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2018

## Congress, the Courts, and Party Polarization: Why Congress Rarely Checks the President and Why the Courts Should Not Take Congress's Place

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### Recommended Citation

Neal Devins, *Congress, the Courts, and Party Polarization: Why Congress Rarely Checks the President and Why the Courts Should Not Take Congress's Place*, 21 CHAP. L. REV. 55 (2018).

Available at: <https://digitalcommons.chapman.edu/chapman-law-review/vol21/iss1/5>

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## CHAPMAN LAW REVIEW

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Citation: Neal Devins, *Congress, the Courts, and Party Polarization: Why Congress Rarely Checks the President and Why the Courts Should Not Take Congress's Place*, 21 CHAP. L. REV. 55 (2018).

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# **Congress, the Courts, and Party Polarization: Why Congress Rarely Checks the President and Why the Courts Should Not Take Congress's Place**

*Neal Devins\**

This essay will make two points about Congress-President relations—one is clearly right and the other is debatable. One point (clearly right) is that Congress is generally uninterested in the Constitution, especially with regard to asserting its institutional prerogatives and checking presidential unilateralism. This was largely the case before polarization set in (around 1995) and polarization has significantly exacerbated this phenomenon. In particular, lawmakers from the president's political party no longer assert institutional prerogatives to resist presidential encroachments; consequently, Congress cannot act in a bipartisan way to block presidential initiatives. The second point (debatable) is that courts should not relax standing to sue limitations so that disappointed lawmakers can take their grievances to the judiciary when Congress is unable to stand up for itself. Polarization may make it harder for Congress to check the president, but polarization also cuts against lawmakers (or even institutional counsel) speaking Congress's voice in court.<sup>1</sup> More than that, polarization has fueled the growing perception that the court itself is polarized and politicized—so much so that the courts have good reason to steer from this political thicket.

In making these points, I will focus my attention on how Congress turns to the courts to assert its institutional prerogatives. Section I will talk generally about structural and practical limits to Congress advancing a pro-Congress theory of either statutory or constitutional interpretation before the courts.

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<sup>1</sup> When a House or Senate committee seeks to enforce a subpoena in court, the committee is speaking its own voice and not Congress's voice. See Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 622 (2014). For this reason, the broader point I make against lawmaker efforts to speak Congress's voice in court does not apply to committee enforcement of subpoenas. See *infra* note 46 and accompanying text.

The centralization of litigation authority in the Department of Justice is a manifestation of these limits. Section I will also explain how it is that Congress sought to combat these limits in separation of powers disputes with the executive—giving itself some institutional voice in court by creating the Office of House Counsel and the Senate Office of Legal Counsel. Section II will examine how both lawmakers and institutional counsel have become less and less interested in separation of powers disputes as Congress has become more polarized. In particular, lawmakers have shifted away from institutional pursuits and toward the pursuit of social issues that divide the parties. In making this point, I will also highlight how party polarization has transformed Congress—from mildly disinclined to think about its institutional prerogatives under the Constitution, to outright uninterested in protecting its role in our system of divided government. Correspondingly, lawmakers of the president’s party no longer use their oversight authority to check the president; lawmakers of the opposition party see oversight principally as a vehicle to embarrass their political opponents. Section III will consider the ramifications of increasing party polarization on the standing of lawmakers and institutional counsel in disputes with the executive. These disputes are increasingly visible; opposition party lawmakers have strong incentive to discredit the president and frustrate his agenda. Litigation is a visible, low cost way to pursue their interests. For this very reason, however, litigation exacerbates polarization and threatens the judiciary. The judicial role in checking the executive should not expand to take into account Congress’s failure to assert its institutional prerogatives through traditional Article I devices, most notably, oversight and legislation.<sup>2</sup>

I. WHY CONGRESS (PRETTY MUCH) LEAVES IT TO THE  
DEPARTMENT OF JUSTICE TO DEFEND CONGRESS’S INTERESTS  
IN COURT<sup>3</sup>

The competing incentives of the president and Congress explain both Congress’s disinterest in asserting its institutional

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<sup>2</sup> My argument will be limited to the question of whether polarization—as a policy matter—cuts in favor of more expansive standing for lawmakers and institutional counsel. I will not engage in constitutional analysis to ascertain the appropriate scope of lawmaker or institutional standing. For recent treatments of this constitutional question, see Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311 (2014); Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339 (2015); and Michael Sant’Ambrogio, *Legislative Exhaustion*, 58 WM. & MARY L. REV. 1253 (2017).

<sup>3</sup> This Section builds on and occasionally borrows from earlier writings of mine, most notably, Neal Devins, *Why Congress Does Not Challenge Judicial Supremacy*, 58 WM. & MARY L. REV. 1495 (2017).

prerogatives and the related dynamics of Congress's interface with both the executive and the courts. To start, presidents are well positioned to simultaneously advance policy goals and expand the power of the presidency. In particular, presidents always claim they are constitutionally authorized to pursue favored policy positions and, as such, presidents are consistent and persistent advocates of executive power. Political scientists Terry Moe and William Howell put it this way: "[W]hen presidents feel it is in their political interests, they can put whatever decisions they like to strategic use, both in gaining policy advantage and in pushing out the boundaries of their power."<sup>4</sup>

For its part, Congress possesses ample weapons to defend its institutional interests, but has little incentive to make use of these tools. While each of Congress's 535 members have some stake in Congress as an institution, lawmakers regularly trade-off their interest in Congress as a strong, vibrant institution. They put aside institutional interests in favor of their interests in reelection, in serving on a desired committee, in assuming a position of leadership in their party, or in advancing their and their constituents' policy goals. Lawmakers, in other words, are "trapped in a prisoners' dilemma: all might benefit if they could cooperate in defending or advancing Congress's power, but each has a strong incentive to free ride in favor of the local constituency."<sup>5</sup>

This collective action problem stymies Congress in two distinctive ways. First (and most obviously), lawmakers have little interest in defending congressional prerogatives. On war powers, for example, lawmakers rarely assert Congress's constitutional powers. In particular, today's military is all volunteer and generally supportive of presidential power; lawmakers feel little constituent or public pressure to reign in presidential warmaking.<sup>6</sup> Consequently, notwithstanding the clear constitutional mandate that Congress "declare war,"<sup>7</sup> lawmakers often find it more convenient to acquiesce to presidential unilateralism than to face criticism that they obstructed a necessary military operation.<sup>8</sup>

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<sup>4</sup> Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 138 (1999).

<sup>5</sup> *Id.* at 144.

<sup>6</sup> Neal Devins, *Bring Back the Draft?*, 19 GA. ST. U. L. REV. 1107, 1110 (2003).

<sup>7</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>8</sup> See LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR AND SPENDING 166–68 (2000). For this very reason, institutionally-minded members of Congress have turned to the courts to preserve their constitutional powers. For one prominent example, see *Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000), which holds that members of

Second, the policy interests of lawmakers are not necessarily in sync with the institutional interests of Congress. Lawmakers opposed to legislation on policy grounds often embrace a narrow view of congressional power. Indeed, constitutional objections to legislation are typically raised by lawmakers and those who oppose legislation on policy grounds.<sup>9</sup> Examples abound, including the Affordable Care Act, the Defense of Marriage Act, and the federal Partial Birth Abortion Act. Lawmakers opposed to these statutes filed briefs arguing that Congress was without constitutional authority to enact these measures.<sup>10</sup>

With little interest in abstract discussions of legislative power, there clearly is no appetite for pursuing institutional goals such as enhancing pro-Congress interpretations of the Constitution or federal statutes. Likewise, lawmakers have little interest in contemplating potential judicial review of their handiwork—policy goals are pursued when a bill is enacted and a court decision striking down legislation is seen as an opportunity to reassert policy priorities through the enactment of new legislation.<sup>11</sup> When amending legislation in the wake of a judicial decision, lawmakers do not engage with the courts; they rather “make[] clear concessions to the Court’s decision” by embracing the same policy through alternative means.<sup>12</sup> As Second Circuit Judge Robert Katzmann put it, “Congress is largely oblivious of the well-being of the judiciary as an institution.”<sup>13</sup> Consider, for example, issues of statutory interpretation that cut to the core of congressional priorities and prerogatives. The simple fact is that “[n]o one ever lost an election by saying ‘I’m for purposivism’”,<sup>14</sup>

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Congress could not sue President Bill Clinton for alleged violations of the War Powers Resolution in his handling of the war in Yugoslavia. For additional discussion, see *infra* Section III, which argues that institutionally-focused lawsuits are a rarity and that most lawmakers seek partisan advantage through litigation.

<sup>9</sup> See J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM 143–44 (2004).

<sup>10</sup> See generally Neal Devins, *Measuring Party Polarization in Congress: Lessons from Congressional Participation as Amicus Curiae*, 65 CASE W. RES. L. REV. 933 (2015). For reasons I will detail in Section II, polarization exacerbates this phenomenon, as today’s lawmakers are more apt to file briefs and make other formal declaration that Congress has exceeded its powers.

<sup>11</sup> See PICKERILL, *supra* note 9, at 23.

<sup>12</sup> *Id.* at 49.

<sup>13</sup> ROBERT A. KATZMANN, JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 7 (1988).

<sup>14</sup> Victoria F. Nourse, *Overrides: The Super-Study*, 92 TEX. L. REV. 205, 214 (2014). In 2016, congressional Republicans pursued legislation that would eviscerate judicial deference to agency interpretations. See Vikram David Amar, *Chevron Deference and the Proposed “Separation of Powers Restoration Act of 2016”: A Sign of the Times*, JUSTIA: VERDICT (July 26, 2016), <https://verdict.justia.com/2016/07/26/chevron-deference-proposed-separation-powers-restoration-act-2016-sign-times> [<http://perma.cc/DVG4-WFF9>]. When introduced, this bill—which was never taken up in the Senate—sought to call attention to the “lawless” Obama administration; lawmakers were not concerned with

and with no constituency payoff, there is no lawmaker interest in thinking about statutory interpretation techniques used by the courts.

#### A. Congress and the Department of Justice

Another manifestation of lawmaker uninterest in institutional power, including judicial review of Congress's handiwork, is the centralization of litigation authority in the Department of Justice ("DOJ"). First, although the defense of federal statutes is an executive function,<sup>15</sup> Congress limits its influence over legal arguments made in court by centralizing litigation authority this way. Second (and somewhat relatedly), the entity within Congress that oversees the Justice Department (the House and Senate Judiciary Committees) have incentive to embrace judicial supremacy—potentially at the expense of pro-Congress theories of interpretation. Neither of these claims is obvious, so let me provide more details.

First, by centralizing litigation authority in the DOJ, subject matter committees in Congress focus their energies on policymaking; for most lawmakers, what matters is direct influence through the writing of laws, the holding of hearings, and related investigations.<sup>16</sup> Unlike legislation and oversight, legal arguments made in court are abstract and indirect. Historically, however, Congress understood that decentralized lawyering enhanced lawmaker power vis-à-vis the executive. Before 1870, there was no DOJ; before 1933, powerful agency solicitors controlled statutory and administrative legal arguments.<sup>17</sup> These solicitors had strong ties with congressional oversight committees and, at this time, oversight committees held greater sway with executive branch legal arguments.<sup>18</sup>

Recognizing the costs of decentralization to executive power, Franklin Delano Roosevelt reorganized executive branch litigation, transferring litigation authority from agency solicitors

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congressional power, and indeed the bill sought to sift power to the courts, not Congress. In July 2017, the bill was reintroduced by Senate Republicans. See Press Release, Orrin Hatch, Senate Leaders Introduce Bill to Restore Regulatory Accountability (July 19, 2017), <https://www.hatch.senate.gov/public/index.cfm/2017/7/senate-leaders-introduce-bill-to-restore-regulatory-accountability> [<http://perma.cc/R32G-23RD>].

<sup>15</sup> For reasons why I think this is so, see Grove & Devins, *supra* note 1, at 625. For a competing perspective, see Jack M. Beermann, *Congress's (Less) Limited Power to Represent Itself in Court: A Comment on Grove and Devins*, 99 CORN. L. REV. ONLINE 166, 168 (2014).

<sup>16</sup> See Neal Devins & Michael Herz, *The Battle That Never Was: Congress, the White House, and Agency Litigation Authority*, 61 L. & CONTEMP. PROBS. 205, 219 (1998).

<sup>17</sup> See NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789–1990*, at 62–63 (1992).

<sup>18</sup> See Devins & Herz, *supra* note 16, at 207.

to the DOJ.<sup>19</sup> In so doing, presidents—through their Attorneys General—have greater control of the administrative state. In particular, unlike agency solicitors (who are more beholden to oversight committee chairs than to the White House), the Attorney General is typically a close political ally of the president, often involved in the president’s personal and political life.<sup>20</sup> Correspondingly, since the mission of DOJ attorneys is to defend the interests of the United States (rather than a single agency whose interests may be in conflict with other agencies), there is less chance that either narrow constituent interests or congressional committees will capture the DOJ. Indeed, defenders of centralized litigation authority highlight the perceived need for the government to make consistent legal arguments across a range of cases.<sup>21</sup> More to the point, “DOJ attorneys may well see the president as their client.”<sup>22</sup> Indeed, as Sai Prakash and I have examined in our study of DOJ refusals to defend federal statutes, the DOJ fends off agency rivals and thereby enhances its status within the executive by advancing a pro-president legal policy agenda.<sup>23</sup>

Congress’s willingness to go along with DOJ control of litigation is a byproduct of the intensity of preferences within Congress and the executive branch. For reasons already noted, presidents push for centralization of litigation authority in the DOJ. The DOJ too is a fierce advocate for centralization; the power and prestige of the DOJ is tied to litigation authority, and the DOJ’s preference to control litigation far exceeds departmental and agency interests in decentralized arrangements. After all, agency heads have substantial power to advance policy preferences through their power to regulate and

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<sup>19</sup> See Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237, 256–58 (1996).

<sup>20</sup> See Devins & Herz, *supra* note 16, at 219.

<sup>21</sup> For a summary of DOJ arguments in support of centralized litigation authority, see The Attorney General’s Role as Chief Litigator for the United States, 6 Op. Att’y Gen. 47 (1982). For a fuller presentation and critique of those arguments, see Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558 (2003).

<sup>22</sup> Devins & Herz, *supra* note 16, at 219; see also Geoffrey P. Miller, *Government Lawyers’ Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1298 (1987). The DOJ, however, is not simply a lackey of the president; witness, in particular, the battle between President Trump and his DOJ.

<sup>23</sup> See Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 537–59 (2012); see also Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1105–06 (2013). In making this point, a distinction must be drawn between DOJ efforts to advance the president’s legal policy agenda and possible DOJ investigations into criminal conduct by high-ranking executive officials. The power of the DOJ is hinged both to its advocacy of the executive’s legal policy agenda and its reputation for neutrality in the pursuit of criminal investigations.



their work with congressional committees in shaping federal law.<sup>24</sup> More significantly, the DOJ's overseers in Congress are strong supporters of centralization. The power of the House and Senate Judiciary Committees is significantly moored to the power of the DOJ and, as such, the Judiciary Committees look for ways to strengthen DOJ control of litigation. For example, when other congressional committees contemplate shifting litigation authority away from DOJ and to a regulatory agency, the Judiciary Committees fight back. Michael Herz and I recount several such episodes in our study of DOJ centralization of litigation authority, including fights between the House Judiciary and Energy and Commerce Committees regarding the enforcement of environmental laws.<sup>25</sup>

The interests of the DOJ and Judiciary Committees also coalesce on judicial supremacy. Both are strong advocates of judicial power as the power of the DOJ and Judiciary Committees is moored to the courts. When the federal courts play a significant policy-making role, the power of the DOJ to speak the government's voice is at its apex, as is the power of the Judiciary Committees to oversee the DOJ. For this very reason, the DOJ embraces a duty to defend federal statutes that sees the Supreme Court as speaking the last word on the Constitution's meaning; as a result, the Senate Judiciary Committee typically demands that Solicitor General and Attorney General nominees formally commit to the defense of federal statutes.<sup>26</sup> Furthermore, Judiciary Committee members demonstrate respect for basic legal principles, "adher[ing] to formal rules against interfering in any way with ongoing litigation, and maintain[ing] a general policy that no bill should take effect retroactively."<sup>27</sup> In other words, unlike power committees who pay no attention to potential judicial roadblocks to favored policy initiatives, the Judiciary Committees are court-centric and conform to—rather than challenge—judicial limits on congressional power.<sup>28</sup>

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<sup>24</sup> See Devins & Herz, *supra* note 16, at 219 (explaining why agencies do not see litigation authority as core to their powers); see also Devins, *supra* note 3, at 1528–30 (highlighting agency role in drafting legislation).

<sup>25</sup> See Devins & Herz, *supra* note 16, at 221–22.

<sup>26</sup> For a discussion of DOJ views, see The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 43 Op. Att'y Gen. 275 (1980). For a general discussion of the incentives of the DOJ, Congress, and the White House, see Devins & Prakash, *supra* note 23, at 538–59.

<sup>27</sup> Mark C. Miller, *Congress and the Constitution: A Tale of Two Committees*, 3 SETON HALL CONST. L.J. 317, 338 (1993).

<sup>28</sup> See *id.* at 317–62 (contrasting House Judiciary Committee to Energy and Commerce Committee).

## B. Congress in Court

The fact that Congress largely leaves it to the DOJ to speak the government's voice in court does not mean that lawmakers never turn to the courts for recourse. In Section II, I will discuss lawmaker amicus filings as well as the practices of institutional counsel for the House and Senate—analysis that will highlight how party polarization has contributed to declining lawmaker interest in Congress's institutional authority vis-à-vis the president. In Section III, I will discuss court-imposed limits on the standing of disappointed lawmakers to defend Congress's institutional prerogatives. For the balance of this section, I will examine the political conditions that led to the establishment of institutional counsel—conditions that speak to the circumstances when Congress will overcome the disincentives that typically result in lawmaker disinterest in Congress's institutional authority.

The Office of Senate Legal Counsel was created by statute in 1978 as part of Watergate-era reforms to bolster congressional interests in separation of powers disputes; the Office of House Counsel was created by an administrative directive of the House Speaker Tip O'Neill in 1976.<sup>29</sup> Differences between the two offices reflect differences in the chambers. The House is controlled by the majority party and the House counsel essentially works for the majority party.<sup>30</sup> Senate norms traditionally favor bipartisanship and the Senate counsel acts at the behest of a supermajority of members from both parties.<sup>31</sup> Indeed, Senate norms of bipartisanship explain the unwillingness of the House to sign onto a joint congressional counsel that would serve both

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<sup>29</sup> See Grove & Devins, *supra* note 1, at 608–14. In addition to creating an Office of Senate Legal Counsel, Congress also mandates that the DOJ notify that office when it would not defend federal statutes (principally so that institutional counsel could defend congressional interests in separation of powers disputes). See 2 U.S.C. § 288e(a) (2006) (allowing the Senate counsel—when authorized—to appear in legal actions regarding “the powers and responsibilities of Congress under the Constitution”). The House Bipartisanship Legal Advisory Group (“BLAG”) directs the House counsel. See Grove & Devins, *supra* note 1, at 618. The BLAG is controlled by the majority party and has always backed majority party preferences.

<sup>30</sup> See Grove & Devins, *supra* note 1, at 618–19. In litigation defending the Defense of Marriage Act, the House counsel responded to Democratic complaints that it did not speak the voice of the entire House by acknowledging that it represents the views of the majority party. *Id.* In lower court filings, the counsel stated that although it “seeks consensus whenever possible, it functions on a majoritarian basis, like the institution it represents.” *E.g.*, Brief for Defendant–Appellant the Bipartisan Legal Advisory Group of the United States House of Representatives, *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (No. 12-2335), 2012 WL 3647722, at \*3 n.1.

<sup>31</sup> See Grove & Devins, *supra* note 1, at 612–21 (noting that Senate counsel action must be approved by two-thirds of a group made up of four members of the majority party and three members of the minority party).

chambers and serve as a bulwark against presidential power.<sup>32</sup> Notwithstanding arguments that “[n]either House acting alone can assert the prerogative of representing the Congress,”<sup>33</sup> House leadership feared that a nonpartisan joint office might not give voice to majority preferences in the House.

The willingness of lawmakers to back the creation of an Office of Senate Legal Counsel to advance the Senate’s institutional interests in the courts is a byproduct of unique political circumstances—so much so that the creation of this office is the exception, which proves the rule of lawmaker disinterest in protecting their institutional prerogatives. During the Watergate era (1972–1978), Democrats occupied every ideological niche and there were several liberal Republicans.<sup>34</sup> For this reason, George Wallace justified his third-party bid for the presidency by claiming that “there was not a ‘dime’s worth of difference’ between the two parties.”<sup>35</sup> Senate committees, for example, often made use of unified staff—rather than divide staff by majority or minority party.<sup>36</sup> With no meaningful ideological gap between the parties, bipartisanship was possible and Congress sometimes saw itself as an institution with a distinctive set of interests that set it apart from the White House. Nonetheless, lawmakers still needed to see personal political advantage in asserting Congress’s institutional interests and, as such, the previously discussed collective action problem typically stood as a roadblock to Congress’s asserting institutional interests, especially on matters as abstract as litigation authority. Watergate, however, made fears of presidential overreach politically salient and lawmakers rallied behind several significant legislative proposals designed to limit the president and protect Congress.<sup>37</sup> Congress enacted the

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<sup>32</sup> See *id.* at 612–13; see also Rebecca Mae Salokar, *Legal Counsel for Congress: Protecting Institutional Interests*, 20 CONGRESS & PRESIDENCY 131 (1993).

<sup>33</sup> *Public Officials Integrity Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearing on S. 555 Before the Comm. on Governmental Affairs*, 95TH CONG. 61 (1977) (statement of Sen. James Abourezk, D–S.D.).

<sup>34</sup> See SEAN M. THERIAULT, PARTY POLARIZATION IN CONGRESS 27–35 (2008); see also STEVEN S. SMITH & GERALD GAMB, *The Dynamics of Party Government in Congress*, in CONGRESS RECONSIDERED 147–49 (Lawrence C. Dodd & Bruce L. Oppenheimer eds., 9th ed. 2009).

<sup>35</sup> Richard Pearson, *Ex-Gov. George C. Wallace Dies at 79 in Alabama*, WASH. POST (Sept. 15, 1998), [https://www.washingtonpost.com/archive/local/1998/09/15/ex-gov-george-c-wallace-dies-at-79-in-alabama/f77a36e4-0689-4086-9b96-b0d9a293cd57/?utm\\_term=.f39de6268e8c](https://www.washingtonpost.com/archive/local/1998/09/15/ex-gov-george-c-wallace-dies-at-79-in-alabama/f77a36e4-0689-4086-9b96-b0d9a293cd57/?utm_term=.f39de6268e8c) [<http://perma.cc/4CEW-DRM5>].

<sup>36</sup> See Neal Devins, *The Academic Expert Before Congress: Observations and Lessons from Bill Van Alstyne’s Testimony*, 54 DUKE L.J. 1525, 1543 (2005).

<sup>37</sup> See Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today’s Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395, 401–06 (2009).

War Powers Resolution (overriding a presidential veto),<sup>38</sup> the 1974 Impoundment Control Act,<sup>39</sup> and the 1978 Ethics in Government Act.<sup>40</sup> All these statutes were politically popular; all these statutes responded to presidential overreach of core legislative powers.

In Section II, I will explain why today's Congress lacks the will and the way to assert institutional prerogative against the executive. Before doing so, let me close this section out by highlighting ways that institutional counsel—before polarization set in—defended congressional prerogatives in court. In the 1970s and 1980s, lawmakers were more willing to embrace a unified view of Congress's institutional prerogatives. In particular, rather than see themselves as Democrats or Republicans, lawmakers were sanguine with institutional counsel defending the constitutionality of federal statutes or seeking to enforce committee subpoenas against executive officials. Consider, for example, Congress's participation in two Reagan-era separation of powers disputes, *Immigration and Naturalization Services v. Chadha* (legislative veto) and *Bowsher v. Synar* (deficit reduction).<sup>41</sup> In both cases, counsel for the House and Senate participated in oral arguments and filed briefs supporting Congress.<sup>42</sup> In both cases, party identity did not matter—majority Democrats in *Chadha* initially litigated the dispute against the Carter administration; majority Senate Republicans litigated the *Synar* dispute against the Reagan administration.<sup>43</sup>

The ability and willingness of institutional counsel to advance Congress's institutional interests in a bipartisan way, as we will see, stands in stark contrast to practices in today's polarized Congress. At the same time, the participation of institutional counsel in earlier separation of powers disputes should not be seen as a departure from this section's central claims about lawmaker uninterest in institutional authority and lawmaker acquiescence to judicial supremacy. To start, institutional counsel embraced separation of powers litigation and believed in judicial supremacy. At the time of *Chadha* and *Bowsher*, the status of the lawyers in these offices

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<sup>38</sup> War Powers Resolution, 50 U.S.C. §§ 1541–48 (1973).

<sup>39</sup> Impoundment Control Act, 2 U.S.C. §§ 682–88 (1974).

<sup>40</sup> Ethics in Government Act, P.L. 95-521, 92 Stat. 1824 (1978).

<sup>41</sup> *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986).

<sup>42</sup> See Devins, *supra* note 10, at 950.

<sup>43</sup> In *Chadha*, no member of Congress filed an amicus brief. In *Bowsher*, there were two amicus briefs filed—one in support of the statute and one in opposition of the statute. These briefs were bipartisan. See *id.* at 1017–19.

hinged on their participation in *marque* separation of powers disputes—high profile cases where they were arguing against top DOJ lawyers, cases which often made their way to the Supreme Court.<sup>44</sup> In the case of the Senate counsel, the very purpose of her office was to provide a bipartisan institutional voice to Senate interests in separation of powers disputes against the president.<sup>45</sup> Likewise, the power of these lawyers derives from the power of the courts; institutional counsel pursue high visibility cases in court and embrace the Court's power to say what the law is. For their part, lawmakers in the pre-polarization era were generally uninterested in the work of institutional counsel and acquiesced to a system that largely ran itself. In other words, after lawmakers put in place institutional counsel in the Watergate era, lawmakers did not see these offices as partisan tools and passively went along with the efforts of these offices to advance Congress's institutional interests in court.<sup>46</sup>

## II. HOW PARTY POLARIZATION HAS CONTRIBUTED TO GROWING LAWMAKER DISINTEREST IN CONGRESSIONAL PREROGATIVES

Section I highlighted the collective action problem that limits lawmaker interest in institutional power disputes, including lawmaker support of DOJ control of government litigation. Section I also explained the creation of institutional counsel for Congress in the Watergate era, highlighting how the political salience of presidential power disputes overcame collective action limitations. In this section, I will focus on today's polarized Congress. I will highlight how polarization exacerbates the collective action problem. I will also look to changing practices in both institutional counsel litigation and lawmaker amicus filings to document the diminishing salience of institutional power disputes to members of Congress.

### A. Polarization and the Collective Action Problem

Polarization diminishes the ability of lawmakers to work together to defend Congress's institutional prerogatives. Unlike the Watergate era, today's lawmakers increasingly identify with party-defined messages and seek to gain power by advancing

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<sup>44</sup> I speak from personal experience. In 1985, I had preliminary conversations with then-Senate counsel Mike Davidson about working in his office.

<sup>45</sup> See Grove & Devins, *supra* note 1, at 611–13.

<sup>46</sup> I certainly do not mean to suggest that all lawmakers were disengaged in separation of powers disputes. During the pre-polarization period, there were certainly institutionally-minded members in the House or Senate who cared deeply about Congress's constitutional prerogatives. At the same time, these members were a fairly small minority and most members were subject to the collective action problem discussed earlier in this section.

within their respective party.<sup>47</sup> Correspondingly, Republicans and Democrats are increasingly at odds with each other and increasingly unlikely to find common ground. Measures of ideology reveal that all or nearly all Republicans are more conservative than the most conservative Democrats.<sup>48</sup> Likewise, with the demise of Northern Rockefeller Republicans and Southern Democrats, there is no meaningful ideological range within either party.<sup>49</sup>

The rise in party-line voting exemplifies this phenomenon. Unlike the Nixon impeachment (where—even before the release of Watergate tapes—seven of seventeen Republicans joined House Democrats in voting for articles of impeachment),<sup>50</sup> the “virtual party line votes in the House and the Senate” during the Clinton impeachment “reinforce[d] public perception of the intense partisanship underlying the proceedings.”<sup>51</sup> The filibuster is another example. In November 2013, the then-Democratic Senate made it more likely that presidential lower court nominations would be approved by repealing the filibuster for those nominees; in April 2017, the Republican Senate likewise made it more likely that presidential Supreme Court nominations would be approved by repealing the Supreme Court filibuster rule.<sup>52</sup> These examples, while striking, typify current practice: House Republicans vote with their party around

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<sup>47</sup> See Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 NW. U. L. REV. 737, 756–59 (2011); see also C. LAWRENCE EVANS, *Committees, Leaders, and Message Politics*, in CONGRESS RECONSIDERED 238 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed. 2001).

<sup>48</sup> See *The Polarization of the Congressional Parties*, VOTE VIEW (Jan. 18, 2013), web.archive.org/web/20131116022958/http://polarizedamerica.com/political\_polarization.asp.

<sup>49</sup> See Jason M. Roberts & Steven S. Smith, *Procedural Contexts, Party Strategy, and Conditional Party Voting in the U.S. House of Representatives, 1971–2000*, 47 AM. J. POL. SCI. 305, 314–15 (2003).

<sup>50</sup> See Richard K. Neumann, Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CON. L.Q. 161, 255 (2007). Republicans and Democrats also came together in subpoenaing information from the executive and going to court to seek enforcement of that subpoena. See *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 726–27 (D.C. Cir. 1974). For additional discussion, see Grove & Devins, *supra* note 1, at 600–01.

<sup>51</sup> MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 193 (2d ed. 2000).

<sup>52</sup> See Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES (Nov. 21, 2013), <https://nyti.ms/17Qt6DG>; see also Amy Davidson Sorkin, *Gorsuch Wins, The Filibuster Loses*, THE NEW YORKER (Apr. 6, 2017), <https://www.newyorker.com/news/amy-davidson/gorsuch-wins-the-filibuster-loses> [<http://perma.cc/3PHE-CAEJ>]. In September 2017, Senate Republicans threatened to do away with the so-called blue slip, a practice which allows Senators from the state of residence of a federal judicial nominee to delay or potentially block a vote on the nominee. See Karoun Demirjian, *McConnell Wants to End Practice of Allowing Senators to Block Appeals Court Judges*, WASH. POST (Sept. 13, 2017), [https://www.washingtonpost.com/powerpost/senate-gop-leader-wants-to-end-practice-of-allowing-senators-to-block-circuit-court-judges/2017/09/13/d10aa028-98d9-11e7-87fc-c3f7ee4035c9\\_story.html?utm\\_term=.81217b34d9a0](https://www.washingtonpost.com/powerpost/senate-gop-leader-wants-to-end-practice-of-allowing-senators-to-block-circuit-court-judges/2017/09/13/d10aa028-98d9-11e7-87fc-c3f7ee4035c9_story.html?utm_term=.81217b34d9a0) [<http://perma.cc/UQZ9-AR5U>].

ninety-two percent of the time and Senate Democrats vote with their party around ninety-four percent of the time.<sup>53</sup>

When it comes to oversight and hearings, party identity is also key. Majority and minority staff no longer work together; each side, instead, calls witnesses who support preexisting party views.<sup>54</sup> Oversight too is contingent on party identity. When the majority party is the same as the president, oversight is lax; when the government is divided, oversight is a top priority.<sup>55</sup> Correspondingly, the House majority is willing to seek judicial enforcement of subpoenas against high-ranking executive officials during periods of divided government. When Democrats controlled the House in 2007, the Bush administration's firing of U.S. attorneys prompted extensive oversight and litigation.<sup>56</sup> In the Fast and Furious gun running case of 2012–2013, Republicans targeted Obama Attorney General Eric Holder.<sup>57</sup> In both these disputes, the minority filed competing briefs urging judicial restraint.<sup>58</sup>

Party polarization, finally and most significantly, contributes both to the rise of presidential unilateralism and to Congress's acquiescence to judicial supremacy. Members of the president's party are unlikely to check presidential priorities and, consequently, the opposition party is unlikely to forge a bipartisan coalition to check presidential power.<sup>59</sup> Moreover, the

<sup>53</sup> Elahe Izadi, *Congress Sets Record for Voting Along Party Lines*, NAT'L J. (Feb. 3, 2014), <https://www.nationaljournal.com/s/62617> [<http://perma.cc/9GLY-ND99>].

<sup>54</sup> See Neal Devins, *The Academic Expert Before Congress: Observations and Lessons from Bill Van Alstyne's Testimony*, 54 DUKE L.J. 1525, 1544 (2005).

<sup>55</sup> See Devins, *supra* note 37, at 409.

<sup>56</sup> See Philip Shenon, *As New 'Cop on the Beat,' Congressman Starts Patrol*, N.Y. TIMES (Feb. 6, 2007), <http://www.nytimes.com/2007/02/06/us/politics/06waxman.html>.

<sup>57</sup> See John Bresnahan & Seung Min Kim, *Holder Held in Contempt of Congress*, POLITICO (June 28, 2012, 5:47 PM), <http://www.politico.com/story/2012/06/holder-held-in-contempt-of-congress-077988> [<http://perma.cc/8STK-YLEE>]. Another manifestation of polarization's impact on Executive Branch-Congress dynamics is the March 2018 decision of the Trump administration to turn over Obama-era documents on the Fast and Furious investigation to Republican-led Congress. See Sarah N. Lynch, *Trump administration to provide records on Obama-era gun-smuggling probe*, REUTERS (Mar. 7, 2018, 9:21 AM), <https://www.reuters.com/article/us-usa-justice-guns/trump-administration-to-provide-records-on-obama-era-gun-smuggling-probe-idUSKCN1GJ2KH> [<http://perma.cc/DL54-VBTK>].

<sup>58</sup> See Jordy Yager, *Dems File Brief Urging Court to Dismiss Issa's Contempt Suit Against Holder*, THE HILL (Dec. 19, 2012, 9:34 PM), <http://thehill.com/homenews/house/273827-dems-file-brief-urging-court-to-dismiss-issas-contempt-suit-against-holder.com> [<http://perma.cc/MN5W-KP94>]. The partisan divide in these cases stands in sharp contrast to the bipartisan efforts of the Watergate-era Congress to go to court to enforce a subpoena against President Nixon. For additional discussion, see *supra* note 50 and accompanying text.

<sup>59</sup> I do not mean to suggest that the president's party will never stand up to the president. In 2017, Republicans in Congress joined Democrats to back sanctions legislation against Russia for its meddling in the 2016 elections—legislation which was seen as a rebuke to President Trump. See Elana Schor, *Congress Sends Russia Sanctions to Trump Desk, Daring a Veto*, POLITICO (July 27, 2017, 1:55 PM),

prospects of both parties coming together to advance Congress's institutional interests through the enactment of legislation is less likely in divided government (and we have had divided government thirty-six of the past fifty years). The result: presidents act unilaterally and Congress stands aside. Sometimes presidents advance new policies through executive orders (Clinton on health care; Bush on faith based initiatives; Obama on immigration);<sup>60</sup> sometimes presidents take greater control of the administrative state through Office of Management and Budget regulatory review and related coordinating techniques.<sup>61</sup>

Polarization facilitates judicial supremacy for much the same reason. Lawmakers are increasingly at odds about preferred policies; on matters before the courts, lawmakers—as I will soon discuss—increasingly file conflicting Democrat and Republican amicus briefs. Consequently, courts are emboldened, as it is close to unimaginable that lawmakers will stand together to advance pro-Congress positions in ways that courts would take into account.<sup>62</sup> Polarization furthers judicial supremacy in other ways. For example, polarization has resulted in a shift of power away from congressional committees and to party leaders—so much so that committee hearings related to constitutional and statutory interpretation are now dominated by the court-centric Judiciary Committees.<sup>63</sup>

## B. Polarization and Amicus Briefs<sup>64</sup>

Lawmakers regularly file amicus briefs in federal court litigation, especially before the Supreme Court. From 1974–1985,

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<http://www.politico.com/story/2017/07/27/russia-sanctions-bill-senate-to-pass-241034> [<http://perma.cc/TM7H-4FQH>]. At the same time, my bottom line claim is valid, that is, today's lawmakers rarely have incentive to check a president of their own party. Indeed, Congressional Republicans backed President Trump's efforts to discredit his own Department of Justice and FBI by releasing memos and conducting oversight favorable to the president. *See also infra* note 93 and accompanying text (discussing Republican support for President Trump during the first months of his presidency). For a provocative argument that Congress retains its core powers to check the president and that the failure to act speaks more about the situational use of power (rather than the diminution of power tied to polarization), see JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS (2017).

<sup>60</sup> *See* Moe and Howell, *supra* note 4, at 165–66 (noting that only 3 of 1000 executive orders from 1973–1998 were overridden by legislation). For a more complete (and current) inventory, see WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 112–20 (2003).

<sup>61</sup> *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247–49 (2001).

<sup>62</sup> *See* Devins, *supra* note 3, at 1518–19; *see also* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 14–17 (1998) (arguing that the Supreme Court calibrates its decisions to take into account the possibility of congressional disapproval).

<sup>63</sup> *See* Devins, *supra* note 36, at 762–63.

<sup>64</sup> This subsection is drawn from Devins, *supra* note 10.



930 lawmakers signed onto fifty-two briefs in forty-five cases; from 2002–2013, those numbers skyrocketed—3807 lawmakers signed onto one hundred fifty briefs in eighty-six cases.<sup>65</sup> This spike in filings, however, does not speak to greater lawmaker interest in Congress’s institutional authority, nor greater congressional influence before the Court. In fact, differences between the less polarized 1974–1985 period and the highly polarized 2002–2013 period speak both to the rise of partisanship in lawmaker briefs and a shift away from less divisive separation of powers cases to salient divisive issues like abortion, health care, and gay rights. During the 1974–1985 period, fifteen briefs (twenty-nine percent) were filed on social issues and twenty (thirty-eight percent) were filed on institutional issues.<sup>66</sup> During the 2002–2013 period, fifty-two (thirty-five percent) were filed on social issues and forty-three (twenty-nine percent) were filed on institutional issues.<sup>67</sup> Individual lawmakers were twice as likely to sign onto social issue briefs (1822 lawmakers; forty-eight percent) than institutional briefs (926 signatories; twenty-four percent).<sup>68</sup> In the earlier period, lawmakers signed onto comparable numbers of social and institutional issue briefs (388 lawmakers, forty-two percent for social issue briefs; 372 lawmakers, forty percent for institutional).<sup>69</sup>

More striking, today’s lawmakers focus almost exclusively on the underlying policy dispute. Briefs are filed in cases that do not implicate congressional power (affirmative action and legislative prayer are two recent examples).<sup>70</sup> The question of whether congressional power is expanded or limited is of secondary importance. Democrats backed the Affordable Care Act and campaign finance laws and opposed the Defense of Marriage Act; Republicans were on the opposite side of both issues.<sup>71</sup>

A closer look at abortion and separation of powers filings backs up these claims. For abortion, lawmakers did not file any amicus briefs in cases implicating state regulatory authority until 1986; in 1980, a bipartisan coalition of 238 lawmakers (104 Democrats, 135 Republicans) filed a brief arguing that lawmaker control over the appropriations process extended to the decision not to fund abortions.<sup>72</sup> Starting in 1986, however, lawmakers

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<sup>65</sup> *Id.* at 942–43.

<sup>66</sup> *Id.* at 945–46.

<sup>67</sup> *Id.* at 946.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 995–96, 999–1000.

<sup>71</sup> *Id.* at 992–94, 998–99.

<sup>72</sup> See Brief of Rep. Jim Wright et al. as Amici Curiae, *Harris v. McRae*, 448 U.S. 297 (1980) (No. 79-1268), 1980 WL 339672, at \*1–5.

began to file in state as well as federal cases; partisan divisions also emerged. Initially, competing briefs were filed by coalitions dominated by Republicans or Democrats (pro-choice briefs were ninety percent Democrats and pro-life briefs were ninety percent Republicans).<sup>73</sup> By 2014, most briefs were exclusively Democrat or Republican filings. In the 2014 *Burwell v. Hobby Lobby* case (involving the contraceptive mandate of the Affordable Care Act), four of five briefs were one party briefs.<sup>74</sup>

Abortion briefs are striking for another reason—hundreds of lawmakers sign onto these briefs (an average of 171 signatories per case).<sup>75</sup> In other words, lawmakers see abortion briefs as an opportunity to register a policy preference on an issue that divides the party. Lawmakers no longer care whether the underlying issue implicates state or federal power. More striking, even in cases implicating federal power, lawmakers now care only about pro-choice or pro-life preferences and not about the scope of federal power. Today, it is inconceivable that a broad bipartisan coalition would back legislative power—as they did in the 1980 abortion funding case.<sup>76</sup> Instead, Democrats will resist federal power to restrict abortion rights and back federal power to guarantee abortion access; Republican views of federal power are likewise contingent on whether pro-choice or pro-life policy outcomes are at play. In the 2007 *Gonzales v. Carhart* case, for example, Republicans uniformly backed and Democrats uniformly resisted congressional power to impose a federal partial birth abortion ban.<sup>77</sup>

Amicus filings in separation of powers cases highlight both the growth of partisanship and the declining importance of separation of powers issues to lawmakers. As noted, today's lawmakers are less likely to participate in disputes implicating institutional power and less likely to sign onto briefs in cases where briefs are filed. While House and Senate counsel participation may deflate the number of signatories (a topic I will address in the next subsection), it is quite clear that there is less

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<sup>73</sup> Devins, *supra* note 10, at 947.

<sup>74</sup> *Id.* at 948.

<sup>75</sup> *Id.* One hundred and seventy-one is the average number of briefs studied in my earlier research on congressional amici.

<sup>76</sup> In 2014, House Republican leadership filed a lawsuit against Obama administration implementation of the Affordable Care Act—claiming that the administration usurped Congress's appropriations power. For their part, Democratic leadership filed competing briefs—advancing a narrower view of the appropriations power. See Brief of Amici Curiae Members of Congress in Support of Defendants' Motion for Summary Judgment, *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53 (D.D.C. 2015) (No. 1:14-cv-01967-RMC), 2015 WL 10376844.

<sup>77</sup> Devins, *supra* note 10, at 1014–15. All 152 Republican signatories supported the law. Ninety-nine out of one hundred and one Democrat signatories opposed.

interest in staking out a position in a separation of powers dispute than a case implicating abortion or some other social issue. For example, throughout the enemy combatant dispute, a total of sixteen lawmakers signed amicus briefs and no amicus briefs were filed by the House or Senate counsel.<sup>78</sup> Additionally, when an amicus brief is filed, there are relatively few brief signers—roughly nineteen per brief as compared to 171 in abortion cases.<sup>79</sup>

Separation of powers filings are revealing for other reasons.<sup>80</sup> First, there is a growing trend towards partisan filings; recent examples include George W. Bush litigation over enemy combatants, Barack Obama litigation over recess appointments and immigration, Donald Trump litigation over immigration.<sup>81</sup> Second, although some bipartisan briefs were filed, lawmakers were not motivated by a desire to preserve or expand congressional power. In litigation over the item veto in the 1990s, lawmakers defended delegating legislative power to the president in order to facilitate their reputations as deficit hawks.<sup>82</sup> In related 2012 and 2014 litigation over the authority of Congress to allow individuals born in Jerusalem to list Israel as their place of birth, brief signers were interested in reaffirming their support for Israel.<sup>83</sup>

Lawmaker amicus briefs reflect growing polarization in Congress, including growing lawmaker disinterest in issues implicating Congress's institutional power. Moreover, with increasing attention paid to short-term goals tied to advancing party policy priorities, lawmakers are increasingly apt to file briefs highlighting limits in legislative power. Relatedly, today's amicus briefs largely cancel each other out—coalitions of Democrats and Republicans make competing arguments about constitutionality so that there are roughly as many briefs arguing that Congress is without authority as arguing that Congress has constitutional authority. And if that isn't enough—these briefs are further limited by the fact that Republicans and Democrats are inconsistent in their positions

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<sup>78</sup> *Id.* at 949.

<sup>79</sup> *Id.* at 948. Nineteen is the average number of studied briefs in my earlier research.

<sup>80</sup> The balance of this paragraph is largely lifted from *id.* at 949–50.

<sup>81</sup> *Id.* at 949; see also Seung Min Kim, *Dem Lawmakers Back Brief Supporting Obama's Immigration Action*, POLITICO (Mar. 8, 2016, 9:00 AM), <https://www.politico.com/story/2016/03/obama-immigration-action-democrats-amicus-brief-220419> [<http://perma.cc/BH6G-4L5N>]; Tal Kopan, *Congressional Democrats Join Court Challenge to Trump's Travel Ban*, CABLE NEWS NETWORK (Feb. 15, 2017, 3:28 PM), <http://www.cnn.com/2017/02/15/politics/democrats-amicus-brief-trump-travel-ban/index.html> [<http://perma.cc/9YT3-CFG4>].

<sup>82</sup> Devins, *supra* note 10, at 949–50.

<sup>83</sup> *Id.* at 950.

over time. The flashpoint in these briefs is the underlying policy issue and not the more abstract question regarding the scope of congressional power. For reasons I will now detail, changes in the role of institutional counsel in Congress also demonstrate growing partisanship and polarization in separation of powers disputes.

### C. Polarization and the Changing Role of Institutional Counsel

Party polarization has reshaped the role of institutional counsel. Gone are the days where institutional counsel served as a bulwark against a too powerful executive—defending the House and Senate in separation of powers lawsuits, typically speaking the voice for both Democrats and Republicans.<sup>84</sup> Indeed, in the period before polarization, lawmakers typically did not file amicus briefs and typically backed Congress as an institution when they did file amicus briefs.<sup>85</sup> At that time, the House and Senate counsel often worked in tandem, participating in the same cases and advancing the shared institutional interests of the House and Senate in a strong Congress.<sup>86</sup> Today, House-Senate differences are on prominent display as polarization has transformed the role of institutional counsel in ways that reflect profound differences between the House and Senate.

The Senate counsel was designed to reflect Senate norms of bipartisanship and consensus. From 1978 (when the Office of Senate Legal Counsel was first created) until 1995, the Senate counsel regularly participated in litigation involving the separation of powers. However, polarization has made bipartisan consensus next to impossible; as a result, the Senate counsel is largely moribund in the very separation of powers disputes that were core to the creation of the office. With one notable exception (that I will soon discuss), the Senate counsel has not locked horns with the executive and defended congressional prerogatives before the Supreme Court in any separation of powers dispute since 1995.<sup>87</sup> For example, in a 2014 dispute over the president's

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<sup>84</sup> See Devins, *supra* note 10, at 950.

<sup>85</sup> See Grove & Devins, *supra* note 1, at 617; Devins, *supra* note 10, at 950.

<sup>86</sup> See Grove & Devins, *supra* note 1, at 614–22 (discussing efforts of House and Senate counsel to coordinate filings in separation of powers litigation).

<sup>87</sup> See *id.* at 617; see also Neal Devins, *Counsel Rests*, SLATE (Jan. 13, 2014, 5:55 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/01/the\\_senate\\_s\\_lawyer\\_doesn\\_t\\_participate\\_in\\_important\\_litigation\\_against.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/01/the_senate_s_lawyer_doesn_t_participate_in_important_litigation_against.html) [<http://perma.cc/3T3R-EU3N>]. In a 2015 dispute regarding a federal statute intended to facilitate the collection of money judgments brought by victims of terrorists acts, the Senate Counsel and Department of Justice both filed amicus briefs backing up congressional authority. See Brief for the U.S. as Amicus Curiae Supporting Respondents, *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016) (No. 14-770), 2015 WL 9412676; Brief of Amici Curiae Former Senior Officials of

purported end-running of the Senate's confirmation power through the use of recess appointments, the Senate counsel stood on the sidelines while counsel for Senate Republicans filed briefs and made oral arguments before both the D.C. Circuit and Supreme Court.<sup>88</sup>

The one case where the Senate counsel did participate, *Zivotofsky v. Kerry*, is the exception that proves the rule. The issue in *Zivotofsky* was whether Congress could override State Department policy to disallow individuals born in Jerusalem to claim on their passports that they were born in Israel (so that their passports would designate their birthplace as Jerusalem and not Israel).<sup>89</sup> Senate Democrats and Republicans did not come together to defend Senate prerogatives; they came together to support Israel. Lawmakers who signed amicus briefs in the case included some of the most liberal Democrats and some of the most conservative Republicans.<sup>90</sup> These lawmakers regularly signed onto single party briefs in other cases, but were united in their support of Israel. Indeed, while 333 signatories of a pro-Congress amicus brief signed a letter to President Obama affirming the "commitment to the unbreakable bond that exists between our country and the state of Israel,"<sup>91</sup> no member of the *Zivotofsky* coalition spoke about the case's separation of powers implications on either the House or Senate floor.<sup>92</sup>

On the House side, polarization has played out in fundamentally different ways, reflecting the fact that the House counsel speaks the voice of the House majority. During periods of unified government, the House typically leaves the president alone—seeing the president as the leader of their party and

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the Office of Legal Counsel in Support of Respondents, *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016) (No. 14-770), 2015 WL 9412677.

<sup>88</sup> See Devins, *supra* note 87. For their part, Senate Democrats too stood on the sidelines, not wanting to embrace a circumscribed confirmation power and not wanting to join Senate Republicans in their efforts to limit Obama administration efforts to fill judicial and administrative vacancies. *Id.* In *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2556–57 (2014), the Supreme Court unanimously rejected Obama administration arguments and backed a larger Senate role.

<sup>89</sup> *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2081–83 (2015). The Supreme Court ruled that the president has complete power of recognition and that Congress cannot override that power by statute. *Id.* at 2096.

<sup>90</sup> Devins, *supra* note 10, at 954.

<sup>91</sup> Letter by Representatives Steny Hoyer and Eric Cantor to Secretary of State Hillary Clinton Reaffirming the U.S.-Israel Alliance, AIPC (Mar. 26, 2010), [https://www.aipac.org/-/media/publications/policy-and-politics/source-materials/congressional-action/2010/3\\_26\\_10\\_letter\\_to\\_secretary\\_of\\_state\\_re\\_us\\_commitment\\_to\\_israeli\\_security\\_and\\_middle\\_east\\_peace.ashx](https://www.aipac.org/-/media/publications/policy-and-politics/source-materials/congressional-action/2010/3_26_10_letter_to_secretary_of_state_re_us_commitment_to_israeli_security_and_middle_east_peace.ashx). That letter was sent by 333 House members; a nearly identical letter was sent by seventy-six Senators. See Ben Smith, *76 Senators Sign on to Israel Letter*, POLITICO (Apr. 13, 2010, 4:21 PM), <http://www.politico.com/blogs/ben-smith/2010/04/76-senators-sign-on-to-israel-letter-026380> [<http://perma.cc/N5GN-Y4CG>].

<sup>92</sup> Devins, *supra* note 10, at 954.

someone to shield from opposition party criticism.<sup>93</sup> Oversight is lax and the president and House speaker sound similar messages on the issues that divide the parties. Needless to say, the House counsel is not engaged in litigation disputes with the White House during periods of unified government.<sup>94</sup>

During periods of divided government, however, the House is increasingly willing to challenge presidential actions in court, including lawsuits against presidential initiatives and subpoena enforcement actions. As discussed earlier, the Democratic House sought to enforce subpoenas against the George W. Bush administration and the Republican House likewise sought to enforce subpoenas against the Obama administration.<sup>95</sup> More telling, the Republican House challenged Obama administration implementation of the Affordable Care Act, claiming that the administration “spent billions of unappropriated dollars to support the Patient Protection and Affordable Care Act” and that “under the guise of implementing regulations, effectively amended the Affordable Care Act’s employer mandate by delaying its effect and narrowing its scope.”<sup>96</sup> The House too has pursued the defense of federal statutes that the executive refuses to defend. Recent examples include Miranda override legislation

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<sup>93</sup> The Trump administration may ultimately become the exception that proves the rule. At least until January 2018, however, Republicans in Congress—notwithstanding some public criticism of the president—have largely backed President Trump and certainly Republican lawmakers have not gone to court to challenge the president. See Aaron Bycoffe, *Tracking Congress in the Age of Trump*, FIVETHIRTYEIGHT (Sept. 14, 2016 3:24 PM), <https://projects.fivethirtyeight.com/congress-trump-score/> [<http://perma.cc/CG7L-YBV3>]. Indeed, House Republicans backed President Trump’s efforts to discredit his own bureaucracy by releasing a memo critical of the FBI. See *supra* note 59. At the same time, there is reason to think that Republicans in Congress may see personal advantage in criticizing the president and, as such, Congress may eventually step up its oversight of the Trump administration. In late September 2017, for example, Republican House overseers joined Democrats in seeking information regarding Trump administration officials’ use of personal emails to conduct government business. See Mike DeBonis, *Gowdy Joins Democrats in Probing Trump Administration’s Use of Personal Email*, WASH. POST (Sept. 25, 2017), [https://www.washingtonpost.com/news/powerpost/wp/2017/09/25/gowdy-joins-democrats-in-probing-trump-administration-use-of-personal-email/?utm\\_term=.174e3bea8e4a](https://www.washingtonpost.com/news/powerpost/wp/2017/09/25/gowdy-joins-democrats-in-probing-trump-administration-use-of-personal-email/?utm_term=.174e3bea8e4a) [<http://perma.cc/EKE6-7ZAC>].

<sup>94</sup> The only exception is a low salience separation of powers dispute regarding the Federal Advisory Committee Act in 1993. See Memorandum from Jennifer Casazza, DOJ Decline Defense Congressional Participation 6 (on file with author) (discussing the House Counsel’s participation in *Association of American Physicians and Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993)).

<sup>95</sup> See Shenon, *supra* note 56; Bresnahan & Kim, *supra* note 57.

<sup>96</sup> U.S. House of Representatives. v. Burwell, 130 F. Supp. 3d 53, 57 (D.D.C. 2015). The House also appeared as amicus in backing a state challenge to Obama administration immigration initiatives. For additional discussion, see Brief for 172 Members of the U.S. House of Representatives and 40 U.S. Senators as Amicus Curiae in Support of Respondent Edith Schlain Windsor, *infra* note 106.

(*Dickerson v. United States*) and the Defense of Marriage Act (*United States v. Windsor*).<sup>97</sup>

*Dickerson* and *Windsor* reveal the profound impact of polarization on the work of the House counsel. In periods of divided government, the House counsel will advance majority party preferences. In part, this means that the House counsel will engage in disputes that have nothing to do with the separation of powers—as the focus is advancing the policy agenda of the House (and, for reasons discussed, separation of powers gives way to social issues when Congress is polarized).<sup>98</sup> In part, this means that the minority party in Congress will publicly take issue with the House counsel. In both *Dickerson* and *Windsor*, the House minority filed a competing brief to make clear that the House counsel was both wrong on the merits and spoke only for the majority party.<sup>99</sup> Institutional power disputes follow a similar script. The minority party will make competing filings and the House counsel will focus her energies on highly politicized matters, especially investigations intended to embarrass high-ranking Executive Branch officials. Recent examples include Democratic investigations of the U.S. Attorneys' firings under George W. Bush and Republican investigations of Attorney General Eric Holder's handling of the Fast and Furious gun smuggling scheme.<sup>100</sup>

In today's polarized Congress, the House and Senate counsel no longer represent Congress's institutional interests in disputes with the president. The Senate counsel is largely enfeebled by bipartisanship requirements. The House counsel represents the majority party and is only interested in checking the president during periods of divided government. Moreover, the House counsel largely limits her intervention to highly politicized disputes that divide Republicans and Democrats—so much so that the minority party increasingly rebuts House counsel filings with opposition briefs. Finally, as was true with lawmaker amicus filings, institutional disputes are less critical to institutional counsel and the social issues that divide the

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<sup>97</sup> See Grove & Devins, *supra* note 1, at 618; see also *Dickerson v. United States*, 530 U.S. 428 (2000); *United States v. Windsor*, 570 U.S. 744 (2013).

<sup>98</sup> See Shenon, *supra* note 56; Bresnahan & Kim, *supra* note 57.

<sup>99</sup> See Brief Amicus Curiae of the House Democratic Leadership in Support of Petitioner, *Dickerson v. United States*, 530 U.S. 428 (2000) (No. 99-5525), 2000 WL 126192; Jennifer Bendery, *Defense of Marriage Act: House Republicans Tie Federal Gay Marriage Ban to House Rules*, HUFFINGTON POST (Jan. 23, 2014), [http://www.huffingtonpost.com/2013/01/02/defense-of-marriage-act\\_n\\_2399383.html](http://www.huffingtonpost.com/2013/01/02/defense-of-marriage-act_n_2399383.html) [<http://perma.cc/3XJR-ZC64>].

<sup>100</sup> See Shenon, *supra* note 56; Brian Montopoli, *So Is This U.S. Attorney Purge Unprecedented Or Not?*, CBS NEWS (Mar. 14, 2007, 5:17 PM), <https://www.cbsnews.com/news/so-is-this-us-attorney-purge-unprecedented-or-not/> [<http://perma.cc/73UP-WEHQ>]; Bresnahan & Kim, *supra* note 57.

parties are increasingly likely to spill over to the work of institutional counsel.

### III. CONCLUSION: WHY EXPANDING LAWMAKER STANDING IS NOT THE SOLUTION TO CONGRESSIONAL DYSFUNCTION

In turning back a lawsuit by members of Congress who challenged the Reagan administration for subverting Congress's war making powers by backing the Contras, then-judge Ruth Bader Ginsburg claimed that "Congress has formidable weapons at its disposal—the power of the purse and investigative resources far beyond those available in the Third Branch. . . . 'If the Congress chooses not to confront the President, it is not our task to do so.'"<sup>101</sup> This claim made sense in 1985 and even in 1993 when Judge Ginsburg was confirmed to the Supreme Court by a resounding bipartisan vote of 96–3;<sup>102</sup> at that time, the seeds of polarization were planted but had not yet taken hold of Congress. Today, the natural disinclinations of lawmakers to invest in Congress as an institution have metastasized. The era of presidential unilateralism has now taken hold as Congress lacks the will and way to check the president and advance its institutional interests.<sup>103</sup>

The question remains: Should the courts fill that void by providing avenues for disappointed lawmakers to challenge the president? After all, our system of checks and balances anticipates some check on presidential unilateralism and judicial intervention seems far more likely than Congress coming together in a bipartisan way to place limits on presidential entreaties. For institutionally minded lawmakers, court filings may be the only real vehicle available to check the president's expansionist tendencies.

For the balance of this essay, I will explain why polarization does not cut in favor of an expanded judicial role—notwithstanding the fact that polarization cuts against

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<sup>101</sup> Sanchez-Espinoza v. Reagan, 770 F.2d 202, 211 (D.C. Cir 1985) (Ginsburg, J., concurring).

<sup>102</sup> Linda Greenhouse, *Senate, 96-3, Easily Confirms Judge Ginsburg as a Justice*, N.Y. TIMES (Aug. 4, 1993), <http://www.nytimes.com/1993/08/04/us/senate-96-3-easily-affirms-judge-ginsburg-as-a-justice.html>.

<sup>103</sup> As noted earlier, the Trump administration may become the exception that proves this rule. See Moe & Howell, *supra* note 4, at 138. Republicans (as of January 2018) are generally backing the president and, consequently, reinforcing the central claims of this essay. That may change and that change may add nuance to the claims made in this paper. Nonetheless, I truly doubt that the actions of Congress during the Trump era will undermine my central claims regarding congressional incentives. Furthermore, a tick up in congressional oversight would cut in favor of my bottom line conclusions regarding legislator standing to challenge the executive in court.



Congress asserting its institutional prerogatives through the legislative process. My argument is two-fold. First, lawmakers will increasingly turn to the courts for partisan ends and, relatedly, it is increasingly likely that there will be competing factions of Democratic and Republican filings. In other words, lawmakers will see courts as one more vehicle to articulate party preferences and call attention to differences between the two parties. These lawmakers speak for their political party; they do not speak Congress's institutional voice.

Consider four recent cases where the House of Representatives squared off against the Obama administration—*Committee on Oversight and Government Reform v. Holder* (where the House sued Attorney General Holder for failing to turn over requested documents in its Fast and Furious investigation); *United States House of Representatives v. Burwell* (where the House sued the Obama administration for implementing the Affordable Care Act in ways that allegedly undermined House prerogatives); *United States v. Windsor* (where the House defended before the Supreme Court the DOMA after the Obama administration refused to defend); and *United States v. Texas* (where the House appeared before the Supreme Court as amicus to challenge Obama's immigration directive).<sup>104</sup> In all four cases, Republican lawmakers sought to embarrass the Obama administration and/or advance favored policy priorities in the courts;<sup>105</sup> in all four cases, Democratic lawmakers filed competing briefs defending the Obama administration.<sup>106</sup> Needless to say, if Democrats controlled the House there would be a raft of lawsuits challenging the Trump administration.<sup>107</sup> Indeed, Democratic

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<sup>104</sup> See Comm. on Oversight and Gov't Reform v. Holder, 979 F. Supp. 2d 1 (D.D.C. 2013); U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53 (D.D.C. 2016); United States v. Windsor, 133 S. Ct. 2675 (2013); United States v. Texas, 136 S. Ct. 2271 (2016).

<sup>105</sup> See Bresnahan & Kim, *supra* note 56 (discussing Holder); see also *Burwell*, 130 F. Supp. 3d 53; Grove & Devins, *supra* note 1, at 618–19 (discussing DOMA); Brief for Amicus Curiae the United States House of Representatives in Support of Respondents, United States v. Texas, 809 F.3d 134 (5th Cir. 2015) (No. 15-674), 2016 WL 1377718.

<sup>106</sup> See Yager, *supra* note 58; Brief of Amicus Curiae Members of Congress in Support of Defendants' Motion for Summary Judgment, U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53 (D.D.C. 2015) (No. 1:14-cv-01967-RMC), 2015 WL 10376844; Brief of 172 Members of the U.S. House of Representatives and 40 U.S. Senators as Amicus Curiae in Support of Respondent Edith Schlain Windsor, Urging Affirmance on the Merits, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 840029; Brief of 186 Members of the U.S. House of Representatives and 39 Members of the U.S. Senate as Amici Curiae in Support of Petitioners, United States v. Texas, 809 F.3d 134 (5th Cir. 2015) (No. 15-647), 2016 WL 891342.

<sup>107</sup> For this very reason, there are real costs to a regime in which institutional counsel for the House have standing to speak the House's voice without allowing minority party lawmakers access to the courts to raise institutional power claims. Specifically, during periods of unified government, Congress would be mute. See Bycoffe, *supra* note 93. During periods of divided government, Congress would be active—but only presidential

state Attorneys Generals have launched more than a dozen lawsuits against the Trump administration and Democrats in Congress have also launched lawsuits.<sup>108</sup> For example, almost 200 Congressional Democrats have filed a lawsuit claiming that President Trump violated the Foreign Emoluments Clause by accepting benefits from foreign states without first seeking to obtain the consent of Congress.<sup>109</sup>

There is little question that opposition party lawmakers are now locked and loaded; they will go to court whenever possible to strengthen their base, advance their agenda, and—whenever possible—embarrass the president. None of this is to say that the House and Senate never have standing to defend institutional prerogatives. Indeed, I have previously written (with Tara Grove) that House and Senate counsel can seek judicial enforcement of subpoenas.<sup>110</sup> In particular, the House and Senate need not act as a bicameral body when it comes to implementing the “rules of . . . proceedings” of their respective chambers;<sup>111</sup> it therefore

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opponents would speak Congress’s voice. To the extent that the Supreme Court signaled potential approval of such a regime in *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2657 (2015), the Court should rethink its approach to lawmaker and institutional standing. For further discussion of the *Arizona* case, see Sant’Ambrogio, *supra* note 2, at 1540.

<sup>108</sup> See Michael Levenson, *Maura Healey’s Top Target These Days is Donald Trump*, BOS. GLOBE (June 24, 2017), <https://www.bostonglobe.com/metro/2017/06/23/healey/8C3t7IXZZWENRHKlVqbIK/story.html> [<http://perma.cc/R9ET-ZK63>]. For a particularly revealing look at the efforts of New York Attorney General Eric Schneiderman’s efforts to wage legal warfare with President Trump, see Danny Hakim & William K. Rashbaum, *New York’s Attorney General in Battle with Trump*, N.Y. TIMES (Dec. 26, 2017), [https://www.nytimes.com/2017/12/26/nyregion/eric-schneiderman-attorney-general-new-york.html?\\_r=0](https://www.nytimes.com/2017/12/26/nyregion/eric-schneiderman-attorney-general-new-york.html?_r=0).

<sup>109</sup> See *Blumenthal v. Trump*, Complaint, No. 17-cv-01154, 2017 WL 2561946 (D.D.C. June 14, 2017). A related lawsuit filed by the Citizens for Responsibility and Ethics in Washington was dismissed for want of standing. See David A. Fahrenthold & Jonathan O’Connell, *Judge dismisses lawsuit alleging Trump violated Constitution*, WASH. POST, (Dec. 21, 2017), [https://www.washingtonpost.com/politics/judge-dismisses-lawsuit-alleging-trump-violated-constitution/2017/12/21/31011510-e697-11e7-ab50-621fe0588340\\_story.html?utm\\_term=.0c2df9144622](https://www.washingtonpost.com/politics/judge-dismisses-lawsuit-alleging-trump-violated-constitution/2017/12/21/31011510-e697-11e7-ab50-621fe0588340_story.html?utm_term=.0c2df9144622) [<http://perma.cc/V78R-PK6C>].

<sup>110</sup> See Grove & Devins, *supra* note 1, at 597–603, 622. The House also may have standing in ongoing (as of fall 2017) litigation regarding the appropriations power and Obama-era enforcement of the Affordable Care Act. Specifically, since the Constitution mandates that appropriations legislation originates in the House, the House arguably suffers a distinct injury when presidential action allegedly undermines House appropriations authority. In *Burwell*, 130 F. Supp. 3d at 58, federal district judge Rosemary Collyer found standing for this reason. On December 15, 2017, Collyer’s standing holding was effectively ratified by a settlement between the Trump administration, House Republicans, and Democratic Attorneys General. See Anna Edney & Andrew M. Harris, *Obamacare Subsidy Lawsuit Settled by White House, Democrats*, BLOOMBERG POLITICS (Dec. 15, 2017, 3:10 PM), <https://www.bloomberg.com/news/articles/2017-12-15/obamacare-subsidy-lawsuit-settled-by-white-house-democrats> [<http://perma.cc/6WEC-X5FK>].

<sup>111</sup> U.S. CONST. art. I, § 5, cl. 2. The fact that either chamber might have authority to seek judicial enforcement of subpoenas does not mean that judicial resolution is superior

stands to reason that each chamber can pursue investigations as well as issue and enforce subpoenas as a unilateral body. At the same time, these lawsuits come at a cost in this age of polarized politics. Lawmakers are not motivated to use litigation to advance Congress's institutional interests; the focus of litigation is partisan gain and Democrats and Republicans will simply use the courts as another field of battle to engage in partisan battles with each other. Again, that is not to say that lawmakers or institutional counsel are without standing; my concern is whether polarization—as a policy matter—weighs in favor or against congressional standing.

My second argument against congressional lawsuits is that they embroil the courts in highly partisan political fights and that the courts pay a price for being embroiled in such overtly political litigation. Starting in 2010, the Supreme Court became a partisan Court—all of the Republican-nominated Justices are now to the right of all of the Democratic-nominated Justices.<sup>112</sup> Polarization has fueled this partisan divide and Senate Democrats and Republicans have both exacerbated this divide by engaging in party-line voting on judicial nominees and, relatedly, by ending the filibuster.<sup>113</sup> When Barack Obama was president and Democrats controlled the Senate, Democrats broke a Republican logjam on lower court nominees by ending the filibuster for such nominees.<sup>114</sup> When Republicans gained control, they blocked Obama's Supreme Court nominee Merrick Garland by claiming that the 2016 election should decide who appoints the next Supreme Court Justice.<sup>115</sup> And after Democrats filibustered Trump nominee Neil Gorsuch, the majority Republican Senate ended the filibuster of Supreme Court nominees and confirmed Gorsuch on a near party line vote.<sup>116</sup>

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to informal political bargaining. See Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 110, 130–32 (1996).

<sup>112</sup> See Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 301 (2017).

<sup>113</sup> *Id.* at 323–25.

<sup>114</sup> Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), [https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0fd2ca728e67c\\_story.html?utm\\_term=.5cf247d3b95a](https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0fd2ca728e67c_story.html?utm_term=.5cf247d3b95a) [<http://perma.cc/GJ4F-AZDA>].

<sup>115</sup> Mitch McConnell & Chuck Grassley, *McConnell and Grassley: Democrats Shouldn't Rob Voters of Chance to Replace Scalia*, WASH. POST (Feb. 18, 2016), [https://www.washingtonpost.com/opinions/mcconnell-and-grassley-democrats-shouldnt-rob-voters-of-chance-to-replace-scalia/2016/02/18/e5ae9bdc-d68a-11e5-be55-2cc3c1e4b76b\\_story.html?utm\\_term=.b97a5e7c3539](https://www.washingtonpost.com/opinions/mcconnell-and-grassley-democrats-shouldnt-rob-voters-of-chance-to-replace-scalia/2016/02/18/e5ae9bdc-d68a-11e5-be55-2cc3c1e4b76b_story.html?utm_term=.b97a5e7c3539) [<http://perma.cc/F6KX-9PXB>].

<sup>116</sup> Russell Berman, *Republicans Abandon the Filibuster to Save Neil Gorsuch*, THE ATLANTIC (Apr. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/04/republicans-nuke-the-filibuster-to-save-neil-gorsuch/522156/> [<http://perma.cc/A4LD-9G66>]. Senate Republicans also did away with the blue slip (allowing home state Senators to

Against this backdrop, it is little wonder that the courts—especially the Supreme Court—are increasingly seen as another political, partisan institution.<sup>117</sup> The Court, as the Justices have recognized, must “speak and act in ways that allow people to accept its decisions.”<sup>118</sup> Indeed, to preserve their reputation as a collegial court, most Supreme Court Justices have spoken against the politicization of the Judiciary.<sup>119</sup> Correspondingly, after the death of Justice Antonin Scalia, the Justices committed themselves to deciding cases unanimously and to avoid partisan 4–4 deadlocks.<sup>120</sup>

Judicial resolution of congressional lawsuits cuts against these efforts of the Court to preserve its reputation as a court of law. For reasons discussed, congressional lawsuits are increasingly likely to be seen as partisan. And while some of these lawsuits will be filed by institutionalists interested in defending Congress’s constitutional prerogatives, it is nonetheless the case that judicial rulings on President Trump and the Emoluments Clause, or President Obama’s implementation of the Affordable Care Act, will both be seen as partisan and will dwarf nonpartisan efforts to, say, preserve Congress’s war-making authority. Again, it may be that lawmakers or institutional counsel already possess

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block judicial nominees) when then-Senator Al Franken sought to hold up the nomination of Seventh Circuit judge David Stras. *See* Kevin Freking, *Senate confirms David Stras for Court of Appeals despite Al Franken withholding support*, TWIN CITIES PIONEER PRESS (Jan. 30, 2018, 3:57 PM), <https://www.twincities.com/2018/01/30/senate-confirms-david-stras-for-court-of-appeals-despite-al-franken-withholding-support/> [<http://perma.cc/S4JZ-SGYA>].

<sup>117</sup> Richard A. Posner, *The Supreme Court is a Political Court. Republicans’ Actions are Proof*, WASH. POST (Mar. 9, 2016), [https://www.washingtonpost.com/opinions/the-supreme-court-is-a-political-court-republicans-actions-are-proof/2016/03/09/4c851860-e142-11e5-8d98-4b3d9215ade1\\_story.html?utm\\_term=.c21993986959](https://www.washingtonpost.com/opinions/the-supreme-court-is-a-political-court-republicans-actions-are-proof/2016/03/09/4c851860-e142-11e5-8d98-4b3d9215ade1_story.html?utm_term=.c21993986959) [<http://perma.cc/8B6n-Z3G2>].

<sup>118</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 865 (1992) (plurality opinion). In quoting this language, I do not mean to suggest that the Court does or should follow public opinion.

<sup>119</sup> *See, e.g.*, Robert Barnes, *The Political Wars Damage Public Perception of the Supreme Court, Chief Justice Roberts Says*, WASH. POST (Feb. 4, 2016), [https://www.washingtonpost.com/politics/courts\\_law/the-political-wars-damage-public-perception-of-supreme-court-chief-justice-roberts-says/2016/02/04/80e718b6-cb0c-11e5-a7b2-5a2f824b02c9\\_story.html?utm\\_term=.1723d547a198](https://www.washingtonpost.com/politics/courts_law/the-political-wars-damage-public-perception-of-supreme-court-chief-justice-roberts-says/2016/02/04/80e718b6-cb0c-11e5-a7b2-5a2f824b02c9_story.html?utm_term=.1723d547a198) [<http://perma.cc/725G-A48V>]; Ryan Lovelace, *Sonia Sotomayor Saddened by Perception of Judges as Political*, WASH. EXAMINER (Mar. 10, 2017, 10:42 AM), <http://www.washingtonexaminer.com/Sonia-sotomayor-saddened-by-perception-of-judges-as-political/article/2617019> [<http://perma.cc/ZUY4-W8FE>]; Catherine Lutz, *Justice Elena Kagan Talks Power on the Supreme Court*, ASPEN INST. (July 18, 2017), <https://www.aspeninstitute.org/blog-posts/supreme-court-associate-justice-elena-kagan-power-court/> [<http://perma.cc/93MK-DPM4>]; Lincoln Caplan, *A Workable Democracy*, HARV. MAG. (Mar.–Apr. 2017), <http://harvardmagazine.com/2017/03/a-workable-democracy> [<http://perma.cc/7LTC-2TBX>].

<sup>120</sup> *See* Adam Liptak, *Rulings and Remarks Tell Divided Story of an 8-Member Supreme Court*, N.Y. TIMES (May 30, 2016), <https://www.nytimes.com/2016/05/31/us/politics/rulings-and-remarks-tell-divided-story-of-an-8-member-supreme-court.html>; Adam Liptak, *A Cautious Supreme Court Sets a Modern Record for Consensus*, N.Y. TIMES (June 27, 2017), <https://www.nytimes.com/2017/06/27/us/politics/supreme-court-term-consensus.html>.

constitutional standing to bring such suits. Nonetheless, party polarization cuts against the bringing of those lawsuits and is reason for the courts to move cautiously before expanding congressional standing.<sup>121</sup>

In arguing against congressional standing, I understand full well that I am embracing presidential unilateralism. As Justice Jackson wrote in the Steel Seizure case, “[t]he tools belong to the man who can use them.”<sup>122</sup> Congress is not likely to use its tools; it is naturally disinclined to stand up for institutional prerogatives and party polarization further cuts against Congress asserting its prerogatives. Nonetheless, the courts should not seek to prop Congress up by intervening in cases where standing is not clearly established. Today’s Congress is a cacophony of competing sound bites by Democrats and Republicans. Amicus curiae filings by lawmakers and institutional counsel provide an appropriate vehicle for the expression of the myriad interests of lawmakers and political parties. Congressional lawsuits are not such a vehicle; those lawsuits further expose partisan rifts in Congress and are potentially harmful to the courts’ institutional standing.

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<sup>121</sup> The courts are generally reluctant to intervene and look for ways to avoid tackling the merits in these disputes. Indeed, federal courts often seek end-runs where they do not have to rule on standing. This is true of information access disputes. See Complaint, *supra* note 109. It is also true of ongoing litigation regarding the appropriations power—where the D.C. Circuit Court of Appeals is holding the case in abeyance (starting December 5, 2016) rather than ruling on the lower court’s standing determination. In this litigation, the House and Trump administration both support the D.C. Circuit’s action. See Timothy Jost, *Parties Ask Court to Keep Cost Sharing Reduction Payment Litigation on Hold (Updated)*, HEALTH AFF. BLOG (Feb. 21, 2017), <http://healthaffairs.org/blog/2017/02/21/parties-ask-court-to-keep-cost-sharing-reduction-payment-litigation-on-hold/> [<http://perma.cc/2QUV-XPXE>].

<sup>122</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

