The Role of Courts in Our Constitutional Democracy

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Director’s Note

Americans have long looked to courts as guardians of our fundamental liberties, protectors of the rights of individuals and political minorities, and arbiters of the Constitution and laws of the land. Courts today, however, face many challenges, including funding cutbacks that threaten their ability to function as such a ‘guardian.’ This issue of Insights explores the role that courts play as the third branch of American government.

Our issue opens with a brief history of the federal judiciary. Bruce Ragsdale outlines how the Constitution established the court system, and how it has evolved over time into what we know today. We have included a time line of the “Development of the American Judiciary” for use with your students. Jane Pribek Salem then looks at the growing use of problem-solving courts in states to address specific cases and circumstances. Kimberlianne Podlas explores how popular culture, particularly television, influences our perceptions of real-life courts. In our Perspectives feature, we ask diverse experts to answer the question, “Do courts have adequate resources to face today’s challenges?” Throughout the issue, be sure to look for Learning Gateways, not as a stand-alone feature as in past issues, but a recurring sidebar tailored to each article. Finally, do not miss the full-page preview of the rich roundup of resources online at www.insightsmagazine.org, which offers teachers additional instructional supports, including articles, lessons, and primary sources, and opportunities for continued discussion.

We hope that this issue helps you address historical and contemporary topics regarding the American justice system. Let us hear from you. We would like your feedback, including ideas about how you might incorporate this issue into your classroom. And let us know if there are topics that you would like to see us tackle in these pages.

As always, enjoy the issue, and best wishes,

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The Federal Courts in Our Constitutional Democracy

A history of the federal judiciary

by Bruce A. Ragsdale

The Framers of the Federal Constitution ensured that the proposed new government for the United States would have a separate judicial branch, with unprecedented protections for the independence of federal judges. Article III of the Constitution vested the judicial power of the United States in a Supreme Court and whatever inferior courts the Congress decided to establish. The potential range of federal jurisdiction outlined by the Constitution extended to all cases arising under the Constitution, federal statutes, and treaties. The federal courts would also have jurisdiction over admiralty cases, over many cases involving state governments, and, in a potentially enormous grant of judicial authority, over private suits involving citizens from different states. Judges on federal courts would enjoy tenure during good behavior and protection against any reduction in their salaries. While the Constitution never defined good behavior, the restriction of impeachment to cases involving treason, bribery, or “high crimes and misdemeanors” set a high bar for the removal of judges.

Article III, however, was by far the briefest of the constitutional articles establishing the three branches of government and left much about the judiciary undetermined. The Constitution granted to the Congress broad authority to define the organization and the jurisdiction of a federal court system. Congress would decide if the nation should have a system of lower federal courts, or if, as some proposed, existing state courts would exercise federal jurisdiction at the trial level. Congress would also determine whether lower federal courts and state courts would share jurisdiction over federal questions and whether the Supreme Court would exercise judicial review of state court decisions. The appointment of judges by the president with the advice and consent of the Senate further guaranteed that the elected branches of the government would have a significant and continuing influence on the role of the federal courts within the constitutional system. While federal judges would be protected against direct political pressure, the “political” branches of the federal government would continue to define much about the structure and responsibilities of the federal courts.

The constitutional outline of the judiciary and, especially, the degree of independence granted judges have been the subjects of popular debate throughout United States history. In a constitutional system based on the consent of the governed and a revolutionary notion of popular sovereignty, the apparent paradox of judicial independence raised questions about what was required to guarantee impartial justice and a protection of the popular will embodied in the Constitution. In The Federalist, Alexander Hamilton explained that only a judiciary free from political interference could enforce the Constitution’s limits on government, but for more than two centuries, the recurring debates on the organization of the federal courts...
and their jurisdiction have revealed divergent opinions about the best means of devising a court system that maintains public confidence and respect. These debates, one of the most important continuities in federal judicial history, offer opportunities for teachers who want to incorporate the study of the judiciary and citizen participation in the court system into their curriculum.

In the debates over the ratification of the proposed Constitution, critics of the charter of government focused on the inadequacy of the checks and balances on the federal judiciary, which they feared would marginalize state courts and lead the way to a consolidated national government. The anti-Federalist writer “Brutus” warned that the Constitution rendered judges “independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.” But even critics of the proposed Constitution, including Brutus, acknowledged the need to protect judges from political pressure. The question for Brutus and many others was how the principle of popular sovereignty might extend to the judiciary without compromising that court’s necessary independence. Anti-Federalists believed that courts needed to be geographically accessible and governed by familiar rules and procedures, which is why many thought the new government should rely on existing state courts to exercise federal jurisdiction at the trial level. The anti-Federalists also argued for additional constitutional protections for civil liberties and for jury trials in civil as well as criminal cases. Their emphasis on proximity, visibility, and stronger checks on judicial power found considerable popular support and influenced the first plans for the court system once the Constitution was ratified.

In the Judiciary Act of 1789, Congress established a federal court system that fulfilled the Constitution’s promise of a strong national judiciary at the same time that it accommodated popular concerns about the dangers of remote, unaccountable courts. A Supreme Court with one chief justice and five associate justices would hear appeals from lower federal courts and from state supreme courts in certain cases raising constitutional questions. The Supreme Court would also exercise the limited original jurisdiction described in the Constitution. Congress established two types of trial courts that would be organized throughout the country. Each state was organized as a judicial district in which a district court with a single judge would have jurisdiction over admiralty cases and minor federal crimes. In each judicial district, a U.S. circuit court would have exclusive jurisdiction over more serious federal crimes and would share with the state courts jurisdiction over most suits involving the U.S. government and suits between citizens of different states (what is known as diversity jurisdiction). The circuit courts also heard some appeals from the district courts, but for more than 100 years they would serve as the most important trial courts in the federal system. The circuit courts had no judges of their own, but were presided over by the local district judge and two Supreme Court justices, who “rode circuit” through the judicial districts grouped within geographical circuits. (Congress soon revised the law to require only one justice in a circuit court.)

Although Congress would make substantive changes in the federal court system over the following two centuries, the act of 1789 set out the decentralized, state-based organizational structure that still characterizes the federal judiciary. The act institutionalized the local connections that many in 1789 thought would secure public confidence in the new court system. Judicial districts were organized within a state’s borders, and district judges were required to live within their respective districts. The act provided that in most procedural matters, the federal trial courts would follow the rules in effect in the respective state courts. The requirements for circuit riding ensured that Supreme Court justices would learn about the diversity of state law and procedures, and that the justices would be available and visible to citizens throughout the country. At the same time that the Congress defined the organization of the courts, it passed and sent to the states for ratification the Bill of Rights, which added to the Constitution further protections of civil liberties.
and procedural rights for defendants in the federal courts.

As the nation's population spread west and new states entered the Union, Congress repeatedly extended the judicial system of 1789. In 1807, 1837, and 1863, Congress increased the number of justices on the Supreme Court and established an equal number of judicial circuits so that new states would have their own U.S. circuit courts and access to the superior wisdom and experience that many litigants expected from the justices on circuit. Although some justices complained about the time and travel required by circuit riding, and a few publicly argued that it was unconstitutional to assign them to courts to which they had not been appointed, Congress repeatedly voted to perpetuate and extend the circuit riding system. Members of Congress referred to the circuit courts as schools in which the justices learned about local law and the details of important cases that were likely to be appealed to the Supreme Court. In fact, in the Supreme Court's deliberations, justices relied on their colleagues' circuit experience for a better understanding of appealed cases. Circuit riding also required that the justices regularly participate in jury trials, which members of Congress likened to the “democratic” component of the judiciary. The justices on circuit were considered a crucial link between citizens and the judicial branch, and their service on the regional trial courts became an important foundation of public confidence in the system of justice.

Even the most ardent supporters of circuit riding recognized that the time and travel required of justices would be unsustainable as the nation expanded across the continent and federal caseloads increased. In the 1850s, Congress briefly considered the establishment of a new kind of federal court that would hear appeals from the trial courts and, by making final decisions in many kinds of cases, relieve the Supreme Court of its caseload burden. Following the expansion of federal jurisdiction after 1875 to include all cases arising under federal law, caseloads grew at even faster rates, and the Supreme Court, which had almost no discretion about the appeals it would hear, fell two and then three years behind in deciding pending cases. An 1869 law requiring the justices to attend each assigned circuit court once every two years instead of every year did little to relieve the burden on the Supreme Court justices.

But how could the business of the Supreme Court be reduced without undermining citizens’ right of appeal or eliminating the justices’ highly visible service on the regional trial courts? For more than 15 years, Congress debated competing proposals to reorganize the federal courts and to revise the courts’ jurisdictional authority. Some, who wanted to limit the reach of the federal government and the allegedly pro-business bias of the federal courts, proposed the transfer of most private suits to the state courts. Many others proposed some kind of appeals courts, whether made up of judges appointed for the purpose or of justices from a greatly enlarged Supreme Court that would sit in divisions around the country in addition to sitting together in the nation’s capital. All of the proposals entailed limiting some citizens’ access to the Supreme Court, whether through the elimination of jurisdiction, restrictions on the types of cases that could be automatically appealed to the high Court, or by imposing higher monetary requirements for the subjects of dispute in civil suits.

In 1891, in the most sweeping change in the judiciary since 1789, Congress established courts of appeals for each of the nine regional circuits in the United States. The act of 1891 gave the Supreme Court some control over the cases that it would hear, and made the new courts of appeals the final word on appeals in whole categories of cases. Supreme Court justices were still assigned to circuit duties, and they could sit with circuit judges and district court judges on the three-judge panels that heard arguments in the new courts of appeals. The initial result of the circuit court act was a reduction in the number of cases appealed to the Supreme Court each year, but a continuing increase in federal caseload and the consequent appeals to the Supreme Court soon outpaced the ability of the justices to keep up with the workload. In 1911 Congress abolished the circuit trial courts, consolidating all
trial jurisdiction in the district courts and eliminating the requirement for regular circuit attendance of the Supreme Court justices. In 1925, Congress sharply restricted the right of automatic appeal to the Supreme Court so that the justices, through the grant of certiorari, would be able to determine the great majority of cases that would come before the Court. The circuit courts of appeals grew in proportional importance as more and more of their decisions became the final authority in the federal courts, and the Supreme Court became the court we know today, focused largely on constitutional questions and the resolution of conflicting findings in the courts of appeals.

The creation of the circuit courts of appeals, the elimination of the justices’ circuit riding duties, and the restrictions on appeals to the Supreme Court represented fundamental changes in the judicial system created in 1789. Gone was the emphasis on citizen access to the Supreme Court justices and diverse state legal cultures, replaced by a commitment to a dependable and equal application of the law. The greatest challenge to the judiciary in the second half of the twentieth century was managing the exponential growth in the scope of court business, and many of the subsequent institutional changes in the court system were efforts to facilitate the speedy and reliable resolution of cases. More and more states were divided into multiple judicial districts, and additional judges were authorized for district and appeals courts. New regional circuits were established to handle the increase in appellate cases. After 1968, magistrate judges were appointed to assist district judges in many preliminary proceedings, and following an act of 1978, bankruptcy judges were appointed to handle that growing area of jurisdiction.

The institutional history of the federal judiciary reflects more than two centuries of debate about the role of the courts within our constitutional system. Article III of the Constitution has protected judges and courts from the political pressures of shifting majorities or of individual officeholders, but it has also allowed the elected branches of the government to shape and reshape a court system to facilitate the speedy and reliable resolution of cases.
Judicial Elections or Appointments? (1832)
Today, in the United States, there are two primary methods of state judicial selection: election and appointment. Each state is different, with most opting for a hybrid of elected and appointed positions. Election, of course, is exactly as it sounds, with judicial candidates running campaigns, and voters selecting winners. Supporters of this system argue that it is a democratic method that allows people to select their judicial representatives and ensures that judges assume office on the will of the majority rather than personal connections. Some supporters also believe that elections increase diversity among sitting judges.

The appointment process is typically based on merit selection, with designated executives or nominating committees identifying judges. Supporters of this system argue that it ensures the most qualified candidates will become judges, rather than those who win elections, and that judges will be free of political obligations that accompany partisan campaigns. Some states pair appointments with “retention elections,” where voters decide whether appointed judges should retain their positions from term to term.

Juvenile Courts (1899)
One of the first major specializations of courts in the world was the creation of the juvenile court system. Rather than exposing children to adult criminals in the court system to possibly breed more crime, juvenile courts were designed to rehabilitate delinquent children into law-abiding adult members of society. American prison reformer Frederick Wines explained:

“We make criminals out of children who are not criminals by treating them as if they were criminals. That ought to be stopped. What we should have, in our system of criminal jurisprudence, is an entirely separate system of courts for children… who commit offences which would be criminal in adults. We ought to have a “children’s court”… we ought to have a “children’s Judge,” who should attend to no other business. We want some place of detention for those children other than a prison.”

Cameras in the Courtroom (1972)
Federal courts are essentially closed to cameras, following a 1972 ban by the Judicial Conference. This requires the media and the public to rely on courtroom sketch artists, which have been working in American courts since the eighteenth century. A three-year pilot program allowed electronic media in civil courtrooms in selected federal courts in the early 1990s. The Judicial Conference then voted to permit each of the federal courts of appeals to “decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments.”

Most declined—only two circuits permit such coverage. While a few federal court judges have determined that they have discretion to allow camera coverage of proceedings, such access remains the exception rather than the rule.

State courts allow more audiovisual coverage. Following a 1981 Supreme Court decision that held that electronic media coverage of state court cases does not violate the due process rights of witnesses or defendants, more and more states began to open their courtrooms to cameras. Today, 48 out of 50 states allow cameras into their courts in some fashion, and 37 states permit televised trials.
Trial on the Radio (1925)
WGN Radio spent $1,000 per day to rent AT&T cables stretching between Chicago and Dayton, Tennessee, to broadcast the Scopes trial live to ensure that listeners would have a front-row seat to what was dubbed “the trial of the century.” The radio station was allowed to arrange the courtroom so that their four strategically-placed microphones would pick up voices, and dictated where parties would sit. Announcer Quinn Ryan, famous for creating broadcasts that were “almost as good as being there,” did not disappoint his audience, and described William Jennings Bryan: “He enters now. His bald pate like a sunrise over Key West.”
For most of the trial, Ryan allowed his listeners to hear everything, and only offered additional commentary to identify speakers or clarify points. Unfortunately, radio technology, still new in 1925, did not allow for recording of the broadcast, so transcripts are all that remain.

John Thomas Scopes during the trial. Photo courtesy of the Library of Congress.

Following the September 11, 2001, attacks in the United States, and the subsequent War on Terror, Salim Hamdan, of Yemen, was detained by the U.S. military at Guantanamo Bay, Cuba. He challenged his detention. In Hamdan v. Rumsfeld, the Supreme Court addressed three issues: (1) whether Congress may pass legislation preventing the Supreme Court from hearing the case of an accused combatant before his military commission takes place, (2) whether the special military commissions violated federal law (including the Uniform Code of Military Justice and treaty obligations), and (3) whether courts can enforce the articles of the 1949 Geneva Convention. The Court ruled that Congress could not pass legislation preventing the hearing of the case, thus the Court had jurisdiction over the case, and that the manner in which the military commissions were established violated the Uniform Code of Military Justice and the Geneva Convention because the president did not hold the power to create commissions without more detailed direction from Congress. The impact of the decision on Hamdan was that he could still be tried; however, his trial had to be in a court, such as a military court/martial, or possibly a commission that had court-like protections. Following trial by a commission in 2008, he was sentenced to 66 months in prison, with 60 months already served. Hamdan was released in 2009.

Court Finds a Home (1935)
The Supreme Court Building is located in Washington, D.C., one block east of the U.S. Capitol. It was designed by architect Cass Gilbert, and completed in 1935. It features marble from Vermont, Georgia, and Alabama, as well as several sculptures that depict episodes and leaders in legal history. The west façade, thought of as the “front” of the building, bears the motto “Equal Justice Under Law,” while the east façade features “Justice, the Guardian of Liberty.” Two seated figures, “The Contemplation of Justice” and “The Authority of Law,” sculpted by James Earle Fraser, adorn the left and right of the west doors.
Prior to the completion of the building, the Supreme Court met in a small basement room, known as the Old Senate Chamber, in the U.S. Capitol. In 1929, former President and Chief Justice William Howard Taft successfully argued for funding of a Court headquarters as a way to distance itself from Congress and exist as an independent branch of government. Not all of the justices, however, were pleased with the completed building. Harlan Fiske Stone called it “bombastically pretentious” and “Wholly inappropriate for a quiet group of old boys such as the Supreme Court.”
In 2006, Judge Robert Russell in Buffalo, New York, started thinking deeply about a defendant in his mental health treatment court, and what more could be done to help the man who, after several months just was not progressing. He was attending court appearances and complying with the court-ordered treatment. But it was obvious to Russell by the way the man avoided eye contact, hung his head and slumped in his seat, that they were not reaching him—which would leave no alternative except prison.

Russell knew the defendant was a veteran of the Vietnam war. In fact, he had noticed a sizeable number of veterans facing jail or prison sentences in 11 years of presiding over treatment courts, first in drug treatment court and now in mental health treatment court. Russell had an idea: he asked two court officials whom he also knew to be Vietnam veterans to talk to the defendant. Twenty minutes later, the man’s case was called. The change was remarkable, Russell says. The man stood straight and tall, expressing a sincere desire to complete the program. He ultimately did.

“That's what began the dialog,” Russell recalls. “Is there something more we should be doing to help our veteran population? And I thought about how one veteran speaking to another veteran seemed to have an impact, even if it was only for a short period of time. Something connected.”

Russell started talking about creating a special court to serve veterans whose mental health or addiction problems land them in the criminal justice system. He retold the story about the Vietnam vet to anyone he thought could help, to exemplify how one veteran reaching out to another can make a difference. That, together with meeting whatever treatment, housing or employment placement needs veterans often have, could drastically improve the lives of the men and women who'd defended our nation.

The response was overwhelming. At one meeting of an advisory board to the local veterans’ hospital, for example, not only did the board commit its support and monetary resources, but also, every board member who had military service in his or her background volunteered to help.

In January 2008, the first veterans’ treatment court in the United States opened its doors.

About the same time, the RAND Corporation, a nonprofit global policy think tank initially formed to offer research and recommendations to the armed forces, calculated that some 1.65 million U.S. veterans had served in Iraq and Afghanistan—there are over 2 million now. Approximately one in five of them was self-reporting mental health issues.
Three-and-a-half years later, the Erie County, New York, court has dispensed justice with a focus on treatment and connecting veterans with the services they have earned through their service for some 200 defendants. Close to 80 have graduated, including Manny Welch (see sidebar), while some 120 remain under Russell’s watchful eye as they complete their individualized treatment programs. Just a handful have been removed from the docket and transferred to regular criminal court, Russell notes. “But the number is small and it’s totally outweighed by those who’ve completed the program or are on the path, and are living a sustained life.”

How Veterans’ Treatment Courts Work

Specialty courts with an emphasis on problem-solving first began with juvenile courts, dating back to 1899. In modern times, however, many variations of problem-solving courts have been created, starting with the first drug treatment court in Dade County, Florida, in 1989. Today, according to the National Association of Drug Court Professionals (NADCP) in Arlington, Virginia, there are more than 2,550 drug treatment courts, and another 1,200-plus problemsolving courts, such as mental health treatment courts and DWI courts, operating in all 50 states and U.S. territories.

This includes roughly 80 veterans’ treatment courts nationwide, says Matt Stiner, with the NADCP’s Justice for Vets program. Stiner helped implement the nation’s third veterans’ treatment court in Tulsa, Oklahoma. It quickly became a national mentor court, training others, and setting up similar courts in locations across the United States. These days, Justice for Vets offers intensive training for other courts looking to establish special dockets for veterans.

Judge Charles Porter, a retired Air Force JAG officer and longtime Navy reservist who presides over veterans’ treatment court in Minneapolis, Minnesota, says, “We’re a universal consent court, in that everyone has to agree that someone should be there, including the defendant, his or her lawyer, the prosecutor, our treatment team and the judge.”

In Minneapolis, typically a defendant has pled guilty to a lesser crime than that originally charged, in exchange for consenting to participate in veterans’ treatment court. “Our veterans’ treatment court is a criminal court,” Porter emphasizes. “People who are there have been convicted of crimes, both misdemeanors and felonies. We believe that the treatment modality is best for the long-term success for them and keeping them out of the system in the future. But we’re not unwilling to ‘use the stick,’ when consequences are the only thing that’s left.”

Every veterans’ court case is assigned a team: a defense attorney and prosecutor, probation officer, social worker and police officer, plus representatives from the federal Veterans’ Administration, personnel from county and state veterans’ affairs agencies, and occasionally professionals from other groups such as the domestic violence prevention community. They create an individualized treatment plan for the defendant, often consisting of counseling or participation in Alcoholics Anonymous or similar programs, and drug testing. The team also helps veterans and their families receive benefits, such as housing, medical and dental care, and job training or placement. The team reconvenes often to monitor compliance.

The veteran mentor is a key player on every team. Stiner, a veteran of the U.S. Marine Corps who completed one tour of duty in Iraq, explains, “It’s the camaraderie. Once you’ve been shot at or have killed other people—not eating or sleeping, and living with a high level of stress—it creates a bond between you and others who have done that. You can’t know what it’s like until you do it yourself. I noticed when setting up the Tulsa court that the vets trusted me a heck of a lot more because I’d had similar experiences.”

Defendants frequently experience setbacks within the first few months, Porter explains. Many court appearances in the first six months help keep defendants on track. Once they are making progress, the court appearances become less frequent. “The in-court reviews are an important piece of it, and all the defendants say that. They say that having me yell at them or pat them on the back is something that really matters,” Porter says.

The goal is to provide defendants with resources for sustained stability, which may require, anywhere from a year to 18 months, before they are eligible to graduate.
Community Court: Local courts that typically address “quality of life” crimes, such as petty theft, turnstile jumping, vandalism, loitering, and prostitution. With community organizations working in partnership with local police, community courts attempt to solve the problems of defendants appearing before the court, while encouraging offenders to give back to their community to compensate for damage they may have caused.

Domestic Violence Court: Specially designed court to address traditional problems confronted in domestic violence cases—e.g., withdrawn charges by victims, threats to victims, lack of defendant accountability, high rates of recidivism. Through cooperation with social service agencies and the judiciary, domestic violence courts provide victims with special protections, housing, job training, and closely monitors any interactions with defendants.

Drug Court: Specially designed criminal court in which substance-abusing offenders are placed in judicially supervised treatment programs to reduce potential for future crime, and increase the likelihood of successful rehabilitation. Specific programs are offered in states to adults, juveniles, college students, families, reentering prisoners, Native Americans, and veterans.

DWI (Driving While Impaired) Court: Postconviction court dedicated to changing the behavior of repeat alcohol or drug-dependant offenders. Goals include protecting public safety, while addressing the root cause of impaired driving. Similar to drug courts in practice.

Gambling Courts: Operate similar to the drug court model, with individuals who are suffering from a pathological or compulsive gambling disorder, and as a result, face criminal charges. Participants enroll in a judicially supervised program that might include meetings with Gamblers Anonymous, psychotherapy, and debt counseling.

Gun Court: Typically designed for youths and young adults who have committed gun offenses that have not resulted in serious physical injury. Gun courts focus on educating defendants about gun safety and provide infrastructure for direct and immediate responses to defendants who violate court orders. By consolidating offenses in one court, the judiciary is able to partner with community organizations to reduce the numbers of illegal guns in a location.

Homeless Court: Help homeless people charged with summary or nuisance offenses secure housing and obtain social services needed for stabilization. Participation often substitutes for fines and jail time, and includes substance abuse and mental health treatment, health care, life skills, literacy classes, and job training.

Mental Health Court: Divert select defendants with mental illnesses intro judicially supervised, community-based treatment.

Reentry Court: Seek to stabilize returning parolees during the initial phases of their community reintegration by helping them to find jobs, secure housing, remain drug free, and assume familial and personal responsibilities. Following graduation, participants are transferred to traditional parole supervision programs.

Tribal Healing to Wellness Court: Address the specific strengths, history, and wellness needs of a tribal community, including drug and alcohol treatment, by structuring higher levels of accountability and treatment services. In addition to coordinating with the judiciary, mental health professionals, tribal advocates, and educators, the partnership involves tribal leaders and healers.

Truancy Court: Designed to assist school-aged children to overcome the underlying causes of truancy by combining efforts of schools, courts, mental health providers, families, and the community. Guidance counselors report on a student’s progress during the school year, which courts use to enable special testing, counseling, or other services. Truancy courts are often held on school grounds, and ultimately result in dismissal of charges if a student reengages in their education.

Veterans’ Court: Uses a hybrid of drug court and mental health court principles to serve military veterans, and sometimes active-duty personnel. They promote sobriety, recovery, and stability through a coordinated response with traditional partners, as well as federal and state veteran affairs offices, volunteer veteran mentors, and organizations that support veterans and their families.

Source: National Drug Court Institute, 2011.
Porter has presided over cases involving very young veterans; to reservists and guardsmen who are older and have established civilian lives; to Vietnam-era vets who have never adequately adjusted to postservice lives and often have lived nomadically; ranging all the way up to World War II veterans who just now in their eighties, when facing their own natural mortality, are starting to experience night terrors stemming from events that took place several decades ago. Among them, a universal theme is, they are in court because they have engaged in aberrant behavior, and treatment professionals believe they can be rehabilitated.

So far, in Porter’s one-year-old court, five defendants have graduated. It is not a lot of time to definitively conclude that the court meets its stated goals. Still, “I think we’re being successful,” Porter says. “Our partnership with the Veterans Administration, and the cooperation we’re getting from prosecutors and the defense bar, is having a salutary effect. People keep coming back to us, wanting to use the court. And a few graduates have stopped by—some just to say hi, but also, last week, one stopped in to say we’d essentially saved his life.”

Weighing the Pros and Cons
Some critics have questioned whether defendants in veterans’ treatment courts receive diminished penalties compared to nonveterans and whether that’s fair. But to Stiner’s way of thinking, if veterans receive any special treatment, they are owed it. “The military does not accept persons with mental health or addiction issues,” he says. “These were perfectly healthy, patriotic Americans who’ve joined the armed forces to defend our freedom. They endure multiple, lengthy deployments in a constant state of high alert. Some struggle to cope with life at home when they return and turn to substance abuse and other self-destructive behaviors to cope. It’s our duty to ensure that they receive the support and services they’ve earned.” Porter adds that he and other veterans’ treatment court judges do not hesitate to mete out severe consequences when warranted.

Other critics maintain that treatment courts weaken the justice system overall, because defense attorneys do not act as zealous advocates for their clients, as their ethics code requires. Rather, they counsel clients to simply follow the dictates of prosecutors. Again, Stiner is not convinced. “Defense attorneys are critical to the success of Drug Courts and Veterans’ Treatment Courts and most certainly should be active in the process. Just like in any other court docket, they are crucial for ensuring that participants are completely informed of their rights and the consequences they face in the program, not only as they decide to enter but also during the entire time they participate. When I worked for the Tulsa Veterans’ Treatment Court, I saw defense attorneys who cared deeply about their clients and believed that the program was not only in the best interest of their veteran, but the justice system and society at large.”

Importantly, veterans’ treatment courts do not cost taxpayers additional funds, Russell says, and they ultimately save money. There is no “line item” on a budget appropriating money for the

First Person: A veterans’ treatment court success story

Manny Welch is a U.S. Navy veteran in Buffalo, New York, who served during the Vietnam era. Welch ultimately found himself in the Erie County, New York, criminal courts, facing up to four years’ imprisonment. Instead, he opted for drug treatment court in 2004, and transferred to the veterans’ treatment court upon its creation in 2008.

I did drugs for years, and kept on getting in trouble and going to jail. It was a roller-coaster ride all the way downhill. I put my using ahead of friends, family, jobs—everything.

The veteran mentors and drug treatment court helped me get my life back on track. It wasn’t an overnight thing. It took about four years to actually get it right. But I got it right eventually, and Judge Russell continued to show compassion and to care about me. Even when I wanted to get out of court and just go to jail, he wouldn’t allow it. They all helped me turn my life around and I’m grateful for it.

Now I’m in school, I’ve got a job with the [U.S. Department of] Veterans Affairs, and I coach kids’ basketball in the summer. I’ve re-built my relationship with my twin daughters from my first marriage. My second wife and our three children have all seen my active addiction side and how I am now. We were close to divorce many times but are now working to repair that relationship.

I follow a 12-Step program, and I give back to the community by volunteering at Judge Russell’s treatment court, and also by volunteering at the [U.S. Department of] Veterans Affairs Hospital in their substance abuse unit.

My life is so different now, and all my thanks go to God and the people at drug and veterans’ treatment court that helped me get on the right track.

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Courts Lack Adequate Funding
Judge Kevin S. Burke

If the bridge to the courthouse is closed because of lack of repairs, you naturally care more about transportation funding than court funding. If your child is in public schools where there are too many kids in the class, you care more about education funding. If you like nature, the parks are important to you. All of these and more are important functions of government that compete with courts for funding. But we need to remember that when someone needs access to courts they more often need it now. If your parents are going through a divorce, you want to know where you are going to live. If you are the victim of a crime or accident, closure will not occur until the legal proceedings are completed. If your business cannot collect debt, your business closes.

Courts need to have adequate and stable funding. There is a systemic failure in many states in achieving adequate and stable funding for the courts even though the amount of money courts need is a small percentage of state budgets. Sometimes the thought is courts can or should raise money through fines or fees, but there are limits on that approach. Providing funding for the courts is part of our constitutions. The other two branches of government have an obligation to fund courts. Part of the problem of inadequate court funding is economic. When the economy is not going well, courts frequently have more cases; so in times like this, cuts to court funding could not come at a worse time. But a bigger part of the problem is the lack of political will to fund what we need in government. For judges and supporters of court funding to succeed, we have to take on the larger political issue of convincing people that government isn’t an evil; that the government provides for them.

Kevin Burke is a judge on the Hennepin County District Court in Minnesota and president of the American Judges Association.

Courts Eliminate Programs
Pauline Weaver

Do courts have adequate resources to face today’s challenges? From the perspective of someone who spent 29 years in a public defender’s office, the answer has to be ‘no.’

Funding reductions to the courts have resulted in the elimination of programs that are successful but labor and cost intensive, such as diversion programs dealing with drugs and first-time petty theft offenders. Defendants that were eligible for these programs are now being prosecuted and convicted, which can have a devastating effect on employment, housing, scholarships, and immigration.

These reductions are happening in the face of an economic downturn, which means that more people than ever qualify for the services of public defenders. This creates overwhelming caseloads for public defenders and grossly inadequate resources.

The lack of funding for programs and public defense jeopardizes public confidence, perpetuates racial disparities, and endangers public safety. It also contributes to a rush to justice that leads to wrongful convictions, encourages offenders to plead guilty to crimes when they otherwise might not, and ultimately, spend too much time in jail or prison, resulting in more burdens on our society.

Pauline Weaver practiced with the Alameda County Public Defender’s Office, where she tried everything from driving without a license to death penalty cases. She currently has her own practice in Fremont, California.

Resources Affect Jurors Too
Shari Seidman Diamond

Funding is a general problem for the courts, but one constituency rarely receives attention in the complaints about underfunding: the juror.
Laypersons called for jury service receive minimal compensation, a condition that is particularly problematic in these hard economic times. Jury service requires these conscripted citizens to leave their jobs (the employer may or may not pay the juror during service) or find a babysitter to allow the juror to engage in a public service that is constitutionally guaranteed in the American justice system.

Many improvements have been introduced in the modern jury system (e.g., jurors traditionally served for several weeks or a month; now, in a majority of jurisdictions, jury service is a one day/one trial operation in which a juror completes service in one day unless selected for a trial). Pay for a day of service is generally minimal by any metric. For example, in Chicago, the Cook County courts pay $17.50 per day and, in an austerity move, the proposed county budget would eliminate free parking in the courthouse parking lot for jurors. It is not surprising that court administrators are reporting greater reluctance to serve from prospective jurors.

Jury service is an important element in the justice system and a majority of Americans strongly support it. Citizens play a crucial role when they serve as jurors and, as one judge regularly tells the jurors who are assembled for jury service, no one can pay them what they are worth. We demean the value of their service when we fail to provide even modest compensation.

Shari Seidman Diamond is professor of law and psychology at Northwestern University Law School and a research professor at the American Bar Foundation.

Budget Crises Move Us in the Wrong Direction

Judge Paul DeMuniz

Courts are a fundamental part of democracy. They provide a constitutional check to governmental power through judicial review and by having citizen jurors issue indictments and decide guilt or innocence.

Courts provide a forum for fair and prompt problem-solving for all people—something no other branch of government is obligated to do. Courts operate in the open, with published rules and all parties present—no backroom deals.

Courts need adequate resources to fulfill these core functions for all types of cases. In criminal cases, courts sentence offenders and protect individual rights. In civil cases, courts ensure businesses and consumers play by the rules and live up to obligations—whether that is a debt, liability for an injury, or interpreting the contract provisions. Courts make critical and sometimes life-altering decisions about families in divorces and child custody cases, and ensure the safety and well-being of children in foster care.

In addition to needing sufficient funding to perform these basic functions, many courts need to reengineer their decades-old and tradition-bound ways of operating, and update their technology. That does not just mean managing cases electronically instead of handling millions of pieces of paper, but also being thoughtful about how courts address juror use of texting and Google to ensure fair trials. All of this takes people and resources.

As courts close, people cannot seek protective orders, file pleadings, or pay their fines. This not only reduces access to justice, but reduces state revenues as well. Courts are losing resources to perform their core functions, much less to meet expectations for prompt, timely, and fair decisions. This is hardly a direction in which anyone, or any society, wants to proceed.

Paul DeMuniz is chief justice of the Oregon Supreme Court.
Public Opinion and Our Courts

In a democratic society such as the United States, the power of our courts rests on more than coercion and threat of punishment. It also rests on the public’s respect for them and belief in their legitimacy. When citizens regard an authority as legitimate, they voluntarily comply with its rules and follow its decisions. This reinforces the credibility of the courts and contributes to their ability to promote justice. The public cannot appreciate our courts or believe that their results are just, however, unless it has some basic understanding of them.

People learn about the legal system through various means. Some have first-hand experiences as jurors or litigants, others study law in school, but most learn from secondary sources such as television. Indeed, research shows that a majority of what people know about the law comes from television, be it in the form of news reports, daytime judge programs, police procedurals, or late-night comedies. Furthermore, because television has a unique ability to take us into worlds with which we would otherwise have no contact, it can be a powerful conduit of factual, ideological, and normative information.

Putting Television on Trial

Accordingly, it is important to understand what television says about our courts, as well as how it impacts public perceptions about them. In doing so, it is important to distinguish personal familiarity with the medium from scientific expertise in its effects. In this regard, reaching a verdict about television’s impact is much like reaching a verdict on any other issue: it requires evidence and investigation. Indeed, claims or presumptions that appear reasonable on their face, may, when subjected to scrutiny, be revealed as mistaken or meritless.

Research from various disciplines, including psychology, media studies, sociology, and law, provide insight into the relationship between television and public opinion. Studies show that, under the right circumstances, television can impact viewers, but it seldom does so in an immediate, direct way. Instead, it works in long-term, subtle ways, influencing notions of what is common, shaping expectations about processes and people, and providing frameworks for thinking about issues.

Most theories explaining the relationship between television and viewer beliefs rest on cultivation theory. According to cultivation theory, the heavy, long-term exposure to television’s imagery cultivates attitudes and perceptions that are consistent with that imagery. Cultivation does not hypothesize that a television program celebrating vigilante justice will cause viewers to mimic that behavior by running out and shooting criminals. Instead, it asserts that if a viewer regularly...
and consistently sees a great deal of violence on television, she will presume that there is a significant amount of violence in the real world; or, if a viewer regularly sees television judges yell at litigants, she will assume that it is normal for judges to yell at litigants. Cultivation also contributes to opinion formation. For instance, since most crime stories conclude with the police catching the culprit, a viewer may conclude that police solve most crimes. In turn, the viewer may develop the opinion that police are effective.

The way that television frames issues can also impact public perception. When the media consistently frames an issue in a particular way—such as by evaluating presidential candidates in terms of experience versus change, or discussing teen sexting in terms of “child pornography”—the media framework becomes part of the public's thinking. Although the media frame does not tell the public what to think, it encourages people to conceptualize the issue in a certain way. This can then impact the way that the public seeks to address an issue or how it evaluates the success of legal policies.

**Judging Television’s Judges**

A prominent icon of our courts is the judge. Recognizing that the behavior of judges impacts the public’s confidence in the judiciary, the Model Code of Professional Conduct requires judges to conform to the highest behavioral standards (Canon 1) and act in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Canon 2). More specifically, Canon 3 instructs that a judge be patient, dignified, and courteous to litigants.

When most people conjure an image of a judge, however, television judges most easily come to mind. In fact, much of the public’s information about judges and judging comes from daytime reality courtrooms such as Judge Judy and Christina’s Court. (High school students today have never lived in a world without Judge Judy.) Research suggests that, over time, these portrayals can cultivate perceptions of how judges do, or should, behave.

This can be problematic, since, in many respects, the behaviors and temperament of television judges differ from those aspired to by the judiciary. Whereas real judges strive to be neutral and refrain from interfering with the presentation of evidence (lest they be seen as inquisitorial or biased), television judges are active, moralistic interrogators who demand center stage.

Studies have found that viewers typically expect real-life judges to be vocal and involved with the development of evidence. Additionally, some people are so accustomed to the television model of judging that they are disappointed when a judge does not scold a litigant, or even misinterpret a judge’s silence as indicating disbelief in a witness. Not only can this distort the proper role of the judiciary, but it can also undermine respect for it and its decisions.

**Perceptions of Attorneys**

By prosecuting defendants, suing wrongdoers, and defending against meritless accusations, attorneys also participate in and provide access to our court system. Moreover, inasmuch as lawyers utilize the remedies, abide by the rules, and follow the decisions of our courts, they contribute to their authority and endorse the justice they provide.

Although people seldom witness attorneys practicing law in real life, they have many opportunities to do so on television. These depictions can influence opinions about the legal profession. This is especially important, because television does not create all attorneys equal. Instead, it tends to juxtapose moral “white-hatted” prosecutors against “black-hatted” defense attorneys. This is best exemplified by Law & Order.

Systematic analysis of the characters and narrative of Law & Order reveals
that it celebrates prosecutors as agents of justice who punish wrongdoers and prosecute only the legally or morally guilty. By contrast, it shows criminal defense attorneys as helping the guilty escape punishment and raising the “legal technicalities” that prevent our courts from achieving justice. Furthermore, *Law & Order* and similar dramas endorse a crime control model of justice. (The crime control model focuses on stopping crime, catching criminals, and punishing the guilty. It places faith in law enforcement and prosecutors, and believes that procedural rules either prevent these professionals from efficiently carrying out their duties or allow the guilty to escape punishment). For instance, stories show how prosecutors must sometimes bend “technical” legal rules in order to achieve justice, or, conversely, that due process rights prevented this goal. When an episode concludes with the guilty party being punished, it both demonstrates the effectiveness of the crime control model, and positions it as the standard by which the success of our courts is measured.

Consistent with this, surveys show that a majority of Americans believe that prosecutors are moral (and associate them with the pursuit of justice on behalf of society) and defense attorneys are dishonest. These opinions are more pronounced among crime drama viewers, who also hold more positive views of law enforcement.

Although *Law & Order* undoubtedly contributed to these cultural perceptions, it cannot be said to have caused them. This underscores an important aspect of the symbiotic relationship between television and public perceptions. Television programs not only shape the public’s beliefs, but, because they emerge from the cultural milieu, television depictions are shaped by the public’s beliefs. In fact, *Law & Order*’s popularity coincided with a broader cultural shift to a “law and order,” or crime control, ideology. In the early 1990s, political and public sentiment regarding crime and criminals began to change. This ushered in a “get tough” approach to crime, and is associated with “three strikes and you’re out” sentences, the death penalty, and increasingly severe penalties for transgressions. As the public became more concerned about law and order, television programs and the news designated crime and criminals major issues. As television focused on the punitive aspects of law, the public became more concerned about crime and criminals. Thus, programs such as *Law & Order* not only reflected the public’s

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**Learning Gateways**

**What Does Television Say About Courts?**

**Do Daytime Judge Shows Promote Access to Justice or Litigiousness?**

Many of the disputes on daytime judge shows involve sums of money, emotionally charged issues, or people motivated “by the principle.” On the one hand, this might promote litigiousness, by encouraging people to sue over every perceived slight. On the other hand, this might promote access to justice, by demonstrating that where a legal wrong has occurred, even if minor and involving “average” people, our courts are available.

Assign one half of the class the “litigiousness” point of view and the other half of the class the “access” point of view. Next, watch one or two segments of a judge show and ask students to collect evidence supporting their assigned point of view. Teachers might also wish to explore whether the age, gender, and socioeconomic status of the litigants comports with our notions of who goes to court or has the ability to pursue litigation.

**Legal Ideology on Nonlaw Television Programs**

While some television programs do not fall into the traditional law genre, they nonetheless address legal issues or communicate an ideology of law. To the extent that these programs are “off the radar,” it is important to both recognize their “law” features and consider their substance.

Sometimes these themes are more concrete (and plot-focused), such as when an episode depicts a trial, jury duty, or a visit to an attorney. Other times they are more abstract (and story-focused), such as when they explore the system’s response to character’s being arrested, incarcerated, committing a crime, or being victimized.

Have students discuss which television shows they have watched that included legal themes. Some examples might include *Star Trek*, *The Simpsons*, *Battlestar Galactica* (the trial of Gaius Baltar), or *South Park*.

Ask students to consider what the program says about our courts. Their fairness? Their efficiency? Their problems? Their ability to achieve justice?

Specific factors you may wish to explore include: Were people treated fairly; was the judge neutral and trustworthy; did the attorneys act ethically; was the end result correct (as opposed to “just”); did the wrongdoer and/or victim receive justice; did the system work?

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views, but also sensitized and cultivated in the public these views.

The “CSI Effect”
Recently, the news media and legal community have speculated that criminal procedurals such as *CSI: Crime Scene Investigation* cause a “CSI effect.” The thesis is that jurors now expect that every case will include forensic evidence, and, unless such evidence is presented, will not convict. Although the name is catchy and the premise that a popular, long-running television show could impact jurors is plausible, the “CSI effect”—at least one causing wrongful acquittals—appears to be more myth than reality.

Scholars from law and other fields have been unable to find any empirical support for an antiprosecution “CSI effect” on verdicts. Evidence suggests that television viewers do not require forensic evidence as a prerequisite for a conviction, they are not more prone to acquit in cases warranting convictions, and they do not wrongly interpret the absence of forensics against the prosecution. To the contrary, viewers of police and crime dramas are often more likely to convict and hold favorable views of law enforcement.

To the extent that jurors may be more interested in forensic evidence, it appears to reflect the modernization of society. Thus, as ATM cameras, cell phone records, Skype, video surveillance cameras, GPS, and Breathalyzer tests have become facts of modern life, 

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**Lawyers on Television**

Since its debut in 1990, the most prominent fictional lawyers on television have been the prosecutors of *Law & Order* (1990–2010), *Law & Order Criminal Intent* (2001–2011), and its spin-offs. Not only did these exemplify the crime control model, but also, for the most part, they portrayed prosecutors positively and defense attorneys negatively.

Beginning in 1997, these attorneys were joined by the Boston law firm attorneys of David E. Kelly’s *Ally McBeal* (1997–2002), *The Practice* (1997–2004), and *Boston Legal* (2004–2008). Though *Boston Legal* and to a much greater extent *The Practice* focused on criminal defense attorneys, they also lent credence to the crime control model. For example, while the main attorney character on *The Practice* began as an idealist who wanted to protect the innocent and wrongly accused, he quickly discovered that the bread and butter of criminal defense work was working on behalf of the guilty. Indeed, one common defense strategy employed by the firm was “Plan B,” creating reasonable doubt by (knowingly) accusing an innocent third party. This is consistent with the stereotypes of criminal defense attorneys doing engaging in questionable behavior and as preventing prosecutors from punishing guilty defendants.

The recent demise of the *Law & Order* franchise has led to a significant reduction in the number of prosecutors on television. Indeed, no presently produced television features prosecutors as lead characters. Instead, they are now recurring or adjunct characters in crime dramas, such as *The Closer* (TNT), *CSI* (CBS), *Criminal Minds* (CBS), and *Bones* (FOX), where they prosecute the accused offenders arrested by the police. This does not mean that the crime control model has been rejected, but that it is now exemplified primarily through law enforcement specialists and forensic experts who are principled individuals who use science or other means (the confession of the guilty party) to prove guilt and bring the guilty party to justice.

Meanwhile, it appears that television may be rekindling its romance with law firm attorneys (both civil and mixed practice). In the past three years, these shows have grown in popularity.

*The Good Wife* (CBS): a critically acclaimed, Emmy-winning drama focusing on a law firm specializing in both civil and criminal practice. While criminal defense attorneys are portrayed as intelligent, zealous advocates able to prove the innocence of wrongly accused clients, a few lead characters (including Alicia Florrick, the titular “Good Wife,” and a senior partner) commonly question the morality of the positions they are asked to defend. This show also demonstrates institutional interactions with state’s attorneys, who are generally portrayed as competent and reasonable.

Other legal dramas presently on television:

*Harry’s Law* (NBC): a disgruntled former patent attorney finds new life as a criminal defense attorney running a small practice.

*Suits* (USA Network): a brilliant attorney assisted by a savant masquerading as an attorney work at a glamorous New York firm that handles both criminal and civil cases.

*Franklin & Bash* (TNT): a light-hearted lawyer/buddy show, featuring two young, unconventional attorneys who go from ambulance chasing to working in a prestigious law firm.

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Introduction
The Supreme Court has ruled that certain issues are inappropriate for judicial review. Thus, for example, the courts should decline to hear cases involving issues textually granted under the Constitution to another branch of government. This is the political question doctrine.

Under a different doctrine, the Court has said that congressional acts are unconstitutional when they purport to regulate in an area under exclusive executive authority. Thus, for example, Congress may not “make treaties” (even if the Senate must advise and consent); that power belongs to the president alone. This clear line becomes murkier when the president acts pursuant to an ancillary power and when Congress has legislated in the area. This raises separation-of-powers concerns.

Issues
Does the political question doctrine deprive the federal courts of jurisdiction to enforce a federal statute that explicitly directs the Secretary of State about how to record the birthplace of an American citizen on a Consular Report of Birth Abroad and on a passport?
Does that federal statute impermissibly infringe upon the president’s power to recognize foreign sovereigns?

Facts
Menachem Binyamin Zivotofsky was born in Jerusalem to two United States citizens. When Zivotofsky applied for a U.S. passport, the State Department, under its regulations, declined to designate “Israel” as Zivotofsky’s birthplace on his passport. The State Department regulations are based on a longstanding policy of the executive branch to recognize no state as having sovereignty over Jerusalem. Zivotofsky sued, arguing that the State Department regulation violated U.S. statutory law, which required the State Department to designate “Israel” as the birthplace for anyone born in Jerusalem. The Court heard arguments for Zivotofsky on November 7, 2011.

Menachem Binyamin Zivotofsky was born in Jerusalem to two United States citizens. When Zivotofsky applied for a U.S. passport, the State Department, under its regulations, declined to designate “Israel” as Zivotofsky’s birthplace on his passport. The State Department regulations are based on a longstanding policy of the executive branch to recognize no state as having sovereignty over Jerusalem. Zivotofsky sued, arguing that the State Department regulation violated U.S. statutory law, which required the State Department to designate “Israel” as the birthplace for anyone born in Jerusalem. The Court heard arguments for Zivotofsky on November 7, 2011.

Separation of Powers Within a Passport? Zivotofsky v. Clinton

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record the place of birth as Israel.” The act thus purported to nullify the State Department passport regulations.

But the act itself rested on shaky constitutional grounds. The Executive Branch has held, at least since 1995, that repeated congressional attempts to require the president to recognize Israeli sovereignty over Jerusalem violate the president's constitutional powers over foreign affairs. Indeed, when President George W. Bush signed the act in 2002, he also issued a statement calling that very guideline to “record the place of birth as Israel,” or “Jerusalem, Israel” regulation, as unconstitutional. He wrote that the regulation, if construed as a mandate (as it reads), would “impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states.” In other words, the president signed the bill, but unilaterally declined to comply with a key part for constitutional reasons. (This practice is not uncontroversial, as discussed more below.) The Executive Branch continues to maintain that the “Jerusalem, Israel” regulation is unconstitutional.

Nevertheless, the Zivotofskys sued the secretary of state, seeking an order compelling the State Department to list Menachem's place of birth as “Israel.” The district court twice dismissed the case, concluding that it raised a non-justiciable political question. A three-judge panel for the United States Court of Appeals for the District of Columbia affirmed. The appeals court declined to rehear the case, and this appeal followed. In addition to the political question issue, the Supreme Court directed the parties to brief and argue the merits: whether the “Jerusalem, Israel” regulation impermissibly infringes upon the president's authority to recognize foreign sovereigns.

Case Analysis
The Constitution distributes powers over foreign affairs between the executive branch and the legislative branch. Thus, for example, the president has power, with the advice and consent of the Senate, to make treaties and to appoint ambassadors. The president also has the executive power, and the president is the commander in chief. But Congress has power to regulate foreign commerce, to regulate the value of foreign currency, and to declare war, among others. Congress also has the spending power, or the power of the purse.

Despite this separation of powers relating to foreign affairs, however, the courts have recognized that the Constitution gives a broad range of foreign affairs powers to the president alone. In particular—and most relevant here—Article II, Section 3, assigns the power to “receive Ambassadors and other public Ministers” to the president alone. That authority implies the power to decide which ambassadors the president will receive. That power, in turn, includes the ancillary power to decide the governments with which to engage in diplomatic relations.

But that power does not sprawl indefinitely. There must be a line at which the executive power yields to Congress.

This case tests those lines in a most blunt way. After all, the congressional act, particularly the “Jerusalem, Israel” regulation, runs directly against the State Department regulations. One or the other must give.

If the president’s sole constitutional power over the reception of ambassadors and ministers extends to the sole ancillary and unenumerated power to designate the place of birth on a passport, then Congress cannot intrude, and the “Jerusalem, Israel” regulation is invalid. On the other hand, if the president’s sole constitutional power does not extend to this ancillary and unenumerated power, the State Department regulations will fall, and the “Jerusalem, Israel” regulation will govern. If the president and Congress share concurrent authority, the statute clashes with the regulation, and the Court will have to sort it out. (This three-part analysis tracks Justice Jackson’s framework in his famous concurrence in Youngstown Sheet & Tube Co. v. Sawyer, (1952).) The extent of presidential authority—the key to this case—depends on just how far the president’s power to receive ambassadors and other ministers extends.

But it is possible that the Court will not even reach this question. That is because there is a threshold separation-of-powers issue in this case, the one that caused the lower courts to dismiss it: the political question doctrine. The political question doctrine holds that the judiciary should stay its hand in certain constitutional disputes—that some disputes are best left to the political
branches to resolve. The Court set out a list of examples of political questions in 1962, in the seminal case *Baker v. Carr* (1962). Under *Baker*, political questions include those issues that “lack ... judicially discoverable and manageable standards for resolving [them],” or those issues that involve “an initial policy determination of a kind clearly for non-judicial discretion,” or, most relevant here, those issues that are textually committed to the president, to Congress, or to both under the Constitution. If the Court rules that this case involves a political question, the Court will dismiss it.

The parties framed their arguments against this doctrinal backdrop. But the parties’ arguments did not always divide neatly between the two issues; instead, there was some overlap. This was because the Court cannot resolve the threshold political question issue without taking at least a peek at the underlying merits.

Zivotofsky proffered four principal arguments. First, Zivotofsky argued that this case is simply about congressional authority to enact a statute—a question quintessentially for the courts—not the political question doctrine. Zivotofsky claimed that the political question doctrine is inapplicable to this case: The Supreme Court’s political question cases do not involve a party’s claim that Congress exceeded its authority (as in this case), and the *Baker v. Carr* standard is irrelevant when, as here, Congress considered and decided the political question and incorporated that decision into its validly enacted, presidentially signed legislation.

Zivotofsky said that the Court has frequently decided separation-of-powers questions without letting the political question doctrine stand in its way. In particular, Zivotofsky pointed to *Japan Whaling Ass’n v. American Cetacean Society*, 478 U.S. 221 (1986). That case involved an alleged conflict between the “Packwood Amendment” to the Magnuson Fishery Conservation and Management Act, which purported to expedite the executive’s certification process when foreign nationals conducted their fishing operations so as to “diminish the effectiveness” of the International Convention for the Regulation of Whaling, and a subsequent executive agreement with Japan not to certify it if it met certain conditions. The Court ruled that the case did not raise a political question. Zivotofsky contended that his case is similar to *Japan Whaling*, and that it raises similar threats to foreign relations, and therefore *Japan Whaling* should govern his case. Zivotofsky also argued that claims of individual rights, like his, are justiciable even if they affect foreign affairs.

Second, Zivotofsky argued that the “Jerusalem, Israel” regulation does not interfere with any exclusive executive power. Zivotofsky said that by the original understanding of the president’s power to receive ambassadors, the president does not have the authority to recognize foreign sovereigns—and certainly not the exclusive authority to do so. Lower courts and the government’s claims to the contrary are inconsistent with the history and ignore language in the Court’s opinions that assign the recognition power to both the president and Congress. But even if the president has this authority, Zivotofsky contended that it does not include the ancillary authority to determine whether a particular city is governed by a particular sovereign. And in any event, Zivotofsky claimed, the State Department’s regulations are not an exercise of any executive authority to recognize foreign sovereigns.

More generally, Zivotofsky argued that the president does not have exclusive authority to conduct the nation’s foreign policy. He pointed to a line of Supreme Court cases that recognize a complementary role for Congress. But even so, he argued, the State Department regulations have only a trivial impact on American foreign policy, as evidenced by the fact that the occasional reference to “Jerusalem, Israel” in official documents of other executive departments has not harmed the government’s foreign policy interests.

Third, Zivotofsky argued that the “Jerusalem, Israel” regulation is appropriate passport legislation under Congress’s authority to legislate on the form and content of a passport. Moreover, he said, it remedies the State Department regulations’ discrimination against supporters of Israel.

Finally, Zivotofsky said that President Bush’s constitutional objection to the “Jerusalem, Israel” regulation in his signing statement amounts to an unconstitutional veto. In effect, Zivotofsky argued, President Bush’s statement excises the “Jerusalem, Israel” regulation from the act without giving Congress an opportunity to override this “veto” through the formal return procedure mandated by the Constitution.

Secretary Clinton responded with four arguments. First, Secretary Clinton argued that the president has exclusive power under the Constitution to recognize foreign sovereigns and to determine passport content as it relates to that power. She claimed that the president’s explicit constitutional power to receive ambassadors necessarily includes the power to decide which ambassadors to receive and which states and governments to recognize. She said that the president has exercised this sole authority “[f]rom the Washington Administration to the present,” that Congress has acquiesced to that practice, and that the courts have affirmed it. (A good part of Secretary Clinton’s brief was dedicated to illustrating the practice, congressional acquiescence, and judicial affirmation over
time.) Secretary Clinton contended that the president’s recognition power necessarily includes the power to determine the territorial limits of foreign states.

Secretary Clinton argued that these powers include the authority to determine the content of passports, at least insofar as that content is related to the government’s foreign policy. She claimed that the passport is an instrument of foreign policy, because it asks foreign governments to allow the bearer, a U.S. citizen, to come and go and allows the president thus to communicate with foreign sovereigns. The passport is therefore tied to the president’s constitutional power over national security and foreign policy—a tie that Congress has confirmed. And when Congress has interfered with the president’s power over passports as an instrument of national security or foreign policy, as it has from time to time, the executive branch has consistently declined to recognize and enforce the interference. (Congress may have its own powers with regard to passports—for example, to enact travel control statutes that require U.S. citizens to have passports for certain travel—but that power cannot infringe upon the president’s authority over national security and foreign policy.)

Second, Secretary Clinton argued that the State Department passport regulations implement the president’s decision, pursuant to his constitutional power over foreign policy, not to recognize any state as having sovereignty over Jerusalem. Secretary Clinton said that the purpose of the birth location on a passport is to identify the holder (as Zivotofsky argued), but the description of the place of birth is more: it is an official statement of U.S. foreign policy, that is, whether the United States recognizes a state’s sovereignty over a particular area. She claimed that the regulation on Jerusalem is perfectly consistent with the State Department’s more general policy not to list as a place of birth a country whose sovereignty over the relevant territory the United States does not recognize. And she contended that the magnitude of the impact on foreign policy does not matter: this is a judgment left to the executive alone under the Constitution.

Third, Secretary Clinton argued that Zivotofsky’s claim raises a nonjusticiable political question. She said that passport policy is an issue textually committed to the executive branch under the Constitution (as described above), and that Zivotofsky’s mere statutory claim cannot overcome this and convert the case to a justiciable one. She contended that Japan Whaling is distinguishable: That case involved a statute that purported to interfere with executive branch power under another statute, not under the Constitution, as here. Moreover, Zivotofsky’s other cited cases did not involve issues that were textually committed to the executive alone; instead, those issues left room for the involvement of other branches, including the judiciary. And Secretary Clinton contended that Zivotofsky’s argument that this case involves individual rights cannot save it from the political question doctrine: Congress has no authority to create individual rights that intrude upon an area the Constitution commits to the executive; and in any event, Zivotofsky’s argument is inconsistent with Supreme Court precedent.

Finally, Secretary Clinton argued that even if the question is justiciable, the “Jerusalem, Israel” regulation impermissibly infringes on the president’s power to recognize foreign sovereigns. As described above, Secretary Clinton contended that the president has sole authority under the Constitution over national security and foreign affairs, and that the “Jerusalem, Israel” regulation is an exercise of that authority. Because the president has exclusive authority in these areas, she argued, any congressional action intruding on this authority is unconstitutional.

**Significance**

Important and momentous cases sometimes come hidden behind relatively ordinary facts. *Zivotofsky v. Clinton* is one of those cases; it is undoubtedly one of the most important cases in the 2011 term and is one of the most important separation-of-powers cases in years.

This case is significant in part because it raises two important separation-of-powers questions—one on the power of the judiciary (as against the political branches), and the other on the powers between the president and Congress. And because these issues overlap to some degree, we can expect any ruling to say at least something about each. On the political question issue, the case gives the Court an opportunity to revisit this shifty area of constitutional law and to say something about the competing values behind the political question doctrine, on the one hand, and access to the courts and the judiciary’s role in safeguarding the separation-of-powers, on the other. On the merits, the case gives the Court an opportunity to consider the relative powers between the president and Congress over foreign affairs in this narrow context and beyond. Together, these two separation-of-powers issues make this case all the more important.

The case is significant for another reason. Unlike some other separation-of-powers cases, the powers exercised here, between the president and Congress, are in direct and obvious conflict with each other. In other words, there is no way for the Court to harmonize the “Jerusalem, Israel” regulation and
the State Department regulations. One must give way to the other; it is a zero-sum game. This puts the separation-of-powers question in particularly sharp focus, for the Court, if it reaches this question, cannot hedge based on an interpretation of either. It must declare one a winner and the other a loser; this case, unlike some others, leaves no middle ground. As such, any ruling on this issue will necessarily give us a sharper sense of the extent of unenumerated, ancillary presidential authority and the priority of powers when Congress clashes with that authority.

But while the case puts these issues in sharp focus, it is a mistake to think that the Court will necessarily have the final say. For example, if the Court rules the case nonjusticiable, leaving both the “Jerusalem, Israel” regulation and the State Department regulations in place, the president can persist in declining to enforce the “Jerusalem, Israel” regulation; and Congress, for its part, can exercise its power of the purse, its oversight power, and its confirmation authority to check the president. Similarly, if the Court rules that the “Jerusalem, Israel” regulation is invalid, Congress can seek to effect policy through these powers. If the Court rules that the “Jerusalem, Israel” regulation is valid, the Constitution gives the president the authority to try to change it, by recommending “such Measures as he shall judge necessary and expedient.”

There are a couple of especially interesting features of the case. First, as mentioned above, the Court directed the parties to brief and argue the question whether the “Jerusalem, Israel” regulation infringes on the president's power to recognize foreign sovereigns. The Court seems primed to wrestle directly with this and to rule on it. More: Congress has weighed in. A bipartisan group from the House and Senate, as amicus in favor of Zivotofsky, argued that Congress has authority under its powers of immigration and naturalization, and under its power to regulate foreign commerce, to enact the “Jerusalem, Israel” regulation, and that it does not intrude on executive authority.

Next, the case potentially raises the president’s authority to issue constitutional signing statements. As suggested above, presidential signing statements raising constitutional objections to legislation are not uncontroversial. They act, in effect, as a veto, but they bypass the return and possibility for override required by the Constitution. The evidence suggests that constitutional signing statements have proliferated in recent administrations; it also suggests that the executive branch has sometimes used them to achieve policy goals (by ignoring congressional commands) that it could not achieve through the ordinary sign-or-return alternative available under the Constitution. Zivotofsky argued (briefly, just enough to put the issue before the Court) that constitutional signing statements are invalid, and the case gives the Court an opportunity to say something about them. (For example, the Court could rule that constitutional signing statements are invalid and provide no cover for the president against congressional legislation. Or, on the other hand, it could rule that the president’s constitutional objections are valid and buttress Secretary Clinton’s argument that Congress intruded into an area of exclusive executive authority.) But just to be clear: constitutional signing statements are not squarely before the Court, and the Court need not rule on their validity to resolve this case.

Finally, we hardly need to call attention to the very sensitive and unique foreign policy interests in this case. At a time when disputes between the president and Congress (or at least some vocal members of it) over U.S. foreign policy toward Israel seem to be at a head, this case has obvious political and practical foreign policy significance.

But on the other hand, the case—and in particular, the State Department’s passport regulations—may have nothing to do with foreign policy. The Court may say that it is only about a line on a passport—a line designed for identification purposes only, and having nothing to do with U.S. foreign interests.

In some ways, this is what the case comes down to. If the Court says the place-of-birth line on the passport is merely administrative, having little or nothing to do with foreign policy, the case is almost certainly justiciable, and the “Jerusalem, Israel” regulation likely trumps the State Department regulations. But if, on the other hand, the Court says that the place-of-birth line on the passport is part of U.S. foreign policy, the case is less likely justiciable, and, even if it were, the State Department regulations more likely trump the “Jerusalem, Israel” rule.

This article is excerpted from “Zivotofsky v. Clinton,” PREVIEW of United States Supreme Court Cases, Volume 39, Issue 2, October 31, 2011, pp. 83–87.
they have become common sources of information. For instance, suppose the state accuses a driver of speeding through a tollbooth without paying. The prosecution could attempt to prove the allegation with eyewitness testimony alone, or it could produce the video surveillance photo of the car going through the tollbooth, speedometer readings, and GPS history of the car’s location. If the prosecution ignores or does not produce such information, it would be reasonable for the jury to question the accusations or not be convinced beyond a reasonable doubt. This would not be an example of the jury wrongly acquitting due to the absence of (worthless) forensic evidence, but of a reasonable doubt.

In fact, if there is any CSI effect, it likely helps the prosecution by enhancing the public’s perception of law enforcement and making questionable forensic techniques appear valid and absolute. The key to discerning a television program’s impact lies in the overall story or message of the program. With regard to CSI, it does not teach viewers that a prosecutor must present forensic evidence to prove guilt or that when she does not do so, the accused is innocent. If anything, it tells them scientific investigation occurred before trial and justified the defendant’s arrest. Indeed, the general message of CSI is that police forensics are objective and infallible, and that experts are neutral and never wrong.

Yet in reality, many forensic techniques (including fire, ballistics, shoeprint, dog sniff, bite mark, and hair strand analysis) have never been scientifically validated (KP5). They often rely upon subjective judgments that can differ according to the individual examiner, as well as whether she is asked to confirm or exclude a suspect. The story these crime procedurals tell, however, celebrates these techniques as established science that produces certain answers. What some people perceive to be a CSI effect might, instead, be something of a hindsight bias. Speaking from personal experience, many advocates overestimate the strength of their cases or possess other information that did not go into the jury’s decision making. Therefore, when a prosecutor loses what she believed was a winning case, she seldom reassesses her conclusion or criticizes her lawyering. Rather, she looks for an external explanation, such as the judge’s rulings, the machinations of opposing counsel, or the jury. Hence, the “CSI effect” may be a disconnect between an advocate’s perception of her case, the probative value of the evidence, and the verdict.

**Conclusion**

Ultimately, the “effect” of television on our courts is neither simply good nor bad. Instead, it depends on the overall messages and themes dominating television’s stories. Consequently, as we contemplate our court system, including its proper role, efficiency, and “success” in achieving “justice,” it is important to acknowledge television as both a contributor to our beliefs and a cultural artifact reflecting those beliefs.

**Additional Resources**

the delivery of justice as the country grew in size and population and experienced dramatic social and economic change. The political debates on the organization and role of the federal courts provide an opportunity for teachers to broaden students’ understanding of the judiciary beyond the narrow focus on constitutional cases decided by the Supreme Court. Public expectations for the judiciary and enduring questions about our constitutional order are evident in the most notable debates on the future of the court system. In the early years of the Republic, the judiciary became one of the principal dividing lines between Federalists and Republicans (anti-Federalists). Federalists wanted a court system that would counter what they saw as the excesses of popular politics, while Republicans sought to restrain what they saw as the political bias of federal judges. In the

Learning Gateways
Teaching About the Judicial Branch

The following strategies are designed to introduce students to the role of the Judicial branch in our role of government. They are not meant to be exhaustive curriculum, but can serve as discussion starters for more in-depth instruction.

Let the Court Decide

Article III of the U.S. Constitution designates the general parameters of the Supreme Court’s jurisdiction. The Constitution provides the Court with original jurisdiction over specific cases, while Congress regulates appellate jurisdiction. Congress has created two appeal routes: appeals from lower federal courts, and appeals from highest state courts when a substantial federal question is involved. In addition to these limits on the Court’s jurisdiction, the Court itself has imposed limits on its own power. For example, the Court will not issue advisory opinions. This activity highlights the limits placed on the Judicial branch, through both the Constitution and the Court’s practices.

Have students read Article III, Sections 1 and 2 of the Constitution. Under which of the following examples would the Supreme Court have jurisdiction over, or authority to hear, the case?

1. By law the Sabine River divides Louisiana and Texas. The river has altered its course, and Texas has sued Louisiana over the proper boundary between the two states.

2. The state of Oregon provides its citizens with the right to vote in statewide referenda and initiatives. If passed, the initiatives become laws. People in the state are challenging this policy as a violation of Article 4, Section 4, of the U.S. Constitution, which guarantees “every State in this Union a Republican form of Government,” in that such a government requires laws made by elected representatives rather than citizens who propose initiatives for the ballot.

3. A prisoner in Florida asks the Court to review his case. He is poor, and could not afford a lawyer during his trial. He claims he was denied his right to a lawyer because one was not provided for him.

4. President Obama asks the Court to determine whether a proposed treaty with England is constitutional.

Interpreting the Constitution

One of the most important roles of the judiciary is to interpret the Constitution. This exercise introduces students to the difficulties with drafting and interpreting the Constitution.

1. Have students read Amendments 1, 2, 4, or 6 to the U.S. Constitution, then identify the purpose of the amendment and what it guarantees. You may select one amendment for students to read together, or split students into small groups and assign one amendment to each group.

2. Ask students to brainstorm as many ambiguities as they can find in the wording or future implementation of the amendment. Examples might include: does the amendment apply to state as well as federal governments, what does “enjoy” mean, at what point are you guaranteed a lawyer, does this amendment apply to everyone?

3. Ask students to act as legislative aides and redraft the amendment to correct any “ambiguities.” Compare the new “air-tight” clause with the original amendment. Do problems still exist?

For answers or explanations to accompany scenarios, please visit www.insightsmagazine.org. These strategies were adapted from Peter deLacy, “Teaching About Judicial Review,” Update on Law-Related Education, Fall 1986, pp. 22-23.
late-nineteenth and early-twentieth centuries, the Progressive critique of federal courts included proposals to impose term limits on judges, to restrict the courts’ ability to halt labor strikes, and to limit the Supreme Court’s judicial review. Public reaction to Franklin Roosevelt’s proposed “court-packing” legislation and the opposition from the president’s fellow Democrats indicated how deeply committed most Americans were to judicial independence from an overbearing executive, even one whose policies they supported.

Another valuable opportunity to engage student interest in the judiciary is found in the stories of dramatic, high-profile trials in the federal courts. For most citizens, the trial courts located throughout the country have been the face of the federal judiciary, and the stories of citizens’ interaction with the courts have frequently shaped public opinion about the legal system and thus informed political debates on proposed institutional changes to the federal judiciary. The federal trial courts have been the forum for legal disputes reflecting significant public policy debates, and these courts have been the critical stage for the assertion and defense of citizens’ legal rights. Notable trials provide another rich perspective that is not available from a curriculum that limits judicial history to a very small selection of Supreme Court decisions. The dramatic stories and personalities revealed through trials also provide the likeliest means of engaging student interest in legal proceedings. The Teaching Judicial History project, developed through a partnership of the Federal Judicial Center and the American Bar Association, offers ten examples of cases that can bring the judicial perspective into students’ exploration of familiar topics in United States history and government classes. The study of these individual trials, like the examination of political debates on the federal court system, can be rewarding opportunities to bring the least examined, and least understood, branch of government into students’ exploration of our constitutional system.

FOR DISCUSSION

1. How did the growth of the United States influence changes in the federal judiciary?
2. Why do you think it is important that a judiciary be free from political interference?
3. The anti-Federalist writer Brutus warned that the Constitution rendered judges “independent of the people, of the legislature, and of every power under heaven itself.” What was his concern? Should we be concerned about this today?

Law Day 2012 provides the organized bar and bench with a focused opportunity to highlight the role of the nation’s courts in our constitutional democracy and to foster public understanding about the judiciary. This effort is especially appropriate and timely next year as the nation marks the 225th anniversary of the United States Constitution.

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Buffalo veterans’ treatment court. Rather, the court just represents a re-allocation of existing resources, primarily from the U.S. Department of Veterans Administration but also from community service groups.

“No one’s studied the effectiveness of veterans’ treatment courts because they’re still so new,” Russell says. “However, we can rely on drug treatment courts, which have been in existence for over 20 years now and have been studied tremendously. Research measuring the effectiveness of drug treatment courts as an alternative to incarceration has proven tremendous cost savings.”

While there is typically no extra expenditure of public monies to run the veterans’ treatment court, training people to work in veterans’ treatment courts does cost money, Stiner says. In his mind, however, a little “seed money” to help with start-up expenses should be a national priority; if for no other reason than to help struggling vets remain productive members of society rather than become a burden upon it. A bipartisan bill introduced in Congress—the Services, Education, and Rehabilitation for Veterans, (SERV) Act—would do just that, as well as provide additional resources for existing veterans’ treatment courts.

For more information on problem-solving courts, including those in your state, visit www.insightsmagazine.org.

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For more information, see:


The National Association for Drug Court Professionals, at http://www.nadcp.org/nadcp-home/.


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**FOR DISCUSSION**

1. How are problem-solving courts different from regular courts?
2. Do you think that the Veterans’ Treatment Court in Buffalo is an appropriate solution for veterans who end up in court? Why or why not?
3. Do you agree with critics that who think defendants in problem-solving courts might end up with diminished penalties for crimes? If so, is this fair? Why or why not?
States, in recent decades, have been creating problem-solving courts to effectively address specific types of cases common in their communities. These courts work with individuals who are accused of or arrested for crimes associated with larger problems—e.g., drug addiction, mental health issues, and homelessness. These courts also take cases that might benefit from being resolved together and outside of the regular courtroom setting—e.g., truancy, gun crimes, and community issues. In this activity, students will explore the role of problem-solving courts within their community.

If students require some background on problem-solving courts, they might refer to the article, “Turning to Problem-Solving Courts,” on page 10. of this issue of Insights, or available handouts at www.insightsmagazine.org. Distribute the “Types of Problem-Solving Courts” handout as additional background, for homework, or to facilitate discussion.

Procedure

1. Arrange students into small groups, and ask each group to identify one issue in their school, city, county, or state that might benefit the community to have related cases addressed in a problem-solving court.

2. Each group should conduct research to determine if a problem-solving court to address that issue exists in their school, city, county, or state.

   Visit www.insightsmagazine.org for resources to help you or your students determine what special courts are operating in your state.

3. Once they have located a relevant problem-solving court, each group should conduct further research to complete a Court Profile for their chosen problem-solving court. The Court Profile should answer the following questions:
   
   - What is the name of the problem-solving court?
   - What issues is it trying to address? What is the court’s mission statement?
   - How does this court work? Are there any outside partners?
   - Why do you think this issue warrants a separate court?
   - How does this court benefit the community?

If students find that there is no active problem-solving court for their selected issue within their school, city, county, or state, they might select another court, or complete the Court Profile to develop a plan for a new court.

4. Use the completed Court Profiles to develop a classroom or online exhibit called “The Role of Problem-Solving Courts in Our Community,” and allow groups to share their profiles with the rest of the class.

Extended Activities

- Share the completed “The Role of Problem-Solving Courts in Our Community” with a local or state bar association, newspaper, or the public as a community education resource.

- Allow students to interview judges, lawyers, or other legal professionals associated with their selected problem-solving courts. Include the interviews in the exhibit.

- Invite judges, lawyers, or other legal professionals associated with an active local or state problem-solving court to speak with students or view the final exhibit.

- Students who developed plans for new problem-solving courts might write an op-ed explaining why the new court is necessary, outlining their plan for how it could work, and telling how their new court will benefit the community.

- Contact your local court, or problem-solving court, for a tour, or arrange for students to sit in on a public trial or court procedure.

- As a class, develop a model for a youth court, which might be presented to school or community officials for use in the community. Youth courts are forums in which young people sentence their peers for offenses such as juvenile crime, traffic infractions, or school rule violations. Allow students to fill roles within the youth court, and participate in the decision-making process for handling juvenile delinquency. Visit www.insightsmagazine.org for resources on how to establish and implement a youth court in your community. If a youth court already exists in your school or community, encourage students to become involved.
**In Depth**

**Understanding Jury Service**

The right to trial by jury is one of our society’s most valued liberties. Each year, approximately 15 million Americans are summoned for jury duty. By serving on a jury, American citizens participate directly in our justice system.

**Does the U.S. Constitution guarantee every defendant a right to a jury trial in every case?**

No. In civil cases (which are noncriminal cases where one private individual or business sues another—as opposed to a criminal case), the Seventh Amendment guarantees the right to a jury trial in “suits at common law.” These are civil suits in which money is sought for an alleged injury or loss—for example, breach of contract or personal injury actions. The right to a jury trial does not apply if the plaintiff is seeking something other than money—for example, an order to cease certain conduct or to turn over certain property. Congress also has provided for a jury trial in some instances in which the federal Constitution does not require it. Additionally, the U.S. Supreme Court has ruled that a defendant who is facing jail time of six months or longer is entitled to a trial by jury. In both criminal and civil cases, state constitutions may also guarantee broader rights to a jury trial.

**How many jurors sit on a jury?**

That depends on where the case is being heard. A federal criminal trial jury usually has twelve members. In some states, there may be fewer than twelve jurors in less serious criminal cases. In more serious state cases, in which the punishment may be more than a year of imprisonment in jail, twelve jurors are often required.

**Must all jury verdicts be unanimous?**

In the federal system, jury decisions must be unanimous. If the jury cannot reach a unanimous decision, it is considered a “hung jury” and a mistrial is declared, meaning a trial will end without a decision. After a mistrial, another trial may be held. In the state court system, requirements regarding unanimity vary. In more than a third of the states, agreement of only three-fourths or five-sixths of the jurors is needed to render a verdict in civil cases.

**Will the court protect me and the other jurors against threats or violence?**

The law entitles you to such protection. Occasionally, the court sequesters a jury during a trial—that is, houses it in a hotel to isolate it from outside influences. Even if you are not sequestered for the entire trial, it is not uncommon for a jury to be sequestered during deliberations. If this happens, police officers or court officials escort you and the other jurors to and from court. After the trial, the police will continue to ensure the safety of discharged jurors, at least for a time.

**If I am called for jury duty and I have a job, will I lose my paycheck for the time I spend performing jury service?**

That depends. Some states require that employers continue to pay employees their full salary, or at least a percentage of it. Some employers will do this voluntarily, others may not. Most states provide jurors with a modest daily stipend.

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InDepth
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