
The role of constitutional courts in multi- level governance

United States of America:
The Supreme Court

STUDY

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**THE ROLE OF CONSTITUTIONAL COURTS
IN MULTI-LEVEL GOVERNANCE:
A COMPARATIVE LAW PERSPECTIVE**

United States of America: The Supreme Court

STUDY

November 2016

AUTHOR

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List of abbreviations*

Ch.	Chapter. An early designation for public laws published in United States Statutes at Large.
Comm.	Committee
Cong. Q. Almanac	Congressional Quarterly Almanac, a publication that tracks developments in the Congress.
Cong. Rec.	Congressional Record, the official account of the debate and proceedings in the Congress.
Dall.	Dallas' Reports. An early reporter of US Supreme Court opinions and part of United States Reports.
Doc.	Document
F.R.D.	West's Federal Rules Decisions. A private publication that prints opinions from federal courts concerning rules of procedure and evidence, and also transcripts of judicial conferences.
J.	Journal
L	Law
S.	Senate
S. Ct.	West's Supreme Court Reporter, a private publication of Supreme Court opinions and orders that is cited if an opinion is not yet in United States Reports.
Stat.	United States Statutes at Large, the official chronological publication of laws passed by the Congress.
Sup. Ct. R.	Supreme Court Rules. The official rules of the US Supreme Court.
U.S.	United States. Also, United States Reports, the official publication of US Supreme Court opinions and orders.
U.S.C.	United States Code, the official compilation of federal laws of a permanent and general nature. Comprises 52 subject titles. Most of the sections pertaining to the judiciary are found in title 28.
U.S. Const.	United States Constitution. Cited by Article (art.), Section (§ or sec.), and Clause (cl.).
Wheat.	Wheaton's Reports. An early reporter of US Supreme Court opinions and part of United States Reports.

* Abbreviations are taken from *The Bluebook: A Uniform System of Citation* (20th ed. 2015). *The Bluebook* is an authoritative citation manual used in legal writing in the United States.

Executive summary

This report provides information about the Supreme Court of the United States, how it is organized and functions, the mechanisms by which cases reach the Court and how it treats treaties that have not been ratified by the United States government.

The United States is a federated country. As such it has national governmental structures, which are outlined in its constitution, and state structures, which are outlined in the individual constitutions of each state. The United States Constitution is the second such document for the country, the first being the Articles of Confederation, which were in effect for the years 1781 to 1789. The Articles of Confederation had weak national structures and did not provide for a national executive or for any real national judiciary. These problems were addressed in the Constitution, which was drafted by the Constitutional Convention in 1787 and ratified by the states.

The Constitution does not specify the structure of the federal judiciary that was to be adopted except for calling for the establishment of a Supreme Court and other inferior courts that Congress may establish. The Constitution does set out the areas of federal jurisdiction, and it also lists certain areas where the Supreme Court has original jurisdiction.

The first federal congress established a system of lower federal courts that since 1789 have evolved into the current structure of district courts (trial-level courts), circuit courts of appeal (intermediate courts of appeal), and the Supreme Court (the court of final review). Over the past two centuries the procedures for these courts have also evolved, and Congress has whittled away at certain areas where the Supreme Court had exclusive original jurisdiction, and given that Court more control over the selection of cases that it may review on appeal. Because of the freedom that the Supreme Court has over its docket, it now renders full opinions on many fewer cases each year than it did forty years ago.

The United States is also a common law jurisdiction. Many of the doctrines that govern federal jurisdiction and the practices of the Supreme Court have their origin in "judge-made law." In particular, the doctrine of judicial review is not mentioned in the text of the Constitution or the early judiciary acts, although history shows that it was not unfamiliar to the drafters of the Constitution. It is however, one of the most formable doctrines of the courts since it allows for the review of statutes to determine if they are compatible with the Constitution.

The Supreme Court's role in interpreting the United States Constitution and laws is paramount; however, due to the freedom granted to the Court to control most of its docket it only provides opinions in a selected few cases each year.

I. Introduction and historical evolution of the Supreme Court

The Supreme Court of the United States of America is the only court specifically mentioned in the US Constitution.¹ Although the Constitution specified that a Supreme Court would exist it did not set forth how the Court would be organized or its size beyond mentioning the existence of a Chief Justice.² Legislation was passed in the first Congress in 1789 for enacting the Constitution's judicial provisions, Article III, into law.³

¹ U.S. CONST. art. III, § 1, cl. 1 ("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.").

² The office of Chief Justice is mentioned in passing in article I, § 3, clause 6, where the Chief Justice is designated as the presiding officer in the Senate for an impeachment trial of the President. This has happened twice: in the impeachment trial of President Andrew Johnson in 1868, where Chief Justice Salmon P. Chase presided, and in the impeachment trial of President Bill Clinton in 1999, where Chief Justice William Rehnquist presided.

³ Article III concerns the judicial power of the federal government. It specifies a Supreme Court for the nation and allows Congress to create inferior courts, sets out jurisdiction for the Supreme Court and the lower federal courts, specifies the tenure of federal judges and limits changes in their compensation, provides for the right of a criminal defendant to a trial by jury, and defines the crime of treason against the United States.

II. Composition of the Supreme Court

II.1. Number

The initial size of the Supreme Court was five associate justices and the Chief Justice.⁴ Since 1789 the Court's size has varied from six to ten justices, with the current authorized size of nine dating from 1869.⁵ Because of a vacancy due to the recent death of Associate Justice Antonin Scalia, there are currently seven associate justices and the Chief Justice.⁶

II.2. Duration of the term of office

Supreme Court justices, and most other federal judges, do not have specifically defined terms of office; instead, they serve "during good behavior."⁷ A concise restatement of the purpose of this policy can be found in *The Federalist* number 78, where Alexander Hamilton wrote,

"[T]he standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is no less excellent barrier to the encroachments and oppressions of the representative body."⁸

Hamilton also observes that under a limited constitution the judicial branch has no power to enforce its will and in fact is subject to "being overpowered, awed, or influenced by its coordinate branches."⁹ The establishment of tenure during good behavior gives judges the ability to resist such pressures. Finally, the concept of tenure during good behavior was familiar to the framers of the Constitution from its use in some of the colonies.¹⁰ The framers were also familiar with British developments toward judicial independence as they occurred through the early to middle eighteenth century.¹¹

Lifetime tenure is also linked with a constitutional requirement that the salaries of judges, "shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."¹² This provision provides the judiciary with a shield against the use of financial pressures by the legislative or executive branches.

II.3. Qualifications required for appointment

The Constitution and federal statutes are silent on the qualifications required for a nominee. However, it has been the practice since the beginning of President Washington's

⁴ Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73.

⁵ STEPHEN M. SHAPIRO ET AL., *SUPREME COURT PRACTICE* § 1.2(a) at 4 (10th ed. 2013). The Court's composition is set out at 28 U.S.C. § 1 (2012).

⁶ A list of current justices, in order of seniority along with basic biographical information, can be found on the Supreme Court's website: *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES (Aug. 24, 2016), <http://www.supremecourt.gov/about/biographies.aspx>.

⁷ U.S. CONST. art. III, § 1, cl. 2.

⁸ THE FEDERALIST NO. 78 (Alexander Hamilton).

⁹ *Id.*

¹⁰ *Id.*

¹¹ English practice is traced in J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 192 (3d ed. 1990).

¹² U.S. CONST. art. III, § 1, cl. 2.

administration to only nominate individuals who have been trained in law and who have at least some experience in the profession. Formal legal education in an academic setting did not become widely established in the United States until the last quarter of the nineteenth century. Thus, many justices who served on the Supreme Court prior to 1890 received their training by “reading the law” in the office of a local lawyer. A few early justices, such as Associate Justice John Blair (1790–1795), were able to receive at least some education in the English Inns of Court.¹³ The last individual to serve as a justice who did not have any academic legal training was James F. Byrnes, who was an associate justice from July of 1941 to October of 1942. Byrnes’ background included a career as a court stenographer. He read law and was admitted to the bar in South Carolina before beginning a career in politics.¹⁴

The formal legal educational background of justices has become more elitist during the past sixty years. Whereas Associate Justice Charles Evans Whittaker, who served from 1957 to 1962, could come from a publically supported university law school,¹⁵ the current eight members of the Court are graduates of just three elite private law schools: Harvard, Yale, and Columbia.¹⁶

Most justices have been males of European heritage. Until the twentieth century all justices had been at least nominal Christians.¹⁷ Until 1967, with the confirmation of Thurgood Marshall as Associate Justice, no African-American had sat on the Court.¹⁸ Retired Associate Justice Sandra Day O’Connor, who was confirmed in 1981, was the first woman to be appointed to the Supreme Court.¹⁹

All of the current members of the Supreme Court, except for Elena Kagan, served as judges on a US Court of Appeals before being appointed to the Court. This is a recent development, although for several years in the last decade all of the members of the Supreme Court had served, at least briefly, as federal appellate court judges.

In the past most justices worked in private practice for a least a few years prior to entering public service.²⁰ However, only four of the current eight justices have worked in private practice, and only one, Associate Justice Kennedy, has worked as a solo practitioner.²¹ A number of recent justices have also taught at a law school, including Justices Kennedy, Ginsburg, and Kagan, who was also the dean of Harvard Law School. Justice Oliver Wendell

¹³ Robert M. Ireland, *Blair, John, Jr.*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 90 (Kermit L. Hall ed., 2d ed. 2005).

¹⁴ John W. Johnson, *Byrnes*, *id.* at 133.

¹⁵ Eric A. Chiappinelli, *Whittaker, Charles Evans*, *id.* at 1088. Whittaker was a graduate of what is now the University of Missouri at Kansas City School of Law.

¹⁶ In addition, the current three retired justices (Souter, O’Connor, and Stevens) also attended elite private law schools (Harvard, Stanford, and Northwestern, respectively).

¹⁷ Associate Justice Louis Brandeis, who joined the Supreme Court in 1916, was the first Jewish justice. The first Catholic was Chief Justice Roger B. Taney, who was appointed by Andrew Jackson in 1836. Currently no Protestants are on the Supreme Court.

¹⁸ Associate Justice Clarence Thomas was the second African-American appointed to the court.

¹⁹ Three women currently serve as associate justices: Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan.

²⁰ LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 340–50 (6th ed. 2015). This source provides extensive useful information on the Supreme Court and justices in tabular form.

²¹ Information compiled from biographies of the current justices in *2 ALMANAC OF THE FEDERAL JUDICIARY: SUPREME COURT* 1–32 (Wolters Kluwer 2016).

Holmes Jr. is probably the most noteworthy former academic. Shortly before joining the faculty at Harvard he wrote a major summary of American law, *The Common Law*.²²

Although it was once common for many justices to have held at least one elected office, this is no longer so.²³ The last justice who had any experience as an elected official is Sandra Day O'Connor, who was a member of the Arizona Senate and also served as a trial court judge.²⁴ With a few exceptions most justices with prior political experience sought election only to the Congress, or to a position in state government.²⁵ Justices may have also served in appointed positions in state and federal government. Justice Kagan was Solicitor General of the United States, a position in the Department of Justice; Chief Justice Roberts served as deputy White House Counsel and as Principal Deputy Solicitor General. Many recent justices, such as Justices Thomas and Alito, worked in the executive branch or in an administrative agency.²⁶

As a part of the nomination process the individual under consideration is subject to a background check by the Federal Bureau of Investigation. The background check looks at potential problems concerning financial improprieties and the overall fitness of the candidate to serve as a judge. There will often be a prior background check on file for an individual, since many nominees now come to the Court after prior service on the federal bench, or in an executive agency such as the Department of Justice.

What has become more common, however, is that an administration screens potential nominees based upon a mixture of concerns about an individual's politics, personal background, and perceived judicial philosophy as manifested in his or her writings. For instance, one commentator believes that David Souter may have been nominated by President George H.W. Bush because his lack of a substantial judicial record would have helped to keep abortion and other politically contentious issues out of the debate during the campaigns for the 1990 mid-term elections, which were then underway.²⁷ The Souter nomination also is more typical of recent nominations in that Souter, along with other candidates for the nomination, was first reviewed by a close-knit panel of presidential advisors before having a private interview with the president.²⁸ Souter had been on a list of possible candidates in 1987 for the vacancy that ultimately was filled by Anthony Kennedy. In 1990 he was contacted by C. Boyden Gray, President George H.W. Bush's White House Counsel, to see if he was interested in the vacancy created by the retirement of Associate Justice William Brennan. Souter communicated with Senator Warren Rudman, one of his mentors in New

²² EPSTEIN ET AL., *supra* note 20, at 340–50.

²³ *Id.* at 353–66.

²⁴ Sandra Day O'Connor, ARIZONA STATE LIBRARY, ARCHIVES AND PUBLIC RECORDS, <http://apps.azlibrary.gov/officials/Detail.aspx?ID=1047> (last visited Aug. 12, 2016). O'Connor entered the state senate via an appointment to fill a vacancy in 1970. She was elected in her own right in 1972. In 1974 she was elected as a Maricopa County Superior Court Judge.

²⁵ Chief Justice Taft was elected President of the United States in 1908 and was defeated in his bid for reelection in 1912. He was appointed to the Supreme Court as chief justice in 1921. Charles E. Hughes resigned his position as an associate justice in 1916 to run as the Republican Party nominee for president against Woodrow Wilson. He was narrowly defeated and in 1930 returned to the Supreme Court as chief justice. Earl Warren ran for Vice-President of the United States in 1948 on the Republican ticket. He was defeated and was named chief justice by President Eisenhower in 1953. 2 DAVID G. SAVAGE, *GUIDE TO THE U.S. SUPREME COURT* 1057–58, 1138 (5th ed. 2010).

²⁶ EPSTEIN ET AL., *supra* note 20, at 353–66.

²⁷ HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON* 304–05 (rev. ed. 1999).

²⁸ *Id.*

Hampshire politics, and agreed to meet with Bush about the position. The interview with Bush took place in the White House and also involved US Attorney General Richard Thornburgh, White House Counsel Grey, and White House Chief of Staff John Sununu, who knew Souter from his time in New Hampshire state politics. After Souter left the interview, the group quickly reviewed his suitability and that of Edith H. Jones, a federal appellate judge from Texas. President Bush then decided to nominate Souter, who accepted and appeared with the President at a news conference shortly afterwards.²⁹ Souter was ultimately confirmed by the Senate on a vote of 90–9.³⁰

Presidents may also consider the potential nominee’s ability to secure Senate confirmation. Thus, in 1993, and again in 1994, President Bill Clinton seriously considered nominating Bruce Babbitt, who was then serving as Secretary of the Interior. Each time he decided against submitting Babbitt’s name after being warned by conservatives that the nomination would face serious opposition in the Senate. In 1994 nominee Stephen G. Breyer had an added advantage of being familiar to the members of the Senate Committee on the Judiciary, since he had worked as the committee’s chief counsel from 1979 to 1980. Breyer’s confirmation hearing was generally uneventful and the committee voted 18–0 to favorably report his nomination to the Senate.³¹ He was confirmed by a vote of 87–9.³²

II.4. Process of appointment

The Constitution gives the power to fill vacancies on the Supreme Court to the President, with the Senate having the power to give its “advice and consent” to the nomination.³³ Since 1789 presidents have nominated 152 men and women³⁴ to serve on the Supreme Court, of which 108 were approved and confirmed by the Senate.³⁵

The usual procedure for a nomination is that the President submits a name to the Senate for consideration. Under Senate Standing Rule XXV(m), the nomination is then referred to the Committee on the Judiciary, which conducts an investigation and schedules hearings to question the nominee and any witnesses who wish to testify as to the nominee’s fitness.³⁶ After the conclusion of hearings and review the committee votes on referring the nomination to the

²⁹ David J. Garrow, *Justice Souter Emerges*, N.Y. TIMES MAG., Sept. 25, 1994, at 36, 52.

³⁰ 136 CONG. REC. 26996–97 (1990).

³¹ *Centrist Justice Easily Confirmed*, 50 CONG. Q. ALMANAC 303, 310 (1994).

³² 140 CONG. REC. 18704 (1994).

³³ The specific language is found at article II, § 2, clause 2 of the Constitution, which states: “and he [the President] shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors . . . Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for[.]”

³⁴ The first woman nominated to serve on the Supreme Court was Sandra Day O’Connor, by then President Reagan in 1981. A total of five women have been nominated to the Supreme Court of which all but one, Harriet Miers, have been confirmed by the Senate. The total number of nominees includes the nomination of Merrick Garland by President Obama in 2016. The Senate has yet to take up Judge Garland’s nomination.

³⁵ A list of individuals who have served is available at *Members of the Supreme Court of the United States*, SUPREME COURT OF THE UNITED STATES (Aug. 25, 2016), https://www.supremecourt.gov/about/members_text.aspx. The names of two individuals who were confirmed but did not serve, Robert Hanson Harrison, who declined to serve after confirmation, and Edwin Stanton, who died after confirmation but before serving, are listed in the “Notes” section of the page. This figure counts each of the six chief justices who were earlier confirmed as associate justice only once.

³⁶ S. Doc. No. 18, 113th Cong., 1st Sess. 25–26 (2013); see also RULES OF PROCEDURE OF THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY, <https://www.judiciary.senate.gov/about/rules> (last visited Aug. 15, 2016).

entire Senate for consideration.³⁷ Since 1970, the committee has voted to favorably refer to the Senate all but two nominations—that of Robert Bork in 1987, and that of Clarence Thomas in 1991.

In the case of Bork the committee voted 5 to 9 against recommending that the Senate approve his nomination, but then voted 9 to 5 to send the nomination to the Senate with an unfavorable recommendation.³⁸ In the case of Thomas the committee voted 7 to 7 to report the nomination without recommendation. After allegations of improper personal behavior towards subordinates were raised against the nominee, the Senate allowed the committee to hear from additional witnesses. After three additional days of hearings the Thomas nomination was taken up and approved by the Senate on a vote of 52 to 48.³⁹

After a nomination is referred, the leadership of the Senate sets a schedule for its consideration. During the resulting debate senators may comment on the nominee's professional and personal background, and his or her judicial temperament and philosophy. A vote of the majority of the senators present and voting is needed to confirm the nominee. A nomination can also fail if the Senate is unable to end debate, which is called a filibuster,⁴⁰ on the nomination. This happened in 1968 when Abraham Fortas was nominated to the position of Chief Justice.⁴¹

It is also possible for a president to fill a vacancy on the Court when the Senate is not in session through the use of a recess appointment.⁴² This procedure has not been used since 1957 when President Eisenhower appointed Potter Stewart to be an associate justice. Any justice appointed in this fashion serves until the Senate adjourns *sine die*. Nominees may, as in the case of Justice Stewart, later be renominated and confirmed by the Senate to a permanent appointment. The Supreme Court in 2014 limited the ability of the President to make recess appointments by stipulating that ten days is probably the minimum period of time that the Senate must not be in session.⁴³

The process by which a president selects a nominee can vary between administrations. In the past seventy years it has not been uncommon for a president to have either a personal or professional relationship with nominees. Thus, Chief Justice Fred Vinson had often played

³⁷ The Law Library of Congress maintains a list of resources for most nominations to the Supreme Court since 1968, including transcripts of committee hearings and floor debate. *Supreme Court Nominations*, LAW LIBRARY OF CONGRESS, <https://www.loc.gov/law/find/court-nominations.php> (last updated Mar. 17, 2016).

³⁸ S. COMM. ON THE JUDICIARY, 100TH CONG. LEGISLATIVE AND EXECUTIVE CALENDAR 191 (S. PRT. 100–153, 1988); *Reagan Fills Court Vacancy on Third Attempt*, 43 CONG. Q. ALMANAC 271, 273 (1987). The Bork nomination was rejected by a vote of 42 to 58.

³⁹ S. COMM. ON THE JUDICIARY, 102ND CONG. LEGISLATIVE AND EXECUTIVE CALENDAR 163 (S. PRT. 102–133, 1992).

⁴⁰ See *Virtual Reference Desk: Filibuster*, UNITED STATES SENATE, http://www.senate.gov/reference/reference_index_subjects/Filibuster_vrd.htm (last visited Sept. 24, 2016).

⁴¹ *Attempt to Stop Fortas Debate Fails by 14-Vote Margin*, 24 CONG. Q. ALMANAC 531 (1968).

⁴² See U.S. CONST. art. II, § 2, cl. 3 (“The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.”).

⁴³ *National Labor Relations Board v. Canning*, 573 U.S. _____, 134 S. Ct. 2550 (2014). The language governing how long a house may recess without notifying the other chamber is found in art. I, § 5, cl. 4, of the U.S. Constitution, which states, “[n]either House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.”

poker with President Truman,⁴⁴ and Harriet Miers had worked as George W. Bush's personal counsel and also the White House Counsel, which is a political appointment.⁴⁵

Most nominations in the past 116 years have been approved by the Senate. Since 1900 only eight nominations have been rejected or have not received a final vote. A nomination may not come to a vote due to the Senate being unable to end a filibuster, or unlimited debate, through approving a vote for cloture.⁴⁶ The failure to end debate will result in the Senate being unable to vote on the nomination.⁴⁷

II.5. End of the term of office

As with other Article III judges, Supreme Court justices "hold their offices during good behavior," which is limited only by resignation, retirement, death, or the threat of impeachment.⁴⁸ In the history of the Supreme Court only one justice, Justice Samuel Chase, has been impeached by the House of Representatives. Associate Justice Chase was impeached in 1804 for his misconduct in his role as a circuit judge, and not for his actions as a member of the Supreme Court.⁴⁹ Chase was acquitted by the Senate on all counts.⁵⁰ An attempt by then Representative Gerald Ford was made in 1970 to impeach Associate Justice William O. Douglas for violating the Canons of Judicial Ethics and various federal laws by failing to recuse himself in the Supreme Court's consideration of an appeal of an obscenity conviction. A special subcommittee empaneled by the Judiciary Committee of the House of Representatives to review the evidence against Douglas reported that he had not violated any laws or ethical canons. The attempt to impeach Douglas was then dropped.⁵¹

It is not uncommon for justices to retire from the Supreme Court. The Federal Judicial Retirement System allows justices to take "senior status," with no reduction in pay, if the individual is at least sixty-five years of age and has been a federal judge for at least fifteen years. Senior status judges may continue to hear a limited number of cases; in the case of Supreme Court justices this would not normally involve cases before the Court. Supreme Court justices may also retire under the same "Rule of Eighty," which allows the incumbent to retire at full salary based upon a sliding scale of age and years of service.⁵²

⁴⁴ 3 ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES 425 (David S. Tanenhaus ed., 2008).

⁴⁵ 2 GUIDE TO THE PRESIDENCY AND THE EXECUTIVE BRANCH 1136–37 (Michael Nelson ed., 2013).

⁴⁶ Cloture is the procedure by which the Senate is able to terminate unlimited debate, known as a filibuster, on a matter. The procedure for invoking cloture is covered in Senate Rule XXII. *Virtual Reference Desk: Cloture*, UNITED STATES SENATE, <http://www.senate.gov/reference/index/cloture.htm> (last visited Aug. 30, 2016).

⁴⁷ The names of all nominees, including final disposition, can be found at *Supreme Court Nominations, 1789 to 2010*, THE SUPREME COURT HISTORICAL SOCIETY, http://supremecourt.history.org/timeline_SCOTUSAppointments.html (last visited Aug. 26, 2016). The nomination of Abraham Fortas in 1968 to be Chief Justice was withdrawn after the failure of a vote to invoke cloture on a filibuster against considering his nomination. The nomination of Douglas Howard Ginsburg in 1987 was withdrawn before the Committee on the Judiciary formally took up his nomination.

⁴⁸ U.S. CONST. art. III, § 1, cl. 2.

⁴⁹ For a summary of the background of the Chase impeachment see Irving Dilliard, *Samuel Chase, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969: THEIR LIVES AND MAJOR OPINIONS 195–97* (Leon Friedman & Fred L. Israel eds., 1969).

⁵⁰ EMILY FRIED VAN TASSEL & PAUL FINKELMAN, *IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT 102* (1999).

⁵¹ *Justice Douglas Impeachment*, 26 CONG. Q. ALMANAC 1025–26 (1970).

⁵² The "Rule of Eighty" is set out at 28 U.S.C. § 371 (2012), and the workload requirements for a senior status judge

Justices may also resign before age sixty-five, or before their pension rights vest. Abraham Fortas left the Court after only four years in 1969 at the age of fifty-eight. In the last sixty years only three members of the Supreme Court, two of whom were chief justices, have died in office.⁵³

II.6. Measures to support independence, impartiality, etc.

As mentioned in II.2, *supra*, members of the Supreme Court, and other members of the federal judiciary, are provided with tenure “during good behavior,” and protection against compensation being reduced during their term in office. These safeguards provide the judiciary with a degree of protection from political forces that are not available to other officers of the government. Thus, the President is limited by the Constitution to only two terms in office.⁵⁴ Members of Congress are required to periodically stand for reelection, and the Constitution limits the mechanisms for increases in their salaries.⁵⁵

The Judicial Conference of the United States promulgated a Code of Judicial Conduct in 1973. It has been amended several times.⁵⁶ The Code is applicable to the judges and staff of the federal courts, but does not apply to justices of the Supreme Court. Provisions of federal statutory law, however, specify that “[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”⁵⁷

Supreme Court justices routinely recuse themselves as needed. For example, Justice Kagan did not participate in considering a number of cases during her first two years on the Court because she had participated in preparing the government’s responses or in oral arguments before the Court in those cases in her former role as Solicitor General.⁵⁸

II.7. Immunity

In the United States no individual is above the law and this applies to Supreme Court justices. Justices may be charged with a civil or criminal offense committed outside of the performance of their official duties, in the proper tribunal where the action occurred. In the late nineteenth century Justice Stephen Field was arrested in California on a spurious charge that he had been involved in the murder of David Terry, a former California Supreme Court justice who was

are set forth in subsection (e) of section 371. For an explanation of the “Rule of Eighty,” see Debra Cassens Weiss, *Why Do Federal Judges Retire? More Income Is Top Answer*, ABA JOURNAL: DAILY NEWS (Aug. 5, 2012), http://www.abajournal.com/news/article/why_do_federal_judges_retire_more_income_is_top_answer/.

⁵³ Chief Justice Fred M. Vinson died in office in 1953, Chief Justice William H. Rehnquist died in office in 2005, and Associate Justice Antonin Scalia died in February of 2016. In addition, Associate Justice John Marshall Harlan II died three months after retiring for health reasons in 1971.

⁵⁴ U.S. CONST. amend. XXII.

⁵⁵ *Id.* amend. XXVII.

⁵⁶ The Code is available online at <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>.

⁵⁷ 28 U.S.C. § 455(a) (2012).

⁵⁸ Stephen Wermiel, *SCOTUS For Law Students: Justice Kagan’s Recusals*, SCOTUSBLOG (Oct. 9, 2012), <http://www.scotusblog.com/2012/10/scotus-for-law-students-sponsored-by-bloomberg-law-justice-kagans-recusals/>. For information about the number of recusals in the October 2015 term, see Debra Cassens Weiss, *Supreme Court Justices Recused Themselves 180 Times in Most Recent Term*, ABA JOURNAL (July 12, 2016), http://www.abajournal.com/news/article/supreme_court_justices_recused_themselves_180_times_in_most_recent_term.

involved in a case Field had ruled on. Field's attorney submitted a petition for a writ of habeas corpus in the local federal court and after a hearing Field was released without being charged.⁵⁹

However, justices are immune from suits or prosecutions for events that occur during the course of their official duties. The doctrine of judicial immunity applies not just to members of the Supreme Court but also to other judges in federal and state courts.⁶⁰ The remedy in such case would be to impeach the justice for committing a "high crime or misdemeanor." Impeachment is covered in II.5, *supra*.

⁵⁹ The Field incident was bizarre, involving an assault against the justice on a train by Terry, Field's former colleague, and an earlier ruling by Field on the validity of a former marriage by Terry's wife. Details can be found in GEORGE C. GOREMAN, *THE STORY OF THE ATTEMPTED ASSASSINATION OF JUSTICE FIELD BY A FORMER ASSOCIATE ON THE SUPREME BENCH OF CALIFORNIA* (1893). Terry was killed by Field's bodyguard, a U.S. marshal. In the twenty-first century at least one justice, Antonin Scalia, received a traffic ticket. See David Lat, *The Wheels of Justice (Scalia): Will Nino Fight His Traffic Ticket?*, ABOVE THE LAW (May 29, 2011), <http://abovethelaw.com/2011/03/the-wheels-of-justice-scalia-will-nino-fight-his-ticket/>.

⁶⁰ The doctrine is reviewed in the opinion of the Supreme Court in *Stump v. Sparkman*, 435 U.S. 349, 355–56 (1978). Justice White in his opinion noted that for the doctrine to apply a judge must have had "jurisdiction over the subject matter before him." *Id.* at 356.

III. Internal organization and functioning of the Supreme Court

III.1. Internal organization

The Supreme Court is a small institution; in 2010 fewer than 250 people worked at the Court. The justices are nominated by the President and confirmed by the Senate. The Court has the freedom to appoint its major officers as set forth by statute. It also is responsible for the policies governing its operations. It receives some administrative support by another federal judicial agency, the Administrative Office of the United States Courts.

III.1.1. Chief Justice and Associate Justices

The Chief Justice, legally designated as the Chief Justice of the United States,⁶¹ is the leader of the Supreme Court—the “first among equals.” The Chief Justice is nominated by the President when a vacancy in the office occurs. The nomination and confirmation process is no different from that applicable to other Supreme Court justices, discussed in II.4, *supra*, except for the title of the office. A nominee may be a current member of the Supreme Court, although this is not always the case.

In his public role the Chief Justice presides over the sessions of the Court; issues annual reports on the state of the federal judiciary that include recommendations for policy changes and a review of the workload of the Supreme Court;⁶² provides managerial guidance to the Court’s officials; provides budget estimates and requests to the Congress; and advocates, as necessary, for the needs of the Supreme Court and the rest of the federal judiciary.⁶³ Chief justices may lobby Congress for legislation, as was the case with William Howard Taft and the Judges’ Bill in 1925.⁶⁴ The incumbent Chief Justice also has a number of other duties and benefits, which are defined by law or custom, such as serving as a member of the Board of Regents of the Smithsonian Institution and having the authority to borrow books from the Law Library of Congress.⁶⁵

The Chief Justice has a significant role in shaping the workflow of the Supreme Court. He or she is responsible for drafting the weekly “discussion list,” which designates the certiorari petitions that may merit the attention of the Court.⁶⁶ Although the list is not binding on the other justices it provides an overall structure to each session. The Chief Justice also presides at the regular private conferences of the justices and has the right to speak first about each

⁶¹ 28 U.S.C. § 1 (2012). The law changing the title dates from 1866, but it was not until 1888 that it was first used by an incumbent, Chief Justice Fuller. JAMES W. ELY, *THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888–1910*, at 24 (1995).

⁶² The end-of-the-year reports of the Chief Justice on the state of the federal judiciary since 2000 may be found at *Chief Justice’s Year-End Reports on the Federal Judiciary*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx> (last visited Aug. 15, 2016).

⁶³ Peter G. Fish, *Chief Justice, Office of the*, in *THE OXFORD COMPANION*, *supra* note 13, at 162–65.

⁶⁴ Note 104, *infra*, references sources that track the role of Chief Justice Taft in shaping the Judges’ Bill.

⁶⁵ The language for the Board of Regents is found at 20 U.S.C. § 42 (2012); the language for the Law Library of Congress is found at 2 U.S.C. § 137(c) (2012). The Supreme Court has its own law library but still, as needed, borrows materials from the Library of Congress.

⁶⁶ The “discussion list” is reviewed in III. 2.

petition. When voting with the majority on a case the Chief Justice makes the assignment of which justice will write the Court's opinion.⁶⁷

Associate justices are ranked by years of service on the Court. In conference, justices speak after the Chief Justice in order of seniority. If the Chief Justice does not vote with the majority on a case, the most senior associate justice in the majority is responsible for assigning a justice to write the opinion.⁶⁸ The senior ranking associate justice also assumes the duties, but not the title, of Chief Justice if that individual should die in office, or upon his or her resignation or retirement, until a new Chief Justice is confirmed by the Senate. In September 2005, Justice John Paul Stevens carried out this role between the death of Chief Justice Rehnquist and the swearing-in of John Roberts as Rehnquist's successor.⁶⁹

III.1.2. Chambers

The Supreme Court building is located in Washington, DC, across from the US Capitol, and opened in 1935. Prior to that year the Court's chambers were located in the US Capitol building from 1801 to 1935, except for two years immediately after 1814 when the Capitol was undergoing repairs after the burning of the building during the War of 1812.⁷⁰

The building contains a courtroom and separate chambers for each justice. In addition it contains space for support operations such as a library, offices for law clerks, and administrative operations.⁷¹

III.1.3. Administrative Structure

The major officers of the Supreme Court are: the Clerk, the Reporter of Decisions, the Marshal, and the Librarian. In addition the Counselor to the Chief Justice is an important position, but the person holding this position is not considered to be an officer of the Supreme Court. These positions are appointed, and subject to removal, by the Court.⁷² The Counselor to the Chief Justice assists the Chief Justice in many external duties such as in his role as head of the federal judiciary.⁷³ Each officer has the authority to appoint staff needed to carry out their responsibilities.⁷⁴

The Reporter of Decisions is responsible for preparing and publishing the official version of opinions of the Supreme Court. Opinions are published in several formats in paper, from bench opinions on the day an opinion is announced through the bound volumes of the official reporter, *United States Reports*.⁷⁵ As part of the editorial process staff in the Reporter's office

⁶⁷ See SAVAGE, *supra* note 25, at 994.

⁶⁸ Paul J. Wahlbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. REV. 1729, 1731 (2006).

⁶⁹ JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 207 (2011).

⁷⁰ Maxwell Bloomfield, *Buildings, Supreme Court*, in THE OXFORD COMPANION, *supra* note 13, at 117–20.

⁷¹ Additional information can be found at *The Supreme Court Building*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/about/courtbuilding.aspx> (last visited Sept. 15, 2016).

⁷² The positions and their duties are set forth in chapter 45 of title 28 of the United States Code.

⁷³ *Court Officers and Staff: Counsel to the Chief Justice*, FEDERAL JUDICIAL CENTER, http://www.fjc.gov/history/home.nsf/page/admin_03_09.html (last visited Sept. 15, 2016). The Counselor is appointed by the Chief Justice and serves at his pleasure.

⁷⁴ For instance, 28 U.S.C. § 674(b) (2012), gives the Librarian the authority “with the approval of the Chief Justice [to] appoint necessary assistants and fix their compensation [.]”

⁷⁵ Opinions of the Supreme Court are also published by commercial firms and on websites.

prepares a syllabus (summary) of each opinion. The syllabus is not considered to be part of the text of the opinion.

The Clerk of the Supreme Court is responsible for keeping track of submissions to the Court and assigning docket numbers to properly filed cases. The Clerk also releases the weekly order list, and has a number of other administrative duties including communicating with counsel and lower courts as needed.⁷⁶

The Marshal is responsible for security at the Court. The Marshal also functions as the Court's financial officer, disbursing funds for expenses incurred by the Court and tacking expenses and fees.⁷⁷

The Librarian administers the Supreme Court Library, including the supervision of the professional research and reference staff and the acquisition of research and reference materials. Copies of transcripts of oral arguments are also available through the library.⁷⁸

In addition to law clerks, each justice may also personally appoint secretaries to assist in the performance of their duties.⁷⁹

The Court receives additional support from the staff of the Administrative Office of the United States Courts. This body, which is part of the federal judiciary, was established by law in 1939⁸⁰ to provide independent administrative support and guidance to the individual federal courts. Support includes guidance on personnel matters for professional employees and financial matters.⁸¹

III.1.4. Law clerks

The justices are aided in this work by a team of law clerks—typically recent law school graduates. The clerks of most of the justices participate in a “clerk pool.” A pool clerk will review each petition for certiorari submitted to the Supreme Court. The clerk will summarize each petition's arguments, rulings, and facts in a brief memorandum that is circulated among the justices. Depending on each justice's preference, clerks may also assist in researching and drafting justices' opinions. Most of the law clerks were law review editors in law school. Many also have prior experience clerking for judges in lower federal courts. The justices have complete discretion in hiring their clerks, and under current legislation they are allowed to hire up to four.⁸² Some clerks later return to the Supreme Court as justices; Chief Justice Roberts

⁷⁶ A description of duties of the Clerk's office can be found in SHAPIRO ET AL., *supra* note 5, § 1.8 at 27.

⁷⁷ 28 U.S.C. § 672(c) (2012).

⁷⁸ Although there are notes of arguments from some cases as early as the nineteenth century, transcripts were not systematically kept until the 1953 term. Tape recordings of oral arguments began with the 1955 term and are available through the website of the Oyez Project maintained by the Chicago-Kent School of Law, at <https://www.oyez.org/>. The Supreme Court Clerk's Office now also releases recordings from cases the same day that oral arguments are held, which are accessible at https://www.supremecourt.gov/oral_arguments/oral_arguments.aspx.

⁷⁹ 28 U.S.C. § 675 (2012).

⁸⁰ Act of August 7, 1939, ch. 501, 53 Stat. 1223.

⁸¹ *Judicial Administration: Administrative Office of the U.S. Courts*, UNITED STATES COURTS, <http://www.uscourts.gov/about-federal-courts/judicial-administration> (last visited Sept. 26, 2016).

⁸² John R. Hermann, *Clerks of the Justices*, in 1 ENCYCLOPEDIA OF THE U.S. SUPREME COURT 186–87 (Thomas T. Lewis ed., 2001).

clerked for then Associate Justice Rehnquist.⁸³ The justices review the petitions and discuss the merits of those considered in the regular conferences.⁸⁴

III.2. Internal functioning

The Supreme Court operates a continuous annual term, which begins on the first Monday of October.⁸⁵ Terms are designated by the month and year when a term begins; the term that starts on October 3, 2016, will be designated the October 2016 term. The summer recess of the Supreme Court begins when “all the cases argued and submitted during the term have been disposed of by written opinions or otherwise,” which is usually the last week of June, or before the July 4th Independence Day holiday.⁸⁶ If necessary the Supreme Court can delay its summer recess to hold oral arguments and render an opinion in a case of immediate importance. This happened in the October 1973 term where oral arguments in *United States v. Nixon* were held on July 8 and the opinion was handed down on July 24.⁸⁷ In exceptional cases oral arguments may be scheduled for a period when the Supreme Court would normally be in recess.⁸⁸ A term ends when the new term begins.

The schedule for each year follows a regular pattern.⁸⁹ Beginning with the opening of the term in October the justices sit to review and hear oral arguments in cases for two weeks, followed by one or two weeks when no oral arguments are scheduled. In the weeks that oral arguments are not heard the justices spend time reviewing pending petitions for review and writing opinions. This pattern is repeated from October to April, with a break of about a month from early December to early January, and from late January to late February. Normally, the last oral arguments occur before the beginning of May. Each week of oral arguments usually consists of one to three days of arguments and at least one conference day. Usually at least two cases are scheduled for oral arguments each day and the Court allocates one hour total for arguments in each case.⁹⁰ Each side in the case is allotted equal time; if an advocate for a brief submitted *amicus curiae* is to participate, with the consent of the party that the brief supports and the approval of the Court, the time that he or she is given will be taken from the time allocated for the party on whose behalf the brief was filed.⁹¹ Most outside requests to participate in oral arguments are rejected, although requests from the Solicitor General, or from state governments, are often approved.⁹²

⁸³ See entry for John G. Roberts, Jr., Chief Justice of the United States, *Biographies of Current Justices of the Supreme Court*, *supra* note 6.

⁸⁴ Remarks by Ruth Bader Ginsburg, *Judicial Proceedings—D.C. Circuit*, 160 F.R.D. 169, 205 (1994).

⁸⁵ 28 U.S.C. § 2 (2012).

⁸⁶ SHAPIRO ET AL., *supra* note 5, § 1.3 at 11.

⁸⁷ *United States v. Nixon*, 418 U.S. 683 (1974). The Nixon case was a development of the Watergate scandal and concerned the release of White House tape recordings to the Special Prosecutor investigating the burglary and cover up. At the same time that the appeal was pending the House of Representatives had begun proceedings to impeach President Nixon.

⁸⁸ A second round of oral arguments for *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), were held on September 9, 2009.

⁸⁹ The schedule for the October 2016 term of the Supreme Court can be seen at *Supreme Court Calendar: October Term 2016*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/oral_arguments/2016TermCourtCalendar.pdf (last visited Aug. 26, 2016).

⁹⁰ SUP. CT. R. 28(3) (effective July 1, 2013), <https://www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf>.

⁹¹ SHAPIRO ET AL., *supra* note 5, § 14.7 at 782.

⁹² *Id.* Rule 28.7 governs participation by counsel as *amicus curiae* in oral arguments.

In exceptional circumstances the Supreme Court may schedule more than one hour of arguments for a case. Six hours of arguments over three days were held for *National Federation of Independent Businesses v. Sebelius*, which challenged the constitutionality of President Obama's health insurance law, the Patient Protection and Affordable Care Act.⁹³ Oral arguments are held in open court; members of the Supreme Court bar, the news media, and the public may attend. Public access to arguments is provided in two lines: a line for those who wish to hear an entire argument, and a line for those who wish to hear only three minutes of an argument.⁹⁴ Justices will continue to review petitions when the Court is in recess, although the workload during the summer recess is reduced enough to allow for individuals to travel and even teach. Justice Kennedy, for example, teaches each summer as a faculty member of the McGeorge School of Law's summer institute in Salzburg, Austria.⁹⁵

Justices are also responsible for hearing emergency petitions from the federal circuit courts of appeal.⁹⁶ Each justice is assigned to one or more federal circuits.⁹⁷

Each week that oral arguments are held the justices also meet privately for at least one conference session. One day is also devoted to a conference session during the week before the justices sit to hear oral arguments. This means that the first conference of the session is actually held before the first Monday of October.⁹⁸ During these sessions the justices will discuss and vote on each case that they heard during the week's oral arguments. The justices also review the "discussion list" that the Chief Justice has prepared, which lists noteworthy petitions for *certiorari*, and vote on each petition on the list. Justices may also bring up for discussion any pending petition that is not on the discussion list. At each conference the justices also review pending cases on the appellate and original dockets to determine if each case should be taken or dismissed outright. The Clerk of the Supreme Court compiles an order list that is released each Monday that the Supreme Court is in session. Opinions are released as they become available; the justices read excerpts from significant opinions in open court.⁹⁹ Dissenting justices may, in exceptional cases, also read from their opinions.

The justice assigned to write the opinion of the Court prepares a draft and circulates it among the other justices. The other justices voting in the majority may choose to write concurring opinions that agree with the holding stated in the opinion of the Court but not necessarily with the reasoning on each point, or dissenting opinions that disagree with the holding of the

⁹³ *National Federation of Independent Businesses v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2566 (2012). The oral arguments for this case are available at *National Federation of Independent Businesses v. Sebelius*, OYEZ, <https://www.oyez.org/cases/2011/11-393> (last visited Aug. 12, 2016). The Oyez website has an extensive library of sound recordings of oral arguments dating back to the October 1955 term.

⁹⁴ *Visitor's Guide to Oral Arguments*, SUPREME COURT OF THE UNITED STATES (Aug. 30, 2016), <https://www.supremecourt.gov/visiting/visitorsguidetooralargument.aspx>.

⁹⁵ *Justice Kennedy to Teach in Salzburg Program*, UNIVERSITY OF THE PACIFIC: MCGEORGE SCHOOL OF LAW (Mar. 12, 2015), http://www.mcgeorge.edu/News/Justice_Kennedy_to_Teach_in_Summer_Salzburg_Program.htm.

⁹⁶ SUP. CT. R. 23.

⁹⁷ A list of current circuit assignments can be found at *Circuit Assignments*, SUPREME COURT OF THE UNITED STATES (Aug. 23, 2016), <https://www.supremecourt.gov/about/circuitAssignments.aspx>.

⁹⁸ For the October 2016 term the first conference will be held on Monday, September 26. See *Supreme Court Calendar*, *supra* note 90.

⁹⁹ See SAVAGE, *supra* note 25, at 999.

Court. The other opinions may even concur on some points put forward by the opinion of the Court and dissent on others.¹⁰⁰

Much less frequently a group of justices collaborate in writing the Court's opinion. One such example is the opinion of the Supreme Court in *Planned Parenthood v. Casey*, a major decision concerning abortion rights that was jointly written by Justices O'Connor, Kennedy, and Souter.¹⁰¹ If the Court enters an opinion on a tie vote, which happened several times during the October 2015 term following the vacancy created by Justice Scalia's death, the holding of the lower court is affirmed and establishes no precedent at the level of the Supreme Court or in other lower courts, beyond that of the case in dispute.¹⁰²

The Supreme Court also releases *per curiam* opinions, which are unsigned opinions of the entire Court.

¹⁰⁰ MORRIS L. COHEN ET AL., *HOW TO FIND THE LAW* 25–26 (9th ed. 1989).

¹⁰¹ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), available at https://www.law.cornell.edu/supremecourt/text/505/833#writing-USSC_CR_0505_0833_ZO.

¹⁰² Lyle Denniston, *On Aliens, Arizona May Win—For Now*, SCOTUSBLOG (Dec. 08, 2010), <http://www.scotusblog.com/2010/12/on-aliens-arizona-may-win-for-now>.

IV. Jurisdiction of the Supreme Court

IV.1. Introduction

The jurisdiction of the Supreme Court is set forth in Article III of the US Constitution. Most of the jurisdiction given to the Court is over appeals, although the Constitution does list some areas where it has original jurisdiction. The Court has read Article III to the effect that Congress may not increase its area of original jurisdiction. The Congress has reduced the Court's exclusive original jurisdiction to cases between states; other areas of original jurisdiction are now shared with lower federal courts. The Congress has also changed the manner in which appeals are heard so that the Court now has great discretion, through the routing of almost all appeals through the certiorari process, to decide which cases it will review.

IV.1.1. Scope of Jurisdiction of the Federal Courts Generally

Article III, section 2, clause 1, of the Constitution limits the judicial power of the United States to "cases or controversies," stating as follows:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a state and the citizen of another state,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Federal courts, and specifically the Supreme Court, have cited this clause over the years to limit the reach of the federal judiciary. A very old precedent, dating from the administration of President George Washington, prohibits the Supreme Court and other federal courts from providing advisory opinions to the Congress or the Executive.¹⁰³

IV.1.2. Distinction between "original jurisdiction" and "appellate jurisdiction"

The Supreme Court is not a trial court in the normal sense of the phrase, although very early in its history the justices did conduct one jury trial. This precedent has not been repeated.¹⁰⁴

The Supreme Court does retain original exclusive jurisdiction over cases concerning disputes between two states (see *infra* point IV.2).¹⁰⁵ The Supreme Court also retains concurrent original jurisdiction in a limited number of other instances. This includes actions involving diplomatic personnel from foreign nations, controversies between the federal and state governments,

¹⁰³ Joan R. Gunderson, *Advisory Opinions*, in THE OXFORD COMPANION, *supra* note 13, at 21. The matter concerned the commissioning of privateers by the French Revolutionary government minister to the United States. The justices notified President Washington via a letter that it would not be appropriate for the Court to provide an opinion under the doctrine of "separation of powers." Ireland, *supra* note 13, at 90.

¹⁰⁴ The case was *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794), which used a special jury of merchants. A discussion of the case can be found in Lochlan F. Shelfer, Note, *Special Juries in the Supreme Court*, 123 YALE L.J. 208 (2013), <http://www.yalelawjournal.org/note/special-juries-in-the-supreme-court>.

¹⁰⁵ 28 U.S.C. § 1251(a) (2012).

and “actions or proceedings by a State against the citizens of another State or against aliens.”¹⁰⁶ Most such cases are now taken up by lower federal courts.

Another way that the Supreme Court may review cases is through its appellate jurisdiction. This was formerly the primary method by which cases reached the Court; during the first 130 years of the Court it was required to review such appeals. Beginning in the late nineteenth century, Congress addressed the request of the justices for a more manageable docket by passing laws that structured the flow of federal appeals.¹⁰⁷ The Judiciary Act of 1891¹⁰⁸ created the modern federal courts of appeal and provided restrictions on the types of cases that could be appealed to the Supreme Court. The existing circuit courts were continued, but they lost their appellate jurisdiction to the new courts. By 1925, the old circuit courts had been abolished. In that year the Congress limited the types of appeals that could be made to the Supreme Court and gave the Court greater power over its docket, channeling more cases into the discretionary certiorari process.¹⁰⁹ In 1988 Congress eliminated most of the remaining grounds for mandatory appeals to the Supreme Court.¹¹⁰

At present there are two areas where the Supreme Court has appellate jurisdiction: (1) with regard to a limited number of laws where the Congress has required that a case at trial be heard by a panel of three federal district court judges; and (2) as designated in a limited number of laws governing elections and the political process.¹¹¹ Due to the changes in the law the Supreme Court receives very few direct appeals.¹¹²

IV.2. Disputes between two states

As noted above, the Supreme Court does retain original exclusive jurisdiction over cases concerning disputes between two states.¹¹³ The majority of these cases concern disputes over water rights or boundaries.¹¹⁴ The usual practice in such cases is to assign the review of the

¹⁰⁶ 28 U.S.C. 1251(b) (2012).

¹⁰⁷ Congress has the power to do this under the Exceptions Clause of Article III, Section 2, Clause 2 of the Constitution, which reads, “[i]n all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.”

¹⁰⁸ Act of March 3, 1891, ch. 517, 26 Stat. 826.

¹⁰⁹ Act of February 13, 1925, ch. 229, 43 Stat. 936. This is colloquially known as the “Judges’ Bill,” perhaps because of the lobbying by Chief Justice Taft and other members of the Supreme Court for its passage.

¹¹⁰ Supreme Court Case Selections Act of 1988, Act of June 27, 1988, Pub. L. 100-352, 102 Stat. 662. For a more in-depth discussion of the history of legislation restricting mandatory appeals, see Kenneth W. Starr, Essay, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1369–70 (2006); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges’ Bill*, 100 COLUM. L. REV. 1643 (2000); Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81 (1988).

¹¹¹ For a list of some of the three panel laws see SHAPIRO ET AL., *supra* note 5, § 2.10, at 104–05. The major political appeals concern congressional and legislative reapportionment cases, and the financing of elections under the Campaign Fund Act of 1971. One statute that provided for a direct appeal is 18 U.S.C. § 700(d) (2012), which criminalized the desecration of the US flag. In 1990 the Supreme Court upheld the dismissal of two prosecutions under this statute on the grounds that they violated the right to free speech under the First Amendment. *United States v. Eichman*, 496 U.S. 310 (1990).

¹¹² 28 U.S.C. § 1253 (2012), specifies that in limited circumstances a party may appeal “an interlocutory or permanent injunction in any civil action,” issued by a three-judge panel.

¹¹³ 28 U.S.C. § 1251(a) (2012).

¹¹⁴ *History of the Federal Judiciary: Original Jurisdiction of the Supreme Court*, FEDERAL JUDICIAL CENTER, http://www.fjc.gov/history/home.nsf/page/jurisdiction_original_supreme.html (last visited Aug. 13, 2016).

dispute to a special master, an outside trier of facts, who reviews the evidence in light of the relevant law and issues a report. The parties to the dispute may file exceptions or objections to the report. The justices may either accept the master's recommendations, or reject the recommendations in whole or in part.¹¹⁵ There are usually very few such cases pending, although exclusive original jurisdiction cases can be in dispute for years before the master submits a report and a decision is rendered.¹¹⁶ The justices may reject an original jurisdiction case if the pleadings do not support the Court's jurisdiction.

IV.3. Controversies between the federal and state governments

Disputes between the federal government and a state government are first heard by federal district courts. The findings of that court can then be appealed to a federal court of appeals. An opinion of the appellate court may then be submitted for review to the Supreme Court by a party seeking a writ of certiorari from the Court. The Supreme Court has discretion in reviewing these cases. As mentioned in section IV.1.2, *supra*, Congress has provided that cases dealing with a limited number of subjects may proceed to the Supreme Court by appeal instead of certiorari.

IV.4. Questions about laws

Judicial review is the doctrine by which the Supreme Court and lower federal courts may rule on the constitutionality of federal and state laws, including statutes, regulations, and court cases. This is an ancient doctrine—while not specifically mentioned in the Constitution it was implied in some of the debates during the Constitutional Convention and immediately afterwards.¹¹⁷

The Supreme Court's classic formulation of the doctrine can be found in Chief Justice John Marshall's opinion in *Marbury v. Madison*.¹¹⁸ The issue in *Marbury* involved the interpretation of the Judiciary Act of 1801,¹¹⁹ which provided for the creation of a number of new judgeships and the appointment of individuals to fill the new positions. The act was a blatantly political attempt to pack the federal judiciary with appointees before the new Jefferson administration and the new Jefferson-allied Congress could take office. After the change in administrations the new Secretary of State, James Madison, refused to deliver the commissions of office for the appointed judges. One appointee, William Marbury, sought from the Supreme Court a writ of mandamus, which was provided for by section 25 of the Judiciary Act of 1789,¹²⁰ to compel the

However, one pending petition that seeks to invoke the court's original jurisdiction concerns a multi-state dispute over unclaimed personal property. Lyle Denniston, *Three-way Fight Over Unclaimed Property*, SCOTUSBLOG (June 10, 2016), <http://www.scotusblog.com/2016/06/three-way-fight-over-unclaimed-property/>.

¹¹⁵ ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 10.2 at 487–88 (7th ed. 1993).

¹¹⁶ See EPSTEIN ET AL., *supra* note 20, at 78, for a breakdown by recent term of the number of cases on the original docket.

¹¹⁷ The concept was familiar to some colonial-era lawyers, such as John Adams and John Otis, from a 1610 English case, *Dr. Bonham's Case*, where it was set forth in the opinion of Sir Edward Coke of the Court of Common Pleas. For a partial list of such debate, see Horace A. Davis, *Annulment of Legislation by the Supreme Court*, 7 AM. POL. SCI. REV. 541 (1913).

¹¹⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), available at <https://www.law.cornell.edu/supremecourt/text/5/137>.

¹¹⁹ 2 Stat. 89.

¹²⁰ 1 Stat. 73, 85.

delivery of his commission. Chief Justice Marshall, writing the opinion for the court, held that the provision of the section of the 1789 Act empowering the Supreme Court to issue writs of mandamus was an unconstitutional expansion of the Court's original jurisdiction. In discussing the issue of whether a court may find that an act of a legislature is unconstitutional Marshall formulated the following justification for the exercise of judicial review:

Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law. This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that, if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.¹²¹

Marshall's opinion concluded with this passage, which provides a rationale for the application of the doctrine,

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument.¹²²

The Marshall Court would later use judicial review to strike down a law from Georgia that voided fraudulent sales of public lands to subsequent purchasers on the grounds that it was counter to the Constitution's Contracts Clause.¹²³ A few years later it used the Constitution's Supremacy Clause of Article VI¹²⁴ to strike down a state statute that imposed a tax on a nationally chartered bank.¹²⁵

In the related cases of *Fairfax's Devisee v. Hunter's Lessee*¹²⁶ and *Martin v. Hunter's Lessee*¹²⁷ the Court would wrestle with its power under section 25¹²⁸ of the Judiciary Act of 1789 to use

¹²¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) at 178.

¹²² *Id.* at 180.

¹²³ *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). The Contracts Clause is found at Article I, Section 10, Clause 1 of the Constitution and reads, "[n]o State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts."

¹²⁴ U.S. CONST. art. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.").

¹²⁵ *McCulloch v. Maryland*, 7 U.S. (4 Wheat.) 316 (1819), available at <https://www.law.cornell.edu/supremecourt/text/17/316>.

¹²⁶ *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813), available at <https://www.law.cornell.edu/supremecourt/text/11/603>.

¹²⁷ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), available at <https://www.law.cornell.edu/supremecourt/text/14/304>.

¹²⁸ 1 Stat. 73, 85–86. The relevant language reads in part as follows:

That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision against their validity; . . . may be re-examined and reversed or affirmed in the Supreme Court of the United

judicial review to uphold performance required under a treaty, in this instance the Jay Treaty of 1794,¹²⁹ in the face of opposition from state action (in *Fairfax's Devisee*). Subsequently, the Virginia Supreme Court of Appeals expressly refused to carry out the Supreme Court's mandate, arguing that section 25 was unconstitutional. In its opinion the Supreme Court upheld the validity of section 25 of the Judiciary Act of 1789 and affirmed its role as the superior arbitrator of American law. In the opinion of the majority of the court, Justice Story wrote

On the whole, the Court (i.e., Supreme Court) are of opinion that the appellate power of the United States does extend to cases pending in the State courts, and that the 25th section of the judiciary act, which authorizes the exercise of this jurisdiction in the specified cases by a writ of error, is supported by the letter and spirit of the Constitution. We find no clause in that instrument, which limits this power, and we dare not interpose a limitation where the people have not been disposed to create one.¹³⁰

IV.5. The special case of international treaties

Under US law a treaty is ratified by approval of the Senate.¹³¹ Treaties that the US has not signed or ratified have no binding legal authority, although they may be cited as persuasive authority.¹³² As in other cases where relief is sought in federal court the party asking for enforcement of a treaty must be able to satisfy the doctrine of standing that is discussed in IV.1, *infra*. The Supreme Court has not ruled against the constitutionality of any ratified treaty.¹³³ The Supreme Court will not provide an advisory opinion on the constitutionality of an unratified treaty.¹³⁴

States

Id. § 25.

¹²⁹ 8 Stat. 116. The Jay Treaty between the United Kingdom and the United States was negotiated to settle a number of outstanding diplomatic issues between the two countries. Article 9, which was in dispute, reads as follows:

It is agreed, that British Subjects who now hold Lands in the Territories of the United States, and American Citizens who now hold Lands in the Dominions of His Majesty, shall continue to hold them according to the nature and Tenure of their respective Estates and Titles therein, and may grant Sell or Devise the same to whom they please, in like manner as if they were Natives; and that neither they nor their Heirs or assigns shall, so far as may respect the said Lands, be and the legal remedies incident thereto, be regarded as Aliens.

Id. at 122.

¹³⁰ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) at 351.

¹³¹ U.S. CONST. art. II, § 2, cl. 1 ("[The President] shall have Power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur[.]").

¹³² For instance Justice Kennedy, in the opinion of the Supreme Court in *Roper v. Simmons*, 543 U.S. 551, 556–58 (2005), available at <https://www.law.cornell.edu/supct/pdf/03-633P.ZO>, noted that article 37 of the United Nations Convention on the Rights of the Child, which the United States has not signed, prohibits the execution of individuals for crimes committed under the age of eighteen. The holding in *Roper*, however, was squarely based upon US law—namely, the Constitution's Eighth Amendment prohibition against cruel and unusual punishment.

¹³³ William C. Banks, *Treaties and Treaty Power*, in THE OXFORD COMPANION, *supra* note 13, at 1026–27. As early as 1796 the majority of the Court ruled that a statute of Virginia that was counter to a provision of the 1783 Treaty of Paris that ended the American War of Independence was invalid.

¹³⁴ See note 104, *supra*, and accompanying text for a discussion of advisory opinions.

V. The right to judicial access to the Supreme Court

V.1. General terms

To enter federal court a party must have a controversy that the court can address. This is the doctrine called “standing.” Standing is part of the doctrine of justiciability, which provides guidance to courts on what types of actions can be considered.¹³⁵ In criminal trials the government as prosecutor must be able to cite a specific law that the defendant violated. In civil suits the plaintiff must show a loss. The plaintiff must also show that the defendant caused the loss through his actions or inactions; that the right to sue in federal court arises under one of the reasons set forth in the “cases or controversies” clause; and that the federal courts can shape a remedy that will rectify, either in whole or in part, the loss that was suffered. A related doctrine of justiciability includes the type of claims that may be brought. Federal courts are very reluctant to entertain claims related to political questions, such as the legitimacy of elections, unless a specific statute has been called into question.¹³⁶ Individual claimants must be able to show a specific loss; the courts generally will not entertain suits by individuals who are alleging that their loss is related to their status as a “taxpayer” or “citizen.” However, taxpayer suits have been upheld where the plaintiff is able to show that “there is a logical nexus between the status asserted and the claim sought to be adjudicated.”¹³⁷

At the Supreme Court interested outside individuals not a party to the dispute before the Court may file a motion to submit an *amicus curiae* brief, setting forth their view of the case. The interest of the Court in such “friend of the court” briefs is stated in Supreme Court Rule 37(1):

An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.¹³⁸

In cases involving major disputes, such as over reproductive rights or the Patient Protection and Affordable Care Act, it is not uncommon for more than twenty *amicus* briefs to be submitted.¹³⁹

¹³⁵ The classic exposition of the doctrine of justiciability can be found in the opinion of the Supreme Court in *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240 (1937), available at <https://www.law.cornell.edu/supremecourt/text/300/227>.

¹³⁶ The major formulation of the “political question,” doctrine dates from the decision of Chief Justice Taney in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), available at <https://www.law.cornell.edu/supremecourt/text/48/1>, where the court refused to rule on the legitimacy of a declaration of martial law in Rhode Island during a domestic insurrection over that state’s restrictions on the franchise.

¹³⁷ *Flast v. Cohen*, 392 U.S. 83, 102 (1968), available at <https://supreme.justia.com/cases/federal/us/392/83/case.html>. This case involved the use of federal funds to support instructional activities at sectarian schools. The opinion of the Supreme Court found that the plaintiffs satisfied the requirement of showing an injury by invoking the Establishment and Free Exercises Clauses of the First Amendment of the Constitution.

¹³⁸ SUP. CT. R. 37(1).

¹³⁹ Twenty-four such briefs were submitted in *National Federation of Independent Businesses v. Sebelius*. This case is also unusual in that the Court appointed counsel to submit a merit brief in support of severability of the act, an issue that was addressed in the opinion of the Court. See Briefs and Documents, *National Federation of Independent Business v. Sebelius*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/national-federation-of-independent-business-v-sebelius> (last visited Aug. 16, 2016).

Cases may also reach the Supreme Court from federal courts of appeal through the appellate court certifying a question about federal law that it wants the Supreme Court to clarify.¹⁴⁰ The Supreme Court has not granted leave to hear a case on certification since 1981.¹⁴¹

V.2. The writ of certiorari

Although the use of a petition for a writ of certiorari has been possible since the late nineteenth century, it did not become the main way of advancing a case to the Supreme Court until the mid-twentieth century. As a result of the Judges' Bill the Supreme Court was given more control over the cases that it would review.¹⁴² Certiorari became the only practical way for the vast majority of cases to receive review after the passage of the Supreme Court Case Selections Act of 1988.¹⁴³

The guidelines for review of a writ of certiorari by the Court are set forth in Supreme Court Rule 10, which reads as follows:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.¹⁴⁴

Only parties to the dispute in the lower court may file a petition for a writ of certiorari, and generally, but not always, only the losing party files.¹⁴⁵ Because of the limitation on appellate

¹⁴⁰ Certification is mentioned as a process for a case in a court of appeals to be considered at any point by the Supreme Court. See 28 U.S.C. § 1254(2) (2012). Supreme Court Rule 19 governs the certification process.

¹⁴¹ Although the process may be considered "dormant," there is some support for its revival. See Kevin G. Crennan, *The Viability of Certification in Federal Appellate Procedure*, 52 WM. & MARY L. REV. 2025 (2011); Amanda L. Tyler, *Setting the Supreme Court's Agenda: Is There a Place for Certification?*, 78 GEO. WASH. L. REV. 1310 (2010); *United States v. Seale*, 558 U.S. 985 (2009) (dismissal of question certified by US Court of Appeals for the Fifth Circuit) (Justice Stevens, joined by Justice Scalia, dissenting).

¹⁴² Certiorari from federal appellate courts is provided for in 28 U.S.C. § 1254(1) (2012), and from the highest court of a state in 28 U.S.C. § 1257 (2012). Chapter 81 of title 28 of the *United State Code* also lists other routes of certiorari from other federal and territorial courts.

¹⁴³ Pub. L. 100-352, 102 Stat. 662; see also note 111, *supra*, for legislative history references.

¹⁴⁴ SUP. CT. R. 10 (effective July 1, 2013), <https://www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf>.

¹⁴⁵ The controlling language for a party seeking the writ from a case heard by a US court of appeals is found at 28

and certification cases, the Supreme Court's docket is now overwhelmingly filled with certiorari cases.¹⁴⁶ During the October 2013 term, 8,574 cases were submitted to the Supreme Court via petitions for writs of certiorari.¹⁴⁷

One favored party in certiorari filings is the Solicitor General's Office. That Office, which is staffed by attorneys who work for the Department of Justice, sees upwards of 70 percent of its petitions granted by the Supreme Court. One theory for this rate of success is that the office closely screens cases lost by the government to find those of the "most general public importance."¹⁴⁸

As stated in Rule 10, certiorari is granted only for "compelling reasons." This phrase and the repeated use of the word "important" in subsections (a) through (c) of the Rule are from the 1995 additions to the Rule; the prior language was not as restrictive.¹⁴⁹ In addition, the 1995 amendments added the final paragraph, which sets out the policy that very few cases will be reviewed due to "erroneous factual findings or the misapplication of a properly stated rule of law." As Justice Scalia suggested in 1994, such differences must be more than just a difference between the circuit courts about procedure:

The only really demanding criterion is the general requirement of a square conflict among the circuits. Thus, many of the cases we take do not involve questions of earth-shattering importance, though they almost all involve questions on which there ought to be one answer, and the lower courts have produced several.¹⁵⁰

Cases that are granted certiorari are assigned either to the paid or the *in forma pauperis* lists. The paid list consists of petitions filed by a party who has retained counsel and has paid the US\$300 docket fee. Parties submitting paid petitions are required to comply with the submission guidelines set forth in Rule 33.¹⁵¹ The *in forma pauperis* list consists of individuals who have submitted a notarized statement to the effect that they lack the resources to comply

U.S.C. 1254(1) (2012), which provides for review "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." The language for a party seeking the writ from a case heard by the highest court of a state is found at 28 U.S.C. 1257(a) (2012), which provides as follows:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

¹⁴⁶ For a graphic representation of the division of the October 2013 term, see *Make-Up of the Merits Docket, SCOTUSblog Statpack: October Term 2013*, SCOTUSBLOG (July 3, 2014), http://sblog.s3.amazonaws.com/wp-content/uploads/2014/07/SCOTUSblog_makeup_OT13.pdf.

¹⁴⁷ EPSTEIN ET AL., *supra* note 20, at 83.

¹⁴⁸ SHAPIRO ET AL., *supra* note 5, § 4.1 at 237. The Solicitor General's office is so influential in the work of the Court that it is sometimes referred to as the Supreme Court's "tenth justice." See David Baarlaer, *The Tenth Justice: The Role of Solicitor General*, LAWYERS.COM (Feb. 2, 2011), <http://blogs.lawyers.com/2011/02/the-tenth-justice-the-role-of-solicitor-general/>.

¹⁴⁹ The word "important" did appear in subsection (c) prior to 1995.

¹⁵⁰ Remarks by Antonin Scalia, *Judicial Proceedings—D.C. Circuit*, 160 F.R.D. 169, 206 (1994).

¹⁵¹ The Clerk's office has posted a useful guide to filing on its website. Supreme Court of the United States, Office of the Clerk, Memorandum to Those Intending to Prepare a Petition for a Writ of Certiorari in Booklet Format and Pay the \$300 Docket Fee (Oct. 2015), <https://www.supremecourt.gov/casehand/guidetofilingpaidcases2015.pdf>.

with the filing fee and rules concerning the required number of copies of submissions. Most prisoners who seek postconviction relief from the Supreme Court file under the *in forma pauperis* rules.¹⁵²

Each year the Supreme Court denies the vast majority of petitions for a writ of certiorari.¹⁵³ Although most petitions are denied, those on the paid docket have a somewhat better chance of having their petitions granted.¹⁵⁴ In order for a petition to be accepted it must receive the votes of four of the nine justices. This is colloquially called “the rule of four,” which is not a formal rule, but simply the Court’s decision to follow precedent concerning certiorari petitions.¹⁵⁵

One area where the public is often aware of the Supreme Court’s work concerns its review of capital (death penalty) cases.¹⁵⁶ Postconviction proceedings in capital cases in the US are complex and, unless involving federal defendants, involve questions that concern federalism and the role of the federal courts.¹⁵⁷ Generally, to have a conviction and sentence reviewed in a federal court a state prisoner must first exhaust any direct review available in state courts and any available state post-review relief. The prisoner may then enter the federal review process. Along the way the prisoner may at certain stages file a petition for a writ of certiorari from the Supreme Court seeking review of federal constitutional issues that arose either from the record of the trial, the direct review stage, or matters raised at the post-review phase. One factor that complicates such review, however, is the scheduled execution date. If that date is before the projected review process is to be completed counsel for the defendant will seek to have the Supreme Court issue a stay of the execution. A stay is usually granted in such cases due to the final nature of the sentence, especially at the direct review phase of the proceedings.¹⁵⁸ However, recent changes in federal statutory and case law have limited the ability of a petitioner to seek successive stays at later stages of the review.¹⁵⁹ Eventually all pending death penalty convictions, except where the prisoner waives any further proceedings or receives relief in the direct appeals process, are brought before the Supreme Court, often multiple times.

¹⁵² Supreme Court Rules 33 and 39 govern the procedures for filing *in forma pauperis*.

¹⁵³ In the period from the 2009 to the 2013 October terms 44,318 petitions were received of which a total of 402 were granted. EPSTEIN ET AL., *supra* note 20, at 83.

¹⁵⁴ Of 9,345 paid petitions from the 2009 through the 2013 terms, 335 were granted (3.799%); during the same period only 47 of the 34,973 *in forma pauperis* petitions were granted (0.134%). *Id.*

¹⁵⁵ For a history of the development of the Rule of Four and a case study of its effects in selective terms of the Court, see John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1 (1983).

¹⁵⁶ Nineteen states and the District of Columbia have formally abolished the death penalty. Capital punishment is still legal in the remaining 31 states and for certain federal crimes, although governors in four states where it remains legal have imposed moratoriums on carrying out capital sentences. Map, *States with and without the Death Penalty as of August 18, 2016*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>.

¹⁵⁷ A helpful schematic of the process is available at *Death Penalty Appeals Process*, CAPITAL PUNISHMENT IN CONTEXT, http://www.capitalpunishmentincontext.org/resources/dpappeals_process (last visited Aug. 12, 2016).

¹⁵⁸ SHAPIRO ET AL., *supra* note 5, § 18.2 at 926.

¹⁵⁹ *Id.* § 18.4 at 929 (noting that decisions of the Supreme Court since the late 1970s have reduced the likelihood for state prisoners to be able to obtain relief on the merits in post-conviction habeas corpus review). In addition, Title I of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, limits the scope of issues that a prisoner may raise at the habeas corpus phase of his post-trial review.

VI. The procedure

This discussion focuses on the procedure applicable to a petition for a writ of certiorari because almost all cases that come before the Supreme Court are through this route.¹⁶⁰

Petitions from a federal court of appeal are governed under 28 U.S.C. § 1254(1), which provides that court of appeals cases may be reviewed by the US Supreme Court “[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.”

A party in a civil suit may petition the Court for a writ of certiorari up to ninety days after the entry of a judgment or decree.¹⁶¹ A petition from a judgment or decree from a state court must be from the state’s court of final review.

In criminal cases from state courts the statute provides that the time limit for filing a petition is governed by Supreme Court rules.¹⁶² In criminal cases from federal courts the time limit is governed by Supreme Court Rule 13(a), which also provides for a ninety-day timeframe from the issuance of the judgement or order that is being challenged.

In either criminal or civil cases a party may also seek a sixty-day extension of the time to file a petition. Under Supreme Court Rule 30.3 the petition for extension must be made to the justice who is the circuit justice for the place where the petition is being filed and must be made no later than “10 days before the specified final filing date as computed under these Rules.”¹⁶³

The Court is strict in applying the time limit, which may only be modified by operation of an act of Congress.¹⁶⁴

If the petition is timely filed and otherwise in order the Clerk of the Supreme Court assigns a docket number which is then entered on the docket. Petitioners are required to file forty copies of the petition and pay the required docketing fee.¹⁶⁵ Petitioners moving to proceed in forma pauperis need file only the original and ten copies of the motion to proceed and the original and ten copies of the petition. An exception is made for inmates proceeding in forma pauperis without benefit of counsel, who need only file an original petition and motion.¹⁶⁶

¹⁶⁰ Extensive treatment of this matter can be found in SHAPIRO ET AL., *supra* note 5, ch. 6. There is also a useful checklist of procedures at the front of Shapiro et al. The checklist reviews the process for those cases that are submitted on appeal.

¹⁶¹ 28 U.S.C. § 2101(c) (2012), which reads as follows:

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

¹⁶² 28 U.S.C. § 2101(d) (2012), which reads as follows:

The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

¹⁶³ SUP. CT. R. 30 (2013).

¹⁶⁴ In 2006 a petition from a prisoner on death row was rejected by the Clerk of the Supreme Court because it was filed one day late. The petitioner was later executed. See *Bowles v. Russell*, 551 U.S. 205 at 212 n.4 (2007).

¹⁶⁵ SUP. CT. R. 12.1 (2013). The docketing fee is US\$300. SUP. CT. R. 38(a) (2013).

¹⁶⁶ SUP. CT. R. 12.2 (2013).

In addition to filing the petition with the Clerk's Office a petitioner must also file evidence of proof of service on all parties to the case.

The respondent is given the opportunity to respond, usually by a brief in opposition. After the brief in opposition is filed the Clerk submits the documents in the case to the Court. Later the petitioner and the respondent may file additional submissions.¹⁶⁷

If the petition for certiorari is denied the petitioner may seek rehearing under Rule 44.2. Petitions for rehearing are discussed in VII, *infra*.

¹⁶⁷ SHAPIRO ET AL., *supra* note 5, at xxxviii–xl.

VII. Effects and execution of the judgments

The controlling statute concerning the effect of the Court's decisions is found at 28 U.S.C. 2106 (2012), which reads as follows:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

The Clerk of the Court communicates with the lower courts concerning the ruling.¹⁶⁸ Rule 45 specifies that the mandate in the case of state courts, or a certified copy of the judgment in the case of federal courts, must be sent to the appropriate court after entry of the judgment.¹⁶⁹ In the event of pressing need the Clerk's office forwards a copy of the mandate or judgment sooner than the twenty-five-day period provided by the Rule. For example the Supreme Court's opinion in *Bush v. Gore*, 531 U.S. 98 (2000), which ended the recount of ballots in Florida and the 2000 presidential election, was delivered on December 12, 2000. The Clerk's office sent a certified copy of the mandate to the Florida Supreme Court on the same day.¹⁷⁰ The Court relies upon lower courts and government officials, as needed, to oversee the implementation of its mandates and judgments, although if necessary it will remind recalcitrant parties that its decisions are legally binding.¹⁷¹

After the Court has published its opinion or denied the petition for a writ of certiorari the losing party may petition for a rehearing or reconsideration. This process is governed by Rule 44, which gives the losing party up to twenty-five days to file. The losing party's attorney of record must also certify that the petition is in "good faith," and is not an attempt to delay implementation.¹⁷² It is very rare for such petitions to be approved, in most cases it is due to an intervening decision of the Supreme Court addressing the issue of the case.¹⁷³

The opinions of the Court are usually, but not always, intended to be applicable *erga omnes*. One noteworthy exception where this was not the case is the Court's per curiam opinion in *Bush v. Gore*,¹⁷⁴ where the opinion includes this restricting language:

The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer.

¹⁶⁸ *Id.* § 15.8 at 848.

¹⁶⁹ SUP. CT. R. 45 (2013).

¹⁷⁰ See documents provided at <http://election2000.law.stanford.edu/wp-content/uploads/2012/09/USMandate9491.pdf>.

¹⁷¹ See *Cooper v. Aaron*, 358 U.S. 1, at 17–19 (1958), for a review of the constitutional history of this doctrine. *Cooper* involved the attempt by state officials in Arkansas to halt or delay the racial desegregation of public schools in Little Rock (the state capital) as required under the Court's decision in *Brown v. Board of Education*. The *Cooper* opinion is available at <https://supreme.justia.com/cases/federal/us/358/1/case.html>.

¹⁷² SUP. CT. R. 44.

¹⁷³ SHAPIRO ET AL., *supra* note 5, § 15.5 at 836–37, provides a review of statistics for a number of years beginning in the early 1980s through the 2005 term.

¹⁷⁴ *Bush v. Gore*, 532 U.S. 98 (2000), available at <https://www.law.cornell.edu/supct/html/00-949.ZPC.html>.

Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.¹⁷⁵

As mentioned in III.2, *supra*, in the event of a tie vote the Court's opinion affirms the decision of the lower court but does not establish a general precedent. This situation occurred several times during the October 2015 term after the death of Justice Antonin Scalia.¹⁷⁶

The Court's opinions are binding *ex tunc* but depending upon the circumstances they may have the effect of operating *ex nunc*. Thus the Court's opinion in *Roper v. Simons* vacated the capital sentences of all individuals on death row in the United States who were sentenced for crimes committed before the age of eighteen in addition to finding that such sentences violated the Eight Amendment's prohibition against "cruel and unusual" punishment.¹⁷⁷

¹⁷⁵ *Id.* at 109.

¹⁷⁶ The most prominent case from this term was a 4–4 tie upholding a decision of the Fifth Circuit Court of Appeals, which had struck down President Obama's Deferred Action for Parents of Some Americans Program in *United States v. Texas*, 579 U.S._____, 136 S. Ct. 2271 (2016).

¹⁷⁷ *Roper v. Simons*, 543 U.S. 551, 578–79 (2003).

VIII. Conclusions

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.

–Alexander Hamilton, *Federalist No. 78*

The Supreme Court of the United States, in comparison to the other components of the federal government, is a small body with little direct power. However, through the exercise of its role in interpreting the Constitution of the United States, and by using the tool of judicial review, the Court has come to have a major role in the federal government, in state-federal relations, and in the shaping of American society. The ability of the Court to control its workload by restricting the cases it hears to the certiorari docket allows it to focus on the major issues in American law that require resolution by an authoritative voice. Because of this the Court has an influence in the daily lives of Americans that is vastly greater than what might be expected for a small and unelected institution.

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