has recognized in a canonical [article](#), courts can invite legislative overrides of their interpretations of statutes, softening the blow of formalism while hewing to judicial restraint. The line of sentencing cases following *United States v. Booker* (2005) repeatedly saw Justices, like Justice Souter in *Rita v. United States* (2007), call for Congress to “restore the [mandatory sentencing guidelines] scheme to what it had in mind” by curing the statute of its constitutional defects. More generally, as some lower courts have [cataloged](#), “it is not uncommon [for] circuits to include language in opinions that flags potential issues for Congress to consider, should it choose to do so.”

Second, the Justices might aim not just to toss the ball, but to pass the buck, deflecting blame from the parties or the public for a decision they perceive as legally correct yet harsh or unjust. The Justices might invite a legislative override not because they expect one to occur, but merely to highlight that it is the legislature’s choice—not theirs—that has mandated the result at hand. Justice Kennedy arguably took this tack in his *Mathis v. United States* (2016) concurrence, bemoaning the decision’s “arbitrary and inequitable results” and noting that, while “Congress is capable of . . . resolv[ing]

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<sup>4</sup> See also ROBERT A. KATZMANN, JUDGING STATUTES 94–95 (2014) (discussing this example and attesting to its prominence).

these concerns,” there instead had been “continued congressional inaction in the face of a [sentencing] system that each year proves more unworkable.” Beyond the sentencing context, this strategy holds particular appeal when a court must rule against sympathetic plaintiffs. To shift blame to the legislature, the Justices may (in Justice Stevens’ [words](#)) “emphasize the distinction between constitutionality and wise policy” and thus underline that “[t]he Constitution does not prohibit the legislatures from enacting stupid laws.” Beyond the sentencing context, Justice Alito’s recent concurrence in [Garland v. Cargill](#) (2024), where he joined the Court in striking down a ban on “bump stock” devices that enhance the rate of fire for semiautomatic rifles, seemed to evince this objective: while existing statutory text would not bear the government’s characterization of bump-stock-equipped rifles as prohibited “machineguns,” as Justice Alito framed it, the “simple remedy” was for Congress to “amend the law.”

Finally, in a related vein, the Justices may indulge in lobbying language for the purposes of reifying their conceptions of judicial [role morality](#)—the function that the Justices ought to play in the constitutional system. Justice Scalia’s dissent in [Sykes v. United States](#) (2015), rebuking Congress for its vague sentencing statutes, articulated a role for the Supreme Court of protecting citizens against the pathologies of the legislative process. Beyond the sentencing context, Justice Thomas dissented in [Lawrence v. Texas](#) (2003) by noting that, while he would “vote to repeal” the anti-sodomy law at issue “were [he] a member of the Texas Legislature,” he “recognize[d] that as a Member of this Court [he was] not empowered to help petitioners and others similarly situated.” In the courts of appeals, too, judges [frequently insist](#) that they would arrive at a different view of a statute *if they were the legislators*.

This suggests a paradox: It is exactly by weighing in on matters of legislative policy that the Justices (and other judges) may call attention to their distinct role in the constitutional system. Asserting what the law *ought* to be helps sharpen the line between that normative position and what, ostensibly, the law actually *is*. After all, Justices deploy lobbying language to flag that their policy views have *not* determined the legal outcome. So, we might understand lobbying language as a device for the Justices to distance themselves from the policymaking process rather than really to influence it. In that case, the propriety of such language would seem most in doubt, not for those who advocate formalism and judicial restraint, but for those who wish that the Justices would more forthrightly incorporate policy considerations into their legal reasoning.

That conception makes sense of Justice Alito's statement decrying judicial lobbying in *McClinton*. Justice Alito has himself deployed lobbying language in sentencing cases. Consider [\*Chambers v. United States\*](#) (2009), a case about what offenses constituted a "violent felony" under the Armed Career Criminal Act (ACCA). In Justice Alito's concurrence, he noted that "the only tenable, long-term solution is for Congress to formulate a specific list of expressly defined crimes that are deemed to be worthy of ACCA's sentencing enhancement." What distinguishes that statement from those the Justices in *McClinton* addressed to the Sentencing Commission? One possibility: the likelihood of successfully spurring policy change. In *McClinton*, the statements joined by four Justices credibly suggested that the Court would consider a future constitutional challenge to acquitted-conduct sentencing. It was more than plausible that the Commission would act accordingly. And indeed, the Commission ended up [voting unanimously](#) in April 2024 to prohibit consideration of acquitted conduct in sentencing determinations. Perhaps Justice Alito's concern was not that his colleagues had lobbied the Commission per se, but that they had done so in a way that was particularly likely to work, effectively changing the law without adding a case to the merits docket. From this perspective, lobbying language is most objectionable when it is most likely to be effective.

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