

# Supreme Court Procedures

## Background

Article III, Section 1 of the Constitution establishes the Supreme Court of the United States. Currently, there are nine Justices on the Court. Before taking office, each Justice must be appointed by the President and confirmed by the Senate. Justices hold office during good behavior, typically, for life.

The Constitution states that the Supreme Court has both original and appellate jurisdiction. Original jurisdiction means that the Supreme Court is the first, and only, Court to hear a case. The Constitution limits original jurisdiction cases to those involving disputes between the states or disputes arising among ambassadors and other high-ranking ministers. Appellate jurisdiction means that the Court has the authority to review the decisions of lower courts. Most of the cases the Supreme Court hears are appeals from lower courts.

## Writs of Certiorari

Parties who are not satisfied with the decision of a lower court must petition the U.S. Supreme Court to hear their case. The primary means to petition the court for review is to ask it to grant a *writ of certiorari*. This is a request that the Supreme Court order a lower court to send up the record of the case for review. The Court usually is not under any obligation to hear these cases, and it usually only does so if the case could have national significance, might harmonize conflicting decisions in the federal Circuit courts, and/or could have precedential value. In fact, the Court accepts 100-150 of the more than 7,000 cases that it is asked to review each year. Typically, the Court hears

cases that have been decided in either an appropriate U.S. Court of Appeals or the highest Court in a given state (if the state court decided a Constitutional issue).

The Supreme Court has its own set of rules. According to these rules, four of the nine Justices must vote to accept a case. Five of the nine Justices must vote in order to grant a stay, e.g., a stay of execution in a death penalty case. Under certain instances, one Justice may grant a stay pending review by the entire Court.

### Law Clerks

Each Justice is permitted to have between three and four law clerks per Court term. These are individuals who, fairly recently, graduated from law school, typically, at the top of their class from the best schools. Often, they have served a year or more as a law clerk for a federal judge. Among other things, they do legal research that assists Justices in deciding what cases to accept; help to prepare questions that the Justice may ask during oral arguments; and assist with the drafting of opinions.

While it is the prerogative of every Justice to read each petition for *certiorari* himself/herself, many participate in what is informally known as the "cert pool." As petitions for *certiorari* come in on a weekly basis, they are divided among the participating Justices. The participating Justices divide their petitions among their law clerks. The law clerks, in turn, read the petitions assigned to them, write a brief memorandum about the case, and make a recommendation as to whether the case should be accepted or not. The Justice provides these memoranda and recommendations to the other Justices at a Justices' Conference.

## Briefs

If the Justices decide to accept a case (grant a petition for *certiorari*), the case is placed on the docket. According to the Supreme Court's rules, the petitioner has a certain amount of time to write a brief, not to exceed 50 pages, putting forth his/her legal case concerning the issue on which the Court granted review. After the petitioner's brief has been filed, the other party, known as the respondent, is given a certain amount of time to file a respondent's brief. This brief is also not to exceed 50 pages.

After the initial petitions have been filed, the petitioner and respondent are permitted to file briefs of a shorter length that respond to the other party's respective position. If not directly involved in the case, the U.S. Government, represented by the Solicitor General, can file a brief on behalf of the government. With the permission of the Court, groups that do not have a direct stake in the outcome of the case, but are nevertheless interested in it, may file what is known as an *amicus curiae* (Latin for "friend of the court") brief providing their own arguments and recommendations for how the case should be decided.

## Oral Arguments

By law, the U.S. Supreme Court's term begins on the first Monday in October and goes through the Sunday before the first Monday in October of the following year. The Court is, typically, in recess from late June/early July until the first Monday in October.

The Court hears oral arguments in cases from October through April. From October through December, arguments are heard during the first two weeks of each month. From January through April, arguments are heard

on the last two weeks of each month. During each two-week session, oral arguments are heard on Mondays, Tuesdays, and Wednesdays only (unless the Court directs otherwise).

Oral arguments are open to the public. Typically, two cases are heard each day, beginning at 10 a.m. Each case is allotted an hour for arguments. During this time, lawyers for each party have a half hour to make their best legal case to the Justices. Most of this time, however, is spent answering the Justices' questions. The Justices tend to view oral arguments not as a forum for the lawyers to rehash the merits of the case as found in their briefs, but for answering any questions that the Justices may have developed while reading their briefs.

The Solicitor General usually argues cases in which the U.S. Government is a party. If the U.S. Government is not a party, the Solicitor still may be allotted time to express the government's interests in the case.

During oral arguments, each side has approximately 30 minutes to present its case, however, attorneys are not required to use the entire time. The petitioner argues first, then the respondent. If the petitioner reserves time for rebuttal, the petitioner speaks last. After the Court is seated, the Chief Justice acknowledges counsel for the petitioner, who already is standing at the podium. The attorney then begins: "Mr. Chief Justice, and may it please the Court . . . ."

Only the Chief Justice (most senior Justice on the Court, currently Anthony Kennedy) is addressed as Mr. Chief Justice. Others are addressed as "Justice Ginsburg," or

"Your Honor." The title "Judge" is not used for Supreme Court Justices.

## Conference

When oral arguments are concluded, the Justices have to decide the case. They do so at what is known as the Justices' Conference. Two Conferences are held per week when Court is in session, on Wednesday and Friday afternoons. The Justices vote on cases heard on Mondays and Tuesdays of a given week at their Wednesday afternoon Conference. The Justices vote on cases heard on Wednesday at their Friday afternoon Conference. When Court is not in session, usually only a Friday Conference is held.

Before going into the Conference, the Justices frequently discuss the relevant cases with their law clerks, seeking to get different perspectives on the case. At the end of these sessions, sometimes the Justices have a fairly good idea of how they will vote in the case; other times, they are still uncommitted.

According to Supreme Court protocol, only the Justices are allowed in the Conference room at this time—no police, law clerks, secretaries, etc. The Chief Justice calls the session to order and, as a sign of the collegial nature of the institution, all the Justices shake hands. The first order of business, typically, is to discuss the week's petitions for *certiorari*, i.e., deciding which cases to accept or reject.

After the petitions for *certiorari* are dealt with, the Justices begin to discuss the cases that were heard since their last Conference. According to Supreme Court protocol, all Justices have an opportunity to state their views on the case and raise any questions or concerns they may have.

Each Justice speaks without interruptions from the others. The Chief Justice makes the first statement, then each Justice speaks in descending order of seniority, ending with the most junior justice—the one who has served on the court for the fewest years.

When each Justice is finished speaking, the Chief Justice casts the first vote, and then each Justice in descending order of seniority does likewise until the most junior justice casts the last vote. After the votes have been tallied, the Chief Justice, or the most senior Justice in the majority if the Chief Justice is in the dissent, assigns a Justice in the majority to write the opinion of the Court. The most senior justice in the dissent can assign a dissenting Justice to write the dissenting opinion.

If a Justice agrees with the outcome of the case, but not the majority's rationale for it, that Justice may write a concurring opinion. Any Justice may write a separate dissenting opinion. When there is a tie vote, the decision of the lower Court stands. This can happen if, for some reason, any of the nine Justices is not participating in a case (e.g., a seat is vacant or a Justice has had to recuse).

## Opinions

All opinions of the Court are, typically, handed down by the last day of the Court's term (the day in late June/early July when the Court recesses for the summer). With the exception of this deadline, there are no rules concerning when decisions must be released. Typically, decisions that are unanimous are released sooner than those that have concurring and dissenting opinions. While some unanimous decisions are handed down as early as December, some controversial opinions, even if heard in

October, may not be handed down until the last day of the term.

A majority of Justices must agree to all of the contents of the Court's opinion before it is publicly delivered. Justices do this by "signing onto" the opinion. The Justice in charge of writing the opinion must be careful to take into consideration the comments and concerns of the others who voted in the majority. If this does not happen, there may not be enough Justices to maintain the majority. On rare occasions in close cases, a dissenting opinion later becomes the majority opinion because one or more Justices switch their votes after reading the drafts of the majority and dissenting opinions. No opinion is considered the official opinion of the Court until it is delivered in open Court (or at least made available to the public).

On days when the Court is hearing oral arguments, decisions may be handed down before the arguments are heard. During the months of May and June, the Court meets at 10 a.m. every Monday to release opinions. During the last week of the term, additional days may be designated as "opinion days."

### Additional Resources

For those interested in learning more about how the Supreme Court operates, please visit the [Supreme Court of the United States](http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1).

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