MONITORING OR MEDDLING? CONGRESSIONAL OVERSIGHT OF THE JUDICIAL BRANCH

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I. INTRODUCTION

In a 2000 column, former member of Congress, Lee Hamilton (D-IN) wrote: "[G]ood oversight stands at the core of good government."[1] Hamilton's words express the essential role that the United States Congress plays in holding the rest of the government accountable. Indeed, congressional scholars have long taught that oversight of the executive branch is one of the core functions of the U.S. Congress, and the fields of political science, public administration, and law all have

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1. Lee Hamilton, *True Congressional Oversight*, CENTER ON REPRESENTATIVE GOVERNMENT (May 16, 2000) https://corg.indiana.edu/true-congressional-oversight.

contributed to the considerable scholarly literature on oversight of the executive branch.[2] Fewer studies have explored Congress' efforts to engage in judicial branch oversight, and even fewer still identify legislatively initiated review of judicial branch activities as oversight at all.[3] The Congressional Research Service's own *Congressional Oversight Manual* (2014 edition) makes no direct mention of Congress' judicial branch oversight activities.[4] The 2017 Constitution Center volume on congressional oversight and investigations devotes a mere 20 pages (under 15 percent of the text) to oversight of federal courts.[5] Yet, even a cursory investigation of legislative-judicial branch relations makes it clear that Congress regularly engages in activities that properly should be considered oversight of the federal judiciary.[6] Moreover, the House of Representatives' standing rules regarding oversight include the review of "court decisions" among the standing committees' oversight responsibilities,[7] making it all the more surprising that the oversight literature has neglected the judicial branch.

In this Article, I argue that federal courts and the administrative agencies that support them are scrutinized in ways that look nearly identical to the type of attention that Congress gives to executive branch agencies. Congress monitors judicial capacity, workloads, and decisions, and uses both its constitutional and statutory authority to influence and rein in the courts as it deems necessary.[8] Yet, the oversight literature has

2. *See, e.g.*, LINDA FOWLER, WATCHDOGS ON THE HILL: THE DECLINE OF CONGRESSIONAL OVERSIGHT OF U. S. FOREIGN RELATIONS (2016); Joshua D. Clinton, David E. Lewis, & Jennifer L. Selin, *Influencing the Bureaucracy: The Irony of Congressional Oversight* 58 AM. J. POL. SCI. 387 (Apr. 2014); Jamelle C. Sharpe, *Judging Congressional Oversight,* 98 ADMIN. L. REV. 881 (2013).

3. Periodically, a legal scholar, political scientist, or scholar of bureaucracy will attempt to analyze legislative-judicial branch relations through an oversight lens. Still, when the literature on congressional oversight is considered *in toto*, congressional efforts to monitor the judicial branch are rarely referred to as oversight activities. *But see* CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM (2008); Lauren C. Bell & Kevin M. Scott, *Policy Statements or Symbolic Politics: Explaining Congressional Court-Limiting Attempts*, 89 AM. JUDICATURE SOC'Y 196 (2006).

4. ALISSA M. DOLAN, ELAINE HALCHIN, TODD GARVEY, WALTER OLESZEK, & WENDY GINSBURG, CONGRESSIONAL OVERSIGHT MANUAL (2014).

5. MORTON ROSENBERG, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY (2017).

6. ELIZABETH B. BAZAN & MORTON ROSENBERG, CONG. RESEARCH SERV., CONGRESSIONAL OVERSIGHT OF JUDGES AND JUSTICES (2005); KENNETH R. THOMAS, CONG. RESEARCH SERV., LIMITING COURT JURISDICTION OVER FEDERAL CONSTITUTIONAL ISSUES: COURT STRIPPING (2003).

7. Rule X 2(d)(1)B, CONG. RULES OF THE U.S. HOUSE OF REPRESENTATIVES (Jan. 6, 2015), http://clerk.house.gov/legislative/house-rules.pdf.

8. WALTER J. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 26 (1973).

generally neglected Congress' influence on the courts by treating Congress' interactions with the courts as something other than oversight.[9] As a result, opportunities have been missed to apply to the judicial branch what scholars know about oversight in the bureaucratic context.

This Article proceeds as follows: first, I review relevant scholarship on congressional oversight generally, including a brief history of congressional oversight and several theories of executive branch oversight. Next, I review the more modest literature on judicial branch oversight and demonstrate the ways in which the literature on executive branch oversight offers guidance for understanding congressional-court relations. Third, I show that Congress' efforts to control the federal courts are multifaceted and continual. In this section, I offer newly-collected data on judicial branch oversight efforts undertaken by Congress between 2009 and 2017. This data provides evidence that congressional oversight of the judicial branch occurs regularly. Finally, I summarize the arguments made herein, and conclude by arguing that the failure to consider many of Congress' interactions with the courts as oversight has reduced scholars' ability both to understand fully the ways in which Congress engages in oversight. It has also limited our knowledge about legislative-judicial relations more generally.

II. UNDERSTANDING OVERSIGHT

Whether its activities arise from an unusual national event, normal institutional practice, or a duly-enacted law, Congress' oversight work has developed from its need to collect and use information in the process of carrying out the powers granted to it under the Constitution.[10] Today, congressional oversight is carried out under the aegis of an extensive and interwoven set of constitutional, statutory, and common law obligations.[11] But, that was not always the case.

A. A Brief History of Congressional Oversight

Although the framers of the Constitution sought to make each branch of government accountable to the others, they offered little in the way of guidance regarding how such accountability might be obtained.[12] Nothing in the Constitution explicitly grants Congress the authority to

9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

engage in oversight or investigations, although Article I, section 8 allows Congress to "make rules for the government"[13] and to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[14]

Early congresses did engage in investigations, even compelling testimony on occasion,[15] but these activities were frequently challenged as exceeding the scope of congressional authority.[16] It was not until 1927 that the U.S. Supreme Court determined that the ability to engage in investigations and to compel witness testimony was certainly *intended* by the Constitution even if Congress was not granted explicit power to do so.[17] In addition, congressional oversight activity was far rarer and more haphazard during most of Congress' first century than such activities are today. This was the result of both a lack of attentiveness and a lack of capacity. Regarding the former, in his classic *Congressional Government: A Study in American Politics*, first published in 1885, Woodrow Wilson took Congress to task for focusing too much on legislating and not sufficiently on monitoring the work of the government, writing:

> Unless Congress have and use every means of acquainting itself with the acts of and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to

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13. U.S. CONST. art. I, § 8, cl. 14.

14. U.S. CONST. art. I, § 8, cl. 18.

15. United States House of Representatives, *Investigations and Oversight*, http://history.house.gov/Institution/Origins-Development/Investigations-Oversight/ (last visited Jan. 20, 2018).

16. Justice VanDevanter explained:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.

McGrain v. Daugherty, 273 U.S. 135, 275 (1927).

17. *McGrain*, 273 U.S. at 275.

> its legislative function. The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration.[18]

Although Wilson was pointed in his critique of Congress for failing to engage in sufficient monitoring of the rest of government, lack of capacity was a significant reason for its lack of monitoring. In the early congresses, there were few standing committees that could be tasked with consistent oversight of government activities. Congressional scholars Christopher J. Deering and Steven S. Smith note that it was not until the early-to-mid nineteenth century that standing committees were developed in Congress, but that the standing committees did not accumulate significant authority until after 1910.[19] Moreover, as George B. Galloway explained in 1951: "Many of the old standing committees of Congress were minor, inactive committees—'ornamental barnacles on the ship of state,' in Alvin Fuller's phrase."[20] It was not until 1947 that what Deering and Smith call the period of "committee government"[21] began in Congress, following passage of the Legislative Reorganization Act of 1946, which Congress passed to give itself some degree of parity of staffing and information resources with the executive branch, allowed congressional committees to professionalize the oversight activities that they had been developing up until that point. The Legislative Reorganization Act both authorized permanent professional staff for congressional committees[22] and codified the congressional oversight function by requiring Congress' standing committees to exercise "continuous watchfulness" over the activities of the executive branch.[23] As Eric Schickler notes, "[t]his was in response to concern that lagging congressional oversight had allowed federal agencies to usurp the legislative branch's prerogatives during World War II. Congressional

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18. WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 303 (15th ed. 1901).

19. CHRISTOPHER J. DEERING & STEVEN S. SMITH, COMMITTEES IN CONGRESS 26–30 (3rd ed. 1997).

20. George B. Galloway, *The Operation of the Legislative Reorganization Act of 1946*, 45 AM. POL. SCI. REV. 41 (1951).

21. *Id.*

22. The Legislative Reorganization Act of 1946, 2 U.S.C.A. § 4301 (West 2018).

23. That language was adjusted in the Legislative Reorganization Act of 1970, 2 U.S.C.A §190d (West 2018), to require committees to "review and study, on a continuing basis, the application, administration, and execution of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that committee."

investigations expanded in frequency and aggressiveness during this period, challenging the executive branch on numerous fronts."[24] The 1970 Legislative Reorganization Act gave congressional committees even greater resources, while also mandating a broader range of oversight activities, including monitoring programs under their jurisdiction, and producing biennial oversight reports.[25]

Today, Congress' oversight powers are broad. They include "congressional budget authorizations, appropriations, confirmations, and investigative processes, and, in rare instances...impeachment."[26] The targets of congressional oversight are most often executive branch departments and agencies, but as we will see, the courts are not immune from congressional scrutiny, although individual judges and justices are generally protected from congressional inquiries into their official conduct.[27] The tools available to Congress to engage in its oversight function are similarly expansive. These tools include the ability to convene hearings in Washington and around the country, issue subpoenas for documents or testimony, charge witnesses with perjury or contempt, and compel witnesses in congressional proceedings.[28] Congressional committees likewise have the capacity to offer witnesses immunity from prosecution and thus can obviate a witness's Fifth Amendment right against self-incrimination.[29]

Each chamber's rules provide insights into how Congress is supposed to engage in oversight. For example, Rule X of the Rules of the U.S. House of Representatives requires that House standing committees "review and study on a continuing basis the impact or probable impact of tax policies affecting subjects within its jurisdiction."[30] Furthermore, House rules require that "all significant laws, programs, or agencies" within a committee's jurisdiction "are subject to review every 10 years."[31] Rules XXV and XXVI of the Standing Rules of the Senate impose similar requirements on the Senate's standing committees.[32]

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24. ERIC SCHICKLER, THE LEGISLATIVE BRANCH 35–62, 49 (Paul J. Quirk and Sarah A. Binder eds., 2005).

25. DOLAN, *supra* note 4.

26. ROSENBERG, *supra* note 5, at 1; *see also* DOLAN, *supra* note 4 at 17–22.

27. BAZAN, *supra* note 6, at 5–6.

28. ROSENBERG, *supra* note 5.

29. *Id.* at 20–23.

30. Rule X, cl. 2(c), U.S. CONG. RULES OF THE U.S. HOUSE OF REPRESENTATIVES (Jan. 6, 2015), http://clerk.house.gov/legislative/house-rules.pdf.

31. Rule X, cl. 2(d)(1)D, U.S. CONG. RULES OF THE U.S. HOUSE OF REPRESENTATIVES (Jan. 6, 2015), http://clerk.house.gov/legislative/house-rules.pdf.

32. *See* Rules XXV and XXVI, STANDING RULES OF THE SENATE (Jan. 24, 2013), https://www.gpo.gov/fdsys/pkg/CDOC-113sdoc18/pdf/CDOC-113sdoc18.pdf.

B. Theories of Oversight

Congressional review of the bureaucracy has been a significant area of focus for scholars of public administration for at least the past half century. As Joshua D. Clinton, David E. Lewis, and Jennifer L. Selin explain: "The question of political control over the bureaucracy has a lengthy history because of the administrative state's critical role in policymaking. If unelected administrators make policy, they should arguably do so at the behest of democratically elected officials such as members of Congress or the president."[33] The extant literature quantifies the extent to which Congress engages in oversight, explores how effective congressional oversight activities are, and offers theoretical frameworks to explain more fully how and why Congress engages in oversight. It is the latter work that I address in the remainder of this section, since it is most generally applicable to an expansion of the oversight literature to encompass congressional oversight of the judicial branch. I focus on two of the most commonly cited theories of oversight: principal-agent theory and police patrol versus fire alarm oversight.

1. Principal-Agent Theory

In 1984, Terry M. Moe first applied principal-agent theory, which has its roots in economics, to understanding the existence of, and internal controls on, the public bureaucracy. Moe defines principal-agent relationships this way: "The principal-agent model is an analytic expression of the agency relationship, in which one party, the principal, considers entering into a contractual agreement with another, the agent, in the expectation that the agent will subsequently choose actions that produce outcomes desired by the principal."[34] He then applies this definition to the use of the theory to explain political control of the bureaucracy:

> Democratic politics is easily viewed in principal-agent terms. Citizens are principals, politicians are their agents. Politicians are principals, bureaucrats are their agents. Bureaucratic superiors are principals, bureaucratic subordinates are their agents. The whole of politics is therefore structured by a chain of principal agent relationships, from citizen to politician to bureaucratic superior to bureaucratic subordinate and on down the hierarchy

33. Clinton, et al., *supra* note 2, at 387–88.

34. Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 756 (1984).

> of government to the lowest-level bureaucrats who actually deliver services directly to citizens.[35]

Moe's early work does not fully develop the principal-agent model in the context of understanding political control of the bureaucracy, but it formed a foundation for subsequent explication of the concept. Later, Jonathan Bendor and Terry Moe refined Moe's original theoretical approach by developing a practical workflow for the principal-agent relationship, explaining that "[c]itizens pressure legislators through elections, legislators influence the bureau through budgets and oversight, the bureau affects citizens through the costs and benefits generated by regulatory enforcement and the circle is closed when citizens link their electoral support to legislators' positions on agency-relevant issues."[36] Relatedly, Mathew McCubbins' work addressed the challenges of *shirking* and *slippage,* two problems Congress may encounter when it delegates authority to the bureaucracy.[37] The former challenge, in which bureaucratic agents simply do something other than what Congress has asked, results from conflicts between congressional goals and agency goals. The latter challenge, which results from differences in institutional design, may result when it is simply infeasible for the agent to do what Congress wishes.[38] Congress may be motivated to intervene in bureaucratic decisions when it observes either of these conditions, since both result in failures to carry out Congress' will.[39] But because Congress also anticipates these problems, McCubbins notes that Congress will constrain agency decisions by being precise about the institutional, structural, and regulatory arrangements that it sets up.[40]

2. Police Patrols and Fire Alarms

The notion that Congress, as principal, should be monitoring agent compliance with its own preferences animated Wilson's call for robust congressional monitoring of the rest of government.[41] In addition, congressional concerns about the lack of agency deference to congressional will, motivated Congress' efforts under its reorganization

35. *Id.* at 765–66.

36. Jonathan Bendor & Terry M. Moe, *An Adaptive Model of Bureaucratic Politics*, 79 AM. POL. SCI. REV. 755, 757 (1985).

37. Mathew D. McCubbins, *The Legislative Design of Regulatory Structure*, 79 AM. J. POL. SCI. 721, 724 (1985).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

acts to codify its own oversight authority.[42] But that does not mean that Congress' efforts are fully routinized or effective even today.[43] As a practical matter, it is impossible for Congress to monitor every agency action; information asymmetry, procedural differences between the two chambers, and members' other responsibilities make such monitoring difficult. As a result, members and committees must make strategic decisions about when to engage in oversight.[44]

Congressional scholars Mathew McCubbins and Thomas Schwartz categorize congressional oversight activities as falling into one of two categories: "police patrol" oversight and "fire alarm" oversight.[45] Police patrol oversight occurs at Congress' own initiative. It is, according to McCubbins and Schwartz, comparatively centralized and direct.[46] Police patrol oversight is part of Congress' regular monitoring process for the federal agencies described earlier.

Fire alarm oversight works differently. In addition to the regular monitoring that Congress does, congressional rules also require standing committees to "review specific problems with Federal rules, regulations, statutes, and court decisions that are ambiguous, arbitrary, or nonsensical, or that impose severe financial burdens on individuals."[47] This is more consistent with what McCubbins and Schwartz refer to as "fire alarm" oversight. For example, in response to media reports during summer 2017 that members of the President's cabinet were misusing public funds by making short trips via private planes, the U.S. House of Representatives Committee on Oversight and Government Reform requested in September 2017 that White House Chief of Staff John Kelly provide a range of documents detailing "non-career employees" use of private airplanes to make official trips.[48]

In contrast with police patrol oversight, fire alarm oversight is less centralized and more dependent on others, including citizens and interest groups, to identify potential problems with federal programs. As Hugo Hopenhayn and Susanne Lohmann explain: "A political principal who

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42. *Id.*

43. *Id.* at 445–46.

44. *See* CHARLES SHIPAN, CONGRESS AND THE BUREAUCRACY, THE LEGISLATIVE BRANCH 432–58 (Paul J. Quirk & Sarah A. Binder eds., 2005).

45. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols vs. Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

46. *Id.*

47. Rule X, Clause 2(d)(1)B RULES OF THE U.S. HOUSE OF REPRESENTATIVES (Jan. 6, 2015), http://clerk.house.gov/legislative/house-rules.pdf.

48. Trey Gowdy & Elijah Cummings, *Letter to the Honorable John F. Kelly* (Sept. 26, 2017), https://oversight.house.gov/wp-content/uploads/2017/09/2017-09-26-TG-EEC-to-Kelly-WH-Travel-due-10-10.pdf.

suffers an informational disadvantage vis-a-vis a regulatory agency can nevertheless use information supplied by the media, interest groups, and constituents to monitor whether the agency is acting in her best interests."[49]

Because legislative time is scarce, and information about bureaucratic activities is not always easily obtained, fire alarm oversight offers Congress multiple advantages. One benefit of this fire-alarm approach is that members of Congress do not have to pay careful attention to what is happening in the bureaucracy because they will be alerted to potential problems by interest groups, constituents, and the media. Scarce member and committee time may not need to be spent on routine monitoring, since members know that there are others watching. As now-Justice Elena Kagan wrote in 2001: "Such a system allows Congress to pass on many of the costs of monitoring administrative action to non-governmental entities."[50] In addition, when Congress does act in response to complaints from external sources, its members may score political points with the person or group that identified the concern by responding to fire alarms in ways the groups prefer. As Charles Shipan notes, intervening in bureaucratic decisions "allows [Congress] to claim credit with their constituents and with important interest groups."[51]

C. The Challenges of Oversight

Existing theories of oversight not only help to explain when and how Congress engages in oversight, they also help us to understand why Congress is challenged in its oversight ability.[52] While the theoretical elegance of principal-agent theory offers a framework to think about the legislature-agency relationship, the reality of Congress-bureaucracy interactions is rarely that tidy. For one thing, Congress is not the only political branch watching. Presidents also monitor their subordinates in the bureaucracy; but presidents frequently differ in their goals from those of Congress, which leaves agency personnel in the difficult position of trying to please multiple masters simultaneously. As political scientist Andrew Whitford explains, "[b]ureaucrats are caught between the conflicting demands of the legislated desires of Congress and the policy agendas of presidents because they both carry out the law and work for

49. Hugo Hopenhayn & Susanne Lohmann, *Fire Alarm Signals and the Oversight of Regulatory Agencies*, 12 J.L. ECON. & ORG. 196, 208 (1996).

50. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2258 (2001).

51. SHIPAN, *supra* note 44 at 435.

52. ROSENBERG, *supra* note 5.

the president."[53] Kagan traces the start of significant presidential involvement with the bureaucracy to the start of the Ronald Reagan administration in 1981, locating that period as the date when presidents became more active in using the bureaucracy to accomplish their policy goals. She writes:

> The more the demands on the President for policy leadership increase and the less he can meet them through legislation, the greater his incentive to tap the alternate source of supply deriving from his position as head of the federal bureaucracy. Administrative action is unlikely to provide a President with all he could obtain through legislation: Congress, after all, has set bounds on administration through prior statutory enactments. But as compared with legislative stasis, administrative action looks decidedly appealing. More, administrative action has the potential to spur legislative action by calling public attention to Congress' failure to act on the relevant issue.[54]

Because both Congress and the President are watching, bureaucrats must be responsive to multiple principals simultaneously. But inter-branch conflict may also reduce the effectiveness of either branch to monitor effectively the work of the federal agencies. As Ogul and Rockman explain: "By virtue of the competitiveness between its branches, U.S. government is unusually political and possibly subject to excesses of parochial influences. The oversight process...lacks coordination and gives prevailing programs in general, if not in all of their particulars, an advantaged status."[55] Moreover, even within Congress, the overlapping nature of committee jurisdictions means that Congress may not be internally consistent in the messages it delivers to the agencies it monitors. For example, Clinton, et al., identified 108 committees and subcommittees in Congress that have oversight authority for the U.S. Department of Homeland Security.[56] This fragmented approach to oversight means that Congress may have trouble communicating a single preference to an agency, a problem that is exacerbated because interest groups, the media, and the public also are not monolithic in the signals they send to Congress. All of this adds

53. Andrew B. Whitford, *The Pursuit of Political Control by Multiple Principals*, 67 J. POL. 28, 29 (2005).

54. Kagan, *supra* note 50, at 2312.

55. Morris S. Ogul & Bert A. Rockman, *Overseeing Oversight: New Departures and Old Problems*, 15 LEGIS. STUD. Q. 5, 21 (1990).

56. Clinton, et al., *supra* note 2, at 387.

complexity to institutional and member-level decisions about how to respond to signals from those sounding fire alarms about agency activities.

Finally, as Rosenberg notes, "investigative oversight is very hard, sometimes dirty, and often unrewarding in the ways that are today so important for a legislator's political survival."[57] Even in the absence of challenges within the principal-agent relationship, Congress' lack of resources, reduced staff capacity, and increasing difficulty achieving executive branch compliance with congressional requests has made congressional oversight of the executive branch difficult. The courts, likewise, have permitted Congress to delegate increasing amounts of legislative authority to the executive branch and have upheld challenges to congressional efforts to reclaim it.[58] Moreover, an unintended consequence of relying on fire alarms rather than police patrols to monitor the executive branch may be a further reduction in Congress' ability to achieve compliance with its preferences. That is because, as Epstein and O'Halloran explain: "In many cases agencies rationally adjust their proposals to appease interest groups and avoid a fire alarm."[59]

As the preceding discussion makes clear, congressional oversight of the executive branch has been the subject of significant study over a period of several decades. The studies reported here are a fraction of the extant literature. Yet, there is virtually nothing in this body of literature that incorporates congressional intervention in the judicial branch. As a result, the literature provides little clarity regarding how to think about the same congressional actions when they occur in connection with the judicial branch, rather than the executive branch. In the next section, I discuss the ways in which both the theory and practice of executive branch oversight has been and can be applied to the judicial branch as well.

III. OVERSIGHT OF THE JUDICIAL BRANCH

As noted in the Introduction, few oversight scholars or practitioners include congressional interactions with the courts in their work on this important congressional activity. But, both the scope of Congress' efforts to monitor and influence the courts, as well as the clear application of extant theories of executive branch oversight to court-Congress

57. ROSENBERG, *supra* note 5, at 213.

58. Sharpe, *supra* note 2, at 183.

59. David Epstein & Sharyn O'Halloran, *A Theory of Strategic Oversight.* 11 J.L. ECON. & ORG. 227, 228 (1995).

interactions argues for a more holistic, integrated approach to thinking about congressional oversight as inclusive of Congress' review of the judicial branch. Before turning to a discussion of the various forms of congressional response to the judicial branch, this section develops the argument that many of Congress' activities related to the courts are substantially similar enough to its activities in the executive branch oversight process to warrant including the courts in the oversight literature.

To begin with, it is clear many congressional interactions with the courts are similar to congressional interactions with the executive branch. While Congress cannot directly investigate individual judges with whose decisions its members disagree and cannot reduce the pay of or easily remove most federal judges from office,[60] Congress can do many things to affect the scope and function of the federal courts, just as it can in its oversight of the executive branch. As Walter J. Murphy writes in his classic *Elements of Judicial Strategy:*

> Congressmen have an impressive array of weapons which can be used against judicial power. They can impeach and remove the Justices, increase the number of the Justices to any level whatever, regulate court procedure, abolish any tier of courts, confer or withdraw federal jurisdiction almost at will, cut off the money that is necessary to run the courts or to carry out a specific decision or set of decisions, pass laws to reverse statutory interpretation, and propose constitutional amendments either to reverse particular decisions or to curtail directly judicial power. Furthermore, senators share to some extent the President's power to appoint judges to all federal courts.[61]

As Murphy makes clear, Congress' management of the affairs of the judicial branch has the potential to involve far more significant reach into the courts' staffing, structure, and workload than the extent to which Congress can influence the same inside the executive branch.[62] And when Congress attempts to use the "weapons" Murphy mentions, it does so most frequently through each chamber's Committee on the judiciary.[63] Thus, oversight of the judicial branch is less likely to suffer from the

60. U.S. CONST. art. III, § 1 states: "The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

61. MURPHY, *supra* note 8, at 26.

62. *Id.*

63. *Id.*

problem of competing and overlapping jurisdiction within the Congress, which may make congressional oversight of the judicial branch even more successful than congressional oversight of the executive branch.

Because Congress engages in similar efforts at monitoring both the executive and judicial branches, the theories of executive branch oversight discussed earlier are also applicable to the judicial branch. The previous section's lengthy discussion of congressional oversight generally can also help to contextualize the activities that dominate the legislative-judicial relationship.

For example, principal-agent theory is also helpful for understanding congressional efforts at limiting federal courts. While Congress does not delegate its own authority to the courts, as is may do with the bureaucracy, judicial politics scholars Kirk Randazzo, Richard W. Waterman, and Jeffrey A. Fine find that "Congress can operate as a viable principal to federal judges if the legislators decide to craft unambiguous statutes."[64] Thus, when the courts strike down an act of Congress, or interpret a statute in ways contrary to what Congress intended—forms of slippage similar to what occurs in the bureaucratic implementation process—it is likely to be just as motivated to correct what it perceives as a judicial mistake. As McCubbins writes in the bureaucratic context, "Congress, in structuring its relationship with a regulatory agency, will attempt to induce agency compliance through the application of rewards and sanctions. Rewards and sanctions arise largely through the exercise of its constitutionally defined powers of authorization, appropriation, and appointment."[65]

Likewise, the distinction between police patrol and fire alarm oversight is helpful in thinking about the ways in which Congress monitors the judicial branch. Police patrol oversight—that is, oversight activities that are initiated regularly by Congress—include such activities as appropriating funds for the courts, monitoring judicial workloads and authorizing courts and judgeships in response. Congress also uses the Senate confirmation process to make prospective judgments about the shape and direction of the courts' future decisions. These regular activities are largely diffuse by their nature; that is, Congress can use them to shape the federal courts generally. But Congress is less capable of influencing the outcome of particular cases through these activities.[66]

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64. Kirk A. Randazzo, Richard W. Waterman, & Jeffrey A. Fine, *Checking the Federal Courts: The Impact of Congressional Statutes on Judicial Behavior* 68 J. POL. 1006, 1016 (2006).

65. McCubbins, *supra* note 37, at 728.

66. This is not to say that such activities are not political. Voluminous evidence documents the extent to which the U.S. Senate has slowed its pace and rate of judicial confirmations, particularly during periods in which the White House is controlled by the

Police patrol-style oversight is only one form of congressional intervention into the judicial branch. Congress also responds to fire alarms in the context of the courts, as interest groups and constituents seek congressional response to judicial decisions with which they disagree. These fire alarms lead to two additional types of oversight activities available to Congress: responding legislatively to a specific judicial decision and stripping the courts' jurisdiction to hear particular types of cases. Political scientist Tom S. Clark notes in his study of congressional efforts to curb the Supreme Court: "Interest groups concerned with the judiciary and its role in American politics closely monitor legislative activity concerning the Courts and draw their supporters' attention to legislators' actions and positions. Indeed, previous scholarship demonstrates that constituent preferences are a primary determinant of legislative responses to, and attacks on, the judiciary."[67] Because interest groups so closely monitor the work of the federal courts, it is likely that like bureaucratic agencies, the courts are able to prevent congressional intervention in their decisions by consciously (and conscientiously) avoiding decisions that violate majoritarian norms or that are attentive to particularistic group interests. Just as the courts may be attentive to interest group preferences that they are aware of, they may be equally attentive to congressional signaling about group or public preferences. Professor Clark finds that Congress itself sends important signals to the Court about public support for its decisions when it introduces court-curbing legislation and that the Court responds under certain circumstances. Clark writes:

> When the Court fears it will lose public support, it will adjust its behavior in light of congressional signals about the Court's level of public support. However, the magnitude of that effect is mediated by the political context in which those signals are sent. Instead of responding to Court curbing more strongly when it is facing its ideological opponents, the Court responds most strongly when the Court curbing comes from its ideological allies.[68]

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opposite party from that which controls the Senate. *See generally* Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202 (1988). Likewise, Congress has used the budget process to try to influence the courts. *See* Eugenia Froedge Toma, *Congressional Influence and the Supreme Court: The Budget as a Signaling Device*, 20 J. L. STUD. 131 (1999).

67. Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, AM. J. POL. SCI. 971, 974 (2009).

68. *Id.* at 985.

Together, the literature demonstrates that signals from interest groups and Congress provide federal courts with important information about the extent to which their decisions will be accepted and, relatedly, the extent to which they are likely to come under attack by members of Congress or congressional committees that are unhappy with their decisions. This means that in the context of monitoring the judicial branch, fire alarm oversight may be a particularly effective means for responding to perceived judicial overreach on the part of powerful interests that Congress cares about.

When read together it is clear that many of the same theories that explain congressional oversight of the executive bureaucracy can likewise explain Congress' relationship with the federal judiciary. However, there is an important caveat to note before continuing. The relationship between Congress and the courts is susceptible to the same factors that influence congressional watchfulness over the executive branch. At the same time it is also complicated by strongly-held, but somewhat contradictory, principles: judges and courts are entitled to independence in their decision making and that despite this independence, courts ought to defer to legislative majorities whenever possible. Charles Geyh articulates this as a "dynamic equilibrium," in which

> Congress may possess the power to render the judiciary subservient, but having concluded that doing so would be inappropriate, it has stayed its hand most of the time. Perpetuation of norms that guard against "inappropriate" or "improper" congressional intrusions upon the judiciary's autonomy has been aided by the courts' timely sensitivity to and deference to Congress and the political process, which has made such intrusions largely unnecessary.[69]

That is to say that Congress may restrain its own willingness to monitor the courts in the same way it would normally monitor the executive branch out of deference to the norm of judicial independence. But the courts, recognizing their vulnerable position vis-à-vis the elected branches may likewise limit their own activities to those unlikely to draw the ire of the political branches. Expounding on that theme, Murphy adds: "Even where [a justice] had doubts about the validity of congressional action, he would be restrained in nullifying the statute by his concept of the proper role in a democratic system of government."[70]

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69. GEYH, *supra* note 3, at 21.
70. MURPHY, *supra* note 8, at 2.

The relationship between the courts and Congress exists at the nexus of constitutional powers, statutory rules, and institutional norms. As I turn next to an analysis of the specific oversight activities Congress engages in vis-à-vis the courts, it becomes clear that not only in theory but also in many important practices, Congress treats the courts, particularly the Supreme Court, much like it treats the executive branch agencies it oversees. Congress is actively involved in the judicial appointments process, in monitoring the courts' budgets, and in watching and responding to judicial decisions. Yet, the literature rarely treats these actions as *per se* oversight, focusing on them instead as constitutional imperatives rather than efforts at political control of the judiciary. In the subsections that follow, I detail the ways in which several of these activities ought properly to be considered oversight of the judicial branch.

A. Creating Courts, Judgeships, and Judicial Branch Agencies

The ability to create lower federal courts and the judgeships that staff them is one way in which the legislative branch's relationship with the judicial branch mirrors its relationship with the executive bureaucracy. Congress' authority to create courts comes from both Article I and Article III of the United States Constitution. Article I permits Congress to "constitute Tribunals inferior to the supreme Court,"[71] and Article III states that "the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[72] Although it is clear from Article III's grant of appellate jurisdiction to the Supreme Court that the framers expected Congress to create lower federal courts, the Constitution offered no guidance to Congress about how to do so. Congress quickly settled on a three-tiered system, with district courts in each new state (plus Maine and Kentucky), regional circuit courts, and the one Supreme Court established under the Constitution.[73] That system has survived largely intact, although the number, structure, and size of each of the courts within it all were subject to regulation by Congress over the course of the nineteenth and twentieth centuries.

Over the last two hundred years, Congress has expanded the size of federal courts, as well as the number of judges on them, in order to

71. U.S. CONST. art. I, § 8.

72. U.S. CONST. art. III, § 1.

73. The Judiciary Act of 1789, 1 Stat. 73. *See* https://www.fjc.gov/history/legislation/landmark-legislation-judiciary-act-1789 for additional analysis by the Federal Judicial Center.

accommodate the U.S.'s growing population and Westward expansion. Throughout the nineteenth century and into the twentieth century, Congress also regularly reviewed and considered the proper role of circuit courts, circuit riding for U.S. Supreme Court justices, and the need to expand access to justice to citizens whose own state did not have a circuit court located within it.[74] During the twentieth century, Congress continued to tinker with the size and function of federal courts, expanding the bankruptcy courts' jurisdictions, and carving the tenth and eleventh circuits from the eighth and fifth circuits, respectively.[75]

In addition to the creation of courts, Congress also creates, monitors, and reacts to the work of the federal judicial agencies, including the Administrative Office of the United States Courts, the Federal Judicial Center, and the United States Sentencing Commission. The last is a particularly good example of the ways in which Congress has utilized executive branch-style oversight to monitor the work of the federal judiciary.

B. Case Study: The United States Sentencing Commission

Congress created the United States Sentencing Commission in the Sentencing Reform Act of 1984.[76] Its purpose was to promulgate guidelines to ensure that the purposes of sentencing were met by the fair and consistent sentencing of defendants whose conduct was similar. Although Congress established the Sentencing Commission as an independent agency within the federal judiciary, it gave the President the power to make nominations to the Commission, which require confirmation by the U.S. Senate.[77]

The creation of the Sentencing Commission was controversial. Not only had Congress created an agency within the judicial branch that was controlled, in part, by the President, but the work of the Commission was designed deliberately to constrain federal judges as they sentenced defendants in their courtrooms. As Lewis J. Liman wrote in a 1987 *Yale Law Journal* essay, "The guidelines have legal force similar to regulations issued by administrative or executive agencies. Although the guidelines must sit before Congress for 180 days before they go into effect, only congressional legislation can block the implementation of the

74. BRUCE A. RAGSDALE, DEBATES ON THE FEDERAL JUDICIARY: A DOCUMENTARY HISTORY, VOL. I: 1787–1875 203–04 (2013).

75. JACK KOBRICK & STANLEY S. HOLT, DEBATES ON THE FEDERAL JUDICIARY: A DOCUMENTARY HISTORY, VOL. III: 1939–2005 (2018).

76. *See* 28 U.S.C.A § 991 (West 2018); 18 U.S.C.A § 3551 (West 2018).

77. 23 U.S.C.A § 991(a) (West 2018).

guidelines or change any of their terms."[78] Opponents of the Sentencing Commission, and the Sentencing Guidelines it created, challenged the constitutionality of the Commission and its work nearly immediately.

In *Mistretta v. United States,* the United States Supreme Court upheld the constitutionality of the Sentencing Commission, noting in the opinion that "[d]eveloping proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate."[79] Moreover, and significant for the purposes of this article, the Court noted that the U.S. District Court had rejected the appellant's assertion that the Sentencing Commission violated the principle of separation of powers, noting that "the Sentencing Commission 'should be judicially characterized as having Executive Branch status'...and that the guidelines are similar to substantive rules promulgated by other agencies."[80]

Indeed, with the Supreme Court's blessing, Congress has tended to treat the Sentencing Commission much like it treats executive branch agencies to which it has delegated authority. Since creating the Commission in 1984, the U.S. House of Representatives and the U.S. Senate have held dozens of oversight hearings on the Sentencing Commission itself or inquiring into the Commission's activities. Many of these have focused on whether the Sentencing Commission has adequately enacted sentencing policies that further Congress' goals, while others have scrutinized the federal courts' compliance with the Guidelines. For example, at an October, 2000 hearing in the U.S. Senate Judiciary Committee's Criminal Justice Oversight Committee entitled "Oversight of the United States Sentencing Commission: Are the Guidelines Being Followed?" subcommittee chairman Strom Thurmond railed against federal judges, the Sentencing Commission, and the U.S. Department of Justice for allowing the sentencing of criminals to fall below the required Guidelines penalty.[81]

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78. Lewis J. Liman, *The Constitutional Infirmities of the United States Sentencing Commission*, 96 YALE L. J. 1363, 1367 (1987).

79. Mistretta v. United States, 488 U.S. 361 (1989).

80. *Id.* at 654.

81. Oversight of the U.S. Sentencing Commission: Are the Guidelines Being Followed?: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary, 107th Cong. 317–18 (2000) (Statement of Strom Thurmond, Sen.).

C. Authorization of New Judgeships

Closely related to the establishment of judicial branch agencies and courts is the authorization of judgeships to staff them. Most recently, the Judicial Conference of the United States has recommended an additional sixty judgeships to tackle increased caseloads in the Ninth Circuit and in a number of district courts across the country.[82] But the number of appellate court judges has not changed since 1990, and the last time the number of judges on the U.S. district courts increased was in 2003.[83] Multiple studies have demonstrated that the creation of judgeships is subject to unique political pressures.[84] As John M. deFigureido and Emerson H. Tiller note:

> Congress can selectively increase the number of judgeships in the federal judiciary, creating judicial vacancies where they would otherwise not be, and install judicial agents, through a like-minded president, who will share policy preferences congruent with those of the congressional majority. . . . In short, judicial expansion offers a politically efficient, if not insidious, control mechanism for the legislature.[85]

Although deFigureido and Tiller suggest that Congress may see the creation of judgeships as a expedient way to magnify congressional influence on the courts, their logic also helps to explain why 1990 was the last significant expansion of federal judgeships, since as Cynthia R. Farina notes, "congressional polarization has been steadily and consistently increasing since the 1980s."[86] Partisan minorities, especially in the Senate, undoubtedly understand the stakes involved in the creation of new judgeships when the majority party in Congress and the White

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82. *See* Table 1: *Additional Judgeships or Conversion of Existing Judgeships Recommended by the Judicial Conference,* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, http://www.uscourts.gov/sites/default/files/2017_judicial_conference_judgeship_recommendations_0.pdf.

83. *See Authorized Judgeships*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS 7-8, http://www.uscourts.gov/sites/default/files/allauth.pdf.

84. For example, see: John M. De Figueiredo, Gerald S. Gryski, Emerson H. Tiller, and Gary Zuk. *Congress and the Political Expansion of the U.S. District Courts.* 2 Am. Law & Econ. Rev. 107 (2000); John M. deFigureido & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary,* 39 J.L. ECON. & ORG. 435, 436 (1996); *LawScope in Washington: Fifth Circuit Split Hangs up Judgeship Bill Conferees.* 64 ABA J. 962 (1978).

85. deFigureido and Tiller, *supra* note 84, at 436..

86. Cynthia R. Farina, *Congressional Polarization: Terminal Congressional Dysfunction?*, 115 COL. L. REV. 1689, 1701 (2015).

House is the same. At the same time, while partisan considerations are relevant to Congress' decisions about whether to expand the number of judgeships on the federal courts, party concerns are not the only determining factor. Congress also must be responsive to burgeoning caseloads and fire alarm pressure from constituents or interest groups who find it difficult to gain access to the courts. Congress is constrained as well by courthouse capacity and internal constraints within judicial districts and circuits. Finally, institutional conflicts between Congress and the courts are also a factor that affects Congress' willingness to expand the number of judgeships.

In all, Congress' ability to control the size, authority, and staff levels of the federal judiciary gives the legislative branch extraordinary influence over the capacity of the judicial branch. Moreover, by timing any expansion in the number of judgeships right, Congress can ensure "like-minded judges," which "relieves Congress of the need to monitor and discipline the judiciary, as such judges would be expected to share a common sense of justice with the legislators."[87]

IV. CONGRESSIONAL BUDGET AUTHORITY

A second activity in which Congress treats the federal judiciary in much the same way as it treats executive branch agencies is in Congress' budget-setting process for the federal courts. In the judicial context, Congress sets the budgets for the federal courts, appropriates funds to them, and sets the compensation rate for federal judges. These activities are, in important respects, identical to the ways Congress treats executive branch agencies and staff members. As a result, concerns about funding have led to tensions between the judiciary and Congress in the past. As Mark C. Miller explains: "Judges see the courts as an independent and coequal branch of government, but Congress sometimes views them as just one more federal agency begging for money and other resources."[88] Economist and policy scholar Eugenia Froedge Toma—applying bureaucratic theory to the legislative-judicial relationship—reiterated that Congress controls the budget for the federal courts just as it controls the budgets of executive branch agencies and programs.[89] She writes that "the relationship between Congress and the Supreme Court resembles—in kind if not in degree—that between Congress and other agencies in a very important way. Congress signals its overall approval or disapproval

87. deFigueiredo and Tiller, *supra* note 84, at 459.

88. MARK C. MILLER, THE VIEW OF THE COURTS FROM THE HILL: INTERACTIONS BETWEEN CONGRESS AND THE FEDERAL JUDICIARY 78 (2009).

89. Toma, *supra* note 66.

of the Court's direction through budgetary allocations."[90] For example, Toma cites the 1964 Government Employees Salary Reform Act, in which "[i]n response to the liberal Court of the 1960s, a less liberal Congress . . . increased the annual salaries of members of Congress and of federal judges, except Supreme Court justices, by $7,500. The justices of the Supreme Court received increases of only $4,500."[91]

Moreover, because the budget process occurs on a regular basis,[92] this tool of congressional control may be particularly powerful. Congress may be able to more effectively use its power over the budget to influence the courts than it can use other types of oversight. That is, Congress need not devote extraordinary time or energy to trying to influence the courts, nor will Congress incur the potentially substantial political costs that other types of interventions with the federal courts risk when it uses the budget process, rather than other mechanisms.

When the courts identify needs that Congress is unwilling to meet, tensions between the legislative and judicial branches may flare. Over the last two decades, significant frustration has been directed at Congress from the courts over judicial salaries and insufficient funding for court personnel, security and facilities. For example, Chief Justice John Roberts' 2013 *Year-End Report on the Federal Judiciary* devoted significant space to an appeal to Congress to provide adequate funding for the courts, noting that the courts simply could not fulfill their constitutional obligations in the absence of more funding.[93] He wrote:

> By its own initiative, the Judiciary had already achieved significant cost reductions when the sequester provisions of the Budget Control Act of 2011 went into effect on March 1, 2013...The impact of the sequester was more significant on the courts than elsewhere in the government, because virtually all of their core functions are constitutionally and statutorily required. Unlike most Executive Branch agencies, the courts do not have discretionary programs they can eliminate or postpone in response to budget cuts. The courts must resolve all criminal, civil, and bankruptcy cases that fall within their jurisdiction, often under tight time constraints....[s]equestration cuts have

90. *Id.* at 146.

91. *Id.* at 134.

92. *See generally The Federal Budget Process,* NAT'L. CONF. OF ST. LEGISLATURE, http://www.ncsl.org/research/fiscal-policy/federal-budget-process.aspx (last visited Mar. 30, 2018).

93. CHIEF JUSTICE OF THE U.S. SUPREME COURT, 2013 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1–10 (2013), https://www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf.

> affected court operations across the spectrum. There are fewer court clerks to process new civil and bankruptcy cases, slowing the intake procedure and propagating delays throughout the litigation process. There are fewer probation and pretrial services officers to protect the public from defendants awaiting trial and from offenders following their incarceration and release into the community. There are fewer public defenders available to vindicate the Constitution's guarantee of counsel to indigent criminal defendants, which leads to postponed trials and delayed justice for the innocent and guilty alike. There is less funding for security guards at federal courthouses, placing judges, court personnel, and the public at greater risk of harm.[94]

The Chief Justice's concerns are borne out by more objective analysis. As Stephen B. Burbank, Jay Plager, and Gregory Ablavsky write:

> Federal judicial caseloads have risen dramatically, and the number of Article III judges in regular active service and the compensation those judges receive have not kept pace with the workload or inflation. These developments may have adverse consequences for the institution, and recent economic conditions have exacerbated budgetary pressures already exerted by Congress on the institutional judiciary.[95]

Because the courts have no independent financial foundation, Congress' appropriation and spending powers can have a real impact on their work. For example, during a period of five years (2009–2013), Congress denied federal judges cost-of-living adjustments to their salaries, a situation that was remedied ultimately through a judicial finding that not to provide such adjustments was in violation of the Compensation Clause of the Constitution and the Ethics Reform Act of 1989.[96]

Still, the ways in which Congress uses its budget authority to exercise control over the judicial branch are not necessarily fully understood. Few studies exist that look at congressional control of

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94. *Id.* at 4–6.

95. Stephen B. Burbank, S. Jay Plager & Gregory Ablavsky, *Leaving the Bench: 1970–2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 5 (2012).

96. *See Judicial Compensation*, U.S. COURTS, http://www.uscourts.gov/judges-judgeships/judicial-compensation#fn1 (last visited Feb. 1, 2018).

judicial budgets, and those that do exist rely heavily on anecdote or formal models. For example, writing in 1980, Dean L. Yarwood and Bradley C. Canon noted that Congress has generally refrained from using the budget process to retaliate against the Supreme Court for decisions with which it disagreed.[97] However, curiously, the authors go on to cite several examples when members made their displeasure with judicial decisions known during budget hearings.[98] For example, "when the justices sought an additional automobile to take them to and from the Court, in 1978, Senate subcommittee Chairman Ernest Hollings (D-SC) responded somewhat jocularly, 'Couldn't [we] get a bus to bus the judges? I learned about bussing from reading the *Swann* case and others.'"[99]

A. Confirmation and Impeachment of Judges

Another of Congress' constitutionally-prescribed responsibilities is to review and approve (or reject) presidential nominees to the federal courts.[100] The mechanics of approving specific individuals to serve in specific judgeships is a wholly separate process from the authorization of the judgeships themselves, discussed above. While a majority of both chambers of Congress must endorse an increase in the number of authorized judgeships, the U.S. Senate alone is given the task of approving the individuals selected by the President to fill them.[101] The Senate's confirmation process is also an important form of oversight over the federal courts. As Congressional Research Service Analyst Elizabeth B. Bazan explains, when the Senate has concerns about a nominee, "any number of oversight methods would be available to obtain information regarding a particular judge or Justice during a nomination process. These might include informal Member contacts with the judge or Justice; congressional staff studies; studies prepared by congressional support agencies or noncongressional entities; and formal committee hearings."[102] Congress is also responsible for removing federal judges from office, which it does through the impeachment and removal

97. Dean L. Yarwood & Bradley C. Canon, *On the Supreme Court's Annual Trek to the Capitol*, 63 JUDICATURE 322, 324 (1980).

98. *Id.*

99. *Id.*

100. U.S. CONST. art. II, § 2, cl. 2.

101. *See Nominations,* U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm (last visited Mar. 30, 2018).

102. ELIZABETH B. BAZAN, ET AL., CONG. RESEARCH SERV., RL32935, CONGRESSIONAL OVERSIGHT OF JUDGES AND JUSTICES 2 (2005).

processes outlined in the Constitution.[103] Indeed, as Bazan has noted, the confirmation and impeachment process are the two primary places where Congress is able to exercise formal oversight over individual judges and justices.[104]

Like the congressional budget process, the process of confirming nominees to the federal courts is, at least in theory, a regularized, routine process.[105] While certain nominees may trigger senators or interest groups to sound a fire alarm,[106] the process itself is routine. Indeed, as Nancy Scherer, Brandon L. Bartels, and Amy Steigerwalt have demonstrated, *unless* an interest group sounds an alarm, nominees to the lower courts are nearly always confirmed.[107] While the removal process is less routine—owing mostly to its infrequent use—it too is among the formal mechanisms provided in the Constitution to give Congress authority over staffing the federal judiciary.[108]

The role for Congress in approving candidates for federal judgeships is articulated in Article II of the United States Constitution. Article II gives the President the power to appoint judges "by and with the advice and consent of the Senate,"[109] but this power, like so many others related to the federal courts, is not defined further in the Constitution. Instead, precedents established in the late eighteenth and early nineteenth century senates shaped the advice and consent process in important ways, which has continued to be refined over time by partisan and institutional conflicts within and between the Senate and the White House. For example, the U.S. Senate established the principle of senatorial courtesy—the idea that presidents should defer to home-state senators

103. *See* U.S. CONST. art. III, § 1.

104. BAZAN, *supra* note 102, at 2.

105. Again, this is not to suggest that the confirmation process is apolitical. Certainly, in recent years, the process has been politicized to unprecedented levels—for example the Republican-controlled Senate's unwillingness to even hold a hearing on President Barack Obama's nominee to replace the late Justice Antonin Scalia during nearly the entirety of 2016. *See generally* Elliot Slotnick, et al., *Obama's Judicial Legacy: The Final Chapter,* 5 J. L. & CT. 363 (2017). But the process of considering nominees to the federal courts is highly regularized and structured within the Senate, which has delegated the task to the Senate Judiciary Committee. *About: Jurisdiction,* COMM. ON THE JUDICIARY, https://www.judiciary.senate.gov/about/jurisdiction (last visited Mar. 30, 2018). The Committee, in turn, has a cadre of staff members on both the majority and minority sides whose sole purpose is to investigate nominees and manage the confirmation process. *See* Nancy Scherer, Brandon L. Bartels, & Amy Steigerwalt, *Sounding the Fire Alarm: The Role of Interest Groups in the Lower Federal Court Confirmation Process*, 70 J. POL. 1026, 1026–28 (2008).

106. Scherer, *supra* note 105, at 1029.

107. *Id.*

108. *See* U.S. CONST. art. III, § 1.

109. U.S. CONST. art. II, § 2.

when making appointments to courts within their states—during the presidency of George Washington;[110] since then, the Senate has continued to insist on presidential consultation with legislators when making nominations.[111] For the most part, however, the appointment of judges and other important government officials was considered so routine that in 1977, the public interest group Common Cause published a white paper, calling the confirmation process "The Senate Rubber Stamp Machine."[112]

A decade later, in 1987, President Ronald Reagan's nomination of Robert S. Bork to the Supreme Court ushered in a new era of scrutiny of judicial nominations—and tit-for-tat retaliation—in the U.S. Senate.[113] Another decade later, then-chairman of the Senate Judiciary Committee ended the formal role of the American Bar Association (ABA) in the judicial confirmation process, signaling a shift away from the use of peer review in the appointment process and toward an even greater politicization of the confirmation process.[114] Former Fourth Circuit Chief Judge J. Harvie Wilkinson has lamented the contemporary confirmation process's eschewing of expertise, writing:

> Any career of distinction will involve its share of risks and controversies; that comes with having been in the arena. Honorable positions taken in the course of honorable professional service, though, are regularly becoming an impediment in the confirmation path, blocking the real leaders of our profession from service, even on the lower federal bench.[115]

Because the confirmation process, like the congressional budget process, is constitutionally-prescribed,[116] the Senate can operate with a relatively freer hand in its activities aimed at influencing the direction of the federal judiciary. Holding hearings is expected, so even when the

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110. LAUREN COHEN BELL, WARRING FACTIONS: INTEREST GROUPS, MONEY, AND THE NEW POLITICS OF SENATE CONFIRMATION 26 (2001).

111. *Id.* at 29.

112. COMMON CAUSE, THE SENATE RUBBERSTAMP MACHINE: A STUDY OF THE U.S. SENATE'S CONFIRMATION PROCESS (1977).

113. *See* Linda Greenhouse, *Bork's Nomination is Rejected,* 58-42; *Reagan 'Saddened'*, N.Y. TIMES (Oct. 24, 1987), https://www.nytimes.com/1987/10/24/us/bork-s-nomination-is-rejected-58-42-reagan-saddened.html

114. *See* Neil A. Lewis, *Head of Senate Judiciary Panel Reconsiders A.B.A. Advisory Role,* N.Y. TIMES (Feb. 19, 1997), https://www.nytimes.com/1997/02/19/us/head-of-senate-judiciary-panel-reconsiders-aba-advisory-role.html.

115. J. Harvey Wilkinson III, *Congress & the Court: Judicial Confirmation,* 137 DAEDALUS 77, 78 (2008).

116. U.S. CONST. art. II, § 2.

Senate is skeptical about a nominee, the act of questioning the nominee does not leave Congress vulnerable to claims that it is overstepping its authority to monitor the courts. In recent years, however, the Senate has used its negative agenda control—that is, its ability *not to hold* hearings or confirmation votes on nominees to attempt to influence the direction of the federal courts.[117]

The information provided in Table I is a snapshot of where the confirmation process stood on December 1 from 2009 to 2017. As Table I demonstrates, the number of vacancies on December 1 has exceeded the number of pending nominations in each of the last nine years, sometimes by more than double. This may mean that the White House has been slow to make nominations. But the fact that there are often far more vacancies and/or pending nominations on December 1 of each year than confirmations that have occurred to date likewise demonstrates that the rate and pace of the Senate confirmation process for federal judges has not kept pace with the need. Indeed, the Congressional Research Service has documented the extent to which the number of days between nomination and confirmation of even non-controversial nominees to the federal courts has increased dramatically over the last several years. For example, a 2012 CRS Report for Congress demonstrated that not a single one of President Barack Obama's nominees to the Circuit Courts of Appeals waited fewer than 100 days to be confirmed, and 63.6 percent waited for 200 or more days to be confirmed.[118] That proportion represented a dramatic increase over the same proportion of Reagan (5.1 percent), Bush I (7.3 percent), Clinton (22.2 percent), and Bush II (35.7 percent) nominees who waited 200 or more days for confirmation.[119]

117. Michael D. Ramsey, *Why the Senate Doesn't Have to Act on Merrick Garland's Nomination,* THE ATLANTIC (Mar. 15, 2016), https://www.theatlantic.com/politics/archive/2016/05/senate-obama-merrick-garland-supreme-court-nominee/482733/.

118. BARRY J. MCMILLION, CONG. RESEARCH. SERV., R42732, LENGTH OF TIME FROM NOMINATION TO CONFIRMATION FOR "UNCONTROVERSIAL" U.S. CIRCUIT AND DISTRICT COURT NOMINEES: DETAILED ANALYSIS 10 tbl. 1 (2012).

119. *Id.*

Table I: Judicial Vacancies and Senate Confirmations, 2009–2017[120]

Year	Judicial Vacancies	Nominations Pending	Conf.'s Jan. 1	Since
2017	144	44	24	
2016*	105	59	11	
2015*	66	27	21	
2014	58	28	71	
2013	94	52	83	
2012	83	44	36	
2011	84	44	123	
2010	108	53	29	
2009	97	16	17	
AVG.	93	41	46	

Note: * = Divided party control of the Senate and White House.

The dramatic increase in the amount of time it takes nominees to be confirmed today relative to 30 years ago is the logical outgrowth of three decades of legislative scrutiny of judicial activity. It is also a reflection of the extent to which Congress is willing to use its authority to attempt control over the judicial branch. In the opening paragraph of his 2008 essay "Judicial Independence, Judicial Accountability, and Interbranch Relations," Stephen B. Burbank writes:

> Recent years have witnessed attacks on the courts, federal and state, that have been notable for both their frequency and their stridency. Many of these attacks have been part of strategies calculated to create and sustain an impression of judges that makes courts fodder for electoral politics. The strategies reflect a *theory of judicial agency*, the idea that judges are a means to an end, and that it is appropriate to pursue chosen ends through the

120. Values represent the absolute number of judicial vacancies and nominations pending as of December 1 in the years indicated. The number of confirmations is the cumulative number of confirmations across the entire year as of December 1 in the years indicated. Data compiled by author by statistics maintained by the Administrative Office of the U.S. Courts.

> selection of judges who are committed or will commit to them in advance.[121]

That is to say that, as Whittington notes, "the political appointments process creates regular opportunities for elected officials to bring the Court into line with political preferences."[122]

B. Monitoring Decisions

Multiple previous studies document the extent to which members of Congress are attentive to the actions of the federal courts. Writing in the *Yale Law Review* in 1991, William Eskridge noted:

> Congress and its committees are aware of the Court's statutory decisions, devote significant efforts toward analyzing their policy implications, and override those decisions with a frequency heretofore unreported. Congressional overrides are most likely when a Supreme Court interpretation reveals an ideologically fragmented Court, relies on the text's plain meaning and ignores legislative signals, and/or rejects positions taken by federal, state, or local governments.[123]

Congress' efforts to rein in the courts for decisions with which it disagrees dates as far back as *Chisholm v. Georgia*,[124] after which Congress passed, and the states ratified, the Eleventh Amendment.[125] After the Civil War, Congress attempted to require a two-thirds majority of the Court for any decision to invalidate an act of Congress.[126] Nevertheless, as recently as the early 1990s, scholarship on Congress had

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121. Stephen B. Burbank, *Judicial Independence, Judicial Accountability, & Interbranch Relations*, 95 GEORGETOWN L. J. 909, 910 (2007) (emphasis added).

122. Keith E. Whittington, *Interpose Your Friendly Hand': Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV., 583, 583 (2005).

123. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331, 332 (1991).

124. Chisholm v. Georgia, 2 U.S. 419 (1793).

125. William A. Fletcher, *Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition against Jurisdiction*, 35 STAN. L. REV. 1033, 1058 (1982) (noting that the reactions to the Court's decision in *Chisholm* were immediate as a proposed constitutional amendment was introduced the very next day in the U.S. House of Representatives).

126. JOHN B. GATES, THE SUPREME COURT AND PARTISAN REALIGNMENT 44 (1992); Bryant Putney, *The President, the Constitution, and the Supreme Court*, CQ RESEARCHER (June 19, 1935), http://library.cqpress.com/cqresearcher/document.php?id=cqresrre1935061900.

largely neglected to analyze congressional responses to Supreme Court decisions. By the mid-1990s, as if in response to Eskridge's claim that political science had ignored congressional response to Supreme Court decisions,[127] political scientists Joseph Ignagni and James Meernik painstakingly documented the efforts by Congress to overturn Supreme Court decisions via legislation.[128] Nancy Staudt, Renè Lindstädt, and Jason O'Connor, who treat congressional response to Supreme Court decision-making as oversight, found that Congress actively responded to fifty-four percent of Supreme Court decisions involving tax law between the period 1954 and 2004,[129] including efforts either to override or codify the Court's decision in thirty-six percent of cases.[130]

In Table II, I report on Congress' response to all Supreme Court cases granted oral argument or decided by a *per curiam* decision from the October Term 2009 through the October Term 2016.[131] Staudt, Lindstädt, and O'Connor categorize congressional response to Supreme Court decisions as falling into the following categories: override proposals, codification proposals, positive citations, negative citations, citations for purposes of understanding the Supreme Court's approach to statutory interpretation, and the use of citations in nomination proceedings.[132] I adopt similar categories, but modify their approach to capture more fully the nuances of congressional response.[133]

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127. Eskridge, *supra* note 123, at 335.

128. Joseph Ignagni & James Meernik, *Explaining Congressional Attempts to Reverse Supreme Court Decisions*, 47 POL. RES. Q. 353 (1994).

129. Nancy Staudt, Renè Lindstädt, & Jason O'Connor. *Judicial Decisions As Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954–2005*, 82 N.Y.U. L. REV. 1340, 1352 (2007).

130. *Id.* at 1343.

131. To identify these cases, I use the lists of cases decided by term on SCOTUSblog, which can be found by typing in the term of interest to the search feature. *See* SCOTUSBLOG, http://www.scotusblog.com (last visited Mar. 30, 2018). For example, the cases decided in the October 2013 Term can be found at *October Term 2013,* SCOTUSBLOG, http://www.scotusblog.com/case-files/terms/ot2013/ (last visited Mar. 30, 2018).

132. Staudt, *supra* note 129, at 1354.

133. I added three additional categories to the ones Staudt, Lindstädt, and O'Connor used. I included these additional types of congressional activities because while they may not be a direct response to a Supreme Court decision, they send an important signal to the courts that Congress is watching and—as noted previously—signaling important consequences in the oversight context. The first is a category to identify efforts to strip jurisdiction from the courts to hear future cases as a response to a decision. The second is a category that identifies reference to congressional mentions of cases prior to the Court's decision, since these may be proactive efforts to influence a Supreme Court decision. For example, on December 23, 2009, United States Senator Patrick Leahy made a lengthy speech on the Senate floor in which he chronicled the legislative history of the Torture Victims Protection Act. 155 CONG. REC. S13869 (daily ed. Dec. 23, 2009) (statement of

Table II: Congressional Response to Supreme Court decisions, October 2009-June 2017[134]

Congressional Response	**Frequency**
Cases That Did Not Trigger A Response	592
Cases That Triggered A Response	99
Type of Response	
Jurisdiction Stripping Proposal	2
Override Proposal	22
Codification Proposal	6
Hearing Held	7
Positive Citation	20
Negative Citation	25
Cited for Purposes of Understanding Court's Approach to Statutory Interpretation	4
Used in Nomination Proceeding	20
Pre-decision speech or reference	9
Other	15

Notes: Compiled by author using keyword searches for case citations in records retrieved from www.Congress.gov. Frequencies for specific response types do not sum to 99 because many cases elicited multiple responses.

Table II demonstrates that Congress does not respond to all or nearly all of the Court's decisions. This finding is consistent with Joseph Ignagni and James Meernik's finding that Congress responded to just twenty-nine percent of Supreme Court decisions that overturned a federal statute enacted by Congress.[135] This finding also comports with Richard Hasan's 2013 update of Eskridge's data that showed that congressional

Senator Patrick Leahy). At the end of his speech, Senator Leahy said, "I hope that the Supreme Court studies this definitive and comprehensive history as it considers the case of *Samantar v. Yousuf*." *Id.*

134. Most of the categories I used in the table below are self-explanatory. For the purposes of Table I, and following on the methodology of Staudt, Lindstädt, and O'Connor, override proposals are defined as bills that seek to overturn a Supreme Court decision and codification proposals are bills that are introduced to codify the Court's decision. Unlike Staudt, Lindstädt, and O'Connor, I only coded those mentions of Court decisions that are explicitly positive as a positive citation, and only those mentions that are explicitly negative (e.g. "the Court erroneously decided") as negative. Neutral mentions were coded as "other."

135. Ignagni, *supra* note 128, at 364.

overrides have become much more rare since 2001.[136] The data presented in Table II are likewise not surprising given that many of the Court's decisions included in this analysis address matters far removed from congressional interest.

Although Congress does not respond to all Supreme Court decisions, Table II makes clear that when Congress does respond, it can be quite aggressive. While just two of the ninety-nine responses reviewed above resulted in the introduction of a bill to strip jurisdiction from the federal courts, among the "other" responses was a legislative proposal introduced on January 3, 2017 by Congressman Steve King (R-IA) to prohibit the federal courts from citing *National Federation of Independent Business et al. v. Sebelius*,[137] *King v. Burwell*,[138] or *Burwell v. Hobby Lobby*.[139, 140] Moreover, Table II makes clear that Congress was far more likely to introduce legislation to override a Supreme Court decision than to codify it—by nearly a four to one margin (twenty-two override efforts compared with just six codification efforts). And while some override measures are offered simply to clarify congressional intent,[141] others are intended to gut the Court's decision. For example, on September 23, 2010, Senator Charles Schumer (D-NY) is recorded in the *Congressional Record* as follows:

> I rise today in support of DISCLOSE, the Democracy Is Strengthened by Casting Light on Spending in Elections Act, and I urge my colleagues to support this bill. This bill is in direct

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136. Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 101, 105 (2013).

137. National Federation of Independent Business et al. v. Sebelius, 567 U.S. 519 (2012).

138. King v. Burwell, 135 S.Ct. 2480 (2015).

139. Burwell v. Hobby Lobby, 134 S.Ct. 2751 (2014).

140. *See* H.R.177, 115th Cong. (1st Sess. 2017).

141. For example, during the debate on the conference report on the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pennsylvania House member Paul Kanjorski noted that the bill would fix an erroneous interpretation by the Supreme Court of legislative intent:

> In the case of *Morrison v. National Australia Bank*, the Supreme Court last week held that section 10(b) of the Exchange Act applies only to transactions in securities listed on United States exchanges and transactions in other securities that occur in the United States. In this case, the Court also said that it was applying a presumption against extraterritoriality. This bill's provisions concerning extraterritoriality, however, are intended to rebut that presumption by clearly indicating that Congress intends extraterritorial application in cases brought by the SEC or the Justice Department.

156 CONG. REC. H5237 (daily ed. June 30, 2010) (statement of Representative Paul Kanjorski).

> response to *Citizens United v. FEC* in which the Supreme Court, led by Chief Justice Roberts and its activist majority, overruled almost a century of law and precedent and held that corporations have the same first amendment rights as people.[142]

Wisconsin Senator Russ Feingold echoed Schumer's view in equally strident language: "Congress has a responsibility to survey the wreckage left or threatened by the Supreme Court's ruling and do whatever it can constitutionally to repair that damage or try to prevent it."[143] As these examples demonstrate, not only was the DISCLOSE Act offered to override the Supreme Court's decision, but its sponsors expressed their disapproval in language that was harshly critical of the Court and even of the Chief Justice.

C. Setting Jurisdictions

Closely connected with Congress' efforts at monitoring judicial decisions are its activities related to setting jurisdictions. Article III, Section 2 of the Constitution gives courts appellate jurisdiction "with such exceptions, and under such regulations as the Congress shall make."[144] As professor and Judge Robert Katzmann explains: "Congress has given the federal courts subject-matter jurisdiction in legislation covering more than three hundred subjects—from matters of great moment to such earthy ones as the Egg Products Inspection Act, the Horse Protection Act, and the Standard (Apple) Barrel Act."[145]

For the most part, Congress' jurisdiction setting activities are benign and routine. When they propose legislation, members of Congress frequently include provisions setting or regulating the federal courts' appellate jurisdiction, or making it clear what the path is within the courts to address claims that may arise under the law.[146] The jurisdictional provisions clarify where appellants frustrated with administrative decisions may enter the federal courts (e.g. at the district or Court of Appeals level or at a court of specialized jurisdiction), impose time limits for judicial review, or specify the circumstances under which a federal court may intervene.

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142. 156 CONG. REC. S7387 (daily ed. Sept. 23, 2010) (statement of Senator Charles Schumer).

143. 156 CONG. REC. S7387 (daily ed. Sept. 23, 2010) (statement of Senator Russell Feingold).

144. U.S. CONST. art. III, § 2, cl. 2.

145. ROBERT A. KATZMANN, COURTS AND CONGRESS 83 (1997).

146. *See, e.g.*, Seth W. Greenfest, *Explaining Congressional Grants of Jurisdiction to Federal District Courts.* 34 JUST. SYS. J. 274 (2013).

In a smaller subset of proposed legislation, however, members of Congress attempt to explicitly eliminate the federal courts' ability to hear or make decisions in cases that arise under a particular provision of the law, or that involve a particular legal claim. In some instances, Congress attempts to use its jurisdiction stripping ability to retaliate against the judicial branch for previous decisions with which it disagrees or to prevent the courts from deciding a future case in a particular way. For example, Charles Geyh notes: "In 2003, House Republicans began a campaign to strip the federal courts of jurisdiction to hear cases on such subjects as the Pledge of Allegiance and gay marriage."[147] It is almost certainly no coincidence that the Supreme Court had heard and decided *Lawrence v. Texas*[148] in spring 2003 and had granted *certiorari* in *Elk Grove United School District v. Newdow*[149] on October 13, 2003.

Legal scholars and political scientists alike have invested significant time and effort in attempting to catalogue and understand when and why Congress attempts to limit judicial jurisdictions. Within political science, previous studies have found that ideologically extreme members of Congress are more likely to attempt to influence the federal courts via *amicus curiae* briefs[150] and introducing bills to strip the federal courts of appellate jurisdiction.[151] Bethany Blackstone considered Congress' responses to Supreme Court decisions between 1995 and 2010, and found that Congress regularly attempts to reverse decisions with which it disagrees through ordinary legislation.[152]

A review of legislation proposed in the House of Representatives between 2009 and 2017 reveals that there were approximately forty pieces of legislation introduced that imposed one or more specific restrictions on the federal courts' jurisdiction.[153] For example, on March 8, 2011, former Congressman Ron Paul (R-TX-14) introduced the "We The People Act" (H.R. 958), which proposed, in part, that:

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147. CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 4 (2009).

148. Lawrence v. Texas, 539 U.S. 558 (2003).

149. Elk Grove United School District v. Newdow, 542 U.S. 1 (2004), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

150. *See generally* Rorie Spill Solberg & Eric Heberlig, *Communicating to the Courts and Beyond: Why Members of Congress Participate as Amici Curiae*, 29 LEGIS. STUD. Q. 591 (2004).

151. Bell & Scott, *supra* note 3, at 196–97.

152. Bethany Blackstone, *An Analysis of Policy–Based Congressional Responses to the U.S. Supreme Court's Constitutional Decisions*, 47 L. & SOC. REV. 199, 199 (2013).

153. *See infra* Table III. Data compiled by the author by keyword search for "jurisdiction" "courts" "federal court" and "no court."

> The Supreme Court of the United States and each Federal court—
>
> (1) shall not adjudicate—
>
> (A) any claim involving the laws, regulations, or policies of any State or unit of local government relating to the free exercise or establishment of religion;
>
> (B) any claim based upon the right of privacy, including any such claim related to any issue of sexual practices, orientation, or reproduction; or
>
> (C) any claim based upon equal protection of the laws to the extent such claim is based upon the right to marry without regard to sex or sexual orientation; and
>
> (2) shall not rely on any judicial decision involving any issue referred to in paragraph (1).[154]

While Paul's bill is quite transparent in its effort to strip the federal courts of their jurisdiction in a wide range of cases, many other congressional efforts are less obvious. And, complicating matters further, there is not necessarily consensus among scholars about how to identify or count bills related to jurisdiction-setting activities, so it is not entirely clear just how frequently such efforts occur.[155]

The data presented in Table III are my own effort to summarize recent jurisdiction-stripping efforts by members of the House of Representatives.[156] Consistent with previous research, I focus on the

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154. H.R. 958, 112th Cong. (1st Sess. 2011).

155. Bell & Scott, *supra* note 3, note .2; Greenfest *supra* note 146 at 277.

156. To compile this table, I reviewed every bill introduced in the House of Representatives between 2009 and 2017 that included the words "jurisdiction" and "court" or "no court" or "federal courts" in it. I identified these using www.Congress.gov's keyword search for legislation introduced in the House. Using an in-text search of each proposed bill, I classified each bill one of four ways: "sets jurisdiction," "adjusts jurisdiction," "strips jurisdiction," or "misclassified." Misclassified cases are those returned in the initial search query that included some combination of the search terms but that did not actually have a substantive impact on judicial jurisdictions. For example, appropriations bills frequently included some combination of the search terms but were simply referring to, and not adjusting, the jurisdiction of specific courts. It is also important to note that classifying legislation is not necessarily straightforward, and that some cases required me to make a judgment call with regard to whether a proposal was setting, adjusting, or stripping jurisdiction. For that reason, in Table III, I have

House of Representatives, because its members have fewer direct methods of influencing judicial behavior than do senators, who are constitutionally required to participate in the judicial appointment process.[157] Table III reports, for each Congress, the number of discrete efforts to strip jurisdiction from the federal courts, as well as provides a list of the subjects that Congress sought to prevent the courts from considering.

As Table III demonstrates, jurisdiction-stripping legislation is not a significant proportion of bills introduced in the House of Representatives. And, it should be noted that jurisdiction-stripping efforts are rarely successful. For that reason, it might be tempting to ignore the times where Congress has made efforts to strip jurisdiction. But doing so would cause us to miss the substance and impact of such efforts when they do occur. For example, while the number of specific efforts to strip jurisdiction is small in any given Congress, it is clear that these proposals seek to limit the courts from making decisions on several politically salient issues, including marriage equality, religious freedom, immigration, abortion, and voting rights. Furthermore, while very few jurisdiction efforts successfully wend their way through the legislative process, just the fact that they are introduced sends important signals to the courts that Congress is paying attention to their work; as we have seen, and as members of Congress know, such signaling can have effects on the courts' behavior in future cases.

Perhaps not surprisingly, given the subjects of the jurisdiction-stripping attempts, a sizeable majority of the efforts at limiting jurisdiction noted in Table III were offered by Republican members of the House of Representatives—of the forty attempts catalogued here, just nine were offered by Democrats. In all, the identification here of a small number of politically-charged efforts to strip jurisdiction in recent years is consistent with Bell and Scott's conclusions that "efforts to restrict the federal courts' jurisdiction are rare events undertaken most frequently by members of Congress who are ideologically at the conservative extreme of their congressional parties."[158]

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included only those bills that clearly stripped jurisdiction from the federal courts; I did not include those that fell into my middle "adjusts" jurisdiction category.

157. *See e.g.*, Bell & Scott, *supra* note 3, at 197. Another reason for focusing exclusively on the House is that it avoids the problem of how to count identical, coordinated efforts in the Senate.

158. Bell & Scott, *supra* note 3, at 200.

Table III: Congressional Efforts to Strip Judicial Jurisdictions, 111th –115th Congresses

Cong.	Number of Measures	Subject Matter or Law[159]
111th	3	Defense of Marriage Act Americans With Disabilities Act Religious freedom, privacy, marriage equality
112th	12	Immigration Federal court jurisdiction Liability protection for fuels/additives Whistleblower hearing deadlines Defense of Marriage Act Americans With Disabilities Act Religious freedom, privacy, marriage equality
113th	9	Liability protection for fuels/additives Visa Refusals Projects in Forest Reserve Revenue Areas Review of sentencing in cases where a law enforcement officer was murdered Good Samaritan protection for using AED Waivers on inadmissibility in immigration Voting Rights Americans With Disabilities Act
114th	7	Marriage equality Visa Refusals Abortion Immunity from liability related to AEDs Assaults on state/local law enforcement officers Voting Rights
115th (1st Sess.)	9	Chapter 11 filings Visa Refusals Immigration Assaults on state/local law enforcement officers Abortion Voting Rights Americans With Disabilities Act
Total	**40**	

Notes: Compiled by author by keyword search for "jurisdiction" "courts" "federal court" and "no court."

159. Only discrete subjects or laws are identified here; that is, in some congresses, the same bill was introduced more than once.

V. CONCLUSION: JUDICIAL BRANCH OVERSIGHT AS A POLITICAL ACTIVITY

In October 2017, the U.S. Senate Judiciary Committee held an oversight hearing on the United States Department of Justice.[160] In his opening statement, Committee Chairman Charles Grassley (R-IA) stated:

> Oversight is just one of the critical functions and constitutional responsibilities for the legislative branch. It's an opportunity for Congress to investigate and question the policies and actions of the executive branch. It's an opportunity for the executive branch to take responsibility for them. And it's an opportunity for Congress to defend its constitutional powers and to check any abuses by an over-reaching executive branch.[161]

Few would argue with Grassley's statement. Yet, having reviewed the myriad ways in which Congress watches, reacts to, and attempts to control the federal judiciary, it is likely that few would disagree that Congress also frequently behaves as if Grassley's statement applies equally to the judicial branch. And yet, as I have noted throughout this article, the literature on congressional oversight has tended to treat congressional efforts at influencing judicial branch activities as something other than *per se* oversight.

As this article has demonstrated, however, the federal courts are in many ways remarkably similar to the agencies in the executive bureaucracy, if not in their function than in their structure and in their dependence upon Congress for physical, financial, and staff resources. The courts are organized hierarchically, as is the executive branch. The Chief Justice of the United States presides not only over the Supreme Court, but also over the Judicial Conference of the United States, which means that he "has many of the same responsibilities as a more typical agency head."[162] The courts go through the same annual appropriations process that the executive branch agencies go through. Congress creates support agencies for the federal judiciary and monitors their work—and in the case of the United States Sentencing Commission, monitors its

160. *Oversight of the U.S. Department of Justice*, SENATE COMM. ON THE JUD. (Oct. 18, 2017), https://www.judiciary.senate.gov/meetings/10/18/2017/oversight-of-the-us-department-of-justice.

161. *Grassley Statement at Justice Dept. Oversight Hearing*, CHUCK GRASSLEY: UNITED STATES SENATOR FOR IOWA (Oct. 18, 2017), https://www.grassley.senate.gov/news/news-releases/grassley-statement-justice-dept-oversight-hearing.

162. Toma, *supra* note 66, at 135.

work for compliance with congressional directives.[163] The national legislature also is attentive to the decisions that the courts make and is responsive to interest group and constituency fire alarms in much the same way that Congress responds to signals about executive branch actions. Likewise, mindful of the possibility of response, the courts watch for signals from Congress and may alter their preferred course of action in order to reduce the likelihood of provoking a congressional response.

To be sure, there are important distinctions between oversight of the executive branch and oversight of the judicial branch, and I would be remiss if I did not mention them. First, where Congress delegates authority to the executive branch to carry out assigned responsibilities, Congress typically does not delegate its own authority to the judicial branch.[164] This reduces its incentives to actively monitor the courts, since the courts are not the direct implementers of congressional will. Moreover, because of the principle of judicial independence enshrined in the Constitution and preserved through more than two centuries of interactions between Congress and the federal courts, individual judges and justices are insulated from congressional inquiry in ways that executive branch officials are not. The timing of the federal judicial process likewise reduces congressional capacity to monitor the courts. Whereas Congress will look to executive branch agencies to implement in short order, it can take a significant amount of time for a case to wend its way through the federal courts for a final decision by the U.S. Supreme Court—assuming a case is filed to begin with. Finally, the judicial branch of government is much smaller in size than the executive bureaucracy, and as a result, it may be able to monitor itself more effectively than can the much larger executive branch agencies.

But the differences between the federal courts and the executive bureaucracy are not so stark as to render Congress' activities in monitoring each entirely separate from its activities in monitoring the other. Certainly, not every congressional activity relative to the federal judiciary ought to be considered oversight. At the same time, Congress' use of its institutional authority to hold committee hearings inquiring into judicial decisions, to set the courts' budgets, and to determine who gets

163. *About,* U.S. SENTENCING COMM., https://www.ussc.gov/about-page (last visited Mar. 31, 2018).

164. One exception is the U.S. Sentencing Commission. *But see* Liman, *supra* note 78 (arguing that the Commission should have been found to be an unconstitutional delegation of legislative authority to the judicial branch).

to serve as a federal judge looks an awful lot like Congress' actions to hold the executive branch accountable.[165]

This Article has taken steps to remedy the disconnect between the literature on congressional oversight of the executive branch and oversight of the judicial branch. It has demonstrated that several of the theories that explain congressional oversight in the executive branch context also explain Congress' interactions with the judicial branch. Moreover, this article has demonstrated that while Congress may be challenged in its capacity to provide effective oversight of the executive branch, it is able to effectively curb the courts. While traditional oversight activities, such as hearings and requests for information are likely to be more limited in the judicial context,[166] when Congress turns its sights on the courts, it brings significant constitutional, statutory, and institutional authority to bear on reviewing judicial actions and offering correction.

In sum, if congressional oversight of the executive branch is political control of the bureaucracy, then it is hard not to view the totality of Congress' efforts at monitoring and influencing the judicial branch chronicled here as attempts at political control of the judiciary. For this reason, it is unfortunate that the literature on congressional oversight continues to ignore almost completely Congress' role in shaping the federal courts. Bringing the courts into the oversight literature will provide additional insights into the ways in which Congress approaches its oversight responsibilities, while allowing a fuller understanding of the impact of congressional oversight on the judicial branch.

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165. *See* U.S. CONST. art. II, § 2.

166. During the 114th Congress, the U.S. Senate Homeland Security and Governmental Affairs Committee, which is the Senate's standing committee with primary authority to engage in oversight of government activities, held only one hearing with a significant focus on the federal courts out of more than 120 total committee and subcommittee hearings. That hearing, a subcommittee hearing entitled "Examining the Proper Role of Judicial Review in the Federal Regulatory Process" explored the "role of the judiciary in the federal rulemaking process" and whether courts have "deferred more and more to agencies—substituting agency judgment for their own." *See Examining the Role of Judicial Review in the Federal Rulemaking Process*, U.S. SENATE COMM. ON HOMELAND SEC. AND GOV'T AFF. (Apr. 8, 2015), https://www.hsgac.senate.gov/hearings/examining-the-proper-role-of-judicial-review-in-the-federal-regulatory-process.