

The Federal Judicial System

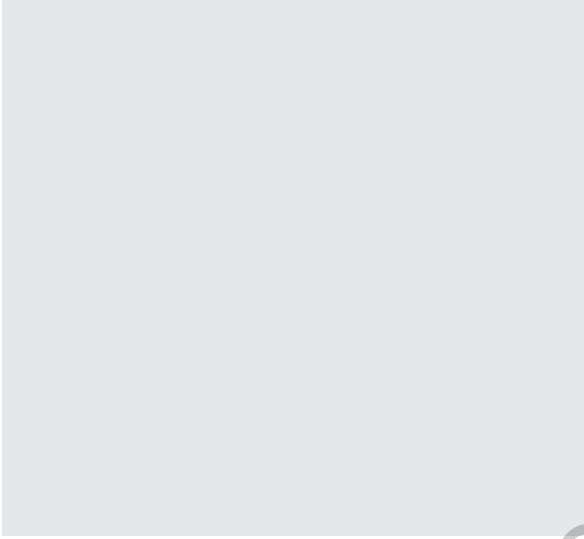
Chapter Goals and Objectives

In this chapter, readers will learn that...

- Before we can understand the federal judicial system as it is today, we must first learn about its historical development.
- There are three primary levels of the federal judiciary: the Supreme Court, the Courts of Appeals, and the Federal District Courts.
- The federal court system has many different actors and institutions that support it: law clerks and magistrate judges. Also, the Administrative Office of the US Courts and the Federal Judicial Center.
- The COVID-19 epidemic has had a major impact on the administration of the Federal Courts.
- It is important to understand the size and nature of the Federal Judicial Workload.

One of the most important, most interesting, and most confusing features of the judiciary in the United States is the dual court system—that is, each level of government (state and national) has its own set of courts. Thus, there is a separate court system for each state, one for the District of Columbia, and one for the federal government. Some legal problems are resolved entirely in the state courts, whereas others are handled entirely in the federal courts. Still others may receive attention from both sets of tribunals.

To simplify matters, we discuss the federal courts in this chapter and the state courts in Chapter 3. Because knowledge of the historical events that helped shape the national court system can shed light on the present judicial structure, our study of the federal judiciary begins with a description of the court system as it has evolved over more than two centuries. We first examine the three levels of the federal court system in the order in which they were established: the Supreme



Built in 1935, this edifice is the home of the United States Supreme Court.

Court, the courts of appeals, and the district courts. The emphasis in our discussion of each level will be on policymaking roles and decision-making procedures.

In a brief look at other federal courts, we focus on the distinction between constitutional and legislative courts. Next, we discuss the individuals and organizations that provide staff support and administrative assistance in the daily operations of the courts. Our overview discussion concludes with a brief look at the workload of the federal courts.

The Historical Context

Prior to ratification of the Constitution, the country was governed by the Articles of Confederation. Under the Articles, almost all functions of the national government were vested in a single-chamber legislature called Congress. There was no separation of executive and legislative powers.

The absence of a national judiciary was considered a major weakness of the Articles of Confederation. Both James Madison and Alexander Hamilton, for example, saw the need for a separate judicial branch. Consequently, the delegates gathered at the Constitutional Convention in Philadelphia in 1787 and expressed widespread agreement that a national judiciary should be established. A good deal of disagreement arose, however, on the specific form that the judicial branch should take.

The Constitutional Convention and Article III

The first proposal presented to the Constitutional Convention was the Randolph Plan (also known as the Virginia Plan), which would have set up both a Supreme Court and inferior federal courts. Opponents of the Virginia Plan responded with the Paterson Plan (also known as the New Jersey Plan), which called for the creation of a single federal supreme tribunal. Supporters of the New Jersey Plan were especially disturbed by the idea of lower federal courts. They argued that the state courts could hear all cases in the first instance and that a right of appeal to the Supreme Court would be sufficient to protect national rights and provide uniform **judgments** throughout the country.

The conflict between the states' rights advocates and the nationalists was resolved by one of the many compromises that characterized the Constitutional Convention. The compromise is found in Article III of the Constitution, which begins, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Thus, the conflict would be postponed until the new government was in operation.

The Judiciary Act of 1789

Once the Constitution was ratified, action on the federal judiciary came quickly. When the new Congress convened in 1789, its first major concern was judicial organization. Discussions of Senate Bill 1 involved many of the same participants and arguments that were involved in the Constitutional Convention's debates on the judiciary. Once again, the question was whether lower federal courts should be created at all or whether federal claims should first be heard in state courts. Attempts to resolve this controversy split Congress into two distinct groups.

One group, which believed that federal law should be adjudicated in the state courts first and by the US Supreme Court only on appeal, expressed the fear that the new government would destroy the rights of the states. The other group of legislators, suspicious of the parochial prejudice of state courts, feared that litigants from other states and other countries would be dealt with unjustly. This latter group naturally favored a judicial system that included lower federal courts. The law that emerged from the debate, the Judiciary Act of 1789, set up a judicial system comprising a Supreme Court, consisting of a chief justice and five associate justices; three circuit courts, each with two justices of the Supreme Court and a district judge; and thirteen district courts, each presided over by one district judge. The power to create inferior federal courts, then, was immediately exercised. Congress created not one but two sets of lower courts.

The US Supreme Court

A famous jurist once said, "The Supreme Court of the United States is distinctly American in conception and function and owes little to prior judicial institutions."¹

To understand what the framers of the Constitution envisioned for the Court, another American concept must be considered: the federal form of government. The founders provided for both a national government and state governments; the courts of the states were to be bound by federal laws. However, final interpretation of federal laws could not be left to a state court and certainly not to several state tribunals, whose judgments might disagree. Thus, the Supreme Court must interpret federal legislation. Another of the founders' intentions was for the federal government to act directly on individual citizens as well as on the states. The Supreme Court's function in the federal system may be summarized as follows:

In the most natural way, as the result of the creation of Federal law under a written constitution conferring limited powers, the Supreme Court of the United States came into being with its unique function. That court maintains the balance between State and Nation through the maintenance of the rights and duties of individuals.²

Given the high court's importance to the US system of government, it was perhaps inevitable that the Court would evoke great controversy. A leading student of the Supreme Court said,

Nothing in the Court's history is more striking than the fact that, while its significant and necessary place in the Federal form of Government has always been recognized by thoughtful and patriotic men, nevertheless, no branch of the Government and no institution under the Constitution has sustained more continuous attack or reached its present position after more vigorous opposition.³

The Impact of Chief Justice Marshall

John Marshall served as chief justice from 1801 to 1835, and although he was not the nation's first chief justice, he dominated the Court to a degree unmatched by anyone who came after him. In effect, Marshall was the Court—perhaps because, in the words of one scholar, he “brought a first-class mind and a thoroughly engaging personality into second-class company.”⁴ Marshall's dominance of the Court enabled him to initiate some major changes in the way opinions were presented. Before his tenure, the justices ordinarily wrote separate opinions (called seriatim opinions) in major cases. Under Marshall's stewardship, the Court adopted the practice of handing down a single opinion, and the evidence shows that from 1801 to 1835, Marshall himself wrote almost half the opinions.⁵ In addition to bringing about changes in opinion-writing practices, Marshall used his powers to involve the Court in the policymaking process. Early in his tenure as chief justice, in *Marbury v. Madison* (1803), the Court asserted its power to declare an act of Congress unconstitutional.⁶

In this decision, Marshall declared Section 13 of the Judiciary Act of 1789 unconstitutional because it granted **original jurisdiction** to the Supreme Court in excess of that specified in Article III of the Constitution. Thus, the Court's power to review and determine the constitutionality of acts of Congress was established. This decision is rightly seen as one of the single most important decisions the Supreme Court has ever handed down. A few years later, the Court also claimed the right of **judicial review** of actions of state legislatures. During Marshall's, tenure it overturned more than a dozen state laws on constitutional grounds.⁷ Inferior federal and state courts also exercise the power to review the constitutionality of legislation. Judicial review is one of the features that set American courts apart from those in other countries. Judicial scholar Herbert Jacob said that "the United States is the outlier in the extraordinary power that its ordinary courts exercise in reviewing the constitutionality of legislation; France and Germany occupy intermediate positions, and the Japanese courts are the least active."⁸ Constitutional challenges to legislation do occur in France and Germany, but ordinary judges sitting in ordinary courts do not exercise these powers. In Japan, the Supreme Court, although possessing the power of constitutional review, rarely exercises it. Judicial review in the United Kingdom is basically of administrative actions.⁹

The Supreme Court as a Policymaker

The Supreme Court's role as a policymaker derives from the fact that it interprets the law. Public policy issues come before the Court in the form of legal disputes that must be resolved:

Courts in any political system participate to some degree in the policymaking process because it is their job. Any judge faced with two or more interpretations and applications of a legislative act, executive order, or constitutional provision must choose among them because the controversy must be decided. And when the judge chooses, their interpretation becomes policy for the specific litigants. If the interpretation is accepted by the other judges, the judge has made policy for all jurisdictions in which that view prevails.¹⁰

In an article about the European Court of Justice, which serves the twenty-five member states of the European Union, judicial scholar Sally J. Kenney said that this court, similar to the US Supreme Court, "is grappling with the most important policy matters of our time—separation of powers, the environment, communications, labor policy, affirmative action, sex discrimination, and human rights issues."¹¹ Fundamental human rights issues in the European Court of Justice are typically raised in the context of trade, however.¹²

An excellent example of US Supreme Court policymaking may be found in the area of racial equality. Separation of the races in public schools was contested in the famous *Brown v. Board of Education* case of 1954.¹³ Parents of Black

schoolchildren claimed that state laws requiring or permitting segregation deprived them of equal protection of the laws under the Fourteenth Amendment. The Supreme Court ruled that separate educational facilities are inherently unequal, and therefore, segregation constitutes a denial of equal protection. In the *Brown* decision, the Court overturned the separate-but-equal doctrine and established a policy of desegregated public schools.

In an average year, the Court decides, with signed opinions, some sixty-five to seventy-five cases.¹⁴ Thousands of other cases are disposed of with less than the full treatment. Thus, the Court deals at length with a very select set of policy issues that have varied throughout its history.

In a democracy, broad matters of public policy are, at least in theory, presumed to be left to the elected representatives of the people—not to judicial appointees with life terms. In principle, US judges are not supposed to make policy, but in practice, they cannot help but do so to some extent, as the examples discussed earlier demonstrate.

The Supreme Court, however, differs from legislative and executive policymakers. Especially important is the fact that the Court has no self-starting device. The justices must wait for problems to be brought to them; there can be no judicial policymaking if there is no litigation. The president and members of Congress have no such constraints. Moreover, even the most assertive Supreme Court is limited to some extent by the actions of other policymakers, such as lower court judges, Congress, and the president. The Court depends on others to implement its decisions.

The Supreme Court as Final Arbiter

The Supreme Court has both original and **appellate jurisdiction**. Original jurisdiction means that a court has the power to hear a case for the first time. Appellate jurisdiction means that a higher court has the authority to review cases originally decided by a lower court.

The Supreme Court is overwhelmingly an appellate court because most of its time is devoted to reviewing decisions of lower courts. The Supreme Court is the highest appellate tribunal in the country, and as such, it has the final word in the interpretation of the Constitution, acts of legislative bodies, and treaties—unless the Court's decision is altered by a constitutional amendment or, in some instances, by an act of Congress.

Since 1925, a device known as *certiorari* has allowed the high court to exercise discretion in deciding which cases it should review. Under this method, a person may request Supreme Court review of a lower court decision; then, the justices determine whether the request should be granted. During the twelve-month period ending September 30, 2017, the Supreme Court granted review to only 69 cases.¹⁵ If review is granted, the Court issues a **writ of certiorari**, which is an order to the lower court to send up a complete record of the case. When *certiorari* is denied, the decision of the lower court stands.

The Supreme Court at Work

The formal session of the Supreme Court lasts from the first Monday in October until the business of the term is completed, usually in late June or July. Formal sessions are held in a large courtroom that seats three hundred people. At the front of the courtroom is the bench where the justices are seated. When the Court is in session, the chief justice, followed by the eight associate justices (the number since 1869) in order of seniority (length of continuous service on the Court), enters through the purple draperies behind the bench and takes a seat. Seats are arranged according to seniority, with the chief justice in the center, the senior associate justice on the chief justice's right, the second-ranking associate justice on the left, and continuing alternately in descending order of seniority. Near the courtroom are the conference room, where the justices decide cases, and the chambers that contain offices for the justices and their staff.

The Court's term is divided into sittings, each lasting approximately two weeks, during which the justices meet in open session and hold internal conferences and recesses. During this time, the justices work behind closed doors to consider cases and write opinions. The sixty-five to seventy-five cases per term that receive the Court's full treatment follow a routine pattern, which is described below.

Oral Argument

Oral arguments are generally scheduled on Monday through Wednesday during the sittings. The sessions run from 10:00 a.m. to noon and from 1:00 to 3:00 p.m. Because the procedure is not a trial or the original hearing of a case, no jury is assembled, and no witnesses are called. Instead, the two opposing attorneys present their arguments to the justices. The general practice is to allow thirty minutes for each side, although the Court may decide that additional time is necessary. For example, when the Court heard oral arguments in the same-sex marriage case (*Obergefell v. Hodges*) on April 28, 2015, it allotted two-and-a-half hours. The Court normally hears four cases in one day. Attorneys presenting oral arguments are frequently interrupted with probing questions from the justices. The oral argument is considered particularly important by both attorneys and justices because it is the only stage in the process that allows such personal exchanges. Oral arguments are open to the public.

The Conference

On Fridays preceding the two-week sittings, the Court holds conferences; during sittings, it holds conferences on Wednesday afternoon and all-day Friday. At the Wednesday meeting, the justices discuss the cases argued on Monday. At the longer conference on Friday, they discuss the cases that were argued on Tuesday and Wednesday, plus any other matters that need to be considered. The most important of these other matters are the certiorari petitions.

A quorum for a decision on a case is six members; obtaining a quorum is seldom difficult. Cases are sometimes decided by fewer than nine justices because of vacancies, illnesses, or nonparticipation resulting from possible conflicts of interest. Supreme Court decisions are made by a majority vote. In the event of a tie, the lower court decision is upheld.

Opinion Writing

After a tentative decision has been reached in conference, the next step is to assign an individual justice to write the Court's opinion. The chief justice, if voting with the majority, either writes the opinion or assigns it to another justice who voted with the majority. When the chief justice votes with the minority, the most senior justice in the majority makes the assignment.

After the conference, the justice who will write the Court's opinion begins work on an initial draft. Other justices may work on the case by writing alternative opinions. The completed opinion is circulated to justices in both the majority and the minority groups. The writer seeks to persuade justices originally in the minority to change their votes and to keep their majority group intact. A bargaining process ensues, and the wording of the opinion may be changed to satisfy other justices or obtain their support. A deep division in the Court makes it difficult to achieve a clear, coherent opinion and may even result in a shift in votes or in another justice's opinion becoming the Court's official ruling.

In most cases, a single opinion does obtain majority support, although few rulings are unanimous. Those who disagree with the **opinion of the Court** are said to dissent. A dissent does not have to be accompanied by a **dissenting opinion**, but in recent years, it usually has been. Whenever more than one justice dissents, each may write an opinion, or all may join in a single opinion.

On occasion, a justice will agree with the Court's decision but differ in their reason for reaching that conclusion. Such a justice may write what is called a **concurring opinion**. A classic example is Justice Sandra Day O'Connor's concurring opinion in *Lawrence v. Texas* (2003).¹⁶ In that case, the majority relied on the Due Process Clause of the Fourteenth Amendment to declare a Texas statute banning same-sex sodomy unconstitutional. Justice O'Connor agreed with the majority that the statute should be struck down, but she based her conclusion on the Fourteenth Amendment's Equal Protection Clause. As sodomy between opposite-sex partners is not a crime in Texas, the state treats the same conduct differently based solely on the sex of the participants. According to Justice O'Connor, that violates the Equal Protection Clause.

An opinion labeled "concurring and dissenting" agrees with part of a Court ruling but disagrees with other parts. Finally, the Court occasionally issues a **per curiam** opinion—an unsigned opinion that is usually brief. Such opinions are often used when the Court accepts the case for review but gives it less than full treatment. For example, it may decide the case without benefit of oral argument and issue a per curiam opinion to explain the disposition of the case.

The “Shadow Docket”

In recent years, scholars have begun to take notice of what has been termed “the shadow docket” of the Supreme Court.¹⁷ This refers to the ever-increasing attempts by presidential administrations to seek emergency relief from the Supreme Court on a variety of measures. Such a tactic allows the administration often to bypass federal appeals courts by asking the Supreme Court to block or undo a federal district court decision of which the administration disapproves.

The US Courts of Appeals

The **courts of appeals** have been described as “perhaps the least noticed of the regular constitutional courts.”¹⁸ They receive less media coverage than the Supreme Court, in part because their activities are simply not as dramatic. However, one should not assume that the courts of appeals are unimportant to the judicial system. For example, in its 2018 term, the Supreme Court handed down decisions with full opinions in only sixty-nine cases; this means that the courts of appeals are the courts of last resort for most appeals in the federal court system.

Originating in the Judiciary Act of 1789 as three circuit courts, the courts making up the intermediate level of the federal judiciary evolved into courts of appeals in 1948. Despite this official name, they continue to be referred to colloquially as circuit courts. Although these intermediate appellate courts have been headed at one time or another by circuit judges, courts of appeals judges, district judges, and Supreme Court justices, they now are staffed by 179 authorized courts of appeals judges.

The courts of appeals in each of the twelve regional circuits are responsible for reviewing cases appealed from federal district courts (and in some cases from administrative agencies) within the boundaries of the circuit. [Figure 2.1](#) depicts the appellate and district court boundaries and indicates the states contained in each.

A specialized appellate court came into existence in 1982, when Congress established the Federal Circuit, a jurisdictional instead of a geographic circuit. The US Court of Appeals for the Federal Circuit was created by consolidating the Court of Claims and the Court of Customs and Patent Appeals.

The Review Function of the Courts of Appeals

As one modern-day student of the judiciary has noted:

The distribution of labor among the Supreme Court and the Courts of Appeals, implicit in the Judiciary Act of 1925, has matured into fully differentiated functions for federal appellate courts. Substantively, the Supreme Court has become increasingly a constitutional tribunal. Courts of Appeals concentrate on statutory interpretation, administrative review, and error correction in masses of routine adjudications.¹⁹

Figure 2.1 District and Appellate Court Boundaries



Note: The large numerals indicate the Courts of Appeals; the dashed lines indicate district boundaries. Number and composition of circuits set forth by 28 U.S.C. § 41.

Although the Supreme Court has had discretionary control of its docket since 1925, the courts of appeals still have no such luxury. Instead, their docket depends on how many and what types of cases are appealed to them.

Most of the cases reviewed by the courts of appeals originate in the federal district courts. Litigants disappointed with the lower court decision may appeal the case to the court of appeals of the circuit in which the federal district court is located. The appellate courts have also been given authority to review the decisions of certain administrative agencies. Well over a thousand administrative law judges now perform judicial functions within the executive branch of the federal government. In adjudicating cases, they conduct formal trial-type hearings, make findings of fact and law, apply agency regulations, and issue decisions.²⁰ This type of case normally enters the federal judicial system at the court of appeals level instead of at the federal district court level.

Because the courts of appeals have no control over which cases are brought to them, they deal with both routine and incredibly important matters. At one end of the spectrum are frivolous appeals or claims that have no substance and little or no chance for success. Such appeals are no doubt encouraged by the fact that the Supreme Court has ruled that assistance of counsel for first appeals should be granted to all indigents who have been convicted of a crime.²¹ Occasionally, a claim is successful, which then motivates other prisoners to appeal.

At the other end of the spectrum are the cases that raise major questions of public policy and evoke strong disagreement. Decisions by the courts of appeals in such cases are likely to establish policy for society, not just for the specific litigants. Civil liberties, reapportionment, religion, and education cases provide good examples of the kinds of disputes that may affect all citizens.

There are two purposes of review in the courts of appeals. The first is error correction. Judges in the various circuits are called on to monitor the performance of federal district courts and federal agencies and to supervise their application and interpretation of national and state laws. In doing so, the courts of appeals do not seek out new factual evidence but instead examine the record of the lower court for errors. In the process of correcting errors, the courts of appeals also settle disputes and enforce national law.

The second function is sorting out and developing those few cases worthy of Supreme Court review. The circuit judges tackle the legal issues earlier than the Supreme Court justices do, and they may help shape what they consider review-worthy claims. Judicial scholars have found that the second hearing of appealed cases sometimes differs from the first.

The Courts of Appeals as Policymakers

The Supreme Court's role as a policymaker derives from the fact that it interprets the law; the same holds true for the courts of appeals. The scope of the courts of appeals' policymaking role takes on added importance because they are the courts of last resort in most cases. A study of three circuits, for example, found that the US Supreme Court reviewed only nineteen of the nearly four thousand decisions of those tribunals.²² As an example of the impact of circuit court judges, consider a decision in a case involving the Fifth Circuit. For several years, the University of Texas Law School granted preference to Black and Mexican American applicants to increase the enrollment of these classes of minority students. This practice was challenged in a federal district court on the ground that it discriminated against White and nonpreferred minority applicants in violation of the Fourteenth Amendment. On March 18, 1996, a panel of Fifth Circuit judges ruled in *Hopwood v. Texas* that the Fourteenth Amendment does not permit the school to discriminate in this way and that race may not be used as a factor in law school admissions.²³ The US Supreme Court denied a petition for a writ of certiorari in the case, thus leaving it the law of the land in Texas, Louisiana, and Mississippi, the states constituting the Fifth Circuit.²⁴ However, the Supreme Court did tackle the use of race as a factor in law school and undergraduate admissions in two cases decided during its 2002–2003 term. The cases, *Gratz v. Bollinger* and *Grutter v. Bollinger*, are discussed more fully in Chapter 14.

A major difference in policymaking by the Supreme Court and by the courts of appeals should be noted. Whereas there is one high court for the entire country, each court of appeals covers only a specific region. Thus, the courts of appeals are more likely to make policy on a regional basis. Still, as evidenced by

the *Hopwood* case, they are part of the federal judicial system and “participate in both national and local policy networks, their decisions becoming regional law unless intolerable to the Justices.”²⁵

The Courts of Appeals at Work

The courts of appeals do not have the same degree of discretion as the Supreme Court to decide whether to accept a case for review. Nevertheless, circuit judges have developed methods for using their time as efficiently as possible.

Screening

During the screening stage, the judges decide whether to give an appeal a full review or to dispose of it in some other way. The docket may be reduced to some extent by consolidating similar claims into single cases, a process that also results in a uniform decision. In deciding which cases can be disposed of without oral argument, the courts of appeals increasingly rely on law clerks or staff attorneys who read petitions and briefs and then submit recommendations to the judges. As a result, many cases are disposed of without reaching the oral argument stage. A study in 2016 indicated, for example, that about 70 percent of the appeals were terminated without oral argument.²⁶

Three-Judge Panels

Those cases given the full treatment are normally considered by panels of three judges rather than by all the judges in the circuit. This means that several cases can be heard at the same time by different **three-judge panels**, often sitting in different cities throughout the circuit.

Panel assignments are typically made by the circuit executive or someone else, and then a clerk assigns cases blindly to the panels. Because all the circuits now contain more than three judges, the panels change frequently so that the same three judges do not sit together permanently. Regardless of the method used to determine panel assignments, one fact remains clear: a decision reached by most of a three-judge panel does not necessarily reflect the views of most of the judges in the circuit.

En Banc Proceedings

Occasionally, different three-judge panels within the same circuit may reach conflicting decisions in similar cases. To resolve such conflicts and to promote circuit unanimity, federal statutes provide for an **en banc** procedure, in which all the circuit’s judges sit together on a panel and decide a case. The exception to this general rule occurs in the large Ninth Circuit, where assembling all the judges

becomes too cumbersome. There, en banc panels normally consist of eleven judges. The en banc procedure may also be used when the case concerns an issue of extraordinary importance. The procedure may be requested by the litigants or by the judges of the court. The circuits themselves have discretion to decide if and how the procedure will be used. Clearly, its use is the exception, not the rule.

Oral Argument

Cases that have survived the screening process and have not been settled by the litigants are scheduled for **oral argument**. Attorneys for each side are given a short amount of time (in some cases no more than ten minutes) to discuss the points made in their written briefs and to answer questions from the judges.

The Decision

Following the oral argument, the judges may confer briefly, and if they agree, they may announce their decision immediately. Otherwise, a decision will be announced only after the judges confer at greater length. Following the conference, some decisions will be announced with a brief order or per curiam opinion of the court. A small portion of decisions will be accompanied by a longer, signed opinion and perhaps even dissenting and concurring opinions. Recent years have seen a general decrease in the number of published opinions, although circuits vary in their practices.

US District Courts

The US district courts represent the basic point of input for the federal judicial system. Although some cases are later taken to a court of appeals or perhaps even to the Supreme Court, most federal cases never move beyond the US trial courts. In terms of sheer numbers of cases handled, the district courts are the workhorses of the federal judiciary. However, their importance extends beyond simply disposing of many cases.

Current Organization of the District Courts

The practice of respecting state boundaries in establishing district court jurisdictions began in 1789, and it has been periodically reaffirmed by statutes ever since. As the country grew, new district courts were created. Congress eventually began to divide some states into more than one district. California, New York, and Texas have the most, with four each. Other than consistently honoring state lines, the organization of district constituencies appears to follow no rational plan. Size and population vary widely from district to district. Over the years, a court was added for the District of Columbia, and several territories

have been served by district courts. US district courts now serve the fifty states, the District of Columbia, Guam, Puerto Rico, the Virgin Islands, and the Northern Mariana Islands.

Congress often provides further organizational detail by creating divisions within a district. In doing this, the national legislature precisely lists the counties included in a particular division as well as the cities in which court will be held.

As indicated, the original district courts were each assigned one judge. With the growth in population and litigation, Congress has periodically added judgeships to the districts, bringing the current total to 677. The Southern District of New York, which includes Manhattan and the Bronx, currently has twenty-eight judges and is the largest. Because each federal district court is normally presided over by a single judge, several trials may be in session at various cities within the district at any given time.

The District Courts as Trial Courts

Congress established the district courts as the trial courts of the federal judicial system and gave them original jurisdiction over virtually all cases. They are the only federal courts in which attorneys examine and cross-examine witnesses. The factual record is thus established at this level. Subsequent appeals of the trial court decision will focus on correcting errors, not on reconstructing the facts. The task of determining the facts in a case often falls to a jury, a group of citizens from the community who serve as impartial arbiters of the facts and apply the law to the facts.

The Constitution guarantees the right to a jury trial in criminal cases in the Sixth Amendment and the same right in civil cases in the Seventh Amendment. The right can be waived, however, in which case the judge becomes the arbiter of questions of fact as well as matters of law. Such trials are referred to as **bench trials**. Two types of juries are associated with federal district courts. The **grand jury** is a group of people convened to determine whether probable cause exists to believe that a person has committed the federal crime of which they have been accused. Grand jurors meet periodically to hear charges brought by the US attorney. Petit jurors are chosen at random from the community to hear evidence and determine whether a **defendant** in a civil trial has liability or whether a defendant in a criminal trial is guilty or not guilty. Federal rules call for twelve jurors in criminal cases but permit fewer in civil cases. The federal district courts generally use six-person juries in civil cases.

Norm Enforcement by the District Courts

Some students of the judiciary make a distinction between norm enforcement and policymaking by the courts.²⁷ Trial courts are viewed as engaging primarily in norm enforcement, whereas appellate courts are seen as having greater opportunity to make policy.

Norm enforcement is closely tied to the administration of justice because all nations develop standards considered essential to a just and orderly society. Societal norms are embodied in statutes, administrative regulations, prior court decisions, and community traditions. Criminal statutes, for example, incorporate concepts of acceptable and unacceptable behavior into law. A judge deciding a case concerning an alleged violation of that law is basically practicing norm enforcement. Because cases of this type rarely allow the judge to escape the strict restraints of legal and procedural requirements, they have little chance to make new law or develop new policy. In civil cases, too, judges are often confined to norm enforcement; opportunities for policymaking are infrequent. Rather, such litigation generally arises from a private dispute whose outcome is of interest only to the parties in the suit.

Policymaking by the District Courts

The district courts also play a policymaking role. One leading judicial scholar explains how this function differs from norm enforcement:

When they make policy, the courts do not exercise more discretion than when they enforce community norms. The difference lies in the intended impact of the decision. Policy decisions are intended to be guideposts for future actions; norm-enforcement decisions are aimed at the case at hand.²⁸

The discretion that a federal trial judge exercises should not be overlooked, however. As Americans have become more litigation-conscious, disputes that were once resolved informally are now more likely to be decided in a court of law. The courts find themselves increasingly involved in domains once considered private. What does this mean for the federal district courts? According to one study, “These new areas of judicial involvement tend to be relatively free of clear, precise appellate court and legislative guidelines; and as a consequence the opportunity for trial court jurists to write on a clean slate, that is, to make policy, is formidable.”²⁹ In other words, when the guidelines are not well established, district judges have a great deal of discretion to set policy.

A recent decision by Judge Lee Rosenthal, a President Bush, Sr. appointee in the Southern District of Texas, is a case in point. For years, it has been unclear whether LGBT workers are protected from discrimination in the workplace by the same federal job protections that guard against gender discrimination. (Surely, it would be hard to argue that the authors of the legislation specifically had LGBT persons in mind when they passed the legislation, and so it has been an open question as to whether the laws could be “stretched” to include such individuals.) On April 11, 2018, this Republican jurist ruled, almost offhandedly, that of course lesbian, gay, bisexual, and transgender persons are covered by the same federal laws that guard against gender discrimination—a decision, which upheld by the appellate courts—is of monumental policy significance.³⁰

Three-Judge District Courts

From time to time, Congress has passed legislation permitting certain types of cases to be heard before a **three-judge district court** rather than a single trial judge. Such courts are created on an ad hoc basis and must include at least one judge from the federal district court and at least one judge from the court of appeals. Appeals of decisions of three-judge district courts go directly to the Supreme Court.

At one time, Congress provided that private citizens challenging the constitutionality of state or federal statutes and seeking injunctions to prohibit their further enforcement could bring the case before a three-judge district court. That is what happened in the famous abortion case of *Roe v. Wade* (1973).³¹ Jane Roe (a pseudonym), a single, pregnant woman, challenged the constitutionality of the Texas antiabortion statute and sought an injunction to prohibit further enforcement of the law. The case was initially heard by a three-judge court consisting of District Judges Sarah T. Hughes and W. N. Taylor and Fifth Circuit Court of Appeals Judge Irving L. Goldberg. The three-judge district court held the Texas abortion statute invalid but declined to issue an injunction against its enforcement on the ground that a federal intrusion into the state's affairs was not warranted. Roe then appealed the denial of the injunction directly to the Supreme Court.

Constitutional Courts, Legislative Courts, and Courts of Specialized Jurisdiction

The Judiciary Act of 1789 established the three levels of the federal court system in existence today. Periodically, however, Congress has exercised its power, based on Article III and Article I of the Constitution, to create other federal courts. Courts established under Article III are known as constitutional courts, and those courts created under Article I are called legislative courts. The former handles the bulk of litigation in the system, and for this reason, they will remain the focus of this discussion. The Supreme Court, courts of appeals, and federal district courts are constitutional courts. The Administrative Procedure Act (APA) was passed in 1946, with the goal of ensuring fairness and due process in executive agency actions or proceedings involving rulemaking and adjudications. To meet these goals, the APA created the position of Administrative Law Judge (ALJ) within the federal government. Originally called hearing examiners, the ALJs are employees of federal agencies who function like trial judges in the executive branch. As might be expected, the Social Security Administration hires far more ALJs than any other federal agency.³²

The two types of courts may be further distinguished by their functions. Legislative courts, unlike their constitutional counterparts, often have administrative and quasi-legislative as well as judicial duties. Another difference is that legislative courts are often created to help administer a specific congressional

statute. For example, more than two hundred immigration judges in more than fifty immigration courts throughout the United States adjudicate cases pursuant to the Immigration Reform and Control Act of 1986 and the Immigration Act of 1990. Their decisions are appealable to the Board of Immigration Appeals, a fifteen-member administrative body housed in the US Department of Justice. All board decisions are subject to review in the federal courts.³³ Constitutional courts are tribunals established to handle litigation.

Finally, the constitutional and legislative courts vary in their degree of independence from the other two branches of government. Article III (constitutional court) judges serve during a period of good behavior or what amounts to life tenure. Because Article I (legislative court) judges have no constitutional guarantee of good-behavior tenure, Congress may set specific terms of office for them. Judges of Article III courts are also constitutionally protected from salary reductions while in office. Those who serve as judges of legislative courts have no such protection. Bankruptcy courts provide a good example. The bankruptcy judges are appointed for fourteen-year terms by the court of appeals for the circuit in which the district is located and have their salaries set by Congress.

The Impact of the COVID Epidemic on Federal Court Administration

The advent of the COVID-19 virus in 2020 has had a considerable impact on the administration of the US courts (and on state judiciaries as we shall see in Chapter 3). In his annual report on the federal judiciary Chief Justice John Roberts addressed this subject in detail. Noted Supreme Court reporter Nina Totenberg summarized Roberts's address as follows:

Court employees began working from home in March, and in May, the high court began hearing oral arguments by teleconference for the first time. Its weekly conference, in which the justices—with nobody else present—discuss and vote on argued cases, have also taken place by teleconference....

Roberts reported that unlike the high court, the federal appeals courts, as well as some other federal courts, have implemented video oral arguments to keep up with their work. In some cases, he said, that has proved particularly challenging—for instance in bankruptcy cases where there may be as many as 100 lawyers who are participants.

The chief justice's biggest attaboy, however, went to the federal district courts, which he noted "faced the biggest challenge." Federal district court judges, among other things, preside over criminal and civil trials. They and their staffs handle the biggest caseload in the federal system, and are responsible for many other functions, from arraigning defendants

to sentencing them, to allowing some of those behind bars to leave if they are eligible, because of the especially dangerous conditions in prison during the pandemic. As Roberts put it, these judges ‘have had to work out how to carry on their vital functions consistent with the best available public health guidance.’”

The result was that most hearings went virtual, and case filings went electronic, while in some jurisdictions, district courts tried to hold trials by spreading out jurors in the largest courtrooms, erecting plexiglass between people, and trying other ways to ensure everyone’s safety. What Roberts did not report is that in many places efforts at holding jury trials faltered amid new outbreaks of the pandemic.

That any trials took place ‘is a credit to judges and court staff, but also to the citizens who serve as jurors’ Roberts said, noting that responses to jury summonses “have met with or exceeded” expectations.³⁴

Administrative and Staff Support in the Federal Judiciary

The daily operation of federal courts requires a myriad of personnel. Although judges are the most visible actors in the judicial system, a large supporting cast is also needed to perform the tasks for which judges are unskilled or unsuited, or for which, they simply do not have adequate time. Some members of the support team, such as law clerks, may work specifically for one judge. Others—for example, US **magistrate** judges—work for a particular court. Still, others may be employees of an agency serving the entire judicial system, such as the Administrative Office of the United States Courts.

United States Magistrate Judges

To help federal district judges deal with increased workloads, Congress passed the Federal Magistrates Act in 1968. This legislation created the office of US magistrate to replace the US commissioners, who had performed limited duties for the federal trial courts for several years. In 1990, with passage of the Judicial Improvements Act, their title was changed to US magistrate judge. Magistrate judges are formally appointed by the judges of the district court for eight-year terms, although they can be removed for “compelling cause” before the term expires.

The magistrate judge system constitutes a structure that responds to each district court’s specific needs and circumstances. Within guidelines set by the Federal Magistrates Acts of 1968, 1976, and 1979, the judges in each district court establish the duties and responsibilities of their magistrate judges. Of most

significance, the 1979 legislation permits a magistrate judge, with the consent of the involved parties, to conduct all proceedings in a nonjury civil matter; to enter a judgment in the case; and to conduct a trial of persons accused of **misdeemeanors** (less serious offenses than felonies) committed within the district, provided the defendants consent.

In other words, Congress has given federal district judges the authority to expand the scope of magistrate judges' participation in the judicial process. Because each district has its own needs, a magistrate judge's specific duties may vary from one district to the next and from one judge to another. The decision to delegate responsibilities to a magistrate judge is still made by the district judge, so that a magistrate judge's participation in the processing of cases may be narrower than that permitted by statute.

Law Clerks

Several thousand law clerks now work for federal judges, bankruptcy judges, and US magistrate judges.³⁵ In addition to the law clerks hired by individual judges, all appellate courts and some district courts hire staff law clerks who serve the entire court.

A law clerk's duties vary according to the preferences of the judge for whom they work. They also vary according to the type of court. Law clerks for federal district judges often serve primarily as research assistants, spending a good deal of time examining the various motions filed in civil and criminal cases. They review each motion, noting the issues and the positions of the parties involved, then research important points raised in the motions and prepare written memoranda for the judges. Because their work is devoted to the earliest stages of the litigation process, law clerks may have a substantial amount of contact with attorneys and witnesses. Law clerks at this level may also be involved in the initial drafting of opinions. As one federal district judge said, "I even allow my law clerks to write memorandum opinions. I first tell him what I want and then he writes it up. Sometimes I sign it without changing a word."³⁶ At the appellate level, the law clerk becomes involved in a case first by researching the issues of law and fact presented by an appeal. Saving the judge's time is important. Consider the courts of appeals. These courts do not have the same discretion that the US Supreme Court has to accept or reject a case. Nevertheless, the courts of appeals now use certain screening devices to differentiate between cases that can be handled quickly and those that require more time and effort. Law clerks are an integral part of this screening process.

Beginning around 1960, some courts of appeals began to use staff law clerks who work for the entire court as opposed to a particular judge. They began to be used primarily because of the rapid increase in the number of pro se matters (generally speaking, those involving indigents) coming before the courts of appeals. Today, some district courts also have pro se law clerks for handling prisoner petitions. In some circuits, the staff law clerks deal only with pro se matters; in others, they review nearly all the cases on the court's docket. As a

result of their review, a truncated process may be followed—that is, no oral argument or full briefing is made.

Many cases are scheduled for oral argument, and the clerk may be called on to assist the judges in preparing for them. Intensive analysis of the record by judges before oral argument is not always possible. Judges seldom have time to do more than scan pertinent portions of the record called to their attention by law clerks. As one judicial scholar aptly noted, “To prepare for oral argument, all but a handful of circuit judges rely upon bench memoranda prepared by their law clerks, plus their own notes from reading briefs.”³⁷ Once a decision has been reached by an appellate court, the law clerk frequently participates in writing the order that accompanies the decision. The clerk’s participation generally consists of drafting a preliminary opinion or order pursuant to the judge’s directions. A law clerk may also be asked to edit or check citations in an opinion written by the judge.

Because the work of the law clerk for a Supreme Court justice roughly parallels that of a clerk in the other appellate courts, all aspects of their responsibility do not need to be restated here. However, a few important points about Supreme Court law clerks deserve mention. Clerks play an indispensable role in helping justices decide which cases should be heard. At the suggestion of Justice Lewis Powell in 1972, a majority of the Court’s members began to participate in a “certpool”: the participating justices pool their clerks, divide up all filings, and circulate a single clerk’s certiorari memo to all those participating in the pool.³⁸ The memo summarizes the facts of the case, the questions of law presented, and the recommended course of action—whether the case should be granted a full hearing, denied, or dismissed. Once the justices have voted to hear a case, the law clerks, like their counterparts in the courts of appeals, prepare bench memoranda that the justices may use during oral argument. Finally, law clerks for Supreme Court justices, like those who serve courts of appeals judges, help to draft opinions.

Administrative Office of the US Courts

The administration of the federal judicial system is managed by the Administrative Office of the US Courts, which essentially functions as “the judiciary’s housekeeping agency.”³⁹ Since its creation in 1939, it has handled everything from distributing supplies and negotiating with other government agencies for court accommodations in federal buildings to maintaining judicial personnel records and collecting data on cases in the federal courts.

The Administrative Office also serves a staff function for the Judicial Conference of the United States, the central administrative policymaking organization of the federal judicial system. In addition to providing statistical information to the conference’s many committees, the Administrative Office acts as a reception center and clearinghouse for information and proposals directed to the Judicial Conference.

Closely related to this staff function is the Administrative Office’s role as liaison for both the federal judicial system and the Judicial Conference. The

Administrative Office serves as advocate for the judiciary in its dealings with Congress, the executive branch, professional groups, and the public. Especially important is its representative role before Congress, where, along with concerned judges, it presents the judiciary's budget proposals, requests for additional judgeships, suggestions for changes in court rules, and other key measures.

The Federal Judicial Center

The Federal Judicial Center, created in 1967, is the federal courts' agency for continuing education and research. Its duties fall generally into three categories: (1) conducting research on the federal courts, (2) making recommendations to improve the administration and management of the federal courts, and (3) developing educational and training programs for personnel of the judicial branch.

Since the inception of the Federal Judicial Center, judges have benefited from its orientation sessions and educational programs. In recent years, magistrate judges, bankruptcy judges, and administrative personnel have also been the recipients of educational programs. The Federal Judicial Center's extensive use of videos and satellite technology enables it to reach large numbers of people.

Federal Court Workload

Table 2.1 shows the number of civil and criminal cases entering the federal district courts during the twelve-month periods ending September 30, 2016, through September 30, 2019. The number of civil cases varied over the time period of this table, but the total number of such cases is over 23,000 higher in 2019 than it was several years previously. Criminal cases, on the other hand, have

Table 2.1 Cases Filed in US District Courts During Recent, Twelve-Month Periods Ending September 30, 2016, Through September 30, 2019: By Case Type

	2016	2017	2018	2019
Civil	274,552	292,076	282,936	297,877
Criminal	77,357	75,163	87,149	92,678

Source: https://www.uscourts.gov/sites/default/files/data_tables/jb_c2_0930.2019.pdf (accessed January 27, 2021); <https://www.uscourts.gov/us-district-courts-judicial-business-2019>

generally increased over time, from over 77,000 cases in 2016 to well over 92,000 cases in 2019.⁴⁰

Table 2.2 provides figures on the total number of appeals commenced in the courts of appeals from 2016 to 2019. The number of appellate court cases has generally declined in recent years, from over 60,000 cases in 2016 to over 48,000 cases in 2019. Not surprisingly, the bulk of the appeals come from the district courts and federal administrative agencies.⁴¹ In Table 2.3, we look at caseload data for the US Supreme Court. The total number of cases on the Court's docket has steadily declined from a high of 8,066 in 2014 to a low of 7,622 in 2018. The decline may be attributed to the general decline in the number of pauper's petitions, that is, those brought by indigent people for whom the filing fee and requirement of multiple copies are waived by the Court.

Table 2.2 Appeals Filed in US Courts of Appeals During Recent, Selected Twelve-Month Periods Ending September 30, 2016, Through September 30, 2019

2016	2017	2018	2019
60,357	50,506	49,276	48,486

Source: Compiled from data available online at <https://www.uscourts.gov/us-courts-appeals-judicial-business-2019> (accessed January 28, 2019).

Table 2.3 Cases on the Docket, Argued, and Disposed of by Full Opinions in the US Supreme Court, October Terms 2014 Through 2018

Cases	2014	2015	2016	2017	2018
Paid	1,845	1,839	1,850	2,062	1,910
Pauper	6,215	5,688	5,477	5,320	5,703
Original	6	8	7	8	9
Argued	75	82	71	69	73
Disposed of by Full Opinions	75	70	68	63	69

Source: Compiled from data available online at https://www.uscourts.gov/sites/default/files/data_tables/supcourt_a1_0930.2019.pdf

The key point to remember about the workload of the Supreme Court is that the justices themselves have discretion to decide which cases merit their full attention. As a result, the number of cases argued before the Court may fluctuate from session to session. In the 2018 term, seventy-three cases were argued, but only sixty-nine were disposed of by full opinions.

A final word about the workload of the federal courts deserves mention before concluding our discussion. That deals with the fact that only Congress can create new judge positions or move the judges from slower-growing regions of the country to faster-growing ones. Efforts to do that, however, have run into political resistance in recent years. The result is a major backlog of civil cases piling up in some of the nation's federal trial courts. The problem is especially critical in cases involving immigration matters. A 2017 study concluded that, "The massive backlog of immigration cases is a real problem. Since 2011, the number of pending cases has doubled to more than 600,000 bogging down lawyers and miring immigrants in an average of nearly two years of uncertainty before their fate is decided."⁴² By December 2020, the number doubled again to a massive 1,290,766 cases.⁴³ For example, in the nation's two largest states, California, and Texas, respective wait times [are] 659 and 790 days.⁴⁴ In an effort to supposedly expedite the work of the immigration judges, in April 2018, former Attorney General Jeff Sessions announced that each immigration judge will now be required to complete 700 cases in a year to qualify for a "satisfactory" performance rating. This is regardless of the nature and scope of the proceedings assigned to them. Judges who complete more than the 700-case minimum would qualify for a higher performance rating, and with it, they may receive a possible raise in pay. One critique of this plan has said, however, that:

the plan should be seen for what it is: an attempt to undermine judicial independence and compel immigration judges to look over their shoulders to make sure that the [Trump] administration is smiling at them. This is a genuine threat to the independence of the immigration bench.⁴⁵

SUMMARY

In this chapter, we offered a brief historical review of the development of the federal judiciary. A perennial concern has existed since preconstitutional times for independent court systems.

We focused on the three basic levels created by the Judiciary Act of 1789, noting, however, that Congress has periodically created both constitutional and legislative courts. The bulk of federal litigation is handled by US district courts, courts of appeals, and the Supreme Court.

Furthermore, we noted the profound effect that the COVID epidemic has had on federal judicial administration.

We also briefly examined the role of magistrate judges and law clerks associated with the federal judiciary.

Finally, we looked at administrative assistance for the federal courts as this relates to the Administrative Office of the US Courts and the Federal Judicial Center. We concluded our discussion with a brief look at the workload of each of the three levels of the federal judiciary.

FURTHER THOUGHT AND DISCUSSION QUESTIONS

1. Why is the US Supreme Court described as “distinctly American in conception and function”?
2. How can a democracy justify the fact that federal judges appointed for life possess the power to nullify federal and state laws that were enacted by elected representatives?
3. Since Article III judges are appointed for life and are independent of one another, what guarantees exist that justice is consistently and equitably dispensed?

SUGGESTED RESOURCES

Administrative Office of the U.S. Courts website. Available online at www.uscourts.gov/adminoff.html. A useful site for caseload data compiled for each level of the federal judiciary.

Barrow, Deborah J., and Thomas G. Walker. *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform*. New Haven, CT: Yale University Press, 1988. An excellent study of the politics involved in the splitting of the Fifth Circuit Court of Appeals.

Baum, Lawrence. *The Supreme Court*, 14th ed. Washington, DC: CQ Press, 2021. A brief look at all aspects of the U.S. Supreme Court.

Burrows, Vanessa K. “Administrative Law Judges: An Overview.” *Congressional Research Service* (April 13, 2010). Available online at www.crs.gov. A good introduction to administrative law judges in the federal government.

Federal Administrative Law Judges Conference Website. Available online at www.faljc.org. Provides useful information about administrative law judges in the federal government.

Federal Judicial Centre Website. Available online at www.fjc.gov. The website of the federal courts’ continuing education and research agency.

Federal Judiciary Website. Available online at www.uscourts.gov. The single most important source of information about all aspects of the federal judiciary. Provides links to individual district courts, courts of appeals, and bankruptcy courts, as well as to other useful Internet sites.

Legal Information Institute Website. Available online at www.law.cornell.edu. An excellent source of information about all aspects of the U.S. Supreme Court, including recent and historical decisions.

Oyez Website. Available online at www.oyez.org. Another useful site for recent and historical Supreme Court decisions.

Rowland, C. K., and Robert A. Carp. *Politics and Judgment in Federal District Courts*. Lawrence, KA: University Press of Kansas, 1996. A thorough study of the various factors that influence the decisions of federal district judges.

Songer, Donald R., Reginald S. Sheehan, and Susan B. Haire. *Continuity and Change on the United States Courts of Appeals*. Ann Arbor, MI: University of Michigan Press, 2000. The most thorough study to date of the U.S. courts of appeals.

U.S. Supreme Court Website. Available online at www.supremecourtus.gov. Provides information about all aspects of the nation's highest court.

NOTES

1. Charles Evans Hughes, *The Supreme Court of the United States* (New York, NY: Columbia University Press, 1966), 1.
2. *Ibid.*, 2.
3. Charles Warren, *The Supreme Court in United States History*, vol. 1 (Boston, MA: Little, Brown, 1924), 4.
4. John P. Frank, *Marble Palace* (New York, NY: Knopf, 1958), 79.
5. See Sheldon Goldman, *Constitutional Law and Supreme Court Decision-Making* (New York, NY: Harper & Row, 1982), 41.
6. *Marbury v. Madison*, 1 Cranch 137 (1803).
7. See Lawrence Baum, *The Supreme Court*, 5th ed. (Washington, DC: CQ Press, 1995), 22.
8. Herbert Jacob, "Conclusion," in Herbert Jacob et al., *Courts, Law, and Politics in Comparative Perspective* (New Haven, CT: Yale University Press, 1996), 394.
9. *Ibid.*

10. Robert H. Birkby, *The Court and Public Policy* (Washington, DC: CQ Press, 1983), 1.
11. Sally J. Kenney, "The European Court of Justice: Integrating Europe Through Law," *Judicature* 81 (1998): 250.
12. *Ibid.*, 251.
13. *Brown v. Board of Education*, 347 U.S. 483 (1954).
14. https://www.uscourts.gov/sites/default/files/data_tables/supcourt_a1_0930.2019.pdf (accessed January 30, 2021).
15. *Ibid.*
16. *Lawrence v. Texas*, 539 U.S. 558 (2003).
17. For an in-depth discussion of this phenomenon, see [https://urldefense.com/v3/_https://www.abajournal.com/web/article/scotus-shadow-docket-draws-increasing-scrutiny_!!LkSTlj0I!Vs_qIBoqaJJ5kxIIZURW7POtB6TyHvkFea3gnfLf_25MyIYyTWBSrgQiCWHv\\$](https://urldefense.com/v3/_https://www.abajournal.com/web/article/scotus-shadow-docket-draws-increasing-scrutiny_!!LkSTlj0I!Vs_qIBoqaJJ5kxIIZURW7POtB6TyHvkFea3gnfLf_25MyIYyTWBSrgQiCWHv$) (accessed march 27, 2021).
18. Stephen T. Early, Jr., *Constitutional Courts of the United States* (Totowa, NJ: Littlefield, Adams, 1977), 100.
19. J. Woodford Howard, Jr., *Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits* (Princeton, NJ: Princeton University Press, 1981), 75–76.
20. See Vanessa K. Burrows, "Administrative Law Judges: An Overview," *Congressional Research Service*, <http://www.crs.gov>.
21. See *Douglas v. California*, 372 U.S. 353 (1963).
22. See Donald R. Songer, "The Circuit Courts of Appeals," in *The American Courts: A Critical Assessment*, eds. John B. Gates and Charles A. Johnson (Washington, DC: CQ Press, 1991), 47.
23. *Hopwood v. Texas*, No. 94-50664, Fifth Circuit, March 18, 1996.
24. *Hopwood v. Texas*, 518 U.S. 1033 (1996).
25. Howard, *Courts of Appeals in the Federal Judicial System*, 79.
26. <http://dodsonparker.com/does-oral-argument-really-matter/> (accessed March 7, 2018).
27. See Herbert Jacob, *Justice in America*, 4th ed. (Boston, MA: Little, Brown, 1984), chap. 2.
28. *Ibid.*, 37.

29. Robert A. Carp and Claude K. Rowland, *Policymaking and Politics in the Federal District Courts* (Knoxville, TN: University of Tennessee Press, 1983), 3.
30. “Judge Lee Rosenthal: LGBT Federal Job Protections Apply,” <https://www.newsmax.com/thewire/judge-lee-rosenthal-lgbt-protections/2018/04/11/id/853851/> (accessed April 18, 2018).
31. The decision of the three-judge district court may be found in *Roe v. Wade*, 314 F. Supp. 1217 (1970), and the Supreme Court decision in *Roe v. Wade*, 410 U.S. 113 (1973).
32. For an informative study see Burrows, “Administrative Law Judges: An Overview.”
33. See information about the Executive Office for Immigration Review, immigration courts, and the Board of Immigration Appeals at the U.S. Department of Justice website, <http://www.usdoj.gov>.
34. Nina Totenberg, “Chief Justice Roberts’ Annual Report Focuses on COVID, Skips Trump and Controversy,” December 31, 2020, National Public Radio, <https://www.npr.org/2020/12/31/952388851/chief-justice-roberts-annual-report-focuses-on-covid-skips-trump-and-controversy> (accessed February 7, 2021).
35. Frank M. Coffin, *On Appeal: Courts, Lawyering, and Judging* (New York, NY: W. W. Norton, 1994), 72.
36. Quoted in Robert A. Carp and Russell R. Wheeler, “Sink or Swim: The Socialization of a Federal District Judge,” *Journal of Public Law* 21 (1972): 379.
37. Howard, *Courts of Appeals in the Federal Judicial System*, 198.
38. See David M. O’Brien, *Storm Center: The Supreme Court in American Politics*, 2nd ed. (New York, NY: W. W. Norton, 1990), 165.
39. Peter G. Fish, *The Politics of Federal Judicial Administration* (Princeton, NJ: Princeton University Press, 1973), 124, 166.
40. For more specific information about the types of civil and criminal cases, see <http://www.uscourts.gov/statistics-reports/analysis-reports/federal-court-management-statistics>.
41. See the information available online at <http://www.uscourts.gov/statistics-reports/analysis-reports/federal-court-management-statistics>.
42. Tessa Berenson, *Time*, August 28, 2017, 12. Also, see <https://cis.org/Report/Massive-Increase-Immigration-Court-Backlog>.

43. https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php (accessed January 30, 2021).
44. Berenson, *Time*, 2017. For more up-to-date statistics on this phenomenon, see <https://www.keranews.org/news/2020-11-27/u-s-has-largest-immigration-court-backlog-on-record-texas-is-more-behind-than-any-other-state>.
45. Bruce J. Einhorn, "Jeff Sessions wants to bribe judges to do his bidding," *The Washington Post*, https://www.washingtonpost.com/opinions/jeff-sessions-wants-to-bribe-judges-to-do-his-bidding/2018/04/05/fd4bdc48-390a-11e8-acd5-35eac230e514_story.html?utm_term=.9fc372cb5d97 (accessed April 6, 2018).