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## 7.3 Courts

PLEASE NOTE: This book is currently in draft form; material is not final.

**LEARNING OBJECTIVES**

In this section you will learn:

1. The role and function of court systems in most modern governments.
2. How the U.S. court system works.

Courts are typically the branch or part of government where laws are interpreted and enforced. Courts typically feature judges, either alone or in panels, who decided legal matters in cases brought before them according to the laws of that country. The court system may be separate from other branches of government, as in divided systems; or they may be subservient to the rest of the government, as in authoritarian systems; or they may be somewhere in between, as in some parliamentary system. Courts are often set up for specific purposes, such as tax, bankruptcy and military courts in the United States. Let's first consider courts in the United States, then see how they compare with court systems in other countries.

### U.S. Courts

U.S. courts are different in a couple of ways: First, because the United States is a federal system, there is a dual federal and state system of courts, each with its own powers and area of authority; second, because of the power of **judicial review**, by which U.S. courts can overturn acts of Congress or state legislatures because they are judged to run contrary to the U.S. or to a state constitution. Not every court in every country has this power; all U.S. courts of a certain level have this power.

In the United States, courts are the third branch of the government, and thereby serve as a check on the first two. The highest court, the U.S. Supreme Court, is one of the most powerful in the world because of its ability to overturn legislation. It cannot, however, consider things on a review basis; someone has to bring suit for it to consider anything.

The **Supreme Court** is the only court mentioned in the Constitution, but that document gives Congress the power to create courts inferior to the Supreme Court. They did. Beneath the Supreme Court are 13 Courts of Appeal, and beneath them 96 federal district courts. In addition, the federal court system includes the Court of Military Appeals, tax courts, bankruptcy courts, claims courts and international trade courts.

Federal judges are appointed for life, except for bankruptcy court judges, who are appointed for 14-year terms. Apparently, this is because the courts were created until Article I on the Constitution, not Article III, which says that federal judges are appointed for life. <http://www.bankruptcylawnetwork.com/here-comes-the-judge/> This insulates them from political pressure because they don't have to run for re-election. This sometimes leads people to complain about the court's insularity, most often when they disagree with the kinds of decisions the courts are making. Many state court judges are elected, and the evidence does not suggest any particular advantage or disadvantage for that system. Voters may find judicial elections particularly challenging, since judges are not supposed to campaign on how they would rule on a particular kind of case, as they are supposed to rule on cases based on the facts as presented in trial. The people who might know something about the quality of a judicial candidate are lawyers, but outside of bar association ratings, they're generally not talking, since every potential judge is somebody you might have to try a case before some day. Consequently, judicial elections sometimes feature little-known candidates with good names unseating experienced judges whose names don't sound as good. In some U.S. states, judges are chosen by commissions; in others, they are appointed by governors and confirmed by the state senate, much as with the U.S. federal courts.

In the case of federal courts, federal judicial nominations have become a serious political issue in the last 30 years. Presidents nominate federal judges, including Supreme Court justices, who must be confirmed by the U.S. Senate. Conservative presidents will want to appoint conservative judges, while more liberal presidents will do the opposite. So nominees, particularly for the Supreme Court, tend to undergo intense scrutiny in Senate hearings, with nearly every moment of the nominee's adult life up for inspection. Under the rules of the U.S. Senate, one senator can hold up the confirmation of any judge, even if that senator's party lacks a majority in the Senate. As a consequence, judicial vacancies have been filled rather slowly, especially during the presidency of Barack Obama, as conservative Republicans sought to prevent him from filling all the court openings below the U.S. Supreme Court.

Even with Supreme Court vacancies, the Senate can and sometimes does say no. In 1969, President Richard Nixon nominated Clement Haynesworth to the high court, despite the candidate's questionable record on civil rights. The U.S. Senate rejected his nomination. Nixon, apparently angered, responded with an even more conservative nominee, G. Harrold Carswell, and the Senate again voted no. Ronald Reagan sought to nominate Robert Bork to the high court, but he did not fare well in hearings and seemed too conservative for the time. His next nominee, Daniel Ginsberg, foundered on revelations that he had smoked some marijuana in college. George W. Bush sought to nominate his private White House attorney, Harriet Myers, whose relative lack of qualifications prompted Senate leadership to make clear to the president that his was a questionable

choice, the nomination was withdrawn. So, most of the time, these rejections don't come to a vote, and a careful president tends to sound out Senate leaders on the likelihood that a nominee will be looked upon favorably.

Although the 50 state court systems have great authority within their own borders, the U.S. Supreme Court has the final say in interpreting the Constitution. The court has subsequently made many important decisions that have had large impact on U.S. politics and government.

At various times in its history the court has validated slavery and sent people to jail for nothing more than peacefully protesting U.S. involvement in World War I. The 19th century High Court simultaneously prohibited the states and the national government from regulating railroads, saying that was reserved for the other level of government (depending on the suit). The court also struck down FDR's New Deal proposals that would have given the government sweeping powers over the economy. The court ended segregation in schools and greatly expanded civil rights protection in the 1950s and 1960s.

Not everybody will agree with every court decision. Modern courts are sometimes criticized for "judicial activism," which seems to flow one way or another depending on whether you happen to agree with the court's decision. Critics of judicial activism argue that the courts should strictly interpret the Constitution as written, as opposed to those who might argue that the Constitution's often vague and open language renders that idea both difficult and questionable. And one could argue that both ways. In the 2011 Citizens United decision, the court clearly made a decision that put freedom of speech in the form of spending money on politics ahead of ensuring equal access of all citizens to electoral office. The point is not whether that was a right or wrong decision—there's a rational argument to be made for both positions—the point is that the high court, in making that decision, had to interpret the law.

This is especially important in light of what is known as case law. Court decisions at all levels build and expand the body of law that guides the country. Other courts, in reaching verdicts in new cases, will make reference to other decisions in other courts. In particular, U.S. Supreme Court decisions trickle down to all lower courts, informing their decisions on subsequent cases. To that end, it makes a difference if the Supreme Court has ruled 9-0, leaving no doubt as to their opinion, or merely 5-4, which means that things might someday change. In light of the importance of case law, to argue that judges should only interpret law, not make it, is to misunderstand the U.S. court system. Every judicial decision makes law.

As we discussed earlier, U.S. Courts can only hear cases that are brought before them. The power of judicial review does not extend to issuing advisory opinions on proposed or existing laws. Somebody has to file suit, and a judge has to say that the case has enough merit to be heard. In the United States, court cases start at what are called **trial courts**. At this level, evidence is presented and arguments are made. The case may be heard by a jury of six to 12 people; in major cases, a grand jury may be convened, to determine whether a case should proceed to trial. In some cases, defendants may waive their right to a trial by jury and have their case decided solely by the presiding judge. There are basically two kinds of cases: civil cases, featuring disputes between two or more private parties; and criminal cases, in which someone stands accused of having broken the law. In criminal cases, the judge may also set the sentence if the defendant is convicted. The defendant is presumed innocent until proven guilty, so that the burden of proof lies with

the plaintiff or with the state, in the form of the prosecution, to prove that the defendant has committed some wrong or otherwise broken the law. In criminal cases in particular, the prosecution must prove beyond a reasonable doubt that the defendant has committed a crime.

If either party in a civil case is dissatisfied with the verdict, or if the defendant feels he or she has been wrongly convicted, they may appeal the decision to a higher court. At the federal level, this is the U.S. Court of Appeals. Every U.S. state court system has a similar court, although it may have a different name. **Appeals courts** accept no new evidence; the parties making the appeal are arguing, in effect, that mistakes were made in the original trial, such as overlooking evidence or misapplying the law. Appeals courts are under no obligation to hear appeals. They can let the verdict stand; they can overturn the verdict in whole or in part; or they can send the case back to the trial judge with instructions.

It is possible to appeal all the way to a state supreme court or to the U.S. Supreme Court, but the highest courts usually only hear cases in which substantial constitutional questions are at stake. So while 5,000 cases may get appealed to the U.S. Supreme Court in a single year, it may hear no more than 150–200 in that same time frame. Decisions by state Supreme Courts may sometimes be appealed to the U.S. Supreme Court, which is the court of original jurisdiction—the trial court—in cases involving top federal officials.

You probably can't appeal your traffic ticket all the way to the Supreme Court; there's no constitutional question involved there. But sometimes an ordinary citizen can succeed in seeking justice at the highest level. For example, in 1961, a sometime, small-time criminal named Clarence Gideon was arrested for knocking over a pool hall in Florida. Mr. Gideon was actually innocent of this crime, but as he couldn't afford legal representation, he was forced to represent himself and was quickly convicted of this crime. Gideon didn't give up, however, and eventually his letters reached the U.S. Supreme Court, which was looking for a case that involved this issue of legal representation—the right to attorney. The court took on the case, ruled that in all felony cases, the defendant has the right to an attorney, and sent the case back to the trial court for a rehearing. A lawyer was appointed to represent Gideon, and he quickly demolished the prosecution's apparently flimsy case, and Gideon was set free. The public defender system, which grew out of that Supreme Court decision, is often overworked and underfunded, but sometimes, it works. It worked for Clarence Gideon, who remains a shining example that sometimes, you can make a difference.

Courts in other countries may vary from U.S. courts. In France and other countries influenced by France, under the Napoleonic code, a defendant is guilty until proven innocent. French courts also do not consider case law in making decisions. Many courts in other nations lack the power of judicial review, although the United Kingdom adopted a Supreme Court in 2009. Some countries do have a special constitutional court, which does have the power of judicial review.

## KEY TAKEAWAYS


- In congressional systems, courts are the third branch of government.
- U.S. courts have the power of judicial review, which means they can overturn acts of government as unconstitutional. But this requires somebody to have filed suit over the law.
- U.S. federal judges are appointed for life, to help insulate them from political


pressure in making judicial rulings.

## EXERCISE

1. How does your state choose judges? What are the advantages of this system, compared to the federal system of presidential appointments with Senate confirmation? Are there also disadvantages?

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