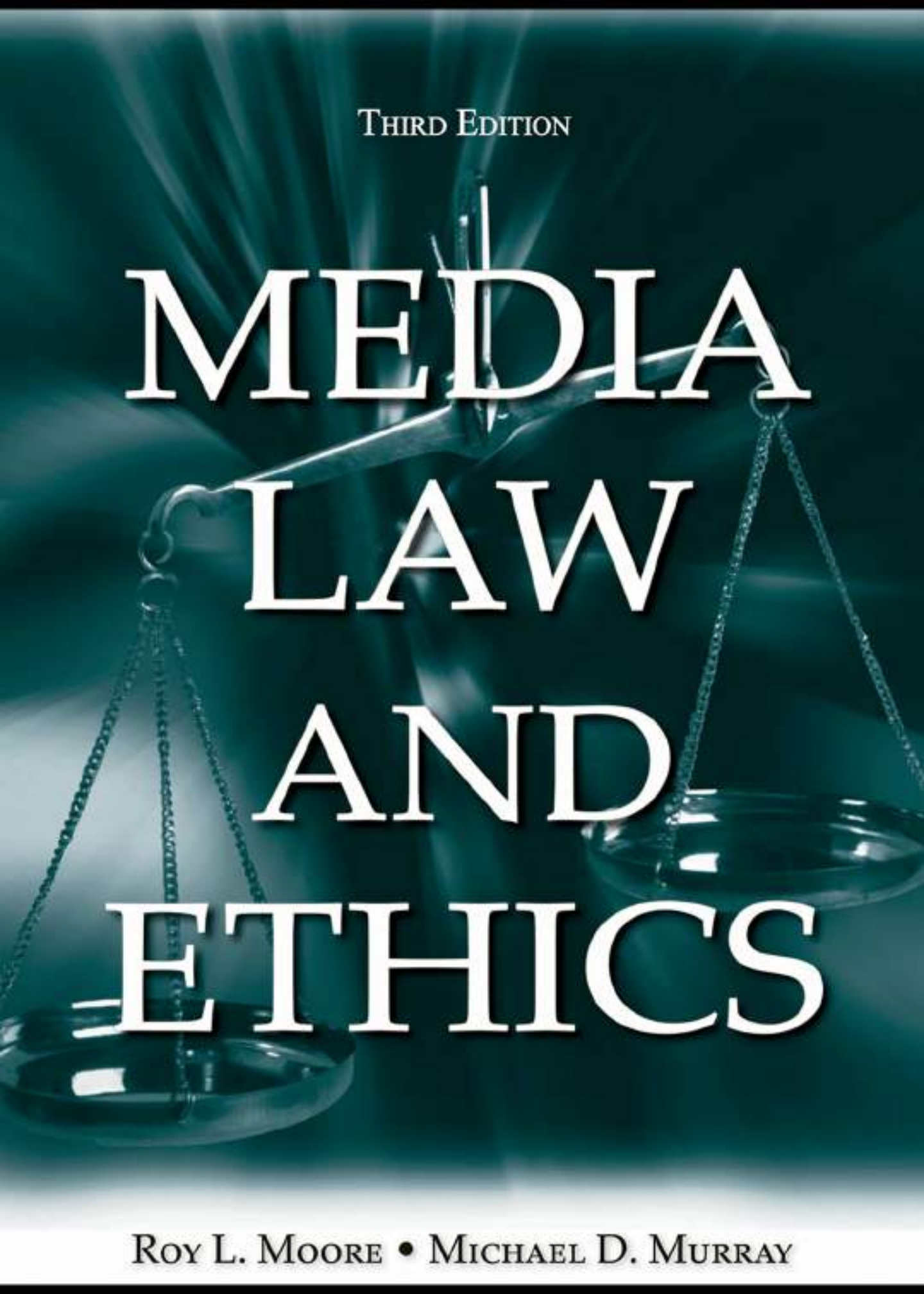

THIRD EDITION
MEDIA LAW AND ETHICS
ROY L. MOORE • MICHAEL D. MURRAY

CHAPTER
2

The U.S. Legal System

The structures, functions, and procedures of our federal and state judicial systems can be confusing, complex, and even intimidating to the layperson, but journalists must be familiar with the basics as well as some of the intricacies. Today, most major news media outlets devote a substantial amount of coverage to judicial decisions and proceedings. These include civil and criminal trials, criminal pretrial proceedings, and, frequently, appellate court rulings. Some of this increased coverage can be traced to a series of U.S. Supreme Court decisions favoring greater access of the public and the press to the judicial process. Most states now provide for routine access of video, film, and still cameras to criminal and, in some cases, civil trials, although such access has become more difficult since 9/11. Cameras continue to be prohibited in most federal courts. Every state permits cameras in at least some courtrooms, but a dozen states impose bans in criminal cases.[1]

Major U.S. Supreme Court cases are usually handed down each week the court is in session from the first Monday in October until late June or early July. These decisions frequently lead radio and television newscasts, including those of the major networks, and receive front-page attention in major dailies. Occasionally, even lower federal and state appellate court decisions attract headlines.

The trend toward more specialized beats such as consumer reporting and legal affairs has accelerated the need for journalists to have broad bases of legal knowledge. For example, professional athletes and team owners and managers frequently battle in the courts over contracts, antitrust issues, and even liability for personal injuries of spectators. The sports writer who cannot distinguish a judgment non obstante veredicto from a directed verdict or a summary judgment from a summary jury may not be able to write a complete story about a major league baseball player's suit against a team mascot for injuries suffered in a home plate collision. Not only should the writer understand and know how to explain to the readers the issues being litigated, but he or she should also comprehend the basis or bases on which the case was decided at trial and later on appeal.

Significantly more mass communication law now involves court decisions than in the past. Much of our knowledge of communication law is derived from cases decided in the last two decades in which trial and appellate courts either established constitutional boundaries and limitations; interpreted federal or state statutes; or set, affirmed, or rejected precedents at common law. Law (whether constitutional, statutory, administrative, common, or equity) usually has little meaning until an appropriate court or courts interpret it and thus ultimately determine its impact.

Attorneys, judges, and other legal experts sometimes hurl criticism and scorching comments at the press for what they perceive as weak, inaccurate, and even distorted coverage of court cases. Law degrees are not necessary to enable journalists to understand the judicial system, but they must possess thorough and comprehensive knowledge of the system and its processes.

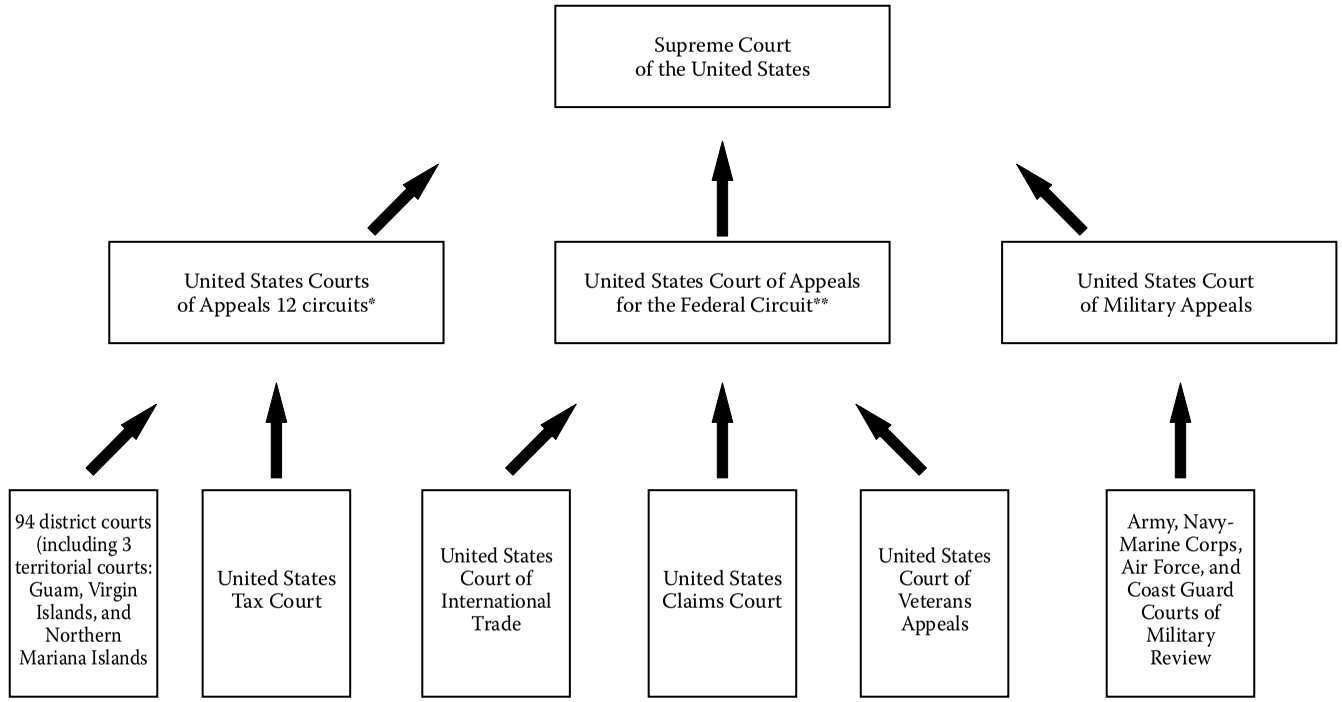
The Federal Court System

Although we usually refer to the U.S. judicial system, there are actually 51 separate and distinct judicial systems. Each state has its own, and there is an independent federal judicial system.

As Figure 2.1 illustrates, there are three basic levels of courts in the federal system—U.S. District Courts, U.S. Courts of Appeals, and the Supreme Court of the United States. Other specialized courts such as U.S. Tax Court, U.S. Claims Court, and U.S. Court of International Trade are also part of the federal system, but these courts are rarely connected with communication law.

The "work horse" or primary trial court in the federal system is the U.S. District Court. Every state has at least one such court and most states have two or more; highly populated states such as California, Texas, and New York have as many as four. Each district court serves a specific geographic area in that state (or can include an entire state as in the case of 26 states that have only one federal district court). Altogether, there are 94 federal judicial districts—counting those in the District of Columbia, Guam, Northern Mariana Islands, Puerto Rico, and the Virgin Islands—and the number of judges in each ranges from 1 to 28. In 2006, U.S. District Court judges earned $165,200 a year (the same as members of Congress), and Circuit Court judges made $175,100.[2] The Chief Justice's salary was $212,100, and the Associate Justices earned $203,000.[3] In 2003, Congress created 15 new district court judgeships,[4] the first since 1990. Salaries have been periodically increased under a 1989 statute that banned nearly all sources of outside income for federal judges but at the same time provided regular raises tied to the cost of living.[5] The total budget in 2005 for the whole federal court system, including the U.S. Supreme Court, was slightly more than $5.4 billion, with about $67 million of that going to the Supreme Court.[6]

A specific U.S. District Court is designated by the region it serves: for example, U.S. District Court for the Northern District of Georgia, U.S. District Court for the Eastern District of Kentucky, U.S. District Court for the Central District of California, or U.S. District Court for the District of Massachusetts.



* The 12 regional courts of appeals also review cases from a number of federal agencies.
** The Court of Appeals for the Federal Circuit also receives cases from the International Trade Commission, the Merit Systems Protection Board, the Patent and Trademark Office, and the Board of Contract Appeals.

Figure 2.1 The United States Court system.

U.S. District Courts are primarily trial courts. A trial court, also known as a court of original jurisdiction, is the court in which litigation in a case is likely to be initiated, and if there is a trial, the court in which the trial will occur. Jury trials take place only in trial courts. The primary purposes of any civil or criminal trial, whether a bench trial (judge only, no jury) or a jury trial, are (a) to seek to determine the facts in the case (similar to the traditional who, what, when, where, why, and how used to organize a news story), (b) to ascertain the appropriate law or legal principles (whether constitutional, statutory, common, or administrative law) in the case, and (c) to apply those principles to the facts as determined at trial. In a jury trial, the jury decides the facts in the case and then applies the law, as determined by the judge, to those facts.

Numerous studies have shown that most of the federal courts and many state courts are understaffed and overloaded with cases. However, the vast majority of both civil and criminal cases never go to trial. In fact, the trend in both state and federal courts is that fewer civil and criminal cases are tried by a judge or jury even though the workloads have risen dramatically. According to statistics compiled by the Administrative Office of the U.S. Courts, from 1970 to 2001 the percentage of civil cases resolved after a trial (bench or jury) dropped from 10 percent to 2.2 percent.[7] During the same period, the total number of civil and criminal cases filed annually increased 146 percent from 127,280 to 313,615.[8] Approximately 85 percent of all criminal defendants in federal courts pleaded guilty in 2001, compared to about 62 percent in the 1970s.[9] Part of this trend can likely be explained by the push on the part of the courts to encourage parties to settle through alternative forms of dispute resolution such as mediation, arbitration, and facilitation.

A relatively small percentage of civil and criminal cases are appealed. Criminal defendants generally have statutory or constitutional rights to at least one appeal when they lose at trial, and both defendants and plaintiffs in civil cases have such rights. Typically, a higher percentage of criminal convictions than civil decisions are appealed. In a civil case, usually only the losing side will appeal the decision. In rare cases, a plaintiff who is dissatisfied with the amount of damages awarded may appeal to a higher court for a new trial on the basis that the damages awarded were inadequate. For instance, a libel plaintiff granted only nominal damages may appeal the jury or judge's decision even though that party technically won the case. In that same situation, the defendant may appeal the decision in hopes of having the verdict overturned.

Most appeals are made on grounds of either (a) errors in court procedures such as presentation of evidence or jury instructions or (b) errors in substantive law by the court such as the judge's application of the wrong criteria for determining whether a plaintiff is a public figure in a libel suit.

Appeal rights are considerably different in criminal cases than in civil cases. If an accused criminal is acquitted, the prosecution is prohibited from appealing the court's decision, whether by a judge or a jury, even if new evidence against the defendant for the same crime(s) emerges later. The 5th Amendment to the U.S. Constitution specifically prohibits double jeopardy ("nor shall any person be subject for the

same offence to be twice put in jeopardy of life or limb"). Even if defendants later admit to crimes, they cannot be tried again.

This can lead to what can be described as an "injustice," as illustrated in the classic case of the 1955 murder of Emmett Till, a 14-year old African American boy, in Money, Mississippi. The case has been the subject of several documentaries and books. Till was found in the Tallahatchie River—shot through the head. A 70-pound fan was wrapped around his neck with barbed wire. The murder attracted widespread international and national media attention. Till's mother insisted that his casket be open for public viewing, and Jet magazine and other publications showed graphic photos of the horribly disfigured body in the open casket. Two white men were arrested for the murder and admitted to kidnapping Till. An all-white, all-male jury acquitted them at trial. In a Look magazine article only four months later, the pair bragged about the murder and provided extensive details about how they committed the crime.[10] In spite of this, the two could not be retried because of the prohibition against double jeopardy.

Double jeopardy applies only to criminal charges. A person acquitted of a particular crime can still be successfully sued for a similar civil offense using the same or similar evidence presented in the criminal suit because the common standard of proof in civil cases is preponderance of the evidence rather than beyond a reasonable doubt.

The U.S. Supreme Court has added interesting twists to the double jeopardy clause over the years. In 1996, the Court ruled in *United States v. Ursery*[11] that the clause prohibits successive prosecutions but not successive punishments. In an 8 to 1 decision, the Court held that Guy Jerome Ursery was not placed in double jeopardy when he was prosecuted and convicted for growing marijuana after he had earlier paid the federal government $13,250 to settle a civil forfeiture claim against his house where authorities found the plants. The Court invoked an old legal principle that holds that forfeiture is not double jeopardy because it is against property, not against an individual.[12] (Forfeiture involves under the law what is known as an in rem proceeding.) The Court held that such "in rem civil forfeitures are neither punishment nor criminal for purposes of the Double Jeopardy Clause."

In *Sattazahn v. Pennsylvania* (2003)[13] the Court held in a 5 to 4 decision that the double jeopardy ban does not prevent a state from seeking the death penalty against a defendant in a new trial even though he automatically received a life sentence in the original trial because of a hung jury during the penalty phase of the trial. The majority reasoned that a life sentence is not an acquittal and thus does not invoke the prohibition against double jeopardy.

There are no constitutional or statutory limits on how many times a defendant can be tried for the same crime unless the defendant has actually been acquitted. A hung jury is not the same as an acquittal, as illustrated in the case of Curtis Kyles, who was tried five times over a period of nearly 14 years in a 1984 murder in New Orleans.[14] Trial one led to a hung jury, but a second trial resulted in a guilty verdict and a death sentence. On appeal, Kyles' conviction was overturned by the U.S. Supreme Court, leading to three subsequent trials with all resulting in hung juries.

Fourteen years after the murder, the local prosecutor dropped the charge, and Kyles was freed from prison.

The constitutional bar against double jeopardy is by no means a universal right, as illustrated by the retrial in Hamburg, Germany in 1995 of Guenter Parche. After Parche was sentenced in 1993 to two years' probation for stabbing tennis star Monica Seles during a match, the prosecutor asked a higher court to grant a retrial, and the court obliged. German law grants such a right to prosecutors. A few states grant the prosecution a rather limited right to appeal specific points of law, but it is not a right to appeal a determination of not guilty.

If convicted, the criminal defendant can appeal the trial court's decision on grounds that range from violation of the 6th Amendment right "to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed" to failure of the state (i.e., the prosecutor) to prove its case beyond a reasonable doubt. Although the U.S. Supreme Court has not mandated a specific time frame during which a trial must be conducted in order to meet the 6th Amendment requirement for a speedy trial, most states have established their own standards. For example, California requires that the trial be held within 60 days from the time the defendant is formally charged unless the defendant waives this right.

Defendants often do waive the right so they will have more time to prepare their defense, but asserting this right can sometimes work to a defendant's advantage, as witnessed by the O.J. Simpson murder trial in 1995. Simpson's attorneys refused to waive the 60-day requirement, forcing the prosecution to prepare its case against the former pro-football star within a very short time frame. Simpson was acquitted, and the prosecutors were criticized in the press for the many strategic mistakes they committed during the trial. Prejudicial pretrial or during-trial publicity may also be shown to have violated a defendant's 6th Amendment right to an impartial jury. If Simpson had been convicted, it is likely that he would have cited the massive publicity surrounding the criminal trial.

Once the defendant (now the appellant or petitioner) files an appeal, that individual effectively waives a claim of double jeopardy. Appellate courts lack authority to ascertain guilt or innocence because this determination is a question of fact for the trial court, not a question of law. Thus the appellate court could order a new trial, pending further appeals, but it cannot declare the appellant guilty or not guilty. Therefore, the criminal defendant granted a new trial by the appellate court could be retried for the same offense(s), but any new trial would have to follow closely the guidelines or standards established by the appellate court.

For instance, three men sentenced to die by a Georgia trial court in the murder of six members of the same family were granted new trials by an 11th Circuit U.S. Court of Appeals more than 14 years after their convictions because of "prejudicial pretrial publicity." One of the men was reconvicted three years after the original convictions were overturned by the federal appellate court and again given the death sentence after a jury trial. A second defendant received a life sentence after a jury deadlocked on the death penalty. The third man also faced only a life sentence

because the county prosecutor did not seek the electric chair for him, thanks to a new state statute that prohibited the execution of mentally retarded defendants.

A filtering process further assures that higher appellate courts such as state supreme courts and the U.S. Supreme Court consider a very small percentage of cases from lower appellate and trial courts. The U.S. Supreme Court can exercise its discretion and refuse to hear most appeals. During the 1980s the Court typically granted full-scale review to 150 to 200 of the approximately 5,000 cases appealed to it each year, but by the mid-2000s the Court heard about 80 cases each term or only about one percent of the approximately 8,000 cases filed for discretionary appeal known as a writ of certiorari.[15]

The "Alday family murders" case from Georgia illustrates another major appellate right of convicted criminals. A defendant convicted in any state court may appeal to the federal courts through a writ of habeas corpus[16] on grounds that the person's constitutional rights (typically 5th or 6th Amendment rights) were violated during the judicial process that led to conviction. Such appeals normally begin in a U.S. District Court and then wend their way eventually to the U.S. Supreme Court. If it believes such grounds may exist, the federal court has the discretion to hear the appeal and to order a new trial in state court, if warranted. All the federal court needs to do to hear the appeal is to simply issue the writ of habeas corpus, which then requires police to release the prisoner until the legality of the detention can be established. The purpose of the writ is to enable the court to ascertain the validity of the petitioner's detention or imprisonment, not to determine the person's innocence or guilt.

In 1996, President Bill Clinton signed into law the "Antiterrorism and Effective Death Penalty Act," which set up a gatekeeping function for the federal courts, requiring them to dismiss any habeas corpus petition filed by a state prisoner who had already had a previous claim considered. Under the statute, (1) federal courts must defer to state court decisions regarding habeas corpus petitions except when they conflict with federal law or are applied in an unreasonable manner, (2) inmates must file any federal habeas corpus petitions within one year of conviction, and (3) prisoners have to file all such petitions after the first one for consideration by a three-judge panel of the U.S. Court of Appeals. The panel then determines whether the petition falls within one of the few exceptions such as when "the applicant shows that the claim relies on a new rule of constitutional law."[17] If an exception did not apply, the claim is automatically dismissed. The law was immediately challenged on the ground that it violated the U.S. Constitution's Suspension Clause, which says that the "Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."[18]

In *Felker v. Turpin, Warden* (1996),[19] the U.S. Supreme Court held "that although the Act does impose new conditions on our authority to grant relief, it does not deprive this Court of jurisdiction to entertain original habeas corpus petitions."[20] Thus the Court was acknowledging that the new law made it more difficult for prisoners to have more than one application for habeas corpus relief considered, but upheld it as constitutional because it did not specifically prohibit the Court itself from considering such petitions. The purpose and effect of the law is to keep prisoners, especially those on death row, from clogging the courts with petitions.

The Sam Sheppard case[21] of the 1960s is one of the best examples of how a writ of habeas corpus works. In this case, the U.S. Supreme Court granted a writ and agreed to hear Sheppard's appeal of a murder conviction on grounds of prejudicial publicity. The defendant, a prominent osteopath from Cleveland, had been serving 12 years of a life sentence in an Ohio state prison but was freed, pending the outcome of a new trial, when the Court issued the writ and overturned his conviction. Even the highest court in the land, like all appellate courts, lacks the authority to decide a defendant's guilt or innocence. Thus the Supreme Court could merely order Sheppard freed until a new trial could be conducted. Previous appeals by Sheppard and his lawyers had failed, including one made earlier to the Supreme Court. Sheppard was ultimately acquitted at trial by a state jury, but his fate is unusual because most individuals who win new trials in criminal cases are subsequently found guilty again.

Code of Conduct for United States Judges

All federal judges must adhere to the Code of Conduct for United States Judges, which includes seven canons as well as other guidelines and principles for ethical conduct. For example, judges are required to disqualify themselves from cases in which they have personal knowledge of the facts in controversy, any personal bias concerning any of the parties, previous involvement earlier in the case as an attorney, or any financial interest in any party or subject matter involved. This Code of Conduct has been adopted by the Judicial Conference of the United States, the national policy-making body for the federal courts. The conference is chaired by the Chief Justice of the United States and includes 26 other members—the chief judge of each court of appeals, one district court judge from each circuit, and the chief judge of the Court of International Trade.[22]

The seven canons state that:

1. A judge should uphold the integrity and independence of the judiciary.
2. A judge should avoid impropriety and the appearance of impropriety in all activities.
3. A judge should perform the duties of the office impartially and diligently.
4. A judge may engage in extra-judicial activities to improve the law, the legal system, and the administration of justice.
5. A judge should regulate extra-judicial activities to minimize the risk of conflict with judicial duties.
6. A judge should regularly file reports of compensation received for law-related and extra-judicial activities.
7. A judge should refrain from political activity.[23]

Venue versus Jurisdiction

No state or federal court has the authority to render a judgment unless it has both jurisdiction and venue in the case. Jurisdiction, the legal right of a court to exercise authority in a particular case, is an enormously complex concept that has been the subject of many scholarly books, treatises, and law review articles. Attorneys must be familiar with such terms as *pendent*, *ancillary*, *concurrent*, and *primary jurisdictions*, but for our purposes, only personal jurisdiction and subject matter jurisdiction are relevant.

Personal jurisdiction (also called in *personam jurisdiction*) is the authority of the court over a defendant in a given case. Unless the court possesses personal jurisdiction over the defendant, the court cannot effect a binding judgment against that individual or other entity. The federal and state rules regarding personal jurisdiction can be highly complex, especially in their application, but one of the viable grounds for appeal by a defendant in a civil case can be that the trial court lacked in personam jurisdiction.

In the case of property, whether personalty (such as an automobile or a book) or realty (land and that which is attached to it such as a building), the court must also have jurisdiction *in rem* before it can establish the rightful ownership of that property when there is a dispute.

Jurisdiction of the subject matter is simply the power of the court to hear a particular type of case. Most state court systems include a two-tiered trial court structure. Usually the system includes a lower trial court with limited jurisdiction that can adjudicate only those civil cases in which the amount in dispute is less than a specified monetary sum and/or only certain criminal cases such as misdemeanors (but no felonies). A higher trial court typically has general jurisdiction or the authority to hear all civil and criminal cases that can be tried in that court system, including those that could have been heard in the lower trial court (but which the higher trial court permitted to bypass the lower court).

Examples of subject matter are divorce, equity, felonies, misdemeanors, child custody, and contracts. Even if a particular court may have personal jurisdiction over the parties to the suit, the court cannot hear that case unless it also has subject matter jurisdiction. On rare occasions, an appellate court will reverse a trial court decision on grounds that the lower court lacked jurisdiction (either personal or subject matter). Usually it is clear which specific court (or courts) has jurisdiction, but the U.S. Supreme Court and other appellate courts have struggled for decades with the issue of jurisdiction, especially *jurisdiction in personam*.

Venue, a relatively simple concept compared to jurisdiction, is the county or other geographical area where a case is to be litigated. Journalists often confuse jurisdiction with venue, but the concepts are not synonymous. An easy way to remember the difference is to keep in mind that venue bears only on the specific geographic location where the case is to be tried and is derived from the Latin, *venire* ("to come").

Ascertaining proper venue involves two major steps. First, it must be determined which particular type of court has both personal and subject matter jurisdiction to

hear the case. (In diversity cases and in a limited number of other types of cases as discussed in the next section, both a state court and a U.S. District Court may have jurisdiction. Thus a case could be heard in either court but not both.)

For instance, in a libel suit in which a citizen in Tennessee is suing a newspaper whose primary place of business is in Alabama, a U.S. District Court in Tennessee would likely have both personal and subject matter jurisdiction. Once a judicial determination has been made that a U.S. District Court has such jurisdiction, the question of venue faces the court and the parties. In the vast majority of cases, this question is easily resolved. In the libel case at hand, the U.S. District Court in Alabama—whose geographic authority includes the city or town in which the newspaper is published—would have venue authority. Venue in such a libel suit could (but not necessarily would) lie in another U.S. District Court, such as the plaintiff's state of residence or domicile (Tennessee in this case) if a substantial number of copies of the newspaper were distributed there. Venue could also lie in an Alabama or Tennessee state trial court (assuming that court had jurisdiction).

In summary, think of jurisdiction as the authority of a specific type of court such as a state circuit court as opposed to a state district court, for example, to hear the particular subject matter(s) in the case (e.g., worker's compensation or divorce) and the authority over the parties in the suit (especially the defendant). Venue is simply the specific court, from a geographic perspective, of that type or level of court (U.S. District Court, state superior court, etc.) in which the case can be litigated.

These distinctions are not trivial. Thus a reporter writing a news story about an invasion of privacy suit should be specific in citing the court on first reference (e.g., the "U.S. District Court for the Eastern District of Kentucky" or the "Fulton County [Georgia] Superior Court," not simply "in federal court" or "in superior court").

Federal prosecutors in criminal cases generally must try a defendant in the district where the crime occurred, as required under the 6th Amendment. However, this constitutional restriction on venue does not prevent a defendant from being granted, on request, a change to the same type or level of court in another location within that state. By requesting this voluntary change of venue, the defendant effectively waives a 6th Amendment right to be tried in the state or district where the alleged crime was committed. A change of venue is usually granted by the judge when adverse pretrial and/or during-trial publicity is likely to interfere with the defendant's 6th Amendment "right to a speedy and public trial, by an impartial jury"—often characterized as the right to a fair trial. For example, U.S. District Court Judge Richard Matsch moved the federal trial in 1997 of Timothy McVeigh from Oklahoma City, Oklahoma, to Denver, Colorado. McVeigh was on trial for the April 1996 bombing of the Alfred P. Murrah Federal Building that killed more than 169 people and injured more than 500 in the deadliest bombing in the U.S. A closed-circuit telecast was arranged in Oklahoma City, where the blast occurred, for survivors of the attack and relatives of those killed. McVeigh was found guilty of all charges and given the death penalty by a unanimous jury (as required). He was

executed by lethal injection on June 11, 2001. On rare occasions, a change of venue would be made when important witnesses in a civil or criminal case would have difficulty appearing.

Most state constitutions or statutes have venue requirements similar to those under federal law. Although subject matter and personal jurisdiction can usually be challenged during an appeal even if they were not challenged earlier, any objections to a court's venue must be established by the defendant early in the suit (usually no later than in a pretrial motion to dismiss or in the answer) or be deemed waived.

Can a trial court choose not to hear a civil suit even though the court meets all of the statutory and constitutional requirements for venue? In relatively rare situations in which another trial court satisfies all of the venue requirements and in which a clearly more convenient forum than that selected by the plaintiff can be found, a court may invoke a judicial doctrine known as *forum non conveniens*—a discretionary power of the court to decline jurisdiction. This power can be invoked only when (a) a defendant files a motion to dismiss based on forum non conveniens, (b) the plaintiff's forum is clearly inconvenient for the litigants and/or witnesses, and (c) there is another forum in which the suit can be brought. Forum non conveniens is always discretionary on the part of the court, and thus the judge could still permit the case to be heard even if all of the aforementioned conditions were met. In fact, many states have statutes that prohibit a court from granting a motion to dismiss on grounds of *forum non conveniens* if the plaintiff is a legal resident of the state in which the suit has been brought.

Forum non conveniens per se is no longer a real issue in the federal courts because Congress codified the doctrine in what is known as a *transfer statute*. Under 28 U.S.C. §1404, a federal trial court can transfer a case to another court within the same court system in which the suit could have been filed originally. Obviously, the other court would also have to have both proper jurisdiction and venue in the case. There are two major differences, however, between the traditional forum non conveniens and transfer: either side may request a transfer and the cause of action is not dismissed and then brought again in the new court when there is a transfer as is done for forum non conveniens. However, transfers can only occur when the two courts involved are in the same system. Thus *forum non conveniens* would have to be used for changing from a federal court to a state court or vice versa and for changing from a court in one state to one in another state.

Transitory versus Local Causes of Action

In civil cases in state courts, lawsuits can be distinguished as either transitory or local. If a cause of action is deemed local, the plaintiff can file suit only in the specific court designated by statute or by a provision in the state constitution. Local actions nearly always involve real property, whether the dispute concerns ownership, alleged trespassing, or damage to real property. Thus the suit must be brought in the county in which the property is located.

Transitory causes of action, on the other hand, can be brought in "any court of general jurisdiction in any district wherein the defendant can be found and served with process" (i.e., with the complaint or petition).[24] Transitory actions do require what are commonly called *minimum contacts* in the case of a foreign corporation or a nonresident defendant. (*Foreign* means out of state, not just out of the country.) The U.S. Supreme Court first adopted the minimum contacts test for assuring due process for in personam jurisdiction in 1945 in *International Shoe Company v. Washington*.[25] In a series of cases since *International Shoe*,[26] the Court has established minimum contacts, fair play, and substantial justice as the constitutional standard for personal jurisdiction.

The U.S. Court of Appeals

As discussed earlier, appellate courts such as the U.S. Court of Appeals are not trial courts but merely serve to consider appeals from trial courts and from federal agencies. Such appeals are usually based on alleged violations of procedural and/or substantive law. State and federal appeals courts generally have three basic options with any appeal they hear: (a) affirm or reverse the criminal or civil verdict or judgment of the lower trial court, (b) dismiss the appeal, or (c) remand (send back) the case to the trial court for further consideration (usually for proceedings consistent with the appellate court's decision). The court also has the option of reversing the trial court decision and sending the case back with an order to dismiss.

The 94 judicial districts of the federal court system are organized into 12 regional circuits, each of which has limited jurisdiction over a specific geographical area or circuit, as shown in Figure 2.2. These regional courts also hear appeals from cases decided by federal administrative agencies. Eleven of these circuits are numbered, but one is designated the U.S. Court of Appeals for the District of Columbia Circuit (no number). There is also a 13th circuit court, the Court of Appeals for the Federal Circuit—the only federal appellate court that has national jurisdiction other than the U.S. Supreme Court. This court hears specialized appeals such as those involving international trade, patent litigation, and claims for damages against the federal government. The geographic areas covered by the 11 numbered circuits vary from three to nine states. The judicial caseloads for most of the federal courts continue to climb each year. For the 12-month period ending March 31, 2004, 60,505 cases were filed in the U.S. Courts of Appeal, excluding the Federal Circuit,[27] the vast bulk of which were from the lower district courts, U.S. Tax Court, and federal administrative agencies. By comparison, 255,851 civil and 70,746 criminal cases were filed in the U.S. District Courts during that same period.[28]

The Court of Appeals for the Federal Circuit has *exclusive appellate jurisdiction* over some 15 specific types of cases such as final decisions of the U.S. Claims Court and the Court of International Trade and most patent appeals. *Exclusive jurisdiction* (whether original or appellate) is, as the term implies, the power of that specific court to hear and decide that particular matter to the exclusion of any other court.

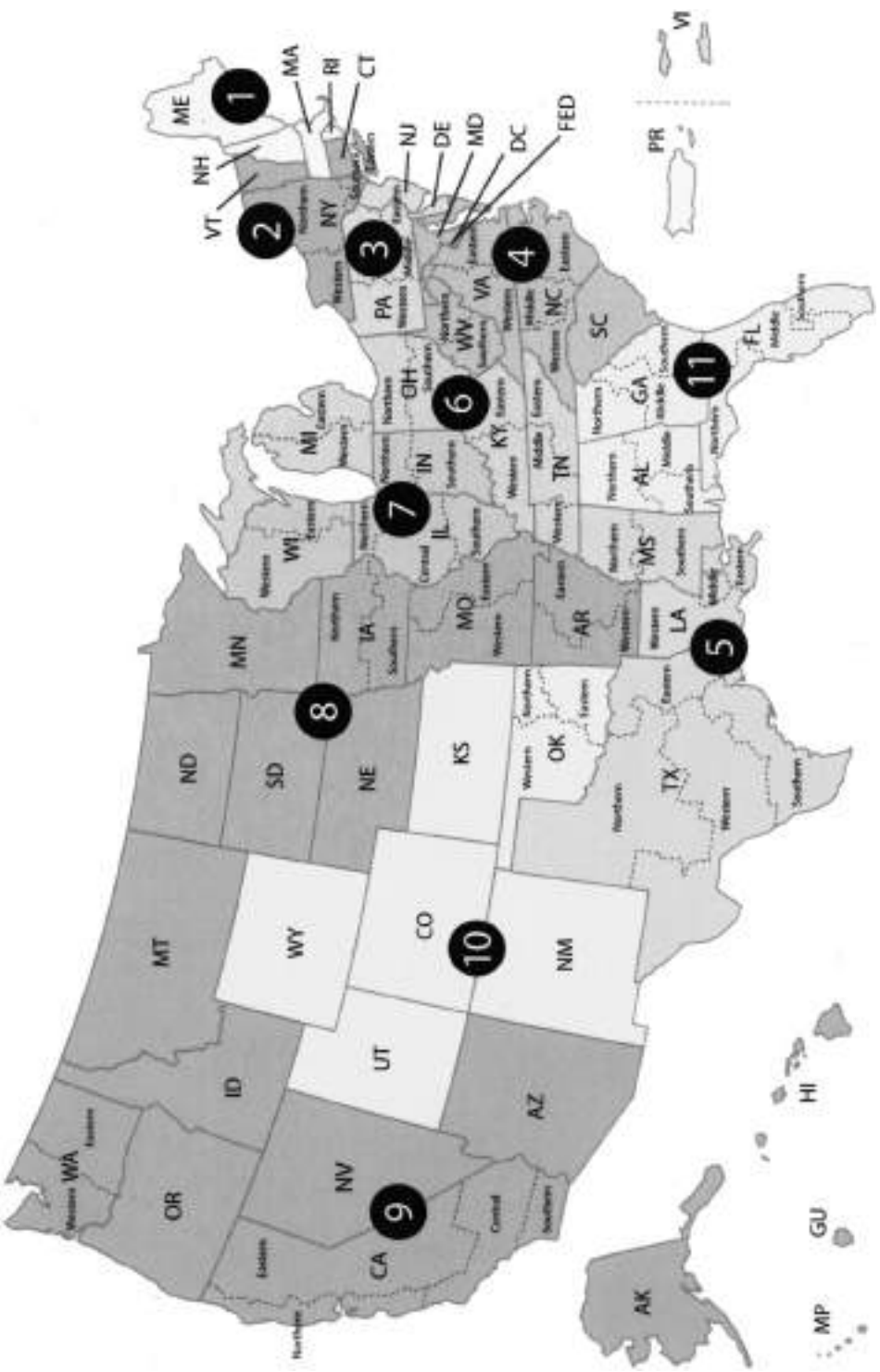


Figure 2.2 Geographic boundaries of United States Courts of Appeals and United States District Courts.

Nonexclusive jurisdiction means, of course, that one or more other courts could hear the case, although not at the same time. All of the federal courts have original and exclusive jurisdiction over certain types of cases, such as violations of federal laws, but this jurisdiction varies from court to court. For example, the federal courts have original and exclusive jurisdiction over all controversies between two or more states. Federal courts also have *concurrent jurisdiction* with state courts in certain types of cases such as those involving *diversity* or actions between citizens of different states, as discussed in the next section.

Diversity

Article III, §2 of the United States Constitution specifies the judicial power of the federal courts, noting that this power "shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority." This section then lists the other types of cases over which the federal courts have jurisdiction, including those involving the United States as a party, controversies between two or more states, and admiralty and maritime cases. Such cases qualify for federal jurisdiction because they involve what are known as federal questions or matters that directly involve the federal issues or the federal government and its interests. There is one other way in which a case can be heard in federal court—diversity of citizenship.

Diversity of citizenship, or *diversity* as it is usually known, under §2 involves controversies "between Citizens of different States." When the conditions for diversity are met, a plaintiff can choose to have a case tried in either state or federal court. The requirements include (a) meeting a jurisdictional or threshold amount in dispute, which has been $75,000 since 1997, and (b) having complete diversity. The jurisdictional amount is set by Congress and has increased over the years from $10,000 in 1958 to $75,000 today.[29] The requirement of complete diversity, which means that in multi-party suits no plaintiff can be a citizen of the same state as any defendant, was established by the U.S. Supreme Court in 1806 in *Strawbridge v. Curtiss*.[30]

To avoid the problem of plaintiffs engaging in forum shopping or deciding whether to take a case to federal or state court based upon which court would be most likely to render a favorable verdict, the Supreme Court established the principle that the same substantive law—usually state law—will apply in diversity cases as would apply if the case were tried in state court. Beginning with *Erie Railroad Co. v. Tompkins* (1938) through *Hanna v. Plumer* (1965),[31] the Court created an outcome test under which an analysis is conducted to ensure that a final decision in a diversity case is the same as what would have occurred if the case had been tried in state court. However, the rules of civil procedure may be different because federal rules will apply in federal court and state rules in state court.

In 2001, the U.S. Supreme Court held in *Semtek International v. Lockheed Martin*[32] that a Maryland Court of Special Appeals was wrong when it dismissed a case

filed in that state's court system after the same case had earlier been dismissed in U.S. District Court in California. The federal court in California dismissed the case because the lawsuit had been filed past the statute of limitations deadline. The plaintiff then filed the suit in a trial court in Maryland where the statute of limitations had not expired. However, the Maryland court dismissed the case on the ground of res judicata—Latin for "the thing that has been decided." This is the judicial doctrine that once a court with proper jurisdiction has made a decision based upon the merits of the case, that decision is final and further lawsuits are barred. The U.S. Supreme Court said the lawsuit could go forward in Maryland because federal courts apply state substantive law in diversity cases, not federal law. The Court cited *Erie Railroad Co. v. Tompkins* in its reasoning, noting that nation-wide uniformity under which state law applies in diversity cases was necessary to prevent forum shopping. The concern of the Court is that the outcome be the same, whether a diversity case is tried in federal court or state court, not that the result be the same regardless of which state court hears the case.

The U.S. Supreme Court

No court in this country has attracted more media and public attention than the U.S. Supreme Court. There is no better example of this than the intense coverage of Bush v. Gore (2000), in which the Court effectively decided who won the presidential election that year. The per *curiam* opinion (an unsigned opinion representing the whole court) technically dealt with only whether the Florida Supreme Court in ordering a state-wide recount of disputed presidential ballots had violated Article II, §1, clause 1 and the Equal Protection and Due Process provisions of the U.S. Constitution. Clause 1 deals with the appointment of electors. Equal Protection and Due Process are guarantees contained in the 14th Amendment: The Equal Protection clause prohibits states from unlawfully discriminating against citizens, and the Due Process clause assures that states may not deprive citizens of life, liberty, or property without proper administration of justice.

In *Bush v. Gore*,[33] the Court abruptly and decisively ended the protracted uncertainty over whether Al Gore or George W. Bush won the election in which Gore officially won the popular vote but Bush won the electoral vote, thanks to a razor-thin margin of 1,784 votes out of more than 5.8 million cast in Florida. Everyone—the presidential candidates, the American public, and Congress—deferred to the Supreme Court for the final decision, an indication of just how powerful the Court can be. For more than a month, chads (small bits of cards left after ballots are punched with a Votomatic machine) of all sorts—dimpled, pregnant, scratched, and punched—were subjects of intense discussion in a national debate over who won the election. The answer ultimately boiled down to the decision of five justices that the recount process ordered by the Florida Supreme Court could not be done prior to December 12, the deadline under the U.S. Constitution for electors to select a president. According to the Court, "having once granted the right to vote on equal terms, the

State may not, by later arbitrary and disparate treatment, value one person's vote over another."[34] Only three days earlier, the Court had granted an injunction to halt a recount ordered by the Florida Supreme Court pending a hearing and a decision in the case by the U.S. Supreme Court. The Court's final decision did not escape criticism that included the opinions of the four dissenting justices. In his book, *Supreme Injustice: How the High Court Hijacked Election 2000*, Harvard law professor and legal expert Alan M. Dershowitz said the decision "has left a permanent scar on the credibility of the Supreme Court."[35]

Bush v. Gore made history in another way. For the first time, audiotapes were made available to the press immediately following the conclusion of the one-hour oral arguments. In the past, audio recordings were not released until the beginning of the next term of the Court, although transcripts of the Court's decisions are publicly available on the Court's Web site (www.supremecourtus.gov) within minutes after opinions are issued. Three years later the Court allowed the press to have immediate access to the recordings in the combined cases of *Grutter v. Bollinger* and *Gratz v. Bollinger*,[36] challenging the University of Michigan's affirmative action policies for undergraduate and law school admissions. In both instances it was clear that the Court provided such quick access to the recordings because of the intense public interest in the cases. The Court has continued to do this periodically, but whether it will ever do this routinely remains to be seen.

Distinguishing Characteristics of the U.S. Supreme Court

The U.S. Supreme Court is unique in several significant ways. First, it is the only court specifically established by the U.S. Constitution. Article 3, §1 of the Constitution creates "one supreme Court," while granting Congress the authority to ordain and establish "inferior courts," if it so chooses. Thus Congress could constitutionally abolish all of the federal courts except the Supreme Court. As noted previously, the Supreme Court does have original jurisdiction over specific types of cases enumerated in Article 3, §2(2), but the Court functions primarily as an appellate court. Typically, the Court decides one or two original jurisdiction cases each nine-month term.

In 2004, for example, the Court decided an original jurisdiction case involving a dispute between the states of Kansas and Colorado over a 1949 compact involving the Arkansas River.[37] The case could be traced all the way back to 1985 when Kansas claimed that Colorado had violated the agreement by drilling new irrigation wells that depleted the water from the river. Per tradition, the Court first appointed a Special Master to hear evidence and arguments on both sides and then make recommendations in the form of a "Special Master's Report." Because the two sides could not agree on the recommendations, the Supreme Court faced the task of deciding the case under its original jurisdiction authority. Over the years, there were four Special Master's Reports, with the Court essentially agreeing with the recommendations each time, including the most recent one.[38] Kansas was unhappy with some of the recommendations in the last report and asked the Court to overrule those recommendations. The Supreme Court sided with the Special Master once again.

In contrast, until the last decade or so, under its appellate jurisdiction, the Court traditionally heard oral arguments and issued decisions for about 160 cases each term from the approximately 7,500 it was formally requested to consider. Since the early 1990s, though, the Court has substantially reduced its load, typically hearing only 80 to 90 cases each term.

A second unique feature is that the U.S. Supreme Court, as one of the three branches of government (along with the President and Congress), both interprets and applies the U.S. Constitution in cases in which the other branches play a role. In other words, the Court is the final arbiter of the Constitution. This authority is quite wide ranging and has invoked considerable controversy over the years, but especially in the last two decades. The debate is usually framed in terms of a liberal versus conservative court but really revolves around the issue of whether the Court merely interprets the law or both interprets and makes the law. Former President Ronald Reagan was particularly proud of the fact that he had been able to select (with approval of the U.S. Senate) Chief Justice William H. Rehnquist (who had been nominated as Associate Justice during President Richard M. Nixon's reign) and Associate Justices Sandra Day O'Connor, Antonin Scalia, and Anthony M. Kennedy. The senior President George Bush got to appoint two Associate Justices—Souter in 1990 and Thomas the next year. President Bill Clinton also appointed two justices—Ruth Bader Ginsburg in 1993 and Stephen G. Breyer in 1994. President George W. Bush appointed Chief Justice John G. Roberts in 2005 and Associate Justice Samuel Alito in 2006.

A third feature is the intricate but fascinating process by which the Supreme Court reviews cases. Other federal courts and some state courts may follow some of the steps followed by the Supreme Court in its decision making, but the process as a whole is rather unique. There are three ways in which a case can be heard on appeal by the Court: direct appeal, writ of certiorari, and certification. The grounds on which each of these types of appeals can be heard are enumerated in Title 28 of the U.S. Code.

Mandatory versus Discretionary Jurisdiction

Until 1988, under Title 28 and other federal statutes, some litigants had a right, theoretically, to have an appeal heard by the Supreme Court. For example, if a U.S. Court of Appeals held that a state statute or treaty was invalid because it violated the Constitution, laws, or treaties of the United States, the state had a statutory right to have the case ultimately decided by the Supreme Court. A similar right existed if the state's highest appellate court held the statute or treaty unconstitutional. However, for at least 50 years the Supreme Court rejected the vast majority of such appeals "for want of a properly presented federal question" or "because of the inadequacy of the record"[39] or other basis. Thus a seemingly obligatory appeal was in practice discretionary.

In 1988, the picture changed dramatically for mandatory jurisdiction. For almost a decade Congress tried unsuccessfully to grant the unanimous request of the U.S.

Supreme Court that it be given greater choice in selecting cases for review. More specifically, the justices called for Congress to essentially kill the body's mandatory jurisdiction. With the support of the Reagan administration, then-Chief Justice Rehnquist and various legal organizations such as the American Bar Association, a bill passed Congress that granted the Court's wish. Congressman Robert Kastenmeier (D-Wis.), chairman of the House subcommittee on courts, characterized the new statute as the "most significant jurisdictional reform affecting the high court in over 60 years."[40]

Over the years Congress narrowed or eliminated various mandatory appeals that ranged from antitrust cases to suits contesting the constitutionality of state and federal statutes, but it took the 1988 legislation to kill nearly all appeals based on mandatory jurisdiction. To understand the real impact of this statute, one must realize that during its 1987–1988 term, the Court handled 248 mandatory appeals, with 206 decided summarily (i.e., without full briefing or oral argument), including 120 dismissed for lack of jurisdiction and 83 for lack of a federal question.[41] Thirty-two of the appeals were actually accepted for review, none of which the Court would have had to have decided if the 1988 legislation had been in effect at that time. Until the 1988 statute, the Court typically decided only about 200 cases on the merits each term, with about one-fifth of the load involving mandatory jurisdiction. These summary decisions were nevertheless binding on state and other federal courts because they had been decided on the merits, leaving the lower courts with little or no guidance beyond the vote of the Court.

The 1988 law that amended or repealed several sections of Title 28 did not eliminate all mandatory jurisdiction. Specific appeals under the Civil Rights and Voting Rights Acts and the Presidential Election Campaign Act retain their mandatory status.[42]

The 1988 law left intact another way in which the court could hear an appeal: certification. Under §254(3) of Title 28, questions of law in any civil or criminal case can be certified by a court of appeals to the Supreme Court. For example, if a U.S. Court of Appeals is uncertain about the constitutionality of a new federal criminal statute, it can certify this question of law to the Supreme Court for a determination. As with all other judicial cases, there must be a real case in controversy. The federal courts, including the Supreme Court, are prohibited from deciding purely political questions because they are not "justiciable" matters for the courts.

Writ of Certiorari

By far the most common way and now virtually the only way cases are heard by the Supreme Court is *writ of certiorari*. There are three major situations in which the Court will hear an appeal under this writ: (a) before or after judgment or decree in a civil or criminal case in a court of appeals; (b) final judgments or decrees of the highest appellate court of a state, Puerto Rico, or the District of Columbia involving the constitutionality of a state or federal treaty or statute or any title, right or privilege claimed under the U.S. Constitution; and (c) certain types of decisions by

the U.S. Court of Military Appeals. Most states have abandoned this discretionary writ in their courts, but Congress and the Supreme Court continue to cling to what many legal critics contend is an outmoded process.

"Granting cert" (press and legal shorthand for granting a writ of certiorari) is a relatively simple process by which the Supreme Court (after agreeing to hear a case) formally orders the lower appellate court to certify the record and then turn it over to the Supreme Court. Denial by the Supreme Court of the request to issue the discretionary writ is tantamount to a denial of the party's appeal.

Certiorari begins when an attorney for one side in a case (nearly always the losing side) files a written petition with the U.S. Supreme Court. Such petitions can be filed in other courts, but they are much less common now than in the past. Under a working rule adopted by the court (known as the "rule of four"), four justices must agree to hear the appeal before the Court will review the lower court decision. This rule is based on the belief that a legal question is substantial enough to be considered when at least four members are willing to grant a writ of certiorari. When four votes are not available, which occurs about 90 percent of the time, the petition is thereby denied and the lower court (i.e., the last court in which the appeal was decided) ruling stands. Although news stories occasionally unintentionally mislead the public into believing otherwise, denial does not necessarily mean that the Court agrees with the lower court decision but merely that the justices did not feel the appeal warranted their attention because of the lack of a major legal issue. When the Court declines to hear an appeal, it is inaccurate to publish or broadcast that the Court "upheld" the lower court decision. However, it is accurate to say the Court allowed the lower court decision to stand, although it is more accurate to indicate the Court did so by rejecting the appeal from the lower court.

Appellate Briefs and Oral Arguments

If the Court votes to hear the case, the writ is then issued and a tentative date is set for oral arguments. Prior to the oral hearing, the attorneys for the two sides are required by a specified deadline to submit written briefs detailing their positions and arguments. A well written appellate brief will normally contain an extended statement of the issues involved, a summary of the facts in the trial court case, relevant laws, arguments based on the law and trial and appellate court decisions that support that position, and a summary of and justification for the particular relief sought.

The form and the content of appellate briefs are usually dictated by the particular court hearing the appeal, and the U.S. Supreme Court is no exception. There are other types of briefs, such as a trial brief, but these are not the same as appellate briefs. Although they presumably summarize, appellate briefs are rarely "brief" and are typically lengthy and detailed. The briefs are presumably read by all of the justices before the oral arguments that typically last 30 minutes for each side. The Court is quite strict about the time frame, and the justices, including the Chief Justice, will often interrupt the presenting attorneys' arguments with pointed questions

while the clock is running. In a major case, it is not unusual for attorneys to fail to complete oral arguments because of these interruptions. Except in rare cases such as those involving sensitive national security matters, the oral arguments are open to the press and to the public, unlike Supreme Court deliberations that are always secret.

The court has lost a bit of its mystique, in the eyes of some folks, over the years. In 1993, Librarian of Congress James H. Billington opened the late Justice Thurgood Marshall's files to the public. Marshall donated 173,700 items from his career that cover more than 3,000 Supreme Court cases.[43] The materials provide considerable insight into the decision-making process of the Court and include Marshall's handwritten tallies of justices' votes, hundreds of internal memos, and Marshall's personal comments. The justice's widow criticized the Library of Congress for releasing the documents so soon after Marshall's death, but Library of Congress officials said the justice had agreed there should be no restrictions on access after he died.

Later in the same year Peter Irons, a University of California-San Diego political science professor, published a package entitled "May It Please the Court." It included 23 edited recordings and transcripts of selected oral arguments of major Supreme Court decisions. Most of the justices criticized the release of the tape recordings and transcripts, just as they had the release of Justice Marshall's papers. Professor Irons gained access to the tapes in 1990 as part of a research project in which he agreed to limit their use to private research and teaching purposes and not to reproduce them. Excerpts were broadcast on National Public Radio and C-SPAN. The Court issued a warning in August 1993 before the package was actually published threatening legal steps because Irons violated contractual commitments but then announced three months later that it had decided not to pursue legal remedies against the author but instead to make the tape recordings in the National Archives publicly available on a "generally unrestricted basis."[44]

The Court also lost a bit of its luster in spring 1995 when the Minneapolis Star Tribune published a series of articles indicating that seven current or former Supreme Court justices had received free trips to the Virgin Islands, Florida, and California from West Publishing, a major legal publisher that was litigating in the federal courts over copyright of its citation system. The trips that were also reimbursed for other federal judges were connected to deliberations of a committee that selects the Edward J. Devitt Award sponsored by West Publishing to honor a member of the federal judiciary for distinguished service. No legal or ethical rules were apparently violated, but there was criticism from some ethicists.[45]

Deliberations

Later, after oral arguments have been presented in a case, the U.S. Supreme Court justices deliberate in chambers to hammer out a decision. The sessions are so secret that even the law clerks and assistants are excluded. The discussion begins with the

Chief Justice enunciating his views (although usually not his vote), followed by the Associate Justices in order of seniority (highest to lowest) on the Court. According to books purporting to offer insights into the Court such as Bob Woodward's *The Brethren*, the views and subsequent votes sometimes change as the justices attempt to forge a majority opinion. Tentative votes are usually taken first. However, when the final vote is made, the justices state their decisions beginning with the justice with the shortest tenure on the court on up to the most senior justice, with the Chief Justice voting last in the case of a tie. If the Chief Justice is a member of the majority in the decision, he or she has the option of writing the majority opinion or designating the justice who will write the opinion. If the Chief Justice is in the minority, the most senior justice in the majority can write the opinion or select the justice to do so.

Types of Opinions

Initially, the draft of a majority opinion is written, usually with the assistance of law clerks, and then circulated to the other members, including those in the minority. Each justice has the option of (a) agreeing with the majority opinion, (b) writing a separate concurring opinion agreeing with the conclusions, outcome, or result of the majority opinion but disagreeing with the majority's reasons or rationale, (c) writing a dissenting opinion disagreeing with the majority opinion's conclusions, outcome, reasons, and rationale, or (d) concurring with the majority in part and dissenting in part. For the latter, the justice agrees with a portion or portions of the majority opinion but disagrees with another portion or portions.

Majority opinions are ideal because they can establish a *precedent* to guide future cases, but sometimes justices cannot reach a majority opinion or they may wish to merely issue a brief majority opinion. A *plurality opinion* results when fewer than a majority and more than required for a *concurring opinion* join in an opinion. Plurality opinions never establish precedents but they sometimes influence lower court decisions, as witnessed by the Supreme Court's three-justice plurality decision in *Rosenbloom v. Metromedia*,[46] a 1971 libel case. Although the Court explicitly rejected the plurality decision three years later, many lower courts, especially trial courts, adopted the rule cited in the plurality opinion that the actual malice rule of *New York Times v. Sullivan*[47] included involuntary public figures.

Another type of opinion worthy of attention is the *per curiam opinion*, as noted earlier in the discussion of *Bush v. Gore* (2000). These unsigned opinions written by one or more justices but representing the views of the whole Court are usually brief because they require the agreement of each justice. There are many theories about why the Court issues per *curiam* opinions, including the desire by each justice not to have his or her name specifically attached to the opinion. *Per curiam* decisions, even in First Amendment cases, are fairly uncommon.

A final option of the Court is a *memorandum decision* in which the Court gives its ruling in the case but offers no opinion. A memorandum decision is technically

not a judgment but merely an announcement of the Court's vote. Such decisions, which can be rather frustrating for litigants who are looking for precise answers, are becoming more common as the workload of the Court continues to increase each year.

Terms of Service on the Court

Much of the aura surrounding the Supreme Court can be attributed to the fact that justices are appointed for life[48] and can be removed from office only upon impeachment. Judges of the U.S. courts of appeals, the district courts, and the Court of International Trade also serve for life, but other federal judges, including bankruptcy and magistrate judges and those serving on the Court of Federal Claims serve for specific periods. Many U.S. Supreme Court justices have served on the Court until their deaths, with some staying on the Court even in their 80s. Although there have been instances in which suggestions have been made that particular justices be impeached, such as Michigan Congressman Gerald Ford's[49] campaign to have Associate Justice William O. Douglas impeached in the late 1960s, only one U.S. Supreme Court Justice has ever been impeached. The U.S. House of Representatives impeached Associate Justice Samuel Chase (not to be confused with Samuel P. Chase, who joined the Court later and served as Chief Justice) in 1804 for his political activities outside the courtroom while he was still serving on the Court. However, the U.S. Senate could not muster enough votes to convict him.[50]

In recent years, the trend has been for the President to nominate relatively young justices to serve on the Court to ensure that a conservative majority sits on the Court for many years to come, regardless of who may become President later. Associate Justice Clarence Thomas, the only African American serving on the Court, was 43 when he was approved 52 to 48 to succeed Associate Justice Thurgood Marshall in October 1991 by the Senate in one of the closest votes in Supreme Court history. His nomination by the senior President George Bush was extremely controversial because of his staunchly conservative views. The Senate approved the chief executive's choice in spite of an unprecedented Senate Judicial Committee extended hearing over University of Oklahoma Law Professor Anita Hill's sexual harassment allegations. When he assumed the role of Chief Justice in October 2005, Justice Roberts, at age 50, became the second youngest Chief Justice in history, with Justice John Marshall, who served from 1801 to 1835, having been the youngest at 46.

Size of the Court

One common myth about the Supreme Court is that the U.S. Constitution requires the court to have nine justices. In fact, the Constitution does not provide for any specific number; instead Congress was left with the task of setting the number. Before Congress set the number in 1867 at nine (which has continued to today), the number of justices on the Court changed six times and ranged from 6 to 10. As of 2006, 110 justices have served on the Court, 17 of whom served as chief justices. Only five

associate justices later became chief justices, including the late Chief Justice William H. Rehnquist.

According to another myth, President Franklin Delano Roosevelt appointed the most members to the Court. Actually, President George Washington holds the record because he appointed the six original justices plus another four during his second term. However, President Roosevelt is second because he appointed eight justices and selected Associate Justice Harlan Fiske Stone as Chief Justice. President Ronald Reagan appointed three justices and picked Associate Justice Rehnquist as Chief Justice. The senior President George Bush had the chance to appoint two Associate Justices, and President Bill Clinton appointed two. President George W. Bush appointed the current Chief Justice Roberts and Associate Justice Alito.

The Court's Schedule

The Supreme Court adheres to a rather strict schedule. Each annual session begins on the first Monday in October and typically ends by the July 4 holiday. Court sessions alternate among hearings, delivering opinions, and recesses. Hearings and opinions are known as sittings. The usual rotation between sittings and recess is every two weeks. Opinions are written during the recesses. The sittings begin at 10:00 a.m. each day and typically end by 3:00 p.m.

Each sitting begins promptly at 10:00 a.m. when, at the sound of the gavel, everyone stands and the Court Marshal announces: "The Honorable, the Chief Justice and the Associate Justices of the U.S. Supreme Court. Oyez! Oyez! Oyez! All persons having business before the Honorable, the U.S. Supreme Court, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!" The audience then sits after the justices have been seated.

About two dozen cases are heard during each sitting, but the Court conducts other business during this time; it may release a list of orders, admit new attorneys to the Court bar, and release opinions. Opinions are not announced in advance, and thus reporters and others covering the Court do not know which opinions will be released on any given day, lending an element of surprise to the proceedings. Oral arguments and some of the other business are announced in advance. Public sessions are conducted only on Mondays, Tuesdays and Wednesdays.

During May and June, the last two months of its sessions, the Court conducts no other public business except to announce opinions. When the last opinion has been announced, usually in late June, the Court recesses until the following October. However, during the summer hiatus numerous petitions for review and motions are processed.

Until 1935 the U.S. Supreme Court had no building of its own in which to meet but instead convened at various locations in the District of Columbia, including the U.S. Capitol. In October 2001 during the anthrax scares that followed the September 11 terrorist attacks on Washington, New York City and Pennsylvania, the Court had to temporarily move its oral hearings and other business for the first

time since it acquired its own building. After traces of anthrax were found in the Court's basement mailroom, the justices and other court employees were tested for anthrax, administered preventive doses of an antibiotic, and moved to the E. Barrett Prettyman Courthouse.[51]

Mootness, Ripeness, and Standing

Before this discussion of the Supreme Court ends, three more terms need to be explained: *mootness*, *ripeness*, and *standing*. Legal scholars sometimes refer to these concepts as the three horsemen. Mootness refers to the refusal of a court to hear a case when the outcome has already been determined, and thus any decision by the Court would have no impact on the case. In other words, the Court will not decide "dead" or merely academic issues. From time to time, the Supreme Court will deny certiorari in a case on the grounds that the issue in the case is nonjusticiable. The basis for this refusal is, once again, that Article III, §2 of the U.S. Constitution restricts all federal courts including the U.S. Supreme Court to real "cases" and "controversies." For example, a fired government "whistle blower" who sues his federal employer for violating his First Amendment rights but subsequently settles out of court will not be permitted to continue his suit simply to have the Court determine whether his rights were violated, even if any claim for damages is sought. In most cases, the death of a plaintiff does not render a suit moot. For example, if a plaintiff in a libel suit dies before the case comes to trial or dies while a case is being appealed, the legal representative(s) can continue the case on the victim's behalf.

A good example of how the death of a plaintiff does not automatically render a case moot is *Tory v. Cochran* (2005),[52] a U.S. Supreme Court decision discussed in more detail in Chapter 8. Johnnie Cochran, who served as the lead attorney in O.J. Simpson's murder trial, died one week after the U.S. Supreme Court heard oral arguments in an appeal of a gag order. The Court granted a motion by Cochran's attorney that Cochran's widow be substituted for her husband. The permanent order had been issued by a California trial court five years earlier and upheld by two state appellate courts. It prohibited a former client of Cochran and an associate from uttering any statements about the lawyer or his law firm in any public forum and was issued after the trial court ruled that Cochran had been defamed by picketing outside his office. In a 7 to 2 decision, the Supreme Court said the case was not moot because the restrictive order remained in effect even though Cochran had died. The Court held that the order was unconstitutional prior restraint, ruling that "the injunction, as written, now amounts to an overly broad prior restraint on speech, lacking plausible justification." However, the Court refused to rule on whether the First Amendment prohibits such an injunction in a libel case, arguing that Cochran's death made it unnecessary to make such a determination.

The 2001 U.S. Supreme Court decision in *City News & Novelty v. Waukesha*[53] illustrates the concept of mootness. The case involved an adult-oriented store whose business license was not renewed by the city because of alleged violations of a

city ordinance. The denial was upheld in administrative proceedings and by the state courts on appeal. In its appeal, City News raised three questions, but the U.S. Supreme Court agreed to hear only one—whether the constitutional right to a prompt judicial review in such a case meant a determination on the merits of the denial of the license or simply prompt access to judicial review. In a 1965 decision, *Freedman v. Maryland*,[54] the U.S. Supreme Court ruled that before the government can restrict adult-oriented materials or businesses, certain procedural safeguards must be followed to assure that the First Amendment is not violated. One of those safeguards is that there must be a prompt final judicial decision. At the time of the appeal, some of the federal circuit courts had held that the requirement meant a prompt judicial determination on the merits of a permit denial, but other courts, including the Wisconsin Court of Appeals, determined that the requirement simply meant prompt access to judicial review. With a conflict among the courts, this issue was clearly one that needed to be resolved, not only for the parties in the case but for the country as a whole. Unfortunately, the question ultimately remained unresolved. After petitioning the U.S. Supreme Court for certiorari, City News withdrew its renewal application and shut down. In a unanimous opinion by Justice Ginsburg, the U.S. Supreme Court dismissed the petition on the ground that the case was moot because "City News is not properly situated to raise the question on which this Court granted review."[55]

Vacatur, a process in which the parties to a case seek to set aside a judgment, is often used by the U.S. Supreme Court to render a case moot, especially when there has been a settlement. A 1994 U.S. Supreme Court decision, however, significantly limits the use of vacatur, at least in the federal courts. In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*,[56] the Court in a unanimous opinion written by Justice Scalia held that "mootness by reason of settlement does not justify vacatur of a judgment under review." An equitable remedy, vacatur is frequently used by business and government to have adverse rulings set aside to avoid having a judgment against them on the record as well as to avoid an unfavorable precedent.[57] After U.S. Bancorp reached a settlement with Bonner Mall in a bankruptcy suit, the mortgage company asked the U.S. Supreme Court to vacate the decision of the 9th Circuit Court of Appeals on the ground that the settlement had made the ruling moot. U.S. Bancorp made a rather interesting argument to support the idea of "routine vacatur," as it is known—by leaving an issue unsettled, vacatur encourages "continued examination and debate." U.S. Bancorp also told the Court the process facilitates settlements, thus reducing the workload on the federal courts. The Supreme Court found neither argument compelling, noting: (a) "The value of intra-circuit debate seems to us far outweighed by the benefits that flow to litigants and the public from the resolution of legal questions" and (b) "We find it quite impossible to assess the effect of our holding, either way, upon the frequency or systemic value of settlement."[58]

A second obstacle that may confront litigants or appellants in a case is lack of *ripeness*. Citing Article III, §2, the Court will sometimes refuse to hear a case because it believes the controversy is not ready (ripe) for review. The rationale for this ripeness

doctrine is to prevent courts from engaging in premature, abstract, or political decisions. For example, a newspaper that wanted to challenge the constitutionality of a proposed federal law restricting access to government records could not have its case decided because this issue would not have been ripe for consideration. Instead of hearing the suit, the Court would dismiss it and probably note that the newspaper must wait until the law is enacted and the paper was actually denied access—and thus suffered some harm or abridgement of its First Amendment rights.

A good illustration of the concept of ripeness is the U.S. Supreme Court's decision in *Palazzolo v. Rhode Island*[59] in which a landowner sued the state after a state regulatory agency designated salt marshes such as the one on the owner's land as protected coastal wetlands on which development was severely restricted. The owner claimed the regulations constituted a taking of his property without compensation under the Takings Clause of the 5th Amendment.[60] The owner had originally been one of several partners in the company that owned the property but eventually bought out his associates and became sole owner. When the owner sought permission from the state agency to construct a wooden bulkhead and fill the entire marsh area, his application was denied, as was his later request to fill 11 of the property's 18 wetland acres to build a private beach club. He then sued the state, arguing that the regulations violated the 5th and 14th Amendments as a taking. A trial court ruled against him, and the State Supreme Court affirmed, ruling, among other things, that the owner's suit was not ripe because the owner had not sought permission to make other uses of the land. The U.S. Supreme Court disagreed, holding that the two application denials by the agency had been a final determination on the permitted use for the land. According to the Court, there was no "genuine ambiguity in the record as to the extent of permitted development on petitioner's property, either on the wetlands or the uplands."[61] The regulations were unequivocal in their restrictions, the Court said.

Finally, litigants in federal court must have *standing* to avail themselves of justice in the federal courts. Standing has been interpreted to mean a plaintiff must have suffered actual injury or must be threatened with injury in the case of governmental action. In other words, this standing to sue doctrine requires that a party be "sufficiently affected so as to insure that a justiciable controversy is presented to the court."[62]

In a 1997 case, *Raines et al. v. Byrd et al.*,[63] the Court held that six members of the U.S. Congress—two Representatives and four Senators—had no standing to file a complaint against the Secretary of the Treasury and the Director of the Office of Management and Budget to determine the constitutionality of the Line Item Veto Act. The Act, passed by the both the Senate and the House of Representatives in March 1996, granted the President the authority to "cancel" specific spending and tax items after the President had already signed them into law, simply by notifying Congress within five days after the particular Act takes effect. The U.S. District Court of the District of Columbia had earlier sided with the plaintiffs in holding that the Act was unconstitutional. President Bill Clinton had made no line item vetoes when the complaint was filed. The Act included a provision requiring the Court to grant expedited review, and thus the trial court decision was directly appealed to

the Supreme Court. Stressing that a plaintiff bears the burden of proof in establishing standing and that "the alleged injury must be legally and judicially cognizable," the Court held "that these individual members of Congress do not have a sufficient 'personal stake' in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing."[64] The Court characterized any injury to the appellees as "wholly abstract and widely dispersed" and their claim as "contrary to historical experience."[65]

State Court Systems

If you intend to become a practicing journalist, you should thoroughly review your state court system. State and federal courts play an increasingly important role in news and news gathering, and thus it is not unusual now for most reporters, editors, and writers to occasionally cover a state court decision or a trial, regardless of the specific beat assigned.

A state court is a hierarchy, organized by levels from limited or general jurisdiction trial courts to intermediate appellate courts to the highest appellate court (usually, but not always, called the supreme court). The review process is quite similar to that of the federal courts, discussed earlier, with the higher courts having the power to review and, of course, reverse lower court decisions.

Figures 2.3 and 2.4 illustrate the court system and the appeals process of one state—Kentucky. Both the system and the appeals process in Kentucky are similar to those of many other states, but you should consult appropriate references to learn more about your own jurisdiction.

Although the federal court system and the 50 individual state court systems are independent, links allow cases to flow from one to the other, especially between the federal and state courts. Although most cases that move from one court system to another are cases appealed from a state court to a federal court (nearly always to the U.S. Supreme Court), on rare occasions a court in one state may refuse to hear a case on grounds that a court in another state is the more appropriate or convenient forum. In other relatively rare cases, a court in one state may invoke the law of another state under a doctrine known as choice of law, which arises when a determination must be made as to which state's laws apply when a conflict exists between the two states' laws.

For example, suppose a sports celebrity sues a food conglomerate for using her picture and name to sell one of its popular cereals. The company has headquarters in Atlanta, the ads appear primarily in New York, and the celebrity resides in Oklahoma. If the case is tried in Oklahoma, whose appropriation (the alleged tort committed here) laws will prevail if the laws of the three states involved conflict with each other? As any other state court would do under the circumstances, the Oklahoma court would apply its own conflict of law rules to make that determination.[66]

The final matter to consider about state courts is their relationship to the federal courts, including interpreting federal laws such as the U.S. Constitution. As is

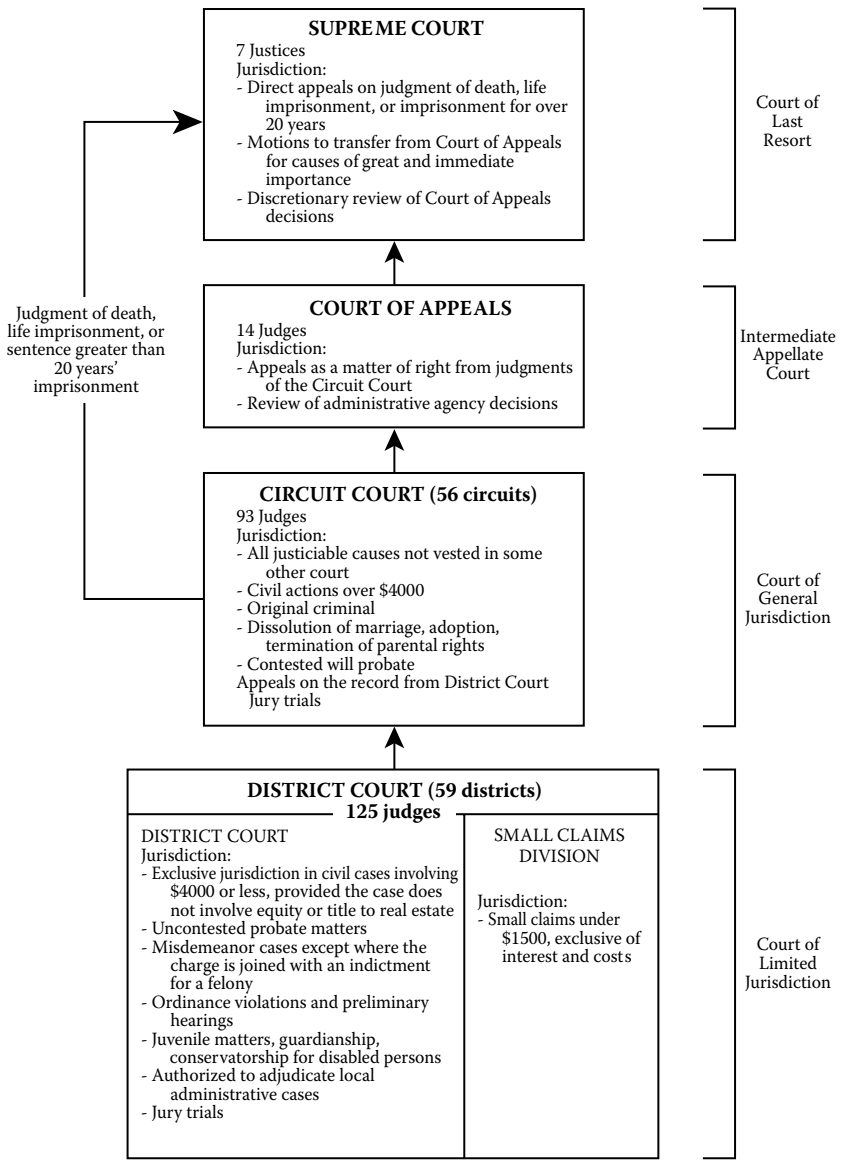


Figure 2.3 Kentucky court system. (Compiled by Administrative Office of the Courts), Frankfurt, Ky. Reprinted by permission.)

pointed out in the next chapter, state courts in some circumstances have the authority to interpret and apply federal laws, including the U.S. Constitution. Although the Supreme Court, as mentioned earlier, has declared that it will be the final arbiter of the meaning of the U.S. Constitution, state courts can indeed decide cases involving the Constitution and even federal statutes when Congress has specifically permitted state courts to interpret and apply federal laws. On the other hand, federal courts will apply state laws in certain types of cases, such as those involving diversity (in which the parties are residents of different states).

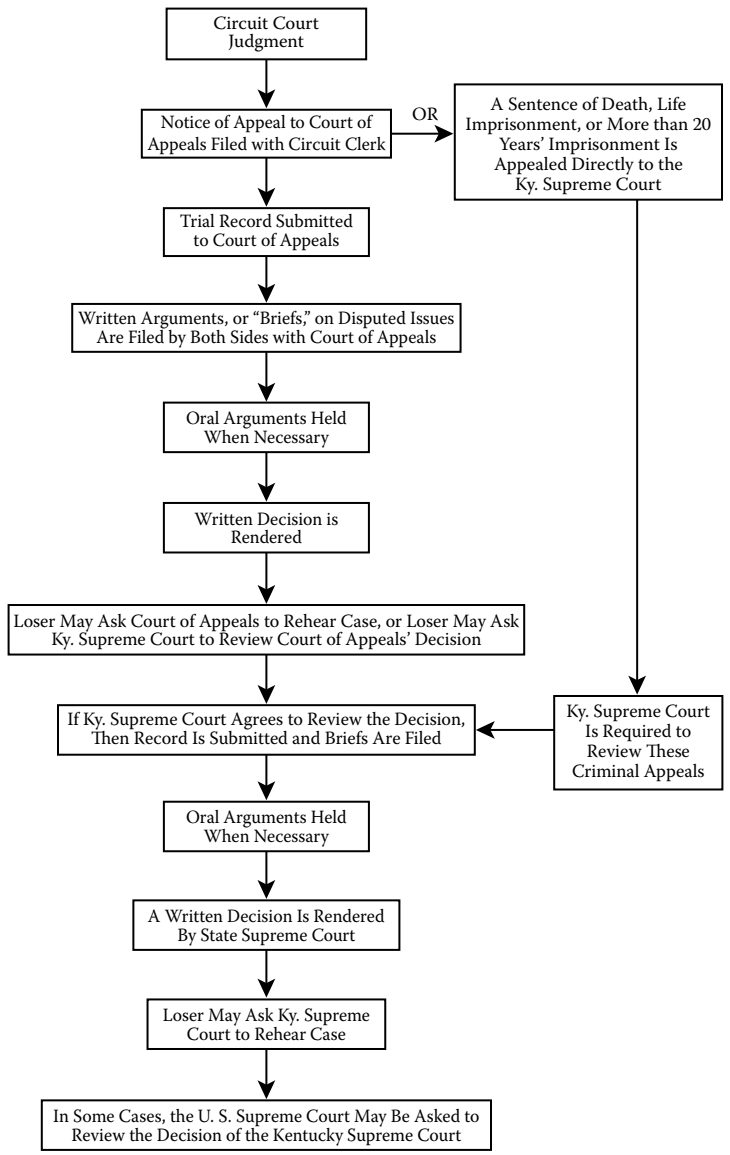


Figure 2.4 Kentucky appellate process. (Compiled by Administrative Office of the Courts, Frankfurt, Ky. Reprinted with permission.)

Summary

The federal court and most state courts have three basic levels—a general trial court, an intermediate appellate court, and a supreme court. The primary trial court in the federal system is the U.S. District Court. Trial courts determine the facts in a case, ascertain the appropriate law or legal principles, and then apply the law to the facts. Appellate courts such as the U.S. Court of Appeals and the U.S. Supreme Court merely hear appeals from cases tried in the trial courts and from federal agencies

and thus do not conduct trials except in those rare instances in which a court has original jurisdiction. Appellate courts do not determine guilt or innocence.

Before a federal or state court can hear a case, it must have both jurisdiction and venue. Jurisdiction includes both personal and subject matter jurisdiction. In civil cases in state courts, suits are classified as either transitory or local.

The U.S. Supreme Court is the only federal court created by the U.S. Constitution. This court is the final arbiter of the Constitution and hears cases by direct appeal, writ of certiorari, and certification. Virtually all appeals heard by the court are now by writ of certiorari since a 1988 federal statute eliminated nearly all mandatory jurisdiction by the U.S. Supreme Court. But before a case can be heard by the court by writ of certiorari, at least four justices must agree to consider the appeal. If at least five justices agree, a majority opinion is reached and a precedent can be established. A plurality opinion (one written by less than a majority) never sets a precedent. Other types of decisions are per *curiam* opinions and memorandum decisions. If a case is moot or not ripe, or if the parties have no standing, the Court will refuse to hear the case per Article III, §2 of the U.S. Constitution.

It is imperative that journalists and aspiring journalists be familiar with legal concepts, judicial principles, and the structures of the state and federal court systems to ensure that their stories are accurate and complete. Media consumers have already been confused and even misled in television shows and novels about lawyers and the courts, with a few notable exceptions.

Endnotes

1. Kathy Chang, *Focusing on Courts*, 28 News Media & Law 27 (Fall 2004).
2. *See* "Judicial Salaries Since 1968" at www.uscourts.gov.
3. *Id*.
4. *Id*. The new judgeships were created under Pub. L. 107-273 (July 2003).
5. *See* Hope Viner Samborn, *The Vanishing Trial*, 88 A.B.A. J. 24 (Oct. 2002).
6. *See* "Frequently Asked Questions."
7. Samborn, supra.
8. *Id*.
9. *Id*.
10. *See* Thomas Doherty, *The Ghosts of Emmett Till*, Chron. Higher Educ., Jan. 17, 2003, at B12, for a review of various documentary films and publications about the case.
11. *United States v. Ursery*, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996).
12. *See* Gibeat, *One Toke Over the Line*, 82 A.B.A. J. 28 (Sept. 1996).
13. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S.Ct. 772, 154 L.Ed.2d 588 (2003).
14. *See* Pamela Coyle, *Tried and Tried Again*, 84 A.B.A. J. 38 (Apr. 1998).
15. *See* Anne Gearan, *Justices Reject Almost 2,000 Appeals*, Lexington (Ky.) Herald-Leader (Associated Press), Oct. 8, 2002, at A3.
16. The official name is *writ of habeas corpus ad subjiciendum*. There are other *writs of habeas corpus* but the use of the term, *writ of habeas corpus*, is nearly always in reference to a *writ of habeas corpus ad subjiciendum*.
17. Pub. L. 104-132, 110 Stat. 1217, 18 U.S.C. 153 (1996).
18. U.S. Const., Art. I, §9, cl. 2.

19. *Felker v. Turpin, Warden*, 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996).
20. *Id*.
21. *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).
22. *See Understanding the Federal Courts*, downloadable free at the Web site for the Administrative Office of the U.S. Courts: www.uscourts.gov
23. *Id*.
24. *Black's Law Dictionary*, 1343.
25. *International Shoe Company v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).
26. *See* especially *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) and *Kulko v. Superior Court of California*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978).
27. These statistics were gathered from the Web site of the Administrative Office of the Courts: www.uscourts.gov
28. *Id*.
29. 28 U.S.C.A. §1332 (2004).
30. *Strawbridge v. Curtiss*, 7 U.S. 267, 2 L.Ed. 435, 3 Cranch 267 (1806).
31. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965).
32. *Semtek International v. Lockheed Martin*, 531 U.S. 497, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001).
33. *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388.
34. *Id*.
35. Alan M. Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000*, 206 (2001).
36. *Grutter v. Bollinger*, 539 U.S. 982, 124 S.Ct. 35, 156 L.Ed.2d 694 (2003) and *Gratz v. Bollinger*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003).
37. *Kansas v. Colorado*, No. 105 Orig. (2004).
38. *Kansas v. Colorado*, 533 U.S. 1, 121 S.Ct. 2023, 150 L.Ed.2d 72 (Kansas III) (2004).
39. *See* Gunther, Gerald, *Constitutional Law: Cases and Materials*, 10th ed., 1670 (Mineola, NY: Foundation Press, 1980).
40. *See* Marcotte, *Some Relief for Supreme Court*, 74 A.B.A. J. 33 (Sept. 1988).
41. *See* Stern, Gressman, and Shapiro, *Epitaph for Mandatory Jurisdiction*, 74 A.B.A. J. 68 (December 1988).
42. *Id*.
43. *See* B. Weiser and J. Biskupic, *Justice's Papers Offer Rare Look Inside Supreme Court*, Lexington (Ky.) Herald-Leader (Washington Post), May 23, 1993, at A1; *Librarian of Congress Defends Release of Papers from Justice Marshall*, Lexington (Ky.) Herald-Leader (Washington Post), June 12, 1993, at A10.
44. *See* H.J. Reske, *Publicity-Shy Justices Criticize Prof*, 79 A.B.A. J. 36 (Nov. 1993); H.J. Reske, *Justices' Reversal*, 80 A.B.A. J. 31 (January 1994); D.O. Stewart, *May It Please the Court . . .*, 80 A.B.A. J. 50 (Mar. 1994).
45. *See* Richard C. Reuben, *West-Financed Judicial Award Under Fire*, 81 A.B.A. J. 36 (May 1995).
46. *Rosenbloom v. Metromedia*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296, 1 Med.L.Rptr. 1597 (1971).
47. *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, 1 Med.L.Rptr. 1527 (1964).
48. Technically, all federal judges serve during "good behavior," which has been interpreted to mean for life unless impeached.
49. Ford became President in 1974 when President Richard Nixon was forced to resign after revelations of a conspiracy to cover up the Watergate break-in.

50. These and other interesting facts about the Court can be found in a booklet, The Supreme Court of the United States, updated each term and available from the main office of the court. Also see Understanding the Federal Courts, supra, note 22.
51. *See* Mary Deibel, *First Time in Decades High Court Begs Space*, Atlanta Journal-Constitution (Scripps Howard News Service), Oct. 30, 2001, at A3.
52. *Tory v. Cochran*, 544 U.S. 734, 125 S.Ct. 2108, 161 L.Ed.2d 1042, 33 Med.L.Rptr. 1737 (2005).
53. *City News & Novelty v. Waukesha*, 531 U.S. 278, 121 S.Ct. 743, 148 L.Ed.2d 757 (2001).
54. *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).
55. *Id.*
56. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S.18, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994).
57. *See* H.J. Reske, *Supreme Court Bans Routine Vacatur*, 81 A.B.A. J. 18 (Feb. 1995).
58. U.S. Bancorp Mortgage Co.
59. *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001).
60. See Amendment Five in Appendix F ("The Constitution of the United States"), which states, in part, that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."
61. *Palazzolo v. Rhode Island.*
62. *Black's Law Dictionary*, 1260.
63. *Raines et al. v. Byrd et al.*, 521 U.S. 811, 117 S.Ct. 1489, 137 L.Ed.2d 699 (1997).
64. *Id.*
65. *Id.*
66. Choice-of-law principles go by such colorful names as *lex fori*, *center of gravity*, *renvoi*, and *grouping of contracts*. This topic has been the subject of numerous books, articles, and treatises and, in fact, is regularly taught as an elective course at most law schools.