# The Tensions of Judicial Appointment

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The rancor that exists around the nomination of judges to the federal court continues to rise as the battle over the partisan control of our government intensifies. Perhaps no other decision of our president results in greater division between the two political parties' partisans than his choice for the federal bench. After a brief overview of the framers structuring of the judicial selection process, an analysis of the modern selection of federal judges by the executive branch will reveal the changing patterns of judicial appointment. The political and philosophical implications of the current selection process of judicial appointments will be addressed, highlighting a few of the more revealing battles between the president and Congress.

## Development of Constitutional Procedures of Selection

For nearly the entire constitutional convention in Philadelphia in 1787, the delegates debated the manner in which federal judges were to obtain office. Many of the delegates, such as George Mason and Oliver Ellsworth, pushed for judges to be selected by the national legislature, as was the practice in most of the states at the time. Alexander Hamilton, James Madison, and others instead insisted that judges should be appointed by the president (Farand 1967). After extensive debate the delegates reached an impasse and referred the matter to a special committee. Perhaps out of frustration, the delegates unanimously accepted the current arrangement of appointment by the president with confirmation by the Senate.

While it took months for the delegates in Philadelphia to determine the method of selection, a consensus developed concerning the term of federal judges. After little debate the delegates decided to follow the English tradition of allowing judges to serve life appointments "during **Good Behavior**." This is a lower standard than is required

for officials within the executive branch, who can be removed from office for "treason, bribery, or other high crimes and misdemeanors." As a result, it has been exceedingly rare for federal judges to be removed from office. Only 13 judges throughout our history have been impeached, and the majority of these either were acquitted by the Senate or left office before the Senate could hear the case.

Much debate has ensued concerning the intent of the Framers in establishing the **advice and consent of the Senate** procedures concerning judicial appointments. Some commentators, Alexander Hamilton chief among them, believed that the Senate would only play a minor role in determining the makeup of the federal judiciary. Hamilton wrote in *Federalist No. 76*:

> The person ultimately appointed must be the object of his [the president's] preference, though perhaps not in the first degree. It is also not very probable that his nomination would often be overruled. The Senate could not be tempted, by the preference they might feel to another, to reject the one proposed; because they could not assure themselves, that the person they might wish would be brought forward by a second or by any subsequent nomination. They could not even be certain, that a future nomination would present a candidate in any degree more acceptable to them.

Hamilton believed that the Senate's role in the process was simply to ensure that truly "unfit" nominations would not make it to the federal bench. Contrary to this limited role, many of the framers called for a more robust role for the Senate. Indeed, the Senate rejected one of George Washington's selections for the U.S. Supreme Court in 1795.

A more complex debate has ensued over the role partisanship should play in the process. Henry Abraham, a political scientist who researches the courts, writes that the "delegates simply assumed, perhaps a mote naively, albeit quite understandably, that those selected as federal jurists would be chosen on the basis of merit. Period." (Abraham 1999, 18) Other commentators disagree with this assessment and suggest that the founders were fully aware that the appointment and confirmation process would be partisan and expected politics to play a role in the process as it does in other executive appointments. This debate is likely to never be resolved.

## How Does the Nomination Process Work?

The process of nomination to the federal bench differs depending on the level of the court vacancy. What is normal for a U.S. District Court or Circuit Court of Appeals

vacancy is very different for the process followed for a vacancy in one of the nine seats on the U.S. Supreme Court. In actuality it is more accurate to say that the Senate has the power of appointment at the district court and circuit court of appeals levels while the president is left the power to confirm. When a vacancy occurs on a district court, a senator from the president's party who represents that state will submit a list of names to the president's staff for consideration, and if the president seeks to circumvent such consultation, the senator may invoke a tradition called **"senatorial courtesy."** According to that tradition, if a senator invokes senatorial courtesy, the president's selection will have a difficult time being confirmed. If no senator from that state is from the president's party, the president will likely consider the opinions of other high-ranking officials from his party in the state. The president is then likely to accept this recommendation as his first choice for the open post.

The same process is followed when a vacancy occurs on the U.S. Circuit Court of Appeals. Since a circuit court has jurisdiction over several states, by tradition the senator of the president's party who is from the state in which the departing jurist resided has a large say over who the new appointee will be. If there are two senators of the president's party who are from the same state in which a vacancy occurs, the nominee must usually be acceptable to both of the state's senators. Finally, even if both of the senators from a state are from the opposition party of the president, it is likely they will have significant leverage in the final choice of the president with their influence in their own chamber.

A different process exists concerning the selection of nominees for the U.S. Supreme Court. While each nomination differs depending on the balance of partisan power in the nation's capital and sitting president, a general pattern has developed. Typically, a subset of the president's advisers along with the high-ranking staff of the Department of Justice compile a list of candidates and assemble background files on these individuals. The individuals on this list may be submitted by interest groups, internal executive branch officials, members of the judiciary and Congress, and even the president himself. Candidates who survive a first investigation are sent extensive questionnaires about their personal lives and judicial philosophies. The answers to these surveys are forwarded to officials at the Department of Justice, the president's inner circle and, if the president desires, to the **American Bar Association's (ABA) Standing Committee on the Federal Judiciary**. If the ABA committee's recommendation is favorable, the FBI is asked to do a security check and the ABA issues a more formal report. However, the ABA's role was drastically reduced by President Bush in 2001. Speculation exists for the reasons behind the limitation of the

ABA's role, but many insiders believe it stems from the treatment of Ronald Reagan's appointment of Robert Bork to the Supreme Court. (See below for more information on the Bork nomination.)

With the FBI report and, prior to President Bush, the formal recommendation of the ABA in hand, the president contacts the potential nominee and conducts an interview in Washington, D.C. If the president is satisfied with the nominee, the nominee's name is announced and he or she is officially nominated to the bench.

When a nomination arrives in the Senate it is transferred to the Committee on the Judiciary. After providing time for the committee's senators and staff to prepare, the committee will hold hearings concerning the nominee in which the nominee and other interested parties will testify. Once the hearing is complete, the members of the committee will vote and make a recommendation to the full Senate. The Senate will then consider the candidate and, with the support of a majority of the senators, make a formal recommendation to approve the nomination. Nominees receiving this recommendation are then sworn in as federal judges.

It would be remiss to not mention a last check of the Senate. This is the power of the filibuster. The filibuster refers to the ability of any senator to take the floor during debate to prevent the vote on any motion or nomination. Under current Senate rules, a formal motion of cloture must be approved to force the end of a filibuster. Cloture requires the consent of at least 60 of the 100 senators. As a result, a minority of 41 senators can prevent the approval of any nomination. Another tactic in recent years is "the hold," a process whereby a single senator might request a delay in considering a judicial appointment until some "question" is resolved. The hold is a technique more likely to be used in lower court appointments.

Prior to 1968 there is no record of a filibuster being used to prevent the approval of a judicial nominee. Abe Fortas, an associate justice on the U.S. Supreme Court, was nominated by Lyndon Johnson for the position of chief justice, but his nomination was thwarted by a coalition of Southern Democrats and Republicans who used the filibuster to prevent his approval by the full Senate. That filibuster was based on the fact that Fortas had continued to advise President Johnson on political matters even after his appointment to the Court, and the revelation of this continued relationship was perceived as a violation of checks and balances between the presidency and the Court. Today, the blockage of judicial nominations in the Senate is commonplace by both parties using the filibuster and other procedural rules. During 2005, in frustration with the successful use of the filibuster by the minority Democrats, an attempt was made by Republicans to alter the ability of the filibuster to prevent judicial

nominations. The "**nuclear option**," as it came to be called, suggested changing the Senate filibuster rules allowing a simple majority of the Senate to vote directly on the approval of a judicial nominee. The nuclear option was forestalled by a coalition of senators referred to as "the Gang of 14," led by Republican John McCain and Democrat Joseph Lieberman, who preserved the strength of the filibuster in judicial nominations; at present, the nuclear option has simply been removed from Senate consideration.

## The Process in Motion: Recent Approval Battles

It is difficult to judge the influence of each selection process on future nominations, however, three nominations in the past quarter century stand out for their influence on the current politics of the nomination process. The nominations of Robert Bork, Clarence Thomas, and John Roberts all shed a different light on the nomination and confirmation process.

Robert Bork was introduced by President Ronald Reagan as the replacement for the moderate Lewis Powell Jr., who had served on the Court since January 1972 (see Bronner 1989). While Ronald Reagan introduced Bork as an "even-handed and open-minded" judge who was neither a conservative nor a liberal, Bork is more accurately described as a true conservative who practices an **original intent** manner of constitutional interpretation. Bork had previously served in numerous capacities in Washington, including as the country's solicitor general and as the acting attorney general under Richard Nixon. Bork is famously responsible for firing Special Prosecutor Archibald Cox, who was investigating the Watergate scandal; this firing is now known today as the "Saturday Night Massacre." Prior to his nomination to the Supreme Court, Bork served as a justice on the Circuit Court of Appeals for the District of Columbia.

Bork's nomination was met with immediate derision by the Democratically controlled Congress. Within an hour of Reagan's announcement, Senator Ted Kennedy, an influential member of the Committee on the Judiciary, took to the Senate floor and, on a nationally televised broadcast, denounced the appointment and suggested Bork supported segregation and banning the teaching of evolution. The hearings conducted before the Committee on the Judiciary concerning the Bork nomination are some of the longest on record, lasting 12 days and producing a written transcript of more than 6,000 pages. The senators examined every aspect of Bork's judicial philosophy and his long political career. In response, Bork was forthcoming and detailed in his answers.

After the exhaustive process, the committee reported Bork's nomination to the full Senate with only 5 of the 14 members of the committee supportive of his appointment. In the end, only 42 senators voted to support the Bork appointment, and the vacancy on the Court was eventually filled by the more moderate Anthony Kennedy.

The Bork nomination is the first that truly energized the entire interest group establishment that had grown in Washington over the past 50 years. Interest groups as varied as the National Organization of Women, the American Civil Liberties Union, the NAACP, and Planned Parenthood all mobilized to convince the Senate to reject his nomination. In the two-and-a-half months between his appointment by Ronald Reagan and his eventual rejection by the Senate, millions of dollars were spent and countless hours were occupied concerning the outcome of his appointment. Even today, to be **"Borked"** is used to describe a coordinated attack against a nominee to prevent his or her approval by the Senate.

If the Bork nomination revealed the contentious side of the confirmation process, the approval of Clarence Thomas may be regarded as the darkest days for the process. Thomas was chosen by the first President Bush to succeed the first African American seated on the Court, Thurgood Marshall, in the summer of 1991 (see Mayer and Abramson 1994). While Thomas maintained the racial balance on the Court, his conservative judicial viewpoints differed dramatically from his predecessor. Thomas had served in numerous positions under the tutelage of John Danforth, who at the time of Thomas's appointment to the Supreme Court was serving as a senator.

Thomas's most influential government position had been chairman of the Equal Employment Opportunity Commission (EEOC) under Ronald Reagan. While Thomas was originally challenged by women's rights groups for his disapproval of the *Roe v. Wade* decision that established a woman's right to choose whether to have an abortion at least in the early stages of pregnancy, his nomination appeared headed for a quick approval by the Committee on the Judiciary. As the committee's hearings neared their end, National Public Radio's Supreme Court correspondent Nina Totenberg reported that Anita Hill, now a law professor at the University of Oklahoma but previously a member of Thomas's staff at the EEOC, claimed to have been sexually harassed by Thomas.

On October 11, 1991, Hill was sworn in before the Senate Committee on the Judiciary to provide her testimony. Hill claimed that on numerous occasions Thomas made inappropriate sexual gestures toward her when they worked together at the EEOC. Hill's testimony was both graphic and riveting to the national media. The

committee called forth numerous other witnesses who either corroborated Hill's testimony or supported Thomas in his full denial of the charges leveled against him. Thomas lashed out at the committee, testifying that:

> This is not an opportunity to talk about difficult matters privately or in a closed environment. This is a circus. It's a national disgrace. And from my standpoint, as a black American, it is a high-tech lynching for uppity blacks who in any way deign to think for themselves, to do for themselves, to have different ideas, and it is a message that unless you kowtow to an old order, this is what will happen to you. You will be lynched, destroyed, caricatured by a committee of the U.S. Senate rather than hung from a tree. (Senate Judiciary Committee Hearing, 1991)

After extensive debate the committee sent the Thomas nomination to the full Senate without a recommendation. In the closest vote in over a century, the Senate approved Thomas to the Supreme Court by a vote of 52-48.

A final exemplar of the appointment process came with the recent appointment to fill the vacated seat of the Chief Justice William Rehnquist upon his death in 2005. Originally appointed by President George W. Bush to replace the retiring associate justice Sandra Day O'Connor, John Roberts's nomination was transitioned to that of chief justice upon the unexpected death of Rehnquist. Following a successful career in both private and public legal service, including service as one of Chief Justice Rehnquist's law clerks, Roberts was prominent on the short list of potential Supreme Court justices after he took a position on the Circuit Court of Appeals for the District of Columbia in 2003. Described as a judicial minimalist whose opinions stick narrowly to the context of each case and who favors precedent and a limited role for the judiciary, Roberts's supporters expected little opposition to his nomination.

The Roberts nomination and hearings process is exemplary because it highlights the differing philosophies concerning the role of the Senate in the confirmation process. During his hearings before the Senate Committee on the Judiciary, Senator Orrin Hatch asserted that the Senate must apply a "judicial rather than a political standard to evaluate Justice Roberts's fitness for the Supreme Court." Senator Hatch asserted "judges interpret and apply but do not make the law." (See *Confirmation Hearings on the Nomination of John G. Roberts Jr.*) Justice Roberts built Senator Hatch's assessment into an analogy: "Umpires don't make the rules; they apply them. I come before the committee with no agenda. I have no platform. Judges are not

politicians." He assured the senators that if seated on the Court, he would "remember that it is [his] job to call balls and strikes and not to pitch or bat."

Democratic Senator Charles Schumer argued instead that "the most important function of the hearings . . . is to understand your legal philosophy and judicial ideology." He believed it is the Senate's right to inquire into the detailed beliefs of the nominee. He stated that the nominee "should be prepared to explain [his] views on the First Amendment and civil rights and environmental rights, religious liberty, privacy, workers' rights, women's rights, and a host of other issues."

Both Hatch and Schumer had distilled valid yet inconsistent views on what Supreme Court justices do and how the Senate should evaluate them. For Hatch, a nominee's political values were irrelevant because judges were expected to be neutral arbiters, akin to umpires not politicians. For Schumer, a nominee's political beliefs were the fundamental aspect of the confirmation process because an individual's political beliefs determine the direction of their votes on future cases (see Eisgruber 2007).

After the committee discussion, the Roberts appointment was recommended by the committee for approval by the whole Senate. He won broad support from members of both political parties in the vote before the full Senate to become the seventeenth chief justice of the United States Supreme Court and was approved by a vote of 78-22.

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BOX 5.1

## Is Burning the Flag Legal and Constitutional?

One recent constitutional issue that has generated controversy concerns whether it is legal and constitutional to burn the American flag as a protest against government policies. One group of players views the flag as a vital symbol of the American nation and government. They see flag burning as an unacceptable action that defames the nation and everything the nation stands for. Other players feel that burning the American flag is a constitutionally protected form of free speech. While many who see flag burning as constitutional are upset by this action, they contend that free speech rights are fundamental and must be protected.

This issue came to a head through the Supreme Court decision *Texas v. Johnson* (1989).[a] In this case, the Supreme Court overturned the conviction of Gregory Lee Johnson, who had burned a flag at the 1984 Republican National Convention. Johnson was convicted of violating a Texas law that forbade flag burning. The Supreme Court, by a close 5 to 4 decision, ruled that the Texas law was unconstitutional because it violated the First Amendment right to free speech.

President George Bush, many members of Congress, and others throughout the nation were angered by the Supreme Court decision. Some argued for a constitutional amendment that would prohibit flag burning. Congress decided, instead, to enact a federal law—the Flag Protection Act of 1989—that states that anyone who knowingly mutilates, defaces, physically defiles, burns, or tramples the American flag shall be fined or imprisoned. This law was a direct message to the Supreme Court that the Congress did not care much for the Court's interpretation of the First Amendment in the *Johnson* case.

The struggle did not end there. Shortly after Congress enacted the Flag Protection Act of 1989, some opponents set out to test the law's constitutionality. In both Washington, D.C. and Seattle, opponents openly burned the flag and were charged with violating the new federal law. Federal judges dismissed these cases, citing the *Johnson* decision. In June 1990, the Supreme Court upheld the lower court judges' decisions, ruling that the federal law violated the free speech guarantee of the First Amendment.[b]

*The burning of the American flag as a means of political protest has been upheld as constitutional by the Supreme Court on the basis of freedom of expression rights.*

The Court decision prompted calls from President George Bush and many members of Congress for a constitutional amendment to prohibit flag burning. Although a national poll by the *New York Times* showed that 59 percent of those surveyed favored a constitutional amendment, Congress has thus far not enacted legislation to commence the amendment process.

[a] *Texas v. Johnson*, 491 U.S. 397 (1989).

[b] *United States v. Shawn D. Eichman, David Gerald Blalock, and Scott W. Tyler* and *United States v. Mark John Haggerty, Carlos Garza, Jennifer Proctor Campbell, and Darius Allen Strong*, 110 S. Ct. 2404 (1990).

This has been true even in cases where the substance of public comments or printed materials has severely criticized the government or the overall American political system.

### *Campaign Spending, Expenditures, and Free Expression*

The issue of freedom of expression has extended into many areas of political life. In the wake of the Watergate scandal, Congress enacted laws in the 1970s intended to limit the contributions made to electoral candidates and the expenditures made by candidates in election races. These campaign finance laws were challenged on

# Unnecessary & Dangerous: The Flag Amendment in Congress

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In 1989 and 1990, the Supreme Court twice ruled that state and federal laws making "desecration of the flag" a crime are unconstitutional. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," the court said. Thus, the Supreme Court decided that using the flag in nonviolent political protest is a form of free speech protected by the First Amendment, and cannot be banned. Some members of Congress who disagreed with this ruling soon announced plans to amend the Constitution to ban flag "desecration," and a proposed constitutional amendment to ban desecration of the flag has been considered by Congress a number of times in recent years, never receiving enough votes to pass.

The proposed flag amendment raises a number of serious questions. First, what exactly is "flag desecration"? Certainly, the burning of a flag would fall into the category of desecration, but what else would? Does hanging the flag upside down to express distress with government policy count? How about sitting on a beach towel in the shape of a flag? Is it desecration to drop a paper flag on the ground after a Memorial Day parade? One of the many problems with the proposed amendment is that it doesn't tell us what desecration actually is.

The flag is a powerful symbol of all that is great about our country, but it is just that – a symbol. Congress should not attempt to protect the cloth of the flag at the expense of the very freedoms the flag represents. It is important to recognize that it becomes a slippery slope when our lawmakers begin to reign in our freedoms. If the flag amendment passes, it will make an entire category of speech unconstitutional just because the government doesn't like it. This constitutional amendment is not just about burning the flag; it is about our right to express ourselves in ways that others might find offensive. What could Congress deem valued or unlawful next? This is a varied and dynamic nation with a population to match. We cannot possibly expect to have the same priorities and it is not up to Congress to decide what each one of us believes to be sacred.

We at the ACLU believe in defending the freedoms of all Americans, whether their opinions are of the majority or minority. We believe that if Americans wish to voice their opinions by physically defacing the flag, it should be protected as freedom of speech. The First Amendment gives us the liberty to express our ideas freely and should not be hampered by Congress. Indeed, the First Amendment exists precisely in order to protect unpopular speech. We cannot impose loyalty or patriotism on our citizens. Whether showing our pride or voicing our dissent, there should be no infringement of this basic right. Free speech is fundamentally American. Censorship is not. ☆

**Law and Justice students from Illinois strike a pose with Sen. Richard Durbin, D-Ill., and Sen. Barack Obama, D-Ill., in June 2005.**

constitutional interpretation. The 1803 case of *Marbury v. Madison* established the principle of judicial review. Since then, the courts have exercised judicial review to declare unconstitutional any federal or state laws or policies that violate rights, rules or principles established by the Constitution.

By a 5-4 vote in *Texas v. Johnson*, the Supreme Court ruled that flag-burning was protected by the First Amendment, as long as there was no danger of "rioting or other breach of peace." It also found that the government's interest in preserving the flag as a national symbol of unity did not justify Johnson's criminal conviction for engaging in political expression.

Justice Brennan, author of the court's majority opinion, wrote:
"We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents. ... The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong." To learn more, read the full text of *Texas v. Johnson*.

Justice Kennedy, concurring with the majority, wrote:
"But whether or not he [Johnson] could appreciate the enormity of the offense he gave, the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution."

Chief Justice Rehnquist wrote the minority, or dissenting, opinion:
"The cry of 'no taxation without representation' animated those who revolted against the English Crown to found our Nation — the idea that those who submitted to government should have some say as to what kind of laws would be passed. Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of the people — whether it be murder, embezzlement, pollution, or flag burning." To learn more, read the full text of *Texas v. Johnson*.

***Step 8: The paper***
Assign students to write position papers presenting and defending their positions on flag-burning. Ask students to add a personal note after the formal paper in which they indicate whether they have changed or modified their viewpoint about this controversial topic, now that they have completed research and heard all the arguments.

**Enrichment**

1. Many people, including such leaders as then-President George Bush, were outraged by the Supreme Court's decision. "Flag-burning is wrong, dead wrong, and the flag of the United States is very, very special," said Bush. Congress then passed a law making flag burning illegal. The Supreme Court struck down the

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## *Summary*

The Supreme Court hears oral arguments beginning at ten in the morning, with each attorney typically allocated a half-hour. Justices are permitted to interrupt attorneys to ask questions at any time, and the clock is not stopped no matter how long the question. Attorneys are not allowed to read but may use notes. Lights indicate how much time is left—a white one signaling five minutes and a red light notifying attorneys to stop. The proceedings are taped but are not aired on radio or television.

The justices meet in secret conference to discuss and vote on cases. No one is permitted in the room. The associate justice with the least seniority has the responsibility of running errands to obtain books or answering knocks at the door. The conference by tradition commences with a handshake. The chief justice speaks first on cases and is followed by justices in order of seniority; votes are taken in reverse sequence on the assumption that junior members may be intimidated if voting last. During the tenure of Chief Justice Burger, a pattern began in which formal votes were often not taken and the chief interpreted the outcome of the case. If in the majority, the chief justice assigns the writing of the opinion; if in the minority, the associate justice with the most seniority has the duty of assigning the writing of the Court's opinion. The opinion is circulated in draft form to the other justices who may suggest changes, even on the threat of changing their vote. It sometimes happens that what began as a majority opinion may lose enough support to end up as a dissenting opinion. A justice is permitted to change his or her vote until a judgment is announced in open session.

The entire Court is not required to be present to vote on a case. A quorum exists so long as six justices are participating. In a tie vote, the decision of the last court to hear the case prevails but it does not mean that the justices are expressing agreement with the ruling; the vote of each justice is not publicly revealed in such situations.

The recent trend on the Supreme Court is greater fragmentation in voting. Far fewer decisions are decided unanimously, declining from close to 90 percent in the nineteenth century to 38.7 percent in 1995. Justices are more willing to articulate their own views and are producing a higher rate of both *concurring* and *dissenting* opinions. Concurring opinions are important in establishing whether the Court's decision is creating precedent. "Occasionally," Lawrence Baum explains, "because of disagreement about the rationale, no opinion gains the support of a majority of judges; in this situation, there is a decision but no authoritative interpretation of the legal issues in the case."

## *Discussion Questions*

1. The Theme Summary describes several of the practices and rituals of the Supreme Court. Based on the Summary, how would you describe the culture of this institution? In what ways are its folkways (and thus its culture) similar to or different from the other branches of the government?

2. In what respects is the Supreme Court a political institution? (Students should think carefully about their definition of *political* when answering this question.)

3. What are the reasons for a greater number of concurring and dissenting opinions in the Court decisions of recent decades? What are the advantages and disadvantages of such outcomes? Students should also consider the effect of these opinions on the relationships among the justices.

#2

*Summary*

The power of the Supreme Court evolved slowly. In the first three years of the nation's existence, the justices did not hear any cases at all. The Supreme Court's immediate priority was to establish its institutional legitimacy. This goal was accomplished in a series of developments under the leadership of Chief Justice John Marshall: (1) defeat of the impeachment proceeding, based purely on political charges, against Justice Samuel Chase that validated the doctrine of judicial independence; (2) the issuance of a single majority opinion that enabled the Court to speak with one authoritative voice in lieu of each justice writing separately; and (3) assumption of the power of judicial review in *Marbury* v. *Madison* (1803), making the Supreme Court an equal partner in the governing process with Congress and the president.

Once secure in its position, the Supreme Court turned to the task of adjudication. The history of Supreme Court decision-making falls into three eras differentiated by the type of issue that dominated judicial attention during a particular period of time.

1. From 1787 to 1861, federal–state relations and slavery were the great issues. In *Martin* v. *Hunter's Lessee* (1816), the Court asserted its right to impose binding interpretations of federal law upon state courts. Three years later, *McCulloch* v. *Maryland* (1819) upheld the supremacy of the federal government in a conflict with a state over a matter not clearly assigned to federal authority by the Constitution. Although federal preeminence was written into constitutional theory, it was not until after the Civil War that the theory applied in practice. In fact, the Court played an important role in intensifying regional tensions through its decision in *Dred Scott* v. *Sandford* (1857), in which federal law (the Missouri Compromise) prohibiting slavery in northern territories was ruled unconstitutional. This decision, moreover, was only the second time that a federal law was declared unconstitutional by the Supreme Court. The Court's reluctance to use judicial review attests to its still uncertain status in the early part of the nineteenth century.

2. From the Civil War to 1937, the dominant issue was the relationship between government and the economy. The Court acted to support property rights and held that the due process clause of the Fourteenth Amendment protected commercial enterprises from some forms of regulation. The justices were merely reflecting the prevailing *laissez-faire* philosophy of the time. The Court, however, was not blind to the injustices of capitalism and upheld state regulations in over 80% of such cases between 1887 and 1910. As the justices attempted to balance the public interest against private property rights, their decisions became riddled with inconsistencies in distinguishing reasonable from unreasonable regulation or in separating interstate from intrastate commerce. According to Justice Holmes, the Court had lost sight of its mission by forgetting that "a Constitution is not intended to embody a particular economic theory." The necessities of the Great Depression would compel a revision in constitutional theory on economic issues.

3. From 1938 to the present, the Court has switched its focus to the protection of personal liberties. This change was partially prompted by the political pressure generated by Franklin Roosevelt's unsuccessful effort to pack the Supreme Court with justices favorable to his New Deal economic package. As the Court allowed the government a freer hand on economic regulation, it took up the challenges presented by social and political upheaval following World War II, such as free speech and racial integration. Only recently has the number of civil liberties cases in the Court's docket begun to shrink, perhaps as a reaction to the conservative majority appointed by Presidents Reagan and Bush.

## *Discussion Questions*

1. What problems did the Court have in trying to limit economic regulation in the era between the Civil War and the New Deal? In attempting to limit regulation, was the Court reading its own political views into the Constitution or striving for a neutral interpretation of the document? Did the Founders believe in private property and want it protected? Was the Fourteenth Amendment intended to prevent economic regulation?

2. What was the Roosevelt court-packing plan? What does it suggest about the Supreme Court and the other branches of government?

3. How would one distinguish successful from unsuccessful assertions of judicial power? What is it that puts *Marbury* in one class and *Dred Scott* in another?

Arguably, partisanship was never more evident than in the Supreme Court's *Bush v. Gore* (2000) decision that blocked a manual recount of the Florida presidential vote in 2000, thereby assuring the election of the Republican nominee, George W. Bush.[34] The five justices in the majority—Chief Justice William Rehnquist and associate justices Sandra Day O'Connor, Anthony Kennedy, Antonin Scalia, and Clarence Thomas—were all Republican appointees and were the same justices who in previous decisions had deferred to state authority and had opposed new applications of the Fourteenth Amendment's equal protection clause. Yet they rejected the authority of the Florida high court, which had ordered a statewide manual recount of the vote. They also employed a never-before-used application of the equal protection clause, ruling that the recount could not go forward because no uniform standard for counting the ballots existed. Justice John Paul Stevens, who thought the Florida high court had acted properly in ordering a recount, accused the Court's majority of devising a ruling based on their partisan desires rather than on the law. Stevens noted that different standards for casting and counting ballots are used throughout the country, even within the same state. Stevens argued that the Supreme Court's majority had ignored "the basic principle, inherent in our Constitution and our democracy, that every legal vote should be counted."[35] Some observers suggested that if Bush had been trailing in the Florida vote, the Court's majority would have come up with reasons why a recount was required.

## DEBATING THE ISSUES

### SHOULD ALL THE FLORIDA BALLOTS HAVE BEEN COUNTED?

In *Colegrove v. Green* (1946), Justice Felix Frankfurter warned the Supreme Court about getting involved in election politics, saying that it "ought not to enter this political thicket." In 2000, the Court thrust itself into the thorniest political thicket of all—a presidential campaign. In *Bush v. Gore*, the Court by a narrow majority blocked a statewide manual recount of uncounted ballots in Florida, thereby settling the election in favor of Republican George W. Bush. His Democratic opponent, Al Gore, had argued that all the Florida votes—not just those that could be read by machine—should count. Bush supporters retorted that a manual recount would be inherently subjective and open to mischief. These opposing views also existed within the Supreme Court, as the following opinions show.

**YES** Florida law holds that all ballots that reveal the intent of the voter constitute valid votes. . . . [The Florida Supreme Court] decided the case before it in light of the legislature's intent to leave no legally cast vote uncounted. In so doing, it relied on the sufficiency of the general "intent of the voter" standard articulated by the state legislature, coupled with a procedure for ultimate review by an impartial judge, to resolve the concern about disparate evaluations of contested ballots. If we assume—as I do—that the members of that court and the judges who would have carried out its mandate are impartial, its decision does not even raise a colorable federal question. . . . What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. . . . Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

*—John Paul Stevens, associate justice of the Supreme Court*

**NO** The standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another. . . . The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. . . . It is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise. . . . The Supreme Court of Florida has said that the legislature intended the State's electors to "participat[e] fully in the federal electoral process." That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards.

*—Supreme Court's majority opinion*

#1

**AP US Government / Mr.Copacia**

Name_____
Hour_____

**The Judiciary / Reading the Constitution as Twentieth-Century Americans (by Justice William J. Brennan, Jr. 1997)**

**P. 19**

1) Constitutional aspirations?

_____ _____ _____

2) What does the phrase "faith in progress" mean?

_____

3) Explain the concept "amendments represent interpretations".

_____

_____

3a) What does Brennan mean when he says the constitution is a lodestar fro our aspirations?_____

_____

4) Explain why ambiguity needs interpretation._____

_____

5) When justices interpret the constitution they:_____

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6) Constitutional interpretations must be received as _____.

7) Our self government in a representative democracy must be reconciled with vesting in

_____

_____

8) Judicial power actually resides in_____

_____

9) Is legitimacy based on the "intentions of the founders" or is legitimacy based on something or someone else?
Explain._____

_____

10) The framers hid their differences in the

_____

11) Why is it that we cannot look at history all the time as a basis for our court decisions? What could be wrong with previous decisions?

_____

_____

**P. 21**

12) What does "faith in the majoritarian process counsels restraint " mean?_____

_____

13) What does the author mean by "enshrinement of the majority"?_____

14) Unabashed enshrinement of the majority would result in what?_____

15) The purpose of the bill of rights is to declare_____

_____

16) Why must we reach beyond political majorities?_____

_____

17) What does Brennan mean when he says: Faith in democracy is one thing, blind faith is another?_____

_____

_____

_____

**P.22**

18) Each generation has the choice to_____.
The Constitution can be _____.

19) Justices must read the Constitution in the only way we can: as

_____.

20) The ultimate question for supreme court justices is:_____

21) The genius of the Constitution rests not in any static meaning it had in world that is dead and gone but in the:

_____

_____

**P. 23**

22) The constitution is a sparkling vision of the supremacy of the _____

_____.

22a) this dignity is found specifically in the

_____.

**P. 24**

23) As the authority of government itself expands, the possibilities for_____

_____.

24) The challenge that the constitution faces is whether constitutional structure can

_____

_____

_____

**P. 25.**

25) There is no worse injustice than

_____

_____

# 14

# THE FEDERAL COURTS

The judicial branch plays a large role in making public policy. The major power that the federal courts have is judicial review, the right to declare laws of Congress and acts of the president unconstitutional.

## KEY TERMS

amicus curiae
briefs
class action suits
concurring opinion
courts of appeals
dissenting opinion
district courts
*Dred Scott v. Sandford*
in forma pauperis
judicial activism
judicial review
"litmus test"
*Marbury v. Madison*
*McCulloch v. Maryland*
opinion of the Court
senatorial courtesy
solicitor general
stare decisis
strict construction
writ of certiorari

## KEY CONCEPTS

- The federal courts have evolved into an institution that has significant impact on public policy.
- The selection of federal judges is a very political process.
- A limited number of cases are heard in federal courts, and an even more limited number reach the Supreme Court.
- Judicial activism is a philosophy in which judges make bold policy decisions.
- The other branches of government and the public have checks on the powers of the federal courts.

# 14

# THE FEDERAL COURTS

For a full discussion of the federal courts, see *American Government*, 8th ed., Chapter 14 / 9th ed., Chapter 14.

## THE DEVELOPMENT OF THE FEDERAL COURTS

Most of the Founders probably expected judicial review to be an important judicial power, but it is unlikely that they thought the federal courts would play a large role in policy-making. The original view of the Founders was known as strict construction: judges would be bound by the wording of the Constitution and precedent, which was drawn mainly from the British legal system. Within a few decades, however, an activist approach emerged, and judges looked at the underlying *principles* of the Constitution.

The federal courts have evolved toward judicial activism, shaped by political, economic, and ideological forces of three historical eras:

- **National supremacy and slavery (1789-1861)** Two early court cases, *Marbury v. Madison* (1803) and *McCulloch v. Maryland* (1819), helped establish the supremacy of the national government. *Marbury* gave the Supreme Court the power to declare a congressional act unconstitutional. *McCulloch* established that federal law is supreme over state law. Both suggested that powers granted to the federal government should be construed broadly. The power of the federal government to regulate commerce among the states was also established, and state law that conflicted with federal law was declared void. A major case, *Dred Scott v. Sandford* (1857), made the Supreme Court a major player in setting the stage for the Civil War. The Supreme Court ruled that blacks were not citizens of the United States and that federal law prohibiting slavery in northern territories was unconstitutional.
- **Government and the economy (1865-1936)** The dominant issue during this period was deciding when the economy would be regulated by the states and when by the national government. Most court decisions protected private property. The Court upheld the use of injunctions to prevent labor strikes, struck down the federal income tax, sharply limited the reach of the antitrust laws, restricted the powers of the Interstate Commerce Commission, refused to eliminate child labor, and prevented states from setting maximum hours of work. These restricted the federal government's ability to regulate the economy. Yet the Court also authorized various kinds of regulation, such as requiring railroads to improve their safety, approving mine safety laws, and regulating fire-insurance rates. While the Court was supportive of private property, it could not develop a principle distinguishing between reasonable and unreasonable regulation.
- **Government and political liberty (1936-present)** During this period the Court has deferred to the legislature in regulating the economy. It has shifted its attention to personal liberties and is active in defining rights. The Warren Court, which began in 1953, redefined the relationship of citizens to the government and protected the rights and liberties of citizens.

During the past fifteen years, the Supreme Court has begun to rule that the states have the right to resist some federal action. It is possible that this is the beginning of a new era in which the Court will return certain powers to the states, a process known as devolution.

## THE SELECTION OF JUDGES

All federal judges are nominated by the president and confirmed by the Senate. Presidents almost always nominate a member of their own political party, and party background does have some effect on how judges behave. However, rulings are also shaped by other factors, such as the facts of the case, precedent, and lawyers' arguments.

Confirmations are often contentious. Senate delays on confirmations often leave many seats open on the appellate courts. One tradition regarding nominations is senatorial courtesy: senators from the president's party review an appointee for a federal district court in their state; senators can "blue-slip"—that is, veto—a nominee, a practice that has been criticized because it gives senators virtual power in nominating judges.

Another concern is the use of the "litmus test," a test of ideological purity used by recent presidents, in nominating, and senators, in confirming, judges for federal courts. Presidents seek judicial appointees who share their political ideologies. Because various presidents appoint judges, different circuits issue different rulings over similar cases. While candidates cannot be asked how they would rule in a specific case, they can be asked about judicial philosophy. Litmus tests are most apparent in Supreme Court confirmations, for which there is no tradition of senatorial courtesy.

## THE JURISDICTION OF THE FEDERAL COURTS

The United States has two court systems—one state, one federal—which can complicate the questions of which cases the federal courts may hear, and how cases beginning in the state courts may end up before the Supreme Court.

The Constitution lists the kinds of cases over which federal courts have jurisdiction; all others are left to state courts. Federal courts can hear all cases involving the U.S. Constitution, federal law, and treaties; these are known as federal-question cases. Federal courts may also hear cases involving different states or involving citizens of different states; these are known as diversity cases. Some cases, such as those where both state and federal laws have been broken, can be tried in either state or federal courts.

The Constitution specifies a very limited original jurisdiction for the Supreme Court. Nearly every case the Supreme Court hears is on appeal and chosen by the court. It does this by issuing a writ of certiorari. If four justices agree to hear a case, a "writ of cert" is issued, and the case is scheduled for a hearing. The Court tends to take cases that pose a significant federal or constitutional question, involve conflicting decisions by circuit courts, or contain a constitutional interpretation by one of the highest state courts regarding state or

federal law. Only about one hundred appeals are granted certiorari in a given year.

Some Americans criticize the courts as undemocratic. The Supreme Court rejects all but a few of the applications for certiorari. In addition, the costs of appeals are high. Nevertheless, costs can sometimes be lowered or even covered in full in the case of indigents (called in forma pauperis), for which the government pays the costs. Those who are unable to afford counsel are provided a lawyer at no charge. Interest groups are also sources of funding for litigation. Court costs are also affected by the practice of fee shifting, which enables plaintiffs to collect their costs from a defendant if the defendant loses.

Getting to court requires legal standing. To have standing there must be a real controversy between adversaries, and the litigants must demonstrate personal harm. Under certain circumstances, a citizen can benefit from a court decision without ever going to court. In these cases, courts recognize class-action suits, in which an identifiable group of people has standing. If the case is won, all who have circumstances similar to the active plaintiffs receive a share of the judgment. Since 1974, the Supreme Court will not hear class-action suits unless every ascertainable member of the group is notified individually. This is often prohibitively expensive.

## THE POWERS OF THE SUPREME COURT

Once a case gets to the Supreme Court, lawyers for each side submit briefs. A brief is a document that sets forth the facts of the case, summarizes the lower-court decision, gives the arguments for the side represented, and discusses precedents on the issue.

Oral arguments are presented later. Each side has one half-hour, but justices can interrupt with questions. Because the federal government is either the plaintiff or defendant in about half the cases that the Supreme Court hears, the solicitor general of the United States appears frequently before the Court. The solicitor general, the third ranking officer in the Justice Department, decides which cases the government will appeal from the lower courts and personally approves every case presented to the Supreme Court.

Written briefs and even oral arguments may be offered by a "friend of the court," or amicus curiae. An amicus brief is from an interested party not directly involved in the suit. The reasoning and research found in academic law journals are also sources of ideas used by the justices in reaching decisions and writing their opinions.

After briefs are submitted and oral arguments are heard, justices develop their opinions and decisions. Much of this work is performed by clerks, who are often recent graduates of the top law schools in the country. These drafted opinions are circulated among the justices and their clerks. Next, the justices meet in conference to allow for the exchange of ideas and arguments and to vote. The chief justice counts the votes, writes the decision of the court (or assigns someone to write the official decision if he is among the minority), and manages the process.

In deciding a case, a majority of justices must be in agreement. Sometimes the opinion is brief and unsigned; this is known as a per curiam opinion. There are three kinds of opinions:

- An opinion of the Court is the majority opinion.
- A concurring opinion is an opinion that agrees with the decision but uses different reasoning to reach that conclusion.
- A dissenting opinion is a minority opinion. Disagreeing with the decision, it has no value as precedent but may form the basis for later appeals or reversals of precedent.

The federal courts have the power to make public policy in three ways:

- by interpretation of the Constitution or law
- by extending the reach of existing law
- by designing remedies that involve judges acting in administrative or legal ways

These powers can be measured in several ways. Over 130 laws have been declared unconstitutional. Over 260 cases have been overturned—to let a prior decision stand is called stare decisis. Judges now handle cases once left to the legislature. Further, judges now often go beyond what is narrowly required by imposing remedies for issues and problems.

**AP Tip**

Judicial activism versus judicial restraint is a major issue when considering the federal courts. The issue will certainly appear on the AP exam in some form.

Judicial activism, the philosophy by which judges make bold policy decisions, has both supporters and critics. Supporters believe courts should correct injustices when other branches or state governments refuse to do so, and when change creates new circumstances not foreseen by the Founders. They also argue that the courts are the last resort for those without the power or influence to provoke new laws. Promoting the philosophy known as judicial restraint, critics argue that judges cannot put themselves above the law and that they lack expertise in designing and managing complex institutions. These critics also note that the courts are not accountable because judges are not elected.

Judicial activism increased during the twentieth century because government has tended to do more and courts have interpreted a greater number of laws. Also, activist judges have become far more widely accepted in American political culture as our values, society, and technology have changed.

## CHECKS ON JUDICIAL POWER

Like the other branches of the federal government, the judicial branch does not have unrestrained powers. There are several checks on the powers of the federal courts:

- Courts rely on others to implement their decisions. Congress can check the courts in several ways:
  - Confirmation proceedings gradually alter the composition of the courts.
  - Impeachment proceedings, though rare, can also change the composition of the courts.
  - Congress can change the number of judges, giving the president more or fewer appointment opportunities.
  - Revising legislation can undo Supreme Court decisions.
  - Amending the Constitution can alter the jurisdiction of the Court.
  - Defying public opinion may be dangerous for the legitimacy of the Supreme Court. Public confidence in the Supreme Court since the 1960s has varied as the Court has issued controversial rulings. Today there is often more popular support for the executive and legislative branches.

The courts have substantial power, and judicial review in particular makes the courts an important part of the complex process of establishing and revising American public policy.