CHAPTER 10
THE JUDICIARY

Chapter Goals and Learning Objectives

The role of the federal judiciary today, particularly the U.S. Supreme Court, differs dramatically from its function early in the nation’s history. The “least dangerous branch” gained prominence from the development of the doctrine of judicial review and, as well, from the growth in the size and reach of the federal government. The Framers never envisioned the ambit and authority of the Supreme Court and lower federal courts; of course, the Framers never envisioned the incredible growth of the federal government and its laws, laws adjudicated by the federal courts. The Supreme Court today, as arbiter of the Constitution, can, in a single decision, dramatically reshape the social and political structure of the country as evidenced, for example, by Brown v. Board of Education, Roe v. Wade, Bush v. Gore and Lawrence v. Texas. As our social and political beliefs change in the country, so do the interpretations of our laws by judges and justices on the federal bench. Who sits on the Supreme Court and in the federal courts across the nation truly matters. It is no wonder that many scholars believe the most lasting decision a president makes while in office is who he appoints to the Supreme Court and the federal bench.

This chapter is designed to give you an overview of the federal judicial system. The main topic headings in the chapter are:

- The Constitution and the Creation of the National Judiciary
- The American Legal System
- The Federal Court System
- How Federal Court Judges are Selected
- The Supreme Court Today
- Judicial Philosophy and Decision Making
- Judicial Policy Making and Implementation

In each section, there are certain facts and ideas that you should strive to understand. Many are in boldface type and appear in both the narrative and in the glossary at the end of the book. Other ideas, dates, facts, events, people, etc. are more difficult to pull out of the narrative. (Keep in mind that studying for objective tests [multiple choice, T/F] is different than studying for essay tests. See the Study Guide section on test taking for hints on study skills.)
In general, after you finish reading and studying this chapter, you should understand the following:

- the Constitution and the creation of the federal judiciary: the Supreme Court’s explicit creation by Article III and creation of the lower federal courts by Congress under the authority of Article III and Article I
- the American legal system and the civil and criminal law
- the federal court system, its types, and jurisdiction
- how federal court judges are selected by presidential nomination and Senate review and confirmation
- the operation and function of the Supreme Court today
- judicial philosophy and decision making: how judicial decisions are reached based on legal and extra-legal factors
- how judicial policies are made and implemented

Chapter Outline and Key Points

In this section, you are provided with a basic outline of the chapter and key words/points you should know. Use this outline to develop a complete outline of the material. Write the definitions or further explanations for the terms. Use the space provided in this workbook or rewrite that material in your notebook. This will help you study and remember the material in preparation for your tests, assignments, and papers.

*Hamdi, et. al. v. Rumsfeld* (2004) and the separation of powers—

"the least dangerous branch"—

the physical location provided the Supreme Court in the early days of the country as a clue to the significance given it by the founders—

how the Supreme Court is referred to—

**The Constitution and the Creation of the Federal Judiciary**

the consideration given to the creation of a federal judiciary at the Constitutional Convention—

*Federalist No. 78*—

Article III—

Article III, section I—

judicial review—
Marbury v. Madison (1803)—

Martin v. Hunter’s Lessee (1816)—

Article III, Congress and the lower federal courts—

life tenure—

independence of the judiciary—

The Judicial Power of the U.S. Supreme Court (Table 10.1)—

checks on the power of the judiciary—

“advice and consent” power of the Senate and judicial nominations—

The Judiciary Act of 1789 and the Creation of the Federal Judiciary

Judiciary Act of 1789—

federal district courts—

litigants—

circuit courts—

size of the Supreme Court—

first public session of the Supreme Court—

characteristics of the early Supreme Court that created problems of prestige and personnel—

the Supreme Court justices as circuit court jurists in the early days of the Court—

John Jay—

eyear Court’s refusal to issue advisory opinions to Washington—

early Court’s work advancing principles of nationalism and national supremacy—

Chisholm v. Georgia (1793)—
The Marshall Court: *Marbury v. Madison* (1803) and Judicial Review

John Marshall—

Marshall elimination of the practice of *seriatim*—

Marshall Court helps define federalism in series of decisions from 1810 to 1821—

concept of judicial review mentioned in *Federalist No. 78* but not in the U.S. Constitution—

judicial review—

*Marbury v. Madison* (1803)—

the facts and the politics of *Marbury*—

immediate and long-term effect of Court’s decision in *Marbury*—

**The American Legal System**

the judicial system of the United States—

Dual Structure of the American Court System (Figure 10.1)—

trial courts—

appellate courts—

**Jurisdiction**

jurisdiction—

original jurisdiction—

where do more than 90 percent of all state and federal cases end?—

appellate jurisdiction—

**Criminal and Civil Law**

criminal law—

style of the case—
civil law—
settlements—
plaintiff—
defendant—
the state as plaintiff—
judges during trial—
juries—
historic exclusion of women and blacks—
peremptory challenges—

**The Federal Court System**

constitutional courts—
legislative courts—

**District Courts**

federal district courts—
number of federal district courts—
least number in each state and number in most populist states—
district court jurisdiction:

1) 

2) 

3) 

The Federal Court System (Figure 10.2)—

U.S. Attorney—
The Courts of Appeals

U.S. Courts of Appeals—
circuit courts of appeals—
intermediate level courts—
eleven numbered courts of appeals—
D.C. Court of Appeal—
U.S. Court of Appeals for the Federal Circuit—
number of sitting federal court of appeals active judges as of 2005—
chief judge—
three-judge panels—
en banc—
do courts of appeals have original jurisdiction?—
jurisdiction of courts of appeals—
right to appeal—
courts of last resort—
general purpose of appellate courts and procedures—
brief—
precedent—
stare decisis—

The Supreme Court

jurisdiction today—
membership number since 1869—
Supreme Court staff—
How Federal Court Judges are Selected

political process of selection—

senatorial courtesy—

nominations under Bill Clinton and George W. Bush—

How a President Affects the Federal Judiciary (Figure 10.3)—

Who are Federal Judges?

Characteristics of District Court Appointees from Carter to Bush (Table 10.2)—

The Supreme Court, 2006 (Table 10.3)—

political nature of appointments—

prior judicial experience—

Appointments to the U.S. Supreme Court

constitutional requirements—

importance to president—

instances where president was wrong in assumptions about nominees—

Eisenhower appointments—

Nomination Criteria

competence—

ideological or policy preference—

rewards—

pursuit of political support—

religion—

race, ethnicity, and gender—

169
The Supreme Court Confirmation Process

- power of the Senate—
- simple majority vote for confirmation—

Investigation

- FBI—
- ABA—
- George W. Bush and ABA—
- Federalist Society—
- Senate Judiciary Committee—

Lobbying by Interest Groups

- Interest Groups Appearing in Selected Senate Judiciary Committee Hearings (Table 10.4)—
- Robert Bork—
- lobbying for district and appellate court nominations—

The Senate Committee Hearings and Senate Vote

- first nominee to testify in detail—
- committee recommendation to full Senate—

The Supreme Court Today

- public awareness of Court and members—
- Don’t Know Much About the Supreme Court (Table 10.5)—
- “cult of the robe”—
- comparison of how proceedings of the Supreme Court and Congress are conducted and covered—
Deciding to Hear a Case

petitions received and opinions issued in 2005-2006 term—
workload of Supreme Court from its inception until 1950—
Supreme Court Caseload, 1950-2005 Terms (Figure 10.4)—
significant role in policy making and politics—
significance of content of Supreme Court’s docket—
increase in number of Bill of Rights cases since the 1950s—
The Roberts Court (picture and caption)—
How a Case Gets to the Supreme Court (Figure 10.5)—
two types of jurisdiction—
substantial federal questions—
writ of certiorari—
two requirements for meeting certiorari:

1)

2)

cert pool—
discuss list and percentage of cases that reach it—
Rule of Four—
the role of clerks—
What Do Supreme Court Clerks Do? (Table 10.6)—

How Does a Case Survive the Process?
criteria for Court accepting a case—
cues regarding the characteristics of cases the Court accepts—
solicitor general—

amicus curiae—

percentage of cases accepted where the U.S. government is the petitioning party—

conflict among the circuits—

interest group participation—

use of amicus briefs by interest groups—

**Hearing and Deciding the Case**

submission of legal briefs—

oral arguments—

tradition and ceremony of oral argument—

when do oral arguments take place?—

who participates in oral arguments?—

mechanics of oral arguments—

how do justices use oral arguments?—

the conference and the vote—

role of conferences—

role of least senior member of the Court in conferences—

how conferences highlight the power and importance of the Chief Justice—

majority vote wins—

writing opinions—

majority opinion—

who assigns task of writing majority opinion?—
importance of majority opinion—
concurring opinion—
plurality opinion—
dissenting opinion—

**Judicial Philosophy and Decision Making**

principles of *stare decisis*—

**Judicial Philosophy, Original Intent, and Ideology**

judicial restraint—
judicial activism—
strict constructionist—
judicial activism: liberal and conservative—

**Models of Judicial Decision Making**

behavioral characteristics—
the attitudinal model—
the strategic model—

**Public Opinion**

check on the power of the courts—
energizing factor—
Court as direct target of public opinion—
Court’s effect on public opinion—
prestige of the Court—
public confidence in the Court—
The Supreme Court and the American Public (Table 10.8)—
Judicial Policy Making and Implementation

primary way federal judges and the Supreme Court, in particular, make policy—

democratic theorists on the power of the courts to make policy—

Policy Making

measures of the power of the Court—

declaring laws unconstitutional—

ability to overrule itself—

political questions—

Implementing Court Decisions

judicial implementation—

role played by well-crafted or popular decisions—

implementation populations—

consumer population—

three requirements for effective implementation:

1) 

2) 

3) 

Research Ideas and Possible Paper Topics

1) Research the Court's current docket (see official Supreme Court Web site below). How many cases will it hear (or has heard)? What types of cases will the Court hear (or has heard)? What constitutional issues are (or were) at stake? Why do you think the Court has chosen to rule (or ruled) on these cases?

2) Research biographies on the current Supreme Court justices. What are their backgrounds? Why were they chosen for the Court and by whom? How are they perceived by court-watchers? (In other words, what do the experts think of them?)
Is there a definite majority on the Court for any single set of constitutional issues? The Warren Court was characterized as very activist, particularly regarding due process rights. Will the Rehnquist Court be so characterized as very activist (although in other areas)? If so, how? And what evidence can you find about activist trends on the Roberts Court?

3) Choose two well-known Supreme Court cases of the past twenty years. Research to determine interest group activity and attempts at public persuasion on the Court during the cases. Using those examples and the text, write a paper (or prepare a short talk) about the impact of public opinion and lobbying on the Supreme Court.

4) Research and analyze President Bush’s judicial appointments to the Supreme Court and the federal bench. What type of judicial policy does Mr. Bush seek in a nominee? How have his nominees reflected the president’s political opinions? How well have President Bush’s nominees fared in the process of Senatorial confirmation?

5) Constitutional law is taught textually. The language and nuance of what the Court says in its opinions is very important. Choose five cases and read the actual opinions. What types of language does the Court tend to use? Are rulings broad or narrow? Are precedents overturned? How does the Court use precedent generally? What did you learn about the Court from reading opinions?

Web sites

The official Web site of the Supreme Court of the United States offers transcripts of oral arguments before the Court, recent case decisions, a history of the Court, the Court’s docket, and other information.

www.supremecourtus.gov

Oyez-Oyez-Oyez is a comprehensive database of major constitutional cases featuring multimedia aspects such as audio of oral arguments.

http://www.oyez.org/oyez/frontpage

The site of the Supreme Court History Society covers the basic history of the Court and has a gift catalog (for that special gift to your pre-law friends).

www.supremecourthistory.org

SCOTUS Blog (Supreme Court of the United States—SCOTUS) was started several years ago by an attorney whose practice is exclusively devoted to appeals before the U.S. Supreme Court and who is one of the most prominent private lawyers in that field, Tom Goldstein. Goldstein manages the blog as well as contributes to it, along with other attorneys, scholars and journalists who are all ardent students of the Court. It is fascinating reading for anyone keenly interested in the Court.

http://www.scotusblog.com/movabletype
Findlaw is a searchable database of S.C. decisions plus legal subjects, state courts, law schools, bar associations, and international law.
   www.findlaw.com

Rominger Legal Services provides U.S. Supreme Court links, including history, pending cases, rules, bios, etc.
   www.romingerlegal.com/supreme.htm

FLITE: Federal Legal Information Through Electronics offers a searchable database of Supreme Court decisions from 1937-1975.
   www.fedworld.gov/supcourt/index.htm

U.S. Supreme Court Plus has decisions from the current term as well as legal research, bios, basic Supreme Court information, and more. Also offers a free e-mail notification service of Supreme Court rulings. While this is primarily a subscriber fee site, you can still find some good free information here.
   www.usscplus.com

The Legal Information Institute offers Supreme Court opinions under the auspices of Project Hermes, the court's electronic-dissemination project. This archive contains (or will soon contain) all opinions of the court issued since May of 1990.
   http://supct.law.cornell.edu/supct/

The Federal Judiciary Homepage offers a wide variety of information about the U.S. Federal Court system.
   www.uscourts.gov

Law.com offers the latest Supreme Court news on its “United States Supreme Court Monitor” Web site. (Free registration is required.)
   http://www.law.com/jsp/scm/news.jsp

The American Bar Association provides analysis of the issues, arguments, background and significance of every case slated for argument in the U.S. Supreme Court.
   http://www.abanet.org/publiced/preview/home.html

C-SPAN also offers information about oral arguments before the U.S. Supreme Court.
   http://www.c-span.org/courts/oralarguments.asp
MULTIPLE CHOICE QUESTIONS

1) Article III establishes
   a. the Supreme Court.
   b. inferior courts.
   c. ten-year terms for federal judges.
   d. All of the above.

2) The three-tiered structure of the federal court system was established by
   a. Article III.
   b. Article IV.
   c. the Judiciary Act of 1789.
   d. the Seventeenth Amendment.

3) The doctrine of judicial review was established by
   a. the Judiciary Act of 1789.
   b. Article III.
   c. Chisholm v. Georgia.
   d. Marbury v. Madison.

4) The Supreme Court in its early history met
   a. in a small room in the basement of the U.S. Capitol building.
   b. in the Supreme Court Building constructed across the street from the
      U.S. Capitol building.
   c. in the county courthouse in Alexandria, Virginia
   d. rarely because it had so little work to accomplish.

5) Federal district courts are courts of original jurisdiction, meaning that they hear
   a. cases only involving federal questions.
   b. appellate cases or trials.
   c. appellate cases.
   d. trials.

6) The court that handles most cases involving federal regulatory agencies is the
   a. First Circuit Court of Appeals.
   b. District Court.
   c. D.C. Court of Appeals.
   d. U.S. Court of Appeals for the Federal Circuit.
7) The reliance on past decisions to reach decisions in new cases is based on the doctrine of
   a. *stare decisis.*
   b. *per curiam.*
   c. *amicus curiae.*
   d. *seriatim.*

8) The size of the Supreme Court is
   a. alterable only by constitutional amendment.
   b. set by Congress.
   c. set by the Constitution.
   d. All of the above.

9) Which of the following is a criterion for nomination to the U.S. Supreme Court?
   a. must be over the age of 35
   b. must be a native-born citizen
   c. must have graduated from an accredited law school
   d. None of the above.

10) The original jurisdiction of the Supreme Court
   a. includes disputes between states.
   b. includes cases affecting ambassadors, public ministers, or a state.
   c. includes territorial disputes among states.
   d. All of the above.

11) Nearly all Supreme Court cases arrive at the Court through
    a. *in forma pauperis* petitions.
    b. original jurisdiction cases.
    c. writ of *certiorari*.
    d. informal request for review by state courts.

12) For the Court to grant a writ of *cert*, the case typically
    a. involves a substantial federal question.
    b. comes from a state court of last resort or the U.S. Court of Appeals.
    c. must be approved by four justices of the Supreme Court for review.
    d. All of the above.

13) The person responsible for handling appeals on behalf of the U.S. government before the Supreme Court is the
    a. solicitor general.
    b. attorney general.
    c. procurator.
14) When a justice disagrees with the ruling of a Court majority opinion, he/she may write a
a. concurring opinion.
b. dissenting opinion.
c. per curiam opinion.
d. plurality opinion.

15) The idea that judges should refrain from making policy is referred to as
a. democratic theory.
b. delegation.
c. judicial restraint.
d. judicial activism.

TRUE/FALSE QUESTIONS

1) John Marshall was the first Chief Justice of the United States.

2) The opinion by John Marshall in *Marbury v. Madison* (1803) dramatically increased the power and importance of the Supreme Court.

3) In courts of original jurisdiction, judges are interested only in questions of law.

4) The federal court structure is established in Article III.

5) The Supreme Court has nine justices as stipulated in the Constitution.

6) President Eisenhower was pleased with the work on the Court of his appointee as Chief Justice, Earl Warren.

7) Politics permeates the selection process of federal court judges and Supreme Court Justices.

8) The vetting of federal judicial nominees by the ABA remains a crucial element in the decision of the president in selecting a nominee to the Supreme Court under the administration of George W. Bush.

9) The Chief Justice of the Supreme Court always assigns the writing of opinions.

10) The Supreme Court is in no way subject to public opinion or the lobbying of interest groups.

COMPARE AND CONTRAST

original and appellate jurisdiction
Supreme Court’s exercise of jurisdiction in its early days versus today

criminal and civil law

federal and state court systems

constitutional and legislative courts

common law and statutory (legislative) law

selection of federal and state judges

writ of certiorari and in forma pauperis

opinions: seriatim, majority, concurring, plurality, dissenting

judicial restraint and judicial activism

SHORT ANSWER AND ESSAY QUESTIONS

1) Discuss the facts and ruling in Marbury v. Madison and the significance of the case to American jurisprudence. Does opposition to the doctrine of judicial review still exist today? Research this latter question.

2) What impact did John Marshall have on the Court and the nation?

3) Define and discuss the concepts of jurisdiction and precedent.

4) What are briefs, and are they used by Supreme Court?

5) What kinds of opinions does the Supreme Court issue, and what are their effects?

6) Explain the basics of the American judicial system. How was it created, and what are its structures and rules?

7) How are federal judges and Supreme Court justices selected? Discuss fully the legal and political issues involved.

8) Discuss judicial philosophies of the Warren, Rehnquist and Roberts Courts.

9) What is the process by which the Supreme Court decides a case? Be sure to start at the process of getting on the docket and going through to the opinion stage.

10) What “extra-legal” factors shape judicial decision making?
ANSWERS TO STUDY EXERCISES

MULTIPLE CHOICE ANSWERS

1) a
2) c
3) d
4) a
5) d
6) c
7) a
8) b
9) d
10) d
11) c
12) d
13) a
14) b
15) c

TRUE/FALSE ANSWERS

1) F
2) T
3) F
4) F
5) F
6) F
7) T
8) F
9) F
10) F