

Student Handout: Supreme Court Nominations and Political Ideology Activity 2, Part A

Name _____

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Background: In 1787, the framers of the Constitution divided the authority of the federal government into three branches: the executive, legislative and judiciary. Each branch was granted distinct powers and within these powers, checks and balances were established so none of the three branches could become too powerful. In a stroke of genius, the framers also established an institution designed to interpret the constitution's provisions. This institution was the Supreme Court, a concept quite unique at the time. Though this power is not specifically stated in the Constitution, it was intended by the framers as explained in the Federalist Papers in Federalist 78: "Limitations [on government's power] can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void."

This inferred power became a reality with the case of *Marbury v. Madison* in 1803. In this case, Chief Justice John Marshall struck down a 1789 law passed by Congress that gave authority to the Court which wasn't granted in the Constitution. Marshall's decision asserted the power of judicial review to the Supreme Court – the power to declare acts of Congress unconstitutional. This power provides the judicial branch with an important check on the powers of the two other branches and keeps in balance the powers of government. In recent years, some conservative organizations and politicians have expressed concern that some judges have over extended this power with rulings that go against the will of the people. When this happens, the judges are accused of being "activists" and "legislating (or making laws) from the bench." Examples of this are court rulings striking down anti-abortion laws, anti-gay marriage laws, and laws allowing the display of the Ten Commandments. Historically, the courts have often decided cases that were not always in the mainstream of society's thinking – *Brown v. Board of Education* that desegregated the schools and providing legal counsel at government expense for those accused of capital offenses. But these too were controversial at the time and the court was questioned by some on its decisions.

Another example of striking a balance of power among the three branches is the power of appointment and "advice and consent." The Executive Branch has the power to appoint members to the Supreme Court (and lower courts) and the Senate has the power to advise and agree to the appointments...or not... thus preserving the balance of power among the three branches of government. At least in theory. The political philosophies or ideologies of either the president or the Senate can influence their decision making. Both branches will assert their decisions of appointment and confirmation are based solely on constitutional principles and the quality and experience of the candidates. However, in reality, political ideology plays a strong role in the decisions surrounding judicial appointments. If the political will of either branch is leaning toward change, then that branch will be looking for judges that are more inclined to look at the law as flexible to a degree. Conversely, if the political will is more inclined to keep the status quo or refer back to the "original intent" of the Constitution's framers, then the choice will be for a judge who is more inclined to rule in that way.

The terminology used to describe a judicial nominee's ideology can be confusing. In nearly all cases, judges rule based on the principles of the Constitution. However, the Constitution is subject to interpretation by these judges. They know the framers of the Constitution wrote the document with the intention that the application of some of its principles would change over time as would the society it was to govern. These methods of interpretations