

## **Future of the United States Supreme Court**

*David Wallis*

A few months ago, the United States Supreme Court became the final arbitrator on whether election ballots cast in select counties of Florida should be manually recounted. When the Court ruled against manual recounts in *Bush v. Gore*, the media and liberal political analysts lashed out at the Court, accusing it of replacing its judgment for the judgment of the voters. Supreme Court Justice John Stevens joined in the criticism of the Court in his dissenting opinion:

Time will one day heal the wounds to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

The Court has not always been looked to as the final arbitrator of political controversies. A review of the early years of the Court reveals that it did not even enjoy co-equal status with the executive and judicial branches. Indeed, when the current capital complex was constructed in Washington D.C., no one thought to provide a chamber for the Court. The Court had to be housed in a basement room of the Senate.

The Court got off to a very slow start in taking care of its own business. It decided only two cases in its first three years, and only about sixty cases in its first ten years of existence. The Court's first Chief Justice, John Jay, also served as ambassador to England and spent most of his time abroad until, in his absence, he discovered he had been elected as Governor of New York.

The Court began to be the battleground for determining political controversies soon after the Republicans took control of Congress in 1800 and Thomas Jefferson was elected as President. Before giving up his office as President, John Adams appointed his Secretary of State, John Marshall, as Chief Justice of the Court. On the evening before the Republicans took control of Congress, the old Federalist Congress created several new judgeships and confirmed Adams' selections of new Federalist judges for these newly-created positions. The next day, Jefferson took office and his Secretary of State, James Madison, refused to deliver the commissions to many of the new Federalist judges, including Jefferson's distant relative, William Marbury.

Marbury petitioned the Court to mandate that Madison deliver to him his judicial commission. Marshall, writing for the Court, held that Marbury had a right to his judicial commission. In so doing, the Court found that it had the authority to rule on the correctness of Executive actions. Nevertheless, the Court ruled that it could not grant Marbury a remedy because it was not within the original jurisdiction fixed for the Court in Article III of the Constitution. Had Marbury gone to a lower federal court first, the

Court could have granted him a remedy on appeal because Article III provides the Court with appellate jurisdiction to grant Marbury's remedy. This case, Marbury v. Madison, has been the fountainhead of the Court's power of judicial review. It established the role of the Court as the final arbitrator of the Constitution.

Shortly after the decision of Marbury v. Madison, Jefferson wrote to a friend that "the Federalists have retired into the judiciary as a stronghold . . . and from that battery all the work of Republicanism are to be beaten down and erased." The Republicans fought back at the Court by attempting to impeach one of the Court's most outspoken Federalist Justices, Samuel Chase. The House of Representatives passed articles of impeachment based on Chase's statements before a grand jury sharply criticizing Congress and his unacceptable degree of partiality in presiding over two trials.

The Senate trial of Chase took an unprecedented ten days. Although the Republicans held 25 of the 34 Senate seats at the time, they could not reach the two-thirds majority necessary to impeach Chase. The Senate impeachment vote set an important precedent that has governed the removal by impeachment of federal judges from that day to this: A judge's judicial acts may not serve as the basis for impeachment - only acts amounting to "high crimes and misdemeanors" can serve as the basis for removing a judge. The only way left for the other branches of government to affect the opinions of the Court was through the appointment of new Justices.

During the almost 200 years since Marbury v. Madison, the Court has ruled on most of the significant political controversies faced by our Country. A review of last year's Court decisions illustrates the role that the Court has taken in our country's political structure. Last year the Court, many times by a 5-4 vote, ruled on Constitutional issues such as gay leaders in Boy Scouts, prayer at high school graduation and football games, government aid to private schools, partial birth abortions, and the rights of grandparents. Over 40 percent of last year's written decisions were determined by two or fewer votes.

Among the current nine Justices, several patterns of voting have occurred during the past few years. Chief Justice Rehnquist and Justices Scalia and Thomas are viewed as the conservative voting block. Justices Stevens, Ginsburg and Breyer often team up on the liberal side. The so-called moderate or "swing" votes are often Justices O'Connor, Kennedy, and Souter. Of the swing votes, Justice Souter most often joins the liberal side on social issues, and Justices O'Connor (except on women's rights issues) and Kennedy favor the conservative side.

The composition of the Court became a much-watched issue in the 2000 Presidential elections. I know of a couple individuals who voted for Vice-President Gore solely because of the possibility of a Republican President appointing anti-abortion Justices to the Court. Not only will abortion remain a hot issue for the Court, but issues such as affirmative action, school vouchers, federal-state power balance, gun control, health care reform, police authority, same-sex marriage, domestic-partnership benefits, privacy on the Internet, and voter's rights are likely to be reviewed as well.

Both conservative and liberal political analysts agree that two to five Justices of the Court may step down in the next four years. Likely suspects are Chief Justice Rehnquist (age 75), Justice Stevens (age 80), and Justice O'Connor (age 70). If these predictions hold true, the selection of replacements for these Justices could substantially change the course of constitutional law. If the change is dramatic and if it affects certain sensitive social issues (e.g., abortion), it will be interesting how the other branches of government and society will react because there is little that can be done to affect the Court's decisions. At a minimum, the replacement of Justices on the Court will be closely watched and hotly contested. Another possibility is that the other branches of government may try to change the judicial review authority of the lower federal courts, thus affecting the number of cases that can reach the highest Court. One result is clear: the appointment of Justices certainly will be a critical issue during Senate confirmation hearings for future Justices and will become an important issue during future Presidential elections.