A COMPARISON OF THE HOUSE AND SENATE JUDICIARY COMMITTEES AND THEIR RELATIONSHIPS TO THE FEDERAL COURTS

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I. INTRODUCTION

One key element of the interactions between the U.S. Congress and the federal courts is the relationship between the federal judiciary and the primary committees in Congress. Both the House Judiciary Committee and the Senate Judiciary Committee have jurisdiction over most issues affecting the judicial branch. There is very little academic literature that directly compares the U.S. House and Senate Judiciary Committees. It can be even harder to find literature that compares the committees' respective relationships and their interactions with the federal courts. This article will attempt to fill this void. This article will bring a new institutionalist approach to the analysis of the interactions between Congress and the federal courts,[1]

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focusing on the respective relationships between the federal courts and each of the two Judiciary Committees in Congress. This research is supplemented by personal interviews that I have conducted over the years with Members of Congress, congressional staff, federal judges, lobbyists, and those working in think tanks and other organizations that focus on the work of the judiciary and its relationship to Congress.[2]

Many judicial and congressional scholars conclude that Congress and the federal courts are two political institutions that should not be studied in isolation.[3] As Kevin den Dulk and Mitchell Pickerill have argued, "treating the Court or Congress in isolation misconstrues the nature of inter-institutional lawmaking in the United States. The actions of each institution have important reciprocal effects; both contribute to the form and substance

Patron-Cohen Endowed Faculty Research Fund at Clark University. Special thanks to Michael Spanos for his help in preparing this manuscript.[1] New institutionalism means that scholars explore how "institutional cultures, structures, rules, and norms constrain the choices and action of individuals when they serve in a political institution. New institutionalism thus combines the interests of traditionalist scholars in studying formal institutional rules and structures with the focus of behavioralist scholars on examining the action of individual political actors." MARK C. MILLER, JUDICIAL POLITICS IN THE UNITED STATES 185 (2015). [HEREINAFTER MILLER, JUDICIAL POLITICS]. For example, Gibson has summarized the study of judicial behavior using the new institutionalist model in this way, "In a nutshell, judges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do." James L. Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 AMER. POL. BEHAVIOR 7, 9 (1983).

[2] For all of my interviews, I promised the participants that I would not reveal their names nor the identities of their employers. I first interviewed Members of Congress and staff who served on the House Judiciary Committee (among other committees) in 1989. An analysis of those interviews including quotations from the interviews can be found in MARK C. MILLER, THE HIGH PRIESTS OF AMERICAN POLITICS: THE ROLE OF LAWYERS IN AMERICAN POLITICAL INSTITUTIONS (1995). [HEREINAFTER MILLER, HIGH PRIESTS]. I conducted other interviews during the 2006-2007 academic year, and the analysis of those interviews and quotations can be found in MARK C. MILLER, THE VIEW OF THE COURTS FROM THE HILL (2009). [HEREINAFTER MILLER, VIEW OF THE COURTS]. For this current project, I conducted additional interviews during the summers of 2017 and 2018. Financial assistance for conducting these latest interviews came in part from the Patron-Cohen Endowed Faculty Research Fund at Clark University.

Over the years, it has become much more difficult to interview current congressional staff, especially in the House of Representatives. After a request for an interview with a House staffer, I received the following email in July of 2018, which has become a typical response for interview requests. "Unfortunately, our office has a blanket policy of not participating in any types of research or surveys, including ones that aren't for attribution or where data is not disaggregated."

[3] *See, e.g.*, ROBERT A. KATZMANN, ED., JUDGES AND LEGISLATORS: TOWARDS INSTITUTIONAL COMITY (1988); CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM (2006); J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM (2004);

of law."[4] These interactions are a normal part of the American system of separation of powers. As Thomas Clark reminds us, "[s]eparation of powers represents perhaps the most important contribution the American experiment has made to constitutional democracy throughout the world."[5]

While there is a great deal of academic literature that analyzes the workings of the U.S. Congress or the federal judiciary independently, there is far less literature that examines the interactions between these two federal governmental institutions.[6] Unfortunately, this relationship is not well understood by scholars, practitioners, or members serving in the two governmental institutions.[7] Our lack of understanding of the interactions between these two branches can have serious public policy ramifications because each institution plays a significant role in the legislative and policymaking process. As Pickerill explains, "Lawmaking in our separated system is continuous, iterative, speculative, sequential, and declarative . . . and consequently each institution in our system must necessarily anticipate, interact with, and react to the actions of the other institutions."[8] Thus, in general, the relationship between Congress and the federal courts is generally ill-defined, amorphous, and perhaps situationally dependent.[9]

Not only do we need a better understanding of the relationship between Congress and the courts, but also these two branches do not understand each other very well. As Robert Katzmann has argued, "Th[e] study of judicial-congressional relations is rooted in the premise that the two branches lack appreciation of each other's processes and problems, with unfortunate consequences for both and for policymaking more generally."[10] In 2018, I interviewed an employee of a think tank who also recognized this problem,

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[4] Kevin R. den Dulk & J. Mitchell Pickerill, *Bridging the Lawmaking Process: Organized Interests, Court-Congress Interactions, and Church-State Relations*, *35* POLITY 419, 420 (2003).

[5] TOM S. CLARK, THE LIMITS OF JUDICIAL INDEPENDENCE 1 (2011).

[6] Some example of works that examine the interactions between Congress and the federal courts include STEPHEN M. ENGEL, AMERICAN POLITICIANS CONFRONT THE COURT: OPPOSITION POLITICS AND CHANGING RESPONSES TO JUDICIAL POWER (2011); ROSS K. BAKER, STRANGERS ON A HILL: CONGRESS AND THE COURT (2007); GEYH, *supra* note 3; PICKERILL, *supra* note 3; JEB BARNES, OVERRULED?: LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS (2004); GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY (2003); COLTON C. CAMPBELL AND JOHN F. STACK, JR., EDS., CONGRESS CONFRONTS THE COURT: THE STRUGGLE FOR LEGITIMACY AND AUTHORITY IN LAWMAKING (2001); KATZMANN, *supra* note 3; ROBERT A. KATZMANN, COURTS & CONGRESS (1997).

[7] MICHAEL A. BAILEY, FORREST MALTZMAN, & CHARLES R. SHIPAN, THE AMORPHOUS RELATIONSHIP BETWEEN CONGRESS AND THE COURTS, THE OXFORD HANDBOOK OF THE AMERICAN CONGRESS 834 (ERIC SCHICKLER & FRANCES E. LEE, EDS. 2011).

[8] Pickerill, *supra* note 3, at 4.

[9] *See generally* MILLER, VIEW OF THE COURTS, *supra* note 2.

[10] KATZMANN, *supra* note 3, at 1.

stating, "There is an inherent institutional distance between judges and legislators. There is a lack of understanding between the branches. Most Members of Congress only have a vague idea of what the federal courts actually do."[11] Given this lack of understanding between the branches, it is not surprising that our understanding of the relationship between the two institutions is often fuzzy. The constitutional relationship between the two branches is equally nebulous. As Michael Bailey, Forrest Maltzman, and Charles Shipan conclude, "Whereas Congress's relationship with the executive is spelled out in detail in the Constitution, the relationship between Congress and the judiciary was left by the founders to be defined by history. Since history is rarely tidy or consistent, the relationship that exists between the courts and Congress is as messy as the Constitution itself."[12] This messiness is also reflected in the different ways that the two Judiciary Committees interact with the federal judiciary.

II. THE JUDICIARY COMMITTEES AS REFLECTING THE CULTURES OF THEIR RESPECTIVE CHAMBERS

In many ways, the House and Senate Judiciary Committees reflect the institutional cultures of their respective broader chambers. As Woodrow Wilson in 1885 famously observed, "Congress in session is Congress on public exhibition, whilst Congress in its committee-rooms is Congress at work."[13] Generally, the House is designed to meet the needs of the majority party in the chamber, while the Senate is much more protective of the rights of individual Senators.[14] House members, with their short two-year terms and generally smaller, often more homogeneous constituencies, are normally closer to the views of the voters in part because House members are constantly running for reelection.[15] The House is also a highly hierarchical institution where power alternates over time between party leaders and committee chairs.[16] Ambitious U.S. Representatives must find ways to position themselves to gain these leadership positions if power in the chamber is one of their goals.[17] Congressmen and Congresswomen serve on a relatively small number of committees, and House members tend to specialize through their committee posts in order to be noticed in their very

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11 *See supra* note 2 and accompanying text.

12 BAILEY, MALTZAN, & SHIPAN, *supra* note 7, at 835.

13 WOODROW WILSON, CONGRESSIONAL GOVERNMENT (1885).

14 David W Rohde, *Committees and Policy Formulation*, *in* THE LEGISLATIVE BRANCH 219 (Paul J. Quick & Sarah A. Binder eds., 2005).

15 *Id*.

16 *See, e.g.*, John H. Aldrich & David W. Rohde, *Lending and Reclaiming Power: Majority Leadership in the House Since the 1950's*, *in* CONGRESS RECONSIDERED (Lawrence C. Dodd & Bruce I. Oppenheimer, eds., 11TH ED. 2017).

17 RICHARD F. FENNO, CONGRESSMEN IN COMMITTEES (1973).

large and crowded chamber.[18]

Senators, on the other hand, have the luxury of six-year terms and have larger, usually more heterogeneous, constituencies within their states which often force them to be generalists who take a broader public policy view on many issues.[19] In addition, the Senate has the same number of committees as the House with far fewer members to fill those committee slots.[20] While House members concentrate on a small number of committees, Senators are often spread very thin among a large number of committee and subcommittee assignments.[21] On the other hand, the smaller size of the chamber also benefits Senators because almost every Senator in the majority party is a committee or subcommittee chair.[22] Senators often rely on staff for assistance in making committee decisions more than House members do.[23]

Floor rules in the Senate make it easier for individual Senators to bypass the committees and offer their policy preferences as amendments on the floor, even if those amendments are not germane to the underlying substance of the legislation.[24] The House, on the other hand, has a strict germaneness rule that requires all committee and floor amendments to legislation to be of a similar subject matter to the underlying bill.[25] The Senate also does not have the equivalent of the House Rules Committee, which must approve all legislation coming to the floor. The House Rules Committee sets the terms of floor debate for all bills and regulates the number and source of amendments that members can offer on the floor.[26] The Senate floor is much more freewheeling than the House. For example, the Senate has a filibuster rule, which requires sixty votes to invoke cloture and thus end debate on any measure subject to the filibuster.[27] As Bryan Marshall and Bruce Wolpe note, "[t]he Senate's small size, procedural prerogatives, and growing individualism have meant that the chamber's committees have had less power and have been less critical for achieving members' goals than their House counterparts."[28] In large part because of the ability of Senators to

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18 Rohde, *supra* note 14, at 209–10.

19 ROSS K. BAKER, HOUSE & SENATE 9-11 (4TH ED. 2008).

20 *Id*. at 39.

21 Barbara Sinclair, *The New World of U.S. Senators*, CONGRESS RECONSIDERED 5 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 11th ed., 2017).

22 *Id.*

23 *Id.*

24 *Id.* at 9.

25 WALTER J. OLESZEK, MARK J. OLESZEK, ELIZABETH E. RYBICKI & WILLIAM A. HENIFF, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 211-215 (10th ed. 2015).

26 Rohde, *supra* note 14, at 219.

27 SARAH A. BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK (2003).

28 BRYAN W. MARSHALL AND BRUCE C. WOLPE, THE COMMITTEE, 43 (2018).

bypass committees and offer their amendments directly on the floor, most Senate committees are much weaker than the committees in the House, as is the committee system as a whole.[29]

In general, committees in Congress serve various functions for the parent chamber. From a broader institutional perspective, congressional committees fulfill at least three different functions: drafting legislation, reporting legislation to their respective full chambers, and having oversight and investigatory powers.[30] Senate committees, of course, have the additional power of reviewing presidential nominations within their respective jurisdictions.[31] Congressional committees can differ greatly in their jurisdictions, political environments, decision-making styles, and institutional cultures.[32] Given the importance of committees in both chambers of Congress, but especially in the U.S. House of Representatives, both chambers have made a series of institutional and structural changes to the committee system over the years.[33]

Committee membership helps members fulfill various professional and policy goals.[34] Richard Fenno argued that the institution of the congressional committee system was designed in part to meet the individual goals of committee members such as reelection, public policy formation, power within the chamber, and perhaps higher office.[35] Fenno then created a three category typology of congressional committees based on the primary goals that draw members to that specific committee: reelection committees, policy committees, and power in the chamber committees.[36] "Member goals are less easily characterized in the Senate than in the House" because of the large number of committees on which an individual Senator serves and because nearly all Senators can get a seat on one of the top four committees.[37]

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29 Rohde, *supra* note 14, at 219.

30 CHRISTOPHER J. DEERING & STEVEN S. SMITH, COMMITTEES IN CONGRESS 11-12 (3RD ED. 1997).

31 LAUREN COHEN BELL, WARRING FACTIONS: INTEREST GROUPS, MONEY, AND THE NEW POLITICS OF SENATE CONFIRMATION 7 (2002).

32 MILLER, HIGH PRIESTS, *supra* note 2, at 139–40.

33 For a brief history of some of the most important changes to the committee system in the House of Representatives, *see* MARSHALL & WOLPE, *supra* note 28, at 5–9.

34 FENNO, *supra* note 17.

35 FENNO, *supra* note 17.

36 FENNO, *supra* note 17. Some scholars refer to the power in the chamber committees as influence committees or prestige committees. *See* DEERING & SMITH, *supra* note 30, at 63.

37 FENNO, *supra* note 17, at 78.

Almost all commentators classify the two Judiciary Committees as policy committees,[38] which attract members (often lawyer-legislators) interested in the legalistic, often court-related jurisdiction of the committees.[39] Both of these committees have been some of the most active in their respective chambers. For instance, from 1947-1968, each committee ranked fourth in its chamber for the largest number of roll call floor votes held on bills originating in these committees.[40] In addition, the House Judiciary Committee has had more bills and resolutions referred to it than any other committee in the House.[41] The Judiciary Committees also hold most of the constitutional hearings in Congress.[42] For example, from 1995-2009, the two Judiciary Committees held seventy-two percent of the constitutionally-based hearings (or hearings in which constitutional issues are prevalent) in the legislative branch.[43] Both the House and Senate Judiciary Committees have a generally lawyerly decision-making culture that is sometimes extremely partisan in nature and thus rife with conflict.[44]

The committees also attract the attention of a wide variety of interest groups on all sides of the highly controversial issues under their jurisdiction.[45] Thus, some have referred to the House Judiciary Committee like its Senate counterpart as a "national issue committee."[46] As Roger Davidson and Oleszek explain, "[t]he Judiciary Committees are buffeted by diverse and competing pressure groups that feel passionately on the volatile issues such as abortion, school prayer, and gun control. The committees' chances for achieving agreement among their members or on the floor depend to a large extent on their ability to deflect such issues altogether or to accommodate diverse groups through artful legislation drafting."[47] The

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[38] *SEE, E.G.*, CHARLES S. BULLOCK, III, *MOTIVATIONS FOR U.S. CONGRESSIONAL COMMITTEE PREFERENCES: FRESHMEN OF THE 92ND CONGRESS,* 1 LEGIS. STUDIES Q. 201-12 (1976); DEERING & SMITH, *supra* note 30, at 64, 73, 80, 82; F. SCOTT ADLER, WHY CONGRESSIONAL REFORMS FAIL 54 (2002); SCOTT A. FRISCH & SEAN Q. KELLY, COMMITTEE ASSIGNMENT POLITICS IN THE U.S. HOUSE OF REPRESENTATIVES 78 (2006).

[39] MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 135.

[40] GEORGE GOODWIN, JR., THE LITTLE LEGISLATURES 106 (1970).

[41] ROGER H. DAVIDSON, JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 104 (Robert A. Katzmann, ed., 1988).

[42] Neal Devins, *Party Polarization and Congressional Committee Considerations of Constitutional Questions*, 105 NW. U. L. REV 737, 750 (2017).

[43] *Id.*

[44] *See generally* MILLER, THE VIEWS OF THE COURTS, *supra* note 2, at 135–38 (discussing severe partisan division on the House Judiciary Committee). *But see* C. LAWRENCE EVANS, LEADERSHIP IN COMMITTEE: A COMPARATIVE ANALYSIS OF LEADERSHIP BEHAVIOR IN THE U.S. SENATE 60-66 (2001) (DISCUSSING THE VARYING EXTENT OF PARTISANSHIP ON THE SENATE JUDICIARY COMMITTEE).

[45] GOODWIN, *supra* note 40, at 102.

[46] GOODWIN, *supra* note 40, at 102.

[47] ROGER H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AND ITS MEMBERS 218 (9th

fact that many of these interest groups care deeply about the decisions of the federal courts has certainly helped shape the relationships and interactions between the two Judiciary Committees and the judicial branch.

Today, both committees are highly partisan and extremely polarized, even more so than their respective chambers. In the 1950s and 1960s, Senate Democrats put an unusually large number of conservatives on the Senate Judiciary Committee.[48] Since that time, however, both the House and Senate Judiciary Committees have usually attracted members from the ideological extremes of each party.[49] A Republican staffer for the House Judiciary Committee explained to me in 2018 that "[t]he Committee draws more extreme members who are especially passionate about their pet issues."[50] Neal Devins agrees with this analysis, noting, "[j]udiciary Committee polarization is more extreme than party polarization elsewhere because the Judiciary Committees tend to attract especially ideological lawmakers."[51]

Committee assignments are handled by each party in each chamber, but members often request assignments to particular committees.[52] At times, members were eagerly seeking membership on the Judiciary Committees, while during other periods the Judiciary Committees became highly unattractive. In the 1950s and 1960s, legislators saw membership on both committees as fairly desirable.[53] Writing in the late 1980s, Randall Ripley argued that the Senate Judiciary Committee was still one of the most attractive committee in the Senate.[54] In the 1980s, however, members started to leave the Senate Judiciary Committee.[55] Chairman Joe Biden (D-DE) was especially concerned about member recruitment to the committee after the all-male and all-white committee voted to confirm Justice Clarence Thomas to the Supreme Court in 1991, despite Anita Hill's allegations of sexual harassment against him.[56] Following the 1992 elections, Biden personally recruited the newly-elected Senator Carol Mosely-Braun (D-IL), an African-American woman, to the committee along with the newly-elected non-lawyer Senator Diane Feinstein (D-CA).[57] After spending only two years on the Judiciary Committee, Senator Mosely-Braun quickly left the Judiciary

ed. 2004).

48 RANDALL B. RIPLEY, CONGRESS: PROCESS AND POLICY 151 (4th ed. 1988) [HEREINAFTER RIPLEY, CONGRESS].

49 MILLER, HIGH PRIESTS, *supra* note 2, at 140.

50 *See supra* note 2 and accompanying text.

51 Devins, *supra* note 432, at 777.

52 RIPLEY, CONGRESS, *supra* note 48, at 155.

53 MORRIS OGUL, CONGRESS OVERSEES THE BUREAUCRACY 138-39 (1976).

54 RIPLEY, CONGRESS, *supra* note 48, at 155.

55 DEERING & SMITH, *supra* note 30, at 82.

56 DEERING & SMITH, *supra* note 30, at 82.

57 DEERING & SMITH, *supra* note 30, at 82.

Committee when a spot on the Finance Committee opened up.[58] Senator Feinstein remained on the committee and currently serves as its ranking minority member.[59]

On the other side of the Capitol, the House Judiciary Committee was ranked as the seventh most desirable committee in the House during the 88th-92nd Congresses (1963-1973) among the twenty standing committees then found in the House.[60] From 1961-1975, forty percent of the freshmen members who requested the House Judiciary Committee listed it as their first choice.[61] The House Judiciary Committee, however, lost its attractiveness. Starting in the 1970s, the House Judiciary Committee had trouble getting enough members to fill all the seats on the committee.[62] During the 93rd-97th Congresses (1973-1983), the House Judiciary Committee dropped to the thirteenth most desirable committee among the twenty regular standing committees,[63] in large part because it departed from its traditional civil rights legislation.[64] Starting in the 1980s, the party leadership in the U.S. House had to change the rules in order to attract more Congress people to the committee.[65] The size of the committee was reduced and the rule that required all members to be lawyers was relaxed.[66] Today, the House Committee has again become fairly large, with forty-one members serving on it in 2019.[67]

The desirability of the Judiciary Committees has changed over time, but the changes have sometimes been uneven between the two parties and within factions of each party. Christopher Deering and Stephen Smith noted that in the 1980s, for example, Democrats had trouble recruiting enough members to serve on the House Judiciary Committee, while conservative Republicans were quite interested in the committee.[68] Along these same

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58 DEERING & SMITH, *supra* note 30, at 82.

59 *See, e.g.*, Press Release, Office of Senator Dianne Feinstein, Feinstein Announces New Judiciary Committee Staff Director, (Sept. 20, 2019), https://www.feinstein.senate.gov/public/index.cfm/press-releases?ContentRecord_id=24DF3C2C-F766-4E84-AD41-F4E2B41C20AA

60 Malcom Jewell & Chu Chi-Hung, *Membership Movement and Committee Attractiveness in the U.S. House of Representatives, 1963-1971*, 18 AM. J. POL. SCI. 433, 438 (1974).

61 KENNETH A. SHEPSLE, THE GIANT JIGSAW PUZZLE: DEMOCRATIC COMMITTEE ASSIGNMENTS IN THE MODERN HOUSE 46 (1978).

62 RIPLEY, CONGRESS, *supra* note 48, at 156.

63 Bruce A. Ray, *Committee Attractiveness in the U.S. House, 1963-1981*, 26 AM. J. POL. SCI. 609, 610 (1982).

64 OGUL, *supra* note 53, at 151.

65 DEERING & SMITH, *supra* note 30, at 73; MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 137.

66 Ray, *supra* note 63, at 612.

67 *See* The House Judiciary Committee website at https://judiciary.house.gov/.

68 DEERING & SMITH, *supra* note 30, at 73.

lines, in their study of the U.S. House from the early 2000s, Scott Frisch and Sean Kelly found that newly-elected Republicans were more interested in serving on the House Judiciary Committee than were newly-elected Democrats.[69] On the Democratic side, African-American members have often sought out seats on the House Judiciary Committee,[70] in part because of its more recent return to its prior focus on its civil rights jurisdiction.[71] In 2019, the House Judiciary Committee had eight African-American members, two Asian-American members, and three Hispanic/Latino members among its forty-one total membership.[72] It also had thirteen female members.[73]

The Senate Judiciary Committee is especially reflective of the political dynamics of its broader chamber. Thus, minority party members of the committee use every possible procedural tactic to delay actions of the committee with which they disagree.[74] Agreeing with this assessment, a staffer to the ranking minority member of the committee once noted, "[t]he [Senate] Judiciary Committee is a better reflection of the Senate floor than any other. Everybody uses their procedural rights. People divide up earlier, and it feels like the floor. There are fights; there's screaming and yelling; and people filibuster in committee."[75] As a Democratic Senate staffer summarized the situation for me in a 2017 interview, "[t]he Judiciary Committee is less collegial than other committees in the Senate."[76]

The Senate in general—and the Senate Judiciary Committee in particular—also kill many bills that the House has endorsed, including most of the anti-court legislation passed by the House Judiciary Committee early in this century under Chairman Sensenbrenner (R-WI) (to be discussed in more detail below). Comparing the two Judiciary Committees, a former Republican staffer who worked on the Senate Judiciary Committee told me, "[T]he Senate Judiciary Committee stops extreme measures passed by the House because of the threat of filibusters in that chamber. The House doesn't have to worry about filibusters. Their members can be as extreme as they choose to be."[77] My more recent interviews indicate that this trend is continuing. As one former Republican Senate staffer told me in 2017, "[t]he Senate Judiciary Committee stopped everything coming from the House."[78] As one lobbyist said in 2017, "[t]he Senate is a shield against the hyperactive

69 FRISCH & KELLY, *supra* note 38, at 106.
70 FRISCH & KELLY, *supra* note 38, at 302.
71 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 136.
72 *See* The House Judiciary Committee website at https://judiciary.house.gov/.
73 *Id.*
74 EVANS, *supra* note 44, at 61–62.
75 EVANS, *supra* note 44, at 61.
76 *See supra* note 2 and accompanying text.
77 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 138.
78 *See supra* note 2 and accompanying text.

House."[79] Marshall and Wolpe confirm this conclusion when they note, "[w]ith the growing levels of partisanship, the contemporary Senate has earned a reputation as a legislative graveyard."[80] The Senate Judiciary Committee has certainly served as the legislative graveyard for anti-court legislation passed by the House or considered by the House Judiciary Committee.

A number of my interviewees compared the House and Senate and their respective Judiciary Committees. As one lobbyist told me in 2018, "[t]he Senate is slower, more moderate, and more deliberative than the House."[81] Another lobbyist told me in 2017 that she preferred working with Senate staffers because they "were more consistent and more stable. There is too much turnover among committee members and staff in the House."[82] Many of my interviewees said that, traditionally, the Senate Committee was less partisan than its House counterpart, although that norm may be changing.[83] The House would also pass more extreme legislation than the Senate.[84] Further, it is worth noting that since Reconstruction, seventy-eight percent of court-curbing legislation introduced in Congress has originated in the House, while only twenty-two percent has started in the U.S. Senate.[85] Of course, it is important to remember that very few of these bills have ever been enacted into law.

The House Judiciary Committee has long been known for its "court like deliberative style and lawyerlike committee culture,"[86] because so many lawyer-legislators have served on it.[87] Jackie Koszczuk and Amy Stern have described the House Judiciary Committee as a forum "where passionate and combative oratory is generally the order of the day."[88] Despite its lawyerlike style and culture, the House Judiciary Committee nevertheless reflects the highly partisan and ideologically polarized nature of the broader House of Representatives. As a lobbyist described the House committee: "The true believers come to the House Judiciary Committee. There are bomb hurlers on both sides of that committee."[89] A Democratic Senate staffer noted in 2017 that there is no minority voice on the House Judiciary Committee, just

79 *See supra* note 2 and accompanying text.

80 MARSHALL & WOLPE, *supra* note 28, at 43.

81 *See supra* note 2 and accompanying text.

82 *See supra* note 2 and accompanying text.

83 *See supra* note 2 and accompanying text.

84 *See supra* note 2 and accompanying text.

85 CLARK, *supra* note 5, at 26.

86 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 135.

87 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 135.

88 JACKIE KOSZCZUK & H. AMY STERN, CQ's POLITICS IN AMERICA 2006: THE 110TH CONGRESS 797 (2005).

89 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 136.

as there is little role for members of the minority party in the broader House chamber.[90] When asked to compare the House and Senate Judiciary Committees, another Democratic Senate staffer told me in 2017 that, "[t]he committee is much bigger in the House and it has a broader range of extremists in both parties than in the Senate."[91] Another Democratic Senate staffer explained that, "[t]he House Committee is more stage-managed than the Senate Judiciary," meaning the committee chair has a great deal of power in the House, while individual Senators have a greater voice on the Senate Committee.[92] A former Democratic Senate staffer said that the Senate Judiciary Committee gets more attention than its House counterpart because of its role in judicial confirmations, but the House Judiciary Committee focuses more on the substance of proposed legislation than does the Senate Committee.[93] The Judiciary Committees are also the dominant voice in Congress on constitutional issues.[94]

III. JUDICIAL NOMINATIONS AND CONFIRMATIONS

Of course, one key difference between the House and Senate Judiciary Committees is the fact that only the Senate Judiciary Committee considers presidential nominations for the federal bench. Although the full Senate must give its advice and consent to all presidential nominations, the process for federal judicial nominees begins in the Senate Judiciary Committee before going to the full Senate. As Lauren Bell has noted, "[p]residents routinely fill more federal judgeships than any other office."[95] The House does not play a role in confirming federal judges, so one could argue that Senators on the Senate Judiciary Committee are more familiar with federal judges because of the Committee's role in the nomination process. One might also assume that the Senate's nomination process for federal judges would mean that the Senate Judiciary Committee might have better relationships with federal judges than their House Judiciary Committee counterparts. Over the years, however, various interviewees, including federal judges, have told me that individual judges rarely contact the Senate Judiciary Committee or its members directly over policy issues.[96] Instead, these Senators would defer to the lobbyists who work in the Administrative Office of the U.S. Courts who lobby on behalf of the Judicial Conference,

90 *See supra* note 2 and accompanying text.
91 *See supra* note 2 and accompanying text.
92 *See supra* note 2 and accompanying text.
93 *See supra* note 2 and accompanying text.
94 Devins, *supra* note 432.
95 BELL, *supra* note 31, at 102.
96 *See supra* note 2 and accompanying text.

the policy making arm of the federal judiciary.[97] Since federal judges rarely contact members of the House or Senate Judiciary Committees directly after they have been confirmed, the structural differences in their roles in judicial confirmations may not automatically translate into differences between the two committees in their relationships with the federal courts.

Senators have often used judicial confirmation hearings as a mechanism to send signals to the judges regarding the past rulings they oppose and what kinds of future decisions they would like to see from the courts. As Michael Gerhardt explains, "Senators, and presidents, employ their authority over appointments to impress their constitutional views upon other institutions (and the public)."[98] At the hearings, Senators may ask a lot of questions about the nominees' views on judicial activism and other judicial philosophies.[99] Thus, the Senators are trying to figure out how the nominees may rule on future controversies. In today's world, most judicial nominees refuse to give direct answers to these questions.[100] In fact, the judicial confirmation process is dreaded by many judicial nominees and the process could have prolonged effects on future interactions between Congress and the courts. As Ross Baker explains, "[i]n recent years, justices of the Supreme Court have emerged badly battered from the polarized, partisan, and contentious confirmation process in the Senate, so it would not be surprising if they were to harbor lingering bitterness towards the politicians who subjected them to harsh and lengthy interrogation."[101]

This section will look at the confirmation process in greater detail. Once the president nominates a judge to the federal bench for the U.S. District Courts, the U.S. Court of Appeals, or the U.S. Supreme Court, the nomination is then referred to the Senate Judiciary Committee. In addition to the vetting process by the FBI[102] and the American Bar Association ("ABA"),[103] the Senate Judiciary Committee staff conducts its own investigation into the candidates, including their answers to a lengthy questionnaire from the committee.[104] Since some Republican presidents such as President George W. Bush and President Donald Trump have viewed the ABA as a partisan and liberal organization, they did not submit the names

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97 *See, e.g.*, MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 26–28.

98 MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL & HISTORICAL ANALYSIS, xxvi (2000).

99 *Id.*

100 BAKER, *supra* note 6, at 108.

101 BAKER, *supra* note 6, at 107.

102 AMY STEIGERWALT, BATTLE OVER THE BENCH: SENATORS, INTEREST GROUPS, AND LOWER COURT CONFIRMATIONS 70 (2010).

103 PAUL M. COLLINS, JR. & LORI A. RINGHAND, SUPREME COURT CONFIRMATION HEARINGS AND CONSTITUTIONAL CHANGE 33 (2013).

104 BELL, *supra* note 31, at 36.

of nominees to the ABA before they submitted them to the Senate Judiciary Committee.[105] In these cases, the Committee requests ABA ratings of the nominees after the names have been made public instead of receiving them at the same time that the Committee receives the name of the nominee from the White House. The GOP's unhappiness with the ABA is somewhat surprising, since the organization has traditionally been very conservative. Regardless, today, most conservatives view the ABA as leaning too far left.[106] Individual members of the Judiciary Committee may also request written answers to questions in addition to the committee questionnaire. The Committee also seeks written information from interest groups and the general public in its investigatory stage.[107]

Once the committee staff members conclude their investigation of the nominees, the committee chair will then decide whether it will hold a hearing on the nomination.[108] Generally, the nomination dies if there is no committee hearing.[109] In addition to having almost complete control over the question of whether or not a nominee will get a hearing, the committee chair also controls the witness list for the hearings, including what role interest groups will play in the hearing process.[110] For example, when Senator Ted Kennedy (D-MA) chaired the Senate Judiciary Committee from 1978-1981, interest groups participated in a large percentage of judicial confirmation hearings.[111] However, when Strom Thurmond (R-SC) took over the chairmanship from 1981-1987, interest group participation dropped dramatically.[112] Under Joe Biden's (D-DE) stewardship from 1987-1995, interest group participation in confirmation hearings again increased, but it dropped when Senator Orin Hatch (R-UT) gained the chairmanship of the committee from 1995-2001.[113] Thus, it appears that Democrats are more open to interest group participation in the confirmation hearings than are Republican committee chairs.

The decision to hold a hearing for lower court nominees usually involves the norm or tradition of Senatorial Courtesy, including the so-called Blue Slip process explained below. Since each U.S. District Court is located

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105 Lee Rawles, *Its Ratings System under Fire, ABA Stresses Importance of Federal Judicial Candidate Evaluations*, ABA JOURNAL (JAN. 1, 2018), HTTP://WWW.ABAJOURNAL.COM/MAGAZINE/ARTICLE/FEDERAL_JUDICIAL_CANDIDATE_EVALUATIONS; NEAL DEVINS AND LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 127 (2019).

106 DEVINS & BAUM, *supra* note 105, at 84–85.

107 COLLINS & RINGHAND, *supra* note 103, at 38–39.

108 COLLINS & RINGHAND, *supra* note 103, at 38–39.

109 COLLINS & RINGHAND, *supra* note 103, at 38–39.

110 BELL, *supra* note 31, at 113.

111 BELL, *supra* note 31, at 113.

112 BELL, *supra* note 31, at 113.

113 BELL, *supra* note 31, at 114.

within a specific state, Senators would invoke the norm of Senatorial Courtesy and would refuse to vote for a nominee opposed by the home-state Senator if the Senator was a member of the same political party as the president. Many presidents went one step further and deferred to the Senators of their political party and from that particular state before nominating someone for a federal trial court opening.[114] In other words, Senators often suggested names for judicial openings in their states and many presidents would simply nominate the Senator's choice. This patronage approach seemed to meet the political needs of many Senators and of many presidents.[115] For the U.S. Circuit Courts of Appeals, by tradition, although not by statute, each seat belongs to a single state except for those on the U.S. Court of Appeals for the District of Columbia and the U.S. Court of Appeals for the Federal Circuit.[116] The Senate Judiciary Committee has often deferred to the home-state Senators of the nominees about U.S. Court of Appeals nominations as well.[117]

The Blue Slip process is an informal procedure governed by tradition. Typically, the chair of the Senate Judiciary Committee would send a blue slip of paper to each of the home-state Senators regardless of party for each lower court judicial nominee from their state.[118] The custom began as early as 1917,[119] although its modern manifestation dates from 1956.[120] If the Senator supported the nomination, then they would return the blue slip to the committee chair.[121] If they opposed the nominee, then they would either note their opposition on the blue slip or would never return the slip to the committee.[122] When faced with opposition to a nominee from a home-state Senator regardless of party, the chair of the Senate Judiciary Committee would usually refuse to schedule a hearing on that nominee, effectively killing that nomination.[123] While the norm of Senatorial Courtesy seems to have applied only to Senators from the president's party, the institutionalization of the blue slip tradition gave a veto to home-state

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114 JOHN ANTHONY MALTESE, THE SELLING OF SUPREME COURT NOMINEES 120–21 (1995).

115 STEIGERWALT, *supra* note 102, at 5.

116 STEIGERWALT, *supra* note 102, at 50.

117 NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 141, 144 (2005).

118 SARAH A. BINDER & FORREST MALTZMAN, ADVICE & DISSENT: THE STRUGGLE TO SHAPE THE FEDERAL JUDICIARY 15 (2009).

119 BARRY J. MCMILLION, CONG. RESEARCH SERV., R44975, THE BLUE SLIP PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS 2 (2017).

120 *Id*.

121 *Id*.

122 *Id*.

123 SCHERER, *supra* note 117, at 142.

Senators from either party.[124] The blue slip process today also provides a paper trail to track the progress of judicial nominations,[125] considering that since 2001, the chairs of the Senate Judiciary Committee have publicized whether blue slips were returned for any given nominee.[126]

The issue of giving an absolute veto to home-state Senators over judicial nominees from their states regardless of party has given rise to different interpretations of the blue slip tradition by different Judiciary Committee chairs. As Amy Steigerwalt notes, "[m]uch like other informal Senate customs, a negative blue slip is only as powerful as the Senate leadership, in this case the Judiciary Committee chair, allows it to be."[127] One of the key determinants of how a Judiciary Committee chair will approach the blue slip process seems to be whether the Senate and the President are controlled by the same party or different political parties.[128]

For many chairs of the Senate Judiciary Committee over the years, the refusal to return a blue slip or noting opposition to a nominee on a returned blue slip has prevented the chair from calling a hearing regarding that nomination.[129] Without a hearing, the nomination effectively dies.[130] However, different Judiciary Committee chairs have interpreted the norm differently. For example, starting in 1956, Chairman James Eastland (D-MS) apparently treated a single negative blue slip or the failure to return one as an absolute veto on the nomination.[131] However, Chairman Ted Kennedy (D-MA) changed that approach when he became chair of the committee in 1979.[132] For example, in 1980, Kennedy held hearings on a nominee from North Carolina over the objections of Senator Jessie Helms (R-NC).[133] Chairman Strom Thurmond (R-SC) ignored Democratic objections to some of President Reagan's lower court nominees following the 1980 election, although he did allow Republican Senators to veto nominees for the U.S. Court of Appeals.[134] Coming to power after the 1986 elections, Chairman Joe Biden (D-DE) often ignored the objections of his Democratic colleagues and held hearings on Reagan and Bush nominees.[135] With a Democrat in the

124 SCHERER, *supra* note 117, at 142.
125 BINDER & MALTZMAN, *supra* note 118, at 39.
126 STEIGERWALT, *supra* note 102, at 36.
127 STEIGERWALT, *supra* note 102, at 53.
128 CARL TOBIAS, *SENATE BLUE SLIPS AND SENATE REGULAR ORDER*, 37 YALE L. & POL'Y REV. INTER ALIA 1, 4 (2018).
129 *Id.*
130 *Id.*
131 BINDER & MALTZMAN, *supra* note 118, at 65.
132 BINDER & MALTZMAN, *supra* note 118, at 65.
133 SCHERER, *supra* note 117, at 143.
134 SCHERER, *supra* note 117, at 143–44.
135 SCHERER, *supra* note 117, at 143–44.

White House, Chairman Orin Hatch (R-UT) reinstituted the blue slip veto tradition.[136] However, Hatch (R-UT) refused to follow the blue slip custom starting in 2003 when Republicans gained unified control of the White House and the Senate.[137] At times, he held hearings on nominees even when both home-state Democratic Senators opposed them.[138] These controversial nominations were often filibustered when they reached the Senate floor.[139] In 2005, Chairman Arlen Specter (R-PA) returned to the single Senator veto practice on blue slips.[140]

When Democrat Chairman Patrick Leahy (D-VT) took control of the committee in 2001, and again in 2007, he instituted a rule that one negative blue slip would slow down a nomination and two negative blue slips would kill it.[141] Chairman Chuck Grassley (R-IA) followed this same practice during the Obama administration.[142] After President Trump's election, and under considerable pressure from Senate Majority Leader Mitch McConnell (R-KY) and other prominent conservatives, Grassley announced a new blue slip policy that, for the first time, would treat U.S. Court of Appeals nominees differently than those nominated for the U.S. District Courts.[143] Grassley said he would likely honor a single negative blue slip for a district court nominee, but not for a circuit court nominee because the circuit courts cover multiple states and are more important nationally.[144] Grassley held hearings on a variety of Trump appellate nominees despite the fact that one home-state Senator objected.[145] In 2019, new Judiciary Committee Chairman Lindsey Graham (R-SC) went a step further, stating that, "[t]he blue slip process for circuit judges are [sic] not gonna [sic] be allowed to become a veto."[146] In February of 2019, the Senate confirmed a Ninth Circuit nominee even though both home-state Senators refused to return their blue slips.[147] It was the first time in history that the Senate had confirmed a federal judge over the opposition of both home-state Senators.[148]

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136 BINDER & MALTZMAN, *supra* note 118, at 55.

137 BINDER & MALTZMAN, *supra* note 118, at 55.

138 BINDER & MALTZMAN, *supra* note 118, at 55.

139 BINDER & MALTZMAN, *supra* note 118, at 55.

140 Tobias, *supra* note 128, at 7.

141 SCHERER, *supra* note 117, at 146.

142 MCMILLION, *supra* note 119, at 4.

143 Tobias, *supra* note 128, at 19.

144 Tobias, *supra* note 128, at 19.

145 Tobias, *supra* note 128, at 19.

146 Jordain Carney, *Senate Reignites Blue Slip War over Trump Court Picks*, THE HILL (Feb. 24, 2019), https://thehill.com/homenews/senate/431232-senate-reignites-blue-slip-war-over-trump-court-picks.

147 Deanna Paul, *In 'Dangerous First,' Conservative Judge Installed After Vetting by Only Two Senators*, WASH. POST, Feb. 27, 2019.

148 *Id*.

On the other hand, nominations to the U.S. Supreme Court have always been politicized.[149] Since 1939, almost all presidential nominees for the U.S. Supreme Court have faced confirmation hearings before the Senate Judiciary Committee.[150] While many commentators question the value of these Supreme Court confirmation hearings, others note that the hearings are a clear public forum for Senators and others to send clear messages to the nominees about important issues of constitutional and statutory interpretation.[151] In other words, the confirmation hearings are clear signaling devices in the institutional dialogue between Congress and the federal courts regarding judicial decisions.[152] Supreme Court nominees do not face the blue slip process. Nevertheless, the Committee chair has a great deal of discretion about whether or when to schedule confirmation hearings for the nominee.[153] For example, Senator Majority Leader Mitch McConnell (R-KY) refused to allow Senate Judiciary Committee Chairman Grassley (R-IA) to hold hearings on President Obama's nomination of Judge Merrick Garland to the U.S. Supreme Court in 2016.[154] McConnell argued that the Senate should not consider a Supreme Court nominee during a presidential election year.[155] McConnell's role in halting the committee hearings for Judge Garland was confirmed in many of my more recent interviews.[156]

Traditionally, the Senate would easily confirm the vast majority of the President's nominees for federal judgeships at all levels. In fact, before the 1980's, the Senate confirmed about ninety percent of presidential judicial nominees.[157] High confirmation rates were especially true for lower court nominations, although Supreme Court nominees have historically received more scrutiny from the Senate.[158] The notable exceptions to presidential

149 STEIGERWALT, *supra* note 102, at 4.

150 COLLINS & RINGHAND, *supra* note 103, at 1.

151 COLLINS & RINGHAND, *supra* note 103, at 1–8. These scholars stress that Supreme Court confirmation hearings primarily concern constitutional issues and not statutory interpretation issues because in their research they note that only about one percent of the dialogue at these hearings involves statutory interpretation questions. COLLINS & RINGHAND, *supra* note 103, at 2, n. 4.

152 The idea that the U.S. Supreme Court is not necessarily the last word on constitutional interpretation, but that the meaning of the Constitution is part of an institutional conversation or dialogue among the Court, the Congress, the President, the bureaucracy and the states is often referred to as the Governance as Dialogue Movement. *See, e.g.*, MILLER, JUDICIAL POLITICS, *supra* note 1, at 25–26, 200–01; *SEE ALSO* LOUIS FISHER, RECONSIDERING JUDICIAL FINALITY: WHY THE SUPREME COURT IS NOT THE LAST WORD ON THE CONSTITUTION (2019); LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988).

153 DEVINS & BAUM, *supra* note 105, at 108–09.

154 DEVINS & BAUM, *supra* note 105, at 108–09.

155 DEVINS & BAUM, *supra* note 105, at 108–09.

156 *See supra* note 2 and accompanying text.

157 BELL, *supra* note 31, at 5.

158 BELL, *supra* note 31, at 5.

success in judicial nominations were, for example, when a coalition of Republicans and conservative Democrats successfully filibustered the nomination of Abe Fortas to be Chief Justice in 1968 and when the Senate rejected President Nixon's nominations to the Supreme Court of Clement Haynsworth and G. Harold Carswell in 1969 and 1970, respectively.[159] Many commentators point to the rejection of President Reagan's nomination of Judge Robert Bork to the U.S. Supreme Court in 1987 and the role of interest groups in that fight as the start of the modern era of highly contested judicial nominations in the U.S. Senate.[160] As a result, between 1981 and 2014, the percentage of judicial confirmations dropped to about sixty-five percent.[161] Recently, interest groups have become more involved in all judicial nominations, including those for the lower federal courts.[162] This heightened interest group involvement has clearly changed the nomination and confirmation processes for lower federal judgeships.[163]

Evidence of this new era is demonstrated by the fact that the Senate filibustered or otherwise delayed a variety of Clinton, George W. Bush,[164] and eventually Obama nominations[165] to the federal bench. Thus, as the Senate has grown more ideologically polarized, the confirmation process has also become more contentious and more partisan in nature. As Barbara Sinclair notes, "[p]arty polarization has made the confirmation process an increasingly confrontational one."[166] The same ideological and interest group battles over legislation in the Senate have carried over to its confirmation of presidential appointees.[167] As Bell has argued, "the Senate's confirmation process has become little more than an extension of its legislative work."[168]

In the full Senate, the motion to consider a presidential nomination is not debatable, but the motion to approve the nomination is.[169] Therefore, for an extended period in the history of the Senate, all presidential nominations,

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159 MICHAEL COMISKEY, SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES 66-68 (2004).

160 MALTESE, *supra* note 114, at 7–8; BINDER & MALTZMAN, *supra* note 118, at 7–8.

161 SARAH BINDER & FORREST MALTZMAN, *IS ADVICE AND CONSENT BROKEN? THE CONTENTIOUS POLITICS OF CONFIRMING FEDERAL JUDGES AND JUSTICES*, *IN* CONGRESS RECONSIDERED 402-03 (2016).

162 *See generally* BELL, *supra* note 31.

163 *See generally* BELL, *supra* note 31.

164 BINDER & MALTZMAN, *supra* note 118, at 4.

165 BINDER & MALTZMAN, *supra* note 161, AT 399–400.

166 BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 61 (5TH ED. 2017).

167 *See* BELL, *supra* note 31, at ix.

168 *See* BELL, *supra* note 31, at ix.

169 SINCLAIR, *supra* note 166, at 61.

including judicial nominations, were subject to the filibuster.[170] This changed in 2013 when the Democratically controlled Senate invoked the so-called "nuclear option" and eliminated the filibuster for many executive branch nominees and for lower federal court nominees.[171] In 2017, the Republican controlled Senate then eliminated the filibuster for U.S. Supreme Court nominees in order to get then Judge Neil Gorsuch confirmed to the high court.[172]

Aside from the notable battles over nominees to the U.S. Supreme Court, most of the modern judicial confirmation fights involved controversial nominations to the U.S. Courts of Appeals.[173] However, during the Obama Administration, Republican Senators took the conflict to a new level when they filibustered judicial nominees for the first time who were supported by their Republican home-state colleagues.[174] In addition, for the first time, a nomination to the U.S. District Court was almost blocked by a successful filibuster in 2011 during the Obama Administration.[175] According to one Democratic Senate aide speaking in 2011, "[the GOP] have approached district court nominees with the same exacting inquiry standards that used to be reserved for the Supreme Court and for controversial circuit court nominees. But now it extends to every lifetime appointment."[176]

IV. ROUTINE AND NON-ROUTINE INTERACTIONS BETWEEN CONGRESS AND THE COURTS

In overall terms, sometimes the relationship between Congress and the federal courts is cooperative and sometimes it is highly contentious. It is quite routine for politicians to criticize court decisions with which they disagree, but it is much less common for Congress as a whole to curb the judicial branch's institutional powers. Interest groups often urge politicians to take issue with particular judicial decisions, and the politicians find this criticism to be an easy way to score points with those who are unhappy with a specific court ruling. The introduction of court-curbing legislation may also be a low-cost signaling device, allowing politicians to express their displeasure with the courts and/or with specific court decisions, since they know that there is not a high probability that these measures will actually

170 SINCLAIR, *supra* note 166, at 61

171 ROGER H. DAVIDSON, WALTER J. OLESZEK, FRANCES E. LEE & ERIC SCHICKLER, *IN* CONGRESS AND ITS MEMBERS 372 (16TH ED. 2018).

172 *Id.* at 368–69.

173 BINDER & MALTZMAN, *supra* note 161, AT 405.

174 BINDER & MALTZMAN, *supra* note 161, AT 405.

175 BINDER & MALTZMAN, *supra* note 161, AT 405.

176 BINDER & MALTZMAN, *supra* note 161, at 406.

become law.[177] As Stephen Engel concludes, "[p]olitical attacks on the federal courts that do not result in undermining judicial power could be a win-win for all sides."[178]

The Constitution protects the independence of federal judges by giving them life terms and by prohibiting Congress from reducing their salaries.[179] Of course, this does not mean that Congress must give the judges annual cost of living increases or otherwise increase their incomes. However, when Congress is unhappy with the federal courts it has a variety of weapons it can use to attack judicial power.[180] These include overturning statutory interpretation decisions of the courts by passing a new statute, passing constitutional amendments meant to overturn the courts' constitutionally-based decisions (although at times Congress has enacted mere statutes that were intended to overturn constitutional decisions), restricting the budgets and salaries of the federal courts, changing the structure and/or number of judges on specific courts, restricting the courts' jurisdiction, creating an Inspector General for the judiciary, and impeaching federal judges.[181] Congress, of course, can ignore a judicial decision with which it disagrees.[182] When Congress does attempt to curb the courts, it often does so through the two Judiciary Committees.[183]

There are some routine interactions between Congress and the courts that receive very little scholarly or other attention and are therefore usually non-conflictual. For example, Congress seems to regularly pass deliberately ambiguous statutes, knowing that the courts will probably fix them.[184] Congress may also want to shift various issues to the courts in an attempt to protect these policies from future unsympathetic voters and legislators. As Pickerill explains, "Elected officials might also want to empower courts as a way of entrenching policies and programs that they believe are becoming vulnerable to new or emerging electoral majorities."[185] On the other hand, the Supreme Court and other federal courts routinely invite Congress to

177 CLARK, *supra* note 5, at 26–27.

178 ENGEL, *supra* note 6, at 19.

179 MILLER, JUDICIAL POLITICS, *supra* note 1, at 55.

180 WALTER J. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 26 (1973); CLARK, *supra* note 5, at 2–3, 36–43.

181 *See generally* MILLER, VIEW OF THE COURTS, *supra* note 2.

182 For example, the Supreme Court in INS v. Chadha, 462 U.S. 919 (1983), declared the one-house legislative veto to be unconstitutional, but Congress has routinely ignored that decision and continues to enact legislative veto provisions; LOUIS FISHER AND DAVID GRAY ADLER, AMERICAN CONSTITUTIONAL LAW 215 (7TH ED. 2007).

183 Lauren C. Bell, *Monitoring or Meddling? Congressional Oversight of the Judicial Branch*, 64 WAYNE L. REV. 23, 27–28 (2018).

184 LOVELL, *supra* note 6, at 5–7.

185 J. Mitchell Pickerill, *Institutional Interdependence and the Separation of Powers*, *in* THE POLITICS OF JUDICIAL INDEPENDENCE 115 (BRUCE PEABODY, ED. 2011).

overturn their statutory interpretation decisions if the current majority in Congress might disagree with the judicial pronouncement.[186] Sometimes these invitations to override come directly from the dissent.[187] These interactions therefore do not produce much friction between the branches. As Pickerill has noted, "[t]hose who expect a constitutional revolution, a constitutional moment, or other form of severe confrontation between the Court and Congress simply do not appreciate the more routine and typical type of interaction between the Court and Congress in the political process."[188]

Some of the routine interactions between Congress and the courts are based on the fact that Congress must approve annual appropriations for the federal judiciary.[189] These appropriations include funding for construction of new federal courthouses, for staff salaries, for technology and security needs, for judicial libraries, and for other operating expenses.[190] These budget issues can also involve salaries for federal judges.[191] Although individual legislators have often threatened to use congressional budget powers against the federal courts in order to retaliate for judicial decisions that they do not like,[192] Congress as a whole has rarely done so. Nevertheless, the annual budget process does provide the prospect of conflict between Congress and the courts. As I have written previously, "[t]he annual appropriations process provides a clear avenue to see the different institutional perspectives of the [federal courts] and of Congress. The courts rightly see themselves as an independent third branch and many judges seem to resent Congress's interference with their budget requests."[193] Congress, on the other hand, "often views the federal courts as just one more federal agency begging for funds."[194] These routine interactions between the courts and Congress may appear to be conflictual, but generally are not. As George

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186 Lori Hausegger and Lawrence Baum, *Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation*, 43 AM. J. POL. SCI. 162, 164–65 (1999).

187 For example, Justice Ginsburg's dissenting opinion in Ledbetter v. Goodyear Tire & Rubber Company, 550 U.S. 618 (2007), calling for Congress to overturn this statutory interpretation ruling led exactly to that result when Congress enacted the Lilly Ledbetter Fair Pay Act of 2009. *See* MILLER, JUDICIAL POLITICS, *supra* note 1, at 236–37.

188 PICKERILL, *supra* note 3, at 130.

189 Bell, *supra* note 183, at 45–46.

190 Bell, *supra* note 183, at 45–46.

191 Bell, *supra* note 183, at 45–46.

192 Eugenia Froedge Toma, *Congressional Influence and the Supreme Court: The Budget as a Signaling Device*, 20 J. L. STUD. 131, 131–35 (1991).

193 Mark C. Miller, *The View of the Courts from the Hill: A Noninstitutional Perspective*, *in* MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE 64 (MARK C MILLER & JEB BARNES, EDS., 2004).

194 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 90.

Lovell has written, "the appearance of conflict between independent branches frequently masks more cooperative interaction between interdependent branches."[195]

The exceptions to this norm of budgetary comity between the two institutions stand out. For example, in 1964 Congress granted twice the annual cost of living increase for lower court federal judicial salaries as they did for the justices of the U.S. Supreme Court in order to signal their dissatisfaction with various rulings from the high court.[196] Nevertheless, some politicians have still clamored for Congress to use its budgetary powers against the courts. For example, in 2005 the then Majority Leader of the House Tom DeLay (R-TX) bellowed, "[w]e set up the courts. We can unset the courts. We have the power of the purse."[197] At about the same time, Representative Steve King (R-IA), then a member of the House Judiciary Committee, expressed his frustration with the federal courts by proclaiming, "[w]hen their budget starts to dry up, we'll get their attention."[198]

At other times, the interactions between the two branches are less routine in part because Congress ultimately decides how to structure the federal courts and their jurisdictions. Congress decides how many judges will serve on each U.S. District Court, the U.S. Courts of Appeals, and the U.S. Supreme Court. For example, in 1977, 1984, and in 1990, Congress greatly expanded the number of judgeships on the U.S. District Courts, suddenly giving the president many more judicial nominations than his predecessors.[199] The policymaking arm of the federal judiciary, the Judicial Conference, makes recommendations on the courts that require additional

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195 LOVELL, *supra* note 6, at xix-xx.

196 JOHN R. SCHMIDHAUSER AND LARRY L. BERG., THE SUPREME COURT AND CONGRESS: CONFLICT AND INTERACTION, 1945–1968, 8–9 (1972).

197 Quoted in Rick Klein, *DeLay Apologized for Blaming Federal Judges in Schiavo Case; but House Leader Call for Probe of 'Judicial Activism'*, BOSTON GLOBE, APR. 14, 2005, AT A.9.

198 Quoted in Ruth Marcus, *Booting the Bench: There's New Ferocity in Talk of Firing Activist Judges*, WASH. POST, APR. 11, 2005, AT A.19. In 2019, the Republican party leaders stripped King of all of his committee assignments in the chamber, including his longstanding seat on the House Judiciary Committee, because of statements he made in support of White Nationalism. *See also* Mike DeBonis, *House Republican Leaders Move to Strip Rep. Steve King of his Committee Assignments Over Comments About White Nationalism*, WASH. POST, Jan. 14, 2019.

199 John M. De Figueiredo and Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 J. LAW & ECON. 435, 443 (1996); BINDER & MALTZMAN, *supra* note 118, at 104.

judges,[200] but Congress often ignores those suggestions.[201] Congress also determines the boundaries of the U.S. Courts of Appeals, occasionally redrawing those boundaries for workload or ideological reasons. For example, following the lead of its Judiciary Committees, Congress in 1980 split the old Fifth Circuit and moved the states of Florida, Georgia, and Alabama to the new Eleventh Circuit for both political and management reasons.[202] Today, many conservatives would like to split the current Ninth Circuit because of its perceived liberal decisions.[203] When Republicans controlled the House Judiciary Committee, that committee held various hearings over the years on the issue, as did the Senate Judiciary Committee.[204] Congress also sets the number of justices on the U.S. Supreme Court, and historically Congress has altered the number of justices to fit its political needs at the time.[205] Notably, Congress refused to enact Franklin Roosevelt's Court Packing Plan, in part because it seems that having nine justices on the Supreme Court has become constitutionalized in the American voters' minds.[206]

Because the House has no role in judicial confirmations, some argue that the House Judiciary Committee pays extra attention to the issue of how many judges should serve on the U.S. District Courts and other federal courts. As Binder and Maltzman have argued:

> From the vantage of the House, legislators have constitutional authority to make decisions about the structure of the bench, but not about who sits on the bench. . . . Regardless of whether party control is unified or divided, the creation of new judgeships provides an electorally valuable opportunity for credit claiming. Even if new judgeships are not created within one's state or district,

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200 MILLER, JUDICIAL POLITICS, *supra* note 1, at 42–43. The Administrative Office of the United States Courts has a group of lobbyists who lobby Congress on behalf of the Judicial Conference and thus on behalf of the federal courts in general. GEYH, *supra* note 3, at 238–39.

201 BINDER & MALTZMAN, *supra* note 118, at 108–09.

202 DEBORAH J. BARROW AND THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM 242 (1988).

203 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 94–96.

204 *See, e.g.*, Scott Bomboy, *Drive to Split Ninth Circuit Faces an Uncertain Future*, CONST. DAILY, (AUG. 29, 2017), https://constitutioncenter.org/blog/drive-to-split-ninth-circuit-faces-an-uncertain-future.

205 Originally, in 1789, Congress created a Supreme Court with six justices, but Congress increased that number to seven in 1807, to nine in 1837, to ten in 1863, back to seven in 1866, and then back again to its current number of nine in 1869. COLLINS & RINGHAND, *supra* note 103, at 18.

206 KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 268 (2007).

> House members can claim credit for acting to improve the efficiency of the courts.[207]

Interestingly, Binder and Maltzman conclude that in the House Judiciary Committee, new judgeships are created to benefit representatives from both political parties and to allow both parties to claim credit, while the Senate Judiciary Committee prefers to give more judgeships to states represented on the Committee by members of the president's political party.[208]

There have been various periods throughout history when the conflicts between the federal courts and the elected branches have been more pronounced. President Thomas Jefferson and his Democratic-Republican Party allies in Congress believed that a life term for federal judges maintained the Federalist Party policies that Jefferson's election seemed to repudiate. As Charles Geyh has written, "[t]he election of Thomas Jefferson ushered in the first sustained wave of national anger directed at federal judges."[209] The Jeffersonians in Congress promptly eliminated sixteen new judgeships for the federal circuit courts that the Federalists had hastily created before they lost power in Congress (the so-called Midnight Judges),[210] and they further prevented the Supreme Court from meeting for one year.[211] The Supreme Court acquiesced to these actions. The Jeffersonians then attempted to impeach federal judges (including Supreme Court justices) who they felt were too strongly partisan members of the Federalist Party. The Senate refused to remove most of these judges from office, including Justice Samuel Chase, thus setting the precedent that federal judges would not be removed from the bench merely because of their rulings.[212] President Andrew Jackson was also no friend of the federal courts and preferred to ignore the courts when they made rulings with which he did not agree. Although apocryphal, he is often quoted as saying in response to the Supreme Court's unpopular ruling in *Worcester v. Georgia*,[213] "John Marshall has made his decision, now let him enforce it."[214]

President Lincoln vowed never to allow judges to get in the way of his mission to save the Union during the Civil War. In attacking the authority of the highest court in the country, Lincoln said, "[t]he candid citizen must confess that if the policy of the Government upon vital questions affecting

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207 BINDER & MALTZMAN, *supra* note 118, at 109.

208 BINDER & MALTZMAN, *supra* note 118, at 122.

209 GEYH, *supra* note 3, at 53.

210 Stephen M. Engel, *Presidential Manipulations of Judicial Power*, *in* THE POLITICS OF JUDICIAL INDEPENDENCE 75–80 (BRUCE PEABODY, ED. 2011).

211 C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT, 1957–1960, 6 (1961).

212 GEYH, *supra* note 3, at 54–55, 125–142.

213 Worcester v. Georgia, 31 U. S. 515 (1832).

214 Engel, *supra* note 210, at 80.

the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers."[215] After the Civil War, the Radical Republicans in Congress changed the number of justices on the U.S. Supreme Court several times to meet their political needs, expanding it to ten during the Lincoln presidency and then reducing the Court to seven members in the Johnson Administration in order to prevent the Democratic president from replacing several retiring justices.[216] They also prevented the Court from hearing cases in which the justices might have declared Reconstruction to be unconstitutional.[217]

Coming from the left, the Populists and Progressives in Congress routinely attacked the legitimacy of the conservative activist U.S. Supreme Court and other federal courts in the late 1800's and the early 1900's.[218] These groups advocated reforms to reduce judicial power, which included: requiring the popular election of federal judges, allowing Congress to overturn Supreme Court rulings with a two-thirds vote, requiring the vote of seven justices before a law could be declared unconstitutional, and ending life terms for federal judges by instituting voter recall provisions.[219] Senator Robert La Follette, running for president in 1924 as the Progressive Party candidate, called federal judges "petty tyrants and arrogant despots."[220] Along these same lines, President Theodore Roosevelt once said that, "I may not know much law, but I do know that one can put the fear of God in judges."[221] And, of course, President Franklin Roosevelt was so unhappy with the Supreme Court declaring his New Deal programs to be unconstitutional that he proposed his infamous "Court Packing Plan" in order to almost double the size of the Court and allow him to appoint a majority of the justices.[222] Congress refused to enact this proposal, but they did pass an early retirement program that gave Roosevelt enough appointments to place his allies to control the Court's majority.[223]

Since the 1950s, conservative politicians and the interest groups supporting them have routinely attacked the federal courts because of their perceived liberal bias.[224] Conservatives were especially upset with the

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215 Engel, *supra* note 210, at 69.

216 GEYH, *supra* note 3, at 66.

217 *See* GEYH, *supra* note 3, at 66–70.

218 WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1927 1 (1994).

219 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 63–65.

220 WALTER F. MURPHY, CONGRESS AND THE COURT 50 (1962).

221 DONALD GRIER STEPHENSON, JR., CAMPAIGNS AND THE COURT: THE U.S. SUPREME COURT IN PRESIDENTIAL ELECTIONS 130 (1999).

222 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 65–69.

223 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 65–69.

224 ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 359 (1972).

liberal activism of the Warren Court and often called for Chief Justice Warren to be impeached.[225] In 1964, Senator Barry Goldwater (R-AZ), the Republican candidate for president, made the judiciary a significant campaign issue.[226] In 1968, while running for president, Richard Nixon made "law and order" and attacks on liberal activist judges central themes in his campaign.[227] In 1970, then Minority Leader of the U.S. House, Representative Gerald Ford (R-MI) called for the impeachment of Justice William O. Douglas, at least in part because of his liberal views.[228] In his 1980 and 1984 campaigns for president, Ronald Reagan also made attacks on the federal courts an important campaign issue.[229]

In fact, all of the Republican Party platforms since 1976 have made negative statements about the federal judiciary, with some members even calling for Congress to enact court-stripping or jurisdiction stripping legislation against the federal courts.[230] On the other hand, the platforms of the Democratic Party did not include any such anti-court references in the same time period.[231] Conservative opposition to the courts continues today. When running for president in 2016, Senator Ted Cruz (R-TX), a member of the Senate Judiciary Committee, supported a variety of proposals advanced by the Religious Right to curb the power of the courts, including ending life terms by imposing retention elections for U.S. Supreme Court justices.[232] Senator Cruz said, "[t]o see the court behaving as it is today, as a super-legislature, simply enacting the policy preferences of the elite judges who are serving upon it, is a profound betrayal of their judicial oaths of office and of the constitutional design that has protected our liberty for over two centuries."[233] President Donald Trump has routinely attacked federal judges in highly personal ways when they issued decisions with which he disagreed.[234] For example, President Trump complained that U.S. District Judge Gonzalo Curiel could not remain impartial in a fraud case dealing with Trump University because of his Mexican heritage.[235] The President also

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225 *Id.*

226 *Id.*

227 *See generally* KEVIN P. PHILLIPS, THE EMERGING REPUBLICAN MAJORITY (1970).

228 WHITTINGTON, *supra* note 206, at 225; GEYH, *supra* note 3, at 109.

229 STEPHENSON, *supra* note 221, at 204.

230 Bruce Peabody, *Introduction*, in THE POLITICS OF JUDICIAL INDEPENDENCE 5–6 (BRUCE PEABODY, ED. 2011).

231 *Id.*

232 Katie Zezima, *Cruz Once Clerked for a Chief Justice, but He's No Longer a Friend of the Court*, WASH. POST (JULY 6, 2015).

233 *Id.*

234 *See, e.g.*, Robert Barnes, *Rebuking Trump's Criticism of "Obama Judge," Chief Justice Roberts Defends Judiciary as 'Independent'*, WASH. POST (NOVEMBER 21, 2018).

235 Katie Shepherd, *Trump 'Violates All Recognized Democratic Norms,' Federal Judge Says in Biting Speech on Judicial Independence*, WASH. POST (NOVEMBER 8, 2019).

criticized U.S. District Judge Amy Berman Jackson's handling of the criminal case of his friend, Roger Stone.[236] Trump also called for Justices Sotomayor and Ginsburg to recuse themselves from any cases about the president or his personal finances in part because of their criticism of the Trump Administration's legal strategy.[237]

The early 2000s seemed to be the low point in the inter-institutional relationship between Congress and the federal courts. During interviews I conducted in 2006 before the midterm elections, I heard this relationship described as "venomous," "hostile," "tense," "deteriorating," "contentious," "animosity," "strained," and "adversarial."[238] One liberal U.S. Representative told me that, "[t]he relationship between the Congress and the federal courts is at an all-time low."[239] The same year, another liberal Member of Congress told me, "[t]here is less respect for the independence of the courts today."[240] In his research, Clark found the period between 2001-2008 was one of the highest in modern history for the introduction of court-curbing legislation in Congress.[241] About the same time, Baker described the inter-institutional relationship among the judicial and legislative branches as, "mutual wariness, suspicion, jealousy, and even a bit of spite."[242]

Even Justice Sandra Day O'Connor agreed with these concerns, stating in 2004 that the relationship between Congress and the federal courts was "more tense than at any time in my lifetime."[243] Justice Ginsburg agreed, stating that the judiciary was "under assault in a way that I haven't seen before."[244] In 2005, *Newsweek* ran a story entitled, "The War on Judges," which concluded that, "concern over the rising tide of anti-judge rhetoric has rocked even the Supreme Court. Though judges were pulled into the culture wars before, lately the animosity—and a range of new efforts to curb judicial power—have reached fever pitch."[245] As Chief Justice Rehnquist wrote in his 2004 annual report, "[c]riticism of judges has dramatically increased in recent years, exacerbating in some respects the strained relationship between

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236 Ann E. Marimow, *Trump Takes on Judge Amy Berman Jackson Ahead of Roger Stone's Sentencing*, WASH. POST (FEB. 12, 2020).

237 Meagan Flynn and Brittany Shammas, *Trump Slams Sotomayor and Ginsburg, Says They Should Recuse Themselves from 'Trump-related' Cases*, WASH. POST (FEB. 25, 2020).

238 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 17.

239 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 17.

240 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 17.

241 CLARK, *supra* note 5, at 43.

242 BAKER, supra note 6, at 116.

243 Linda Greenhouse, *Rehnquist Resumes His Call for Judicial Independence*, N.Y TIMES (Jan. 1, 2005, at A10).

244 Tony Mauro, *Justices Fight Back*, USA TODAY (JUNE 20, 2006, AT 22).

245 Debra Rosenburg, *The War on Judges*, NEWSWEEK (APRIL 25, 2005).

the Congress and the federal judiciary."[246] Summarizing the alarm that many felt about the increased attacks on the judiciary during this period, Geyh concluded that, "[s]ome have likened the relationship between courts and Congress to a conversation or dialogue, but such measured and civil exchanges do not capture the rough and tumble of the interaction in its ordinary course the way a schoolyard fracas does."[247]

During this period, Congress expressed its displeasure with the federal courts in various ways. For example, the House and Senate Judiciary Committees held a variety of hearings to express their displeasure with federal judges, some of which were aimed at attacking specific court decisions such as the one in *Kelo v. City of New London* (2005), where the Supreme Court ruled that local governments had the right to define the phrase "public use" in the Taking Clause of the Fifth Amendment.[248] In a 2005 hearing before a House Judiciary Committee subcommittee, Representative Tom Feeney (R-FL) said that the *Kelo* decision was "indicative of the larger trend in the Court to substitute their own prejudices and biases for the constitutional language itself."[249] Speaking as a supporter of the Religious Right, Feeney went on to call for Congress to examine the religious faith of any nominee to the high court.[250] Earlier in his congressional career, Feeney authored an amendment on the House floor requiring the Department of Justice to monitor individual federal judges who deviated from the federal criminal sentencing guidelines.[251] The ABA, the American Civil Liberties Union ("ACLU"), and even Chief Justice Rehnquist strongly opposed Feeney's amendment.[252] As I have written previously, "[f]ederal judges saw this move as a clear attack on judicial independence, because they perceived that the next step was impeachment for federal trial judges who deviated from the guidelines."[253]

Sometimes the hearings took on broader topics, like the use of foreign court decisions as persuasive precedent in American courts.[254] Various politicians and interest groups called for the impeachment of any judges who

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246 William H. Rehnquist, YEAR-END REPORT ON THE FEDERAL JUDICIARY, 4 (Jan. 2005).

247 Charles Geyh, *The Choreography of Courts-Congress Conflicts*, in THE POLITICS OF JUDICIAL INDEPENDENCE 23 (BRUCE PEABODY, ED. 2011).

248 Kelo v. City of New London, 545 U. S. 469, 483–90 (2005).

249 *Supreme Court's Kelo Decision and Potential Congressional Responses: Hearing Before the Subcommittee on the Constitution of the House Judiciary Committee*, 109th Cong. 6 (2005) (Statement of Rep. Tom Feeney, Member, H. Comm. on the Judiciary).

250 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 117.

251 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 150.

252 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 150.

253 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 150.

254 *House Resolution on the Appropriate Role of Foreign Judgements in the Interpretation of the Constitution of the United States: Hearing Before the Subcommittee of the Constitution of the House Judiciary Committee*, 109th Cong. (2005).

cited foreign judicial decisions in any form.[255] As one interest group spokesperson for a Religious Right group stated in 2005 at a conference entitled, "Remedies to Judicial Tyranny," "if about forty [federal judges] get impeached, suddenly a lot of these guys would be retiring."[256] Although Congress has never removed a federal judge merely for their political views or for their judicial rulings, the threat of impeachment remains a weapon some would like to use against federal judges with whom they disagree. The standards for impeachment are not clear. For example, in advocating for the impeachment of Justice William O. Douglas, then House Minority Leader Gerald Ford (R-MI) argued that an "impeachable offense is whatever a majority of the House of Representatives considers it to be at any given moment in history."[257]

An angry Congress may also prevent the federal courts from hearing certain types of cases through a process known as jurisdiction stripping, or court-stripping.[258] Congress creates federal court jurisdiction, and many argue that the legislative branch can also take this jurisdiction away. During Reconstruction, Congress was successful in stripping the Supreme Court of jurisdiction in some cases such as *Ex Parte McCardle* (1869).[259] Notwithstanding, the Court rejected similar attempts in *United States v. Klein* (1872).[260] Thus, the limits on the power of Congress to strip the federal courts of jurisdiction remain unclear. Nonetheless, in the late 1800s and early 1900s, Progressives and Populists called for the legislative branch to enact court-stripping legislation, similar to what conservatives have done since the 1950s, because of their perception that the Supreme Court had become a liberal activist court.[261] When Congress included court-stripping provisions in the Military Commissions Act of 2006, the Supreme Court promptly ignored them and declared portions of the underlying act unconstitutional.[262]

Although conceptually different from court-stripping, the House Judiciary Committee in 2006 did pass another attack on the federal courts when it approved a bill to create an Inspector General for the federal courts. Inspectors General have long served in the executive branch, auditing the actions and expenditures of their federal agencies and departments, and

255 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 181.

256 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 181.

257 GEYH, *supra* note 3, at 169.

258 For a discussion of the debates about whether or not Congress can strip the federal courts of jurisdiction in all instances, *see* MILLER, JUDICIAL POLITICS, *supra* note 1, at 242–45; MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 156–70.

259 Ex Parte McCardle, 74 U.S 506 (1869).

260 United States v. Klein, 80 U.S. 128 (1872).

261 *See generally* ROSS, *supra* note 218.

262 BOUMEDIENE V. BUSH, 553 U.S. 723 (2008).

reporting their conclusions directly to Congress.[263] The proposed judiciary Inspector General legislation was strongly opposed by federal judges and others, who saw it as another attempt to promote the impeachment of judges with whom the conservatives disagreed.[264] The bill was not considered by the full House nor by the Senate Judiciary Committee.[265] As I have written previously, "[h]aving an inspector general for the federal judiciary would skew the continuing dialogue between Congress and the courts, as well as potentially harm both the institutional and the decisional independence of the judiciary."[266]

The Religious Right and/or the Tea Party Movement prompted many of the attacks on the judiciary during this time period.[267] Both movements and the interest groups associated with them comprised important parts of the Republican coalition.[268] Geyh summarized the views of the Religious Right regarding the role of judges in our society in this way: "[f]or this new breed of Christian conservative, natural law trumps all, and judges who are serious about the rule of law should interpret and apply constitutional, statutory, and common law in a manner consistent with the higher teachings of God."[269] Thus, conservatives seemed to care much more about judicial appointments than did liberals.[270] As one Democratic staffer in the U.S. Senate told me in a 2017 interview, the strong support from evangelicals and others in the Religious Right and President Trump's election have seemed to end the conservative attacks on the federal courts.[271] Many of my interviewees over the years have explained that conservatives care much more about the federal courts than do liberals, and conservatives were leading the charge against the federal courts in the early part of this century.[272] As a former Democratic Senate staffer told me in 2017, "[t]he GOP leadership pushes hard on judges because the Republican base makes

[263] As I have written previously, "[Inspectors General] are usually executive-branch officials whose charge is to combat waste, fraud, and abuse in federal entities." MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 171.

[264] MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 170–79.

[265] MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 170–79.

[266] MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 171

[267] MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 105–33.

[268] MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 105–33

[269] GEYH, *supra* note 3, at 271.

[270] *See, e.g.*, "According to 2016 exit polls, 26 percent of Trump voters said Supreme Court nominations were the most important factor in their vote." Felicia Sonmez, *McConnell Campaigns Sell 'Back-to-Back Supreme Court Champs' T-shirts*, WASH. POST, (AUG. 12, 2019). For Clinton voters, that same figure was only eighteen percent. *See* Philip Bump, *A Quarter of Republicans Voted for Trump to Get Supreme Court Picks—and It Paid Off*, WASH. POST, (JUN. 26, 2018).

[271] *See supra* note 2 and accompanying text.

[272] *See supra* note 2 and accompanying text.

judicial confirmations a high priority. On the left, however, voters don't connect judges with policy."[273]

Others have argued that alarm over the tense relationship between the courts and Congress at the beginning of the current century was overblown, in large part because Congress as a whole took very little action to restrict judicial power, despite all of the anti-court rhetoric coming from various members of the legislative branch.[274] Therefore, Pickerilll concluded that, "[w]hile a number of attacks on the courts may seem ill-advised and impolitic, they do not constitute a serious threat to the U.S. judiciary."[275] Summarizing much of this line of argument, Geyh concluded that, "[a]lthough Congress has threatened the judiciary's independence on any number of occasions, it has rarely made good on those threats."[276] David O'Brien agreed, noting that efforts to restrict the power of the federal courts in general and the Supreme Court in particular have very rarely been enacted, and thus "[c]ourt-curbing legislation is not a very effective weapon . . . . Most proposals to curb the Court, of course, are simply that."[277]

Many scholars have long felt that broad public support for the work of the federal courts has protected them from many of these institutional attacks.[278] O'Brien refers to this as the "myth of the cult of the robe."[279] Geyh argues that the courts are protected from the most dangerous institutional attacks because over the years, Congress and the courts have reached a "dynamic equilibrium" that favors judicial independence.[280] Even in the current era of extreme political polarization, the federal courts still have higher levels of public support than do the other branches of government. In fact, in a 2017 public opinion survey about trust in government, individuals expressed higher levels of trust for the courts than those who trusted either of the other two branches combined.[281] As Neal Devins and Lawrence Baum have concluded, "[p]olitical polarization, in other words, has fueled a general decline in support for all governmental actors; it has not eroded the Court's advantage over the other branches in

273 *See supra* note 2 and accompanying text.

274 *See, e.g.*, Pickerill, *supra* note 185.

275 Pickerill, *supra* note 185, at 101.

276 GEYH, *supra* note 3, at 51.

277 DAVID M. O'BRIEN, STORM CENTER, 362 (9th ed. 2001).

278 *See, e.g.*, JAMES BRYCE, THE AMERICAN COMMONWEALTH (2ND ED. 1891); Pritchett, *supra* note 211; MURPHY, *supra* note 180; JOHN BRIGHAM, THE CULT OF THE COURT (1987); BARBARA PERRY, THE PRIESTLY TRIBE: THE SUPREME COURT'S IMAGE IN THE AMERICAN MIND (1999); CLARK, *supra* note 5.

279 O'Brien, *supra* note 277, at 92.

280 GEYH, *supra* note 3, at 253–55.

281 DEVINS & BAUM, *supra* note 105, at 31.

public approval."[282]

One question is whether federal judges, including U.S. Supreme Court justices, alter their decisions in the face of expected congressional opposition. Clark argues that the Supreme Court does not worry very much about congressional attacks themselves, but instead the justices see these attacks as evidence that their public support (as opposed to their elite support) may be weakening. Clark concludes, "the bulk of empirical evidence suggests that the Supreme Court is not at all influenced by congressional ideology . . . . [However], the justices interpret Court-curbing threats as signals about the nature of its public support."[283] Thus, court-curbing legislation serves as an important mechanism for judges to learn about their relationship with the general public.[284] Devins and Baum disagree with this notion that the Supreme Court follows public opinion, instead arguing that, "[t]he Justices are more responsive to relevant segments of the social and political elite than to the public as a whole."[285]

V. THE COMMITTEES OF LAWYERS

The Judiciary Committees have traditionally been the committees of lawyers. In their longitudinal study of the committee assignment process in the U.S. House from WWII to the early 2000's, Frisch and Kelly found that, "[l]awyers, regardless of party or electoral status, are likely to request assignment to Judiciary."[286] The parties generally obliged to these requests, and only lawyers were appointed to the committees for many years.[287] In 1989-1990, thirty-four of the thirty-five members of the House Judiciary Committee were lawyers.[288] The trend continued in 1995, when Congressman Sonny Bono (R-CA) was the only non-lawyer to serve on the House Judiciary Committee that year.[289] Following his death, his wife Mary Bono (R-CA), was the sole non-lawyer on the committee.[290] As a result, both committees developed a lawyerlike and incrementalistic deliberative style and culture.

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282 DEVINS & BAUM, *supra* note 105, at 31.

283 CLARK, *supra* note 5, at 12, 20.

284 CLARK, *supra* note 5, at 12, 21.

285 NEAL DEVINS AND LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS COME TO THE SUPREME COURT 9 (2019).

286 FRISCH & KELLY, *supra* note 38, at 148.

287 A non-lawyer was the only member to request the House Judiciary Committee in 1979, but that that request was denied. Lynette P. Perkins, *Member Recruitment to a Mixed Goal Committee: The House Judiciary Committee*, 43 J. OF POL. 348, 348 (1981).

288 MILLER, HIGH PRIESTS, *supra* note 2, at 127.

289 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 135.

290 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 135.

Clearly, lawyer-politicians today continue to be greatly over-represented among the membership of both Judiciary Committees.[291] At the end of the 115th Congress (2017-2018), there were 167 voting members with law degrees in the full House (37.8%) and fifty-five (55) Senators.[292] But, in July of 2017, the House Judiciary Committee had only eight non-lawyers among the forty members (eighty percent lawyers), and the Senate Judiciary Committee had only six non-lawyers among its twenty members (seventy percent lawyers).[293] In July of 2018, the number of non-lawyers on the House Judiciary Committee was nine (seventy-eight percent lawyers), but the Senate Judiciary Committee had only four non-lawyers among its twenty-one members (eighty-one percent lawyers).[294] In June of 2019, the Congressional Research Service reported that 161 House members in the full House were lawyers (36.6% lawyers) and fifty-three Senators had law degrees (fifty-three percent lawyers).[295] In July of 2019, on the Senate Judiciary Committee, seventy-seven percent of the members were lawyers, while lawyers made up eighty percent of the membership of the House Judiciary Committee.[296] On both committees, the non-lawyers were often female.[297] For example, in 2019, on the Senate Judiciary Committee, three of the five non-lawyers were women (with one male non-lawyer holding a Ph.D. instead of a law degree).[298]

Many of my interviewees have highlighted the fact that the two Judiciary Committees attract especially high-quality lawyer-legislators. As one U.S. Representative told me in 1989, "[i]t's great to work with all those lawyers on [House] Judiciary. The members have more experience and are higher quality than most. They are also brighter than most."[299] Congressional staffers on the House Judiciary Committee are almost always lawyers themselves have told me over the years that they preferred working

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291 When counting lawyer members in Congress, I count all individuals with law degrees, as opposed to counting only those who list attorney or some other lawyer related field as their main occupation. I argue that even lawyer-politicians who have never practiced law nevertheless have been socialized into the profession through law school and thus "think like a lawyer." *See* MILLER, HIGH PRIESTS, *supra* note 2, at 17–23.

292 Jennifer E. Manning, MEMBERSHIP OF THE 115TH CONGRESS: A PROFILE 4 (Congressional Res. Serv., (2018)).

293 *See* the House Judiciary Committee website at https://judiciary.house.gov/.

294 *See* the Senate Judiciary Committee website at https://www.judiciary.senate.gov/.

295 Jennifer E. Manning, MEMBERSHIP OF THE 115TH CONGRESS: A PROFILE 5 (Congressional Res. Serv., (2018)).

296 *See* the Senate Judiciary Committee website at https://www.judiciary.senate.gov/.

297 *See* the Senate Judiciary Committee website at https://www.judiciary.senate.gov/ and the House Judiciary Committee website at https://judiciary.house.gov/.

298 *See* the Senate Judiciary Committee website at https://www.judiciary.senate.gov/.

299 MILLER, HIGH PRIESTS, *supra* note 2, at 128.

with lawyer members of the committee.[300] As one staffer explained in an interview in 1989, "Because of their training and discipline, lawyer members see the importance of nuance and wording. They also ask tougher questions of witnesses."[301] In 2006, stressing the importance of having liberal lawyer-legislators on the Judiciary Committee, one U.S. Representative told me that, "[t]he conservatives don't understand the courts and the legal ideology of the courts very well. They don't really know the impact of the opinions of the courts, and they don't bother to try to understand judicial rulings. They just attack the courts. Lawyers [on the committee] must stand up for the courts when they can't stand up for themselves."[302]

Even the non-lawyer members of the two Judiciary Committees eventually learn to navigate the committees' lawyerlike and incrementalistic cultures. In 2018, a Republican lawyer who worked as a staffer for a GOP member of the House Judiciary Committee told me, "[t]here aren't a lot of differences between the lawyer and non-lawyer members. The lawyers and non-lawyers on the committee use the same language. The non-lawyers learn to talk like lawyers. Newer non-lawyers on the committee who haven't yet adapted are more obvious."[303] Another lobbyist told me, "Senator Feinstein, the ranking minority member of the Judiciary Committee, is one of the best lawyers on the committee."[304] The statement was, of course, meant to be ironic because Senator Feinstein is one of the few members of the Senate Committee who does not have a law degree, and the lobbyist was fully aware of that fact.

On the other hand, sometimes the differences between the lawyer-politicians and the non-lawyers on the committees are more obvious. In 2017, a former Democratic staffer on the Senate Judiciary Committee noted in an interview with me that, "[i]t is quite obvious that Chairman Grassley and Ranking Member Feinstein are not lawyers. It is quite odd to have non-lawyers as both the chair and the ranking member."[305] This staffer went on to note that it was easy to tell which members of the Senate Committee were lawyers because they often highlighted that fact in their public comments.[306] In 2017, a different Democratic Senate staffer told me that his boss "loves being a lawyer," mentions that fact quite often, and has even continued writing law review articles after his election to the Senate.[307] Not everyone

300 *See supra* note 2 and accompanying text.
301 MILLER, HIGH PRIESTS, *supra* note 2, at 128.
302 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 207.
303 *See supra* note 2 and accompanying text.
304 *See supra* note 2 and accompanying text.
305 *See supra* note 2 and accompanying text.
306 *See supra* note 2 and accompanying text.
307 *See supra* note 2 and accompanying text.

wants the committees to be made up exclusively of lawyers. For example, in 2017, a former Democratic Senate staffer told me that, "[s]ometimes it is quite useful to have a non-lawyer perspective on the Committee."[308]

In my early research, lawyer members of the House and especially those lawyers who served on the House Judiciary Committee were extremely protective of the courts.[309] In 1989, one House Judiciary Committee staffer explained why he felt the committee was extremely supportive of the third branch. He said, "[j]ust like one can disagree with different schools of thought among legal scholars or other academics, Judiciary members disagree with the courts without attacking the courts as an institution. When Judiciary members disagree with a court's decision, they don't call for the impeachment of the judge; they file amicus briefs for the appeal."[310] Things had changed quite a bit when I conduced my next round of interviews in 2006-2007. Under Chairman Jim Sensenbrenner (R-WI), the conservative lawyers on the House Judiciary Committee led the charge against the federal courts. For example, writing in 2006, Bell and Kevin Scott found that House Judiciary Committee members were just as likely to introduce court-stripping legislation as were their colleagues who did not serve on that committee.[311] These scholars also found that lawyers in the House were just as likely to introduce court-curbing legislation as were their non-lawyer colleagues.[312] As an employee of the judicial branch told me in 2006, "[t]he days when we could count on lawyers in the House to protect judicial independence are long over. Today ideology and party matter much more than whether a member has a law degree."[313]

Not everyone was happy that there were so many non-lawyers serving in key roles on the Senate Judiciary Committee. In 2018, one lobbyist was quite critical of Senator Chuck Grassley (R-IA), the former chair of the Committee. This lobbyist stated, "[a]s a non-lawyer, Grassley is unaware of

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308 *See supra* note 2 and accompanying text.

309 During my 1989 interviews, I found that over seventy percent of the members of the House Judiciary Committee had extremely positive attitudes toward the federal courts. MILLER, HIGH PRIESTS, *supra* note 2, at 105.

310 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 137.

311 Lauren Cohen Bell and Kevin M. Scott, *Policy Statements or Symbolic Politics? Explaining Congressional Court-limiting Attempts*, 89 AM. JUDICATURE SOC'Y 196, 201 (2006).

312 *Id.*

313 As I noted in 2009, "The number of anti-court bills passed by the House Judiciary Committee in recent years is striking. These have included bills to strip the federal courts of jurisdiction over a variety of types of cases, to increase congressional oversight of the federal courts through such means as crating an inspector general for the courts, and threats of impeachment against federal judges because of their decisions." MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 139.

the process used in the Judicial Conference to make policy."[314] In an interview with me in 2018, an employee of a think tank was equally critical of Senator Grassley's approach to the judiciary, noting that, "Grassley only has a vague conception of what courts do. Everything with Grassley is personal, and he has a great deal of antagonism toward federal judges."[315] This person continued, "[a]s a non-lawyer, Grassley doesn't understand how the court system actually functions."[316] In 2017, a Democratic Senate staffer was more subtle in his criticism of the chairman when he told me, "Grassley is a non-lawyer, and certain issues matter more to him and matter differently than to the lawyer members on the committee."[317] Another Democratic staffer told me that, "[t]he non-lawyer members of the committee rely more on the lawyers on their staff than the lawyer members do."[318]

Both Senator Grassley and former House Judiciary Chair Jim Sensenbrenner (R-WI) are often critical of the federal courts. For instance, both Senator Grassley and Jim Sensenbrenner (R-WI) have introduced anti-court legislation to create an Inspector General for the federal judiciary who would report back directly to Congress.[319] In the press release that notes the introduction of the bill, the Senator stated, "[i]t's been shown through press accounts and various reports that the federal judiciary is in need of some sunshine. An Inspector General can only help shed more light on the actions of the Judicial Branch and keep it accountable to the American people."[320] In 2006, although the legislation passed the House Judiciary Committee, the Senate Committee has never considered it.[321] However, in June 2018, during a hearing on sexual harassment in the judiciary, Senator Grassley again called for the creation of an Inspector General for the federal courts.[322] Grassley, however, unlike Chairman Sensenbrenner of the House Judiciary Committee, did not bring the legislation to a mark-up in the committee, even though he could have because of his position as committee chair. Speaking to me in 2017, another lobbyist explained that, "Grassley wants comity and collegiality, and thus he won't push anti-court legislation in the

314 *See supra* note 2 and accompanying text.

315 *See supra* note 2 and accompanying text.

316 *See supra* note 2 and accompanying text.

317 *See supra* note 2 and accompanying text.

318 *See supra* note 2 and accompanying text.

319 MILLER, VIEW OF THE COURTS, *supra* note 2, at 170–79.

320 Chuck Grassley, *Grassley, Sensenbrenner See Need for Inspector General for the Judiciary* (January 31, 2007), https://www.grassley.senate.gov/news/news-releases/grassley-sensenbrenner-see-need-inspector-general-judiciary

321 MILLER, VIEW OF THE COURTS, *supra* note 2, at 171.

322 *See* Debra Cassens Weiss, *Senate Judiciary Committee Chair Grassley Suggests Judiciary Needs an Inspector General*, ABA J., June 15, 2018.

committee."[323]

VI. THE ROLE OF THE COMMITTEE CHAIR

The leader of a congressional committee at any specific time can have a huge effect on the approach and agenda of that committee and its relationship with the federal courts. In his study of various committee chairs, Andrees Reeves argued that the "[individual] chairmen made a difference in the structure, operations, output, and function of the committee, each leading in a different way. While institutional environmental influences leadership, the way the chairman uses the resources at hand—both institutional prerogatives and personal resources—also has an impact on the institution and its outputs. In large part as a result of the differences in leadership, the committee was a different organization under each chairman."[324] In other words, who the committee chair is at any given time matters.

Committee chairs can have a great deal of influence over staffing issues for the committees within the broader institutional constraints often imposed by party leadership in the parent chamber.[325] Some chairs will hire as many staffers as possible to work for the chair of the full committee, while others will allow the subcommittee chairs to hire more staff.[326] Committee chairs can also determine what kind of staff are hired by the committee, which can involve hiring more with a policy focus or more with a communications or public relations focus. For example, Casey Burgat and Charles Hunt have found in their study of committee staffs between 2001 and 2017, that over this period, the House Judiciary Committee lost about a third of its policy-focused staff and gained more communications aides.[327] These scholars note that for the House Judiciary Committee, "[t]here used to be about 25 policy-focused staffers for every communication aide. Now the ratio is closer to 5 to 1."[328] Different committee chairs make different choices about how many and what kind of staff the committee will employ.

One key difference between the House and Senate Judiciary Committees is the fact that the Senate Committee has always had a much larger number of employees than its House counterpart. This may be due to

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323 *See supra* note 2 and accompanying text.

324 ANDREES E. REEVES, CONGRESSIONAL COMMITTEE CHAIRMEN: THREE WHO MADE AN EVOLUTION 3 (1993).

325 From 1994 to 2014, there was a thirty-five percent decline in committee staffing for the House of Representatives as a whole, while funding for leadership staff increased by eighty-nine percent for the same period. Bill Pascrell, Jr., *Why is Congress so Dumb?*, WASH. POST, (Jan. 12, 2019).

326 *See generally* EVANS, *supra* note 44.

327 Casey Burgat and Charles Hunt, *Why Was the Peter Strzok Hearing Such a Circus? Because Congress Wanted it That Way*, WASH. POST, (July 17, 2018).

328 *Id*.

the Senate Committee's role in judicial nominations and confirmations. Burgat and Hunt found that in 2001, the Senate Judiciary Committee had 157 staffers while the House Judiciary Committee employed only eighty-nine staffers.[329] In 2017, however, the Senate Committee employed 103 people while the House Committee employed only seventy-seven.[330] The ratio among senior staffers, policy-oriented staffers, and communications staffers seems to change depending on who is chairing each committee respectively. The trend, however, is that the total number of staff for the Senate Committee has been steadily declining in the 2001-2017 period, while the number of House Committee staffers has fluctuated somewhat but remained generally stable.[331] Burgat and Hunt report that overall Senate committee staffs dropped throughout the chamber by fifteen percent during the 2001-2017 period.[332] The Senate Committee certainly has a smaller percentage of communications staff when compared to its House counterpart.[333]

The individual chairing a congressional committee can also affect the legislative effectiveness of that committee, as well as relationships with other committees. John Baughman, in his study of cooperation and competition among congressional committees, notes that the personalities of committee leaders can contribute to the level of cooperation or confrontation among committees.[334] Citing Hall's work,[335] Baughman also argued that the House member participation in committee work is uneven, allowing committee chairs and a few highly interested committee members to dominate a committee's agenda.[336] In their study of legislative effectiveness in Congress, Craig Volden and Alan Wiseman found that committee and subcommittee chairs had the highest legislative effectiveness scores.[337] As these scholars note, "[c]ommittee and subcommittee chairs significantly outperformed minority-party members and members of their own party."[338] In his work on Senate committees, C. Lawrence Evans agrees, concluding that, "Committee leaders tend to be more effective at managing information the longer they have held the position, the broader their experience as a

329 This data was provided from these scholars directly to the author.

330 *Id*.

331 Burgat and Hunt, *supra* note 328

332 Burgat and Hunt, *supra* note 328.

333 Burgat and Hunt, *supra* note 328

334 JOHN BAUGHMAN, COMMON GROUND: COMMITTEE POLITICS IN THE U.S. HOUSE OF REPRESENTATIVES 180 (2006).

335 RICHARD L. HALL, PARTICIPATION IN CONGRESS (1996).

336 BAUGHMAN, *supra* note 334, at 185.

337 CRAIG VOLDEN AND ALAN E. WISEMAN, LEGISLATIVE EFFECTIVENESS IN THE UNITED STATES CONGRESS 76 (2014).

338 *Id.*

committee leader, and the longer they have been in the Senate."[339]

The committee chair on the Judiciary Committees holds a great deal of power in the committee, especially in the House. Over the years, the prestige and attractiveness of the House Judiciary Committee was largely driven by the agenda of its chair.[340] For example, Emanuel Celler (D-NY) maintained control over the House Judiciary Committee by assigning the committee's subcommittees very vague jurisdictions so that he could directly control which subcommittee received a specific bill.[341] Chairman Jack Brooks (D-TX), who served as committee chair in the early 1990s, has been described as "aggressive," although less autocratic than some of his predecessors.[342] Chairman Jim Sensenbrenner (R-WI) was a hands-on chair who greatly influenced the direction that the committee took, and especially in his disdain for the federal judiciary. Sensenbrenner has been described as "opinionated and direct to a fault,"[343] "heavy-handed," "gratuitously partisan,"[344] and that he "doesn't suffer fools lightly. Known as much for his prickliness as his smarts, he can be downright ornery to colleagues, journalists, unprepared witnesses, and even constituents."[345] As a Senate Judiciary Committee staffer told me in 2006, "Sensenbrenner is a partisan guy who wants to assert his power and always get his way."[346]

Decentralization and the respect for the rights of individual Senators have in part made the Senate Judiciary Committee chair less powerful than his House colleagues. Traditionally, the Senate Judiciary Committee has been highly decentralized,[347] as evidenced by the size of the committee staff, for example. In 1965, when the average size of a committee staff was twenty-eight, the Senate Judiciary Committee had 137 staffers, almost all employed by the committee's subcommittees and hired by their respective chairs.[348] Senator James Eastland (D-MS) allowed the subcommittees to have a great deal of discretion in their work during his term as chair in the 1960s and 1970s.[349] The decentralized nature of the Senate Judiciary Committee continued into the 1980's and has led scholars to refer to

339 EVANS, *supra* note 44, at 36.

340 Lynette P. Perkins, *Influences of Members' Goals on Their Committee Behavior: The U.S. House Judiciary Committee*, 5 LEGIS. STUDIES QUARTERLY 390 (1980).

341 WILLIAM L. MORROW, CONGRESSIONAL COMMITTEES 40 (1969).

342 DEERING & SMITH, *supra* note 30, at 150.

343 Koszczuk & Stern, *supra* note 88, at 1122.

344 JACKIE KOSZCZUK AND MARTHA ANGLE, CQ'S POLITICS IN AMERICA 2008: THE 110TH CONGRESS 1112 (2007).

345 THOMAS E. MANN AND NORMAN J. ORNSTEIN, THE BROKEN BRANCH 175, 252 (2006).

346 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 142.

347 MORROW, *supra* note 341, at 192.

348 GOODWIN, *supra* note 40, at 60–61.

349 MORROW, *supra* note 341, at 74.

Republican Chairman Strom Thurmond as more constrained in his leadership tactics than other Senate committee chairs at the time.[350] Perhaps Thurmond had no choice, but Evans describes the policy consequences of his procedural choices as "negligible."[351] Thus, Thurmond was described as being "fair, but his fairness had boundaries."[352] Given the institutional constraints, some have even argued that the Senate Judiciary Committee would not have tolerated a powerful committee chair in that era.[353]

More recent chairs of the Senate Judiciary Committee have asserted their individual powers more forcefully. As former chair Senator Patrick Leahy (D-VT) once told a journalist, "I've always set the agenda in Judiciary."[354] Recently, however, Chairman Chuck Grassley (R-IA) has yielded to pressure from the Majority Leader to change his blue-slip policy and to refuse to allow hearings on President Obama's nomination of Merrick Garland to the U.S. Supreme Court.[355] Thus, the Senate Judiciary Committee reflects the realities of its parent chamber. However, the committee chair can significantly influence the committee functions. For example, we have seen many differences in how various Senate Judiciary chairs handled the blue-slip process, as discussed in more detail above.[356]

It is certainly true that who is chairing the Judiciary Committees can have an enormous effect on the relationship between the committee and the federal courts. For example, House Judiciary Chair Emanuel Celler (D-NY) was generally a friend of the federal courts, and he used his power as committee chair to block jurisdiction stripping proposals and other anti-court measures in the 1960's and early 1970's.[357] Chairman Peter Rodino (D-NJ) further protected the courts by making the committee a graveyard for conservative anti-court measures, including various proposed constitutional amendments in the 1970's and 1980's.[358] Chairman Jack Brooks (D-TX) generally followed the Rodino model. After the Republicans took control of the full House (which was after the 1994 elections), Chairman Henry Hyde (R-IL) was strongly supportive of the courts and did not allow the committee to consider court-curbing measures.[359] On the other hand, Hyde's successor

350 EVANS, *supra* note 44, at 164.
351 EVANS, *supra* note 44, at 164.
352 EVANS, *supra* note 44, at 66.
353 EVANS, *supra* note 44, at 164.
354 DAVIDSON, OLESZEK, LEE, & SCHICKLER, *supra* note 171, at 197.
355 DEVINS & BAUM, *supra* note 105, at 108–09.
356 *See, e.g.*, MCMILLION, *supra* note 119.
357 Lucas Powe, Jr., *The Warren Court and the Political Process*, *in* THE AMERICAN CONGRESS: THE BUILDING OF DEMOCRACY 553 (JULIAN E. ZELIZER, ED. 2004).
358 Neal Devins, *Elected Branch Influences in Constitutional Decisionmaking*, LAW & CONTEMP. PROBS. 99 (1993).
359 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 145–47.

Chairman Jim Sensenbrenner (R-WI) was extremely antagonistic toward the federal judiciary, as one staffer for a judicial branch agency that closely follows court-Congress relations told me in 2018.[360] As a Democratic member of the House Judiciary Committee told me in 2006, "Chairman Sensenbrenner wants to whip up the country against the courts, turning the judges into the enemy. Federal judges feel physically insecure right now."[361] Sensenbrenner thereby led the charge against the federal judiciary and convinced his committee to pass legislation that would have created an Inspector General for the Federal Judiciary.

Subsequent chairs have been far less antagonistic towards the courts. As one lobbyist mentioned in 2018, Chairman Lamar Smith (R-TX) was less problematic for the courts than Sensenbrenner, while Chairman Bob Goodlatte (R-VA) was quite sympathetic to the courts, and to federal judges in particular.[362] This individual concluded that, "Chairman Lamar Smith was fine to work with on various issues affecting the federal courts."[363] Chairman Jerrold Nadler (D-NY) has been a strong champion of the federal judiciary and has led the charge against anti-court measures over the years.[364] As one lobbyist told me in 2018, "[t]he key factor of great importance in the relationship between Congress and the courts is the committee leadership and their individual attitudes towards the judiciary."[365]

In order to understand the effects that an individual can have on the committee, it is useful to compare two chairs of the House Judiciary Committee who took very different approaches to leading the committee. Comparing the leadership of Chairman Hyde and Sensenbrenner, both conservative Midwestern Republicans, one congressional staffer explained to me in 2006, "Congressman Hyde had an old-school approach to the courts, treating judges with the respect deserved for members of a co-equal institution. Sensenbrenner is a highly partisan guy who wants to assert his own power and impose his will on anyone who gets in his way, including federal judges."[366] When Representative Hyde stepped down as chair of the House Judiciary Committee in 2001, the U.S. Judicial Conference passed a resolution praising his assistance to the federal courts.[367] On the other hand, Chairman Sensenbrenner led institutional attacks against the courts,[368] and

360 *See supra* note 2 and accompanying text.

361 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 143.

362 *See supra* note 2 and accompanying text.

363 *See supra* note 2 and accompanying text.

364 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 153.

365 *See* MILLER, THE VIEW OF THE COURTS, *supra* note 2 and accompanying text.

366 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 146.

367 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 147.

368 Sensenbrenner has proudly stated that he has been the floor manager of more impeachment efforts than any other Member of Congress. *See, e.g.*, Philip Wegman, *He has*

convinced the House Committee to pass anti-court legislation, including a bill that would have created an Inspector General for the federal judiciary.[369] As chairman of the committee, he also led the committee in impeachment investigations against several sitting federal judges, although these committees did not come forward with the articles of impeachment in these cases.[370] Clearly, the individual who chairs the Judiciary Committees has a strong effect on the relationship between the committees and the federal judiciary.

VII. CONCLUSIONS

The relationship between Congress and the federal courts is clearly complicated, and the interactions at any given moment in time are heavily influenced by a variety of factors. The relationships between the courts and the House Judiciary Committee and the Senate Judiciary Committee, respectively, are equally complex. Both committees are dominated by lawyer-legislators who serve on the committees in much greater numbers than their proportion in the parent chambers.[371] As the "Committees of Lawyers," both Judiciary Committees tend to have court-like and lawyerly cultures that tend to prefer incrementalistic approaches to decision-making. Traditionally, lawyers would protect the courts from attacks, although this seemed to change in the early 2000's, at least on the House Judiciary Committee.[372] The court-like decisional style, however, seems to be more deeply engrained on the Senate Judiciary Committee. In overall terms, the relationship between the committees and the courts has been cooperative at times, but at other times it has been highly conflictual.

It is quite common for politicians to criticize specific court rulings with which they disagree. It is very rare, however, for Congress to take action to restrict the institutional power of the independent judiciary, and thus reduce the voice of the courts in the inter-institutional dialogue that helps determine constitutional meaning in our society.[373] When Congress is angry with the federal courts, it has a wide array of weapons in its arsenal to use against the

Managed the Most Impeachments in History and Warns Impeaching Kavanaugh Would be a 'Waste of Time', THE WASHINGTON EXAMINER, Nov. 21, 2018.

369 MILLER, THE VIEW OF THE COURTS, *supra* note 2, at 147.

370 For example, in July of 2006, Sensenbrenner introduced a resolution that allowed the House Judiciary Committee to begin impeachment investigations against U.S. District Judge Manuel L. Real of Los Angeles. As one law professor said at the time, "Sensenbrenner has an agenda of scaring federal judges." *See* Henry Weinstein, *Impeachment Inquiry of Judge Sought*, L.A. TIMES, July 18, 2006. The committee eventually dropped its impeachment inquiry without voting for articles of impeachment.

371 *See supra* note 291 and accompanying text.

372 *See generally* MILLER, THE VIEW OF THE COURTS, *supra* note 2.

373 *See supra* note 152 and accompanying text.

judiciary. Although Congress often makes threats against the courts, such measures are rarely used. Not only are the two Judiciary Committees the chief voices of their respective chambers on constitutional issues, but they are also the place where court-curbing legislation often begins. This is especially true in the House, where the committee chair has stronger control over the committee's agenda than in the Senate.

The House and Senate Judiciary Committees are constrained by broader institutional structures, norms, and cultures of their parent chambers. The Senate has a long tradition of protecting the prerogatives and rights of individual Senators, and the Senate committee system makes committees much weaker than those in the House.[374] Senate committees tend to be decentralized, which gives the chair of the committee less power than his or her House counterparts. The Senate is also likely to ignore most extreme bills, that may pass the House, because of the procedural rules in the Senate, including the filibuster on the Senate floor.[375] Thus, Senate committees often become graveyards for bills approved by the more aggressive House. Whoever chairs the Senate Judiciary Committee must function in this environment. The Senate Judiciary Committee often refuses to consider anti-court legislation occasionally passed in the House.

The House, on the other hand, is a very hierarchical institution that protects the needs of the majority party. Even though this power has shifted back and forth over time between committee chairs and party leaders in the chamber, the House Committee chairs have nevertheless retained a fair amount of discretion to determine the committee's approach to various issues. This power is enhanced by the fact that on the House Judiciary Committee, members tend to come from the extremes of each party, thus giving the House Committee chair the advantage of having like-minded colleagues in his or her party on the committee. The House Judiciary Committee's relationship with the federal courts is largely determined by the preferences of whomever is chairing the committee. When the chair has an anti-court agenda, then he or she is likely able to convince the members of his or her party on the committee to follow their lead.[376]

Today, interest groups representing the Religious Right and the Tea Party Movement play a large role in lobbying the two Judiciary Committees about their desires to reign in the federal courts.[377] In the late 1800's and early 1900's, it was Progressives and Populists from the left who wanted to limit the power of the then-conservative activist federal bench.[378] Since the

374 *See supra* note 29 and accompanying text.
375 *See supra* note 27 and accompanying text.
376 *See supra* notes 357–370 and accompanying text.
377 *See supra* notes 267–273 and accompanying text.
378 *See supra* notes 218–223 and accompanying text.

1950's, however, conservative interest groups, especially those affiliated with the Religious Right and other social conservative movements, wanted to place restrictions on the policy-making abilities of the federal courts.[379] These individuals want to reduce the voice of the federal courts by calling for impeachment of judges who issue rulings with which they disagree or for other structural changes that would restrict the independence of the federal judiciary.[380] In the early 2000's, these groups were especially successful in getting the attention of the members of the House Judiciary Committee and its then chairman, Representative James Sensenbrenner (R-WI). These socially conservative interest groups wanted to reduce what they perceived to be the liberal activist voice of the federal courts in the inter-institutional constitutional dialogue. The House Committee discussed a variety of anti-court measures, held a variety of hearings on anti-court legislation, set forth potential articles of impeachment for several federal judges, and passed several court-curbing bills in committee mark-ups.[381] The conservative lawyer members of the House Judiciary Committee accommodated the desires of these groups, leading to what many labeled "The War on Judges."[382]

One key difference between the House and Senate Judiciary Committees that does not seem to affect the relationship between the committees and the federal courts is the role that the Senate committee plays in the confirmation process for federal judicial nominees. Although the House has no role in confirming federal judges, this difference does not seem to make the Senate more protective of federal judges. Judges seem to leave lobbying efforts for both committees to the professional lobbyists in the Administrative Office of the Federal Courts, who speak on behalf of the Judiciary Conference (the policy arm of the federal judiciary).[383] Because judges rarely contact either Members of Congress or Senators directly, the role of the Senate in confirming federal judges does not seem to change the committee's interactions with the federal courts after the appointment and confirmation stage.

The individual who is chairing the committee is perhaps the key variable that shapes the relationship between the judiciary and the two committees. This factor seems to be much more important in the House than in the Senate, although it is important to see how various chairs of the Senate Judiciary Committee have approached the blue-slip tradition during the confirmation process for federal judges. While the chairs of the Senate

379 *See supra* notes 225–229 and accompanying text.
380 *See supra* notes 254–256 and accompanying text.
381 MILLER, VIEW OF THE COURTS, *supra* note 2, at 156–84.
382 *See supra* notes 238–247 and accompanying text.
383 *See supra* notes 96–97 and accompanying text.

Committee seem to be able to shape their committee's approach to judicial confirmations, within the constraints imposed by the party leadership in the chamber, they have less power to influence the committee's overall approach to anti-court legislation.[384] For example, when Senator Chuck Grassley (R-IA) chaired the Senate Committee, he could not convince the committee to approve his court-curbing agenda, in part because he could not overcome the Senate's general unwillingness to enact extreme and non-incrementalistic measures. Senator Grassley also did not want to increase tensions with the other members of the committee on legislative matters because he was compelled by the party leadership to take certain highly controversial steps on the judicial confirmation side. One example, in particular, was Senator Grassley's refusal to hold confirmation hearings on President Obama's appointment of Judge Merrick Garland to the U.S. Supreme Court.[385] The Senate Judiciary Committee is thus clearly reflective of the broader culture of its parent chamber, which means it is harder for the Senate chair to control the approach of the committee, unlike the House chair.

In the House, the key variable in court-Congress relations seems to be the agenda of the chair of the House Judiciary Committee. In general, committee chairs in the House have a great deal of discretion when it comes to setting the tone, approach, and agenda of their committee. When chairs of the House Judiciary Committee like Representatives Rodino (D-NJ), Hyde (R-IL), or Nadler (D-NY), wanted to protect the courts from attacks, they were able to do so. On the other hand, when chairs like Representative Sensenbrenner (R-WI) wanted to restrict the independence of the courts, he was able to convince the committee members to follow his lead in part because the committee has traditionally drawn its members from the most extreme wings of both parties. Sensenbrenner was able to shape the work of the committee to promote his personal anti-court agenda which also reflected the agenda of the key Religious Right, Tea Party, and other socially conservative interest groups. This was in part due to the fact that Republican members of the committee all supported those same groups.[386] It is worth noting, however, that few of these measures were considered on the floor of the House. Although the relationship between the Judiciary Committees and the federal courts are extremely complicated, there are many variables to consider. Ultimately, a key factor to consider is the committee chair, who can have a profound effect on the role that each branch plays in the inter-institutional constitutional dialogue.

384 *See supra* notes 74–85 and accompanying text.
385 *See supra* notes 153–156 and accompanying text.
386 *See supra* notes 267–273 and accompanying text.