



Chapter 15

Courts, Judges, and the Law

How is the U.S. judicial system organized to ensure justice?

■ 15.1 Introduction

On February 2, 1790, the U.S. Supreme Court met publicly for the first time. Of the six justices that President George Washington had appointed to the Court, however, only four had managed to reach New York City, the new nation's temporary capital. The other two justices missed the Court's first term entirely.

The courtroom was crowded with onlookers as the justices arrived. Most of the observers were more impressed with the "elegance" of the justices' robes than with the judicial business at hand. In truth, there was no business. The Supreme Court's **docket**, or list of cases, was empty and would remain so for the next three years. After dealing with a few house-keeping chores, the justices ended their first session on February 10.

The Constitution, which had been ratified only two years earlier, clearly established the Supreme Court as part of a federal judiciary. Article III, Section I begins, "The judicial Power of the United States, shall be vested in one supreme Court." However, the framers of the Constitution were divided as to whether the new nation needed any inferior, or lower, courts. Some delegates to the Constitutional Convention argued that the state courts were more than able to deal with the nation's legal business. Others

The Supreme Court of the United States

Speaking of Politics

criminal law

The branch of law that regulates the conduct of individuals, defines crimes, and provides punishments for criminal acts. In criminal cases, the government is the prosecutor, because criminal acts are viewed as crimes against society.

civil law

The branch of law that concerns relationships between private parties. A civil action is usually brought by someone who claims to have suffered a loss because of another party's actions.

burden of proof

The obligation in a legal case to prove allegations by presenting strong supporting evidence. In a criminal case, this burden rests on the prosecution and in a civil case on the plaintiff.

defendant

The person or party in a criminal trial who is charged with committing a crime. Or, in a civil case, the person or party being sued.

prosecution

The attorneys representing the government and the people in a criminal case. It is the prosecution's job to show why a person accused of a crime should be found guilty as charged.

plaintiff

The person or party who brings a lawsuit, or legal action, against another party in a civil case.

writ of certiorari

An order from the Supreme Court to a lower court to provide the records of a case the Court has decided to review.

legal brief

A written document drawn up by an attorney that presents the facts and points of law in a client's case.



The Judiciary Act of 1789 created a judicial system with several levels. Under certain circumstances, decisions from lower courts can be appealed to a higher court for review. There is no appeal, however, in cases decided by the Supreme Court. Decisions made there are final.

worried that a new set of federal courts would be too expensive.

In the end, the delegates compromised. The Constitution does not require the creation of inferior courts. However, it does permit "such inferior Courts as the Congress may from time to time ordain and establish."

Congress promptly moved to create these "inferior courts" by enacting the Judiciary Act of 1789. This law established a federal judicial system made up of district and circuit courts and specified the kinds of cases the courts could try. It laid out the qualifications and responsibilities of federal judges, district attorneys, and other judicial officials. It set the number of Supreme Court justices at six and established the principle that decisions of the Supreme Court are final and cannot be appealed.

With relatively minor changes, the federal judicial system created in 1789 is the same system we have today. The number and levels of courts has grown with the nation, and three more justices have been added to the Supreme Court to deal with its growing caseload. This chapter examines the federal judicial system and its relationship to state systems and to ordinary citizens seeking justice.

15.2 The Main Role of the Judicial Branch: Resolving Society's Conflicts

At the heart of every judicial proceeding is the law. And at the heart of every law is a potential conflict. Such conflicts may involve individuals, businesses, interest groups, or society at large. The judicial system's job is to resolve those conflicts peacefully, in accordance with the law, and in a manner most parties to the conflict will see as just, or fair.

Two Kinds of Legal Conflicts: Criminal and Civil

The challenge of resolving conflicts in a just manner usually begins in trial courts, which focus on sorting through the facts of a case. Cases can be categorized by whether the dispute involves criminal or civil law.

Criminal law refers to legal measures passed by a legislative body to protect the welfare of society and to provide punishments for those who fail to comply. The government, acting on society's behalf, always prosecutes criminal cases. People found guilty of violating criminal laws are punished through fines, prison sentences, probation, or similar penalties. To be convicted of a crime, a person must be found guilty **beyond a reasonable doubt**, usually by a jury. This does not mean it must be proved with absolute certainty but rather that there must be no reasonable explanation for what happened other than that the accused did it.

Civil law refers to legal measures that govern conflicts between private parties or, occasionally, between a private party and the government. Such conflicts can arise from various circumstances, including disputes over the ownership of property, injuries suffered in an accident, or questions about the terms of a contract. In most civil cases, one party sues another party for damages, or compensation of some sort.

The **burden of proof** in civil trials is lower than in criminal trials. The party bringing the lawsuit must only prove that there is a **preponderance of evidence**. This means that the party must prove that it is more likely than not that the other party is at fault and should be held liable. This decision is usually made by a jury. A jury also decides on the amount of **damages**, or money to compensate for the losses suffered, that the party found liable should pay.

The Many Players in a Court of Law

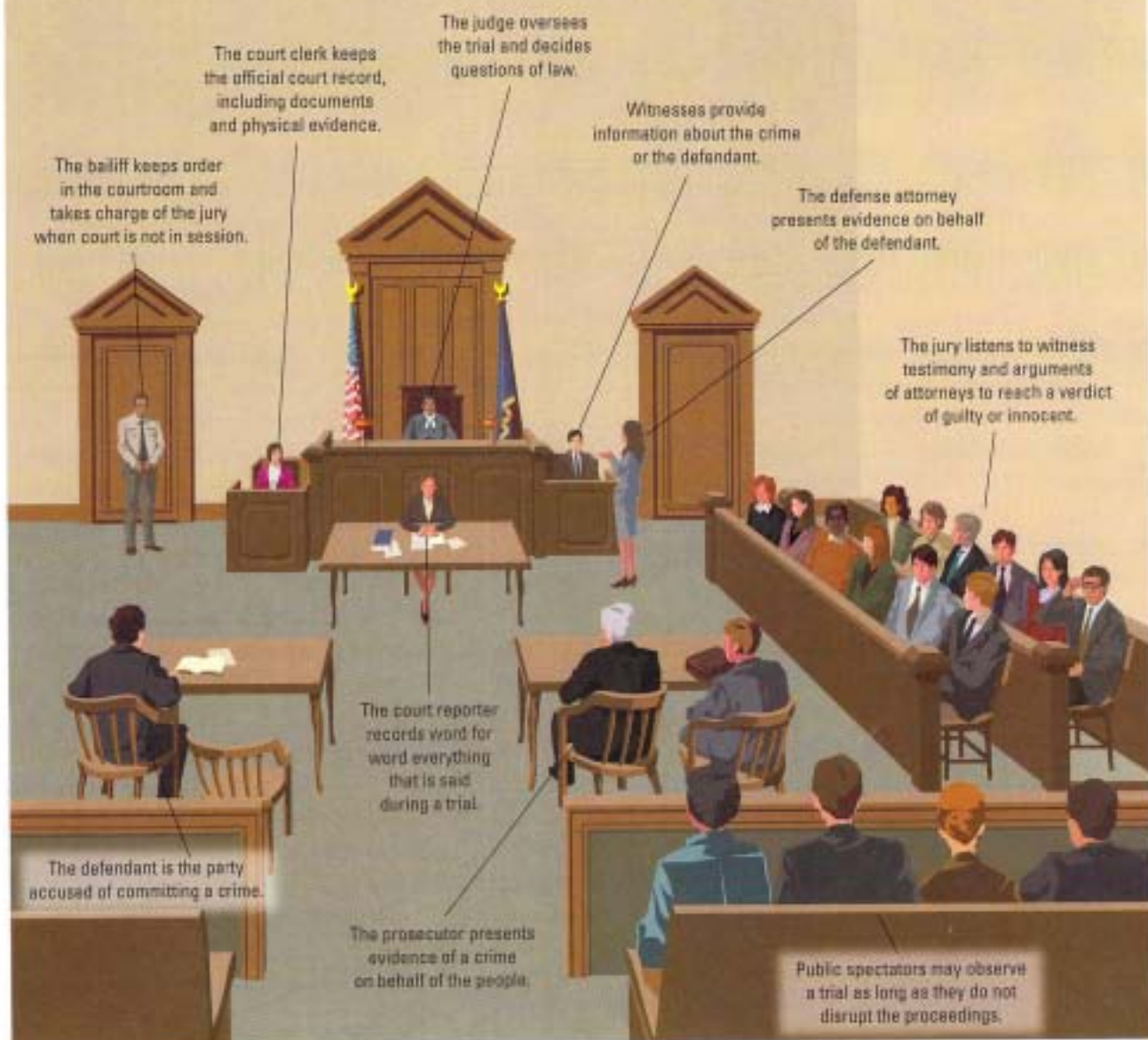
If you have ever watched a trial on television or in a movie, you have most likely seen the various players in a typical courtroom. Presiding over the courtroom is the judge. The judge controls the legal proceedings, from jury selection to sentencing. It is the judge's job to determine whether certain evidence is admissible. Before a jury decides a case, the judge instructs the

jurors on how the law should guide them in making their decision.

Sitting near the judge are the people directly involved in the case being tried. In a criminal trial, the person accused of a crime is known as the **defendant**. The government lawyer or team of lawyers bringing evidence against the defendant forms the **prosecution**.

Who's Who in the Courtroom

This diagram shows the key players in a criminal trial. In a civil trial, the plaintiff and the plaintiff's attorney would replace the prosecutor.



Trial by Jury

Trial by a jury of one's peers is a right that dates back to the Magna Carta and that is guaranteed in the Constitution's Bill of Rights. A 2008 survey conducted by Harris Interactive shows that a majority of Americans believe that most juries are fair and impartial.



How often do most people who are on trial have a jury that is fair and impartial?



In a civil trial, the person bringing the lawsuit to court is the **plaintiff**. The person the suit has been brought against is the defendant. Usually plaintiffs and defendants are represented by attorneys who argue the case before the jury. To make a compelling case for their clients, attorneys may present both physical evidence, such as documents and objects, and the testimony of witnesses.

Additional officers of the court, such as the court clerk, the bailiff, and the court reporter, are not directly involved in a case. Instead, their job is to help with the functioning of the courtroom itself.

The Key Role of Citizens: Witnesses and Jurors

Citizens also play a key role in most trials, both as witnesses for the defense or prosecution and as jurors. Testifying in court as a witness can be an ordeal. Witnesses sometimes have to wait outside the courtroom for hours until they are called to testify. Testifying in court can be a scary experience, especially when it is the opposing attorney's turn to begin questioning. During this **cross-examination**, the witness's memory or truthfulness may be questioned. Witnesses play a crucial role in the judicial process by providing information to the jury as to who did what, when, and where.

The most important decisions in many trials are those made by the jury. A typical jury consists of 12 people, although some states allow smaller juries. To serve as a juror, a person must be a U.S. citizen, 18 years of age, able to understand English, a resident within the court's jurisdiction, and not a convicted felon. Potential jurors are usually culled from voter registration lists, Department of Motor Vehicle lists, telephone directories, and utility company lists.

For many Americans, jury duty is the only service they are directly required to perform for their government. Reporting for jury duty when summoned, however, does not guarantee that an individual will serve on a jury. Nearly four out of five prospective jurors are dismissed for a variety of reasons. Some are excused because they may have a prejudice or bias concerning the case. Others are excused if they can show that serving on a jury would create an "undue hardship."

Once selected to serve, jurors listen carefully to the evidence presented to them during a trial. When the trial ends, they deliberate with the other jurors to try to reach a unanimous verdict. The decision they reach has enormous consequences for the plaintiffs and defendants involved in criminal and civil cases. Knowing this, jurors take their responsibility seriously. More than 60 percent of those who have

served on juries report that they would be willing to do so again.

15.3 America's Dual Court System

When Congress enacted the Judiciary Act of 1789, it was, in effect, creating a dual court system in the United States. The new federal judicial system was set up alongside already-existing state judicial systems. For the most part, the two systems operate independently of one another, but they can overlap. This diagram shows how that dual system looks today.

Jurisdiction Determines What Gets Tried Where

One way to sort out what gets tried where in this dual system is to look at each court's jurisdiction, or its authority to enforce laws. For example, state courts have jurisdiction over cases arising under state law. Federal courts are generally limited to cases involving federal law or the Constitution. Within each system, jurisdiction is limited by three factors:

level in the court hierarchy, geographic reach, and type of case.

Level in the court hierarchy. Each level within the hierarchy of the state or federal court system has a set of responsibilities. Trial courts, at the bottom of the hierarchy, generally have **original jurisdiction**. This means they have the authority to hear a case for the first time.

Moving up the hierarchy, appeals courts have **appellate jurisdiction**. This means they have the authority to review decisions made in lower courts. Appeals courts do not second-guess jury decisions by reviewing the facts in a case. Instead, their focus is on whether the trial in the lower court was carried out in a fair manner, with **no errors of law**. An error of law is a mistake made by a judge in applying the law to a specific case.

Geographic reach. With the exception of the Supreme Court, courts hear cases that arise within certain geographic boundaries. Within a state judicial system, the geographic jurisdiction of a trial court is

The Dual Court System

The United States has both a federal judicial system and state judicial systems. Each system has its own jurisdiction. In cases that involve both federal and state laws, however, the two may overlap. The arrows indicate the most common routes that cases take through the appeals system.



Jurisdiction in State and Federal Courts

Cases Heard in State Courts	Cases Heard in Federal Courts	Cases Heard in Both State and Federal Courts
<ul style="list-style-type: none"> Crimes punishable under state law Traffic violations Divorce and child custody disputes Landlord and tenant disputes Most contract disputes Most personal injury lawsuits Most workers' injury claims Inheritance matters Most issues involving regulation of trades and professions 	<ul style="list-style-type: none"> Matters involving interstate and international commerce Disputes involving federal taxes or federal programs, such as Social Security Patent and copyright issues Issues involving treaties and foreign countries Disputes involving citizens of other countries Bankruptcy matters Disputes between states Habeas corpus actions 	<ul style="list-style-type: none"> Crimes punishable under both state and federal laws Environmental regulations Certain civil rights claims Civil actions involving large groups of people seeking damages (class-action suits) Issues involving the U.S. Constitution

usually limited to the city or county in which that court operates. In the federal system, trial court districts are larger.

The geographic reach of appellate courts is greater than that of trial courts. Most states have regional appeals courts and a state supreme court. The federal system has 13 appellate courts. The U.S. Supreme Court accepts cases from anywhere in the United States and its territories.

Type of case. A case's subject matter also determines where it will be tried. At both the state and the federal levels, the typical trial court has **general jurisdiction**. This means the court can hear cases covering a variety of subjects.

Some courts, however, have **limited jurisdiction**. This means they specialize in certain kinds of cases. Traffic courts deal only with traffic violations. Bankruptcy courts only hear cases involving bankruptcy issues. Juvenile courts work only with young offenders.

Most Cases Are Heard in State Courts

State courts are the workhorses of the judicial system, handling several million cases a year. In 2010, the combined caseload of the 50 states and Puerto Rico totaled around 100 million cases. This equals

roughly one case for every three people. Nearly half of these cases were traffic related. In contrast, the entire federal system hears fewer cases each year than do the courts of a medium-size state.

State court systems vary in their structures. However, most states have four general levels of courts: trial courts of limited jurisdiction, trial courts of general jurisdiction, intermediate appellate courts, and courts of last resort.

Trial courts of limited jurisdiction. Local courts that specialize in relatively minor criminal offenses or civil disputes handle most of the cases filed each year. They are known as justice-of-the-peace courts, magistrate courts, municipal courts, city courts, county courts, traffic courts, or small-claims courts, depending on the state and the types of cases they hear. Their hearings are generally informal and do not involve jury trials. Cases heard in these courts may be appealed to trial courts.

Trial courts of general jurisdiction. General trial courts handle most serious criminal cases and major civil disputes. They are often called superior, district, or circuit courts. In rural areas, general trial court judges may have to travel within a large circuit to try cases. In urban areas, general trial court judges may

specialize in criminal, family, juvenile, civil, or other types of cases.

Intermediate appellate courts. Intermediate courts of appeals hear appeals from general trial courts. Though the structure varies from state to state, most state appeals courts employ three-judge panels to hear and decide cases.

Courts of last resort. The name of the appeals court at the top of the state system varies from state to state. The most common name is state supreme court. Most often, these “courts of last resort” convene in the state’s capital. Their jurisdiction includes all matters of state law. Once a state supreme court decides a case, the only avenue of appeal left is the U.S. Supreme Court. Such appeals are limited, however, to cases that present a constitutional issue, which is a highly unlikely occurrence.

Choosing State Judges: Election, Appointment, and Merit Selection

Each state has its own method of choosing the judges who preside over state courts. Nonetheless, there are three basic routes to a judgeship: election, appointment, or merit selection.

Judicial election. The oldest method of choosing state judges is through the election process. This method became popular during Andrew Jackson’s presidency in an effort to make U.S. politics more democratic. Supporters of this method argue that judicial elections provide a public forum for debating judicial issues. They also argue that elections allow voters to remove judges who have not upheld the public trust.

This method of choosing judges is not without its pitfalls, however. First, to fund their campaigns, judicial candidates must often seek contributions from lawyers and business that may eventually appear before them in court. This may interfere with their ability to be impartial. Second, voter turnout for judicial elections is notoriously low. Most voters simply do not know enough about judgeship candidates to cast a meaningful vote.

Judicial appointment. In a handful of states, judges are appointed by the governor or state legislature. This method relieves poorly informed voters of the

responsibility of choosing judges. Nonetheless, it also has drawbacks. Governors often use their appointment power to award judgeships to those who have supported them politically. Similarly, state legislatures tend to appoint former lawmakers to be judges. Such appointees may or may not be highly qualified to serve as judges.

Merit selection and retention elections. Finally, many judges are selected through a process that combines appointments and elections. Under this system, a committee nominates candidates for judgeships based on their merits, or qualifications. The governor then appoints judges from this list.

After a fixed period, usually a year, voters are asked to confirm or reject the appointment in a **retention election**. The ballot in such an election typically reads, “Shall Judge X be retained in office?” If a majority of voters answer yes, the judge remains in office for a longer term. If a majority says no, which rarely happens, the judge is removed from office.

Supporters of this process argue that it takes the politics out of judicial appointments by focusing on candidates’ qualifications rather than on their political connections or popularity with voters. At the same time, merit selection allows voters to review a judge’s performance on the bench from time to time. Opponents argue that this method gives the public too little control over judges.



State courts handle most of the cases that pass through the justice system. About half of the cases handled by state courts are related to traffic.

15.4 The Federal Judiciary

At fewer than 500 words, Article III of the Constitution, which spells out the powers of the nation's judicial branch, is remarkably brief. The framers' brevity on this topic may reflect their thinking that the judiciary would be, in Alexander Hamilton's words, the "least dangerous" of the three branches. As Hamilton saw it,

The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse . . . It may truly be said to have neither FORCE nor WILL, but merely judgment.

—*The Federalist* No. 78, 1788

Over time, however, the federal judiciary has grown in both size and power in ways the framers could not have predicted.

The Constitutional Powers of the Judicial Branch

The Constitution outlines the kinds of cases to be decided by the judicial branch. Article III gives the federal courts jurisdiction in two types of cases. The first type involve the Constitution, federal laws, or

disputes with foreign governments. The second are civil cases in which the plaintiff and defendant are states or are citizens of different states.

Nowhere, however, does the Constitution mention the power of judicial review. Nonetheless, in *The Federalist* No. 78, Hamilton declared that the duty of the federal courts "must be to declare all acts contrary to . . . the Constitution void."

In 1803, the Supreme Court took on that duty for the first time in *Marbury v. Madison*. In that case, the Court declared a portion of the Judiciary Act of 1789 to be unconstitutional. It thus established the power of the judiciary to review the constitutionality of legislative or executive actions.

Over time, judicial review has become the judicial branch's most important check on the other two branches. In 1886, in *Norton v. Shelby County*, the Court summed up what it means to declare an act of Congress or the president unconstitutional:

An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

U.S. District Courts: Where Federal Cases Begin

Ninety-four district courts occupy the lowest level in the federal judiciary. These 94 courts include 89 federal

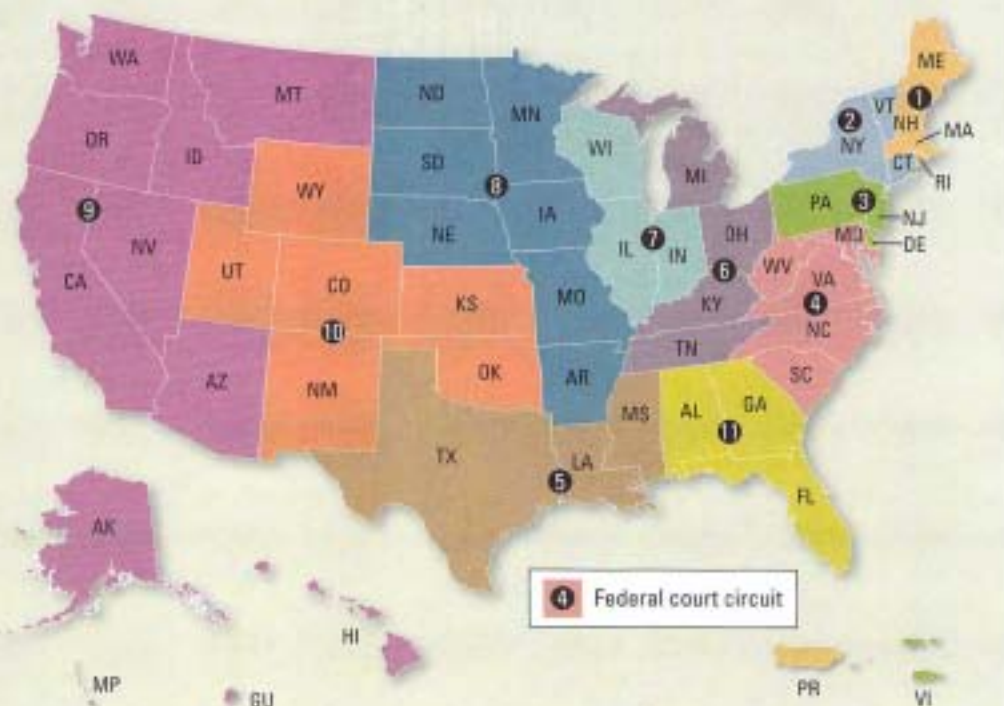
The Checking Powers of the Federal Judiciary

The framers tried to keep the federal judiciary as independent as possible from the other two branches of government. This was done so that judges could function, in Alexander Hamilton's words, as "faithful guardians of the Constitution."



U.S. Courts of Appeals

Cases in the federal judicial system usually begin in one of the 94 district courts. Judgments from district courts can be appealed to one of 13 U.S. appeals courts. Eleven of these courts, one for each of the court circuits numbered and colored on the map, cover the 50 states and U.S. territories. Another, the court for the D.C. Circuit, deals with cases in the District of Columbia, while the thirteenth has national jurisdiction over cases involving special subjects.



court districts throughout the country, with at least one district in each state. The five additional district courts are located in Washington, D.C., Puerto Rico, and three other U.S. territories. Each district court is a trial court with original jurisdiction in its region. District courts are where most cases in the federal system begin.

In the past, civil cases dominated district court caseloads. Increasingly, however, criminal cases are crowding the dockets of these courts, with drug violations leading the way. District court cases are tried before a jury, unless a defendant waives that right. In such cases, the judge decides the outcome of the case in what is known as a **bench trial**.

U.S. Appeals Courts: Where Most Appeals End

Thirteen appellate courts occupy the second level of the federal judiciary. These midlevel courts are known as U.S. courts of appeals. Only a fraction of the cases decided in district courts are reviewed by appeals courts. Of these, an even smaller number get heard by the Supreme Court.

Of the 13 appeals courts, one deals with cases arising in Washington, D.C. Another 11 review cases in circuits made up of several states. In 1982, Congress added the U.S. Court of Appeals for the Federal Circuit to the judicial system. This 13th appeals court reviews cases nationwide that involve special subjects, such as veterans' benefits, trademarks, and international trade.

The judges who staff appeals courts sit in panels of three to hear cases. Their primary job is to review district court cases to determine whether the district judge made an error in applying the law in that one trial. Sometimes, however, their decisions have a broader application than the specific case before them. This was true of the decision made by a three-judge panel in the 1996 case of *Hopwood v. Texas*.

The *Hopwood* case dealt with the University of Texas Law School's admissions policy. In an effort to enlarge its enrollment of minority students, the law school gave preference to African American and Hispanic applicants. This practice of making special

efforts to admit, recruit, or hire members of disadvantaged groups is known as **affirmative action**.

An earlier legal challenge to affirmative action policies had reached the Supreme Court in 1978. In *Regents of the University of California v. Bakke*, the Court held that a university could consider race in admitting students to correct past discrimination and to achieve a more diverse student body. However, schools could not set up separate admission systems for minorities. Nor could schools reserve a quota, or fixed number, of admission slots for minority applicants.

The *Hopwood* case began in 1992, when four white students who had been denied entry to the University of Texas Law School filed a lawsuit in federal district court. The plaintiffs argued that the school's admissions policy violated their Fourteenth Amendment right to equal protection under the law. They also charged that it violated the Civil Rights Act of 1964, which prohibits discrimination based on race in any program receiving federal funding, as the school had done.

After a short trial, the court decided in favor of the university. The presiding judge said that affirmative action programs, while "regrettable," were still necessary to overcome a legacy of racism. In response, the four plaintiffs appealed their case to the U.S. Court of Appeals for the Fifth Circuit.

The appeals court reversed the lower court's decision. The judges found that the law school had created a separate admissions policy for minorities, which violated the *Bakke* rules. They declared the law school's race-based admissions policy unconstitutional.

Still, the Supreme Court can overturn decisions made in appellate courts. For example, the Supreme Court stepped in when the *Hopwood* ruling conflicted with the ruling from another appellate court case that allowed colleges to use race as a factor for admission. The Supreme Court overturned the *Hopwood* decision in *Grutter v. Bollinger* (2003). In this landmark case, a white law school applicant challenged the admissions policy of the University of Michigan Law School, which considered the race of applicants to create a diverse student body. In a 5–4 decision, the Court ruled in favor of the school, determining that although quotas are illegal because of *Bakke*, schools can still consider race during the admissions process.

Special Courts Have Specialized Jurisdictions

From time to time, Congress has established special federal courts to deal with specific categories of cases. Staffing these courts are judges expert in a particular area, such as tax or trade law. These special courts include both lower and appeals courts.

During times of war, the United States has also set up **military tribunals** to try members of enemy forces. A military tribunal is a court in which officers from the armed forces serve as both judge and jury. During the American Revolution, George Washington set up military tribunals to try spies. Abraham Lincoln used military tribunals during the Civil War to try Northerners who aided the Confederacy. Franklin Roosevelt ordered military tribunals during World War II to try German prisoners of war in the United States accused of sabotage. In 2006, Congress authorized the creation of military tribunals to try noncitizens accused of committing acts of terrorism against the United States.

Federal Judges: Nomination, Terms, and Salaries

Despite their different levels and functions, all federal courts have one thing in common: judges. These judges oversee court proceedings, decide questions

Special Federal Courts

U.S. Court of Appeals for Veterans Claims: Reviews decisions regarding benefits due to veterans.

U.S. Court of International Trade: Hears cases involving customs, unfair import practices, and other trade issues.

U.S. Court of Federal Claims: Has jurisdiction over claims for damages made against the United States.

U.S. Tax Court: Resolves disputes between taxpayers and the Internal Revenue Service.

U.S. Alien Terrorist Removal Court: Oversees procedures for deporting suspected foreign terrorists.

U.S. Foreign Intelligence Surveillance Court: Approves requests for **surveillance warrants** by federal police agencies investigating foreign spying or terrorism.

Military courts: Try cases that involve potential violations of military law.

U.S. Court of Appeals for the Armed Forces: Reviews convictions by the lower military courts.

of law, and, where no jury is present, determine the outcome of the cases before them.

The Constitution gives the president the power to appoint federal judges with the "Advice and Consent of the Senate." But it says nothing about the qualifications of judges. In general, presidents look for candidates who have distinguished themselves as attorneys in the state where an opening exists. They also tend to look for candidates who share their political ideology.

In theory, the confirmation process looks simple enough. The president submits a nomination to the Senate. The nomination goes to the Senate Judiciary Committee for study. If approved by the committee, the nomination is submitted to the full Senate for a confirmation vote. The reality, however, is more complex, mainly because of an unwritten rule known as **senatorial courtesy**. This rule allows a senator to block a nomination to a federal court in his or her home state.

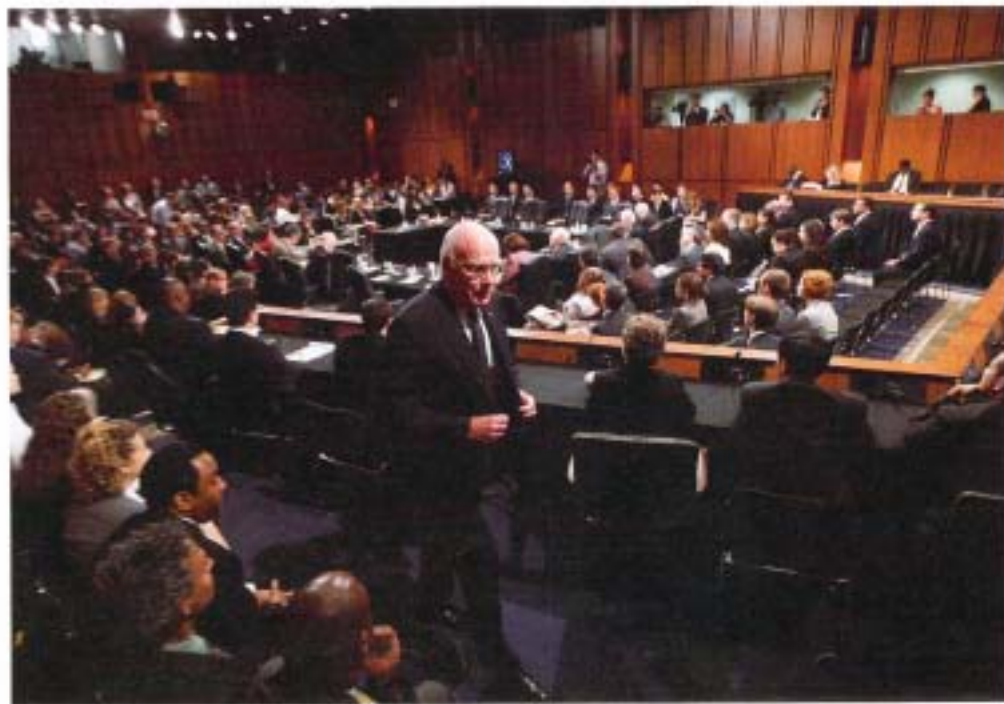
Nominations are blocked through a process known as the **blue-slip policy**. When the Senate Judiciary Committee receives a nomination, it notifies the senators from the nominee's state by sending them an approval form on a blue sheet of paper. If a senator fails to return the blue slip, this indicates his or her opposition to the appointment. As a courtesy to the senator, the Judiciary Committee then kills the nomination by refusing to act on it.

Nominees who make it through the confirmation process remain in office, as Article III states, "during good Behaviour." In practical terms, this means they are judges for life or until they choose to retire.

The only federal judges not appointed to life tenures, or terms of service, are those serving in most of the special courts. With the exception of the Court of International Trade, the creation of these special courts was not expressly authorized under Article III. Instead, Congress created them using its legislative authority. As a result, Congress has the power to fix terms of service for special court judges.

The only way to remove a federal judge with lifetime tenure from office is by impeachment. Over the past two centuries, the House of Representatives has impeached 13 federal judges. Of that number, only seven were convicted of wrongdoing in the Senate and removed from office.

Article III also states that the salaries of judges with lifetime tenure "shall not be diminished during their Continuance in Office." This means that judges cannot be penalized for making unpopular decisions by cutting their pay. The purpose of these protections was, in Hamilton's words, to ensure "the independence of the judges . . . against the effects of occasional ill humors in the society."



After the president nominates a candidate for judgeship in a federal court, the Senate Judiciary Committee holds extensive hearings in which testimony is given by the nominee and witnesses who support and oppose the candidate. After the hearing, the committee gathers to vote whether to confirm or reject the nomination.

15.5 The Supreme Court

The Supreme Court is the court of last resort in the federal judicial system. William Rehnquist, who served as chief justice of that court, attended his first session in 1952 while working as an assistant to Justice Robert Jackson. Rehnquist later recalled,

The marshal of the Court, who was sitting at a desk to the right of the bench, rose, pounded his gavel, and called out, "All rise!" Simultaneously, three groups of three justices each came on the bench . . . When each was standing by his chair, the marshal intoned his familiar words: "Oyez, oyez, oyez . . ." This ceremony moved me deeply. It was a ritual that had been used to open Anglo-Saxon courts for many centuries.

—William Rehnquist, *The Supreme Court: How It Was, How It Is*, 1987

As of 2012, 108 male and four female Supreme Court justices have heard those opening words and proceeded to decide some of the nation's most contentious legal issues.

The Selection Process for Supreme Court Justices

Supreme Court justices are selected through the same process used for all federal judges. However, their appointments generally attract a great deal more attention.

When a vacancy occurs on the Court, the presi-

dent pulls together a list of possible candidates to consider. The Department of Justice conducts background checks on the candidates to verify that their character, experience, and judicial philosophy meet the general criteria set by the president. This process often involves lengthy interviews with the candidates.

In the past, the American Bar Association, a voluntary association of lawyers, prescreened judicial appointments based on a candidate's experience, professional competence, integrity, and **judicial temperament**. The ABA's role in the selection process was controversial. Some critics argued that a nongovernmental organization should not have so much power in judicial appointments. Others raised concerns about political bias on the part of ABA committee members. The ABA's formal involvement in the selection process ended in 2001.

Once a candidate has been selected, the nomination goes to the Senate Judiciary Committee for review. The committee holds public hearings, during which it takes testimony from the nominee and from witnesses who support or oppose the appointment. The Judiciary Committee then recommends, by majority vote, whether the full Senate should confirm or reject the nomination.

Finally, the full Senate votes on the nomination. In the case of district and appellate court appointments, the Senate usually confirms the president's nominee. When the nomination is for a Supreme

President Obama appointed two justices to the Supreme Court. Sonia Sotomayor (left) testified before the Senate Judiciary Committee in 2009. After the committee approved her with a 13–6 vote, the full Senate confirmed her nomination, making Sotomayor the first Latina Supreme Court justice. In 2010, Elena Kagan (right) underwent the same process. For both Sotomayor and Kagan, the committee and full Senate voted along party lines with a few senators of the opposing party approving their nominations.





This illustration shows an attorney presenting a case before the Supreme Court in 2012. Cameras are not allowed in the courtroom during the oral arguments, so the news media rely on sketches, like this one made by a professional court artist. Legislation has been introduced to televise Supreme Court sessions. Although Supreme Court Justice Elena Kagan stated that “it would be terrific to have cameras in the courtroom,” Supreme Court Justice Antonin Scalia expressed his concern that televised snippets from their arguments would “miseducate the American people.”

Court justice, however, the stakes are higher and confirmation is less sure. In the past, the Senate has rejected around one in five nominations to the Court.

The Judiciary Committee’s recommendation to confirm or reject a nomination is often affected by partisanship and the opinions of interest groups. In 1987, for example, President Reagan nominated Robert Bork for the Supreme Court. However, outcry from Democrats and interest groups, such as the ACLU, over Bork’s conservative views led the committee, and ultimately the full Senate, to reject the nomination. In order to avoid this fate, presidents are careful to select candidates whose views fit theirs but are not so extreme that the Senate rejects them.

The Supreme Court Chooses Its Cases

More than one attorney, dismayed by a jury’s verdict, has vowed, “We’ll appeal this case all the way to the Supreme Court!” However, given the fact that the Court is asked to review several thousand cases each year but will only hear between 100 and 150, this is not a realistic promise.

The Supreme Court has both original and appellate jurisdiction. However, only a handful of original jurisdiction cases are filed each term. Overwhelmingly, the cases reaching the Supreme Court are appeals from cases that began in lower courts.

The most common way that a case comes to the Supreme Court is through a petition for a **writ of certiorari**. A writ is a legal document. A writ of certiorari is a document issued by the Supreme Court ordering that a case from a lower court be brought before it. When petitioning for a writ of certiorari, the party that lost an appeal in lower court explains why the Supreme Court should review the case.

For a writ of certiorari to be granted, four of the nine Supreme Court justices must agree to hear the case. If a writ is granted, the case is added to the Court’s docket. If a petition is denied, the decision of the lower court stands.

Written Briefs and Oral Arguments

Once the Court decides to hear a case, the attorneys for both sides prepare **legal briefs**. These are written documents, sometimes hundreds of pages long, that present the legal arguments for each side in the case.

Sympathetic interest groups may also choose to file an **amicus curiae brief**. *Amicus curiae* is a Latin term meaning “friend of the court.” Interest groups use amicus briefs to let the Court know that the issue at hand is important to far more people than just the plaintiffs and defendants in the case.

Eventually, attorneys from both sides appear before the Court to present their case. This phase is known as **oral argument**. In general, attorneys are

Organization of the Federal Judiciary

Many special courts have been added to the basic structure of the federal court system over time. The arrows show the most common routes of appeal from the lower courts to the Supreme Court.



allotted only 30 minutes to explain why the Court should decide in favor of their client. The Court encourages attorneys to use this time to discuss the case, not deliver a formal lecture. During oral argument, the justices often interrupt to ask questions of the attorneys. The justices may even use their questions as a way of debating one another.

As interesting as oral arguments are to the public, the real work of the Court is done in conference. When the Court is in session, the justices meet twice a week in conference to discuss cases. No one other than the nine justices may attend. The chief justice presides and is the first to offer an opinion regarding a case. The other justices follow in order of seniority. Cases are decided by majority vote. But votes in conference are not final. As Justice John Harlan observed, "The books on voting are never closed until the decision actually comes down."

Decision Options: To Uphold or Overrule

Most Supreme Court decisions either uphold or overturn a decision made by a lower court. If the lower court's decision is upheld, the case ends at this point. There is no further appeal for the losing party to pursue.

If the Supreme Court overturns a lower court's decision, it may send the case back to the lower court for further action. For example, should the Court decide that a criminal defendant was denied a fair trial, the case will be sent back to a lower court to be either dismissed or tried again.

Every decision serves as a precedent for future cases with similar circumstances. Under the doctrine known as *stare decisis* lower courts must honor decisions made by higher courts. The term *stare decisis* is Latin for "to stand by things decided." This practice brings consistency to legal decisions from court to court.

Occasionally, the Court reverses a previous decision, thereby setting a new precedent. But this is not done lightly. "I do think that it is a jolt to the legal system when you overrule a precedent," said Supreme Court nominee and future chief justice John Roberts during his confirmation hearings in 2005. A reversal may happen when the views of society have changed and when the Supreme Court reflects those changes. It may also occur when justices who voted one way leave the Court and new ones with different views take their place.

Majority, Dissenting, and Concurring Opinions

Once the Court as a whole decides a case, one justice will be assigned to write the **majority opinion**. An opinion is a legal document stating the reasons for a judicial decision. It often begins by laying out the facts of the case. Then it explains the legal issues involved, including past precedents, and the reasoning behind the Court's decision. The chief justice writes this opinion if he or she sided with the majority. If not, the most senior justice in the majority camp writes the opinion.

Justices who disagree with the majority opinion may choose to write a **dissenting opinion**. In it, they lay out their reasons for disagreeing with the majority. Some justices who sided with the majority, but for different reasons than stated in the majority opinion, may write a **concurring opinion**. In it, they explain how their reasoning differs from the majority's. Because few decisions are unanimous, these additional opinions often accompany a majority opinion.

Judicial Activism Versus Judicial Restraint

The most controversial cases decided by the Supreme Court are often those that involve judicial review. More than two centuries after the Court assumed this power, Americans are still divided about its proper use. On one side are supporters of judicial activism, and on the other are advocates of judicial restraint.

Judicial activism is based on the belief that the Court has both the right and the obligation to use its power of judicial review to overturn bad precedents and promote socially desirable goals. Liberals tend to be more supportive of judicial activism than are

conservatives. They look to the Court to defend the rights of women and minorities, for example, when legislatures fail to act.

Advocates of **judicial restraint** hold that judicial review should be used sparingly, especially in dealing with controversial issues. Conservatives tend to be more supportive of judicial restraint than are liberals. In their view, elected representatives, not unelected judges, should make policy decisions on such issues as abortion rights and gay marriage.

Recent appointments to the Supreme Court have been more inclined toward judicial restraint than to activism. During Senate Judiciary Committee hearings on his nomination to the Supreme Court, John Roberts described his view of a judge's role:

Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ballgame to see the umpire.

—John Roberts, 2005

Summary

The U.S. judicial system has evolved over more than two centuries to meet the needs of a changing society. Today's federal and state courts not only resolve conflicts, but also shape public policy through the judicial review process.

Dual court system The United States has two separate but related court systems: one federal and one state. The two systems maintain exclusive jurisdiction in some areas but overlap when cases involve both state and federal laws.

State judicial systems Each state has its own hierarchy of courts. Trial courts of limited and general jurisdiction handle most cases. Intermediate appeals courts and state courts of last resort review cases appealed from the lower courts.

Federal judicial system Most cases involving federal law and the Constitution are tried in U.S. district courts. Decisions made there can be appealed to higher courts, including the Supreme Court. The federal judicial system also includes special courts with very specific jurisdictions.

State and federal judges Many state judges are elected or appointed by the governor or legislature. In states using merit selection, judges are appointed and then confirmed by voters in a retention election. Federal judges are appointed by the president and confirmed by the Senate.

How did the Supreme Court rule on the Affordable Care Act?

In 2012, the Supreme Court ruled on *National Federation of Independent Business v. Sebelius*, a landmark case that challenged the constitutionality of the Affordable Care Act. Although the Court upheld most of the act, the Supreme Court justices disagreed on two important parts: the expansion of Medicaid and the individual mandate.

In its decision, the Court struck down the expansion of Medicaid and upheld the individual mandate, with Chief Justice John Roberts casting the deciding vote. As you read this article, think about how the Court's decision affected Congress's powers. Do you agree with this decision?

Obamacare Upheld: How and Why Did Justice Roberts Do It?

by David Cole

The Supreme Court closed out its 2011–12 term . . . in dramatic fashion, upholding the Affordable Care Act by a sharply divided vote. The Court's bottom line, reasoning and lineup of justices all came as a shock to many . . . I don't think anyone predicted that the law would be upheld *without* the support of Justice Anthony Kennedy, almost always the Court's crucial swing vote. And while most of the legal debate focused on Congress's power under the Commerce Clause, the Court ultimately upheld the law as an exercise of the taxing power—even though President Obama famously claimed that the law was not a tax. The most surprising thing of all, though, is that in the end, this ultraconservative Court decided the case, much as it did in many other cases this term, by siding with the liberals.

Justice Kennedy, on whom virtually all hope for a decision upholding the law rested, voted with Antonin Scalia, Samuel Alito and Clarence Thomas. They would have invalidated all 900 pages of the law—even though the challengers had directly attacked only two of the law's hundreds of provisions.

But Chief Justice John Roberts sided with Justices Ruth Bader Ginsburg, Sonia Sotomayor, Stephen Breyer and Elena Kagan to uphold the law as a valid exercise of Congress's power to tax.

What led Roberts to cast his lot with the law's supporters? The argument that the taxing power supported the individual mandate was a strong one. The mandate provides that those who can afford to buy healthcare insurance must do so, but the only consequence of not doing so is the payment of a tax penalty. The Constitution gives Congress broad power to raise taxes "for the general welfare," which means Congress need not point to some other enumerated power to justify a tax. (By contrast, if Congress seeks to regulate conduct by imposing criminal or civil sanctions, it must point to one of the Constitution's affirmative grants of power—such as the Commerce Clause, the immigration power, or the power to raise and regulate the military.)

The law's challengers—and the Court's dissenters—rejected the characterization of the law as a tax. They noted that it was labeled a "penalty," not a tax; that it was designed to encourage people to buy health insur-



Because Supreme Court justices serve for life, they are somewhat isolated from political pressures. However, they do not operate in a vacuum. When the Supreme Court makes decisions, it pays attention to public opinion. Here, demonstrators on both sides of the issue voice their thoughts about health care reform. To what extent do you think the Supreme Court should take public opinion into account?

ance, not to raise revenue; and that Obama himself had rejected claims that the law was a tax when it was being considered by Congress. But Roberts said the question is a functional one, not a matter of labels. Because the law in fact would raise revenue, imposed no sanction other than a tax and was calculated and collected by the IRS as part of the income tax, the Court treated it as a tax and upheld the law.

Chief Justice Roberts did go on to say (for himself, but not for the Court's majority) that he thought the law was not justified by the Commerce Clause or the Necessary and Proper Clause, because rather than regulating

existing economic activity it compelled people to enter into commerce . . .

The other provision challenged conditioned state's receipt of Medicaid funding on their implementation of the Act's greatly expanded Medicaid coverage. Where Medicaid initially covered only several discrete categories of persons, under the ACA it extends to all adults earning less than 133 percent of the poverty level. The states argued that threatening them with loss of all their Medicaid funding was a coercive condition on the funding. Seven members of the Court agreed that if the law were enforced to take away state's *existing* Medicaid funds it

would be unconstitutional, but the majority upheld the provision as a condition only on the funds provided for the expanded Medicaid program . . .

As Roberts put it, "We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation's elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions."

So why did Roberts do it? In part, the outcome reflects the fact that the truly radical position in this dispute was that of the challengers. Even very conservative lower court judges, including Jeffrey Sutton of the Sixth Circuit and Laurence Silberman of the DC Circuit, had concluded that the law was valid (although on Commerce Clause, not taxing power, grounds). But in addition, I cannot but think that at the back of Roberts's mind was the Court's institutional standing. Had the law been struck down on "party lines," the Court's reputation would be seriously undermined . . . and ultimately, its legitimacy is the source of the Court's power.

David Cole is a blogger and legal affairs correspondent for The Nation.

Reprinted with permission from the June 28, 2012 issue of *The Nation*. For subscription information call 1-800-333-8538. Portions of each week's *Nation* magazine can be accessed at <http://www.thenation.com>.