

# Washington University Law Review

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Volume 95 | Issue 5

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2018

## Congress in the Administrative State

Brian D. Feinstein

*The Wharton School of the University of Pennsylvania*

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### Recommended Citation

Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. 1189 (2018).  
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## CONGRESS IN THE ADMINISTRATIVE STATE

BRIAN D. FEINSTEIN\*

*In an era of increased concern over presidential power, congressional oversight of the executive branch constitutes a substantial—but underappreciated—means of influencing agency decision-making. Scholars too often have overlooked it, and Congress is sub-optimally designed for its provision, but oversight has a significant impact on agency behavior.*

*This Article provides a corrective. It presents the legal mechanisms that give oversight hearings their force and situates these hearings in their historical and legal context. In light of this framework and historical practice, the Article posits that ex post oversight hearings facilitate political control over the administrative state. Because oversight gets its bite from an implicit threat of legislative sanctions should an agency not change its behavior following hearings, however, committees' decisions whether to pursue oversight hinge on the credibility of this threat.*

*To test this theory, the Article introduces an original dataset of over 14,000 agency “infractions,” i.e., agency actions that are potential subjects of hearings. Analysis of these data reveals, first, that oversight is most likely to occur when the particular preference alignment of Congress, the relevant committee, and the agency make the threat of new legislation credible. A second empirical analysis finds that, when oversight hearings do occur, they can get results; infractions that are subject to hearings are 18.5% less likely to recur compared to otherwise similar infractions that are not subject to hearings.*

*These findings call into question the received wisdom regarding Congress's role in governance. Whereas scholars focused on the political branches' formal powers see Congress as a branch in decline, a more nuanced picture emerges when one also considers “soft powers,” like oversight. These findings offer a blueprint for greater congressional involvement in administration: to increase Congress's role in governance, committee membership rosters should be representative of the larger legislature and committees with overlapping jurisdictions should be established. By redesigning its internal structure, Congress can promote more frequent oversight and, because oversight can be consequential, thereby strengthens Congress as a check on presidential administration.*

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## INTRODUCTION

In retrospect, it was only a blip on the media's radar screen. But in the summer of 2000, tire safety held the public's attention.<sup>1</sup> That summer, the nation learned that failed Firestone tires were responsible for over one hundred deaths during the previous several years.<sup>2</sup> Concerned about the perceived inability of the National Highway Traffic Safety Administration (NHTSA) to identify and adequately address the defect,<sup>3</sup> Congress enacted legislation requiring the agency to establish a data-reporting and analysis system by mid-2002 under which manufacturers must submit to NHTSA information on accident-related claims.<sup>4</sup>

Yet NHTSA, with more industry-friendly officials at the helm following the 2000 election,<sup>5</sup> dragged its feet.<sup>6</sup> In 2002, a House subcommittee convened a hearing where several legislators sharply criticized NHTSA's administrator for the agency's inaction concerning the defect information system.<sup>7</sup>

Following the hearing, NHTSA made swift progress, completing the first phase of the system just nine months later.<sup>8</sup> Two years after that, the agency issued the first recall based on analysis using the new system—which,

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\* Assistant Professor of Business Law and Legal Ethics, The Wharton School of the University of Pennsylvania. email: feinstein@wharton.upenn.edu. I gratefully acknowledge Michelle Minju Cho and Greg Solomon for research assistance, and thank Dan Carpenter, Adam Chilton, Jake Gersen, Tom Ginsburg, Daniel Hemel, William Hubbard, Aziz Huq, Jonathan Masur, Jennifer Nou, Eric Posner, Eleanor Powell, Neda Raeker, Eric Schickler, Glen Staszewski, Nick Stephanopoulos, Matt Stephenson, Lior Strahilevitz, Mark Tushnet, the Chicago Bigelow Fellows, and participants at the American Law & Economics Association annual meeting and the Administrative Law New Scholarship Roundtable.

1. See VANDERBILT TELEVISION NEWS ARCHIVE, <https://tvnews.vanderbilt.edu/search> (search "firestone" OR "tire safety" between the dates of July 1, 2000 and September 30, 2000, for each of ABC, CBS, and NBC) (showing that the ABC, CBS, and NBC evening news programs aired 110 stories concerning "Firestone" or "tire safety" between those dates) (last visited Feb. 6, 2018).

2. Keith Bradsher, *More Deaths are Attributed to Faulty Firestone Tires*, N.Y. TIMES, Sept. 20, 2000, at C2.

3. See, e.g., S. REP. NO. 106-423, at 1 (2000) (statement of Sen. John McCain).

4. Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act of 2000, Pub. L. No. 106-414, 3(b), 114 Stat. 1801-02 (2000) (setting a June 30, 2002 deadline for creation of the system for death, injury, and property claims).

5. See Myron Levin & Alan C. Miller, *Industries Get Quiet Protection From Lawsuits*, L.A. TIMES, Feb. 19, 2006, at A1.

6. See U.S. DEP'T OF TRANSP., MH-2002-071, REVIEW OF THE OFFICE OF DEFECTS INVESTIGATION 5 (2002).

7. See *The Implementation of the TREAD Act: One Year Later: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 107 Cong. 5-6 (2002) (statement of Rep. John Dingell, Ranking Member, H. Comm. on Energy and Commerce); *id.* at 28 (statement of Rep. Cliff Stearns, Chair, Subcomm. on Commerce, Trade, and Consumer Prot. of the H. Comm. on Energy and Commerce).

8. U.S. DEP'T OF TRANSP., MH-2004-088, FOLLOW-UP AUDIT OF THE OFFICE OF DEFECTS INVESTIGATION 5 (2004). The final phase of the system was completed in mid-2004. *Id.*

incredibly, had become the government's largest non-military computer database.<sup>9</sup>

This sequence of events—Congress passes a law, the agency delays implementation, Congress critiques the agency's inaction, and the agency improves—suggests that congressional pressure caused an otherwise recalcitrant agency to act.<sup>10</sup> Yet the episode stands outside of the accepted view of congressional power. When scholars typically discuss Congress's role, they tend to focus on the branch's well-known, direct powers: primarily its lawmaking function, along with appropriations and appointments.<sup>11</sup> Recent work on Congress's other powers—most notably Josh Chafetz's study of Congress's "soft powers" concerning the freedom of speech or debate and each chamber's powers to establish cameral rules and discipline its members—has begun to challenge this conventional focus on the institution's legislative powers.<sup>12</sup> Yet mechanisms, like oversight, that lie beyond those delineated in the Constitution remain underappreciated—despite the significant resources that Congress expends performing these functions.<sup>13</sup> Given this incomplete picture, it is not surprising that the received wisdom holds that Congress's role in policymaking, relative to that of the President, is diminished.<sup>14</sup>

This Article provides a corrective. It contends that, as NHTSA's

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9. Kevin M. McDonald, *Separations, Blow-outs, and Fallout: A TREADise on the Regulatory Aftermath of the Ford-Firestone Tire Recall*, 37 J. MARSHALL L. REV. 1073, 1177–78 (2004).

10. See Press Release, Rep. Fred Upton, Upton Announces Recall on Ford Excursion Firestone Tires Issued between 2000 and 2003 (Feb. 26, 2004), <https://perma.cc/9PSX-6T5S> (credit-claiming by Rep. Upton, the principal sponsor of the Act and major participant in the 2002 hearing, concerning the 2004 recall).

11. See Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 724 (2012) (noting that Congress's "hard powers," or its formal means of coercion, e.g., legislation, the power of the purse, impeachment, etc., "tend to be more familiar" than Congress's "soft powers," which presumably include oversight); Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 65 (2006) (noting that "the dominant image" of Congress's role in administration emphasizes its lawmaking function, and that, once a law has been passed, "the only mechanisms that prevent the administration from ignoring Congress's goals altogether are judicial review and the possibility of further legislation").

12. JOSH CHAFETZ, *CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* 201–301 (2017).

13. *Id.* Data collected for this Article show that, each year in recent Congresses, House committees and subcommittees convene a median of 221 critical hearings concerning agencies; for Senate committees and subcommittees, the figure is 82 hearings annually. Brian D. Feinstein, *Infractions and Hearings Data Base*.

14. See, e.g., Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1938 (2014); ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010); BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010); Sanford Levinson & Jack Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789 (2010); STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008); THOMAS MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACE* (2006); William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2449 (2006).

response to congressional oversight hearings exemplifies, hearings provide Congress with a powerful tool to influence administration. This Article tests this theory with an original dataset of 14,431 agency “infractions,” which, as explained *infra*, comprise the set of issues from which Congress tends to select its subjects for oversight hearings. These infractions include critiques regarding a wide variety of regulatory implementation, enforcement, and personnel issues across all executive departments and major independent agencies, as raised in inspector-general reports, Government Accountability Office “top challenges” lists, and newspaper editorials. For each infraction, I identify, first, whether Congress held a hearing on the subject within one year after its mention and, second, whether the infraction reappeared in the dataset in the next year.

The use of this large-scale dataset allows for the comparison of agency actions that are subject to oversight hearings with otherwise similar agency actions for which Congress does not hold hearings. After all, one cannot know the independent effect of the Transportation Recall Enhancement, Accountability and Documentation (TREAD) Act implementation hearing on NHTSA’s later actions without comparing that episode to a (hypothetical) other NHTSA implementation issue on which Congress did not hold hearings. This effort, the first large-scale, quantitative study of congressional oversight, answers two questions: under what conditions will oversight occur, and is this activity consequential? Taken together, answers to these questions will shed light on the broader question of whether oversight enables Congress to exert a degree of *ex post* control over the administrative state following legislative enactments.

Empirical analysis concerning the first question shows that the particular preference alignment of Congress, the relevant committee, and the relevant agency affect whether oversight occurs concerning a given infraction. This finding is attributable to Congress’s bifurcated structure: committees are empowered to convene hearings, but only the full legislature may sanction agencies for continued non-compliance following hearings. This structure encourages committees to ignore some infractions that Congress might prefer to probe, based on the committees’ fears that convening hearings could motivate Congress to enact legislative changes that the committees oppose. Essentially, committees—mindful that their parent chamber’s preferences may differ from their own—make strategic decisions concerning which agencies they take to task and which they ignore.<sup>15</sup>

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15. See J.R. DeShazo & Jody Freeman, *The Congressional Competition for Control of Delegated Power*, 81 TEX. L. REV. 1443 (2003); Steven Shimberg, *Checks and Balance: Limitations on the Power of Congressional Oversight*, 54 L. & CONTEMP. PROBS. 241, 245 (1991). For instance, the House subcommittee that convened the TREAD Act oversight hearing in 2002 also possessed

A second analysis finds that, when it occurs, oversight often is consequential, changing agency behavior for a statistically significant 18.5% of infractions, relative to otherwise similar infractions for which oversight does not occur. To put that figure in perspective: agencies commit an average of 656 infractions per year, of which 239 infractions continue (or reoccur) the next year; by holding oversight hearings, Congress prevents an additional forty-seven infractions per year from reappearing in the dataset in the next year on average. Oversight alters agency behavior—moving it towards congressional preferences on issues ranging from the level of regulatory enforcement to the creation of programs that stretch agencies' statutory authority, as well as concerning more run-of-the-mill issues such as waste, fraud, and abuse—an average of 89 times per year.

These findings have implications for our understanding of the roles that all three branches play in the administrative state. *First*, the finding that committees strategically decline to hold hearings based on the preference alignment of Congress, the committee, and the relevant agency shows a subtle majoritarian dynamic at work in Congress's internal organization. Although committee-based oversight can be remarkably impactful, outlier committees are less likely to engage in oversight. Thus, the existence of a bifurcated congressional principal provides a majoritarian check on unrepresentative committees—and cuts against arguments favoring strong presidential administration based on the premise that congressional control supposedly involves control by outlier committees.

Prescriptively, that finding suggests that those interested in enhancing Congress's capacity ought to do away with two of the branch's institutional features: legislators' self-selection onto committees and the granting of exclusive jurisdictions to committees. The current practice of allowing legislators to select their committee assignments yields committees that are unrepresentative of floor preferences. As explained *infra*, outlier committees refrain from convening oversight hearings in instances where Congress would prefer hearings to occur. Thus, creating committees that reflect congressional preferences would foster greater oversight. Similarly, granting a single committee property rights to oversee a given agency reduces the likelihood that the agency will be subject to oversight if that committee's preferences are not properly aligned with those of Congress and the agency. Accordingly, placing agencies under the non-exclusive control of multiple committees would encourage greater oversight.

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jurisdiction over the Consumer Product Safety Commission (CPSC). See H.R. REP. NO. 107-802 (2003). Yet, despite extensive criticism of the CPSC from consumer groups during that period, see, e.g., Caroline E. Mayer, *Critics Doubt Safety Chief's Priorities*, WASH. POST, Oct. 30, 2004, at E1, the subcommittee did not hold hearings on the CPSC in that year.

*Second*, the finding that oversight can substantially alter agency behavior indicates that Congress's position vis-à-vis the White House is not as diminished as some suggest. In recent years, scholars have begun to push back against the conventional perception of an enfeebled Congress.<sup>16</sup> This Article contributes to this nascent reassessment by adding oversight as among Congress's soft powers that provide the branch with a source of control over administrative agencies.<sup>17</sup>

*Finally*, these findings suggest that concerns that administrative law doctrines leave the executive branch without supervision deserve reconsideration. In recent years, a growing chorus of jurists and scholars has voiced concerns that deference doctrines strip agencies of any checks, judicial or legislative, on their actions.<sup>18</sup> That oversight provides Congress with a powerful mechanism to influence agency behavior—and that Congress has the ability to restructure its internal institutions to promote even greater oversight, should it so desire—belies this notion. Thus, these findings provide a rejoinder to critics of judicial deference to agencies on these grounds.

This Article proceeds in four parts. Part I provides an overview of the mechanics of congressional oversight, including the historical practices and legal framework that shape how Congress conducts oversight. Part II examines the circumstances in which agencies are subject to oversight or ignored, emphasizing how congressional institutions—specifically, the committee system—impact the branch's oversight activities. Part III assesses whether oversight is consequential, examining the extent to which hearings alter future agency behavior. Finally, Part IV discusses implications of these findings and presents a blueprint for Congress to better utilize its oversight function as a check on growing executive authority.

## I. FUNDAMENTALS

### A. *Hearings and Alternatives*

This Article examines one form of congressional monitoring of the administrative state: oversight hearings convened by committees and subcommittees. Congress's oversight work, naturally, is not limited to on-

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16. See, e.g., CHAFETZ, *supra* note 12, at 37; David R. Mayhew, *Congress as a Handler of Challenges: The Historical Record*, 29 *STUD. AM. POL. DEV.* 185, 211 (2015); Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 *U. CHI. L. REV.* 777, 779–80 (2012).

17. Cf. Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 *STAN. L. REV.* 573 (2008) (on the persuasive influence of post-enactment congressional or cameral resolutions).

18. See *infra* Section IV.E.



the-record hearings.<sup>19</sup> Actions ranging from informal, largely consequence-less discussions between committee staffers and members of the senior executive service to, at the farthest extreme, presidential impeachment and conviction trials can all be considered oversight. Most oversight activity occurs at the lower end of this spectrum, with legislators, staff members, and congressional support agencies—most prominently the Government Accountability Office—communicating with agency personnel both to receive information and to convey recommendations.<sup>20</sup> Operating under time and resource constraints, legislators outsource some of this information-gathering to affected interest groups and provide mechanisms by which these groups can alert allied legislators of disfavored agency action.<sup>21</sup>

More broadly, members of Congress also exert *ex post* influence over the administrative state via the appropriations process, information-forcing reporting requirements, the confirmation process, and casework.<sup>22</sup> Committee-based legislative vetoes—which persist as tacit understandings between committees and agencies in the wake of the Supreme Court’s holding in *Immigration and Naturalization Service v. Chadha* that the mechanism is unconstitutional—provide another means of *ex post* control.<sup>23</sup> In a sense, any congressional intervention in the executive branch could be viewed as performance of Congress’s oversight function.<sup>24</sup> Seen in this light, Carl Friedrich’s observation that policymaking “is a continuous process, the formation of which is inseparable from its execution” holds true.<sup>25</sup>

That virtually any legislative intervention that lies beyond Congress’s formal powers can be classified as oversight stymies potential comparisons of the relative efficacy of Congress’s many means of influencing the administrative state. For one, legislators utilize these mechanisms—e.g., committee hearings, legislative support agency audits, casework, informal

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19. See Beermann, *supra* note 11, at 122.

20. JOEL ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 132 (1990).

21. CHRISTOPHER FOREMAN, SIGNALS FROM THE HILL: CONGRESSIONAL OVERSIGHT AND THE CHALLENGE OF SOCIAL REGULATION 13 (1989).

22. See Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1482 (2015).

23. See LOUIS FISHER, CONG. RESEARCH SERV. RS22132, LEGISLATIVE VETOES AFTER CHADHA (2005) (identifying hundreds of legislative vetoes in effect in 2005); *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

24. See FREDERICK KAISER, WALTER OLESZEK & TODD TATELMAN, CONGRESSIONAL OVERSIGHT MANUAL 78–80 (2011) (classifying casework, audits, and the monitoring of the *Federal Register* as forms of oversight).

25. Carl Joachim Friedrich, *Public Policy and the Nature of Administrative Responsibility*, in PUBLIC POLICY 3 (C.J. Friedrich & Edward S. Mason eds., 1940).

staff contacts, etc.—for different purposes; one would not expect, for instance, a full-day hearing to investigate an undelivered Social Security check. Further, with so many of these Congress-agency contacts being informal and unrecorded (e.g., staff-level phone conversations), measurement problems abound.

Thus, the scope of this Article is more limited; it focuses exclusively on committee and subcommittee oversight hearings, which are the most direct, observable form of congressional monitoring. Congress holds hundreds of hearings annually, most of which occur in committees and subcommittees that have jurisdictional mandates and dedicated staff resources to perform this function.<sup>26</sup> These hearings are the most public, performative, high-stakes manner in which Congress oversees the administrative state.<sup>27</sup>

Hearings—more than any other form of monitoring—enjoy a legal framework that encourages their success. Most importantly, committees are authorized to issue subpoenas to compel testimony at hearings.<sup>28</sup> If an individual fails to comply with a subpoena, either chamber may cite that individual for contempt of Congress via one of three mechanisms: Congress's inherent contempt power,<sup>29</sup> a criminal contempt statute available to both chambers,<sup>30</sup> or a civil contempt statute available to the Senate.<sup>31</sup> In addition, witnesses that, whether under oath or not, knowingly make a false statement concerning a material issue in the presence of a quorum of committee members are subject to prosecution.<sup>32</sup> Full committees, by a two-thirds vote, also have the power to compel a witness's testimony following that individual's assertion of his or her Fifth Amendment privilege against self-incrimination.<sup>33</sup> In these circumstances, the committee may compel that witness's testimony by obtaining a court order granting the witness immunity from future criminal prosecution.<sup>34</sup> Accordingly, the legal framework that hearings enjoy may make them a particularly effective form

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26. See KAREN L. HAAS, CLERK OF THE HOUSE OF REPRESENTATIVES, LIST OF STANDING COMMITTEES (2018), <https://perma.cc/N8PA-UY4D> (listing oversight subcommittees nested in ten House authorization committees, as well as the Committee on Oversight & Government Reform, which contains six subcommittees).

27. See Beermann, *supra* note 11, at 122.

28. See *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975) (reaffirming the constitutionality of this subpoena power); KAREN L. HAAS, CLERK OF THE HOUSE OF REPRESENTATIVES, 114th Cong., RULES OF THE HOUSE OF REPRESENTATIVES, R. XI (2015) (authorizing all standing committees and subcommittees to issue subpoenas); SENATE COMM. ON RULES AND ADMINISTRATION, SENATE MANUAL, S. DOC. NO. 113-1, Rule XXVI (2014) (similar).

29. See *Anderson v. Dunn*, 19 U.S. 204 (1821).

30. 2 U.S.C. §§ 192, 194 (2012).

31. 2 U.S.C. §§ 288b, 288d; 28 U.S.C. § 1365.

32. 18 U.S.C. §§ 1001(a), (c)(2).

33. KAISER, OLESZEK & TATELMAN, *supra* note 24, at 32.

34. *Id.*

of oversight. While acknowledging that hearings are one of many possible congressional interventions into administration, this study therefore focuses on hearings.

### B. Historical Practice

As with many congressional functions, committee oversight hearings trace their origins to the British Parliament.<sup>35</sup> During the 1680s—roughly contemporaneous with the expansion of parliamentary power in the Glorious Revolution of 1688—parliamentary committees investigated alleged misappropriations of funds by the navy, dissatisfaction with the English army’s conduct of the Williamite War in Ireland, and the East India Company’s declaration of martial law on a remote island.<sup>36</sup> Colonial legislatures in America adopted the practice, investigating, *inter alia*, corruption in the granting of corporate charters, misconduct by gubernatorial officials, and the disbursement of public funds.<sup>37</sup>

The U.S. Congress first addressed the question of whether it has the authority to oversee executive affairs on March 27, 1792.<sup>38</sup> On that date, the House voted down a resolution directing the President to investigate the army’s defeat by Shawnee and Miami forces in the Battle of the Wabash.<sup>39</sup> In its place, the House adopted an alternative resolution “empower[ing] [a House investigative committee] to call for such persons, papers, and records, as may be necessary to assist their inquiries.”<sup>40</sup>

From the early Republic until the 1910s, congressional oversight occurred on an *ad hoc* basis, with most investigations conducted by short-term committees established to examine discrete subjects.<sup>41</sup> Investigations typically occurred every few years during this period.<sup>42</sup> The frequency and depth of investigations began to increase in the early twentieth century. This development is attributable to the confluence of two related trends: the rise of the Progressive movement and the growing popularity of investigatory journalists known as muckrakers.<sup>43</sup> Congressional attention to oversight continued to increase through World War II, when Congress largely tabled

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35. See James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 162 (1926).

36. See *id.*

37. See *id.* at 165–66.

38. *Id.* at 170.

39. *Id.*

40. 3 ANNALS OF CONG. 490–94 (1792).

41. See DAVID R. MAYHEW, *AMERICA’S CONGRESS: ACTIONS IN THE PUBLIC SPHERE*, JAMES MADISON THROUGH NEWT GINGRICH 82–83 (2002); Landis, *supra* note 35, at 171–210.

42. See MAYHEW, *supra* note 41, at 82–83; Landis, *supra* note 35, at 171–210.

43. See MAYHEW, *supra* note 41, at 82–83.

its legislative function in favor of monitoring the war effort, most prominently through the career-making Truman Committee.<sup>44</sup>

From the mid-twentieth century through the present, oversight hearings have been a near-constant presence in Congress.<sup>45</sup> The vast majority of hearings during this period—and, hence, the vast majority of hearings analyzed in this Article—probe relatively narrow subjects, e.g., the Bureau of Land Management’s fee schedules for agricultural and extractive uses of public land, the National Weather Service’s efforts to commercialize its intellectual property, etc. Occasionally, however, Congress addresses high-profile subjects, conducting compelling, televised hearings that become embedded in the public conscience.<sup>46</sup> Often, a single proper noun is all that is needed to evoke these complex, dramatic events: Kefauver, McCarthy, Watergate, Iran-Contra, Benghazi.

Although high-profile hearings that occurred during the period under study in this Article are included in my analysis, they are only part of the story. This project’s aims are broader: to shine a light on Congress’s often overlooked, routine oversight of administrative agencies, showing that the use of this basic function enables Congress to influence executive-branch outcomes following the passage of laws.

### C. *Legal Authority*

A combination of Supreme Court case law, statutes, and congressional rules governs the conduct of congressional overseers. Supreme Court opinions, largely from the early- to mid-twentieth century, define the constitutionally permissible scope of congressional investigations; a combination of public law and congressional rules, enacted in bursts of reform-minded legislative activity during the 1940s and 1970s, establishes the institutional structures through which Congress conducts oversight.

#### 1. *Constitutional Authority*

Although the Constitution does not expressly grant Congress the power to conduct oversight, the Supreme Court has held that the “power of the Congress to conduct investigations is inherent in the legislative process.”<sup>47</sup> Thus, Congress’s oversight powers are implied by the Constitution and are

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44. *See id.* at 82–87.

45. *See* DOUGLAS L. KRINER & ERIC SCHICKLER, INVESTIGATING THE PRESIDENT: CONGRESSIONAL CHECKS ON PRESIDENTIAL POWER 38 (2016).

46. *See* MAYHEW, *supra* note 41, at 82–90.

47. *Watkins v. United States*, 354 U.S. 178, 187 (1957).

coterminous with the branch's lawmaking powers.<sup>48</sup> This connection between oversight and lawmaking is crucial; Congress's oversight power must be applied "in aid of the legislative function."<sup>49</sup>

In determining whether a committee hearing meets this constitutional requirement, the Supreme Court adopts a broad definition of "legislative function." For instance, in *McGrain v. Daugherty*, the Court held that a Senate investigation into the Teapot Dome scandal was constitutionally valid,<sup>50</sup> despite the vagueness of the language in the Senate resolution authorizing the hearings: to obtain "information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper."<sup>51</sup> Acknowledging that "[a]n express avowal of the object [of the hearings] would have been better," the Court nonetheless held that the Senate's stated purpose was constitutionally adequate.<sup>52</sup> "The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating," the Court concluded, "and we think the subject-matter was such that the presumption should be indulged that this was the real object."<sup>53</sup>

This broad definition of legislative purpose notwithstanding, the Supreme Court does not give Congress *carte blanche* to conduct hearings. Since congressional investigations resemble aspects of both the legislative and judicial processes, it is unsurprising that the Court has held that variants of well-established limits on these processes also apply to oversight hearings.<sup>54</sup> For example, because Congress cannot enact laws that infringe on the First Amendment, neither can it compel testimony at hearings whose only conceivable legislative purpose would infringe on the First Amendment. In *Watkins v. United States*, for instance, the Court reversed on First Amendment grounds a conviction for contempt of Congress following a union official's refusal to testify before the House Committee on Un-American Activities on alleged communist involvement in organized labor.<sup>55</sup> The *Watkins* Court reasoned that since "an investigation is part of

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48. See, e.g., *Nixon v. Administrator of General Services*, 433 U.S. 425, 453–54 (1977); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 505–06 (1975); *Barenblatt v. United States*, 360 U.S. 109, 134 (1959); *Watkins*, 354 U.S. at 187; *McGrain v. Daugherty*, 273 U.S. 135, 156–75 (1927).

49. *Kilbourn v. Thompson*, 103 U.S. 168, 189 (1880).

50. *McGrain*, 273 U.S. at 177–82.

51. 68 CONG. REC. 7217 (1924).

52. *McGrain*, 273 U.S. at 178.

53. *Id.*

54. See *Barenblatt v. United States*, 360 U.S. 109, 112 (1959) ("Congress . . . must exercise its [investigative] powers subject to the limitations placed by the Constitution on governmental action, more particularly in the context of [the oversight activities in] this case the relevant limitations of the Bill of Rights.").

55. 354 U.S. 178, 215–16 (1957).

lawmaking,” it is “subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly.”<sup>56</sup>

The Supreme Court also has indicated in dicta that the Fourth Amendment’s bar on unreasonable searches and seizures extends to congressional investigations. In *McPhaul v. United States*—another case originating with an Un-American Activities Committee investigation—the Court applied the same standard to assess the reasonableness of the committee’s subpoenas as it applied to Fourth Amendment challenges to subpoenas issued in judicial and administrative proceedings.<sup>57</sup>

Concerning the Fifth Amendment, the Court has stated in dicta that the privilege against self-incrimination is available to witnesses in congressional investigations<sup>58</sup> despite the Amendment’s express reference to persons “in any criminal case.”<sup>59</sup> The Due Process Clause also applies to congressional investigations, mandating that “the pertinency of the interrogation to the topic under the congressional committee’s inquiry must be brought home to the witness at the time the questions are put to him.”<sup>60</sup>

Beyond the aforementioned constitutional limitations, however, courts are reluctant to apply procedural safeguards that are typically associated with judicial proceedings to the congressional context. For instance, there is no congressional analogue to the right of a defendant in a judicial proceeding to cross-examine witnesses pursuant to the Due Process and Confrontation clauses.<sup>61</sup> Courts are even more deferential to Congress concerning the application of common-law privileges to oversight hearings.<sup>62</sup> For example, committees exercise complete discretion over whether to grant testimonial privileges, such as the attorney-client privilege, to witnesses.<sup>63</sup> The judiciary’s unwillingness to extend other constitutional and common-law protections present in the judicial process to congressional investigations arguably is itself rooted in the Constitution; this general deference to congressional committees to devise their own procedural

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56. *Id.* at 197.

57. 364 U.S. 372, 382–83 (1960).

58. *Quinn v. United States*, 349 U.S. 155, 161 (1955).

59. U.S. CONST. amend. V.

60. *Deutch v. United States*, 367 U.S. 456, 467–68 (1961); *see also Barenblatt v. United States*, 360 U.S. 109, 123–24 (1959); *Watkins*, 354 U.S. at 214–15.

61. *See United States v. Fort*, 443 F.2d 670, 678–81 (D.C. Cir. 1970).

62. *See, e.g., In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 39 (D.D.C. 1998) *aff’d in part, rev’d in part on other grounds sub nom. In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998) (rejecting an assertion of work-product immunity by the White House Counsel’s Office, based on the Office’s failure to show that potential future congressional investigations constitute adversarial proceedings of the type for which the privilege ordinarily may apply).

63. *See In re Grand Jury Proceedings*, 5 F. Supp. 2d at 30–38.

safeguards finds support in the Rules of Proceedings Clause.<sup>64</sup>

## 2. *Statutory Authority*

The Legislative Reorganization Act of 1946 provides the foundation for the contemporary Congress's oversight work.<sup>65</sup> The Act mandates that all House and Senate standing committees "exercise continuous watchfulness of the execution [of laws] by the administrative agencies," and provides committees with enhanced tools—namely, professional committee staffs and strengthened congressional support agencies—to help achieve this goal.<sup>66</sup> The Legislative Reorganization Act of 1970 and the Congressional Budget Act of 1974 further increased committee staffs and the scope and budgets of congressional support agencies.<sup>67</sup> Beginning in the late 1970s, Congress augmented its information-gathering abilities—or, depending on one's perspective, outsourced much of this tedious and resource-intensive function to the executive branch itself—by establishing positions within the executive branch charged with issuing reports to Congress and the general public,<sup>68</sup> mandating that the executive periodically provide Congress with certain pre-specified information,<sup>69</sup> and protecting executive branch whistleblowers from reprisal.<sup>70</sup>

## 3. *Cameral Rules*

Oversight hearings take place exclusively in committees and subcommittees.<sup>71</sup> As a formal matter, only the chair of the relevant committees or subcommittee typically may call a hearing.<sup>72</sup> In many

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64. U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . .").

65. See Beermann, *supra* note 11, at 122; see also Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812 (1946).

66. Legislative Reorganization Act, *supra* note 65.

67. Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297, 325-29 (1974); Legislative Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1140, 1168-71, 1173-79, 1181-85 (1974).

68. See Inspector General Reform Act of 2008, Pub. L. No. 110-409, 122 Stat. 4302 (2008); Chief Financial Officers Act of 1990, Pub. L. No. 101-576, 104 Stat. 2838 (1990); Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978).

69. See GPRA Modernization Act of 2010, Pub. L. No. 111-352, 124 Stat. 3866, 3866-84 (2010); Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat. 163 (1995); Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285, 285-96 (1993).

70. See Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, 123 Stat. 3034 (2009); Whistleblower Protection Act of 1989, 5 U.S.C. §§ 1213-1214 (2000 ed. & Supp. III).

71. See H.R. Res. 5, rule X, 133th Cong. (2013) (enacted); SENATE MANUAL, rule XXV, 112th Cong. (2011), <https://perma.cc/8TM5-QBKK>.

72. KAISER, OLESZEK & TATELMAN, *supra* note 24, at 69.

committees, however, well-established norms dictate that the chair will call a hearing at the behest of a significant number—often, but not always, a majority—of the group’s majority party membership.<sup>73</sup> Once called, a hearing in a House committee or subcommittee may be conducted if at least two committee or subcommittee members are in attendance; for most Senate committees and subcommittees, hearings may be held with only one member present.<sup>74</sup> Minority party members enjoy no formal rights to hold hearings or issue subpoenas.<sup>75</sup> Still, minority party members may participate fully in the questioning of witnesses and, in the House, also may call their own witnesses at the request of a majority of the minority members.<sup>76</sup>

## II. OCCURRENCE

Given Congress’s substantial and deep-rooted oversight authority, the natural next question is: When does Congress use this power? Specifically, when will Congress’s committees engage in oversight? This Part provides a theory, grounded in the legislative branch’s internal structure, to explain why committees convene oversight hearings regarding certain agency actions and ignore others. This theory generates three hypotheses, all of which relate to the concept that the particular preference alignment of the relevant political actors affects whether oversight occurs concerning the given agency action.<sup>77</sup> To test the theory, this Part introduces an original dataset of over 14,000 agency “infractions,” or potential subjects for hearings, and examines which of these infractions cause congressional overseers to act and which do not.

### A. Theory

#### 1. Congress as a Bifurcated Principal

While committee hearings may have several purposes and be directed at multiple audiences, I posit that two audiences within government—the agency subject to hearings and the overall legislative branch—often are particularly important. Regarding the former audience, committee-based oversight serves as a warning to the targeted agency: shape up or face

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73. *Id.* at 68.

74. *Id.* at 30.

75. *Id.* at 69.

76. *Id.*

77. As explained *infra*, “preference alignment” refers to the relative distance of these actors along a unidimensional, liberal-to-conservative scale.



sanctions.<sup>78</sup> Considering the nontrivial time and resource costs associated with convening a hearing, doing so provides a costly signal to the agency, conveying the committee's resolve.<sup>79</sup> If the agency does not alter its behavior to be more consistent with committee preferences, the committee could introduce legislation sanctioning the offending agency, and, if that legislation passes, the agency could face sizeable negative consequences.<sup>80</sup> Thus, oversight hearings provide powerful inducements to the targeted agency based on the legislative branch's potential response should the agency not modify its behavior.<sup>81</sup>

Concerning the latter audience, committee hearings provide a signal to the overall legislative branch—which may have previously overlooked the agency's issue area—that legislative sanctions may be necessary. Since committees possess limited independent power to sanction wayward agencies, oversight hearings are consequential largely based on the signal that they provide to the larger legislative branch, placing previously overlooked issues and agencies on the congressional agenda.<sup>82</sup> This agenda-setting function is not merely a byproduct of holding publicized hearings. Rather, committee-based oversight derives its potency from the cue it provides to Congress.

Figure 1 illustrates the basic sequence of agency and committee actions relevant to a decision to conduct oversight. First, the committee, when faced with an agency infraction, must decide whether or not to hold a hearing. Second, if a hearing is held, the agency must decide whether to comply with or flout the committee's wishes following the hearing. Finally, if the agency decides not to comply, the committee must decide whether to alert Congress to the agency's intransigence.

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78. See DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 111 (2d ed. 1974) (“[Legislators] can affect the way legislation is implemented by giving postenactment cues to the bureaucracy. Behind the cues lies the threat of future legislation, but in a relation of anticipated responses the cues may be sufficient.”).

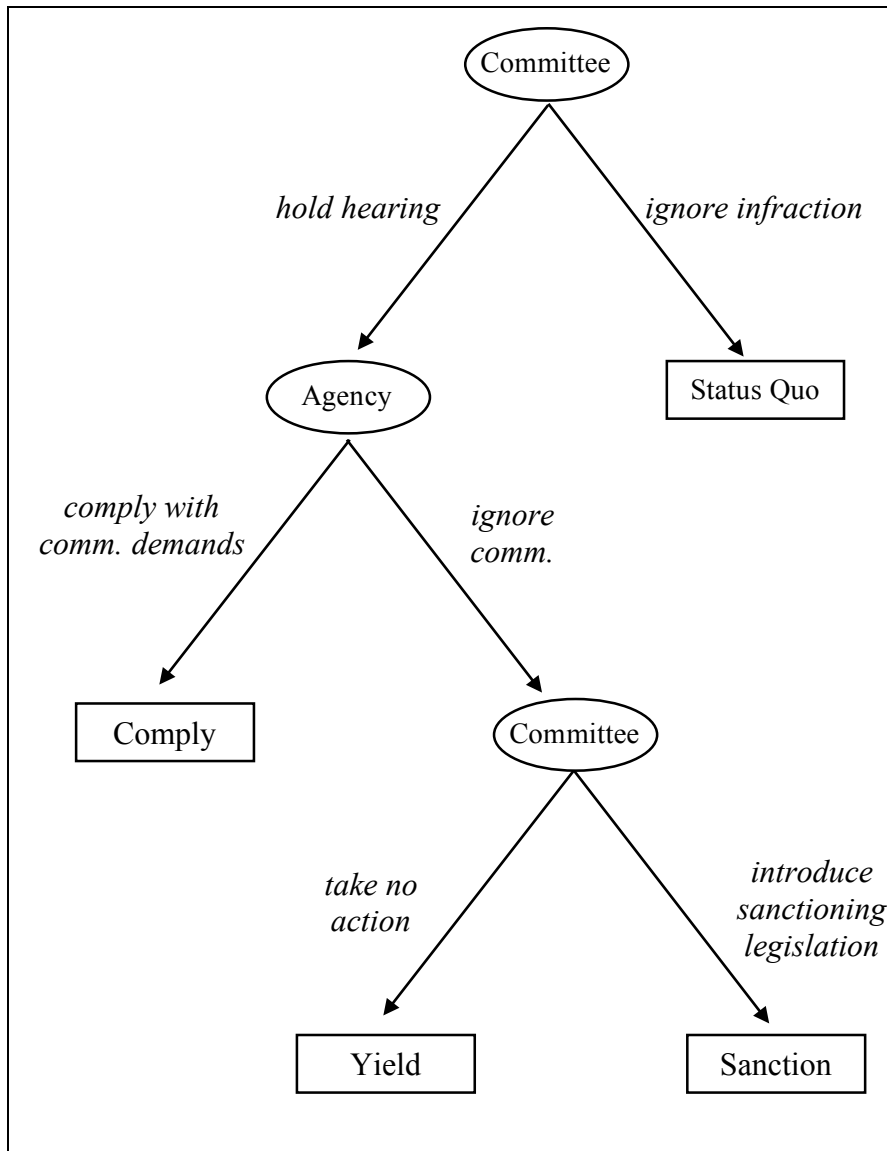
79. See Charles M. Cameron & B. Peter Rosendorff, *A Signaling Theory of Congressional Oversight*, 5 *GAMES & ECON. BEHAV.* 44, 44 (1993) (“Hearings signal the *resoluteness* of the committee—the likelihood that the committee will expend the effort to . . . overrul[e] an agency.”).

80. Committees also possess means to sanction agencies unilaterally. For instance, a committee may decline to report an agency-favored bill or, for Senate committees, a nomination to the floor. While the parent chamber may override these decisions by discharging the bill or nomination, the chamber incurs costs in doing so. These unilateral sanctions are beyond the scope of this Article and remain a promising avenue for future research.

81. See Beermann, *supra* note 11, at 125; Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 *DUKE L.J.* 1059, 1078 (2001).

82. See FOREMAN, *supra* note 21, at 35 (“[T]he most common impact of congressional scrutiny is to raise a given issue, whether significant or trivial, as a priority . . .”).

Figure 1: Committee & Agency Actions During the Oversight Process



To provide a bit more detail, when presented with evidence of bureaucratic wrongdoing, the committee is faced with a simple decision at the first node: hold hearings or ignore the infraction. When making this initial decision, the committee considers potential outcomes further down the game tree. If the committee chooses to ignore the infraction, the game

ends, with the status quo preserved. If the committee holds a hearing, then the targeted agency is the next player to move. Following the hearing, the agency may either comply with the committee's demands or ignore them.

If the agency ignores the committee's demands, then the committee is faced with a second choice. The first option is to punish the agency. There are several forms of sanctions, all of which involve Congress's exercise of its "hard powers."<sup>83</sup> For instance, Congress can narrow the scope of the agency's mission; provide a more detailed mandate to constrain the agency's discretion; or, in the Senate, delay or refuse to report out a nominee to the agency. All of these sanctions typically originate with a first step taken by the House or Senate authorization committee with oversight jurisdiction over the agency. (For ease of reference, throughout this Article I refer to all of these measures—even those involving budgetary measures and appointments—as "legislative sanctions.")

Alternatively, the committee, when faced with an intransigent agency, may yield. If from the committee's perspective the potential legislative sanctions imposed by Congress would be worse than other options, the committee may choose not to act. Put more plainly, the agency calls the committee's bluff.

Notice that, when deciding whether to hold a hearing, the committee must take into account the likely responses of both the agency and Congress. Accordingly, preference divergence between Congress and particular committees leads committees to behave strategically in deciding which agencies (among those agencies within the committees' jurisdictions) to oversee.<sup>84</sup> When deciding whether to hold an oversight hearing, a committee must weigh the potential gains from curbing agency misbehavior against the possibility that a hearing, by highlighting a neglected corner of the executive branch, will awaken Congress to enact policy changes that the committee opposes.

Similarly, preference divergence between the committee and agency makes oversight less likely, all else equal. To see why, note that committee-agency preference divergence increases the likelihood that the agency will ignore the committee's demands, thus leaving the committee with the choice between acquiescing or alerting the larger legislature—which could lead to committee-disfavored legislative action. Because the committee may prefer the status quo to either of these outcomes, the committee is less likely to engage in oversight in the first instance when the committee and agency hold divergent preferences.

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83. For a typology of Congress's hard and soft powers, see CHAFETZ, *supra* note 12, at 3.

84. Jurisdictional boundaries, though often not precisely fixed, constrain these strategic decisions. See generally DAVID C. KING, *TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION* (1997).

Thus, the insight that committees conduct oversight hearings, which get their bite from the threat of Congress-imposed sanctions for continued agency non-compliance, has implications concerning when oversight will occur. Specifically, the need for committees, when deciding whether to hold hearings, to anticipate both the agency's and Congress's likely response to potential hearings limits the set of issues on which committees decide to hold hearings.

To be clear, this Article does not claim that committees engage in oversight *exclusively* to influence agencies. Legislators may convene hearings to raise their profiles with voters, donors, their colleagues, or others. Whether hearings also alter agency behavior sometimes may be secondary, or even orthogonal, to these objectives. Neither do agencies view hearings solely as a means to signal potential legislative changes should the agency not bend to the committee. For instance, agency officials may fear public admonishment in future hearings and therefore accommodate a committee to avoid future embarrassment irrespective of any potential for legislative sanctions. The Article does assume, however, that the prospect of influencing agencies is often in the mix when committees hold hearings; in other words, that legislators to some extent care about influencing policy and that a substantial source of their ability to exert influence is grounded in their legislative power.

## 2. Hypotheses

The above theory leads to three testable hypotheses. The following notion motivates all three hypotheses: When deciding whether to hold hearings, committees will look down the game tree to weigh the expected result of hearings given the relevant actors' likely behavior at each subsequent node against the expected result if the committee declines to hold hearings. This logic—essentially, a rudimentary model of coercive bargaining—generates the following three hypotheses.

*First*, the distance between the political preferences of an *agency* and those of *Congress* may impact committee oversight activity. When an agency and Congress are largely in agreement, the supposed “threat” of legislation is less formidable, giving agencies less of an incentive to conform to committee objectives following oversight hearings. Aware of this heightened risk of non-compliance, committees may have less of an incentive to hold hearings under these circumstances. Conversely, agencies with preferences that are far from those of Congress may be more likely to be overseen. This rationale leads to the following hypothesis.

Hypothesis 1: As agency and congressional preferences diverge, committee-based oversight tends to increase.

*Second*, differences between the *agency* and *committee* may affect oversight levels. Here, the presence of a bifurcated congressional principal leads to an unintuitive prediction. Common sense suggests that a committee is more likely to oversee an agency with preferences that are at odds with the committee's views. But the theory presented above points to a different result. Consider that, as agency and committee preferences converge, the agency may find compliance with committee demands to be less onerous. Thus, when faced with a decision to either comply with committee demands following a hearing or face the possibility of legislative sanctions, agencies may be more likely to comply when their views are closer to those of the committee. Committees, aware of this tendency, may be encouraged to pursue oversight more vigorously.

Given the counterintuitive nature of this prediction, I present two competing hypotheses; Hypothesis 2a states the "common sense" logic that agencies with divergent preferences from those of the relevant committees will receive more oversight attention, while Hypothesis 2b presents the converse, which is grounded in the theory presented *supra*.

Hypothesis 2a: As agency and committee preferences *diverge*, committee-based oversight tends to increase.

Hypothesis 2b: As agency and committee preferences *converge*, committee-based oversight tends to increase.

At first blush, Hypothesis 2b may seem surprising. Why would a committee be *more* likely to call attention to infractions committed by friendly agencies? Recall that as agency and committee preferences diverge, the prospect of complying with the committee following a hearing becomes less appealing to the agency—and, thus, the agency is more willing to risk legislative sanctions, *ceteris paribus*. Looking down the decision tree, the committee recognizes that oversight hearings are less likely to yield agency compliance where agency and committee preferences diverge. Accordingly, the committee is less interested in holding oversight hearings in the first instance. The basic rationale—which is familiar in the international relations literature on economic sanctions—is that coercion is more likely to be effective when the coercing actor and its target already have relatively close preferences, because the target can more easily meet the sender's demand in this circumstance; thus, coercion is more likely to occur in the

first instance.<sup>85</sup>

*Third*, I hypothesize that preference convergence between *committee* and *Congress* is associated with increased oversight. Consider that as a hypothetical sanctioning bill moves from committee markup to floor vote, the signal that the originating committee had intended to send may be distorted; this distortion is especially likely where the committee and chamber are at loggerheads.<sup>86</sup> The possibility that the enacted version of a sanctioning bill may deviate significantly from committee intentions suggests that oversight may not occur when committee and Congress hold markedly different preferences.<sup>87</sup> Under these circumstances, the sanctions threat that is necessary for oversight to have an effect may not be plausible.<sup>88</sup>

Essentially, if the committee and legislature have opposing views, the committee cannot credibly commit to introduce sanctioning legislation should the agency not comply following a hearing since this legislation could be altered during post-markup stages, leading to a final product that is far removed from committee objectives. Alternatively, the committee could worry that a hearing would alert Congress to take up legislation in a previously unperturbed policy area, inadvertently providing a cue to Congress, which, again, could lead to a legislative product far from committee preferences. Aware of these potential outcomes, the committee may neglect its oversight function when it and Congress hold disparate preferences, i.e., when the committee weakly prefers the status quo to Congress's position in the relevant issue area. By contrast, committees with political preferences that are aligned with those of Congress may have greater incentive to pursue oversight.

Hypothesis 3: As committee and congressional preferences converge, oversight tends to increase.

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85. See Daniel W. Drezner, *Conflict Expectations and the Paradox of Economic Coercion*, 42 INT'L STUD. Q. 709, 719–21 (1998).

86. See Terry M. Moe, *An Assessment of the Positive Theory of "Congressional Dominance"*, 12 LEGIS. STUD. Q. 475, 488 (1987) (stating that, at the final passage stage, bills "may bear very little resemblance to what the subcommittee originally threatened to produce . . .").

87. See Kathleen Bawn, *Choosing Strategies to Control the Bureaucracy: Statutory Constraints, Oversight, and the Committee System*, 13 J.L. ECON. & ORG. 101, 102–08 (1997) (noting that this divergence is not an uncommon occurrence due to the greater relative influence of organized interests in committee).

88. See Moe, *supra* note 86, at 488 ("[T]he long-run prospect of a substantially moderated, compromise bill is likely to carry little inducement value as a control mechanism.").

## B. Research Design

### 1. Unit of Analysis: Agency Infractions Data

To examine when a committee will decide to take up an agency action as the subject of an oversight hearing, it is not sufficient simply to examine the characteristics of agency actions that receive oversight attention; instead, one must determine the pool of agency actions that *potentially* could lead to hearings—some of which capture Congress’s attention whereas others do not—and probe the relevant differences between the two groups that led Congress to focus its attention on the former set of agency actions but not the latter.

Accordingly, I constructed an original dataset of agency infractions, defined as any perceived agency action during the 1991–2012 period that potentially could result in a hearing.<sup>89</sup> I derived these data from inspectors general (IG) semiannual reports, Government Accountability Office (GAO) annual “top management challenges” lists, and *New York Times* and *Wall Street Journal* editorials. For each action, I employed a mix of hand-coding by a research assistant and automatic text analysis techniques<sup>90</sup> to identify both the relevant agency and the subject matter of the infraction from a list of forty-two subjects.<sup>91</sup>

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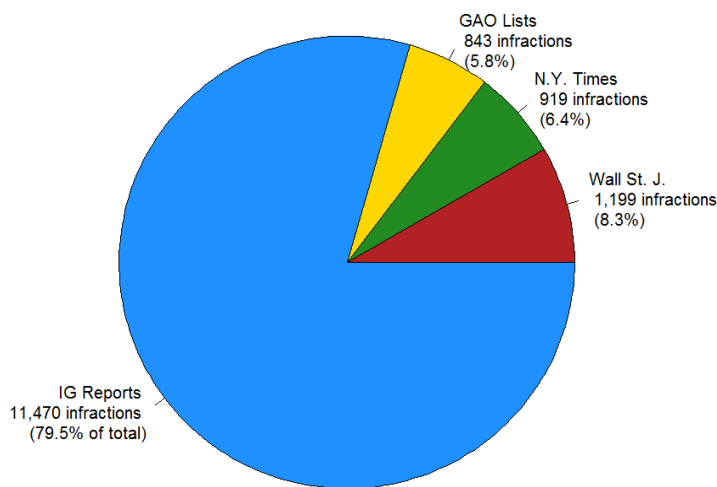
89. This period covers Congresses with a variety of partisan alignments and changes in presidential and congressional leadership, thereby militating against the possibility of party-alignment- or officeholder-driven results for the analysis to follow. Democrats and Republicans each held the presidency and majorities in both chambers for approximately four years during this period. (Republicans controlled all three entities for additional seven non-consecutive months in 2001–2002 due to several unusual events in a closely divided Senate.) Of the eight possible permutations of Democratic or Republican control of the White House, Senate, and House, six occurred during this period.

90. For the IG reports, I first ran a Perl script to extract text from PDF versions of each report. I then ran a script to identify, within each report, text that is suggestive of an infraction. This script identified text containing the agency name and, in close proximity, one of the subject areas listed in note 91, and automatically assigned an agency code and a subject-matter code to each infraction. A research assistant then reviewed these automated assignments. For the newspaper editorials, a research assistant and I searched the *New York Times* and *Wall Street Journal* online archives for mentions of each agency on each newspaper’s editorial page. One of us then read each editorial that mentioned an agency to determine, first, whether the editorial criticized the agency and, if so, how to hand-code the editorial concerning the agency code and subject-matter code. For the annual GAO Top Management Challenges lists, I hand-coded each item on each list.

91. These subject areas are: (1) financial management / qualified audit; (2) Government Performance & Results Act implementation; (3) program evaluation; (4) information-resource management; (5) information-technology issues, e.g., Clinger-Cohen Act implementation, the Y2K bug, and IT procurement; (6) Paperwork Reduction Act implementation; (7) Freedom of Information Act implementation and related issues concerning secrecy; (8) intergovernmental relations; (9) facilities, public-land, and construction management; (10) public land management; (11) procurement, acquisitions, and non-construction contractor management; (12) rule or proposed rule with no statutory basis; (13) grants to state or local governments; (14) grants to foreign governments; (15) grants for domestic spending to individuals, universities, and NGOs; (16) foreign-aid grants or other grants for

These four sources capture a broad range of issues that plausibly could lead to hearings. Inspector-general reports cover the widest range of subjects. GAO management-challenges lists, which are separate from the reports that the agency publishes at Congress's direction, focus on information-technology, procurement, and human resources. The newspaper editorials tend to discuss agencies that are allegedly too harsh or too lenient with regulated groups or client groups, as well as critiques of appointees' alleged misconduct or incompetence. Figure 2 provides an overview of the distribution of these 14,431 across the four sources.

Figure 2: Sources of Agency Infractions Data



foreign spending to individuals, universities, NGOs, foreign governments, and transnational bodies; (17) other grant management issues; agency is (18) insufficiently or (19) overly attentive to client group; (20) agency unable to prevent client group misbehavior; agency is (21) too harsh or (22) too lenient to regulated group; (23) agency unable to prevent regulated group misbehavior; (24) agency tolerates discrimination against its employees; agency tolerates discrimination against contractors, clients, regulated groups, or others; (25) violence or threatened violence by agency personnel; (26) safeguarding privacy or trade secrets; (27) other civil rights or civil liberties violations; (28) recruiting qualified civil servants; (29) training civil servants; (30) incompetent civil servants; (31) politically motivated civil servants; (32) bribery of civil servants; (33) fraud, theft of government property, or improper billing by civil servants; (34) other misconduct by civil servants; (35) incompetent or unqualified appointee; appointee unwilling to implement (36) congressional, (37) presidential or secretarial, or (38) judicial directive; (39) attorney general unwilling to appoint special prosecutor; (40) fraud, theft of government property, or improper billing by appointee; (41) conflict of interest, or appearance thereof, caused by appointee's ties; and (42) other misconduct by appointee.



At first glance, compiling data on possible topics for oversight may appear to be an exercise in futility. After all, on one level any criticism—no matter which person or entity gives voice to it—about any aspect of the executive branch can be considered a potential oversight topic. On the other side, using overly narrow criteria for determining which critiques have a “reasonable” chance of being covered in hearings may raise endogeneity concerns.

There are three reasons why this project avoids these pitfalls. First, the four included sources capture the overwhelming majority—over 90%—of topics that actually appear on Congress’s oversight agenda. The fact that the vast majority of hearings can be traced to a specific infraction in the dataset provides compelling support for the measure’s content validity. Second, legislator and staff surveys suggest that overseers actually rely on these four sources when setting their oversight agendas.<sup>92</sup> Third, for those infractions identified in IG reports, which account for 11,970 of the 14,431 infractions in the dataset, endogeneity concerns—specifically, the possibility of congressional influence in the subjects chosen—are not present, since these offices are considered removed from congressional influence.<sup>93</sup>

I do not claim that legislators consult these particular four sources in selecting potential topics. Rather, these four sources do a remarkably good job of mirroring the content of the unknown sources—media, government offices, colleagues, supporters, etc.—that actually influence legislators’ oversight decisions. Taken together, these four sources encompass the range of administrative issues that tend to attract Congress’s attention.<sup>94</sup>

Neither do I suggest that legislators, in selecting topics for hearings, are motivated primarily by an intention to actually “correct” agency behavior. Instead, this Part expressly assumes that congressional oversight is politically motivated. But recognition of the politicized nature of oversight does not imply that the subjects of hearings are made up out of whole cloth. Rather, there almost always is *some* actual “misbehavior” that grounds

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92. See ABERBACH, *supra* note 20, at 89.

93. See PAUL LIGHT, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* 3–24 (1993).

94. The IG and GAO reports emphasize apolitical valence issues, e.g., procurement management, employee retention, etc., while the two newspaper editorial pages often voice ideologically-driven critiques. In addition, while all four sources address program implementation issues, GAO reports on program implementation tend to cut across agencies, e.g., the executive branch is slow to implement statutory provisions related to information technology. Also note that, unlike with most GAO reports, which are compiled at legislators’ request, these “top management challenges” lists are compiled on GAO’s own initiative. Moreover, although both the IG reports and the newspaper editorials frequently feature corruption allegations, the *Times* and *Journal* tend to focus on behavior by senior appointees, while the IGs deal with civil servants and, occasionally, lower-level appointees. Approximately 80% of the infractions included in these data are derived from the IG reports, 9% from each of the newspapers, and the remaining 2% from the GAO lists.

congressional oversight. While that real-world agency action may be mere pretense, misrepresented or exaggerated for oversight-as-political theater, it is typically still present. Further, for those hearings topics that arguably *are* manufactured, the *New York Times* and *Wall Street Journal* editorial pages may capture many of these subjects. In fact, of the 5,202 unique oversight hearings that House committees and subcommittees held between 1991 and 2012, the subjects of 4,801 were cited in at least one of the four sources during the preceding twelve months—a 7.7% omission rate. While I do not take a position regarding the actual sources that politically motivated legislators use to select subjects for hearings, this low incorrect classification rate indicates that, regardless of the actual process by which oversight topics are generated, these four sources generally are reflective of the actual pool of potential hearings.

Employing individual infractions as the unit of analysis represents an improvement over past work on oversight, which relies on each hearing as the unit of analysis.<sup>95</sup> Including each infraction—regardless of whether it results in a hearing—as an observation in this dataset allows for variation in the dependent value. Since virtually all oversight hearings can be traced to a specific motivating agency action or event, an analysis of oversight activity that does not consider the population of *possible* oversight hearings is essentially omitting the most proximate and arguably the most likely cause for a given topic to be placed on the oversight agenda.<sup>96</sup>

It is important to acknowledge that considerable variation among infractions—each of which has unique characteristics—is stripped away in the course of placing each infraction into one of the forty-two subject-matter categories listed in Footnote 91. To be sure, similar loss of detail occurs in many instances when qualitative information is standardized as data,<sup>97</sup> with the creation of a new dataset in this Article, the reader sees how the sausage is made.

From the other direction, one also could say that the data are insufficiently standardized. For instance, the charge that the Mine Safety & Health Administration is insufficiently attentive to investigating fatal

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95. See, e.g., David C.W. Parker & Matthew M. Dull, *Divided We Quarrel: The Politics of Congressional Investigations, 1947–2004*, 34 LEGIS. STUD. Q. 319 (2009); DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–90* (1991); ABERBACH, *supra* note 20, at 132; MORRIS S. OGUL, *CONGRESS OVERSEES THE BUREAUCRACY* (1976).

96. Moreover, a study seeking to determine what factors explain the occurrence of oversight hearings that only examines those instances where oversight hearings occur is selecting on the dependent variable, leading to potentially biased estimates.

97. See, e.g., ADAM J. BERINSKY, *SILENT VOICES: PUBLIC OPINION AND POLITICAL PARTICIPATION IN AMERICA* (2006) (investigating the views of survey respondents who say they “don’t know” in response to a survey question); Stephen R.G. Jones & W. Craig Riddell, *The Measurement of Unemployment: An Empirical Approach*, 67 ECONOMETRICA 147 (1999) (discussing shortcomings in the collection and interpretation of unemployment statistics).

accidents (subject-matter category 22) is obviously qualitatively different from an allegation of waste, fraud, or abuse in National Parks Service construction projects (category 9). Most significantly, the former charge has a political dimension, as the appropriate level of regulation is a subject of political contestation, whereas the latter charge has lower political salience. Further, the line between political and non-political “good government” issues is often blurry. For instance, conservatives generally may care more about Type I errors by agencies (e.g., a computer glitch that leads to the approval of applicants that do not meet the standards for the Social Security disability program) and liberals more about Type II errors (such as a glitch with the opposite effect).

To address this critique, I run the analyses to follow twice: once for all forty-two categories of infractions and again for the subset of infractions with the clearest connection to partisan contestation. This subset includes agency rulemakings (category 12 in Footnote 91); grant decisions (13–17); solicitousness towards client groups (18–20); solicitousness towards regulated groups (21–23); appointee competence or responsiveness (35–39); and criminal or unethical behavior by an appointee (40–42). The results of this second set of analyses are reported throughout Parts II and III.

## 2. *Dependent Variable: Oversight Hearings Data*

For each infraction, I determine whether an oversight hearing was held in the twelve months following the first mention of the infraction. I define “oversight” broadly, as inquiries into agency practices in which the agency undertakes autonomous action or otherwise exercises discretion in a manner of which members of Congress may disapprove. Common subjects of oversight hearings include agency-generated rules and proposed rules; adjudicatory decisions; allegations of waste, fraud, or abuse; non-statutorily mandated features of the executive branch’s structure; and many procurement and personnel practices. To collect these data, I start with a dataset of all hearings held during the relevant period from the Comparative Agendas Project (CAP) database, a comprehensive online database of congressional activity, among other topics.<sup>98</sup> After excluding non-oversight-related hearings,<sup>99</sup> a research assistant or I read the short

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98. FRANK BAUMGARTNER & BRYAN JONES, *Congressional Hearings*, COMPARATIVE AGENDAS PROJECT: U.S. POLICY AGENDAS, [www.comparativeagendas.net/us](http://www.comparativeagendas.net/us) (last visited Feb. 6, 2018).

99. I excluded all hearings that (i) CAP coded as an appropriations hearing, markup, or bill referral; (ii) the hearings description, as included in the CAP dataset, included the phrased “as required by”; (iii) the hearing title or description indicated that the primary purpose of the hearing was to consider new legislation; or (iv) the hearing title explicitly praised the subject agency.

descriptions of each hearing in the CAP database and classify each hearing by the target agency and subject matter, using the same agency and subject-matter codes as for the infractions data.<sup>100</sup> With this procedure, I determine that Congress held 5,202 oversight hearings between 1991 and 2012.

### 3. *Independent Variables: Congressional, Committee, and Agency Preferences*

Converting the hypotheses in Section II.A into testable variables involves identifying preference estimates for Congress, its committees and subcommittees, and executive agencies.

To determine congressional and subcommittee preferences, I start with the DW-NOMINATE dataset, which contains estimates on a unidimensional scale of each legislator's ideological position based on that legislator's roll call voting record.<sup>101</sup> I measure congressional preferences using preference estimates for the median House majority party member.<sup>102</sup>

To measure subcommittee preferences, I then identify the subcommittee with the most legitimate jurisdictional claim over each infraction.<sup>103</sup> I use the preference estimate for the subcommittee chair as a proxy for the subcommittee's preferences, which is proper because most subcommittees formally authorize only the chair to call a hearing.<sup>104</sup>

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100. Where the short description did not provide sufficient information, we accessed the Congressional Information Service database to examine hearing testimony and other primary source information to determine which agency was the principal subject of each hearing.

101. See ROYCE CARROLL ET AL., DW-NOMINATE SCORES WITH BOOTSTRAPPED STANDARD ERRORS (2015), <http://k7moa.com/dwnomin.htm>; see also KEITH POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997). All calculations utilize first dimension Common Space DW-NOMINATE scores.

102. A set of alternative specifications uses the median House member as an alternative proxy for chamber preferences. The results using this measure were substantially similar to those reported in the main model.

103. The decision to hold hearings can properly be considered to rest with the subcommittee. For Democratic-controlled Congresses during this period, the subcommittee bill of rights granted to subcommittees powers that are relevant to a decision to hold hearings. See generally Richard Hall & Lawrence Evans, *The Power of Subcommittees*, 52 J. POL. 335 (1990). During periods of Republican rule, when the formal powers previously assigned to subcommittees were rolled back, subcommittees still retained their authority in many oversight-related areas, through norms and other informal mechanisms. See generally John Baughman, *The Role of Subcommittees After the Republican Revolution*, 34 AM. POL. RES. 243 (2006). Because the House and Senate rules do not delineate subcommittees' jurisdictions, these determinations necessarily were, in essence, judgment calls. For each infraction, I identify the relevant subcommittee for each infraction by examining subcommittee names and, where possible, descriptions of the subcommittee turf on the subcommittee's website.

104. KAISER, OLESZEK & TATELMAN, *supra* note 24, at 69. As an alternative specification for subcommittee preferences, I also used preference estimates for that group's median majority party member. As discussed in Section I.C, many subcommittees by convention permit a subset of subcommittee members—typically a majority of the majority-party members—to call a hearing. *Id.* The minority party, by contrast, essentially plays no role in the scheduling of oversight hearings. See MARTIN

To ascertain agency preferences, I employ Chen-Johnson scores.<sup>105</sup> These authors use bureaucrats' campaign contributions to elected officials to estimate agencies' ideological views. They then input the roll-call-based preference estimate for the elected official back to the donor, using a weighted average to determine the preferences of individuals that donate to multiple politicians.<sup>106</sup>

Finally, to construct *Agency-Chamber Divergence*, I normalize the Chen-Johnson and DW-NOMINATE scores for, respectively, agencies and the House and Senate, on a zero to one scale. I then calculate the absolute value of the distance between these two scores for each agency-chamber dyad. I employ a similar procedure to create *Agency-Comm. Convergence* and *Comm.-Chamber Convergence*.<sup>107</sup>

### C. Results

With a pool of 14,431 agency infractions as the unit of analysis; 5,202 oversight hearings as the dependent variable; and political preference estimates for Congress, its committees, and all executive and most independent agencies as independent variables, I run a series of logistic regression models to test the hypotheses listed in Section II.A. To provide a substantive interpretation of the coefficient estimates, I then simulate first differences.

Table 1 reports the results of these models. The first column shows the theorized directions of the relevant coefficients, based on the hypotheses developed above. Model 1 reports the results of a series of bivariate models using all infractions as observations. Model 2 reports the results of a multivariate model using these same data. Models 3 and 4 report these results only for infractions in the most politically salient categories.<sup>108</sup> For

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JAMES, CONGRESSIONAL OVERSIGHT 48 (2002). In light of the role that a majority of the majority party plays, this median provides a second way to operationalization subcommittee preferences. The results in Parts II and III using this alternative specification are substantially similar.

105. Jowei Chen & Tim Johnson, *Federal Employee Unionization and Presidential Control of the Bureaucracy: Estimating and Explaining Ideological Change in Executive Agencies*, 27 J. THEORETICAL POL. 151 (2014) (dataset available at <http://www-personal.umich.edu/~jowei/AgencyIdeology/>).

106. A set of alternative specifications uses agency-ideology scores derived from a survey of prominent administrative scholars and journalists, polling each respondent on his or her opinion of various agencies' ideological outlooks. See Joshua D. Clinton & David E. Lewis, *Expert Opinion, Agency Characteristics, and Agency Preferences*, 16 POL. ANALYSIS 3, 11 (2008). The results using this measure of agency ideology were substantially similar to those reported in the main model.

107. Because these quantities are easier to interpret as becoming larger as the relevant actors' preferences converge rather than diverge, *Agency-Comm. Convergence* and *Comm.-Chamber Convergence* use the inverses of the absolute values of the distances between, respectively, agency and committee and committee and chamber.

108. Recall from Section II.B that these most politically salient infractions are: agency

all models, the coefficient estimates show the association between features of the congressional-committee-agency environment and the likelihood of a committee convening at least one oversight hearing concerning that infraction.

*Table 1: Regression Results*

	Theory Predicts:	All Infractions		High Salience Infractions	
		Model 1 (Bivariate Models)	Model 2 (Multivar. Model)	Model 3 (Bivar. Models)	Model 4 (Multivar. Model)
Agency-Chamber Divergence	+ (H.1)	2.047** (0.659)	1.831* (0.834)	2.094** (0.740)	1.443 (0.966)
Agency-Comm. Convergence	- (H.2a) + (H.2b)	0.804 (0.885)	1.512* (0.632)	0.304 (0.745)	1.704 (1.013)
Comm.-Chamber Convergence	+ (H.3)	66.479*** (18.420)	53.835** (20.005)	58.337* (24.826)	64.936* (29.402)
Congress Fixed Effects		N	Y	N	Y
<i>observations</i>		14,431	14,431	2,070	2,070
Cells report coefficient estimates and, in parentheses, standard errors clustered by committee. Unit of analysis: agency infractions. Dependent variable: whether at least one hearing was held concerning the infraction in the 12 months following the infraction's mention. Models 1 and 3 include fixed effects for each Congress between the 103rd and 112th (baseline category: 102nd Congress). *** signifies $p < 0.001$ , ** $p < 0.01$ , * $p < 0.05$ . Models estimated via logistic regression.					

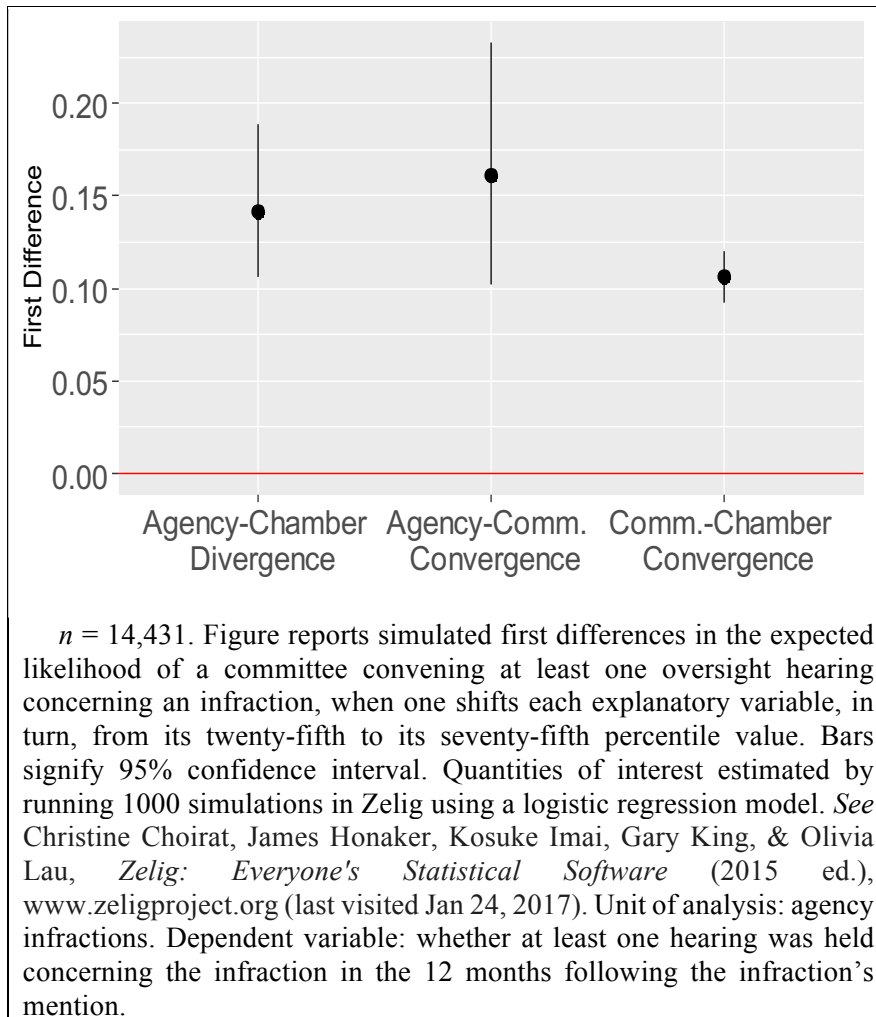
rulemakings (category 12 in Footnote 91); grant decisions (categories 13–17); solicitousness towards client groups (18–20); solicitousness towards regulated groups (21–23); appointee competence or responsiveness (35–39); and criminal or unethical behavior by an appointee (40–42).

The hypotheses related to *Agency-Chamber Divergence* and *Comm.-Chamber Convergence* generally find support in Table 1. All of the associated coefficient estimates are positively signed and, with the exception of *Agency-Chamber Divergence* in Model 4, statistically significant. The story is more mixed for *Agency-Comm. Convergence*. While the coefficient estimates are positive in all four models, they only reach conventionally accepted levels of statistical significance in Model 2, which is the full, multivariate model. In Models 1 and 3, the associated standard errors dwarf the coefficient estimates.

The substantive interpretation of these estimates is not intuitive. Figure 3 reports the expected change in the likelihood of a committee convening at least one oversight hearing concerning an infraction when each covariate, in turn, shifts from its twenty-fifth percentile value to its seventy-fifth percentile value. For instance, the value for the *Committee-Chamber Convergence* variable indicates that oversight hearings are 10.6% more likely to occur in expectation when *Committee-Chamber Convergence* is at its seventy-fifth percentile value—i.e., when the preferences of the relevant committee and its parent chamber are closer together than is the case for seventy-fifth of the observations in the dataset—than when this variable is at its twenty-fifth percentile value.

These simulated first differences are generated from Model 2, the full model. Analyses grounded in the other models yield similar results for *Agency-Chamber Divergence* and *Comm.-Chamber Convergence* and null results for *Agency-Comm. Convergence*.

Figure 3: First Differences in the Expected Likelihood of Oversight



These results show that political differences among the various actors—agencies, committees, and Congress—substantively affect which problems within administrative agencies become topics for oversight hearings.<sup>109</sup> The reason why committees must take other actors' preferences into account

109. I also run similar simulated first differences for the 2070 infractions in the most politically salient categories. See *supra* Section II.B (listing these most politically salient infractions). The resulting coefficient estimates are all properly signed and larger than the associated clustered standard errors, although only *Comm-Chamber Convergence* achieves conventionally accepted levels of statistical significance. These results may be attributable to the substantially smaller sample size in this model.



when deciding whether to conduct oversight is rooted in what this Article terms “the oversight dilemma”: the impact of hearings requires the potential for sanctions following an agency’s non-compliance with committee objectives expressed in a hearing, but committees do not possess any independent authority to impose these measures. Since oversight involves a bifurcated principal, it is consequential only to the extent that an implied threat of congressional sanctions following non-compliance with committee objectives is credible.<sup>110</sup> As a result, committees limit their oversight activity based on factors in the larger political environment—but, when committee oversight does occur, it is aligned with the more democratically representative preferences of the overall Congress.

### III. IMPACT

Determining whether oversight alters agency behavior or is merely reelection-oriented posturing is essential to assessing whether oversight can serve as an *ex post* check on delegated powers. Given Congress’s broad delegations of *ex ante* policymaking authority to the executive branch,<sup>111</sup> the relative weakness or underuse of other *ex post* means of influence,<sup>112</sup> and the judiciary’s broad endorsement of the transfer of policymaking authority to the executive branch,<sup>113</sup> a firm understanding of the consequences of *ex post* oversight is crucial to assessing the extent to which Congress exercises control over the administrative state.

The notion that oversight affords Congress some degree of control over administration is in tension with the conventional wisdom. The dominant perspective among legal scholars regarding the relative abilities of the political branches to control the administrative state considers Congress in decline and the White House ascendant.<sup>114</sup> This perspective holds that, at

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110. Recall that this logic motivated the development of Hypotheses 1–3. See *supra* Section II.A.

111. See Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 434–38 (1999).

112. See Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727, 731 (2009) [hereinafter Beermann, *The Turn Toward Congress*].

113. See *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 474 (2001) (noting that only a bare-bones “intelligible principle,” such as that the regulation is in the “public interest,” is needed to satisfy the nondelegation doctrine). The Court also grants agencies wide latitude in interpreting their organic statutes and self-promulgated regulations, and in determining the appropriate administrative procedures to govern their decision-making. See *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.* 435 U.S. 519, 524 (1978). Relatedly, courts exhibit an overall disinclination to interfere where Congress has not unambiguously expressed its intent via *ex ante* lawmaking. See *Chevron*, 467 U.S. at 842; *Dames & Moore v. Regan*, 453 U.S. 654, 678–79 (1981); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637 (Jackson, J., concurring).

114. See *supra* note 14 (providing citations).

least since the New Deal era, Congress has demonstrated a willingness to cede policymaking power to the executive branch via the enactment of broadly-written and, in some cases, deliberately vague statutes that place few limits on administrative agencies.<sup>115</sup> The judiciary mostly has assented to this transfer of policymaking authority,<sup>116</sup> with the Supreme Court upholding every statute challenged on nondelegation grounds that it has considered since 1935.<sup>117</sup> Further, the design of administrative procedures has proven inadequate as an alternative means of congressional control. Although administrative procedures—in theory—could be designed to facilitate popular or interest group influence in the administrative state, thereby obviating the need for continued, direct congressional involvement,<sup>118</sup> Congress does not devote much attention to this function.<sup>119</sup>

The received wisdom among legal scholars also focuses on the White House's development of a set of tools to enhance presidential control of administration—a development that occurred concurrent to the decline in Congress's exercise of its lawmaking authority.<sup>120</sup> Most notably, the use of executive orders to set administrative policy has become increasingly common since the New Deal era.<sup>121</sup> The establishment of the White House Office of Management & Budget in the 1970s<sup>122</sup> and the expanded role that

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115. See Seidenfeld, *supra* note 111.

116. See *Am. Trucking Ass'n's*, 531 U.S. at 474 (requiring only that Congress provide an “intelligible principle” to guide executive branch policymakers).

117. See Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003, 1012 (2015).

118. See Mathew McCubbins, Roger Noll, & Barry Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) [hereinafter McNollgast, *Procedures as Instruments*]; accord Administrative Procedure Act (APA) of 1946, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 553, 555–57, 706 (requiring a notice and comment period before most agency rulemakings, mandating trial-like features in certain agency adjudications, and requiring that substantial evidence support agency adjudicatory findings)).

119. See Glen O. Robinson, *Administrative Arrangements and the Political Control of Agencies: Political Uses of Structure and Process*, 75 VA. L. REV. 483, 488 (1989) (noting that an overview of a variety of agencies' organic statutes “reveals no relevant specification of internal structure.”); *id.* at 488–89 (arguing that this inter-agency procedural uniformity suggests that Congress does not vary administrative procedures for the purpose of promoting agency responsiveness to favored groups, which calls into question the notion that the APA enables a form of indirect congressional influence in administration). Perhaps as a result, the formal ability of outside actors to challenge administrative proceedings or outcomes is limited. See *Withrow v. Larkin*, 421 U.S. 35 (1975) (the challenger bears the burden of demonstrating actual bias in proceedings in which the same agency serves as investigator and adjudicator); *Enviocare of Utah v. NRC*, 194 F.3d 72 (D.C. Cir. 1999) (*Chevron* deference permits agencies to exclude certain parties from adjudications).

120. See Thomas O. Sargentich, *The Contemporary Assault on Checks and Balances*, 7 WIDENER J. PUB. L. 231, 247–55 (1998).

121. See Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 133 (1999).

122. Although OMB's origins are in the 1920s Bureau of the Budget, the office's reorganization in the 1970s significantly expanded its powers and strengthened its ties to the White House. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2275–76 (2001).

its Office of Information & Regulatory Affairs subunit has played since the 1980s and 1990s, rejecting proposed regulations that failed its cost-benefit analyses, further bolstered presidential control of administration.<sup>123</sup> More recently, the increased use of presidential signing statements as post-passage instruments of White House policy also augments presidential power.<sup>124</sup> Mostly unchallenged by the courts,<sup>125</sup> these mechanisms reinforce the perception that the President occupies the central position in the administrative state.<sup>126</sup> By contrast, many of the functional innovations proposed by Congress to buttress its role in administration have been struck down on formalist, separation-of-powers grounds.<sup>127</sup>

On the surface, trends in the use of these three formal control mechanisms—i.e., Congress’s reduced role in lawmaking and concomitant delegation of policymaking authority to administrative agencies; its inability to design administrative procedures as an alternative means of indirect control; and the White House’s establishment of new mechanisms to enhance its involvement in administration—suggest that Congress is a branch in decline.<sup>128</sup> Yet emphasis on these formal, directly coercive mechanisms neglects other potential means of congressional influence.<sup>129</sup> Consider that Congress began to pursue its oversight function with renewed vigor during roughly the same period as its relative role in policymaking declined. For instance, Congress passed its two arguably most consequential oversight-related bills—the Administrative Procedure Act (APA) and the Legislative Reorganization Act (LRA)—in 1946,<sup>130</sup> directly following a

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123. See *id.* at 2277–81, 2285–90.

124. See Ronald A. Cass & Peter L. Strauss, *The Presidential Signing Statements Controversy*, 16 WM. & MARY BILL RTS. J. 11, 15 (2007).

125. See, e.g., *Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981). *But see Clinton v. City of New York*, 524 U.S. 417 (1998) (holding the presidential line item veto unconstitutional).

126. See generally Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1728 (1996).

127. See *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (blocking legislators from serving on an administrative board); *Bowsher v. Synar*, 478 U.S. 714 (1986) (striking down a statute that placed some budgetary authority in the hands of an executive official removable only by Congress); *INS v. Chadha*, 462 U.S. 919 (1983) (disallowing the one-chamber legislative veto). *U.S. Senate v. FTC*, 691 F.2d 575 (1982), *aff’d*, 463 U.S. 1216 (1983) (holding the two-chamber veto unconstitutional); *Process Gas Consumers Group v. Consumer Energy Council*, 673 F.2d 425 (1982), *aff’d*, 463 U.S. 1216 (1983) (striking down a one-chamber veto of administrative rules); *Buckley v. Valeo*, 424 U.S. 1 (1976) (preventing congressional leaders from unilaterally selecting members of an independent agency).

128. See SEAN GAILMARD & JOHN W. PATTY, *LEARNING WHILE GOVERNING: EXPERTISE AND ACCOUNTABILITY IN THE EXECUTIVE BRANCH* 168 (2013); ACKERMAN, *supra* note 14.

129. See Beermann, *supra* note 11, at 64–65; Chafetz, *supra* note 11, at 724.

130. The APA provided mechanisms by which interest groups could activate “fire alarms” to alert Congress of disfavored administrative action. See Mathew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 173 (1984). The LRA established the framework for Congress’s current oversight institutions. See

period of massive presidential aggrandizement during the New Deal and World War II.<sup>131</sup> Equally noteworthy is the fact that the 1970s and 1980s saw the concurrent development of new mechanisms for presidential control of administration and increased congressional attention to oversight.<sup>132</sup> Perhaps Congress's heightened attention to oversight constituted an attempt to reassert control over powers that had shifted to the executive branch.<sup>133</sup>

### A. Theory

#### 1. Congressional Abdication versus Congressional Dominance

I claim that, in an era of greater executive involvement in administration, Congress uses oversight hearings to retain some degree of control over delegated powers. Political scientists have long debated whether Congress-agency relationships are characterized by congressional abdication or congressional dominance. Grounded in capture theory, the abdication perspective holds that because committees, agencies, and interest groups tend to have close ties, the prospects for vigorous committee oversight of agencies are slim.<sup>134</sup> That reelection-focused legislators supposedly have little incentive to conduct the hard work of day-to-day oversight (beyond headline-grabbing, high-profile probes) further supports the abdication perspective.<sup>135</sup> Thus, the provision of oversight constitutes a collective action problem, with reelection-oriented legislators being poorly incentivized for its production.

A second set of scholars, by contrast, considers Congress to dominate agencies.<sup>136</sup> According to congressional dominance theory, the fact that

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Beer mann, *supra* note 11, at 122.

131. See generally ERIC SCHICKLER, *DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS* (2001).

132. See Kagan, *supra* note 122, at 2277–81, 2285–90 (describing the strengthening of the White House-directed OMB and OIRA during the 1980s); ABERBACH, *supra* note 20, at 34–37 (noting a marked increase in oversight activity during the 1970s and 1980s).

133. Cf. Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL'Y 227, 235 (1998) (stating that greater presidential involvement, “[by] raising the stakes for other actors in the system, . . . may trigger an oversight arms race.”).

134. See LAWRENCE C. DODD & RICHARD L. SCHOTT, *CONGRESS AND THE ADMINISTRATIVE STATE* (1979); THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (1979); Seymour Scher, *Conditions for Legislative Control*, 25 J. POL. 526, 533–34 (1963).

135. See WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* (2003); Terry M. Moe, *The Presidency and the Bureaucracy: The Presidential Advantage*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* 425 (Michael Nelson, ed., 2003).

136. See Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) [hereinafter McNollgast, *Structure and Process*]; McNollgast, *Procedures as Instruments*, *supra* note 118; McCubbins & Schwartz, *supra* note 130.

committees are privileged actors in the legislative process empowers them to take on recalcitrant agencies.<sup>137</sup> Committee prerogatives during the budget and reauthorization processes enable committees to control the agencies within their jurisdictions.<sup>138</sup>

Committees' *ability* to oversee and direct agencies does not imply, however, that committees actually *engage in* oversight, much less that this oversight is consequential. Rather, congressional dominance theory contends that legislators design bureaucratic institutions to respond to their preferences, through the enactment of information-forcing provisions and via committees' involvement in appointments.<sup>139</sup> In effect, according to dominance theory, committees substitute *ex ante* means of control in place of *ex post* oversight. Rather than engaging in active, continual monitoring of agencies ("police patrols," in the theory's parlance), committees are mobilized to act only when an outside group, e.g., an interest group aligned with the committee, sounds a "fire alarm" to notify the committee that something is amiss.<sup>140</sup>

Abdication theory points to infrequent hearings as indicating that Congress is shirking; dominance theory posits that infrequent hearings are a consequence of well-crafted administrative procedures and interest-group monitoring that reduce the need for congressional involvement.<sup>141</sup> Missing from both theories is any evidence regarding whether oversight hearings—when they occur—are consequential. If even infrequent hearings significantly impact agency behavior, that hypothetical finding would undercut the abdication perspective. Conversely, if hearings do not have an impact, that finding would weaken the dominance perspective, which implies that, when a fire alarm is pulled, that alarm should lead to changed agency behavior. Yet, despite the role that oversight plays in both theories, little is known about how consequential oversight activity actually is.<sup>142</sup>

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137. See Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983); see also KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* 97 (1991) (regarding committee perquisites in the lawmaking process).

138. See *id.*

139. See Randall L. Calvert, Mathew D. McCubbins & Barry R. Weingast, *A Theory of Political Control and Agency Discretion*, 33 M. J. POL. SCI. 588, 598, 604 (1989).

140. McCubbins & Schwartz, *supra* note 130, at 165–75.

141. See McNollgast, *Structure and Process*, *supra* note 136, at 443; McNollgast, *Procedures as Instruments*, *supra* note 118, at 244.

142. Although there is no shortage of claims regarding the effects of oversight, these claims in large part have not been tested globally, viz. beyond discrete case studies of particular agencies or issue areas. Political science offers few empirically-grounded insights into the impact of oversight on administrative outcomes, as scholars have not empirically analyzed the consequences of oversight in a systemic manner. Instead, scholarship on oversight can be grouped into three categories. First, scholars have debated the extent to which Congress and its members are motivated to conduct oversight. See, e.g.,

## 2. *Assessing the Abdication and Dominance Perspectives*

The infractions data introduced in Part II can fill this gap. If specific infractions are found to be less likely to recur following a hearing—relative to their rate of recurrence when no hearing is held—this would suggest that executive branch officials take oversight seriously. By contrast, a null finding would suggest that oversight hearings are toothless—that, while hearings may serve members' electoral needs, they do not affect policy outcomes. This Part tests the hypothesis that oversight hearings reduce recidivism; in other words, that infractions that are the subject of oversight hearings are less likely to recur than are similar infractions that do not appear on Congress's oversight agenda.

The basic notion to be tested here is simple: that oversight matters. Congress marshals substantial resources to perform its oversight function, from the time that legislators spend preparing for and conducting hearings on often technical subjects to the engagement in these efforts of hundreds of committee staff members—and thousands more at the Government Accountability Office, Congressional Research Service, and other legislative support agencies.<sup>143</sup> Further, separate from committee staff, legislators' personal staff members often devote extensive time to oversight functions, including preparing their political principals for hearings.<sup>144</sup>

Yet much of this activity, including most of the hundreds of hearings held each year, does not make headlines. So why do legislators devote these resources to oversight, incurring opportunity costs for the use of their time and salary space in their staff budgets? Simply put, this Article posits that legislators expend resources on oversight because oversight can get results.

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ABERBACH, *supra* note 20. Second, positive political theorists have presented theories of the conditions for or consequences of oversight. See, e.g., Murray Horn & Kenneth A. Shepsle, Commentary, *Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 499 (1989); McCubbins & Schwartz, *supra* note 130; Moe, *supra* note 85. Third, case studies examine the consequences of oversight with respect to a limited number of specific agencies, congressional committees, or policy areas. See, e.g., Mary K. Olson, *Agency Rulemaking, Political Influences, Regulation, and Industry Compliance*, 15 J.L. ECON. & ORG. 573 (1999) (studying the FDA); Jeffrey C. Talbert, Bryan D. Jones, & Frank R. Baumgartner, *Nonlegislative Hearings and Policy Change in Congress*, 39 AM. J. POL. SCI. 383 (1995) (drug abuse and three other issues); JOEL A. MINTZ, *ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES* (1995) (environmental policy); R. DOUGLAS ARNOLD, *CONGRESS AND THE BUREAUCRACY: A THEORY OF INFLUENCE* (1979) (military basing, public works projects and social services grants).

143. See WILLIAM WEST, *CONTROLLING THE BUREAUCRACY* 131–32 (1995); RICHARD HALL, *PARTICIPATION IN CONGRESS* 138 (1996).

144. See ABERBACH, *supra* note 20, at 55. That legislators often utilize their *personal* staff for committee oversight constitutes a revealed preference. Because members of Congress receive a single lump sum for all personal staff compensation, every dollar spent on oversight work, including preparing for hearings, that personal staff members conduct is one less dollar that can be used, e.g., for constituent service. See IDA A. BRUDNICK, CRS REP. FOR CONGRESS, R40962, *MEMBERS' REPRESENTATIONAL ALLOWANCE: HISTORY AND USAGE* 10–11 (2015).

I am agnostic regarding the specific causal mechanism by which hearings alter agency behavior. Although I presume, based on Part II, that oversight derives much of its power from an implicit threat of legislative sanctions should the agency not comply with committee demands following a hearing, the analysis in this Part does not rely on this assumption. Perhaps the embarrassment of being publicly criticized is enough to motivate reputation-valuing agency officials to change. Or perhaps lower-level agency officials angling for a promotion alert Congress to infractions (bypassing the media), and when they are promoted, they implement changes; in this telling, oversight motivates a personnel change, and this personnel change, in turn, leads to new practices at the agency.

## B. Research Design

### 1. Foundations

Each agency action that is a plausible candidate for congressional attention varies on two dimensions: congressional attention and recurrence. This variance allows for evaluation of the consequences of oversight hearings, by comparing the recurrence rate of infractions that lead to oversight hearings with the recurrence rate for otherwise similar infractions that do not.

Once again, TREAD Act implementation is illustrative. Table 2 identifies four problems with NHTSA's implementation of the Act, all of which were derived from the DOT Inspector General's January 2002 report.<sup>145</sup> The table classifies each issue based on whether Congress held a hearing and whether the issue persisted.

Table 2: Typology of TREAD Act Implementation Issues

	<u>Hearing Held</u>	<u>No Hearing Held</u>
<u>Issue Resolved</u>	(1) Defect information system not created by deadline	(3) Peer review needed
<u>Issue Persisted</u>	(2) Tire pressure warning rule not created by deadline	(4) Cost overruns

145. See U.S. DEP'T OF TRANSP., *supra* note 6.

TREAD Act implementation provides examples of all four possible situations included in Table 2. *First*, recall that the Department of Transportation's Inspector General faulted NHTSA for its inaction in creating a new defect information system.<sup>146</sup> The next month, a House oversight panel strongly criticized the agency for this failure.<sup>147</sup> NHTSA completed the first phase of the system later that year, and the agency's first recall based on the system occurred in 2004.<sup>148</sup> Accordingly, this issue is placed in Box (1) in Table 2; Congress held a hearing, and the issue was resolved.

*Second*, NHTSA's failure to publish in a timely manner a rule requiring automakers to install tire pressure warning systems also provoked legislators' ire, but did not change agency behavior. The TREAD Act required the agency to complete a rulemaking by November 1, 2001, for a regulation requiring "a warning system in new motor vehicles to indicate . . . when a tire is significantly under inflated."<sup>149</sup> The Inspector General's January 2002 report criticized the agency for failing to issue a final rule.<sup>150</sup> Legislators seized on this delay—and also faulted the agency for indications from the notice-and-comment period that the agency was receptive to undercutting the warning-system requirement—during the February 2002 hearing.<sup>151</sup>

On June 5, 2002, NHTSA published a final rule, which, after an additional delay, would require select vehicles to include a pressure sensor on *at least one* tire.<sup>152</sup> The Second Circuit held that the rule's allowance for automakers to forgo a warning system on all but one tire was contrary to the TREAD Act's unambiguous text per *Chevron* and arbitrary and capricious per *State Farm*.<sup>153</sup> With the rule vacated, the Inspector General's September

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146. *Id.*

147. *The Implementation of the TREAD Act*, *supra* note 7, at 5–6, 28.

148. See U.S. DEP'T OF TRANSP., *supra* note 8, at 5; McDonald, *supra* note 9, at 1177–78.

149. Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act of 2000, Pub. L. No. 106–414, § 13, 114 Stat. 1800, 1806.

150. See U.S. DEP'T OF TRANSP., *supra* note 6, at ii–v, 3, 30.

151. See *The Implementation of the TREAD Act*, *supra* note 7, at 28 (statement of Rep. Cliff Stearns, Chair, Subcomm. on Commerce, Trade, and Consumer Prot. of the H. Comm. on Energy & Commerce); *id.* at 6 (statement of Rep. Ed Bryant); *id.* at 10 (prepared statement of Rep. Billy Tauzin, Chair, H. Comm. on Energy & Commerce); *id.* at 32 (statement of Rep. Fred Upton); *id.* at 34 (statement of Rep. Bart Gordon).

152. 49 C.F.R. § 571.138 pt. S4.2 (2002); 67 Fed. Reg. 38704, 38722–23 (June 5, 2002) (final rule). Further, the rule would be phased-in gradually over this three-year period; it would not apply to a most new vehicles until the second year. 67 Fed. Reg. at 38706, 38708–09, 38722–38; 66 Fed. Reg. at 38989–95. Finally, the rule did not specify *any* requirements after a three-year window. *Id.* at 38722.

153. *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 62 (2d Cir. 2003). The court permitted the rule's incremental phase-in period to stand, however. See *id.*



2004 report noted that rulemaking was still ongoing—over two and a half years after the hearing and almost three years after the statutorily imposed deadline.<sup>154</sup> Accordingly, this issue is placed in Box (2) in the table; although oversight occurred concerning both perceived weaknesses in the then-proposed rule and delays in its completion, this oversight was not effective.

*Third*, the Inspector General's January 2002 report faulted NHTSA for inconsistent decisions concerning whether recalls are warranted, and recommended that the agency institute a form of peer review among its analysts.<sup>155</sup> Legislators did not broach this subject in the February 2002 hearing or, indeed, in any other hearing. The Inspector General, however, raised the subject *sua sponte* during the February 2002 session—to commend the agency for its responsiveness.<sup>156</sup> Because this issue was resolved without congressional intervention, it appears in Box (3).

*Fourth*, the Inspector General's report criticized NHTSA for cost overruns associated with implementing that Act.<sup>157</sup> Not only did legislators ignore this critique during oversight hearings, but one legislator faulted NHTSA for spending *too little* money on implementation.<sup>158</sup> Unsurprisingly, NHTSA's failures to contain costs reappeared in the Inspector General's September 2004 report.<sup>159</sup> This issue, which Congress ignored and which persisted, belongs in Box (4).

A naïve analysis of the impact of oversight would compare the recurrence rates of issues that receive congressional attention with those that do not. This strategy, however, ignores the facts that neither the probability of selection for oversight hearings nor the likelihood of "correction"—either post-oversight or, if no hearings are held, at some future point—is uniform across subjects.

Consider that peer review is likely the most tractable issue included in Table 2. Requiring analysts to check each other's work involves few tradeoffs; given that NHTSA employed eight analysts in 2004,<sup>160</sup> even doubling the staff to conduct peer reviews would not be budget-busting. By contrast, Boxes (1) and (2) involve the issuance of highly technical regulations for which NHTSA is required to consider costs to automakers

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154. See U.S. DEP'T OF TRANSP., *supra* note 8, at 4, 9–10.

155. See U.S. DEP'T OF TRANSP., *supra* note 6, at x, 13–16.

156. See *The Implementation of the TREAD Act*, *supra* note 7, at 6 (statement of Kenneth M. Mead, Inspector General).

157. See U.S. DEP'T OF TRANSP., *supra* note 6, at viii–iv, 5–9.

158. See *The Implementation of the TREAD Act*, *supra* note 7, at 6 (statement of Rep. Dingell).

159. See U.S. DEP'T OF TRANSP., *supra* note 8, at 2–7, 10–11, 14.

160. See *id.* at 3.

when crafting the rules,<sup>161</sup> and Box (4)'s imperative to reduce the agency's outlays may place other program goals at risk.

Because issue areas differ in terms of both their suitability for oversight hearings and their tractability, straightforward comparisons across these four categories are impractical. Instead, one must compare the recurrence rate of issues that are subject to oversight with otherwise similar issues that Congress ignores. The remainder of this subpart describes how this comparison is made.

### 2. *Connecting Infractions to Hearings and to Later Infractions*

Part II.B, *supra*, introduced two new datasets on agency infractions and oversight hearings. In this Part, I use these datasets to examine the recurrence rate of infractions that are subject to hearings with the recurrence rate of otherwise similar infractions that are not. First, I determine whether each infraction in the first dataset is connected to a hearing in the second dataset. I code each infraction on two dimensions: the targeted agency and the specific subject area, e.g., problems with intergovernmental grants, under-enforcement concerns, etc.<sup>162</sup> I then code each hearing along the same two dimensions. Whenever an infraction and hearing are assigned the same subject-area and agency code and the hearing occurred within the twelve months following the first mention on the infraction, I consider this particular infraction to be the subject of that hearing. Finally, for each infraction (and regardless of whether a hearing occurred), I determined whether an infraction with the same agency and subject-matter codes reappeared in the infractions dataset in the 13 to 24 months following the initial infraction. Thus, this process identifies, for each infraction, (i) whether the infraction led to a hearing and (ii) whether the infraction reoccurred.

### 3. *Method*

To test the hypothesized causal relationship between oversight hearings and agency recidivism, one cannot simply compare agency recidivism concerning infractions that were and were not subject to hearings, because infractions in these two groups likely differ in other ways that may be

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161. See, e.g., 5 U.S.C. § 553 (2012) (requiring notice and comment for substantive rulemakings); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (mandating cost-benefit analysis for same); U.S. DEP'T OF TRANSP., *supra* note 8, at 9 (describing the technical nature of the defect information system).

162. See *supra* note 91 (listing the forty-two subject areas).

correlated with recidivism. Neither is conventional regression analysis, with a set of variables controlling for these other potential differences in infractions, appropriate.<sup>163</sup> Accordingly, I use genetic matching, a statistical method that allows for the evaluation of causal claims. While it is impossible for a given infraction to simultaneously both receive and not receive the “treatment” of an oversight hearing, matching provides a second-best alternative for causal inference; it allows the analyst to identify a control observation that is as similar as possible to a given treated observation concerning a set of observable, pre-treatment covariates but for the fact that the control observation did not receive the treatment.<sup>164</sup>

Genetic matching, specifying one-to-one matching with replacement, is the most appropriate matching method for this analysis based on the properties of some of the covariates on which it is important to achieve balance.<sup>165</sup> The genetic matching algorithm identifies a suitable set of ignored infractions to compare to the set of infractions that are subject to at least one hearing so that the distributions of the two groups will be

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163. Because regression analysis involves the minimization of squared errors, marginal observations are heavily weighted. This feature presents a problem where, as here, there are many observations in one category that are extremely unlike observations in the other category, and thus cannot be “controlled for” with a set of variables. For instance, because it would be absurd to think that a Watergate-style event would *not* lead to at least one hearing, including such an event in a linear regression would lead to biased estimates, regardless of the quality and quantity of the control variables or the weighting scheme for outlying observations. Matching, by contrast, places emphasis on observations that have similar covariates, so that extreme or marginal observations might receive no weight at all.

164. The causal effect of treatment  $\tau$  on unit  $i$  is given by  $\tau_i = Y_{i1} - Y_{i0}$ , where  $Y_{i1}$  is the potential outcome if  $i$  receives treatment and  $Y_{i0}$  is the potential outcome if  $i$  does not. Assuming that the process by which an observation  $i$  is selected into the treatment or control group is determined by  $X_i$  (a set of observable, pre-treatment covariates), it is possible to estimate the average treatment effect for the treated (ATT) as:

$$\bar{\tau} | (T = 1) = E[E(Y_i | X_i, T_i = 1) - E(Y_i | X_i, T_i = 0)]$$

where  $T_i$  is a treatment indicator, with a value of 1 if  $i$  is in the treatment regime and 0 otherwise. As the above equation shows, calculating the ATT for observational data requires pairing treated observations with untreated ones in terms of the covariates in  $X$ . Matching algorithms do just this: pairing each treated unit with a closely-matched control unit. See Jasjeet Sekhon, *Opiates for the Matches: Matching Methods for Causal Inference*, 12 ANN. REV. POL. SCI. 487 (2009) (providing an overview of matching methods).

165. Since most of the covariates are discrete, the Equal Percent Bias Reduction (EPBR) property does not hold. Because multivariate matching based on Mahalanobis distance, propensity score matching via logistic regression, and other affinely invariant matching methods all require that this property be met, the fact that some covariates are discrete means that using these methods would result in greater bias. Jasjeet Sekhon, *Multivariate and Propensity Score Matching Software with Automated Balance Optimization: The Matching Package for R*, 42 J. STAT. SOFTWARE 1, 30 (2011). Genetic matching, by contrast, does not require that EPBR hold. Genetic matching also compares favorably to propensity score and Mahalanobis distance matching in terms of bias and mean squared error reduction; it also does not require any parametric assumptions. See *generally id.* (providing an overview of the GenMatch function); Sekhon, *supra* note 164 (noting that this procedure minimizes the largest covariate discrepancy between treatment and control groups, i.e., it maximizes covariate balance).

comparable in terms of a variety of specified confounding factors.<sup>166</sup>

#### 4. Covariates

This analysis matches on eleven factors that, taken together, capture the process by which units are assigned to treatment.<sup>167</sup> Specifically, the analysis includes three covariates that capture the preference alignment among agency, committee, and Congress (*Agency-Committee Alignment*, *Committee-Chamber Alignment*, and *Agency-Chamber Alignment*); one covariate that captures background political circumstances (*Congress*, i.e., the two-year period in the which the infraction occurred); three covariates that relate to agency characteristics (*Executive Order*, *Regulatory Function*, *Defense / Foreign Affairs Function*); three that measure the salience of the infraction (*NYT Mentions*, *WSJ Mentions*, *Total Mentions*); and one that captures the topic of the infraction (*Subject Matter*).

As discussed *supra* in Part II, the relative preferences of Congress, the committee, and the agency all impact the committee's decision to hold oversight hearings. These inter-actor relationships are captured in the *Agency-Committee Alignment*, *Committee-Chamber Alignment*, and *Agency-Congress Alignment* covariates.<sup>168</sup>

*Congress*, a dummy variable taking values corresponding to the 102nd through 112th Congresses, is an especially important covariate, because it contains information concerning a wide variety of relevant features of the political system, e.g., the presence of divided government, the national

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166. See Alexis Diamond & Jasjeet Sekhon, *Genetic Matching for Estimating Causal Effects: A General Multivariate Matching Method for Achieving Balance in Observational Studies*, 95 REV. ECON. & STAT. 932 (2013). To provide a bit more technical detail regarding the research design:  $W_i$  is a binary treatment indicator, coded as 1 if infraction  $i$  was dealt with in an oversight hearing during the twelve months following its first mention, and zero otherwise.  $X$  is a  $(n \times k)$  matrix of  $k$  covariates and  $n$  infractions.  $Y_i(0)$  denotes the number of times infraction  $i$  would be mentioned in the four sources—IG reports, GAO lists, *Times* and *Journal* editorials—subsequent to the initial twelve month period if the infraction is *not* taken up in an oversight hearing during the twelve months following its initial mention.  $Y_i(1)$  represents the number of times  $i$  would be mentioned in these four sources if a hearing is held concerning  $i$ . Thus,  $Y_i(0)$  and  $Y_i(1)$  are “potential outcomes,” representing the likelihood of issue  $i$  reappearing, with and without hearings. Assuming unconfoundedness given the observed covariates—i.e., that, conditional on the observed covariates, units are assigned to the treated group in a manner independent of outcomes—the average treatment effect for the treated is:  $\tau_{ATT} = E(Y_i(1) - Y_i(0) | W_i = 1)$ .

167. The use of the terms of “treatment” and “control” is consistent with the nomenclature in matching studies involving observational data in the social sciences. See, e.g., Gary King & Richard Nielsen, *Why Propensity Scores Should Not Be Used for Matching 1* (Dec. 16, 2016) (working paper), <https://perma.cc/WY9D-3NUG>. I do not suggest that the two groups are identical, which is rarely possible in non-experimental settings.

168. As in Part II, subcommittee preferences are estimated using subcommittee chairs' ideal point estimates based on Common Space DW-NOMINATE scores, and agency preferences are captured by Johnson-Chen scores.

mood, and the majority party leadership's macro-level oversight goals.

*Executive Order* captures whether the agency was created via an executive order, department secretarial order, or executive branch-initiated reorganization plan after 1946.<sup>169</sup> According to William Howell and David Lewis, agencies that were created via unilateral executive action are typically designed so as to maximize presidential control.<sup>170</sup> Given this Congress-subverting purpose, structural differences between agencies with a statutory basis and those without may influence the relative susceptibility of these two types of agencies to oversight.

*Regulatory Function* reflects whether a majority of the programs that the agency administers are regulatory in nature.<sup>171</sup> Whether an agency primarily performs a regulatory function may affect its assignment to treatment, as the often highly complex subject matter that regulatory agencies address may indicate that the legislature's hidden information problem is particularly acute. Thus, oversight could be a more potent mechanism for information revelation for regulatory agencies.

*Defense / Foreign Affairs Function* refers to whether the agency's primary mission involves defense, foreign policy, international trade or foreign aid.<sup>172</sup> Although the evidence is mixed, some scholars contend that Congress adopts a more deferential posture towards the executive branch concerning foreign affairs.<sup>173</sup>

*NYT Mentions* and *WSJ Mentions* are event counts of the number of times these newspapers published a critical editorial concerning the agency

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169. These data were obtained from a dataset created by David Lewis for agencies created between 1946 and 1997. See David E. Lewis, *Administrative Agency Insulation Data Set Code Book*, IQSS DATAVERSE NETWORK, <https://perma.cc/VV6G-P38P>. I supplemented this dataset by researching agencies created between 1998 and 2012. Given that the creation of new agencies by unilateral executive action is a relatively recent phenomenon, agencies created before 1946 were coded as a zero.

170. William Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095, 1096 (2002).

171. See David E. Lewis, *Testing Pendleton's Premise: Do Political Appointees Make Worse Bureaucrats?*, 69 J. POL. 1073 (2007) (providing a description of OMB PART Management Grades, which include program categories for every federal program in existence during these years, as well as information specifying the agency in each program is located). I consider an agency to have a primarily regulatory function if this dataset classifies at least half of the programs that the agency administers as regulatory.

172. The contents of this variable were obtained from the David Lewis dataset for those agencies established between 1946 and 1997, and were entered based on the author's own determinations for all other agencies. See Lewis, *supra* note 169.

173. Compare LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995), with WILLIAM G. HOWELL & JON PEVEHOUSE, *WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS* (2007); John Yoo, *Politics as Law? The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CALIF. L. REV. 851, 875 (2001). Bureaucracy experts also generally consider defense-focused agencies to have a more conservative outlook. Clinton & Lewis, *supra* note 106, at 11.

infraction in the twelve months following its first mention in any of the four sources. Taken together, these covariates provide a crude measure of issue salience and media or public attention from sources considered to be left- and right-of-center respectively. *Total Mentions in Year  $t$*  is an event count of the number times that all four sources criticize the agency regarding the infraction during the same twelve month period. This covariate provides an additional measure of issue salience among inside-the-Beltway actors.

Since one reasonably could expect infractions that are the subject of intense media attention to be more likely subjects of oversight hearings, including these three media-related covariates helps ensure that observations in the treated and control groups are balanced in terms of public attention. That media attention to an issue typically declines after an initial burst of coverage should not affect these results, assuming that the rate of decline for issues that are the subject of oversight is equivalent to the rate of decline for issues that are not subject to oversight.

Finally, *Subject Matter* is a categorical variable. Each infraction is assigned one of forty-two subject-matter codes, as listed in Footnote 91.

I set the matching function to match exactly on the *Congress* and *Subject Matter* covariates and use the nearest match for all other covariates.<sup>174</sup> Through this procedure, each infraction on which a committee held a hearing was matched with an infraction for which oversight did not occur. For each matched pair, both the treated and control infraction involved the same subject area and occurred during the same Congress. Further, the two groups of observations are closely matched in terms of (i) the alignment of political preferences among the agency, committee, and Congress; (ii) whether the agency was created via executive order; whether the agency performs (iii) a mostly regulatory or (iv) defense or foreign-relations functions; and the number of instances that year in which (v) the *New York Times* editorial page; (vi) the *Wall Street Journal* editorial page; or (vii) either newspaper's editorial page mentioned the infraction.<sup>175</sup>

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174. Finding an exact match for each treatment unit on *Congress* is particularly desirable for two reasons. First, as previously detailed, *Congress* is a particularly meaningful covariate because it captures a wide variety of features in the political environment. Second, the temporal, discrete nature of this variable means that, in some circumstances, "close enough" is not adequate. Whereas, for instance, the analyst might be satisfied with a match where the control and treated units have slightly different values for, say, *Agency-Congress Alignment*, the same cannot necessarily be said for a pair where, e.g., one unit is in the Democrat-led 103rd Congress and the other is in the Republican-led 104th Congress.

175. To test for post-matching balance between the treated and control groups, I ran paired sample  $t$ -tests, for differences in means, and bootstrap Kolmogorov-Smirnov tests, for differences in distributions, concerning each covariate. Across these tests, the lowest  $p$ -value reported is 0.129, which suggests that, using a strict  $p > 0.10$  criterion, the matched groups can be considered balanced on the covariates.

The matching function also substantially reduces standardized bias, or the mean difference between

Having created the matched groups and assessed balance,<sup>176</sup> I then fit a series of logistic regression models on the matched data. These models include all of the previously mentioned covariates along with a dichotomous indicator variable taking the value of 1 if a hearing was held within twelve months of the infraction's first mention. The outcome variable is whether the infraction is mentioned against in the thirteen to twenty-four months following its first mention; standard errors are clustered by committee.

Before proceeding to the analysis, several qualifications are in order. Most importantly, while the eleven included covariates capture significant considerations, they do not exhaust the potential ways in which infractions subject to oversight could differ from those that are ignored. For instance, infractions vary in importance to key donors or interest groups, not to mention as pet causes among legislators; yet operationalizing variation of these types is beyond this Article's scope—and perhaps beyond the realm of possibility. Further, several of the included covariates are rough simulacra for the underlying concepts they seek to capture. For example, the number of references to the infraction in two major newspaper editorial pages is a crude proxy for salience, particularly as the media landscape fractured during the study period. While acknowledging these shortcomings—which in some form are present in many observational studies—this Article nonetheless provides a first-cut assessment of a key potential mechanism for congressional influence in the administrative state.

### C. Results

With each infraction for which a hearing was convened well-matched with an otherwise similar infraction for which oversight did not occur, direct measurement of the impact of congressional oversight on agency recidivism is possible. The top row in Figure 4, labeled “Model 1 (1991–2012),” reports the estimated effect of holding at least one hearing on whether there is at least one critical mention of the infraction in any of the four sources during the following twelve months, along with the associated 95%

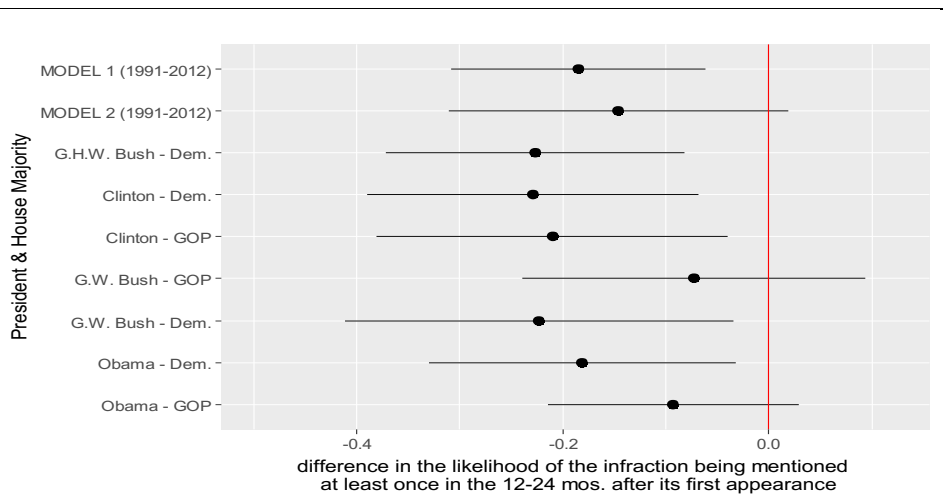
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the two groups divided by the standard deviation in the treated group, for all covariates. Prior to matching, the standardized differences for three out of the eleven covariates exceed 20%. See Paul Rosenbaum & Donald Rubin, *Constructing a Control Group Using Multivariate Matched Sampling Methods that Incorporate the Propensity Score*, 39 AM. STATISTICIAN 33, 36 (1985) (classifying standardized differences greater than 20% as large). Post-matching, the largest standardized difference, for *Defense / Foreign Affairs Function*, is 1.0%. The fact that such close balance was achieved on these covariates presents a strong case for unconfoundedness. Even though treatment was not randomly assigned, one may say that it was not assigned on the basis of these covariates, which capture a diverse set of factors related to the political climate, committee and agency political preferences, media attention and overall issue salience.

176. See discussion *supra* note 175.

confidence interval. The second row, labeled “Model 2 (1991–2012),” reports this estimate only for the most politically salient infractions, i.e., those involving agency rulemakings, grant decisions, the agency’s posture toward client groups and regulated groups, and appointee competence and ethics.<sup>177</sup> Subsequent rows show the estimated effects from running separate models (all of which include the full set of infractions) for each combination of President and House party majority during the 1991–2012 period.<sup>178</sup>

*Figure 4: Effects of Hearings on Future Infractions, by President & House of Representative Majority Party*



Unit of analysis: agency infraction. Treatment: whether at least one hearing was held concerning the infraction in the twelve months following the infraction’s mention. Outcome variable: whether the infraction is mentioned at least once in the twelve months following treatment. Study period: 102nd–112th Congresses (1991–2012). Bars signify 95% confidence intervals, which were derived using committee-clustered standard errors.

Full model contains 14,431 observations and 5202 treated observations (all of which were matched), and 4992 unweighted matched observations, i.e., control-group observations. (Two hundred and ten control-group observations were matched with more than one treated observation; an additional 4237 control observations were not matched with any treated observation, and thus were excluded.) Models estimated via logistic regression.

177. Recall from Section II.B that these subject areas correspond to categories 12–23 and 35–42 in Footnote 91).

178. These models were run without the *Congress* covariate.



As Figure 4 shows, when a hearing is held concerning an infraction, that infraction is less likely to reappear in the four sources than are similar infractions that do not receive oversight attention. Overall, oversight attention is associated with an 18.5% reduction in the likelihood of recurrence across all infractions (Model 1). For the most politically salient infractions (Model 2), the estimated reduction is 14.6%—although the associated 95% confidence interval crosses zero, indicating that we cannot reject the null result at this level.

Remarkably, these results persist during periods of both unified and divided government. Figure 4 also shows that hearings are associated with a 7.3% to 22.9% reduction in agency recidivism for all partisan combinations during this period (although two of these estimates are not statistically significant). Contrary to expectations based on the view that inter-branch competition will be most intense when different parties control the branches,<sup>179</sup> there does not appear to be a discernable difference between the recidivism rates in periods of unified versus divided government.

To put the magnitude of these effects in perspective, infractions that are not subject to hearings have a 40.9% likelihood of recurrence in the next year; infractions that are subject to hearings have a 33.3% likelihood of recurrence. To better understand how this average 18.5% reduction in agency recidivism affects the absolute number of agency infractions, Figure 5 provides the predicted probabilities of infractions that were subject to hearings reappearing in the infractions dataset in the thirteen to twenty-four months after their appearance, compared to the predicted probabilities for infractions that Congress ignored. As the estimates in the bottom-left corner of Figure 5 show, infractions that appear once in a given year and are not subject to hearings have a 33% predicted probability of recurrence, whereas infractions that appear once in a given year but *are* subject to hearings have a 25% probability of recurrence—a 24.2% reduction for infractions that appear only once in a given year.

As Figure 5 illustrates, infractions that appear more than once in a given year are more likely to reappear in subsequent years, perhaps because infractions that receive greater attention from the four sources are more difficult to resolve. Still, for infractions that are mentioned between two and seven times in one year, the probability that the infraction is mentioned the next year is lower when oversight occurs. In most cases, this lower likelihood of recurrence is statistically significant, as the lack of overlap in most of the 95% confidence intervals in Figure 5 conveys.

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179. See Daryl Levinson & Richard Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006).

Figure 5: Predicated Probability of Infraction Reappearing in Dataset in Year Following First Mention

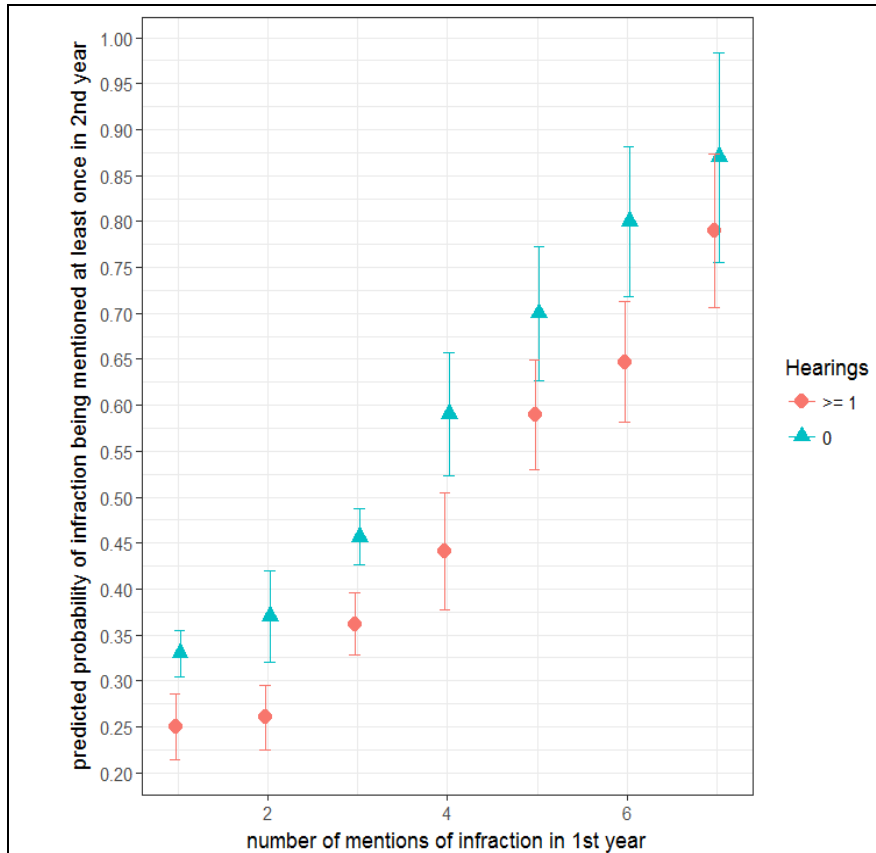


Figure reports simulated predicted probability of an infraction reappearing in the dataset in the thirteen to twenty-four months following its appearance. X-axis denotes the number of times that the infraction appears in the dataset following its first appearance. Bars signify 95% confidence intervals. Quantities of interest estimated by running 1000 simulations in Zelig using a logistic regression model and holding *Subcommittee Preferences* and *Agency Preferences* covariates at their means; *Executive Order*, *Regulatory Function*, and *Def. / For. Affairs Function* at their modes; and *NYT Mentions* and *WSJ Mentions* at their medians. See King, et al., *Zelig*, *supra* Figure 3. Unit of analysis: agency infractions. (Infractions from all 42 categories in Footnote 91 are included.) Bars signify 95% confidence intervals, which were derived using committee-clustered standard errors.

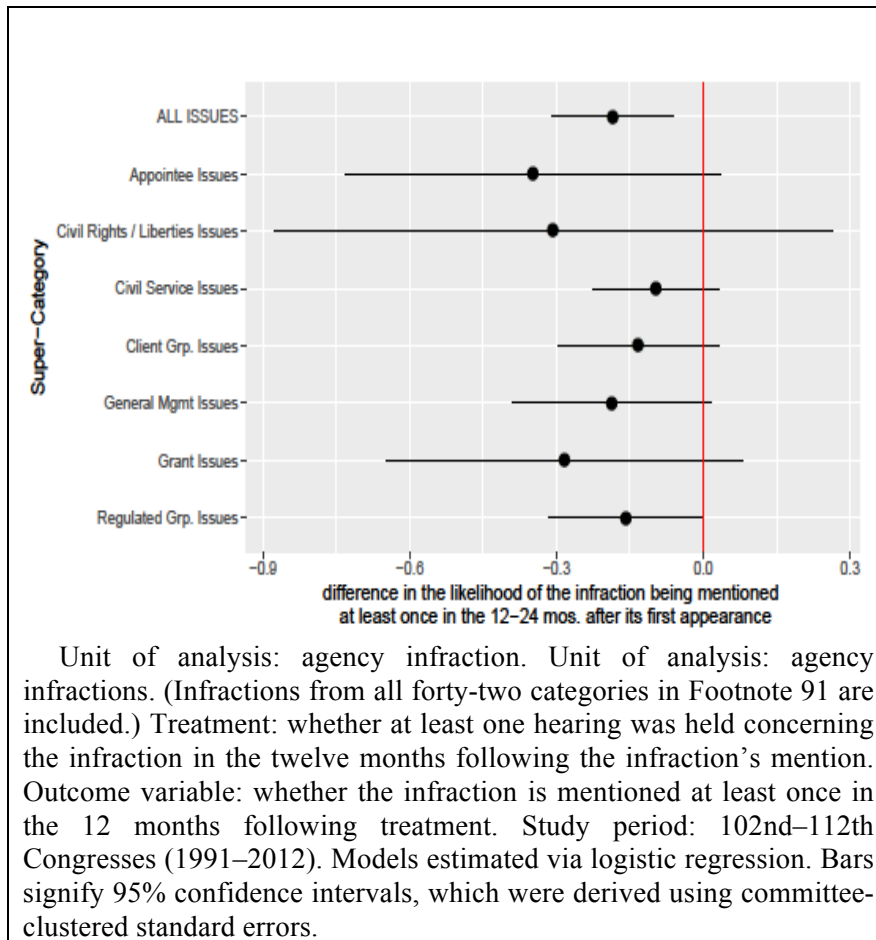
Assessing whether an 18.5% reduction indicates that oversight hearings are consequential raises the question: *Compared to what?* As discussed in Section I.A, *supra*, Congress possesses various carrots and sticks for influencing agency behavior. The importance of these other tools, ranging from informal legislator-administrator contacts to GAO reports detailing agency misbehavior, should not be discounted. On the other hand, these tools may derive their impact, at least in part, from the fact that they are deployed in the shadow of potential oversight hearings. Regardless, this Part simply reports the *marginal* effect of oversight hearings, whether those hearings occur in isolation or in combination with other means of influence.

Naturally, the lack of quantifiable “success rates” for these other tools hinders the assessment of the relative impact of oversight hearings compared to these other measures. In absolute terms, the magnitude of an 18.5% reduction is in the eye of the beholder. At least to this observer, though, the notion that a small subset of legislators may be able to exert influence on the administrative state—which is alternatively considered a co-equal fourth branch of government or the object of growing presidential control—without passing a statute is noteworthy.

Conducting similar analyses for limited subsets of these infractions data yields similar results as reported in the full model—albeit often just on the wrong side of the conventionally accepted  $p < 0.05$  level of statistical significance. As discussed above, Model 2 in Figure 4 reports that oversight hearings are associated with an estimated 14.6% reduction in the recurrence rate for a politically salient subset of infractions (with a standard error of 0.084 associated with this 0.146 point estimate).

Running separate models for infractions in each of the forty-two subject areas yields negative estimates for almost all models. Almost all these estimates are far from conventionally accepted levels of statistical significance, however, perhaps because of the relatively low number of observations in most categories. Accordingly, I reclassify the forty-two subject areas into seven “super-categories,” each of which contains sufficient observations for analysis, and run a separate model for each of the seven super-categories. Figure 6 reports the effect estimates and corresponding 95% confidence intervals for each. Although, as Figure 6 shows, most of these intervals just barely include positive numbers, and thus are not statistically significant at the  $p < 0.05$  level, all of the estimates except for “Civil Rights / Liberties Issues” are significant at the  $p < 0.10$  level.

Figure 6: *Effects of Hearings on Future Infractions, By Infraction Topic*



The fact that oversight reduces bureaucratic recidivism is noteworthy and, for those that believe that Congress ought to play an expanded role in administration, encouraging. Coupling with the findings in Part II concerning when oversight will occur, this result suggests several implications concerning the role of Congress in administration.

#### IV. IMPLICATIONS

The basic conclusion from the preceding analyses is that, when undertaken, oversight can have a significant effect on agency behavior, but political constraints prevent oversight from occurring in many instances.

The statement that oversight is *conditionally* impactful may seem a bit vexing. On the one hand, Part III demonstrates that oversight *can* be highly consequential, reducing the rate of recurrence of infractions by 18.5%. Considering that oversight hearings are sometimes dismissed as little more than venues for political posturing, this finding is noteworthy, and should be cause for optimism among those that see congressional engagement with the administrative state as important.<sup>180</sup> Moreover, Part II shows that outlier committees conduct oversight less frequently, mitigating the charge that committee-based oversight may distort agency action away from the median legislator's preferences.

On the other hand, Part II also suggests that principal-agent issues inherent in the relationship between Congress and its committees push overseers to be highly selective concerning which infractions they address. (Namely, oversight tends to increase as agency and congressional preferences diverge, per Hypothesis 1, and as committee and congressional preferences converge, per Hypothesis 3. Agency-committee convergence also may be associated with increased oversight, per Hypothesis 2b, although the lack of statistical significance in some models counsels in favor of caution here.) While the existence of a bifurcated principal does clip the wings of outlier committees, tempering their influence over administrative outcomes, it also leads to fewer subjects being covered in hearings relative to what would be addressed in a system in which committees perfectly mirror floor preferences. Thus, committee oversight arguably does not fully reflect Congress's priorities.

What is one to make of these findings? The following sections discuss implications of the results presented *supra*.

#### A. Committee-Chamber Relations

Congress-agency interactions are best thought of not as a clear principal-agent relationship, but instead as a relationship where the cooperation of two actors—the committee and Congress, which together can be considered the principal—may be necessary for effective oversight. According to J.R. DeShazo and Jody Freeman, congressional involvement in administration involves a “double delegation,” in which Congress transfers *ex ante*

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180. Because this analysis only considers the effects of completed oversight hearings, it may underestimate oversight's impact. Much like the threat of litigation brings potential defendants—mindful of the frictional costs involved in a legal defense—to the settlement table, the threat of oversight hearings—with their own attendant frictional costs—may convince agencies to comply with committee demands. In this way, oversight's “second face of power” influences agency behavior without the need for any observable action by the committee. *Cf.* Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POLI. SCI. REV. 947 (1962).

policymaking authority to agencies, and entrusts responsibility for *ex post* monitoring of this first delegation to congressional committees and subcommittees—with principal-agent problems ingrained in both delegations.<sup>181</sup>

Concerning this second delegation, the finding in Part II that preference divergence between committees and their parent chamber is associated with less frequent oversight suggests that slack exists in the principal-agent relationship between Congress and its committees. The functional split between committees, which are responsible for oversight, and Congress, which alone is authorized to punish agencies should they ignore committee overseers, limits the set of topics on which strategic committees will engage on oversight.

This feature of Congress has implications concerning the comprehensiveness of oversight, raising questions concerning the importance of oversight as a means of *congressional* control over the administrative state.<sup>182</sup> Consider how oversight activity would differ if, hypothetically, there were no principal-agent problem between Congress and its committees, i.e., if committee preferences perfectly mirrored the floor. The status quo promotes the odd result of committees devoting less attention to overseeing agencies with differing preferences than the committee, because the committee recognizes that agencies with differing preferences are less likely to comply with committee demands following a hearing and more likely to court legislative sanctions. But if committee preferences perfectly matched those of Congress, committees would not need to consider whether holding hearings would awaken a slumbering Congress to move policy away from committee preferences. Instead, agencies with policy preferences that are far from Congress's (and its committees') preferences would receive greater oversight attention, and agencies whose preferences align with Congress's (and its committees') preferences would receive less attention.

Slack in the principal-agent relationship between Congress and its committees prevents this more sensible behavior from occurring. The presence of a bifurcated congressional structure limits committees'

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181. DeShazo & Freeman, *supra* note 15, at 1444–46.

182. See Beermann, *supra* note 11, at 142–43 (noting that oversight “may allow for too much deviation from the terms of the legislative program and from the preferences of Congress as a whole given that oversight does not include the discipline of public majority votes in Congress. . . . There are reasons to be wary of a system [allowing] . . . small groups within Congress to shape administrative action.”); DeShazo & Freeman, *supra* note 15, at 1447 (“Double delegation creates a serious risk . . . that agency decision-making . . . will be driven by the interests of small sub-majorities of Congress.”); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1291 (2002) (doubting that “oversight committees accurately reflect the views of the House or Senate as a whole”).

oversight activity, relative to the amount of activity that would occur if committees were perfect agents of Congress. With this bifurcated principal, a strategic committee will restrict the set of agencies or topics that it monitors, as the committee's preferences diverge from those of other relevant actors. Under certain conditions, a committee with either a sufficiently different political outlook than Congress or than an agency within its jurisdiction may choose to ignore agency behavior that the committee opposes. Thus, two principal-agent problems hamper Congress's ability to control the administrative state: (i) Congress's delegation of policymaking power to agencies leads to one form of agency cost, and (ii) the branch's delegation of the task of monitoring the administrative state to its committees leads to a second form.<sup>183</sup>

### B. Majoritarianism

A pessimistic reading of these findings suggests that Congress cannot control delegated powers via committee-based action, since the presence of a bifurcated principal leads committees to ignore agencies that Congress, in the aggregate, would prefer to actively monitor. Under this view, Congress's "double delegation"—of policymaking authority to agencies and of policy oversight to its committees—suggests a failure to ensure that policy outcomes reflect Congress's will both via detailed statutory enactments and through *ex post* monitoring that reflects the preferences of the legislative branch.<sup>184</sup>

A more balanced interpretation, however, notes the presence of a subtle majoritarian dynamic in the oversight dilemma. As Part II shows, committees devote greater attention to oversight when their preferences are more closely aligned with those of the parent chamber. That committees' oversight decisions are made with an eye towards the larger legislature indicates a degree of committee responsiveness to its principal.

This responsiveness provides a rejoinder to scholars that, pointing to the unrepresentative nature of congressional committees, contend that the President ought to possess greater power over the administrative state.<sup>185</sup> The argument for greater presidential control at Congress's expense often begins with the premise that "congressional" control really means control

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183. Cf. Kenneth A. Shepsle, *Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey*, 8 J.L. ECON. & ORG. 111 (1992) (referring to a "drift tradeoff" in the design of mechanisms for continued congressional involvement in administration).

184. See DeShazo & Freeman, *supra* note 15, at 1444–46.

185. See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995).

by committees.<sup>186</sup> Given the supposed unrepresentativeness of committees and their susceptibility to interest group capture,<sup>187</sup> the argument continues, greater presidential control of administration is preferable to an expanded role for congressional committees.<sup>188</sup>

The results reported in Part II cast doubt on this critique. That oversight increases as committee and chamber preferences converge suggests instead that committee-based oversight involves some measure of accountability to Congress. Unrepresentative committees are not given free rein to impose their views on agencies. Rather, the prospect of committee-disfavored legislative action deters outlier committees from attempting to influence agencies within their jurisdictions via the oversight process. In this way, the presence of a bifurcated congressional principal serves as a majoritarian check on unrepresentative committees.

### C. Jurisdictional Redundancy

To some observers, the fact that unrepresentative committees are less likely to use the oversight process to pull agencies towards their preferences may appear to be faint praise for the system. After all, this finding implies that agencies situated within the jurisdictions of unrepresentative committees may enjoy some degree of unfettered discretion. This feature, however, also suggests a benefit of Congress's fragmented oversight system, in which multiple committees, in both chambers, share jurisdiction for many agencies.<sup>189</sup> According to DeShazo and Freeman, "Congress is best viewed as a collection of rivals who vie for control over power delegated to agencies."<sup>190</sup> But while DeShazo and Freeman consider this competition among unrepresentative committees and subcommittees as creating "risk that submajorities will ultimately direct agency implementation,"<sup>191</sup> the findings presented in this Article mollify their conclusion. The presence of multiple committees with overlapping jurisdictions may mitigate the possibility that preference divergence between the legislative branch and any one particular committee will leave

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186. See Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1471, 1522–23 (2015).

187. See Kagan, *supra* note 122, at 2336 (stating that committees have a "far more tenuous connection to national majoritarian preferences" than does the White House); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 42 (1991) (similar).

188. See Calabresi, *supra* note 185, at 51 ("Congressional committee chairs are in many ways rival executives to the cabinet secretaries whose departments and personal offices they oversee.").

189. See KING, *supra* note 84, at 6.

190. DeShazo & Freeman, *supra* note 15, at 1446.

191. *Id.* at 1444.



some agencies unmonitored.

This finding speaks to a debate regarding the impact of committees' exclusive jurisdictional "property rights" on congressional capacity. Whereas one group of scholars critiques committee jurisdictional redundancy as inefficient, discouraging congressional involvement in administration and thus allowing the executive to act with fewer congressional checks,<sup>192</sup> others acknowledge benefits to jurisdictional fragmentation including the decreased susceptibility of multiple entities to interest group capture and the increased likelihood that problems will be discovered with redundant safeguards.<sup>193</sup> The existence of a bifurcated principal—which limits committee oversight activity where the relevant committee's ideological outlook diverges from that of the target agency or Congress—suggests an additional benefit of duplicative committees; redundancy increases the likelihood that for at least one committee, the preference relationships between committee, chamber, and agency that are associated with more frequent oversight will be properly aligned.

#### *D. Checking the President*

These findings also suggest that a reconsideration of the dominant perspective concerning executive-congressional power dynamics is in order. Part III provides a partial corrective to popular accounts of the current balance of powers; Part II offers an institutional design strategy to militate against further executive aggrandizement.

The notion that the executive branch plays an outsized role in governance, exercising legislative and judicial functions with few perceived checks from Congress or the courts, has gained wide currency in recent years.<sup>194</sup> Presidential self-aggrandizement, Congress's routine delegation of

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192. See Joshua D. Clinton, David E. Lewis, & Jennifer L. Selin, *Influencing the Bureaucracy: The Irony of Congressional Oversight*, 58 AM. J. POLI. SCI. 387 (2014); Patricia Wald & Neil Kinkopf, *Putting Separation of Powers into Practice: Reflections on Senator Schumer's Essay*, 1 HARV. L. & POL'Y REV. 41, 47 (2007); Beermann, *supra* note 11, at 122; NAT'L COMM'N ON TERRORIST ATTACKS, 9/11 COMMISSION REPORT 104–07 (2004).

193. See Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1691–99 (2006). Cf. RICHARD POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11 36 (2005) (arguing that, without competition, agencies may grow complacent).

194. See, e.g., NLRB v. Noel Canning, 134 S. Ct. 2550, 2606 (2014) (Scalia, J., concurring) (noting "the continuing aggrandizement of the Executive Branch"); City of Arlington v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting) ("[T]he danger posed by the growing power of the administrative state cannot be dismissed."); *supra* note 14 (collecting citations to scholarly work). During the Obama administration, these concerns emanated mostly from conservatives. See, e.g., Josh Blackman, *Presidential Maladministration*, 2018 U. ILL. L. REV. (forthcoming 2018). With the change in administration, the roles of conservatives as critics of, and progressives as abettors in, presidential

lawmaking functions to executive agencies, and the Supreme Court's willingness to abide these broad delegations so long as Congress provides a bare "intelligible principle" to guide agency policymaking, when taken together, all reinforce the view of an executive ascendant, with Congress imposing few restrictions on its power.<sup>195</sup>

While misgivings regarding trends in the relative power of the political branches are legitimate, the narrative of an enfeebled Congress unable to check an unbounded executive (except through the rare passage of new laws) is deficient.<sup>196</sup> As Part III of this Article shows, this account ignores Congress's extra-legislative powers, including committee oversight of executive agencies, as a means of controlling administrative outcomes.

Taken in tandem with Part III, Part II demonstrates that the structure and characteristics of the members of the committee system impact Congress's ability to conduct oversight, and thus to exercise control over the executive branch. Findings that certain institutional design characteristics facilitate oversight may motivate Congress to reorganize along those lines to more vigorously check the White House.<sup>197</sup>

### *E. Administrative Democracy*

Whereas some scholars worry that the President plays too large of a role in the administrative state, others claim that holes in the President's control over administration leave agencies without sufficient democratic checks. At

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aggrandizement likely will flip. See Adrian Vermeule, *Two Futures for Administrative Law*, NOTICE & COMMENT BLOG (Nov. 30, 2016), <https://perma.cc/FU58-UMGY>.

195. See *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472–75 (2001) (delineating the expansive terms of the nondelegation doctrine); Watts, *supra* note 117, at 1003 (noting Congress's sweeping delegations to agencies); Kagan, *supra* note 122 (describing the President's growing role in the administrative state).

196. While no scholar has, to my knowledge, argued that the executive is completely unbound, many have noted a massive transfer in power, with supposedly few checks, from Capitol Hill to the White House. See *supra* note 14; see also Eric Posner, *The Executive Unbound*, Trump Ed., ERICPOSNER.COM (Feb. 2, 2017), <https://perma.cc/GRR3-J29H> (stating that "[w]hile . . . some passages [of *The Executive Unbound*] may have led readers to think that the book imagines that the president is subject to literally no constraints from Congress and the courts, that was never the argument").

197. Would legislators *want* to reorganize Congress's committee system to better control the executive branch? In light of the current unified Republican control of the political branches, the notion that legislators desire to better check the President may seem far-fetched. See Levinson & Pildes, *supra* note 179. Even in the current partisan climate, however, majority-party members of Congress possess an electoral incentive to monitor the executive branch—lest problems fester and voters blame incumbents in both of the political branches. Further, some legislators, motivated by a sense of institutional loyalty, genuinely may consider recalibrating the balance-of-powers to be a worthy policy goal in itself. See SCHICKLER, *supra* note 131 (on entrepreneurial legislators pursuing institutional reforms based on a combination of personal ambition and concern over Congress's institutional prestige); accord David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. (forthcoming 2018).

least since the New Deal era, judges and commentators have charged that Congress's delegations of policymaking authority to administrative agencies create a democratically unaccountable "fourth branch" of government.<sup>198</sup>

Since that period, a central project of administrative law has involved reconciling the practical reality of a technocratic administrative state with democratic, liberal-legalistic values.<sup>199</sup> In previous generations, this effort emphasized designing administrative procedures to encourage public participation in administrative decision-making.<sup>200</sup> Later expansion of access to the courts helped ensure that agencies adhere to these public-minded procedural requirements.<sup>201</sup>

More recently, scholars have argued that the fact that a democratically elected President heads the executive branch provides some redress for the administrative state's supposed "democratic deficit."<sup>202</sup> For instance, Elena Kagan (writing years prior to her investiture) claimed that "presidential control of administration . . . possesses advantages over any alternative control device in advancing . . . core democratic values."<sup>203</sup>

Indeed, the administrative state's connection to a democratically elected President provides a rationale for the judiciary's deferential posture in reviewing agency activity. Most notably, in granting agencies wide latitude in interpreting ambiguous statutes, the *Chevron* Court explained:

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.<sup>204</sup>

To the extent that *Chevron* and its progeny are rooted in these dual links between (i) agencies and the President and (ii) the President and the public,

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198. See Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 440 (2003).

199. See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

200. See Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 260–65 (2017).

201. See *id.*

202. See *id.* at 260 (referring to this concept as a "democracy deficit").

203. Kagan, *supra* note 122, at 2332; see also Calabresi, *supra* note 185, at 23 (1995); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 500 (1987).

204. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

skepticism regarding either of these links calls into question the doctrine's continued viability. The Court raised such doubts in *Free Enterprise Fund*. In that case, the Court stated that “[t]he growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people.”<sup>205</sup> By this view, the President provides the democratic bridge between the administrative state and the people—and this connection is precarious.<sup>206</sup> Justices Clarence Thomas and Neil Gorsuch express similar concerns.<sup>207</sup>

The notion that only presidential control can redress the administrative state’s democratic deficit is puzzling. *Ex post* congressional involvement in administration is real and significant; committee-based oversight provides Congress with an ongoing means of influencing agency behavior. Administrative lawyers and scholars have pushed for changes in administrative procedures, judicial doctrine, and executive branch structures as means of increasing democratic accountability in the administrative state.<sup>208</sup> Greater attention to redesigning congressional structures to facilitate oversight could play a similar function.

The prospect of Congress filling gaps in the other branches’ oversight is particularly promising in areas in which courts are particularly reticent to act. For instance, under *Heckler v. Chaney*, “agency decisions to refuse enforcement” are “general[ly] unsuitab[le] for judicial review.”<sup>209</sup> This doctrine places a theoretically infinite set of non-actions outside of the courts’ field of vision. Yet Congress holds no such qualms about probing agencies’ decisions to refrain from acting.<sup>210</sup>

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205. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 499 (2010) (Roberts, C.J.).

206. Chief Justice Roberts elaborated on these views in dissent. *See City of Arlington, Tex. v. FCC*, 569 U.S. 290, 313 (2013) (“[A]gencies enjoy . . . a significant degree of independence . . . [N]o President could . . . supervise so broad a swath of regulatory activity.”) (quotation and citation omitted) (Roberts, C.J., dissenting); *id.* at 315 (“It would be a bit much to describe [agency discretion under *Chevron*] as ‘the very definition of tyranny,’ but the danger posed by the growing power of the administrative state cannot be dismissed.”) (citation omitted).

207. *Dep’t of Transp. v. Ass’n of Am. Railroads*, 135 S. Ct. 1225, 1254 (2015) (“We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure.”) (Thomas, J., concurring in the judgment); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (“Add to [the combination of legislative, judicial, and executive functions in agencies] the fact that . . . agencies wield vast power and are overseen by political appointees (but often receive little effective oversight from the chief executive to whom they nominally report), and you have a pretty potent mix.”) (Gorsuch, J., concurring).

208. *See* Jud Mathews, *Minimally Democratic Administrative Law*, 68 ADMIN. L. REV. 605 (2016) (providing an overview of these efforts).

209. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

210. *See, e.g.,* Lynnley Browning, *How Credit Suisse Got Off Easy*, NEWSWEEK (June 19, 2014),

I do not wish to seem Pollyannaish about the ability of oversight to “solve” the democratic deficit. An 18.5% reduction is not earth-shattering. But neither should we ignore Congress’s function as watchdog over the administrative state, which provides a measure—albeit limited—of democratic accountability to agency decision-making. Congressional oversight is one tool among many that can push agencies towards greater public accountability.

### CONCLUSION

Through its oversight function, Congress plays an important—and often overlooked—role in the administrative state after it passes laws. Although hearings do not directly compel agencies to act, the signal they provide to both targeted agencies and the larger legislative branch concerning the prospect of future legislative sanctions following continued non-compliance may persuade agencies to conform to committee preferences. In this way, Congress’s ability to conduct oversight can be placed among the branch’s set of persuasive “soft powers.”<sup>211</sup> Whereas scholarship focused on lawmaking, the *ex ante* design of administrative procedures, and other formal means of control concludes that Congress has ceded considerable control over administration to the White House,<sup>212</sup> this Article shows that, when certain conditions are met, *ex post* oversight can be remarkably impactful.

This conclusion is subject to several caveats. Section III.B acknowledges, while infractions in the “treatment” and “control” groups are substantially similar in important respects, they are not identical. (Neither could they be.) Because my research design aggregates individual infractions and hearings, each of which undoubtedly has unique characteristics, in the service of general conclusions, it necessarily ignores nuances present in any particular episode. Although this project is therefore incomplete, there is value in a first-cut assessment of the impact of oversight hearings *in toto*.

Further, that oversight can be effective does not imply that it is efficient. Congress has many tools to influence agency behavior, from whistleblower statutes and the design of administrative structures to convention-based legislative vetoes and the newly reinvigorated Congressional Review Act. Whether oversight hearings lead to greater welfare gains within Congress

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<https://perma.cc/2YMD-ZX4T> (reporting that the DOJ, after a long period of inaction, entered into a plea agreement with a bank to pay a then-record criminal tax fine, shortly following an oversight hearing at which Sen. Carl Levin’s “public bashing” of the DOJ “rattled” a DOJ witness).

211.

*Cf.* Chafetz, *supra* note 11; Gersen & Posner, *supra* note 17.

212. *See generally supra* Part III; Beermann, *supra* note 11, at 64.

than other mechanisms is beyond the Article's scope.

Although examining connections between oversight activity and the relative alignment of Congress, its committees, and executive agencies is a positive and descriptive project, the implications of this work are prescriptive. In an era of growing judicial concerns about democratic control over administration, oversight holds promise as a means of involving the popular branch in administrative decision-making. Further, Congress can tailor its internal institutional design to enhance the role that the branch plays in administration. If Congress desires to strengthen its hand in administration, this Article provides a blueprint that shows how to do so.