CHAPTER 10
THE JUDICIARY

Narrative Lecture Outline

In many ways, the Supreme Court remains more cloaked than other branches of government. Congress and the presidency seem to actively seek publicity and public attention while the Court seems to shun it. Congress can be seen daily on C-SPAN and its committee meetings and deliberations are usually open to the public. The president gives press conferences and is followed by the White House press corps. But the Supreme Court steadfastly remains private. Cameras are forbidden. Only recently did the Court begin to let tapes of oral argument be made public and then only weeks after the event. Several justices have been quoted as saying cameras would be allowed in their court only over their dead bodies.

However, the Court is the ultimate arbiter of what the Constitution means. We, as citizens, should know more about the Court. The opening vignette about the *Hamdi* and *Hamden* cases shows us that the judiciary is very important in maintaining our civil liberties and in checking executive power. In both these cases, oral arguments are available as podcasts. The power and influence of the justices and the Court is vividly displayed in these recordings and to understand the nature of the Supreme Court, listening to actual cases is highly recommended.

But first, let's consider the creation and powers of the Court and the broader court system in the United States.

The Constitution and the Creation of the Federal Judiciary

Alexander Hamilton once called the national judiciary "the least dangerous branch." This was probably true in the late 1700s, but today, the federal courts are significantly different and more powerful. Nevertheless, the courts still have two basic limitations: they have neither the power of the purse, nor the sword. In other words, the courts can rule on issues, but cannot fund programs or their implementation. They also cannot force compliance with their rulings. For those things, they must rely on Congress and the executive branch.

Most Americans do not know much about the judiciary and the role it has played in creating a strong national government and in social reforms. Most Americans are also unaware that at times in its history, the courts have obstructed popular programs and progress. Plus, most Americans seem to think of the courts as apolitical. Courts, and especially the Supreme Court, are NOT above the political fray but part of it!

In this lecture, we will discuss the nature and history of the Supreme Court and the federal judiciary, as well as the processes and personalities associated with them.

I often find it useful to spend 15 minutes at the beginning of this unit defining general legal terminology for the class—it seems to eliminate some of their confusion. I usually cover jurisdiction, standing, precedent, stare decisis, appeals, etc. on the board.

Then as the lecture progresses, I remind them of the definitions and point them out on the board.

Article III of the Constitution establishes:

- Supreme Court in which the judicial power of the United States is vested
- life tenure or "good behavior" for judges
- judges receive compensation that cannot be diminished during their service
- such inferior courts as Congress may choose to establish
- original jurisdiction of the Supreme Court

The intent of Article III was to remedy the failings of the Articles of Confederation that left judiciary matters to the states, and to avoid the experience of the colonial era of all powerful British courts that trampled on the rights of citizens.

As with the rest of the Constitution, Article III was the result of compromise. There were many debates at the Constitutional Convention and between the Federalists and Anti-Federalists during the Ratification Debates about the document including Article III. Among the key issues that did not make it into the new document were: no federal courts below the Supreme Court; explicitly giving the Supreme Court the power of judicial review (the power to review acts of other branches and rule them unconstitutional; limited terms for justices; and more). The limits—checks and balances—placed on the courts were also compromises between those who feared the chaos under the Articles or the excessive "order" under British rule.

The Judiciary Act of 1789 and the Creation of the Federal Judicial System

Congress established "inferior courts" through the Judiciary Act of 1789. This Act established the federal judiciary in the same three-tiered structure we know today. The main courts of fact in the federal system are District Courts, then come the Circuit Courts of Appeals, and finally the Supreme Court. The Judiciary Act also set the number of justices for the Supreme Court at six (the number has varied over the years, since it is not determined in the Constitution, from five to ten and was set at nine by the Judiciary Act of 1869).

At first, the Supreme Court was not a high-status post. Justices left the Supreme Court to take "better jobs." All Justices rode circuit meaning they literally had to ride a horse around to hear court cases on appeal. Some justices tallied up 10,000 miles a year on horseback.

Although the Supreme Court was not considered prestigious at first, early Supreme Courts did decide some important cases. Among those cases was *Chisholm* v. *Georgia* (1793) in which the Justices ruled that the Court's jurisdiction in Article III, section 2, included the right to hear cases brought by a citizen of one state against the citizen of another. The states saw this ruling as an attack on their sovereignty, and they forced through the 11th Amendment to change the original jurisdiction of the Court and expressly forbade such cases.

The Marshall Court: *Marbury* v. *Madison* and Judicial Review

President John Adams appointed John Marshall Chief Justice in 1801. He changed the Court in many ways and brought prestige and importance to the bench. He is often considered the most important Justice ever to serve the Court. Among the reforms and policies he instituted were: delivery of a single court opinion emphasizing unity whenever possible; deciding cases that would assure the Court to be the final arbiter of constitutionality; enforcing the authority of the Supreme Court to declare state laws invalid; broad interpretation of the "necessary and proper clause" and the supremacy of the national government.

Judicial review is the power to decide if a law or other legal issue contravenes the Constitution, and overturn it. This power is not mentioned in the Constitution. The Marshall Court established the power of Judicial review for itself and posterity in *Marbury* v. *Madison* (1803). *Marbury*'s long-term effect has been to give additional powers to the Court and allow them to determine what the Constitution means.

The American Legal System

The American legal system is a dual system:

- state courts—actually 50 different "systems"
- federal courts

Both systems have three tiers:

- trial courts—litigation begins and courts hear the facts of the case at hand (original jurisdiction)
- appellate courts—decide questions of law, not fact (appellate jurisdiction)
- high or supreme courts

Criminal and Civil Law

Criminal law regulates individual conduct. Laws, either state or national, determine what is legal and illegal. For example, prostitution and gambling are illegal in many places but are legal in others. Also, punishments can differ dramatically from place to place. For murder, some states have the death penalty and others don't.

Since crimes are considered to be against society, the government is usually the plaintiff in criminal cases, hence titles like: *The People of the State of California* v. *Michael Jackson*. Most crimes are state issues though some, like kidnapping or bank robbery, are considered national/federal crimes.

Civil law is about relations between private citizens (including corporate citizens). Usually civil law suits are about recovering damages of some kind and have both a plaintiff and defendant.

Most cases never get to court. Most civil disputes are settled out of court and criminal cases can settle due to plea bargains or dismissals.

Jurisdiction

Before a court can hear a case, it must have jurisdiction or the right to hear that particular case. There are two basic types of jurisdiction: original and appellate. Original jurisdiction is a court's authority to hear disputes and determine the facts of a case. Appellate jurisdiction is the power to review or revise a lower court decision.

The U.S. Supreme Court has both types of jurisdiction. About 6 percent of its caseload consists of original jurisdiction cases. These cases involve two or more states, the U.S. and a state, foreign ambassadors or diplomats, or a state and the citizen of another state. About 94 percent of the Supreme Court's cases come to it through the appeals process and have already been heard by the highest state court, the U.S. Court of Appeals, Court of Military Appeals, lower federal courts, U.S. regulatory commissions or legislative courts.

The Federal Court System

District Courts

Federal courts of original jurisdiction are called district courts. There are 94 district courts with over 678 active judges and an additional 300 retired judges who assist by hearing cases on a limited basis. Every state has at least one district court and these courts do not cross state lines. The largest states—California, New York, and Texas—each have four district courts.

The bulk of the workload of federal courts occurs in district courts—over 325,000 cases. In general, federal district courts hear cases that involve:

- the federal government as a party
- a federal question, constitutional issue, treaty with another nation, or a federal statute
- civil suits in which parties are from different states, and the amount of money at issue is over $75,000

Each federal district has a U.S. attorney who is nominated by the president and confirmed by the Senate. He or she is the chief law enforcement officer for that district.

The Courts of Appeal

The United States Courts of Appeals (formerly known as the Circuit Courts of Appeals) are the intermediate appellate courts in the federal system. There are 11 circuit courts referred to by number plus the D.C. Court of Appeals and the U.S. Court of Appeals for the Federal Circuit (for a total of 13 courts). The D.C. Court of Appeals deals with federal regulatory commissions and agencies and the Federal Circuit Court deals with patents, contracts, and financial claims against the federal government.

Courts of Appeals have no original jurisdiction. A litigant does not have an automatic right of appeal. Most cases do not go any further than district court and those cases that go to the Courts of Appeals rarely go further. Courts of Appeals try to correct errors of law and procedure. They hear no new testimony.

Decisions made by Courts of Appeals are binding on district courts within their geographic territory. Only the U.S. Supreme Court sets national precedents. Precedents are extremely important in our legal system based on common law. The doctrine of *stare decisis* is the key to our system and means "let the decision stand" in Latin. This means judges rely on case law (past decisions) to shape their opinions which leads to continuity and predictability in the legal system.

The Supreme Court

The U.S. Supreme Court reviews cases from lower courts and acts as the final interpreter of the U.S. Constitution. It decides numerous cases of tremendous policy significance and ensures uniformity of interpretation for national laws and the Constitution. The Court resolves conflicts among the states and maintains the supremacy of national laws in the systems.

Since 1869, the Court has had nine justices nominated by the president and approved by the Senate. The Constitution does not set how many justices should serve, and the number has ranged from six to ten. One justice is nominated by the president to be the Chief Justice, the other justices are known as Associate Justices.

The Chief Justice presides over public sessions of the Court, conducts the Court's conferences, and assigns the writing of opinions (if he is in the majority, otherwise the senior justice in the majority assigns the opinion). By custom, he administers the oath of office to incoming presidents and vice presidents at the Inauguration.

The Supreme Court has a very small staff—around 400 people and clerks—and hears roughly 75 to 90 cases per term. The jurisdiction of the Supreme Court is determined by the Constitution and the Court itself.

How Federal Court Judges are Selected

The Constitution does not set qualifications for federal court judges or Supreme Court Justices. The selection of judges is a very political process. Judges are nominated by the president and confirmed by the Senate. Often presidents solicit suggestions from members of the House of Representatives, Senators, their political party, and others.

In general, presidents try to select well-qualified individuals for the bench. However, they also use judicial appointments in order to advance their own political philosophies. When the Senate and president are of different parties (or if the majority in the Senate is thin) the process can be quite confrontational and politically charged. The process has been getting more confrontational since the early 1980s and continues in that vein. Even when a president tries to select moderate judges, as Clinton has, the Senate can often be obstructionist. In 1998, there was such a backlog of judicial appointments from the Clinton Administration (Judiciary Chair Orrin Hatch {R-UT} refused to schedule hearings or pass the nominees to the floor) that Chief Justice William Rehnquist broke with tradition and publicly criticized the Senate for causing problems for the federal judiciary. He noted that 10 percent of the federal bench was vacant, and people were playing politics! George W. Bush's nominees also faced opposition from the Senate. Senate Democrats charged that the nominees were too conservative and staged filibusters on some nominees. Bush made several recess appointments during the 108th Congress further irritating the Democrats. Finally in 2004, President Bush reached an agreement with Senate Democrats that he would make no more recess appointments if they would confirm 25 of his nominees. This accord fell apart in 2005 when the Bush administration again nominated judges considered by Senate Democrats to be extremist.

A bitter confrontation ensued. Republicans threatened a 'nuclear option' that would have prevented future filibustering of judicial nominees. A group of fourteen moderate senators came together, dubbed the "gang of fourteen," to ensure that qualified

candidates would at least be brought to a vote except in extraordinary circumstances. This compromise position won the day.

Who are Federal Judges?

Typically federal judges have:

- held previous political office such as prosecutor or state court judge
- political experience such as running a campaign
- prior judicial experience
- traditionally been mostly white males
- been lawyers

Appointments to the U.S. Supreme Court: Nomination Criteria

Competence—most nominees have prior judicial experience

Ideological or Policy Preference—most presidents seek nominees who share their political philosophy and policy preferences, however, it does not always work out that way! Nixon nominated Warren Burger thinking he was highly conservative, and he was Chief Justice of one of the most activist Courts in history.

Rewards—often nominees are personal friends of the president or are party activists

Pursuit of Political Support—sometimes a president will use an appointment to shore up political support, for example, he may appoint a woman or African American to gain support among those groups

Religion—traditionally there was a "Jewish" seat on the Court though most justices have been Protestant

Race, Ethnicity, and Gender—only two African Americans (Thurgood Marshall and Clarence Thomas) and two women (Sandra Day O'Connor and Ruth Bader Ginsburg) have served on the Court

The Supreme Court Confirmation Process

Before 1900, about 25 percent of presidential nominees to the Supreme Court were rejected by the Senate. Ordinarily the Senate Judiciary Committee investigates nominees, holds hearings, and votes on a recommendation for full Senate action. A simple majority is required for confirmation. Today, nominations are far more contentious.

Investigation

Once a list of potential nominees is made, the names are sent to the FBI before a nomination is formally made for preliminary vetting. The president also

sends the list to the American Bar Association (ABA), which rates the nominees based on qualifications as Well Qualified, Qualified, or Not Qualified. This has been the policy of every administration since Eisenhower. But President George W. Bush changed that. Like presidential candidate Bob Dole before him, George W. Bush campaigned on a platform that included barring the ABA from vetting judicial appointees. Republicans have claimed that though it is technically nonpartisan, the ABA has become more and more liberal and partisan over the years and therefore exercises too much influence on the process of judicial selection. On March 22, 2001, the Bush Administration told the ABA that the ABA will no longer receive the names of candidates for appointment to federal judgeships prior to their nomination. The ABA announced that it will continue to provide evaluation of the professional qualifications of nominees for the Administration, the Senate, and the public despite the fact that they will now have to do it after the information is made public.

Then a formal nomination is made and sent to the Senate where the Judiciary Committee conducts its own investigation. Each nominee is asked to fill out an extensive questionnaire about previous work experience, judicial opinions written, judicial philosophy, speeches and interviews given to the press. Staffers contact potential witnesses who might offer testimony about a nominee's fitness for the post.

Lobbying by Interest Groups

Many groups play a role in the process of nominating and confirming Supreme Court justices, though this is a fairly recent occurrence. It is most common for interest groups to lobby against a nominee. The 1987 confirmation hearings for Robert Bork seem to have been a turning point. The process got nastier and interest groups became far more active. Bork was a conservative and was nominated by a Republican but had a distinguished record. Interest groups on both sides of the political spectrum were highly active.

The Senate Committee Hearings and Senate Vote

Not all nominees generate intense confrontations like Bork's. Indeed Stephen Breyer's (a Clinton appointee) hearing was uneventful. But since the 1980s, it has become traditional to ask nominees probing questions and most nominees refuse to answer saying that the issue will come before the Court and they don't wish to prejudice their judgments. The Judiciary Committee recommends acceptance or rejection and then the full Senate votes.

The Supreme Court Today

According to a 2006 poll, more than half of all Americans could not name a single member of the Supreme Court. The best known Justice was Sandra Day O'Connor who was named by 27 percent of those polled. Four of the nine had name recognition in the single digits! Some of this is the fault of the American public's lack of interest. But the Supreme Court also relishes its sense of privacy and decorum.

Deciding to Hear a Case

About 8,000 cases a year come to the Supreme Court. In its 2005-2006 term, the Court held arguments on 87 cases and handed down signed opinions in 74 cases. The discrepancy is because the Court has total control of its own docket. The Court decides what cases to hear. It hears from two to five original jurisdiction cases a year, the rest are appellate cases. There are two avenues to the Supreme Court for appellate review: a *writ of certiorari* and an *in forma pauperis*. A *writ of certiorari,* or cert, is a request for the Supreme Court to order up the records of a lower court for review. Since 1988, nearly all appellate cases begin with a writ of cert. More than half of the Court's cases dealt with issues related to the Bill of Rights.

Five percent of Supreme Court cases consist of cases of original jurisdiction, and the rest are appellate. About 1/3 of the caseload deals with criminal law and many of these are filed *in forma pauperis* or a pauper's petition by indigent prison inmates. These petitions do not have filing fees or printing costs, and do not have to be typed. The Court has been denying most of these since the late 1980s. Many of these petitions were by the same people over and over and about frivolous matters.

The Rule of Four

All petitions of cert must meet two criteria:

- the case must come from a U.S. Court of Appeals, a special three judge district court, or a state court of last resort (in other words, all other avenues must have been exhausted)
- the case must involve a federal question meaning a question of interpretation of federal constitutional law or a federal statute or treaty

The Clerk of the Court sends the petitions to the chief justice's office. His clerks review the petitions and then they go to the associate justices. Noteworthy cases are put on a "discuss list" and all other cases are dead listed and go no further unless a justice asks they be activated during conference session.

During the weekly conference session, the justices review the discuss list in order of seniority and the justices vote. If four justices want to hear a case, cert is granted. This is called the "Rule of Four."

The Role of Clerks

Clerks are generally from top-ranking law schools and are near the top of their graduating class. Clerking for the Supreme Court is highly competitive and difficult to attain. They search for facts and do research, they read and summarize cases, go over writs of *cert*, help write opinions and more. Sometimes they play tennis and take walks with their justices as well. It is unclear how much influence clerks have on the writing of opinions. Relationships tend to be close and confidential. In 1998, a former clerk Edward Lazarus (he had clerked for Harry Blackmun) wrote a book explaining how the Court really works and charged that the justices give too much power to very young and very ideological clerks.

Recently clerks have been in the news due to the small numbers of women and minorities who have had the opportunity to clerk at the Court. Groups have picketed the Court on behalf of better diversity among clerks.

How Does a Case Survive the Process?

It is difficult to guess why certain cases are heard and others are not. And since the Court does not announce its reasoning, we do have to guess. In general, cases that tend to be accepted share the following characteristics:

- federal government asked for the review
- conflict among circuit courts on the issue
- civil rights or civil liberties question
- an ideological or policy preference of the justices
- significant political or social interest as evidenced by the presence of interest group *amicus curiae* briefs

The Federal Government

The solicitor general handles all of the appeals for the U.S. government to the Supreme Court. The solicitor general has a special relationship with the Court and is party to over half the cases heard by the Court. The Court usually hears between 70-80 percent of the cases in which the government is a party compared with 5 percent of other types of cases.

Conflict Among the Circuits

Justices often take cases when the circuit courts have ruled in different ways in order to establish consistency in federal laws.

Interest Group Participation

Amicus briefs, or friend-of-the-Court briefs, are also a good indicator of whether the Court will hear a case. Cases with lots of *amicus* briefs are often heard.

Hearing and Deciding the Case

Once accepted, the lawyers prepare a written argument for the Court and *amicus* briefs are filed by interested parties (these briefs are a form of lobbying).

Oral Arguments

The Supreme Court's term begins the first Monday in October and runs through June or July. Oral arguments are generally scheduled from October through April at the beginning of a week (Monday through Wednesday). Each attorney gets 30 minutes, but is constantly interrupted from the bench with questions and comments.

Oral arguments are an opportunity for the public to watch the Court. The arguments also ensure that justices hear the most important facts and arguments in a case. They provide the justices with additional information, including the broad political implications of a decision. And the justices can highlight issues for each other throughout the process.

The Conference and the Vote

The justices meet on Fridays for closed conferences. Justices present their ideas in order of seniority, and a vote is taken to see how each justice thinks he or she will vote. Conference votes are not final, just indicative of positions prior to the writing of an opinion. The chief justice tends to be very important in these conferences.

Writing Opinions

Opinion writing serves a number of functions. First, it is an opportunity for the justices to discuss their ideas in writing. Second, the process is a cumulative one in which the point of each successive draft is to build a consensus or marshall a majority. The drafting process leads to many iterations, much discussion, and the changing of minds on the Court.

There are five kinds of opinions:

- majority opinion—reflects the ideas of a majority of the Court (5-4, 6-3, 7-2, and so on). The legal reasoning of a majority opinion becomes legal precedent for future cases. Stronger majorities mean stronger precedents.
- concurring opinion—a justice agrees with the verdict but not the reasoning
- plurality opinion—three or four justices sign an opinion. Often these are on the "winning" side accompanied by concurring opinions
- dissenting opinion—one or more justices disagrees with the opinion of the majority or plurality
- per curiam opinion—unsigned opinion issued by the Court

If the Chief Justice is in the majority, he assigns the writing of the opinion. Otherwise, the senior justice in the majority assigns the opinion. Drafting an opinion is important and allows a justice to have a huge impact on how issues are framed and decided.

How the Justices Vote

Justices do not make decisions in a vacuum. They are part of the social and political worlds and they operate according to principles such as *stare decisis*.

Legal Factors

Judicial Philosophy, Original Intent, and Ideology

Judicial Restraint vs. Judicial Activism: the former advocates minimalist roles (strict construction) for the unelected court system, and the latter feels that judges should use the law to promote justice, equality, and personal liberty (judicial activism).

Precedent

Court decisions always refer to previous legal decisions—ours is a system of precedents and *stare decisis*. So it is often difficult to overturn a bad precedent, but it does happen.

Extra-Legal Factors

Behavioral Characteristics

The personal experiences of the justices affect how they vote. Early poverty, job experience, friends and relatives all affect how decisions are made.

Ideology

Ideological beliefs probably influence justices' voting patterns.

The Attitudinal and Strategic Models

A justice's attitudes affect voting behavior and they may act strategically trying to gauge the possible behavior of their fellow justices.

Public Opinion

Justices watch TV, read newspapers, and go to the store like everyone else. They are not insulated from public opinion and are probably swayed by it some of the time.

Judicial Policy Making and Implementation

All judges make policy. That's just a fact. Judges can interpret laws and clauses in new ways or discover "new rights" in their reading of the Constitution. More than 100 federal laws have been declared unconstitutional since 1803. This gives the Court power. The Court can also, occasionally, overrule itself that also adds to its power. Plus, the type and nature of cases considered by the Court is growing. Prior to 1962, the Court would not get involved in redistricting and now it is often involved. This enlargement of jurisdiction also enhances their powers.

Implementing Court Decisions

Courts do not have the power to implement their decisions. The executive does that. This was particularly noticeable following the *Brown* ruling. The Court ordered desegregation in 1954...implementation is still below par.

Conclusion

The Supreme Court and the federal court system have a number of powers and some significant limitations. They are peopled by individuals like us who are influenced by participation in society, by the media, and by politics.

At the Founding, women and minorities were largely excluded from the courts often precluded from being attorneys, judges, jurors, or litigants. Today, while still below par, the federal benches are far more representative than they once were. And the courts continue to change today.

Web Sites for Instructors

The **Federal Judiciary Homepage** offers a wide variety of information about the U.S. Federal Court system.
www.uscourts.gov

Findlaw is a searchable database of SC decisions plus legal subjects, state courts, law schools, bar associations and international law.
www.findlaw.com

FLITE: Federal Legal Information Through Electronics offers a searchable database of Supreme Court decisions from 1937-1975.
www.fedworld.gov/supcourt/index.htm

The Legal Information Institute offers Supreme Court opinions under the auspices of Project Hermes, the court's electronic-dissemination project. This archive contains (or will soon contain) all opinions of the court issued since May of 1990.
supct.law.cornell.edu/supct/

Oyez-Oyez-Oyez is a comprehensive database of major constitutional cases, including multimedia aspects such as audio.
www.oyez.com/oyez/frontpage

Rominger Legal Services provides U.S. Supreme Court links including history, pending cases, rules, bios, etc.
www.romingerlegal.com/supreme.htm

The site of the **Supreme Court History Society** covers basic history of the Court and has a gift catalog.
www.supremecourthistory.org

U.S. Supreme Court Plus has decisions from the current term as well as legal research, bios, basic Supreme Court information, and more. It also offers a free e-mail notification service of Supreme Court rulings.
www.usscplus.com

Web Activities for Classes

1) Have students do some research on the Court's current docket. How many cases will it hear? How many came to the Court through *cert,* and how many through *in forma pauperis*? What types of cases will the Court hear? What constitutional issues are at stake? Have students discuss why the Court has chosen to rule on these cases orally or in a paper.

2) Have students use the Web to do some biographical research on the current Supreme Court justices. What is their background? Why were they chosen for the Court, and by whom? How are they perceived by "court-watchers"? (In other words, what do the experts think of them?) Is there a definite majority on the Court for any single set of constitutional issues? The Warren Court was characterized as very activist, particularly regarding due process rights. Can the Rehnquist Court be characterized? If so, how? You can use either class discussion or assign write papers addressing these issues.

3) Have students choose two well-known Supreme Court cases. They should use the Web to do some research to determine how much interest group activity and how many attempts at public persuasion there were on the Court during that case. Using those examples and the text, have students write a paper (or prepare a short talk) about the impact of public opinion and lobbying on the Supreme Court.

4) Have students search the Web and find a Supreme Court case with a majority opinion, concurring opinion, and a dissenting opinion. They should read each and discuss what they mean in real terms and as precedents.

General Class Activities and Discussion Assignments

1) Stage a discussion about how state court judges, federal judges, and Supreme Court justices are selected. The class should address at least the following: Do the processes differ? How and why? Is there an optimum way to select judges? Who should sit on the bench? Who should determine that—public opinion, legislators, the Bar Association, or some other entity?

2) Shakespeare, loosely quoted, once said that to fix our problems we should first kill all the lawyers. Have students contemplate that scenario and answer the following: what is the current state of our justice system? Have them do some research on court filings, plea bargains, violent crime, white collar crime, and other issues. Is America getting more violent or just more litigious? What are the effects of all this litigation? On individuals? the body politic? public opinion? And what is the effect of *Court TV*, *Burden of Proof*, and other TV-ified judicial proceedings?

3) Assign the following problem:

Constitutional law is taught very textually. This means that many ConLaw professors read aloud from Court opinions quite extensively. The language and nuance of what the Court says in its opinions is very important. Choose several cases and read the actual opinions. What types of language does the Court tend to use? Are rulings broad or narrow? How often are precedents overturned? How does the Court use precedent generally? What kinds of things did you learn about the Court from reading opinions? Be sure to explain 'why' for each of your answers.

Possible Simulations

1) States use a number of different ways to select judges. Stage a debate about the relative merits and deficiencies in these selection methods.

2) The president has just nominated a new member to the Supreme Court. Have students stage a confirmation hearing. (Have them research previous hearings and the Senate Judiciary Committee) Then have them discuss the implications of such a hearing on who wants to serve and on the integrity and independence of the judiciary.

Additional Sources

Howard Ball. *Supreme Court and the Intimate Lives of Americans: Birth, Sex, Marriage, Childrearing, and Death*. New York University Press, 2004.

Vincent Bugliosi, et. al. *The Betrayal of America: How the Supreme Court Undermined Our Constitution and Chose Our President*. Thunder's Mouth Press, 2001.

Philip Cooper. *Battles on the Bench: Conflict Inside the Supreme Court*. University Press of Kansas, 1999.

Ronald Dworkin (ed). *Badly Flawed Election: Debating Bush v. Gore, the Supreme Court, American Democracy*. The New Press, 2002.
Martin Garbus. *Courting Disaster*. Times Books, 2002.

Leland H. Gregory. *Presumed Ignorant! Over 400 Cases of Legal Looniness, Daffy Defendants, and Bloopers from the Bench*. Bantam Books, 1998.

Kermit Hall (ed). *Conscience and Belief: The Supreme Court and Religion*. Garland Publishers, 2000.

Thomas H. Hammond, Chris W. Bonneau, and Reginald S. Sheehan. *Strategic Behavior and Policy Choice On The U.S. Supreme Court*. Stanford University Press, 2005.

Thomas G. Hansford and James F., II Spriggs. *The Politics of Precedent on the U.S. Supreme Court*. Princeton University Press, 2006.

James Hitchcock and Robert P. George (ed). *The Supreme Court and Religion in American Life: From Higher Law to Sectarian Scruples (New Forum Books Series), Vol. 2*. Princeton University Press, 2004.

Edward Lazarus. *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court*. Times Books, 1998.

Charles S. Lopeman. *The Activist Advocate: Policy Making in State Supreme Courts*. Praeger, 1999.

Robert Lipkin. *Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism*. Duke University Press, 2000.

Robert McCloskey and Sanford Levinson. *The American Supreme Court, 3/e*. University of Chicago Press, 2000.

Nada Mourtada-Sabbah. *The Political Question Doctrine and the Supreme Court of the United States*. Lexington Books, 2007.

John T. Noonan. *Narrowing the Nation's Power: The Supreme Court Sides with the States.* University of California Press, 2002.

Todd C. Peppers. *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk*. Stanford University Press, 2006.

Jamin B. Raskin. *Overruling Democracy: The Supreme Court Versus the American People*. Taylor and Francis, Inc., 2004.

William H. Rehnquist. *The Supreme Court*. Knopf, 2001.

Herman Schwartz. *The Rehnquist Court*. Hill and Wang, 2002.

Kenneth Starr. *First Among Equals: The Supreme Court in American Life*. Warner, 2002.

Tinsley Yarbrough. *The Rehnquist Court and the Constitution*. Oxford University Press, 2001.