

"Both critics and defenders of the US federal courts tend significantly to overstate their power and independence." Discuss.

The US federal courts are just one branch of America's constitutionally separated government. Critics generally claim that the courts have too much power relative to the other branches of government; defenders of the courts either claim that they are not as powerful as critics make them out to be, or accept that they are powerful and claim that this power is justified. However, their power is often overstated and it can be shown that they are limited to a considerable extent by their own decisions, by other branches of government, and by external agencies.

There are two types of federal court in the USA: the legislative courts, consisting of the Tax Court, the Court of Appeals for the Armed Services and the Court of Veterans' Appeals; and the constitutional courts, consisting of the Supreme Court (set up by the Constitution), the Courts of Appeals (established by Congress in 1789) and the District Courts (established by Congress in 1891). The vast majority of cases go through the constitutional courts, and the vast majority of important decisions are made there, so it is them that are the main subject of this essay.

The federal courts (especially the Supreme Court) could be seen as anomalies in a system of electoral accountability; they are neither accountable to the electorate nor answerable to politicians. However, the Constitution was not designed to allow the total dominance of majoritarian democracy, and the courts were never supposed to be representative. This alarms those critics who see liberty's best defence in democratic accountability, but appeals to those fearful of the democratic 'tyranny of the majority'. Their power and legitimacy derives partly from a widespread public distrust of politicians, and a desire to see the Constitution protected. This may derive from the fact that most Americans are members of some minority or other, and their collective interest might best be served by an undemocratic Court. Hamilton sees the Constitution as 'fundamental law', and claims that 'the intention of the people [i.e. the Constitution] ought to be preferred to the intention of their agents [i.e. politicians]'.

It is worth examining first what the powers of the federal courts actually are. The district courts have original jurisdiction in federal cases - crimes against the USA, financially substantial civil cases (where over \$10,000 is at stake) under federal law or the federal Constitution, review and enforcement of the orders and actions of certain federal agencies, and other cases determined by Congress. These are the only federal courts in which attorneys are present to examine and cross-examine witnesses, and the only federal courts which make use of a jury; they exist mainly to establish the facts of a case under current law. Their role is traditionally seen as one of norm

enforcement, not policy-making. The idea was that high courts would make decisions which the lower courts would implement. However, lower courts can be seen as more independent actors than this theory suggests, for example in the desegregation of schools, where many lower courts evaded or postponed the Supreme Court's decision. Moreover, their decisions serve as a guide for future actions, and they have a particularly large policy-making role in this sense; this is particularly true of the increasingly popular 'private' legislation, for example disputes between neighbours. Lower courts must also interpret some of the more vague Supreme Court decisions; for example, on the issue of obscenity laws, phrases like 'patently offensive', 'contemporary community standards' and 'without redeeming social value' cannot be interpreted on a case-by-case basis by the Supreme Court, and the decision must be left to lower courts.

The Courts of Appeals (also known by their former name of Circuit Courts) have an entirely appellate role, with most of their cases coming from the federal district courts. 85% of cases presented before these courts go no further. J. Woodford Howard describes their role as to 'concentrate on statutory interpretation, administrative review and error correction in masses of routine adjudications.' This is in contrast to the Supreme Court, seen by Howard as a 'constitutional tribunal'. The Courts of Appeals have an important role in sorting cases for the Supreme Court, deciding which ones need appeal to a higher body. However they do have some policy-making role as well, and influence outside their geographical area; for example, in 1996 the Court of Appeals for the 5<sup>th</sup> Circuit ruled against affirmative action in admissions to the University of Texas Law School, citing the 14<sup>th</sup> Amendment to the Constitution. The Supreme Court denied a review of the case. In theory the judgement only applies in the 5<sup>th</sup> Circuit, but it has had consequences across the rest of the USA as well.

The Supreme Court has both an original and an appellate jurisdiction, the former derived from the Constitution, and the latter determined (in theory) by Congress. Its original jurisdiction allows it to rule on cases involving two or more States, cases between the USA and any State, cases affecting 'foreign ambassadors, ministers and consuls' and cases by a State against a citizen of any other State or 'foreign States, citizens or subjects'. Except in cases between the USA and a State, its jurisdiction is not exclusive. Its appellate jurisdiction has two main elements. Firstly, it is the final arbiter in federal cases. It has the power of *certiorari*, meaning that it may choose which cases come before it and which remain with the Courts of Appeals. It interprets legislation, judging on the lawfulness of the actions of public officials. However, it also has the ability to strike down any law passed by Congress as unconstitutional, determining the fit between Constitutional law and statute law. As such, it does have a role to play as a policy maker. Its sphere of operation has changed over time; between 1845 and 1941 its prime concern

was the basis of federal intervention in the economy, but a change in its composition then led to a greater focus on civil liberties cases such as those concerning racial equality, privacy or freedom of speech. Its policy-making role can clearly be seen in such cases - in *Plessy v. Ferguson* (1896) the Court effectively allowed the 'separate but equal' policy of Louisiana to be applied across the whole country, while by its decision in *Brown v. Board of Education* (1954) it ensured desegregation.

However, there are a number of limits on the powers and independence of the federal courts. Some of these derive from the Constitution itself, such as Presidential nomination and Senate scrutiny of appointments to the federal bench. The federal courts are also limited by their own adherence to the principle of judicial self-restraint, and also by other branches of the government.

While the decisions of the courts are supposed to be non-political, the appointments system is anything but non-political. Federal judges right down from Supreme Court Justices to district courts judges are nominated by the President and approved or rejected by the Senate. It is fair to say that Presidents do not always appoint judges purely on criteria of ability; rather they tend to appoint or promote those who have a similar judicial or social outlook as the President. The system has become especially politicised since the nomination of Thurgood Marshall in 1967. The Senate rarely rejects nominations to the Supreme Court; since 1932, there have been only three outright rejections (Haynsworth, Carswell and Bork), two filibusters (Fortas and Thornberry) and one candidate withdrawn by the President to save embarrassment (Ginsburg). However, looking at these rejections gives a clear insight into the lack of political independence in appointments to the bench. Haynsworth, a strict constructionist nominated by Nixon, was deeply conservative on civil rights and labour law. A corruption scandal resulted in his rejection. Carswell was another Nixon nomination, one who had defended segregation and had attempted to secure federal funding for a segregated golf club. Even his supporters admitted that he was intellectually mediocre, with one delivering an infamous speech to the Senate in which he claimed that because the majority of Americans were not as intelligent as the average Supreme Court Justice, they needed someone less intelligent to represent them. Bork, nominated by Reagan, was seen as having too narrow a judicial philosophy; he had opposed the Civil Rights Act of 1964, dismissed the Watergate Special Prosecutor on Nixon's direct instruction, and claimed that the Constitution did not include a right to privacy. Except in the Bork case, it was on the grounds of competence and not judicial philosophy that the nominations were rejected, but it is notable that all these rejected judges had been nominated for political reasons in the first place. Because Justices choose when to retire (unless they die in office) it is very difficult for a President to achieve short-term manipulation of the Supreme Court. However, long-term ideological manipulation is a distinct possibility, and its consequences can be seen in the Rehnquist Court,

where a liberal President had to work with a Court largely appointed by his conservative predecessors.

Courts also limit themselves by the principle of judicial self-restraint. This is employed largely to maintain their legitimacy and to reduce the number of cases in which they could become involved. Its maxims are derived from the Constitution, Congress and common law, and are summarised below.

- A definite controversy must exist, so there needs to be a case. The courts are not in the business of providing advisory opinions, so both parties need 'standing' (a direct and personal interest in the outcome of a case) and the case must not be moot.
- A plea to the Supreme Court must be specific, citing a particular part of the Constitution
- One may not challenge a law from which one has already directly benefited.
- Appellate courts rule on legal, not factual, questions; the latter are the responsibility of the trial courts.
- The Supreme Court is not (technically) bound by precedent.
- Other remedies must be exhausted; a case must work its way up the ladder with legal petitions even including, for example, a Grievances Committee at a university.
- Courts do not in theory decide 'political questions', those which should be resolved by other branches of government. For example, the Pacific States Telephone and Telegraph Company objected to Oregon giving its citizens the right to vote in referenda, claiming it was being 'reduced to a democracy' while the Constitution guaranteed a 'republican form of government'. The Supreme Court decided that as the relevant section of the Constitution was concerned with the duties of Congress, this was a political question. This maxim also helps to explain why the Supreme Court has refused to get involved in foreign affairs, for example not declaring the Vietnam War illegal.
- The burden of proof is on the petitioner; laws are presumed legal unless proven otherwise. However, some say that in cases where the government seeks to restrict civil rights, the burden of proof must lie with the government.
- Laws are overturned on the narrowest grounds only; the Supreme Court may only overturn a portion of a law, thus amending it, and often may dismiss a law on the grounds that an official acted beyond his delegated authority. This helps to prevent direct conflict between the courts and Congress.
- No rulings are made on the 'wisdom' of legislation, only on its constitutionality. This maxim is probably the one least understood by the general public and the one most often violated by the courts.

While these prescriptive maxims suggest a less powerful court system than might previously have been imagined, the courts still have a large policy-making role. However, the courts may come into conflict with the other branches of government in the USA, which are essential to the implementation and impact of judicial decisions.

Congress has the power to decide precisely which areas the Supreme Court has appellate jurisdiction over, as well as determining the types of issues and cases that the courts will hear. For example, in the 1950s the Jenner-Butler bill aimed to deprive the Court of all jurisdiction in security cases involving suspected communists, in effect removing all of their civil rights. This only failed to get through the House by one vote. In the 1980s, 36 senators voted to remove the issue of school prayer from the Supreme Court's jurisdiction. Another example can be seen in the 1996 Defence of Marriage Act, which permitted the state courts to ignore judgements from other states 'respecting' same-sex marriages.

However, the power of Congress to overturn legislation is in practice rather limited. Between 1950 and 1972 only 27 out of 222 labour and anti-trust decisions were the objects of reversal attempts in Congress, and only 9 of these were successful. In response to an unpopular Supreme Court decision about the right to deface the American flag, Congress passed the Flag Protection Act in 1989. This provoked a number of flag-burning demonstrations, and in 1990 the Supreme Court declared the law unconstitutional. If the courts misinterpret a law passed by Congress, it takes time to re-write the law and make it less ambiguous, and the second attempt to pass the law may need the support of the President and the opposition party. Constitutional amendments are even more difficult to obtain, requiring a two-thirds majority in both houses of Congress and ratification by three quarters of the states. Only four Supreme Court decisions have ever been overturned by constitutional amendments. Congress still wields threats such as the impeachment of judges, closer scrutiny of the judicial philosophies of nominees and (most commonly) verbal denouncements. It seems that in its dealings with the courts, the bark of Congress is far worse than its bite. Congress do have powers over the courts, but rarely use them, as the public generally prefer the separation of powers and such moves generally reduce the popularity of Congress. However, the advantage of the courts is a fragile one; were they not to maintain their popularity, it would be much easier for Congress to override them.

The Executive branch of government has some influence over the implementation of court decisions. In some cases, the President may be required directly to implement an order, for example when Nixon was ordered to hand over tapes of his conversations. The status or visibility of a President may encourage support or resistance to a law; for example, Eisenhower's lack of enthusiasm about *Brown v. Board of Education (1954)* may have led to Governor Orval

Farbus of Arkansas blocking desegregation at Little Rock. Presidents may also lobby Congress for changes in the Supreme Court; most famously, Roosevelt aimed to increase its size to 15 members in order to 'pack' it with justices favourable to the New Deal, while Reagan pushed for constitutional amendments to overturn the Supreme Court's decisions on school prayer and abortion by limiting their jurisdiction in such matters. Reagan's influence extended into the lower courts more than ever before; he set up an Office of Legal Policy to ensure that all nominees to federal courts were systematically screened on the basis of their judicial philosophy. As well as the President, two other major figures in the executive branch are the Attorney-General and the Solicitor-General. Nominated by the President and accepted or rejected by the Senate, the occupants of these positions can have an important influence on judicial policy. The Attorney-General can emphasise or de-emphasise specific policies. The Solicitor-General has a dual responsibility to the executive and the judiciary, acting as a counsellor to the Supreme Court about the meaning of federal statutes and the Constitution, and determining which cases involving the US as a party will be appealed to the Supreme Court.

However, the executive does not have as much power over the courts as the above analysis suggests. Firstly, the courts have the power to embarrass a President, for example in the cases of the Nixon tapes and the order to Clinton's bodyguards to give evidence over the Lewinsky affair. Secondly, as judges can choose the time of their own retirement, many wait until a President is in office who will pick a successor similar to themselves. For example, it now seems likely that some of the more conservative Supreme Court justices will retire, safe in the knowledge that President Bush will replace them with other conservative justices.

The power and independence of the federal courts in the USA is often overemphasised. While neither Congress nor the Executive by themselves have a great deal of power over court decisions (though Congress must have granted jurisdiction), the principle of judicial self-restraint ensures that their role remains limited; were they too powerful, this would be reflected by unpopularity. Despite the courts not being constitutionally bound by past precedent, there is an enormous emphasis on it, and norm enforcement is far more prevalent than policy-making on most issues. Historically, the greatest policy-making influence of the courts has been in civil rights questions, with very little policy appearing on labour or economic issues. They are however at their most powerful when new types of controversies abound, for example freedom of speech on the Internet, so some revival in the power of the courts may be occurring now. That said, there has also been a recent tendency towards appointing strict constructionists to the Supreme Court, and this reduces the likelihood that the Courts will act as a policy-maker.