

Syllabus for Appellate Courts: Operation and Reform  
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This course will examine the practices and powers of American appellate courts, with a particular emphasis on the federal courts of appeals.

We will begin with an overview of the function of appellate courts—why they were created and what we expect of them today. We will then move to the specific components of appellate adjudication, including mediation, briefing, oral argument, and judgment, as well as the personnel who contribute to the adjudication process. Next, we will consider the ways in which the appellate courts have been affected by an increasing caseload, and proposals for alleviating the strain on the courts. Finally, we will turn to the Supreme Court and consider similar aspects of process and practice, as well as reform proposals discussed by the Presidential Commission on the Supreme Court of the United States.

Ultimately, the goal of the course is to expose you to how appellate courts operate and the purported goals of these institutions. Over the course of the semester, you should also be evaluating what you think are the fundamental objectives of appellate review and whether the current structure of the courts allows them to meet those goals.

*Readings*

Readings will mostly be in the form of scholarly articles and government reports, and will be posted on our course website.

*Class Participation*

This class will be run using a mix of cold-calling and volunteering. I expect everyone to come to class prepared to be called on to discuss the readings each day. If for some reason you cannot do the readings for a particular week or cannot attend class, please e-mail me before class to let me know.

## *Requirements*

(1) *Weekly Postings.* Everyone must post a single question or comment about the readings before each class, excluding the first and final weeks. These questions / comments should be informal and must be short (absolutely nothing longer than three sentences). The question can be of any sort—critical, a request for clarification, etc. The comment can simply indicate what you found most interesting about one of the readings and why. Note: The idea is that it should take only five minutes at most to think of a question or comment after you have completed the readings. Please post no later than **9 p.m. on the day before class** so that others can review the posts; questions / comments posted after 9 p.m. will not receive credit.

(2) *Final paper.* You will also be required to hand in a final paper by **5 p.m. on Monday, May 9<sup>th</sup>**. If the paper is late, I will not be able to give it full credit. The paper should include an in-depth analysis of one or two of the topics covered in the course, and should speak to both the positive (i.e. the way the courts currently operate) and the normative (i.e. the way you think the courts should operate in light of the goals you believe they should further). Outside research is allowed, but you should be sure to respond to material we have covered in class. I would be happy to discuss the topic in advance if that would be useful. We will also be discussing everyone's topics during our class wrap-up on Monday, April 25<sup>th</sup>.

The paper length should be in the range of 20 to 25 double-spaced pages (using a standard font and standard margins). Please e-mail the paper directly to me (mlevy21@gmu.edu).

## *Grades*

The final paper will count for 75% of your grade, and class participation (which includes the questions and comments posted) will count for 25% of your grade.

## Appellate Courts: Schedule

### Jan. 24 – Background on (Federal) Appellate Courts

- APPELLATE COURTS, *Appeals and Appellate Courts: Background and General Considerations*, 1–23
- Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411 (1987), 411–431

### Jan. 31 – The Function of Appellate Courts

#### A. Error Correction

- Chad M. Oldfather, *Error Correction*, 85 IND. L. J. 49 (2010), 49–75
- Harlon L. Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L. J. 62 (1985), 73–86
- Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUDIES 379 (1995), 379–93

#### B. Law Development

- APPELLATE COURTS, *Lawmaking by Intermediate Appellate Courts, Judicial Lawmaking by Supreme Courts*, 288–303

### Feb. 7 – Growth in Volume and Structural Changes in Case Management

- Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity “Crisis”: Charting a Path for Federal Judiciary Reform*, 108 CAL. L. REV. 789 (2020), 851–63
- Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L. J. 315 (2011), 316-83 (but skim 325–65)
- William M. Richman & William L. Reynolds, *INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS* (2013), 116–27

### Feb. 14 – Mediation, Screening, Oral Argument and “Non-Argument” Cases

#### A. Mediation

- APPELLATE COURTS, *Appellate ADR*, 564–569
- Robert J. Niemic, FEDERAL JUDICIAL CENTER, *MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS* (2d ed. 2006) (only the Circuit you are assigned)

- Irving R. Kaufman, *Must Every Appeal Run the Gamut? The Civil Appeals Management Plan*, 95 YALE L. J. 755 (1986)

#### B. Screening

- APPELLATE COURTS, *Screening*, 514–528

#### C. Oral Argument and “Non-Argument” Cases

- APPELLATE COURTS, *Oral Argument*, 528–541
- Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35 (1986), 35–46

### Feb. 21 – Opinion Writing and Publication

- APPELLATE COURTS, *Opinions—Published and Unpublished*, 549–555
- Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177 (1999), 177–83
- Merritt E. McAlister, “Downright Indifference”: *Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533, 533–594 (2020),
- Merritt E. McAlister, *Missing Decisions*, 169 U. PA. L. REV. 1101 (2021), 1102–08

### Feb. 28 – Growth in Volume and Structural Changes in Personnel and Judges

#### A. Court Personnel

- APPELLATE COURTS, *Law Clerks*, 477–494
- APPELLATE COURTS, *Central Staff Attorneys*, 494–506
- Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1 (2007), 39–53

#### B. Visiting Judges

- Marin K. Levy, *Visiting Judges*, 107 CAL. L. REV. 67 (2019), 68–130 (but skim 74–101)

### March 7 – The Role of Chief Judges

- Tracey E. George & Albert H. Yoon, *Chief Judges: The Limits of Attitudinal Theory and Possible Paradox of Managerial Judging*, 61 VAND. L. REV. 1 (2008) (excerpts)
- Marin K. Levy & Jon O. Newman, *The Office of the Circuit Chief Judge*, 169 U. PA. L. REV. 2423 (2021) (excerpts)

March 14 – [No Class; Spring Break]

March 21 – Potential Reforms at the Courts of Appeals:

A. Adding Judges

- Stephen Reinhardt, *A Plea to Save the Federal Courts: Too Few Judges, Too Many Cases*, 79 A.B.A. J. (1993)
- Leah Litman, *Expand the Lower Courts*, NY TIMES (2020)
- Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE (1993)
- Federal Judicial Center, *Imposing a Moratorium on the Number of Federal Judges: Analysis of Arguments and Implications* (1993) 23–54

B. Limiting Jurisdiction

- Jon O. Newman, Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761 (1989), 770–76

C. Adding New Courts / Creating Specialty Courts

- APPELLATE COURTS, *Reorganizing the Middle Tier, Creating a New Appellate Tier, Appellate Subject-Matter Organization*, 964–79

March 28 – Understanding the Role of the Supreme Court and Reform

- PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, FINAL REPORT (2021), 12–66

April 4 – Supreme Court Expansion / Packing and Term Limits

- PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, FINAL REPORT (2021), 67–151

April 11 – The Supreme Court’s Role and Procedures & Practices

- PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, FINAL REPORT (2021), 152–243

April 18 – Background on (State) Appellate Courts

- Tracey E. George & Albert H. Yoon, “The Gavel Gap: Who Sits in Judgment on State Courts?” (2016)
- Marin K. Levy, *Packing and Unpacking State Courts?*, 61 WM. & MARY L. REV. 1121 (2020), 1124–1154

April 25 – Course Wrap-Up

May 9 – Final paper due by 5 p.m.