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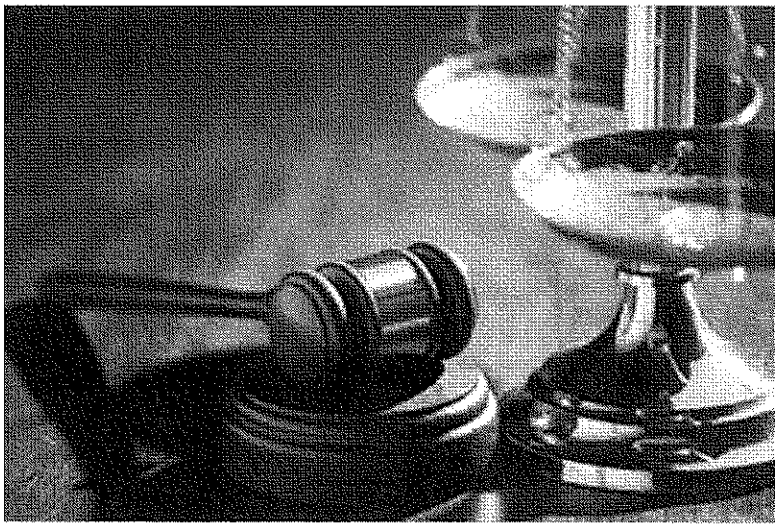
The Judicial Branch

Textbook

Reading



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.

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."

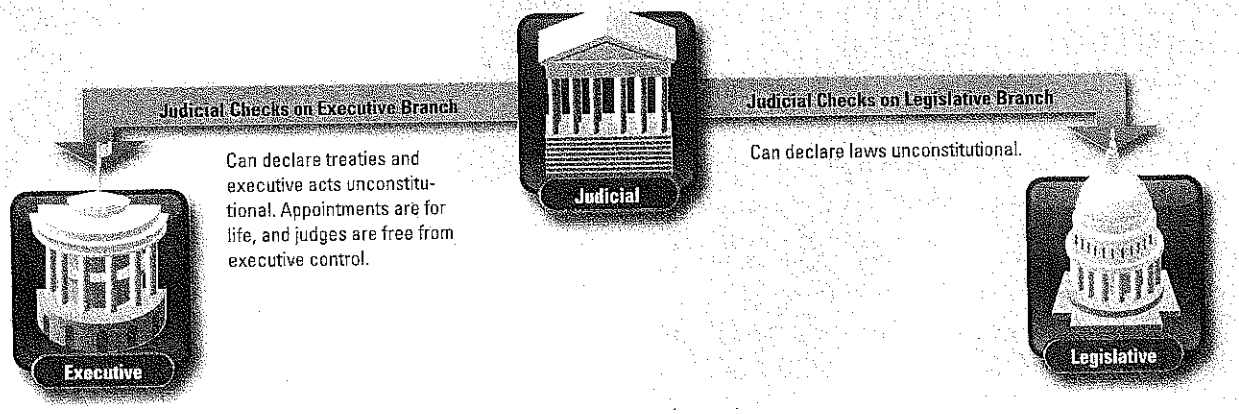
In 1803, the Supreme Court took on that duty for the first time in *Marbury v. Madison*. In that case, the Court declared a portion of the Judiciary Act of 1789 to be unconstitutional. It thus established the power of the judiciary to review the constitutionality of legislative or executive actions.

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.*

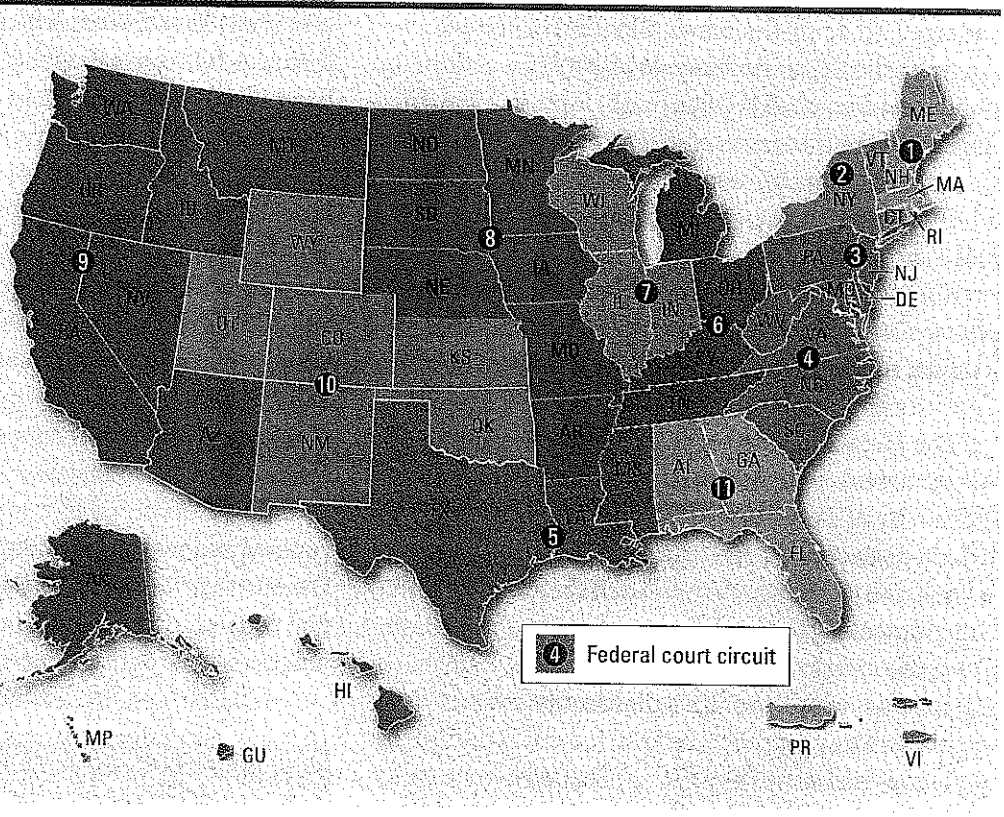
The Checking Powers of the Federal Judiciary

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.



U.S. District Courts: Where Federal Cases Begin

Ninety-four district courts occupy the lowest level in the federal judiciary. These ninety-four courts include 89 federal 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 and trade issues.

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 admission policy unconstitutional.

Technically, the *Hopwood* decision only affected the University of Texas. But Texas attorney general Dan Morales declared it should be applied throughout the state and to areas beyond admissions policies. Morales applied *Hopwood*'s ban on race-based preferences "to all internal institutional policies, including admissions, financial aid, scholarships, fellowships, recruitment and retention, among others."

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, as listed below.

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 from the United States.

U.S. Foreign Intelligence Surveillance Court: Approves requests for **surveillance warrants** by federal police agencies investigating foreign spying or terrorism. A surveillance warrant allows wiretaps, videotaping, property searches, and other spying on suspected spies or terrorists.

U.S. Foreign Intelligence Surveillance Court of Review: Reviews decisions by the Foreign Intelligence Surveillance Court to deny requests for surveillance warrants.

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 7 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."

In the past, most federal judges were white males. But as this photograph of President George W. Bush's nominees for federal judgeships in 2001 shows, that is changing. Nearly one-third of Bush's district court appointments have been women and members of minority groups.

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 2007, 108 male and two female Supreme Court justices have heard those opening words and proceeded to decide some of the nation's most contentious legal issues.

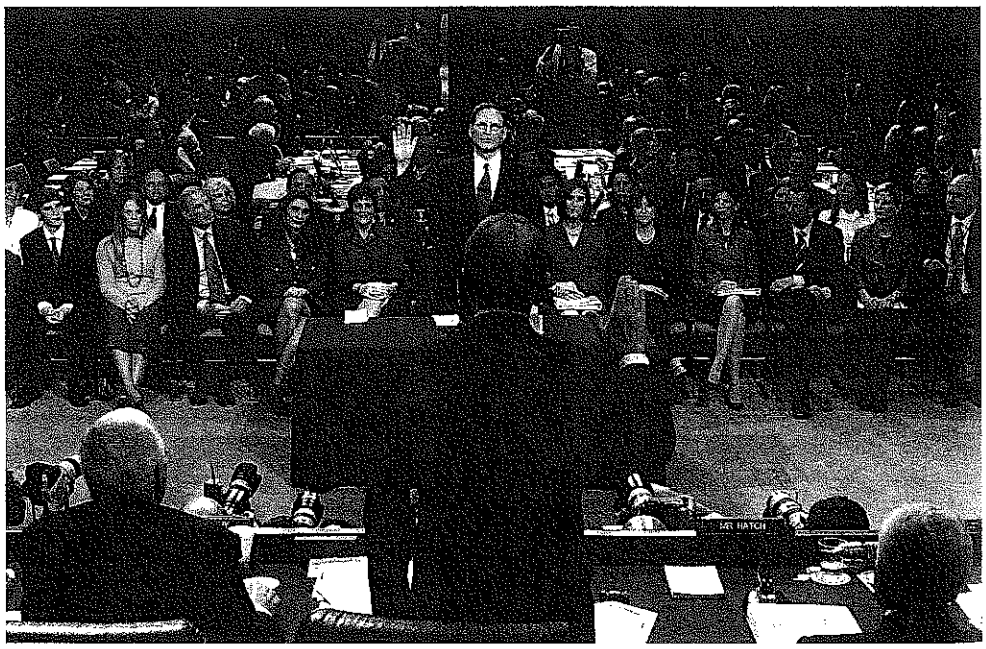
The Selection Process for Supreme Court Justices

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

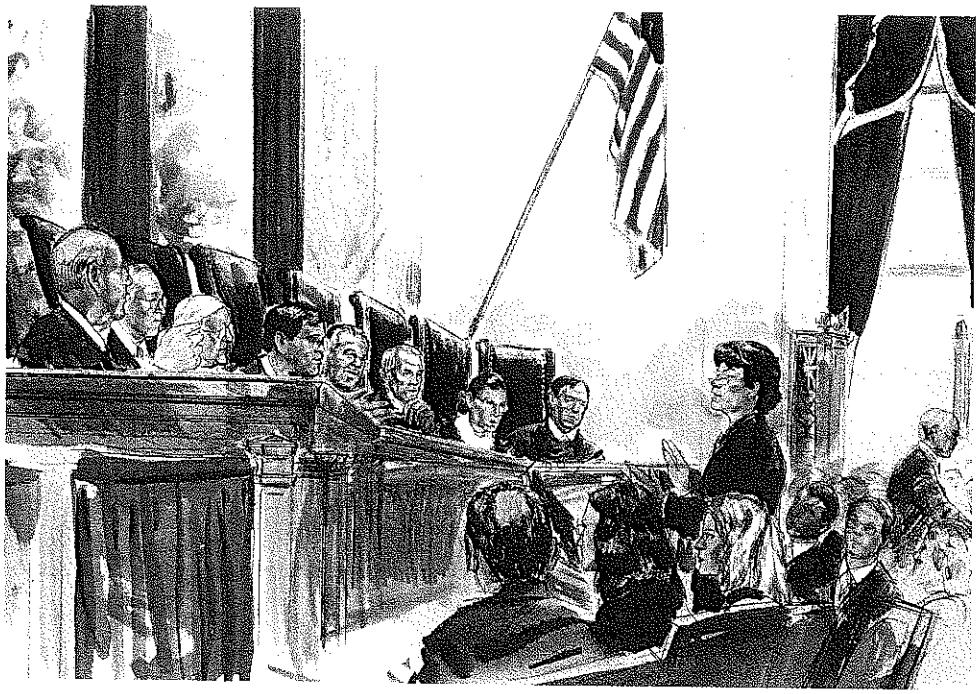
When a vacancy occurs on the Court, the president pulls together a list of possible candidates to consider. The Department of Justice conducts background checks on the candidates to verify that their character, experience, and judicial philosophy meet the general criteria set by the president. This process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

In the past, presidents have sought advice about judicial candidates from the American Bar Association, a voluntary association of lawyers. The ABA's Standing Committee on the Federal Judiciary assesses a candidate's experience, professional competence, integrity, and **judicial temperament**. It defines judicial temperament as "compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias, and commitment to equal justice." Based on these factors, the committee rates candidates as "well qualified," "qualified," or "not qualified."

The ABA's role in the selection process has long been controversial. Some critics argue that a nongovernmental organization should not have so much power in judicial appointments. Others have raised concerns about political bias on the part of ABA committee members. In 2001, President Bush ended the tradition of formally consulting with the ABA. A White House spokesperson explained that the president did not want to "grant a preferential, quasi-official role in the judicial selection process to a politically active group."



In 2006, Supreme Court nominee Samuel A. Alito Jr. was questioned extensively by the Senate Judiciary Committee. He was approved by the committee by a narrow party-line vote of 10 to 8. The Senate was also divided along party lines, voting 58-42 in favor of his appointment.



This illustration shows an attorney presenting a case before the Supreme Court in 2006. Cameras are not allowed in the courtroom during oral arguments, so the news media rely on sketches, like this one made by a professional court artist. Legislation has been introduced in Congress to open up Supreme Court sessions to television cameras. "It's a question of when, in my judgment, not if," predicted Senate Judiciary Committee chair Arlen Specter in 2006.

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 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 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

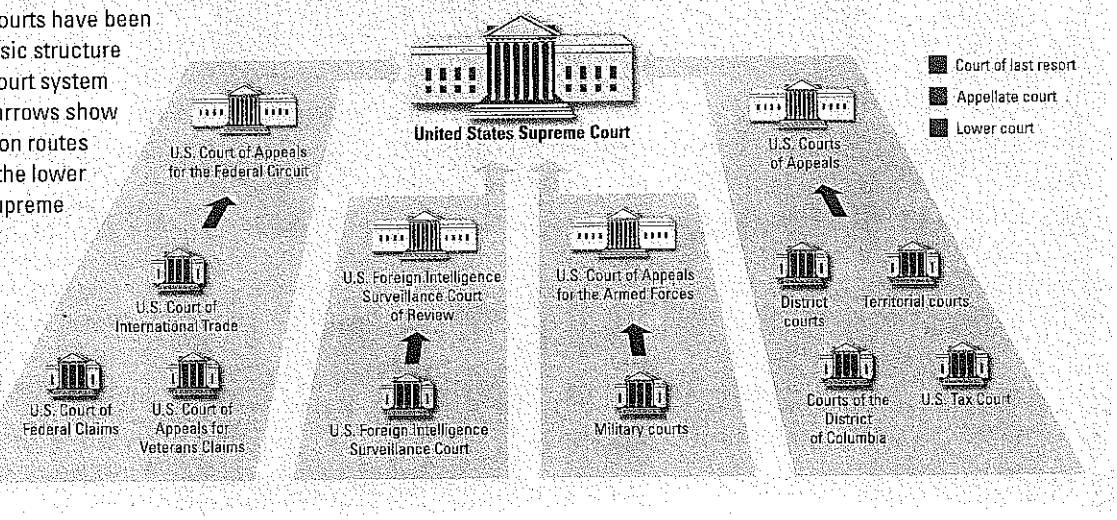
Once the Court decides to hear a case, the attorneys for both sides prepare **legal briefs**. These are written documents, sometimes hundreds of pages long, that present the legal arguments for each side in the case.

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.