# The Judiciary

CHAPTER 9

- Amicus curiae
- Appellate jurisdiction
- Burger court
- Concurring opinion
- Constitutional courts
- Criminal law
- Dissenting opinion
- *Gibbons v Ogden* (1824)
- Judicial activism
- Judicial restraint
- Judiciary committee
- Litigation
- Majority opinion
- Marshall court
- *McCulloch v Maryland* (1819)
- Minority opinion
- Oral argument
- Original jurisdiction
- Precedent
- Rehnquist court
- Senate confirmation
- Special courts
- Stare decis
- Unanimous opinion
- Warren court
- Writ of certiorari

## Contemporary Connection

The Supreme Court run by Chief Justice John Roberts has turned into what has been described as more conservative than its predecessors. The court's critics describe this type of conservatism as judicial activism. The court's supporters disagree and describe the court's actions as judicial restraint. This chapter explores the Judiciary, its evolution, how it makes decisions regarding constitutional issues, and the ideological battles between the liberal and conservative members of the court. The terms "judicial activism" and "judicial restraint" are also explained in the context of the past and today's court.

One of the more dramatic changes incorporated into the new Constitution was the creation of the judicial branch of government. Realizing that a separate branch was needed to adjudicate legal issues, the Founding Fathers set up a court system that had at its top a Supreme Court holding the final power of constitutional review. In addition to a federal judiciary, consistent with the federal system, states set up their own court systems.

This chapter will explore the nature of the judicial branch of government. It will look at how the court system is organized, how justices are appointed, and the background of judges. A central issue that will be discussed is the policy-making function of the Supreme Court. How cases get to the Supreme Court and how they are decided directly relates to this issue. By looking at the history of the Court, you will also be able to understand the impact the Court has had on American society. Finally, we will look at the ongoing debate regarding the issue of whether the Court's policymaking function should be activist or whether justices should show judicial restraint.

Unlike the other two constitutionally established institutions of government, the judiciary, to many, is the most distant from the average citizen. There is a lack of understanding regarding the powers and function of the Court, and since federal justices serve for life, they are not directly responsible to the electorate. Yet the judiciary helps to maintain a delicate balance between order and liberty. It has a major impact on the average citizen. If you trace the influence of the Supreme Court from the Marshall Court to the Rehnquist Court, you will see how public policy is affected.

**QUICK CONSTITUTIONAL REVIEW OF THE JUDICIARY**

- Basis of constitutional power found in Article III.
- Judges are appointed by the president with the consent of the Senate and serve for life based on good behavior.
- Judicial power extends to issues dealing with common law, equity, civil law, criminal law, and public law.
- Cases are decided through original jurisdiction or appellate jurisdiction.
- Chief Justice of the Supreme Court presides over impeachment trials.
- Congress creates courts "inferior" to the Supreme Court.

## DUAL COURT SYSTEM

**The American judicial system has a duality that is consistent with our federal system of government.**

The dual nature of the court system reflects the shared power of the national and state governments. According to the Constitution, the Congress can establish lower federal courts. It also permits the states to develop their own criminal justice system and courts to support it. Although they are independent from the federal courts, the state courts are linked by an appeals process that enables individuals to challenge state statutes in federal court. On the federal level Congress has created two kinds of courts—constitutional courts and special courts. Constitutional courts were formed to carry out the direction in the Constitution for the courts to exercise judicial power. Special courts were created by Congress to deal with cases deriving from the delegated powers of Congress such as military appeals, tax appeals, and veteran appeals.

The jurisdictions of federal and state courts depend upon the nature of the cases. The Constitution specifically assigns federal courts jurisdiction in cases dealing with laws arising from the Constitution, treaties, all cases dealing with ambassadors, cases

dealing with admiralty and maritime issues, cases in which the United States is involved with two or more states, or cases between citizens of different states. The Supreme Court has original jurisdiction only in those "cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party." Exclusive state court jurisdiction involves those cases deriving from state laws. However, through the appeals process, many of those cases could eventually end up in federal court.

## STRUCTURE

**The structure of the federal court system facilitates the judicial process.**

The Constitution allows the establishment of "inferior" courts or lower courts. The first major organizational act of Congress occurred in 1789 with the Judiciary Act creating district courts. Congress has also responded by creating specialized or legislative courts and courts of appeal.

District courts, of which there are currently 94, handle 80 percent of the federal cases brought to them. Each state has at least one federal judicial district. The district court is the court of first hearing for cases involving federal crimes, civil suits involving federal laws, bankruptcy proceedings, admiralty and maritime cases, and immigration cases. United States attorneys are appointed by the president and confirmed by the Senate. They are responsible for bringing cases to the district courts.

The courts of appeal were established by Congress in 1891. They were created to set up an intermediate level of appeal before cases got to the Supreme Court. There are 13 courts of appeal and a Supreme Court Justice is assigned to act as liaison. These courts are responsible to review decisions of district courts and special courts. They review and enforce decisions of federal regulatory agencies and review cases on appeal from state supreme courts. The Supreme Court is the last final court of appeals, and it will be looked at as a separate topic later in this chapter.

## SELECTION OF JUSTICES

**The appointment of federal justices has as much to do with partisanship as ideology and is another example of the relationship among government branches and institutions.**

The other two branches of government, the executive and legislative, are linked in the process of selecting federal justices. In addition, special interests such as the American Bar Association give their input. The result is a process that sometimes gets embroiled in political controversy. The president must get the approval of the Senate for all federal judgeships. In addition, the tradition of senatorial courtesy, the prior approval of the senators from the state from which the judge comes, has been part of the appointment process. This courtesy does not apply to Supreme Court justice nominations. Once nominated, the judicial candidate must appear before the Senate Judiciary Committee and is given a complete background check by the Department of Justice. Usually, lower court justices are not hand-picked by the president. They come from recommendations of other officials. Many lower court judgeships are given as a result of prior political support of the president or political party. From the administration of Franklin Roosevelt to the administration of George W. Bush, with the exception of Gerald Ford, every president has appointed over 90 percent of lower federal court judges from his own political party. There have been an increasing number of minority judges appointed, especially women, African-Americans, and Hispanics. When the Senate refuses to move forward on a presidential nominee, the president can make a recess appointment. Such an appointment bypasses Senate confirmation but only lasts for the remainder of the congressional session. President

Clinton, President George W. Bush, and President Barak Obama used this process to make judicial appointments.

## Supreme Court Nominations

The consideration of judicial ideology has become increasingly important in the selection of Supreme Court justices. When a Supreme Court nominee appears before the Senate Judiciary Committee, issues such as constitutional precedent, judicial activism, legal writings, and past judicial decisions come under scrutiny. Other issues such as feelings of interest groups, public opinion, media opinion, and ethical and moral private actions of the nominee have been part of the selection process. Let's look at four recent nominees to illustrate this point.

When Justice Lewis Powell left the Court in 1987, President Reagan nominated Robert Bork. Bork had been an assistant attorney general in the Justice Department and was part of the "Saturday Night Massacre" when Nixon fired Attorney General Elliot Richardson. Bork was third in line and carried out Nixon's order to fire the special prosecutor, Archibald Cox, who was investigating the Watergate break-in. Bork was a conservative jurist and believed in judicial restraint. Many of his writings were questioned, as well as a number of his views regarding minorities and affirmative action. He was rejected by the Senate.

After his defeat, the term "Borked" was coined. It refers to a presidential appointee who does not get approved by the senate because of ideological reasons.

Douglas Ginsburg was nominated by Reagan after Bork's rejection. He was also considered extremely conservative. Under intense Senate questioning, conflict of interest issues surfaced as well as allegations that Ginsburg had used marijuana when he was a professor in law school. Reagan withdrew his nomination and finally succeeded in getting unanimous Senate approval for the more moderate Anthony Kennedy.

The most heated debate over confirmation occurred when President Bush nominated Clarence Thomas in 1991 to replace the first African-American Justice, Thurgood Marshall. This nomination brought to national attention the actions of the male-dominated Judiciary Committee when it came to questioning both Thomas and Anita Hill. Thomas was narrowly confirmed by a vote of 52–48. The confirmation process brought to the forefront the conflict between the president's constitutional authority to nominate the person he feels is best qualified and the responsibility of the Senate to approve the nominee. The partisanship of the committee as well as the leaks leading to the testimony of Hill added to the controversy.

When Clinton became president, his first two nominees, Ruth Bader Ginsburg and Stephen Breyer, reflected an attempt on his part to depoliticize the process. Both nominees received easy Senate approval.

The second term of George W. Bush brought about a major change in the makeup of the Supreme Court. Sandra Day O'Connor, the Court's first female appointee resigned. President Bush nominated Judge John G. Roberts, Jr. to replace her. Judge Roberts clerked for William Rehnquist in 1980 when Rehnquest was an associate justice. Roberts went on to serve on the U.S. Court of Appeals for the D.C. Circuit in 1992. He had previously argued 39 cases before the Supreme Court. Roberts described himself as a "strict constructionist" who relied heavily on precedent in determining the outcome of cases that came before him.

Before the confirmation process began, Chief Justice William Rehnquist died and President Bush decided to nominate Roberts as Chief Justice leaving O'Connor's

replacement vacant until Roberts was confirmed. After the confirmation hearings were completed, the Senate voted to confirm Roberts as the seventeenth Chief Justice of the Supreme Court. Roberts became the youngest Chief Justice since John Marshall. Bush's nominee to replace O'Connor was federal appeals Judge Samuel Alito, who was confirmed by the Senate.

The death of William Rehnquist ended an era of judicial restraint and conservative activism. Rehnquist's legacy will be far reaching. Decisions in the areas of federalism and the rights of the accused turned the Court to the right. O'Connor's legacy as a swing vote on the Court was also significant. In 2009, Justice David Souter retired. President Obama nominated the first Hispanic-American judge, Sonia Sotomayor, to the Supreme Court. President Obama appointed Solicitor General Elena Kagan to the court after Justice John Stevens retired.

## LIMITED NUMBER OF CASES

Based on "the rule of four" (a minimum of four justices agreeing to review a case), the Supreme Court's docket is taken up by a combination of appeals cases ranging from the legality of the death penalty to copyright infringement. The process it takes for a case to reach the Court has been documented by Peter Irons in his book and audiotape research *May It Please the Court*, the traditional salutation given to the justices. Irons interviewed attorneys who argued landmark cases and for the first time released audiotapes of the oral arguments.

**Even though the Supreme Court receives thousands of cases to review, it chooses only between 75 and 100 cases each session from state courts, courts of appeals, and district courts. Critics claim that the limited number of cases accepted limits the Court's ability to make public policy.**

The controversy surrounding the release of the book and tapes brought to light the question of whether television should be allowed at Supreme Court sessions as they are in the Congress. The Court released audiotapes for the first time in 2000, immediately following the disputed 2000 presidential election and the legal challenges that followed. The tapes were released to the media and were played over the Internet. They continued this practice during subsequent terms whenever there was a case that evoked a large amount of public interest, such as the University of Michigan affirmative action case, the Guantanamo Bay detainee case, and the McCain-Feingold campaign finance law case.

Irons describes the process it takes for a writ of certiorari (Latin for "to be made more certain"). The appeal is heard based on five criteria:

- If a court has made a decision that conflicts with precedent.
- If a court has come up with a new question.
- If one court of appeals has made a decision that conflicts with another.
- If there are other inconsistencies between courts of different states.
- If there is a split decision in the court of appeals.

If a writ is granted, the lower court sends to the Supreme Court the transcript of the case that has been appealed. Lawyers arguing for the petitioner and respondent must submit to the Court written briefs outlining their positions on the case. The briefs must be a specified length, must be on a certain color of paper, and must be sent to the Court within a specified period of time. Additional amicus curiae, "friend of the court," briefs may be sent to support the position of one side or the other. Once the case has been placed on the docket, the lawyers are notified, and they begin preparing for the grueling process of oral arguments before the Court. Attorneys are often grilled by the sitting justices for 30 minutes. Often, the Solicitor General of the

United States represents the government in cases brought against it. Although these arguments do not usually change the position of the judges, they offer the public an insight into the legal and constitutional issues of the case. After the case is heard, the nine justices meet in conference. A determination is made whether a majority of the justices have an opinion on the outcome of the appeal.

Once a majority is established, sometimes after much jockeying, the Chief Justice assigns a justice to write the majority decision. Opposing justices may write dissenting opinions and if the majority has a different opinion regarding certain components of the majority opinion, they may write concurring opinions. The decision of the case is announced months after it has been reached. Sometimes, when the case is significant, the decision is read by the Chief Justice. At other times a pur curiam decision, a decision without explanation, is handed down. Once a decision is handed down, it becomes public policy. The job of implementing the decision may fall on the executive branch, legislature, or regulatory agencies, or it may require states to change their laws.

Probably one of the most far-reaching cases was *Roe v Wade* (previously discussed), which invalidated a number of state laws. However, a number of cases attempted to redefine the *Roe* doctrine. The fact that the number of cases decided decreased during the Rehnquist years illustrates the restraint of that Court in tampering with Court precedent. Another route of appeal used by people convicted of a crime has been through the writ of habeas corpus. Claiming that their constitutional rights were violated procedurally, criminals appeal their case to the federal courts. In *Herrerra v Collins* (1993) the Supreme Court rejected the appeal of a Texas man on death row who claimed that he had new evidence that proved his innocence. The Court ruled that the writ was not in their jurisdiction and sent a clear message to other states that they should handle these appeals.

## EFFECT ON PUBLIC POLICY

**The history of the Supreme Court illustrates its impact on public policy.**

From the landmark *Marbury v Madison* ruling, to the *Miranda* decision, to the controversies surrounding the separation of church and state, the Supreme Court has had a significant impact on public policy. By looking at the history of the Court, you will be able to see how various chief justices have been identified as contributing to the importance of the Court in the public policy arena.

John Marshall has been given credit for setting the course of the young Supreme Court. When the issue of federal judgeships came to him in the *Marbury* case, Marshall had to find legal rationale to rule that the Judiciary Act of 1789 was unconstitutional. The case revolved around the arguments made by William Marbury, who had been appointed to a minor judgeship by outgoing Federalist President John Adams at the midnight hour of his administration. The incoming Secretary of State, James Madison, refused to deliver the commissions, and Marbury asked the Supreme Court to issue a writ of mandamus directing the executive branch to make the appointments. The argument was made directly to the Supreme Court, using the route of original jurisdiction prescribed by the Judiciary Act. Marshall, who was originally the Secretary of State under Adams responsible for delivering the commissions, was in a real bind. He convinced the rest of the Court that even though Madison was wrong not to deliver the commissions, the Judiciary Act of 1789 was unconstitutional because it did not meet the requirements outlined in the Constitution related to original jurisdiction. The principle of judicial review was established, and

the Supreme Court began making crucial policy decisions. Other cases, previously described, such as *Gibbons v Ogden* (1824) and *McCulloch v Maryland* (1819), further strengthened the power of the Marshall Court. The modern court began with the court run by Chief Justice Earl Warren in 1952.

Perhaps the most activist Court in the history of the Supreme Court, the Warren Court (1953–1969) faced the question of determining the future of the civil rights movement. Appointed by President Eisenhower in 1954, Chief Justice Earl Warren convinced a split court that it was essential to overturn the separate but equal doctrine established by *Plessy v Ferguson* (1896). The Court also expanded the rights of the accused and ordered states to reapportion their legislatures (see Chapters 6 and 8).

When Warren retired in 1969, President Nixon had an opportunity to change the face of the Court. He appointed Warren E. Burger, a conservative jurist. He also filled another vacancy by appointing Harry Blackmun to the Court. The Court, however, continued to make rulings that irked those strict constructionists. Even though more conservative than the Warren Court, it continued to break down segregation by ordering bussing to end segregation patterns. It upheld affirmative action programs, and even though it limited aspects of the *Miranda* decision, it continued to recognize the rights of the accused. The Burger Court will be remembered most for the *Roe v Wade* decision. Blackmun also emerged as the Court's liberal spokesperson. Ironically, Burger had to write the majority decision in *United States v Nixon* (1974), which rejected Nixon's claim of executive privilege in not turning over the Watergate tapes.

In 1986, after Republican appointments made by Ford and Reagan, William Rehnquist became the nation's 17th Chief Justice. Along with Sandra Day O'Connor, Anthony Kennedy, and Antonin Scalia, this Court was the most conservative in American history. It began to reverse many of the earlier Warren and Burger rulings. When George Herbert Walker Bush was elected president in 1988, he added to the Court's conservative majority by appointing David Souter and Clarence Thomas. However, Souter took more of a middle-of-the-road approach and emerged as a crucial swing vote in many cases. After Clinton was elected in 1992, he had the opportunity to start the process of reversing the conservatism of the Court by appointing Ruth Ginsburg and Stephen Breyer. The future of the Supreme Court will depend to a large extent on the new coalitions formed and on the outcome of presidential elections. One thing has certainly become evident: a majority may vote one way on one issue, and on another issue an entirely new majority may emerge.

This scenario occurred during the 1995–1996, 1996–1997, and 1998–2001 terms, when a number of landmark cases were decided by a slim majority. In many of these cases, Justices Sandra Day O'Connor and Anthony Kennedy became the important swing votes.

Some of these decisions have been characterized as a new form of judicial activism "conservative activism." The cases that overturned federal laws sent a signal that the federal government was using too much of its inherent powers to create law. In the first four terms that Chief Justice John Roberts has presided over the Supreme Court, the court's majority has been more conservative in their decisions. Along with Justice Alito, Justices Scalia and Thomas—with Kennedy as the swing vote—have tilted the court more to the right.

## JUDICIAL PHILOSOPHY

**The debate on whether the Supreme Court should reflect an activist position or exhibit judicial restraint has not been resolved.**

In the early days of the republic, arguments revolving around strict constructionist versus loose constructionist interpretation of the Constitution abounded. Today, we see people arguing whether the Court should be activist or demonstrate judicial restraint. All Supreme Court nominees are asked to describe their judicial philosophy.

The critics of judicial activism make the argument that it is not the Court's responsibility to set policy in areas such as abortion, affirmative action, educational policy, and state criminal law. They feel that the civil liberty decisions have created a society without a moral fiber. The fact that judges are political appointees, are not directly accountable to the electorate, and hold life terms makes an activist court even more unpalatable to some.

On the other hand, proponents of an activist court point to the responsibility of the justices to protect the rights of the accused and minority interests. They point to how long it took for the doctrine of separate but equal to be overturned. And they point to how many states attempt to circumvent court decisions and national law through laws of their own. Proponents of judicial activism also make the argument that you need the Supreme Court to be a watchdog and fulfill its constitutional responsibility of maintaining checks and balances. As Alexander Hamilton wrote in Federalist No. 78, "Laws are dead letters without courts to expound and define their true meaning and operation."

The critics of judicial restraint feel that the interests of government are not realized by a court that refuses to make crucial decisions. They suggest that the federal system will be weakened by a court that allows state laws that may conflict with the Constitution to go unchallenged. Proponents of judicial restraint point to the fact that it is the role of the Congress to make policy and the role of the president to carry it out. They feel that the Court should facilitate that process rather than initiate it. They point to the fact that in many cases the Constitution does not justify decisions in areas where there are no references. The right to an assisted suicide, for instance, became an issue that advocates of judicial restraint urged the Court to reject on the grounds that it was not a relevant federal issue to hear on appeal. The Rehnquist Court, in fact, ruled against a group of physicians arguing for the constitutional right to assisted suicide.

One of the ironies in the debate is that those favoring judicial restraint would like to see precedent be the guiding light. However, in declaring congressional laws unconstitutional and creating new precedent, those advocating restraint have themselves become activists.