

5. History of the U.S. Court System

This chapter was contributed by Robert A. Parks.



The Roberts Court, October 2010

Back row (left to right): Sonia Sotomayor, Stephen G. Breyer, Samuel A. Alito, and Elena Kagan. Front row (left to right): Clarence Thomas, Antonin Scalia, Chief Justice John Roberts, Anthony Kennedy, and Ruth Bader Ginsburg.

Just as they say that those who do not know history are doomed to repeat it, debaters who don't know history are doomed to get beat up in a debate round. All debaters should know the origins of our legal system and how the courts are set up. Understanding the history of the topic of judicial reform helps tremendously when debating the current resolution.

Origins of the US Court System

Prior to declaring independence in 1776, America consisted of English colonies that used an English judicial system. England did not codify laws into statutes and did not have a separate judiciary until 2005. They did, however, have the concept of English common law, which meant

using previously decided cases to guide future proceedings, thus giving the expectation that future similar cases will be decided in predictable ways based on past rulings.

The American colonists brought the concept of judicial proceedings with them from England, but not many of the practitioners, thus leading to local colonists filling legal roles and requiring somewhat simplified proceedings. In large cities, most of the traditional conventions were observed. But in more rural areas, oftentimes the local magistrate alone decided if enough evidence existed to have a trial, over which the same magistrate would then preside. Very few people could afford to be represented by legal counsel and were at the mercy of the government for justice. Appeals were rare or nonexistent.

When setting up a new form of government we were fortunate to have among the framers several very prominent lawyers. Within the Constitution they created several new judicial concepts such as a Supreme Court, and the idea that the judiciary would be a separate, empowered branch of the central government with the ability to determine the constitutionality of laws.

Article III Courts

The three branches of the U.S. federal government are outlined in the first three Articles of the Constitution. Every person who exercises any authority or office in the federal government does so because he is elected to, appointed to, or employed by one of those three branches:

Legislative, Executive, and Judicial. The Founders thought the Legislature was the most important, so they put its framework into Article I, which describes the work of Congress. Next came the Executive Branch, headed by the President, which is in Article II. Then came the establishment of the Judicial Branch of government in Article III.

The Supreme Court

Article III of the Constitution places the judicial power of the federal government in "one supreme Court, and in such inferior Courts" as the Congress might decide to establish. The Constitution also defined the role of the Supreme Court as having "original jurisdiction"⁶ over cases involving a state as a party, and diplomats. The Judiciary Act of 1789 defined the Supreme Court as a body of six with one chief justice and five associate justices. The act also expanded the jurisdiction of the Supreme Court to include appellate jurisdiction over cases in which state

⁶ "Original jurisdiction" means the dispute starts there, rather than coming there on appeal after a lower court has already heard it and made a decision. As we will see below, the Supreme Court very rarely hears cases under original jurisdiction; their work is almost always hearing appeals from lower courts. Picture: http://www.google.fr/imgres?imgurl=https://upload.wikimedia.org/wikipedia/commons/4/43/Supreme_Court_US_2010.jpg&imgrefurl=https://en.wikipedia.org/wiki/Supreme_Court_of_the_United_States&h=1000&w=1500&tbnid=QhYlgEJGM4RPM:&zoom=1&tbnh=124&tbnw=186&usg=__rWQbxnQQCwc2qFm8Go_Jg6sdefc=&docid=J1qxAOV5EPpi2M

courts ruled on federal statutes and established judicial “circuits” or areas of the country where a judge would travel around and hear cases.

Initially the Supreme Court justices⁷ were each assigned a circuit and presided with lower federal judges on federal circuit courts. The process was intended to bring the highest possible standard of justice to all parts of the country and also create a uniformity of law in all federal cases. As the US population grew, more circuits had to be established and more justices were added to the Supreme Court. A seventh justice was added in 1807, the eighth and ninth in 1837, and a tenth in 1863. Congress passed legislation in 1866 to reduce the size of the court back to seven, to be achieved by not filling vacancies. The number of justices had dropped to eight by 1869 before the Congress decided to authorize a total of nine justices (with eight federal judicial circuits). The number of justices has remained the same ever since, even though a ninth circuit was later added.

Circuit riding eventually became a tremendous draw on the time of the Supreme Court, so in 1801 Congress created separate circuit judgeships, but just a year later they required the Supreme Court to return to circuit duty. By 1869 Congress once again appointed more circuit judges and phased the Supreme Court out of circuit riding for good. In 1891 federal legislation was passed to create a system to for the Supreme Court to grant limited review of cases based upon a “writ of certiorari.”⁸ By 1988 most types of mandatory jurisdiction for the Supreme Court were phased out. Today almost all cases heard by the Supreme Court are by grant of certiorari.

In extremely rare cases, the Supreme Court may grant the *writ of certiorari* before the judgment is rendered by the court of appeals, thereby reviewing the lower court's ruling directly. Certiorari before judgment was granted in the *United States v. Nixon* case (1974) and in the *United States v. Booker* decision (2005) involving federal sentencing guidelines.

District Courts and Circuit Courts of Appeals

The 13 districts coincided with the 11 states which had ratified the constitution (at that point North Carolina and Rhode Island had not ratified) as well as Maine and Kentucky, which were part of Massachusetts and Virginia, respectively. Originally these courts heard few cases, but their jurisdiction was gradually expanded into other areas like non-capital criminal cases and later “diversity jurisdiction” in civil cases. In the 1891 Evarts Act the federal system was substantially overhauled to eliminate circuit courts as they had been, and transferred much of

⁷ “Justice” is the title of a member of the U.S. Supreme Court, rather than “judge.”

⁸ <https://www.law.cornell.edu/wex/certiorari>. A writ of certiorari is an order by the Supreme Court in which they grant permission for you to appeal your case to them. Given the limits of time and volume of cases, only a very tiny fraction of cases on appeal ever get certiorari. The Supreme Court ignores the vast majority of cases that attempt to appeal to it.

their workload to the district courts. The legislation also created three-judge circuit courts of appeals in nine circuits, as well as severely curtailing the number of cases appealable to the Supreme Court.

By the 1930s, the circuit appellate courts also had jurisdiction over administrative appeals of decisions rendered by federal regulatory agencies. Two additional courts of appeals were created with the establishment of new regional circuits, the Tenth in 1929 and the Eleventh in 1980.⁹



Every location in the U.S. is in a district assigned to a federal court. Some districts are equivalent to the state (e.g. Kansas, Maine). But some states have multiple federal districts (e.g. California has 4: the Northern, Eastern, Central and Southern Districts of California), each with their own federal district court. There are 11 regional Circuit Courts of Appeal, to which cases go that are appealed from the District Court. Cases from California, for example, would be appealed to the 9th Circuit Court of Appeals, while cases from Maine would go to the 1st Circuit, etc., as indicated on the map. The next appeal after the Circuit Courts of Appeal would be to the US Supreme Court, if they grant certiorari. If not, the Circuit Court of Appeals gets the final word.

⁹ Picture:

http://www.google.fr/imgres?imgurl=http://upload.wikimedia.org/wikipedia/commons/thumb/d/df/US_Court_of_Appeals_and_District_Court_map.svg/620px-US_Court_of_Appeals_and_District_Court_map.svg.png&imgrefurl=http://www.shmoop.com/judicial-branch/the-inferior-courts.html&h=402&w=620&tbnid=5N2iBJ7eU6L2M:&zoom=1&tbnh=90&tbnw=139&usq=__x8bP3ztGhTfpE4rDgqA-BmnBK9o=&docid=L7Pw6e7v4QvRvM

In the Judicial Code of 1948, Congress changed the title of all of the federal appellate courts to the US Court of Appeals for the respective Circuit. The thirteen¹⁰ appellate courts today have a total of 179 judgeships. The United States courts of appeals are considered among the most powerful and influential courts in the United States. They set legal precedent for their respective regions and strongly influence other circuits and the state courts in their region. Finally, because less than one percent of their more than annual 10,000 caseload is reviewed by the Supreme Court, they are a powerful judicial voice in the US today. These judges are nominated by the President, confirmed by the Senate, have lifetime tenure and earn an annual salary that cannot be reduced.¹¹

This raises an interesting, and sometimes disturbing, scenario: Similar cases handled differently by the different circuits. It is not unusual for an important matter of law to be appealed to various Circuit Courts of Appeals, and for those courts to render decisions that are substantially different from each other. This can mean that the interpretation of federal law, and its applicability on American citizens, may in some cases depend on what region of the country the citizen lives in. Sometimes known as a “circuit split,” these differing, conflicting rulings continue to apply differently in different regions until they are resolved by an appeal to the Supreme Court, in which case the ruling of the high court overturns any Circuit Courts’ rulings that are not in compliance, and the entire country is unified around a single interpretation.

FISA Court

Congress passed the Foreign Intelligence Surveillance Act (FISA) in 1978 as a post-Watergate check on abuses by federal agencies. FISA established the Foreign Intelligence Surveillance Court, a special court made up of seven district court judges selected by the Chief Justice of the Supreme Court. These judges serve non-renewable seven-year terms to review applications for warrants related to national security investigations, and at least one of them has to be on the US District Court for DC. The USA Patriot Act of 2001 expanded the FISA court to eleven members, drawn from at least seven different districts and at least three must be within twenty miles of Washington, DC. These judges come to DC on a rotating basis to hear requests for federal surveillance warrants, which must certify that the target is either a “foreign power,” an “agent of a foreign power,” or if a US citizen or resident alien they must be involved in the commission of a crime.

¹⁰ The eleven regional ones in the picture plus two others: the Court of Appeals for the D.C. Circuit and the Court of Appeals for the Federal Circuit.

¹¹ These characteristics of lifetime appointment and guaranteed salary were intended by the Founders to make Article III judges independent of politics when rendering their decisions. No Supreme Court justice or other Article III federal judge has to worry about being fired or having his salary reduced if he makes an unpopular decision.

Court of International Trade

As a new country, the US initially found it difficult to navigate the complex system of tariffs and in 1890 Congress established the Board of General Appraisers to decide controversies related to appraisals of imported goods and classifications of tariffs. The Board was part of the Treasury Department and decided appeals from custom officer decisions. The Board's decisions were appealed to US Circuit Courts. Due to a high volume of appeals, Congress established the Court of Customs Appeals in 1909 to hear all appeals from the Board of General Appraisers. In 1926 the Board was renamed as the US Customs Court and the board members became judges, and in 1930 they were transferred from Treasury to the Justice department. In 1980 the Congress changed the US Customs Court to the US Court of International Trade, and made them an Article III court with lifetime tenure of its nine judges and the requirement that no more than five be of the same political party.

Court of Appeals for the Federal Circuit

This Article III appeals court hears cases coming up from lower courts based on their subject matter, not their geographic location like the eleven numbered Circuit Courts of Appeals. It takes cases on appeal from the Court of International Trade, the Court of Federal Claims, the Court of Appeals for Veterans' Claims, and from the federal district courts in cases involving patent law.

Federal Court Jurisdiction over American Indians

Native American tribes have been responsible for keeping the peace, resolving disputes and dispensing justice on their territorial lands for centuries, and were doing so long before the United States ever existed. After the formation of the US government, there began to be clashes with tribal and US federal law. Following the case of *Ex Parte Crow Dog* (109 US 557 (1883)), the Department of the Interior set up the Court of Indian Offenses to handle minor crimes and to resolve disputes between tribal members. The Indian Reorganization Act of 1934 changed the policy and encouraged tribes to create (or restore from ancient times) their own systems of laws and courts. Most tribes lacked the financial ability to create and maintain their own courts.



**Saginaw Chippewa Indian
Tribal Court
Mt Pleasant, Michigan**

Subsequent laws have provided some of the funding needed to establish justice systems and today nearly 300 American Indian nations and Alaskan Native villages have established formal tribal court systems. Most tribal courts resemble US judicial systems and apply written laws and court rules in their practice.

In 1885, Congress passed the Major Crimes Act, which defines a set of crimes over which the federal courts have simultaneous jurisdiction along with tribal courts, when those crimes are

committed by Native Americans against Native Americans on Native American lands. In many cases, understanding the jurisdiction of who can prosecute someone in a given scenario can be a very complex task, even for attorneys. The factors at play are: was the perpetrator or victim a Native, or non-Native American? Did the crime occur in “Indian Country” or outside? Was the crime a “major crime” on the list in the Major Crimes Act? If both perpetrator and victim were American Indians, were they both of the same tribe that owns the territory on which the crime was committed, or were they of different tribes?

A good example of such confusion occurred in 1973 when a non-Native named Mark Oliphant was arrested and charged in tribal court for crimes alleged to have been committed on a Native American reservation. Oliphant applied for a *writ of habeas corpus* in US federal court, claiming the tribal court had no jurisdiction because he was not an American Indian. The US Supreme Court agreed with Oliphant in a landmark case (*Oliphant v. Suquamish Indian Tribe*) stating that American Indian tribal courts do not have inherent criminal jurisdiction to try and to punish non-Natives, and hence may not assume such jurisdiction unless specifically authorized to do so by Congress. Congress did, however, act to amend the Indian Civil Rights Act to affirm that tribes had criminal jurisdiction over Natives of other tribes who were arrested on the reservation convening the court. Congress also recently allowed Tribal Courts to handle cases where a non-Native commits domestic violence towards a Native American on the territory of a Native American tribe, through the passage of the Violence Against Women Reauthorization Act of 2013.¹²

The District of Columbia

Congress has power “To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States” (Constitution, Article I Section 8). This means Congress gets to decide, among other things, the court system for the District of Columbia.¹³



**1864 map of the
District of Columbia**

Congress first established a court system for the District in 1801, which included a federal circuit court and courts of local jurisdiction. In 1838 Congress established a criminal court to relieve the circuit court of criminal proceedings. During the Civil War in 1863, Congress eliminated all circuit and district courts for DC and established the DC Supreme Court with four justices. In

¹² Picture: <http://www.sagchip.org/user/login.aspx?returnURL=/tribalcourt/index.aspx>

¹³ Picture: <http://www.historicmapworks.com/Atlas/US/9720/Washington+D.C.+1864+Mitchell+Plate/>

1893, a Court of Appeals for DC was created to handle appeals from the DC Supreme Court. The Congress in 1934 designated the Court of Appeals as the US Court of Appeals for DC and in 1948 as the US Court of Appeals for the DC Circuit, with the same authority as other federal appeals court judges. In 1936 Congress changed the name of the DC Supreme Court to the District Court for DC and then in 1948 it became the US District Court for DC. The District of Columbia Court Reform and Criminal Procedure Act of 1970 established two courts, the Superior Court and the DC Court of Appeals, to hear cases of local jurisdiction.

Article IV Courts

Article IV Section 3 of the Constitution states: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States...” Originally, lands that were owned by the US were first designated as territories with a territorial government and court system. On the continental US, these were eventually formed into states. Later the US added a number of territories around the world, some of which became independent countries, like the Federated States of Micronesia, Palau, and the Marshall Islands. Currently the US holds 16 territories, 11 of which are small islands that are not permanently inhabited. The five with a permanent population are Puerto Rico, Guam, American Samoa, Northern Marianas and the US Virgin Islands.

The US has traditionally set up Article IV federal territorial courts whose jurisdiction includes civil and criminal matters. Although they are sometimes called US District Courts, they are NOT Article III US District Courts, which only exist in the 50 US states, Puerto Rico and the District of Columbia. They also assume the jurisdiction of a United States bankruptcy court in their respective territories but do not have separate bankruptcy courts within their purview.

The US Territorial Court for the Northern Mariana Islands was established by Congress in 1977. The Court regularly resides in Saipan but hears cases all over the Mariana Islands. Judges are appointed for ten-year terms. Appeals from this court are heard at the Ninth Circuit Court of Appeals. Guam has a United States territorial court that was established in 1950 and sits in the capital, Hagatna. Appeals from this court are heard at the US Court of Appeals for the Ninth Circuit.

The US Virgin Islands has a US territorial court that sits in both St. Croix and St. Thomas. Appeals of the court's decisions are taken to the US Third Circuit Court of Appeals. In 2004 the Territorial Court was renamed as the Superior Court of the Virgin Islands. The Supreme Court of the Virgin Islands was created in 2007 to exclusively hear appeals from the Superior Court in three-judge panels. Its decisions are subject to review by the United States Supreme Court, but only if that court decides to grant certiorari.

American Samoa does not have a federal territorial court, and issues of federal law are decided in the US District Court in Hawaii or the US District Court in DC. Prior to 1966, Puerto Rico had a federal territorial court. Congress established the Federal District Court of Puerto Rico as an Article III court with its members appointed to lifetime tenure. Review of these cases is to the US Court of Appeals for the First Circuit and then to the US Supreme Court.

Article I Courts

Under Article I Section 8 of the US Constitution, Congress retains the power to “constitute Tribunals inferior to the supreme Court” and it has indeed done so. Over the years several of these “Article I Courts” have been created, usually to address a specialized area of legal questions.

Tax Court

The US Tax Court was first created as the US Board of Tax Appeals in 1924. With the Revenue Act of 1942, Congress remade the Tax Board as the "Tax Court of the United States," and the board members became administrative judges. The Tax Reform Act of 1969 changed the Tax Court to a full judicial court. The US Supreme Court addressed the unique nature of this court in its 1991 decision *Freytag v. Commissioner*. They opined that the US Tax Court is an "Article I legislative court" that "exercises a portion of the judicial power of the United States." This "exclusively judicial role distinguishes it from other non-Article III tribunals that perform multiple functions..." The Tax Court is today composed of 19 judges appointed by the President and confirmed by the Senate. The Court also employs a number of “special trial judges” who are appointed by the chief judge of the US Tax Court and who serve as US magistrate judges hearing cases involving up to \$50,000. Either the petitioner (the taxpayer) or the respondent (the Commissioner of Internal Revenue) may appeal a decision of the Tax Court to the appropriate US Court of Appeals.

Bankruptcy Courts

Article I Section 8 of the Constitution says Congress has the power “To establish ...uniform laws on the subject of bankruptcies throughout the United States.” In 1800 Congress enacted legislation authorizing judges of the district courts to appoint commissioners who would oversee the discharge of debts in bankruptcy. Congress in 1841 gave the courts the mandate to formulate rules for bankruptcy proceedings and granted them “jurisdiction in all matters and proceedings in bankruptcy.” The 1898 bankruptcy act established the position of “referee,” which was to be appointed by district judges to have the purpose of overseeing the administration of bankruptcy. Later federal legislation expanded the judicial power of these referees. The Bankruptcy Reform Act of 1978 gave exclusive original bankruptcy jurisdiction to the district courts and established a bankruptcy court in each judicial district to manage bankruptcy cases. These new courts were

to be considered adjuncts of the district courts but would be presided over by bankruptcy judges appointed by the president and confirmed by the Senate for fourteen-year terms.

After the Supreme Court held that it was unconstitutional to grant bankruptcy jurisdiction to courts of judges who did not have life tenure or other Article III protections (*Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 US 50 (1982)), the Bankruptcy Amendments and Federal Judgeship Act of 1984 conferred bankruptcy jurisdiction on the district courts and authorized the district courts to refer any or all matters falling within that jurisdiction to the bankruptcy judges for the district. It also provided that bankruptcy judges would be appointed by the courts of appeals to fourteen-year terms. Today all bankruptcy cases are referred to an Article I bankruptcy court to decide most of the issues. If one of the parties does not consent to the decision, the bankruptcy court will submit proposed findings of fact and conclusions of law to the district court who enters the final order. That decision is reviewed by the US Court of Appeals or bankruptcy appellate panels.

Court of Federal Claims

Under the Constitution, the US federal government was provided broad powers but there was no provision for a remedy for those who were wronged in some way by an action of the federal government (e.g. a taking of property, breach of contract, etc.). The only recourse was to implore Congress for a private bill of relief. Many were filed and few were dealt with and by the 1850s over 20,000 such bills were pending. In response the Congress created the Court of Claims in 1855 to deal with the private claims. The Tucker Act of 1887 created a panel of five judges with lifetime tenure to hear claims for money against the US, with the exception of tort claims¹⁴. At that time tort claims were within the discretion of the Congress and they remained that way until 1947 when Congress waived sovereign immunity for torts and gave jurisdiction to Article III courts.

In 1948 Congress changed the court's name to the US Court of Claims, and in 1953 Congress officially declared the Court of Claims "to be a court established under Article III of the Constitution of the United States." The Federal Courts Improvement Act of 1982 abolished the original Court of Claims and created the "United States Court of Federal Claims" as an Article I court. There are sixteen judges appointed to fifteen-year terms. This court hears money claims against the federal government based on the Constitution, statute, executive department regulations, or government contracts. Typical cases might involve disputes concerning tax refunds, federal contracts, federal takings of private property, or government employees' pay.

¹⁴ "Tort" claims are lawsuits for damages caused by someone's neglect or misbehavior.

Court of Appeals for Veterans' Claims

From the Revolutionary War forward the US has had military veterans who have petitioned for pensions, benefits, back pay and medical relief. The first federal Veterans Home was opened in 1834. Following the Civil war a large number of Veterans Homes was set up to help the inordinate number of indigent, sick and wounded veterans. In 1917 as the US entered World War I, Congress established a new system of veterans benefits that included disability compensation, insurance and vocational rehabilitation. Administration of all veterans' benefits was consolidated in 1930 into the newly formed Veterans Administration. The large number of veterans created after WWII prompted the passage of the GI Bill in 1944, but the administration of benefits and care was wholly decided by an executive department with no recourse for appeal. The Board of Veterans Appeals decided benefits claims and their decisions were not judicially reviewable. The Department of Veterans Affairs Act of 1988 changed the Veterans Administration into the Department of Veterans Affairs, with a cabinet-level secretary and the creation of new statutes and regulations, including the provision for a new Court of Veterans Claims. In 1999 the court was renamed the US Court of Appeals for Veterans Claims. The judges are Article I judges and appeals of their decisions are heard by the US Court of Appeals for the Federal Circuit.

Administrative Law Judges

An important aspect of the federal judicial system to understand is the concept of an administrative law judge (ALJ). In American administrative law, ALJs are Article I judges under the U.S. Constitution. As such, they do not exercise full judicial power, that is, the power over life, liberty, and property. Article I judges are, however, triers of fact who both preside over trials and adjudicate the claims or disputes involving administrative law. ALJs can administer oaths, take testimony, rule on questions of evidence, and make factual and legal determinations for the Social Security Administration, Board of Veterans Appeals, Federal Energy Regulatory Commission, etc. ALJs are generally considered to be part of the executive branch, not the judicial branch, but the Administrative Procedure Act (APA) is designed to guarantee the decisional independence of ALJs. Federal administrative law judges are not responsible to, or subject to, the supervision or direction of employees or agents of the federal agency engaged in the performance of investigative or prosecution functions for the agency. Agency officials may not interfere with their decision making, and administrative law judges may be discharged only for good cause based upon a complaint filed by the agency with the Merit Systems Protection Board established and determined after an APA hearing on the record before an MSPB ALJ.

Military Tribunals

In addition to military courts martial (see below under Article II) Congress may also set up military tribunals. These can be Article I courts to review agency decisions, military decisions, or even to try civilians. Military commissions are a form of military tribunal convened to try

individuals for unlawful conduct associated with war. Military tribunals were convened during the American Revolution, and the term “military commission” first became common during the Mexican-American War. With the Military Commissions Act of 2009, today we are trying prisoners held at Guantanamo Bay for various crimes against the US and/or its citizens.

Article II Courts

Article II of the Constitution deals with the office and power of the President. There are a few court systems that might be called “Article II” courts, because they are organized under the authority of the Executive Branch of government.

The Uniform Code of Military Justice and Courts of Military Review

As Commander in Chief of the military, the President is responsible for overseeing that important part of the federal government. Courts that try cases involving military service members on duty are sometimes called “Article II” courts, because they are part of the military chain of command leading ultimately all the way up to the President.

Since the inception of the military there has been the need to maintain good order and discipline within the ranks by means of a military justice system. Commanders have been empowered to sit in judgment of those accused of wrongdoing and meting out punishments since the Revolutionary War. Until the 20th century, this included whipping, imprisonment on bread and water, and even summary execution.

American military justice was completely transformed by the creation of the Uniform Code of Military Justice (UCMJ) in 1948. The UCMJ set forth the specific elements of what constituted a crime, specified maximum punishments, allowed for legal representation, and created a route of judicial appeal with a newly created court structure. The latter included individual courts of military review for each branch and a civilian Court of Military Appeals as the final arbiter. The Air Force, Army, Navy-Marine Corps and Coast Guard each set up a Court of Military Review that was staffed with military personnel from the respective branch. If a court martial produced a sentence that included a punitive dismissal from the service or confinement for one year or more, the case was automatically reviewed by the service court of military review. After review, the cases can be appealed to the Court of Military Review, a three-judge panel of civilians who only review these cases. Appeal from the Court of Military Review is to the US Supreme Court upon certiorari. In 1989 the Court was expanded to five judges and in 1994 the names of the review courts were changed: the military courts of military review became the courts of criminal appeals, and the court of military appeals became the US Court of Appeals for the Armed Forces.

Court Martials themselves are criminal trials that fall under the power of the President's authority as Commander in Chief of the Militia provided by Article II Section 2. The US Court of Appeals for the Armed Forces, however, is an Article I court.

The 2014 National Defense Authorization Act (NDAA) contains reforms aimed at preventing and reducing sexual assault in the military. Specifically, it eliminates commanders' (convening authorities) ability to modify sentences for serious offenses by overturning a guilty verdict or reducing the finding of guilty to that of a lesser included offense; and, the Article 32 (preliminary hearing) is limited to the following objectives: a determination of probable cause and jurisdiction, a consideration of the form of charges, and a recommendation regarding the disposition of the case. The accused is still allowed to submit evidence and cross-examine witnesses, but the victim does not have to testify. If the victim does elect to testify, the cross-examination is restricted to the limited purpose of the hearing.

Immigration Courts

The US immigration court system is administered under the Executive Office for Immigration Review (EOIR) which is part of the Department of Justice, headed by the Attorney General, who reports to the President. Once the Department of Homeland Security charges someone with a violation of US immigration law, the EOIR decides if they should be permitted to remain in the US or deported. An illegal alien appearing before the Immigration Court may make the claim that he has a valid reason to stay in the United States and should be granted a visa to have his status changed into a legal status. For example, he may claim that he is fleeing persecution in his home country and should be treated as a refugee. Immigration Courts hear these cases and adjudicate these claims.

There are more than 235 immigration judges conducting these administrative court proceedings in 58 immigration courts nationwide. The EOIR decisions are appealed to the Board of Immigration Appeals (BIA), which also reports to the Attorney General. Appeals from the BIA go to the Circuit Court of Appeals for the region in which the case originated.

The impact of immigration cases on the federal court system is huge. In 2007, more than 35% of all the cases in the 9th Circuit Court of Appeals were immigration appeals. In the 2nd Circuit the same year, it was 39% of the caseload.¹⁵

¹⁵ M. Margaret McKeown and Allegra McLeod, 2009. Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform, p. 288

6. The Status Quo of Federal Courts

This chapter was contributed by Robert A. Parks.



Resolved: That the United States Federal Court system should be significantly reformed.

There are a large number of aspects of the US Federal Court System that lend themselves to reform. While there are a number of courts that can be positively changed, we would urge you to expand your vision to include the many aspects of the court system and how it operates.

Grand Jury Reform

Once an individual is arrested for a federal crime, particularly a felony, that arrest is almost automatically going to yield an indictment at grand jury. The requirement of a grand jury indictment before a trial is required for federal crimes by the Fifth Amendment, and was originally intended as a safeguard for the citizen against the government. But today, its protective

effect has been eroded. Although originally designed to be a check on the government's power to indiscriminately charge individuals without evidence, today's grand jury is clearly a prosecutorial tool. The Grand Jury process itself is secret, there are few rules, there are no rights for the accused to testify or present evidence or question the prosecution's evidence. In fact, the evidence need not be admissible in a later court of law to be considered in a Grand Jury. Little wonder that virtually every case taken to the Grand Jury returns a true bill to indict. This leads to...

Plea Bargaining Reform

Prosecutors, particularly when facing the defendant with a Grand Jury indictment in hand, will apply a great deal of pressure to motivate the defendant to resolve the matter by plea bargaining. Defendants may be frightened by federal mandatory minimum sentencing rules and by zealous, some say "overcharging," prosecution that lists every possible thing the prosecutor can think of with which to charge the defendant, whether it could be proven in court or not. By entering a guilty plea in exchange for a reduced sentence and/or the dropping of some charges, the defendant gets a guarantee of a shorter sentence, but gives up the right to a trial, where he might have been acquitted and gotten no sentence at all. Most defendants, including some innocent ones, cannot afford to roll the dice on the outcome of a trial, given the harsh results if they lose.

Not only does virtually every case going to the Grand Jury get indicted, but 96% of all federal criminal cases feature some type of guilty plea. The concept is simple: an accused agrees to give up virtually every right they have at trial in exchange for something they feel provides them with a benefit. The government saves substantial dollars in court and trial costs, may get a second conviction by forcing one accused to testify against the other and gets a guaranteed conviction, since there's no jury that might vote an acquittal.

The idea that this is an equitable exchange, however, is totally erroneous. The government typically holds all of the cards in a guilty plea offer. They can dictate terms and apply pressure to get the accused to accede to their demands.¹⁶ Typically the accused pleads guilty to secure an improved situation at trial like having certain charges dropped (which could have been specious or overcharged by the government in the first place), a specific sentencing recommendation from the prosecution which is virtually always followed by the judge (or to have a sentencing

¹⁶ Oren Bar-Gill *Professor of Law and Co-Director for Law, Economics, and Organization at the New York University School of Law+ and Omri Ben-Shahar *Professor of Law, University of Chicago Law School+. "The Prisoners' (Plea Bargain) Dilemma." Regulation. Spring 2010. p. 42.

<https://www.google.fr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCEQFjAAahUKewjthveOrNHGAhV CORQKHcv6DcQ&url=http%3A%2F%2Fwww.cato.org%2Fregulation%2Fspring-2010%2Fprisoners-plea-bargain-dilemma&ei=PyOgVa3rNsLyUMvlt6AM&usg=AFQjCNHtH93ooApZHoVEAhJdf77ozZ3INA&sig2=ePvP7Ee0zgyQVIHe7F0Hlg&bvm=bv.97653015,d.d24>

multiplier dropped from the proceeding) or it could be a deal to not seize the family home and cars in civil forfeiture.

The ultimate result of the system, however, is that there are a certain number of people who are intimidated into pleading guilty when they have done nothing wrong. It simply looks bad enough that they cannot risk a really high sentence so they plead guilty (commit perjury) and take their chances on appeal. The other key to understanding this is that for some it is setting them up to fail: “Many of these people are poor. They're destitute. They have no money at all, and yet they're going to be told to pay a fine. They're going to be told to pay a fee to a probation officer every month—I mean, all sorts of consequences that are going to flow. And perhaps the one that's least understood is that the failure to meet these payments and meet the conditions of probation is going to bring that person right back into court, and they're going to face probably more time in prison than they did originally because now they're going to be punished for violating their probation.”¹⁷ Probation is certainly not the same as being acquitted. It allows the government to force specific behavior on an individual to include who they can talk to, where they can work, mandatory drug testing, payment of fees and fines and if they have a single violation they can end up going to prison and serving a lengthy term. Remarkable as it may seem, changing the circumstances under which a plea can be done, limiting the terms that can be used or banning them altogether may be alternatives which lead to better justice for our criminal justice system.

Immigration Court Reform

One of the leading topics for political candidates these days is immigration reform. This is also a key topic for discussion under the federal court system. The US immigration court system is administered under the Executive Office for Immigration Review (EOIR) which is part of the Department of Justice. Some critics charge that there is little justice in a system where those sitting in judgment are employed by the same people who are charging them with violating immigration law in the first place. A more independent judiciary would potentially lead to greater acceptance from the immigrant community. The other aspect of this topic that is undebatable is the huge backlog of over 445,000 cases in the immigration court system. There are only 235 immigration judges conducting these administrative court proceedings in 58 immigration courts nationwide. The case can be made for a substantial increase in the number of immigration courts or immigration judges in the US federal court system, as well as various reforms of Immigration Court proceedings. Many of the rules that apply in Article III courts (like the right to a government-supplied attorney in criminal cases) do not apply in Immigration Court.

¹⁷ Stephen Bright, Professor of Law at Harvard and Yale; Director of the Southern Center for Human Rights in Atlanta. “The Plea”. Frontline. June 17, 2004. <http://www.pbs.org/wgbh/pages/frontline/shows/plea/etc/script.html>.

Tax Court Reform

The Tax Court is composed of 19 judges appointed by the President and confirmed by the Senate. Either the petitioner (the taxpayer) or the respondent (the Commissioner of Internal Revenue) may appeal a decision of the Tax Court to the appropriate US Court of Appeals. Although we have a number of federal courts that are designed to handle specific types of law, taxation is not one of them. We currently funnel all our tax appeals into an already overburdened Appeals Circuit Court system, where they inevitably generate disparate results that must be reconciled by the Supreme Court. In the past, some lawmakers have proposed the establishment of a United States Court of Tax Appeals to have exclusive review jurisdiction in civil tax matters. Jurisdiction of these cases could be removed from the other courts of appeals, and trial jurisdiction from the Court of Claims in tax matters. Thus, the United States Tax Court and the district courts would continue to share original jurisdiction of civil tax cases at the trial level, but with a single reviewing court, there would no longer be the possibility of a conflict in decisions at the appellate level. And it would provide a panel of judges with expertise in the arcane specialties of tax law who possibly could render better decisions than the Circuit Court judges who, though generally well-qualified, are not experts in tax matters.

Bankruptcy Court Reform

Another perceived loophole in the federal system has to do with bankruptcy laws. Congress has provided that bankruptcy is under the exclusive jurisdiction of the federal courts, specifically the bankruptcy courts and in turn, the federal district courts. Federal law provides, however, that where a bankruptcy case is tried can be determined by several factors, including the place of incorporation, where the assets are located, where the company is headquartered, etc. There is also evidence to suggest that this provides an opportunity for companies to “forum-shop” their bankruptcy filing to get into a more favorable court. This could lead to some unjust outcomes that might be fertile grounds for reform.

Article IV Court Reform

In 1966 Congress made the decision to convert one territorial court from Article IV to Article III status: Puerto Rico. The basis for this decision was stated at the time to be fairness for the citizens of the local community to have the benefit of independent, life-tenured judges just as they would in a federal district court in the US. This begs an interesting question: why are the citizens of the other permanently inhabited US territories not entitled to the same federal court status as Puerto Rico? A case can be made for the need to provide Article III courts to ensure fairness for the citizens of the US Virgin Islands, Guam, the Northern Mariana Islands and Guam as well.

FISA Court Reform

The Foreign Intelligence Surveillance Court (FISC) is made up of eleven members, drawn from at least seven different districts and at least three must be within twenty miles of Washington, DC. These judges come to DC on a rotating basis to hear proposals for federal warrants which must certify that the surveillance target is either a “foreign power,” an “agent of a foreign power,” or if a US citizen or resident alien they must be involved in the commission of a crime. There are a number of criticisms of the court, namely the lack of an advocate for those people the warrants are proposed to surveil, the lack of any kind of appellate procedure, and the exceedingly high percentage of times that warrants are issued. All of these are possible areas of reform, and it should also be considered whether the court itself should be abolished and let the question of granting warrants return to the mainstream federal court system for review.

Supreme Court Reform

The US federal court system has a feature that has spawned a great deal of discussion: life tenure for its Supreme Court justices. The average stay on the Supreme Court has more than tripled since the court’s inception. Judges in recent years have stayed on the court for decades, leading some to question whether decreased mental capacity, loss of physical stamina, an increased political jockeying and acrimonious confirmation spectacles may be good reasons to institute term limits. The advent of term limits could very well lead to presidents selecting the most qualified candidate instead of the one who might live the longest with a similar political ideology.

Other proposals for reform include requiring the Supreme Court to adopt and abide by a code of ethics, installing video cameras in the chamber for real-time viewing of cases, and changing the way new Justices are chosen, to replace the often contentious and vacuous Senate confirmation process.

Justice for American Indians

The clash between Native Americans and Anglo-American government has been simmering ever since the days the colonists first arrived. Currently the federal court system purports to recognize tribal sovereignty, but for many, the reality is that the federal courts have eroded the tribal position significantly. The landmark decision of *Oliphant v. Susquamish Tribe* in 1978 excluding non-Native Americans from the jurisdiction of tribal courts was just one of many federal court decisions that limited the American Indians’ ability to effectively govern on a reservation and contributes to their animosity toward a system that is perceived as unfair. There are a number of ways this issue can be addressed: reverse *Oliphant*, present new sovereignty rules for tribal courts, or provide support for a more robust tribal court system.

Summary

We haven't even touched on ideas about reforming military courts martial, the use of military tribunals, or reform of some of the other courts we mentioned above in the historical chapter. This topic is rich in subject matter for Affirmative cases, and there is plenty of literature that will support the good researching debater who takes the time to prepare his case well.

The keys to success, for both Affirmative and Negative debaters, will be research of specific topics combined with background reading on all the different types of courts and how they operate. This will give you the knowledge you need to be able to discuss these difficult subjects intelligently in the only "court" we hope you ever have to appear in: the one where the judge signs a debate ballot.