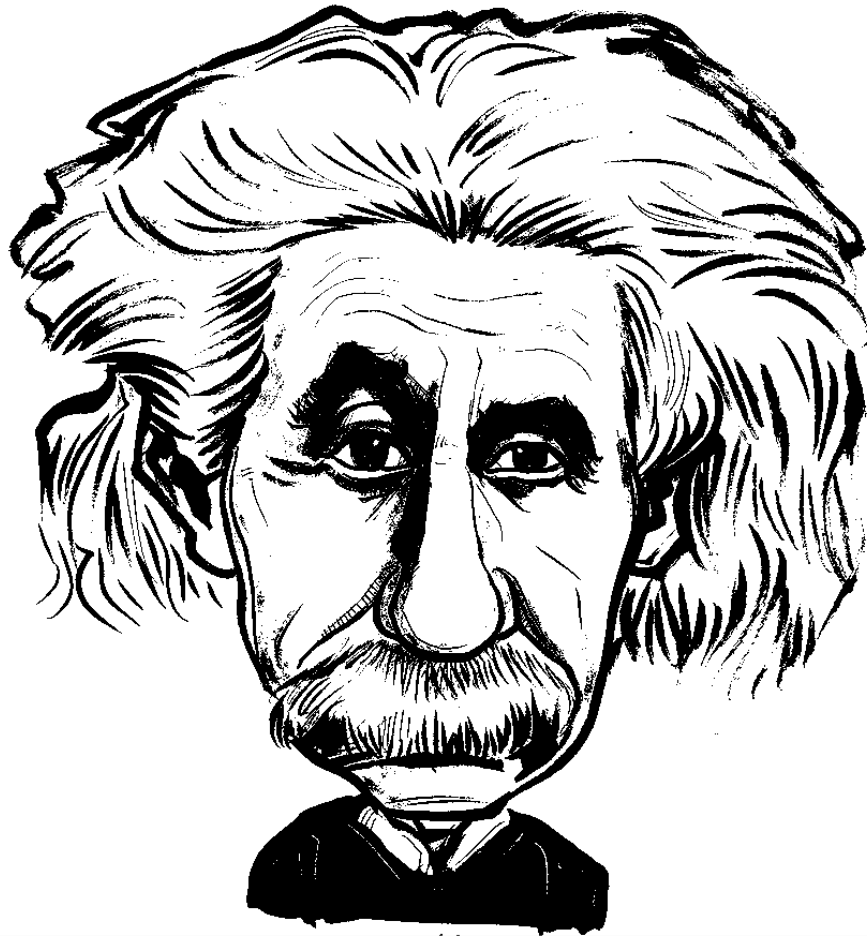


# **AP**

## **U.S. Government & Politics**

### **Quick Notes**



# **UNIT 6**

## **POLICYMAKING INSTITUTIONS: THE BUREAUCRACY AND THE JUDICIARY**

## APGoPo 6-1

# THE FEDERAL BUREAUCRACY

The Constitution made little mention of a bureaucracy other than to make the president responsible for appointing (with the advice and consent of the Senate) public officials, including ambassadors, judges, and "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.

The bureaucracy began in 1789 when Congress created a Department of State to assist the new Secretary of State, Thomas Jefferson. From 1789 to about 1829, the bureaucracy was drawn from an upper-class, white male elite. In 1829, the new President Andrew Jackson employed a spoils system to reward party loyalists with key federal posts. Jackson believed that such rewards would not only provide greater participation by the middle and lower classes, but would insure effectiveness and responsiveness from those who owed their jobs to the president. The spoils system ensured that with each new president came a full turnover in the federal service.

### 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

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- *Garfield's assassination by a disappointed office-seeker (1881)*

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- *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

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- *Hatch Act (1939)*
  - Political activities of bureaucrats are limited

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- *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

### 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

### 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 (or regulatory policy)*
  - Issue rules and regulations that impact the public and that the private sector must follow
    - Sets clean air standards, requires labels on food, sets emission standards for 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*

### 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

## APGoPo 6-2

# THE CABINET DEPARTMENTS

**Article 2, Section 2, Clause 1:** *The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he 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, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.*

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.
- Secretaries have varying levels of influence on presidential decisions
- Secretaries can be fired by the president

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
- 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
- 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

## APGoPo 6-3

# THE INDEPENDENT REGULATORY AGENCIES

These agencies (also known as independent regulatory commissions) are created by Congress to regulate important parts of the economy, making 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. The commissions have quasi-legislative powers because they have the authority to make rules and regulations that have the force of law. The 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).

Some examples are:

- **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, enforces the provisions of the law such as the limits and prohibitions on contributions, 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.
    - Understand the difference between monetary policy (controlling the money supply) and fiscal policy (taxing and spending).
  - Sets bank interest rates; controls inflation; regulates the money supply; adjusts banks reserve requirements.

The regulatory agencies maintain a close relationship with the industries they regulate

- Agency employees are often recruited from the regulated industry
- Agency employees often are employed by the regulated industry once they leave the agency
- Agencies make decisions after consulting the regulated industry
- Agencies often rely on support from regulated industries in making budget requests before Congress
- An agency's relationship with a regulated industry may change when a new president takes office

# THE GOVERNMENT CORPORATIONS

Government corporations are a blend of private corporations and government agency. They were created to allow more freedom and flexibility than exists in regular government agencies. They 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.

Some examples are:

- **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.
- **The Tennessee Valley Authority** - This corporation was created as one of Franklin Roosevelt's New Deal programs. Its mission is to harness the power of the Tennessee River to protect farmlands and provide cheap electricity.

# INDEPENDENT EXECUTIVE AGENCIES

Other agencies that do not fall into the first three categories are called independent executive agencies. Independent agencies closely resemble Cabinet departments, but they are smaller and less complex. Generally, they have narrower areas of responsibility than do cabinet departments. Most of these agencies 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.

Some well-known examples are:

- **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.
- **Social Security Administration** - The SSA administers Social Security, a social insurance program consisting of retirement, disability, and survivors' benefits. To qualify for these benefits, most American workers pay Social Security taxes on their earnings.
- **The National Aeronautics and Space Administration** - NASA administers the United States space program, financing ventures into space since 1958.

## 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
- ***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

**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

## **CONTROLLING THE BUREAUCRACY PRESIDENTIAL, COURT, AND INTEREST GROUP INFLUENCE**

### **THE PRESIDENT AND THE BUREAUCRACY**

- **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 \$)
    - OMB coordinates the requests of the agencies
- **Other Powers**
  - Propose the reorganization of the executive branch
  - Presidential power of influence over different agencies direction
- **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

### **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**

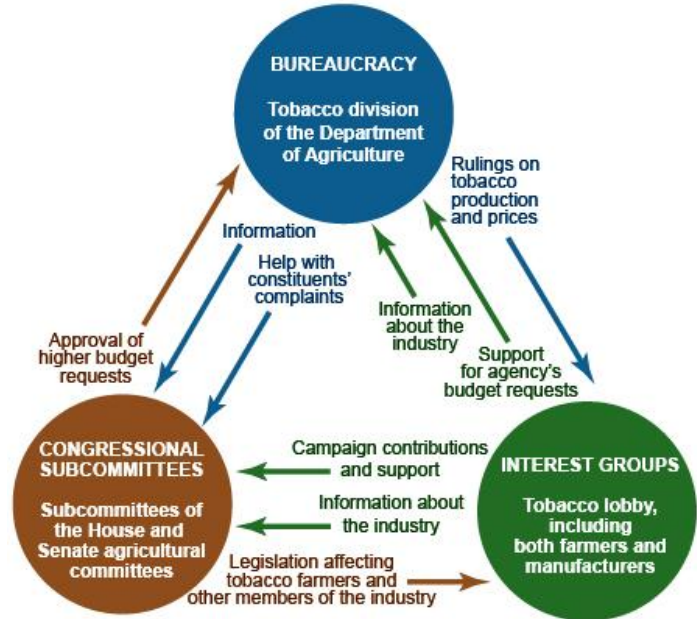
- **Powers**
  - Lobbying
  - "Revolving door" - Agencies are staffed by people who move back and forth between the public/private sector
  - Client groups
    - Some agency-interest group relations are so close that the interest group is said to be a client of the agency (e.g., dairy groups and Agriculture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

## 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.

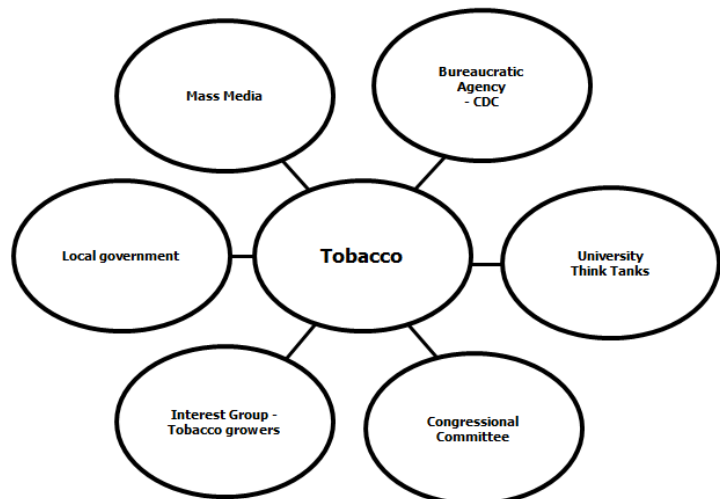
Example: An important issue that government has recently addressed is the effect of tobacco on health and the government's role in regulating it. The tobacco farmers and industry have numerous interest groups, a "tobacco lobby" that provide information to the tobacco division of the Department of Agriculture and to subcommittees of the House and Senate agricultural committees. They support the agency's budget requests and make contributions to the election campaigns of the subcommittee members. The subcommittees pass legislation affecting tobacco farmers and other members of the industry and approval higher budget requests from the agency. The agency gives the subcommittees information, help with constituents' complaints, and develop rules on tobacco production and prices. They all have a common interest - the promotion of tobacco farming and industry, and they can help one another achieve their goals. As a result, the president and Congress beyond the subcommittee have little decision-making power.



### 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.

The iron triangle may be criticized because interest groups today are so prolific that they are bound to create cross-demands on subcommittees and the bureaucracy. In the tobacco issue discussed above, interest groups have formed demanding that tobacco products be banned or heavily restricted by the federal government. With these counter-demands, the policymaking process would not run so smoothly and would broaden the number of people involved in the system. The issue is discussed on many levels, both inside and outside government. An agency, then, can be described as being embedded, not in an iron triangle, but in an issue network. The networks are contentious, with arguments and disagreements occurring along partisan, ideological, and economic lines. When a president appoints a new agency head, he will often choose someone from the issue network who agrees with his views.





# 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/political questions 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

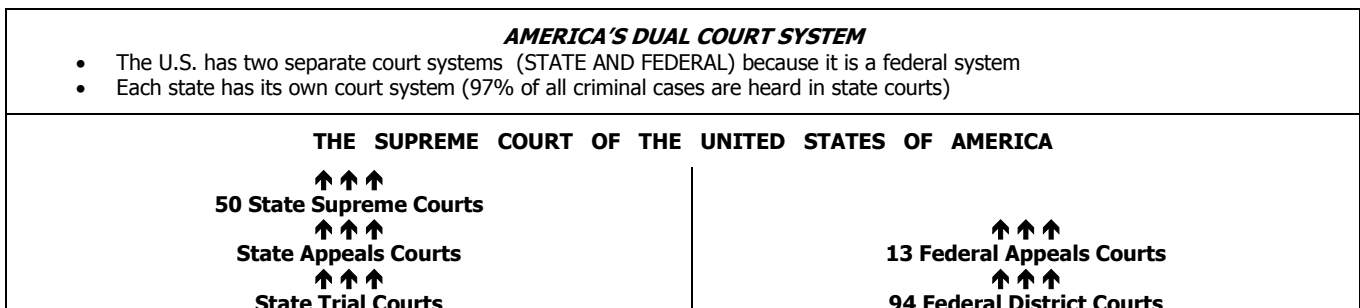
## JUDICIAL LAW-MAKING

- 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

<b>TYPES OF LAW</b>	
<b>Criminal</b>	<b>Civil</b>
<p><i>Concerns violations of the criminal code</i></p> <p>Example: Violations against society</p>	<p><i>Concerns disputes between two parties rather than violations against society</i></p> <p>Examples Breach of contract, slander, medical malpractice</p> <p>Class-action lawsuit - suit brought by a group of people who share a common grievance</p>

<b>TYPES OF JURISDICTION</b>			
Jurisdiction is a court's authority to hear a case			
<b>Exclusive</b> Cases that can be heard only in certain courts	<b>Concurrent</b> Cases that can be heard in either a federal or a state court	<b>Original</b> Courts in which a case is first heard	<b>Appellate</b> Courts that hear cases brought to them on appeal from a lower court

<b>FEDERAL COURT JURISDICTION</b>	Federal courts may try a case if it involves	<ul style="list-style-type: none"> <li>&gt; Disputes between two or more states</li> <li>&gt; The Constitution, a federal law, or a treaty</li> <li>&gt; The U.S. government as a party</li> <li>&gt; Citizens of different states</li> <li>&gt; Ambassadors or diplomats</li> </ul>
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## APGoPo 6-9

# STRUCTURE OF THE FEDERAL COURT SYSTEM

**Article 3, Section 1:** *The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.*

### ARTICLE III – THE FEDERAL (CONSTITUTIONAL) COURTS

- The Supreme Court is the only court specifically mentioned in the Constitution
  - The President has the power to appoint all federal judges = Executive branch check on the judicial branch
  - The Senate has the power to confirm all federal judges = Legislative branch check on the executive branch and judicial branch
  - 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

### THE THREE LEVELS OF CONSTITUTIONAL COURTS

<b>DISTRICT COURTS</b>	<ul style="list-style-type: none"><li>• 94 courts w/ ~700 judges</li><li>• Handle over 300,000 cases</li><li>• Cases are tried by a judge and petit (trial) jury – jury decides outcome of case<ul style="list-style-type: none"><li>○ Use grand juries to issue indictments<ul style="list-style-type: none"><li>▪ Orders that charge an individual with a crime</li><li>▪ Does not mean that one is guilty; it means that one will be tried</li></ul></li></ul></li><li>• Jurisdiction: original</li><li>• Most cases end in a plea bargain</li><li>• Decisions may be appealed to Courts of Appeals</li></ul>
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<b>COURTS OF APPEALS</b>	<ul style="list-style-type: none"><li>• 13 “circuit” courts w/ ~160 judges</li><li>• 156 judges try &gt;18,000 cases a year</li><li>• Cases tried by a panel of three judges<ul style="list-style-type: none"><li>○ Do not hold trials or hear testimony – judges review district court decisions</li></ul></li><li>• Jurisdiction: appellate (hears appeals from District Courts and regulatory agencies)</li><li>• Decisions may be appealed to the Supreme Court</li></ul>
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<b>SUPREME COURT</b>	<ul style="list-style-type: none"><li>• Highest court in the land</li><li>• ~10,000 cases are petitioned for a writ of certiorari – only hear about 80 cases a year</li><li>• Cases tried by entire court (currently nine judges)</li><li>• Jurisdiction: original and appellate<ul style="list-style-type: none"><li>○ Almost all cases are heard on appeal</li></ul></li><li>• Court of last resort<ul style="list-style-type: none"><li>○ Supreme Court is the final arbiter of the Constitution</li><li>○ Supreme Court decisions establish precedents that are binding on the entire nation</li></ul></li></ul>

## FEDERAL ATTORNEYS AND JUDGES

<b>FEDERAL ATTORNEYS</b>		
<p style="text-align: center;"><b>ATTORNEY GENERAL</b></p> <ul style="list-style-type: none"> <li>▪ Appointed by President with Senate consent</li> <li>▪ Head of Department of Justice</li> </ul>	<p style="text-align: center;"><b>SOLICITOR GENERAL</b></p> <ul style="list-style-type: none"> <li>▪ Appointed by President with Senate consent</li> <li>▪ Represents U.S. government in Supreme Court</li> <li>▪ Decides which cases the federal government will appeal to the Supreme Court</li> <li>▪ Decides the federal government's position in these cases</li> <li>▪ Sometimes called the "10<sup>th</sup> Justice" of the Supreme Court because of his/her influence there</li> </ul>	<p style="text-align: center;"><b>U.S. ATTORNEYS</b></p> <ul style="list-style-type: none"> <li>▪ At least one for each District Court, 94 in all</li> <li>▪ Prosecutes federal cases, though most cases are settled by plea-bargaining</li> <li>▪ Appointed by the President for 4-year terms (key patronage positions)</li> <li>▪ Senatorial courtesy applies in their appointments</li> </ul>

<b>FEDERAL JUDGES</b>	
<ul style="list-style-type: none"> <li>• Appointed by President with "advice and consent" of Senate (majority vote needed for confirmation)</li> <li>• Given life tenure subject to good behavior</li> <li>• May be impeached and removed by Congress (very rare)</li> </ul>	
<p style="text-align: center;"><b>Advantages of life terms</b></p> <ul style="list-style-type: none"> <li>• Experience</li> <li>• Stability</li> <li>• Re-election not necessary</li> <li>• No fear of removal based on decision</li> <li>• Interest groups have little influence</li> </ul>	<p style="text-align: center;"><b>Disadvantages of life terms</b></p> <ul style="list-style-type: none"> <li>• Judicial activism</li> <li>• Precedent</li> <li>• Old court</li> <li>• Ideology; slow to change</li> </ul>

### 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

**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 (and judges may try to retire when there is a president with a similar ideology)

**American Bar Association**

→ Evaluates nominees (Senate Judiciary Committee considers ABA ratings)

**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

## APGoPo 6-11

# THE SUPREME COURT

### KEY POWERS

- Power of judicial review (established by *Marbury v. Madison*, 1803)
  - 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

### APPELLATE JURISDICTION

- Most cases come under the Court's appellate jurisdiction
  - Cases appealed from both state supreme courts and federal courts of appeals
- 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)

### 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

### 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)

## APGoPo 6-12

# DECISIONS OF THE SUPREME COURT

### **THE SUPREME COURT AT WORK**

- Term begins on first Monday in October and continues until the end of June
- Hears cases from Monday-Thursday (Quorum of 6 needed to conduct business)
- Before oral arguments, the Justices read the attorneys' briefs
- Justices also read *amicus curiae* briefs
- Justices hear 30" oral arguments from each side
- At the Friday conference, Justices discuss the cases
- Simple majority needed for decisions. In case of ties, previous court decision stands.

### **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
  - Unanimous – expresses opinion of all nine Justices (~1/3 of the cases are decided by a 9-0 vote)
  - 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

### **ASSIGNING OF OPINIONS**

- If Chief Justice voted with the majority, he assigns someone in the majority to write the opinion
- If the C.J. is in the minority, the most senior Justice among the majority assigns the opinion

### **THE POLITICS OF OPINION WRITING**

- Assigning the opinion is a key power of the Chief Justice: it enables to CJ to get the right "slant" on the issue.
- Majority opinion writer must be careful not to alienate others in the majority, because they may change their minds and switch positions.
- The majority opinion writer must therefore structure the argument in such a way as to keep the support of at least four other intelligent, independent Justices, any of whom may threaten to "jump ship" and switch his/her vote.
- Threat of a dissenting opinion can sometimes convince the majority to bend a bit in certain parts of the decision.

### **PURPOSES OF OPINIONS**

- Communicate the Court's reasoning to the public
- Establish precedents for future cases – importance of *stare decisis*
- Drop "hints" that Congress, the states, or the President should take certain actions

### **EVADING COURT DECISIONS**

- The Supreme Court is the highest court in the land, but it is possible to evade Court decisions:
  - Congress can amend the Constitution (w/ State ratification); 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 (e.g., Jackson's famous line: "John Marshall has made his decision. Now let him enforce it.")
  - State and local governments may simply not carry it out, either (e.g., desegregation, school prayer)
  - "The Constitution may be what the Supreme Court says it is, but a Supreme Court opinion is what a trial judge or a policeman or a school board or a city council says it is."

### **VOTING BLOCS ON THE CURRENT SUPREME COURT**

- Liberals
  - Ruth Bader Ginsburg (Clinton, 1993, 82)
  - Stephen Breyer (Clinton, 1994, 76)
  - Sonia Sotomayor (Obama, 2009, 60)
  - Elena Kagan (Obama, 2010, 54)
- Conservatives
  - Antonin Scalia (Reagan, 1986, 79)
  - Clarence Thomas (H.W. Bush, 1991, 66)
  - John Roberts (W. Bush, 2005, 60) – Chief Justice
  - Samuel Alito (W. Bush, 2006, 65)
- Swing/Moderate Conservative
  - Anthony Kennedy (Reagan, 1987, 78)

## APGoPo 6-13

# 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"

## 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)

### **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