Introduction

How the Supreme Court Functions

The Supreme Court of the United States, the most powerful judicial tribunal in the world, meets in Washington on the first Monday of each October. It remains in intermittent session until the following June, recessing from time to time for considerable periods so that the nine justices may concentrate on the reading of briefs, passing upon petitions, and on the writing of opinions in cases which have been considered.

Most cases come before the Supreme Court on appeal from lower courts. After the appeal has been allowed, counsel for each side provides the Court with briefs in advance of oral argument. The Supreme Court *Rules* prescribe the contents of the brief. It must contain, for example, a statement of the facts, an assignment of errors, the legal question involved, the argument, and a conclusion. These briefs are printed at the expense of the parties.[1]

Formal argument takes place after the briefs are submitted at the convenience of Court and calendar. In the early days, when cases were few, there was no time-limit upon counsels' argument. Mr. Justice Story, who was on the Court from 1811 to 1845, declared that the mode 'of arguing causes in the Supreme Court is excessively prolix and tedious.'[2] In a case that came before the Court shortly after Story's appointment, the printed brief consisted of 230 pages and the argument lasted five days.[3] With an increase in the number of cases coming before the Court, it was necessary to limit argument for each side to two hours, and then later to one hour. No witnesses appear before the Court. During argument, the justices are free to address questions to counsel for either side in the case.

The next step in the process of deciding a case is the conference. Here the justices discuss the case. The Chief Justice states his opinion first, the latest appointee states his last. Then a vote is taken, the Chief Justice voting last. If all the justices are agreed in regard to the decision, the Chief Justice assigns the writing of the opinion. If the Court is divided and the Chief Justice is with the majority, he allots the writing of the opinion to one of the majority. Should the Chief Justice side with the minority, then the assignment of the Court's opinion falls upon the senior Associate Justice with the majority. Whichever side the Chief Justice supports, he may at his discretion undertake to write the opinion for that side.

[1] Any citizen unable to meet the cost of a suit or action in a United States court, including the printing of briefs in appellate proceedings, has recourse to a fund provided by the government. 28 U.S.C.A. §§ 832-6.

[2] Quoted in Warren, Charles, *The Supreme Court in United States History*, Boston, 1935, I, p. 423.

[3] Ibid. p. 424.

The opinion of the majority is spoken of as the majority opinion or the opinion of the Court. If a justice agrees with the majority in regard to the decision but differs regarding the reasons for the decision, he will more than likely write what is called a concurring opinion. If a justice disagrees with the decision of the majority he is at liberty to set forth the reasons for his disagreement in a dissenting opinion.[4]

The Justices of the Supreme Court

Though the Constitution does not require that the justices of the Supreme Court shall be lawyers, all of them, in fact, have been members of the legal profession. Some of the justices have come to the Court with little judicial background; most of them have been practicing attorneys; others have had large political or administrative experience; approximately half have come to the Court with judicial experience behind them.

Once appointed to the Supreme Court, a justice is supposed to drop the trappings of political partisanship. Unlike Congress or the Executive, where a man who is not a loyal party adherent is suspect, the Supreme Court is alleged to be free of partisanship; in fact, partisanship is frowned upon.

A Supreme Court justice does not have to be partisan. He cannot be removed except by impeachment. President Theodore Roosevelt appointed Oliver Wendell Holmes, Jr., to the Supreme Court after much thought and after convincing himself that Holmes would decide cases 'properly.' As Holmes wrote later, Roosevelt 'looked on my dissent to the *Northern Securities case* as a political departure (or, I suspect, more truly, couldn't forgive anyone who stood in his way) . . . if he had not been restrained by his friends, I am told that he would have made a fool of himself and would have excluded me from the White House. . .'[5] A President will always choose men whose opinions in his judgment will be 'right.' Once a justice is appointed to the Supreme Court, however, tenure and the absence of a need for partisanship provide him with conditions conducive to independent judgment, so necessary in a democracy.

Original Jurisdiction

The Supreme Court has both original and appellate jurisdiction. By original jurisdiction is meant the power of the Court, conferred by Article III of the Constitution, to entertain a case or controversy as a court of first instance. It means that instead of being heard originally in a lower court, the case is taken

[4] All opinions of the Court are found in the Supreme Court *Reports*. The *Reports* prior to 1875 are cited by name of the court reporter who prepared them for publication: Dallas, 4 vols., 1790-1800; Cranch, 9 vols., 1801-15; Wheaton, 12 vols., 1816-27; Peters, 16 vols., 1828-42; Howard, 24 vols., 1843-60; Black, 2 vols., 1861-2; Wallace, 23 vols., 1863-74. Beginning with the 1875 volume, which is cited as 91 U.S., the volumes are numbered consecutively. There are two unofficial publications of Supreme Court decisions: *United States Supreme Court Reporter*, cited as S.Ct., beginning with the opinions found in 106 U.S.; and *United States Supreme Court Reports, Lawyers' Edition*, cited as L.Ed.

[5] *Holmes-Pollock Letters*, ed. by Howe, Mark DeWolfe, Cambridge, 1941, II, pp. 63-4.

directly to the Supreme Court. This power extends to all cases 'affecting ambassadors,[6] other public ministers, and consuls, and those in which a State shall be a party. . .' If one state desires to prevent the negligent deposit by another state, in an interstate stream, of drainage containing typhoid germs, because dangerous to the health of the inhabitants of the former, it may take the issue directly to the Supreme Court.

Appellate Jurisdiction

In all other cases within the purview of Federal judicial power, the Supreme Court hears and decides cases that have already been decided or are in process of being decided in the lower courts. This is called appellate jurisdiction. The appellate jurisdiction of the Supreme Court is exercised 'with such exceptions and under such regulations as the Congress shall make.'[7]

The Judicial Code

Federal statutes governing the judiciary were revised, amended, and codified in what is called the Judicial Code. This code became effective 1 January 1912, and has been amended many times. The Judicial Code with its amendments and revisions is part of the United States Code, a compilation of the laws of the United States of a general and permanent character in force 3 January 1941. Since the issuance of the 1940 edition there have been several Supplements containing revisions and amendments.

Title 28 of the United States Code is entitled 'Judicial Code and the Judiciary.' In conformity with Article III of the Constitution, Title 28, as amended, governs the organization, jurisdiction, and procedure of the Federal judicial system. It regulates the appellate jurisdiction of the Supreme Court.

Methods of Review

The Judicial Code provides for three methods whereby cases are appealed to the Supreme Court: (a) by appeal; (b) by certificate; and (c) by writ of certiorari.

(a) In general, the term 'appeal' applies to any method whatsoever by which a case is carried from a lower court to a higher court for review. This is not the meaning of the term as it is used here.

The term 'appeal' in a narrower and more technical sense means an appeal as of right, involving no discretion on the part of the higher court whether it will entertain the cause, and depending solely upon the wishes of one of the parties to the suit in the lower court.

(b) The term 'certificate' relates to a method of appeal whereby a lower court 'certifies' to a higher court certain questions of law the answers to which

[6] Under international law, diplomatic officers are not subject to our courts. See Hackworth, Green Haywood, *Digest of International Law*, Washington, 1942, IV, pp. 513-604.

[7] Art. III.

are important in a case pending in the lower court. Unlike the 'appeal,' this method of review is not within the control of the litigants or parties to the suit, but of the lower court.

(c) 'Certiorari,' which means 'to be informed more fully,' is also within the control of the court, but this time the higher court. The party adversely affected by the decision of the lower court petitions the higher court for a writ of certiorari. If the petition is granted, the higher court then issues the writ to the lower court, which is then required to send up the entire record of the case for review. But it is within the discretion of the higher court whether the writ will issue.

Courts to which the Supreme Court's Appellate Jurisdiction Applies

The appellate jurisdiction of the Supreme Court applies to the following courts: the Federal District Courts, the Circuit Courts of Appeals, the Court of Appeals of the District of Columbia,[8] and certain courts of the forty-eight states.

Federal District Courts. The Judicial Code provides for direct review by the Supreme Court, on *appeal,* of a final judgment or decree of a Federal District Court in the following cases only:

(a) in suits brought by the United States to enforce the anti-trust and inter-state commerce laws;
(b) under the Criminal Appeals Act where the District Court has decided against the United States;
(c) in suits to enjoin the operation and enforcement of state statutes or the order of a state administrative board;
(d) in suits to enjoin enforcement of the orders of the Interstate Commerce Commission;
(e) in suits to set aside the orders of the Secretary of Agriculture under the Packers and Stockyards Act;
(f) in suits involving the constitutionality of an act of Congress.

In all other cases, decisions of the District Courts may be reviewed by the Circuit Courts of Appeals.

Circuit Courts of Appeals and the *Court of Appeals of the District of Columbia.* In any case, civil or criminal, these courts may *certify* to the Supreme Court any questions of law concerning which instructions are desired for a proper decision of the cause. Also, the Supreme Court, upon petition of one of the parties to the suit, may require by *certiorari* that the cause be *certified* to it for review.

In any case (this applies to the Circuit Courts of Appeals only) where a

[8] These are all 'constitutional courts,' established by Congress by virtue of Article III of the Constitution. We have omitted consideration of such courts as the Court of Claims, the Court of Customs and Patent Appeals, and the territorial courts. These are called 'legislative courts' and they have been created by Congress on the basis of powers conferred in Article I. They are not part of the 'regular' Federal judicial system.

state statute is alleged to be repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, the party relying upon the state statute may carry the case to the Supreme Court on *appeal.*

State Courts. The Judicial Code confers upon the Supreme Court the power to review certain decisions of the highest state courts in which a decision could be had.[9]

In the following cases the Supreme Court will review the decision of the state court on *appeal:*

(a) where the validity of a treaty or statute of the United States is questioned and the decision is against its validity;
(b) where the validity of a state statute is questioned on the ground that it is repugnant to the Constitution, treaties, or laws of the United States, and the decision upholds its validity.

The Supreme Court may by *certiorari* require that certain cases be *certified* to it for review and determination whether the Federal claim has been sustained or not. These are:

(a) where the validity of a treaty or statute is questioned;
(b) where a state statute is questioned as being repugnant to the Constitution, treaties, or laws of the United States;
(c) or where any title, right, or privilege is claimed by either party to a suit under the Constitution, treaties, or laws of the United States.

[9] In all cases the highest court is not necessarily the court of last resort in the state.