The President and the Judiciary

I. Constitutional Framework

A. Nomination of justices to the Supreme Court, with advice and consent of Senate

B. Nomination of other judicial officials established by law, with advice and consent of Senate

C. Article 3: Vests all judicial power in the Supreme Court and lower federal courts

D. Executive given the constitutional duty to see that laws are faithfully executed and that court decisions are upheld: if the Department of Justice is unable to enforce the laws and decisions of the judiciary, the President may use federal troops and the National Guard to ensure compliance. President Eisenhower used federal troops and the National Guard to enforce court-ordered desegregation in a Little Rock high school in 1957. President Kennedy called on the National Guard and federal troops to enforce a federal court order to desegregate the University of Mississippi.

E. Reprieves and pardons, except in the case of impeachment

1. Reprieve: temporary postponement of court’s sentence, designed to give president time to consider a pardon

2. Pardon: stops the civil or criminal process from proceeding, with offender restored to innocence and all civil and political rights retained

3. Limits: cases of impeachment and prevention of execution of laws (Supreme Court Chief Justice Taft indicated in *Ex Parte Grossman* that a presidential pardon used to prevent the execution of laws would constitute an impeachable offense)

4. Attorney General makes recommendations about pardons to president. The attorney general relies on the Office of Pardon Attorney, created by Congress in 1891, which supervises the consideration of pardons and the paperwork involved when a pardon is granted.
5. Historical grants of pardons:

a. Washington granted amnesty to farmers involved in the Whiskey Rebellion, who had protested payment of federal excise taxes.

b. Jefferson stopped the prosecutions going forward from the Alien and Sedition Acts, instituted by the Federalists under Adams, and pardoned those already convicted under these acts.

c. During the Civil War, Lincoln offered amnesty to Confederate rebels who took an oath to support the Constitution, laws, Supreme Court decisions, and presidential proclamations.

d. President Andrew Johnson issued a proclamation excluding certain groups of confederate leaders from amnesty, but pardoning most, including Jefferson Davis and members of Jefferson’s own cabinet.

e. Truman pardoned 1500 WWII draft resisters and 9000 who had deserted during the Korean War.

f. Carter and Ford pardoned more than 10,000 who resisted the draft during U.S. involvement in Vietnam.

g. Most infamous pardon: Ford’s pardon of Nixon. In response, the Senate voted 55-24 in favor of a resolution opposing pardons for others involved in Watergate.

h. Bush pardoned former Reagan Secretary of Defense Casper Weinberger and several others before they went to trial for their involvement in Iran-Contra.

i. Limits on pardon? How likely would Clinton be to pardon Susan McDougal? If Clinton had resigned and Gore became president, how likely is it that Gore would have pardoned Clinton?
II. Presidential Exercise of Judicial Power: Historical Examples of Military Courts and National Security Concerns

A. Mexican-American War (mid-late 1840s): President Polk established military courts to handle the disposition of ships seized for trading with the enemy.

B. Civil War: (See subsequent Supreme Court decision declaring Lincoln’s establishment of martial law courts to be unconstitutional) Lincoln established martial law courts in several border states for trials of civilians arrested by military authorities for treasonous activities.

   1. Supreme Court in *Ex Parte Milligan* ruled that Lincoln acted unconstitutionally, given that regular U.S. courts were in operation.

   2. No confrontation between President and Supreme Court because war was over and Lincoln was dead when the decision was handed down.

C. WWII

   1. Roosevelt established military tribunal for German saboteurs caught on Long Island. Convicted and sentenced to death, lawyers sought trial in civilian courts, but Roosevelt proceeded with execution.

   In the Supreme Court decision in the case of *Ex Parte Quirin*, handed down shortly before the executions, the Court supported the President’s authority to act. This may have been due to the belief that Roosevelt would carry out the executions regardless of the Court’s decision.

   2. Roosevelt established relocation centers for Japanese and Japanese-American citizens on the West Coast, and the Supreme Court upheld these relocations in several cases.

   The Court did insist that individuals in the camps had a right to individual hearings to decide if detention was warranted. Roosevelt dismantled the relocation camps rather than providing for hearings.

   30 years after these forced relocations, Congress provided partial monetary compensation for damages suffered.
III. Judicial Nominations

A. Lower court (district and appeals courts) nominations: note difference in process of appointments between district and appeals courts

1. Approximately 50 appointments each year, so that 2-term president may fill about half of the 800+ (as of 1995) lower-court judges

2. White House and Justice Department consults with members of president’s party in Congress on nominations

3. Since 1840, senatorial courtesy has allowed senators of president’s party a veto over an appointment of a federal district judge in his/her state by allowing a senator to block a vote on Senate nomination

4. Senators give recommendations to White House, and president exercises a veto over the choice

5. Senator’s from the opposition party are typically given ¼ of state’s judicial nominations to federal court

6. President typically makes nominations to the U.S. Court of Appeals in consultation with the senators from the circuit’s states, but given involvement of several states, senators are not given veto power as with district court appointments. In practice, senators have substantial influence on appointments to Appeals courts.

7. Appointments are clearly not apolitical, as a majority of federal judges have been politically active and many have worked for candidates in campaigns, whether Republican or Democrat: 90% of nominations are from the president’s party and presidents attempt to select nominees who share their ideological views.

8. Nominees are carefully screened in terms of qualifications and background checks.

9. Electoral coalitions influence presidential nominations: Democrats are more likely to nominate women, minorities, and Jews; Republicans are more likely to nominate white males, Protestants and Catholics.
B. Supreme Court Nominations

1. On average, presidents make 2 appointments to the Supreme Court.

2. ½ of nominees have been personally known by the president.

3. Since 1840s, some presidents (Truman, Eisenhower, some for Nixon, and Ford) have accorded the ABA Standing Committee on the Judiciary a role in screening potential Supreme Court nominees. The ABA rates nominees as “well-qualified,” “qualified,” or “not qualified.”

Presidents Reagan, Bush and Clinton have allowed ABA pre-screening only for lower-court appointments.

4. There are often political and ideological battles over nominations. Examples include:

   Learned Hand: denied a seat on the Supreme Court because he had supported T. Roosevelt’s Bull Moose Party over President Taft. As Chief Justice, Taft lobbied the White House against Hand each time his name came up as a potential nominee.

   Louis Brandeis: nominated by President Wilson, Boston lawyer Brandeis had fought against interlocking corporate directorships and bank control of companies, championed minimum-wage and maximum-hour regulations, and supported right of unions to collective bargaining. Democrats voted along party lines to confirm the appointment in both the judiciary committee and the full Senate.

   Charles Evans Hughes: nominated in the 1930s and opposed by unions and labor groups and supported by corporations. This time, Republicans had the votes to confirm Hughes.

   Robert Bork: Reagan nominee who failed in confirmation hearings because Democrats in Congress thought he was too conservative (he opposed Supreme Court cases on abortion rights, the right to privacy, poll taxes, and one-person, one-vote).
More than $10 million were spent on a media campaign by various liberal groups who opposed Bork (e.g. women’s groups, civil rights groups, groups opposed to making abortion illegal), and an equal amount was spent in his favor.

Bork was ultimately defeated.

5. In 1930, the Senate Judiciary Committee began to call Supreme Court nominees to appear before the committee.

6. Important changes (and continuity) in the nomination process over time
   a. Increase in public nature of process
   b. Increase in overt political nature of the process
   c. Continuity and change in criteria of importance for nominees from geographic and religious considerations

Continuity is reflected in the concern for professional qualifications, political qualifications, and symbolic factors such as religion and gender.

Change is reflected in the symbolic factors of importance over time. In the 1800s, geographic balance was sought as a means to ensure representation from all regions of the country. Religion became an important factor with the influx of Jewish and Catholic immigrants in the 1800s, but it has become less of a factor in recent decades. Race and gender have become more prominent in the symbolic concerns of appointments since the civil rights era of the 1960s.

IV. Checks and Balances: Supreme Court as “least dangerous branch”

The Supreme Court, unlike the Congress or the executive, does not have the enforcement and funding abilities required to implement judicial decisions. Thus, Supreme Court justices have taken care to avoid confrontations with the executive or legislative branches in situations where the Court might lose. The power and prestige of the Court relies, to a great extent, upon the extent to which its rulings are accepted as binding.
The Supreme Court also lacks the legislative powers of the president and Congress. The Court is given the task of interpreting the laws that already exist, not making new laws (note the controversy over “judicial activism,” where the judiciary is viewed by critics as stepping over the line into policy making). The lack of enforcement mechanisms and legislative power has led to the application of the term “the least dangerous branch” to the Supreme Court.

V. Selected cases of importance for review in terms of the relationship between the president and the judiciary:

1803, *Marbury v. Madison*, established judicial review (favored by Federalists, opposed by Jeffersonians) by declaring Judiciary Act of 1789, under which Marbury brought his suit, unconstitutional. Although this case established greater power for the Court, it is also notable for its failure to directly challenge President Jefferson and to require Jefferson to grant Marbury his judgeship. It is believed that Jefferson would have defied the Court.

1863, *Prize Cases*, Supreme Court sanctioned Lincoln’s commitment to hostilities (blockade of Southern ports) without a declaration of war. The Supreme Court sidestepped the question of whether the president acting alone can initiate hostilities by characterizing Lincoln’s actions as a response to actions by the South and not a declaration of war. This effectively gave the president the ability to commit the nation to war without congressional approval and a formal declaration of war. The decisions in these Civil War cases are consistent with the view that there are two Constitutions, one for peace and one for war.

1866, *Ex Parte Milligan*, Milligan, a civilian resident of Indiana was sentenced to death by a military commission for the crime of conspiring against the government. The Supreme Court held this action to be unconstitutional because Milligan should have been tried in federal court in Indiana, as the Indiana courts were still in operation. It is notable that this case was decided after the Civil War had ended and Lincoln was dead.

1936, *United States v. Curtiss-Wright Export Corporation*: gave president sweeping authority in foreign affairs, identifying the president as the government’s “sole organ” in international relations.

1937, *United States v. Belmont*: The Supreme Court ruled that the president has the sole right to enter into executive agreements with other nations.

1942, *Ex Parte Quirin*: the Supreme Court ruled that President Roosevelt had the authority to act in establishing a military tribunal to try alleged German saboteurs caught on Long Island and sentenced to death. Contrast this case to *Ex Parte Milligan*.

1952, *Youngstown Sheet and Tube Company v. Sawyer*: Supreme Court ruled against President Truman’s argument that national security concerns gave him the authority to prevent a strike in the steel industry.

1974, *U.S. v. Nixon*: Supreme Court ruled that President Nixon had to turn over audiotapes and transcripts to the special prosecutor investigating the Watergate burglary and cover-up, indicating that presidents are not immune from criminal prosecution.

1982, *Nixon v. Fitzgerald*: Supreme Court held that president has absolute immunity from civil suits that arise “out of the execution of official duties”.

1997, *Clinton v. Jones*: Supreme Court held that the president does not have immunity from civil suits that arise from actions outside the president’s official duties. The Court advised lower courts to grant “utmost deference to Presidential responsibilities” in proceeding with the case, but the Court also held that “the doctrine of separation of powers does not require federal courts to stay all private actions against the president until he leaves office.”

**Questions to consider:**

1. Why do Supreme Court decisions sometimes seem to contradict each other?
2. What factors influence how the Supreme Court will decide a case concerning the president?