Congress & the Constitution

# Why Courts & Congress Collide, and Why Their Conflicts Subside

*Judicial independence—and accountability—have been preserved.*

**by Charles Gardner Geyh**

Throughout history, presidents and Congress have battled the federal courts over constitutional authority, case jurisdiction, and controversial rulings. In this article Charles Gardner Geyh traces the ebb and flow of tensions between the courts and Congress and discusses the implications for our system of government.

The relationship between Congress and the federal courts has become increasingly acrimonious in recent years. Angry legislators have accused "judicial activists" on the left and right of usurping political power. Conservatives have decried judicial decisions that uphold the right to an abortion, recognize a right of homosexuals to marry, disallow prayer in public schools, or impede the application of the death penalty. Liberals have attacked the Supreme Court for deciding the outcome of the 2000 Presidential election in *Bush v. Gore*, and for diminishing congressional power to regulate commerce, implement the civil rights amendments, and force state compliance with federal law. Court critics have proposed a range of remedies, from impeaching errant judges to holding their budgets hostage, "unmaking" federal courts, thwarting the appointment of "activist" judges, and depriving the courts of jurisdiction to hear cases on politically sensitive subjects. For their part, court defenders have argued that these attacks on the courts operate to intimidate judges, undermine the independence of the judiciary, and compromise the rule of law.

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Polling data suggest that the public is conflicted about these developments. On the one hand, in a 2001 poll conducted for the Justice at Stake Campaign, 79 percent thought that the phrase "dedicated to facts and law" described judges well or very well, and a 2005 Maxwell poll found that 73 percent believe that judges "should be shielded from outside pressure and allowed to make decisions based on their own independent reading of the law." On the other hand, that same Maxwell poll revealed that nearly 56 percent think that judges "always say that their decisions are based on the law … but in many cases judges are really basing their decisions on their own personal beliefs." A 2005 survey conducted for the American Bar Association found that 56 percent agree with the statement that judicial activism "seems

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to have reached a crisis"; in that same poll, 56 percent agreed with the statement that court opinions should be in line with voters' values and that judges who repeatedly ignore those values should be impeached.

This is not the first time that members of Congress have gotten angry with the courts. To the contrary, cycles of anti-court sentiment have come and gone at generational intervals since the nation was founded. When Thomas Jefferson became President in 1802 his supporters embarked on a concerted effort to purge the federal courts of judges that the prior administration had appointed. In the 1820s, Andrew Jackson challenged the supremacy of the Supreme Court vis-à-vis Congress and the President when it came to interpreting the Constitution, and several states openly advocated defiance of Supreme Court rulings. In the aftermath of the Civil War in the late 1860s, members of Congress, still furious with the Court for its pro-slavery ruling in the 1856 *Dred Scott* case, threatened to "annihilate" the Court if it interfered with Congress's Reconstruction agenda. In the late 19th and early 20th centuries, populists and progressives railed against conservative courts that invalidated legislation regulating business and industry and threatened to curb the courts in a variety of ways. During the 1950s and 1960s, critics of the Supreme Court's rulings on civil rights and civil liberties went to war against what they perceived to be the liberal excesses of the Warren Court.

*Supporters for Gore and Bush face off outside the U.S. Supreme Court in 2000.*

## A Constitutional Framework

The relationship between Congress and the federal courts is governed in part by the text of the U.S. Constitution. At the most basic structural level, the powers of government are separated between Congress, which legislates, and the judiciary, which adjudicates. In addition to the separation of powers, however, the Constitution includes a number of more specific provisions enabling each branch of government to keep the others in check. Congress is authorized to check the judiciary in several ways. Congress alone has the authority to remove a federal judge—the Constitution provides that the House may impeach and the Senate remove a judge for "high crimes and misdemeanors." By virtue of its power to tax and spend, Congress sets the judiciary's budget. Other provisions give Congress the discretion to create lower courts (or not) and authorize it to modify the Supreme Court's jurisdiction. Finally, the Constitution delegates to the U.S. Senate the power to confirm or reject the President's nominees for judicial office.

On the other hand, the Constitution gives the courts one important check over Congress: It delegates to the federal courts the "judicial power," and authorizes federal courts to exercise that power over cases and controversies concerning the Constitution and federal laws (among other subjects). In the famous case of *Marbury v. Madison* (1803), the Supreme Court ruled that the Constitution authorized the federal courts to exercise the power of "judicial review," whereby the courts were empowered to invalidate acts of Congress that, in the courts' view, did not comply with the Constitution.

In addition, the Constitution guarantees judges some independence from Congress by offering them tenure during "good behavior" and a salary that may not be cut. The judiciary's independence from Congress was very important to those who drafted the Constitution. They wanted judges to follow the law without fear of retaliation from Congress, and they worried that if Congress could fire judges or cut their pay when the judges made unpopular decisions, it could impair the judges' impartial assessment of the facts and law.

Tenure during good behavior and a salary that cannot be cut, however, were not enough by themselves to ensure the judiciary's independence from congressional intimidation. It would seem that Congress could retaliate against the author of an unpopular decision by disestablishing the judge's court, cutting the judge's budget, denying the judge a pay raise, stripping the judge of jurisdiction to hear future cases on the same issue, or even removing the judge by impeachment (although a judge can only be impeached for high crimes or misdemeanors, Congress alone decides what a crime or misdemeanor is).

Despite the presence of these weapons in its arsenal, Congress has deployed them only rarely, and with decreasing frequency. In 1802, Congress disestablished sixteen federal judgeships created the year before (when the opposing political party was in power) and in so doing effectively removed the unpopular judges from office—a trick Congress would never repeat in over two centuries since. In 1805, the House impeached but the Senate declined to remove a justice of the Supreme Court for high-handed decision making. It was a precedent that would stick: despite repeated efforts, Congress has *never* removed a judge for making unpopular or outrageous decisions. In 1867, Congress stripped the Supreme Court of jurisdiction to hear a politically sensitive, pending case—a tactic it has often proposed but almost never approved in the years since. And in 1937, President Franklin Roosevelt proposed an unprecedented plan to pack the Supreme Court with additional justices so as to shift the Court's decision-making majority in his favor—a plan which received a cool reception in Congress, and which has never been resurrected in the nearly seventy years since.

The courts, of course, have weapons too. They could theoretically make indiscriminate use of their power of judicial review to hold Congress at bay by declaring act after act unconstitutional. But that has never happened either. To the contrary, the courts have developed an impressive array of prudential doctrines enabling them to avoid deciding constitutional questions that could provoke confrontations with Congress.

Why has Congress traditionally respected the judiciary's independence, despite its cyclical dissatisfaction with the courts and the seeming availability of various mechanisms at its disposal to control judges and their decisions? The answer does not lie in the text of our Constitution per se, but in our constitutional culture. During these periods of court-directed hostility, when court critics in Congress have threatened judges at every turn, court defenders have risen up to argue that such threats are antithetical to a tradition of judicial independence that our nation has embraced since it was founded—even if, as a technical matter, Congress does possess the constitutional authority to make good on those threats. And history has tended to characterize those few episodes in which Congress has retaliated against the courts as exceptions to a more enduring rule. As *Newsweek* editor and Columbia University Professor Raymond Moley testified before the House Judiciary Committee in 1937, in opposition to President Roosevelt's court-packing plan:

> [A] deliberate attempt by one branch of Government to weaken another branch has very few parallels in our history. And none of them is creditable....That way has always been open to the purposes of any dominant Executive and congressional majority. But the very fact that it has not been employed, except in one or two cases of which we are not very proud, has established an inhibition upon the use of this method—an inhibition based upon custom and tradition. In other words, a custom has been established that fundamental changes should not be so attained—a custom of the Constitution, or a doctrine of political stare decisis, if you will, which is as binding upon public officials as a written provision of the Constitution itself.

Mindful of Congress's power, the courts have—with exceptions—taken care not to exercise their power of judicial review in ways that could cause a congressional backlash.

## Conclusions

Returning to the contemporary debate where this article began, our constitutional culture has tended to look askance at congressional proposals to intimidate judges—even if such efforts are within Congress's constitutional authority to implement. But that does not mean that Congress or the voters it represents are averse to judicial accountability. When judges commit crimes, they are accountable to the criminal justice system and the impeachment process. When they engage in misconduct, they are accountable to a disciplinary process. When they commit decision-making errors, they are accountable to an appellate process.

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### FOR DISCUSSION

What is the power of judicial review? Is it explicitly stated in the Constitution? Why (not)?

What are some of the ways that Congress can "reprimand" the federal courts? Why hasn't Congress used these powers very often?

How are federal judges—who hold life tenure—accountable to Congress and to the American people? Are these methods of accountability adequate?

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When they are wasteful in their spending, they are accountable to a congressional appropriations process. When they are inefficient in their administration, they are accountable to congressional oversight. And when judges make bad decisions, they are accountable to Congress, the media and the public, all of whom enjoy a first amendment right to criticize—publicly and harshly—the decisions judges make.

Whether a given episode is better characterized as an inappropriate threat calculated to intimidate, or appropriate criticism calculated to promote accountability, remains open to perennial debate. Perhaps that is a good thing. By preserving a constructive tension between judicial accountability and judicial independence, we preserve a dynamic equilibrium between courts and Congress that has served our nation well for over two centuries.

## For Further Reading

Fish, Peter. *The Politics of Federal Judicial Administration*. Princeton, N.J. Princeton University Press, 1973.

Geyh, Charles Gardner. *When Courts & Congress Collide: The Struggle for Control of America's Judicial System*. Ann Arbor: University of Michigan Press, 2006.

Katzmann, Robert A. *Courts & Congress*. Washington, D.C.: Brookings Institution, 1997.

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guage in a way that reflects the holding in the Supreme Court decision. For example, in *Buckley v. Valeo* (1976), the Supreme Court struck down various provisions of the Federal Election Campaign Act (FECA). FECA was an early attempt by Congress to regulate election campaigns, and especially to limit the influence of money in campaigns. In short, Congress had placed certain limits on campaign contributions and expenditures, and it created the Federal Election Commission (FEC) to enforce FECA. The FEC was to consist of commissioners appointed by the president, the Speaker of the House, and the President Pro Tempore of the Senate. But the Supreme Court held that many of the limits on contributions and expenditures violated the First Amendment's rights to free speech and freedom of association, and that the appointment of some of the commissioners by members of Congress violated separation of powers principles, in particular the "appointments clause" of Article II, which gives presidents alone that power. Less than a year after the *Buckley* decision was handed down, Congress repealed the relevant provisions of FECA and replaced them with new statutory language. The new version of FECA regulated only those contributions and expenditures that the Court said could be regulated in the *Buckley* decision, and in the manner prescribed by the Court. In addition, none of commissioners of the FEC would be appointed by members of Congress under the new version of FECA. In other words, Congress kept FECA alive by, in essence, codifying the Court's holding. There are a few instances in which Congress revives legislation in ways that are less deferential to the Court—but only a few.

Yet another type of congressional response to judicial review involves the ultimate deference to the Court by repealing the legislation without any attempt to save it. Congress has repealed 10 (14 percent) of the 74 statutory provisions at issue here. For example, in 1950, Congress passed the Subversive Activities Control Act (SACA) in an effort to fight communism—or the "Red scare"—in the United States In *Aptheker v. Secretary of State* (1964) and *Albertson v. Subversive Activities Control Board* (1965), the Court struck down different provisions of the statute. Those provisions were later repealed by Congress, and the SACA is no longer in effect.

### FOR DISCUSSION

What does the term "judicial supremacy" mean? Does the Constitution provide for judicial supremacy? for judicial review?

When the Supreme Court strikes down an act of Congress, what are some of the ways that Congress might respond?

When coequal branches of government such as Congress and the Supreme Court disagree, how are these disagreements resolved?