

Chapter 14

The Judiciary: The Balancing Branch

Key Chapter Questions

1. How and why do judges make the law?
2. What are the components of the federal court structure in the United States?
3. What factors influence the selection and eventual confirmation of federal judges?
4. What are the procedures of the Supreme Court?
5. What is the meaning and significance of judicial restraint and judicial activism?
6. What are the linkages between what the judges do and what the people want done?

Chapter Outline

- I. Introduction/The scope of judicial power (see Tocqueville, Laski, Marshall references)
 - A. American judicial system rests on an “adversary system”
 1. Based on “Fight Theory”—arguments aim at fairness in the judicial system
 2. Judicial power is passive; only “justiciable disputes” considered
 3. In recent years, class action suits are increasingly important
 4. Courts cannot resolve political questions (best left to other branches for solution)
 - A. Do judges make law?
 1. Not only *do* judges make law, they *must*
 2. Adherence to precedent
 - a. *Stare decisis* is the rule of precedence – judges are expected to abide by all previous decisions of their own courts and all rulings of superior courts
 - b. The doctrine of *stare decisis* is less controlling in the field of constitutional law; because the Constitution itself, rather than any one interpretation of it, is binding, the Court can reverse a previous decision it no longer wishes to follow
 3. Types of law (insert)—common, equity, constitutional, admiralty/maritime, administrative, criminal and civil
- II. Federal justice (Judicial power from Article III; legislative and constitutional courts)
 - A. Federal courts of general jurisdiction (some GOP members favored term limits for judges)
 1. District courts – the trial courts of original jurisdiction (94 in the 50 states plus DC/P.Rico)
 - a. The only federal courts that regularly employ grand juries and petit (trial) juries
 - b. Assisted by federal magistrate judges—can issue warrants, handle jury selection, etc.
 - c. District judges are bound by the precedents of the appellate courts that review their decisions, but these judges have considerable discretion in applying these precedents
 - d. Except for the few cases that may be taken directly to the Supreme Court, a final decision of a district court is reviewable by a court of appeals
 - e. Each court has at least 2 judges but may have up to 28 (most hold office for life)
 2. Courts of appeals (12 judicial circuits plus 13th located in DC)

- a. Have only appellate jurisdiction – the authority to review decisions of the district courts within their circuits and also some of the actions of the independent regulatory agencies
 - b. Less than 1 percent of the cases from these courts are looked at carefully by the Supreme Court
 - c. Controversy over the Ninth Circuit; White Commission proposal recommended partition
 - B. State and federal courts
 - 1. Each state maintains a judicial system of its own; state courts have sole jurisdiction to try all cases not within the judicial power the Constitution grants to the United States
 - 2. Except for the limited habeas corpus jurisdiction of the district courts, the Supreme Court is the only federal court that may review state court decisions
- III. Prosecution and defense
- A. Federal lawyers
 - 1. On the federal level, the job of prosecution falls to the Department of Justice: the attorney general, the solicitor general, the 94 U.S. attorneys, and some 1,200 assistant attorneys
 - 2. The president, with the consent of the Senate, appoints a U.S. attorney for each district court
 - B. Prosecutors and the solicitor general (sometimes called the “Tenth Justice”)
 - 1. Prosecutors decide whether to charge an offense and which offense to charge; they have largely unreviewable discretion
 - 2. Prosecutors negotiate with the lawyers for defendants and often work out a plea bargain
 - 3. The solicitor general represents the government before the Supreme Court
 - 4. When the solicitor general petitions the Supreme Court and asks it to review an opinion of a lower court, the Court is likely to do so; SG wins about three-fourths of time
 - 5. The assistant attorney general heads up the Office of Legal Counsel, which works closely with the Office of the Counsel to the President located in the White House
 - C. Federal defense lawyers
 - 1. About half of the judicial districts use the public defender system to provide lawyers for poor defendants in criminal trials
 - 2. The Legal Services Corporation (LSC) provides financial assistance to 323 organizations that furnish legal help to the poor in non-criminal legal matters; restricted to suing landlords, employers, husbands, or wives in traditional legal battles; Republicans would like to abolish it
 - D. Examples of constitutional/special courts—U.S. Court of International Trade, Foreign Intelligence Surveillance Court
 - E. Examples of Article I (Legislative courts)—U.S. Court of Claims, U.S. Court of Appeals for the Armed Forces, U.S. Court of Veterans Appeals, Bankruptcy Judges
- IV. The politics of judicial selection
- A. The Senate: advice and consent (senatorial courtesy still followed for district judges)
 - 1. The president is allowed considerable discretion in the selection of federal judges
 - 2. The battle over judicial confirmation, if there is one, takes place before the Senate Judiciary Committee; note changed role of ABA; also Judicial Selection Monitoring Project
 - 3. A candidate's political orientation is the major factor in determining how he or she will vote on the cases that come before the Court, but note cases of Bork, Thomas, Souter, Ginsburg, Breyer
 - B. The role of party, race, and gender
 - 1. Partisan considerations are taken for granted, and partisan affiliation is rarely mentioned
 - 2. Clinton appointed more women and minorities to the bench than his predecessors
 - C. The role of ideology
 - 1. Republican judges picked by Republican presidents tend to be judicial conservatives, and

- b. When the chief justice is in the minority, the senior justice among the majority makes the assignment, often to himself or herself
 - c. Dissenting opinions—opinions disagreeing with the decision of the Court
 - d. Concurring opinions—opinions that agree with the decision of the Court, but differ on reasoning
 - 4. Circulating drafts
 - a. The opinion must win the support of at least four
 - b. If the initial version is not acceptable to a majority, bargaining occurs
 - c. Two weapons justices can use against their colleagues are their votes and their willingness to write separate opinions attacking a doctrine the majority wishes to see adopted
 - 5. Releasing opinions to the public—copies of decision made available to reporters, public; published in *United States Supreme Court Reports*; since April, 2000, decisions are on website
 - G. After the court decides
 - 1. As a rule, the Court does not implement its own decision but remands, that is, sends back the case to the lower court with instructions to act in accordance with the Court's opinion; the lower court has considerable leeway in interpreting the Court's mandate
 - 2. The impact of a particular ruling announced by the Court on the behavior of those who are not immediate parties to a lawsuit is even more uncertain
 - 3. Many important decisions require further action by administrative and elected officials before they become the law of the land, yet sometimes Supreme Court decisions are simply ignored
 - 4. The most difficult Supreme Court decisions to implement are those that require the cooperation of large numbers of officials
- VI. Judicial power in a constitutional democracy
- A. Independent judiciary is one of the hallmarks of a free society
 - 1. Court has been attacked for engaging in “judicial legislation”
 - 2. Today, judges often tell public officials what they must do
 - B. The great debate over the proper role of the courts
 - 1. Defenders of the activist role argue that if Congress, the White House, and the state legislatures are unable to resolve problems when people are being denied justice and their constitutional rights, then the courts should resolve those problems
 - 2. Critics of judicial activism contend that for the last half century the federal courts, in their zeal to protect people, became unhinged from their political moorings in the political and constitutional system
 - 3. Others claim the debate between judicial restraint versus judicial activism oversimplifies the choices; rather, judges should take a leadership role in some areas but a restrained role in others (stand of Chief Justice Harlan F. Stone)
 - C. The people and the court
 - 1. There is a correlation between public opinion and judicial decisions
 - 2. President/Senate want judges who reflect their values
 - 3. If the Court's policies are out of step with nation's values, then Court is likely to be reversed