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# The Judiciary

*"It is emphatically the province and duty of the judicial department to say what the law is."*

—John Marshall for the Supreme Court in *Marbury v. Madison, 1803*

**Essential Question:** How do the nation's courts settle legal controversies and establish public policy?

From an early age you developed some understanding of courtrooms in which accused criminals are innocent until proven guilty and one party sues another. Courtroom drama has been popular since Perry Mason—a 1950s television defense attorney who lost only one case in a nine-year run. More recently, TV has stereotyped small claims courts with the feisty, tell-it-like-it-is judge, a beefy courtroom bailiff, and litigants who yell and are rude to each other. The true picture of the judiciary shows a revered institution shaped by Article III of the Constitution, the Bill of Rights, and federal and state laws. The courts handle everything from speeding tickets to death penalty cases. State courts handle most disputes, whether criminal or civil. Federal courts handle crimes against the United States, high-dollar lawsuits involving citizens of different states, and constitutional questions.

## Article III and the Federal Courts

Today's three-level federal court system is made up of the **U.S. District Courts** on the lowest tier, the **U.S. Circuit Courts of Appeals** on the middle tier, and the **Supreme Court** alone on the top. These three types of courts are known as **constitutional courts** because they are either directly or indirectly mentioned in the Constitution. All federal judges are appointed by presidents and approved by the Senate to serve life terms.

No national court system existed under the Articles of Confederation, so the Framers decided to create a national judiciary in basic terms while empowering Congress to expand and define it. Because states had existing courts, many delegates saw no reason to create an entirely new, costly judicial system to serve essentially the same purpose. Others disagreed and argued that a national judicial system with a top court for uniformity was necessary. "Thirteen independent [state] courts of final jurisdiction over the same cases, arising out of the same laws," *The Federalist* argued, "will produce nothing but contradiction and confusion."



### *Article III*

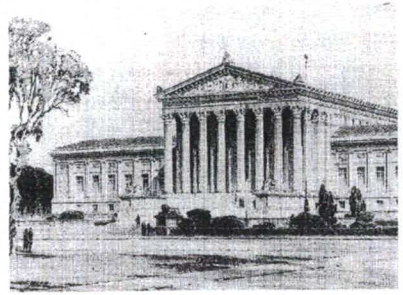
Article III defines an independent, multilevel court system. "The judiciary," Alexander Hamilton argued in *Federalist #78*, "will always be the least dangerous to the political rights of the Constitution because it will have the least capacity to annoy and injure them." He envisioned that courts would settle disputes or hold trials only for federal offenses, not be key players in determining the law. The only court actually mentioned in the Constitution is the Supreme Court, though Article III empowered Congress to create "inferior" courts.

All federal judges "shall hold their offices during good behavior." Although this term of office is now generally called a "life term," judges can be and have been impeached and removed. The Supreme Court has **original jurisdiction**—in other words, it is the court in which the case originates—in cases affecting ambassadors and public ministers and those in which a state is a party. For the most part, however, the Supreme Court acts as an appeals court with **appellate jurisdiction**.

**Treason** Article III also defined *treason* as "levying war" or giving "aid or comfort" to the enemy. Treason is the only crime mentioned or defined in the Constitution. Because the accusation of treason had been used as a political tool in unfair trials to quiet dissent against the government, the founders wanted to ensure that the new government could not easily prosecute that charge just to silence alternative voices. At least two witnesses must testify in open court to the treasonous act in order to convict the accused.

### *Judiciary Act of 1789*

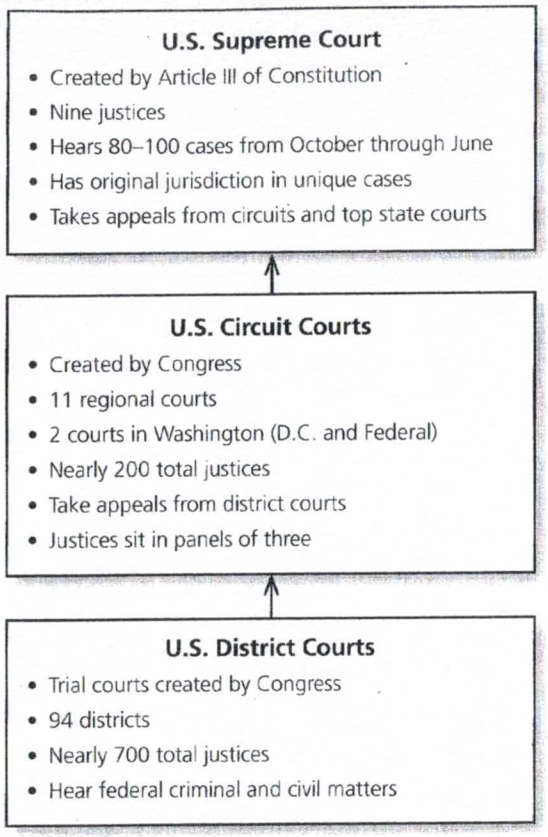
The first Congress quickly defined a three-tier federal court system with the Judiciary Act of 1789. The law established one district court in each of the 13 states, plus one each for the soon-to-be states of Vermont and Kentucky. The law also defined the size of the Supreme Court with six justices, or judges. President Washington then appointed judges to fill these judgeships. In addition to the district court, the Congress created three regional circuit courts designated to take cases on appeal from the district courts. Two Supreme Court justices were assigned to each of the "circuits" and were required to hold circuit court twice per year in every state. The presiding district judge joined them to make a three-judge intermediate panel. In a given period, the Supreme Court justices would hold one court after another in a circular path, an act that became known as "riding circuit."



**Source:** Library of Congress

The Supreme Court is the only federal court named in Article III of the Constitution, yet it did not operate in its own building—shown here in a drawing before it was built—until 1935.

## Federal Court System




### *U.S. District Courts*

There are 94 district courts in the United States—at least one in each state, and for many western states, the geographic district is the whole state. Each district court may have several federal courthouses and several federal district judges. There are nearly 700 district judges nationwide who preside over trials concerning federal crimes, lawsuits, and disputes over constitutional issues. In 2013, the district courts received more than 375,000 case filings nationwide, most of a civil nature.

**A Trial Court** U.S. district courts are trial courts with original jurisdiction over federal cases. The litigants in a trial court are the **plaintiff**—the party initiating the action—and the **defendant**, the party answering the action. Others who may be part of a trial court are witnesses, jury members, and a presiding judge. Trial courts are finders of fact; that is, these courts determine if an accused defendant did in fact commit a crime, or if a civil defendant is indeed responsible for some mistake or wrongdoing.



**Federal Crimes** The U.S. district courts try federal crimes, such as counterfeiting, mail fraud, or evading federal income taxes—crimes that fall under the enumerated powers in Article I, Section 8 of the Constitution. Most violent crimes, and indeed most crimes overall, are tried at the state level. Congress has declared illegal some violent crime and interstate actions, such as drug trafficking, bank robbery, terrorism, and acts of violence on federal property. For example, in the *United States v. Timothy McVeigh*, the government argued that McVeigh exploded an Oklahoma City federal building and killed 168 victims. The court found him guilty and sentenced him to death.

The defendant has a constitutional right to a jury and defense lawyer and several other due process rights included in the Bill of Rights. The judge or jury must find the defendant guilty "beyond a reasonable doubt" in order to convict and issue a sentence. Many cases are disposed of when a defendant pleads guilty before the trial. This process is known as a **plea bargain,** whereby the government and the defendant bargain for a lesser sentence in exchange for a guilty plea. A plea bargain saves courts time and taxpayers money, and it guarantees a conviction. For example, FBI agent Robert Hanson was discovered to have sold government secrets to the Russians for years. He was charged with espionage crimes and pleaded guilty in order to avoid the death penalty.

**U.S. Attorneys** Each of the 94 districts has a U.S. attorney, appointed by the president and approved by the Senate, who represents the federal government in federal courts. These attorneys work in the Department of Justice under the **attorney general.** They serve as federal prosecutors, and with assistance from the FBI and other federal law enforcement agencies they prosecute federal crimes committed within their districts. Nationally, they try close to 80,000 federal crimes per year. Of those, immigration crimes and drug offenses take up much of the courts' criminal docket. Fraud is third.

**Civil Cases** Citizens can also bring civil disputes to court to settle a business or personal conflict. Some plaintiffs sue over **torts**, civil wrongs that have damaged them. In a lawsuit, the plaintiff files a complaint (a brief that explains the damages and argues why the defendant should be held responsible). The party bringing suit must prove the defendant's liability or negligence with a "preponderance of evidence" for the court to award damages. Most civil disputes, even million-dollar lawsuits, are handled in state courts. The U.S. district courts have jurisdiction over disputes involving more than $75,000 with **diversity citizenship**—cases in which the two parties reside in different states.

Disputes involving constitutional questions also land in this court. In these cases, a federal judge, not a jury, determines the outcome because these cases involve a deeper interpretation of the law than more general cases do. Sometimes a large group of plaintiffs claim common damage by one party and will file a **class action suit**. After a decision, courts may issue an **injunction**, or court order, to the losing party in a civil suit, making them act or refrain from acting to redress a wrong.

**Suing the Government** Sometimes a citizen or group sues the government. Technically, the United States operates under the doctrine of **sovereign immunity**—the government is protected from suit unless it permits such a claim. Over the years, Congress has made so many exceptions that it even established the U.S. Court of Claims to allow citizens to bring complaints against the United States. Citizens and groups also regularly bring constitutional arguments before the courts. One can sue government officials acting in a personal capacity. For example, the secretary of transportation could be sued for causing a traffic accident that resulted in thousands of dollars in damage. But the secretary of defense or Congress cannot be sued for the loss of a loved one in a government-sanctioned military battle.

**Special Legislative Courts** In addition to the constitutional courts, the federal judiciary has some additional obscure courts. Congress has created a handful of special courts to hear matters of expert concern. These are known as the **special legislative courts** because they are created by the legislature as opposed to the Constitution. The judges are appointed by the president and approved by the Senate, typically for a 15-year fixed term. These courts deal with specific issues, and therefore an experienced judge in that area of law is desired. Since the body of law around taxation or intelligence gathering changes with the times, these judges aren't given indefinite terms.

## U.S. Circuit Court of Appeals

Directly above the district court is the U.S. Circuit Courts of Appeals. The circuit courts have appellate jurisdiction, taking cases on appeal. In 1891, Congress made the circuit court of appeals a permanent body. By this time, the country had expanded to the Pacific Coast and Supreme Court justices still had to travel across the now distant and expansive circuits. The increasing caseload, too, made this task unmanageable for justices based in Washington.

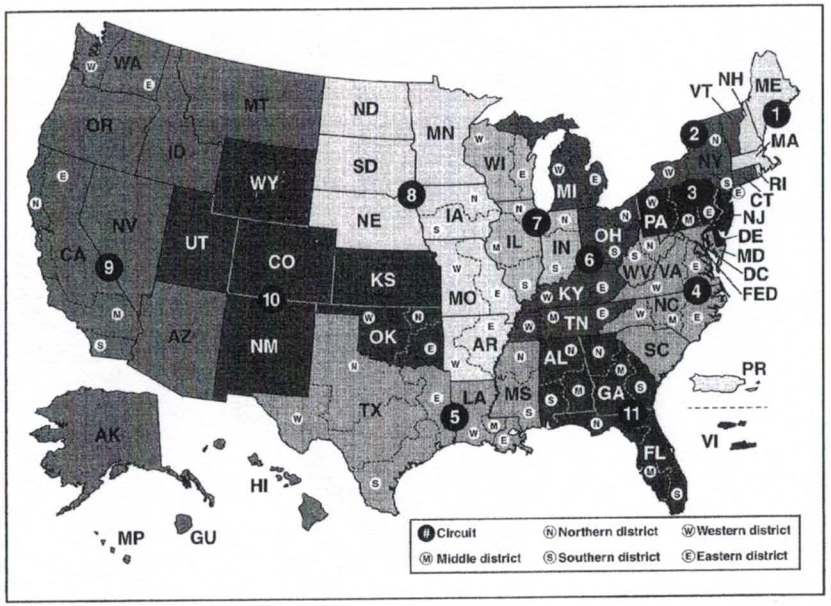
**Appellate Courts** Appeals courts are especially influential because they don't determine facts; instead, they shape the law. The losing party in a trial can appeal based on the concept of ***certiorari***, Latin for "to make more certain." Thousands more cases are appealed than accepted by higher courts. The appellant must offer some violation of established law or procedure that led to the incorrect verdict in the prior court. Appeals courts look different and operate differently from trial courts. Appeals courts have a panel of judges sitting at the bench. There is no witness stand or jury box since the court does not entertain new facts but decides instead on some narrow question or point of law.

The **petitioner** appeals the case, and the **respondent** responds, claiming why and how the lower court ruled correctly. The hearing lasts about an hour as each side makes oral arguments before the judges. Appeals courts don't declare guilt or innocence when dealing with criminal matters, but they may order new trials for defendants. After years of deciding legal principles, appeals courts have shaped the body of U.S. law.



The U.S. Courts of Appeals consist of 11 geographic circuits, each with one court in cities such as Atlanta, New Orleans, and Chicago. Nationwide, there are nearly 200 circuit court justices who sit in panels of three to hear both criminal and civil appeals. On important matters, an entire court will sit *en banc;* that is, every judge on the court will hear and decide a case. Appeals courts' rulings stand within their geographic circuits.

FEDERAL CIRCUITS AND DISTRICTS




In addition to the 11 circuits, two other appeals courts are worthy of note. The Circuit Court for the Federal Circuit hears appeals dealing with patents, contracts, and financial claims against the United States. The Circuit Court of Appeals for the District of Columbia handles appeals from those fined or punished by executive branch regulatory agencies. The D.C. Circuit is considered the second most important court in the nation and has become a feeder for Supreme Court justices.

## The United States Supreme Court

Atop this hierarchy is the U.S. Supreme Court, with the chief justice and eight associate justices. The Supreme Court hears mostly cases on appeal from the circuit courts and also decisions appealed from the state supreme courts. The nine members determine which appeals to accept, they sit *en banc* for attorneys' oral arguments, and they vote to decide whether or not to overturn the lower court's ruling. The Court overturns about 70 percent of the cases it takes. Once the Supreme Court makes a ruling, it establishes a legal precedent.

### *Common Law and Precedence*

Courts follow a judicial tradition begun centuries ago in England. The **common law** refers to the body of court decisions that make up part of the law. Court rulings often establish a **precedent**—a ruling that firmly establishes some legal principle. These precedents are generally followed later as other courts consider the same legal logic in similar cases. The concept of ***stare decisis***, or "let the decision stand," governs common law.

Lower courts must follow higher courts' rulings. Following precedence establishes continuity and consistency in law. Therefore, when a U.S. district court receives a case that parallels an already decided case from the circuit level, the district court is obliged to rule in the same way due to **binding precedent**. Even an independent-minded judge who disagrees with the higher court's precedent is guided by the fact that an appeal of his or her unique decision will likely be overruled by the court above. That's why all courts in the land are bound by U.S. Supreme Court decisions. Judges also rely on **persuasive precedent**. That is, they can consider past decisions made in other districts or rulings in other circuits as a guiding basis for their decision. Precedents can of course be overturned. No two cases are absolutely identical, and for this reason differing considerations come into play. Attitudes and interpretations differ and evolve over time in different courts.

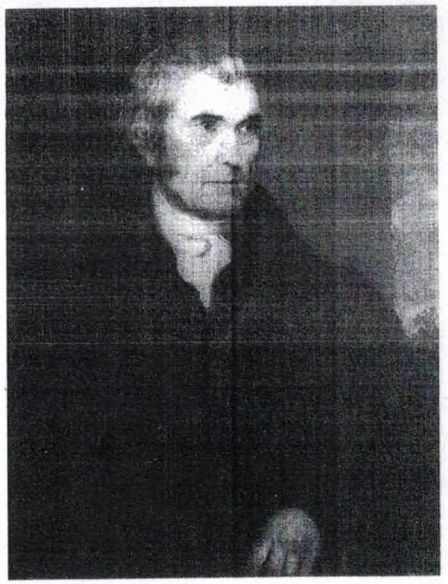
## History of the Supreme Court

The Supreme Court's authority of binding precedent combined with its power of **judicial review**—the ability to declare a legislative act or an executive branch action void—makes it a powerful institution and often the final arbiter of national law. With these two powers, the Court has had an amazing history of establishing national policy. Early on, it addressed national supremacy and states' rights. Later, it defined the relationship between government and industry. Most recently, the Court has extended and protected individual rights and liberties.

### *Defining Federalism*

The Supreme Court in its early years was a nondescript, fledgling institution that saw little action and was held in low esteem. President Washington appointed Federalist John Jay as the first chief justice. For its first year the Court was given a second-floor room in a New York building and convened for only a two-hour session. Several early justices didn't stay on the Court long. Jay resigned in 1795 to serve as governor of New York. The Court's reputation and role would soon change.

**John Marshall** Once President John Adams appointed Federalist **John Marshall** as chief justice, the Court began to assert itself under a strong, influential leader. Marshall remained on the Court from 1801 until his death in 1835, establishing customs and norms and strengthening national powers. Marshall was a Virginian who acquired a strong sense of nationalism and respect for authority and discipline during his service in the Revolutionary War. After independence, he became an ardent Federalist and attended the Virginia ratifying convention to vote in favor of ratification.



**Source:** Library of Congress
Chief Justice John Marshall

**The Marshall Court** John Marshall might as well be considered the father of the Supreme Court as he established its customs and solidified a strong nation under the Framers' plan. Throughout his 34 years as chief justice, he and his colleagues lived in a convivial atmosphere at a boarding house in Washington. Most who knew Marshall liked him. The Supreme Court, seven members at the time, simply shared a small room in the Capitol with Congress. It held hearings in a designated committee room on the first floor for seven years until it was given more spacious quarters. It did not have its own building until the 1930s.

Marshall created a united court that spoke with one voice. When he arrived, he found the Supreme Court functioning like an English court, where multiple judges issued separate opinions when deciding a case. Marshall insisted that this brotherhood of justices agree and unite in their rulings to shape national law. The Court delivered mostly unanimous opinions written by one judge. In virtually every important case during his time, that one judge was Marshall. "He left the Court," Chief Justice William Rehnquist wrote years later, "a genuinely coequal branch of a tripartite national government . . . the final arbiter of the meaning of the United States Constitution." He fortified the Union and the powers of the federal government with rulings that strengthened national supremacy and the Congress's commerce power.

**Judicial Review** One of the Court's first landmark cases was *Marbury v. Madison* (1803), a case involving the eleventh-hour appointments by outgoing President John Adams, who appointed several fellow Federalists in addition to Marshall to fill judicial vacancies. In deciding the case, the Court struck down part of the Judiciary Act and exercised judicial review.

The concept of judicial review existed before *Marbury*. Though the term or concept was not included in the U.S. Constitution, the idea was circulating among those creating it. In *Federalist #78*, Publius argued, "The Courts will have the right to pronounce legislative acts void because they are contrary to the Constitution." And during a debate at the Virginia ratifying convention,

John Marshall himself warned, "If Congress were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard . . . they would declare it void."

**Shaping a Strong Nation** Marshall developed a legacy of siding with the national legislature when controversies regarding federalism arose, strengthening the national government and opening Congress's powers more than Jeffersonian Republicans wanted. The *McCulloch v. Maryland* (page 33) and *Gibbons v. Ogden* (page 34) cases empowered Congress to create a bank and to regulate interstate commerce.

**The Taney Court and Slavery** Chief Justice Roger Taney replaced John Marshall. The Court's operation altered somewhat with new leadership and new members. In 1837, Congress increased its membership to nine justices to ease the workload and created new circuits. It also took up questions regarding slavery during the antebellum period. Taney and his fellow justices were determined to protect slavery and to suppress any threats to the institution's expansion. In *Prigg v. Pennsylvania*, the Court upheld a congressional fugitive slave act and refuted any state's attempt to alter such law.

In 1857, as the North and the South grew further apart, the Court decided the Dred Scott case. The slave Dred Scott had traveled with his master into free territory and claimed, with the help of abolitionist lawyers, that having lived in free northern territory, he should have his freedom. Taney and the Courts majority shocked abolitionists with their decision and left one of the Court's worst legacies. The ***Dred Scott v. Stanford*** ruling held that Scott wasn't even a citizen and thus had no standing, or right, to be a party in federal court, much less the country's top tribunal. The Court went further, stating that a slave owner's constitutional right to due process and property prevented depriving him of that property, regardless of where he traveled. It would take a civil war and constitutional amendments to overturn this ruling and free the slaves.

Congress increased the size of the Supreme Court to ten members in 1863 and then in 1867 decreased it back to nine, where it has been ever since.

## Corporations and the State

In the late 1800s, the Court found itself occupied with concerns over business, trade, and workplace regulations. The nation had expanded its commercial power, and with it came more factories, railroads, and production of goods and services. Workers were subjected to long hours in unsafe conditions for modest pay. Congress tried to address these issues under its power to regulate interstate commerce. State legislations also devised laws creating safety bureaus, barring payment in company scrip, setting maximum daily working hours, and preventing women and children from working in certain industries.

While lawmakers tried to satisfy workers' groups such as the Grangers or labor unions, their counterparts—typically strong businesses dominant in the northeastern United States—argued that minimal government interference and a *laissez-faire* approach to governance was the constitutionally correct path.



When pressed by corporations to toss out such laws, the Court had to decide two principles: what the Constitution permitted government to do, and which government—state or federal—could do it.

**Liberty of Contract** The Court began to overturn various state health, safety, and civil rights laws in 1877. It threw out a congressional act that addressed monopolies. It also ruled Congress's income tax statute null and void. By the turn of the century, the Court had developed a conservative reputation as it questioned business regulation and progressive ideas. In *Lochner v. New York* (1905), the Court overturned a New York state law that prevented bakers from working more than 10 hours per day. The law was meant to counter the pressures from the boss that mandated long hours in an era before overtime pay. In *Lochner,* the Court ruled that liberty of contract—a worker's right to freely enter into an agreement—superseded the state's police powers over safety and health. By 1908, however, the Court considered research and sociological data submitted by noted attorney Louis Brandeis, who later became a justice on the Court. The Brandeis brief persuaded the Court to uphold a maximum-hours law for women working in laundries.

During the Progressive Era, the Court made additional exceptions but quickly returned to a conservative, **strict constructionist** view of business regulation. A strict constructionist interprets the Constitution based on a literal or narrow definition of the language of the Constitution without taking into account changes and social conditions since ratification. The Court held that neither the state nor federal commerce power could be used to suppress child labor. The Court's conservative viewpoint turned further to the right when former president William Howard Taft was appointed chief justice. In *Adkins v. Children's Hospital*, it said that minimum wage law for women also violated liberty of contract.

**The New Deal and Roosevelt's Court Packing Plan** During the Depression, the Court transformed. Charles Evans Hughes replaced Taft as chief justice in 1929. Hughes managed a mixed group with a strong conservative four, nicknamed the "Four Horsemen," which overturned several New Deal programs. The Court struck down business regulations, invalidated the National Recovery Act, ruled out New York's minimum wage law, and restricted the president's powers to remove commissioners on regulatory boards.

The Court's status was raised with a new building that represented its authority, ceremony, and independence. In 1935, the justices moved into their current building with its majestic façade and familiar red-curtained courtroom. The Court also went through another transformation as it changed ideologically to solidify New Deal laws for the next generation.

After his 1936 landslide re-election, Roosevelt responded by devising a plan to "pack the Court." He proposed legislation to add one justice for every justice currently over the age of 70, which would have allowed him to appoint up to six new members. FDR claimed this would relieve the Court's overloaded docket, but in reality he wanted to dilute the power of the "nine old men" who had been unreceptive to his New Deal proposals. The sitting Court denied

any need for more justices. Conservatives and liberals alike felt such a plan amounted to an attack on the Court's independence.

The Court changed ideologically, however, when one of the conservatives took an about-face in *West Coast Hotel v. Parrish*, which sustained a Washington state minimum wage law. Justice Owen Roberts became "the switch in time that saved nine." After the *West Coast Hotel* decision, the Court upheld every New Deal measure that came before it. Roosevelt pressed ahead with more legislation, including a national minimum wage that has withstood constitutional scrutiny ever since. Winning four elections, he was able to appoint nine new justices to the Court friendly to his policies before his death in 1944.

### A Court Dedicated to Individual Liberties

During the 1940s and in the post-World War II years, the Court protected and extended individual liberties. It delivered mixed messages on civil liberties up to this point—holding states to First Amendment protections while allowing government infringements in times of national security threats. It upheld executive action that placed Japanese Americans in internment camps after Pearl Harbor. The Court, however, began a fairly consistent effort to protect individuals' liberties when the rights of minorities and accused criminals came before it. This pattern started after a Jehovah's Witness student refused to salute the American flag in violation of a West Virginia law. It crested in 1973 when the Court upheld a woman's right to an abortion.

**The Warren Court** The Court extended many liberties under Chief Justice **Earl Warren** after President Dwight Eisenhower appointed him in 1953. As an FBI official during the war, Warren oversaw the internment of Japanese Americans, and in 1948 he was the Republican's vice presidential nominee. But any expectations that Warren would act as a conservative judge were lost soon after he took the bench.

**Civil Rights and Civil Liberties** Warren's first major case was *Brown v. Board of Education* in 1954. When the National Association for the Advancement of Colored People argued that the "separate but equal" standard set by the Court in the 1896 *Plessy v. Ferguson* decision was outdated and in violation of the Constitution's equal protection clause, Warren rallied his fellow justices to a unanimous opinion. As the particulars of the integration process were worked out in the courts, the High Court issued several subsequent unanimous pro-integration rulings over the next decade.

Warren was flanked by civil libertarians Hugo Black, William O. Douglas, and Felix Frankfurter. With them, the Court set several precedents to guarantee rights to accused defendants that ultimately created a national criminal justice system. They declared courts could throw out evidence obtained unlawfully by the police. States had to now provide defense attorneys for indigent (poor) defendants at state expense. And arrested suspects had to be formally informed of their rights with the so-called *Miranda* ruling.

The Supreme Court also placed a high priority on the First Amendment's protection against a government-established religion and protection for citizens' free speech. It outlawed school-sponsored prayer and upheld students' rights to protest the Vietnam War in schools. The Court upheld the press's protection against charges of libel. The Warren Court legacy is that of an activist, liberal court that upheld individual rights of minorities and the accused.

Warren's legacy did not please traditionalists because his Court overturned state policies created by democratically elected legislatures. Several Warren Court decisions seemed to insult states' cultures and threaten to drain state treasuries. Some argued that Earl Warren should be impeached. Meanwhile, the counterculture of the 1960s outraged conservative America. President Nixon won the 1968 election, in part by painting Warren's Court as an affront to law enforcement and local control. After winning, Nixon tilted the Court to the right.

**The Burger Court** Nixon's first appointment replaced Warren with U.S. appeals court justice Warren Burger. But Burger by no means satisfied Nixon's quest to instill a conservative philosophy, and he largely failed in judicial leadership. While serving as a lackluster manager of the Court, Burger continued American law on the same path Warren had begun.

Burger had a difficult time leading discussions "in conference"—the Court's closed chambers discussions. Some suspected that Burger at times switched his opinion toward the end of the process in order to gain control and to draft or assign the writing of the opinion. The chief often couldn't round up enough agreement to get a five-justice majority. Thus cases went undecided while the Court took on additional ones. The justices became overworked and took as many as 150 appeals in a year.

In *Roe v. Wade*, Burger joined six others on the Court to outlaw states' anti-abortion laws as a violation of due process. With this ruling, a woman could now obtain an abortion, unconditionally, through the first trimester of a pregnancy. He also penned a unanimous opinion to uphold school busing for racial enrollment balance.

Supreme Court historian and former clerk Edward Lazarus refers to Burger as "an intellectual lightweight" who had "alienated his colleagues and even his natural allies." By 1986, Burger had proven pretentious and chafing to his colleagues, and he had simply become tired. At the press conference where he announced his retirement, a reporter asked him what he would miss most on the Court. Burger stalled, sighed, and said, "Nothing."

**The Rehnquist Court** At the same press conference, President Reagan elevated Associate Justice **William Rehnquist** to the chief's position. Rehnquist had attended Stanford Law School and clerked for Supreme Court Justice Robert Jackson in the 1950s. In considering him as a nominee in 1972, President Nixon was taken aback by Rehnquist's awkward appearance. The president's counsel John Dean recalls the encounter and aftermath. He was wearing a pink shirt and a psychedelic tie. "That's a hell of a costume he's wearing," Nixon said after he left a meeting in the Oval Office, "just like a clown." Nixon looked to Rehnquist's strict constructionist view instead of his style and nominated him anyway. The Senate did not confirm him easily and accused him of racism, as he had recommended upholding the "separate but

equal" doctrine when clerking for a justice in the early 1950s en route to the *Brown* ruling. This same controversy arose in 1986 as he accepted the chief's position.

Initially, Rehnquist found himself in dissent and all alone on several cases, earning him the nickname "the Lone Ranger." When Rehnquist took over for Burger, however, additional strict constructionists soon joined him. He improved the conference procedures and decreased the Court's caseload. All the justices, liberals and conservatives alike, welcomed the changes. In the 1990s, Rehnquist's Court upheld states' rights to place limitations on access to abortions and limited Congress's commerce clause authority.

## The Modern Supreme Court

The Supreme Court is known more for continuity than for change. Membership is small and justices serve long tenures. The Court's customs are established through consensus and remain over generations. The contemporary group operates in many ways as the Marshall, Warren, and Rehnquist courts did. When Justice Sandra Day O'Connor announced her retirement in 2005, the Court had not received any new members since 1994. President George W. Bush named John Roberts as her replacement. Before Roberts was confirmed, Chief Justice Rehnquist died. President Bush quickly altered his nomination to name Roberts as chief, and named his White House counsel, Harriet Miers, as the associate justice to replace O'Connor. Roberts was confirmed, but Miers withdrew her nomination after pressure from Bush's conservative base. He awaited Roberts's confirmation and then appointed Samuel Alito to the Court. President Barack Obama appointed two new justices within his first year in office, circuit judge Sonia Sotomayor and U.S. Solicitor General Elena Kagan. The Court that had not changed in 12 years now had four new members appointed by presidents from both parties.

### *A Diverse, Experienced Court*

Originally, the Court was a white Protestant man's institution. Some diversity came when presidents appointed Catholics and Jews. Justice Taney (1835) was the first Catholic member. Justice Louis Brandeis (1916) was the first Jewish member. President Lyndon Johnson appointed the first African American, Thurgood Marshall, in 1967. Ronald Reagan appointed the first woman, Justice O'Connor, in 1981.

The current Court is as diverse and as experienced as it has ever been. One African American, Clarence Thomas, and three females serve on the Court. There are six Catholics, three Jews, and no Protestants. Historically, many Supreme Court justices had never served as judges before their nomination. Presidents from FDR through Nixon tended to nominate highly experienced political figures and presidential allies. Since 1969, however, that trend has changed to naming lesser-known jurists who have served on other federal courts.



**Ideology** The latter-day Rehnquist Court and the current Roberts Court have been difficult to predict. The conservative and liberal wings have been balanced by the swing votes of O'Connor and now Justice Anthony Kennedy. For the past decade or so, most experts have been quick to characterize the Court as leaning conservative. However, the Court has limited states' use of the death penalty and has upheld government's eminent domain authority for economic development in the *Kelo v. New London* ruling.

**Chief Justice John Roberts** Chief Justice **John Roberts** has guided the Court with judicial minimalism. "Judges and justices are servants of the law, not the other way around. Judges are like umpires," he said during his confirmation hearing. "Umpires don't make rules; they apply them . . . nobody ever went to a ball game to see the umpire." The conversations and conferences go longer. He has achieved more unanimity in decisions and has written more narrow opinions to address the questions before the Court.

**Current and Recent Supreme Court Justices**

| Current Justices | President | Senate vote | Prior Job | Law school |
|---|---|---|---|---|
| John Roberts, Chief | G.W. Bush | 78—22 | DC Circuit | Harvard |
| Antonin Scalia | Reagan | 98—0 | DC Circuit | Harvard |
| Anthony Kennedy | Reagan | 97—0 | Ninth Circuit | Harvard |
| Clarence Thomas | G.H.W. Bush | 52—48 | DC Circuit | Yale |
| Ruth Bader Ginsburg | Clinton | 96—3 | DC Circuit | Harvard |
| Stephen Breyer | Clinton | 87—9 | First Circuit | Harvard |
| Samuel Alito | G.W. Bush | 58—42 | Third Circuit | Yale |
| Sonia Sotomayor | Obama | 68—31 | Second Circuit | Yale |
| Elena Kagan | Obama | 63—37 | Solicitor General | Harvard |
| **Recent Justices** | | | | |
| William Rehnquist | Nixon | 68—26 | Justice Dept. | Stanford |
| John Paul Stevens | Ford | 98—0 | Seventh Circuit | Northwestern |
| David Souter | G.H.W. Bush | 90—9 | First Circuit | Harvard |
| Byron White | Kennedy | Voice vote | Justice Dept. | Yale |
| Sandra Day O'Connor | Reagan | 99—0 | Arizona Court of Appeals | Stanford |
| Harry Blackmun | Nixon | 94—0 | Eighth Circuit | Harvard |
| Lewis Powell | Nixon | 89—1 | ABA President | Harvard |
| Warren Burger | Nixon | 74—3 | DC Circuit | St. Paul |
| Thurgood Marshall | Johnson | 69—11 | Solicitor General | Howard |

## Operation

The Supreme Court is guided by Article III, congressional acts, and its own rules. Congress is the authority on the court's size and funding. The Court began creating rules in 1790 and now has 48 formal rules. These guide the submission of briefs, the Court's calendar, deadlines, fees, paperwork requirements, jurisdiction, and the handling of different types of cases. Less formal customs and traditions it has developed also guide the Court's operation.

**Jurisdiction** The Court has both original and appellate jurisdiction. It serves as a trial court in rare cases, typically when one state sues another over a border dispute or to settle some type of interstate compact. When such cases are filed, the Court appoints a "special master," typically a former judge, to determine the facts and to recommend an outcome. Both states still appear before the Court for a hearing. It also accepts a plethora of ***in forma pauperis*** briefs, filings by prisoners (in the form of a pauper) seeking a new trial.

***New Jersey v. New York.*** One of the rare original jurisdiction cases came in 1998 when New Jersey sued New York for rights to Ellis Island. The island sits in the harbor between the two states, and it served as the main port of entry for a generation of European immigrants. New Jersey was interested in revenues, about $500,000 in annual taxes and fees. More importantly, the state wanted bragging rights to the monument that defines America as a melting pot—the Statue of Liberty. The Court heard the case in May 1998 and ruled for New Jersey.

**Appeals Process** As the nation's highest appeals court, the Court takes cases from the 13 circuits and the 50 states. Two-thirds or more of appeals come through the federal system. The Supreme Court has a more direct jurisdiction over cases starting in U.S. district courts.

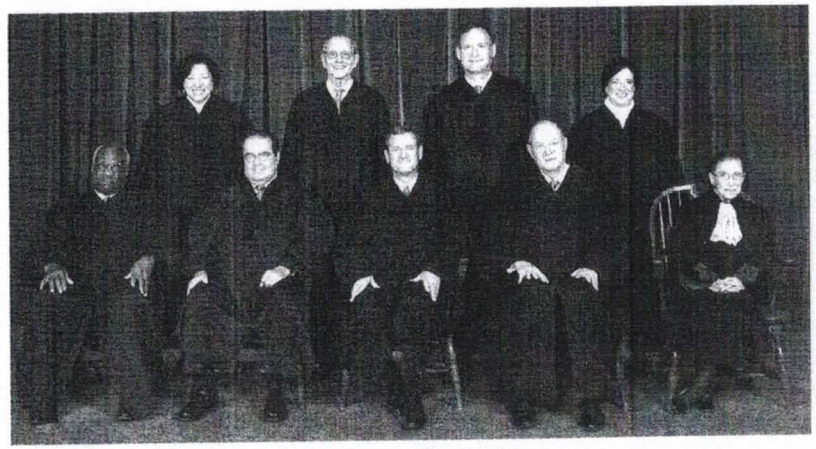
Like the circuit courts, the Supreme Court accepts appeals each year from among thousands filed. The petitioner files a **petition for certiorari**, a brief arguing why the lower court erred. The Supreme Court reviews these to determine if the claim is worthy and if it should grant the appeal. To be more efficient, the justices share their clerks, who review the petitions for certiorari and determine which are worthy. This cert pool becomes a gatekeeper at the Supreme Court. If a certiorari is deemed worthy, the justices add the claim to the **discuss list**. From time to time, all nine justices gather in conference to discuss these claims. They consider past precedents and the real impact on the petitioner and respondent. The Supreme Court does not consider hypothetical or theoretical damages; the claimant must show actual damage. Finally, the justices consider the wider national and societal impact if they take and rule on the case. Once four of the nine justices agree to accept the case, the appeal is granted. This **rule of four**, a standard less than a majority, reflects courts' commitments to minorities.

The Court then issues a **writ of certiorari** to the lower court, informing it of the Court's decision and to request the full trial transcript. The justices spend much time reading the case record. Then a date is set for oral arguments. When the Court opens on the first Monday in October, the nine justices enter to hear the petitioner and respondent make their cases, each having 30 minutes for argument. A Supreme Court hearing is not a trial but a chance for each side to persuade justices on one or more narrow points of law. Justices will ask questions, pose hypothetical scenarios, and at times boldly signal their viewpoints. Sometime after the hearing the justices will reconvene in conference to discuss the arguments and make a decision. A simple majority rules.



## Opinions

Chief Justice John Marshall's legacy of unanimity has vanished. The Court comes to a unanimous decision only about 30 to 40 percent of the time. Therefore, it issues varying opinions on the law. Once the Court comes to a majority, the chief justice, or the senior-most justice in the majority, either writes the Court's opinion or assigns it to another justice in the majority. In making that decision, the assigning justice considers who has expertise on the topic, who is passionate about the issue, and what the nature of the discussions were that took place in conference. The **majority opinion** is the Court's



**Source:** Wikimedia Commons / Collection of the Supreme Court of the United States

John Roberts (seated center) became Chief Justice of the Supreme Court in 2005. Associate Justice Anthony Kennedy (seated beside him on the right) has become an often-deciding swing vote on the Court.

opinion. It is the judicial branch's law much as a statute is Congress's law or an executive order is law created by a president. The majority opinion sums up the case, the Court's decision, and its rationale. These opinions often include colorful legal language.

Justices who find themselves differing from the majority can draft and issue differing opinions. Some may agree with the majority and join that vote but have reservations about the majority's legal reasoning. They might write a **concurring opinion**. Those who vote against the majority often write a **dissenting opinion**. The dissenting opinion has no force of law but allows a justice to explain his disagreements with his colleagues. While these have no immediate legal bearing,

dissenting opinions send a message to the legal community or to America at large and are often referenced in later cases when the Court might revisit the issue or reverse the precedent. On occasion, the Court will issue a decision without the full explanation. This is known as a ***per curium* opinion**.

**BY THE NUMBERS**
**Supreme Court's Recent Caseload**

| Term | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|---|---|---|
| Cases Filed | 7,496 | 8,521 | 8,857 | 8,241 | 7,738 | 8,159 | 7,857 | 7,713 | 7,509 |
| Cases Argued | 87 | 87 | 78 | 75 | 87 | 82 | 86 | 79 | 77 |

**Source:** http://www.supremecourt.gov/

**What do the numbers show?** Roughly how many cases are appealed to the Supreme Court each year? How many cases does the Court generally accept? What fraction or percent of cases appealed does the Court take? Recall the reasons the Supreme Court will or will not accept an appeal.

**Clerks' Role** Each justice typically employs four law clerks to assist them with handling briefs and analyzing important cases. These bright young attorneys typically graduate high in their classes at Ivy League law schools and have a prosperous legal career ahead of them. In fact, several Supreme Court Justices of the modern era served as clerks in their earlier days. They preview cases for the justices and assist them with writing the opinions.

### *Judicial Activism vs. Judicial Restraint*

After the Supreme Court established judicial review in *Marbury*, it only checked the legislature once more in the government's first full century, in the Dred Scott case. Other courts have since reserved the right to rule on government action in violation of constitutional principles, whether by the legislature or the executive. Judicial review has since become a vehicle that has strengthened all courts. It has placed the Supreme Court, in some ways, above the other branches, making it the final arbiter on controversies of federalism that typically have made the federal government supreme while defining what states, the Congress, and the president can or cannot do.

When judges strike down laws or reverse public policy, they are said to be exercising **judicial activism**. To remember this concept, think *judges acting* to create the law. Activism can be liberal or conservative, depending on the nature of the law that is struck down. When the Court threw out the New York maximum-hours law in 1905 in *Lochner*, it acted conservatively because it rejected an established liberal statute. In *Roe v. Wade*, the Court acted liberally to remove a conservative anti-abortion policy in Texas. Courts at all levels have struck down state and federal statutes.



The Court's power to strike down parts of or entire laws has encouraged litigation and changes in policy. Gun owners and the NRA supported an effort to overturn a ban on handguns in Washington, D.C., and got a victory in the *Heller* decision. Several state attorneys general who opposed the Affordable Care Act sued to overturn it. In a 5–4 decision, in *National Federation of Independent Business v. Sebelius*, the Court upheld the key element of the Affordable Care Act, the individual mandate. That mandate is the federal requirement that all citizens must purchase health insurance or pay a penalty.

Critics of judicial activism tend to point out that, in a democracy, policy should be created by the elected representative legislatures. These critics advocate for **judicial self-restraint**. Chief Justice Harlan Fiske Stone first used the term in his 1936 dissent when the majority outlawed a New Deal program. The Court should not, say these critics, decide a dispute unless there is a concrete injury to be relieved by the decision. The current Court's outspoken conservative strict constructionist Antonin Scalia once claimed, "A 'living' Constitution judge [is] a happy fellow who comes home at night to his wife and says, 'The Constitution means exactly what I think it ought to mean!'" Justices should not declare a law unconstitutional, strict constructionists say, when it merely violates their own idea of what the Constitution means, but only when the law clearly and directly violates the document.

**Not Ideologically Exclusive** The idea that judicial activists are liberal and that self-described conservatives are strict constructionists is an outdated overgeneralization. As historian David Garrow has observed, "Both highly conservative and relatively liberal justices have repeatedly embraced judicial activism." Conservatives and strict constructionists tend to criticize judges who make liberal activist decisions with "legislating from the bench." In several cases, however, the Court has exercised a conservative brand of judicial activism. In striking down limits on when a corporation can advertise during a campaign season, it struck down parts of Congress's campaign reform act in *Citizens United v. FEC*.

Ideology aside, still other critics argue judicial policymaking is ineffective as well as undemocratic. Wise judges have a firm understanding of the Constitution and citizens' rights, but they don't always study issues over time. Most judges don't have special expertise on matters of environmental protection, operating schools, or other administrative matters. They don't have the support systems of lawmakers, such as committee staffers and researchers, to fully engage an issue to find a solution. So when courts rule, the outcome is not always practical or manageable for those meant to implement it. Additionally, many such court rulings are just unpopular.

## The Courts and the Other Branches of Government

Congress and the president interact with the judiciary in many ways. From the creation of various courts to the appointment of judges to implementation of a judicial decision, the judiciary often crosses paths with the other two branches.

### *Appointing the Judiciary*

With hundreds of judgeships in the lower courts, presidents will have a chance to appoint several judges to the federal bench over their four or eight years in office. When a vacancy occurs, or when Congress creates a new seat on an overloaded court, the president carefully selects a qualified judge because that person can shape law and will likely do so until late in his or her life. Since John Adams's appointment of the Federalist "midnight judges" in 1801, presidents have tried to shape the judiciary with jurists who reflect their political and judicial philosophy.

District and circuit appointments receive less news coverage and have less impact than Supreme Court nominees but are important nonetheless. In appointing them, presidents tend to consider candidates from the same or nearby geographic areas. Law school deans, high-level state judges, and successful lawyers in private practice make excellent candidates. The president's White House legal team and the Department of Justice in conjunction with the Senate seek out good candidates to find experienced, favorable nominees.

**Senate's Advice and Consent** The Senate Judiciary Committee looks over all the president's judicial appointments. Sometimes the nominee appears before the committee to answer senators' questions about their experience or their views on the law. Less controversial district judges are confirmed without notice based largely on the home state senators' recommendations. The more controversial, polarizing Supreme Court nominees will receive greater attention during contentious and dramatic hearings. The quick determination of an appointee's political philosophy has become known as a **litmus test**. Much like testing a solution for its pH in chemistry class, presidents, senators, or pundits may ask pointed questions on controversial issues to determine a candidate's ideology on the political spectrum.

**Senatorial Courtesy** The Senate firmly reserves its right of advice and consent. "In practical terms," said George W. Bush administration attorney Rachel Brand, "the home state senators are almost as important as—and sometimes more important than—the president in determining who will be nominated to a particular lower-court judgeship." This practice of **senatorial courtesy** is especially routine with district judge appointments, as districts are entirely within a given state. When vacancies occur, senators typically recommend judges to the White House.

**Blue Slip** Senate procedure and tradition basically give individual senators veto power over nominees located in their respective states. For U.S. district court nominations, each of the two senators receives a blue slip—a blue piece of paper they return to the Judiciary Committee to allow the process to move forward. To derail the process, a senator can return the slip with a negative indication or never return it at all. The committee chairman will usually not hold a hearing on the nominee's confirmation until both senators have consented. This custom has encouraged presidents to consult with the home state senators early in the process. President George W. Bush asked senators to offer three recommendations when vacancies occurred.



All senators embrace this influence. They are meant to be guardians and representatives for their states. The other 98 senators tend to follow the home state senators' lead, especially if they are in the same party, and vote for or against the nominated judge based on the senators' views. This custom is somewhat followed with appeals court judges as well. Both George W. Bush and President Obama have considered the views of senators representing states within judicial circuits. Appeals courts never encompass only one state, so the privilege of senatorial courtesy is less likely.

**Confirmation** When a Supreme Court vacancy occurs, a president has a unique opportunity to shape American jurisprudence. Of the 159 nominations to the Supreme Court over U.S. history, 35 were not confirmed. Eleven were rejected by a vote of the full Senate, 23 were postponed or never acted on by the Judiciary Committee, and a few withdrew on their own or by request of the president. Few confirmations brought rancor or public spectacle until the Senate rejected President Nixon's first two nominees. Since then, the Court's influence on controversial topics, intense partisanship, the public nature of the confirmation process, and contentious hearings have made confirmation a partisan event.

**Interest Groups** The Senate's role and the increasingly publicized confirmation process has also involved interest groups. Confirmation hearings were never public until 1929. In recent years, they have become a spectacle and may include a long list of witnesses testifying about the nominee's qualifications. The most active and reputable interest group to testify about judicial nominees is the American Bar Association. This powerful group represents the national interest of attorneys and the legal profession. Since the 1950s, the ABA has been involved in the process. They rate nominees as "highly qualified," "qualified," and "not qualified." More recently, additional groups weigh in on the process, especially when they see their interests threatened or enhanced. Interest groups also target a senator's home state when they feel strongly about a nominee, urging voters to contact their senators in support or in opposition to the nominee. Indeed, interest groups sometimes suggest or even draft questions for senators and assist them at the confirmation hearings.

**Getting "Borked"** The confirmation process became more ideological during the Reagan and first Bush administrations and has continued since. The process took a turn when Reagan chose U.S. Appeals Court Justice **Robert Bork** in 1987. Bork was the conservative's leading intellectual in the legal community. At 60 years old, he had been a professor at Yale Law School, U.S. solicitor general, and a successful corporate lawyer. He was an advocate of original intent, seeking to uphold the Constitution as intended by the Framers. He made clear how he despised the rulings of the activist Warren Court. He spoke against decisions that mandated legislative reapportionment, upheld affirmative action, and placed citizen privacy over state authority.

When asked about his nomination, then-Senator Joe Biden, chair of the Senate Judiciary Committee, warned the White House that choosing Bork would likely result in a confirmation fight. Within hours of Reagan's nomination, Senator Edward Kennedy drew a line in the sand at a Senate press conference.

"Robert Bork's America," Kennedy said, "is a land in which women would be forced into back alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizen's doors in midnight raids, and school children could not be taught evolution."

Kennedy's warning brought attention to Judge Bork's extreme views that threatened to turn back a generation of civil rights and civil liberties decisions. What followed was a raucous, lengthy confirmation hearing. Bork himself jousted with Senator Biden for hours. This contest drew attention as it was a pivotal moment for the Court when every liberal and conservative onlooker in the country had chosen sides. After a go with the committee, the full Senate, which had unanimously confirmed Bork as an appeals court judge in 1981, rejected him by a vote of 58 to 42. The term "to bork" entered the American political lexicon, defined more recently by the *New York Times*: "to destroy a judicial nominee through a concerted attack on his character, background, and philosophy."

**Clarence Thomas** In 1991, Justice Thurgood Marshall, the first African American on the Court, resigned. President George H.W. Bush and his advisors opposed affirmative action but simply could not let the Court return to a completely white institution. After some consideration, Bush introduced Marshall's replacement, conservative African-American judge Clarence Thomas. What followed was Clarence Thomas's controversial confirmation process that centered on ideology, experience, and sexual harassment.

By naming Thomas, Bush satisfied the left's penchant for diversity, while also satisfying his conservative base with a strict constructionist. As Jeffrey Toobin, author of *The Nine*, says, "The list of plausible candidates that fit both qualifications pretty much began and ended with Clarence Thomas." After onlookers expressed concern for Thomas's ideology, they then pointed at his lack of experience. He had never argued a single case in any federal appeals court, much less the Supreme Court. He had never written a book, an article, or legal brief of any consequence. He had served as an appeals judge on the D.C. Circuit for about one year. The ABA gave him only a "qualified" rating, a rarity among nominees to the High Court.

Then Anita Hill came forward. Hill had some years earlier worked on Thomas's staff in the administration and accused him of an array of sexually suggestive office behavior. The Judiciary Committee then invited her to testify. In a highly televised carnival atmosphere, Hill testified for seven hours on the harassing comments Thomas had dealt her and the pornographic films he discussed. Thomas denied many of the allegations and called the hearing a "high-tech lynching." After a tie vote in committee, the full Senate barely confirmed him.

**"The Nuclear Option"** During George W. Bush's first term, Democrats did not allow a vote on 10 of the 52 appeals court nominees that had cleared committee. Conservative nominees were delayed by Senate procedure. The Democrats, in the minority at the time, invoked the right to filibuster judges. One Bush nominee waited four years. Bush declared in his State of the Union message, "Every judicial nominee deserves an up or down vote." Senate Republicans threatened to change the rules, which could be done with a simple majority. The threat to the filibuster became known as a drastic "nuclear option." A bipartisan group of senators dubbed the "Gang of 14" joined forces to create a compromise that kept the Senate rules the same while confirming most appointees. President Obama had a lower confirmation rate than Bush. Late in his first term, about 76 percent of Obama's nominees had been confirmed, while nearly 87 percent of Bush's nominees were confirmed. Bush nominees waited, on average 46 days to be confirmed; Obama's waited 115 days.

**BY THE NUMBERS**
**Recent Presidents' Judicial Appointments**

| President | Supreme Court | Appeals Courts | District Courts | Total |
|---|---|---|---|---|
| Nixon | 4 | 45 | 182 | 231 |
| Ford | 1 | 12 | 52 | 65 |
| Carter | 0 | 56 | 206 | 262 |
| Reagan | 3 | 78 | 292 | 373 |
| G.W.H.Bush | 2 | 37 | 149 | 188 |
| Clinton | 2 | 62 | 306 | 370 |
| G.W. Bush | 2 | 61 | 261 | 324 |

**Source:** U.S. Courts. Excludes Court of International Trade

**What do the numbers show?** What presidents appointed more judges than others? On average, how many Supreme Court judges does a president appoint? How many lower court judges? Which president of recent years appointed the most? How do a president's judicial appointees impact law and government in the United States?

**Reforming Judicial Confirmation** With all the interested parties focused on the potential impact of a new Supreme Court justice, confirmation has become a public and hotly debated event for an otherwise private, venerable institution. Joyce Baugh of Central Michigan University offers a solution to tame the confirmation process: Limit the number of participants at the hearings, prevent nominees from testifying, prevent senators from offering specific hypotheticals to conduct a litmus test, and base confirmation solely on nominees' written records and testimony from legal experts. Chief John Roberts spoke to the persistent problem of filling judicial vacancies in an age of partisanship. In his annual report on the judiciary, he declared, "Each party has found it easy to turn on a dime from decrying to defending the blocking of judicial nominations, depending on their changing political fortunes."

**Surprising Their Appointers** Not all appointees prove to be as controversial in practice as suspected during the power play. And not all confirmed judges follow the philosophy the appointing president expected. Once confirmed, judges are independent from the executive. Several have disappointed the presidents who appointed them. Eisenhower did not bring

Earl Warren to the Supreme Court to make liberal, activist decisions. Warren Burger disappointed Nixon when he voted to legalize abortion and to promote school busing for racial balance. Justice David Souter, appointed by Republican George H.W. Bush in 1990, proved to be a reliably liberal vote until he resigned in 2009.

### Congress and the Courts

**Impeachment** The same process for accusing and removing a president also exists for federal judges who have acted improperly. The first judicial impeachment came in 1804 against John Pickering, an abusive, partisan drunkard on his way to insanity. Pickering refused to yield the bench, so Congress ousted him. Almost immediately, Thomas Jefferson's party moved to impeach Supreme Court Justice Samuel Chase. In an age of partisan attacks, Jefferson's party wanted to weaken the remaining presence of Federalists on the federal bench. Chase had vigorously supported convictions under the Sedition Acts. Wanting to avoid making the impeachment process a political tool to rid the third branch of opponents, Jefferson withdrew his support for the endeavor and Chase survived the Senate vote. Impeachment has served as Congress's check on the so-called life terms. Since these early cases a total of 15 federal judges have been impeached. The most recent was District Judge Thomas Porteous, whom the Senate later found guilty of corruption and perjury and voted to remove.

**Congressional Oversight and Influence** Beyond the Senate's advice and consent and removal powers, Congress can influence the judiciary in other ways. It sets and pays judges' salaries. Congress budgets for the construction and maintenance of federal courthouses. It has passed an entire body of law that helps govern the judiciary. This includes regulations about courtroom procedures to judicial recusal—judges withdrawing from a case if they have a conflict of interest. Occasionally Congress creates new seats in the 94 district courts and on the 13 appeals courts. Congress has more than doubled the number of circuit and district judges over the last 50 years.

| Selected U.S. Courts of Special Jurisdiction |
|---|
| • U.S. Court of Appeals for the Armed Services |
| • U.S. Court of Federal Claims |
| • U.S. Court of International Trade |
| • U.S. Tax Court |
| • U.S. Court of Appeals for Veterans Claims |

### Department of Justice

In addition to appointing the judiciary, the executive branch enters the federal courts to enforce criminal law and to weigh in on legal questions. The president's **Department of Justice**, headed by the attorney general, investigates federal crimes with the FBI or DEA, and U.S. attorneys prosecute the accused criminals. These attorneys are also the legal authority for federal civil law on a more local basis. When a party sues the federal government, it is the U.S. attorneys who defend the United States. In appealed criminal cases, these attorneys present the oral arguments in the circuit courts.

Another high-ranking figure in the Department of Justice is the **solicitor general** who works in the Washington office. Appointed by the president and approved by the Senate, the solicitor general determines which cases to appeal to the U.S. Supreme Court and represents the United States in the Supreme Court room. When you see a Supreme Court case entitled the *United States v. John Doe*, it means the United States lost in one of the circuit courts and the solicitor general sought an appeal. At times, this official will submit an ***amicus curiae* brief** (friend of the court brief) to the Supreme Court in cases where the United States is not a party. As discussed in Chapter 7, an amicus brief argues for a particular ruling in the case. Several solicitors general have later been appointed to the High Court, notably Stanley Reed, Thurgood Marshall, and the newest member Elena Kagan.

### Judicial Implementation

When a court orders, decrees, or enjoins a party, it can do so only from the courtroom. Putting a decision into effect, however, is another matter. Judges alone cannot implement the verdicts and opinions made in their courts. Nine robed justices in Washington simply cannot put their own decisions into effect. They require at least one of several other potential governing authorities—police, regulatory agencies, or other government agencies—to carry out their decisions. Legislatures may have to rewrite or pass new laws.

The implementing population, those charged with putting a court's decision into effect, doesn't always cooperate with or follow courts' orders. When the Supreme Court makes decisions it surely assesses potential enforcement and cooperation. When John Marshall's court deemed that Georgia could not regulate Cherokee Indian lands in its state because such regulation was exclusive to the federal government, President Andrew Jackson strongly disagreed and allegedly said, "John Marshall has made his decision, now let him enforce it." In the late 1950s, after the Court ruled that a Little Rock high school had to integrate, the executive branch sent federal troops to escort the claimants into the formerly all-white school.