

UNIT 6

Institutions of Government:
Bureaucracy and the Judiciary



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PAY ATTENTION



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LESSON 33

UNDERSTANDING THE BUREAUCRACY

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THE CONSTITUTION AND BUREAUCRACY

- The Constitution made little mention of a bureaucracy
- "All other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law" (Article II, Section 3)
- No provisions mentioned departments or bureaus, but Congress created the first bureaucracy during George Washington's presidency

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FROM SPOILS TO MERIT

- **"To the victor belong the spoils" (1828)**
 - The spoils system or patronage, started by Andrew Jackson, was used for filling federal jobs
 - President rewarding supporters with jobs based on service, not on merit
- **Garfield's assassination by a disappointed office-seeker (1881)**
- **Creation of the Pendleton Act (1883)**
 - Eliminated the spoils system (patronage); created merit system
 - An exam-based merit system would be used to fill government jobs
 - Civil Service Commission was created to administer these exams
- **Hatch Act (1939)**
 - Political activities of bureaucrats are limited
- **Civil Service Reform Act (1978)**
 - Abolished the U.S. Civil Service Commission
 - Created the OPM (Office of Personnel Management) to provide guidance to agencies of the executive branch

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THE MODERN BUREAUCRACY

- A bureaucracy is a large, complex organization of appointed, not elected, officials.
 - LARGE: Three million civilian federal employees
 - Department of Defense is the largest department = about 50% (even without active military which is about 1.4 million)
 - Post Office has about 28%
 - <10% of top-level jobs are appointed (political appointees) by the president >> PATRONAGE
 - >90% of federal employees are civil service workers >> MERIT SYSTEM
 - Tenure protection, difficult to fire (unless appointed by president)
 - Specialized units with expertise in a field

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POWER OF THE BUREAUCRACY

- **Implementation and Discretionary authority**
 - Carry out laws of Congress, executive orders of the president
 - Agencies have power to set specific guidelines when receiving a general mandate from Congress
 - Congress gives them the bones, bureaucracy adds the meat
- **Regulation**
 - Issue rules and regulations that impact the public and that the private sector must follow (EPA sets clean air standards); Labels on food, emissions of cars, etc.
- **Administrative Law**
 - Rules and regulations created by an agency that have the effect of law
- **Helping Congress draft legislation**
- **Providing advice to the White House**
- **Settling disputes**

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FEDERAL AND STATE EMPLOYEES

- Federal government employees currently account for 3 percent of all civilian jobs
- The number of federal government employees has remained constant since 1950
- The number of state and local government employees has steadily increased since 1950
- Block grants have contributed to the widening gap between the number of federal and state employees by shifting resources from the federal government to states and local governments
- Federal mandates have also shifted more responsibility to states, causing an increase in the number of their public employees

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THE ORGANIZATION OF THE BUREAUCRACY

Agencies of the executive branch may be organized into four basic types:

- 1) Cabinet departments
- 2) Independent regulatory agencies or commissions
- 3) Government corporations
- 4) Independent executive agencies

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THE CABINET DEPARTMENTS

Article 2, Section 2, Clause 1:

- **The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices**
 - Each of the fifteen cabinet departments is headed by a secretary, except for the Department of Justice, which is headed by the Attorney General
 - All of the heads are *chosen by the President and confirmed by the Senate*
 - Manage a specific policy area with responsibility further divided among various agencies
 - Secretaries often develop a strong loyalty to their departments. They become closer to the department than to the President.

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THE CABINET DEPARTMENTS

The fifteen cabinet departments, in order of creation, are:

- 1) **State (1789)** - advises the president on foreign policy, negotiates treaties, represents the United States in international organizations
- 2) **Treasury (1789)** - collects federal revenues, pays federal bills, mints coins and prints paper money, enforces alcohol, tobacco and firearm laws
- 3) **Defense (1789)** - manages the armed forces, operates military bases
- 4) **Interior (1849)** - manages federal lands, refuges, and parks, operates hydroelectric facilities, manages Native American affairs
- 5) **Justice (1870)** - provides legal advice to the president, enforces federal laws, represents the United States in court, operates federal prisons

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THE CABINET DEPARTMENTS

The fifteen cabinet departments, in order of creation, are:

- 6) **Agriculture (1889)** - provides agricultural assistance to farmers and ranchers, inspects food, manages national forests
- 7) **Commerce (1903)** - grants patents and trademarks, conducts the national census, promotes international trade
- 8) **Labor (1913)** - enforces federal labor laws (child labor, minimum wage, safe working conditions), administers unemployment and job training programs
- 9) **Health and Human Services (1953)** - administers Social Security and Medicare/Medicaid Programs, promotes health care research, enforces pure food and drug laws
- 10) **Housing and Urban Development (1965)** - provides home financing and public housing programs, enforces fair housing laws

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THE CABINET DEPARTMENTS

The fifteen cabinet departments, in order of creation, are:

- 11) **Transportation (1967)** - promotes mass transit programs and programs for highways, railroads, and air traffic, enforces maritime law
- 12) **Energy (1977)** - advances the energy security of the U.S. and takes care of the nation's nuclear security
- 13) **Education (1979)** - administers federal aid programs to schools, engages in educational research
- 14) **Veterans Affairs (1989)** - promotes the welfare of veterans of the armed forces
- 15) **Homeland Security (2002)** - prevents terrorist attacks within the United States, reduces America's susceptibility to terrorism, minimizes damage and helps recovery from attacks that do occur

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THE INDEPENDENT REGULATORY AGENCIES

- **Agencies (also known as independent regulatory commissions) are created by Congress**
 - Regulate important parts of the economy
 - Make rules for large industries and businesses that affect the interests of the public
 - Since regulatory agencies are watchdogs that by their very nature need to operate independently, they are not part of a department
- **Small commissions govern the regulatory agencies**
 - Five to ten members *appointed by the president and confirmed by the Senate*
 - Commissioners are somewhat more "independent" than are the cabinet secretaries because they cannot be removed by the president during their terms of office
 - Commissioners serve rather long terms (5-14 years)
 - Terms of the commissioners are staggered
- **These factors help to insulate regulatory commissions from political pressure**
 - Commissions have quasi-legislative powers because they have the authority to make rules and regulations that have the force of law
 - Commissions also have quasi-judicial powers because they can settle disputes in their fields (such as the FCC fining Howard Stern for objectionable material that was broadcast on his radio program)

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THE INDEPENDENT REGULATORY AGENCIES

Examples:

- **Federal Communications Commission (FCC)**
 - Regulates all communications by telegraph, cable, telephone, radio, and television.
- **The Federal Trade Commission (FTC)**
 - Prevents businesses from engaging in unfair trade practices; stops the formation of monopolies in the business sector; protects consumer rights.
- **Federal Election Commission (FEC)**
 - Administers and enforces the Federal Election Campaign Act (FECA); discloses campaign finance information and oversees the public funding of presidential elections.
- **The Securities and Exchange Commission (SEC)**
 - Regulates the nation's stock exchanges; requires full disclosure of the financial profiles of companies that wish to sell stocks to the public.
- **The Federal Reserve Board (The Fed)**
 - Establishes monetary policy >> refers to the money supply and interest rates.
 - * Monetary policy = controlling the money supply. Fiscal policy = taxing and spending.
 - Sets bank interest rates; controls inflation; regulates the money supply; adjusts banks reserve requirements.

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THE GOVERNMENT CORPORATIONS

- Blend of private corporations and government agency.
- Created to allow more freedom and flexibility than exists in regular government agencies.
- Have more control over their budgets, and often have the right to decide how to use their own earnings.
- Since the government still ultimately controls them, they do not operate like true private corporations.

Examples:

- **The U.S. Postal Service** - The post office is a corporation that competes with private services.
- **National Railroad Passenger Corporation (AMTRAK)** - Congress created Amtrak to provide railroad passenger service that is heavily subsidized by the federal government. Part of the motivation for its creation was the lack of private companies providing the service, and Amtrak has suffered some huge financial losses. Recently, in an attempt to make the corporation more profitably, Congress has allowed Amtrak to drop some of its less popular routes.
- **The Corporation for Public Broadcasting** - This controversial government corporation still operates public radio and television stations. Although largely funded by private donations, the government still provides policies and money to support their programs.

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INDEPENDENT EXECUTIVE AGENCIES

- Agencies that do not fall into the first three categories.
- Closely resemble Cabinet departments, but they are smaller and less complex
- Generally, they have narrower areas of responsibility than do cabinet departments.
- Most are subject to presidential control and are independent only in the sense that they are not part of a department.
- Their main function is not to regulate, but to fulfill a myriad of other administrative responsibilities.

Examples:

- **Central Intelligence Agency** - The CIA is responsible for providing national security intelligence to senior US policymakers.
- **Environmental Protection Agency** - The EPA was established to consolidate in one agency a variety of federal research, monitoring, standard-setting and enforcement activities to ensure environmental protection.
- **The National Aeronautics and Space Administration** - NASA administers the United States space program, financing ventures into space since 1958.

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FREE RESPONSE QUESTION

The United States Congress and the President together have the power to enact federal law. Federal bureaucratic agencies have the responsibility to execute federal law. However, in the carrying out of these laws, federal agencies have policy-making discretion.

- a) Explain two reasons why Congress gives federal agencies policy-making discretion in executing federal law.
- b) Choose one of the bureaucratic agencies listed below. Identify the policy area over which it exercises policy-making discretion AND give one specific example of how it exercises that discretion.
 - Environmental Protection Agency (EPA)
 - Federal Communications Commission (FCC)
 - Federal Reserve Board
- c) Describe two ways in which Congress ensures that federal agencies follow legislative intent.

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FREE RESPONSE RUBRIC

PART (A): 2 POINTS
One point is earned for explaining each of two reasons why Congress gives federal agencies policy-making discretion in executing federal law.

- Congress lacks expertise/agencies have expertise.
- Congress does not want to be blamed for bad policy.
- Time-consuming.
- Easier to come to agreement.
- More efficient.

PART (B): 2 POINTS
One point is earned for correctly identifying the policy area identified with the agency. One point is earned for providing an example. The response must include a correct, specific example of how the agency exercises policy-making discretion in order to earn the point.

AGENCY
The Environmental Protection Agency (EPA)

POLICY AREA
Clean air and water

AGENCY
Federal Communications Commission (FCC)

POLICY AREA
TV, radio, satellite, telephone, etc.

AGENCY
Federal Reserve Board

POLICY AREA
Monetary policy

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FREE RESPONSE QUESTION

Is Congress effective in exercising legislative oversight of the federal bureaucracy? Support your answer by doing ONE of the following:

- Explain two specific methods Congress uses to exercise effective oversight of the federal bureaucracy.

OR

- Give two specific explanations for the failure of Congress to exercise effective oversight of the federal bureaucracy.

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FREE RESPONSE RUBRIC

1 point for taking explicit position: "Yes, Congress is effective," or "No, Congress is not effective," in providing oversight of the bureaucracy.

2 points (maximum) for a complete explanation of the first reason for this failure.

If the writer takes the affirmative (Congress exercises effective oversight):

- Award 1 point for a statement showing general understanding of why failure occurs.
- Award 2 points for a specific explanation of how/why the oversight method is not effective.
- Reasons for the failure may include:
 - No electoral payoff/Political ramifications
 - Oversight is labor intensive/hard work
 - Lack of technical expertise
 - Logrolling
 - Lack of budget control
 - Enabling legislation is vague
 - Interest groups/PACs encourage members to overlook effective administration
 - Failure to "use" available powers or ineffective use of them
 - Iron triangles/ cozy relationship with agencies
 - Bureaucratic pathologies (for example, Congress creates opportunities for casework through red tape, firing administrators is difficult)

2 points (maximum) for a complete explanation of a second specific method Congress uses to exercise effective oversight. Use the guidelines above for the first reason in awarding one or two points for the explanation of the method.

2 points (maximum) for complete explanation of the second reason congressional oversight fails. Use the guidelines above for the first reason in awarding one or two points for the explanation of the reason.

Notes:
A general discussion of checks and balances is not acceptable and does not receive credit.
If the thesis contradicts the discussion or reasons or explanation, score for the answer that gives the student the most points.

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FREE RESPONSE QUESTION

The federal bureaucracy as part of the executive branch exercises substantial independence in implementing governmental policies and programs. Most workers in the federal bureaucracy are civil-service employees who are organized under a merit system.

a) Describe one key characteristic of the merit system.

b) For each of the following, describe one factor that contributes to bureaucratic independence.

- The structure of the federal bureaucracy
- The complexity of public policy problems

c) For each of the following, explain one Constitutional provision that it can use to check the bureaucracy.

- Congress
- The courts
- Interest groups

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FREE RESPONSE RUBRIC

PART (A): 1 POINT
One point is earned for a description of a characteristic of the merit system. Answers may include:

- Hiring or promotion based on merit/experience/qualifications
- Hiring based on testing

PART (B): 2 POINTS
One point is earned for each of two descriptions of factors contributing to bureaucratic independence. Answers may include:

- Structure of the bureaucracy
 - Large
 - Specialized units/expertise
 - Tenure protections/hard to fire
 - Based on merit
 - Independent agencies/independent regulatory commissions
- Complexity of public policy problems
 - Specialized units/expertise
 - Delegated authority — because Congress and the president cannot handle everything, they delegate authority to the bureaucracy
 - Discretionary authority — because legislation lacks details, the bureaucracy can fill in the gaps

PART (C): 3 POINTS
One point is earned for each of three explanations of a constitutional provision that can check the bureaucracy. Answers may include:

- Congress
 - Appropriations — can reward or punish agency
 - Legislation — can pass legislation affecting the bureaucracy
 - Rejection of presidential appointments to the bureaucracy
 - Impeachment of executive officials
- Courts
 - Court rulings that limit bureaucratic practice
 - Judicial review — can declare bureaucratic actions unconstitutional
 - Injunctions against federal agencies
- Interest groups
 - Use of the First Amendment
 - Lobbying
 - Protests
 - Media usage
 - Speech
 - Litigation

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LESSON 34

CONTROLLING THE BUREAUCRACY

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CONTROLLING THE BUREAUCRACY CONGRESSIONAL INFLUENCE

*Congress has a great amount of power over the bureaucracy because Congress can exercise **LEGISLATIVE OVERSIGHT**.*

What are the numerous ways in which Congress can exercise "oversight" of the bureaucracy?

- **Creation of agencies**
 - Constitutional power to create and abolish executive departments and independent agencies, or to transfer their functions
- **Advice and consent**
 - Congress can influence the appointment of agency heads
 - The Senate has the power to confirm presidential appointments
- **Appropriations of agency budgets**
 - Congress determines how much money each agency gets
- **Annual authorization legislation**
 - No agency may spend money unless it has first been authorized by Congress
 - Authorization legislation originates in a congressional committee and states the maximum amount of money that an agency may spend on a given program
 - Even if funds have been authorized, Congress must also appropriate the money
- **Rewriting legislation**
 - If they wish to restrict the power of an agency, Congress may rewrite legislation or make it more detailed
 - The more detailed the instructions, the better able Congress is to restrict the agency's power

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CONTROLLING THE BUREAUCRACY CONGRESSIONAL INFLUENCE

*Congress has a great amount of power over the bureaucracy because Congress can exercise **LEGISLATIVE OVERSIGHT**.*

What are the numerous ways in which Congress can exercise "oversight" of the bureaucracy?

- **Duplication**
 - Giving any one job to more than one agency, keeping any single agency from becoming all powerful
 - For example, drug trafficking is the task of the Customs Services, the FBI, the DEA, the Border Patrol, and the Department of Defense
 - Keeps any one agency from becoming all-powerful
- **Holding hearings and conducting investigations**
 - Congress can call bureaucrats to testify before committees and subcommittees to determine whether the agency is complying with congressional intent
 - Congress can investigate agencies
- **Reorganization**
 - By realigning or restructuring departments, agencies and their responsibilities, Congress can contain costs, reduce bureaucratic overlap and improve accountability.
- **Sunset laws**
 - Provides for the law to cease to have effect after a specific date, unless further legislative action is taken to extend the law
 - Sunset laws create a finite lifespan for a bureaucratic agency
 - In order to be reauthorized, these bureaucracies must prove their effectiveness and merit

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CONTROLLING THE BUREAUCRACY CONGRESSIONAL INFLUENCE?

What are the limits on congressional influence?

Congress may not really want to clamp down on the bureaucracy:

- Members profit politically from the existence of federal programs within their states or districts (e.g., military base closure)
- Easier for Congress to simply pass broadly worded laws and have experts within the bureaucracy fill in the holes
- No electoral payoff; Political ramifications
- Oversight is labor intensive/hard work; Lack of technical expertise
- Congress creates opportunities for casework through red tape
- Congress lacks expertise/agencies have expertise
- Congress does not want to be blamed for bad policy
- Time-consuming

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CONTROLLING THE BUREAUCRACY PRESIDENTIAL INFLUENCE

Appointments

- Appointment of top-level bureaucrats (including Cabinet secretaries)
- Fire top-level bureaucrats (including Cabinet secretaries)

Executive Orders

- An executive order is a directive, order, or regulation issued by the president
- An executive order of the President must find support in the Constitution, either in a clause granting the President specific power, or by a delegation of power by Congress to the President

Economic Powers

- Proposes agency budgets (either an increase or a decrease in \$)

Other Powers

- Propose the reorganization of the executive branch
- Presidential power of influence over different agencies direction

What are the limits on presidential influence?

- Senate confirmation needed for top personnel
- President cannot fire vast majority of bureaucrats
- Reorganization must go through Congress
- Agency budgets must go through Congress

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CONTROLLING THE BUREAUCRACY COURT AND INTEREST GROUP INFLUENCE

COURTS AND THE BUREAUCRACY

Powers

- Court rulings that limit bureaucratic practices
- Judicial review - can declare bureaucratic actions unconstitutional
- Injunctions (a judicial order that restrains a person/group from beginning or continuing an action threatening or invading the legal right of another) against federal agencies

INTEREST GROUPS AND THE BUREAUCRACY

Powers

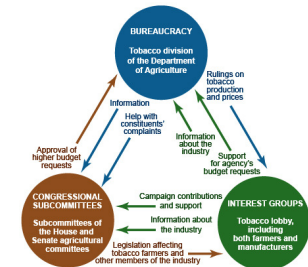
- Lobbying
- "Revolving door" - Agencies are staffed by people who move back and forth between the public/private sector
- Client groups
 - Some agency-interest group relations are so close that the interest group is said to be a client of the agency (e.g., dairy groups and Agriculture Dept)
- Iron triangles: congressional committee, relevant agency, related interest groups
- Issue networks: informal groups of people within both the public/private sectors who have common interests
- Agency employees are recruited from the regulated industry (vice versa)
- Agencies rely on support from regulated industries in making budget requests
- Litigation: Take a bureaucratic agency to court

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IRON TRIANGLES vs. ISSUE NETWORKS

IRON TRIANGLES

- **Definition:** Alliances among bureaucrats, interest groups, and congressional subcommittee members and staff sometimes form to promote their common causes. Also known as subgovernments.



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IRON TRIANGLES vs. ISSUE NETWORKS

ISSUE NETWORKS

- **Definition:** Network that consists of people in interest groups, on congressional staffs, in bureaucratic agencies, in universities, and in the mass media who regularly debate an issue.

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LESSON 35

UNDERSTANDING THE JUDICIARY

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INTRODUCTION TO THE FEDERAL COURTS

JUDICIAL POWER

- Is passive
 - Courts cannot reach out and “take” cases >> Cases must come to them
 - There must be an actual case (“controversy”) for a court to make a ruling >> Courts cannot “create” cases
 - Can’t settle political issues between the president and Congress (must be a constitutional issue)
- Only those with STANDING may challenge a law or government action
 - One who has sustained or is near sustaining an “injury” may bring a case to court
 - One cannot challenge a law simply because one does not happen to like it

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INTRODUCTION TO THE FEDERAL COURTS

JUDICIAL LAW-MAKING

- Judges, contrary to what some may think, are not simply impartial referees who only carry out the law. Judges interpret the law, and in so doing in fact make law. It is necessary that they make law because:
 - Statutes are often broadly-worded, unclear, or contradictory
 - The Constitution is certainly broadly-worded, and requires interpretation
- Thus, interpretation of statutes and the Constitution is, in effect, making law. Evidence of judicial law making:
 - Courts have ruled >1,000 state laws as being unconstitutional
 - Courts have ruled >120 federal laws as being unconstitutional
 - The Supreme Court has reversed itself >140 times since 1810

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INTRODUCTION TO THE FEDERAL COURTS

TYPES OF LAW

Criminal Law

- *Concerns violations of the criminal code*
- Example: Violations against society

Civil Law

- *Concerns disputes between two parties rather than violations against society*
- Examples: Breach of contract, slander, medical malpractice
- Class-action lawsuit - suit brought by a group of people who share a common grievance

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INTRODUCTION TO THE FEDERAL COURTS

<p>TYPES OF JURISDICTION</p> <p>Jurisdiction is a court’s authority to hear a case</p> <p>Exclusive</p> <ul style="list-style-type: none"> • Cases that can be heard only in certain courts <p>Concurrent</p> <ul style="list-style-type: none"> • Cases that can be heard in either a federal or a state court <p>Original</p> <ul style="list-style-type: none"> • Courts in which a case is first heard <p>Appellate</p> <ul style="list-style-type: none"> • Courts that hear cases brought to them on appeal from a lower court 	<p>FEDERAL COURT JURISDICTION</p> <p>Federal courts may try a case if it involves</p> <ul style="list-style-type: none"> • Disputes between two or more states • The Constitution, a federal law, or a treaty • The U.S. government as a party • Citizens of different states • Ambassadors or diplomats
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INTRODUCTION TO THE FEDERAL COURTS

AMERICA'S DUAL COURT SYSTEM

- The U.S. has two separate court systems because it is a federal system
- Each state has its own court system (97% of all criminal cases are heard in state courts)

THE SUPREME COURT OF THE UNITED STATES OF AMERICA

↑↑↑↑

50 State Supreme Courts

↑↑↑↑

State Appeals Courts

↑↑↑↑

State Trial Courts

THE SUPREME COURT OF THE UNITED STATES OF AMERICA

↑↑↑↑

13 Federal Appeals Courts

↑↑↑↑

94 Federal District Courts

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DUAL SYSTEM OF COURTS

– In our federal system, we have both federal and state courts.

– AP test will be about the federal courts.

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STRUCTURE OF THE FEDERAL COURT SYSTEM

ARTICLE III (CONSTITUTIONAL) COURTS

- The Supreme Court is the only court specifically mentioned in the Constitution
- Congress has the power to create all "inferior" (lower) federal courts
 - Legislative branch check on the judicial branch
- Congress has the power to change appellate jurisdiction of federal courts
 - Legislative branch check on the judicial branch
- Judges in these courts hold life terms so that they are free from political pressure
 - Judicial branch check on the legislative branch and executive branch

JUDICIARY ACT OF 1789

- Established the basic three-tiered structure of federal courts that still exists
- Congress set the size of the Supreme Court at six justices – later expanded to nine in 1869

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STRUCTURE OF THE FEDERAL COURT SYSTEM

THE THREE LEVELS OF CONSTITUTIONAL (FEDERAL) COURTS

DISTRICT COURTS (lowest level)

↓ ↓ ↓

COURT OF APPEALS (mid level)

↓ ↓ ↓

UNITED STATES SUPREME COURT (highest level)

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STRUCTURE OF THE FEDERAL COURT SYSTEM

THE THREE LEVELS OF CONSTITUTIONAL (FEDERAL) COURTS

DISTRICT COURTS

- 94 courts w/ ~700 judges
- Handle over 300,000 cases
- Cases are tried by a judge and petit (trial) jury – jury decides outcome of case
 - Use grand juries to issue indictments
 - Orders that charge an individual with a crime
 - Does not mean that one is guilty; it means that one will be tried
- Jurisdiction: original
- Most cases end in a plea bargain
- Decisions may be appealed to Courts of Appeals

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STRUCTURE OF THE FEDERAL COURT SYSTEM

THE THREE LEVELS OF CONSTITUTIONAL COURTS

COURTS OF APPEALS

- 13 "circuit" courts w/ ~160 judges
- 156 judges try >18,000 cases a year
- Cases tried by a panel of three judges
 - Do not hold trials or hear testimony – judges review district court decisions
- Jurisdiction: appellate (hears appeals from District Courts and regulatory agencies)

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STRUCTURE OF THE FEDERAL COURT SYSTEM
THE THREE LEVELS OF CONSTITUTIONAL COURTS

SUPREME COURT

- Highest court in the land
- ~10,000 cases are petitioned for a writ of *certiorari* – only hear about 80 cases a year
- Cases tried by entire court (currently nine judges)
- Jurisdiction: original and appellate
 - Almost all cases are heard on appeal
- Court of last resort
 - Supreme Court is the final arbiter of the Constitution
 - Supreme Court decisions establish precedents that are binding on the entire nation

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LESSON 36

**FEDERAL ATTORNEYS
AND
FEDERAL JUDGES**

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FEDERAL ATTORNEYS

ATTORNEY GENERAL

- Appointed by President with Senate consent
- Head of Department of Justice

SOLICITOR GENERAL

- Appointed by President with Senate consent
- Represents U.S. government in Supreme Court
- Decides which cases the federal government will appeal to the Supreme Court
- Decides the federal government's position in these cases
- Sometimes called the "10th Justice" of the Supreme Court because of his/her influence there

U.S. ATTORNEYS

- At least one for each District Court, 94 in all
- Prosecutes federal cases, though most cases are settled by plea-bargaining
- Appointed by the President for 4-year terms (key patronage positions)
- Senatorial courtesy applies in their appointments

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FEDERAL JUDGES

FEDERAL JUDGES:

- Are appointed by President with "advice and consent" of Senate (majority vote needed for confirmation)
- Are given life tenure subject to good behavior
- May be impeached and removed by Congress (very rare)

Advantages of life terms

- Experience
- Stability
- Re-election not necessary
- No fear of removal based on decision
- Interest groups have little influence

Disadvantages of life terms

- Judicial activism
- Precedent
- Old court
- Ideology; slow to change

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FACTORS AFFECTING SELECTION OF FEDERAL JUDGES

Senatorial courtesy

- President will consult with the two Senators from the state in which they are to be appointed. The Senate will then show "courtesy" to those two senators by not confirming judges to whom the two senators object (does not apply in the appointment of Supreme Court justices).

Senate Judiciary Committee

- Hold public hearings on each Supreme Court nominee, and sends a recommendation to Senate floor for approval or rejection

Senate

- Simple majority vote needed for confirmation

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FACTORS AFFECTING SELECTION OF FEDERAL JUDGES

Political parties

- Judges are generally from the same political party as the President

Age

- Since judges have lifetime appointments, judges live on long after the Presidents who appoint them die (presidential influence continues after they leave office)

Ideology of prospective judges

- Presidents generally try to appoint people of similar philosophy

American Bar Association

- Evaluates nominees (Senate Judiciary Committee considers ABA ratings)

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FACTORS AFFECTING SELECTION OF FEDERAL JUDGES

Existence of a "paper trail"

- If a prospective judge has written extensively, his writings may be used against him during confirmation hearings

Diversity

- Race (mostly white) and gender (mostly male)

Number of judges

- Congress can increase or decrease the number of courts and judges

Interest Groups

- Tactics include protest demonstrations, appearances on TV and radio talk shows, media advertisements, editorials, and e-mails to senators

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FREE RESPONSE QUESTION

PRESIDENTIAL APPOINTMENTS TO THE FEDERAL JUDICIARY BY SELECTED DEMOGRAPHIC CHARACTERISTICS, 2000-2011 (IN PERCENT)						
President	African American	Hispanic	Asian American	White	Women	Men
Barack Obama	22%	11%	8%	59%	46%	54%
George W. Bush	7%	9%	1%	82%	22%	78%

Presidents consider many factors when nominating candidates to the federal courts, and getting their nominees confirmed is often difficult.

- Using the chart above, describe ONE similarity between President Barack Obama's judicial appointments and those made by President George W. Bush.
- Using the chart above, describe TWO differences between President Barack Obama's judicial appointments and those made by President George W. Bush.
- Explain why a president's party affiliation accounts for differences in presidential appointments to the judiciary.
- Describe one way a president can increase the chances of having judicial nominations to federal courts confirmed.

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FREE RESPONSE RUBRIC

PART (A): 1 POINT

One point is earned for a correct description of a similarity between President Barack Obama's judicial appointments and those made by President George W. Bush. Possible responses include:

- In both cases more than half the appointees were white. President Obama's appointees were 59 percent white, while President Bush's appointees were 82 percent white.
- In both cases the number of Hispanic nominees is roughly similar, within two percentage points.
- In both cases Asian Americans were the lowest demographic nominated, both under 10 percent.

PART (C): 1 POINT

One point is earned for a correct explanation of why a president's party affiliation accounts for differences in presidential appointments to the judiciary. Possible responses include:

- President chooses nominees with similar views who will rule in a manner consistent with the President's policy preferences — party ID is a rough indicator.
- President chooses nominees that cater to his party's electoral coalition, which will help his party win future elections.

PART (D): 1 POINT

One point is earned for a correct description of a way that a president can increase the chances of having judicial nominations confirmed. Possible responses include:

- Consulting with the Senate using senatorial courtesy
- Choosing a moderate
- Properly vetting candidates/selecting qualified candidates

PART (B): 2 POINTS

One point is earned for each of two correct descriptions of a difference between President Barack Obama's judicial appointments and those made by President George W. Bush. Possible responses include:

- Obama appointed a significantly greater percentage of women than did Bush. President Obama's appointees were 46 percent women, while President Bush's appointees were 22 percent women.
- Obama was more likely to appoint racial minority candidates than was Bush; for example, 22 percent of President Obama's appointees were African American, as opposed to 7 percent of President Bush's appointees.
- Obama appointed more than Bush in any single minority category, appointing a higher percentage of African Americans, Hispanics, and Asian Americans.

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FREE RESPONSE QUESTION

The Supreme Court is commonly thought to be "above politics". However, one can argue that the appointment of Supreme Court justices is political.

- Identify three characteristics of Supreme Court nominees and discuss how each characteristic has been politically relevant during the appointment process.
- Identify two methods that have been used by interest groups to influence the appointment process. Explain how each of these methods has been used to influence that process.

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FREE RESPONSE RUBRIC

Part A: 4 points total - Nominees' CHARACTERISTICS
1 point for identifying ALL THREE characteristics (1 point total)
1 point for each discussion (3 points total)

Accepted characteristics may include:

- Acceptability (NFT to House OR Congress)
- Age
- Competence/qualifications (e.g. ABA rating)
- Gender
- Ideology
- Issue orientation (litmus test)
- Judicial experience
- Partisan identification
- Patronage
- Race/Ethnicity
- Region
- Religion
- Reputation (e.g. prestigious education, ethics, character)
- Role (activist vs. restraint)

Not necessary to use specific examples of nominees. If example is incorrect, but discussion is correct, student still gets credit.

The discussion for each must show that they are three distinct characteristics — (e.g., acceptability must be discussed differently than ideology — no double-dipping)

Part B: 3 points total - METHODS Used by Interest Groups to Influence Process

1 point for identifying BOTH methods (1 point total)
1 point for each explanation that provides linkage (2 points total)
✓ two explanations must be distinct (no double-dipping)
✓ explanation must answer question of how the method has been used to influence the process

METHODS must be relevant to the appointment process and may include:

- Advertisement (any media)
- Campaign contributions to White House or Senate
- Mailings/e-mail
- Protests/demonstrations
- Ratings
- Talk shows (TV and radio)
- Testifying after nomination
- Writing to interest group members
- Op/ed pieces
- Press conferences
- Lobbying EITHER White House staff/President OR lobbying the Judicial Committee (NFT lobbying Congress in general, can say "lobbing Senate," can say "lobbing White House to influence the President's selection")
- "Use of media" (does not count with another form of media as second point)

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LESSON 37

THE SUPREME COURT AND LIMITS ON ITS INFLUENCE

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THE SUPREME COURT

KEY POWERS

- Power of judicial review (established by *Marbury v. Madison*, 1803)
- Power to declare state laws, federal laws, and presidential actions unconstitutional
- Power to interpret broadly worded laws of Congress
- Power to determine the meaning and application of the Constitution
- Power to overrule earlier Supreme Court decisions (e.g., *Brown* overturning *Plessy*)

ORIGINAL JURISDICTION

- The Court's original jurisdiction only generates two to three cases a year
- The Supreme Court exercises original jurisdiction in cases involving the following:
 - Two or more states
 - The United States and a state government
 - The United States and foreign ambassadors/diplomats

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THE SUPREME COURT

APPELLATE JURISDICTION

- Most cases come under the Court's appellate jurisdiction
- Nearly all appellate cases now reach the SC by a writ of *certiorari*

WRITS OF CERTIORARI

- A writ of *cert* is an order by the Court directing a lower court to send up the record in a given case for its review
- The *certiorari* process enables the SC to control its own caseload
- Cases must involve a serious constitutional issue or the interpretation of a federal statute, action, or treaty
- Denying a decision may mean any number of things:
 - Case lacks a substantial federal issue
 - Party lacks standing
 - Court agrees with a lower court

THE RULE OF FOUR

- SC clerks screen the approximately 9,000 petitions that come to the SC each term
- The justices conduct weekly conference meetings where they discuss petitions prepared by their clerks
- For a case to be heard on appeal, at least four of the nine justices must agree to hear the case (the Rule of Four)

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THE SUPREME COURT

FILING BRIEFS

- Each party is required to file a brief, or detailed written statement, arguing one side of the case
- Briefs cite relevant facts, legal principles, and precedents that support their arguments
- Interested persons and groups that are not actual parties to the case may file *amicus curiae* ("friend of the court") briefs
 - Cases involving controversial issues such as affirmative action and abortion attract a large number of *amicus curiae* briefs
 - Interest groups use *amicus curiae* briefs to lobby the Court

LISTENING TO ORAL ARGUMENTS

- Oral arguments are open to the public
- Attorneys are allowed exactly 30 minutes to present their case

DISCUSSION AND VOTING

- The justices discuss each case in a closed meeting held on Friday
- The Chief Justice (John Roberts) presides over the meeting

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THE SUPREME COURT

WRITING OPINIONS

- After reaching a decision, the justices must write a formal opinion. Opinions present the issues, establish precedents, and set guidelines for lower courts.
- Types of opinions
 - Majority opinion – officially known as "the opinion of the Court," the majority opinion is the law of the land
 - Concurring opinion – supports the majority opinion but stresses different constitutional or legal reasons for reaching the judgment
 - Minority or dissenting opinion – expresses a point of view that disagrees with the majority opinion. Dissenting opinions have no legal standing

EVADING COURT DECISIONS

- The Supreme Court is the highest court in the land, but it is possible to evade Court decisions:
 - Amending the Constitution; Court cannot strike down something as unconstitutional if it is written in the Constitution
 - When a decision is made, it is "remanded" to a lower court to carry out the SC's decision
 - The lower court will have a certain amount of leeway in doing this
 - The executive branch may simply not carry out the decision
 - State and local governments may simply not carry it out, either (e.g., desegregation, school prayer)

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FACTORS THAT INFLUENCE SUPREME COURT DECISIONS

-- PRECEDENT --

Stare Decisis

- *Stare decisis* is a Latin phrase meaning "let the decision stand"
- The vast majority of SC decisions are based on precedents established in earlier cases
- Precedents help make SC decisions more uniform, predictable, and efficient

Examples

- In *Marbury v. Madison*, the Court established the principle of judicial review as applied to Congress and the president
 - In another case, the Court extended the power of judicial review to overrule state courts
- In *Baker v. Carr*, the SC established the principle of one person, one vote in state congressional districts
 - In *Wesberry v. Sanders*, the Court applied this principle to U.S. congressional districts

Exceptions

- Although precedent is very important, the Court can overturn previous decisions
- *Plessy v. Ferguson* permitted segregation if the facilities were "separate but equal"
- The Court reversed this ruling in *Brown v. Board of Education of Topeka*, declaring that "segregation is a denial of the equal protection of the laws"

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FACTORS THAT INFLUENCE SUPREME COURT DECISIONS

-- JUDICIAL PHILOSOPHY --

Judicial Restraint

- Philosophy that the courts should allow the states and the other two branches (Leg and Exec) of the federal government to solve social, economic, and political problems
- Courts should merely interpret the law rather than make law. That's Congress' job.
- Original intent suggests that courts should follow the intentions of the Founding Fathers

Judicial Activism

- Philosophy of judges to interpret the Constitution according to their own views and take an active role in solving society's problems
- Idea that judges ought to freely strike down laws that are inconsistent with their understanding of the Constitution
- Courts should uphold the "guardian ethic" (guardian of people)
- Examples of judicial activism:
 - Striking down Topeka School Board's policy of segregation in *Brown v. Board* (1954)
 - Striking down a Texas law that banned flag burning in *Texas v. Johnson* (1989)
 - Striking down the Gun Free School Zones Act in *US v. Lopez* (1995)
 - Striking down line item veto in *Clinton v. NY* (1998)
 - Striking down a DC city ordinance banning handguns in *DC v. Heller* (2008)

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FACTORS THAT INFLUENCE SUPREME COURT DECISIONS

-- JUDICIAL PHILOSOPHY --

Public Opinion

- The Constitution insulated SC Justices from direct political pressures
 - Justices are appointed to serve life terms subject only to good behavior
 - The *certiorari* process enables the SC to set its own agenda
 - The public has limited access to Court proceedings
- The Supreme Court is nonetheless aware of and sensitive to public opinion
 - The appointment and confirmation processes keep the SC from deviating too far from public opinion
 - Congress and the state legislatures can amend the Constitution
 - Congress can change the SC's appellate jurisdiction
 - Congress has the power to change the number of Justices on the Court
 - Justices can be impeached

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FREE RESPONSE QUESTION

The United States Supreme Court has the authority to choose which cases it hears, but its authority is limited in a number of ways.

- a) Describe one factor that increases the likelihood for the Supreme Court to accept an appeal.
- b) Describe one factor that limits the Supreme Court's authority to hear cases.
- c) Explain how the executive branch can check the authority of the Court.
- d) Explain how the legislative branch can check the authority of the Court.
- e) Explain how the Court checks the authority of the other branches.

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FREE RESPONSE RUBRIC

PART (A): 1 POINT

One point is earned for a description of one factor that increases the likelihood for the Supreme Court to accept an appeal.

Acceptable descriptions include:

- Cases heard by lower federal courts/State Supreme Courts that have disagreements/inconsistencies in their decisions
- Cases dealing with a constitutional issue
- Cases with a pattern of concern/persecution of an issue
- Cases involving the federal government/policitor General

PART (B): 1 POINT

One point is earned for a description of one factor that limits the Supreme Court's authority to hear cases.

Acceptable descriptions include:

- The Supreme Court must be petitioned to hear a case
- State cases must be about a constitutional/federal issue
- Federal cases must be within appellate or original jurisdiction

PART (C): 1 POINT

One point is earned for an explanation of how the executive branch can check the authority of the Court.

Acceptable executive checks include:

- Appointments that forward a President's ideology or philosophy
- Lack of enforcement of court decisions
- Executive Orders that circumvent the Supreme Court

PART (D): 1 POINT

One point is earned for an explanation of how the legislative branch can check the authority of the Court.

Acceptable legislative checks include:

- Limit the funding of implications of the Court's decisions
- Legislation to circumvent Supreme Court decisions
- Propose an amendment to reverse Supreme Court decisions
- Impeachment of Justices (threat)
- Control the appellate jurisdiction of the Supreme Court

PART (E): 1 POINT

One point is earned for an explanation of how the Supreme Court uses judicial review to check the legislative and/or executive branches.

Note: In points (C), (D), and (E), in order to receive the explanation point, the student must explain how the authority of the Supreme Court or the branches of government has been checked.

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FREE RESPONSE QUESTION

The judicial branch is often assumed to be insulated from politics. However, politics affects many aspects of the judiciary.

- a) Describe two political factors that affect presidents' decisions to appoint members of the federal judiciary.
- b) Identify two political factors that affect the confirmation process of a president's nominees and explain how each factor complicates a confirmation.
- c) Explain how one legislative power serves as a check on court decisions.
- d) Explain how one executive power serves as a check on court decisions.

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FREE RESPONSE RUBRIC

PART (A): 2 POINTS

One point is earned for each of two descriptions of political factors that affect presidential appointment decisions.

Acceptable descriptions include:

- campaign promises
- gender
- geographic diversity
- home-state senator (if lower courts)
- ideology
- interest group input
- issue positions
- party
- potential for confirmation success
- professional background, experience, education
- race
- religion
- scandal

PART (B): 4 POINTS

One point is earned for each of two identifications of political factors that affect the confirmation process for presidential nominees. One point is earned for each of two explanations for how the political factor complicates the confirmation of judicial appointments.

Acceptable factors include:

- advice and consent
- campaign promises
- filibuster
- gender
- geographic diversity
- holds
- home-state senator (if lower courts)
- ideology
- interest group input
- issue positions
- the media (televising Judiciary Committee Hearings)
- party
- professional background, experience, education
- race
- religion
- safe/weak nominees
- scandal
- senatorial courtesy

PART (C): 1 POINT

One point is earned for correctly explaining how a legislative power serves as a check on court decisions.

Acceptable legislative powers include:

- amendments
- confirmation
- congressional funding
- impeachment
- jurisdiction stripping
- legislation

PART (D): 1 POINT

One point is earned for correctly explaining how an executive power serves as a check on court decisions.

Acceptable executive powers include:

- power of appointment
- executive enforcement

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FREE RESPONSE QUESTION

The United States Supreme Court receives many appeals, but it hears and rules on a small percentage of cases each year. Numerous factors influence the actions of the Court, both in deciding to hear a case and in the decisions it hands down.

- a) Define judicial review.
- b) Explain how judicial review empowers the Supreme Court within the system of checks and balances.
- c) Describe the process through which the Court grants a writ of *certiorari*.
- d) Explain how each of the following influences decisions made by individual justices when deciding cases heard by the Court.
 - *Stare decisis*
 - Judicial activism

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FREE RESPONSE RUBRIC

PART (A): 1 POINT

One point is earned for a correct definition of judicial review. An acceptable definition of judicial review is the power of the court to rule on the constitutionality of laws, acts, statutes, executive orders.

PART (B): 1 POINT

One point is earned for an acceptable explanation that demonstrates how judicial review empowers the Supreme Court to exercise power relative to the other branches of government within the system of checks and balances by including one of the following:

- It gives the Court the power to overturn laws passed by Congress/legislative branch or actions taken by the president/executive branch.
- It gives the Court the power to limit actions taken by Congress/legislative branch or the president/executive branch.

PART (C): 1 POINT

One point is earned for correctly describing the process through which the Court grants a writ of *certiorari* by including both of the following:

- A reference to lower courts
- A reference to the rule of 4

PART (D): 2 POINTS

One point is earned for a correct explanation of how *stare decisis* influences decisions made by Justices when deciding cases heard by the Court. One point is earned for a correct explanation of how judicial activism influences decisions made by Justices when deciding cases heard by the Court.

An acceptable explanation of how *stare decisis* influences Justices includes one of the following:

- Justices defer to prior Supreme Court decisions.
- Justices apply precedent to current cases and rule based on past decision.

An acceptable explanation of how judicial activism influences Justices includes one of the following:

- Justices are more likely to strike down laws and policies as unconstitutional.
- Justices are influenced by the future/societal ramifications/needs of the nation.

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FREE RESPONSE QUESTION

The judicial branch is designed to be more independent of public opinion than are the legislature or the executive. Yet, the United States Supreme Court rarely deviates too far from public opinion.

- Describe two ways in which the United States Supreme Court is insulated from public opinion.
- Explain how two factors work to keep the United States Supreme Court from deviating too far from public opinion.

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FREE RESPONSE RUBRIC

PART (A): 2 POINTS

One point is earned for each of the two descriptions. The response must correctly describe two features of the Supreme Court that insulate it from public opinion. The description must identify each feature and add an additional clause or sentence that is factually correct and relevant to the identification. This may be an example or illustration. The response must also link each feature to public opinion. Congress may be used as a surrogate for public opinion, but the President cannot be used unless explicitly linked to public opinion.

Acceptable descriptions may include:

- Appointed but not elected.
- Serve life-terms
- Court's ability to control its own docket/set its own agenda.
- Salaries cannot be reduced.
- Limited access to Court proceedings.

Descriptions that are not acceptable include:

- The Court's role as interpreter of laws/Constitution.
- The fact that the Court accepts only legitimate controversies.

PART (B): 4 POINTS

Two points are earned for each of the two explanations. The response must explain how or why each identified factor keeps the Supreme Court from deviating too far from public opinion.

Acceptable explanations may include:

- The appointment and/or confirmation process (no point is given if the response says that the House confirms, but if the response says Congress confirms, this is acceptable). If the appointment and confirmation both processes are fully discussed as two SEPARATE processes, the response may earn points for both.
- Reliance on other public officials to execute decisions.
- The fact that the Supreme Court can be overruled with new laws or constitutional amendments. ("New laws" do not include Congress's general power to write legislation.)
- The concern for reputation – individual reputation and/or that of the Supreme Court. Concern for credibility/legitimacy of the institution falls into this category.
- The potential for the impeachment of judges.
- Congressional control of the Supreme Court's appellate jurisdiction and/or changing the number of justices on the Court.

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