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CHAPTER 10

CONGRESS AND THE COURTS

On September 4, 2003, Miguel Estrada, President G.W. Bush's nominee for the D.C. Circuit Court of Appeals withdrew his nomination more than two years after Bush had first nominated him. Estrada's nomination never received a vote on the Senate floor as the Senate failed to invoke cloture on his nomination on seven different occasions. Estrada's withdrawal was the culmination of the latest chapter in a bitter partisan dispute over the ideological make-up of the federal judiciary. Senate Democrats repeatedly objected to allowing the Estrada nomination to come to a vote in the Senate, arguing that he was a "stealth" nominee who had failed to be forthcoming about his views on legal issues, while Senate Republicans countered that Estrada was a brilliant legal mind who would be unaffected by his personal political views.

The battle over judicial nominees has raged in the past decade at least in part because the House, Senate, and president are not the only institutional players in the legislative game. With judicial powers under the Constitution lodged separately in the courts, federal judges referee encounters between players in the legislative and executive arenas and help determine the boundaries of each institution's powers. In separation-of-powers cases, for example, judges often draw lines between the two branches and specify the constitutional powers on each side. Judges also consider the scope of legislative powers generally, including the scope of congressional power to investigate the executive branch and where the line between federal and state jurisdictions should be drawn.

The courts are not simply referees in the legislative game either. They are both political and legal institutions. In the past twenty years, judges have increasingly contributed to making policy—not merely interpreting statutes already enacted. Growth of judicial activism in the 1970s and conservative reactions in the 1980s are also part of the story of relations between Congress and the courts.

Congress is not a quiet bystander to the decisions of the courts. Most important areas of law are the product of interaction between the legislative institutions (Congress and the president) and the courts. And the legislative players have a number of ways to influence the courts. First, judges are nominated by the president and subject to confirmation by the Senate. As the Estrada battle demonstrates, the very composition of the courts, can and do reflect political and ideological tugs-of-war between Congress and the president. Second, Congress has certain legislative prerogatives with respect to the

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courts. The size of the Supreme Court and lower courts, the organization and funding for the federal court system, and the Supreme Court's jurisdiction with respect to appeals from lower courts are determined by law and so are subject to the legislative process controlled by the House, Senate, and president. And third, Congress and the president anticipate and react to court rulings: They sometimes comply with, ignore, or even reverse judicial decisions.

This chapter takes up each of these subjects—the courts as referees, the courts as policy makers, and congressional resources and strategies.

Courts as Referees

The Constitution implicitly grants to the Supreme Court the power to declare actions of state and federal legislatures and executives unconstitutional. This authority inserts the court into the dynamics of the legislative game.[1] First exercised in *Marbury* v. *Madison* in 1803, the power of *judicial review* suggests a dominant role for the Supreme Court in the construction of national policy. The ability to declare laws unconstitutional potentially gives the courts the final word in the enactment of new legislation.

Most cases come to the courts when a private party, sometimes an interest group, challenges the constitutionality of an act of Congress after an executive agency seeks to implement or enforce the act. Occasionally, members of Congress file suit against the executive branch for its failure to implement laws in a manner consistent with the members' expectations. In fact, members have apparently been plaintiffs in suits filed against the executive branch in more cases during the past two decades than in all previous decades.[2] Issues of great importance gradually work their way up to the Supreme Court, although this might take years after the original enactment of the legislation.[3]

As Figure 10.1 shows, the Supreme Court has overturned federal laws at an uneven pace over its history. Before 1865 only two statutes were overturned. Indeed, for much of its history the Supreme Court has exercised its review powers only intermittently. Intense legislative-judicial conflict is relatively infrequent, occurring in the two decades around the New Deal (1920s and 1930s) and in the two most recent decades. Even then, the majority of laws overturned by the Court are actually minor or relatively unimportant.[4] And many decisions come late and so have little immediate impact on policy. More than half of the decisions overturning federal legislation have come more than four years after enactment, and more than one-fourth of decisions voiding legislation have occurred at least thirteen years after passage.[5] Only a minority of cases reshapes policy in an important way.

In this section, two types of cases involving the interpretation of the Constitution are discussed: cases involving the separation of powers between Congress and the executive branch and cases concerning the scope of congressional powers. The section concludes with a discussion of the role of courts as referees in disputes about the meaning of statutes.

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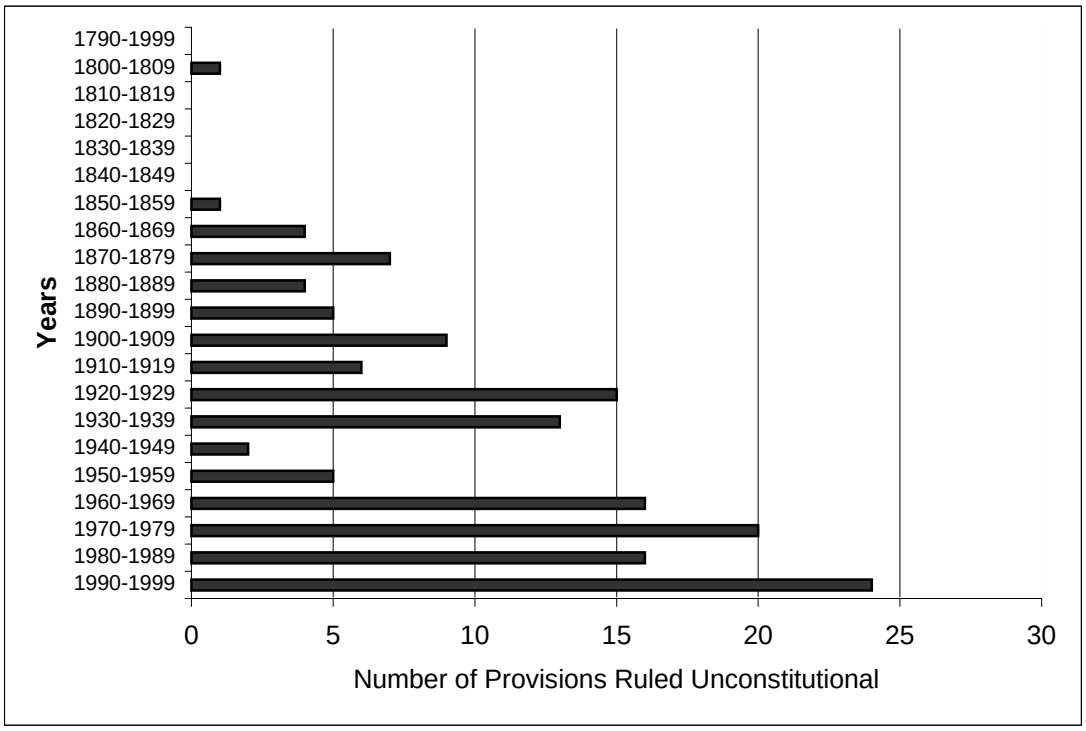
Separation-of-Powers Cases

In the decades before the 1970s, court involvement in separation-of-powers cases was uncommon. Because Congress was relatively deferential to the executive branch, fewer encounters were likely to provoke conflict over the powers of each branch. That situation changed dramatically during the Nixon administration (1969-1974) and in the following years when Congress moved to reassert itself.[6]

President Richard Nixon asserted broad presidential powers in his conflict with a Congress controlled by the Democrats. The most conspicuous conflict was Nixon's battle with Congress over federal spending. Nixon claimed a right to withhold funds from executive agencies—to impound funds—even after the appropriations legislation was enacted into law. For example, Nixon impounded funds appropriated for sewage

Figure 10.1. Provisions of Federal Law Held Unconstitutional by the Supreme Court



Source: The Supreme Court by Lawrence Baum, p. 197. Copyright © 2001 by Congressional Quarterly Press. Reprinted by permission.

treatment plants administered by the Environmental Protection Agency. The impoundments were frequently challenged in the courts, and Nixon usually lost. In 1973 and 1974 alone, only six of over more than fifty cases upheld the president's position on impoundments in any way. Most of the decisions were made at the U.S. district court level and were not appealed by the administration to higher courts.[7] In the sewage-

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treatment case, the Supreme Court ruled that the president was obligated to follow the law and allocate the funds.

In the 1980s, partisan dissension between the Republican White House and the Democratic House continued to drive each branch to the courts for redress against the perceived excesses of the other branch. For most of the Reagan and Bush presidencies, the Supreme Court followed a "doctrinal notion of separated powers"—the view that a sharp line can be drawn between executive and legislative powers.[8] Two particularly revealing decisions in which the Court decided against Congress were *Immigration and Naturalization Service* v. *Chadha* (1983) and *Bowsher* v. *Synar* (1986). These decisions merit attention in light of the ways in which the Court refereed contentious encounters between the branches.

In the *Chadha* decision, the Supreme Court ruled 7 to 2 that the legislative veto (see Chapter 9) was unconstitutional. According to the Court, Congress was to present bills to the president, who had the sole power to veto them. Arguments that the legislative veto was a workable means of extending authority to the executive short of formal enactment of a law were rejected. Still, the ban on legislative vetoes has largely been ignored by Congress, with more than four hundred legislative vetoes enacted into law after Chadha—often with the agreement of the executive branch.[9] Although the *Chadha* decision has forced Congress to be more creative in crafting provisions that give the legislature a potential veto, the response to the decision shows the weakness of the Court as a referee when Congress and presidents agree on mutually beneficial ways to distribute power between themselves.

The Court's role as a referee of the separation of powers is also put into perspective by the narrowness of many of its rulings. Despite the breadth of disagreement between Congress and the president on many separation-of-powers cases, the Court often confines itself to fairly narrow questions. In *Bowsher* v. *Synar,* the Court again tried to maintain a strict boundary between the branches, claiming that the framers of the Constitution provided for a "separate and wholly independent Executive Branch."[10] But in this challenge to the constitutionality of the Gramm-Rudman-Hollings deficit-reduction law (see Chapter 12), the Court ruled only on a fairly narrow, technical point. That provision gave the comptroller general (the head of the General Accounting Office) the authority to determine the size of spending cuts required when the federal deficit exceeded a specified level. Because the comptroller general could be removed by Congress, the Court ruled that executive duties could not be assigned to the comptroller general. The Court ignored more complex questions about the appropriate budgetary responsibilities of the two branches and instead focused on the narrower legal question of removal powers as they concerned the comptroller general.

Although it is tempting to think of the Supreme Court as the ultimate arbiter of the balance of powers between the branches, recognizing that only rarely are the battles solved by formal judicial decisions is important. The courts often refuse to judge a case because of its political nature and leave the dispute for Congress and the president to

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resolve. That is, the court dismisses the case as a "nonjusticiable" political question—one that must be settled by Congress and the president.

The District of Columbia federal appeals court, for example, refused to consider cases brought by members of Congress against the Reagan administration for violations of the War Powers Act in El Salvador, Nicaragua, Grenada, and the Persian Gulf. In *Crockett* v. *Reagan*, in which twenty-nine members of the House claimed that Reagan had violated the War Powers Act by sending military aid to El Salvador, the court argued that the determination of what constitutes imminent hostilities under the act was a fact-finding matter for Congress, not the courts. Judges are put in a particularly difficult position when members take the administration to court, because the members rarely speak with one voice. In *Crockett* v. *Reagan*, numerous senators and representatives stated to the court that no violation of the War Powers Resolution had occurred. In this case, as well as the Nicaragua, Grenada, and Persian Gulf cases, the courts refused to referee the dispute by declaring that it concerned nonjudicable questions.[11]

Congressional Powers

The courts also referee the legislative game by their involvement in questions of congressional powers. Although Article I of the Constitution specifies in some detail the powers of Congress, the Supreme Court has often ruled on whether certain acts of Congress are permissible. In contrast, the Supreme Court has heard relatively few cases on Congress's authority over its internal affairs. On questions of membership qualifications, Congress's ability to punish its members, and speech privileges of members, the Court has generally given Congress a good deal of leeway.[12] A few examples show how difficult the issues can be and how much the role of courts as referees can change in particular areas of the law.

The Commerce Clause. The most frequent way that the courts have refereed legislative politics is by interpreting the limits of congressional power under the Constitution. Perhaps the best examples are Supreme Court rulings that interpret the commerce clause of the Constitution (Article I, Section 8). The commerce clause allows Congress to enact legislation that regulates interstate commerce, and it has been used by Congress to regulate many aspects of American life that are related, however indirectly, to interstate commerce. Over the years, the Supreme Court has decided many cases that affect the limits of what activities are related to interstate commerce. As the national economy became more integrated and as Congress sought to establish more uniform policies for the nation in the late 1800s and early 1900s, congressional powers under the commerce clause became a controversial issue.[13]

In the late 1800s and early 1900s, the Supreme Court took a narrow view of interstate commerce. If an activity concerned production or manufacturing, concerned only intrastate exchange, and did not directly affect interstate commerce, the Court tended to protect it from federal regulation. This interpretation greatly limited the ability of Congress and the president to respond to the rapidly changing national economy. In. fact, the Court's narrow view of the commerce clause led it to strike down Franklin Roosevelt's New Deal legislation in the early 1930s, which was enacted in response to

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the Great Depression. After Roosevelt requested but failed to get congressional approval to enlarge the Court so that he could change the balance of opinion on the Court, however, two justices changed their views on the commerce clause, and the Court reversed itself on several major decisions.

Step-by-step, the Court has allowed Congress to determine what activities are related to interstate commerce since the 1930s. In the 1980s and early 1990s, the Court upheld laws that ban threats and extortion to collect on loans, set minimum wages for employees of state and local governments, and prohibited age discrimination by agencies of state government. Until recently, Court action appeared to virtually erase the line between intrastate and interstate commerce and leave very broad powers for Congress under the commerce clause.

In 1995, led by conservative justices, the Supreme Court changed the direction of seventy years of rulings in favor of congressional discretion to determine the breadth of the commerce clause. In *United States* v. *Lopez,* the Court struck down a 1990 law that prohibited anyone from knowingly carrying a firearm in a school zone. The government argued that Congress had implicit authority, from its ability to interpret the commerce clause, to regulate firearms for such a public purpose. The Court ruled that nothing in the commerce clause or other constitutional provisions authorizes Congress to regulate such behavior. The Court may extend its efforts to set limits on Congress's ability to stretch the commerce clause in other areas of public policy.

Power to Investigate. One area in which the courts have been more active in interpreting congressional powers has been Congress's power to investigate. Although the power to investigate is not mentioned explicitly in the Constitution, investigatory authority has traditionally been considered an implied power of Congress. In general, the authority to acquire information is usually seen as necessary for the proper functioning of a legislature. For example, the investigative and contempt powers of the English Parliament are exempt from judicial review.[14] Although most investigations by the U.S. Congress are carried out without ending up in court, the Supreme Court has on occasion reached some rather controversial decisions about the scope of congressional investigatory authority. In particular, the Court has refereed cases contesting the subjects Congress can investigate and the rights that congressional witnesses retain.

The Court originally took a narrow view of congressional investigative and contempt authority in *Kilbourn* v. *Thompson,* decided in 1881.[15] In overturning the arrest of Hallet Kilbourn, who refused to provide information to the House about certain real estate deals, the Supreme Court limited Congress's ability to investigate private matters. The Court also delineated several principles concerning the proper scope of congressional powers to investigate. Specifically, the Court limited the scope of congressional authority to matters on which Congress could legitimately legislate and on which the chamber had indicated its intent to legislate.

Those standards stood for nearly fifty years, until the Supreme Court broadened congressional authority in *McGrain* v. *Daugherty* in 1927. The Court ruled that Congress had no general power to investigate private matters, but the Court extended the

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scope of congressional authority to any subject of *potential* legislation. The Court also affirmed Congress's power to compel private individuals to testify. Still, the Court did reserve for individuals the right to refuse to answer certain questions if they were not pertinent to the general investigation. Reserving a right for individuals to refuse to testify was to become central to Senator Joseph McCarthy's investigations of subversive activities in the 1950s.

In the 1950s and 1960s, the Warren Court moved to protect the right of private individuals to refuse to answer questions, based on their Fifth Amendment privilege against self-incrimination *(Watkins* v. *United States, 1957; Bernblatt* v. *United States, 1959). Watkins* concerned the rights of a person convicted of contempt of Congress for failing to answer questions about his association with the Communist Party that were posed by the House Un-American Activities Committee. In this case, the Court ruled that the committee did not have a sufficiently well-defined legislative purpose to justify requiring an individual to respond to questions. Chief Justice Earl Warren, writing for the Court, noted that "there is no congressional power to expose for the sake of exposure."[16]

Franking Privilege. Another area in which the courts have recently chosen to referee questions of congressional operations is the franking privilege of members of Congress. In 1992, a court of appeals overturned a district court decision and ruled that members of Congress could not use the frank to send mass mailings to individuals outside of their districts. That practice, according to the 2 to 1 court ruling, constituted an improper incumbent advantage: The government was unconstitutionally subsidizing incumbents over challengers. The law struck down by the court had permitted out-of-district mailings once a redistricting plan had become final. However, the law also permitted members to send mailings to counties adjoining their districts before redistricting was complete. In short, members, at government expense, could reach residents of areas they did not yet represent.

The ability to send such mailings was especially important in an election and redistricting year. But the ruling was particularly striking for other reasons as well. In effect, the court accomplished what Congress seemed unwilling to do. The House had voted twice earlier to impose such a ban, but neither effort succeeded. First, it was adopted as an amendment to a campaign finance bill that was later vetoed by President G.H. Bush. The second attempt was still pending in an appropriations bill when the court ruled, but the ban would not have had any practical effect until the next redistricting, in the year 2002. Even earlier efforts by some House Republicans to get the House to initiate the ban as an administrative order had failed. As one House Republican noted, "It wasn't until the court shone the spotlight on them that they said, 'O.K., we'll stop it.'"[17] Also striking was the House's decision to comply immediately: The House Administration Committee ordered the ban within hours of the decision. Moreover, Republicans on the floor were able to extract an even stronger ban than that outlined by the court, expanding the definition of the mass mailings included in the ban.

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We noted earlier that the courts have generally not interfered with Congress's internal affairs. But the appellate ruling marks a potential turn in the courts' role as referees of Congress. The franking privilege is, after all, only one of many incumbent perks that are considered to unfairly—but not necessarily unconstitutionally—advantage incumbents. The courts' willingness to draw a line between necessary congressional tools and incumbent reelection aids suggests a broader field for the judicial branch in refereeing disputes about the scope of congressional powers.

Regulating Campaign Spending. In overturning parts of campaign finance legislation passed in 1974, the Supreme Court ruled in *Buckley* v. *Valeo* (1976) that Congress cannot limit individual or group expenditures in a political campaign when those expenditures are made independently of a particular candidate or party. The Court said that the First Amendment of the Constitution, which guarantees freedom of speech, prevents the government from regulating political speech—in this case, speech funded by an individual on her own behalf.

The Court said that limitations on campaign expenditures, as for any restraint on political speech, are constitutional only if some compelling government interest exists. The determination of what constitutes a compelling interest requires the courts to exercise discretion and judgment. In this case, the Supreme Court decided that the goal of limiting the electoral influence of wealthy individuals or groups was insufficient and ran directly counter to the intent of the First Amendment. The Court reached a different conclusion in a recent case regarding the constitutionality of the provisions of the 1974 law restricted the amount of money that political parties could spend directly on behalf of candidates. In reversing a previous decision by a circuit court, the Supreme Court held in *FEC v. Colorado Republican Federal Campaign Committee*, that coordinated spending by political parties was not protected by the First Amendment and thus could be constitutionally regulated. Further, a majority of the Court found that there was a compelling government interest in regulating the spending activities of political parties.

The next major Supreme Court decision in the area of campaign finance will come in either late 2003 or 2004 as the Court rules on the constitutionality of major provisions of the 2002 Bipartisan Campaign Reform Act, in *McConnell v. FEC*. See Chapter 4 for more details on the Act.

Politics of Statutory Interpretation

When courts act as referees in the legislative game, they often make judgments about the meaning of statutes. The imprecision of language, inconsistencies among various laws adopted at different times, and evolving circumstances to which a statute must be applied guarantee that the courts will face difficult decisions about the interpretation of laws. Compounding matters is that the legislators and presidents responsible for drafting legislation may have disagreed about the legislation's meaning or even left certain provisions vague to smooth over differences among themselves that would have been obstacles to enactment. Judges, when asked to resolve disputes about the interpretation of statutes, may affect the direction of public policy and sometimes alter the strategies of legislators, presidents, and others who care about policy.

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Judges and legal scholars have developed several approaches to interpreting statutes, each reflecting a different view about how Congress functions, how legislative outcomes are reached, and how capable judges are of understanding congressional intent.[18] The most traditional approach to interpreting statutes relies on the "canons of statutory construction." The canons outline for judges how to interpret the language of laws and are stated in Latin. For example, one canon—*inclusio unius est exclusio alterius*—means that the inclusion of one thing indicates the exclusion of another. Other canons apply to specific subjects. For example, the "rule of lenity" stipulates that statutes that make certain conduct unlawful and impose penalties must be construed to apply narrowly to the conduct specified.

Unfortunately, canons often conflict, and there is no canon to help judges choose the appropriate canon. One school of legal scholars advocates that judges determine the objective or purpose of the statute and then deduce the outcome most consistent with the law's purpose. Another school insists that judges should determine how legislators, motivated by the special interests influencing them, would decide a question if asked to do so. Yet others contend that judges should be free to interpret and reinterpret statutes as the societal or legal context changes. Not surprisingly, some scholars argue that judges should refuse to resolve ambiguities and insist that they be resolved in the legislative process.

Perhaps the most important issue in statutory interpretation is being waged over the relevance and content of legislative histories.[19] A few purists argue for strict construction of statutes. Rather than turning to committee reports and floor debates to interpret legislative intent, supporters of this approach urge courts to restrict themselves to the "plain meaning," or intrinsic meaning, of a statute's text. This view seems to be gaining support in the federal judiciary. Its most prominent proponent is Supreme Court justice Antonin Scalia.

In practice, most judges still gladly accept guidance from committee reports, the record of floor debate, statements of bill or amendment sponsors, presidential messages, and other documented evidence of the intent of a bill's authors. Yet, because legislative histories often encapsulate conflicting views, they are not straightforward guides to statutory interpretation for judges. Most judges seem willing to exercise some judgment about which views should be considered most authoritative. Some effort has been made in recent years to improve communication between the federal judiciary and Congress so that problems of statutory interpretation can be minimized (see the accompanying box).

In recent years a majority of justices on the Supreme Court have begun to look more carefully at legislative histories in the context of federalism cases. In striking down major provisions of the Americans with Disabilities Act, the Violence Against Women Act, and the Religious Freedom and Restoration Act, and upholding provisions of the Family and Medical Leave Act, the Court has cited legislative histories extensively in their opinions.[20] The Court in these cases has used the content of legislative histories to determine whether or not Congress has generated a record of mistreatment of individuals

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by the States. The Court has reasoned that a substantial legislative record is necessary for Congress to abridge states' 11th amendment protection against lawsuits in order to enforce the equal protection clause of the 14th amendment. This new line of reasoning by the Court has altered the balance of power between Congress and the States, and raised new questions about the quality and content of legislative deliberation.[21]

Reducing the Distance Between Courts and Congress

If Congress and the courts are repeatedly drawn into conflict over interpretations of statutes, why not open a path of communication to make each player's intentions clearer? This is one of the questions that led to the creation of the Governance Institute, a nonpartisan organization that explores ways of improving relations between the branches.

Motivated by the need for better communications between judges and legislators, the Governance Institute has devised a system for clearing a channel between the two branches. Under a pilot project initiated by the Institute, staff counsel at the U.S. Court of Appeals for the District of Columbia Circuit are identifying recent appellate opinions from their court that address issues of statutory interpretation based on apparent errors or omissions in legislative drafting. Those decisions are then transmitted to the appropriate committees in Congress for their consideration. The hope is that members of Congress and their staffs will consider corrective legislation for these statutory omissions, ambiguities, or inconsistencies, leading to future improvements in the drafting of legislation and greater clarity in expressions of congressional intent.

Source: Based on information from "Pilot Project to Strengthen Communications Between the Courts and Congress," *Congressional Record*, October 8, 1992, p. S 17537.

Members, lobbyists, and administrations often anticipate that legislative history may be important when issues are taken to the courts (see box). Sometimes, the language of committee reports is the subject of as intense a fight as the bill language itself. For example, after the House Energy and Commerce Committee voted to approve a major overhaul of clean air laws in 1990, it took nearly a month for committee staff to hammer out report language that was acceptable to all sides. On most matters, carefully prepared statements by committee chairs and bill sponsors are made on the floors of the two houses to give weight to a particular interpretation of major provisions of legislation and to set a record that judges cannot easily ignore.

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Judges as Policy Makers

Although the courts' primary role is to serve as a referee of disputes about legislative authority and procedure, the relationship between courts and the legislative institutions is more complex than that. In recent decades, federal judges have been seen as policy makers—as players, not just referees. At times, judges have even moved aggressively to place themselves at the center of political disputes. But in many areas, Congress and the president have encouraged courts' policy-making activities in the legislation they have enacted.

The assertiveness of the Warren Court in the 1950s in addressing racial desegregation marked a considerably more active and aggressive involvement of the courts in national policy making. Although the Burger Court impeded somewhat the extent of judicial involvement in policy making, activism in lower courts continued. Moreover, the Supreme Court still maintained a noticeable level of policy involvement, albeit in a more conservative direction, on issues such as criminal justice.[22]

Congressionally Speaking . . .

Members frequently attempt to establish a clear record about how certain provisions of a bill should be interpreted. One way of doing this is to discuss the provisions in the *committee report* that accompanies the bill. Committee reports provide the background and justification for the bill and its provisions and often provide detailed sections on the meaning of key words or phrases. They are drafted by committee staffs and approved by committees, sometimes after long debate. Members also engage in *colloquies*—scripted exchanges on the floor among two or more members to clarify the interpretation of a bill or an amendment. Colloquies, of course, are transcribed in the *Congressional Record,* where judges, executive branch officials, and others can find floor statements.

In recent years, presidents have used *signing statements,* issued at the time they sign legislation, to offer their interpretation of controversial provisions, These statements send a message to administrative agencies about the interpretation of the law. Courts have not yet placed much weight on signing statements in their reading of legislative histories. They have tended to place greater weight on *veto statements* when the veto is not overridden by Congress and the legislation is modified in the direction suggested by the president.

In the 1970s and 1980s, the mix of liberal, conservative, and moderate judges on the Supreme Court further fueled the expansion of court involvement in policy making. One scholar notes that conservative and liberal justices often were too divided to agree on constitutional interpretation.[23] Reading statutes broadly and sometimes creatively enabled the two sides to sidestep controversial constitutional issues, which, as a by-product, expanded court involvement in the creation of national policy. In lower courts,

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judges often found that they were much less likely to evoke criticism from the Supreme Court if they misread statutes than if they misread the Constitution.

Judicial activism was reinforced by legislative activism on the part of Congress and the president. The wave of legislation between the mid-1960s and mid-1970s created new civil rights, broadened eligibility for welfare and health benefits, established new consumer rights, and set new public health, safety, and environmental standards. Much of the legislation required administrative agencies to design new regulations. Other legislation required agencies to formally account for additional factors in making their decisions. And some new laws were enacted that assigned the executive branch the duty to achieve certain policy goals. At the same time, new and often complex procedures were imposed on agencies by new legislation—the Freedom of Information Act, the Privacy Act, Government in the Sunshine Act, and other legislation. These procedural requirements were designed to open agency decision making to public scrutiny, protect individual rights, and ensure that agency officials heard all interests and views.

Although the role of the courts in the administrative process is in part the result of judges' assertiveness, it is much more than that. The creation of new substantive and procedural rights is often the direct product of interest group politics. Interest groups that lack confidence in decisions by regulatory agencies often view litigation as an alternative route for securing favorable policy outcomes. The type of agency decisions that are reviewable by courts, the actions courts may take, the parties who have standing to sue, and other issues are subject to the give-and-take of legislative politics.[24]

The result is that courts are often left to enforce new rights and procedures, determine whether certain factors were given adequate weight in decisions, and evaluate the effectiveness of agency strategies for achieving specified goals.[25] On the procedural side, judicial review sometimes encourages or even requires agencies to elaborate decision-making processes in ways unanticipated by Congress. Political scientist William Gormley notes that

> by stressing the need for due process and by defining due process very broadly indeed, many federal courts have encouraged administrative agencies to adopt cumbersome procedures when handling individual cases, such as welfare or social security cases. A similar development in rule-making review has stimulated the growth of "hybrid ruling-making" procedures, including opportunities to cross-examine witnesses and other procedural guarantees. In practice, hybrid rule-making often benefits special interest groups, who need little additional protection. That is because such groups can afford the legal representation that hybrid rule-making requires.[26]

And the courts have often taken the step from procedural matters to the substance of agency decisions. In some cases, the law provides explicitly for the appeal of agency decisions to the courts. For example, the law requiring public schools to provide education for children with disabilities provides appeals to give local groups a chance to challenge federal, state, and local decisions affecting education in their communities. In such cases, courts are called on to judge what constitutes adequate education. In doing

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so, the courts are asked to direct public policy, even to influence the spending priorities of government.

In other cases, lawsuits pursued by affected parties or interest groups unhappy with agency decisions have led courts to make policy judgments. Gormley explains:

> Citing the "hard look doctrine" popularized by the late Judge Howard Leventhal, [courts] have insisted that agencies take a hard look at the available evidence, engage in reasoned decision-making, and give careful consideration to alternatives. All of this sounds rather innocuous. In practice, however, the hard-look doctrine enables judges to substitute their judgment for that of administrative officials who possess far greater technical expertise.[27]

Thus, by applying judicially derived doctrine in situations where agencies have been delegated substantial policy-making discretion, the courts sometimes have become policy makers themselves.

The question of why Congress has tended to devolve quasi-legislative powers to agencies and the courts remains. Plainly, institutional politics has become quite complex. Some commentators argue that members of Congress often use the agencies and the courts to avoid difficult choices and political blame. Members, according to this view, often are unable or unwilling to resolve their differences, so they give up and leave legislation ambiguous or include contradictory provisions, which sometimes leaves interested parties no option but to take the matter to court. Other observers note that Congress and the courts have largely been willing allies in the expansion of the federal bench into the legislative arena. Unwilling to trust agency regulators under Republican administrations, Democratic majorities in Congress repeatedly turned to the courts to help put teeth into increasingly complex and detailed legislation in the 1970s and 1980s. And yet other analysts emphasize the influence of interest groups to whom Congress and the president are responding when they approve legislation.

Each of these interpretations seems to fit at least some major legislation. Members of Congress have certainly tried to use the courts when they have lacked the political support to secure policy goals through legislation. As just discussed, failed efforts by members to enforce the War Powers Resolution in the courts show the limits of enticing the courts to resolve political controversies. But Congress's tendency to draw the courts into the policy arena also reflects the cumbersome nature of legislating under divided government. Unable to procure favorable outcomes from regulators, members of Congress and organized groups have deliberately sought the assistance of the courts in battling administrators.

Congressional Resources and Strategies

Congress has formidable tools for dealing with an unfriendly federal judiciary. The framers of the Constitution were careful to reserve several tools for Congress and the president to check the actions of the courts. Lifetime tenure of federal judges is intended to provide some autonomy to the courts, as is the prohibition against reducing the compensation of judges. But neither Congress nor the president has been willing to give a free hand to the federal judiciary. Congress has used its constitutional authority to

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impeach federal judges, change the number of judges and courts, set the courts' budgets, and alter the appellate jurisdiction of the Supreme Court. And perhaps most familiar to even casual observers of American politics, the president and Congress frequently struggle over appointments to the federal bench.

In addition, Congress has responded legislatively to court decisions. Congress often enacts new legislation that is adapted to court rulings. In cases where Congress objects to a court's interpretation of a law, Congress sometimes passes a new bill that clarifies its intentions. In some cases, Congress adjusts the new legislation to take into account a court's ruling about the constitutionality of certain kinds of provisions. And, of course, Congress may propose a constitutional amendment to overrule the courts' interpretation of an existing provision.[28]

Congress and the Structure of the Federal Judiciary

The Constitution vests judicial power in the Supreme Court but grants to Congress the authority to establish inferior courts when it chooses. The size, budget, and appellate jurisdiction of the Supreme Court, as well as the structure, size, budget, and jurisdiction of lower courts, are determined by law and are therefore subject to the normal legislative process. In addition, Congress is authorized by the Constitution to create what are known as Article I courts, or legislative courts—the military courts, tax court, customs courts, and bankruptcy courts. These courts are located in either the executive or judicial branches, the judges are appointed by the president with Senate confirmation, and the judges serve fixed, limited terms.

Partisan politics has been an ever-present condition in Congress's handling of the judiciary. The first major effort to structure the courts for political purposes occurred in 1801, when the defeated president John Adams and his Federalist supporters in Congress created new circuit court judgeships to be filled with Federalists. The effort to influence the character of the federal bench failed, however, when the new Republican Congress repealed the act and abolished the judgeships. Even though Congress postponed the next meeting of the Supreme Court to prevent it from hearing a challenge to its repeal, the Court upheld Congress's power to repeal the Federalists' judiciary Act of 1801 a year later.

Congress has only once limited the jurisdiction of the Supreme Court. In 1868, striking down parts of Reconstruction legislation in 1866, the court was scheduled to hear another case on Reconstruction law—the Habeas Corpus Act, which concerned the rights of individuals held in detention. Anticipating that the Court would use the occasion to find all Reconstruction laws unconstitutional, Congress enacted a law to prevent the Court from hearing cases related to the Habeas Corpus Act. The Supreme Court, incidentally, backed down from any confrontation with Congress when it upheld the constitutionality of the repeal of its jurisdiction a year later.

With the exception of the Reconstruction-era episode, efforts to curb the Supreme Court's jurisdiction have failed. This is not too surprising. After all, the House, Senate, and president, or two-thirds of both houses of Congress, must agree to legislation

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curbing Court jurisdiction before it is enacted.[29] Nevertheless, members of Congress continue to introduce bills that would restrict the jurisdiction of the Supreme Court or all federal courts. Between 1972 and 1985, according to one count, 128 bills were introduced to limit the federal judiciary's jurisdiction in some way.[30] In another study of court-curbing bills introduced between 1789 and 1959, one scholar found that concentrated efforts to curb the Supreme Court occurred most often during periods in which the Supreme Court was particularly aggressive in exercising its power of judicial review.[31] In addition, every court-curbing period occurred when the party dominating Congress differed from the party dominating the Court.

Congress has also had a mixed record in efforts to control the Supreme Court by changing its size. In the nineteenth century, Congress used its power over the size of the Court several times to exert pressure on the Court and to help change its ideological shape.[32] Although Presidents James Madison, James Monroe, and John Quincy Adams each claimed that a growing nation needed a larger Supreme Court (which started with just six members), Congress did not change the Court's size until 1837. Even then, it postponed the change to nine members until the last day of President Andrew Jackson's term that year. Later, by increasing the size of the Court to ten justices, Congress gave President Abraham Lincoln an opportunity to solidify a pro-Union majority on the Court. Soon thereafter, Congress reduced the number of justices from ten to eight to prevent President Andrew Johnson from filling any vacancies. When Johnson's successor, Ulysses S. Grant, took office, Congress changed the number of justices to nine, where it has remained.

The best-known scheme to influence Supreme Court decisions by altering its size was the "court-packing" plan of President Franklin Roosevelt. Roosevelt, disturbed by rulings that struck down important parts of his New Deal legislation, proposed in 1937 that the Supreme Court be expanded from nine to fifteen justices so that he could appoint new justices and change the balance of opinion. Congressional resistance, as well as a series of Supreme Court decisions more favorable to Roosevelt's New Deal legislation, led Roosevelt to drop his plan. But the uproar over the Roosevelt plan has had a chilling effect on other presidents and Congresses that might have pushed legislation to alter the size of the Court for political purposes.[33]

The Senate and Judicial Nominations

The shared power of appointment remains the primary means by which senators and presidents influence federal courts. Needless to say, the president and the Senate do not always agree on what course federal courts ought to take. Two recent presidential nominations to the Supreme Court, the nomination of Judge Robert H. Bork in 1987 and Judge Clarence Thomas in 1991, were particularly controversial. Before exploring appointments to the Supreme Court, it is helpful to look first at appointments to the lower courts.

Lower Court Nominations. Senators of a president's party typically have a great deal of influence over the president's appointments to federal district courts and the courts of appeal (see the accompanying box).[34] Senators usually play an active role in

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the nominating process by suggesting acceptable candidates to the administration. But only a few senators usually play an active role in Senate deliberations considering judicial appointments at the district level. Unlike nominations to the Supreme Court, and more recently circuit courts, which elicit much broader interest, district court seats generally draw fairly localized interest from the Senate body. In most cases, the Senate's Judiciary Committee staff studies lower-court nominees, receives reports from the American Bar Association and the Federal Bureau of Investigation, and routinely recommends approval to the full Senate, which confirms the nominees with little or no discussion.

The record of judicial appointments during the Reagan and G.H. Bush presidencies continued the pattern of routine approval for most nominees, but with the addition of a few very controversial cases.[35] During the course of the Reagan and G.H. Bush presidencies, more than 460 appointments were made to appeals and district courts, meaning that by the end of the Bush administration, more than 70 percent of sitting federal judges had been appointed during the Reagan and Bush years. These appointments have produced a much more conservative federal bench. Although the Democrats controlled the Senate for more than half the period, they largely acquiesced to presidential preferences for more conservative, younger, white federal judges. Not until the few months before the 1992 presidential election did Senator Joseph Biden (D-Delaware) and the Judiciary Committee take a more aggressive stance against the administration's nominees, apparently emboldened by the possibility that Democrat Bill Clinton would win the presidency. After suggesting that he would be more selective about which Bush nominees would receive hearings before the election, Biden and the Judiciary Committee slowed down the pace of confirmation hearings for appellate court appointments.[36]

When Bill Clinton assumed the presidency, he had ninety-nine seats on the federal bench to fill—seats that observers expected would be filled by a greater proportion of minorities and women than were those filled by Bush and Reagan. With a Democratic majority in the Senate during his first two years in office, Clinton was successful in getting rapid confirmations. But after the Republicans took majority control of the Senate in 1995, the speed of Senate confirmations declined markedly. In 1998, conservative chief justice William Rehnquist complained about the slow pace, noting that 101 judicial nominees had been confirmed in 1994 but only 17 were confirmed in 1996 and 36 in 1997. Many vacancies had gone unfilled for more than eighteen months, with some going up to four years between nomination and confirmation. Senate Judiciary Committee Chairman Orrin Hatch (R-Utah) insisted that the Republican Senate had been just as responsive as the Democrats had been for President G.H. Bush, and the battle has continued into the administration of G.W. Bush. In all, the confirmation rate for lower court judges has declined markedly in the past two decades, going from ninety percent in the Carter administration to less than seventy-five percent in the Clinton administration. President's Clinton and G.H. Bush have seen only around fifty percent of their circuit court nominees receive Senate confirmation.[37]

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Congressionally Speaking . . .

Senatorial courtesy is the practice of conferring with senators of the president's party whenever a vacancy in a position subject to presidential appointment is located within the senators' state. The practice applies to vacancies in federal district courts. For many years, senators could exercise a virtual veto over appointments affecting their states. The practice rests on the willingness of the Senate and its Judiciary Committee to refuse to act on nominees opposed by those senators. It gives senators a form of patronage with which to reward political friends.

Recent presidents have challenged this traditional senatorial practice. For appeals court nominations, President Jimmy Carter introduced selection commissions, which were charged with sending at least three names to the president for consideration. President Ronald Reagan abandoned the commissions and instead allowed the attorney general and Justice Department to vigorously scrutinize the philosophy of potential nominees and resist senatorial pressure to nominate people who did not measure up. President G. H. Bush tried to reduce the politicization of the process, but he insisted that senators recommend more than one name for each vacancy and continued the careful review process within the Justice Department. One Bush aide said, "It's very hard to get named to an appellate court post by this administration unless you pass the political smell test. It's not even very subtle." The resulting tension between senators and recent presidents appears to have slowed the process of making presidential nominations. President Clinton has observed senatorial courtesy and worked on an amicable basis to resolve any differences of opinion about district court judgeships with Democratic senators.

In 1997, Senate Republicans considered expanding and formalizing the practice of senatorial courtesy. One proposal considered by the Republican conference would have made nominees to the circuit courts of appeals subject to a veto by a majority of the senators in each circuit. Another proposal would have allowed a Republican senator to register opposition to a candidate for a judicial post even before the president submitted the nomination. Senator Orrin Hatch, the Judiciary Committee chair, opposed the moves, which would have limited his committee's discretion. The conference voted down the proposals by narrow margins.

Source: Quote from "Selection of Conservative Judges Guards Part of Bush's Legacy" by Neil A. Lewis from *The New York Times*, July 1, 1992, p. A13. Dan Carney, "GOP Caucus Rejects Proposals to Alter Confirmation Process," *Congressional Quarterly Weekly Report*, May 3, 1997, p. 1022.

The influence of partisanship in appointment to the lower courts is clear. More than 90 percent of nominees to the lower courts are affiliated with the party of the president nominating them. Moreover, lower-court nominees in the fourth year of a four-year presidential term are much less likely to be confirmed than are nominees sent to the

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Senate in other years, and are nominees typically wait much longer for confirmation in the Senate and presidency are controlled by different parties.[38] At the end of a president's term, senators of the opposition party often prefer to leave judgeships vacant until they see which party wins the presidency. If their party wins the presidency, the new president can submit new names—presumably more to their liking.

Supreme Court Nominations. Supreme Court nominations are not routine. Unlike the appointment process for district court seats, presidential nominations to the Supreme Court garner a much broader spectrum of interest across the Senate. In fact lower court nominees are often screened more carefully if they are thought to be potential Supreme Court nominees. After a president makes a nomination, the Senate Judiciary Committee has the nominee complete a lengthy questionnaire, orders its staff to conduct an extensive background investigation on the nominee, receives an evaluation from the American Bar Association, and then holds several days of hearings. Recently, interest groups have actively lobbied senators and generated publicity for the groups' views. The administration, which sometimes discusses a list of possible nominees with senators in advance of the nomination, coaches the nominee in preparation for the hearings.

The outcomes of Supreme Court confirmation efforts hinge on numerous factors.[39] First, the partisan makeup of the Senate matters. When the president's party has been in the majority, 88 percent of nominees have been confirmed. In contrast, during times of divided government, only 59 percent of nominees have been approved by the Senate.[40] Second, the timing of the nomination also has implications. Not only does partisanship in Congress tend to increase in election years, but the president's influence in the legislative arena usually declines during the course of his term in office. Overall weakness of a president clearly affects his ability to get a nominee approved by the Senate. Reagan nominated Robert Bork in 1987 after the revelations of the Iran-Contra scandal had significantly weakened the president's standing in Congress and public approval. Bork was turned down by the Senate.

Timing is important from other perspectives as well. Many argue that senators up for reelection give greater weight to public opinion than do senators who do not face reelection in the near future.[41] But most senators appear to take into account the qualifications and ideological outlook of nominees. The greater the distance from his or her own positions and the less qualified the nominee, the lower the probability of a senator's voting in favor of the president's choice.[42] The appearance of one or more of these factors—partisan balance, presidential popularity, lateness in presidential term, ideological placement or nominee qualifications—increases the likelihood of conflict in the Senate during the confirmation process. On many confirmation votes, individual senators are also likely to be influenced by constituency concerns. In the case of Thurgood Marshall and Clarence Thomas's nominations to the Court, state racial composition had a determinative effect on votes by senators representing states with large African American populations.[43]

The Senate has failed to confirm only twenty-six, or about 20 percent, of presidents' nominations to the Supreme Court. Twentieth-century presidents have had better luck

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than their predecessors, but even recent presidents have stumbled.[44] President Lyndon Johnson was forced to withdraw two nominations, two nominees of President Richard Nixon were rejected, President Reagan withdrew one nomination and one nominee was rejected, and President Bush withdrew one name. Two nominations deserve special mention: President Reagan's nomination of Robert Bork, which was rejected by the Senate, and President Bush's nomination of Clarence Thomas, which was approved by a narrow margin, 52 to 48.

In 1987, President Reagan faced a Democratic Senate when he nominated Judge Bork, then a judge on the U.S. Court of Appeals for the District of Columbia and a former solicitor general and law school professor. Bork's longstanding and well-published opposition to affirmative action and the established ruling on abortion, and his judicial activism, stimulated an extraordinary and influential effort by civil rights groups and others to prevent his confirmation by the Senate.[45] Interest in his nomination stimulated unprecedented scrutiny by the media—the media even reported Bork's videotape rentals. The Senate voted 58 to 42 against his confirmation.

Four years later, President Bush nominated Clarence Thomas, also a sitting judge on the U.S. Court of Appeals for the District of Columbia, and a former chair of the Equal Employment Opportunity Commission (EEOC). Thomas had relatively little judicial experience: He had been on the appeals court for only eighteen months and had never argued a case before a court. The American Bar Association's review committee rated him "qualified" on their three-point scale (highly qualified, qualified, and not qualified), with two members of the committee voting "not qualified," making Thomas the only Supreme Court nominee rated by the bar association to receive such a weak evaluation. Thomas had a record of commitment to conservative views on many issues, leading liberal groups to mobilize against him and drawing tough questions from the liberal Democrats on the Judiciary Committee.

Nevertheless, Thomas's confirmation seemed likely until the eve of the scheduled vote of the full Senate. National Public Radio reported that a complaint of sexual misconduct against Thomas had been disclosed to Judiciary Committee staff and noted in an FBI report, although it had not been mentioned in the initial committee hearings. The committee reopened the hearings to listen to the testimony of Anita Hill, a University of Oklahoma law professor who had worked for Thomas at the EEOC, who repeated her charges against Thomas. Thomas responded, and the committee heard character witnesses for both Thomas and Hill, all before a very large national television audience.

After Thomas was confirmed by the full Senate, the committee and the Senate were criticized for the manner in which they had conducted the hearings. Senator Arlen Specter ran into difficulty in his 1992 reelection bid because of the way he had grilled Professor Hill. In response to the criticism, Senator Biden announced changes in Judiciary Committee practice that would guarantee that all information received by a committee and its staff would be placed in the nominee's FBI file, ensure all senators access to FBI reports, and provide for closed briefings for all senators so that any

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charges against nominees, if there are any, can be reviewed.[46] And, in a conspicuous move to make sure that any sexism on the committee is held in check, two women—Senators Dianne Feinstein (D-California) and Carol Moseley-Braun (D-Illinois)—were appointed to the committee in 1993.

Congress and the Impeachment of Judges

Under the Constitution, judges "shall hold their offices during good behaviour," but the House is empowered to bring and vote on impeachment charges against judges. If a judge is impeached by the House, the Senate conducts a trial on the charges. A two-thirds vote of the senators present is required to convict and remove a judge—the same number required for removing a president from office. Removal of a judge by House impeachment and Senate conviction is rare. Over the course of the history of the federal bench, no Supreme Court justice has been removed from office by Congress. In 1804, Republicans tried to impeach justice Samuel Chase on several charges, but they failed to get a two-thirds vote to convict. Thirteen lower federal judges have been impeached by the House, and only seven have been convicted by the Senate. Of the seven judicial convictions, three have occurred since 1986.

Congress's impeachment power has not proven to be a source of leverage over the courts. Even the threat of impeachment has only once been credited with inducing a change in Supreme Court membership: Justice Abe Fortas resigned in 1969 after revelations of questionable financial practices. Impeachment trials do pose certain challenges for a Senate already having trouble managing its time and discharging its duties. Any trial procedure involving the full Senate inevitably distracts the Senate from its legislative agenda. To address this problem, the Senate moved in 1986 to form a special twelve-member committee to gather and review evidence on behalf of the full Senate.

Legislative Responses to the Courts

Interaction between Congress and the courts does not necessarily end with judicial action. Congress can, of course, use its traditional legislative powers to respond to court decisions. For example, after the Supreme Court decided in 1988 that burning the U.S. flag in protest of government policy should be afforded First Amendment protection as a form of political speech, Congress eventually enacted a statute designed to strip flag burning of its constitutional protection. In another case, Congress overrode a presidential veto to reverse a Supreme Court decision concerning sex discrimination in colleges and universities.

But successful reversals of unpopular Supreme Court decisions are not automatic. On some occasions, efforts to reverse decisions pass one chamber and get stalled in the other. Other efforts often get stymied at the committee level, after hearings are held on possible legislation to reverse the decision.

Between 1954 and 1990, the Supreme Court struck down sixty-five federal laws, and a congressional committee took action on bills directly related to just nineteen of those Supreme Court decisions.[47] Thus, Congress responded to barely one-third of these

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Supreme Court moves to nullify a federal law. Why? The three-institution legislative game makes a response to the Court difficult. All three institutions must agree, or at least two-thirds of both houses must agree, to any legislative response. If the committees with jurisdiction over the affected legislation recognize that gaining the approval of the House, Senate, and president is impossible, they may choose to take no action.

An Unconstitutional Division of Labor

"The Senate shall have the sole Power to try all Impeachments." The language of the Constitution seems clear enough. Only the Senate can hold impeachment trials for federal officers impeached by the House. But what is meant by "the Senate?" Can a special Senate committee hold an impeachment trial, or can only the full Senate act as jury and judge? Is the word of the Senate final? Or are impeachment trials subject to scrutiny by the Supreme Court? These questions were recently considered by the Court, with the futures of three convicted federal district court judges hanging in the balance.

In 1989, Walter Nixon, Jr., a district court judge from Mississippi, was found guilty of lying to a grand jury about his role in the prosecution of a friend's son in a drug-smuggling case. Nixon, however, challenged his impeachment by the Senate in federal court, charging that the Senate acted in an unconstitutional manner when it allowed a twelve-member committee, rather than the full Senate, to gather evidence and hear testimony in his case. The committee procedure was first used in the 1986 impeachment of district court judge Harry Claiborne, who had been found guilty of tax evasion and sentenced to prison. A U.S. Court of Appeals for the District of Columbia ruled in the Nixon case that the courts could not review congressional impeachment procedures, but a U.S. District Court judge ruled in 1992 concerning another impeached federal judge, Alcee Hastings, that the full Senate must try an impeachment.

In its 1993 decision on the Nixon case, the Supreme Court voted 7 to 2 that federal courts cannot review Senate impeachment proceedings.

You might be wondering why a convicted criminal, such as Judge Claiborne, would have to be impeached and tried to remove him from the bench. The reason is that federal judgeships are held for life and are given up only through retirement, death, resignation, or impeachment. Judge Claiborne continued to receive his full salary and benefits as a federal judge until the Senate convicted him—even though he was serving his sentence in a federal prison.

By the way, Hastings, having been impeached by the House and convicted by the Senate in 1989 on the grounds of conspiring to obtain a $150,000 bribe, was elected in 1992 to represent a Florida district in the House. He is a Democrat and now sits on the House Judiciary Committee, which considered the impeachment of President Bill Clinton.

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Nevertheless, Congress sometimes does respond to court decisions. Several factors appear to motivate congressional efforts to respond to court decisions. One study emphasizes the important role of public opinion in motivating Congress to act.[48] If the majority of public opinion is in favor of action by Congress, the probability of a congressional response increases dramatically. Salience of the issue to organized interest groups, sometimes indicated by the participation of groups in the case before the Supreme Court, also appears to influence congressional decisions to respond. In many cases, however, members seem to have been motivated to take preliminary steps to respond to demands, but they did not push the legislation to the point of passage.

Statutory Reversal and Sex Discrimination in Education

In *Grove City College* v. *Bell* (1984), the Supreme Court interpreted Title IX of the Education Amendments of 1972, which barred sex discrimination in any education program or activity that received federal financial assistance. At issue was whether funds should be terminated for the specific program in which discrimination occurs or for the whole educational institution in which the program is located. The Reagan administration, contrary to the views of prior administrations, indicated that it took the program-specific view. But Congress appeared to believe that the law prohibited funding for the entire institution. Indeed, the House passed a nonbinding resolution on a 414 to 8 vote that endorsed the broader interpretation just before the Supreme Court took up the case.

After the Supreme Court accepted the program-specific view endorsed by the administration, the Democratically controlled House passed legislation in 1984 to make clear that the prohibition on funding applied to the entire institution. The Republican-controlled Senate did not act on the legislation. After the Democrats regained control of the Senate in the 1986 elections, the House and Senate agreed on language that provided even broader civil rights protections than existed in 1972. President Reagan vetoed the legislation, but both houses voted to override the veto.

Not surprisingly, Congress is also more likely to respond to Supreme Court decisions when invited to do so by judges on the bench. On occasion, the Court rules that although particular provisions are unconstitutional, Congress could remedy the problem by rewriting the provision. In effect, the Supreme Court outlines the boundaries of what changes would be considered constitutional. Such guidance by the courts markedly increases the chances that Congress will undertake efforts to respond to or reverse the nullifying decision. Judicial invitations to review give a different cast to relations between Congress and the courts. Far from the conflict that many normally assume exists when the Court overturns a federal law, these invitations to reverse reflect a more cooperative relationship between the branches.

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Amending the Constitution

A frequent response of members to court decisions is to propose a constitutional amendment. Since the Supreme Court's decision in *Roe* v. *Wade* (1973), for example, many members have supported a constitutional amendment that would reserve to the states the power to regulate abortions. The constitutional requirement that an amendment receive the support of two-thirds of both houses before it is sent to the states for ratification sets a high threshold that has seldom been met. Only four amendments to the Constitution were adopted in direct response to Supreme Court decisions: the Eleventh Amendment, on the ability of citizens of one state to bring suit against another state; the Fourteenth Amendment, on the application of the first ten amendments to the states; the Sixteenth Amendment, on the federal income tax; and the Twenty-sixth Amendment, on the right of eighteen-year-olds to vote.

Conclusion

The courts occupy a critical, but often overlooked, place in forming national policy. The roles played by the courts vary widely—from separation-of-powers referee to congressional overseer and partner in policy making. Relationships between the branches clearly depend on the rules of the game. But those rules, as we have seen, are themselves often the product of political battles. The rules of the policy-making process can be ambiguous, and this ambiguity gives the courts an opening into the legislative game. As a result, members of Congress have an incentive to watch over the actions of courts carefully and, on occasion, to enlist judges in their campaigns against a recalcitrant executive branch.

Judges, however, are not always willing to take the bait. Sometimes, the courts smell a political contest and send the dispute back to congressional players to resolve themselves. Other times, judges simply define respective powers of each contending actor and set boundaries for future interactions between the players. Although Congress and the president can shape the membership of the bench, other congressional tools rarely give members enough leverage over the courts to limit judicial independence and discretion. When the courts have chosen to enter the policy process, however, major changes in policy making have often occurred. Whether expanding procedural rights of individuals or forcing executive agencies to work more assiduously to follow congressional intent, federal courts in recent decades have made inroads into the legislative arena. Attention to the interactions of judges, legislators, and executives thus markedly affects our understanding of how separate branches are indeed sharing power to shape national policy.

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NOTES

[1] For an overview of conflict among the three branches, see Jeffrey A. Segal, "Courts, Executives, and Legislatures," in John B. Gates and Charles A. Johnson (Eds.), *The American Courts: A Critical Assessment* (Washington, D.C.: CQ Press, 1991).

[2] As far as we know, no authoritative count of suits filed by members of Congress has been reported. A critical assessment of suits filed by members can be found in Carl McGowan, "Congressmen in Court: The New Congressional Plaintiffs," *Georgia Law Review (1981).*

[3] Some observers have noted that interest groups have increasingly taken their disputes to court rather than slugging it out in the legislative arena. For example, see Benjamin Ginsberg and Martin Shefter, *The Declining Importance of Elections in America* (New York: Basic Books, 1990).

[4] Lawrence Baum, *The Supreme Court,* 7th ed. (Washington, D.C.: CQ Press, 2001), p. 195.

[5] *Ibid.,* p. 196.

[6] For an overview of the changes in the courts' role in separation-of-powers cases, see Nadine Cohodas, "Courts Play Larger Role as Interbranch Referee," *Congressional Quarterly Weekly Report,* January 7, 1989, pp. 13-15. For a broader discussion of congressional reactions to the Nixon administration, see James Sundquist, *The Decline and Resurgence of Congress* (Washington, D.C.: Brookings Institution, 1981).

[7] Figures compiled by the Congressional Research Service of the Library of Congress, as reported in Sundquist, *The Decline and Resurgence of Congress,* p. 209.

[8] For a fuller treatment of the courts and separation-of-powers issues, see Louis Fisher, *Constitutional Dialogues* (Princeton: Princeton University Press, 1988); Louis Fisher, *Constitutional Conflicts Between Congress and the President* (Princeton: Princeton University Press, 1985); and Louis Fisher, "Separation of Powers: Interpretation Outside the Courts," *Pepperdine Law Review* (1990), 18, pp. 57-93. Also see Cohodas, "Courts Play Larger Role as Interbranch Referee," pp. 13-15.

[9] For an overview of the persistence of legislative vetoes, see Louis Fisher, *The Politics of Shared Power: Congress and the Executive*. 4th ed. Texas A&M University Press, pp. 99-104.

[10] Majority opinion in *Bowsher* v. *Synar,* as quoted in Fisher, "Separation of Powers," p. 60.

[11] For more discussion of these and other cases in which the courts have refused to adjudicate disputes between the branches, see Fisher, "Separation of Powers."

[12] For a full discussion of Supreme Court decisions on such questions, see Lee Epstein and Thomas G. Walker, *Constitutional Law for a Changing America: Institutional Powers and Constraints* (Washington, D.C.: CQ Press, 1992), Chapter 3.

[13] On the commerce clause, see Louis Fisher, *American Constitutional Law* (New York: McGraw-Hill, 1990), pp. 371-384.

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[14] David O'Brien, *Constitutional Law and Politics*, Vol. 1 (New York: Norton, 1991), p. 411.

[15] For an overview of cases concerning investigations and contempt powers, see O'Brien, *Constitutional Law and Politics*, Chapter 5, Section B, and Epstein and Walker, *Constitutional Law for a Changing America,* Chapter 3.

[16] For more discussion of the 1950s and the McCarthy and House Un-American Activities Committee hearings, see O'Brien, *Constitutional Law and Politics,* p. 413, and Fisher, *Constitutional Conflicts Between Congress and the President,* Chapter 6. Challenges to congressional inquiries based on First Amendment rights of speech, assembly, and association at first received little welcome by the Supreme Court. However, in 1963 the Court observed that there are certain First Amendment limitations on Congress's ability to investigate.

[17] Representative Bill Thomas (R-California), as quoted in Susan B. Glasser, "Out-of-District Franking Banned," *Roll Call,* August 3, 1992, p. 22.

[18] See Robert A. Katzmann (Ed.), *Judges and Legislators: Toward Institutional Comity* (Washington, D.C.: Brookings Institution, 1988), pp. 15-19, and William N. Eskridge, Jr., and Philip P. Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (St. Paul: West, 1988), pp. 569-828.

[19] *Ibid.* Also see John Ferejohn and Barry Weingast, "Limitation of Statutes: Strategic Statutory Interpretation," *Georgetown Law Journal* 81 (1992), pp. 565-582; Mathew McCubbins, Roger Noll, and Barry Weingast, "Positive Canons: The Role of Legislative Bargains in Statutory Interpretation," *Georgetown Law Journal* 81 (1992), pp. 705-742; and Daniel B. Rodriguez, "Whose Legislation Is It Anyway? Statutory Interpretation and Political Advantage," *International Review of Law and Economics* 12 (1992), pp. 217-231.

[20] See *Nevada Department of Revenue* v. *Hibbs* (2003), *City of Bourne* v. *Flores* (1997), *United States* v. *Morrison* (2000), and *Board of Trustees of the University of Alabama* v. *Garrett* (2001).

[21] For more detail on this point, see Philip P. Frickey and Steven S. Smith, "Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique," *The Yale Law Journal*. May 2002, pp. 1707-1756.

[22] For discussion of the history of judicial activism, see R. Shep Melnick, "The Courts, Congress, and Programmatic Rights," in Richard Harris and Stanley Milkis (Eds.), *Remaking American Politics* (Boulder: Westview Press, 1989), Chapter 7; and Vincent Blasi (Ed.), *The Burger Court: The Counter-Revolution That Wasn't* (New Haven: Yale University Press, 1982).

[23] The argument appears in Melnick, "The Courts, Congress, and Programmatic Rights."

[24] For analysis of interest group strategies with respect to judicial review provisions, see Charles R. Shipan, "Interest Groups and Provisions for Judicial Review," paper

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delivered at the 1992 annual meeting of the American Political Science Association, Chicago, September 1992.

[25] For a review of court responses to expanded administrative decision making, see Eskridge and Frickey, *Cases and Materials on Legislation,* Chapter 5.

[26] William T. Gormley, Jr., "The Bureaucracy and Its Masters: The New Madisonian System in the U.S.," *Governance,* January 1991, pp. 10-11.

[27] *Ibid., p.* 11.

[28] For more detail on the struggle between Congress and Court over legislation, see Jeffrey A. Segal, "Separation of Powers Games in the Positive Theory of Law and Courts." *American Political Science Review* 91(1997): 28-44, and Rafael Gely and Pablo Spiller, "A Rational Choice Theory of the Supreme Court with Applications to the State Farm and Grove City Cases," *Journal of Law, Economics, and Organization* 6(1990): 263-300.

[29] The Court has issued a warning. In 1872, the Court advised that it would not again approve repeals of its jurisdiction that were clearly political efforts to dictate how it should act on certain cases. *United States* v. *Klein,* 80 U.S. 128 (1872).

[30] Data appears in Jeffrey A. Segal, "Courts, Executives, and Legislatures," in John B. Gates and Charles A. Johnson (Eds.), *The American Courts: A Critical Assessment* (Washington, D.C.: CQ Press, 1991), p. 387.

[31] The study by Stuart Nagel—"Court Curbing Periods in American History," *Vanderbilt Law Review* (1965), 18, pp. 925-944—is discussed in greater detail in Segal, "Courts, Executives, and Legislatures," pp. 386-387.

[32] For a more in-depth treatment of congressional efforts to change the size of the Supreme Court, see Jamie L. Carson and Benjamin Kleinerman, "Political Institutions and American Political Development: Evolution in the Size of the U.S. Supreme Court." Typescript, Florida International University, http://www.fiu.edu/~carson.

[33] For more on this episode, see Jamie Carson and Benjamin Kleinerman, "A Switch in Time Saves Nine: Institutions, Strategic Actors, and FDR's Court-Packing Plan." *Public Choice* 113(2002): 301-324.

[34] See, for example, the discussion of Senate confirmation procedures in Baum, *The Supreme Court,* Chapter 2.

[35] For overviews of the politics of judicial appointments in recent years, see Neil A. Lewis, "Selection of Conservative Judges Guards Part of Bush's Legacy," *New York Times,* July 1, 1992, p. A13, and "Waiting for Clinton, Democrats Hold Up Court Confirmations," *New York Times,* September 1, 1992, p. Al.

[36] The pace of confirmation hearings for district court nominees, however, appears not to have been slowed down by Biden and Senate Democrats. Because district court judges are generally bound by precedent and have much less ideological leeway, ideology has generally been less of a concern at the district court level.

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[37] See Denis S. Rutkus and Mitchel A. Sollenberger, "Judicial Nomination Statistics: U.S. District and Circuit Courts, 1977-2003," CRS Report for Congress.

[38] See Sarah Binder and Forrest Maltzman, "Senatorial Delay in Confirming Federal Judges, 1947-1998," *American Journal of Political Science*, 46(2002): 190-99.

[39] For a more in-depth exploration of the behavior of the Senate and of individual senators on Supreme Court nominations, see Jeffrey A. Segal, "Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics," *Journal of Politics,* 49, pp. 998-1015; Charles Cameron, Albert Cover, and Jeffrey Segal, "Senate Voting on Supreme Court Nominees: A Neoinstitutional Model," *American Political Science Review* (1990), 84, pp. 525-534; Donald Songer, "The Relevance of Policy Values for the Confirmation of Supreme Court Justices," *Law and Society Review* (1979), 13, pp. 927-948; and Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (New York: Oxford University Press, 1992).

[40] Data on confirmation success rates are drawn from Peter Lemieux and Charles Stewart, "Advise? Yes. Consent? Maybe: Senate Confirmation of Supreme Court Nominations," paper presented at the Annual Meeting of the American Political Science Association, Washington, D.C., September 1988.

[41] See, for example, Cameron, Cover, and Segal, "Senate Voting on Supreme Court Nominees."

[42] See Byron Moraski and Charles Shipan, "The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices." *American Journal of Political Science* 43 (1999): 1069-1095; and Timothy Johnson and Jason Roberts, "Pivotal Politics, Presidential Capital, and Supreme Court Nominations." Typescript Washington University, http://www.artsci.wustl.edu/~jmrobert.

[43] The cases of Marshall and Thomas are analyzed in detail by L. Marvin Overby, Beth Henschen, Julie Strauss, and Michael Walsh, "Courting Constituents? An Analysis of the Senate Confirmation Vote on Justice Clarence Thomas," *American Political Science Review* (September 1992), pp. 997-1003.

[44] For a discussion of changes in Supreme Court confirmation battles over time, see Richard D. Friedman, "The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond," *Cardoza Law Review* (1983), 5, pp. 1-95.

[45] Gregory Caldeira and John R. Wright, "Lobbying for Justice: Organized Interests, the Supreme Court, and the Bork Nomination in the United States Senate," paper presented at the annual meeting of the American Political Science Association, Chicago, September 1992.

[46] *Congressional Record,* June 25, 1992, p. S8865.

[47] See Joseph Ignagni and James Meernik, "Explaining Congressional Attempts to Reverse Supreme Court Decisions," paper delivered at the annual meeting of the American Political Science Association, Chicago, September 1992.

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[48] Ignagni and Meernik, "Explaining Congressional Attempts to Reverse Supreme Court Decisions."

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