

## **THE JUDICIARY: THE BALANCING BRANCH**

### **I. INTRO**

- a. The example of the 2007 Supreme Court case of striking down as unconstitutional the use of race in assigning pupils to individual schools reflects the more recent conservative leanings of the court based on Bush's nominations
- b. It matters from an ideological perspective, who sits on the court and when court vacancies occur based on who is in the presidency
- c. Citizens and interest groups can take an activist role with the appointment of federal judges, especially the Supreme Court by deciding which presidential candidate to support

### **II. UNDERSTANDING THE FEDERAL JUDICIARY**

#### **a. INTRO**

- i. Framers viewed the federal judiciary as an important check against the power of Congress and the president
- ii. To insulate the federal judiciary from any political influences, they rejected direct election
- iii. Also rejected the House from any role in either selecting or confirming federal judges
- iv. No limits were allowed on federal judges
- v. Salaries cannot be reduced, once confirmed
- vi. Many states maintain systems whereby judges are determined by popular elections

#### **b. CHARACTERISTICS OF THE FEDERAL JUDICIARY**

- i. **CIVIL AND CRIMINAL LAW**- Federal judges rule on many controversial issues due to **JUDICIAL REVIEW** – the power to interpret the

Constitution; only a Constitutional Amendment or later Supreme Court ruling can modify the Court's decision

ii. Several important characteristics:

1. An **ADVERSARY SYSTEM** – a neutral arena where two independent parties can argue their differences and present evidence supporting their views to an impartial judge that guarantees fairness

iii. Handles both **CRIMINAL LAW** – which defines crimes against the public order and provides for punishment; and **CIVIL LAW** – which governs relations between individuals and defines their legal rights

1. Criminal case, a person's liberty is at stake, where civil is mostly monetary

2. Criminal defendants who cannot afford an attorney are provided one by the government, but not in civil cases

3. Criminals have right of jury trial, but not in civil cases

iv. The federal government, not the judiciary, brings all federal criminal cases and can also be a party to a civil action. The federal judiciary decides the cases.

v. Government **PROSECUTORS**, acting on behalf of the public, choose whether or not to pursue a case against criminal **DEFENDANTS** who have potentially violated the law (presumed innocence).

1. In some cases, they can **PLEA BARGAIN** to a lesser offense

c. **CASES, CONTROVERSIES, AND JUSTICIABILITY**

i. Federal judges decide only **JUSTICIABLE DISPUTES** -a dispute growing out of an actual

case or controversy that is capable of settlement by legal methods, according to the Constitution. It is not enough to believe a law to be unconstitutional, there must be a REAL case to be litigated before a judge.

- ii. The parties in litigating a civil suit must have a **STANDING TO SUE**; the **PLANTIFF**, person who begins a civil suit, must have experienced or is in immediate danger of experiencing direct and personal injury. Hypothetical doesn't work
- iii. Several **JUSTICIABILITY** concerns
  - 1. Refuse because harm has not yet occurred; is not **RIPE**
  - 2. Situation is **MOOT**, no longer affects him personally, or case is no longer live
  - 3. Refuse to hear **POLITICAL QUESTIONS**
  - 4. These are very important in an adversarial system
- iv. Courts hesitant to hear disputes on power of Constitution gives to Congress or the president

#### d. **PROSECUTING CASES**

- i. U.S. Department of Justice is responsible for prosecuting federal criminal and civil cases; led by **ATTORNEY GENERAL**, assisted by **SOLICITOR GENERAL**, 94 U.S. attorneys and about 1200 assistant attorneys.
- ii. Solicitor General represents the federal government in cases before the Supreme Court
- iii. President appoints U.S. attorneys with the consent of the Senate, while the attorney general appoints the assistant attorneys in each district
- iv. Federal judiciary also provides help to defendants who cannot afford their own attorney; some appoint private attorneys and some have **PUBLIC DEFENDER SYSTEM** – provides lawyers and is

supervised by federal judiciary to ensure qualified attorneys

### III. THE THREE TYPES OF FEDERAL COURTS

#### a. INTRO

- i. Article III is the shortest of the three articles establishing the institutions of government (Article I & II)
- ii. Article I gave Congress the right to establish “all tribunals inferior to the Supreme Court”
- iii. 1<sup>st</sup> Congress in 1789 created the Judiciary Act of 1789 which created a three-tiered system of federal courts; lowest was DISTRICT COURTS, middle was CIRCUIT COURT OF APPEALS, and the highest is just onw court, THE SUPREME COURT
- iv. The Supreme Court has both ORIGINAL JURISDICTION – the authority to hear a case essentially as a trial court would, only in cases involving ambassadors, other public ministers or diplomats, or cases where a state or states are a party...AND... APPELLATE JUSISDICTION – which reviews decisions of other federal courts and agencies and appeals from state supreme court decisions that raise questions of federal law
- v. Federal courts have jurisdiction only over federal issues in the amount of the controversy is over \$75K

#### b. LEVEL ONE: DISTRICT COURTS

- i. The workhorses of the court system
- ii. In 2007 heard 258K civil cases and 68K criminal cases
- iii. Trial courts where most federal cases begin

- iv. Reapportionment of congressional district and voting rights cases are heard with a three-judge panel
- c. LEVEL TWO: CIRCUIT COURTS OF APPEAL
  - i. Court cases that are APPEALED – sent to a higher court for review- are reviewed by federal COURTS OF APPEAL.
  - ii. Judges are bound by PRECEDENT or decisions made by previous courts of appeals and Supreme Courts
  - iii. Federal regulatory commissions can bring their cases directly to appeals courts
  - iv. Located geographically in 11 JUDICIAL CIRCUITS
    - 1. Review figure 14-1 on page 387
    - 2. 12<sup>th</sup> is in D.C. and hears the largest number of cases challenging federal statutes, regulations and administrative decisions
    - 3. 13<sup>th</sup> appellate court is the Court of Appeals for the Federal Circuit
      - a. Any state or region – patent, copyright or international trade
    - 4. Largest is the 9<sup>th</sup> circuit
    - 5. Can only decide cases that have been decided by district courts
- d. LEVEL THREE: THE SUPREME COURT
  - i. The Constitution established only one court; review figure 14-2 on page 388
  - ii. Compared with Congress and the presidency, the Supreme Court has changed the least since its inception
  - iii. 9 Supreme Court justices today versus 6 in 1789
  - iv. Moved into its own building in 1935
- e. JUDICIAL FEDERALISM: STATE AND FEDERAL COURTS

- i. U.S. has both federal and state courts
- ii. States are also divided between trial courts and appellate courts
- iii. State courts interpret their own state constitutions and laws
- iv. Federal courts have the right of HABEAS CORPUS – a court order requiring explanation to a judge as to why a prisoner is being held in custody- and ensuring the prisoner’s Constitutional rights have not been violated

#### IV. THE POLITICS OF APPOINTING FEDERAL JUDGES

##### a. INTRO

- i. The Constitution set no requirements for serving on the Supreme Court and Congress set no requirements for the lower courts
- ii. The appointment process allows the president (nominating) and the Senate (confirming) ample opportunity for influencing the political direction of the court
- iii. George Washington set two precedents:
  - 1. Appointee was ally or ideologically in agreement
  - 2. All states were represented somewhere in the federal court system
- iv. Because judges are appointed for life, gives president ability to shape ideological bent of the court for years

##### b. MAKING THE INITIAL CHOICES

- i. Article II gives the president the power to appoint federal judges with the advice and consent of the Senate
- ii. The process of consulting with the Senate is complex, but one important norm is SENATORIAL COURTESY – the custom of

- submitting the names of prospective judges for approval to the senators of the appointees' states
- iii. Senatorial Courtesy is not done on Supreme Court nominees, but the president does confer with Congress
- iv. Presidents are also advised by White House staffs and the Justice Department
- v. Nongovernmental agencies, such as the American Bar Association, and liberal and conservative interest groups weigh in on prospective appointees

c. SENATE ADVICE AND CONSENT

- i. The norm is that the president is allowed considerable discretion, but Senate advise and consent can be very difficult and contentious
- ii. All judicial nominees are referred to the Senate Judiciary Committee for a hearing and a committee vote before consideration by the entire Senate
- iii. All district nominees must survive a preliminary BLUE SLIP vote by the two home-state Senators. If either votes no, confirmation is dead.
- iv. Threat of filibuster can delay
- v. Even if nomination is declined, president can make RECESS APPOINTMENTS after the Senate adjourns
- vi. In hearings, Senators will try for LITMUS TESTS to review nominees' views on contentious issues, such as civil rights, abortion, same-sex marriage
  - 1. Stopped the nomination of Bork in 1987
- vii. Lower court nominees don't have the battles Supreme Court nominees do
- viii. Much depends on whether or not the Senate and president are on the same ideological leanings

- d. THE ROLE OF PARTY, RACE AND GENDER
  - i. Presidents seldom nominate judges from the opposing party
  - ii. Attempt to make federal judges diverse in race and gender
- e. THE ROLE OF IDEOLOGY
  - i. Republican presidents tend to choose conservative leaning nominees; whereas Democratic presidents tend to choose liberal leaning nominees
  - ii. Still need to get through bipartisan committees and overall Senate vote without filibusters
- f. THE ROLE OF JUDICIAL PHILOSOPHY
  - i. How do judges view the Constitution? As a living document or as what the framers intended?
  - ii. Are the judges JUDICIAL ACTIVISTS – implied by the Constitution; tend to be more liberal, or do the judges have JUDICIAL RESTRAINT – the letter of the Constitution; tend to be more conservative
- g. REFORMING THE SELECTION PROCESS
  - i. The Bork and Thomas hearings revealed to the nation that the hearings can be personalized and very attack oriented; also can delve into positions on controversial issues

## V. HOW THE SUPREME COURT DECIDES

### a. INTRO

- i. First Monday in October through the end of June
- ii. Listen to oral arguments for two weeks each month from October through April and then adjourn for two weeks to consider cases and write opinions
- iii. At least 6 judges must participate in each decision
- iv. Cases are decided by majority vote
- v. In case of tie, lower court decision is sustained

## b. THE EIGHT STEPS TO JUDGMENT

- i. Rules of appealing a case are established by the Supreme Court and Congress
- ii. Process of deciding cases in Supreme Court is different than other federal courts
- iii. Step-by-step process of accepting and deciding a case
  1. REVIEWING APPEALS- many appeals come from a petition of WRIT OF CERTIORARI – formal petition seeking Court’s review – or IN FORMA PAUPERIS - waive court fees (pauper)(great majority come from prisoners)
    - a. The writs, which the Court can accept or deny, create an agenda or DOCKET; very few actually get decided on
  2. GRANTING AN APPEAL – the Supreme Court will only review a case if it raises a substantial question of federal or Constitutional law with broad public significance
    - a. The Court decides to go forward based on the RULE OF FOUR; four justices want to move forward
    - b. The justices’ law clerks review the detail in the CERT POOL
    - c. Denying a writ of certiorari does not mean the justices agree with the decision of the lower court, nor does it establish precedent
  3. BRIEFING THE CASE – After the case is granted review, each opposing side (Solicitor General for the government) prepare BRIEFS which give legal

arguments, relevant precedents, and historical background for the justices to review

- a. Outside groups interested in the case file **AMICUS CURIAE BRIEFS** – or friends of the court which they can make arguments specific to their members and interest of the judges
4. **HOLDING ORAL ARGUMENTS** - heard within 3-4 months of the written briefs;
  - a. Counsel are each allowed 30 minutes
  - b. The procedure is informally formal; justices might talk amongst each other or ask penetrating questions
5. **MEETING IN CONFERENCE** – Justices meet on Friday mornings to discuss cases they have heard.
  - a. Private and collegial
  - b. Justices give their views based on seniority
6. **EXPLAINING THE DECISION** – the Supreme Court announces and explains its decisions in **OPINIONS OF THE COURT**
  - a. Primary function is to instruct judges of state and federal courts how to decide similar cases in the future
  - b. A justice is free to write a **DISSENTING OPINION** if desired and disagrees with majority opinion
  - c. A justice can also write a **CONCURRING OPINION** if he/she feels strongly with the majority opinion but has a differing reasoning
  - d. Can be directed at Congress or president as an option

## 7. WRITING THE OPINION

- a. Exacting task
- b. Strong-willed persons with excellent writing skills

## 8. RELEASING THE OPINION- Now give brief summaries of decision, but the copies are made immediately available to the public and published in the official UNITED STATES SUPREME COURT REPORTS

### c. INFLUENCES ON SUPREME COURT DECISIONS

- i. CHIEF JUSTICE – appointed and confirmed, but the Chief Justice is the head of the entire federal judiciary;
  1. Has certain responsibilities
  2. But on Supreme Court, he is the “first among equals”
  3. Sets the tone; can be the leader, but not always; depends on personality of the court
- ii. LAW CLERKS- each justice has 4; debate swirls on their influence on their justices and the Court in general
- iii. SOLICITOR GENERAL – represents the government
  1. No appeal can move upwards without his/her consent, so has strong influence on what Supreme Court hears
  2. Can file amicus brief on cases which the federal government is not a party
- iv. CITIZENS AND INTERESTED PARTIES – can also file amicus curiae briefs if they claim to have an interest in the case
- v. AFTER THE COURT DECIDES
  1. Sometimes REMANDS the case back to the lower court with instructions

2. Sometimes can change the behavior of thousands; sometimes totally ignored (school prayer)
3. Most difficult to implement are those that require the cooperation of a large number of officials

## VI. LIMITS ON JUDICIAL ACTION

### a. ADHERENCE TO PRECEDENT

- i. STARE DECISIS- limited based on the rule of precedent; “to stand by which is decided”
- ii. Promotes certainty, uniformity and stability in the law
- iii. Stare decisis less controlling in Constitutional Law due to binding nature of Constitution
- iv. Precedents to not govern judicial decisions forever or nation would still be segregated

### b. CONGRESSIONAL AND PRESIDENTIAL ACTION

- i. CHANGING THE NUMBERS -first action a political party takes after gaining control of the White House and Congress is increasing the number of federal judgeships
  1. Divided government creates a stalemate and few new judgeships
  2. FDR’s court packing scheme to not declare New Deal unconstitutional
- ii. CHANGING THE JURISDICTION- Congressional control over the structure and jurisdiction of federal courts has been used to influence the course of judicial policy making.

## VII. JUDICIAL POWER IN A CONSTITUTIONAL DEMOCRACY

### a. INTRO

- i. Independent judiciary is one of the hallmarks of a constitutional democracy and a free society
- ii. Often criticized when justices make unpopular decisions

### b. THE GREAT DEBATE OVER THE PROPER ROLE

- i. Elections matter because elected officials nominate like-minded judges
- ii. American courts are not all-powerful institutions; public opinion can sway the courts
- iii. Supreme Court and lower courts tend to reflect the competing values of the people
- iv. The power of the Court in a constitutional democracy ultimately rests on retaining the support of the people's will most of the time