11

CONGRESS

Congress was given significant constitutional powers, making it the "first branch" in the minds of the Founders. It has the power over the federal budget, can pass a law even if the president vetoes it, and can alter the way laws are administered.

KEY TERMS

bicameral
caucus
closed rule
cloture
cloture rule
committee system
conference committees
Congressional Budget Office
Congressional Research Service
discharge petitions
division vote
double-tracking
filibuster
franking privileges
General Accounting Office
House Rules Committee
incumbency
joint committees
majority leader
minority leader
multiple referrals
open rule
pork
presidential veto
president pro tempore
quorum
restrictive rule
roll-call vote
Rule 22
safe district
select committees
seniority system
Seventeenth Amendment
Speaker of the House

standing committees
subcommittees
teller vote
term limits
voice vote
whip

KEY CONCEPTS

- The United States Congress is a bicameral legislature that has evolved into two very distinct chambers.
- Three theories (representational, organizational, attitudinal) attempt to explain how members of Congress behave in their voting patterns.
- Congress is organized in various ways, including party, committee, and staff organizations.
- The process of a bill becoming a law is complex and laden with a multitude of rules.
- The ethics of legislators continue to be a concern for the public.

For a full discussion of Congress, see *American Government,* 8th ed., Chapter 11 / 9th ed., Chapter 11.

THE EVOLUTION AND COMPOSITION OF CONGRESS

The Framers of the Constitution created Congress as a bicameral (two-chamber) legislature. They wanted to avoid a concentration of power in a single institution, and they wanted a balance between large and small states. They fully expected Congress to be the dominant institution of the federal government. Congress was generally dominant over the presidency until the twentieth century. Most of the nation's early political struggles—including those over slavery, admission of new states to the Union, internal improvements, tariffs, and business regulation—were played out in Congress.

The dynamics of power in the House of Representatives has varied over the years. The late nineteenth century witnessed powerful Speakers who seized new authority by personally selecting the chairmen and members of all committees, deciding what business would come up for a vote, and placing limitations on who could speak and what the limitations of debate would be. Early twentieth-century Houses revolted against the power of the Speaker and distributed power to party caucuses (associations of members of Congress created to advocate on behalf of a political ideology or constituency), the Rules Committee (the committee that decides which bills come up for a vote and in what order), and chairmen of standing—or permanent—committees. In the 1960s and 1970s, Democratic-controlled Houses changed the rules so that powerful southern committee chairs could not block civil rights legislation. Subcommittees were strengthened, and the House became more democratic. Because of inefficiencies, the House moved back to strong Speakers in the 1990s.

The Senate escaped many of the tensions encountered by the House because it is a smaller chamber. The smaller size of the Senate precludes the need for a Rules Committee. Prior to 1913, senators were elected by the state legislatures, so senators focused on pleasing party leaders and funneling jobs and contracts back to their states. The

Seventeenth Amendment changed the way senators were elected in 1913. As a result, senators were elected directly by the people and, as a consequence, became more interested in pleasing the general electorate.

Senators are allowed to filibuster (give a prolonged speech or series of speeches made to delay legislative action). By the end of the nineteenth century, it had become a common and unpopular practice. In 1917 Rule 22 was enacted, which allowed debate to be cut off if two-thirds of the senators present and voting agreed to a cloture motion to end debate. It has since been revised to allow sixty senators to cut off debate.

Though the typical representative or senator is a middle-aged, white, Protestant, male lawyer, the characteristics of legislators have changed:

- **Sex and race** The House has become less male and less white since 1950. The Senate has been slower to change. Members of color may gain influence more quickly in the future because the former tend to come from safe districts (districts where the winner carries more than 55 percent of the vote). Republican control of both houses in the last decade has reduced minority influence.

AP Tip

The advantages of being an incumbent are important in understanding the dynamics of Congress. Incumbency will certainly appear on the AP exam in some form.

- **Incumbency** Prior to the 1950s, many legislators served only one term. In recent decades, membership in Congress has become a career, causing very low turnover. Although the Republican Revolution of the early 1990s brought many new members to the House, incumbents still hold a great electoral advantage. Most House districts are safe, with one party holding a significant numerical advantage over the other party. Senators are less secure as incumbents. Voters tend to support incumbents for several reasons. Media coverage is higher for incumbents. Further, incumbents have greater name recognition because of franking (mailing privileges), travel to the district, credit claimed for projects brought to a state or district (called pork-barrel projects), and individual case help.
- **Party** Democrats were the beneficiaries of incumbency from the 1930s to 1992. During that time, the Democrats controlled both houses in twenty-five Congresses and at least one house in twenty-eight Congresses. In 1994 voters opposed incumbents because of budget deficits, scandals, and legislative-executive bickering. A conservative coalition of southern Democrats (who often vote conservatively on legislation) and Republicans today controls Congress.

TYPES OF REPRESENTATION

There are at least three theories about how members of Congress behave in terms of voting and formulating policy:

- **Representational view** One view is that legislators vote to please their constituents in order to get reelected. This is most likely true when constituents have a clear view on an issue and the legislator's vote is likely to attract attention. Studies show that legislators are more likely to vote in accord with constituent desires in the areas of civil rights and social welfare but less so on foreign policy issues.
- **Organizational view** When constituency interests are not vitally at stake, legislators may respond to their party leaders or respected colleagues.
- **Attitudinal view** Another view is that a legislator's ideology determines his or her vote.

Members of Congress are increasingly divided by political ideology. This has made the ideological view of voting more important. Taking cues from the party is of decreasing importance. Polarization among members has led to many more partisan attacks and to less constructive negotiations on bills and policies.

THE ORGANIZATION OF CONGRESS

Congress is not a single organization but, rather, a vast and complex collection of organizations by which the business of the legislative branch is carried out and through which its members form alliances. At least three levels of organization exist in Congress: party, committee, and staff.

PARTY ORGANIZATION IN CONGRESS

The president pro tempore formally leads the Senate. Largely a ceremonial office, the president pro tempore is the member of the Senate with the most seniority in the majority party. The true leaders of the Senate are the majority and minority leaders, elected by their respective party members. The majority leader schedules Senate business, usually in consultation with the minority leader. Party whips keep leaders informed and pressure party members to vote in accord with the party line. Each party has a policy committee that schedules Senate business and prioritizes bills. Committee assignments are handled by groups of senators from each party. Committee assignments emphasize ideological and regional balance.

The greater size of the House gives its leadership more power. The Speaker of the House is the leader of the majority party and presides over the House. The Speaker's powers are formidable and include deciding who will be recognized on the House floor; interpreting rules on motions; assigning bills to committees; influencing which bills are brought up for a vote; and appointing members of special and select committees. The majority party in the House also elects a floor leader, called the majority leader. The minority party elects a minority leader.

Each party has a whip, who is in charge of rounding up votes. Each party has a committee for making committee assignments.

Congressional rules have changed since the Republican takeover in the mid- 1990s. No committee chairman serves for more than six years. Seniority is less of a standard for selecting committee chairmen. The Senate is now less party-centered and less leader-oriented.

Though party unity in voting is still evident, there is less cohesion among the parties than during the 1990s. Ideological splits between parties and party leaders are more common. Caucuses—associations of members of Congress created to advocate on behalf of an ideology, constituency, or regional and economic interest—within and between the two major parties have become rivals to the parties in policy formulation. Three types of caucuses have emerged:

- **Intraparty** Members share the same ideology (for example, the Conservative Opportunity Society).
- **Personal interest** Members share an interest in an issue (for example, the human rights caucuses).
- **Constituency concerns** Members have similar constituencies (for example, the Congressional Black Caucus).

COMMITTEE ORGANIZATION IN CONGRESS

Committees do most of the work in Congress. Committees consider bills, maintain oversight of executive agencies, and conduct investigations. There are three types of committees:

- **Standing Committees** These are permanent bodies with specified legislative responsibilities. Examples include the Armed Services Committee and the Judiciary Committee.
- **Select Committees** These are groups appointed for a limited purpose and limited time. Examples include various intelligence committees.
- **Joint Committees** Both representatives and senators serve on joint committees. Conference committees are a type of joint committee appointed to resolve differences in Senate and House versions of the same piece of legislation.

Both Senate and House committees have similar practices. The majority party has the majority of seats on the committees and elects the chair. Usually the ratio of Democrats to Republicans on a committee corresponds roughly to their ratio in that house of Congress, but on occasion the majority party will try to take extra seats on key panels, such as the House Appropriations or Ways and Means committees. Chairs are usually the most senior members of the committee, despite the fact that the seniority system has been under attack in both parties in recent decades.

Two House committees are noteworthy for their prominence in the dynamics of the House. The House Rules Committee is unique to the House because it reviews all bills except revenue, budget, and appropriations bills coming from a House committee before the bills go to the full House. The House Ways and Means Committee is powerful because it drafts tax legislation.

STAFF ORGANIZATION IN CONGRESS

Congressional staffs grew rapidly during the twentieth century. Staffs have several important tasks, but perhaps the most important is taking care of constituency service. Approximately one-third of a congressman's staff works in the home district, and almost all have at least one full-time district office. Staff members also have legislative functions that include devising proposals, negotiating agreements, organizing hearings, and meeting with lobbyists and administrators. Congressional committees also have their own staffs, usually one for the majority side and one for the minority side. Members of Congress can no longer keep up with increased legislative work, so they must rely heavily on their staffs.

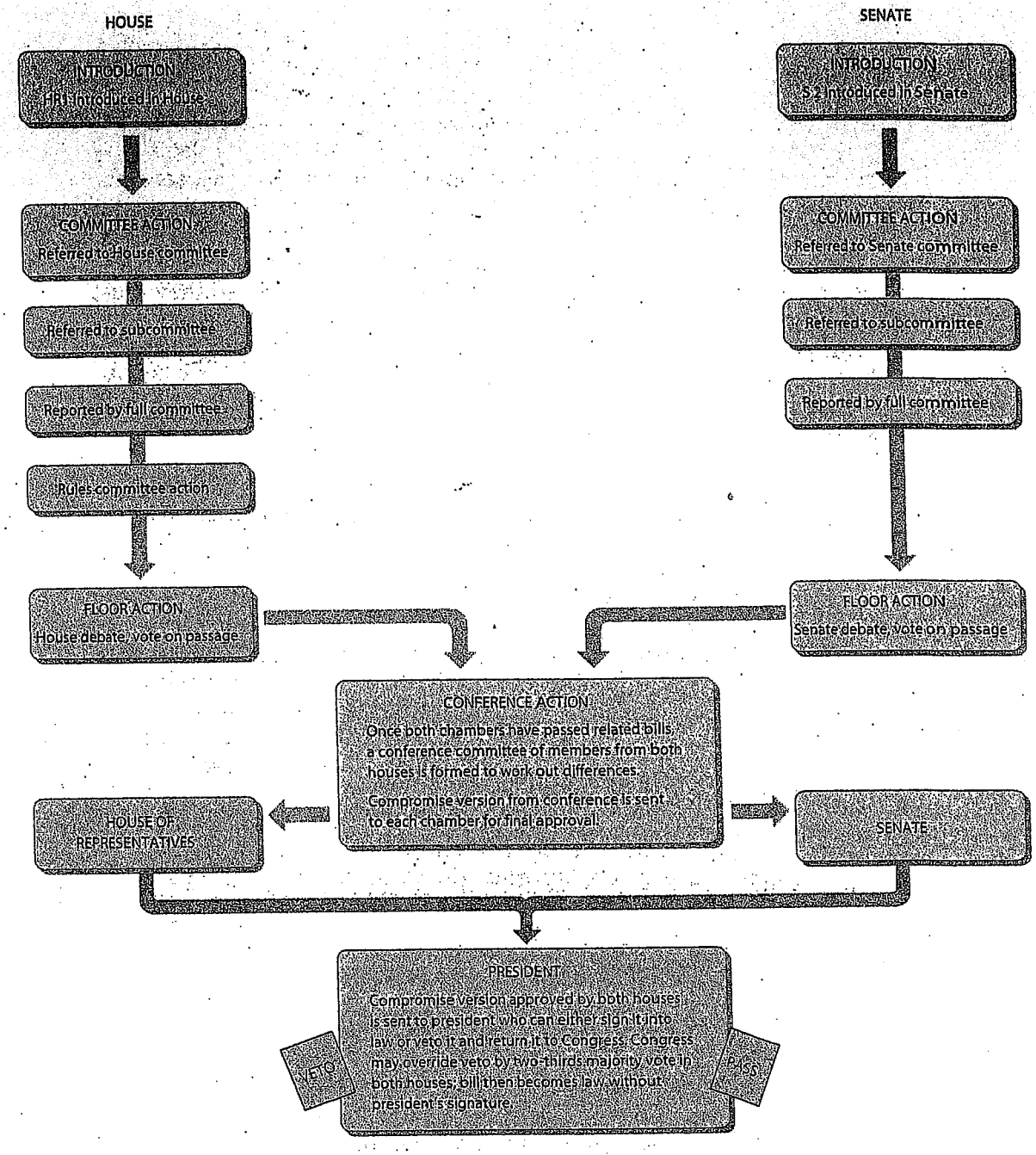
In addition to increasing the number of staff members, Congress has also created staff agencies that work for Congress as a whole. These have largely been created to give Congress specialized knowledge equivalent to what the president has:

- **Congressional Research Service (CRS)** The CRS is part of the Library of Congress and responds to congressional requests for information. It does not recommend policy but looks up facts and indicates the arguments for and against proposed policy. It also tracks the status of every major bill before Congress.
- **General Accountability Office (GAO)** Formerly known as the General Accounting Office, the GAO continues in its traditional role of auditing the money spent by executive departments. In addition, the GAO now investigates agencies and policies and makes recommendations on almost every aspect of government.
- **Congressional Budget Office (CBO)** The CBO advises Congress on the likely economic effects of different spending programs and provides information on the costs of proposed policies.

HOW A BILL BECOMES A LAW

In viewing the following chart of how a bill becomes a law, it must be kept in mind that the complexity of these procedures ordinarily gives a powerful advantage to the opposition of a bill. There are many points at which action can be blocked. If a bill is not passed by both houses and signed by the president within the life of one Congress, it is dead and must be reintroduced during the next Congress.

The process of a bill becoming a law is as follows:



In addition to the actions illustrated in the chart above, the following procedures and rules can influence the passage of a bill:

- **Multiple referrals** Although sending bills to committees is necessary and valuable, committees fragment the process of considering bills dealing with complex matters. To deal with this problem Congress has established a process whereby a bill may now be referred to several committees that simultaneously consider it in whole or in part. This process is called a multiple referral. Following the 1995 reforms, these can be done only sequentially (one committee acting after another's

deliberations have finished) or by assigning distinct portions of the bill to different committees (in the House only).

- **Discharge petitions** In order to keep alive a bill that has stalled at the committee level, a discharge petition bringing a bill to the floor for immediate consideration must be signed by 218 members in the House (in the Senate, any member can move for a discharge petition).
- **Closed rules** Limitations on the amount of debate time allotted to a bill and on the introduction of amendments are known as closed rules and are imposed in the House by the Rules Committee.
- **Open rules** An open rule permits amendments from the floor on a particular piece of legislation and comes from the Rules Committee in the House.
- **Restrictive rules** A restrictive rule permits some amendments but not others.
- **Quorum** A quorum is the minimum number of representatives required to be in attendance to conduct official business.
- **Quorum call** A quorum call is a calling of the roll in either house of Congress to see whether there is a quorum present.
- **Cloture rule** Present only in the Senate, a cloture motion (signed by at least sixteen senators) provides for the end of a debate on a bill if three-fifths of the members agree.
- **Double-tracking** This is a method to keep the Senate going during a filibuster whereby a disputed bill is temporarily shelved so that the Senate can go on with other business.
- **Voice vote** This is a method of voting used in both houses in which members vote by shouting yea or nay.
- **Division vote** Also known as a standing vote, this is a method of voting used in both houses in which members stand and are counted.
- **Teller vote** This is a method of voting used only in the House. Votes are counted by having members pass between two tellers, first the yeas and then the nays.
- **Roll-call vote** A method of voting used in both houses, members answer yea or nay when their names are called.

Power and Ethics in Congress

The American people have several concerns about Congress. The old constitutional dilemma remains: Are members of Congress to refine public opinion or mirror it? James Madison believed that national laws should transcend local interest, that legislators should make reasonable compromises among competing societal interests, and that legislators should not be captured by special interests. Yet now many interest groups represent a significant proportion of the public interest. Another problem is the perception of policy gridlock. The Framers designed Congress to act deliberatively, yet many Americans view this as not acting at all.

Many Americans favor term limits because of the high reelection rate of incumbents and the perception that career politicians act more out of self-interest than out of public interest. The Supreme Court has ruled term-limit proposals unconstitutional. Those opposing term

limits argue that they would likely produce amateur legislators who would be less prone to compromise and more influenced by lobbyists. Other reforms aim at reducing the power and perks of congressmen, claiming, for instance, that franking (or mailing) privileges need to be regulated and that pork—projects aimed at benefiting a congressman's home district or state—needs to be trimmed to avoid wasteful projects.

Americans continue to question the ethics of legislators. Scandals do occur in Congress, and most cries for reform are aimed at rules about the influence of money. Ethics codes and related reforms enacted in 1978, 1989, and 1995 have placed members of Congress under tight rules governing financial disclosure. The problem with these codes is that they assume that money is the only source of corruption. This is certainly not the case. For example, corruption can also come in the form of bargaining, involving the exchange of favors and votes, among members of Congress (known as logrolling) or between members of Congress and the president. In addition, jobs offered to former legislators create an ethics issue. While there are limits on how soon former legislators can lobby their former colleagues on certain issues, the rules are vague and their intentions are often circumvented.

Twenty-first century Congresses are complex and powerful organizations. Although reforms are often suggested, traditional patterns continue to dominate much congressional practice.

12

THE PRESIDENCY

The American presidency is a unique office. Presidents can send the most formidable military forces of the world into combat but can also have Congress reject their most treasured programs. The key to understanding this paradox is found in the system of separation of powers.

KEY TERMS

ad hoc structure
cabinet
circular structure
divided government
electoral college
executive privilege
impeachment
impoundment of funds
independent agencies
pocket veto
presidential coattails
presidential succession
pyramid structure
Twenty-fifth Amendment
Twenty-second Amendment
unified government
veto
White House office

KEY CONCEPTS

- The powers of the presidency are constrained by the separation of powers in the Constitution.
- The executive branch includes the president's personal staff, the cabinet, and many other agencies that report to him.
- Presidential power often rests on the president's ability to persuade, as well as the checks and balances he has on other branches of government.
- Presidents bring to office a program they hope to enact during their terms.
- Succession to presidents who leave office because of death, impeachment, or incapacitation has been clarified over the span of American history.

For a full discussion of the presidency, see *American Government*, 8th ed., Chapter 12 / 9th ed., Chapter 12.

DIVIDED GOVERNMENT AND THE POWERS OF THE PRESIDENCY

Unlike parliamentary systems that often assure that one party will be in power, American elections often produce divided government (a government in which one party controls the White House and a different party controls one or both houses of Congress). Even in periods of unified government (when the same party controls the White House and both houses of Congress), presidents and congresses can often work at cross-purposes. Conflicts between the president and Congress are the result of separation of powers.

The Framers of the Constitution had several fears that shaped the powers of the presidency: they feared the military power of the president; they feared presidential bribery in ensuring reelection; they feared lack of balance between the legislative and executive branches.

The electoral college was the answer to some of these fears. The original system included the following:

- Each state would choose its own method of selecting electors, whose number would match the state's number of representatives in Congress.
- Electors would meet in each state capital and vote for president and vice president.
- If no candidate won a majority, the House would decide the election, with each state delegation casting one vote.

Large states would have their say, but small states would have a minimum of three votes. Ultimately, because of our two-party system, the electoral college has worked differently than expected. Today there is a winner-take-all system in forty-eight states. Only in very rare cases does an elector vote for a presidential candidate other than the one who carried his or her state.

The Framers settled on a four-year term, and George Washington set the precedent of serving no more than two terms. Later, the Twenty-second Amendment limited the presidency to two terms. The Framers gave the president the following constitutional powers:

- serve as commander in chief of the military
- commission officers of the military
- grant reprieves and pardons for federal offences
- convene special sessions of Congress
- receive ambassadors (by implication giving the president the power to make foreign policy because he decides which ambassadors to recognize and which to ignore, as well as which countries receive U.S. ambassadors)
- faithfully execute the laws
- wield the "executive power"
- appoint officials to lesser offices

The Framers also gave the president the power to make treaties and to appoint ambassadors, judges, and high officials, but because the Senate must give its consent, these powers are shared. In addition, the Framers gave the president the power to approve legislation.

Perhaps even greater than these explicit presidential powers have been those informal powers that lie in manipulating politics and public opinion. Americans increasingly look to the president for leadership and hold him responsible for a large and growing portion of our national affairs.

THE EXECUTIVE BRANCH

The executive branch includes four areas:

- **The White House Office** The president's closest assistants have offices in the White House, usually in its West Wing. Titles vary from administration to administration, but in general the men and women who hold these offices oversee the political and policy interests of the president. They are not confirmed by the Senate and can be hired and fired at the president's will. There are three ways that presidents can organize their personal staffs:

> **AP TIP**
>
> A president's leadership style, which says much about the way an administration will evolve, is often a topic on the AP exam.

  - **Pyramid structure** Most assistants report through a hierarchy to a chief of staff, who then deals directly with the president. The Eisenhower, Nixon, and Reagan administrations are examples of this.
  - **Circular structure** The assistants in the West Wing report directly to the president, with no screening by the chief of staff. Carter's administration is a good example. This is also known as a wheel-and-spokes structure.
  - **Ad hoc structure** Task forces, committees, and informal groups of friends and advisers deal directly with the president. For example, Clinton's health care policy was headed not by a cabinet member but by First Lady Hillary Clinton.

- **The Executive Office of the President** Agencies in the Executive Office report directly to the president and perform staff services for him. Unlike the White House staff, Executive Office appointments must receive Senate confirmation. The principal agencies are the Office of Management and Budget (which assembles the budget), the Central Intelligence Agency, the Council of Economic Advisers, the Office of Personnel Management, and the Office of the U.S. Trade Representative.

- **The cabinet** The cabinet is composed of the secretaries of the executive branch departments and the attorney general. There are fifteen major departments. Some of the oldest include State, Treasury, Defense, and Justice. Although not explicitly mentioned in the Constitution, every president has had a cabinet. The secretaries become advocates for their departments, but they also serve at the president's will. Heads of other agencies, such as the chief of the Environmental Protection Agency, have been elevated to cabinet-level status. Some cabinet departments and secretaries are inevitably closer to the president than others.
- **Independent agencies and commissions** The president appoints members of agencies that have quasi-independent status. The difference between an executive agency and an independent agency is not precise. In general, heads of independent agencies serve for a fixed term and can be removed only for cause; executive agencies have heads that can be removed at any time. Examples of independent agencies include the Federal Reserve Board and the Consumer Product Safety Commission. Executive agencies include the Postal Service and all cabinet departments.

PRESIDENTIAL POWER IN ACTION

Presidents rely heavily on persuasion. The president has the only true *national* constituency of any elected office, and this can be used to enlarge his powers. Presidents have three audiences to persuade: fellow politicians and leaders in the nation's capital; party activists and officials outside of Washington; the general public.

Presidents try to transform popularity into congressional support for their programs, though this is more difficult than it used to be. Presidential coattails (by which members of Congress are elected based on the president's popularity) seem to be a thing of the past. Congressional elections are relatively insulated from presidential elections because of weakened party loyalty and the direct relationships congressional members have with constituents. Nevertheless, Congress tends to avoid the political risks of opposing a popular president by passing more of that president's legislative agenda.

Presidential popularity and its impact on getting legislative proposals passed are difficult to measure. Getting a high number of proposals passed can be misleading if the president's major bills are never passed. Presidents can get a high number of favorable bills passed by avoiding controversial measures. The timing of proposing bills is also critical. A president is generally most popular immediately after he is elected—the "honeymoon period." Most will decline in popularity as the term continues. A sluggish economy, scandal, and an unpopular war, all can hurt a president's popularity. National emergencies, such as the attacks on September 11, 2001, can give the president at least a temporary spike in popularity.

Another form of presidential power is the ability to prevent other branches of government from pushing their agendas. Presidents can use their powers by saying "no" in a number of ways:

- **The budget** The president's staff and the Office of Management and Budget put together budget proposals to present to Congress. An administration's priorities and policies show up there, and the president can say "no" by excluding agency proposals from the final budget.
- **Veto** The president can send a veto message to Congress within ten days of the bill's passage. In it he sets forth his reasons for not signing the bill. A bill that has been returned to Congress with a veto message can be passed if two-thirds of each house votes to override the veto. Congress rarely overrides vetoes. Attempts at line-item vetoes (approving some provisions of a bill but rejecting others) were made in 1996, but the Supreme Court has ruled them unconstitutional. A bill that is not signed or vetoed within ten days while Congress is still in session becomes law automatically, without the president's approval. A pocket veto occurs when the president does not sign the bill within ten days and Congress has already adjourned. The bill does not become law.
- **Executive privilege** Confidential communications between the president and his advisers do not have to be disclosed. The justification for this practice has been the separation of powers and the need a president has for candid advice. During the Watergate scandal, President Nixon refused to turn over tape recordings of White House conversations. The Supreme Court, ruling on executive privilege for the first time, held that there was a sound basis for the practice, particularly in military and diplomatic matters, but there was no immunity from judicial process under all circumstances.
- **Impoundment of funds** From time to time presidents have refused to spend money appropriated by Congress. In response to President Nixon's impoundments in 1972, the Budget Reform Act of 1974 was passed. The act requires presidents to notify Congress of funds they do not intend to spend. Congress must agree within forty-five days to delete the item. If Congress doesn't agree with the impoundment of funds, the president is required to spend the money. The act also requires presidents to notify Congress of delays in spending.

THE PRESIDENT'S PROGRAM

Modern presidents are expected to have a program when they take office—for example, Reagan's commitment to tax cuts and larger military expenditures, Franklin Roosevelt's New Deal. There are two ways for a president to develop a program. One, exemplified by Presidents Carter and Clinton, is to have a policy on almost everything. Another way, illustrated by President Reagan, is to concentrate on three or four major initiatives or themes and leave everything else to subordinates. In either case, a president's resources in developing a program include interest groups, aides, campaign advisers, federal departments and agencies, and various specialists.

A president's program will often meet many constraints. Public and congressional reactions can encourage or discourage a president's plan. The limited amount of time and attention a president can give to one program can also constrain its development. At other times, programs can be put aside when an unexpected crisis occurs. Presidents are also hampered by the fact that federal programs and the federal budget can be changed only marginally.

Virtually all modern presidents have attempted some type of reorganization of the executive branch. President George W. Bush's establishment of the Homeland Security Department is an example of a long-standing practice: presidents often reorganize because the large number of agencies that report to them can be overwhelming. It is also tempting to reorganize because it is much easier to change policy through reorganizing than through abolishing an old program or agency.

VICE PRESIDENTS AND PRESIDENTIAL SUCCESSION

The vice president's role is unclear. The extent to which vice presidents participate in the White House is left up to individual presidents. Vice presidents do have the constitutional role of presiding over the Senate and voting in the case of a tie. In practical terms, however, the vice president's leadership powers in the Senate are weak, especially in times of divided government.

A vice president becomes president when a president dies or is convicted of a bill of impeachment. The issue of succession also arises when a president becomes seriously ill and is unable to perform his duties. In eight historical cases, no *elected* official was available to succeed the new president should he subsequently die in office because there was no clear provision for a new vice president when a former one moves up to become president.

The first attempt to clarify succession was the Succession Act of 1886, which was amended in 1947. At first this designated the secretary of state as next in line for the presidency should the vice president die, followed by the other cabinet officers in order of seniority. But this meant that the president could pick his own successor by choosing the secretary of state. A 1947 amendment to the law made the Speaker of the House and the president pro tempore of the Senate next in line for the presidency. This also seemed like a poor solution because those positions are often filled based on seniority and not on executive skill.

Both problems were addressed in 1967 by the Twenty-fifth Amendment, which allows the vice president to serve as "acting president" whenever the president declares that he is unable to discharge the powers and duties of his office or whenever the vice president and a majority of the cabinet declare that the president is incapacitated. The amendment deals with the succession problem by requiring a vice president who assumes the presidency to nominate a new vice president. This person takes office if the nomination is confirmed by a majority vote of both houses of Congress.

Presidents can be removed upon impeachment and conviction. The House votes to indict the president. The impeached president must be convicted by a two-thirds vote of the Senate (which sits as a court, hears the evidence, and makes its decision) to be removed. Only two presidents—Andrew Johnson and Bill Clinton—have ever been

impeached. Richard Nixon surely would have been if he had not resigned before a vote was taken in the House. Neither Johnson nor Clinton was convicted.

13

THE BUREAUCRACY

The federal bureaucracy is a complex web of federal agencies with overlapping jurisdictions. Most people think of the bureaucracy as wasteful, confusing, and rigid. Because the bureaucracy has such a large and complex organization, it is easy to find examples supporting this view. A closer look at the bureaucracy reveals that there is satisfaction with many aspects of government services and that many of the bureaucracy's problems are the result of actions taken by Congress, the courts, and the president.

KEY TERMS

civil service
competitive service
congressional oversight
discretionary authority
excepted service
iron triangle
issue networks
laissez-faire
merit system
National Performance Review
Office of Personnel Management
patronage
Pendleton Act
red tape

KEY CONCEPTS

- The federal bureaucracy grew dramatically as a result of the Great Depression and World War II.
- Federal agencies have substantial power in setting policy.
- The characteristics of bureaucrats generally reflect those of the American public.
- Congressional oversight is an important check on the powers of the bureaucracy.
- Several impressions of the federal bureaucracy are constant subjects of reform.

For a full discussion of the bureaucracy, see *American Government*, 8th ed., Chapter 13 / 9th ed., Chapter 13.

GROWTH OF THE BUREAUCRACY

The Constitution made scarcely any provision for a bureaucracy. The president appoints the heads of executive agencies and nominates cabinet secretaries, subject to Senate confirmation. Congress has the right to appropriate money, to investigate the agencies, and to shape the laws they administer. As a result, both Congress and the president have control over the bureaucracy.

The appointment of public officials has changed over time. These appointments are significant because officials affect how laws are interpreted and the tone and effectiveness of their administration. Patronage—appointments based on political considerations—dominated appointments in the nineteenth and early twentieth centuries. Patronage rewarded supporters, created congressional support, and built party organizations. The Pendleton Act of 1883 began a slow but steady transfer of federal jobs from the patronage system to the merit system (hiring on the basis of an individual's qualifications for the job).

After the Civil War, industrialization and the emergence of a national economy necessitated federal regulation of interstate commerce, foreshadowing the growth of government agencies. The numbers of agencies and bureaucrats grew. The new agencies provided services like administering military pensions. They did not create a huge body of regulations because:

- there was still a belief in limited government
- states' rights continued to be important
- there was a fear of concentrated discretionary power
- there was a commitment to laissez-faire (a freely competitive economy)

The Great Depression and World War II led to increased government activism. As a consequence, agencies took on a heightened regulatory role. The Supreme Court upheld laws that granted discretion to administrative agencies. The introduction of income taxes supported a larger bureaucracy. Most of all, the public became convinced that continuing military preparedness and ongoing social programs were in the best interests of the nation. These attitudes still prevail.

ACTIVITIES OF AGENCIES

Although there has been only a modest increase in the number of federal government employees since 1960, there has been significant growth in the number of privately contracted employees as well as state and local government employees. Far more important than any of these trends, however, is the growth of discretionary authority—the ability of agencies to choose courses of action and to make policies not set out in the statutory law.

Congress has delegated substantial authority to administrative agencies in three areas:

- paying subsidies to particular groups and organizations in society (for example, farmers, veterans, scientists, schools, universities, hospitals)
- transferring money from the federal government to state and local governments through grants
- devising and enforcing regulations for various sectors of society, particularly the economy, schools, health care, roads, and telecommunications

BUREAUCRATS

Bureaucrats—employees of agencies or bureaus—are distinct from elected officials. While in practice bureaucrats have some discretionary authority (for example, police do not arrest every lawbreaker they see), only elected officials are supposed to have discretionary authority. This explains why bureaucrats are insulated from being fired for political purposes and why bureaucrats must engage in seemingly redundant procedures and rules. These assure that policies made at the top are carried out throughout the organization and that every citizen is treated the same way.

The activities and powers of various agencies have tremendous impact on public policy. An understanding of who runs and works in those agencies is important:

- **Recruitment and retention** The federal civil service system was designed to recruit qualified people on the basis of merit and to retain and promote employees on the basis of performance. Many federal officials belong to the *competitive service,* in which they are appointed only after they have passed a written examination. Employees hired outside the competitive service are part of the *excepted service*—they are not hired based on an exam but, typically, are hired in a nonpartisan fashion. Most bureaucrats cannot be easily fired, although there are informal methods of discipline. When bureaucrats do get fired, the process of dismissal often takes more than a year.
- **Personal and professional attributes** The bureaucracy is a cross section of American society in terms of the education, sex, race, and social origins of its members. As is the case in the general workforce, African Americans and other minorities are most likely to be heavily represented in the lowest grade levels and tend to be underrepresented at the executive level. Because of the civil service system, bureaucracies were, for a long time, less discriminatory in hiring minorities and women than private businesses were. At higher levels, the typical civil servant is a middle-aged male with a college degree whose father was somewhat more advantaged than the average citizen. While career civil servants are more progovernment

than the public at large, on most policy questions they do not have extreme positions.

- **The nature of their jobs** Career bureaucrats often differ politically from their supervisors and the political appointees who head their agencies. Nevertheless, most bureaucrats try to carry out policy, even policy with which they disagree. "Whistle-blower" legislation protects them from punitive action by supervisors for reporting waste, fraud, or abuse in their agencies. Moreover, most civil servants have highly structured jobs that make their personal attitudes irrelevant. For example, the Environmental Protection Agency attracts bureaucrats who want to protect the environment and public health as well as free marketers who want to insulate companies from unnecessary regulation. Both end up performing their jobs in similar ways. Within each agency there is a culture and informal understanding among employees about how they are supposed to act. This culture can motivate employees, but it also can make agencies resistant to change.
- **Involvement in iron triangles and issue networks** Agencies have often used their positions to form useful power relationships with a congressional committee or an interest group. At one time scholars described the relationship between an agency, a committee, and an interest group as an iron triangle (for example, the Department of Veterans Affairs, the House and Senate committees on veterans' affairs, and veterans' organizations such as the American Legion). Through iron triangles, the self-interest of all three groups is served. Iron triangles are far less common today because politics has become too complicated. Issues involve more powerful actors than they once did because of the interchange among agencies, Congress, lobbyists, think tanks, academia, and corporations. This interchange has created issue networks—composed of members of interest groups, professors, think tanks, and media who regularly debate government policy on a certain subject. Issue networks have largely replaced iron triangles.

CONGRESSIONAL OVERSIGHT

AP Tip

The power of Congress to oversee the bureaucracy is fundamental to the system of checks and balances and is likely to appear on the AP exam.

Congressional supervision of the bureaucracy takes several forms. First, no agency can exist without congressional approval, and Congress influences agency behavior by the statutes it enacts. Second, no money can be spent unless Congress has first authorized it. Authorization legislation starts in a congressional committee and states the maximum amount of money that an agency can spend on a

given program. This may be permanent, or it may be renewed each year. Third, even funds that have been authorized cannot be spent unless they are also appropriated. The House Appropriations Committee and its various subcommittees make appropriations annually.

The House Appropriations Committee has special power over agencies. The committee can recommend an amount lower than what an agency has requested and can revise or amend an agency's budget request. Both practices have the effect of strong congressional influence on agency policy. Although the Appropriations Committee does not have the power it once did, it still is the single most powerful influence on agency spending and policy.

Congress can also investigate agencies by holding hearings. Although the power to investigate is only implied in the Constitution, the Supreme Court has consistently upheld Congress's right to investigate. Investigations are generally used as a means for checking agency discretion and also for authorizing agency actions independent of presidential preferences.

REFORMING THE BUREAUCRACY

There are five frequently mentioned problems with the bureaucracy:

- **Red tape** Too many complex rules and procedures must be followed to get something done.
- **Conflict** Some agencies seem to be working at cross-purposes with other agencies.
- **Duplication** Two government agencies seem to be doing the same thing.
- **Imperialism** Agencies tend to grow without regard to the benefits that their programs confer or the costs that they entail.
- **Waste** Agencies spend more than is necessary to buy some products and services.

These problems do exist, but they are overstated and have logical origins in the Constitution and the policy-making process. For example, conflict and duplication occur because Congress, in setting up agencies and programs, often wants to achieve a number of different, partially inconsistent goals or cannot decide which goal it values most. Red tape and waste result from the obligation of bureaucrats to execute policy in accord with the rules set by elected officials and political appointees. It is noteworthy in regard to bureaucratic problems that while people are likely to say that they have a poor opinion of "the bureaucracy," they also often say that they have had good experiences with the bureaucrats with whom they have dealt personally.

Bureaucratic reform is always difficult to accomplish. Most rules and red tape grow out of struggles between the president and Congress. Periods of divided government make matters worse. This does not mean that reform is impossible, only that it is very difficult. There have been many attempts to make the bureaucracy work better for less money. Several reforms have stressed presidential control over the bureaucracy for the sake of efficiency, accountability, and

consistency. The latest attempt, laid out in a report called the National Performance Review (NPR), in 1993, suggested a new kind of organizational structure that would encourage less centralized management, more employee initiatives, and fewer detailed rules, all leading to more customer satisfaction.

Despite attempts to decrease the size of the federal bureaucracy, it remains a huge, complex, and powerful part of the federal government. As with any large organization, it has both strengths and weaknesses, but its critical role in implementing and defining public policy is unquestioned.

14

THE FEDERAL COURTS

The judicial branch plays a large role in making public policy. The major power that the federal courts have is judicial review, the right to declare laws of Congress and acts of the president unconstitutional.

KEY TERMS

amicus curiae
briefs
class action suits
concurring opinion
courts of appeals
dissenting opinion
district courts
Dred Scott v. Sandford
in forma pauperis
judicial activism
judicial review
"litmus test"
Marbury v. Madison
McCulloch v. Maryland
opinion of the Court
senatorial courtesy
solicitor general
stare decisis
strict construction
writ of certiorari

KEY CONCEPTS

- The federal courts have evolved into an institution that has significant impact on public policy.
- The selection of federal judges is a very political process.
- A limited number of cases are heard in federal courts, and an even more limited number reach the Supreme Court.
- Judicial activism is a philosophy in which judges make bold policy decisions.
- The other branches of government and the public have checks on the powers of the federal courts.

For a full discussion of the federal courts, see *American Government*, 8th ed., Chapter 14 / 9th ed., Chapter 14.

THE DEVELOPMENT OF THE FEDERAL COURTS

Most of the Founders probably expected judicial review to be an important judicial power, but it is unlikely that they thought the federal courts would play a large role in policy-making. The original view of the Founders was known as strict construction: judges would be bound by the wording of the Constitution and precedent, which was drawn mainly from the British legal system. Within a few decades, however, an activist approach emerged, and judges looked at the underlying *principles* of the Constitution.

The federal courts have evolved toward judicial activism, shaped by political, economic, and ideological forces of three historical eras:

- **National supremacy and slavery (1789-1861)** Two early court cases, *Marbury v. Madison* (1803) and *McCulloch v. Maryland* (1819), helped establish the supremacy of the national government. *Marbury* gave the Supreme Court the power to declare a congressional act unconstitutional. *McCulloch* established that federal law is supreme over state law. Both suggested that powers granted to the federal government should be construed broadly. The power of the federal government to regulate commerce among the states was also established, and state law that conflicted with federal law was declared void. A major case, *Dred Scott v. Sandford* (1857), made the Supreme Court a major player in setting the stage for the Civil War. The Supreme Court ruled that blacks were not citizens of the United States and that federal law prohibiting slavery in northern territories was unconstitutional.
- **Government and the economy (1865-1936)** The dominant issue during this period was deciding when the economy would be regulated by the states and when by the national government. Most court decisions protected private property. The Court upheld the use of injunctions to prevent labor strikes, struck down the federal income tax, sharply limited the reach of the antitrust laws, restricted the powers of the Interstate Commerce Commission, refused to eliminate child labor, and prevented states from setting maximum hours of work. These restricted the federal government's ability to regulate the economy. Yet the Court also authorized various kinds of regulation, such as requiring railroads to improve their safety, approving mine safety laws, and regulating fire-insurance rates. While the Court was supportive of private property, it could not develop a principle distinguishing between reasonable and unreasonable regulation.
- **Government and political liberty (1936-present)** During this period the Court has deferred to the legislature in regulating the economy. It has shifted its attention to personal liberties and is active in defining rights. The Warren Court, which began in 1953, redefined the relationship of citizens to the government and protected the rights and liberties of citizens.

During the past fifteen years, the Supreme Court has begun to rule that the states have the right to resist some federal action. It is possible that this is the beginning of a new era in which the Court will return certain powers to the states, a process known as devolution.

THE SELECTION OF JUDGES

All federal judges are nominated by the president and confirmed by the Senate. Presidents almost always nominate a member of their own political party, and party background does have some effect on how judges behave. However, rulings are also shaped by other factors, such as the facts of the case, precedent, and lawyers' arguments.

Confirmations are often contentious. Senate delays on confirmations often leave many seats open on the appellate courts. One tradition regarding nominations is senatorial courtesy: senators from the president's party review an appointee for a federal district court in their state; senators can "blue-slip"—that is, veto—a nominee, a practice that has been criticized because it gives senators virtual power in nominating judges.

Another concern is the use of the "litmus test," a test of ideological purity used by recent presidents, in nominating, and senators, in confirming, judges for federal courts. Presidents seek judicial appointees who share their political ideologies. Because various presidents appoint judges, different circuits issue different rulings over similar cases. While candidates cannot be asked how they would rule in a specific case, they can be asked about judicial philosophy. Litmus tests are most apparent in Supreme Court confirmations, for which there is no tradition of senatorial courtesy.

THE JURISDICTION OF THE FEDERAL COURTS

The United States has two court systems—one state, one federal—which can complicate the questions of which cases the federal courts may hear, and how cases beginning in the state courts may end up before the Supreme Court.

The Constitution lists the kinds of cases over which federal courts have jurisdiction; all others are left to state courts. Federal courts can hear all cases involving the U.S. Constitution, federal law, and treaties; these are known as federal-question cases. Federal courts may also hear cases involving different states or involving citizens of different states; these are known as diversity cases. Some cases, such as those where both state and federal laws have been broken, can be tried in either state or federal courts.

The Constitution specifies a very limited original jurisdiction for the Supreme Court. Nearly every case the Supreme Court hears is on appeal and chosen by the court. It does this by issuing a writ of certiorari. If four justices agree to hear a case, a "writ of cert" is issued, and the case is scheduled for a hearing. The Court tends to take cases that pose a significant federal or constitutional question, involve conflicting decisions by circuit courts, or contain a constitutional interpretation by one of the highest state courts regarding state or

federal law. Only about one hundred appeals are granted certiorari in a given year.

Some Americans criticize the courts as undemocratic. The Supreme Court rejects all but a few of the applications for certiorari. In addition, the costs of appeals are high. Nevertheless, costs can sometimes be lowered or even covered in full in the case of indigents (called in forma pauperis), for which the government pays the costs. Those who are unable to afford counsel are provided a lawyer at no charge. Interest groups are also sources of funding for litigation. Court costs are also affected by the practice of fee shifting, which enables plaintiffs to collect their costs from a defendant if the defendant loses.

Getting to court requires legal standing. To have standing there must be a real controversy between adversaries, and the litigants must demonstrate personal harm. Under certain circumstances, a citizen can benefit from a court decision without ever going to court. In these cases, courts recognize class-action suits, in which an identifiable group of people has standing. If the case is won, all who have circumstances similar to the active plaintiffs receive a share of the judgment. Since 1974, the Supreme Court will not hear class-action suits unless every ascertainable member of the group is notified individually. This is often prohibitively expensive.

THE POWERS OF THE SUPREME COURT

Once a case gets to the Supreme Court, lawyers for each side submit briefs. A brief is a document that sets forth the facts of the case, summarizes the lower-court decision, gives the arguments for the side represented, and discusses precedents on the issue.

Oral arguments are presented later. Each side has one half-hour, but justices can interrupt with questions. Because the federal government is either the plaintiff or defendant in about half the cases that the Supreme Court hears, the solicitor general of the United States appears frequently before the Court. The solicitor general, the third ranking officer in the Justice Department, decides which cases the government will appeal from the lower courts and personally approves every case presented to the Supreme Court.

Written briefs and even oral arguments may be offered by a "friend of the court," or amicus curiae. An amicus brief is from an interested party not directly involved in the suit. The reasoning and research found in academic law journals are also sources of ideas used by the justices in reaching decisions and writing their opinions.

After briefs are submitted and oral arguments are heard, justices develop their opinions and decisions. Much of this work is performed by clerks, who are often recent graduates of the top law schools in the country. These drafted opinions are circulated among the justices and their clerks. Next, the justices meet in conference to allow for the exchange of ideas and arguments and to vote. The chief justice counts the votes, writes the decision of the court (or assigns someone to write the official decision if he is among the minority), and manages the process.

In deciding a case, a majority of justices must be in agreement. Sometimes the opinion is brief and unsigned; this is known as a per curiam opinion. There are three kinds of opinions:

- An opinion of the Court is the majority opinion.
- A concurring opinion is an opinion that agrees with the decision but uses different reasoning to reach that conclusion.
- A dissenting opinion is a minority opinion. Disagreeing with the decision, it has no value as precedent but may form the basis for later appeals or reversals of precedent.

The federal courts have the power to make public policy in three ways:

- by interpretation of the Constitution or law
- by extending the reach of existing law
- by designing remedies that involve judges acting in administrative or legal ways

These powers can be measured in several ways. Over 130 laws have been declared unconstitutional. Over 260 cases have been overturned—to let a prior decision stand is called stare decisis. Judges now handle cases once left to the legislature. Further, judges now often go beyond what is narrowly required by imposing remedies for issues and problems.

AP Tip

Judicial activism versus judicial restraint is a major issue when considering the federal courts. The issue will certainly appear on the AP exam in some form.

Judicial activism, the philosophy by which judges make bold policy decisions, has both supporters and critics. Supporters believe courts should correct injustices when other branches or state governments refuse to do so and when change creates new circumstances not foreseen by the Founders. They also argue that the courts are the last resort for those without the power or influence to provoke new laws. Promoting the philosophy known as judicial restraint, critics argue that judges cannot put themselves above the law and that they lack expertise in designing and managing complex institutions. These critics also note that the courts are not accountable because judges are not elected.

Judicial activism increased during the twentieth century because government has tended to do more and courts have interpreted a greater number of laws. Also, activist judges have become far more widely accepted in American political culture as our values, society, and technology have changed.

CHECKS ON JUDICIAL POWER

Like the other branches of the federal government, the judicial branch does not have unrestrained powers. There are several checks on the powers of the federal courts:

- Courts rely on others to implement their decisions. Congress can check the courts in several ways:
  - Confirmation proceedings gradually alter the composition of the courts.
  - Impeachment proceedings, though rare, can also change the composition of the courts.
  - Congress can change the number of judges, giving the president more or fewer appointment opportunities.
  - Revising legislation can undo Supreme Court decisions.
  - Amending the Constitution can alter the jurisdiction of the Court.
  - Defying public opinion may be dangerous for the legitimacy of the Supreme Court. Public confidence in the Supreme Court since the 1960s has varied as the Court has issued controversial rulings. Today there is often more popular support for the executive and legislative branches.

The courts have substantial power, and judicial review in particular makes the courts an important part of the complex process of establishing and revising American public policy.

15

POLICY-MAKING IN THE FEDERAL SYSTEM

Policy-making at the federal level is rarely accomplished consistently and routinely. An issue must first find its way to the political agenda, and then decisions must be made about how to address the issue. Coalitions are formed that struggle over the issue, and the policy that results depends on who gains, who loses, and the perceptions, beliefs, and values of key political actors.

KEY TERMS

client politics
costs and benefits
entrepreneurial politics
interest group politics
majoritarian politics
policy entrepreneurs
political agenda

KEY CONCEPTS

- The political agenda determines which issues will receive consideration in formulating new policy.
- Costs and benefits determine who supports a policy, who opposes it, and the coalitions that form to compete over a policy.
- Business regulation is an excellent case study of the different types of policies and policy-making.
- Perceptions, beliefs, interests, and values all play a critical role in the policy-making process.

For a full discussion of policy-making in the federal system, see *American Government*, 8th ed., Chapter 15 / 9th ed., Chapter 15.

SETTING THE POLITICAL AGENDA

AP Tip

The political agenda involves virtually all of the participants in the policy-making process and is a term likely to appear on the AP exam.

The most important decision affecting policy-making is determining what belongs on the political agenda—the issues about which public policy will be made. At any given time, certain shared beliefs determine what is legitimate for the government to do. This legitimacy is affected by shared political values, the weight of custom and tradition, the impact of events, and changes in the way that political elites think and talk about politics.

The legitimate scope of government action is constantly growing larger. Government activity is rarely scaled back because people have certain expectations of government that are difficult for politicians to change. Changes in the attitudes of the public and new events generally increase government activities. It is unfair to attribute government growth to one political party.

Three forces enlarge government activity, sometimes without public demand or even when conditions are improving:

- **Groups** Many policies are the result of small groups of people enlarging the scope of government by their demands. These may be organized interests—for example, corporations, unions—or unorganized yet intense groups—for example, urban minorities. Such groups may be reacting to a sense of relative deprivation.
- **Institutions** Major institutions such as the courts, bureaucracy, and Congress may add new issues to the political agenda. The courts make decisions that force action by other branches—for instance, school desegregation. They can facilitate change even when there is no popular majority for change. The bureaucracy has become a source of policy proposals. Congress, especially the Senate, produces potential presidential candidates who focus on activism as a means of gathering recognition.
- **Media** By publicizing issues the media help shape the political agenda. The public often becomes aware of issues through the media.

The political agenda can change because of shifts in popular attitudes, elite interest, critical events, or government actions. Popular attitudes tend to change slowly, often in response to critical events. Elite attitudes and government actions are far more volatile.

COSTS, BENEFITS, AND POLICY

The costs and benefits of a proposed policy provide a way to understand how an issue affects political power. A cost is any burden (monetary or nonmonetary) that people must bear from the policy. It might be a fee or higher taxes, but costs are often nonmonetary items, such as:

- requiring formal reports (for example, the number of team sports for boys and for girls in a school district)
- restricting activities (for example, farming on land that is a protected wetland or discriminating in hiring on the basis of gender)
- performing functions for the government (for example, collecting income and FICA taxes)

A benefit is any satisfaction (monetary or nonmonetary) that people expect to receive from the policy. It might be a tangible reward, but benefits are often intangible items, such as:

- restricting competition (for example, ownership restrictions on television stations or monopolies allowed in professional sports)
- accessing resources owned by the public (for example, mining rights on public land or use of patents developed by government-sponsored research)
- coordinating actions by government agencies (for example, amber alert procedures)

The perception of costs and benefits is also vital in the policy-making process as people consider whether the group to benefit and the costs incurred are legitimate. Political coalitions form over the distribution of costs and benefits.

The politics of policy-making can be illustrated by four kinds of policies:

- **Majoritarian politics** Some policies promise benefits to large numbers of people at a cost that large numbers of people will have to bear (for example, Social Security or military defense). The debate over such policies is generally conducted in ideological or cost terms, not as a rivalry among interest groups. Majoritarian issues are usually resolved in public debate and public votes on bills.
- **Interest group politics** In interest group politics, a proposed policy will confer benefits on some relatively small, identifiable group and impose costs on another small, equally identifiable group (for example, bills requiring business firms to give benefits to labor unions). Interest groups generally carry on the debate over these policies with minimal involvement by the wider public.
- **Client politics** With client politics, some identifiable, often small, group will benefit, but a large part of society will pay the costs (for example, regulated milk prices benefit dairy farmers but increase the cost of milk to consumers). Because the benefits are concentrated, the group that will receive those

benefits has an incentive to organize and work to get them. The costs are widely distributed, affecting many people only slightly, and those who pay the costs may be either unaware of any costs or indifferent to them.

- **Entrepreneurial politics** In entrepreneurial politics a large part of society benefits from a policy that imposes substantial costs on some small, identifiable segment of society (for example, antipollution and safety requirements for automobiles, proposed as ways of improving the health and well-being of all people but at the expense of automobile manufacturers). A key element in the adoption of such policies is often the work of a policy entrepreneur, who acts on behalf of the unorganized or indifferent majority. Entrepreneurial politics can also occur if voters or legislators in large numbers suddenly become disgruntled by the high cost of some benefit that a group is receiving or become convinced of the urgent need for a new policy to impose such costs (for example, cleaning up toxic waste sites).

BUSINESS REGULATION: A CASE STUDY

Efforts by government to regulate business illustrate not only the four kinds of policy-making processes but also the relationship between wealth and power. Some observers believe that economic power dominates political power. In this view wealthy Americans have great access to political power. Politicians and business people with similar backgrounds and ideologies often form mutually beneficial relationships. At times, economic power allows individuals or groups to buy political power. Politicians must defer to business in order to keep the economy healthy. Other observers view political power as a threat to a market economy. Neither extreme is correct. Business and government relations depend on many variables.

Not all efforts to regulate business pit one group against another. Some laws have reflected majoritarian politics, in which the majority of voters were in favor of some form of regulation. For instance, antitrust legislation in the 1890s (for example, the Sherman Act and the Federal Trade Commission Act) was sparked by public support. By the early twentieth century, presidents were taking the initiative in encouraging the enforcement of antitrust laws. Support for antitrust laws came mainly from the ideological convictions of the public and were not the result of interest group activism.

Labor-management conflict in the twentieth century is a good example of interest group politics. Labor unions sought government protection for their rights to strike and engage in other forms of collective action. Business firms opposed labor vigorously. Labor won a victory with the creation of the National Labor Relations Board in the mid- 1930s. Management won victories in the 1940s and 1950s (for example, the Taft-Hartley Act and the Landrum-Griffin Act). In those decades winners and losers were determined by economic conditions and the partisan composition of Congress. Costs and benefits involved specific groups, not the general public.

Client politics is also evident in business regulation. State licensing of occupations such as law and medicine are justified as ways of preventing fraud, malpractice, and safety hazards, and they no doubt serve these purposes. But they also have the effect of restricting entry into the regulated occupation, thereby enabling its members to charge higher prices than they otherwise might. Citizens generally do not object to this because they believe that the regulations protect them and that the higher prices are spread over so many customers as to be unnoticed.

Entrepreneurial politics have often been evident in regulating businesses. The 1906 Pure Food and Drug Act, an early example, forced meatpacking plants to sanitize their conditions following revelations of frightful practices in the widely read novel *The Jungle*. The 1960s and 1970s brought a large number of consumer and environmental protection statutes aimed at specific industries and businesses (for example, the Clean Air Act and the Toxic Substance Control Act). Ralph Nader is an excellent example of a policy entrepreneur, associating himself with many consumer and environmental interests.

Perceptions, Beliefs, Interests, and Values

The perception of costs and benefits affects politics. For instance, if people think that laws fighting pollution will be expensive for companies but not for consumers, they will generally favor such measures. However, if they believe that they will pay for the laws in the form of fewer jobs or higher prices, they will not be as supportive.

Individuals and groups attempt to frame and define issues in ways that work to their advantage. Interest groups try to give the impression that their issue is vital to the welfare of the entire country and should be thought of in majoritarian terms. Likewise, opponents will try to frame an issue in client-politics terms so that the self-interest of the original group is emphasized. Political conflicts are a struggle to make one definition of the costs and benefits of a proposal prevail over others.

Values also play a vital role in policy-making. Concepts of what is good for the community or the country vary widely. What happens now or in the near future is more important to most people than what happens in the distant future—economists label this the short-term/long-term disconnect. Most people seem to react more sharply to what they will lose if a policy is adopted than to what they may gain.

The way people think makes a difference, even in the case of policies where money interests are at stake. Deregulation during the 1980s of industries such as the airlines, long-distance telephone companies, and trucking is a good example. The idea emerged among academic economists that governmental regulations were inefficient in industries that could be competitive. Politicians from both major parties embraced the idea of deregulation because they had the support of regulatory agencies and consumers, even though the industries themselves opposed deregulation. The affected industries feared more competition, lower prices, and fewer profits. The enactment of deregulation signaled the weakening of client politics and the power of ideas in policy-making.

Policy-making at the federal level is a complex and often confusing process that requires an understanding of the policy agenda, the costs and benefits of various issues, and the perceptions of groups involved.

19

CIVIL RIGHTS

Civil rights issues involve discrimination against a group. The government has the authority to treat different people differently—but only if the differences in treatment are reasonable in the view of the courts.

KEY TERMS

affirmative action
Brown v. Board of Education
civil rights
Civil Rights Act of 1964
civil rights movement
de facto segregation
de jure segregation
Fourteenth Amendment
freedom rides
Martin Luther King, Jr.
Montgomery bus boycott
National Association for the Advancement of Colored People (NAACP)
nonviolent civil disobedience
Plessy v. Ferguson
reasonableness standard
Roe v. Wade
Rosa Parks
separate-but-equal doctrine
sit-ins
strict scrutiny standard
Swann v. Charlotte-Mecklenburg Board of Education
Voting Rights Act of 1965

KEY CONCEPTS

- Progress for African Americans in receiving their civil rights was slow.

- African Americans used the federal courts effectively to gain their civil rights.
- Civil rights legislation came as a result of public protest and a change in public opinion regarding the rights of African Americans.
- Women's rights are drawn from different standards than those used for race.
- Affirmative Action is a controversial program to remedy past and present discrimination.

For a full discussion of the topic of civil rights, see *American Government*, 8th ed., Chapter 19 / 9th ed., Chapter 19.

THE BACKGROUND OF THE CIVIL RIGHTS MOVEMENT

Until fairly recently African Americans could not vote, attend integrated schools, sit in the front seats of buses, or buy homes in white neighborhoods. Two main reasons account for the slow pace with which African Americans attained their civil rights. First, politically dominant white minorities in the South feared potential competition for jobs, land, public services, and living space from African Americans. White groups were able to dominate local politics and keep African Americans from organizing politically. Second, the white majority at the national level opposed African American attempts to achieve rights and did not favor federal action to secure those rights.

Progress in achieving civil rights for African Americans depended on either finding more white allies or shifting to new policy-making arenas. Civil rights leaders broadened their base by publicizing the denial to African Americans of essential, widely accepted liberties—for example, voting or organizing. They turned what had been perceived as an interest group set of issues into majoritarian issues. They also moved their legal and political struggle from Congress to the federal courts.

THE CIVIL RIGHTS MOVEMENT IN THE COURTS

The Fourteenth Amendment, adopted in 1868, was both an opportunity and a problem for black activists. It seemed to guarantee equal rights for all. Yet a narrow interpretation of the amendment argued that African Americans had equal legal rights but could otherwise be treated differently than whites. The Supreme Court adopted this narrow view in *Plessy v. Ferguson* (1896), in which it found separate-but-equal facilities to be constitutional.

The National Association for the Advancement of Colored People (NAACP) was established in 1909 to lobby in Washington and publicize black grievances, but its most influential role was played in the courtroom. In fighting the separate-but-equal doctrine, the NAACP established a three-step process to attack school segregation:

- First, persuade the Supreme Court to declare unconstitutional the laws creating schools that were separate but obviously unequal (in regards to funding, facilities, faculty, etc.).
- Second, persuade the Supreme Court to declare unconstitutional the laws creating schools that were separate but not so obviously unequal.
- Finally, have the Supreme Court rule that separate schools are inherently unequal and therefore unconstitutional.

AP Tip

Brown v. Board of Education is one of the most important decisions ever rendered by the Supreme Court and will likely appear on the AP exam.

In a series of court cases that stretched from 1938 to 1954, the NAACP implemented its strategy, culminating in *Brown v. Board of Education* (1954). In the *Brown* case the Supreme Court ruled that separate schools were inherently unequal and overturned *Plessy* in a unanimous decision.

Brown was a landmark decision, and the reasons for it and the means chosen to implement it were important and controversial. Three issues emerged from the decision:

- **Implementation** The *Brown* case was a class action suit that applied to all similarly situated African American students. The Court later ruled that integration should proceed in public schools "with all deliberate speed." In the South, this turned out to be a snail's pace. In 1956 more than one hundred southern members of Congress signed a "Southern Manifesto" that condemned the *Brown* decision as an abuse of judicial power and pledged to use all lawful means to reverse the decision. In the late 1950s and early 1960s, the National Guard and regular army paratroopers were used to escort black students into formerly all-white schools and universities. The collapse of resistance to integration in the 1970s was due to numerous political changes, including the voting power of blacks.
- **Rationale** The decision in *Brown* argued that segregation was detrimental to African American students, creating a sense of inferiority. The Court relied on the findings of social science.
- **Desegregation versus integration** In the South segregation by law (*de jure* segregation) was clearly unconstitutional as a result of *Brown*. In the North segregation was the result of residential segregation (*de facto* segregation). Integration came to be defined by the Court as a "unitary, nonracial system of education." The case of *Swann v. Charlotte-Mecklenburg Board of Education* (1971) set guidelines for all subsequent cases involving school integration:
  - To violate the Constitution, a school system must have intended to discriminate.

- A one-race school creates a presumption of intent to discriminate.
- Remedies for past discrimination can include quotas, busing, and redrawn district lines.
- Not every school must reflect the racial composition of the entire system.

The result of the *Swann* decision was often "white flight" to the suburbs. One issue not settled by *Swann* was whether busing and other remedies should cut across school district lines. The Court later ruled that intercity busing could be authorized only if both the city and the suburbs had practiced segregation. In some cities, the Court believed, there had been intent to segregate and busing was necessary. Busing still remains a controversial issue.

THE CIVIL RIGHTS MOVEMENT IN CONGRESS

Getting Congress to pass new civil rights laws required a far more difficult and decentralized strategy than campaigning in the federal courts. This part of the movement aimed at mobilizing public opinion and overcoming the many congressional barriers to action.

The first strategy was to get civil rights issues on the political agenda by mobilizing public opinion through dramatic events. Sit-ins at segregated lunch counters and "freedom rides" on segregated bus lines made headlines in the newspapers. Efforts were made to get blacks registered to vote in counties where whites had used intimidation and harassment to prevent registration by blacks. Rosa Parks started a bus boycott, organized by a young minister named Martin Luther King, Jr., in Montgomery, Alabama, when she refused to surrender her seat to a white man. Early demonstrations were based on the philosophy of nonviolent civil disobedience—that is, peaceful violation of a law. Later, racial violence and riots erupted when more militant organizations became involved in the civil rights movement.

This mobilization of public opinion had mixed results. It succeeded in getting civil rights on the national political agenda. Yet it set back coalition-building because demonstrations and riots were seen as law breaking by many whites.

In Congress opponents of civil rights had strong defensive positions. Southern Democrats controlled the Senate Judiciary Committee. A southerner controlled the House Rules Committee. A filibuster in the Senate occurred when civil rights legislation came to the floor. President Kennedy was reluctant to submit strong civil rights legislation.

Four developments changed the civil rights movement's chances in Congress:

- Public opinion became more favorable towards the movement as the years wore on.
- Violent reactions by white segregationists received extensive coverage by the media.
- The assassination of President Kennedy, in 1963, gave his successor, President Johnson, a period of strong relations with

Congress and a mythical hero figure to refer to in promoting civil rights.

- The 1964 election was a Democratic landslide that allowed northern Democrats to seize power in Congress.

Five important civil rights bills were passed between 1957 and 1968. Significant voting rights laws were passed in 1957, 1960, and 1965. A housing discrimination law was passed in 1968. The high point of civil rights legislation, however, was the Civil Rights Act of 1964. It assured equality of opportunity in employment, public accommodations, voting, and schools.

The civil rights movement boasted many achievements. Among the most important have been a dramatic rise in African American voting and changes in the opinions of whites regarding civil rights.

Women and Equal Rights

The feminist movement that reappeared in the 1960s questioned the claim that women differed from men in ways that justified differences in legal status. Congress responded by passing laws that required equal pay for equal work, prohibited discrimination on the basis of sex in employment and public education, and banned discrimination against pregnant women on the job.

The Supreme Court had a choice between two standards in considering sex discrimination. The first is the reasonableness standard, which holds that when the government treats some classes of people differently from others, the different treatment must be reasonable and not arbitrary. The second is the strict scrutiny standard, which holds that some instances of drawing distinctions between different groups are inherently suspect. This is the standard used for racial discrimination. Thus the Court will subject those cases to strict scrutiny to ensure that they are clearly necessary to attain a legitimate state goal.

When women complained that some laws treated them unfairly, the Court adopted a mid-level standard somewhere between the reasonable and strict scrutiny tests. For example, the courts prohibit gender-based differences when applied to the age of adulthood, the drinking age, arbitrary employee height and weight requirements, and mandatory pregnancy leaves. Gender-based differences are allowed by the courts in areas such as statutory rape, all-boy/all-girl public schools, and delayed promotions in the Navy.

The rights of women have been determined in three far-reaching areas:

- **The draft** In *Rostker v. Goldberg* (1981), the Supreme Court held that Congress can require men but not women to register for the draft without violating the due-process clause of the Fifth Amendment. In 1993 the secretary of defense allowed women to have air and sea combat positions but not ground combat positions. These decisions remain controversial.
- **Sexual harassment** There are two forms of harassment. The first is quid pro quo, in which sexual favors are expected in return for holding a job or gaining a promotion. Employers are

strictly liable for this form of harassment. The other form is a hostile environment—creating a setting in which harassment impairs a person's ability to work. Employers are liable in this form *if* they are negligent.

- **Abortion** The issue of abortion was left to the states until 1973, when the Supreme Court used *Roe v. Wade* to strike down a Texas ban on abortion and all similar state laws. It holds that a woman's freedom to choose an abortion is protected by the Fourteenth Amendment in the first trimester of pregnancy. Abortion during the second trimester is also left up to a woman, but states are allowed to pass reasonable regulations to protect the mother's health. During the third trimester, states can ban abortion because the fetus is viable. Constitutional amendments to overturn *Roe* have failed. However, there have been successful attempts to restrict abortions:
  - 1976: Congress barred the use of federal funds to pay for abortions except when the life of the mother is at stake.
  - 1989: The Supreme Court first upheld the right of states to impose some restrictions on abortion.
  - 1992: In *Casey v. Planned Parenthood* the Court permitted more restrictions, such as a twenty-four-hour waiting period and parental consent for teenagers. A spousal consent requirement was overturned.

AFFIRMATIVE ACTION

The politics of civil rights are often expressed in one of two views. The first view advocates equality of results. In this view the assumption is that racism and sexism can be overcome only when remedies change the results. Equal rights are not thought to be enough. People need benefits as well. Proponents of this view argue that affirmative action—preferential practices—should be used in hiring and college admissions decisions.

The second view advocates equality of opportunities. Proponents believe that reverse discrimination occurs when race or sex is used as a basis for preferential treatment. Laws should be color-blind and sex neutral.

In the *Bakke* case of 1978, the Supreme Court ruled that numerical minority quotas are not permissible but that race could be considered in admissions policies. In general the Court supports the concept of affirmative action, but it is reluctant to support the use of quotas.

Standards are emerging for quotas and preference systems. They include the following:

- Quota systems are subjected to strict scrutiny, and there must be a compelling state interest to justify quotas.
- Quotas must correct an actual pattern of discrimination.
- Quotas must identify actual practices that discriminate.
- Federal quotas will be given deference because the Constitution gives Congress greater power to correct the effects of racial discrimination.

- Preferences are acceptable for the purpose of achieving diversity.

The public generally supports compensatory action (helping minorities catch up) but not preferential treatment. This is in line with American political culture, which supports individualism but also those in need.

Conflicts persist in other areas of civil rights. Immigration rights and the rights of enemy combatants are bound to provoke more rulings from the Supreme Court in the future. An area that is already receiving widespread attention is gay rights. In the past, sexual conduct has been regulated by the states. The Supreme Court has overturned some state laws that ban certain sexual practices by citing the privacy rights implied in the Fourth and Fourteenth Amendments. Yet other rulings have not upheld gay rights, such as the Boy Scouts' right to exclude gays. Gay rights remain controversial.

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CIVIL LIBERTIES

Civil liberties are the constitutional protections an individual has against government. In order to understand the nature of civil liberties, it is necessary to understand why the liberties stated in the Bill of Rights are important, how they came to apply to the states, and why they have grown in scope and meaning.

KEY TERMS

Bill of Rights
civil liberties
clear-and-present danger doctrine
commercial speech
due-process clause
establishment clause
exclusionary rule
free-exercise clause
Gitlow v. New York
incorporation doctrine
libel
Mapp v. Ohio
Miranda v. Arizona
Patriot Act
obscenity
prior restraint
probable cause
search warrant
slander
symbolic speech

KEY CONCEPTS

- Civil liberties have created significant issues because there is often competition among groups and individuals for rights guaranteed in the Constitution.
- First Amendment rights have created several controversial and enduring issues.
- Several rights of the accused are guaranteed in the Bill of Rights.

- The Patriot Act was created as a result of the 9/11 attacks, and many believe that some of its provisions violate the Constitution.

For a full discussion of civil liberties, see *American Government*, 8th ed., Chapter 18 / 9th ed., Chapter 18.

BACKGROUND OF CIVIL LIBERTIES ISSUES

The Framers of the Constitution had three objectives in regards to civil liberties. First, they wanted to limit federal powers and assure the rights and liberties found in the various state constitutions. Second, they meant for the Constitution to be a document proclaiming what the federal government *could* do, not what it *could not* do. Third, any mention of what the government could not do was meant to apply only to the federal government, not to the state governments.

Civil liberties have created major issues in the nation's history for three reasons:

- The Bill of Rights contains competing rights. Often the rights of one group or individual directly conflict with the rights of another. For instance the media may insist on their right to broadcast information about a court case, but that information may compromise an individual's right to a fair trial. The right of a group to protest may be in conflict with the right of citizens to have public order.
- Government officials have often been successful at taking action against the rights of political or religious dissidents. In times of crisis, politicians can convince the public that the liberty of a minority needs to be restricted. For instance congressional acts were passed during World War I that made it a crime to utter statements that would interfere with the draft. During the Cold War a law required members of the Communist party to register with the government.
- Waves of immigrants who are not white and Western European have created cultural conflicts. Conflicts continue to exist about the meaning of constitutionally protected freedoms based on ethnic, cultural, or religious factors. For instance, Jews have been offended by crèches at Christmastime on government property, while some English-speakers press for monolingual schools in Spanish-speaking areas.

FIRST AMENDMENT RIGHTS

Because the First Amendment contains several of our most basic freedoms, it has often been the battleground for civil liberties issues. Interpreting and applying the First Amendment has typically dealt with one of the following issues:

- **Freedom of expression and national security** Early American legal thought set forth the idea that the press should

be free of prior restraint—government censorship of the press in advance of publication—even if publication is clearly against the interests or security of the government. The press, however, had to accept the consequence if what was published was inaccurate or illegal. During World War I, Congress defined further some of the limits of expression by passing legislation stating that treason, insurrection, forcible resistance to federal laws, and encouraging disloyalty in the armed services were not protected by the First Amendment. The Supreme Court upheld these limits on free expression in 1919 by issuing the "clear-and-present danger" test: the words used cannot create a clear and present danger to the public, and Congress can prevent such dangers. Later the Court moved towards allowing more freedom of expression but deferred to Congress during times of crisis. For instance, under the Smith Act of 1940, the Court upheld the convictions of communists preaching revolution. In 1969, however, the Court ruled that speech calling for illegal acts is protected if those acts are not imminent. In 1977 an American Nazi march in Skokie, Illinois, an area heavily populated by Jews, was held to be lawful. The general view of the Court has been that hate speech is permissible, but not hate crimes that result in direct physical harm.

AP Tip

Incorporation doctrine is basic to an understanding of civil liberties and will likely appear on the AP exam.

- **Incorporation doctrine** The Fourteenth Amendment (1868) created the possibility that some or all of the Bill of Rights might restrict state government actions based on the amendment's "due-process clause." The Supreme Court initially denied making the Bill of Rights applicable to the states. However, in *Gitlow v. New York* (1925), the Court argued for the first time that fundamental personal rights are protected from infringement by the states because of the due-process clause. Most, though not all, of the Bill of Rights has been incorporated into the states since 1925.
- **Defining speech** Some kinds of speech are not fully protected by the First Amendment:
  - Libel (a written statement defaming another with false information) and slander (a defamatory oral statement) have drawn variable jury awards. The burden of proof in libel and slander cases tends to be higher for public figures because they must also show the words were written with actual malice, with reckless disregard for the truth, and with knowledge that the words were false.
  - The Federal Communications Commission has not created an enduring and comprehensive definition of obscenity. A 1973 definition allowed contemporary community standards to determine what is obscene. The same ruling

created a standard for obscenity based on whether the material in question had "serious literary, artistic, political, or scientific value." The Supreme Court has typically upheld zoning ordinances for adult theaters and bookstores. Pornography on television, video, and the Internet has strained the community standard ruling, and regulation of these has generally been ruled unconstitutional.

- Symbolic speech, or expression through acts rather than words, is not protected when it involves an illegal act (for example, burning a draft card). Symbolic speech is generally protected when no illegal act is involved. For instance, flag burning has been ruled protected speech.

- **Defining a person** Corporations and organizations usually have the same First Amendment rights as individuals. More restrictions can be placed on commercial speech than on individual speech, but the restrictions must be narrowly tailored and serve the public interest. Young people have fewer rights than adults do. For instance, the Supreme Court has ruled that a school newspaper can be censored by the school's administration.
- **Church and state** Religious rights in the First Amendment are protected by two different clauses:
  - *The free-exercise clause* The government cannot interfere with an individual's practice of religion. Furthermore, the law may not impose special burdens on religion. Yet there are no religious exemptions from a law binding all other citizens, even if that law oppresses one's religious beliefs. Some conflict between religious freedom and public policy continues to be problematic, such as conscientious objectors to military service and refusal to work on Saturdays.
  - *The establishment clause* The Supreme Court has traditionally interpreted the establishment clause to mean no government involvement in religion, even if the involvement is not preferential. Yet some kinds of government aid to parochial schools and denominational colleges have been allowed. Aid is allowed if it involves a secular purpose, has an impact that neither advances nor inhibits religion, and does not create "excessive government entanglement with religion." Supreme Court rulings remain complex and shifting in regard to the establishment clause.

RIGHTS OF THE ACCUSED

The Bill of Rights offers several civil liberties that protect the accused. These include the right to exclude evidence improperly obtained from a trial, the right to proper searches and seizures, and the right to avoid self-incrimination.

Evidence gathered in violation of the Constitution cannot be used in trials; this is referred to as the exclusionary rule. The exclusionary rule is derived from both the Fourth Amendment (freedom from

unreasonable searches and seizures) and the Fifth Amendment (protection against self incrimination). In *Mapp v. Ohio* (1961), the Supreme Court ruled that the exclusionary rule applies to the states as well as the federal government.

Reasonable searches of individuals can be made only with a properly obtained search warrant, issued when a judge determines that the police have good reason—probable cause—to believe that a crime has been committed and that the evidence bearing on that crime will be found at a certain location. In addition an individual can be searched if that search occurs in the process of a lawful arrest. In general the police can search the individual being arrested, items in plain view, and items under the immediate control of the individual. An arrest made of someone in a car is a constantly changing matter in regards to proper searches. Recent court rulings have tended to allow the police to do more searching of a car upon arrest. Concern for public safety can justify mandatory drug testing, even without a search warrant or individualized suspicion. Lacking the threat to public safety, however, the Supreme Court has been skeptical about drug testing.

The constitutional ban on confessions and self-incrimination was originally intended to prevent torture or coercion. These rights were extended in the 1960s. *Miranda v. Arizona* (1966) set guidelines for police questioning the accused by forcing officers to read suspects their rights. These were designed to protect the accused against self-incrimination and to protect their right to counsel. Police were originally disgruntled by having to follow the guidelines of *Miranda* because they thought that reading suspects their rights would silence them and hinder investigations. Today police accept the reading of rights as a routine part of an arrest.

TERRORISM AND CIVIL LIBERTIES

The attacks of September 11, 2001, raised important questions about how far the government can go in investigating and prosecuting individuals. Congress passed a new law, the Patriot Act, designed to increase federal powers in investigating terrorists. It included these provisions:

- The government may tap any telephone used by a suspect after receiving a court order.
- The government may tap Internet connections with a court order.
- The government may seize voicemail with a court order.
- Investigators can share information learned in grand jury proceedings.
- Any noncitizen may be held as a security risk for seven days, or longer if certified to be a security risk.
- The federal government may track money across U.S. borders and among banks.
- The statute of limitations on terrorist crimes is eliminated, with increased penalties.

An executive order then proclaimed a national emergency so that any noncitizen believed to be a terrorist or to have harbored a terrorist would be tried by a military court. A military court operates with the following provisions:

- The accused are tried before a commission of military officers.
- A two-thirds vote of the commission is needed to find the accused guilty.
- An appeal by the accused may be made only to the secretary of defense or to the president.

The Patriot Act continues to raise issues regarding terrorism and civil liberties. The ability to tap phones and Internet connections is an expansion of police powers that many feel is dangerous and could lead to invasions of privacy against citizens who have no terrorist ties. Government investigations into phone, Internet, voice mail, and even library records can be conducted in secrecy without the knowledge of the person being investigated. Many civil libertarians feel this is a violation of due process of law.