

The question, then, is whether the repeated dissents by Scalia, Kennedy, and Thomas over a twenty-year period finally convinced a majority of the Court, or whether the two newest members—ideologically aligned with them—made the difference. Certainly there has been not only an ongoing constitutional dialogue over campaign finance reform but a political one as well. The two decisions had Republicans cheering for what they considered a victory for free speech, while Democrats lambasted the Court for abandoning a century of precedent that had attempted to control the corrosive and corrupting effects of money in campaigns. The division on the Court may well reflect the political divisions outside, in this case over questions such as free speech and whether corporations have First Amendment rights. But as Justice Jackson once noted, “Conflicts which have divided the Justices always mirror a conflict which pervades society.”

These conflicts are part of the larger dialogue, and while not all divisions within the Court echo questions of public policy being debated by the public, it is rare that a measure that splits the public—affirmative action, campaign finance, and the like—will not show up in the Marble Palace.

WE WILL BE LOOKING primarily at the dialogue that takes place within the Court and how dissent has affected that dialogue. The justices, however, speak not only with each other but with other participants in our constitutional government. For now, we can briefly mention these other members of the dialogue.

Aside from constitutional interpretation, a major task of the Court is statutory interpretation of the laws passed by Congress and signed by the president. Clearly, not every law requires a court hearing, and even those that may wind up in the district courts or the courts of appeals may not raise questions that require the Supreme Court’s review. When the Court passes on legislation, two primary questions arise. The first is whether Congress had power under the Constitution to enact this statute in the first place. If Congress has exceeded this power, then the law is held unconstitutional, and the only way to override that type of decision is by the amendment process. The clearest example of this is the passage of the Sixteenth Amendment, authorizing Congress to tax incomes, a direct response to the Court ruling the income tax unconstitutional in 1895.

More often, the complicated process of drafting a bill has resulted in language that is far from clear as to either meaning or application, and the courts are asked to determine exactly what Congress meant. Some

justices are willing to look at the statements made in the House or Senate to help derive congressional intent; others believe that such documents are irrelevant and that the only thing that matters is the wording of the statute itself.

Statutory interpretation that does not involve constitutionality can be remedied by Congress, in essence, saying to the Court, "That is not what we meant," and reenacting the statute with more precise wording. It should be noted that both a majority opinion and a dissent can lead to congressional revision. Two examples may suffice where a dissenter successfully called upon Congress to reverse a majority opinion.

In 1845, the Court ruled on a statute changing the way that customs officers reported and submitted collected money. The majority held that the wording of the new law abolished the importers' traditional common-law remedy to sue if a mistake had been made. In his dissent, Justice Joseph Story declared that he believed the majority had misinterpreted the statute, and he suggested that Congress correct this mistake. Congress responded with alacrity, making it plain that it had never been its intention to do away with the remedy.

More recently, the Court ruled that the Equal Pay Act required an employee who believed she was being discriminated against because of gender to file a complaint within 180 days of the violation. The Equal Employment Opportunity Commission had interpreted this provision to mean within 180 days of learning about the discrimination. Lilly Ledbetter had worked for many years at Goodyear before learning about the discrepancy in pay that affected her and other women employees. The majority decision, which said that the wording of the statute had to be taken literally, held that the law required filing within 180 days of the discrimination and effectively barred nearly all women from suing, because few if any would have known within six months that their pay was less than that of a man in a similar job. Justice Ruth Bader Ginsburg dissented for herself and three other justices, not only attacking the majority for its crabbed holding, but also calling on Congress to modify the law and to make it clear that the 180-day limit ran from the time one learned about the inequity.

Before the day was over, Senator Hillary Clinton of New York announced she would submit such a bill, and it soon became obvious that a majority in both houses of Congress would support it. Business lobbies inundated the White House with protests, and George W. Bush declared that if Congress passed such a bill, he would veto it. When Barack Obama became president, he immediately invited Congress to pass what he termed the "Lilly Ledbetter Fair Pay Law" and promised he



OFFICIAL WHITE HOUSE PHOTO BY JOYCE BOGHOSIAN

President Barack Obama signs the Lilly Ledbetter Fair Pay Act into law on 29 January 2009. Lilly Ledbetter is standing directly behind the president.

would sign it. Congress acted with alacrity, and Obama signed the bill as one of his first acts as president on 29 January 2009.

Recently, the Court found the wording of a statute to be so flawed that all nine justices called on Congress to remedy that statute's defects. The law, allowing restitution to victims of child pornography, left it uncertain how much a victim could collect and, if numerous people viewed the pictures on the Internet, whether the victim had to go after each one. A woman—"Amy Unknown"—had as a child been raped by her uncle, who took pictures and posted them on the Net. The woman had won a judgment of \$3.4 million against a man who had viewed the pictures. Five members of the Court said she could collect, but only in an amount commensurate to proximate damages. Three members dissented, saying their reading of the statute was that she could collect nothing, while one justice thought she could collect the full amount. All three opinions called on Congress to remedy the defects of the law.

The Court also interacts with the chief executive. In some cases, it is really more a question of whether the law he is executing is in fact constitutional. Although the president might have proposed the measure in the first place, the constitutional question will be whether Congress has the power, and the statutory query will be whether Congress meant for the president to act as he did. When the president or one of his

cabinet members purports to act under the powers granted in Article II, questions deal solely with presidential power and authority. In any case involving the president or Congress, the Court nearly always repeats the mantra that deference is due to the judgments of the coordinate branches of government. Despite that, the Court has had no problem telling the president that he cannot do certain things.

One of the most famous cases involved Harry S. Truman and the steel seizure case of 1952. The threat of a strike by the United Steelworkers led President Truman to conclude that a strike would jeopardize steel production in the middle of the Korean War. Truman believed that he had the same power as Franklin Roosevelt had exercised during World War II, and in April he issued Executive Order 10340 directing Secretary of Commerce Charles Sawyer to seize and operate most of the nation's steel mills. Truman had no statutory authority to do this and claimed he was acting under the executive authority of the president.

Congress, however, had enacted the Taft-Hartley Act of 1947 that included procedures by which the government could secure an eighty-day cooling-off period to postpone any strike that might adversely affect the public interest. Truman, however, had no desire to utilize that law, which he had vetoed and which Congress had then passed over his veto. In the ensuing case, the Supreme Court voted 6–3 that Truman had exceeded his authority and that he had a congressionally sanctioned method that provided him a tool with which to handle the matter.

More recently, one can see a dialogue between the Court and President George W. Bush over the legal process due to detainees held at the Guantánamo Naval Base in Cuba. After the beginnings of the wars in Afghanistan and Iraq, the army captured prisoners, some of whom the Bush administration labeled “enemy combatants.” It decided that these men would not be treated as prisoners of war but be held incommunicado and without redress to American courts. Cases attacking this policy began almost immediately, with a majority of the lower courts ruling that the administration had exceeded its authority under the Article II war powers. The first of these cases reached the Supreme Court in 2004, despite strong efforts by the Justice Department to prevent any courts from hearing these cases. In the series of cases that followed, the Court consistently told the president that he did not have the authority claimed and that it would be the Court, not the executive branch, that determined the jurisdiction of the high court.

In this case, we can see the justices—both the majority and the dissenters—reaching out beyond the courtroom to talk to the president, to Congress, and to the people. Around this time, Justice Kennedy

spoke to a group at the Court and said that he considered education to be one of the most important tasks of a justice. Decisions and the reasons behind them had to be made clear not just to lawyers but to the public as well. When the decision in the last of these cases came down on 12 June 2008, Kennedy took the unusual step of orally delivering much of his opinion, which included a lengthy history of habeas corpus.

The treatment of detainees at Guantánamo, and the various Court opinions, became part of a very public dialogue in the 2008 presidential campaign between John McCain and Barack Obama. McCain, a former prisoner of war during the Vietnam conflict, did not support torture but argued that the government needed to be able to deal with terrorists outside the confines of the American criminal justice system. Obama, on the other hand, lashed out at the Bush administration for its flagrant disregard not only of human rights but of the Constitution as well and promised to close Guantánamo, a promise that Congress thwarted him from fulfilling.

The detainee issue was not the first issue debated on the Court that became part of the political dialogue on the campaign trail, nor will it be the last. Perhaps in no other way can the people signal their views on the Court decisions than by casting their ballot for or against a candidate who agrees with the majority or with the dissent. The justices' dialogue shapes the constitutional framework of an issue, but many if not most of these questions play out in a larger context. Many voters in 2008 had strong views regarding how the country should deal with the detainees, views that mirrored the various opinions expressed by the justices.

IN A DEMOCRACY, there are—or should be—many participants in a conversation on public policy. The Court, the president, and Congress all have voices that are clearly heard. But there are others for whom the constitutional dialogue is also important. One group consists of judges on state and lower federal courts. For them, the Supreme Court's constitutional rulings are supposed to provide guidance, and in most cases they do. When, however, there is a convincing dissent, these jurists may try to distinguish the facts of a case so that they can follow the dissent rather than the majority.

The dialogue with the legal academy may not generate much public attention, but it is of concern to jurists and to law professors, especially because many judges are former law professors. Louis Brandeis became the first justice to cite a law review article in a Supreme Court opinion. Acting through Felix Frankfurter, he also encouraged law reviews to analyze and criticize Supreme Court decisions, because through such