

Impeachment

Article II, section 4, of the Constitution states: "The President, Vice President, and all Civil Officers of the United States, shall be removed from office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and misdemeanors." This removal power is the ultimate governmental check vested in Congress.⁹⁸ The House has the authority to impeach an official by majority vote. It then tries the case before the Senate, where a two-thirds vote is required for conviction.

Only impeached federal judges have been convicted by the Senate. The most recent case occurred on December 8, 2010, when the Senate voted for only the eighth time to convict and remove a federal district judge.⁹⁹ As for presidents, the House impeached President Andrew Johnson in 1868, after Radical Republicans in the House charged that he had violated the Tenure of Office Act by dismissing the secretary of war. The Senate acquitted Johnson by a single vote. Facing probable impeachment and conviction, President Richard M. Nixon resigned in 1974 after the House Judiciary Committee voted articles of impeachment. In December 1998, President Clinton became the first elected president to be impeached by the House. (Johnson was not elected; he became president when Abraham Lincoln was assassinated.) The charges against Clinton were perjury and obstruction of justice. Two months later, the Senate voted acquittal on both articles of impeachment.¹⁰⁰ The lack of impeachment cases against presidential appointees likely reflects the effectiveness of political mechanisms for holding them accountable. Numerous lower-level federal officials have been pressured to resign amid scandals—or have been directly fired by the president.

Oversight: An Evaluation

Congress's willingness to conduct regular and meaningful oversight stems from several factors: public dissatisfaction with government; revelations of executive agency abuses; the influx of new legislators skeptical of government's ability to perform effectively; concern about the growth of a regulatory state; the availability of seasoned congressional staff; and recognition by Congress that it must make every dollar count.¹⁰¹

Two factors stand out as especially important motivators of oversight since Republicans won control of the 112th House in the November 2010 elections and the Senate four years later. First, top GOP leaders have made cutting agencies and programs a major priority. For example, House Majority Leader Kevin McCarthy, Calif., stressed in a memo to House Republicans the importance of "reforming and streamlining federal agencies so government works as it should."

the Pledge of Allegiance. Other topics—such as same-sex marriage and the public display of the Ten Commandments—evoked similar responses in Congress. Some scholars have argued that such threats of court-curbing legislation affect judicial decision making. One recent study found that the Supreme Court responds to the introduction of court-curbing legislation by striking down fewer laws in subsequent years.³³ Despite the ongoing conflicts between Congress and the courts, on only one occasion in U.S. history did Congress prevent the Supreme Court from deciding a case by removing its appellate jurisdiction:

This extraordinary action was taken by a Congress dominated by Radical Republicans who wanted to prohibit the Supreme Court from reviewing the constitutionality of the Reconstruction Acts of 1867. The acts substituted military rule for civilian government in the ten southern states that initially refused to rejoin the Union and established procedures for those states to follow to gain readmittance and representation in the federal government.³⁴

Congress simply passed legislation repealing the Supreme Court's right to hear appeals involving these matters, thereby preventing "a possibly hostile Court from using the power of judicial review to invalidate a piece of legislation."³⁵ Various scholars have identified a variety of reasons why court-curbing legislation is so rarely adopted: "the historically broad consensus in Congress to protect, or at least tolerate, an independent judiciary; judicial opponents' reluctance to emasculate an institution that they may someday need as an ally; . . . and resistance by the organized bar."³⁶

Impeachment of Judges. Federal judges, like other national civil officers, are subject to impeachment under Article II of the Constitution. They are appointed "during good behavior," effectively for life. Only one Supreme Court justice, Samuel Chase, has ever been impeached by the House. It occurred in 1804, during bitter partisan battles between Federalists and Jeffersonian Republicans. The judiciary was the last bastion of Federalist influence after

Thomas Jefferson won the presidency in the 1800 election. Chase's intemperate and arrogant behavior—he even campaigned for John Adams's reelection in 1800—raised the ire of Jefferson and his allies in Congress. On March 12, 1804, the House voted 73–32 along party lines to impeach Chase. The Senate, however, failed to convict (and thus remove) him. The importance of Chase's acquittal by the Senate was underscored in a book by Chief Justice William Rehnquist:

The acquittal of Samuel Chase by the Senate had a profound effect on the American judiciary. First, it assured the independence of federal judges from congressional oversight of the decisions they made in the cases that come before them. Second, by assuring that impeachment would not be used in the future as a method to remove members of the Supreme Court for their judicial opinions, it helped to safeguard the independence of that body.³⁷

Other Supreme Court justices have been either threatened with impeachment or subjected to impeachment investigations. One example is William O. Douglas in 1953 and in 1970.

Fifteen federal judges have been impeached, and eight have been removed by a two-thirds vote in the Senate.³⁸ The 111th Congress (2009–2011) saw active impeachment proceedings against two district judges. In May 2009, Judge Samuel B. Kent of the Southern District of Texas was convicted of obstruction of justice, resulting from an investigation of claims that he had sexually abused two female court staffers, and sentenced to prison. Nevertheless, he refused to resign from the bench, meaning that he continued to collect his judicial salary. His refusal to step down drew protests from Capitol Hill, and the House soon voted unanimously to impeach him. Kent then resigned, before the Senate could try him. In 2010 Judge Thomas Porteous Jr. of the Eastern District of Louisiana was impeached and removed from the bench based on charges of corruption and making false statements on his financial disclosure reports.

These recent examples of judicial impeachments are representative of such cases throughout U.S. history. Judges have been impeached for unethical and illegal acts, but not because of the legal and policy judgments rendered during the course of their judicial duties. The “Impeach Earl Warren” billboards and bumper stickers that appeared all across the South in the 1960s in the wake of *Brown v. Board of Education* do not represent how impeachment has been used. It is outside congressional norms to employ impeachment as a mechanism to exert political influence over the judiciary.

Size, Procedure, and Pay. Historically, the size of the Supreme Court has ranged from six to ten members. “Generally, laws decreasing the number of justices have been motivated by a desire to punish the president; increases have been aimed at influencing the philosophical balance of the Court itself” (such as Roosevelt’s Court-packing plan).³⁹ But since 1869 Congress has not changed

the Court's size from its current nine justices, so this power is unlikely to be invoked in the foreseeable future.

Procedurally, lawmakers have occasionally proposed that Supreme Court decisions overturning federal laws be accomplished by a supermajority vote of the justices.⁴⁰ None of these proposals has been adopted. Instead, they serve as signals to the judiciary that lawmakers disapprove of certain court decisions. Lawmakers have also communicated complaints to the judicial branch by calling for stronger ethical guidelines for judges to ensure their impartiality, though the judicial branch claims that such oversight would violate judicial independence.⁴¹

Another legislative proposal that has generated interbranch controversy is opening federal courtrooms to television cameras. Several justices have opposed televising Supreme Court proceedings, in part because the cameras might alter decision making, intrude on the privacy of the justices by making them public celebrities, and threaten their personal security. During an appearance before the Senate Judiciary Committee, Justice Anthony Kennedy implored senators not to pass legislation mandating the televising of their open proceedings.⁴² His concern was that televised Court sessions would eventually undermine the collegial character of the Court and encourage the justices to speak in sound bites. Attitudes toward cameras in the courtroom may be changing, however. In her confirmation hearings, the Court's newest member, Elena Kagan, said that she thought "it would be a great thing for the institution and for the American people" to be able to watch Supreme Court arguments on television.⁴³ Justice Sotomayor has expressed similar views. The justices' individual and collective views may not carry the day in the 114th Congress, as incoming Senate Judiciary chair Sen. Charles Grassley, R-Iowa, is a major proponent of televising Supreme Court arguments. One top journalist summarized the chair-to-be's position this way: "Grassley has made it a signature cause as part of his general push to expand government transparency."⁴⁴

A current concern is that fewer aspirants are seeking federal judgeships. Part of the reason is pay: "Salaries are far lower [for federal judges] than what fresh-faced law-school grads can make at big corporate firms."⁴⁵ Chief Justice John Roberts devoted much of his 2008 annual year-end report on the federal judiciary to the inadequacy of judicial salaries. The judicial branch as a whole made a major, but unsuccessful push in the 110th Congress for a judicial pay increase.

Congressional opposition to increased judicial pay has stemmed, in part, from so-called "linkage." For a long time, the salaries of federal judges and members of Congress were for all practical matters linked.⁴⁶ Lawmakers' reluctance to raise their own salaries—for obvious political reasons—was a large part of the reason why federal judges' salaries had not kept pace with inflation. To raise judicial salaries substantially, members of Congress would have to agree to "de-link" their salaries from those of judges, thereby depriving members of political cover on the occasions when they did decide to raise their own salaries. In 2014, however, there were substantial increases in federal judges'

pay, oddly enough, as a result of long-running litigation over the meaning of Article III's Compensation Clause.⁴⁷ The chief justice currently receives an annual salary of \$255,500; associate justices, \$244,400; appeals court judges, \$211,200; and federal district judges, \$199,100.⁴⁸ Even with the recent pay increase, judges' earnings lag behind other high-status legal professionals. Law school deans, for example, can earn over \$400,000 a year, and top law firm partners \$1 million or more a year.⁴⁹ Some analysts, however, question whether there are benefits to paying judges more.⁵⁰ The present state of the federal budget makes any further increases in judges' salaries (other than cost-of-living adjustments) unlikely in the near future.

Constitutional Amendments. On four occasions, Congress successfully used the arduous process of amending the Constitution to overturn decisions of the Supreme Court. In *Chisholm v. Georgia* (1793), the Court held that citizens of one state could sue another state in federal court.⁵¹ To prevent a rash of citizen suits against the states, Congress oversaw passage of the Eleventh Amendment to reverse this decision and protect states' sovereign immunity from lawsuits brought by citizens of other states and foreign countries. The *Dred Scott v. Sandford* (1857) decision⁵²—denying African Americans citizenship under the Constitution—was nullified by the Thirteenth Amendment (abolishing slavery) and Fourteenth Amendment (granting African Americans citizenship). The Sixteenth Amendment overturned *Pollock v. Farmer's Loan and Trust Co.* (1895), which struck down a federal income tax. The Twenty-sixth Amendment invalidated *Oregon v. Mitchell* (1970), which held that Congress had exceeded its authority by lowering the minimum voting age to eighteen for state elections.⁵³

Generally, lawmakers are reluctant to amend the Constitution. The view of Rep. Melvin Watt, D-N.C., reflects that of many members: "I just think the Constitution has served us very well over a long, long period of time, and one needs to make a compelling case before we start amending the Constitution to do anything."⁵⁴ However, certain constitutional amendments have appeared regularly on the legislative agenda. One would ban desecration of the American flag. The proposal is a response to a 1989 Supreme Court ruling in *Texas v. Johnson* that state laws banning flag burning violate the First Amendment right of free speech. The House has passed an anti-flag desecration amendment several times, but the Senate has never approved the measure.

Eliminating life tenure for federal judges is another proposal that sometimes surfaces on Capitol Hill. Bitter judicial nomination battles have prompted some observers to suggest term limits (such as fifteen years) for federal judges. "If the Senate can't figure out how to reach a [partisan] truce in its battles over these all-important jobs," wrote one analyst, "maybe the best solution is to make the jobs not quite so important."⁵⁵ Others simply contend that Supreme Court justices serve too long. Aging justices, it is argued, may become arrogant, out of touch with contemporary values, or too impaired to serve. To avoid the difficulties of winning approval of a constitutional amendment, they

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