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# Federal and State Courts: Structure and Interaction

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## Federal and State Courts: Structure and Interaction

In the United States, the federal government and the states each have their own set of laws and their own court systems. Federal and state courts vary in structure, with significant differences between the federal and state judiciaries as well as variation among the different states. Federal and state courts generally operate separately, but there is not an absolute division between the federal and state judicial systems. Sometimes, state courts decide questions of state law and federal courts decide questions of federal law. However, state courts can also hear many types of federal law claims, and there are circumstances in which federal courts apply state law. Federal courts can also review state court decisions that may conflict with the U.S. Constitution or federal law. In addition, cases or legal issues can move between the two judicial systems.

This report provides an overview of the different structures and functions of federal and state courts and the relationship between the two judicial systems. The report first provides an overview of the federal judiciary. The federal judicial system includes courts established under Article III of the Constitution, with judges who are appointed by the President with the advice and consent of the Senate. Judges appointed to these courts hold office “during good Behaviour” (which has been interpreted to grant them tenure for life unless they resign or are impeached and removed) and are also protected from having their salaries diminished while in office. The federal judicial system also includes other tribunals, sometimes called *Article I courts* or *legislative courts*, whose judges do not have the same constitutional protections as Article III judges. The Constitution limits the matters Article I courts can decide, but these courts can hear cases in territorial courts and military courts, “public rights” cases involving disputes between private actors and the government, and cases where decisionmakers serve as “adjuncts” to Article III courts.

This report also surveys key features of state court systems, highlighting general trends and differences between the state and federal judicial systems. It then discusses legal issues concerning the relationship between federal and state courts, including the jurisdiction of federal and state courts, when state courts apply federal law and vice versa, federal review of state court decisions and other state actions, and how cases or legal issues may move between state and federal court. The report concludes with discussion of selected considerations for Congress, including whether to direct cases to federal or state court and federal funding for federal and state courts. An appendix to the report includes additional information about selection and retention of judges on each state’s highest court.

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**Joanna R. Lampe**  
Legislative Attorney

**Laura Deal**  
Law Librarian

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In the United States, the federal government and the states each have their own sets of laws and their own court systems. Sometimes, state courts decide questions of state law and federal courts decide questions of federal law. However, there is not an absolute division between the federal and state judicial systems. State courts can hear many types of federal law claims, and there are also circumstances in which federal courts apply state law.<sup>1</sup> Federal courts may also review state court decisions that allegedly conflict with the U.S. Constitution or federal law.<sup>2</sup> In addition, cases or legal issues may move between the two judicial systems through mechanisms such as removal from state to federal court or certification of legal questions from federal to state court.<sup>3</sup>

The federal judiciary operates as a relatively unified system subject to substantive laws and procedural rules that usually apply nationwide.<sup>4</sup> Many federal judges enjoy constitutional protections designed to insulate them from political influence, including life tenure “during good Behaviour” and salaries that cannot be reduced.<sup>5</sup> By contrast, each state operates its own judicial system. State court systems vary significantly, but state court judges generally do not enjoy all the same constitutional protections as federal judges.<sup>6</sup>

The complex relationship between state and federal courts is governed by constitutional provisions, federal and state statutes, and prudential doctrines such as federal-state comity.<sup>7</sup> The U.S. Constitution’s Supremacy Clause provides that the Constitution and federal laws and treaties are the “supreme Law of the Land.”<sup>8</sup> This means that the Constitution and federal law prevail over conflicting state laws, and state courts must apply federal law when it governs a case.<sup>9</sup> It also means that federal courts, particularly the Supreme Court, are the final authority on interpreting federal law and possess the constitutional authority to review state court decisions that allegedly conflict with the Constitution or federal law.<sup>10</sup>

Although the federal courts are the final authority on federal law when they have the power to act, there are important limits on federal judicial power. In particular, Article III of the Constitution and applicable federal statutes limit federal court subject matter jurisdiction to specified categories of “Cases” and “Controversies.”<sup>11</sup>

<sup>1</sup> See *infra* “Choice of Law: Applying Federal or State Law”

<sup>2</sup> See *infra* “Federal Court Review of State Court Decisions.”

<sup>3</sup> See *infra* “Moving Between State and Federal Court.”

<sup>4</sup> Lower federal courts and state courts may differ in how they interpret federal law, and lower court decisions may constitute binding precedent for some federal courts but not others. These features of the federal judicial system result in discrepancies (sometimes called “circuit splits”) that the Supreme Court may resolve. See, e.g., Sup. Ct. R. 10 (stating that the Supreme Court may grant review in cases where “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter” or “has decided an important federal question in a way that conflicts with a decision by a state court of last resort”). In addition, each federal court may create local procedural rules to govern proceedings in that court. See, e.g., 28 U.S.C. § 2071.

<sup>5</sup> U.S. CONST. art. III, § 1.

<sup>6</sup> See *infra* “State Courts.”

<sup>7</sup> The Supreme Court has explained that comity is “a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.” *Younger v. Harris*, 401 U.S. 37, 44 (1971).

<sup>8</sup> U.S. CONST. art. VI, cl. 2.

<sup>9</sup> See Cong. Rsch. Serv., *Overview of Supremacy Clause*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artVI-C2-1/ALDE\\_00013395/](https://constitution.congress.gov/browse/essay/artVI-C2-1/ALDE_00013395/) (last visited July 18, 2023).

<sup>10</sup> See *id.*; see also *infra* “State Court Enforcement of Federal Law: Supreme Court Review”, “Habeas Review.”

<sup>11</sup> U.S. CONST. art. III, § 2, cl. 1.

In contrast to the limited jurisdiction of the federal courts, the states operate courts of general jurisdiction, which are not bound by federal constitutional limits on the types of cases they can hear.<sup>12</sup> As part of such general jurisdiction, state courts have the authority to hear most cases that raise issues under the Constitution or federal law, except in areas where the federal courts possess exclusive jurisdiction.<sup>13</sup> Just as federal courts are the ultimate interpreters of federal law, state courts are the ultimate authority on the meaning of state law. Federal courts may apply state law, decide questions of state law when needed to resolve a case, and strike down state laws or other state actions that conflict with federal law or the Constitution.<sup>14</sup> However, if a state’s own courts have definitively interpreted a state law, the federal courts must accept that interpretation.<sup>15</sup>

This report provides an overview of federal and state courts and the relationship between the two judicial systems. The report first provides an overview of the federal judiciary, including courts created pursuant to authority granted to Congress in Article III of the Constitution (Article III tribunals) and courts created pursuant to other provisions of the Constitution (non–Article III tribunals).<sup>16</sup> It discusses selected features of state judicial systems and how state courts differ from federal courts.<sup>17</sup> The report then surveys key legal issues related to federal and state courts, including the jurisdiction of federal and state courts,<sup>18</sup> when state courts apply federal law and vice versa<sup>19</sup> federal review of state court decisions and other state actions,<sup>20</sup> and how cases or legal issues may move between state and federal court.<sup>21</sup> The report concludes with discussion of selected legal considerations for Congress.<sup>22</sup>

## Overview of Federal and State Courts

Article III of the Constitution lays the foundation for the federal judiciary, imposes limits on the federal judicial power, and provides protections for federal judges designed to ensure judicial independence from the executive and legislative branches. Within that constitutional framework, Congress possesses broad authority to establish and regulate federal courts, especially the lower federal courts. Congress has changed the size and structure of the federal courts throughout the history of the United States.<sup>23</sup>

<sup>12</sup> *Court of General Jurisdiction*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A court having unlimited or nearly unlimited trial jurisdiction in both civil and criminal cases.”). States may also establish specialty courts with limited jurisdiction, such as family courts or land courts, but each state has courts of general jurisdiction. *See infra* “Structure of State Courts.”

<sup>13</sup> *E.g.*, *Claflin v. Houseman*, 93 U.S. 130, 136 (1876) (“[I]f exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it.”); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962) (“We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law.”).

<sup>14</sup> *See infra* “Federal Courts Applying State Law.”

<sup>15</sup> *See id.*

<sup>16</sup> *See infra* “Federal Courts.”

<sup>17</sup> *See infra* “State Courts.”

<sup>18</sup> *See infra* “Jurisdiction: Which Courts Can Hear Which Cases”

<sup>19</sup> *See infra* “Choice of Law: Applying Federal or State Law”

<sup>20</sup> *See infra* “Federal Court Review of State Court Decisions.”

<sup>21</sup> *See infra* “Moving Between State and Federal Court.”

<sup>22</sup> *See infra* “Considerations for Congress.”

<sup>23</sup> For discussion of changes to the size of the Supreme Court, see CRS Report R47382, *Congressional Control over the Supreme Court*, by Joanna R. Lampe. For information on the lower courts, see *Chronological History of Authorized Judgeships—District Courts*, U.S. CTS., [https://www.uscourts.gov/judges-judgeships/authorized-\(continued...\)](https://www.uscourts.gov/judges-judgeships/authorized-(continued...))

While the Constitution and federal statutes govern the federal courts, state courts are established pursuant to each state’s constitution and laws. Like federal courts, state courts have evolved as the nation developed.<sup>24</sup> New state courts have been created as new states joined the union, and states have modified the structure of existing courts. This section outlines the current structure of the federal judiciary, then discusses selected features of state court systems.

## Federal Courts

Federal courts fall into two broad categories: courts established pursuant to Article III of the Constitution, sometimes called *Article III courts*, and other adjudicative bodies that are sometimes called *non–Article III courts*, *legislative courts*, or *Article I courts*.

Article III of the Constitution vests the federal judicial power in the judicial branch, sets the outer boundaries of that power, and seeks to protect the judiciary from undue political influence. Federal courts established pursuant to Article III include the Supreme Court, the U.S. Courts of Appeals, the federal district courts, and certain specialized tribunals.<sup>25</sup> In addition to Article III courts, Congress has established other tribunals pursuant to its powers under Article I of the Constitution.<sup>26</sup> These courts may handle specialized subject matter, or they may have jurisdiction over federal areas such as U.S. territories and the District of Columbia.<sup>27</sup>

### Article III Courts

Article III courts are defined by certain constitutional requirements that apply to all Article III judges. First, Article III judges must be nominated by the President and confirmed by the Senate.<sup>28</sup> Second, once on the bench, Article III judges hold office “during good Behaviour,” which has been interpreted to grant them tenure for life unless they resign or are impeached and removed.<sup>29</sup> Third, Congress cannot reduce the salary of Article III judges during their time in office.<sup>30</sup>

The federal Article III courts comprise three main levels: trial-level federal district courts located in each state, the District of Columbia, and Puerto Rico; intermediate courts of appeals; and the Supreme Court. Congress has also established specialized Article III tribunals. The Constitution provides that the federal judicial power “shall be vested in one supreme Court,” but it leaves to

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judgeships/chronological-history-authorized-judgeships-district-courts (last visited July 18, 2023); *Chronological History of Authorized Judgeships—Courts of Appeals*, U.S. CTS., <https://www.uscourts.gov/judgeships-authorized-judgeships/chronological-history-authorized-judgeships-courts-appeals> (last visited July 18, 2023).

<sup>24</sup> See, e.g., *New York State Court of Appeals*, HIST. SOC’Y OF THE N.Y. CTS., <https://history.nycourts.gov/court/nys-court-appeals/> (last visited July 18, 2023); *New York State Supreme Court*, HIST. SOC’Y OF THE N.Y. CTS., <https://history.nycourts.gov/court/nys-supreme-court/> (last visited July 18, 2023); *The Supreme Court of Virginia Information Pamphlet*, VIRGINIA SUP. CT., <https://www.vacourts.gov/courts/scv/scvinfo.pdf> (last visited July 18, 2023).

<sup>25</sup> See *infra* “Article III Courts.”

<sup>26</sup> See *infra* “Non–Article III Federal Courts.”

<sup>27</sup> As discussed further below, the District of Columbia has both Article III and non–Article III courts. See *infra* “U.S. Courts of Appeals”; “U.S. District Courts”; “District of Columbia Local Courts.”

<sup>28</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>29</sup> U.S. CONST. art. III, § 1.

<sup>30</sup> *Id.*

Congress the discretion whether to establish lower federal courts by statute.<sup>31</sup> As of July 2023, the Article III courts include the following tribunals.

### *Supreme Court of the United States*

The Supreme Court is the nation's highest court, with jurisdiction to review decisions of the lower federal courts as well as decisions of the states' highest courts that raise questions under the Constitution or federal laws or treaties.<sup>32</sup> The Supreme Court sits as a single panel, which, since 1869, has comprised nine members: one Chief Justice and eight Associate Justices.<sup>33</sup>

The Constitution and federal statutes provide for Supreme Court original jurisdiction<sup>34</sup> or mandatory appellate review in certain narrow categories of cases.<sup>35</sup> In most cases, however, parties seek Supreme Court review on appeal from a decision of a state court or lower federal court via a discretionary *petition for a writ of certiorari*. The Court then has the discretion to choose which appeals to hear.<sup>36</sup> The Court receives thousands of petitions for certiorari each year and has recently granted certiorari in about 50-80 cases annually.<sup>37</sup> The Court is mostly likely to hear cases that present novel and important questions of federal constitutional or statutory law, often including legal questions on which different federal courts of appeals or state high courts have reached different answers.<sup>38</sup>

The Court decides most matters by a majority vote, meaning that a party may prevail in a case if five of the nine Justices agree with its position.<sup>39</sup>

### *U.S. Courts of Appeals*

The intermediate federal appellate courts include thirteen courts of appeals with a total of 179 authorized permanent judgeships.<sup>40</sup> Twelve of these courts are regional courts of appeals that mainly exercise jurisdiction over cases arising in a particular geographic area. Eleven of the regional courts of appeals cover groups of states and territories, hearing appeals from federal district courts within those areas, and are designated by number.<sup>41</sup> The twelfth regional court of

<sup>31</sup> U.S. CONST. art. III, § 1. *See also* Cong. Rsch. Serv., *Overview of Establishment of Article III Courts*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artIII-S1-8-1/ALDE\\_00013557/](https://constitution.congress.gov/browse/essay/artIII-S1-8-1/ALDE_00013557/) (last visited July 28, 2023).

<sup>32</sup> *See About the Court*, U.S. SUP. CT., <https://www.supremecourt.gov/about/about.aspx> (last visited July 18, 2023). The Supreme Court also has original jurisdiction over certain cases. *See infra* note 35.

<sup>33</sup> 28 U.S.C. § 1.

<sup>34</sup> *Original jurisdiction* means that a case begins in the Supreme Court rather than reaching the Court on appeal. Cong. Rsch. Serv., *Supreme Court Original Jurisdiction*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artIII-S2-C2-2/ALDE\\_00001220/](https://constitution.congress.gov/browse/essay/artIII-S2-C2-2/ALDE_00001220/) (last visited June 2, 2023).

<sup>35</sup> U.S. CONST. art. III, § 2, cl. 2; 28 U.S.C. §§ 1251, 1253.

<sup>36</sup> *See, e.g.*, 28 U.S.C. §§ 1254, 1257.

<sup>37</sup> *See The Supreme Court at Work*, U.S. SUP. CT., <https://www.supremecourt.gov/about/courtatwork.aspx> (last visited July 18, 2023); *Statistics*, SCOTUS BLOG, <https://www.scotusblog.com/statistics/> (last visited July 18, 2023).

<sup>38</sup> *See* Sup. Ct. R. 10.

<sup>39</sup> *See Supreme Court Procedures*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (last visited July 18, 2023). If an even number of Justices participate in a matter and their votes are split equally, the lower court's judgment is "affirmed by an equally divided Court." *See, e.g.*, *LeDure v. Union Pacific R.R. Co.*, 142 S. Ct. 1582 (2022).

<sup>40</sup> *See Authorized Judgeships*, U.S. CTS., <https://www.uscourts.gov/sites/default/files/allauth.pdf> (last visited July 18, 2023).

<sup>41</sup> 28 U.S.C. § 41. For instance, the U.S. Court of Appeals for the First Circuit (First Circuit) hears appeals from federal (continued...)



appeals is the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), which covers only the District of Columbia.<sup>42</sup> The remaining federal appeals court is the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), which takes appeals from federal district courts and certain administrative bodies and Article I courts in certain specific subject matter areas identified by Congress.<sup>43</sup>

In addition to the circuit courts' appellate jurisdiction, some types of cases, including judicial review of certain federal agency actions, commence in the federal courts of appeals.<sup>44</sup> Although the district courts and most of the circuit courts have jurisdiction primarily based on geography, Congress can enact legislation sending certain categories of cases to a particular federal court.<sup>45</sup>

The number of judges authorized by Congress for each regional court of appeals reflects, roughly, a combination of that circuit's population and its caseload.<sup>46</sup> The First Circuit is the smallest with six authorized judgeships, while the U.S. Court of Appeals for the Ninth Circuit is the largest with twenty-nine. The D.C. Circuit covers by far the smallest geographic area and population. However, because the federal government is based in Washington, D.C., many cases involving the federal government proceed in the D.C. federal courts. The D.C. Circuit has 11 authorized judgeships.<sup>47</sup> The Federal Circuit has 12 authorized judgeships.<sup>48</sup>

Most matters before the federal appeals courts are decided by panels of three circuit judges.<sup>49</sup> Each appeals court may, at its discretion, choose to hear or rehear (i.e., reconsider) a case *en banc*. The phrase *en banc*, from the French for “on the bench,” means that a matter is submitted to the full court or to a subset of the court that is larger than the usual three-judge panel.<sup>50</sup> Three-judge panels and *en banc* panels decide cases by a majority vote of the judges on the panel.

Like the Supreme Court, the federal appeals courts generally do not engage in factfinding.<sup>51</sup> Unlike the Supreme Court, the appeals courts do not have discretion over whether to hear cases and must rule on all appeals or petitions for review that are properly before them.<sup>52</sup> For the large proportion of federal court appeals in which the parties do not file a petition for a writ of

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district courts in Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico (and from non–Article III courts from the U.S. Virgin Islands), while the U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit) covers Alabama, Florida, and Georgia. *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Federal Circuit subject matter jurisdiction includes cases involving international trade, government contracts, patents, trademarks, certain money claims against the U.S. government, federal personnel issues, veterans' benefits, and public safety officers' benefits claims. See 28 U.S.C. § 1295; see generally *Court Jurisdiction*, U.S. CT. APPEALS FED. CIR., <https://cafc.uscourts.gov/home/the-court/about-the-court/court-jurisdiction/>. (last visited July 18, 2023).

<sup>44</sup> See, e.g., 28 U.S.C. §§ 1296, 2342; 15 U.S.C. § 717r(b).

<sup>45</sup> For instance, a provision of the Clean Air Act requires that certain administrative actions “based on a determination of nationwide scope or effect” be reviewed in the D.C. Circuit. 42 U.S.C. § 7607(b)(1).

<sup>46</sup> 28 U.S.C. § 44; see also CRS Report R45899, *Recent Recommendations by the Judicial Conference for New U.S. Circuit and District Court Judgeships: Overview and Analysis*, by Barry J. McMillion.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> 28 U.S.C. § 46.

<sup>50</sup> *En banc*, Black's Law Dictionary (11th ed. 2019). For courts with fewer than fifteen judges, all active judges on the court participate in the *en banc* panel, while courts with more than fifteen judges constitute *en banc* panels drawn from the Court's active members. 28 U.S.C. § 46.

<sup>51</sup> See, e.g., *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985).

<sup>52</sup> See Fed. R. App. P. 3.



certiorari or the Supreme Court denies review, a federal appeals court is the highest court that reviews the case.<sup>53</sup>

### ***U.S. District Courts***

The district courts are trial-level courts where most federal litigation commences for both civil and criminal matters.<sup>54</sup> In cases involving factual disputes, district courts are primarily responsible for resolving factual questions, which they do by conducting trials. Cases that go to trial may be heard by juries, which resolves disputed questions of fact. (In such cases, district court judges continue to resolve questions of law.) Other cases may be heard in a *bench trial* without a jury, during which a district court judge resolves both factual and legal questions. In addition to trying federal cases in the first instance, district courts also oversee U.S. bankruptcy courts<sup>55</sup> and provide judicial review of certain federal agency actions.<sup>56</sup>

Usually, a single district judge presides over each district court case. In a few relatively narrow categories of cases, Congress has instead provided for trial by a three-judge district court composed of two district judges and one circuit judge.<sup>57</sup>

There are currently 94 district courts with 663 permanent Article III judgeships.<sup>58</sup> Each state has a least one Article III district court, as do the District of Columbia and Puerto Rico.<sup>59</sup> Some states are divided into multiple judicial districts, and some districts are further divided into geographic divisions.<sup>60</sup>

Cases brought before federal district courts can also be heard by U.S. *magistrate judges*. Magistrate judges are not Article III judges and thus are limited in what matters they can decide.<sup>61</sup> They are not nominated by the President and confirmed by the Senate but are rather appointed by district judges in the districts in which they sit.<sup>62</sup> Magistrate judges also do not enjoy life tenure but instead are appointed for renewable terms of up to eight years and are also subject to an age limit.<sup>63</sup>

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<sup>53</sup> See, e.g., *Appeals*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/types-cases/appeals> (last visited July 18, 2023).

<sup>54</sup> See *Court Role and Structure*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/court-role-and-structure> (last visited July 18, 2023).

<sup>55</sup> 28 U.S.C. § 157.

<sup>56</sup> See CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole.

<sup>57</sup> 28 U.S.C. § 2284. Certain decisions of three-judge district courts are immediately appealable to the Supreme Court. 28 U.S.C. § 1253.

<sup>58</sup> See *Court Role and Structure*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/court-role-and-structure> (last visited July 18, 2023). This total includes three non–Article III territorial district courts for the territories of Guam, the Northern Mariana Islands, and the U.S. Virgin Islands. There are a total of four authorized judgeships for those three courts. See *infra* “Territorial District Courts.”

<sup>59</sup> See 28 U.S.C. §§ 81-131. Several other U.S. territories have Article I district courts. See *infra* “&&.”

<sup>60</sup> See, e.g., 28 U.S.C. § 124 (defining judicial districts and divisions in Texas).

<sup>61</sup> See “Magistrate Judges” section of CRS Report R43746, *Congressional Power to Create Federal Courts: A Legal Overview*, by Andrew Nolan and Richard M. Thompson II. Congressional offices with questions about Congress’s power to create federal courts may contact Joanna Lampe.

<sup>62</sup> 28 U.S.C. § 631.

<sup>63</sup> *Id.*

### Other Article III Courts

Specialized Article III courts serve a variety of functions, but all are comprised of judges with life tenure who are appointed by the President and confirmed by the Senate. For example, the U.S. Court of International Trade hears civil actions based on customs and international trade laws.<sup>64</sup> Uniquely among federal courts, the Court of International Trade is subject to a partisan balance requirement: The applicable statute provides that not more than five of its judges shall be from the same political party.<sup>65</sup>

The Foreign Intelligence Surveillance Act of 1978 established the Foreign Intelligence Surveillance Court (FISA Court) and the Foreign Intelligence Surveillance Court of Review (Court of Review).<sup>66</sup> The FISA Court is responsible for issuing warrants authorizing the government to conduct certain espionage activities, while the Court of Review serves to review certain orders of the FISA Court.<sup>67</sup> Both tribunals are staffed by judges who have already been appointed by the President and confirmed by the Senate to judgeships on other Article III federal courts. These judges serve staggered terms on the FISA Court or the Court of Review and may then continue to serve on the courts to which they were originally nominated and confirmed.<sup>68</sup>

Sitting federal judges also make up the Judicial Panel on Multidistrict Litigation, a specialized Article III body authorized by statute to transfer related cases to a single district court for coordinated or consolidated pretrial proceedings.<sup>69</sup> Likewise, the Alien Terrorist Removal Court consists of five district court judges, serving staggered terms, who review *ex parte* applications from the Department of Justice to order removal of certain aliens from the United States based on classified information.<sup>70</sup> It consists of five district court judges designated by the Chief Justice of the United States[?] for staggered terms of five years.<sup>71</sup>

While the President appoints judges to serve on the Court of International Trade, the district court judges who serve on the other specialized courts discussed above are selected from eligible sitting Article III judges by the Chief Justice of the United States.

### Non–Article III Federal Courts

In addition to the foregoing Article III tribunals, Congress has established multiple tribunals that are not Article III courts but perform adjudicative functions. Judges on these tribunals, sometimes

<sup>64</sup> See generally *About the Court*, U.S. CT. INT'L TRADE, <http://www.cit.uscourts.gov/AboutTheCourt.html#jurisdiction> (last visited July 18, 2023).

<sup>65</sup> *Id.*

<sup>66</sup> *About the Foreign Intelligence Surveillance Court*, U.S. FOREIGN INTELLIGENCE SURVEILLANCE CT, <https://www.fisc.uscourts.gov/about-foreign-intelligence-surveillance-court> (last visited July 18, 2023); *United States Foreign Intelligence Surveillance Court of Review*, U.S. FOREIGN INTELLIGENCE SURVEILLANCE CT, <https://www.fisc.uscourts.gov/FISCR> (last visited July 18, 2023).

<sup>67</sup> *Id.*

<sup>68</sup> 50 U.S.C. §§ 1803(a)–(b), (d).

<sup>69</sup> See CRS In Focus IF11976, *Multidistrict and Multicircuit Litigation: Coordinating Related Federal Cases*, by Joanna R. Lampe.

<sup>70</sup> 8 U.S.C. §1532(a).

<sup>71</sup> *Id.* The Alien Terrorist Removal Court has yet to conduct any proceedings. See, e.g., Won Kindane, *Procedural Due Process in the Expulsion of Aliens Under International, United States, and European Law: A Comparative Analysis*, 27 EMORY INT'L L. REV. 285, 322 (2013).

called Article I courts or legislative courts, do not enjoy the same constitutional protections as Article III judges.<sup>72</sup>

Non–Article III courts are subject to certain constitutional limits. The Supreme Court has held that most federal litigation must be heard by Article III judges who possess the necessary constitutional protections.<sup>73</sup> The Court has recognized certain exceptions to this rule, however, allowing non–Article III tribunals to hear cases in territorial courts or military courts, “public rights” cases involving disputes between private actors and the government, and cases where decision-makers serve as “adjuncts” to Article III courts.<sup>74</sup> The Article I courts include the following types of tribunals.

### *Courts of Specialized Jurisdiction*

Article I courts include multiple tribunals of specialized jurisdiction that have the authority to decide certain specific types of cases. For instance, U.S. bankruptcy courts are Article I courts that hear bankruptcy cases and certain related matters. District courts have jurisdiction over bankruptcy cases, but as a practical matter, they refer most bankruptcy matters to the bankruptcy courts as a matter of course.<sup>75</sup> A bankruptcy case is generally tried before a single bankruptcy judge in the first instance. Bankruptcy judges are not subject to the Constitution’s judicial appointment and removal provisions. They are appointed by the courts of appeals of the circuit in which their districts are located and serve renewable fourteen-year terms.<sup>76</sup> A bankruptcy judge may be removed during a term in office “only for incompetence, misconduct, neglect of duty, or physical or mental disability,” as determined by a majority of the judicial council of the circuit in which the judge sits.<sup>77</sup>

Review of bankruptcy court decisions differs among judicial circuits. Several circuits have created bankruptcy appellate panels (BAPs), in which three-judge panels composed of bankruptcy judges from the circuit review the initial decisions of single-judge bankruptcy courts.<sup>78</sup> Decisions of BAPs, in turn, may be appealed to the Article III courts of appeals for the relevant circuits.<sup>79</sup> In circuits that have not established BAPs, a bankruptcy court decision may be reviewed on appeal by the district court for the district in which the bankruptcy court sits, then by the relevant court

<sup>72</sup> See “Constitutional Limitations on Non-Article III Courts” section of CRS Report R43746, *Congressional Power to Create Federal Courts: A Legal Overview*, by Andrew Nolan and Richard M. Thompson II. Congressional offices with questions about Congress’s power to create federal courts may contact Joanna Lampe.

<sup>73</sup> See, e.g., *Stern v. Marshall*, 564 U.S. 462, 482–84 (2011).

<sup>74</sup> See generally CRS Report R43746, *Congressional Power to Create Federal Courts: A Legal Overview*, by Andrew Nolan and Richard M. Thompson II. Congressional offices with questions about Congress’s power to create federal courts may contact Joanna Lampe.

<sup>75</sup> See, e.g., Standing Order, No. 12 Misc. 32 (S.D.N.Y. Jan. 31, 2012) (“Pursuant to 28 U.S.C. Section 157(a) any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 are referred to the bankruptcy judges for this district.”), [https://www.nysd.uscourts.gov/sites/default/files/pdf/StandingOrder\\_OrderReference\\_12mc32.pdf](https://www.nysd.uscourts.gov/sites/default/files/pdf/StandingOrder_OrderReference_12mc32.pdf). Since the 1970s, bankruptcy courts have operated as adjuncts to the district courts. See Cong. Rsch. Serv., *Bankruptcy Courts as Adjuncts to Article III Courts*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artIII-S1-9-8/ALDE\\_00013611/](https://constitution.congress.gov/browse/essay/artIII-S1-9-8/ALDE_00013611/) (last visited July 28, 2023).

<sup>76</sup> 28 U.S.C. § 152.

<sup>77</sup> *Id.* § 152(e).

<sup>78</sup> *Id.* § 158; see also *Court Insider: What is a Bankruptcy Appellate Panel?* U.S. CTS. (Nov. 26, 2012), <https://www.uscourts.gov/news/2012/11/26/court-insider-what-bankruptcy-appellate-panel>.

<sup>79</sup> *Id.*

of appeals. The Supreme Court may review court of appeals decisions in bankruptcy cases via a writ of certiorari.<sup>80</sup>

Another specialized Article I tribunal, the U.S. Tax Court, resolves certain types of disputes between taxpayers and the government, including providing taxpayers a forum in which to challenge such determinations before paying the deficiency.<sup>81</sup> The Tax Court is composed of nineteen judges. Tax Court judges are nominated by the President and confirmed by the Senate. They sit for fifteen-year terms and can be removed by the President for “inefficiency, neglect of duty, or malfeasance in office[.]”<sup>82</sup> They are also subject to mandatory retirement at age seventy.<sup>83</sup> The Tax Court is headquartered in Washington, D.C., but its judges travel to hold trials in seventy-four designated U.S. cities.<sup>84</sup>

A single judge presides over a Tax Court case. Some Tax Court decisions may be appealed to the U.S. Court of Appeals for the geographic circuit in which the Tax Court heard the case,<sup>85</sup> while the Tax Court makes a final, unappealable decision in a subset of cases where taxpayers opt for treatment as “Small Tax Cases.”<sup>86</sup>

The U.S. Court of Federal Claims has jurisdiction over certain monetary claims against the federal government, such as claims for tax refunds, federal pay, compensation for injuries caused by vaccines, claims based on government contracts, and intellectual property claims.<sup>87</sup> The Court of Federal Claims is composed of sixteen judges who are nominated by the President and confirmed by the Senate to serve fifteen-year terms.<sup>88</sup> A judge may be removed during that term only upon a finding by a majority of the judges on the U.S. Court of Appeals for the Federal Circuit of “incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability.”<sup>89</sup>

The Court of Federal Claims is based in the District of Columbia but may hear cases in other locations in order to provide “reasonable opportunity to citizens to appear before the [court] with as little inconvenience and expense to citizens as is practicable.”<sup>90</sup> Each case is heard by a single judge, with no jury trial available.<sup>91</sup> Decisions of the Court of Federal Claims may be appealed to the U.S. Court of Appeals for the Federal Circuit, then to the Supreme Court.<sup>92</sup>

The Court of Appeals for Veterans Claims (CAVC) provides the exclusive forum for veterans and other claimants, such as veterans’ surviving spouses, to appeal decisions of the Board of Veterans’ Appeals denying veterans’ benefits.<sup>93</sup>

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<sup>80</sup> See 28 U.S.C. § 1254.

<sup>81</sup> See generally CRS In Focus IF10331, *U.S. Tax Court: A Brief Introduction*, by Barry J. McMillion.

<sup>82</sup> 26 U.S.C. § 7443.

<sup>83</sup> *Id.* § 7447.

<sup>84</sup> *Places of Trial*, U.S. TAX CT., [https://www.ustaxcourt.gov/dpt\\_cities.html](https://www.ustaxcourt.gov/dpt_cities.html) (last visited July 18, 2023).

<sup>85</sup> 26 U.S.C. § 7482(a)(1).

<sup>86</sup> 26 U.S.C. § 7463; Information About Filing a Case in the United States Tax Court, [https://www.ustaxcourt.gov/forms/Petition\\_Kit.pdf](https://www.ustaxcourt.gov/forms/Petition_Kit.pdf) (last visited July 18, 2023).

<sup>87</sup> *About the Court*, U.S. CT. FED. CLAIMS, <https://www.uscfc.uscourts.gov/about-court> (last visited July 18, 2023).

<sup>88</sup> 28 U.S.C. § 171.

<sup>89</sup> *Id.* § 176.

<sup>90</sup> *Id.* § 173.

<sup>91</sup> *Id.* § 174.

<sup>92</sup> *Id.* §§ 1254, 1295.

<sup>93</sup> See generally CRS In Focus IF11365, *U.S. Court of Appeals for Veterans Claims: A Brief Introduction*, by Jonathan M. Gaffney; see also 38 U.S.C. § 7251.

The CAVC consists of nine judges. Judges are appointed by the President and confirmed by the Senate for fifteen-year terms and may be reappointed for additional terms. A judge may be removed by the President during a term only for “misconduct, neglect of duty, engaging in the practice of law,” or living more than fifty miles from Washington, D.C.<sup>94</sup>

Like the Court of Federal Claims, the CAVC is based in the District of Columbia but may hold proceedings in other locations.<sup>95</sup> A case may be heard either by a single judge or by a panel of three judges. Decisions of a single judge may be reviewed by a three-judge panel. Decisions of either a single judge or a three-judge panel may be reviewed by the entire court sitting en banc. Decisions of the CAVC may be appealed to the U.S. Court of Appeals for the Federal Circuit, then to the Supreme Court. However, review by the Federal Circuit is generally limited to legal questions.<sup>96</sup>

The U.S. Court of Appeals for the Armed Forces (CAAF) hears appeals brought by persons convicted at courts-martial under the Uniform Code of Military Justice challenging decisions of the Army, Navy, Marine Corps, Air Force, and Coast Guard Courts of Criminal Appeals.<sup>97</sup>

The CAAF consists of five judges, who must be “appointed from civilian life” by the President and confirmed by the Senate.<sup>98</sup> Judges serve for fifteen-year terms with no bar on reappointment after a term expires. During a term, a judge may be removed by the President only for neglect of duty, misconduct, or mental or physical disability.<sup>99</sup>

The CAAF generally sits in Washington, D.C., but has the authority to sit anywhere in the United States. Decisions of the CAAF may be appealed directly to the Supreme Court via a petition for a writ of certiorari.<sup>100</sup>

### ***Territorial District Courts***

Although they are referred to as “district courts,” the federal district courts in Guam, the Virgin Islands, and the Northern Mariana Islands are legislative courts that differ from the Article III district courts in the states, the District of Columbia, and Puerto Rico.<sup>101</sup> Congress established these territorial district courts pursuant to its Article IV power to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>102</sup> Judges on these courts are appointed by the President with the advice and consent of the Senate. However, they serve for terms of ten years rather than for life and may be removed by the President “for cause.”<sup>103</sup> The district courts in Guam, the Virgin Islands, and the Northern

<sup>94</sup> 38 U.S.C. § 7253.

<sup>95</sup> *Id.* § 7255.

<sup>96</sup> *Id.* § 7292.

<sup>97</sup> See generally CRS In Focus IF12296, *U.S. Court of Appeals for the Armed Forces: A Brief Introduction*, by Andreas Kuersten; see also 10 U.S.C. § 941.

<sup>98</sup> 10 U.S.C. § 942. “A person may not be appointed as a judge of the [CAAF] within seven years after retirement from active duty as a commissioned officer of a regular component of an armed force.” *Id.* § 942(b)(4).

<sup>99</sup> *Id.*

<sup>100</sup> 28 U.S.C. § 1259. An individual can also collaterally challenge CAAF a decision through a petition for a writ of habeas corpus filed in district court or through a claim for back pay filed in the Court of Federal Claims. See Kuersten, *supra* note 97.

<sup>101</sup> See “Territorial Courts” section of CRS Report R43746, *Congressional Power to Create Federal Courts: A Legal Overview*, by Andrew Nolan and Richard M. Thompson II. Congressional offices with questions about Congress’s power to create federal courts may contact Joanna Lampe.

<sup>102</sup> U.S. CONST. art. IV, § 3, cl. 2.

<sup>103</sup> 48 U.S.C. §§ 1424, 1424b, 1611, 1614, 1821.

Mariana Islands exercise jurisdiction similar to that of the other federal district courts. As with the Article III district courts, a decision of a territorial district court is subject to appellate review by the U.S. court of appeals of the circuit where the district court is located, then by the Supreme Court.<sup>104</sup>

In addition to territorial district courts, most U.S. territories have local courts that function much like state courts. Congress has enacted legislation to establish local courts for the U.S. territory of Guam.<sup>105</sup> Local courts for Puerto Rico, the Virgin Islands, and the Northern Mariana Islands are not established directly under federal law.<sup>106</sup> American Samoa does not have a district court but instead has a High Court that has jurisdiction over local matters and also exercises limited jurisdiction over federal matters.<sup>107</sup>

### *District of Columbia Local Courts*

As noted above, the District of Columbia has a federal district court and a federal appeals court established under Article III.<sup>108</sup> Those courts have the same statutory basis and structure, and similar subject matter jurisdiction, as the other Article III district courts and regional courts of appeals.

In addition to those Article III federal courts, Congress has also established local D.C. courts known as the D.C. Superior Court and the D.C. Court of Appeals.<sup>109</sup> Because Congress exercises authority over the District of Columbia, those courts are organized under federal rather than state law.<sup>110</sup> However, they serve a role comparable to that of state courts, administering and interpreting the District of Columbia's local laws.

Judges on the D.C. Superior Court and the D.C. Court of Appeals are appointed by the President based on a list of candidates prepared by the District of Columbia Judicial Nomination Commission.<sup>111</sup> Nominees must be confirmed by the Senate. They serve renewable fifteen-year terms, with a mandatory retirement age of seventy-four.<sup>112</sup> Decisions of the D.C. Superior Court are subject to review on appeals by the D.C. Court of Appeals, then by the U.S. Supreme Court via a writ of certiorari.<sup>113</sup>

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<sup>104</sup> 28 U.S.C. §§ 41, 1254.

<sup>105</sup> 48 U.S.C. § 1424-1.

<sup>106</sup> See *Leyes y Reglamentos del Poder Judicial (Laws and Regulations of the Judiciary)*, PODER JUDICIAL DE PUERTO RICO (PUERTO RICAN JUDICIARY), <https://poderjudicial.pr/leyes-y-reglamentos-de-la-rama-judicial/> (last visited July 18, 2023); *History of the V. I. Judiciary*, JUDICIAL BRANCH OF THE U.S. VIRGIN ISLANDS, [https://www.vicourts.org/about\\_us/overview\\_of\\_judiciary\\_of\\_the\\_virgin\\_islands/history\\_of\\_the\\_v\\_i\\_judiciary](https://www.vicourts.org/about_us/overview_of_judiciary_of_the_virgin_islands/history_of_the_v_i_judiciary) (last visited July 18, 2023); Northern Marianas Judiciary Historical Society, *THE NORTHERN MARIANA ISLANDS JUDICIARY: A HISTORICAL OVERVIEW* 43–50 (2011).

<sup>107</sup> GAO, *American Samoa: Issues Associated with Some Federal Court Options* 11 (Sept. 18, 2008), <https://www.gao.gov/assets/gao-08-1124t.pdf>. Federal matters arising in American Samoa that cannot be adjudicated in Samoan courts generally proceed in federal courts in Hawaii or the District of Columbia. See *id.*

<sup>108</sup> 28 U.S.C. §§ 41, 88; see also *supra* “U.S. Courts of Appeals”; “U.S. District Courts.”

<sup>109</sup> District of Columbia Court Reorganization Act of 1970, Pub. L. 91-358, 84 Stat. 475.

<sup>110</sup> U.S. CONST. art. I, § 8, cl. 17.

<sup>111</sup> D.C. Code § 1-204.31(c).

<sup>112</sup> *Id.* Judges of the D.C. courts are subject to removal by a Tenure Commission based on conviction of a felony, misconduct, failure to perform judicial duties, or “any other conduct which is prejudicial to the administration of justice or which brings the judicial office into disrepute.” D.C. Code § 1-204.32. They may also be required to retire due to mental or physical disability. *Id.*

<sup>113</sup> D.C. Code § 1-204.31(a); 28 U.S.C. § 1257. The D.C. Court of Appeals is treated as the “highest court of a State” (continued...)



## State Courts

Each state has its own judicial system, and there is significant variation between the federal and state courts and among state judiciaries. One key distinction between state and federal courts is that state court judges generally do not have the same constitutional protections that Article III provides for federal judges. As discussed further below, state judges may be selected differently than federal judges, and most do not enjoy life tenure once on the bench. While federal substantive law and procedural rules are fairly uniform throughout the country, state substantive laws and procedural rules may vary significantly.

This section provides an overview of state court systems, highlighting general trends and differences between the state and federal judicial systems. An appendix to this report includes additional information about selection and retention of judges on each state’s highest court.<sup>114</sup>

### Structure of State Courts

State courts are established under each state’s constitution, and like the federal courts, aspects of their structure and proceedings may also be governed by statute. While the structure of state courts varies widely, each state has trial-level courts and at least one appellate court that can review lower court decisions. The highest court is often called the state supreme court, though some states use different names.<sup>115</sup> In addition to a supreme court, most states also have one or more intermediate appellate courts, which can review decisions of the trial courts in the first instance.<sup>116</sup>

State appellate courts may be required to hear all appeals that are properly before them, similar to the federal intermediate appellate courts, or they may have discretion over whether to hear appeals, like the U.S. Supreme Court does in most cases. In many states with intermediate appellate courts, a litigant has a right to appeal to an intermediate appeals court, while the state supreme court has discretion whether to review most or all cases.<sup>117</sup> Sometimes the procedure for appellate review depends on the type of case. For instance, in Massachusetts, most cases may be appealed as of right to the Massachusetts Appeals Court (meaning that the court must hear those cases), and the Supreme Judicial Court then has discretion over whether or not to review the appellate court’s decisions. However, the Supreme Judicial Court has exclusive and mandatory jurisdiction over appeals from first-degree murder convictions.<sup>118</sup> Similarly, a criminal defendant

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for purposes of Supreme Court review. 28 U.S.C. § 1257(b); *see also infra* “Federal Court Review of State Court Decisions.”

<sup>114</sup> *See infra* **Appendix**.

<sup>115</sup> For instance, the highest courts in Massachusetts and Maine are called the “Supreme Judicial Court.” *See Supreme Judicial Court*, STATE OF MAINE JUDICIAL BRANCH, <https://www.courts.maine.gov/courts/sjc/index.html> (last visited July 18, 2023); *Massachusetts Supreme Judicial Court (SJC)*, MASS.GOV, <https://www.mass.gov/orgs/massachusetts-supreme-judicial-court> (last visited July 18, 2023). New York’s highest court is called the “New York State Court of Appeals,” while the statewide trial court system is called the “Supreme Court.” *See Court System Outline*, CT. OF APPEALS STATE OF N.Y., <https://www.nycourts.gov/ctapps/outline.htm> (last visited July 18, 2023).

<sup>116</sup> Delaware, Maine, Montana, New Hampshire, Rhode Island, South Dakota, Vermont, and Wyoming do not have intermediate appellate courts. *See* Benjamin D. Battles, *A Short Guide to Vermont Appellate Practice*, 48-SPG VT. B.J. 28, 28 n.5 (2022), <https://www.vtbar.org/wp-content/uploads/2022/05/Ben-Battles.pdf>.

<sup>117</sup> *See, e.g.*, Steven Shavell, *On the Design of the Appeals Process: The Optimal Use of Discretionary Review Versus Direct Appeal*, 39 J. LEGAL STUD. 63, 84 & n.33 (2010).

<sup>118</sup> MASS. GEN. LAWS ch. 221A, § 10; MASS. GEN. LAWS ch. 278, § 33E; *see also* Learn About the Court Appellate Process, MASS.GOV, <https://www.mass.gov/info-details/learn-about-the-court-appellate-process> (last visited July 18, 2023).



sentenced to death in California is entitled to an automatic direct appeal to the California Supreme Court.<sup>119</sup>

As in the federal judiciary, states may create specialized courts at the trial or appellate level or both. For instance, some states have created separate appellate courts to hear civil and criminal appeals.<sup>120</sup> Specialized trial courts at the state level may include probate courts, family courts, juvenile courts, small claims courts, or others.<sup>121</sup>

## Appointment or Election of Judges

States vary in their provision for selection and retention of judges. Just as the Framers debated the appropriate balance of independence, efficiency, and accountability for federal judges under Article III of the Constitution, the features of various state systems reflect different attempts to achieve these same goals. In contrast to the federal judiciary, most states require judges to stand for election either to be selected for office initially or to remain on the bench. State laws related to the selection and retention of judges may vary depending on the level of court at issue. For instance, judges on Tennessee appellate courts are appointed by the governor and confirmed by the state's general assembly, while trial court judges are elected.<sup>122</sup>

Twenty-one states provide for direct election of judges on their highest courts.<sup>123</sup> In some states, judicial elections are partisan, while in others, they are nonpartisan.<sup>124</sup> In most other states, judges are appointed by the governor, often subject to confirmation by the state legislature or another body. In seventeen states, the governor is required to select a nominee from a list prepared by a body such as a judicial nominating commission.<sup>125</sup> In six states, the governor chooses nominees freely, similar to the federal system.<sup>126</sup> In New Hampshire, the governor and a state executive council appoint judges.<sup>127</sup> In Indiana and Iowa, a judicial nominating commission appoints judges without the involvement of the governor.<sup>128</sup> In South Carolina, the state general assembly elects supreme court justices from a list provided by a judicial merit selection commission.<sup>129</sup> Similarly, in Virginia, supreme court justices are chosen by a vote of the state general assembly.<sup>130</sup>

<sup>119</sup> See CAL. PENAL CODE § 1239; see also Office of Victims' Services, California Attorney General's Office, *A Victim's Guide to the Capital Case Process* 3 <https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/deathpen.pdf> (last visited July 18, 2023).

<sup>120</sup> See, e.g., *Court Structure of Texas*, TEX. JUDICIAL BRANCH, <https://www.txcourts.gov/media/1455946/court-structure-chart-january-2023.pdf> (Jan. 2023); *About The Court of Appeals*, TNCOURTS.GOV, <https://tncourts.gov/courts/court-appeals/about> (last visited July 18, 2023); *About The Court of Criminal Appeals*, TNCOURTS.GOV, <https://tncourts.gov/courts/court-criminal-appeals/about> (last visited July 18, 2023). Pennsylvania has a specialized court that handles matters including appeals from decisions of state government agencies. See *Learn*, UNIFIED JUDICIAL SYS. PA., <https://www.pacourts.us/learn/> (last visited July 18, 2023).

<sup>121</sup> See Special Courts, 20 Am. Jur. 2d Courts § 11.

<sup>122</sup> See Tenn. Const. art. VI, § 3; TENN. CODE ANN. §§ 17-1-103, 17-4-101.

<sup>123</sup> See *infra* **Appendix**.

<sup>124</sup> Compare, e.g., Ala. Const. art. VI, §§ 152, 154 (providing for partisan elections); ALA. CODE § 12-2-1 (same); Ill. Const. art. VI, §§ 10, 12 (same), with Ark. Const. amend. 80, §§ 16(A), 18(A) (providing for nonpartisan elections); Ga. Const. art. VI, § VII, para. I (same).

<sup>125</sup> See *infra* **Appendix**.

<sup>126</sup> See *id.*

<sup>127</sup> N.H. Const. pt. 2 arts. 46, 73.

<sup>128</sup> Ind. Const. art. 7, §§ 9, 11; Iowa Const. art. V §§ 16, 17.

<sup>129</sup> S.C. Const. Ann. art. V, §§ 3, 27.

<sup>130</sup> Va. Const. art. VI, § 7.

Once on the bench, most state judges must periodically stand for election to remain in office. In every state that provides for direct election of judges, judges must periodically stand for reelection.<sup>131</sup> Usually, such elections work similarly to the initial election, but in New Mexico, judges running for subsequent terms must obtain 57% of the vote to be retained in office.<sup>132</sup> In sixteen states where the governor or a nominating commission appoints judges, the judges serve initial terms and then stand for election to remain in office.<sup>133</sup> Judges who seek retention or reelection are usually successful.<sup>134</sup>

In a handful of states, a judge serves for a term of years and may then be reappointed by the governor, the state legislature, or another government body for one or more additional terms.<sup>135</sup> In Massachusetts, New Hampshire, and Rhode Island, judges serve during good behavior once appointed and confirmed, subject to age limits if applicable.<sup>136</sup> In New Jersey, judges serve for initial terms of seven years, after which the governor may reappoint them to serve during good behavior until they reach mandatory retirement age.<sup>137</sup>

### Term and Age Limits

In every state but Massachusetts, New Hampshire, and Rhode Island, judges on the state's highest court serve for renewable terms of years.<sup>138</sup> In some states, the length of judicial terms varies by court, with judges on higher courts serving longer terms than judges on lower courts. For instance, the Montana Constitution provides that “[t]erms of office shall be eight years for supreme court justices, six years for district court judges, four years for justices of the peace, and as provided by law for other judges.”<sup>139</sup> Other states provide for uniform terms at multiple levels of the judiciary.<sup>140</sup> In some states, high court judges serve for short initial terms, which are followed by longer second or subsequent terms if the judges are retained in retention elections. For instance, in Nebraska, supreme court justices are appointed by the governor for initial three-year terms then can stand in retention elections for additional six-year terms.<sup>141</sup> In New Jersey, supreme court judges serve for initial terms of years then may be reappointed to serve indefinitely during good behavior, subject to an age limit.<sup>142</sup> No state expressly limits the number of times a supreme court judge may seek reelection, retention, or reappointment.

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<sup>131</sup> See *infra* **Appendix**.

<sup>132</sup> N.M. Const. art. VI, §§ 33(1)–(2).

<sup>133</sup> See *infra* **Appendix**.

<sup>134</sup> The rate of retention is higher in uncontested retention votes than in contested elections. See, e.g., Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 684 (2009) (citing studies finding that “[i]ncumbent [state] high-court judges are returned to the bench 99% of the time across the country when they run in retention referenda,” while “justices running for reelection in states that use partisan elections were defeated nearly 23% of the time”). See also B. M. Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429–1429-30 (2001).

<sup>135</sup> See *id.*

<sup>136</sup> Mass. Const. pt. 2, ch. III, art. I; N.H. Const. pt. 2 art. 73; R.I. Const. art. X, § 5.

<sup>137</sup> N.J. Const. art. VI, § VI, para. 3.

<sup>138</sup> See *infra* **Appendix**.

<sup>139</sup> Mont. Const. art. 7, § 7.

<sup>140</sup> See, e.g., N.C. Const. art. IV, § 16.

<sup>141</sup> Neb. Const. art. V, § 21.

<sup>142</sup> N.J. Const. art. VI, § VI, para. 3.

Thirty-five states impose age limits for judges. Some of these states provide that retirement occurs automatically upon a judge reaching a certain age.<sup>143</sup> Others allow a judge who reaches retirement age during a judicial term to complete the term or otherwise provide for a limited grace period before retirement.<sup>144</sup> Two states do not impose a mandatory retirement age but allow for required retirement of judges who cannot perform their duties due to age or incapacity.<sup>145</sup> Thirteen states do not impose age limits or mandatory retirement. Most of those states require judges to stand for reelection or retention periodically. Due to the combination of election and retention requirements and age limits, Rhode Island is the only state in which state supreme court judges enjoy life tenure during good behavior once appointed, similar to federal Article III judges.<sup>146</sup>

## Voting Rules

As noted above, federal courts sitting as multi-judge panels (including the Supreme Court and U.S. Courts of Appeals) decide cases by majority vote.<sup>147</sup> Most state high courts sitting in multi-judge panels likewise decide cases by majority vote. However, two states—North Dakota and Nebraska—require the agreement of a supermajority of state supreme court justices before the court can hold a state statute to be unconstitutional. The Nebraska Constitution requires the concurrence of five out of seven judges of the state supreme court in order to strike down a law.<sup>148</sup> The North Dakota Constitution requires the agreement of four out of five state supreme court justices to hold a law unconstitutional.<sup>149</sup> Ohio imposed a supermajority voting requirement in 1912 but repealed it in 1968.<sup>150</sup> By making it more difficult for courts to invalidate legislation, supermajority voting rules have the effect of limiting the power of courts with respect to the legislature.<sup>151</sup>

## Jurisdiction: Which Courts Can Hear Which Cases

*Jurisdiction* is the power of a court to decide a case. There are two types of jurisdiction: *Personal jurisdiction* is a court's authority to adjudicate the rights of the persons or entities before it, while *subject matter jurisdiction* is the authority to decide a particular legal question.<sup>152</sup> A court must

<sup>143</sup> See, e.g., ALASKA STAT. § 22.25.010; Colo. Const. art. VI, § 23.

<sup>144</sup> See, e.g., Ala. Const. art. VI, § 155; 705 ILL. COMP. STAT. ANN. 55/1.

<sup>145</sup> See Nev. Const. art. 6, § 21(8)(b); W. Va. Const. art. VIII, § 8. States that impose age limits may also provide for required retirement of judges due to advanced age or physical or mental disability. See, e.g., Ma. Const. pt. 2, C. 3, art. 1. Federal Article III judges may not be removed due to disability, but federal law creates procedures to resolve complaints of judicial disability. Judges unable to discharge their office by reason of disability may be asked to retire or may not be assigned new cases. See 28 U.S.C. §§ 251-255.

<sup>146</sup> R.I. Const. art. X, § 5.

<sup>147</sup> See *supra* “Supreme Court of the United States”; “U.S. Courts of Appeals.”

<sup>148</sup> Neb. Const. art. V, § 2

<sup>149</sup> N.D. Const. art VI, §§ 2, 4.

<sup>150</sup> See Evan Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rules: Lessons from the Past*, 78 IND. L.J. 73, 90-91 (2003)

<sup>151</sup> See *id.* Some commentators and lawmakers have advocated for imposing a supermajority voting requirement on the U.S. Supreme Court. For discussion of such proposals, see “Voting Rules and Congressional Override” section of CRS Report R47382, *Congressional Control over the Supreme Court*, by Joanna R. Lampe.

<sup>152</sup> See *Jurisdiction*, Black’s Law Dictionary (11th ed. 2019).

have both personal jurisdiction over the parties and subject matter jurisdiction over the legal questions presented in order to rule on a case.<sup>153</sup>

The U.S. Constitution and federal statutory law define the jurisdiction of the federal courts.<sup>154</sup> State constitutions and statutes establish state courts' jurisdiction subject to certain limits under the U.S. Constitution.<sup>155</sup> As discussed further below, sometimes more than one court has the legal authority to hear a case, and litigants may be able to choose whether to proceed in federal or state court or to select between multiple specific courts within the federal or state judiciary.

## Subject Matter Jurisdiction

The Constitution grants the federal courts limited subject matter jurisdiction, and thus federal courts may hear only cases that fall within certain enumerated categories.<sup>156</sup> By contrast, each state has at least one court that may exercise general jurisdiction, meaning that it may hear any type of cases unless a specific limit under the Constitution or federal or state law applies.<sup>157</sup>

Beginning with federal court jurisdiction, Article III, Section 2, Clause 1, of the Constitution provides that the federal judicial power “shall extend” to the following categories of cases and controversies:

- Cases arising under the Constitution, federal law, or treaties;
- Cases affecting ambassadors, other public ministers, and consuls;
- Admiralty and maritime law cases;
- Controversies to which the United States is a party;
- Controversies between two or more states;
- Controversies between a state and citizens of another state;
- Controversies between citizens of different states;
- Controversies between citizens of the same state claiming lands under grants of different states; and
- Controversies between a state or its citizens and a foreign state or its citizens or subjects.<sup>158</sup>

Among those categories, the two that generate the most federal court litigation are the grant of jurisdiction over cases arising under the Constitution, federal law, or treaties—sometimes called

<sup>153</sup> Personal jurisdiction may be waived, meaning that court that would not otherwise have personal jurisdiction over a party may nonetheless hear a case involving that party if the party consents to jurisdiction or fails to object. Subject matter jurisdiction may not be waived. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701-03 (1982).

<sup>154</sup> *See, e.g.*, U.S. CONST. art. III, § 2, cl. 2; 28 U.S.C. §§ 1331, 1332. *See also* Cong. Rsch. Serv., *Overview of Cases or Controversies*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artIII-S2-C1-1/ALDE\\_00013375/](https://constitution.congress.gov/browse/essay/artIII-S2-C1-1/ALDE_00013375/) (last visited July 18, 2023); Cong. Rsch. Serv., *Overview of Federal Question Jurisdiction*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artIII-S2-C1-11-1/ALDE\\_00013326](https://constitution.congress.gov/browse/essay/artIII-S2-C1-11-1/ALDE_00013326/) (last visited July 18, 2023); Cong. Rsch. Serv., *Overview of Diversity Jurisdiction*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artIII-S2-C1-16-1/ALDE\\_00013239](https://constitution.congress.gov/browse/essay/artIII-S2-C1-16-1/ALDE_00013239/) (last visited July 18, 2023).

<sup>155</sup> *See, e.g.*, Cong. Rsch. Serv., *Overview of Personal Jurisdiction and Due Process*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/amdt14-S1-7-1-1/ALDE\\_00000907/](https://constitution.congress.gov/browse/essay/amdt14-S1-7-1-1/ALDE_00000907/) (last visited July 18, 2023).

<sup>156</sup> *See* Cong. Rsch. Serv., *Overview of Cases or Controversies*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artIII-S2-C1-1/ALDE\\_00013375/](https://constitution.congress.gov/browse/essay/artIII-S2-C1-1/ALDE_00013375/) (last visited July 18, 2023).

<sup>157</sup> *See Jurisdiction*, Black's Law Dictionary (11th ed. 2019).

<sup>158</sup> U.S. CONST. art. III, § 2, cl. 1.

*federal question jurisdiction* or *arising under jurisdiction*—and the grant of jurisdiction over disputes between citizens of different states—also known as *diversity jurisdiction*.<sup>159</sup> In the first of these categories, federal courts generally decide matters of federal law. By contrast, when federal courts exercise diversity jurisdiction, they may decide questions of state law when those questions arise in suits between citizens of different states.

Article III, Section 2, Clause 2, grants the U.S. Supreme Court original jurisdiction over two categories of cases: cases affecting ambassadors, other public ministers, and consuls and cases in which a state is a party to the controversy.<sup>160</sup> *Original jurisdiction* means that parties may commence these types of cases directly in the Supreme Court.<sup>161</sup> The Supreme Court has held that its original jurisdiction flows directly from the Constitution, so Congress cannot limit or expand its scope.<sup>162</sup> However, the constitutional grant of Supreme Court original jurisdiction is not exclusive.<sup>163</sup> Parties can commence suits subject to Supreme Court original jurisdiction in state court or in inferior federal courts.<sup>164</sup> Supreme Court cases invoking the Court’s original jurisdiction are relatively rare.<sup>165</sup>

Other types of cases can reach the Supreme Court, if at all, on appeal from a decision of a lower federal court or a state court.<sup>166</sup> Article III provides that the Supreme Court shall have appellate jurisdiction “with such Exceptions, and under such Regulations as the Congress shall make.”<sup>167</sup>

Congress cannot grant the federal courts jurisdiction over cases that fall outside the list in Article III, Section 2, Clause 1, and, as noted, cannot alter the Supreme Court’s original jurisdiction. Otherwise, however, Congress can decide whether, and to what extent, to grant the federal courts jurisdiction over the enumerated categories of cases. This gives Congress substantial control over the subject matter jurisdiction of the federal courts.<sup>168</sup> As a result, federal court jurisdiction is largely defined by federal statutes rather than the text of Article III.

In most cases where federal courts can exercise subject matter jurisdiction, state courts possess *concurrent jurisdiction* to hear cases that could also proceed in federal court. Thus, a citizen of one state suing a citizen of another state and seeking more than \$75,000 in damages may elect to file suit in either federal or state court. Similarly, a person bringing a civil claim under a federal

<sup>159</sup> See generally Cong. Rsch. Serv., *Overview of Federal Question Jurisdiction*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artIII-S2-C1-11-1/ALDE\\_00013326](https://constitution.congress.gov/browse/essay/artIII-S2-C1-11-1/ALDE_00013326) (last visited July 18, 2023); Cong. Rsch. Serv., *Overview of Diversity Jurisdiction*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artIII-S2-C1-16-1/ALDE\\_00013239](https://constitution.congress.gov/browse/essay/artIII-S2-C1-16-1/ALDE_00013239) (last visited July 18, 2023).

<sup>160</sup> U.S. CONST. art. III, § 2, cl. 2; see also Cong. Rsch. Serv., *Supreme Court Original Jurisdiction*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artIII-S2-C2-2/ALDE\\_00001220/](https://constitution.congress.gov/browse/essay/artIII-S2-C2-2/ALDE_00001220/) (last visited July 18, 2023).

<sup>161</sup> See *Jurisdiction*, Black’s Law Dictionary (11th ed. 2019).

<sup>162</sup> *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 98 (1861).

<sup>163</sup> Cf. 28 U.S.C § 1251 (statute providing for “original and exclusive” Supreme Court jurisdiction over controversies between two or more states and “original but not exclusive” Supreme Court jurisdiction over certain other matters).

<sup>164</sup> See, e.g., *Ames v. Kansas ex rel. Johnston*, 111 U.S. 449 (1884).

<sup>165</sup> To illustrate, of the sixty-six merits cases the Court considered during its October 2021 Term, only one invoked the Court’s original jurisdiction. See Angie Gou, Ellena Erskine, & James Romoser, *STAT PACK for the Supreme Court’s 2021-22 Term* 24, SCOTUSBLOG (July 1, 2022) <https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSBlog-Final-STAT-PACK-OT2021.pdf>.

<sup>166</sup> U.S. CONST. art. III, § 2, cl. 2.

<sup>167</sup> U.S. CONST. art. III, § 2, cl. 2.

<sup>168</sup> See generally CRS Report R44967, *Congress’s Power over Courts: Jurisdiction Stripping and the Rule of Klein*, coordinated by Kevin M. Lewis. Congressional offices with questions about Congress’s power to limit federal court jurisdiction may contact Joanna Lampe.

statute may often file in either federal or state court. For instance, some plaintiffs bringing federal civil rights claims under 42 U.S.C. § 1983 elect to sue in state court, sometimes along with related claims under state civil rights laws.<sup>169</sup> The plaintiff's choice of forum is not always the last word on the matter: As discussed further below, there are circumstances in which cases can move between state and federal court.<sup>170</sup>

In some categories of cases, Congress has provided for *exclusive jurisdiction*, meaning that such cases can be brought only in federal court, not in state court. For instance, the federal courts have exclusive jurisdiction over federal criminal cases and cases arising under federal bankruptcy, antitrust, or copyright law.<sup>171</sup>

Cases that do not fall within the bounds of federal court subject matter jurisdiction as established by the Constitution and federal statutes must proceed in state court, if at all. State courts thus have jurisdiction over many issues that have traditionally been matters of state law, including property ownership and transfer; business organizations and professional licensing; marriage, divorce, and adoption; and many aspects of criminal law. There are federal laws that regulate particular aspects of each of these areas that could raise questions for the federal courts, and the Supreme Court may also hear appeals based on the Constitution or federal law.<sup>172</sup> Claims arising under state law between parties from the same state must also generally proceed in state court. In the aggregate, state courts hear significantly more cases than the federal courts do.<sup>173</sup> One 2014 report stated that federal courts consider approximately 400,000 cases a year, compared to more than 100 million cases filed annually in state courts.<sup>174</sup>

## Personal Jurisdiction

In addition to subject matter jurisdiction, any federal or state court hearing a case must have personal jurisdiction over the parties. The Due Process Clause of the Fourteenth Amendment limits when state courts may exercise personal jurisdiction. These limits protect parties from having to defend against litigation in forums to which they have no connection and protect the sovereignty of each state from other states.<sup>175</sup> The Supreme Court has held that a state court may exercise personal jurisdiction over a defendant if the defendant has “certain minimum contacts with [the State] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”<sup>176</sup> Under the Federal Rules of Civil Procedure, federal courts

<sup>169</sup> See, e.g., Martin A. Schwartz, *Section 1983 Litigation – Supreme Court Developments*, 15 *TOURO L. REV.* 859, 860-61 (1999).

<sup>170</sup> See *infra* “Moving Between State and Federal Court.”

<sup>171</sup> See 18 U.S.C. § 3231 (federal criminal proceedings); 28 U.S.C. § 1334 (bankruptcy cases); *id.* § 1337 (antitrust cases); *id.* § 1337 (patent and copyright cases).

<sup>172</sup> See *infra* “Federal Court Review of State Court Decisions.”

<sup>173</sup> Mathew Manweller, *The Roles, Functions, and Powers of State Courts*, in *THE JUDICIAL BRANCH OF STATE GOVERNMENT: PEOPLE, PROCESS, AND POLITICS* 37–96 (Sean O. Hogan, ed.) (2006).

<sup>174</sup> Univ. of Denver, Institute for the Advancement of the American Legal System, *FAQs: Judges in the United States*, [https://iaals.du.edu/sites/default/files/documents/publications/judge\\_faq.pdf](https://iaals.du.edu/sites/default/files/documents/publications/judge_faq.pdf). State judicial systems are also larger than the federal system, in the aggregate. The same report estimates that there are about 30,000 state judges and 1,700 federal judges. *Id.*

<sup>175</sup> See, e.g., Cong. Rsch. Serv., *Overview of Personal Jurisdiction and Due Process*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/amdt14-S1-7-1-1/ALDE\\_00000907/](https://constitution.congress.gov/browse/essay/amdt14-S1-7-1-1/ALDE_00000907/) (last visited July 18, 2023); *Bristol-Meyers Squibb v. Superior Court of Ca.* 137 S. Ct. 1773, 1780-81 (2017).

<sup>176</sup> *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).



ordinarily apply the law of the states in which they sit to determine the scope of their personal jurisdiction.<sup>177</sup>

In general, the doctrine of personal jurisdiction does not determine whether a case must proceed in federal or state court. Instead, it determines the location(s) where a case can proceed within each system. Multiple state and federal courts may possess personal jurisdiction over a single person involved in a legal case or controversy. To illustrate, imagine that a citizen of Delaware travels to Alabama and causes a car accident there. A citizen of Pennsylvania injured in the accident sues the citizen of Delaware. State courts in Delaware would have personal jurisdiction over the defendant because she lives in the state. State courts in Alabama would also have personal jurisdiction because the defendant's conduct giving rise to the claim occurred in Alabama.<sup>178</sup> Federal district courts in Delaware and Alabama would also have personal jurisdiction over the defendant (and could potentially exercise subject matter jurisdiction based on diversity, depending on the amount in controversy).<sup>179</sup> However, Pennsylvania state courts or a federal district court in Pennsylvania would likely not have personal jurisdiction over the defendant because she lacks sufficient connection with the state.<sup>180</sup>

## Venue and Other Considerations

When multiple courts have jurisdiction over a case, other legal doctrines may help determine the most appropriate forum. For instance, rules governing *venue* may guide the selection between different federal courts.<sup>181</sup> Venue rules are not constitutional limitations but rather are imposed by statute to protect a defendant against having to litigate in a forum that is arbitrary or inconvenient.<sup>182</sup> In some circumstances, a court that has the authority to exercise jurisdiction over a case may nonetheless decline to do so. For instance, in a case presenting both federal and state law claims, a federal court may decline to hear the case if it raises a novel or complex issue of state law or if state law claims predominate.<sup>183</sup>

## Choice of Law: Applying Federal or State Law

The forum in which litigation proceeds does not dictate the substantive law that governs the claims brought before a court. In particular, it is not always the case that federal courts apply federal law and state courts apply state law. A comprehensive review of the choice of law principles that determine what laws apply to different cases is outside the scope of this report. However, the following sections outline selected circumstances in which state courts may apply federal law or federal courts may apply state law.

<sup>177</sup> See *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014); Fed. R. Civ. P. 4(k)(1)(A). The Supreme Court has generally declined to resolve questions about the extent to which the Fifth Amendment may place constitutional limitations on the personal jurisdiction of the federal courts. See *Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. 255, 268 (2017); *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 n. (1987).

<sup>178</sup> Cf. *Hess v. Pawloski*, 274 U.S. 352 (1927) (Massachusetts court could exercise jurisdiction over a nonresident who caused an accident while driving negligently within the state.).

<sup>179</sup> See Fed. R. Civ. P. 4(k)(1)(A).

<sup>180</sup> See, e.g., Cong. Rsch. Serv., *Modern Doctrine on Personal Jurisdiction*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/amdt14-S1-7-1-3/ALDE\\_00013034/](https://constitution.congress.gov/browse/essay/amdt14-S1-7-1-3/ALDE_00013034/) (last visited July 18, 2023).

<sup>181</sup> See, e.g., 28 U.S.C. § 1391.

<sup>182</sup> 4 Charles Alan Wright et al., *Federal Practice and Procedure* § 1063 (4th ed. 2023).

<sup>183</sup> See 28 U.S.C. § 1367.



Unless otherwise noted, the discussion in this section relates to civil litigation. Federal courts possess exclusive jurisdiction over federal criminal cases, so federal criminal prosecutions must proceed in federal court.<sup>184</sup> State law criminal prosecutions also almost always proceed in state court subject to the limited exceptions discussed below.

## State Courts Applying Federal Law

State courts are authorized to apply federal law in many types of cases and are required to apply federal law when it governs a dispute. While state courts may interpret and apply federal law, the Supreme Court is the final authority on the meaning of federal law. Decisions of the Supreme Court interpreting the Constitution and federal laws and treaties are binding on state courts as well as on the lower federal courts.<sup>185</sup>

As part of their general jurisdiction, state courts have concurrent jurisdiction to hear most cases that raise issues under the Constitution or federal law.<sup>186</sup> As noted above, Congress may enact legislation providing that certain claims arising under federal law may be heard only in federal court.<sup>187</sup> However, unless Congress expressly or implicitly provides for exclusive federal court jurisdiction, a case raising federal law claims may proceed in either state or federal court.<sup>188</sup> The role of state courts in applying federal law dates back to the Founding. Some of the Framers opposed establishing federal courts other than the Supreme Court, arguing that state courts could bear almost exclusive responsibility for enforcing federal law subject to appellate review by the Supreme Court.<sup>189</sup>

While the Framers ultimately authorized the creation of lower federal courts, the Constitution's Supremacy Clause nonetheless contemplates that state courts will apply federal law, providing that "the Judges in every State shall be bound" by the Constitution and federal statutes and treaties, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."<sup>190</sup> Therefore, when federal and state law conflict, state courts must apply federal law.<sup>191</sup> To illustrate, a criminal defendant may defend against state law charges in state court by arguing that the applicable state statute violates the U.S. Constitution.<sup>192</sup> State courts must consider such federal-

<sup>184</sup> See 18 U.S.C. § 3231 (granting the federal district courts "original jurisdiction, exclusive of the courts of the States," over federal criminal proceedings).

<sup>185</sup> See generally Cong. Rsch. Serv., *Overview of Supremacy Clause*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artVI-C2-1/ALDE\\_00013395/](https://constitution.congress.gov/browse/essay/artVI-C2-1/ALDE_00013395/) (last visited July 18, 2023).

<sup>186</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>187</sup> E.g., *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962) ("We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law.").

<sup>188</sup> See, e.g., 18 U.S.C. § 3231 (granting the federal district courts exclusive jurisdiction over federal criminal proceedings); 28 U.S.C. § 1334 (granting district courts jurisdiction over bankruptcy cases); *id.* § 1337 (granting district courts jurisdiction over antitrust cases).

<sup>189</sup> E.g., *Clafflin v. Houseman*, 93 US 130, 136 (1876) ("[I]f exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it.").

<sup>190</sup> See generally Cong. Rsch. Serv., *Historical Background on Relationship Between Federal and State Courts*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artIII-S1-6-2/ALDE\\_00013230/](https://constitution.congress.gov/browse/essay/artIII-S1-6-2/ALDE_00013230/) (last visited July 18, 2023).

<sup>191</sup> U.S. CONST. art. VI, cl. 2.

<sup>192</sup> See generally Cong. Rsch. Serv., *Overview of Supremacy Clause*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artVI-C2-1/ALDE\\_00013395/](https://constitution.congress.gov/browse/essay/artVI-C2-1/ALDE_00013395/) (last visited July 18, 2023).

<sup>193</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003).

law defenses, and the Supreme Court may review state court decisions on matters of federal law.<sup>193</sup>

In addition to considering federal law defenses, there are other times when state courts are required to hear claims arising under federal law. The Supreme Court has ruled that state courts must generally hear federal law claims unless state law bars a state court from hearing a federal claim through a “neutral rule of judicial administration” that does not improperly burden claims arising under federal law.<sup>194</sup> In several cases, however, the Supreme Court has upheld state courts’ refusal to hear certain federal claims, finding that state law provided a “valid excuse” to decline jurisdiction.<sup>195</sup> For example, the Court has held that state courts may decline to exercise jurisdiction over federal claims pursuant to “a neutral state Rule regarding the administration of the state courts” that does not disproportionately burden federal claims.<sup>196</sup>

## Federal Courts Applying State Law

There are several circumstances in which federal courts apply state law. Perhaps the most prominent example is when federal courts hear diversity cases involving state law claims between parties from different states. Under Supreme Court precedent, federal courts hearing diversity cases apply state substantive law.<sup>197</sup>

Federal courts may also apply state law when exercising *supplemental jurisdiction* over state law claims.<sup>198</sup> Supplemental jurisdiction exists when a claim that would not otherwise be subject to federal court jurisdiction (usually a state law claim) arises from the same set of facts as a claim that is subject to federal court jurisdiction.<sup>199</sup> In these cases, a federal court applies federal law to the federal claims and state law to the state law claims. The federal court may, however, decline to exercise supplemental jurisdiction over a state law claim in some circumstances, including if it raises a novel or complex issue of state law or state law claims predominate over the federal claims.<sup>200</sup>

A less common instance in which federal courts apply state law involves cases removed to federal court under the federal officer removal statute. That statute allows for removal from state to federal court of cases including any civil action or criminal prosecution against the United States or any federal officer or agency “in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of

<sup>193</sup> See Cong. Rsch. Serv., *Modern Doctrine on Supremacy Clause*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artVI-C2-3-4/ALDE\\_00013402/](https://constitution.congress.gov/browse/essay/artVI-C2-3-4/ALDE_00013402/) (last visited July 18, 2023); Cong. Rsch. Serv., *Supreme Court Review of State Court Decisions*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artIII-S2-C2-5/ALDE\\_00001223/](https://constitution.congress.gov/browse/essay/artIII-S2-C2-5/ALDE_00001223/) (last visited July 18, 2023).

<sup>194</sup> *Howlett v. Rose*, 496 U.S. 356, 374 (1990); see generally Cong. Rsch. Serv., *State Court Jurisdiction to Enforce Federal Law*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artIII-S1-6-4/ALDE\\_00013232/](https://constitution.congress.gov/browse/essay/artIII-S1-6-4/ALDE_00013232/) (last visited July 18, 2023).

<sup>195</sup> *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377, 388 (1929); see also *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1 (1950).

<sup>196</sup> *Johnson v. Fankell*, 520 U.S. 911, 918 (1997).

<sup>197</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); cf. *Hanna v. Plumer*, 380 U.S. 460 (1965) (holding that if federal and state procedural law conflict, federal procedural law applies).

<sup>198</sup> See generally Cong. Rsch. Serv., *Supplemental Jurisdiction*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artIII-S2-C1-11-6/ALDE\\_00013331](https://constitution.congress.gov/browse/essay/artIII-S2-C1-11-6/ALDE_00013331) (last visited July 18, 2023). Supplemental jurisdiction may also be called ancillary jurisdiction, pendent jurisdiction, or pendent claim jurisdiction.

<sup>199</sup> 28 U.S.C. § 1367; see also, e.g., *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 380–81 (1959); *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963); *Rosado v. Wyman*, 397 U.S. 397, 402–05 (1970).

<sup>200</sup> 28 U.S.C. § 1367.

Congress for the apprehension or punishment of criminals or the collection of the revenue.”<sup>201</sup> Once a case is removed to federal court under this statute, state substantive law applies to the underlying claims or criminal charges,<sup>202</sup> but the officer must raise one or more defenses under federal law (for example, that federal sovereign immunity bars the suit) for the federal courts to have jurisdiction.<sup>203</sup>

Just as federal courts possess the ultimate authority to interpret federal law, each state’s courts possess the ultimate authority to interpret the state’s own laws and constitution. If a state’s highest court has interpreted a state statute or a provision of the state constitution, federal courts—including the Supreme Court—must accept that interpretation regardless of whether they agree with it.<sup>204</sup> In addition, as discussed further below, when a case pending in federal court presents a novel question of state law that may affect the outcome of the case, the federal court may *certify* the question to the state’s highest court, asking the state court to resolve the state law question so that the federal court can then correctly adjudicate the case in light of the applicable state law.<sup>205</sup>

## Federal Court Review of State Court Decisions

In some circumstances, federal courts may review decisions of state courts. The U.S. Supreme Court has jurisdiction to review a decision of “the highest court of a State” if (1) the decision draws into question the validity of a treaty or statute of the United States; (2) a state statute allegedly conflicts with the U.S. Constitution or a federal law or treaty; or (3) a party claims “any title, right, privilege, or immunity” under the Constitution, a federal treaty or statute, or any federal commission or other federal authority.<sup>206</sup>

The Supreme Court has imposed some limits on its review of state court decisions. First, the Court has held that it may review only final state court judgments, meaning that the party seeking review must generally pursue all available appeals within the state court system.<sup>207</sup> Second, the Court requires that a party seeking to litigate a federal constitutional issue on appeal from a state court judgment must have raised the issue in state court at an appropriate time and with sufficient precision to allow the state court to consider it.<sup>208</sup> Third, when the judgment of a state court rests on an adequate, independent ground based on state law (that is, if the case can be disposed of on state law grounds and the outcome would be the same regardless of how any federal question is

<sup>201</sup> *Id.* § 1442.

<sup>202</sup> *See, e.g., Arizona v. Manypenny*, 451 U.S. 232, 242 (1981) (explaining the removal serves in part to “permit[ ] a trial upon the merits of the state-law question free from local interests or prejudice”).

<sup>203</sup> *See Mesa v. California* 489 U.S. 121, 129 (1989).

<sup>204</sup> *Hortonville Joint Sch. Dist. No. I v. Hortonville Educ. Ass’n*, 426 U.S. 482, 488 (1976). If a state law, as construed by the state’s highest court, conflicts with federal law or the U.S. Constitution, a federal court may strike down the state law. *See* Cong. Rsch. Serv., *Overview of Supremacy Clause*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artVI-C2-1/ALDE\\_00013395/](https://constitution.congress.gov/browse/essay/artVI-C2-1/ALDE_00013395/) (last visited July 18, 2023).

<sup>205</sup> *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997); *see also infra* “Moving Between State and Federal Court.”

<sup>206</sup> 28 U.S.C. § 1257; *see generally* Cong. Rsch. Serv., *Supreme Court Review of State Court Decisions*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artIII-S2-C2-5/ALDE\\_00001223/](https://constitution.congress.gov/browse/essay/artIII-S2-C2-5/ALDE_00001223/) (last visited July 18, 2023).

<sup>207</sup> *See, e.g., Market Street Ry. v. Railroad Comm’n*, 324 U.S. 548, 551 (1945). The Court has developed a series of exceptions permitting review when the federal issue in the case has been finally determined but there are still proceedings to come in the lower state courts. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476–487 (1975).

<sup>208</sup> *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *see also Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988); *Webb v. Webb*, 451 U.S. 493, 501 (1981).

decided), the Court has indicated it will not review any federal question presented even if the state court decided the federal question incorrectly.<sup>209</sup>

Supreme Court review of state court decisions is by a petition for a writ of certiorari, meaning that even if the foregoing requirements are satisfied, the Supreme Court may choose whether or not to hear such cases. Nonetheless, numerous high-profile Supreme Court cases have arrived at the Court on appeal from state courts.<sup>210</sup>

In addition to Supreme Court appellate review of state court decisions, federal courts may review the detention of a person in state custody. Prisoners in state custody may petition in federal court for a writ of habeas corpus alleging that they are “in custody in violation of the Constitution or laws or treaties of the United States.”<sup>211</sup> Therefore, a habeas petition generally does not seek review of the state criminal law basis for a conviction, but it may (for example) claim that the trial procedure in state court violated the prisoner’s federal constitutional rights. Before filing a habeas petition in federal court, a person in state custody must first exhaust available state court remedies.<sup>212</sup> The Antiterrorism and Effective Death Penalty Act of 1996 imposed additional limits on habeas petitions challenging state custody.<sup>213</sup>

## Moving Between State and Federal Court

Sometimes, cases may move between the state and federal judicial systems. One example of this is Supreme Court review of state court decisions, discussed in the preceding section.<sup>214</sup>

Another prominent example is *removal* of cases from state court to federal court. When filing a civil suit, the plaintiff can often choose whether to proceed in state or federal court. If the plaintiff elects to file in state court, the defendant may in some circumstances remove the case to federal court and proceed there instead. A general federal removal statute allows for removal of any civil action brought in a state court that could have been filed originally in federal court.<sup>215</sup> Additional statutes authorize removal in specific circumstances.<sup>216</sup> While the general removal statute applies only to civil cases, other statutory provisions allow for removal of limited classes of civil or criminal proceedings against federal officers or agencies or members of the Armed Forces.<sup>217</sup>

If a case is properly removed to federal court, it will generally proceed in federal court even if the plaintiff prefers a state forum. However, if removal is improper—for example, because the federal courts lack jurisdiction over a case or the defendant missed the removal deadline—the federal

<sup>209</sup> *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875); *Black v. Cutter Laboratories*, 351 U.S. 292 (1956); *Wilson v. Loew’s, Inc.*, 355 U.S. 597 (1958).

<sup>210</sup> *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>211</sup> 28 U.S.C. § 2254.

<sup>212</sup> *E.g.*, *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

<sup>213</sup> Pub. L. No. 104-132, Title I, 110 Stat. 1217–21, amending 28 U.S.C. §§ 2244, 2253, 2254, and Rule 22 of the Federal Rules of Appellate Procedure.

<sup>214</sup> *See supra* “Federal Court Review of State Court Decisions.” Federal habeas review of state detention is not an example of cases moving between the state and federal systems, because a habeas petition initiates a new proceeding.

<sup>215</sup> 28 U.S.C. § 1441.

<sup>216</sup> *See* 28 U.S.C. §§ 1442 (suits or prosecutions against federal officers and agencies), 1442a (suits or prosecutions against members of the Armed Forces), 1443 (civil rights cases), 1444 (foreclosure actions against the United States), 1452 (claims related to bankruptcy cases), 1453 (class actions), 1454 (patent, plant variety protection, and copyright cases).

<sup>217</sup> *See id.* §§ 1442, 1442a.

court may remand the case to state court.<sup>218</sup> The federal court may also sever and remand specific claims over which it does not have jurisdiction.<sup>219</sup>

Another way in which litigation may move from federal to state court is through the process of *certification*. As discussed above, there are circumstances in which federal courts apply state law, but each state’s highest court is the ultimate authority on the meaning and application of the state’s law. If a state supreme court has interpreted a statute, the federal courts are to apply that interpretation.<sup>220</sup> In some cases where there is no state court decision directly on point, a federal court will attempt to predict how state courts would interpret a state law.<sup>221</sup> However, if a federal court case raises a novel question under state law, the federal court may instead certify the question to the state’s highest court.<sup>222</sup> This procedure allows the state court to provide an authoritative interpretation of state law. The federal court maintains jurisdiction over the case as a whole but applies the state court’s interpretation.<sup>223</sup>

## Considerations for Congress

Congress has significant authority to regulate federal courts, including creating federal tribunals, setting judicial procedures, and deciding which federal courts can hear various types of cases.<sup>224</sup> By contrast, Congress has limited authority to regulate state courts directly but may often decide whether certain types of cases will proceed in federal or state court and also provide federal funding to incentivize state courts to adopt certain policies.

## Directing Cases to Federal or State Court

Congress often has the authority to decide whether certain types of cases can be brought in federal or state court or both. The main limitation on this power comes from the Constitution’s limits on federal court jurisdiction: Congress cannot allow the federal courts to hear cases that fall outside Article III’s grant of judicial power.<sup>225</sup> However, because Article III empowers the federal courts to hear cases “arising under” federal law, if Congress has the power to enact substantive laws in a given area, it also has the authority to provide that those laws may (or must) be enforced in federal court.<sup>226</sup>

<sup>218</sup> *Id.* § 1447. *See also, e.g.*, *BP PLC v. Mayor and City of Baltimore*, 141 S. Ct. 1532 (2021).

<sup>219</sup> 28 U.S.C. § 1441(b)(2).

<sup>220</sup> *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

<sup>221</sup> *See, e.g.*, *Krieser v. Hobbs*, 166 F.3d 736, 738 (5th Cir.1999); *Conlin v. Mortg. Elec. Registration Sys., Inc.*, 714 F.3d 355, 358 (6th Cir. 2013).

<sup>222</sup> *See, e.g.*, *Mckesson v. Doe*, 141 S. Ct. 48 (2020). State law must authorize certification. Most states have enacted laws to do so. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997).

<sup>223</sup> *See id.* at 75–76 (explaining how certification limits “friction” between federal and state courts and avoids the delay of requiring a separate proceeding in state court).

<sup>224</sup> *See generally* Cong. Rsch. Serv., *Overview of Establishment of Article III Courts*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artIII-S1-8-1/ALDE\\_00013557](https://constitution.congress.gov/browse/essay/artIII-S1-8-1/ALDE_00013557) (last visited July 18, 2023); Cong. Rsch. Serv., *Overview of Congressional Power to Establish Non-Article III Courts*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artIII-S1-9-1/ALDE\\_00013604](https://constitution.congress.gov/browse/essay/artIII-S1-9-1/ALDE_00013604) (last visited July 18, 2023); CRS Report R47382, *Congressional Control over the Supreme Court*, by Joanna R. Lampe.

<sup>225</sup> *See generally* Cong. Rsch. Serv., *Overview of Cases or Controversies*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artIII-S2-C1-1/ALDE\\_00013375/](https://constitution.congress.gov/browse/essay/artIII-S2-C1-1/ALDE_00013375/) (last visited July 18, 2023).

<sup>226</sup> *See generally* Cong. Rsch. Serv., *Substantive Claims and Defenses in Federal Question Cases*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artIII-S2-C1-11-4/ALDE\\_00013329/](https://constitution.congress.gov/browse/essay/artIII-S2-C1-11-4/ALDE_00013329/) (last visited July 18, (continued...))



When Congress enacts a new law that includes a *private right of action*—the ability of private persons to sue to enforce the law—it may decide whether to specify where such cases will proceed. Congress may provide for concurrent jurisdiction and allow federal claims to proceed in either federal or state court, or it may provide for exclusive federal court jurisdiction. Unless Congress expressly or implicitly provides for exclusive federal court jurisdiction, the presumption is that a statute creates concurrent jurisdiction.<sup>227</sup>

In cases proceeding in federal court, Congress has substantial discretion to decide which federal court(s) can hear a case.<sup>228</sup> Congress has generally provided that cases should be brought where the parties are located or where the conduct giving rise to the case occurred.<sup>229</sup> However, Congress sometimes chooses to route certain types of cases to specific courts. This routing may take the form of directing certain matters to a particular judicial district or circuit court,<sup>230</sup> or Congress may send some cases to specialized tribunals.<sup>231</sup> Commentators and policymakers have at times proposed creating additional specialized federal tribunals, such as an appellate tax court that would hear appeals from the U.S. Tax Court.<sup>232</sup>

When Congress chooses to create a new specialized federal court, it must decide whether to establish the tribunal as an Article III court—which is subject to Article III’s requirements related to life tenure, salary protection, and appointment of judges—or as an Article I court. The Constitution limits the matters that Article I courts can decide independently, so certain matters would need to proceed before an Article III court.<sup>233</sup> When Congress chooses to create an Article I tribunal, it may decide how judges on the tribunal should be selected, how long they should remain in office, whether they should be subject to other qualifications such as residency requirements, and whether and in what circumstances they could be removed from office during their terms.

## Funding for State and Federal Courts

Congress uses its power under the Spending Clause to fund federal courts and can also provide federal funds to state courts.<sup>234</sup> State courts are primarily funded by the states, but Congress occasionally makes federal funding available to state judiciaries and can use such funding to promote certain policies.

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2023). Other legal authorities, such as Article III’s standing requirement, may limit Congress’s ability to create causes of action in the federal courts. *See, e.g.,* *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) (“It is settled that Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.”).

<sup>227</sup> *E.g.,* *Claflin v. Houseman*, 93 US 130, 136 (1876) (“[I]f exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it.”).

<sup>228</sup> *See generally* CRS Legal Sidebar LSB10856, *Where a Suit Can Proceed: Court Selection and Forum Shopping*, by Joanna R. Lampe.

<sup>229</sup> *See* 28 U.S.C. § 1391.

<sup>230</sup> *See, e.g.,* 42 U.S.C. § 7607 (provision of the Clean Air Act requiring that challenges to certain administrative actions under the Act proceed in the D.C. Circuit).

<sup>231</sup> *See, e.g.,* 28 U.S.C. § 1295(a) (granting the Federal Circuit jurisdiction over appeals in cases arising under “any Act of Congress relating to patents or plant variety protection”).

<sup>232</sup> *See, e.g.,* Erwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1994); *see generally* 13 FED. PRAC. & PROC. JURIS. § 3508 n.59 (3d ed.) (collecting proposals for specialized courts).

<sup>233</sup> *See* “Constitutional Limitations on Non-Article III Courts” section of CRS Report R43746, *Congressional Power to Create Federal Courts: A Legal Overview*, by Andrew Nolan and Richard M. Thompson II. Congressional offices with questions about Congress’s power to create federal courts may contact Joanna Lampe.

<sup>234</sup> *See* CRS In Focus IF12353, *Judiciary Budget Request, FY2024*, by Barry J. McMillion.

As discussed above, state courts are creatures of state law and are established under state constitutions and statutes, subject to certain federal constitutional limits. Congress has little power to regulate state courts directly, but in some circumstances it can influence state courts (as it can other institutions and entities of state government) indirectly by making federal funding available. Congress has broad constitutional authority to tax and spend for the public welfare, though the Constitution imposes some limits on Congress's ability to place conditions on federal grants to states and municipalities.<sup>235</sup> Recently, for example, Congress has appropriated funds for initiatives intended to increase court efficiency, expand access to legal representation, develop state courts' technological capabilities, and more.<sup>236</sup> As one specific example, during the COVID-19 pandemic, Congress provided funding for both federal and state courts to conduct remote proceedings by telephone or videoconferencing.<sup>237</sup>

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<sup>235</sup> See generally CRS Report R46827, *Funding Conditions: Constitutional Limits on Congress's Spending Power*, by Victoria L. Killion.

<sup>236</sup> See, e.g., American University, The Justice in Government Project, *Grants Matrix: State-Administered Federal Funds that Can Support Court Access to Justice and Technology Innovations* (July 15, 2021), [https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0022/28507/Grants-matrix.pdf](https://www.ncsc.org/__data/assets/pdf_file/0022/28507/Grants-matrix.pdf).

<sup>237</sup> See National Center for State Courts, *CARES Act Funds Support Digital Access to Courts During the COVID-19 Pandemic* (Nov. 29, 2020), [https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0020/72551/cares-act-case-study-11-29-20-2.pdf](https://www.ncsc.org/__data/assets/pdf_file/0020/72551/cares-act-case-study-11-29-20-2.pdf).



## Appendix. Selection and Retention of State High Court Judges

The following tables include information on the selection and retention of judges on each state's highest court. **Table A-1** outlines how state high court judges are selected and whether they are subject to retention elections or reappointment requirements. **Table A-2** summarizes applicable term or age limits for state high court judges. Selection and retention procedures and term lengths may differ for judges on lower state courts.

**Table A-1. Survey of Selection Methods and Retention Requirements for State High Court Judges**

State	Selection Method	Citation	Retention Requirements	Citation
Alabama	Partisan elections to serve six-year terms	Ala. Const. art. VI, §§ 152, 154; Ala. Code § 12-2-1	Reelection to serve additional six-year terms	No noted limit on reelection
Alaska	Appointment by the governor from a list provided by a judicial council for an initial three-year term	Alaska Const. art. IV, § 5; ALASKA STAT. § 22.05.080	Retention elections for additional ten-year terms	Alaska Const. art. IV, § 6
Arizona	Appointment by the governor from a list provided by a judicial nominating commission for an initial two-year term	Ariz. Const. art. VI, §§ 36, 37	Retention elections for additional six-year terms	Ariz. Const. art. VI, §§ 4, 38
Arkansas	Nonpartisan elections to serve eight-year terms	Ark. Const. amend. 80, §§ 16(A), 18(A)	Reelection to serve additional eight-year terms	No noted limit on reelection
California	Appointment by the governor and confirmation by a commission on judicial appointments for a term of twelve years or, if appointed mid-term, until the first general election after appointment	Cal. Const. art. VI, §§ 16(a), (d)(2)	Retention elections to serve additional twelve-year terms	Cal. Const. art. VI, § 16(d)(1)
Colorado	Nomination by judicial nominating commission and appointment by the governor for a provisional term of two years	Colo. Const. art. VI, §§ 20, 24	Reelection to serve additional ten-year terms	Colo. Const. art. VI, §§ 7, 25

State	Selection Method	Citation	Retention Requirements	Citation
Connecticut	Appointment by the governor from a list provided by a judicial selection committee for a term of eight years	Conn. Const. art. V, § 2	Judicial selection committee reviews justices who wish to be retained and recommends to the governor whether they should be reappointed	CONN. GEN. STAT. § 51-44a(e)
Delaware	Appointment by the governor with the consent of the state senate for a term of twelve years	Del. Const. art. IV, § 3	Incumbents may be reappointed to serve additional terms	Del. Const. art. IV, § 3
Florida	Appointment by the governor from a list provided by a judicial nominating commission for a term of six years	Fla. Const. art. V, § 11(a)	Retention elections for additional six-year terms	Fla. Const. art. V, § 10
Georgia	Nonpartisan elections to serve six-year terms	Ga. Const. art. VI, § VII, para. I	Reelection to serve additional six-year terms	No noted limit on reelection
Hawaii	Appointment by the governor from a list provided by a judicial nominating commission for a term of ten years	Haw. Const. art. VI, § 3	Judge may petition the judicial selection commission and the commission may renew the term of office	Haw. Const. art. VI, § 3
Idaho	Nonpartisan elections to serve six-year terms	Idaho Const. art. V, §§ 6, 7	Reelection to serve additional six-year terms	No noted limit on reelection
Illinois	Partisan elections to serve ten-year terms	Ill. Const. art. VI, §§ 10, 12	Nonpartisan retention elections for additional ten-year terms	Ill. Const. art. VI, § 12(d)
Indiana	Appointment by judicial nominating committee for an initial two-year term	Ind. Const. art. 7, §§ 9, 11	Retention elections for additional ten-year terms	Ind. Const. art. 7, § 11
Iowa	Appointment by a judicial nominating committee for an initial one-year term	Iowa Const. art. V, §§ 16, 17	Retention elections for additional eight-year terms	Iowa Const. art. V, §§ 17
Kansas	Appointment by governor from recommendations by a nominating commission for an initial one-year term	Kan. Const. art. 3, § 5(a)	Nonpartisan retention elections for additional six-year terms	Kan. Const. art. 3, § 5(c)

State	Selection Method	Citation	Retention Requirements	Citation
Kentucky	Nonpartisan elections to serve eight-year terms	Ky. Const. §§ 117, 119	Reelection to serve additional six-year terms	No noted limit on reelection
Louisiana	Partisan elections to serve ten-year terms	La. Const. art. V, §§ 3, 22	Reelection to serve additional ten-year terms	No noted limit on reelection
Maine	Appointment by governor to serve seven-year terms	Me. Const. art. VI, § 4	Reappointment by the governor to serve additional seven-year terms	Me. Const. art. VI, § 4
Maryland	Appointment by governor, by and with advice and consent of the state senate, for an initial one-year term	Md. Const. art. IV, §§ 5A(b), (c)	Retention elections for additional ten-year terms	Md. Const. art. IV, § 5A(c)
Massachusetts	Appointment by governor for term of life during good behavior	Mass. Const. pt. 2, ch. II, § 1, art. IX; pt. 2, ch. III, art. I	Serve during good behavior	Mass. Const. pt. 2, ch. III, art. I
Michigan	Nonpartisan election to serve eight-year terms	Mich. Const. art. VI, § 2	Nonpartisan retention elections for additional eight-year terms	Mich. Const. art. VI, § 2
Minnesota	Nonpartisan elections to serve six-year terms	Minn. Const. art. VI, §§ 7-8; MINN. STAT. ANN. § 204B.36 (subdiv. 4)	Reelection to serve additional six-year terms	No noted limit on reelection
Mississippi	Nonpartisan elections to serve eight-year terms	Miss. Const. Ann. art. 6, §§ 145, 149	Reelection to serve additional eight-year terms	No noted limit on reelection
Missouri	Appointment by governor from a list provided by a nonpartisan judicial commission for initial one-year term	Mo. Const. art. V, §§ 25(a), (c)(1)	Nonpartisan retention elections for additional twelve-year terms	Mo. Const. art. V, § 19, 25(c)(1)
Montana	Nonpartisan elections to serve eight-year terms	Mont. Const. art. VII §§ 7(2), 8; MONT. CODE ANN. § 13-14-111	Reelection to serve additional eight-year terms	No noted limit on reelection
Nebraska	Appointment by the governor from a list provided by a judicial nominating commission for an initial three-year term	Neb. Const. art. V, § 21	Retention elections for additional six-year terms	Neb. Const. art. V, § 21(3)

State	Selection Method	Citation	Retention Requirements	Citation
Nevada	Nonpartisan elections to serve six-year terms	Nev. Const. art. 6, § 3	Reelection to serve additional six-year terms	No noted limit on reelection
New Hampshire	Appointment by the governor and an executive council for term of life during good behavior	N.H. Const. pt. 2, Arts. 46, 73	Serve during good behavior	N.H. Const. pt. 2 art. 73
New Jersey	Appointment by the governor with advice and consent of the state senate for an initial seven-year term	N.J. Const. art. VI, § VI, para. 1	Reappointment by the governor to serve for life during good behavior	N.J. Const. art. VI, § VI, para. 3
New Mexico	Partisan elections to serve eight-year term	N.M. Const. art. VI, §§ 33(1)-(2)	Nonpartisan retention elections in which judges must receive 57% of the vote to be retained for additional eight-year terms	N.M. Const. art. VI, §§ 33(1)-(2)
New York	Appointment by the governor with the advice and consent of the state senate from a list provided by a judicial nominating commission to serve fourteen-year terms	N.Y. Const. art. VI, § 2	Reappointment by the governor to serve additional fourteen-year terms	N.Y. Const. art. VI, § 2
North Carolina	Partisan elections to serve eight-year terms	N.C. Const. art. IV, § 16; N.C. GEN. STAT. § 163-106.2	Reelection to serve additional eight-year terms	No noted limit on reelection <sup>a</sup>
North Dakota	Nonpartisan elections to serve ten-year terms	N.D. Const. art. VI, § 7; N.D. CENT. CODE § 16.1-11-08	Reelection to serve additional ten-year terms	No noted limit on reelection
Ohio	Partisan elections to serve six-year terms	Ohio Const. art. IV, § 6(A)(1); OHIO REV. CODE ANN. § 3505.03	Reelection to serve additional six-year terms	Ohio Const. art. IV, § 6
Oklahoma	Appointment by the governor from a list provided by a judicial nominating commission for an initial one-year term	Okl. Const. art. 7B, §§ 4-5	Retention elections to serve additional six-year terms	Okl. Const. art. 7B, §§ 2, 5

State	Selection Method	Citation	Retention Requirements	Citation
Oregon	Nonpartisan elections to serve six-year terms	Or. Const. art. VII (amended), § 1; OR. REV. STAT. ANN. § 249.002(7)	Reelection to serve additional six-year terms	Or. Const. art. VII (amended), § 1; OR. REV. STAT. ANN. § 249.002(7)
Pennsylvania	Partisan elections to serve ten-year terms	Pa. Const. art. V, §§ 13(1), 15(a)	Nonpartisan retention elections to serve additional ten-year terms	Pa. Const. art. V, § 15(b)
Rhode Island	Appointment by the governor with the advice and consent of the state legislature from a list provided by a judicial nominating commission	R.I. Const. art. X, §§ 4, 5	Judges serve for life during good behavior	R.I. Const. art. X, § 5
South Carolina	Election by the general assembly from a list provided by a judicial merit selection commission for ten-year terms	S.C. Const. art. V, §§ 3, 27	Reapproval by the general assembly for additional ten-year terms	S.C. Const. art. V, § 27
South Dakota	Appointment by the governor from a list provided by a judicial qualifications commission for an initial three-year term	S.D. Const. art. V, § 7	Nonpartisan retention elections to serve additional eight-year terms	S.D. Const. art. V, § 7
Tennessee	Appointment by the governor and confirmation by the general assembly from a list provided by a judicial selection commission to serve an eight-year term or until the end of the term if the vacancy being filled is due to a mid-term vacancy or failure to be retained	Tenn. Const. art. VI, § 3; TENN. CODE ANN. § 17-4-101	Retention elections to serve additional eight-year terms	Tenn. Const. art. VI, § 3; TENN. CODE ANN. § 17-4-101
Texas	Partisan elections to serve six-year terms	Tex. Const. art. V, § 2; TEX. ELEC. CODE § 172.021	Reelection to serve additional six-year terms	No noted limit on reelection

State	Selection Method	Citation	Retention Requirements	Citation
Utah	Appointment by the governor with approval of the state senate from a list of at least three nominees provided by a judicial nominating commission to serve an initial three-year term	Utah Const. art. VIII, §§ 8(1), 9	Nonpartisan retention election for additional ten-year terms	Utah Const. art. VIII, § 9
Vermont	Appointment by the governor with the advice and consent of the state senate from a list of nominees provided by a judicial nominating body for an initial six-year term	Vt. Const. §§ 32, 34	Reelection by a vote of the state general assembly for additional six-year terms	Vt. Const. § 34
Virginia	Chosen by a vote of the state general assembly to serve twelve-year terms	Va. Const. art. VI, § 7	Reelection by a vote of the state general assembly for additional twelve-year terms	No noted limit on reelection
Washington	Nonpartisan elections to serve six-year terms	Wash. Const. art. IV, § 3	Nonpartisan elections to serve additional six-year terms	Wash. Const. art. IV, § 3
West Virginia	Nonpartisan elections to serve twelve-year terms	W. Va. Const. art. VIII, § 2; W. VA. CODE § 3-1-16(b)	Reelection to serve additional twelve-year terms	W. Va. Const. art. VIII, § 2
Wyoming	Appointment by the governor from a list of 3 nominees provided by a judicial nominating commission to serve an initial one-year term	Wyo. Const. art. 5, §§ 4(b), (g)	Retention elections to serve additional eight-year terms	Wyo. Const. art. 5, §§ 4(f)-(g)
Alabama	Partisan elections to serve six-year terms	Ala. Const. art. VI, §§ 152, 154; Ala. Code § 12-2-1	Reelection to serve additional six-year terms	No noted limit on reelection

**Source:** Table prepared by the Congressional Research Service.

**Notes:**

- a. The North Carolina Supreme Court declared unconstitutional a 2015 law related to retention elections. See *Faires v. State Board of Elections*, 368 N.C. 825 (2016).

**Table A-2. Survey of Age Limits for State High Court Judges**

State	Age Limits	Citation
Alabama	Age limit of 70, but a judge who turns 70 during a term in office may complete the term	Ala. Const. art. VI, § 155
Alaska	Age limit of 70	ALASKA STAT. § 22.25.010
Arizona	Age limit of 70	Ariz. Const. art. VI, § 39
Arkansas	Must retire by age 70 or lose retirement benefits, but a judge elected before age 70 may complete a term and a judge who is not eligible to retire at age 70 may continue to serve until eligible; age limit does not apply to judges serving prior to July 1, 1965	ARK. CODE ANN. § 24-8-215
California	No age limit	N/A
Colorado	Age limit of 72	Colo. Const. art. VI, § 23
Connecticut	Age limit of 70	Conn. Const. art. V, § 6
Delaware	No age limit	N/A
Florida	Age limit of 75	Fla. Const. art. V, § 8
Georgia	Age limit of 75, or the end of term in which a judge turns 70, whichever is later	GA. CODE ANN. § 47-2-244(c)
Hawaii	Age limit of 70	Haw. Const. art. VI, § 3
Idaho	No age limit	N/A
Illinois	Automatically retired at end of term in which the judge turns 75	705 ILL. COMP. STAT. ANN. 55/1
Indiana	Age limit of 75	IND. CODE ANN. § 33-38-13-8
Iowa	Age limit of 75	IOWA CODE § 602.1610
Kansas	Must retire at end of term in which the judge attains the age of 75	KAN. STAT. ANN. § 20-2608(A)
Kentucky	No age limit	N/A
Louisiana	Must retire at end of term in which the judge attains the age of 70	La. Const. art. V, § 23(B)
Maine	No age limit	N/A
Maryland	Age limit of 70	Md. Const. art. IV, § 3
Massachusetts	Age limit of 70	Mass. Const. pt. 2, ch. III, art. I
Michigan	May not be elected or appointed after reaching age 70	Mich. Const. art. VI, § 19
Minnesota	Must retire at end of year in which judge turns 70	MINN. STAT. ANN. §§ 490.121(subdiv. 21 d), 490.125
Mississippi	No age limit	N/A
Missouri	Age limit of 70	Mo. Const. art. V, § 26



State	Age Limits	Citation
Montana	No age limit	N/A
Nebraska	No age limit	N/A
Nevada	No age limit, but judges may be forced to retire due to advanced age that interferes with the performance of judicial duties	Nev. Const. art. 6, § 21(8)(b)
New Hampshire	Age limit of 70	N.H. Const. pt. 2, art. 78
New Jersey	Age limit of 70	N.J. Const. art. VI, § VI, para. 3
New Mexico	No age limit	N/A
New York	Must retire at end of the calendar year in which judge turns 70	N.Y. Const. Art VI, § 25(b)
North Carolina	Must retire at end of the month in which judge turns 72	N.C. GEN. STAT. § 7A-4.20
North Dakota	No age limit	N/A
Ohio	Cannot be reelected or appointed after age of 70	Oh. Const. art. IV, § 6(C)
Oklahoma	No age limit	N/A
Oregon	Must retire at end of calendar year in which judge turns 75	Ore. Const. art. VII (amended), § 1a
Pennsylvania	Must retire at end of calendar year in which judge turns 70	Pa. Const. art. V, § 15(b)
Rhode Island	No age limit	N/A
South Carolina	Age limit of 72	S.C. CODE ANN. § 9-8-60(1)
South Dakota	Automatically retired on the first Tuesday after the first Monday of January after the general election at which members of the state legislature are elected immediately following the attainment of age 70 of such justice	S.D. CODIFIED LAWS § 16-1-4.1
Tennessee	No age limit	N/A
Texas	Age limit of 75, but a judge who turns 75 during a term in office may complete the term	Tex. Const. art. V, § 1-a
Utah	Age limit of 75	UTAH CODE ANN. § 49-17-701
Vermont	Must retire at end of calendar year in which judge turns 70	Vt. Const. § 35
Virginia	Must retire twenty days after the convening of the next regular session of the state general assembly after the justice turns 73	VA. CODE ANN. § 51.1-305(B1)
Washington	Must retire at end of calendar year in which judge turns 75	Wash. Const. art. IV, § 3(a)

West Virginia	No age limit, but the state supreme court may retire any justice who "because of advancing years and attendant physical or mental incapacity, should not, in the opinion of the supreme court of appeals, continue to serve as a justice...."	W. Va. Const. art. VIII, § 8
Wisconsin	Must retire after the first July 31 following the date on which the judge turns 70	Wis. Const. art. VII, § 24(2)
Wyoming	Age limit of 70	Wyo. Const. art. 5, § 5

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## Author Information

Joanna R. Lampe  
Legislative Attorney

Laura Deal  
Law Librarian

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