THE SUPREME COURT TODAY

GIVEN THE JUDICIAL SYSTEM'S vast size and substantial, although often indirect, power over so many aspects of our lives, it is surprising that so many Americans know next to nothing about the judicial system, in general, and the U.S. Supreme Court, in particular.

Even today, after the unprecedented attention the Supreme Court received when the fate of the 2000 presidential election was in its hands, nearly two-thirds of those sampled in 2002 could not name one member of the Court; only 32 percent knew that the Court had nine members. In sharp contrast, 75 percent knew that there are three Rice Krispies characters. As revealed in Table 10.5, Sandra Day O'Connor, the first woman appointed to the Court, is the most well-known justice. Still, less than a quarter of those polled could name her. To fill in any gaps in your knowledge of the current Supreme Court, see Table 10.3.

TABLE 10.5 Don't Know Much About . . . the Supreme Court

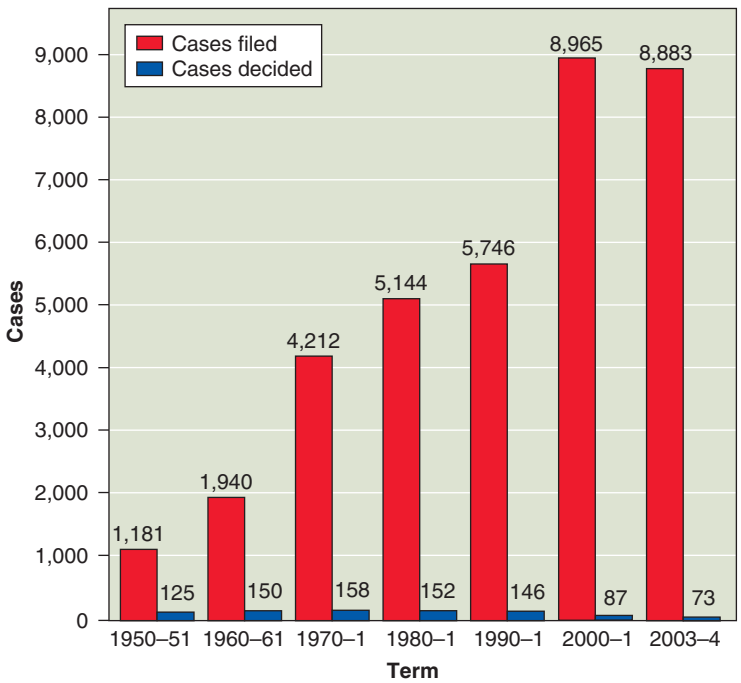
	Percentage Responding Correctly
Rice Krispies Characters:	
Crackle	67
Snap	66
Pop	66
Supreme Court Justices:	
Sandra Day O'Connor	24
Clarence Thomas	19
William H. Rehnquist	11
Antonin Scalia	8
Ruth Bader Ginsburg	7
Anthony Kennedy	5
David Souter	5
Stephen Breyer	3
John Paul Stevens	2

Source: The Polling Company. Accessed May 30, 2002, http://www.pollingcompany.com/News.asp?FormMode=ViewReleases&ID=50. Reprinted by permission of the Polling Company.

While much of this ignorance can be blamed on the American public's lack of interest, the Court has also taken great pains to ensure its privacy and sense of decorum. Its rites and rituals contribute to the Court's mystique and encourage a "cult of the robe."[30] Consider, for example, the way Supreme Court proceedings are conducted. Oral arguments are not televised, and deliberations concerning the outcome of cases are conducted in utmost secrecy. In contrast, C-SPAN brings us daily coverage of various congressional hearings and floor debate on bills and important national issues, and Court TV (and sometimes other networks) provides gavel-to-gavel coverage of many important state court trials. The Supreme Court, however, remains adamant in its refusal to televise its proceedings—including public oral arguments, although it now allows the release of same-day audio tapes of oral arguments.

FIGURE 10.4 Supreme Court Caseload, 1950–2004 Terms

Cases the Supreme Court chooses to hear (represented by blue bars below) represent a tiny fraction of the total number of cases filed with the Court (represented by red bars). The Court's caseload has remained fairly consistent from its 1992 through 2001 terms, although the Court accepted far fewer cases for its review than it did in earlier decades. Still, the Court decides only a small percentage of the cases filed. ■

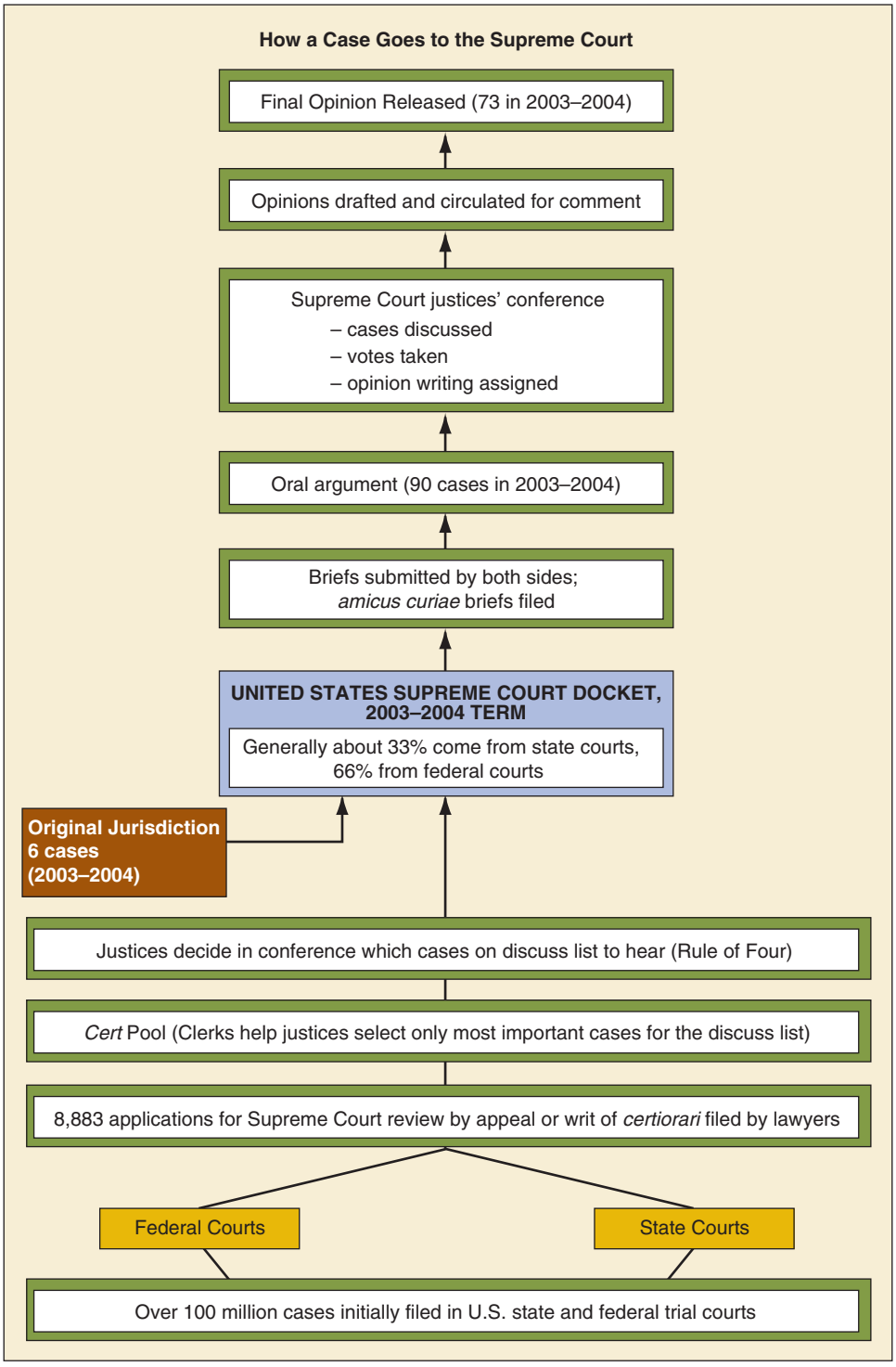


Source: Administrative Office of the Courts; Supreme Court Public Information Office.

Deciding to Hear a Case

Almost 9,000 cases were filed at the Supreme Court in its 2003–2004 term; ninety were heard, and seventy-three were decided. In contrast, from 1790 to 1801, the Court heard only eighty-seven cases under its appellate jurisdiction.[31] In the Court's early years, the main of the justices' workload involved their circuit-riding duties. From 1862 to 1866, only 240 cases were decided. Creation of the courts of appeals in 1891 resulted in an immediate reduction in Supreme Court filings—from 600 in 1890 to 275 in 1892.[32] As recently as the 1940s, fewer than 1,000 cases were filed

FIGURE 10.5 This figure illustrates both how cases get on the Court's docket and what happens after a case is accepted for review. ■



annually. Since that time, filings increased at a dramatic rate until the mid 1990s and then shot up again in the late 1990s, as revealed in Figure 10.4, although there was a slight downturn in the 2003–2004 term. The process by which cases get to the Supreme Court is outlined in Figure 10.5.

Just as it is up to the justices to say what the law is, they can also exercise a significant role in policy making and politics by opting not to hear a case. For example, in late 2004 when it refused to hear an appeal of a Massachusetts Supreme Court decision requiring the state to sanction same-sex marriages, the Court prompted President George W. Bush and others to renew their calls for a constitutional amendment. The

content of the Court's docket is, of course, every bit as significant as its size. During the 1930s, cases requiring the interpretation of constitutional law began to take a growing portion of the Court's workload, leading the Court to take a more important role in the policy-making process. At that time, only 5 percent of the Court's cases involved questions concerning the Bill of Rights. By the late 1950s, one-third of filed cases involved such questions; by the 1960s, half did.[33] More recently, 42 percent of the cases decided by the Court dealt with issues raised in the Bill of Rights.[34]

As discussed earlier in the chapter, the Court has two types of jurisdiction, as indicated in Figure 10.1. The Court has original jurisdiction in "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party." It is rare for more than two or three of these cases to come to the Court in a year. The second kind of jurisdiction enjoyed by the Court is its appellate jurisdiction. The Court is not expected to exercise its appellate jurisdiction simply to correct errors of other courts. Instead, appeal to the Supreme Court should be taken only if the case presents important issues of law, or what is termed "a substantial federal question." Since 1988, nearly all appellate cases that have gone to the Supreme Court arrived there on a petition for a **writ of *certiorari*** (from the Latin "to be informed"), which is a request for the Supreme Court—at its discretion—to order up the records of the lower courts for purposes of review.

writ of *certiorari*
A request for the Court to order up the records from a lower court to review the case.

The Rule of Four. The Supreme Court controls its own caseload through the *certiorari* process, deciding which cases it wants to hear, and rejecting most cases that come to it. All petitions for *certiorari* must meet two criteria:

1. The case must come from either a U.S. court of appeals, a special three-judge district court, or a state court of last resort.
2. The case must involve a federal question. Thus, the case must present questions of interpretation of federal constitutional law or involve a federal statute, action, or treaty. The reasons that the Court should accept the case for review and legal argument supporting that position are set out in the petition (also called a brief).

■ The Supreme Court at the begining of its 2004–2005 term. From left to right: Clarence Thomas, Antonin Scalia, Sandra Day O'Connor, Anthony Kennedy, David Souter, Stephen Breyer, John Paul Stevens, William H. Rehnquist, and Ruth Bader Ginsburg.

Photo courtesy: Ken Heinen/Pool/AP/Wide World Photos

The clerk of the Court's office transmits petitions for writs of *certiorari* first to the chief justice's office, where clerks review the petitions, and then to the individual justices' offices. On the Rehnquist Court, all of the justices except Justice John Paul Stevens (who allows his clerks great individual authority in selecting the cases for him to review) participated in what is called the *cert* pool.[35] Pool participants review their assigned fraction of petitions and share their notes with each other. Those cases that the justices deem noteworthy are then placed on what is called the discuss list prepared by the chief justice's clerks and circulated to the chambers of the other justices. All others are dead listed and go no further unless a justice asks that a case be removed from the dead list and discussed at conference. Only about 30 percent of submitted petitions make it to the discuss list. During one of the justices' weekly conference meetings, the cases on the discuss list are reviewed. The chief justice speaks first, then the rest of the justices, according to seniority. The decision process ends when the justices vote, and by custom, *certiorari* is granted according to the **Rule of Four**—when at least four justices vote to hear a case.

Rule of Four
At least four justices of the Supreme Court must vote to consider a case before it can be heard.

You Are a Clerk to a Supreme Court Justice

The Role of Clerks.

As early as 1850, the justices of the Supreme Court beseeched Congress to approve the hiring of a clerk to assist each justice. Congress denied the request, so when Justice Horace Gray hired the first law clerk in 1882, he paid the clerk himself. Justice Gray's clerk was a top graduate of Harvard Law School whose duties included cutting Justice Gray's hair and running personal errands. Finally, in 1886, Congress authorized each justice to hire a stenographer clerk for $1,600 a year.

Clerks typically are selected from candidates at the top of the graduating classes of prestigious law schools. They perform a variety of tasks, ranging from searching for arcane facts to playing tennis or taking walks with the justices. Clerks spend most of their time researching material relevant to particular cases, reading and summarizing cases, and helping justices write opinions. The clerks also make the first pass through the petitions that come to the Court, undoubtedly influencing which cases get a second look. Just how much help they provide in the writing of opinions is unknown.[36] (See Table 10.6 for more on what clerks do.)

Over time, the number of clerks employed by the justices has increased. Through the 1946 to 1969 terms, most justices employed two clerks. By 1970, most had three clerks, and by 1980 all but three justices had four clerks. In 2005, the nine justices employed a total of thirty-four clerks. This growth in the number of clerks has had many interesting ramifications for the Court. As the number of clerks has grown, so have the number and length of the Court's opinions.[37] And, until recently, the number of cases decided annually increased as more help was available to the justices.

The relationship between clerks and the justices for whom they work is close and confidential, and many aspects of the relationship are kept secret. Clerks may sometimes talk among themselves about the views and personalities of their justices, but rarely has a clerk leaked such information to the press. In 1998, a former clerk to Justice Harry A. Blackmun broke the silence. Edward Lazarus published a book that shocked many Court watchers by penning an insider's account of how the Court really works.[38] He also charged that the justices give their young, often ideological, clerks far too much power.

TABLE 10.6 What Do Supreme Court Clerks Do?

Supreme Court clerks are among the best and brightest recent law school graduates. Almost all first clerk for a judge on one of the courts of appeals. After their Supreme Court clerkship, former clerks are in high demand. Firms often pay signing bonuses of up to $80,000 to attract clerks, who often earn over $130,000 their first year in private practice.

Tasks of a Supreme Court clerk include the following:
- Perform initial screening of the 9,000 or so petitions that come to the Court each term
- Draft memos to summarize the facts and issues in each case, recommending whether the case should be accepted by the Court for full review
- Write a "bench memo" summarizing an accepted case and suggesting questions for oral argument
- Write the first draft of an opinion
- Be an informal conduit for communicating and negotiating between other justices' chambers as to the final wording of an opinion

How Does a Case Survive the Process?

It can be difficult to determine why the Court decides to hear a particular case. Sometimes it involves a perceived national emergency, as was the case with appeals concerning the outcome of the 2000 presidential election. The Court does not offer reasons, and "the standards by which the justices decide to grant or deny review are highly personalized and necessarily discretionary," noted former Chief Justice Earl Warren.[39] Political scientists nonetheless have attempted to deter-

mine the characteristics of the cases the Court accepts; not surprisingly, they are similar to those that help a case get on the discuss list. Among the cues are the following:

- The federal government is the party asking for review.
- The case involves conflict among the circuit courts.
- The case presents a civil rights or civil liberties question.
- The case involves ideological and/or policy preferences of the justices.
- The case has significant social or political interest, as evidenced by the presence of interest group *amicus curiae* briefs.

The Federal Government. One of the most important cues for predicting whether the Court will hear a case is the position the solicitor general takes on it. The **solicitor general,** appointed by the president, is the fourth-ranking member of the Department of Justice and is responsible for handling most appeals on behalf of the U.S. government to the Supreme Court. The solicitor's staff resembles a small, specialized law firm within the Department of Justice. But, because this office has such a special relationship with the Supreme Court, even having a suite of offices within the Supreme Court building, the solicitor general often is referred to as the Court's "ninth and a half member."[40] Moreover, the solicitor general, on behalf of the U.S. government, appears as a party or as an *amicus curiae* in more than 50 percent of the cases heard by the Court each term. ***Amicus curiae*** means friend of the court. *Amici* may file briefs or even appear to argue their interests orally before the Court.

solicitor general
The fourth-ranking member of the Department of Justice; responsible for handling all appeals on behalf of the U.S. government to the Supreme Court.

amicus curiae
"Friend of the court"; *amici* may file briefs or even appear to argue their interests orally before the court.

This special relationship with the Court helps explain the overwhelming success the solicitor general's office enjoys before the Supreme Court. The Court generally accepts 70 to 80 percent of the cases where the U.S. government is the petitioning party, compared with about 5 percent of all others.[41] But, because of this special relationship, the solicitor general often ends up playing two conflicting roles: representing in Court both the president's policy interests and the broader interests of the United States. At times, solicitors find these two roles difficult to reconcile. Former Solicitor General Rex E. Lee (1981–1985), for example, noted that on more than one occasion he refused to make arguments in Court that had been advanced by the Reagan administration (a stand that ultimately forced him to resign his position).[42]

■ This sketch by the Court artist shows Deputy Solicitor General Paul Clement arguing on behalf of the government before the Supreme Court in April 2004.

Photo courtesy: AP Photo/Dana Verkouteren

Conflict Among the Circuits. Conflict among the lower courts is apparently another reason that the justices take cases. When interpretations of constitutional or federal law are involved, the justices seem to want consistency throughout the federal court system.

Often these conflicts occur when important civil rights or civil liberties questions arise. As political scientist Lawrence Baum has commented, "Justices' evaluations of lower court decisions are based largely on their ideological position."[43] Thus, it is not uncommon to see conservative justices voting to hear cases to overrule liberal lower court decisions, or vice versa.

Interest Group Participation. A quick way for the justices to gauge the ideological ramifications of a particular civil rights or liberties case is by the nature and amount of

interest group participation. Richard C. Cortner has noted that "Cases do not arrive on the doorstep of the Supreme Court like orphans in the night."[44] Instead, most cases heard by the Supreme Court involve either the government or an interest group—either as the sponsoring party or as an *amicus curiae*. Liberal groups such as the ACLU, People for the American Way, or the NAACP Legal Defense Fund, and conservative groups including the Washington Legal Foundation, Concerned Women for America, or the American Center for Law and Justice, routinely sponsor cases or file *amicus* briefs either urging the Court to hear a case or asking it to deny *certiorari*.

Research by political scientists has found that "not only does [an *amicus*] brief in favor of *certiorari* significantly improve the chances of a case being accepted, but two, three and four briefs improve the chances even more."[45] Clearly, it's the more the merrier, whether or not the briefs are filed for or against granting review.[46] Interest group participation may highlight lower court and ideological conflicts for the justices by alerting them to the amount of public interest in the issues presented in any particular case.

Hearing and Deciding the Case

Once a case is accepted for review, a flurry of activity begins. Lawyers on both sides of the case begin to prepare their written arguments for submission to the Court. In these briefs, lawyers cite prior case law and make arguments as to why the Court should find in favor of their client.

More often than not, these arguments are echoed or expanded in *amicus curiae* briefs filed by interested parties, especially interest groups. (The vast majority of the cases decided by the Court in the 1990s, for example, had at least one *amicus* brief.)

Since the 1970s, interest groups increasingly have used the *amicus* brief as a way to lobby the Court. Because litigation is so expensive, few individuals have the money (or time or interest) to pursue a perceived wrong all the way to the U.S. Supreme Court. All sorts of interest groups, then, find that joining ongoing cases through *amicus* briefs is a useful way of advancing their policy preferences. Major cases such as *Brown* v. *Board of Education* (1954) (see chapter 6), *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* (1992) (see chapter 5), and *Grutter* v. *Bollinger* (2003) (see chapter 6) all attracted large numbers of *amicus* briefs as part of interest groups' efforts to lobby the judiciary and bring about desired political objectives.[47] (See Table 10.7.)

Interest groups also provide the Court with information not necessarily contained in the major-party briefs, help write briefs, and assist in practice oral arguments during moot-court sessions. In these moot-court sessions, the lawyer who will argue the case before the nine justices goes through several complete rehearsals, with prominent lawyers and law professors role playing the various justices.

Oral Arguments. Once a case is accepted by the Court for full review, and after briefs and *amicus* briefs are submitted on each side, oral argument takes place. The Supreme Court's annual term begins the first Monday in October, as it has since the late 1800s, and runs through late June or early July. Justices hear oral arguments from the beginning of the term until early April. Special cases, such as *U.S.* v. *Nixon* (1974), which involved President Richard M. Nixon's refusal to turn over tapes of Oval Office conversations to a special prosecutor investigating a break-in at the Democratic Party headquarters in the Watergate building, have been heard even later in the year.[48] During the term, "sittings," periods of about two weeks in which cases are heard, alternate with "recesses," also about two weeks long. Oral arguments usually are heard Monday through Wednesday.

Oral argument generally is limited to the immediate parties in the case, although it is not uncommon for the U.S. solicitor general to appear to argue orally as an *amicus curiae*. Oral argument at the Court is fraught with time-honored tradition and ceremony. At precisely ten o'clock every morning when the Court is in session, the Court

TABLE 10.7 *Amicus Curiae* Briefs in an Affirmative Action Case: *Grutter* v. *Bollinger* and *Gratz* v. *Bollinger* (2003)

Photo courtesy: Paul Sancya/AP/Wide World Photos

■ Barbara Grutter and Jennifer Gratz, two of the plaintiffs in The University of Michigan affirmative actions cases.

For the Petitioners

Asian American Legal Foundation
Cato Institute
Center for Equal Opportunity et al.
Center for Individual Freedom
Center for the Advancement of Capitalism
Center for New Black Leadership
Claremont Institute Center for Constitutional Jurisprudence
Law Professors
Massachusetts School of Law
Michigan Association of Scholars
National Association of Scholars
Pacific Legal Foundation
Reason Foundation
State of Florida and Governor Jeb Bush
United States
Ward Connerly

For the Respondents

65 Leading American Businesses
AFL-CIO
American Bar Association
American Council on Education et al.
American Educational Research Association et al.
American Jewish Committee et al.
American Law Deans Association
American Media Companies
American Psychological Association
American Sociological Association
Amherst College et al.
Arizona State University College of Law
Association of American Law Schools
Association of American Medical Colleges
Authors of the Texas Ten Percent Plan
Bay Mills Indian Community et al.
Black Women Lawyers Association of Greater Chicago
Boston Bar Association et al.
Carnegie Mellon University et al.
City of Philadelphia et al.
Clinical Legal Educational Association
Coalition for Economic Equity et al.
Columbia University et al.
Committee of Concerned Black Graduates of ABA Accredited Law Schools
Current Law Students at Accredited Law Schools
Deans of Law Schools
General Motors Corporation
Graduate Management Admission Council et al.
Harvard Black Law Students Association et al.
Harvard University et al.
Hayden Family
Hispanic National Bar Association
Howard University
Human Rights Advocates et al.
Indiana University
King County Bar Association
Latino Organizations
Lawyers Committee for Civil Rights Under Law et al.
Leadership Conference on Civil Rights et al.
Massachusetts Institute of Technology et al.
Members of Congress (3 briefs)
Members of the Pennsylvania General Assembly et al.
Michigan Black Law Alumni Association
Michigan Governor Jennifer Granholm
Military Leaders
MTV Networks
NAACP Legal Defense and Education Fund et al.
National Asian Pacific American Legal Consortium et al.
National Center for Fair and Open Testing
National Coalition of Blacks for Reparations in America et al.
National Education Association
National School Boards Association
National Urban League et al.
New America Alliance
New Mexico Hispanic Bar Association et al.
New York City Council Members
New York State Black and Puerto Rican Legislative Caucus
Northeastern University
NOW Legal Defense and Education Fund et al.
School of Law of the University of North Carolina
Social Scientists
Society of American Law Teachers
State of New Jersey
State of Maryland et al.
Students of Howard University Law School
UCLA School of Law Students of Color
United Negro College Fund et al.
University of Michigan Asian Pacific American Law Students Association
University of Pittsburgh et al.
Veterans of the Southern Civil Rights Movement et al.

For Neither Party

Anti-Defamation League
BP America
Criminal Justice Legal Foundation
Equal Employment Opportunity Council
Exxon Mobil Corporation

Join the Debate

Separation of Powers and the Scalia Recusals

OVERVIEW: The separation of powers is one of the fundamental tenets of the Constitution. Although the lines of authority among the legislative, executive, and judicial branches endlessly shift as the power of each increases or diminishes, each branch must retain its constitutional independence. Once a branch acts in collusion with another, American political theory argues, the door to corruption is opened. When it was learned that Justice Antonin Scalia went duck hunting with Vice President Dick Cheney a few months before the Supreme Court was to review the government's suit to compel the vice president to release documents concerning his secretive Energy Task Force, the question of conflict of interest arose. With this in mind, the Sierra Club filed a motion to formally ask that Justice Scalia recuse (or remove) himself from hearing the case in order to prevent undue influence. Justice Scalia refused to recuse himself and thus proffered an interesting ethical question.

It is historical and common practice for justices to socialize with the political and intellectual classes. For example, Justice Ruth Bader Ginsburg favored the position of the National Organization for Women's legal defense fund in a case before the Court and then spoke at NOW's lecture series two weeks later—these types of practices are considered proper. However, justices regularly recuse themselves if there is a conflict of interest. During the last five years, there have been nearly 500 recusals by the justices. Commentary in the *National Law Journal* argues that if a case before the Court involves an institutional issue, a justice's recusal is not necessary when a friend, family member, or acquaintance is involved. Because the issue in *Cheney* v. *U.S. District Court for the District of Columbia* concerns the separation of powers, the personal and political motives of the parties involved would seem irrelevant. However, public distrust of government, and of the Supreme Court in particular, has been increasing. Therefore, it could be argued, all who act in a political capacity should be meticulous in avoiding the appearance of impropriety or conflict of interest.

Should politicians and judges be held to higher ethical standards than the average citizen? Should members of the Supreme Court be allowed to participate in cases where acquaintances, friends, or family are involved? After all, some justices, such as Justices Sandra Day O'Connor and David Souter, recuse themselves as a matter of course if there is a hint of conflict of interest. Should the other justices be bound to do so as well? Is the issue of the public's trust in government so important that all Supreme Court justices should adhere to the highest ethical standard?

Arguments for Recusal

- **Justices should avoid the appearance of conflict of interest.** The current polarized political atmosphere

marshal, dressed in a formal morning coat, emerges to intone "Oyez! Oyez! Oyez!" as the nine justices emerge from behind a reddish-purple velvet curtain to take their places on the raised and slightly angled bench. The chief justice sits in the middle. The remaining justices sit alternating in seniority and right to left.

Almost all attorneys are allotted one half hour to present their cases, and this time includes that required to answer questions from the bench. As a lawyer approaches the mahogany lectern, a green light goes on, indicating that the attorney's time has begun. A white light flashes when five minutes remain. When a red light goes on, Court practice mandates that counsel stop immediately. One famous piece of Court lore told to all attorneys concerns a counsel who continued talking and reading from his prepared argument after the red light went on. When he looked up, he found an empty bench—the justices had risen quietly and departed while he continued to talk. On another occa-

and the American public's distrust of government and its institutions requires highly visible political figures such as Supreme Court justices to adhere to a rigorous ethical code to help the American people maintain confidence in their political and governmental establishments.

- **The principle of separation of powers must be maintained.** Situations may arise in which either intentional or unintentional collusion or influence occurs. The result could be an event or decision that is harmful to the national interest.
- **Justices must remain impartial.** If a justice's personal or political life might intrude on the decision-making process when rendering judgment, basic judicial ethics suggest that recusal is the proper remedy. Fairness and trust demand that a justice maintain impartiality when hearing a case.

Arguments Against Recusal

- **Questioning of judicial integrity may have a partisan basis.** Though oversight of the judiciary is indispensable, many charges against justices are partisan in nature. To bow to partisan pressure would further implicate the Court as being responsive to partisan politics.
- A recusal impairs the proper functioning of the Court. When a member of the Court is recused, the number of justices is reduced. One possibility is that the Court's decision may be evenly split, which effectually means the case is not decided. The Court might fail to reach a decision that could clarify or settle an important constitutional or political question.
- **It is unreasonable to expect justices to recuse themselves because of friendship.** It is the nature of the capital's professional, social, and political structure for justices to have social contact, address conferences and groups, and engage in political life. It is only –natural that the justices over time would develop many different relationships outside the Court. To ask for a recusal in every instance in which a justice has a friend or acquaintance before the Court would be disabling.

Questions

1. What is the best way to ensure accountability in the federal judiciary? Should we expect our judges to be scrupulously apolitical?
2. What is the best way to ensure the independence of the judiciary? Are the lines that separate the branches becoming blurred, and is this a problem?

Selected Readings

Jeffrey Shaman et al. *Judicial Conduct and Ethics.* New York: Matthew Bender, 1990.

John T. Noonan, ed. *The Responsible Judge: Readings in Judicial Ethics.* New York: Praeger, 1993.

sion, Chief Justice Charles Evans Hughes stopped a leader of the New York bar in the middle of the word "if."

Although many Court watchers have tried to figure out how a particular justice will vote based on the questioning at oral argument, most find that the nature and number of questions asked do not help much in predicting the outcome of a case. Nevertheless, many believe that oral argument has several important functions. First, it is the only opportunity for even a small portion of the public (who may attend the hearings) and the press to observe the workings of the Court. Second, it assures lawyers that the justices have heard their case, and it forces lawyers to focus on arguments believed important by the justices. Last, it provides the Court with additional information, especially concerning the Court's broader political role, an issue not usually addressed in written briefs. For example, the justices can ask how many people

might be affected by its decision or where the Court (and country) would be heading if a case were decided in a particular way. Justice Stephen Breyer also notes that oral arguments are a good way for the justices to try to highlight certain issues for other justices.

The Conference and the Vote. The justices meet in closed conference once a week when the Court is hearing oral arguments. Since the ascendancy of Chief Justice Roger B. Taney to the Court in 1836, the justices have begun each conference session with a round of handshaking. Once the door to the conference room closes, no others are allowed to enter. The justice with the least seniority acts as the doorkeeper for the other eight, communicating with those waiting outside to fill requests for documents, water, and any other necessities.

Conferences highlight the importance and power of the chief justice, who presides over them and makes the initial presentation of each case. Each individual justice then discusses the case in order of his or her seniority on the Court, with the most senior justice speaking next. Most accounts of the decision-making process reveal that at this point some justices try to change the minds of others, but that most enter the conference room with a clear idea of how they will vote on each case. Although other Courts have followed different procedures, through 2004 the justices generally voted at the same time they discussed each case, with each justice speaking only once. Initial conference votes are not final, and justices are allowed to change their minds before final votes are taken later.

Writing Opinions. After the Court has reached a decision in conference, the justices must formulate a formal opinion of the Court. If the chief justice is in the majority, he selects the justice who will write the opinion. This privilege enables him to wield tremendous power and is a very important strategic decision. If the chief justice is in the minority, the assignment falls to the most senior justice in the majority.

The opinion of the Court can take several different forms. Most decisions are reached by a majority opinion written by one member of the Court to reflect the views of at least five of the justices. This opinion usually sets out the legal reasoning justifying the decision, and this legal reasoning becomes a precedent for deciding future cases. The reasoning behind any decision is often as important as the outcome. Under the system of *stare decisis,* both are likely to be relied on as precedent later by lower courts confronted with cases involving similar issues.

In the process of creating the final opinion of the Court, informal caucusing and negotiation often take place, as justices may hold out for word changes or other modifications as a condition of their continued support of the majority opinion. This negotiation process can lead to divisions in the Court's majority. When this occurs, the Court may be forced to decide cases by plurality opinions, which attract the support of three or four justices. While these decisions do not have the precedential value of majority opinions, they nonetheless have been used by the Court to decide many major cases.

Justices who agree with the outcome of the case but not with the legal rationale for the decision may file concurring opinions to express their differing approach. For example, Justice Steven Breyer filed a concurring opinion in *Clinton* v. *Jones* (1997). Although a unanimous Court ruled that a sitting president was not immune to civil lawsuits, Breyer wanted to express his belief that a federal judge could not schedule judicial proceedings that might interfere with a president's public duties.[49]

Justices who do not agree with the outcome of a case file dissenting opinions. Although these opinions have little direct legal value, they can be an important indicator of legal thought on the Court and are an excellent platform for justices to note their personal and legal disagreements with other members of the Court. Justice

Antonin Scalia, for example, is often noted for writing particularly stinging dissents. In his dissent in *Webster* v. *Reproductive Health Services* (1989), for example, Scalia wrote that Justice Sandra Day O'Connor's "assertion that a fundamental rule of judicial restraint requires [the Court] to avoid reconsidering *Roe* [v. *Wade*] cannot be taken seriously."[50]

The process of crafting a final opinion is not an easy one, and justices often rely heavily on their clerks to do much of the revision. Neither is the process apolitical. Today, one vote on the Court can be the difference between two very different outcomes.