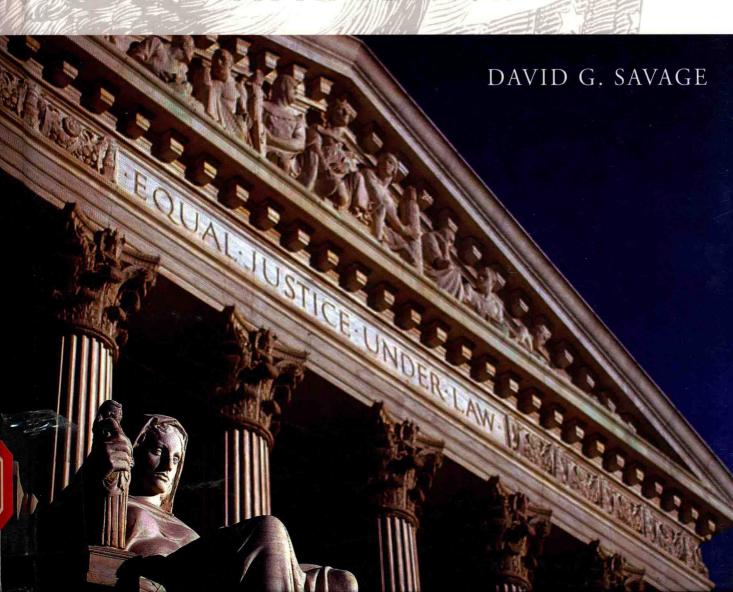
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GUIDE TO

# U.S. SUPREME COURT VOLUME II

FIFTH EDITION



# THE U.S. SUPREME COURT

Fifth Edition \* Volume II

David G. Savage



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### GUIDE TO

# THE U.S. Supreme Court



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# **★ SUMMARY** TABLE OF CONTENTS

# Volume I

| PART I   | ORIGINS AND DEVELOPMENT OF THE COURT | 1   |
|----------|--------------------------------------|-----|
| PART II  | THE COURT AND THE FEDERAL SYSTEM     | 85  |
| PART III | THE COURT AND THE INDIVIDUAL         | 485 |
|          | INDEXES, FOLLOWING PAGE 882          |     |

# Volume II

| PART IV | PRESSURES ON THE COURT                   | 883  |
|---------|------------------------------------------|------|
| PART V  | THE COURT AT WORK                        | 979  |
| PART VI | MEMBERS OF THE COURT                     | 1049 |
|         | REFERENCE MATERIALS                      | 1187 |
|         | SELECTED BIBLIOGRAPHY                    | 1345 |
|         | ILLUSTRATION CREDITS AND ACKNOWLEDGMENTS | 1357 |
|         | INDEXES FOLLOWING PAGE 1360              |      |

# **★ TABLE OF CONTENTS**

# Volume I

|         | Preface                                                              | xiii |    |
|---------|----------------------------------------------------------------------|------|----|
| PART I  | ORIGINS AND DEVELOPMENT OF THE COURT                                 |      | 1  |
|         | CHAPTER 1 ORIGINS OF JUDICIAL POWER                                  | 3    |    |
|         | Foundations                                                          | 4    |    |
|         | A Slow Start, 1790–1800                                              | 6    |    |
|         | Establishment of Power, 1801–1835                                    | . 9  |    |
|         | A Remarkable Term, 1819                                              | 14   |    |
|         | States' Rights, 1836–1860                                            | 17   |    |
|         | War and Recovery, 1861–1872                                          | 23   |    |
|         | Restoring the States, 1873–1888                                      | 27   |    |
|         | CHAPTER 2 FROM THE GILDED AGE TO THE GREAT DEPRESSION                | 35   |    |
|         | Business at the Court, 1889–1919                                     | 36   |    |
|         | New Times, Old Court, 1920–1937                                      | 42   |    |
|         | CHAPTER 3 THE NEW DEAL, CIVIL RIGHTS, AND THE CONSERVATIVE REVIVAL   | 51   |    |
|         | The Switch in Time: The New Deal Transition, 1937                    | 51   |    |
|         | The Court, Civil Liberties, and Civil Rights, 1938–1968              | 52   |    |
|         | The Conservative Revival: From 1969 to The Present                   | 64   |    |
| PART II | THE COURT AND THE FEDERAL SYSTEM                                     |      | 85 |
|         | CHAPTER 4 THE COURT AND THE POWERS OF CONGRESS                       | 87   |    |
|         | Judicial Review and Legislative Power                                | 93   |    |
|         | The Commerce Power                                                   | 106  |    |
|         | Fiscal and Monetary Powers                                           | 144  |    |
|         | The Power over Foreign Affairs                                       | 162  |    |
|         | The Power to Admit States, Govern Territories, and Grant Citizenship | 171  |    |
|         | The Power to Amend the Constitution                                  | 188  |    |
|         | The Power to Investigate                                             | 196  |    |
|         | The Power over Internal Affairs                                      | 205  |    |
|         |                                                                      |      |    |

|          | CHAPTER 5 THE COURT AND THE POWERS OF THE PRESIDENT                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | 231 |     |
|----------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|-----|
|          | The Commander in Chief                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 236 |     |
|          | The Architect of Foreign Policy                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | 254 |     |
|          | The President as Executive                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | 265 |     |
| *        | The Power to Veto and to Pardon                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | 277 |     |
|          | Privilege and Immunity                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 286 |     |
|          | The President versus the Court                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 296 |     |
|          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |     |     |
|          | CHAPTER 6 THE COURT'S ROLE IN SHAPING THE POWERS OF GOVERNMENT                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 325 |     |
|          | Federal Jurisdiction                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 328 |     |
|          | Federal Judicial Power                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 340 |     |
|          | Judicial Restraint                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | 365 |     |
|          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |     |     |
|          | CHAPTER 7 THE COURT AND THE STATES                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | 383 |     |
|          | Judicial Review and the States                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 388 |     |
|          | The States and the Economy                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | 396 |     |
|          | The State and the Individual                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | 428 |     |
|          | The State as Sovereign                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 447 |     |
|          | Interstate Relations                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 474 |     |
|          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |     |     |
| PART III | THE COURT AND THE INDIVIDUAL                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |     | 485 |
|          | CHAPTER 8 THE COURT AND THE INDIVIDUAL                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 487 |     |
|          | In the Beginning: Few Rights and Narrow Protection, 1789–1865                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | 488 |     |
|          | The Civil War Amendments                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | 490 |     |
|          | Freedom for Ideas                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 495 |     |
|          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | 497 |     |
|          | Political Rights Equality before the Law                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | 499 |     |
|          | Fundamental Fairness                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 500 |     |
|          | Turida Heritari aliriess                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | 300 |     |
|          | CHAPTER 9 FREEDOM FOR IDEAS: THE FIRST AMENDMENT AND THE RIGHT TO                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |     |     |
|          | BELIEVE, TO SPEAK, TO ASSEMBLE, TO PETITION, AND TO PUBLISH                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | 505 |     |
|          | Freedom of Speech                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 514 |     |
|          | Freedom of the Press                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 553 |     |
|          | Freedom of Religion                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | 586 |     |
|          | , recount of height                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |     |     |
|          | CHAPTER 10 THE RIGHTS OF POLITICAL PARTICIPATION                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | 623 |     |
|          | Fair Elections and the Right to Vote                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 625 |     |
|          | The Right to an Equal Vote                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | 640 |     |
|          | Freedom of Political Association                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | 660 |     |
|          | An administrative of the state |     |     |
|          | CHAPTER 11 THE SECOND AMENDMENT AND THE RIGHT TO BEAR ARMS                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | 689 |     |
|          | An Individual Right to a Gun                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | 689 |     |
|          | Second Amendment Revival: A Loss for the District of Columbia's                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |     |     |
|          | Handgun Ban                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | 691 |     |

381

## Volume I...

| 695  |
|------|
| 701  |
| 716  |
| 737  |
| 749  |
| 757  |
| 762  |
| 779  |
| 785  |
| 836  |
| 846  |
| 863  |
| 864  |
| 868  |
| 874  |
| 876  |
|      |
| [-1] |
| 1-25 |
|      |

# Volume II

| PART IV   | PRESSURES ON THE COURT                                      |       | 883  |
|-----------|-------------------------------------------------------------|-------|------|
|           | CHAPTER 15 CONGRESSIONAL PRESSURE                           | 885   |      |
|           | Pressures on the Justices                                   | 889   |      |
|           | Pressures on the Institution                                | 901   |      |
|           | Reversals of Rulings                                        | 911   |      |
|           |                                                             |       |      |
|           | CHAPTER 16 PRESIDENTIAL PRESSURE                            | 925   |      |
|           | Politics and Appointments                                   | 931   |      |
|           |                                                             |       |      |
|           | CHAPTER 17 THE COURT, THE MEDIA, AND PUBLIC OPINION         | 945   |      |
|           | Early Years, 1790–1850                                      | 946   |      |
|           | Middle Years, 1851–1900                                     | 952   |      |
|           | Twentieth Century, 1901–1950                                | 958   |      |
|           | The Modern Era                                              | 962   |      |
|           | Covering the Court                                          | 969   |      |
|           | The Court and Public Opinion                                | 972   |      |
|           | Rulings and Reactions                                       | 974   |      |
| PART V    | THE COURT AT WORK                                           |       | 979  |
|           |                                                             |       |      |
|           | CHAPTER 18 HOW THE COURT DECIDES: OPERATIONS AND TRADITIONS | 981   |      |
|           | The Schedule of the Term                                    | 982   |      |
|           | Reviewing Cases                                             | 986   |      |
|           | Arguments                                                   | 989   |      |
|           | Conferences                                                 | 993   |      |
|           | Opinions                                                    | 994   |      |
|           | Traditions                                                  | 1001  |      |
|           | CHAPTER 19 THE PEOPLE OF THE COURT                          | 1009  |      |
|           | The Chief Justice                                           | 1009  |      |
|           | The Justices                                                | 1016  |      |
|           | Supporting Personnel                                        | 1024  |      |
|           | Supreme Court Lawyers                                       | 1030  |      |
|           | Supporting Organizations                                    | 1035  |      |
|           | Supporting Significants                                     | , 555 |      |
|           | CHAPTER 20 COURTROOMS AND COSTS                             | 1039  |      |
|           | Housing the Court                                           | 1039  |      |
|           | Cost of the Court                                           | 1045  |      |
| PART VI   | MEMBERS OF THE COURT                                        |       | 1049 |
| I VIVI VI | MEMBERS OF THE COOK!                                        |       | 1047 |
|           | CHAPTER 21 MEMBERS OF THE COURT                             | 1051  |      |
|           | The President Shall Appoint                                 | 1051  |      |
|           |                                                             |       |      |

271 111

### Volume II . . .

| Justices' Characteristics<br>Controversial Justices                                                                                                                                                  | 1055<br>1060                                 |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------|
| CHAPTER 22 BRIEF BIOGRAPHIES                                                                                                                                                                         | 1063                                         |
| REFERENCE MATERIALS                                                                                                                                                                                  | 1187                                         |
| APPENDIX A CHRONOLOGICAL DOCUMENTS AND TEXTS  Declaration of Independence  Articles of Confederation  Constitution of the United States  Judiciary Act of 1789  Circuit Court of Appeals Act of 1891 | 1187<br>1189<br>1191<br>1195<br>1204<br>1213 |
| Judiciary Act of 1925<br>Rules of the Supreme Court (2010)                                                                                                                                           | 1217<br>1224                                 |
| APPENDIX B TABLES, LISTS, AND GRAPHICAL DATA  Natural Courts                                                                                                                                         | <b>1243</b><br>1245                          |
| Supreme Court Nominations, 1789–2010 Glossary of Legal Terms                                                                                                                                         | 1250<br>1255                                 |
| Acts of Congress Held Unconstitutional Chronology of Major Decisions of the Court, 1790–2009                                                                                                         | 1258<br>1276                                 |
| Quotes and Quips from the Supreme Court: Who Said It? Map of the Federal Court System                                                                                                                | 1341<br>1343                                 |
| Selected Bibliography                                                                                                                                                                                | 1345                                         |
| Illustration Credits and Acknowledgments                                                                                                                                                             | 1357                                         |
| Indexes, following page 1360 Case Index Subject Index                                                                                                                                                | I-1                                          |

# PART IV \* PRESSURES ON THE COURT



| CHAPTER 15 | Congressional Pressure                   | 885 |
|------------|------------------------------------------|-----|
| CHAPTER 16 | Presidential Pressure                    | 925 |
| CHAPTER 17 | The Court, the Media, and Public Opinion | 945 |

# **Congressional Pressure**

ongress and the judiciary are separate but interdependent branches of the federal government. The Supreme Court defines the limits of congressional authority under the terms of the Constitution; Congress confirms the Court's members, sets its jurisdiction, and pays its bills. Just as the Court has used its judicial review powers to influence the shape of federal legislation, so Congress has tried from time to time to use its powers over the Court to influence the outcome of particular rulings.

### **CONGRESSIONAL INFLUENCE**

Congress can influence the Supreme Court in three general ways—through selection, confirmation, and impeachment of individual justices; through institutional and jurisdictional changes; and through direct reversal of the effects of specific Court decisions.

### The Justices

Congress has limited influence over the president's choice of a Supreme Court nominee. There is no established procedure for Congress to advise the president on the choice of a nominee, although a majority in both houses at least twice has successfully petitioned the chief executive to nominate a particular person to a Court vacancy.

The Constitution does, however, require Senate confirmation of all Supreme Court nominees, and the Senate takes this responsibility seriously. Of the 150 nominations to the Court, 28 have failed to win confirmation. All but 6 of these rejections, most of them for partisan political reasons, occurred in the eighteenth and nineteenth centuries.

For a variety of reasons, Congress's power to impeach Supreme Court justices has been of little significance. Only one justice has been impeached—Samuel Chase in 1804—and he was acquitted by the Senate. Another justice, Abe Fortas, resigned in 1969 under threat of impeachment, but Justice William O. Douglas, accused a year later of

committing similar improprieties, not only did not resign but also was cleared of all the charges. Through its appropriations process, Congress controls all of the money for the operation and maintenance of the federal judicial system, including the Supreme Court. It also sets the levels of the justices' salaries. Congress has never tried to pressure the Court by deliberately withholding operational funds. In 1964, however, after the Court handed down a series of controversial rulings, a majority in Congress voted to deny the justices as large a pay increase as other high-ranking federal employees received.

### The Institution

Congress has been least successful in influencing the Court by making changes in the institution itself and in its procedures and functions. Only once has it stopped the Court from taking action by revoking its power to review a case while the case was pending. Proposals to limit the Court's jurisdiction so that it may not review federal legislation on specific subjects are offered whenever the Court issues a particularly controversial decision or series of rulings, but none of these proposals has been approved.

Congress has tried to influence the philosophical composition of the Court by changing its size. This ploy apparently worked once. In 1869, after the Court found a particular statute unconstitutional by a 4-3 vote, Congress increased the size of the Court by two members; the case was reconsidered, and the earlier decision was reversed by a 5-4 vote. Proposals to require unanimity or a two-thirds vote of the justices to declare federal statutes or state laws unconstitutional also have been made in Congress throughout the Court's history, but none has ever passed.

### The Decisions

Congress has been far more adept at reversing specific Court decisions than at eliminating whole areas from Supreme Court review. Reversal may come about through legislation, if the Court's decision is based on statutory construction



and interpretation, or through constitutional amendment, if the decision is an interpretation of a constitutional provision. The first constitutional amendment overturning a Supreme Court decision was the Eleventh, ratified in 1795; the first legislative reversal came in 1852.

### Periods of Confrontation

There have been several major periods of confrontation between Congress and the Court. The first of these occurred in the early 1800s, when the national leadership passed from the Federalists to the Democratic-Republicans. The last confrontational period occurred in the mid-1950s and 1960s, when conservative members of Congress constantly challenged the liberal decisions on social issues handed down by the Warren Court.

In the 1800 elections, the Federalists lost Congress and the presidency to the Democratic-Republicans, and Thomas Jefferson was to replace President John Adams. To ensure that they would have some influence in the national government, the Federalists, in the final days of the Adams administration, passed legislation creating sixteen new circuit court judgeships and forty-two justice of the peace positions. The Federalists also stipulated that when the next vacancy occurred on the Court, it would go unfilled and the number of justices would be reduced by one. Adams quickly appointed Federalists to the new judgeships, but his midnight appointments came so late that some of the appointees never received their commissions. Their suit to force the Jefferson administration to honor the Adams appointments resulted in the famous Marbury v. Madison decision. (See details of this case, pp. 93-97.)

In 1802 the Democratic-Republicans repealed the new judgeships and raised the number of justices back to six. They also postponed the next Supreme Court term so that the Court would be unable to hear quickly an anticipated suit challenging the validity of the repeal. When the Court met again in 1803, it sustained the repeal. Still not satisfied, the Democratic-Republicans decided to attack the Federalists on the Supreme Court through impeachment, selecting as their first target Justice Samuel Chase, a man who had used his position on the bench to advance Federalist doctrine.

The House impeached Chase on a party-line vote, but the Democratic-Republicans did not hold together in the Senate, and he was acquitted. The House then passed a bill to authorize the president to remove a justice at the request of a majority of the House and Senate, but that effort also died in the Senate. After those two defeats, Democratic-Republicans ended their broadside attack on the Federalist judiciary, choosing instead to fill vacancies with individuals of their own persuasion as opportunities arose.

### FEDERAL POWER VERSUS STATES' RIGHTS

In the 1820s and early 1830s controversial decisions expanded the powers of the national government at the expense of state sovereignty. This situation led Congress to try unsuccessfully to remove the Court's jurisdiction to hear cases challenging the validity of state laws. Repeal of this power would have prevented the Court from reviewing the validity of any state law and would have resulted in conflict and confusion among the states. The proposals were, however, soundly defeated in the House in 1831.

### Reconstruction

Congress had its greatest successes in curbing the Court during the post-Civil War Reconstruction era. In addition to reducing the number of justices, as vacancies occurred, from ten to seven to prevent President Andrew Johnson from making any appointments to the Court, Congress repealed the Court's jurisdiction to review certain denials of writs of habeas corpus. The repeal, which the Court ultimately sustained (but which Congress eventually reversed), prevented it from rendering an opinion in a pending case on the constitutionality of the congressional program of Reconstruction.

Once Johnson left office, Congress quickly raised the number of justices to nine. The additional seats proved critical to the Court's reversal of its decision that Congress could not make paper money a substitute currency for gold in the payment of debts.

### Progressives

In the early 1920s Progressives in Congress tried to pressure the economically and socially conservative Court into rendering more liberal decisions, but these attempts were singularly unsuccessful. Indeed, few of their proposals won any consideration at all. Among the proposals were legislation to require two-thirds of the justices to concur in decisions declaring federal statutes unconstitutional and a measure to permit Congress to overrule a Court decision invalidating a federal law by repassing the statute with a two-thirds majority.

### **New Deal Crisis**

Although an economically conservative Court clashed with Congress when it declared most of the early New Deal legislation invalid in the 1930s, the Court's real confrontation was with President Franklin D. Roosevelt, who sought to moderate the Court's conservatism by "packing" it with additional members. The plan was extremely unpopular; a majority in Congress opposed it and instead enacted legislation making retirement for elderly justices more financially attractive. Even though Roosevelt's plan to increase the size of the Court was defeated, at the cost of a serious rift in the Democratic Party, his goal of more economic power for the federal government was achieved.

In decisions reached before the Court-packing plan was unveiled but not announced, the Court indicated that it was adopting a broader view of federal economic regulatory powers. The Court reinforced its new stance by sustaining reenactment of much of the New Deal legislation it had previously found unconstitutional. Then, within months of enactment of the liberalized retirement bill, one of the conservative stalwarts on the Court announced his resignation. From that point on, Roosevelt was able to gradually make appointments that strengthened the liberal faction on the Court.

### The Warren Court

During the fifteen years Earl Warren was chief justice (1954–1969), the Court consistently sustained individual and minority interests against what many citizens considered to be the best interests of the community. Warren began his career on the Court by writing the opinion declaring segregation in public schools unconstitutional. Under his guidance, the Court—often by narrow margins—sustained procedural rights for alleged wrongdoers and criminals, upheld the civil rights of blacks and other racial minorities, granted First Amendment protections to alleged subversives, narrowly defined what material was obscene and could therefore be banned, prohibited officially prescribed prayer and religious observances in public schools, and ordered state legislatures to reapportion on the basis of "one person, one vote."

Each of these decisions outraged some segment of the population. Complaints that the Court was too permissive and that its decisions would lead to the moral downfall of the country abounded, and billboards all across the country demanded Warren's impeachment.

Responding to their constituents and their own more conservative political and social philosophies, several groups in Congress tried to curb the Warren Court, but very few of these attempts were successful, and even fewer had any real effect on the Court. Efforts to cut back the Court's jurisdiction to review certain kinds of federal and state legislation failed, as did several attempts to reverse specific decisions by legislation or through constitutional amendment. Congress did succeed in reversing one decision relating to subversive activities and in modifying three decisions relating to criminal procedures in federal courts. The Court itself—under Warren and his successors, Warren E. Burger, William H. Rehnquist, and John G. Roberts Jr.—modified more of the disputed decisions than did Congress.

### The Post-Warren Court

Although the Burger Court (1969-1986) was significantly more conservative than the Warren Court, a few of its decisions, including acceptance of forced busing as a method to achieve racial desegregation in public schools and its bar on state prohibition of abortions, elicited loud but ineffective calls from Congress for statutory reversal and jurisdictional curbs on the Court. In the 1980s, however, Congress succeeded in reversing two conservative decisions by the Court on questions of civil rights. In the area of voting rights, the Court had made challenges to discriminatory laws more difficult, but Congress amended the 1965 Voting Rights Act to contradict the ruling. A later Court decision that limited the impact of a sex discrimination ban, and affected similar language in other civil rights laws, was reversed by Congress, although the effort took several years to move through the legislative process. With Rehnquist as chief justice, the Court in 1989 cut back on the reach of federal laws against job discrimination. Another protracted legislative battle ensued, concluding in 1991 with passage of a broad-based reversal of several Court decisions.

In the second half of the 1990s, the Rehnquist Court struck down or limited a number of congressional measures that had been championed by liberal Democrats, including the Violence Against Women Act, the Brady Handgun Control Act, and the Americans with Disabilities Act. Senators Joseph Biden, D-Del., and Hillary Rodham Clinton, D-N.Y., spoke out against what they called "conservative judicial activism" by the Court. But Congress as a whole took no action seeking to reverse the decisions.

Republicans in Congress chafed at Court decisions that limited President George W. Bush's authority in the so-called war on terrorism. In *Hamdan v. Rumsfeld* (2006) the Court struck down Bush's rules for military commissions to try terrorists held at Guantánamo Bay, Cuba, on the grounds that these rules had not been written into law. Months later, Congress passed the Military Commissions Act to reverse the Court's decision and to give Bush the authority he needed. This victory proved to be short-lived, as the Court in *Boumediene v. Bush* (2008) struck down one provision of this law as unconstitutional because it barred prisoners from filing a writ of habeas corpus. In a 5-4 decision, the justices said prisoners can go to court to challenge the government's basis for holding them.

For their part, Democrats in Congress objected when the Court made it harder for employees to sue over unequal pay. Writing for the 5-4 majority, Justice Alito said employees who sue must point to an unfair and discriminatory pay decision in the 180 days prior to the suit, citing the statute of limitation set in the law. This 2007 decision threw out a lower court verdict in favor of Lilly Ledbetter, an Alabama woman who learned she had been paid far less than men when she worked for Goodyear Tire Company. In 2009 the Democratic-led 111th Congress passed as its first measure the Lilly Ledbetter Fair Pay Act to reverse the Court's decision. The new law said each new paycheck could be considered an act of discrimination. The bill was signed into law by President Barack Obama.

Although Congress rarely has been successfuloutside of reversing decisions through legislation-in directly pressuring the Court, it is impossible to measure how much, if any, indirect pressure is placed on the Court by consideration of Court-limiting proposals. Perhaps the overall impact of such congressional efforts has been not to weaken the Court's authority but to strengthen it. Each time Congress attempts to curb the Supreme Court and fails, the public perception is heightened that the Court as an institution is unassailable and that its decisions, except in extreme circumstances, are final.



# **Pressures on the Justices**

Congress as an institution has little influence on the selection of nominees to the Supreme Court. Although the Constitution in Article II, section 2, stipulates that the president shall appoint Supreme Court justices by and with the advice and consent of the Senate, the advisory role usually occurs after the fact as the Senate considers confirmation.

### SELECTION AND REJECTION

An individual senator or representative, particularly one who is personally close to the president, may wield some unofficial influence in the selection process. And because the Senate adheres to the custom of senatorial courtesy—a custom that reflects its reluctance to confirm a nominee who is repugnant to a senator of the nominee's home state—presidents do well to assure themselves in advance that their nominees will not be objectionable to the pertinent senators.

In at least two instances, a majority of the Senate and House successfully petitioned the president to nominate a specific individual. In 1862, 129 of 140 House members and all but four senators signed a petition urging President Abraham Lincoln to nominate Samuel F. Miller of Iowa to the vacancy created by the death of Justice Peter V. Daniel. The Senate confirmed Miller's nomination half an hour after receiving it.1 After Justice Robert C. Grier announced his resignation in December 1869, members of Congress submitted a petition to President Ulysses S. Grant asking him to name former secretary of war Edwin M. Stanton to the seat. Already pending in the Senate was the nomination of Grant's attorney general, Ebenezer R. Hoar, to a second vacancy on the Court, but Hoar's nomination had run into some difficulty. Although Stanton was not Grant's first choice, the president acceded to the congressional request, thinking that the Stanton nomination might enhance Hoar's confirmation chances. Grant's strategy never bore fruit, however. Confirmed immediately upon nomination, Stanton died four days later of heart trouble. The Senate rejected Hoar in February 1870.2

### **Qualifications**

Although the Constitution specifies qualifications that the president and members of Congress must meet, it sets no corresponding requirements for Supreme Court justices. Proposals to establish qualifications for the Court have been made throughout the nation's history, but few have received more than passing attention in Congress.

The most frequent recommendations are that justices be natural-born citizens, of a minimum age, and have a certain number of years of judicial experience. This last suggestion may grow into an informal requirement. Pressure from the legal community and the increasing complexity of the law have made experience on the bench an important consideration in the selection of nominees. Although the Senate does not play a significant role in the selection of justices, it plays a crucial one in the confirmation of Supreme Court nominees. Article II, section 2, of the Constitution provides that no nominee shall be seated unless confirmed by the Senate. Of the 148 individuals nominated to a seat on the Supreme Court, 29, nearly one-fifth, have failed to win confirmation. By contrast, the Senate has denied confirmation to only ten cabinet nominees.

### Competence

Only two Supreme Court nominees have gone unconfirmed primarily on the grounds that they were not professionally qualified.<sup>3</sup> In 1873 President Grant nominated his attorney general, George H. Williams, to be chief justice. Williams had served as chief justice of the Oregon Territory, but his record was undistinguished. When the Senate showed signs of balking at the nomination, Williams asked that his name be withdrawn.

Nearly one hundred years later President Richard Nixon's 1970 appointment of G. Harrold Carswell was rejected largely because of Carswell's mediocre juridical record. A second Nixon nominee, Clement F. Haynsworth Jr., although well qualified judicially, was rejected in part because he appeared insensitive to ethical improprieties and participated in cases where his financial interest might have involved him in conflicts of interest. Similar allegations of impropriety led to the resignation in 1969 of Justice Abe Fortas, nominated to the Court four years earlier by President Lyndon B. Johnson. (See "Fortas Resignation," pp. 897–898.)

### **Partisan Politics**

By far, most Senate rejections of Supreme Court nominees have been grounded in political considerations. A primary factor in the rejection of fourteen nominees was the "lameduck" status of the nominating president or the fact that the party in control of the Senate was confident that its presidential candidate would win the next election.

Both of these problems afflicted the Court nominations of President John Tyler, who has the dubious