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VOLUME 4 NUMBER 2

## How U.S. Courts Work

THE SEPARATION of powers and the checks and balances in the U.S. Constitution among the executive, legislative and judiciary is one of the most cherished hallmarks of American democracy. It guarantees not only the independence of the judiciary, but also its formidable power. The idea dates back to ancient Greece, and was articulated in modern times by British philosopher John Locke and French philosopher Baron de Montesquieu.

But it was the Founding Fathers in writing the U.S. Constitution, and James Madison in particular, who gave these ideas living expression in the new republican form of government they established after independence was won. The independence of the judiciary is enshrined in Article III of the Constitution and is given further expression in the Bill of Rights, the first 10 Amendments that were subsequently added.

This journal focuses not so much on judicial independence nor, more broadly, on the role of the judiciary in the U.S. system of government. Rather, it is a guide to how the U.S. court system works in practice — the system's

players, its structure, its functions and its ethical safeguards. But it is important to understand that the U.S. courts exist in an overall constitutional framework that guarantees their independence.

Presidents, for example, may appoint federal judges, but they cannot remove them. That power, seldom used, is the preserve of Congress. Judges for their part can overturn presidential or congressional actions, declaring them unconstitutional — a feature of the U.S. system that foreign observers often find astonishing. But this power of judicial review is not absolute, for the laws can be rewritten and the Constitution can, if necessary, be amended.

The mechanics of the U.S. court system are covered in an article by Professor Toni M. Fine, associate director of the Global Law School Program at New York University School of Law. She discusses the distinction between the federal and state courts, the role of administrative courts, and the all-important appeals process which can filter through special appeals courts at a number of different levels, and may some-

times go all the way to the Supreme Court of the United States which, in the U.S. system, has the final say on judicial and Constitutional matters.

The U.S. system of justice essentially is an adversary process. It is based on the belief that truth is more likely to emerge when both sides — defense and prosecution — are able to present their case aggressively to a jury under impartial rules of evidence before a disinterested judge. These are clear and distinct roles that are explored in a series of interviews with an assistant U.S. attorney (prosecutor), a public defender, an attorney and a judge, conducted by contributing editors Stuart Gorin and Bruce Carey.

There are two, very distinct forms of trials in the American system — civil and criminal. The rules for each, the responsibilities of the court, and the rights of defendants differ considerably. E. Osborne Ayscue, Jr., a civil trial attorney and current president of the American College of Trial Lawyers, explores these differences in his portrayal of the course of a civil and a criminal trial. To illustrate his points, he gives examples of some high-profile cases, well-known to worldwide audiences.

A key component of the U.S. judicial system is the notion of common law or judge-made law (written and unwritten), as contrasted with civil law, which largely is composed of written codes. Judge Peter J. Messitte, U.S. District Court (Maryland) explains the tradition of common law as it was inherited by the new American government from Britain, the colonial power.

No court system can function justly or effectively without built-in safeguards to

ensure, as far as possible, the highest ethical standards for judges, attorneys and others involved in the process. Their fair-mindedness, professionalism, and integrity are absolutely essential to public confidence and support. In a telepress conference to judges in Slovenia, U.S. Supreme Court Justice Anthony Kennedy explores the issue of how ethical standards can be established and maintained to ensure the neutrality of the rule of law.

From the inception of the Republic, the role of courts in the U.S. has been not just to prosecute crimes, but to affirm rights enshrined in the Constitution. In an article on *Brown v. Board of Education*, contributing editor David Pitts traces the history of one of the most important decisions in the history of U.S. constitutional law. It tells the story of how a small group of citizens went to court to overturn a state law they saw as unjust. Their concerns led to a Supreme Court ruling that overturned that state law and similar laws in 24 other states.

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# How the U.S. Court System Functions

By Toni M. Fine

The U.S. Constitution establishes a system of federalism under which the federal government is granted limited authority, with all remaining authority left to the states. This model of shared powers defines the relationship between the federal and state courts. In this overview of the various levels of the U.S. courts, Toni M. Fine, associate director of the Global Law School Program at New York University Law School, explains how the court system functions.

IT IS SOMETHING of a myth to speak about a single U.S. court system because the U.S. judicial system is in reality composed of multiple autonomous courts. There is the federal court system, an integrated system divided into numerous geographic units and various levels of hierarchy; in addition, each state has its own court system with a system of local courts that operate within the state. Under this dual federal/state court structure, the U.S. Supreme Court is the final arbiter of federal law, while the highest court of each state (usually called supreme courts) has the ultimate authority to interpret matters of the law of its state. When federal constitutional or statutory matters are involved, the federal courts have the power to decide whether the state law violates federal law.

The functioning of these systems is complicated by the fact that there are multiple sources of law, and courts of one system are often called upon to interpret and apply the



Toni M. Fine

laws of another jurisdiction. In addition, more than one court may have sovereignty to hear a particular case.

The federal judiciary and the individual state judicial systems are each constructed like a pyramid. Entry-level courts at both the state and federal levels are trial courts, in which witnesses are called, other evidence is presented and the “fact-finder” (a jury and/or sometimes a judge) is called upon to decide issues of fact based on the law.

At the top of each pyramid structure is the “court of last resort” (at the federal level, the U.S. Supreme Court; at the state level, the state supreme court) which has the authority to interpret the law of that jurisdiction. In most states and in the federal system there is also a mid-level court of appeals.

The vast majority of courts at both the state and federal levels are “courts of general jurisdiction,” meaning that they have authority to decide cases of many different types. There are

no special constitutional courts in the U.S. — any court has the power to declare a law or action of a government executive to be unconstitutional, subject to review by a higher-level court.

## The Federal Courts

Traditional federal courts are known as *Article III Courts* because they have the power of judicial review and certain protections under Article III of the U.S. Constitution. These courts are organized in a three-tiered hierarchical structure and along geographic divisions. At the lowest level are the *U.S. District Courts*, which are the trial courts. Appeals from the U.S. District Courts are taken to the *U.S. Courts of Appeals*, often referred to as *U.S. Circuit Courts*. From there, cases may be brought to the *U.S. Supreme Court*. Much of the Supreme Court’s review power is discretionary, and only a small percentage of cases brought to it are actually ruled on by the Court.

The U.S. District Courts are entry-level courts of general jurisdiction, meaning they hear cases involving various criminal and civil matters. There are 94 U.S. federal judicial districts, with at least one district court in each state. In the largest and most heavily populated states, there are several districts, but districts do not cross state lines. The number of judges depends on the size and population — and hence workload — of each district court. Although each district court has numerous judges, a single judge presides over each case.

The U.S. Courts of Appeals is the intermediate-level federal court. The courts of appeals are considered the workhorse of the federal court system because the brunt of cases are

resolved there. Appeals are taken from U.S. district courts to the U.S. courts of appeals if a losing party feels that the judge in the district court made an error of law. Appeals may not be taken to correct perceived errors of fact, unless there is a clear error of law. Thus, for example, a losing party may argue that the judge erred by admitting a certain document into evidence; but the losing party may not argue that the judge or jury reached a bad conclusion based only on that document.

The U.S. Courts of Appeals are divided geographically into 12 circuits — 11 numbered circuits, each covering at least three states, and the *U.S. Court of Appeals for the District of Columbia (D.C. Circuit)*, which also hears cases involving the federal government. Each circuit hears appeals from the district courts within its territory.

The number of judges in each circuit varies widely and is determined by the population and size of each circuit. A panel of three judges — chosen at random — sits on each case, and different combinations of judges sit on different cases.

The U.S. Courts of Appeals may decide cases on the basis of written briefs submitted by the litigants or may order oral argument. A decision is based on written opinion drafted by one of the judges and circulated to the other two panel members. The opinion of the court also must be signed by at least two panel members. Any of the judges on the panel may write a concurring opinion in which the judge agrees with the result reached in the majority opinion but for different or additional reasons. A judge that disagrees with the opinion of the court may instead write a dissenting opinion explaining

why he or she has reached a different conclusion. Although dissenting and concurring opinions do not have the force of law, they may be highly influential in subsequent court decisions.

After the three-judge panel has rendered a decision, litigants have several options: they may seek “reconsideration” of the decision by the same three-judge panel; they may seek “rehearing” of the panel’s decision by all of the judges of that circuit sitting together; or they may seek review by the U.S. Supreme Court by filing a motion for a *writ of certiorari* (when the lower courts have ruled on the case and disagreed on their opinions). Each of these measures of relief is discretionary, however, and is rarely granted.

The U.S. Supreme Court is at the apex of the federal court system and consists of nine justices who hear and decide cases. As in the U.S. Courts of Appeals, justices may join the majority opinion or may write or join a concurring or dissenting one.

The Supreme Court’s general jurisdiction is largely discretionary through the process of *certiorari*. Under the so-called “rule of four,” if four of the nine justices favor hearing a case then *certiorari* will be granted. The Court often accepts cases in which there is a split of authority among different U.S. circuit courts or in which important constitutional or other legal principles are implicated. The denial of *certiorari* does not imply agreement with the lower courts’ decisions, but simply indicates that the requisite number of justices for whatever reason did not want to hear the case.

Besides a *writ of certiorari*, the Supreme Court can review cases on appeal from federal

courts or state supreme courts whose decisions are based on an issue of federal law (for example, when a federal appeals court invalidates a state statute; or when a state court strikes down a federal statute). The Court also may decide specific legal issues referred to it by lower federal courts.

The Supreme Court also has “original jurisdiction” over certain limited cases: controversies between two states; controversies between the United States and an individual state; actions by a state against a citizen of another state or an alien; and cases brought by or against a foreign ambassador or consul.

### Special Courts

In general, the federal court system does not create special courts for specific matters. Two notable exceptions to this rule are the *U.S. Court of Federal Claims* which handles monetary suits brought against the United States, and the *U.S. Court of International Trade*, which is authorized to hear and decide civil actions against the United States, federal agencies or their employees, arising out of any law pertaining to international trade.

There is also one specialized federal appeals court — the *U.S. Court of Appeals for the Federal Circuit*. This court has jurisdiction over appeals from all district courts in cases arising under patent laws as well as over appeals from the U.S. Court of Federal Claims and the U.S. Court of International Trade.

The federal system also embraces a number of courts known as legislative or *Article I Courts*, referring to Article I of the U.S. Constitution. Article I courts act pursuant to

Congress’ legislative powers and have the authority to decide factual questions relating to specific matters. Examples of Article I courts include the *U.S. Court of Appeals for the Armed Forces*, the *U.S. Court of Veterans Appeals*, the *U.S. Tax Court* and the *U.S. Bankruptcy Courts*. Appeals from these courts may be brought to the U.S. Courts of Appeals.

### Administrative Courts

Federal agencies play an enormous role in developing and carrying out U.S. laws on a wide array of topics, from the regulation of natural resources to the health and safety of workers. Often, this means that an agency will sit as a fact-finding tribunal in applying federal regulations. When disagreements occur, the parties present their evidence to an administrative law judge (ALJ), who acts as the fact-finder. Either party may appeal the judge’s decision, usually to a board or commission established by the federal agency that issued the regulations. Because the ALJ has already served the fact-finding function that would normally be undertaken by a federal district court, appeals from rulings of major agencies (e.g., National Labor Relations Board or the Federal Trade Commission) are brought directly before the U.S. Courts of Appeals. Although such appeals may be brought in any circuit, as a practical matter the D.C. Circuit hears most appeals from federal agencies.

### The State Courts

Each state, as well as the District of Columbia and the Commonwealth of Puerto Rico, has its own independent judicial system

that operates independently. The highest court in each state is the ultimate authority on what the law is with regard to state law, from the state's point of view.

The structure of state courts, like that of the federal courts, is in the form of a pyramid. Most states have a three-tiered judicial system composed of a *trial-court* level (sometimes called *superior courts*, *district courts* or *circuit courts*), an *appellate court* (often called the *court of appeals*) and a *court of last resort* (usually called the *supreme court*). Some states simply have one level of appeal.

As in the federal court system, trials are presided over by a single judge (often sitting with a jury); entry-level appellate cases are heard by a three-judge panel; and in state supreme courts, cases are heard by all members of the court, which usually number seven or nine justices.

Also like the federal system, state court cases begin at the trial-court level. These courts are often divided into two levels: *courts of general jurisdiction* and *specialized courts*.

Cases decided by a trial court are subject to appeal to and review by an appellate court. In some states, as noted above, there is only one level of appeal from the lowest state court. In states in which there are two courts of appeals, rules differ as to whether a case will automatically go to the appeals court or the state supreme court. In some states, appeals from the trial court are brought to the mid-level state appellate court, with subsequent discretionary review by the state supreme court. In other states, litigants bring appeals from the trial-level court directly to the supreme court, which decides whether to hear the case itself or to have the appeal resolved by the intermediate

appeals court. Under either of these scenarios, the state supreme court generally reviews cases that involve significant matters of state law or policy.

Specialized state courts are trial-level courts of limited jurisdiction that only hear cases that deal with specific kinds of legal issues or disputes. Although these courts vary from state to state, many states have specialized courts for traffic matters, family law matters, probate for the administration of decedents' estates, and small claims (for cases involving less than a specific sum of money). Rulings of these specialized courts are subject to appeal and review by state courts of general jurisdiction.

## Local Courts

Each of the 50 states is divided into localities or municipalities called cities, counties, towns or villages. Local governments, like their state counterparts, have their own court systems, which are presided over by local "magistrates," who are public civil officers possessing judicial power delegated under the local governing laws. This may include the power to rule on laws relating to zoning authority, the collection and expenditure of local taxes, or the establishment and operation of public schools.

## Conclusion

One of the elements of the U.S. legal system that makes it at once so complex and so interesting is the fact that both the federal government and each state has its own judicial system. Each judicial system is marked by differences in function and operation. Moreover, the fact that there is overlapping jurisdiction and

that any court may hear issues of federal and state law complicates the functioning of these systems further.

At bottom, all court systems in the United States are similar in most fundamental respects. U.S. courts are, for the most part, courts of general jurisdiction. In addition, each system is in the hierarchical form of a pyramidal structure, allowing review and — if necessary — revision by upper-level courts.

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## Players in the Judicial Process

By Stuart Gorin and Bruce Carey

Besides the defendant in a trial, there are other players who bring their own unique perspectives to the process. In separate interviews, contributing editors Stuart Gorin and Bruce Carey talk with Assistant U.S. Attorney Rosa Rodriguez Mera, Southern District of Florida, on the role of the prosecutor; Martin Sabelli, a public defender in San Francisco discusses the fairly new civil right in the U.S. of the right to counsel in a criminal trial; Steve Mayo, a San Francisco attorney who serves as the director of the Institute for the Study of Legal Systems, comments on the process for jury selection; and Judge Laura Safer Espinoza, a New York state judge, explains the mechanics of the courtroom.

### The Prosecutor

FEDERAL PROSECUTORS divide their cases into two major categories — reactive and proactive — says Assistant U.S. Attorney Rosa Rodriguez Mera, whose responsibilities include prosecuting narcotics cases in south Florida.

“Reactive cases are instantaneous: for example, a crime that has been committed at the airport involving drugs,” Rodriguez Mera says. In proactive cases, which can be time-consuming, there is a lot of investigative work that is done before a person is arrested. These types of cases usually are pursued in cooperation with such federal agencies as the Drug Enforcement Administration, the Federal Bureau of Investigation and the U.S. Customs Service, Rodriguez Mera adds. When prosecutors interview law enforcement witnesses, she notes, the agents have to explain such things as how they carried out surveillance. Tapes and transcripts also are reviewed with informant witnesses who will be testifying in the case.



Assistant U.S. Attorney Rosa Rodriguez Mera

In either event, says Rodriguez Mera, “it is the role of the U.S. Attorney’s office to prosecute violations of federal law.”

Once a crime has been committed and a suspect is in custody, the agent notifies the on-duty prosecutor, who determines what evidence there is for an arrest. Such questions as “Where were the drugs?” and “How do we know the defendant knew there were drugs in the suitcase?” are asked of the arresting agents. The prosecutor then contacts the magistrate judge on duty, who authorizes the arrest warrant and decides how much bond will be set for a defendant.

The defendant makes an initial appearance before the magistrate within 48 hours. At that hearing, an attorney is appointed to the defendant if he or she needs one; the defendant is informed of the charges and bond is set. Rodriguez Mera says that if a large amount of drugs is involved or there is a risk of flight or a

danger to the community, then the government will request the suspect be held without bond. Otherwise, the judge can set bond in the case and free the defendant pending trial.

After the defendant has been indicted, if he or she decides to plead “not guilty,” a number of steps can delay the start of a trial, including motions by the defense to suppress evidence — which the judge rules upon — and “discovery” — when the prosecutor turns over copies of statements, lab reports, tapes or other evidence to the defense counsel.

Rodriguez Mera says on a case-by-case basis within set guidelines there is a small amount of discretion for “plea bargaining.” In return for a guilty plea, for example, the government can ask for a lesser amount of prison time for a defendant if the defendant renders “substantial assistance in a case, such as cooperating against a co-defendant,” she adds. As an example, she cites a case involving 10 kilos of cocaine, which carries a mandatory 10-year prison sentence. Rodriguez Mera says that if the defense provides substantial assistance, the government could file a motion requesting that the sentence be reduced, but she also points out that the judge does not have to accept the recommendation.

### The Public Defender

The right to counsel in a criminal trial “is a relatively new civil right in the United States,” says public defender Martin Sabelli, an attorney whose job it is to defend persons accused of federal crimes.

“At least at the state level,” Sabelli continues, “in the long list of rights that the courts



Public Defender Martin Sabelli

have inferred from the Constitution and have added to those originally written by the framers, this one can be traced only to the 1960s and has taken much of the past 30 years to develop effectively.”

The right to counsel stems from the 1963 case of Clarence Gideon, a poor, uneducated man in Florida, who was accused of a minor crime. Gideon appeared in court without money or counsel and asked the court to appoint him a lawyer. But the judge refused because Florida law allowed court-appointed counsel only in cases that could carry the death penalty. Gideon was convicted and sentenced to prison but appealed his case through the Florida state court system and eventually to the U.S. Supreme Court.

“That alone is a magnificent thing,” Sabelli says. “For a poor man with little schooling to have the right to petition the courts all the way to the Supreme Court for an injustice he

suffered tells much about the vital importance of protecting individual liberty in our system of law.”

In Gideon’s case, the Supreme Court ruled in a unanimous decision that every criminal defendant in both federal and state courts has a right to counsel, and if he cannot afford an attorney, then the court must appoint one. Gideon was given a lawyer and a new trial in Florida. With the help of his court-appointed counsel, Gideon was found not guilty.

The Gideon ruling is regarded as a landmark in the ongoing refinement and advancement of human rights, Sabelli says. “Gideon led to the development of the office of the public defender (P.D.) in both the federal court system and in all 50 states,” he continues. “Under certain special circumstances, the court appoints a lawyer from a private firm to defend an accused person. But the bulk of ordinary indigent defendants get their lawyers from the P.D. office.”

The public defender is, in fact, part of the court itself. “We are a part of the judiciary, and the judges oversee our operation to ensure proper ethical behavior and good administration,” Sabelli points out. But no judge — in fact, no person — can interfere with the privileged relationship between a public defender and his client. And public defenders work harder knowing that their own presence will cause the prosecutor to work harder, Sabelli notes. Over the years, he has watched opposing counsel — U.S. attorneys — take greater care in preparing cases and treating the accused with fairness and dignity when they know that a public defender is on the other side.

“The right to counsel is the most basic right of all,” Sabelli concludes. “Without it, the other precious rights could not be guaranteed



Attorney Steve Mayo

—the 4th Amendment right to be free from unreasonable searches and seizures; the 5th Amendment right against double jeopardy and against self-incrimination, and the right to due process; the 6th Amendment right to a speedy public trial, to be allowed to confront witnesses, and to obtain favorable evidence. The right to counsel makes all the other rights possible,” he says. And in the long run, “it gives us better justice and confidence in our government.”

## The Jury

The responsibility of the jury in the U.S. judicial process “is to make factual determinations,” says Steve Mayo, a San Francisco attorney who serves as director of the Institute for the Study of Legal Systems. He notes that if there were no jury, then the judge would have to make all of the decisions in law and in fact.

Instead, the jury makes its decisions based on facts presented during the trial, on the testimony of live witnesses, documents and arguments between the parties presented in court.

Selection of a jury of one’s peers is a strictly random process, Mayo continues. The clerks of local court systems compile names from a number of lists, including, but not limited to, voter registration, automobile registration and drivers’ licenses. Anyone who is at least 18 years of age, is a U.S. citizen and has no felony conviction record is eligible, and is required to report to the courthouse on a given day as part of a jury pool. Some states require persons in the pool to return every day for a given length of time; others use a “one day or one trial” system, after which the citizen is excused from further duty. In either case, usually a person is not called back for several years.

Mayo says that on a typical day several hundred prospective jurors are called to a courthouse and are asked questions by the judge and the lawyers to determine their eligibility to serve. Examples of questions include “Do you speak and understand English?” and “Have you been the victim of a crime?”

In the criminal system, he says, the lawyers on both sides have a number of challenges to excuse prospective jurors without giving a specific reason why. Ultimately, they agree on 12 men and women to serve on a trial and also select three alternates who serve if one of the 12 has to drop out during the course of the trial. For civil cases, sometimes only six jurors are needed.

Occasionally — often for some high-profile criminal cases — a jury is “sequestered” for the length of the trial, Mayo says. That means the jury members cannot go home and

are kept in hotel rooms where they do not have access to radio, television or newspapers so they cannot be influenced by what the media says about a case.

Immediately prior to a trial, Mayo says, the lawyers — in agreement with the judge — have to decide what evidence is going to be allowed to go to the jury. He adds that the lawyers also come up with “questions to put to jury members so when they go to deliberate they will have specific questions they factually have to answer.” For example, he says a question in a civil case might be “Was the person negligent when he ran into the other car?” In a criminal case, a lawyer might ask “Did the defendant knowingly shoot the person?”

Specific instructions of law to the jury also have to be worked out by the lawyers and the judge. Mayo says this could include such things as definitions of terms brought up during the trial, how to treat circumstantial evidence and how to treat expert witnesses.

Once the jury goes into deliberation, it selects a foreman from among its members. “This person serves as a moderator of the discussions,” Mayo says, noting that “frequently people become very firm in their beliefs and they are not willing to listen to others present their views.” The foreman allows everyone to make their views known and keeps the discussion on track.

Deliberations can take hours or even several days because decisions have to be unanimous. A mistrial can be declared if a jury cannot reach a verdict. In a criminal case, if a guilty verdict is reached, the sentence is usually handed down by the judge at a later date. And guilty or innocent, at the conclusion of the trial the jury is excused with the thanks of the

court for carrying out its civic duty.

With very few exceptions, Mayo concludes, the jury system does its job properly, and the decisions reached are almost always the same as the judge would have determined if there had been no jury.

## The Judge

“Judicial independence is of great importance” in the United States, and openness to the press and the public “is a good check on the judiciary,” says Laura Safer Espinoza, a New York state judge. As such, the role of the judge under the common law system in the United States is as “a neutral, impartial finder of facts and in some cases a finder of the law as well.”

This differs from the civil law system practiced in many other countries, Espinoza continues, where a judge “takes the role of investigator and formulator of charges as well as the trier of cases.” She points out, however, that in both systems, in the event of a guilty finding, the judge usually determines the sentence.

In a criminal trial in the United States, Espinoza notes, defendants have the right to face an accuser, opposing counsel have the right to cross-examine witnesses, and all of this takes place before a judge and/or jury, who make “independent determinations of fact” in the case. No judge is allowed to have *ex parte*, or out-of-court, conversations without both of the attorneys being present, she adds. “This is required by our code of ethics, and is a critical component to maintaining honesty and a lack of possibilities for corruption in the system.”

Regarding courtroom decorum, Espinoza says that trials are open to the public and “any citizen has the right to observe what is taking



Judge Laura Safer Espinoza

place.” She adds that the judge has to maintain order among both the spectators and the two sides in the trial, while moving the proceedings along. If attorneys do not behave in a professional manner, Espinoza says, the judge has the power to hold them in contempt of court and they could face either a fine or a short jail sentence, though this rarely happens.

In recent years, a firestorm of controversy has erupted in the United States over whether or not to allow trials to be televised. It is an argument about the balance between the rights of the public to know about the case and the rights of the accused to a measure of privacy.

Espinoza allows that the written press has a right to be in the courtroom, but she believes that cameras “can lead to a distortion of the proceedings,” especially in high-profile cases. Different state legislatures set their own rules relating to TV in the courtroom, she says, but

even where it is allowed, a judge still has the discretion to ban it in certain cases. By contrast, television cameras are not allowed in federal courtrooms.

The selection process for becoming a judge in the United States varies depending upon the state, but generally follows one of two main routes — through popular election or appointment by a governor or mayor. In Espinoza’s home state of New York, a candidate has to be a practicing attorney for a minimum of 10 years and face a merit-selection screening panel of representatives of law schools, bar associations and community organizations. The panels then pass to electoral officials names for consideration to be placed on ballots, or to the selecting official if the appointment system is used. Terms for judges in New York are for 10 years for lower courts and 14 years for higher courts. Depending upon their performance, judges then may or may not be reelected or reappointed.

# Key Distinctions in the U.S. Court System

By E. Osborne Ayscue, Jr.

As provided for in the Constitution, the U.S. has two distinct court systems — federal and state. Each court system has two completely separate forms of court proceedings — criminal and civil. E. Osborne Ayscue, Jr., a civil trial attorney practicing in Charlotte, North Carolina, and the current president of the American College of Trial Lawyers, explains these distinctions which are key to an understanding of the U.S. system of justice.

IT WAS A TRIAL that dominated the headlines for months not only in the United States, but also around the world — the case of the state of California versus famed athlete, O. J. Simpson, on charges of first-degree murder. Americans were fascinated as they tuned in by the millions to the daily televised coverage. But viewers overseas were often confused. Why was Simpson prosecuted in state rather than federal court? Why was the defendant not required to testify? And why, after he was found not guilty, was he tried again in a civil trial where this time he was required to testify? Wasn't that double jeopardy?

The answers to these questions lie in the complex nature of the U.S. judicial system and its parallel system of federal and state courts. The U.S. Constitution assigns specific powers, including certain law-making powers, to the federal government, reserving all other powers to the states. Accordingly, there are federal courts for prosecution of violations of federal law, and state courts for violations of state law. Most crimes are violations of state law.



E. Osborne Ayscue, Jr.

Even the serious crime of murder, in most cases, is a violation of state law in the United States. That is why O.J. Simpson was prosecuted by the state of California, where the crime occurred, and not in the federal courts. Simpson was not required to testify at his murder trial because he had the constitutional right not to, unless he so chose. In fact, defendants in the United States have a myriad of rights that emanate from the Constitution itself, whether or not they are prosecuted in state or federal court. Simpson would have had the same right not to testify against himself in a federal criminal trial, for example.

But how could Simpson be tried twice — once in a criminal trial where he was found not guilty of the murders of his wife, Nicole

Simpson and her friend, Ron Goldman — and again in a civil trial where he was held responsible for their deaths and required to pay the plaintiffs? The answer is that the U.S. criminal and civil trial systems are totally separate with different penalties imposed and different rules of procedure.

In the Simpson civil trial, the defendant was required to testify and the standard of proof was lower. In the civil case, instead of guilt beyond a reasonable doubt, the jury had to find only the preponderance of evidence as to Simpson's guilt. The defendant has fewer procedural rights in a civil trial, where the result is most often limited to monetary damages.

### Civil v. Criminal Trials

The rules for civil v. criminal trials vary somewhat in the federal and state systems, but are similar in most respects since, under the Constitution, all trials must confer specific rights to defendants, and since the rules of evidence are generally the same in both. But there are major differences in procedure for civil and criminal trials:

— Pleading. The statement of the claim or charge is more precise and detailed in a criminal case.

— Discovery. The ability of each side — prosecution and defense — to gather information to support their position, is more limited in a criminal case.

— Higher Burden. In a criminal trial, a defendant must be proved guilty beyond a reasonable doubt. But in a civil trial, the plaintiff and the party bringing the case must prove the claim only by the greater weight of evidence, a

test, for example, the Simpson jury in the civil trial believed was met.

— Greater Protection. Because of the more severe penalties that can be imposed, a defendant in a criminal trial is accorded more procedural rights and safeguards than a defendant in a civil trial.

— Right to Appeal. If a criminal defendant is acquitted, the prosecution's right to appeal is almost nonexistent since the defendant cannot stand trial twice for the same crime. In a civil case the loser has the right to appeal.

— Speedy Trial. In jurisdictions with speedy trial laws, criminal cases may be tried more promptly than civil cases.

### Criminal Trials and the Rights of Defendants

Much of the world's image of U.S. criminal trials is created by Hollywood television dramas — from *Perry Mason*, who rarely if ever failed to win acquittal for his clients, to *L.A. Law*. These shows do not necessarily accurately reflect the basic structure of a U.S. courtroom in a criminal trial. In reality, criminal trials in the U.S. are rarely as dramatic as film portrayals, and are often more ponderous and deliberate.

The judge is the manager of the trial and the final arbiter of the applicable law. The jury decides whether the prosecution has presented enough evidence to convict the defendant beyond a reasonable doubt. The prosecution and the defense team present their case, under the rules of procedure, in an adversary system. What is often amazing to overseas observers is the array of rights that surround a criminal

defendant once he or she is accused of a crime. This is known in the United States as “due process of law.” Those rights include:

— Prosecution only after a preliminary judicial procedure that finds probable cause based on credible evidence presented by the prosecution.

— Right to be brought into open court, where the charges are read to the defendant, who must then enter a guilty or not guilty plea.

— Right to counsel except in trials for minor offenses. This includes the right to a court-appointed lawyer at government expense if the defendant cannot afford one. The defendant also has the right to require the attendance of witnesses and to confront them — through his lawyer — at trial.

— Entitlement to a trial in open court by a jury of one's peers — in other words, fellow citizens. In the United States, verdicts in criminal trials require a unanimous jury verdict in most jurisdictions and, unlike in other countries with jury systems, both the prosecution and the defense have a limited right to excuse jurors from duty whom they believe will not be fair.

— Only one trial for the same offense. This is the celebrated protection against “double jeopardy” that protects defendants from overzealous prosecutors determined to eventually find a jury that will convict.

— Right against self-incrimination. In the United States, a defendant cannot be compelled to testify against himself, a right O.J. Simpson, for example, invoked in his criminal trial. If a defendant chooses to testify, however, he must answer questions from the prosecution as well as the defense.

— Competence to stand trial. A defendant must be mentally competent to understand the offenses of which he is charged.

— A speedy trial. The Constitution guarantees a speedy trial by an impartial jury in the jurisdiction where the offense was committed. The trial, however, also may be moved to another jurisdiction if it is felt that an impartial jury cannot be found.

— Pretrial proceedings. A defendant has the right to adequate time to prepare a defense and can waive his right to a speedy trial. He also has the right to obtain any evidence in the possession of the prosecution that might prove his innocence. In addition, he has the right to interview witnesses before trial.

### The Course of a Criminal Trial

A criminal trial begins with opening statements — first by the prosecution and then by the defense. The prosecution then presents its evidence and witnesses, who are subject to cross-examination by the defense. The court — in essence, the judge — can dismiss the case at this stage if he or she believes the evidence does not prove the defendant committed the crime.

The defense then has the opportunity to present its evidence and witnesses. After the defense case has been presented, the prosecution may present rebuttal evidence. As in a civil trial, the judge supervises the proceedings and rules on disputes about admissibility of evidence. The trial ends with closing statements by both sides and deliberation by the jury, following instructions by the judge.

The jury must find the defendant guilty or not guilty on each charge. A verdict of not guilty terminates the proceedings and the defendant is freed. In the case of a defendant who is found guilty or who has pled guilty, obviating the need for a trial, the sentencing phase begins, except in death penalty cases, where the jury is required to decide between death and a lesser penalty.

The sentencing process includes a presentencing investigation and the filing of a report on all matters germane to the defendant's sentence. The defendant can review and comment on that report. The defendant also has the right to counsel at his sentencing hearing. The court then enters an order, specifying the punishment imposed on the defendant and how that punishment is to be carried out. The judge imposes the sentence subject to any sentencing guidelines that may have been prescribed by law.

Significantly, all defendants in criminal trials have the right to appeal to a higher court, including in some cases, up to the U.S. Supreme Court. A trial verdict can be overturned if errors of law have occurred, or a defendant's rights have been violated. The appeals process is an integral part of the U.S. judicial system. Many defendants have had their sentences overturned or reduced by appeals courts.

One of the most famous examples of the overturning of a sentence on appeal is the case of Dr. Sam Sheppard who, in 1954, was convicted of murdering his wife. Sheppard's initial appeals, including one that went to the Supreme Court, were rejected. But in 1966, the Supreme Court overturned the verdict and ruled that Sheppard was entitled to a new trial. Later

that year, he was acquitted by a new jury. Shepard's case was big news at the time and became even more famous when it became the basis for *The Fugitive*, a long-running, 1960s television show. But many less famous defendants have won new trials, or had verdicts overturned as a result of the appeals process.

### The Course of a Civil Trial

In civil trials, a defendant has many, but not all of the rights that would be available in a criminal trial. A civil action begins with a written statement of a plaintiff's claim and the relief he seeks, called a "complaint." The court then issues a summons, asking for a response to the complaint within a specific timeframe after the defendant receives it.

The defendant must admit or deny each allegation and present any defense. He may also assert claims against the plaintiff, a co-defendant or a person not originally part of the case. He may also move to dismiss the suit for failure to state a valid claim. He could also ask the court to dismiss the suit, claiming lack of jurisdiction over either the subject of the suit or the defendant himself. He might also suggest the plaintiff brought suit in the wrong court or that the defendant was not properly notified of the pending case.

The next phase is a broad "discovery process," which does not normally involve the court. A party seeking discovery, however, requests help from the court to compel a reluctant opponent or other person to give information. Similarly, a party from whom unreasonable discovery is sought may seek the court's protection.

Discovery may include: written questions to be answered under oath; oral deposition under oath; requests for pertinent documents; physical or mental examinations where injury is claimed; and requests to admit facts not in dispute. Before trial, either party may move for summary judgment on any issue the evidence does not support. If the case continues to trial, the court may enter a pretrial order, defining the issues to be decided by the trial and making other provisions to expedite it.

Civil cases sometimes concern grave crimes, as in the Simpson case. Often, however, they concern less serious offenses, such as landlord-tenant disputes. In some instances, third parties are sued. For example, in the case of a recent shooting in Atlanta, Georgia, in which the alleged triggerman was killed, a relative of one of his victims sued the investment company where the shootings occurred, the owners of the building, the company responsible for security there and the estate of the deceased gunman.

Civil actions are normally tried in a court open to the public before a judge and jury of six to 12 jurors chosen at random, unless the parties agree to a trial by a judge only. As in a criminal trial, the parties have the right to dismiss certain jurors. The judge manages the trial proceedings and declares the applicable law. After opening statements, the plaintiff, who has the burden of proof, offers his evidence. If the evidence does not sustain the claim, it is dismissed at this point. If the evidence is deemed sufficient, the defendant presents his case.

After both sides present their evidence, the judge may dismiss any or all claims that are not supportable. Each party is then allowed to make

a closing statement, and then, the judge explains the law to the jury. If the case goes to the jury, it alone must decide what the facts are and decide the case accordingly. In a case tried without a jury, the judge decides the outcome.

Civil penalties are generally much less onerous than those imposed in criminal trials. In the Simpson civil trial, for example, an \$8.5 million verdict was imposed on the defendant. Although this may seem severe, it is considerably less punitive than the life prison term Simpson would have faced had he been found guilty in the criminal trial. Simpson was convicted unanimously in the civil case, but, under California law, he could have been convicted by a 9-3 decision. In the criminal trial, however, a unanimous verdict was required.

In addition to financial recoveries, civil penalties may include ordering a party to perform or refrain from a specific act or other appropriate relief. The judge may also impose court costs on the losing party. Those costs are nominal and do not ordinarily include attorneys' fees. As in criminal cases, the losing party has the right to appeal the decision.

## Conclusion

The U.S. court system may seem overly complex to some foreign observers. It is an adversary system based on trial-by-jury that is by no means perfect. But it does have the advantage of being independent from government. No citizen in America goes to jail because the government wants him there. That decision is made by a jury of his peers — his fellow citizens — who decide the case based on impartial rules of evidence that are designed, as

far as possible, to ensure that only the guilty are convicted and punished.

# Common Law v. Civil Law Systems

By Judge Peter J. Messitte

Judicial independence is a hallmark of the American legal system. As a co-equal branch of government, the judiciary — to a remarkable degree — operates free of control by the executive and legislative branches, deciding cases impartially, uninfluenced by popular opinion. The American people respect their courts and judges, even if they sometimes criticize them. In this contrast of common v. civil law, U.S. District Court Judge Peter J. Messitte (Maryland), considers some basic aspects of both systems and explains how the American common law system compares with that of civil law.

THE TWO PRINCIPAL legal systems in the world today are those of civil law and common law. Continental Europe, Latin America, most of Africa and many Central European and Asian nations are part of the civil law system; the United States, along with England and other countries once part of the British Empire, belong to the common law system.

The civil law system has its roots in ancient Roman law, updated in the 6th century A.D. by the Emperor Justinian and adapted in later times by French and German jurists.

The common law system began developing in England almost a millennium ago. By the time England's Parliament was established, its royal judges had already begun basing their decisions on customary law "common" to the realm. A body of decisions was accumulating. Able lawyers assisted the process. On the European continent, Justinian's resurrected law-books and the legal system of the Catholic Church played critical roles in harmonizing a thousand local laws. England, in the midst of



U.S. District Court Judge Peter J. Messitte

constructing a flexible legal system of its own, was less influenced by these sources. It never embraced the sentiment of the French Revolution that the power of judges should be curbed, that they should be strictly limited to applying the law such as the legislature might declare.

Thus, British colonists in America were steeped in this tradition. Indeed, among the grievances enumerated in the American Declaration of Independence were that the English king had deprived the colonists of the rights of Englishmen, that he had made colonial judges “dependent on his will alone for the tenure of their offices” and that he had denied the people “the benefits of Trial by Jury.”

After the American Revolution, English common law was enthusiastically embraced by

the newly independent American states. In the more than 200 years since that time, the common law in America has seen many changes — economic, political and social — and has become a system distinctive both in its techniques and its style of adjudication.

How does America’s common law system compare with that of civil law?

### “Judge-made” Law

It is often said that the common law system consists of unwritten “judge-made” law while the civil law system is composed of written codes. For the most part, law in the United States today is “made” by the legislative branch. To some extent, however, the judge-made law analogy is true.

Historically, much law in the American common law system has been created by judicial decisions, especially in such important areas as the law of property, contracts and torts — what in civil law countries would be known as *private delicts*. Civil law countries, in contrast, have adopted comprehensive civil codes covering such topics as persons, things, obligations and inheritance, as well as penal codes, codes of procedure and codes covering such matters as commercial law.

But it would be incorrect to say that common law is unwritten law. The judicial decisions that have interpreted the law have, in fact, been written and have always been accessible. From the earliest times — Magna Carta is a good example — there has been “legislation,” what in civil law systems would be called “enacted law.” In the United States, this includes constitutions (both federal and state)

as well as enactments by Congress and state legislatures.

In addition, at both the federal and state levels, much law has in fact been codified. At the federal level, for example, there is an internal revenue code. State legislatures have adopted uniform codes in such areas as penal and commercial law. There are also uniform rules of civil and criminal procedure which, although typically adopted by the highest courts of the federal and state systems, are ultimately ratified by the legislatures. Still, it must be noted that many statutes and rules simply codify the results reached by common or “case” law. Judicial decisions interpreting constitutions and legislative enactments also become sources of the law themselves, so in the end the basic perception that the American system is one of judge-made law remains valid.

At the same time, not all law in civil law countries is codified in the sense that it is organized into a comprehensive organic, whole statement of the law on a given subject. Sometimes individual statutes are enacted to deal with specific issues without being codified. These simply exist alongside the more comprehensive civil or penal codes of the system. And while decisions of the higher courts in a civil law jurisdiction may not have the binding force of law in succeeding cases (as they do in a common law system), the fact is that in many civil law countries lower courts tend to follow the decisions of higher courts in the system because of their persuasive argumentation. Nevertheless, a judge in the civil law system is not legally bound by the previous decision of a higher court in an identical or similar case and is quite free to ignore the decision altogether.

## The Concept of Precedent

In the United States, judicial decisions do have the force of law and must be respected by the public, by lawyers and of course, by the courts themselves. This is what is signified by the “concept of precedent,” as expressed in the Latin phrase *stare decisis* — “let it [the decision] stand.” The decisions of a higher court in the same jurisdiction as a lower court must be respected in the same or similar cases decided by the lower court.

This tradition, inherited by the United States from England, is based on several policy considerations. These include predictability of results, the desire to treat equally everyone who faces the same or similar legal problems, the advantages to be gained when an issue is decided that affects all subsequent cases, and respect for the accumulated wisdom of lawyers and judges in the past. But it is also understood that primary responsibility for making law belongs to the legislative authority; judges are expected to interpret the law, at most filling in gaps when constitutions or statutes are ambiguous or silent.

Thus, there are important limiting features to the concept of precedent. First and foremost, a court decision will only bind a lower court if the court rendering the decision is higher in the same line of authority. For example, a decision of the U.S. Supreme Court on a matter of constitutional or ordinary federal law will bind all U.S. courts everywhere because all courts are lower and in the same line of authority as the Supreme Court in such matters. But decisions of one of the several U.S. Courts of Appeals — the intermediate federal appeals courts — will only bind federal trial courts within their

respective regions. Decisions of a state supreme court on the meaning of a state law where that court sits will be binding everywhere, so long as the state court's decisions do not conflict with constitutional or federal statutory law.

American judges tend to be very cautious in their decision-making. As a rule, they only entertain actual cases or controversies brought by litigants whose interests are in some way directly affected. In addition, judges usually decide cases on the narrowest possible grounds, avoiding, for example, constitutional issues when cases may be disposed of on non-constitutional grounds. Then, too, the "law" that judges state is only so much of their decision as is absolutely necessary to decide the case. Any other pronouncement on the law is unofficial.

Another important limiting feature of the concept of precedent is that the later case must be the same or closely related to the previous one. Unless the facts are identical or substantially similar, the later court will be able to distinguish the earlier case and not be bound by it.

The highest court of a jurisdiction, e.g., the U.S. Supreme Court for the United States or a state supreme court within its own state, can over-rule a precedent even where the facts of the later case are identical or substantially similar to the earlier case. In 1954, for example, in the famous school integration of *Brown v. Board of Education*, the U.S. Supreme Court over-ruled an analogous decision it had rendered in 1896.

But such direct over-ruling is not common. What is more likely is that the high court, by distinguishing later cases over time, will move away from an earlier precedent which has become undesirable. But for the most part, the long standing precedents of the high courts remain.

## An Organized Law

Where does one go to find the law in America? It might be supposed that with both enacted law and judicial decisions comprising the law, the search would be difficult. But the task in fact is relatively easy. Even though much American law is not codified, it still has been systematized and organized by subject matter. Legal encyclopedias and treatises written by learned professors and practitioners set out the law in logical sequence, typically providing historical perspectives as well. These books of authority contain references to the principles and specific rules of law in a given branch of law, as well as citations to relevant statutes and judicial decisions. Accessing statutes in "code-books" and cases in bound volumes called court reports, and nowadays accessing both by computer, is a relatively straightforward undertaking.

But it also bears noting that in the common law system, treatise writers do not have the same importance that they do in the civil law system. In civil law countries, such authorities are often considered sources of law, looked to for the development of the doctrine relative to a given subject matter. Their statements are given considerable weight by civil law judges. In the United States, in contrast, doctrine developed by treatise writers lacks binding force, although it may be cited for its persuasive effect.

## Common Law v. Civil Law

Apart from these features, there are a number of institutions associated with the common law system not usually found in civil law systems. Principal among these is the jury which,

at the option of the litigants, functions in both civil and criminal cases. The jury is a group of citizens, traditionally 12 in number, summoned at random to determine the facts in a lawsuit. When a trial by jury is held, the judge will instruct the jury on the law, but it remains for the jury to decide the facts. This means that ordinary citizens will decide which party will prevail in a civil case, and whether, in a criminal case, the accused is guilty or innocent of the charge against him or her.

The institution of the jury has had an important shaping effect on the common law. Because jurors are brought in on a temporary basis to resolve factual issues, common law trials are usually concentrated events, sometimes only a matter of days (although occasionally possibly weeks or months in duration). Emphasis is on the oral testimony of witnesses, although documents also are presented as evidence. Lawyers have responsibility for preparing the case; the trial judge performs no investigation of the case prior to trial. Lawyers, acting as adversaries, take the lead in questioning the witnesses at trial, while the judge acts essentially as a referee. Testimony is recorded verbatim by a court reporter or electronically.

The trial court, which is the “court of first instance” (i.e., where the case is first heard) in the American system, is where the factual record of the case is made. Generally speaking, appeals courts confine their review of the lower court record to errors of law, not of fact. No new evidence is received on appeal.

All this stands in marked contrast to what is usually found in civil law systems, where jury trials are for the most part unknown. In a given case, instead of a single continuous trial, a

series of court hearings may be held over an extended period. Documents play a more important role than witness testimony. The judge actively investigates the case and also conducts the questioning of the witnesses. Instead of a verbatim record of the proceedings, the judge’s notes and findings of fact comprise the record. Appeals may be taken both on the facts and the law, and the appeals court can, and sometimes does, open the record to receive new evidence.

Despite their differences, both the common and civil law systems have as their goal the just, speedy and inexpensive determination of disputes.

U.S. courts have become particularly sensitive in recent years for the need to continuously reappraise their processes in order to improve the quality of justice. As a consequence of these efforts, there are many other aspects of court activity in the U.S. These range from alternate dispute resolution mechanisms (including arbitration and mediation) to such procedural devices as default and summary judgment, used by judges to decide cases at an early stage without having to proceed to a formal trial.

## JUDICIAL REVIEW

A unique characteristic exercised by the U.S. judicial system, “judicial review,” is not mentioned in the Constitution. It is considered, however, a legitimate right permitting a court “to declare invalid and thus set aside legislation or executive action which has been deemed contrary” to the meaning or interpretation of the Constitution.

The concept of judicial review was first developed in *Marbury v. Madison* (1803) in one of the Supreme Court’s earliest and most celebrated cases, when William Marbury was appointed a justice of the peace by the outgoing president, John Adams. Marbury had never received his commission, however, because of infighting between Adams and the new president, Thomas Jefferson, who had ordered Secretary of State James Madison to withhold the commission. Marbury successfully petitioned the Supreme Court to issue a *writ of mandamus*, which forced government officials to perform their duties, even though they might disagree with the results.

In the unanimous decision by the Supreme Court, Chief Justice John Marshall laid the groundwork for the future authority of the Court by stating that the judicial branch of the government is responsible “to say what the law is.... This is the very essence of judicial duty.” Although the Judiciary Act of 1789 had allowed the Court to issue *writs of mandamus* in the first place, the justices had previously considered them contradictory to the meaning of the Constitution.

*Marbury v. Madison* thus established an important function of the Supreme Court, as well as all other U.S. federal courts. Although *Marbury v. Madison* did not hold that the justices amend the law or the Constitution — they could only interpret it — the premise of judicial review gave the Court, and thus, the entire U.S. judicial system, much greater power.

— Deborah M.S. Brown

## Judicial Ethics and the Rule of Law

By Supreme Court Justice Anthony Kennedy

The rule of law underlies a constitutional democracy, and one of the critical components of the rule of law in a constitutional democracy is neutrality. In a telepress conference to Slovenian judges, U.S. Supreme Court Justice Anthony Kennedy talks about how the judicial branch of government must guarantee the neutrality of the rule of law while maintaining a delicate balance between judicial ethics and independence.

JUDICIAL ETHICS are closely linked to judicial independence, and it's hard to talk about one without talking about the other.

The law is a promise. The promise is neutrality. If the promise is broken, if there is no neutrality in the enforcement, in the administration, in the interpretation of the law, then the law as we know it ceases to exist.

Judicial independence is closely related to neutrality. It is the duty of the judiciary to insist that the other branches of government give to the judiciary the resources and the support and the defense that the judiciary needs to do its job. But it is difficult to convince the other branches of government, in part, because some legislators think judges have an easy job. Legislators are reluctant to raise judges' salaries or to appoint more judges. It is also difficult because resources are scarce, and legislators have to be concerned with building hospitals and schools and roads. A functioning legal system is as important to a growing



U. S. Supreme Court Justice Anthony Kennedy

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economy and to a progressive society as are hospitals and schools and roads. And so, it is the duty of the judge to explain that the courts and the law are an important part of the capital infrastructure of any society.

### The Concept of Judicial Ethics

Closely related to judicial independence is the whole concept of judicial ethics. If a judge is asked to speak to his or her colleagues on the subject of judicial ethics, at first he or she might be reluctant or diffident; but it is very important for judges to talk about judicial ethics. It doesn't mean that the speaker is perfect. It means that we are concerned enough to ensure that the judiciary has the reputation and the reality of integrity and neutrality in all that it does. Judicial ethics — as well as judicial independence — concerns appearances and reality. If the appearance, if the perception of unfairness

exists, a cloud is cast over the judiciary.

One way to think about an ethical code for judges is to say that it has three parts. The first part is that each judge must have as his or her personal code the highest possible standards for personal and professional conduct. Your personal life, the way in which you relate to your family and your society inescapably becomes known to the public, and you must comport yourself with the demeanor, with the fairness, with the integrity, with the rectitude that we expect of our most responsible citizens.

From a professional standpoint, the judge must maintain a demeanor that befits a high judicial official. Demeanor and temperament are very important. For instance, it is sometimes difficult for a judge to be restrained when an attorney is deliberately attempting to argue with the court.... But the judge must insist that the attorney respect not the judge's personal dignity, but the dignity of the office that the judge represents. And it is an art to learn how to control the attorneys in your courtroom.

Some of the finest judges that I know in the federal system have never held an attorney in contempt, have never punished an attorney. By their demeanor, by their stature, by the way they comport themselves, they bring such respect to the courtroom that no attorney would ever dare cross the line of improper conduct before that judge.

Every litigant wants a fair hearing. And that hearing has to have the perception and the reality of being neutral.... The judge must ensure that the hearing is fair in any number of ways. He or she has to give equal time to all sides. He or she has to be expeditious.

And if a litigant gets a fair hearing, most of

them think that justice has been done. Most people who have a cause that they bring to the court are convinced that if only a neutral, fair person will listen to them, justice will be done.

### Battle for Neutrality

Judges, as part of their personal and professional code, must avoid conflicts of interest. Judge may have families in agriculture or business or industry. Does this affect their mindset? Does this affect their attitude? Is a judge from a particular region of the country so that this affects the way he or she decides a case? These things all have a bearing on the outlook of a judge.

But the secret of being a judge who has a high standard of ethics is that you never stop exploring yourself. I have been a judge for over 20 years, and I am surprised how often I have to go back to the very beginning and ask, “Am I controlled by some hidden bias, some predisposition, some predilection, some prejudice that even I cannot see? What is it that is urging me to decide the case in this particular way?” I have to examine my own background and my own intellectual position to ensure that I am being fair.

The battle for neutrality, the battle for fairness in the judge’s mind, never ends. You have to have some outward structures that enable you to strive for perfect neutrality...but you may never reach it because we are all the product of our own biases and background.

### Canons of Ethics

There are, however, certain basic rules for a fair hearing. First, you do not have a financial

or a personal interest in the case that you’re hearing. This sounds simple enough, but what if a member of your family owns stock in a corporation or some of your friends have told you that they hope the case will come out a certain way? This is a conflict of interest and you must resist it.

In the United States — and I’m talking about the federal judiciary — the personal code of conduct is fortified by written canons of ethics. So in my view, the personal code of conduct should be reflected in a written code of ethics, and judges should talk about that code.

When you hear or read the U.S. code of ethics, it sounds so simple, so basic, so elementary, that you might think everybody would agree with it. It sounds almost simplistic, like a platitude. Let me read the seven canons of ethics. These precepts are principles with which no one could disagree.

— A judge should uphold the integrity and independence of the judiciary.

— A judge should avoid impropriety and the appearance of impropriety in all activities.

— A judge should perform the duties of the office impartially and diligently.

— A judge may engage in extra-judicial activities to improve the law, the legal system and the administration of justice.

— A judge should regulate extra-judicial activities to minimize the risk of conflict with judicial duties.

— A judge should regularly file reports of compensation received for law-related and extra-judicial activities; and

— A judge should refrain from political activity.

Some of these canons, including disclosure, reflect the official position of the judiciary of the United States principally to avoid financial conflicts. We are required by law to file a public statement that lists all of our property, all of our assets, all of our holdings and all of our income.... We were so concerned to ensure the appearance of neutrality, that we insisted that all the judge's holdings must be disclosed. For example, if a judge owns even one share of stock, or if a spouse or a member of the judge's family owns one share of stock, that judge is mandatorily disqualified from participating in a case that is connected to that company.... Or if the judge thinks that he or she has a sufficient interest in a case so that neutrality cannot be ensured, the judge should not sit, even if the attorneys ask the judge to do so.

### A Committee of Judges

In the U.S. federal judiciary, we have a committee of judges that answers questions from all members of the judiciary who have concerns about judicial ethics.... The committee gives the judge not only some advice and some principles to think about and to consider, but it also gives the judge some protection. If the judge is later criticized for hearing a case, he or she says, "Well, I wrote about this to the committee and the committee agrees with me."

Let me give you an example. We had a judge who had spent time on a very complex anti-trust case. During the case, he met a lady and they were married. He found out that his wife had a substantial number of shares of stock in the corporations that he was dealing with, and so he wrote to the committee asking what he should do....

So, an ethical system should have a personal and professional code; it should have a written system of ethics, and it should have a mechanism for enforcing them.

### Acknowledging a Judicial Code

From time to time, a judge will dishonor the judicial oath and dishonor the bench. This brings the law as a whole into disrepute. It is tragic, but judges are human, and of course, they are subject to human failings....

In the federal system in the United States, a judge can be removed only by being impeached by the U.S. Senate. There have been only seven instances in our 200-year history in which the Senate has had to remove a judge. Some other judges have resigned under pressure...because of such things as corruption, bribes, alcoholism or mental instability.

In addition to removal of a judge by impeachment, the United States has a disciplinary mechanism in which judges are admonished or reprimanded for misbehavior. This is controlled by the judiciary itself, and I think it very important that any mechanism for the censure or reprimand of judges short of removal should be within the hands of the judiciary. But in turn, the judiciary ought to have a strong enough ethic, a strong enough tradition of fairness and independence that it can deal with its own problems....

This is part of judicial independence. It doesn't mean that we must conceal or protect members of our own guild; it means we must be forthright and vigorous in acknowledging that there must be a judicial code, that it must be specific, that we must understand what it is and that we must enforce it.

I have gone on for some time, and now I would like to take your questions.

**QUESTION:** *The Slovenian constitution has a special provision stipulating that a judge may be a member of a political party, but he or she shall not hold any office in a political organization. Serious questions arose during the local and state election campaigns as to whether a judge may identify himself or herself as a member of a political party, and whether a judge may publicly endorse a non-judicial candidate for public office. Do you think that such political activity may be considered inappropriate?*

**JUSTICE KENNEDY:** In the U.S. structure we have a federal judiciary, of which I am a member, and 50 separate state judiciaries. Some of the answers that I will give you today reflect the federal tradition, which is more rigorous, more remote, more insistent on separation of powers. And so I'll give you two answers: a state answer and a federal answer.

In the federal tradition, we would be horrified if a judge endorsed a political candidate. We think this is inconsistent with the separation of powers that must pertain in our constitutional system. We think judges should not have a political identity.

In the state system, a number of judges are elected. This causes our friends in many European countries to wonder if that judge can ever be independent if he or she is chosen by election. This is beginning to cause a tremendous amount of discussion in the United States, too, because we have the problem of tremendous amounts of money being put into television campaigns, sometimes for judges. So the

question you ask about judges and politics is a very sensitive one in the United States.

If the judiciary is going to be independent, it must divorce itself from political activities. A judiciary cannot be caught up in the partisan disputes that a vigorous political system necessarily engages in. And so I do not think that it is wise to have judicial/political labels added to a judge's name, and I certainly do not think that a judge should endorse a political candidate. One of the sacrifices that you make when you go to the judiciary is that there are certain parts of public and private life that you can no longer participate in, and ultimately, you will bring disrespect to the neutrality of the judiciary if you engage in political affairs....

I think promotions and evaluations of judges must be on their merits as scholars and of their commitment to the neutral principles of the law. So to the extent that your culture and your political system allow it, I would take every possible step to divorce the judge from political endorsements and political activity.

**QUESTION:** *Slovenia is now in the middle of a debate about constitutional changes. Do you see any obstacles for an association of judges to contribute to the improvement of the constitutional law by organizing discussions or participating in preparing a constitutional draft?*

**JUSTICE KENNEDY:** Judges exercise power as part of the governmental apparatus. And so, it is necessary for judges — with their professional experience and their commitment to neutrality — to engage in those discussions and activities which will improve the law.

In the United States, we have specific rulings in our canons which not only permit but encourage judges to teach, to engage in activities to improve the legal system....

When U.S. judges look for allies, we often go to our friends and former colleagues.... We do this openly, explaining in a public letter what our judicial concerns are. We cannot be so removed from the world that we can or should ignore issues and legislation and policies that affect the judiciary, and I think it's quite appropriate for a judge to engage in such activities and discussions.

A judge must be very careful though, to make clear that the judge is doing this as an extra-judicial activity, and will not engage in such discussions on the bench or put it in his or her opinions or writings.

**QUESTION:** *I have read your code of judicial conduct...and I would like to know something more about the provisions of the enforcement of these rules, and in case of transgression, what are the consequences and who enforces them?*

**JUSTICE KENNEDY:** In the judiciary of the United States, we have in each region what we call a judicial circuit. Every state and the District of Columbia belongs to one of 12 different circuits. Each of those circuits has a chief judge and each one of those chief judges has a committee, and it consists of half trial judges and half appellate judges. Any citizen can make — or any other judge can make — a complaint about another judge.

Some of these complaints are simply frivo-

lous. They come from a disappointed litigant who makes some unfounded charge against the judge. These are quickly investigated and dismissed. If there are more serious transgressions alleged, then there is a series of steps. In some instances, the chief judge and the committee simply call the judge before the committee and in private, counsel the judge.... There is no record of the proceedings of the committee other than to say that the complaint was acknowledged and disposed of.... The committee urges that this conduct not be repeated, points out the ethical violation and the damage that this judge does to the judiciary.

If the transgression is either repeated or is more serious, the discipline can include a public censure and an order from the chief judge that certain cases be withdrawn from the offending judge. The judge's calendar will be limited or cases which he or she has mishandled will be taken away.

If the transgression is very serious, amounting to a gross breach of judicial ethics or a crime, the chief judge refers the offending judge to the U.S. Senate for impeachment. This has happened twice, I think, in the last 10 years, and in both cases the judge was impeached.

Some of these problems occur because a judge is indifferent, insensitive or sometimes lazy.... Judges must be scholars. Some judges think that when they get on the bench, they can stop learning. They're wrong. When you get on the bench, that's when you have to begin your learning. This is part of your ethical duties. And some American judges — all of whom are overworked and overloaded — simply become careless and insensitive. That's why our best

technique is counseling by other judges, and it works most of the time.

Let me just say that in some U.S. states, there are judicial removal commissions with private citizens represented, not judges. That's not the federal system. The mechanisms in the states are quite different from the ones I have described.

**QUESTION:** *Allow me to pose a question regarding independence of judges through the following example. There is a bankruptcy case pending against a firm that issued junk bonds. There is a congressional investigation concerning responsibility of politicians involved in the issue of these junk bonds. Might a judge hearing the bankruptcy case be a witness in the investigation? And, if the answer is affirmative, what are the judge's devices against the questions of investigators about the rulings made in the pending bankruptcy case?*

**JUSTICE KENNEDY:** I'm reluctant to comment on any specific case where I don't know all of the background, but your question does allow me to address certain general principles.

For the most part, our rules specifically prohibit a judge from being a character witness....

But if a judge has certain information about activities that are under investigation, then like any other witness, the judge must give to the investigating authorities the facts that are within his or her knowledge....

**QUESTION:** *Your code of judicial conduct says that "Judges may write, lecture, teach and speak on non-legal subjects and engage in the arts, sports and other social and recreational*

*activities, but it must not conflict with their judicial duties." I would like to know, first, do they need any consent? For example, in our country we must have the consent of our president of the court if we want to engage in any extra-judicial activity. Second, can they receive payment for that extra-judicial activity? And third, is there a limit for that payment? For example, can a judge earn money from extra-judicial activities?*

**JUSTICE KENNEDY:** In the federal system, judges can earn money from teaching and from writing. That salary is limited by federal law, and it is roughly 10 percent of the judge's salary. But you must get the permission of the chief judge of your court before doing so in order to ensure that it will not conflict with your judicial activities.... We can never take a fee for lecturing to any group that has an interest before the court. And we must lecture only to law schools or professional associations. Insofar as engaging in other activities like protests and rallies and so forth, judges cannot do that.

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In closing, I'd like to say that this has been a fascinating hour for me. There is a kinship, a bond, a tie of affection among all judges worldwide. We share the same aspirations, the same beliefs, the same trials and tribulations, the same sense of fulfillment and excitement when we advance the rule of law. As this century comes to a close, I think historians will say that one of the great advances in our civilization during this last 100 years has been the gift of law to people across the world. The rule of law

is understood as being the birthright of every man and woman, and judges symbolize both the reality and the aspirations of that rule of law.

Thank you very much.

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# Brown v. Board of Education

## The Supreme Court Decision that Changed a Nation

By David Pitts

In May 1954 — in a landmark decision, *Brown v. Board of Education* — the U.S. Supreme Court ruled that segregated public schools were unconstitutional. The case name, Brown, refers to Oliver Brown, an African American, who sought legal redress when his seven-year-old daughter, Linda, was refused admission to an all-white elementary school in the small, mid-western city of Topeka, Kansas, where they lived. Contributing editor David Pitts traces the origins of one of the most important decisions in the history of U.S. constitutional law that changed not only Topeka, but the entire nation.

IN THE SPRING of 1954, Oliver Brown was the most famous father in America. But he was not the only plaintiff in the *Brown v. Board of Education* case, which originally was filed in 1951. Twelve other plaintiffs in Topeka joined with Brown to represent their children — 20 in all — who were required by law to attend segregated elementary schools. The initial lawsuit was championed by the Topeka chapter of the National Association for the Advancement of Colored People (NAACP), the nation's oldest civil rights organization.

The Brown case, however, was not the first challenge to legally mandated, segregated education in the United States. As early as 1849, a lawsuit had been filed in Boston, Massachusetts. In Kansas alone, between 1881 and 1949, there were 11 suits filed against segregated school systems. By the time the Topeka suit reached the Supreme Court, racial segregation in public schools was the norm across much of the nation and was permitted or legal-



Courtesy Marita Davis

Left, Walter White, executive vice president of the NAACP. Right, McKinley Burnett, president of the Topeka Chapter, NAACP, in the early 1950s.

ly required in 24 states. The Brown case stands out because it was the first successful one of its kind, because of the scope of the Supreme Court ruling and because of its radical effect on American society in the mid-20th century.

### An Unsung Hero

“The unsung hero of the lawsuit in Topeka is McKinley Burnett,” who was then president of the local chapter of the NAACP, says C.E. (Sonny) Scroggins, head of the Kansas Committee to Commemorate Brown v. Board of Education. “It was Burnett who recruited Oliver Brown and the other parents and pushed the legal challenge with the help of the local attorneys,” Scroggins adds, a viewpoint con-

firmed by other sources in Topeka. In effect, Burnett — with the help of NAACP secretary Lucinda Todd and attorneys Charles Scott, John Scott, Elisha Scott and Charles Bledsoe — devised a strategy to win the case.

Burnett died in 1970. His son, Marcus, who was 13 at the time of the initial suit and who still lives in Topeka, says challenging segregation “was a life-long struggle for my father. He was an ordinary working man who believed segregation could be crushed through the courts. He was always convinced we would win.” Marcus Burnett’s sister, Marita Davis, who now lives in Kansas City, Kansas, concurs. “My father was always fighting for his rights,” she says. “I remember that, even as a very young girl. He was always writing letters and holding meetings. Fighting school segregation became very important to him.”

### The Plaintiffs

According to some sources in Topeka, Oliver Brown was the lead plaintiff in the case principally because he was the only man among them. But Charles Scott, Jr., son of the lead local attorney, says Oliver Brown “was made the lead plaintiff because his name came first alphabetically. This case was driven by my father and the other local attorneys in cooperation with Mr. Burnett and the NAACP”

Linda Brown Thompson, now 55 and still living in Topeka, is reluctant to discuss her experience and her father’s role in challenging the system, partly because she feels too much emphasis has been placed by the media on her, to the exclusion of the other 12 plaintiffs in Topeka. Her sister, Cheryl Brown Henderson, executive director of the Brown Foundation for



David Pitts

Zelma Henderson, one of the plaintiffs in the Brown case.

Educational Equity, Excellence and Research, agrees with Charles Scott, Jr.'s assessment. "We are very proud of what our father did," Henderson says. "But it is important not to oversimplify the Brown case — not to forget the attorneys, the other plaintiffs in Topeka and the plaintiffs in the other states who eventually were included in the Brown case."

Zelma Henderson and Vivian Scales, two of the Topeka plaintiffs who also still live there, were young mothers in the early 1950s. Both women were eager to be part of the suit. And they both pay tribute to McKinley Burnett and the local lawyers, saying it was their leadership that made the fight for integration possible.

"I had to drive my two children right

across town, past two all-white schools, to an all-black school," says Henderson. "My children always were proud of our role in making history," she continues. "Donald Andrew is still here in Topeka. He's 55 now. But I lost my daughter, Vicki Ann, to cancer in 1984."

Scales says she also had to take her child, Ruth Ann, "past an all-white school which was right across from where we lived. My daughter, who still lives here and is 57 now, feels very good about what happened. I feel we accomplished something very important."

### The First Ruling

Burnett and the plaintiffs got their day in court in Topeka on February 28, 1951, before the U.S. District Court for the District of Kansas. Raymond Carter, now a federal judge in New York, was then an attorney with the NAACP Legal Defense Fund. With the assistance of the local attorneys, he argued the case and requested an injunction that would forbid the segregation of Topeka's public elementary schools.

The judges were sympathetic to the plaintiffs' case, saying in their decision, "Segregation of white and colored children in public schools has a detrimental effect upon the colored children." But ultimately, the judges ruled against the plaintiffs because the Supreme Court had decreed in an 1896 decision — *Plessy v. Ferguson* — that "separate but equal" school systems for blacks and whites were, in fact, constitutional, a decision that had not been overturned. The Kansas court thus felt compelled to rule in favor of the Topeka

Board of Education and against the plaintiffs because of the Plessy precedent.

“In one sense, my father, the other local attorneys and Mr. Burnett were not disappointed,” says Charles Scott, Jr. “They knew that the only way for segregation to be overturned throughout the nation and not just in Topeka was for the case to be lost and then appealed to the Supreme Court.”

### The Supreme Court Decision

On October 1, 1951, in preparation for it to go to the nation’s highest court, the Brown case was combined with other lawsuits that challenged school segregation in South Carolina, Virginia, Delaware and the District of Columbia. The combined cases officially became *Oliver L. Brown et al. v. The Board of Education of Topeka, et al.* Thurgood Marshall, who later became the first African American to sit on the Supreme Court, was the national NAACP legal counsel who successfully argued the case for the plaintiffs.

The unanimous decision declaring segregated schools unconstitutional was read on May 17, 1954, by Supreme Court Chief Justice Earl Warren. “We conclude,” he said, “that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the 14th Amendment.”

### A Great Legal Triumph

The outcome of *Brown v. Board of Education* was hailed as a great legal triumph, a landmark case evidencing that, in America, the courts exist not just to prosecute crimes but to affirm rights. “The ruling ranks high among all Supreme Court decisions,” says Robert Barker, a law professor and expert on constitutional law at Duquesne University School of Law in Pittsburgh, Pennsylvania.

It is important, he adds, that the Supreme Court relied on the equal protection clause of the 14th Amendment to the U.S. Constitution in rendering its decision. “The Court applied the equal protection clause in the manner it was intended — to provide protection for African Americans in particular.” But there is a broader significance, Barker says. “The 1954 decision led to a great deal of other litigation in which the equal protection clause was referenced, benefiting women and other groups who felt they were denied equal rights.”

Asked how the Court could rule one way — for segregation in *Plessy v. Ferguson* and against it in the Brown case — Barker responds that the Court “had more than 50 years of evidence that racial segregation as practiced, was in fact, a method of oppressing one racial group, and not ‘separate but equal.’”

Mark Tushnet seconds Barker’s pronouncement in his definitive book, *Brown v. Board of Education: The Battle for Integration*. “Even today,” he writes, “Brown stands as the Court’s deepest statement on the central issue in American history — how Americans of all races should treat one another. In that sense, it is a triumph of American constitutionalism.”

Paul Wilson, the Kansas state assistant attorney general, who argued the case in court for segregation, agrees. The Supreme Court ruling, he says, “enlarged the definition of basic justice in intercommunity relations.” Wilson, who details the story of the lawsuit in *A Time To Lose: Representing Kansas in Brown v. Board of Education*, writes that the decision also “gave new dimension to the constitutional concept of equal protection and due process of law.”

### Aftermath of the Ruling

The Topeka Board of Education did not wait for the Court to rule before amalgamating its black and white elementary schools. Before the Brown case, Kansas law had provided for the segregation of elementary schools in communities with populations larger than 15,000. Its junior and senior high schools never had been segregated.

But over much of the nation, the task would prove more difficult. That’s one reason why the Supreme Court, in a lesser known follow-up decision in 1955, issued an implementation ruling ordering a “prompt and reasonable start toward full compliance” and the achievement of school integration “with all deliberate speed.”

Even so, resistance was widespread and the willingness of executive branch officials to use force to implement the Court decision was required in some places. The most famous instance was in 1957 when President Dwight Eisenhower sent federal troops to Little Rock, Arkansas, after the governor of the state, Orville Faubus, failed to obey a federal court order to integrate the schools there — the first time federal troops had entered the South to protect African Americans since the early years after the Civil War.

Elsewhere in the South, the picture was mixed. In most places, school desegregation proceeded smoothly, if not always quickly. By the 1956-1957 school year, “desegregation affecting 300,000 black children was underway in 723 school districts,” according to David Goldfield, who details the story of school desegregation in *Black, White and Southern*.

On the other hand, Goldfield says, Southern lawmakers passed 450 laws “designed to circumvent the Supreme Court ruling,” and as late as 1960 “less than one percent of the South’s students attended integrated schools.” Progress was much faster in Topeka, and in the Midwest generally, with the South finally catching up in the late 1960s and early 1970s. Although the battle against legally mandated segregation was won long ago, the federal courts today are still dealing with school district segregation issues that result from voluntary residential patterns.

### The Courts Change Entrenched Views

The struggle against segregation shows how difficult it is to change entrenched views and customs in any society, particularly those deeply rooted in tradition and history, says John Paul Jones, a law professor and constitutional expert at the University of Richmond in Virginia. “It is significant that the change, when it did come, mostly was a result of court action to enforce inalienable rights enshrined in the U.S. Constitution, rather than as a result of measures passed by popularly elected legislatures and executives.” Without an independent judiciary and the Constitution’s guarantees for minority rights, he adds, the desegregation fight would have been much more difficult.



Marcus Burnett, left, son of Topeka NAACP leader McKinley Burnett, and political activist Sonny Scroggins, at the entrance to Monroe Elementary School.

Gary Orfield and Susan Eaton agree. The courts, including the Supreme Court, played a key role compared with the other branches of government, they write in *Dismantling Segregation*. They add: “With the exception of the years 1964 to 1968, courts — not the legislative or executive branches — have been the dominant policy-setters in desegregation.”

Although the Supreme Court struck down segregation only in public schools, its impact was much broader. It helped trigger an all-out offensive against segregation in all spheres of American life, including public services and employment. Just a year and a half after the ruling, in December 1955, Dr. Martin Luther King, Jr. led a successful bus boycott in

Montgomery, Alabama, to protest segregation in public transport there.

In the years that followed, court orders against segregation were issued against a backdrop of mass action undertaken by a myriad of nongovernmental organizations that together formed the civil rights movement. With the passage of the Civil Rights Act in 1964 and the Voting Rights Act in 1965, segregation was all but vanquished.

#### “We Did the Right Thing”

Civil rights historians, in particular, stress the importance of the Brown decision in forging progress in race relations in general. “It pro-

vided a yardstick of color-blind justice against which Americans could measure their progress toward the ideal of equal opportunity,” writes Robert Wiesbrot in *Freedom Bound: A History of America’s Civil Rights Movement*.

It is still a source of immense pride to the surviving plaintiffs almost a half century later. “I can remember it as though it were yesterday,” says Zelma Henderson. “I first learned about it from the newspaper, the *Topeka State Journal*. I can see the massive headline now, ‘School Segregation Banned.’ I was just elated. I felt then and I feel now that we did the right thing.” Vivian Scales adds, “It’s all so long ago now, but it’s something you never forget, that always stays with you.”

Marcus Burnett doesn’t remember his father’s specific reaction on the day the Supreme Court struck down segregation. “But he always believed that justice would come, so I’m sure he was very happy,” Burnett says. “My father believed the courts were the right way to challenge segregation. He never lost faith that the courts would ultimately uphold the Constitution and the Bill of Rights and end segregation.”

On October 26, 1992, President George Bush signed Public Law 12-525 establishing the Brown v. Board of Education National Historic Site to commemorate the 1954 Supreme Court decision. The site is located in Topeka at the Monroe Elementary School, the same school attended by Linda Brown almost a half century ago before it was desegregated. The memorial — the work of the Brown Foundation and the Kansas Committee to Commemorate Brown v. Board of Education, among others — will house audio-visual mate-

rials and a research library and is due to open to the public in 2002. “We hope people will visit to gain a greater understanding of the scope and complexity of the Brown decision,” says Qefiri Colbert, a spokesman for the National Park Service, which will maintain the memorial.

Oliver Brown, Zelma Henderson, Vivian Scales and the other parents easily could have resigned themselves to disappointment, but they translated their anger into action, says Sonny Scroggins of the Kansas Committee to Commemorate Brown. “The parents showed enormous courage back then,” he adds. The end result was not only an end to segregation, but a fundamental change in the way Americans think about race and equality under the law.

“I’m a very old woman now, but if I had to do it again, I would,” says Vivian Scales. “When you get right down to it, the message of the Brown decision and the memorial is really that all human beings of all races are created equal,” adds Zelma Henderson. “We went to the Supreme Court of the United States to affirm that fact, and we won.”

## HOW THE SUPREME COURT SELECTS AND DECIDES CASES

In the last decades of the 19th century, the Supreme Court was in danger of becoming overwhelmed with cases. So in 1891, Congress responded to the Court's plight by creating an intermediate level of federal courts known as circuit courts of appeal, or appellate courts, which heard appeals from lower district courts. Today, the district courts are divided geographically into 11 circuits, each headed by a court of appeals. An additional court of appeals in the District of Columbia hears cases generated by the federal government.

A citizen can press a claim in either set of courts — district or appellate — but if that person feels that the lower court has ruled unfairly or incorrectly, he or she has the option of petitioning the Supreme Court to hear the case. If the Court decides to take the case, its opinion is final. There is no other legal action that the plaintiff may take. If the Supreme Court refuses to hear a case, then the decision of the previous lower court stands. The Court's refusal to review a case, however, in no way implies that the justices agree or disagree with the lower court's ruling.

The Supreme Court only can hear certain types of cases stipulated in the U.S. Constitution. The Court's jurisdiction extends only to controversies between two states; controversies between the United States and an individual state; actions by a state against a citizen of another state or an alien; and cases brought by or against a foreign ambassador or consul.

Out of the thousands upon thousands of requests each year, the Court selects only about 300 cases, and of those, about half are argued before the Court and receive a final opinion.

The justices tend to focus on several types of cases. One of these is called *certiorari*, when several lower courts have ruled and disagreed on opinions, and thus a "higher authority's" opinion is sought. The Court also looks at cases where a lower court has given an opinion on a matter sent to the Court earlier, but that at the time was rejected by it for review, or cases where the Court's views have changed and the justices wish to issue a new opinion.

The Court also has special jurisdiction to answer so-called "certified questions," involving cases in which a lower court of appeals was unable to make a judgment. Either the lower court asks the Supreme Court to provide instructions that the lower court follows, or the lower court asks the Court to take over the case and make the final decision.

In order for a case to receive Supreme Court review, four of the nine justices must agree that the case merits the Court's attention. If the Court agrees to review a case, it may decide the case on the basis of written briefs submitted by each side, or it may schedule a formal oral argument with the Court in session. Formal argument provides a more detailed presentation of the litigation, although no new factual evidence may be introduced. Sometimes the Court invites an *amicus curiae*, or friend of the court, who shows a plausible interest in the dispute and presents arguments other than those of the litigants.

Once the Court decides to hear a case, at least six of the nine Supreme Court justices must be present. When all the arguments

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have been heard, the nine justices meet privately. The chief justice begins by summarizing a particular case and giving his views on it. After he has spoken, the other eight justices speak in order of seniority, giving their opinions. The justices may also try to persuade dissenting colleagues or, if undecided, to gather more information. When the chief justice believes that no more discussion is needed, he calls for a vote. As they did when speaking, the justices vote in order of seniority, with the chief justice casting his vote first.

Once a vote has been taken, an opinion is assigned to be written. If the chief justice is in the majority, he can either appoint another majority member to write the opinion, or he can write it himself. If the chief justice is in the minority, the senior associate justice in the majority makes the assignment. He or she can write the opinion or pass it on to another justice in the majority.

Once an opinion is written, the justice who wrote it circulates it to the rest of the Court members, who have the option of adding their own additions or suggestions, which often can be polar opposites. In writing opinions, justices have been known to change their mind, and thus shift from the minority to the majority and vice versa.

Although only one justice writes the Court's final opinion, any other justice is free to write his or her own thoughts on a case. In the end, the final opinion must have the approval of at least five justices before it is released as the opinion of the Court.

— Deborah M.S. Brown

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## Internet Sites on the U.S. Courts and the Legal System

### **American Bar Association**

<http://www.abanet.org/>

### **American Judicature Society**

<http://www.ajs.org/index.html>

A nonpartisan organization interested in the administration of justice through educational programs and publications, judicial independence, ethics in the courts, judicial selection, the jury, court administration, and public understanding of the justice system.

### **Appellate Courts**

<http://www.rossrunkel.com/links.htm>

Hot links to the relevant web pages are consolidated in one place, including the U.S. Supreme Court, all federal courts of appeals, the highest courts for 48 states and intermediate courts for 32 states.

### **Association of Trial Lawyers of America (ATLA)**

<http://www.atlanet.org/>

ATLA promotes justice and fairness for injured persons, safeguards victims' rights — particularly the right to trial by jury — and strengthens the civil justice system through education and disclosure of information critical to public health and safety.

### **Brown v. Board of Education National Historic Site**

<http://www.nps.gov/brvb/>

Learn more about the historic Brown decision.

### **Code of Conduct for United States Judges**

[http://www2.law.cornell.edu/  
cgi-bin/foliocgi.exe/judicial/](http://www2.law.cornell.edu/cgi-bin/foliocgi.exe/judicial/)

The "code of ethics" that U.S. judges abide by.

### **Constitutional Law Center**

<http://supreme.findlaw.com/>

### **Department of Justice**

<http://www.usdoj.gov/>

The law organ of the executive branch, serves as counsel for all U.S. citizens and, among other things, represents the federal government in legal matters, generally rendering legal advice and opinions, upon request, to the president and to the heads of the executive departments.

### **Federal Bar Association**

<http://www.fedbar.org/>

The primary professional organization for U.S. private and government lawyers and judges involved in federal practice.

**Federal Judicial Center (FJC)**

<http://www.fjc.gov/>

Provides annotated links to other WWW servers of interest. The FJC is the federal courts' agency for research and continuing education.

**FindLaw**

<http://www.findlaw.com/>

An index to legal resources on the Web.

**Glossary of Legal Terms**

[http://www.uscourts.gov/understanding\\_courts/gloss.htm](http://www.uscourts.gov/understanding_courts/gloss.htm)

**Justice Information Center**

<http://www.ncjrs.org/>

Part of the National Criminal Justice Reference Service, this Department of Justice link is one of the most extensive sources of information on criminal and juvenile justice in the world, providing services to an international community of policymakers and professionals.

**Legal Information Institute**

<http://www.law.cornell.edu/index.html>

Maintained by Cornell University, this website has links to other relevant law-related websites.

**Library of Congress' Law Library**

<http://lcweb2.loc.gov/glin/us-court.html>

Contains an annotated list of federal court resources.

**National Center for State Courts**

<http://www.ncsc.dni.us/>

An independent, nonprofit organization dedicated to providing leadership and service to the state courts through development of policies, advancement of state courts' interests within the federal government, strengthening state court leadership, and providing a model for organizational administration.

**Office of Administrative Law Judges (OALJ)**

<http://www.oalj.dol.gov/>

Under the auspices of the U.S. Department of Labor, the OALJ presides over formal hearings concerning many labor-related matters.

**Rules of the Supreme Court of the United States**

<http://www.law.cornell.edu/rules/supct/overview.html>

Everything you ever wanted to know about the U.S. Supreme Court.

**Understanding the Federal Courts**

[http://www.uscourts.gov/understanding\\_courts/899\\_toc.htm](http://www.uscourts.gov/understanding_courts/899_toc.htm)

This primer on the U.S. judicial system outlines the constitutional powers of the federal courts, describes the roles of state courts and explains the protections given to federal judges by the U.S. Constitution.

**U.S. Court of Appeals for the Armed Forces Homepage**

<http://www.armfor.uscourts.gov/>

**U.S. Federal Judiciary Home Page**

<http://www.uscourts.gov/>

Serves as a clearinghouse for information from and about the judicial branch of the U.S. government and the U.S. courts system.

**U.S. Sentencing Commission**

<http://www.ussc.gov/>

Establishes sentencing policies and practices for U.S. federal courts. The commission is also charged with evaluating the effects of sentencing guidelines on the criminal justice system.

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