



The Changing Relationship of Congress and the Federal Judiciary

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Relationships between members of the United States Congress and the judiciary are shifting, as Democrats and Republicans alike reassess whether the courts are political allies or foes in this highly polarized era. My research tracks what members of the House of Representatives have had to say about judges and the judiciary in recent years – specifically, I have teamed up with a colleague to analyze public statements published on official House websites from 2010 to 2014, a pivotal and contentious period in recent politics.

A Shifting Landscape of Partisan Criticism and Praise

A decade ago, congressional representatives – mostly Republicans and conservatives – were the most prominent and frequent critics of the state and federal judiciary. From 2003 to 2007, a Republican-controlled Congress introduced dozens of proposals to restrict the powers of courts. GOP congressional leaders like House Majority Leader Tom DeLay charged the judiciary with “legislating from the bench.” Over the same period, many Democrats and liberals rose to the defense of judges and courts – maintaining their longstanding support for major civil rights and civil liberties decisions dating from the 1950s and 1960s.

Politics and judicial decisions have obviously taken new turns in recent years. Since President Obama became president, the courts handed down controversial major decisions in such areas as health care, campaign finance, and gun rights; and the Tea Party has emerged as a major political force on the rightward edge of the Republican Party. As these developments unfolded, House websites have frequently posted comments on the judiciary – and the partisan tilt has shifted.

- Not surprisingly, the sheer number of remarks about the Supreme Court on House members’ websites increased after passage in March 2010 of the Obama’s administration’s landmark health reform law, the Affordable Care Act.
- From 2010 to 2012, both Republican and Democratic House members had occasional harsh words for the courts, but prior to the June 2012 decision declaring the Affordable Care Act constitutional, Democratic critiques were rising while Republican attacks were waning.
- Before the Supreme Court handed down its health care ruling, roughly two-thirds of all positive comments about courts and judicial power came from Republicans, who had been satisfied with previous rulings in such areas as the Second Amendment, partial birth abortion, and campaign finance. Especially common was House Republican praise for Republican-appointed Supreme Court Justices such as Samuel Alito and John Roberts.
- Already on the rise, the sheer number of remarks about the Supreme Court shot up after the Supreme Court upheld the core of health reform as constitutional. After the end of June 2012, more than four in five House websites made some reference to courts and judicial decisions.

House Attitudes after the Supreme Court Upheld Health Reform

Overall, then, the early 21st century presents a volatile and shifting picture. No longer were congressional attitudes consistently marked by Republican skepticism versus Democratic support for courts and judges, as had been the case since the mid-1950s. Republican support grew as the Supreme Court moved right. However, we might wonder whether partisan stances changed again after the Court surprised Republicans by upholding the heart of the Obama administration’s health care program.

- The decision was certainly condemned by Republicans in the House, who issued 98% of all negative comments on the ruling and became more hesitant about the judiciary thereafter.
- But GOP reactions did not amount to a simple about-face. Instead of launching a wider critique of the courts, many House GOP members continued to call the Affordable Care Act a bad policy worthy of repeal and trained their blame on President Barack Obama and the Democrats, rather than on the Supreme Court.
- In the current Congress, Democrats rather than Republicans are still the ones most critical of the judiciary. Democrats are displeased by recent Court decisions to gut key enforcement provisions of the 1965 Voting Rights Act and eliminate many campaign finance regulations.

The Future Relationship of Congress and the Courts

My work suggests that courts and judicial decisions may well remain controversial on both sides of the congressional aisle, and additional dynamics may translate critiques into deadlock.

- At the end of President Obama's second term, the federal judiciary will be split, with Democratic and Republican presidents having named half of the sitting judges apiece. Only a short while ago, in 2009, nine of twelve geographic courts of appeals had majorities of judges appointed by Republican presidents and almost six in every ten judges were GOP appointees.
- The Supreme Court of the United States also teeters very much in balance. Over the next few years, retirements are likely to prompt a major struggle over the Court's future, with the Senate playing a decisive role in new appointments while the House serves as a chorus for the debate.

In short, congressional preoccupation with the judiciary is unlikely to wane given continued intense partisanship, the sense that America's legal future lies in the balance, and mobilization by pressure groups such as the National Rifle Association on the right to People for the American Way on the left. We cannot yet be certain, but many signs point not only to continuing severe critiques of judges and particular rulings from legislators on both sides of the congressional aisle, but also to a persistent shift in how Congress relates to the influential U.S. court system. The days of a largely supportive consensus, especially from Democrats, may be gone for a long while to come.

Read more in Bruce Peabody and Kyle Morgan, "Hope, Fear and Loathing, and the Post-Sebelius Disequilibrium: Assessing the Relationship between Parties, Congress, and Courts in Tea Party America ." *British Journal of American Legal Studies* 2, no. 1 (2013): 27-58.