Lesson 39 – The Supreme Court

Presidents come and go, but the Supreme Court goes on forever.
– William Howard Taft, U.S. President
and later Chief Justice of the U.S. Supreme Court

The nine members of the United States Supreme Court are arguably the most powerful group of persons in our government. Neither Congress nor the President can reverse any decision they make. Their judgment cannot be appealed to any other court. A decision by the Supreme Court can wipe laws off the books that have been enforced for generations. The only way that a Supreme Court decision can be reversed is either by a later Supreme Court decision or by the difficult process of ratifying a Constitutional amendment. Our entire society can be permanently and seriously affected by what a five-person majority of these unelected judges thinks about an issue. A Supreme Court justice can never be forced to retire unless he or she is impeached of high crimes and misdemeanors, convicted, and removed from office—a scenario that has never happened.

The Supreme Court Building

The Justices

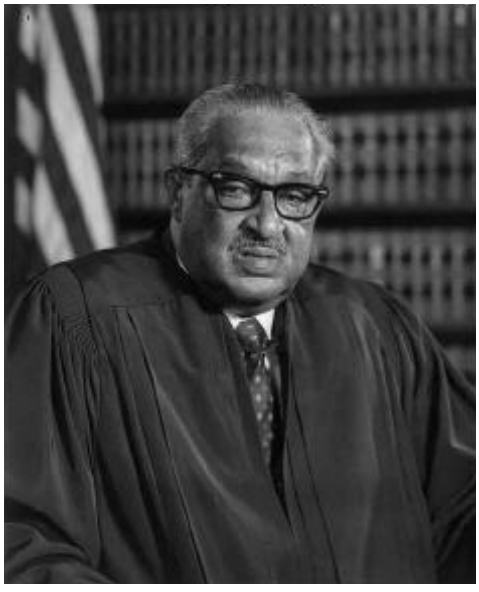
The Supreme Court began in 1789 with six members. It eventually grew to ten by 1863. Three years later, Congress, wanting to prevent Andrew Johnson from nominating someone, passed a law that said the next three vacancies would not be filled. Two vacancies reduced the Court to eight members. A new law passed in 1869 (after Johnson's Presidency ended) set the membership of the Court at nine, where it has remained ever since.

One hundred and ten persons have served on the Supreme Court, including seventeen who have held the position of Chief Justice. For all of American history, the average tenure for a justice has been about fifteen years and a vacancy has occurred approximately every two years. However, since 1970 the average tenure of justices has increased. In this most recent period, the average length of service on the Court has been about twenty-five years. This means that vacancies occur less frequently. Jimmy Carter is the only President to have served at least one full term who was not able to nominate anyone to the Court. The average age at appointment is 53 years. The current average age of the sitting justices is 68 years.

An appointment to the Supreme Court has not always been the culmination of a long and distinguished career as a judge. Through much of American history, many of the men appointed to the Court have been actively involved in politics. For example, Hugo Black was a U.S. Senator from Alabama when he was appointed. Earl Warren was governor of California. Fred Vinson had been a Congressman from Kentucky and had filled several different posts in the Franklin Roosevelt and Truman administrations. William Howard Taft had been U.S. President. Since Warren Burger's appointment in 1969, however, all justices that have been approved have come to the Supreme Court after holding judgeships in lower courts.

In 1937 President Franklin Roosevelt proposed a plan to add one new justice for every sitting justice over the age of seventy, up to a maximum of six new justices or a total of fifteen on the Court. This was a blatant attempt to remake the Court after it had struck down several New Deal programs. The plan never got anywhere in Congress or with the public, but the Court did begin to uphold New Deal legislation after Roosevelt made his proposal. During his long tenure in the Presidency, Roosevelt was able to nominate eight justices.

Thurgood Marshall was an African American attorney who successfully argued landmark civil rights cases before the Supreme Court. Later, he became the first black Supreme Court justice.



Justice Thurgood Marshall

Supreme Court nominations have not always been the hot political topic that they are today. Presidents have generally been able to have their say about who they wanted to serve on the Court. A nomination made by Abraham Lincoln was approved by the Senate a half hour after it was placed before the body! However, the Senate (and the court of public opinion) have had some influence in the matter of who has served on the Court. Twelve nominees have been voted down by the Senate, and another twenty or so nominees have withdrawn from consideration before the Senate voted on them.

Nominations are a pivotal issue today for several reasons. First, the longer recent tenures mean that a justice might be on the Court for thirty years or more. Second, since the Court has such a pivotal role in determining what government does and how laws are interpreted, political interests want to make sure that their perspectives are at least represented on the Court, if not in the majority. Third, Washington is a strongly partisan place; and both sides want to win in any and every situation or controversy that arises.

The Work of the Court

The Supreme Court has original jurisdiction in only a few kinds of cases. These include cases involving foreign ambassadors, ministers, and consuls; cases in which two states are the parties; or in a dispute between a state and the Federal government. In addition, each justice is assigned to at least one of the thirteen U.S. Circuit Courts of Appeal to hear emergency appeals, such as requests for a stay (or postponement) of execution if someone is facing the death penalty.

> Supreme Court justices used to "ride the circuit" to hear cases in Federal courts, in addition to performing their tasks with the high court. Justices complained about having to travel a great deal, a task that became even more difficult as the nation grew in size. Moreover, a justice might have already participated in a case that came before the Supreme Court, so his objectivity in such situations could be questioned. Circuit riding by Supreme Court justices ended in 1891 with the creation of U.S. Circuit Courts of Appeal.

The primary task of the Supreme Court has come to be determining whether the laws of the United States government and the laws of the individual states are within the scope of the Constitution and therefore legitimate. Without some process for determining whether a particular law is within the bounds of the Constitution, the Constitution would be meaningless. As Chief Justice John Marshall wrote in *Marbury v. Madison* (1803), "It is, emphatically, the province and duty of the judicial department, to say what the law is." Marshall was the first Chief Justice to exercise judicial review widely, although this power of the Court was anticipated in **The Federalist** Number 78.

The Court cannot simply decide to declare its position on a topic. It only speaks when a particular case is brought before it that raises a constitutional issue. The Court tries to answer the question, "How does the law apply in this case?" and then generalizes on whether the law is constitutional or not.

Justices of the Supreme Court
Relaxing With a Game of Golf, early 1900s

A case is brought before the Court on appeal, usually from a U.S. Circuit Court of Appeal or the highest appellate court in a state, by one of the parties involved in the case. When the justices decide to review a case, the Court issues a writ of certiorari, in which the Court orders a lower court to send the records of a case to the Court for their review. Over 7,000 cases are appealed to the Court each year. Of these, the Court accepts only about 100. The justices hear oral arguments in 80

or 90 of these and render summary judgments without hearing further arguments in the others. When the Court is considering which cases to review, at least four justices must vote to accept a case before the Court will review it.

Procedures and Traditions

A term of the Supreme Court begins on the first Monday in October. It officially runs for a full year, but regular sessions usually end by late June. During a term, the Court alternates a two-week sitting, when they hear oral arguments, with a two-week recess, when the justices study and discuss cases and work on their written opinions.

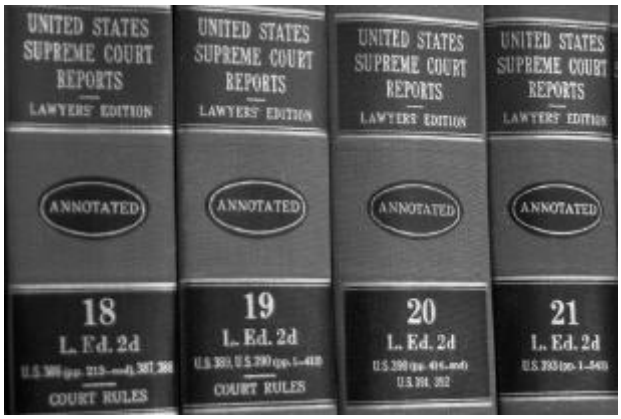
Public sessions for hearing oral arguments are held Monday through Wednesday, 10 a.m. to 3 p.m. with a hour lunch break. Each case receives one hour, which means that each side has thirty minutes to present oral arguments. The justices can ask questions of the attorneys at any time during their thirty minutes. Before oral arguments are heard, each side submits briefs which summarize their arguments. Other groups or individuals can file *amicus curiae* (friend of the court) briefs to support one side or the other, telling why they think a particular ruling is needed. For instance, if the Court is considering a case involving environmental policy, the Environmental Defense Fund or a similar group can file an *amicus curiae* brief. In important cases numerous *amicus curiae* briefs will be filed on behalf of each party. On Fridays, justices meet to discuss cases and consider new petitions for review. An average of about 130 petitions are filed each week.

During the Court's private conferences, usually held on Friday, the justices discuss cases for which they have heard oral

The Supreme Court maintains long-standing traditions. For over a century, the justices have exchanged the "conference handshake" when they are preparing to appear for a public session and when they begin their Friday conferences. Each justice shakes hands with every other justice, indicating that they all share the same purpose even with their differences. As the justices approach the bench to hear oral arguments, the Marshal announces, "The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States. Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!" (Oyez is an old English word meaning "hear ye"). White quill pens are placed on the attorneys' tables, as they have been since the earliest days of the Court.

arguments. The Chief Justice begins the discussion. Sometimes an informal vote is taken. The voting begins with the most junior member of the Court going first. When the Chief Justice decides that the Court is ready for an opinion to be written, he will assign the writing of it to one of the justices or he will take the responsibility for it himself. Separate or concurring opinions can also be written, as well as dissenting opinions by those who disagree with the majority. Dissenting opinions can sometimes influence decisions in later cases in which earlier, majority opinions are qualified or even reversed. Draft opinions are circulated among the justices for criticism and refinement before they are finalized and announced.

The Court's traditions add an interesting twist to its consideration of church and state issues. In addition to the prayer, "God save the United States and this Honorable Court!" that opens each public session of the Court, above the justices in the public chamber is a marble frieze depicting great law-givers throughout history. One of those portrayed is Moses holding tablets on which are written the Ten Commandments in Hebrew. Mohammed is also pictured in the frieze, a fact to which Muslims object since Islamic belief holds that it is blasphemy to portray Mohammed.



Volumes of Supreme Court Reports

Guiding Principles

Supreme Court justices are not bound to follow any traditions or standards as they consider cases brought before them, except their understanding of the Constitution itself. However, a few key principles have developed that guide the Court's consideration of issues. Probably the most important principle is the concept of *stare decisis*, which is Latin for "Let the decision stand." In other words, the precedent of previous Supreme Court decisions plays an important part in the Court's deliberations. It is rare that a Court overturns a previous and standing decision. Usually quite the opposite happens. As time goes on, succeeding decisions reinforce earlier decisions, so overturning a previous decision becomes even more unlikely. It took about sixty years, for instance, for the Court to overturn the "separate but equal" doctrine of racial segregation that was accepted in *Plessy v. Ferguson* in 1896.

A significant exception to the principle of *stare decisis* was the tenure of Earl Warren as Chief Justice (1953-1969). The Warren Court accomplished a breathtaking revolution in American law and society. Its decisions ended state-sponsored racial segregation, brought about reapportionment in the U.S. House of Representatives and in state legislatures, granted

Justice Sandra Day O'Connor

broader rights to those accused of crimes and placed strict limitations on what police authorities could do, gave a wider interpretation to the First Amendment right of free speech, and placed greater limitations on religious expression in anything approximating a state-sponsored venue. We will look at some of these issues in later lessons. The Warren Court is the prime example that people cite when they say they oppose judicial activism or legislating from the bench.

Another major principle followed by the court is the reluctance to become involved in political issues and legislative actions. Generally, the justices want to defer to Congress and to state legislatures unless a flagrant violation of the Constitution is involved. For instance, in January 2006 the Court in *Ayotte v. Planned Parenthood of Northern New England* struck down only one part of New Hampshire's parental notification law regarding a minor obtaining an abortion. Justice Sandra Day O'Connor wrote,

> Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force.

A third principle that is followed by the modern Court is the protection of personal liberty and individual conscience. This has been part of the basis of the Court's decisions outlawing school prayer and other religious activity in public facilities. The Court has inferred an individual's right to privacy from the Constitution (although the Constitution does not use that term), and this has influenced decisions that have established or maintained the right to an abortion.

A highly readable recent book that gives a balanced study of the Court since 1969 is **First Among Equals: The Supreme Court in American Life** (published in 2002) by Kenneth Starr. Starr was the special prosecutor in the Whitewater investigation that eventually led to the impeachment and trial of Bill Clinton.

In earlier eras the Court protected the rights of states to legislate for their people as they saw fit. It also limited the actions of Congress, as when several New Deal programs were struck down as unconstitutional. In more recent times, the Court has supported broader Federal powers and tended to limit state power. As we will see in the next lesson, the Court in the 1950s and 1960s struck down state laws that segregated the races.

What the Law Is

The United States is a nation of laws. Our government was founded by the Constitution, and the national and state governments act on the basis of laws passed by legislatures elected by the people. The person or body that is able "to say what the law is," as John Marshall put it, obviously has a powerful role in our government. That role is filled by the Supreme Court.

Hear a just cause, O LORD, give heed to my cry;
Give ear to my prayer, which is not from deceitful lips.
Let my judgment come forth from Your presence;
Let Your eyes look with equity.
Psalm 17:1-2

Reading

- "The U.S. Supreme Court" from **Democracy in America** by Alexis de Tocquevulle (WHTT, p. 110)

The U.S. Supreme Court, 1921