13

The Courts and the Judicial Branch

The large courtroom sits behind huge double doors at the end of a waiting room lined with marble busts of stern-looking men. When the Court begins its session, those present stand as the judges, dressed in black robes, file in and take their seats at the bench in front of a red velvet curtain. When they are seated, everyone else sits down too. The attorneys are dressed formally, some in frock coats and striped trousers. Beside each justice is a spittoon for chewing tobacco, and on each attorney's desk is a goose quill pen. The lawyers on each side are allowed only 30 minutes to argue their points. When their time is up, a red light goes off on the desk, and the lawyer speaking must stop immediately, even if in mid-sentence. After both sides have been heard, the judges, who hold lifetime positions, meet in secret and eventually announce their decision, which is final.

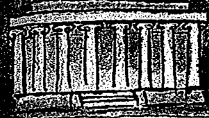
Although it might sound like something from the late nineteenth or early twentieth century, that scene accurately describes a Supreme Court session in modern America. Why is it this way? The Court is operating much as the Founders intended. It serves as a stabilizing force for a democratic republican government. The U.S. judiciary plays an active role in policy making. It exerts a power unlike any other judicial system in the world. It equals the other two branches of government, checking and balancing them in ways that the Founders could not have foreseen.

In this chapter . . .

Foundations of the Judicial System 233

Organization of the Federal Courts 239

The Supreme Court 251



Foundations of the Judicial System

Like the presidency, the federal court system was first created by the Constitution. The national government had no judicial system under the Articles of Confederation. As powerful as the judicial branch is today, the Founders chose to give it only brief attention. Article III is devoted to the judiciary, and it consists of only three short sections compared to the much lengthier Articles I (about Congress) and II (about the presidency).

CONSTITUTIONAL ORIGINS

Article III specifically creates only the Supreme Court and gives Congress the power to create lower federal courts, or "inferior courts." Beginning with the Judiciary Act of 1789, Congress has established a variety of lower courts to handle the rising number of federal cases. The state court systems were already in place well before the Founders got together at the Constitutional Convention in 1787. Today the two levels—state and federal—exist side by side in a dual court system. While the federal courts base their authority on the Constitution and federal law, the powers of state courts come from state constitutions and laws. The principal job of the state courts is to decide disputes between private persons and between private persons and government.

Article III of the Constitution also provides guidelines of the terms of office and compensation of federal judges. To make the judiciary as powerful as the other two branches, the Founders tried to give federal judges considerable independence from the President or Congress. Federal judges may serve as long as they practice "good behavior," and their salary cannot be reduced while they are in office. (In 1998, Supreme Court justices made $167,900, the Chief Justice $175,400, and other federal judges between $125,700 and $145,000.) Once they are appointed by the President and confirmed by the Senate (as provided by Article II), they may be removed from office only by impeachment (outlined in Article I).

Federal question cases—cases "arising under the Constitution, the laws of the United States, and treaties"—are the **exclusive jurisdiction** of the federal courts. State courts may not hear them. For example, when a federal criminal law is broken, but not a state one, the case goes to federal court. A case involving a federal or foreign government official cannot be heard in a state court, nor can a case that arises out of an act of Congress. All cases involving interpretation of the Constitution must go to federal court, and disputes between two state governments must be heard only by the Supreme Court.

In some cases, federal and state courts share jurisdiction, a situation known as **concurrent jurisdiction.** Disputes involving citizens of different states may go to either state or federal court, although federal courts may take them only if they involve a claim of $50,000 or more. If a person commits a crime that violates both state and federal law, the case may go to either state or federal court. For example, if two people rob a state bank that is federally insured, they break both state and federal law. They may be tried in either or both types of courts. Under the dual sovereignty doctrine, state and federal authorities can prosecute an individual for the same crime.

Headlines

DUAL SOVEREIGNTY

The 5th Amendment of the Constitution prohibits double jeopardy, or a person being tried for a crime more than once. Dual sovereignty is not a violation of this amendment, since a person may break both a state law and a federal law with the same action or series of actions.

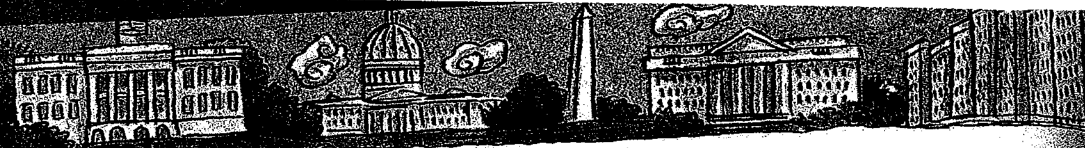
In cases such as *United States v. Lanza* (1922), the Supreme Court has upheld the dual sovereignty principle on two grounds: the right of each level of government to enact laws serving its own purposes and the need to prevent an accused person from avoiding prosecution by choosing a level more sympathetic to his case.

Sometimes the dual sovereignty doctrine can produce contradictory decisions. For example, in the 1992 Rodney King case, four Los Angeles police officers were acquitted of assault in a California state court for beating King during an attempt to arrest him. However, they were later prosecuted in federal court for violating King's civil rights. Two of the four police officers were found guilty.

---

exclusive jurisdiction—the authority of the federal courts alone to hear and rule in certain cases.

concurrent jurisdiction—the authority to hear cases shared by federal and state courts.



A trial court, the court in which a case is originally tried, has **original jurisdiction.** If a person who loses a case in a trial court wants to appeal a decision, he or she may take the case to a court with **appellate jurisdiction.** If the person loses in such a court of appeals, he or she may appeal the case to the Supreme Court, which has both original and appellate jurisdiction.

TYPES OF LAW

Both federal and state courts deal with civil law, criminal law, and constitutional law.

1. Civil Law

Most cases in federal courts involve **civil law**—the law that governs the relations between individuals and defines their legal rights. The **plaintiff** brings charges in a civil suit against a **defendant,** who must defend against the complaint. The plaintiff usually seeks damages in the form of money from the defendant. Whichever side wins, the other usually pays the court costs. Such cases are governed by equity law, which resolves the dispute on the grounds of fairness.

2. Criminal Law

Federal, state, and local governments are responsible for enforcing **criminal law**—law that defines crimes against the public order and provides for punishment. Most criminal cases are settled in state courts because they usually do not involve federal questions. But if a federal law is broken, a federal court may hear cases involving criminal law. Nevertheless, only about 2 percent of all the criminal cases in the United States are heard in federal courts; the rest are handled by state and local courts.

In all criminal cases, the government is always the prosecution and brings charges against the defendant. Examples of federal charges are kidnapping, tax fraud, selling narcotics, or driving a stolen vehicle across state lines. If someone is found guilty, that person may pay a fine or go to prison or may even receive the death penalty.

def·i·ni·tions

original jurisdiction—the court's authority to hear and decide a case for the first time.

appellate jurisdiction—the court's authority to hear cases on appeal.

civil law—the type of law dealing with the rights and relationships of private citizens.

plaintiff—a person who files suit in a civil case.

defendant—one against whom a legal charge has been made.

criminal law—the type of law dealing with crimes and providing for their punishment.

3. Constitutional Law

Federal courts, and occasionally state courts, consider cases based on interpretations of the U.S. Constitution, or **constitutional law.** Federal courts apply constitutional law when they decide whether a law or action conflicts with the Constitution. Most cases involving constitutional law decide the limits of the government's power and the rights of the individual.

JUDICIAL REVIEW

The power to decide the constitutionality of laws and other actions of government is the single most important responsibility of the judicial branch. The final decision is made by the Supreme Court, making it the ultimate authority on the meaning of the Constitution. This extraordinary power of **judicial review** is not specifically mentioned in the Constitution. It was claimed by the third chief justice of the Supreme Court, John Marshall, who served from 1801 to 1835. The debate between Thomas Jefferson and Alexander Hamilton concerning the interpretation of the Constitution set the stage. Jefferson, a **strict constructionist,** believed that the national government should exercise only the powers specifically mentioned in the Constitution. In contrast, Hamilton was a **loose constructionist,** believing that the government could claim broad powers only implied in the Constitution. In *Marbury v. Madison* (1803), Marshall sided with the loose constructionist point of view.

Marbury v. Madison

Marshall's landmark decision had its roots in the election of 1800. John Adams, seeking re-election as a Federalist, lost to Democratic-Republican Thomas Jefferson. Adams feared that Jefferson and his party would destroy all that the Federalists had worked to establish. So he did everything he could in his final days in office to see that the Federalist stamp not be removed from the presidency. He exercised his power of appointment to create and fill 59 federal judgeships (with lifelong terms) with loyal Federalists. William Marbury's appointment had been confirmed by the Senate, and Adams had

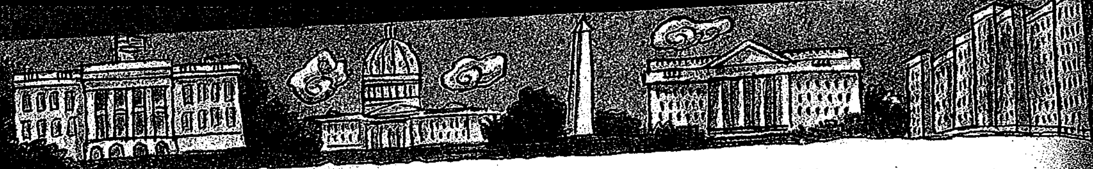
def·i·ni·tions

judicial review—the power of the courts to establish the constitutionality of national, state, or local acts of government.

strict constructionist—the view that judges ought to base their decisions on a narrow interpretation of the language of the Constitution.

loose constructionist—the view that judges have considerable freedom in interpreting the Constitution.

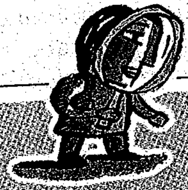
constitutional law—the type of law relating to the interpretation of the Constitution.



even signed the necessary paperwork. But it had not yet been delivered to Marbury when Jefferson became the President. At Jefferson's request, James Madison, the new secretary of state, refused to deliver the commission. Marbury asked the Supreme Court to force Madison to turn over the documents. Marbury argued that the Judiciary Act of 1789 compelled Madison to do so through the **writ of *mandamus.***

Judicial Review

The Court's unanimous decision upheld the supremacy of the Constitution over Congress. Marshall ruled that the part of the Judiciary Act of 1789 that Marbury had cited was unconstitutional. Marshall wrote, "An act of the legislature repugnant [counter] to the Constitution is void," and "it is emphatically the province of the judicial department to say what the law is." With those words he established the power of judicial review, the ability of the courts to declare acts of Congress and the executive branch unconstitutional. As a result, a confrontation between Chief Justice Marshall and President Jefferson was avoided, and the power of the Supreme Court was clarified and expanded. This loose construction established the right of the Court to broadly interpret the Constitution, thus enlarging the power of the judiciary.

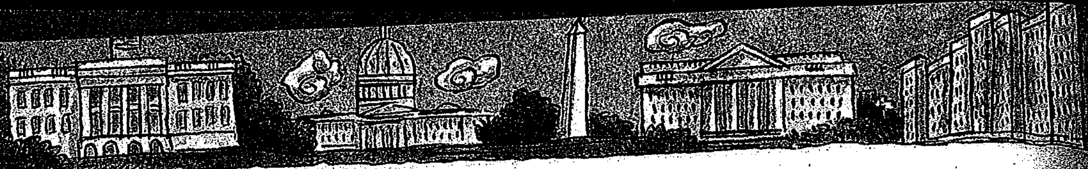


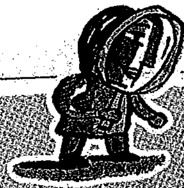
e.g.

READING COURT CASES

Court cases are identified by the names of the plaintiff and the defendant. The *v* stands for the Latin word *versus,* meaning "against." The defendant's name always goes last. So, in *Marbury v. Madison,* Marbury is the plaintiff, who believes he has been wronged, and Madison is the defendant.

writ of *mandamus*—a court order that commands a government official to take a particular action.





e.g.

THE JUDICIAL OATH

Even though the Constitution does not say anything about the duties of justices, the expectations were soon put into words in the form of the Judicial Oath all federal judges must take:

"I do solemnly swear that I will administer justice without respect to persons, do equal right to the poor and to the rich, and that I will impartially discharge and perform all the duties incumbent on me, according to the best of my abilities and understanding agreeably to the Constitution and the laws of the United States so help me God."

JURISDICTION OF THE COURTS

Every court—state or federal—has restrictions on the kinds of cases it may hear. This authority is called the **jurisdiction** of the court. Article III, Section 2 of the Constitution defines the jurisdiction of federal courts. They may try cases involving:

- ambassadors or other representatives of foreign governments,
- maritime law (the law of the sea),
- bankruptcy cases,
- two or more state governments,
- citizens of different states,
- a state and a citizen of a different state or foreign country,
- citizens of the same state claiming lands under grants of different states,
- U.S. laws and treaties, or the interpretation of the Constitution.

def·i·ni·tions

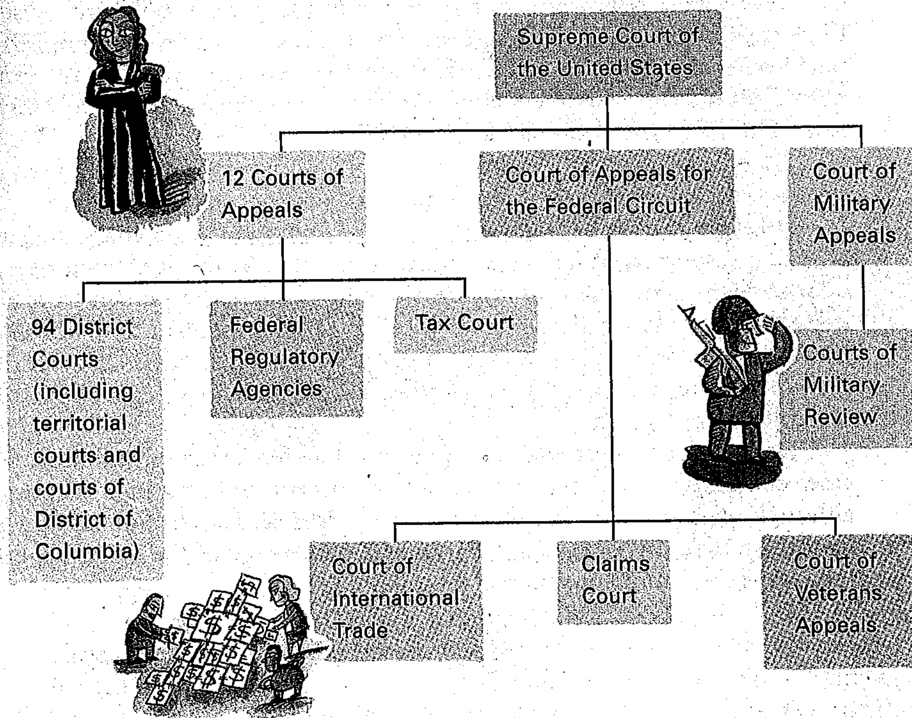
jurisdiction—the right to interpret and apply the law; a court's range of authority.

Organization of the Federal Courts

Recall that the Constitution named only one specific court, the U.S. Supreme Court, and gave Congress the power to establish "such inferior courts" as deemed necessary.

In the Judiciary Act of 1789 Congress created **constitutional courts,** or the inferior courts referred to in Article III, Section 1. Although the basic structure of these courts remains intact today, over the years Congress also established **legislative courts** for specialized purposes. The large majority of all federal cases go to constitutional courts because they have general jurisdiction that covers most situations. The legislative courts are more specialized to correspond to the specific delegated powers of Congress.

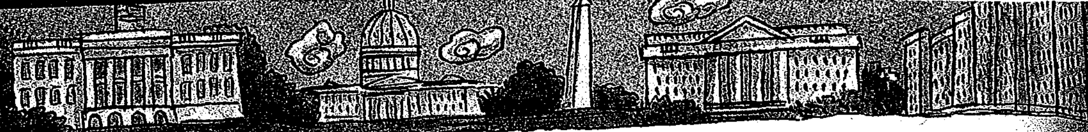
THE FEDERAL COURT SYSTEM



def·i·ni·tions

constitutional court—a federal court with constitutionally based powers and whose judges serve for life. The most important are the Supreme Court, the courts of appeals, and the district courts.

legislative court—a specialized court established to hear cases about and execute the legislative powers of Congress.



CONSTITUTIONAL COURTS

Constitutional courts include the federal district courts, the courts of appeals, and the United States Court of International Trade.

1. The District Courts

Congress created district courts in 1789 as the primary trial courts in the federal system. Originally each state was to have one district court, but as the population grew, some states were divided into more than one district. Today, the United States has 94 district courts, with the largest states having as many as four apiece. Washington, D.C., and Puerto Rico also have district courts assigned to them. The number of judges for each court varies with the population. It ranges from 28 judges who hear cases for the United States Judicial District for Southern New York, to only two judges assigned to several less populated areas.

The district courts are courts of original jurisdiction only; with just a few exceptions, they hear no appeals. District courts may receive appeals from state courts if constitutional questions are involved. They hear a wide range of both criminal cases and civil cases, and their jurisdiction extends to most cases that are heard in the federal courts.

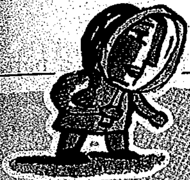
The district courts are the only federal courts that regularly use grand juries to issue indictments and petit juries to try defendants. A **grand jury,** usually made up of 16 to 23 people, hears charges against a person suspected of having committed a crime. If the jury members believe there is sufficient evidence, the court orders the person to trial. A **petit jury,** usually made up of 6 to 12 people, weighs the evidence presented at a trial. If it is a civil case, the jury rules in favor of either the plaintiff or the defendant. In a criminal case, a petit jury reaches a verdict of guilty or not guilty.

District courts hear about 80 percent of all federal cases, and most federal cases end at this level. Very few verdicts are overturned by a higher court, although of those cases that district court judges actually decide (as opposed to those settled out of court), a fairly large percentage of the losers appeal their cases to a court of appeals.

---

grand jury—a group of people who evaluate whether there is enough evidence against a person to order him or her to stand trial.

petit jury—a jury that decides an individual's innocence or guilt; a trial jury.



e.g.

THE SUPPORTING CAST

A federal court needs more than just a judge. Much day-to-day administrative work goes into running the court. Some of the people who provide services include:

BAILIFFS They are the officers of the court who are responsible for prisoners during a trial and who guard the jurors in court.

CLERK This is the person appointed to have custody of the seal of the court and to keep a record of the court's proceedings. The clerk is assisted by deputy clerks, stenographers, and bailiffs.

FEDERAL MAGISTRATE This officer of the court is appointed for an eight-year term and issues warrants for arrest, determines whether or not to hold arrested persons for action by a grand jury, and sets bail (money the accused may be required to deposit with the court as a guarantee of his or her appearance at a future court date).

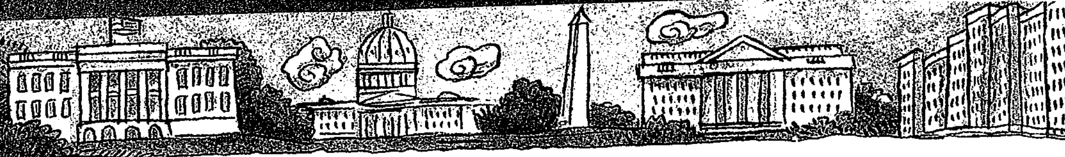
PROBATION OFFICERS These officers are appointed by the magistrate to watch and report on a person placed on probation, which is a conditional suspension of sentence.

ATTORNEY An attorney is appointed by the President and confirmed by the Senate to each federal judicial district. The U.S. attorneys and their staffs prosecute violations of federal law and represent the U.S. government in civil cases.

MARSHALL This officer is appointed to each district court to keep order in the court, carry out court orders, and perform functions similar to those of a sheriff, such as making arrests and keeping the accused in custody.

2. The Courts of Appeals

Congress created the U.S. courts of appeals in 1891 because so many people were appealing cases to the Supreme Court that the Court could not handle them. Today 13 courts of appeals handle about 41,000 cases a year, a figure that has almost doubled every ten years since 1970. The United States is divided into 12 judicial circuits, one of which is the District of Columbia. A justice of the Supreme Court is assigned to each circuit. The thirteenth is the Court of Appeals for the Federal Circuit, which hears cases from all across the nation from the legislative courts and from district courts in certain cases, such as those involving patents, trademarks, or copyrights.



The courts of appeals never have original jurisdiction. Usually a panel of three judges sits on each appeal, but for a very important case, all the judges in the circuit may hear it. Decisions are made by majority vote of the participating judges. The courts of appeals hold no trials and hear no testimony. These judges concentrate on determining if errors of procedure and law occurred in the original proceedings of the cases.

Most appeals come from the district courts within their circuits, but they also hear appeals arising from the decisions of federal regulatory agencies. Since many commissions decide disputes that arise over their regulations, their decisions may be appealed to the courts. For example, if the Securities and Exchange Commission, which governs the stock market, finds a stockbroker guilty of fraud in a dispute, the stockbroker may appeal the decision to a U.S. court of appeals. The decisions of the courts of appeals may be appealed to the Supreme Court, but the Court has almost full control over which cases it hears. Since thousands of cases are appealed and the Court can hear less than 150 cases each year, almost all the decisions of the courts of appeals are final.

3. The Court of International Trade

This court hears civil cases related to tariffs and trade. It was created in 1890 and was originally called the United States General Appraisers. The name was changed to the Court of Customs in 1926. In 1980, Congress changed its structure and gave it its present name. The Court of International Trade is based in New York City, but the judges also hear cases in other major port cities, such as New Orleans and San Francisco. The judges sit in panels of three, and their decisions may be appealed to the Court of Appeals for the Federal Circuit.

LEGISLATIVE COURTS

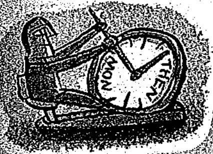
The legislative courts were created to help Congress exercise its powers as stated in Article I, Section 8. They are not governed by Article III as the constitutional courts are, and Congress narrowly defines their jurisdiction. These special courts handle a wide array of cases, but their narrow scope means that they hear many fewer cases than do the constitutional courts.

1. The Court of Military Appeals

Congress created the Court of Military Appeals in 1950 as the highest appeals court for the armed services. This court hears cases appealed to it from military courts by members of the armed forces convicted of breaking military law. Cases from the Court of Military Appeals may be appealed finally to the U.S. Supreme Court, although this rarely happens.

2. The United States Claims Court

Congress established this court in 1982 to handle claims against the United States for money damages. It is composed of 16 judges appointed by the President for 15-year terms. They hear claims throughout the country.



Then and Now

SUING THE GOVERNMENT

Amazingly, the United States government cannot be sued without its consent. The doctrine of sovereign immunity protects the government as a principle of old English public law, "The King can do no wrong." However, Congress long ago readily agreed to concede a long list of legitimate claims against the government. Still, even if the Claims Court upheld your lawsuit, you wouldn't receive your money until Congress appropriated it.

3. The Courts of the District of Columbia

Congress has developed a judicial system for the nation's capital. It includes a federal district court, a court of appeals for the District of Columbia, and local courts to hear civil and criminal cases.

4. The Territorial Courts

Because the Constitution gave Congress the power to make rules to govern U.S. territories, Congress created a court system for the Virgin Islands, Guam, the Northern Mariana Islands, and Puerto Rico. The courts function similarly to district courts, handling civil, criminal, and constitutional cases.

5. The Court of Veterans Appeals

Congress created this court in 1988. It hears appeals from the Board of Veterans Appeals in the Department of Veterans Affairs, a new cabinet department. The court was created to handle veterans' war claims for benefits and other veterans' problems.

6. The United States Tax Court

The power of Congress to tax affects most U.S. citizens. Inevitably, disputes arise over taxes. All civil (but not criminal) cases are heard in the Tax Court. Most cases are generated by the Internal Revenue Service and other Treasury Department agencies. Decisions may go to federal courts of appeals.

FEDERAL JUDGES

You know that the President appoints all federal justices, and, like all other major officials, the Senate must confirm the President's nominations. Consider, however, the numbers: 632 judges serve the district courts, and 179 circuit judges sit on the courts of appeals. Many more are appointed to the legislative courts. Of course, a President would not have to appoint all of them because they serve lifetime terms, but a number of positions always become vacant during a President's term in office. How can the President find time personally to interview candidates for all positions? Although the responsibility of selecting judges demands a great deal of time and effort from the chief executive, some important guidelines traditionally have served to streamline the process.

1. Selection Criteria

The Constitution provides no specific qualifications for federal judges. The criteria for selecting them have developed through history, with each President emphasizing some criteria more than others.

A. EXPERIENCE AND BACKGROUND

Almost all federal judges have law degrees, and most have been practicing lawyers. Many have held previous positions in law and government, as law school professors, members of Congress, or federal district attorneys. About one-third of district court judges have served as state court judges.

Supreme Court justices typically have held high administrative or judicial positions. Many are appointed from the courts of appeals, but surprisingly, some of the most distinguished justices have not had previous judicial experience. The work of the Court is so unique that previous experience is probably much less important than it is for service on the appeals courts. Many Supreme Court justices have worked as attorneys for the Department of Justice, and some have held elective office. For example, William Howard Taft was chief justice after he was President of the United States.

B. PARTY AFFILIATION

The President usually, but not always, appoints judges from his own political party. For example, 81 percent of Republican Gerald Ford's appointments were Republicans. Overall, about 90 percent of judicial appointments since the time of Franklin Roosevelt have gone to members of the President's party. Only 13 of 104 members of the Supreme Court have been nominated by Presidents of a different party, and even then, the exceptions were quite close to the President's political ideology.

The role of partisanship, the strong support of one party, in selecting judges may seem to contradict the idea that judges should be appointed because they are the best qualified for their positions. Remember Federalist John Adams's

fear that his Democratic-Republican successor Thomas Jefferson would retract all that he had worked for as President. Even though the President may occasionally stand above politics, he almost certainly will consider a judicial candidate's political party in making his selections.

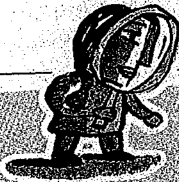
POLITICAL PARTIES AND JUDICIAL APPOINTMENT

PRESIDENT	PARTY	APPOINTEES FROM SAME PARTY
Franklin Roosevelt	Democrat	97%
Harry Truman	Democrat	92%
Dwight Eisenhower	Republican	95%
John Kennedy	Democrat	92%
Lyndon Johnson	Democrat	96%
Richard Nixon	Republican	93%
Gerald Ford	Republican	81%
Jimmy Carter	Democrat	90%
Ronald Reagan	Republican	94%
George Bush	Republican	89%
Bill Clinton	Democrat	90%*

Clinton's figures for nominations during his first term (1992–1996).

C. POLITICAL IDEOLOGY

A person's political party can only suggest what one's political beliefs may be. For example, one survey of federal judges found that 75 percent of the Democrats, but only 28 percent of the Republicans, considered themselves to be liberals. A person's ideology, or set of beliefs, is also an important criterion for Presidents to consider as they select their nominations to the judiciary. A President quite understandably wants justices who will agree with his own political ideology. With a few exceptions, most justices appointed by conservative Presidents reflect conservatism in the decisions they make while on the court, and the same correlation exists for liberal Presidents and justices. However, Presidents have no real way of predicting how justices will rule on particular issues. Behavior doesn't always reflect ideology, and political views also change. For example, President Eisenhower was surprised—and dismayed—that two of his appointees, Earl Warren and William Brennan, were not the conservatives that he believed them to be. When asked if he'd ever made any mistakes, Eisenhower replied, "Yes, two, and they are both sitting on the Supreme Court."



e.g.

THE LITMUS TEST

A litmus test in chemistry determines whether a liquid is acid or alkaline. In politics, a type of "litmus test" is used to measure purity of beliefs, especially the political beliefs of Supreme Court justices. When potential nominees are questioned by a President's staff member, they may have to answer questions about school prayer, tax cuts, abortion, free speech, and many other "hot" issues that they might have to decide in court. Although Presidents usually deny the use of a litmus test in making their selections, the opposing political party often makes that accusation.

D. RACE AND GENDER

Until 1967, all Supreme Court justices were white males, as were most federal judges appointed to lower courts. The tradition was broken in 1967 with Lyndon Johnson's appointment of Thurgood Marshall, a distinguished African-American attorney who subsequently served on the Court for more than 20 years. In 1981, Ronald Reagan appointed the first woman justice, Sandra Day O'Connor. Since then, one other African American, Clarence

Thomas, and one more woman, Ruth Bader Ginsburg, have joined the Supreme Court. (See Almanac page 552.)

Although President Jimmy Carter did not have the opportunity to appoint a Supreme Court justice, he changed the composition of the lower federal courts dramatically. He appointed more African Americans, Hispanics, and women to the federal courts than all other Presidents combined—40 women, 38 African Americans, and 16 Hispanics. President Ronald Reagan did not appoint as many as did Carter, perhaps partly because fewer minority candidates could pass the Reagan administration's conservative ideology screening. Twenty percent of George Bush's appointments were women, 7 percent were African American, and 4 percent Hispanic.

E. SENATORIAL COURTESY

A President's judicial nominations must always be made with the "advice and consent" of the Senate. Quite naturally, a President wants to avoid the public embarrassment of having a nomination rejected, so a custom has emerged over the years that helps a President anticipate problems with nominations before they happen. The practice of **senatorial courtesy** governs the selection of judges to federal trial courts. Before officially nominating an individual to federal district court, a President usually submits the name of a candidate to the senators from the candidate's state before formally presenting it for full Senate approval. If either or both senators oppose the President's choice, the President usually withdraws the name and nominates a more acceptable candidate.

The practice of senatorial courtesy does not usually extend to appointments to the courts of appeals because the circuits of those courts cover more than one state. And, senatorial courtesy is not a factor in appointing Supreme Court justices because they are national, not state, appointments.

2. Selection Process

A President usually realizes that an appointment of a federal judge could leave an enduring mark on the American legal system. According to the Constitution, judges may serve "during good behavior," which gives them a lifetime position. They may be removed only through the impeachment process (impeachment by the House and conviction by the Senate). Of the thousands who have served as federal judges, only 13 have ever been impeached, and only 7 of them have been convicted. Only one Supreme Court justice, Samuel Chase in 1804, has been impeached by the House. The Senate failed to convict Chase, and so he remained in office.

def·i·ni·tions

senatorial courtesy—the practice in which a presidential nomination is submitted initially for approval to the senators from the nominee's state.

Headlines

IMPEACHED JUDGES

Seven judges have been removed from office through the impeachment process.

- ★ John Pickering of the district court in New Hampshire, for judicial misconduct and drunkenness, in 1804
- ★ West H. Humphreys of the district court in Tennessee, for disloyalty, in 1862
- ★ Robert W. Archbald of the old Commerce Court, for improper relations with litigants, in 1913
- ★ Halsted L. Ritter of the district court in Florida, for judicial misconduct, in 1936
- ★ Harry E. Claiborne of the district court of Nevada, for filing false income tax returns, in 1986
- ★ Alcee L. Hastings of the district court in Florida, on charges of bribery and false testimony, in 1989
- ★ Walter L. Nixon of the district court in Mississippi, for perjury, in 1989

A. THE PRESIDENT'S CHOICE

On the surface it appears as if the President has the most control over judiciary appointments. But many others also have an important say in the process, especially in judgeships on federal district courts.

★ CONGRESS Typically when a vacancy appears on a district court, one or both of the senators of the President's party from the state where the judge will serve suggest candidates to the attorney general and the President. If the candidates pass FBI clearance, their appointment is automatic, with the White House playing only a formal role in their selection. So the custom of senatorial courtesy not only provides input from senators, but it gives the President's political party and the House of Representatives some power in the process too.

★ AGENCIES WITHIN THE EXECUTIVE DEPARTMENTS The Department of Justice and the FBI also get an opportunity to influence the selection. They conduct competency and background checks on the suggested candidates, and the President usually selects from those that they recommend. A President usually doesn't risk the political conflict that would result if he

turned down a senator's recommended candidate who survived this screening process. For example, President John Kennedy appointed Senator James O. Eastland's old college roommate to a district court even though Kennedy strongly disagreed with the candidate's racial and political views.

- **SITTING JUDGES AND JUSTICES** Sometimes the Department of Justice asks sitting judges to evaluate prospective nominees. The judges often take it upon themselves to nominate candidates, and they usually feel free to try to block nominees that they don't support.

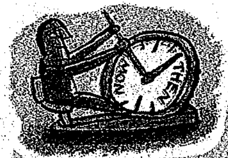
- **PROSPECTIVE NOMINEES** Sometimes individuals who want judicial appointments campaign for themselves. They often work through their political party to gain support, or they contact members of Congress or judges to ask for their endorsements. Most people get judgeships by putting together a carefully orchestrated campaign to gain the necessary support to catch the President's attention.

- **THE AMERICAN BAR ASSOCIATION (ABA)** This interest group for lawyers maintains a standing committee on the federal judiciary. It rates judicial nominees from a high category of "well qualified" to a low of "not qualified." Although its ratings do not bind a President or the Senate, Presidents usually don't nominate anyone rated "not qualified" by the ABA.

B. SENATE CONFIRMATION

Because most nominees for federal district courts are suggested by the senators in the appropriate states, the Senate confirmation required by the Constitution is only a formality for most. However, for appointments that Presidents control, such as appeals court judges and especially for Supreme Court justices, the confirmation process may be very important. Presidents usually rely on the attorney general, the Department of Justice, and the White House staff to identify and screen candidates for the Supreme Court. Although sitting justices may try to use their influence, the President's choice is usually made fairly independently.

The Senate Judiciary Committee interviews the nominee before he or she goes before the entire Senate. If the Judiciary Committee does not recommend the candidate, the Senate usually rejects the nomination. The committee hearing, then, is the most important step toward the nominee's success. Through 1998, 28 of the 146 individuals nominated to be Supreme Court justices have not been confirmed by the Senate.



Then and Now

CONFIRMATION CHALLENGES

In recent years the Senate has held heated confirmation hearings for Supreme Court nominees.

THE BORK REJECTION

In 1987, the Senate rejected President Reagan's nominee for the seat vacated when Lewis F. Powell stepped down from the Court. Reagan's nominee, Robert Bork, was portrayed by his supporters as a highly intelligent, learned man who would defer to Congress and state legislatures and adhere to the principles set by past court decisions. His critics saw him as a judicial activist who would overturn previous decisions and ignore Congress in order to achieve his extremely conservative political ends. After almost 4 months of politicized national debate, 12 days of hearings before the Judiciary Committee, and 23 grueling hours of debate on the Senate floor, the Senate voted 58 to 42 against Bork's confirmation.

THE THOMAS CONTROVERSY

Another Court nominee was only narrowly confirmed in a Senate vote of 52 to 48 in 1991. When the first African-American Supreme Court justice, Thurgood Marshall, retired in 1991, President Bush nominated as his replacement Clarence Thomas, a controversial member of the Court of Appeals for the District of Columbia. Thomas first ran into problems in the Judiciary Committee hearings when he refused to answer questions about his constitutional views. Critics believed that Clarence Thomas also would press his conservative views into active policy making. The committee narrowly recommended Thomas to the full Senate, where his trouble took a turn for the worse. The storm broke two days before the Senate was scheduled to vote on his confirmation. Information had been leaked to the press that a former associate of Judge Thomas, Anita Hill, had accused him of sexually harassing her when she worked for him in the Department of Education. Three days of emotionally charged hearings were telecast to the nation. Thomas denied the charges presented by Hill, and he narrowly escaped rejection by the closest Supreme Court confirmation vote in modern times.

C. SELECTION GRIDLOCK

Because the Senate must confirm the President's nominees, judicial appointments create opportunities for gridlock. When that happens, nothing gets done in government because the legislative and executive branches disagree. On the last day of 1997, Chief Justice William Rehnquist openly rebuked the Senate for failing to move more quickly on judicial appointments.