CONGRESS & THE CONSTITUTION
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Director's Note

Congress is the single most important institution in the lawmaking and policymaking processes of our country. This is evident from the titanic struggle of effort, words, and money in the 2006 campaigns between Democrats seeking to regain control of the House and Senate and Republicans seeking to retain control of these bodies. Indeed, even when the presidency and control of Congress reside in the same political party, Congress frequently sets the legislative agenda, as the recent debates over immigration, social security, and the war in Iraq amply illustrate.

In the course of its lawmaking work, Congress regularly considers the Constitution and its interpretations by the U.S. Supreme Court and other federal courts. How do Congress and the courts interact as “co-equal” branches of government established by the Constitution? In this issue of Insights, we examine Congress-court relationships in historical perspective, across familiar issues, and in new contexts.

Congress does not operate today the same way it did at the turn of the twentieth century or even twenty years ago. Wendy J. Schiller sets the background for the issue by analyzing the rules and procedural changes that the new Republican leadership elected in 1994 brought to Congress, as well as more gradual changes in the power of committee chairs, party leadership, and rank-and-file members that evolved over many decades. This theme is reprised and expanded in the Perspectives feature, where Washington insiders Gary Slaiman, a practicing lawyer and former Senate committee counsel, and David Skaggs, a former member of Congress, provide distinctive views of the lawmaking practices and foibles of Congress.

Charles Gardner Geyh begins the focus on Congress-court relations by offering an historical overview of various conflicts from the times of Thomas Jefferson and Andrew Jackson to the present. J. Mitchell Pickrell provides specific examples of tensions between Congress and the Supreme Court over the constitutionality of federal legislation since the 1950s. And Judithanne Scourfield McLauchlan describes little-known efforts by members of Congress to influence Supreme Court decisions through submitting or joining “friend of the Court” briefs.

You will also find lessons, activities, and resources on Congress for your classroom. Go to Learning Gateways to use the many web-based resources from The Dirksen Congressional Center; see how they can help students achieve a more sophisticated understanding of the lawmaking process while also meeting the required curriculum standards. Learn about the venerable Congressional Page Program, populated by hardworking high school students. And visit the Insights magazine Web site for additional features and resources.

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In key ways, Congress is a different policymaking institution than it was twenty years ago, and the most important shifts have been the return to strong party government in the House and the rise of party government in the Senate. There is no question that power is far more concentrated in the hands of party leaders, especially within the House of Representatives, than it was twenty years ago. Partisan differences between members are much more pronounced than they were in the 1980s because they span a wider range of issues. Redistricting over the past three decades has yielded an extraordinarily low number of competitive seats in the House—this year we expect only 25 races to really determine the control of the House in the next Congress (Jacobson, 2004; Congress Daily). As more and more seats have been redistricted in favor of one party or the other, the percentage of voters in the opposition party in a member’s district has decreased across the board, which has reduced the incentive to cooperate with the opposition in the House. For example, if 60% of the voters in a member’s district are Republican, it makes no sense to cross the aisle to work with Democrats because the member simply does not need their votes at home. In contrast, if there is a close distribution of partisans in a district, the member will feel more pressure to reflect the views of the opposition party. Even in the Senate, which has always been far more resistant to strong party leadership, party cohesion is higher on key votes, and the pressure to vote with one’s party is greater than it was twenty years ago.

Changes in Party and Committee Power Structures
So how did the power structure in Congress change so much over time? The first thing to remember is that power to shape policy outcomes has swung back and forth. "Between 1910 … and 1973, both chambers of Congress were ruled by committee chieftains."

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forth over the last century between party leaders and committees (notably committee chairs). Between 1910, when House Speaker Joe Cannon was deposed by a coalition of members of his own Republican majority party and Democrats, and 1973, both chambers of Congress were ruled by committee chieftains. When the House replaced Speaker Cannon, it stripped the Speaker of the power to appoint the chairs of committees and replaced it with a strict seniority rule to determine who held those positions; the Senate soon followed suit. That single change, coupled with the one-party Democratic domination of the south, gave rise to extremely long careers for southern congressmen and senators. As long as the Democrats kept majority control of Congress, southern Democrats kept control of committees. Even leaders like Sam Rayburn and Lyndon Johnson could not push forth legislation without the tacit consent of these committee chairs (Cooper & Brady, 1981).

In 1973, the Democratic Party caucus adopted a set of major institutional reforms, which resulted in a greater distribution of power among committees through the creation of more subcommittees and subcommittee chairmanships. When subcommittees were granted markup authority (literally the power to create or “mark up” legislation and vote on it at the subcommittee level), it meant that policymaking began at a lower level than the full committee and gave more power to subcommittee chairs to set agendas vis-à-vis the full committee chairs. Moreover, the caucus also adopted a rule that required that committee chairs receive the approval of the caucus before assuming their posts, rather than simply having committee chairs rise up through seniority alone. These two changes weakened committee chairs considerably by creating more points of power in the House, and by making committee chairs more accountable to the party (Rohde, 1991).

By 1994, the Democratic Party in the House had undergone a major transformation in several areas. First, the combination of the shift from Democrat to Republican dominance in the south had eroded the Democratic numerical majority in the House and the South. The most famous example of that strategy was the “Contract with America,” which was not as important for its content as for its symbolism. With it, the Republicans were promising to run the country in a coherent and efficient manner in stark contrast to the increasingly fractured Democratic majority.

When the Republicans first took over the House in 1995, Gingrich instituted several major changes that were designed to consolidate power in the party leadership structure, especially in the office of the Speaker. The Republican Party caucus gave Gingrich the power to appoint committee chairs, who were also term limited, and the party gave the Speaker the power to appoint all members of the Rules Committee, which is the party-controlled gatekeeper through which all legislation must pass before it gets to the House floor. The caucus also adopted term limits for the Speaker (8 years), but they were longer than those for committee chairs (6 years). Gingrich also eliminated a number of subcommittees in order to decrease the dispersion of power across members. Members of the rank and file gave Gingrich almost total control over the party’s policy agenda precisely because they

Senator Joseph Biden (D-DE) confers with Senator Barack Obama (D-IL, seated) during a Senate Foreign Relations Committee hearing in 2005.
believed they owed their seats to him, and they perceived their constituents to be in agreement on policy goals across districts.

The era of Newt Gingrich as Speaker and Trent Lott as Senate Majority Leader (as of 1996) also brought with it the age of “message politics.” With greater control over the actual agenda of Congress, party leaders also worked hard to control the party’s image and reputation through such vehicles as message of the day, as well as making the leaders the media spokespersons on most policy issues, rather than committee chairs (Evans & Oleszek, 2001). With the development of the 24-hour news cycle, cable news outlets, and the Internet, the job of presenting a coherent party image became more important in terms of keeping party members unified but also much harder to accomplish (Thurber & Campbell, 2003). If all the members are on the same policy page, both in private and public arenas, then the minority cannot divide the majority party on major issues.

The Republican Party leaders also used their powers to change the structure of lobbying on Capitol Hill. Prior to the Republican takeover, lobbyists typically approached committee and subcommittee chairs with their requests for legislation and special projects, and they would contribute directly to those members’ campaigns. But when Speaker Gingrich consolidated agenda-setting power, the party leadership organization became another major conduit for lobbying requests, in addition to committee and subcommittee chairs (Sinclair, 2000). And the Republican Party leadership had more credibility than their Democratic predecessors in guaranteeing certain outcomes, because they had much tighter control over committee and floor voting by members.

At the same time, Gingrich and Tom DeLay expanded the use of leadership PACs (which had begun under Democrat Tony Coehlo in the 1980s), whereby contributors to the Republican Party would give money to the leaders to distribute to members directly. Leadership PACs did not preclude individual giving to members themselves; rather, it was in addition to those separate contributions. Party leaders in turn used their resources to reinforce party loyalty among members, even to the point of threatening to finance primary challengers if they defected from the party line.

Majority Party Growing Pains

Twelve years after their sweeping victory, the Republican Party in Congress is now experiencing some of the very same majority party afflictions that plagued the Democrats. Recall that in 1994, the Democrats publicly battled over health care reform within Congress and with the president, and the result was a landslide against them in November.

The greatest threat to a majority party occurs when their internal divisions become external, and holding a majority party together in Congress over the long term is no easy task. House Republicans have already experienced two major shakeups in leadership with the resignations of Newt Gingrich in 1998 (due to midterm election losses) and Tom DeLay in 2006 (due to allegations of scandal). As the public façade of the majority party starts to crack within the House, between the House and Senate, and between the Congress as a whole and an increasingly unpopular president, party unity on the floor has become less predictable. Members feel compelled to publicly distance themselves from their own majority party policies in cases where the policy has proven to be ineffective or unpopular. Once party unity starts to slide on the House floor, it becomes that much

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Republican Representative of Georgia and Speaker of the House, Newt Gingrich, announces on the Capitol steps the “Contract with America.” This was the beginning of the so-called Republican revolution.

FOR DISCUSSION

Who holds the most power in the House of Representatives today—the Speaker, party leaders, committee chairs, caucuses, the rank-and-file members? How has the balance of power changed over time?

What are some of the ways that the House of Representatives and the Senate differ? How, if at all, do these differences influence how the House and Senate operate?

Is the partisan divide between Republicans and Democrats in Congress greater today than twenty or thirty years ago? What evidence could you cite to support your view?
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.

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

"Congress has never removed a judge for making unpopular or outrageous decisions.”

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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.

### 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).

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

What happens in Congress after the Court strikes down legislation?

By J. Mitchell Pickerill

The Supreme Court occasionally strikes down acts of Congress as unconstitutional. In this article political scientist J. Mitchell Pickerill examines how Congress, since the 1950s, has responded to statutes invalidated by the Supreme Court. He provides empirical data and analysis of inter-branch relations, showing that Congress often achieves its original policy goals through revised statutes that meet constitutional standards.

When most Americans read that the Supreme Court has used judicial review to strike down federal legislation, they usually understand the Court's action as an invalidation of the legislation. In other words, the Court has undone the work of Congress and ended the life of the statute—kaput, poof, and it's gone. It is not surprising that this would be the common reaction: it is how the Court's power of judicial review is most commonly taught in high school, college, and even law school classes on the subject. However, what many deem to be conventional wisdom about the death sentence imposed on legislation by judicial review turns out to be false wisdom. The reality is that judicial review does not usually end the life of federal legislation, and Congress often responds to the Court by amending legislation to make it constitutional. This is an important insight into the balance of powers between the Court and Congress because that relationship is nearly always mischaracterized as one in which the Court has the final say over the constitutionality of a statute.

The Debate over Judicial Supremacy

The notion that the Supreme Court’s constitutional decisions are the last word on the constitutionality of a statute springs from the theory of judicial supremacy. Judicial supremacy begins with the premise that pronouncements on the meaning of the Constitution are legal in nature. In a system that prides itself as being governed by the rule of law, it is imperative that law be applied consistently and equally. Therefore, it is essential to have a single, final interpreter of the law. Since Article VI declares the Constitution to be the “supreme Law of the Land,” and the Supreme Court is the highest Court in the land, it necessarily falls to that Court to be the final arbiter of the Constitution. And because the Court is insulated

“It is rare ... that a single institution has the ... last word over a policy or law.”

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from electoral politics, it is the best situated institution of the federal government to protect individual rights and minority interests from the tyranny of the majority. An important implication of judicial supremacy is that members of Congress have no legitimate role in challenging the Court’s constitutional interpretations. Thus, when the Court strikes down legislation, the act has been permanently and irrevocably nullified.

A number of constitutional experts have challenged the role of judicial supremacy in the U.S. system of government. Arguments against judicial supremacy have been put forth as “coordinate construction,” “departmentalism,” and “tripartite” theories, and more recently as “the Constitution outside the Court” and “popular constitutionalism.” These opponents of judicial supremacy argue that the Constitution is more than simply a legal document. It creates and structures political institutions as well as lawmaking and policy-making processes, and it establishes the parameters for federal power. In short, it structures political debates as well as legal ones. And the members of each co-equal branch of government take oaths to uphold the Constitution. Thus, members of Congress and presidents possess legitimate and sometimes necessary authority to interpret the Constitution on their own. From a democratic theory perspective, some even argue that as the people’s representatives in a democracy, the constitutional interpretations of elected officials are superior to those of the unelected justices on the Court who are unaccountable to voters. From this point of view, the Supreme Court creates a problem for democracy when it invalidates legislation duly enacted by a democratically elected Congress.

There are several important implications of the debate over judicial supremacy, but perhaps the most important is an assumption made by both sides that the Court’s exercise of judicial review denies the legislature its preferences by rendering legislation void. There are reasons to suspect that this assumption is faulty. Indeed, it is rare in the U.S. system of government that a single institution has the definitive, authoritative last word over a policy or law. For instance, the executive veto is often used by presidents not to kill legislation, but rather to force members of Congress to bargain with the president and draft legislation he finds acceptable. This is how President Bill Clinton forced a Republican Congress to modify key provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, also known as the Welfare Reform Act. Twice Clinton vetoed the legislation until the sponsors of the bill relented and revised the legislation in ways Clinton preferred. The bill Clinton signed into law was the third version passed by Congress—that neither the passage of the original legislation nor the exercise of the veto was the final decision over the Welfare Reform Act.

It may be helpful to think about the Court’s exercise of judicial review in the same way. Perhaps Congress can respond to the Court and modify legislation in a way that satisfies the Court’s jurisprudential preferences in a manner analogous to how Congress modified the Welfare Reform Act to satisfy President Clinton’s policy preferences. Some scholars have suggested that there are interactions between the Supreme Court and other branches of government—interactions that result in “constitutional dialogues” (Fisher, 1988). Thus, there is reason to believe that Congress might take action in response to the Supreme Court’s exercise of judicial review.

What Really Happens to Invalidated Statutes?

In order to assess the relationship between the Court and Congress over constitutional matters with a little more precision, I collected data on Court decisions invalidating federal legislation and tracked what happened to the legislation after the Court decision (Pickerill, 2004). From the beginning of the Warren Court in 1953 through 1997, the Supreme Court struck down 74 separate federal statutory provisions. However, most of those statutes are currently “good law.” That is, they are operable and are being applied (or capable of being applied) by the executive branch and/or appropriate administrative agencies. One reason is that Congress often times responds to the Court to revive the provisions struck down by the Court. If members of Congress are committed to the policy in a statute that has been struck down, they may save the policy in one of three ways: they may amend the Constitution, in effect overruling the Court; they may pass an amendment to the legislation; or they may repeal the old and pass new legislation. As of 2000, Congress has responded to the Court in one of these three ways for 36 (48%) of the 74 statutory provisions. Only once, however, has Congress amended the Constitution; Congress passed and the states quickly ratified the 26th Amendment lowering the national voting age to 18 after the Court struck down relevant provisions in Oregon v. Mitchell (1970). On the other hand, Congress amended statutes in response to judicial review 27 times, and it repealed the legislation and replaced it with new legislation eight times.

In amending or replacing legislation declared invalid by the Court, Congress usually modifies statutory lan-
Members of Congress have come to play an increasingly significant role as lobbyists before the U.S. Supreme Court. Individual members, partisan coalitions, state delegations, congressional caucuses, the U.S. Senate, and the leadership of the U.S. House of Representatives have presented their views to the Justices by filing amicus curiae briefs. In recent years, members of Congress have filed briefs in cases involving issues ranging from separation of powers (such as the line item veto, congressional term limits, and congressional control over the Supreme Court’s appellate jurisdiction) to “hot button” political issues (such as abortion, gun control, and indecency on the Internet) to cases in which federal statutes were challenged (such as the Clean Water Act, the Flag Protection Act, and the Sentencing Reform Act) to parochial concerns of interest to their districts.

While studies of Congress and the Court focus mostly on institutional responses to the Court’s decisions, members of Congress actually get involved much earlier in the process—before the Court hands down a decision, and, in some cases, before the Court grants certiorari. Unlike the Senate confirmation process, for example, where the Senate can influence the overall direction of the Court by influencing the personnel on the bench, members of Congress, by filing friend of the court briefs, attempt to influence Supreme Court decisions in specific cases. Members of Congress often participate in the high-profile cases on the Court’s docket. I found that members of Congress have filed amicus briefs every term since October Term 1977 and that the frequency of congressional participation continues to rise. Congress has, indeed, “befriended” the Court, and

“Members of the Judiciary Committee and the Black Caucus frequently file amicus briefs.”
Congressional participation is now a fixture in Supreme Court litigation. My findings are based upon interviews with current and former members of Congress and former Supreme Court law clerks, a review of amicus curiae briefs filed, and an analysis of Supreme Court opinions that cite congressional amicus briefs.

Who Participates?
Nearly 800 members of Congress signed their names onto amicus briefs during the Warren, Burger, and Rehnquist Courts (from October Term 1953 through October Term 1997). While I found that a large portion (43 percent) of those members were one-time filers—members who participated in one “hot button” case and never signed on to another brief, there were also “frequent filers.” The “frequent filers” tended to be members who served on the Judiciary Committee and/or members of the Congressional Black Caucus.

Congressional participation as amicus curiae takes many forms. Large coalitions of members tend to participate in cases concerning hot button issues, such as abortion and gun control. Interest groups play a central role in securing congressional participation: in one-third of all cases in which members of Congress participated, interest group(s) joined them as co-signers of the briefs. Even when the groups do not co-sign the briefs, they play a critical role in facilitating and instigating congressional participation. Moreover, members who form a caucus to promote certain policy initiatives participate in cases before the Supreme Court in which those interests and initiatives are at stake. For example, the Congressional Black Caucus is especially active in Supreme Court litigation, filing briefs whenever significant civil rights cases are before the Court. In addition, the U.S. Senate and the leadership of the U.S. House participate in cases before the Court to defend Congress as an institution, especially when congressional power is challenged by the Executive Branch. Individual members of Congress file amicus briefs before the Court in cases of importance to their home state. Likewise, state delegations participate, often in a bipartisan way, in cases that concern home state issues, especially those dealing with interstate conflict. Despite their importance in Congress, congressional committees are the least common congressional amici.

Why Members of Congress File
Members of Congress most frequently file briefs to challenge the executive branch regarding an interpretation of a federal statute or the Constitution, either as executed by a federal agency or as represented by the solicitor general before the Supreme Court. In cases concerning hot button issues, members file amicus briefs in politically charged, highly publicized cases. Often, large coalitions of members file briefs on both sides of the case, and there is evidence that congressional participation in hot button cases is inspired by interest groups. Moreover, members file friend of the court briefs to defend a home state action (a piece of legislation or a ballot initiative) and to fight for the interests of their home state when challenged before the Court.

Members also file amicus briefs to challenge a federal court, to engage in a dialogue with the federal courts about proper construction of federal legislation or the federal Constitution, as well as to offer their opinions about the merit of various Supreme Court precedents or federal court decisions. Members file briefs in separation of powers cases not simply because they disagree with another branch’s interpretation of a statute or policy initiative; instead, these cases involve disputes over the role of the branches vis-à-vis the others (e.g., the challenge of the President’s exercise of the pocket veto or the constitutionality of the line item veto). Members file briefs in cases involving congressional practice, cases in which the rules that govern the operation of the House or Senate (such as impeachment proceedings in the Senate) or that affect the ability of members to carry out their legislative responsibility (such as lawsuits filed against members of Congress) are at issue, in order to secure the protection afforded them by Article I, Section 6’s...
How Does Congress Make Laws (or Avoid Making Laws)?

People, Politics, and Procedures in Lawmaking
by Gary Slaiman and Amanda C. Dupree

The framers of the Constitution intended for Congress to be a reactive, slow-moving branch of the government. They believed that the legislature should hear, analyze, deliberate, and debate an idea before allowing that idea to become a law. In this respect, the nature of the legislative process remains largely unchanged today. Our bicameral system requires that time must be spent, if not in substantive deliberation then in a procedural cooling-off period, before a bill can wend its way through both chambers and onto the President's desk for enactment. Accordingly, given the time involved in nurturing an idea into a law and given the many competing ideas and interests that jockey for position on the legislative calendar, Congress requires persuasion and prodding before determining to take action.

A reactive Congress, however, can make for a responsive Congress. Simply put, Congress acts when the people speak. But how does Congress know what the people want? The people have many ways of reaching Congress: through personal contacts and visits, telephone and letter-writing campaigns, paid advertising and media work, paid lobbyists, and grassroots activities. Each of these techniques serves to amplify the voice of the people before Congress, and a legislative campaign may include any or all of them in order to achieve its goal.

A stakeholder seeking legislation will often hire a lobbyist to advocate on behalf of her interests with members of Congress. Together, client and lobbyist develop a strategy, create a plan, and try to gain the attention of members who will help them. Typically, such members will serve on the committees of jurisdiction or be ones with whom the stakeholder has a strong constituent relationship. Client and lobbyist may draft legislative language to propose to those members, and the member and her staff will work with client and lobbyist until the proposal is ready to be introduced as a bill. Simply gaining the attention of Congress, however, does not guarantee future success. Many ideas never make it to this stage, and the road to enactment only becomes more treacherous from here. Conventional Washington wisdom is that it is easier to kill a bill than to pass legislation.

Let’s look at some of the ways in which a bill can die before making it to the President’s desk. One of the most difficult times for a fledgling legislative proposal is when Congress determines to act and begins developing a solution for the problem. Contrary to what some would believe, legislation does not originate solely from the 535 members of Congress. Rather, drafting legislation is a combination of the efforts of members, their staff and the office of legislative counsel, and of lobbyists, advocacy organizations, stakeholders, trade associations, concerned citizens, and paid legal experts.

Assuming the bill is actually introduced, it will be referred to a committee. Taking the Senate's process as an example, let’s consider what might happen next. The chair of the committee or subcommittee might decide, for whatever reason, that the bill is not worth the committee's time. This decision is a signal that the legislation will die a slow, quiet death. Given that it is up to the committee chair to decide which bills the committee will discuss, a choice on his or her part not to bring up the bill means that it never receives legislative attention. When the com-

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That old saw, “You don’t want to watch sausage or laws being made,” has special poignancy these days regarding Congress. Whether it’s the exponential increase in special spending “earmarks” or the level of vitriolic rhetoric or simply the low level of legislative productivity, the Capitol seems more dysfunctional than usual. What are those people doing? And why do they do it?

For various reasons, the work of Congress has become more partisan and more polarized over the last several years. Many factors contributed to this trend, but a couple deserve special mention.

The partisan divide has gotten deeper. Congressional redistricting in 1991 and in 2001 created more safe districts and fewer competitive ones. Even in this year’s charged political environment, less than 50 House seats are thought to be “in play” in November, compared to close to 100 most times in the 1970s and early 1980s. Safe districts, where winning the primary is tantamount to election, increase the influence of each party’s ideological hard core and tend to elect more partisan members.

Because few congressional families move to Washington these days, members spend more time in their home states and have less time at the Capitol to get to know each other, especially colleagues in the other party. These personal relationships are essential to working out compromises across the aisle, and the lack of much sense of community makes it harder to overcome the partisan divide.

Don’t misunderstand. Important differences exist between the parties and among the American people on key issues, and it’s healthy for the country to have the differences debated. But there need to be limits, and eventually the differences ought to yield to some consensus about the national interest.

Beginning in the early 1990s, both parties have taken an approach that focuses on setting the stage for the next election, often keeping alive issues they think will help them politically, rather than working to resolve the country’s problems. Twenty years ago, at least the first session of each Congress tended to be more devoted to getting things done. But these days, this tactical preoccupation with the next election kicks in at the start of each Congress. This is especially true in the House. The slim GOP majority since 1996 means that party control has been at stake in each election, and both parties have a huge incentive to focus on keeping (or gaining) control. Party leaders have enormous leverage to impose party discipline (i.e., to avoid compromise). Naturally, there’s little incentive to put partisan considerations aside and work to resolve issues that might hold some electoral advantage.

There is no dearth of important issues to be addressed—education, tax simplification, energy and the environment, Iraq, the economy, and the usual social issues. Individual representatives and senators, chairs and ranking members, and congressional committees all still do research, introduce bills, hold hearings, conduct mark-ups, and report out bills. Often, bills pass one house or the other. Then, typically, they languish, the victims of the differing views of the majorities in the two bodies, and especially of the de facto requirement for 60 votes to get anything through the Senate. Pending immigration legislation is a case in point.

Even after you factor in the founders’ belief that lawmaking ought to be cumbersome and the Constitution’s design to make it so, current congressional practice takes on a certain perversity. The textbook description—hammering out a bicameral consensus to pass authorizing legislation setting policy and then enacting funding to implement that policy—seems quaint or anachronistic today.

There are exceptions. Most bills brought to the floor of either house are
relatively noncontroversial and benefit from old-style bipartisan comity. But these bills—naming post offices or honoring championship sports teams—do not deal with the core matters of national governance. Legislation required to set major policy is, more often than not, stymied by the problematic conditions described earlier.

The biggest exceptions are the appropriations bills. These have to pass in some form or other every year to fund the operations of government. As “must pass” bills, they are attractive vehicles for so-called riders dealing with critical policy issues. Leaders of authorizing committees are often complicit in end-running the jurisdiction of their own committees, as they seek some way to pass essential policy in the face of the deadlock that attends most major policy legislation.

But the appropriations process has also been subverted by many of the same circumstances that make policy-making so difficult. The most contentious appropriations bills—e.g., ones funding the Departments of Labor, Health and Human Services, Education, or Interior, and the cultural agencies—often cannot muster the support as separate bills to emerge from a House-Senate conference committee and win final passage. As a result, several bills typically are rolled together into enormous legislative obscenities called Omnibus or Consolidated Appropriations bills and often passed in lame-duck sessions or even in the next session of Congress. These bills of several hundred pages usually are brought to final vote with little advance notice, making even cursory attention to detail impossible for most members, much less the press or public. Thus, they lend themselves nicely to concealing those notorious earmarks.

Would that this description of current practice were the basis for some simple prescription for remedying the situation. Not so. Some changes would help. More competitive House districts would likely elect less partisan members, people more inclined to work across the aisle to develop solutions. A congressional schedule that required representatives and senators to spend more time working together at the Capitol (and getting to know each other) also would help. However, such steps would go only so far.

Ultimately, in a democracy, we get the kind of government we demand. But demanding a more responsible national legislature depends on a citizenry educated both to know how the system is supposed to work and to care enough to do something about it. This education for democracy takes place mainly in the public schools—it was, after all, a central reason for their creation. So, the long-term prescription for what ails Congress is a dramatic and sustained renewal of the civic mission of our schools and the graduation of students ready to be citizens.

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does and what the committee hopes to accomplish with the legislation. But the Committee Report is more than a document of history and description. It is also a forum for the critics of the bill to make their case in dissent. In preparation for floor debate, understanding the nuance of the arguments made in the Committee Report can make the difference between failure and success on the vote for passage.

Although many bills survive committee markup, not all of them actually make it to the Senate floor. It is at this point that many bills are left for dead, because further action is dependent upon the wishes of the Senate leadership. In the Senate, the majority leader determines which bills receive floor time (time for debate, amendment, and voting). In determining which bills will come to the floor, the majority leader uses a calculus that includes, but is not limited to, the need (political and/or real) for the legislation, popular support, and the politics surrounding the issue.

Even if the majority leader decides to bring the bill to the floor, however, the Senate has a peculiar mechanism that provides the minority party with power not enjoyed by its counterparts in the House: the filibuster. The filibuster enables any senator who wishes to prevent legislative action on a bill to do so by literally talking the bill to death; the senator is allowed to talk as long as he or she wishes in order to prevent or delay a vote on the legislation. For example, Strom Thurmond used the filibuster to defeat the Civil Rights Act of 1957 by talking for over 24 hours. In modern practice, senators usually inform the majority leader that they intend to filibuster the bill, and the majority leader generally responds in one of two ways. Either the majority leader will decide the bill is not worth the fight and will drop the legislation from consideration for floor debate, or the majority leader may decide he has the votes necessary to win and will file a motion for cloture, which is a motion to cut off debate and to force votes on the bill. To succeed on a cloture vote requires a supermajority of the Senate—60 votes, and if the majority leader fails to garner 60 votes, generally the bill will be dropped rather than waste valuable floor time. In recent practice, many contentious bills have been unable to move past a cloture vote. For example, repeated attempts to authorize drilling in the Arctic National Wildlife Refuge (ANWR) have failed, including an attempt late last year to authorize drilling as part of the Defense Appropriations Act. After failing to vote to end debate on the measure, the Senate stripped the ANWR provisions in order to move forward with the appropriations legislation. Senators who may agree with the legislation but who do not wish to cast an unpopular vote will often vote against cloture, saying the bill needs more work, which allows the senator to avoid having to go on record casting an unfavorable vote.

If the bill has made it this far, surviving a cloture vote and the amendment process, the Senate will proceed to debate and consideration of the bill, of amendments to the legislation, and after all procedural hurdles are cleared, vote on final passage. If the bill fails to gather at least 51 votes, it is dead. If the bill gains 51 votes, the Senate refers the bill to the House and the process begins again.

The House, however, is not required to take up the Senate’s legislation, and this provides another opportunity for legislation to die before becoming law. Assuming that the House does take up the legislation, and assuming that the bill makes it through the House and onto the floor, the House can amend the Senate’s bill or it can pass its own version of the legislation as a substitute amendment. If this happens, and if the Senate insists upon its version of the legislation, the House and Senate appoint conference—a selected group of members—to conference over the legislation and come to an agreement. This conference requirement forces members to determine what is most important to them about the legislation they are developing and to make the compromises necessary for the bill to pass each house. Assuming agreement can be reached between the houses, the bill as agreed upon by the conferees of both houses is sent to each house for final passage and then sent to the president for signature. But as we have seen with recent proposals for immigration reform and lobbying disclosure reform, agreement between the House and the Senate is hardly a foregone conclusion.

While often frustratingly slow and usually difficult to navigate, our bicameral system has the benefit of ensuring that ideas are thoroughly vetted before becoming law. Most importantly, it offers the minority an opportunity to speak, if not to prevail.

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very day, young men and women scurry around the floor of the U.S. House of Representatives and the U.S. Senate. They prepare the House and Senate chambers for the business of the day by distributing the Congressional Record and other materials.

Moving from building to building, they deliver messages, papers, and documents to members of Congress to assist during debate, floor actions, and committee hearings. They take part in formal ceremonies, such as carrying the electoral college ballots from the Senate to the House chambers for official counting. They deliver flags that have flown over the Capitol to members who request them for constituents. Who are these energetic and busy young men and women? They form the Congressional Page Program. Each year, about 60–80 students participate in the program; about two-thirds serve in the House and the remainder in the Senate.

Pages are high school students—typically, juniors. They must be at least 16 years of age (in earlier times, younger students also participated). They may serve as pages for a full school year, a semester, or a summer, depending upon a variety of factors. This is a job. Unlike internships, pages are paid for their work. Indeed, House pages are paid at an annual rate of $17,540, and Senate pages at $19,100. Pages use some of this salary to cover expenses, including transportation between their home and Washington, D.C., room and board (a residence hall fee for eating and sleeping), and uniforms (typically, navy blazers, grey slacks or skirts, black shoes, and the like).

These students do not give up school or academic pursuits during their time in Washington; indeed, there is a strong educational component to the program—the Page School. Students take classes, which include a junior-year high school curriculum in literature, mathematics, social studies, history, and foreign language, and they participate in varied extracurricular activities around Washington. The students begin their classes at about 6:30 A.M. each weekday, followed by a full day in and around the House and Senate chambers. The Page School is accredited by the Middle States Association of Colleges and Schools.

Many prominent Americans have served as pages. Daniel Webster was appointed the first Senate page back in 1829, and House pages began to serve in the 1840s. The first women were appointed pages in 1971. Ten current members of Congress, and many past members, served as pages.

Senate and House pages are nominated by individual members of Congress, but they are appointed by a small board comprising members of Congress. The selection process is highly competitive—typically, 400 or more applications. For further information and/or details about the application process, students should contact the office and/or Web site of their representative or U.S. senator.

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Variations on “How a Bill Becomes Law”

The following article describes a set of web-based resources on Congress and the legislative process for teachers of American government, civics, social studies, and law-related education. Developed by The Dirksen Congressional Center, these resources and activities are designed to help students achieve a more mature, accurate, and sophisticated understanding of Congress and, in particular, the process of making laws.

Objectives & Materials

From these resources and activities, students will:

- Learn about the internal workings of Congress, including how bills are modified as they proceed through subcommittees and committees.
- Understand how negotiations between members of Congress, between political parties, and between the party leadership and rank-and-file members shape the final outcome of bills.
- Achieve a deeper knowledge of the background and development of key legislation, such as the Civil Rights Act of 1964.

Explore and use the full range of web-based resources provided by The Dirksen Congressional Center at www.dirksencongressionalcenter.org. See, in particular, the CongressLink Web suite at www.congresslink.org. For an historical overview of Congress, its rules, and procedures, read the article by Wendy J. Schiller, “The New Congress: How Congress Has Changed Its Ways,” beginning on page 4.

Target Groups: Students in Grades 4–12

These resources and activities are suitable for high school students and middle school students in a variety of social studies classes. They address several national history and government curriculum standards (see inside front cover). The resources can be adapted and integrated into one, several, or many class periods, and they provide the basis for challenging out-of-class homework and research.

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making procedures in both the House and the Senate, and rules in the legislative body, among other topics.

In contrast to these relatively passive descriptions, however, CongressLink also features a multimedia, interactive depiction of the legislative process. Developed by Stephen Frantzich, Professor of Political Science at the U.S. Naval Academy, “A Bill Becomes Law” (www.congresslink.org/Frantzich/index.htm) uses text, graphics, and video to enliven students’ understanding of what goes on in Congress. The fourteen units provide a rich set of materials on every stage of the process, including the origin of bills, subcommittee review, mark-up and subcommittee voting, committee action, floor debate and votes, ironing out differences between House and Senate versions of a bill, and presidential action. Each unit includes (1) a brief introduction to each legislative stage with photographs and embedded links, (2) definitions of legislative lingo, (3) strategies or power plays—the politics in each stage, (4) seeing is believing through video clips, (5) exceptions to the rule or alternatives to each stage, (6) stats, quirks, and examples—options based on frequently asked questions (e.g., How many bills are introduced?), and (7) the legislative junkie—links to Web sites where students can go for more information.

Unit 4, for example, deals with bill drafting and floor introduction. This unit includes video of a member introducing a bill, reproductions of bills showing the numbering scheme, definitions of “omnibus bill” and “revenue bill,” multimedia explanations of strategies for advancing a bill, and a graph depicting the length of congressional sessions over time.

As Professor Frantzich writes, “There is a temptation to see congressional action as something done at a far distant place. Democracy, though, requires active citizens who help select representatives through elections, who make suggestions about possible policy problems, and who monitor their legislators’ actions. Knowing more about how a bill becomes a law will empower you in these tasks.”

For those interested in learning how members of Congress actually decide to vote, CongressLink uses the analogy of a game of billiards to illustrate how competing influences, such as personal preferences or constituency interests, affect decisions (“Understanding Congressional Decisions through Vectors” at www.congresslink.org/print_expert_vector.htm).

The use of case studies is another way to shed light on lawmaking. CongressLink offers detailed information about both the Civil Rights Act of 1964 and the Voting Rights Act of 1965—landmarks in legislative history. The Civil Rights Documentation Project (www.congresslink.org/civilrights/index.htm) uses a time line to organize digitized historical materials, video and audio records, and links to nearly one hundred other online resources about the social and political climate of the times. April and May 1964, for example, figured prominently in the story, as Senators hammered out the final details of the 1964 bill. Visitors to that portion of the site will discover a blow-by-blow description of the negotiations, biographical sketches of the key players, links to the minutes of the Senate Republican and Democratic conferences, photographs of the negotiators at work, an example of a petition supporting the legislation and of newspaper coverage, and a link to President Lyndon Johnson’s taped telephone conversations during the period. Five other web-based units (www.congresslink.org/print_index6
More than 32,000 people have visited the documentation project since its debut in May of 2006. The entire Web suite received 55 million hits in 2005. “The opportunity that CongressLink has given to many others and me in the educational world has been outstanding,” a high school social studies teacher noted. “Before I became acquainted with CongressLink, I did not comprehend the amount of material that one can receive on the Internet. ... In addition to the fact that students benefit greatly from CongressLink, the Web site is also a learning place for teachers.” Another teacher described her experience: “I just discovered CongressLink this summer and have been using the lessons plans in my Economics and Government classes this semester. The work my students have produced as a result is truly amazing. I will continue to push them by using these lessons as research projects and am confident that they will continue to excel. Keep up the great work.” And finally, an American government teacher reported that “this is by far the best site I have found for Congress lesson plans. My students have enjoyed each of the activities I have used from The Dirksen Center.”

Former Senator Howard H. Baker, Jr., Everett Dirksen’s son-in-law, followed Dirksen as leader of the Republicans in the Senate. He once described the challenge facing him, that of getting action out of the Senate, as “herding cats.” The resources available at CongressLink, we hope, will make understanding that process a bit easier.

The web-based projects discussed in this article, “How a Bill Becomes a Law” and “The Civil Rights Documentation Project,” are two of the many valuable resources included on The Dirksen Congressional Center’s Web suite (www.dirksencongressionalcenter.org), a collection of integrated web sites functioning as a single unit.

Six sites make up the Center’s Web suite. The Dirksen Center (www.dirksencongressionalcenter.org) provides information about the range of services and programs offered and includes online historical materials drawn from the center’s archival collections. CongressLink (www.congresslink.org) is directed to teachers of American government and civics. It features original content, including lesson plans and historical materials, and up-to-the-minute information about Congress. This site provides information about the U.S. Congress—how it works, its members and leaders, and the public policies it produces. About Government (www.aboutgovernment.org) allows viewers an opportunity to explore the diversity of web-based information about the federal government. This site currently links users to more than 300 sites. Congress for Kids (www.congressforkids.net) gives students access to interactive, fun-filled experiences designed to help them learn about the foundation of our federal government and how its actions affect them. Using appealing, full-color illustrations and engaging activities, this site will extend students’ learning in grades four through high school in the basics about the American federal government. Following Uncle Sam as a guide, students test their knowledge and are introduced to new skills. Congress in the Classroom Online (www.congressclass.org) challenges teachers with structured assignments designed to improve their ability to teach about the U.S. Congress. Finally, Communicator (www.webcommunicator.org) is a web-based newsletter providing educators with news and ideas to enhance civic education and improve the understanding of Congress. Each free monthly publication provides information about changes to the other four sites in The Center’s Web suite, shares classroom uses of the information posted on them, and highlights any Center-related accomplishments.

The Dirksen Congressional Center (www.dirksencongressionalcenter.org) is a nonpartisan, not-for-profit organization in Pekin, Illinois, that seeks to improve civic engagement by promoting a better understanding of Congress and its leaders through archival, research, and educational programs.
Congress and Competitive Elections: Where Have They Gone?

by John Paul Ryan

Our Founders provided that members of the U.S. House of Representatives would be directly elected by the people for two-year terms of office, in contrast to U.S. senators who would be chosen by state legislators for six-year terms. Clearly, the framers’ intent was to hold House members closely accountable to popular sentiment. Stephen Erickson (1995) writes that “the principle that new representatives should regularly be circulated through the political system was an integral part of republican political theory.” And indeed, this was the practice in the early republic of the United States. In constitutional debates, James Madison had argued for term limits and, although this provision was dropped, early voluntary retirements among House members were the norm for that era.

In current times, however, there are few voluntary retirements (only 31 among 435 incumbents in 2004). Equally important, competition between the two parties—by every measure—is at an all-time low in races for the U.S. House of Representatives. In 2004, only seven incumbents in the House lost their races. In 85 percent of the House races in 2004, the margin of victory was a landslide (20 percent or greater). Indeed, in only 19 races (4 percent) was the margin of victory within 10 percentage points. These numbers have led political scientist Larry Sabato (2006) to characterize congressional competition as “gone with the wind.”

Moreover, these alarming numbers of noncompetitive elections in 2004 reflect not an isolated example but a growing trend. Back in 1894, Grover Cleveland’s Democratic Party lost 116 House seats in the midterm elections. Herbert Hoover’s Republican Party lost 49 House seats in 1930, following the Great Depression. Franklin Roosevelt’s Democratic Party lost 71 seats in the 1938 midterm elections and another 55 seats in 1942. Similar losses were endured by the sitting president’s party in midterm elections under Presidents Dwight Eisenhower, Lyndon Johnson, and Gerald Ford. By the 1980s, however, the pattern of significant turnovers began to change. Since the 1986 congressional elections, only once has there been a net change of more than eight House seats between the parties (in 1994, the Republicans gained 54 seats and control of the House for the first time since 1954). What happened? How and why have competitive elections in the House virtually disappeared?

The Causes

Scholars and other political observers point to three features of our political system that contribute to the decline in competitive elections for the House: (1) redistricting; (2) the multiple advantages of incumbency; and (3) the coalescence of political values and residency. Let’s examine each of these areas.

Redistricting—the drawing of new boundaries for congressional districts—occurs every ten years, just after the new census. Thus, for example, after the 2000 Census, new districts were drawn in every state for the 2002 congressional elections. Redistricting is particularly contentious in states where lines need to be redrawn because the state gained or lost congressional seats. For example, due to population loss or slow growth, some states (such as Connecticut and Illinois) lost one congressional seat. Other population-growing states, like California, Texas, and Florida, gained seats.

In most states, the state legislature is responsible for drawing new district boundaries. The political party that controls the state legislature has the strong upper hand in drawing new boundaries, as the Texas redistricting controversy in 2003 involving then-House Majority Leader Tom DeLay (R-TX) demonstrates. But in many states, the balance of power between the parties is narrow, leading to much partisan give-and-take in this process. Indeed, some political observers believe that the Democratic and Republican parties often forge a type of “collusion” in many states, by redrawing district boundaries for the primary purposes of preserving the current balance of power between the two parties and protecting the incumbents already in office. The result is a lack of com-
petitive congressional elections nationwide. Of course, reapportionment takes place within the shadow of the Constitution and, in particular, the landmark 1962 U.S. Supreme Court decision, *Baker v. Carr* (see sidebar).

But redistricting is not the only culprit. Other factors are also at work, such as the growing advantages of incumbency. One advantage is the name recognition that incumbents are able to build through free publicity—newsletters to constituents, news features on radio or television, and the like. A second advantage is what political writer George Will calls “earmarks”—federal spending directed by individual members of Congress for specific projects in their districts. Even more important may be recent campaign finance reforms. Statutory limitations on the form and amount of campaign donations and/or expenditures make it more difficult for candidates to raise the money necessary—as much as one to two million dollars or more—to mount a successful challenge to an incumbent. In 2006 House races, incumbents will likely outspend their challengers by a ratio of 5:1 or higher.

Another factor in the rapid decline of competitive elections for Congress may be the growing coalescence of political values and one’s location of residence—the “red state-blue state” phenomenon. Not only are states either predominantly red (Republican, conservative) or blue (Democratic, liberal), as the 2000 and 2004 presidential elections suggested. But areas within the states are increasingly red and blue, based largely upon the divide between urban, suburban, and rural locations. When residential segregation patterns by race, class, and economics are taken into account, the result may be an increasingly strong political affinity among neighbors, leading to highly uncompetitive districts not only in presidential elections but also in races for the House of Representatives.

### The Solutions

The most commonly proffered solution for the evils of redistricting is to take the process out of the hands of state-level politicians in the legislatures, by creating independent (nonpartisan or bipartisan) commissions. Four states—Arizona, Iowa, New Jersey, and Washington—use commissions to draw district boundaries for congressional seats. The commissions’ memberships are typically balanced between the two parties; they may contain independents and may or may not include public officeholders. The experiences in these few states are too new or too limited to form strong conclusions. But reformers see signs that districts in these states have become more competitive. In the meantime, recognizing the problem is a first step. And there is a growing recognition among scholars, political observers, and the public that large numbers of uncompetitive districts may lead to a lack of democratic accountability, polarized political discourse, and corruption.
The Supreme Court Upholds Military Recruiters on Campus

The Supreme Court has struck down acts of Congress more frequently than ever before (over 30 times since 1987). But the Court also regularly upholds acts of Congress, most recently the Solomon Amendment of 1996 that requires colleges and universities to provide student access to military recruiters. Charles F. Williams discusses the details and implications of the case, Rumsfeld v. FAIR, decided on March 6, 2006.

The case of Rumsfeld v. FAIR began when a number of law schools that invited employers into their buildings to conduct job interviews decided to deny military recruiters that same access to students. These schools had all adopted antidiscrimination policies that made their career services and interviewing facilities unavailable to employers who discriminate on the basis of either sexual orientation or other prohibited grounds such as race, religion, or national origin. In this instance, the schools were seeking to enforce their antidiscrimination policies regarding sexual orientation.

Federal law, however, provides that there is no constitutional right to serve in the armed forces and that generally a person may not serve if he or she has engaged in homosexual acts, said that he or she is a homosexual, or married a person of the same sex. Moreover, at the time, federal law also called for withholding federal funding from any college or university “that either prohibits, or in effect prevents” military recruiters “from gaining entry” to campuses. Although this statutory language seemingly only required that the military be granted “entry,” the Defense Department adopted an informal policy that required universities to provide their military recruiters not only entry but also access to students “equal in quality and scope” to what the school provided other recruiters.

A coalition of 36 law schools and law faculties known as the Forum for Academic and Institutional Rights (FAIR) disagreed with this interpretation and sued the Secretary of Defense and other cabinet secretaries in federal court. The plaintiffs argued that the Defense Department policy requiring equal access to students infringed on the schools’ First Amendment freedoms. The district court rejected the schools’ constitutional arguments—it concluded that the federal law regulated conduct rather than speech. But it also rejected the Defense Department’s claim that the statute really required law schools to provide military recruiters access to students that is “at least equal in quality and scope” to the access provided other potential employers.

Congress responded to the latter part of that ruling by clarifying in the so-called Solomon Amendment [named after its sponsor, Rep. Gerald B. H. Solomon (R-NY)] that the Defense Department had read the law correctly. The Amendment now explicitly states that if any part of an institution of higher education denies military recruiters access that is “at least equal in quality and scope” to the access it provides other recruiters, then the entire institution must lose its federal funding. Thus, a plaintiff law school in this case could continue barring military recruiters, but only if the entire university was willing to lose virtually all of its federal contracts and grants. As the law schools later pointed out in their brief to the Supreme Court, for some universities this loss could amount to millions of dollars “for projects as diverse (and unrelated to military recruiting) as cancer research, particle accelerators, and investigations into the promise of school voucher programs.” This prospect was not lost on universities and law schools. Harvard Law School, for example, changed its policy in 2002, so as to allow military recruiters. In announcing the new policy, the law school’s dean pointed out that the university received $328 million annually from the federal government, or about 16% of its total operating budget.

Meanwhile, FAIR appealed its district court loss to the Third Circuit Court of Appeals. That court agreed with the law school and faculty coalition that the Solomon Amendment was unconstitutional and unenforceable.

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Among other things, the appellate court concluded that the Amendment likely violates the First Amendment right to associate, the compelled speech doctrine, and the so-called Doctrine of Unconstitutional Conditions. This latter doctrine had been developed by the Supreme Court in earlier cases to limit Congress’s power to place conditions on the receipt of federal funds. It provides that, even if there is no independent entitlement to a federal benefit, once the government decides to make the benefit available it cannot deny it to anyone on a basis that would infringe the individual’s freedom of speech. In other words, if Congress could not directly require universities to provide military recruiters equal access to their students, it could not condition the receipt of federal funds on that condition either. And by a 2-1 vote, the Third Circuit panel concluded that the First Amendment would in fact bar Congress from directly requiring universities to provide military recruiters equal access to their students. Therefore, the court ruled, the government also lacked the power to make that “equal access” requirement a condition for universities to receive federal funds.

The government appealed to the Supreme Court, setting the stage for what seemed to have many of the markings of a classic 5-4 cliff-hanger. First, observers noted that First Amendment cases are traditionally among the most divisive cases on the Court’s docket, often generating numerous dissents and concurrences. In addition, both sides in this case seemed to have strong arguments. On the one hand, the solicitor general representing the United States came to the Court confident that the Solomon Amendment language regulated conduct rather than speech—it did not explicitly prevent anyone from actually saying or writing anything. Moreover, Congress has traditionally been given the most latitude when the Constitution has explicitly authorized it to do something—in this case the Article I powers to control the purse and raise and support armies. And of course these arguments were taking place against the backdrop of ongoing U.S. wars in Iraq and Afghanistan. Yet FAIR—an organization composed of law schools and expert law faculties—had also marshaled numerous arguments to the contrary, and these had the backing of the Third Circuit Court of Appeals, as well as many of the nation’s top law professors and constitutional law experts who filed amicus curiae briefs in its support.

At the December 2005 oral arguments, however, with new Chief Justice Roberts presiding and Justice Sandra Day O’Connor still on the bench (Justice Alito did not replace her until the end of January) the FAIR arguments received an instantly chilly reception. The Justices were exceedingly skeptical of FAIR’s two chief claims: (1) that its policy barring military recruiters was itself a form of protected speech that the Solomon Amendment was suppressing, and (2) that it was a form of unconstitutional “compelled speech” to be forced to choose between receiving federal funds on the one hand and banning military recruiters on the other.

Two exchanges between the attorneys and the justices foreshadowed the ultimate decision. In one, the FAIR attorney was trying to explain his view that barring military recruiters is a form of speech because it disseminates a message that the schools “believe it is immoral to abet discrimination.” Justice O’Connor, who often filled the role of the moderate swing vote on this closely divided Court, interrupted to object that even under the Amendment the schools could still make that very statement “to every student who enters the room.” Later, Justice Breyer said that the “remedy for speech you don’t like, is not less speech, it is more speech.” And when the FAIR attorney argued that forcing the schools to admit military recruiters also amounted to unconstitutional “compelled speech,” Chief Justice John Roberts objected that the Solomon Amendment “doesn’t insist that you do anything … It says that if you want our money, you have to let our recruiters on campus.”

The final opinion reflected this tenor almost exactly. In a short and unanimous opinion (8-0, with Justice Alito abstaining since he hadn’t been at the oral arguments), the Court upheld the Solomon Amendment. Speaking for the Court, Chief Justice Roberts quoted from the Solicitor General’s oral argument:

The Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military’s congressionally mandated employment policy, all the while retaining eligibility for federal funds … The Solomon Amendment regulates conduct, not speech. It affects what law schools must do—afford equal access to military recruiters—not what they may or may not say.

Law schools, and other parts of the university, may not like the idea of military recruiters on campus. But the law is now clear, as is the enforceability of funding cut-offs for universities that do not comply. New student and faculty protests and counterprotests may arise, as the dialogues over gay rights, nondiscrimination, and America’s participation in the Iraq War continue.
more difficult for party leaders to produce legislation, which in turn further weakens the reputation of the majority party among voters.

The Great Divide between the House and Senate

Some aspects of congressional policymaking have not changed over time. Certain issues can still cause familiar internal division between the House and Senate: tax policy, Medicare prescription drug benefits, and immigration policy have all created conflict between the House and Senate during the Republican Party majority era. That the House and Senate often produce strikingly different versions of the same legislation, despite unified party control, is not surprising. As the Founders intended, the members of the House and Senate have different electoral incentives based on their terms of office and the size of their constituencies. House members are all up for reelection every two years, but senators are up for election every 6 years. In essence, only one-third of senators face reelection at the same time as their House colleagues, so the electoral incentives of the members in each chamber are never fully unified. In all but 6 states, senators represent larger groups than House members, and that means they are forced to compromise on both partisan and ideological grounds more frequently than House members. Senators also have a much longer time horizon in which they can establish their reputations. Those two factors are the reasons the Senate as an institution continues to preserve individual member rights and has not adopted the same kind of strong party structures as we have found in the House. Although the Senate has become more polarized along party lines over the past twenty years, that has not yet translated into any major institutional reforms.

Outlook for the 2006 Elections

When voters go to the polls in November 2006, their collective decisions may signal a major upheaval in American politics, and the stakes of the elections go well beyond the fate of the incumbent members of Congress. If Democrats can make inroads into seats that have up to this point been Republican dominated, it might also reflect shifts in the strength of partisanship among voters themselves. The district boundaries are the same as the previous two elections, so if we see changes in the composition of Congress it will be due to voters making the connection between their individual member and the national policies that are in place. This Republican majority emerged by presenting a unified ideology and approach to government, and they have remained unified for 12 years; essentially, they will succeed or fail not individually but as a group. Even if the Republicans lose some seats but still retain control of Congress, it may scare members enough that they reshape the power structure in the House to return to a more decentralized and individualized policymaking environment. For students of Congress, these may well be the waning days of strong party government in the modern era.
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.
That leaves 28 (38 percent) of the 74 provisions that did not result in an official congressional response. Of these, a majority did not warrant a congressional response. For instance, the Court sometimes strikes laws down “as applied,” which means that the statute itself is not unconstitutional “on its face.” Usually this means that the Court disapproves of the manner in which an agency applied the law, and the Court explicitly states that the statute is constitutional so long as it is applied in a different manner. Of the 74 provisions, 23 (31 percent) were struck down as applied. Of the 28 provisions that did not lead to a congressional response, 16 (70 percent) were as applied cases. Even some of the statutes that were struck down on their face did not warrant a congressional response. Although the Court’s decisions in these cases indicated that the statute in question could never be applied constitutionally in the eyes of the Court majority, congressional responses would be unnecessary in instances where the legislation involved included “sunset clauses,” which in effect establish an expiration date for legislation. In these and similar cases, the Court simply ends the life of a statute prematurely where that statute was set to expire soon anyway.

**Conclusion**

In light of the data described above, we need to rethink the role of judicial review in the U.S. system of separation of powers. Clearly, it is inaccurate to generalize the Supreme Court’s exercise of judicial review as the death of a statute. There is life after judicial review. The main factors that determine whether a statute will live on or not are: (1) Congress’s commitment to the policy involved, and (2) the nature of the Court decision. Where Congress remains committed to a policy, such as with campaign reform in the 1970s, it can usually find a way to pass new statutory language that comports with the Court’s constitutional doctrine while still achieving similar policy goals as the original legislation. When Congress is no longer committed to a policy or the legislation in question is simply outdated, Congress may repeal the legislation. And when the Court strikes legislation down as applied, the onus is on administrative agencies—not Congress—to find alternative methods for applying the statute.

Consequently, the debate over judicial supremacy is misplaced. Students at any level should not be taught that the Court exercises judicial review in a “supreme” manner, that it permanently nullifies legislation, or that it is an obstacle to majoritarian decision making in the elected branches of government. Neither is it accurate to say that Congress is well situated to challenge the Court’s constitutional interpretations. Rather, the Court’s exercise of judicial review often results in a modified statute that incorporates the constitutional law of the Court into the legislation passed by Congress. In this way, the Supreme Court’s exercise of judicial review may force members of Congress to incorporate the justices’ constitutional preferences into a statute. In many other cases, the Court invalidates legislation in a way that does not require a congressional response or even contradicts current preferences in Congress. But this is a far cry from the conventional wisdom being taught in high school, college, and even law school. Judicial review needs to be understood as a device that brings the Court into a dynamic and continuous lawmaking process and forces actors in the other branches of government to consider the Court’s constitutional interpretations, similar to how the presidential veto forces members of Congress to negotiate with presidents. It is simply untrue that the Supreme Court always thwarts the will of the majority in Congress when it exercises judicial review, and it is important that educators help to end this myth.

**For Further Reading**


Speech or Debate Clause. Lastly, members of Congress participate in federalism cases in order to promote congressional power vis-à-vis the states (e.g., defending the constitutionality of a statute linking the state’s drinking age to federal highway funds).

Members also participated as friends of the court to achieve one or more of the following objectives: to take a stand on an important issue of the day, to gain influence in Congress, to defend congressional prerogative and legislative power, to defend the interests of the members’ home state (a form of constituent service), and to promote good public policy. These motivations were not mutually exclusive, and often members joined briefs for more than one reason. Members’ overarching concerns were to secure reelection and to promote congressional power. I also interviewed members of Congress who chose not to participate before the Court; their reasons for nonparticipation were based either on a belief that to do so would inappropriately interfere with judicial independence or for those who represented competitive districts, a reluctance to take a stand on controversial hot button issues.

**Does the Supreme Court Listen?**

Members of Congress are not particularly effective advocates before the Supreme Court. I found that congressional amicus briefs were rarely cited by the Justices in their opinions (only about 10 percent of the time) and that members of Congress win in only 54 percent of the cases in which they file amicus briefs. This winning percentage is lower than the well-documented success rate of the Solicitor General (87 percent in one study; O’Connor, 1983) and a number of organized interest groups.

In looking for predictors of congressional success before the Court, I found that members of Congress were more likely to win in hot button cases and more likely to lose in cases in which they challenge the executive branch. The solicitor general had coattails: when members of Congress filed a brief on the same side as the solicitor general, they were twice as likely to win. Congressional caucuses and committees were not especially persuasive, given their legislative and policy expertise, nor did state delegations enjoy an advantage for their intimate knowledge of their home states and issues of concern to their constituents. The most successful congressional amici were “Republicans with Interest Groups” (usually the Washington Legal Foundation), who won an overwhelming 80 percent of the time. These data might suggest that interest groups and partisan interests have the greatest influence on Supreme Court decision making; however, it is difficult to draw conclusions as to what caused the Court’s conservative decisions. That is, while Republicans enjoyed a higher success rate before the conservative majority on the Rehnquist Court, it may be that these Republican members filed briefs in support of the party that was likely to win regardless of congressional intervention.

The interviews with former Supreme Court law clerks confirmed these data. Members of Congress are not especially influential as friends of the court. The consensus was that the congressional briefs were likely to be treated as “prominent attorneys’ briefs;” that is, with congressional authors, the brief may be more likely to get a reading by the Justices and their law clerks, but, ultimately, it would be judged on the merits of its arguments. The clerks doubted that congressional amici would be influential in the resolution of hot button cases (“the last place one would look for dispassionate legal advice is from a politician”) or in cases involving constitutional interpretation (“the Court will interpret the statute and decide whether it is constitutional”). Some clerks speculated that congressional briefs would be considered instructive in cases concerning federal statutory interpretation, but there is certainly a strong view on the present Court, most notably espoused by Justice Scalia, that it is inappropriate for the Justices to go beyond the text of the statute and to consider legislative history.

For Discussion

What motivates members of Congress to file amicus briefs?

Why do you think members of Congress are less effective advocates before the Supreme Court than the President and the executive branch?

Is it appropriate, under our system of separation of powers, for members of Congress to offer their own interpretations of the Constitution in cases before the Supreme Court.

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The Future of Congress-Court Relations

One striking discovery was the relative influence of the President and Congress before the Supreme Court. Members of Congress are not nearly as successful before the Supreme Court as the Executive Branch.

The Rehnquist Court, while employing a “neo-federalism” jurisprudence, was less active in striking down state or local actions, but it stepped up its scrutiny of Congress. In fact, the Rehnquist Court was three times more active in striking down congressional statutes than its predecessors (Pickerill & Clayton, 2004, p. 233). Not only did the Rehnquist Court take a more aggressive role in limiting congressional power under the Commerce Clause, but also the Court asserted its interpretive dominance in resolving constitutional questions. Consider, for example, the Court’s decision in City of Boerne v. Flores, 521 U.S. 507 (1997). Congress challenged the Court’s decision in Employment Division v. Smith, 110 S.Ct. 1595 (1990), when it enacted the Religious Freedom Restoration Act (RFRA), an attempt to codify earlier Warren Court Free Exercise Clause precedents. The Court, in striking down RFRA, asserted its exclusive power to interpret the Constitution, declaring: “Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”

Interviews with former law clerks confirmed that the Justices do not feel obliged to heed congressional interpretation of the Constitution: “To most Justices and law clerks, it doesn’t matter what Congress has to say regarding whether the statute is constitutional. It doesn’t make a difference. The Court will interpret the statute and decide whether it is constitutional. Congressional amicus briefs don’t make a whole lot of difference in those cases.” In an environment in which the case can be made that the Court is trying to achieve judicial supremacy in constitutional interpretation and is showing disdain for the wishes of Congress by taking a more active role in striking down federal legislation, it should come as no surprise that Members of Congress do not appear to be close “friends” of the Court.

Even though Members of Congress are not nearly as successful as the Executive Branch in influencing judicial decision making, it is important for the Justices to hear from Congress to learn the congressional perspective regarding legislative history, legislative intent, and separation of powers concerns—especially in cases where the solicitor general is taking a contrary position on behalf of the United States. Members of Congress most frequently file amicus briefs in order to challenge the Executive Branch, and this is an appropriate means through which Congress could restore balance to our constitutionally prescribed system of checks and balances. As a former chief of staff to a member of Congress explained to me in an interview: “Filing amicus briefs is an attempt by the legislature to rightfully exert its influence as to how the laws in this country are made. It’s an attempt by members of Congress to assert their constitutional role. The arena was there; members are now taking advantage of it more.” In sum, as the Court asserts itself in the policy realm, members of Congress want to participate, and the amicus procedure allows them to do so.

For Further Reading


You can find supplementary materials and resources for this issue at the Web site for *Insights on Law & Society* at www.insightsmagazine.org.

Visit some of the best sites on Congress, recommended by *Insights* author Wendy J. Schiller.

Obtain more details about the actual work and educational programs of high school students in the Congressional Page Program.

Read the U.S. Supreme Court decision in *Rumsfeld v. FAIR* and other resources on the legality of military recruiters on college campuses.

Use some of the best lessons on Congress from around the Web.

Link to “friend of the court” briefs submitted in key Supreme Court cases.

Learn where to go online to find information about your Senators or Representative.

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