

Overview of Appellate Level

Getting There – The Appeals Process

In the United States when one side loses or is unhappy with some aspect of the outcome of their trial they have a right to appeal.¹ The lawyer representing the party or parties appealing (called the "appellant" or "petitioner") usually files a Notice of Intent to Appeal with the trial court. A transcript of the trial is prepared and sent to the appellate court.² The appellate lawyer files a brief (see "Annotated Forms," Tab #1, and the sample and blank forms, Tab #3), laying out the legal³ errors made at trial and what law applies in this case. The lawyers representing the other party (called the "respondent" or "appellee") files a reply brief. Then there's oral argument, where both lawyers appear before a three-judge court to present their sides of the case (see the diagram "Setting Up an Appellate Courtroom," Tab #3). The appellate judges ask questions and then "takes the case under submission" (reserves making a decision until a later date).

The judges have a conference to see where they stand on the cases they've heard. When two or three judges agree on the outcome (who wins), one of them volunteers to write the "opinion," which lays out not only the "holdings" (legal rulings) in the case, but also the legal rationale for their decision. A judge who agrees with the outcome but has other or different reasons, can write a "concurring" opinion. A judge who disagrees with the outcome can write a "dissenting" opinion. Your students are going to replicate this process.

Basic Scheme

At this level, all your students (except for the nine Supreme Court justices)⁴ are either lawyers or circuit court judges. In our country, there are 12 circuits (see "Circuit Courts Chart, Tab #3), each of which has a number of judges who sit and hear cases in panels of three, hence the name "three-judge court." In this simulation, each panel will hear either two or three cases, depending on class size. The "Student Role Assignment Chart," (Tab #1) will help you assign students to circuits and cases, as well as help you figure out how many lawyers, judges and courts you'll need. Or your students can serve as different panels in your local circuit (see chart).

After you've decided which cases to use, how many and which circuits to have, assign or let your students pick whether to be judges or lawyers, have the lawyers choose a case and a side. It's been my experience that more students will request to be judges than lawyers, so you may need to make some adjustments.

In many instances, due to class size, you'll have one or more students who'll have to argue their case(s) before two different courts. And while you can randomly assign students to the courts, it's fun to make one of the courts liberal and the other conservative, to see if

- 1 In a criminal case, only the defendant can appeal a conviction. The state cannot appeal an acquittal, as this would violate the Fifth Amendment's "double jeopardy" provision.
- 2 Appellate courts are required to hear all the appeals filed within their jurisdiction, whereas the USSC—and the state supreme courts—only hear the cases they want to.
- 3 An appeal only deals with legal issues, not factual ones. For example, if the jury finds X had a blood alcohol level above the legal limit, that is a fact and therefore not appealable. But the issue of whether the blood test was properly admitted into evidence is a legal issue, and therefore subject to appeal.
- 4 This gives the USSC justices time to research their justice. Also the justices hear their cases "fresh."

this affects the outcome. Also, two circuits deciding the same issue differently (called a “conflict in the circuits”) is one of the reasons that the USSC decides to take a case. The main thing is, do what works best for your class.

Sample logistics (25 students):

- 9 for the USSC
- 16 remaining students
 - 2 three-judge Circuit Courts of Appeal = 6 students
 - 5 pairs (one/side) of student lawyers = 10 students

Materials Provided

Here is what’s included in the binder:

- Student Instructions for civil and criminal appeals
- Sample and blank court and lawyer forms (Tab #3).
- Sample student-written appellate and reply briefs, and opinions for three of the cases and one criminal appeal (indicated with a *) see Tab #5, Section K.
- Forms for the *Hopwood* and *People v. Brunetti* appeals.
- **Case Packets** (see Tab #5) from 10 well-known (mostly USSC) court cases that focus on constitutional principles such as religion in schools, reverse discrimination, gender equality in college sports, gays in the military and the Boys Scouts, abortion clinic protests and parental notification, and flag-burning.
 - A: *Ohio v. Akron Center* (parental notification for abortion)
 - B: *Boy Scouts of America v. Dale* (gay Boy Scouts)
 - C: *Cohen v. Brown University* (Title IX and sports in college)
 - D: *Good News Club v. Milford Central School* (religious clubs using schools)
 - E: *Hopwood v. Texas* (white students suing for discrimination in school admissions)
 - F: *Texas v. Johnson* (flag-burning)
 - G: *Department of Defense v. Meinhold* (gays in the military)*
 - H: *Romer v. Evans* (Colorado constitutional amendment about gays)*
 - I: *Schenck v. Pro-Choice Network* (abortion clinic protests)*
 - J: *Lee v. Weisman* (graduation prayer)
- **Constitutional Rights Foundation (CRF) Packets** (Tab #5) consist of 10 fictitious criminal cases, which include a constitutional argument. Excerpts from actual USSC and other court cases are provided (including case citations). These issues are topical—First, Second, Fourth Fifth, and Sixth Amendment issues like defendants’ statements to the police, profile searches, gun control and free speech. Using these materials gives your students the opportunity to argue case law and focus on these issues in some depth.
 - People v. Bell, Stover* (1st)
 - People v. Brunetti** (2nd)
 - People v. Casco, Clevenger, Price, Rose* (4th)
 - People v. Donovan, Martin, Whitman* (5th, 6th)

Student Instructions for Appeals – Civil

Typical Civil Appeals

In the United States, when one side loses or is unhappy with some aspect of the outcome of their case, they have the right to appeal.¹ Appeals at both the state and federal level are heard by three-judge courts. Take, for example, *Hazelwood School District v. Kuhlmeier*. Ms. Kuhlmeier was a student writing for the school newspaper. When the principal blocked one of her articles from being printed, she sued for violation of her First Amendment rights. The trial court found in favor of the school district, holding:²

“First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.”

Kuhlmeier appealed the trial court’s ruling, arguing that even though the article in question was to appear in a school newspaper (as opposed to a regular one), the First Amendment still applied. The case was heard by one of the three-judge courts in the Eighth Circuit, sitting in Missouri. The Eighth Circuit found in favor of Ms. Kuhlmeier and reversed the trial court’s decision.

What You’ll Be Doing

You and your classmates will write and/or argue constitutional law, using actual court cases (mostly U. S. Supreme Court) on issues like abortion, gay rights, the college admission process, and religion in schools. You’ll be either an appellate judge or a lawyer.

You’ll receive:

- These instructions on how to do an appeal
- A Case Packet (information needed to write your briefs and opinions)
- A set of sample forms to use as a formatting guide
- Some blank and/or PDF forms to use when typing your brief

LAWYER PREPARATION AND ROLE

Begin by reading your Case Packet to learn what happened in the lower court and what issues and questions you’ll be dealing with. Next, if you’re going to be citing cases, read the case law. Now begin to frame your arguments and counter arguments.

As a lawyer, you’ll write a brief explaining why your side should win. The lawyer representing the appellant (the one who lost in the lower court) writes the Appellate Brief, which explains what went wrong in the lower court and why this court should reverse the lower court’s decision. The winner writes a Reply Brief, which explains why the lower court’s decision should be upheld (kept in place). Then you’ll argue your case (oral argument) before a three-judge appellate court. Be ready to respond to the judges’ questions, and to counter your opponents’ arguments.

¹ In a criminal case, only the defendant can appeal a conviction. The state cannot appeal an acquittal, as this would violate the Fifth Amendment’s “double jeopardy” provision.

² A “holding” is the court making law.

THE JUDGE'S JOB

You'll sit in one of the 12 circuits in the U. S. and hear two or three cases. You'll prepare for oral argument by reading the Case Packet and the briefs written by your classmates. You'll write out some tough, probing questions to ask the attorneys appearing before you. After the oral arguments, the three of you will discuss the cases and see where you stand. When two or three judges agree on the outcome (who won), one of those judges volunteers to write the opinion. This majority opinion lays out not only the "holdings" (rulings) in the case, but also the legal rationale for their decision. A judge who agrees with the outcome but has a different rationale can write a "concurring" opinion. A judge who disagrees with the outcome can write a "dissenting" opinion.

In this activity, you'll each write at least one opinion—majority, concurring, or dissenting. Using the Kuhlmeier case again, if two of you agreed with the trial court and one didn't, one of you would write the opinion. The person disagreeing could write a dissenting opinion. The third member would write an opinion in one of the other cases.

How Court Opinions Are Organized and Used in Real Life

After the opinions are written, they're usually published in large books (often more than 1500 pages). The books are numbered consecutively, and contain opinions going back to the beginning of the court system. The opinions can be then cited (quoted) by later courts when those courts are in the process of deciding the same or a related issue. The earlier case opinions are "precedent" for the later ones. For example, when the USSC (which is the highest court in the land) decided *Roe v. Wade*, all the other (lower) courts are now bound to follow the holding in this case. The same is true for state supreme courts when they interpret state law.

Federal District Court trials can be found in volumes called "Federal Supplement," which is currently in its third series so it's called "F.Supp.3d." The same is true for the circuit court opinions, which are published in Federal Reporter 3rd (F.3d). The U.S. Supreme Court opinions are published in volumes entitled "United States" (U.S.).

When and How to Cite Case Law

Just as when you write any paper in which you quote (cite) a source, when you cite from a case, you **MUST** include a case citation in any brief, opinion or oral argument. Use the following rules:

- When writing a brief or opinion use the full citation. For example, *Hazelwood School District v. Kuhlmeier* 484 U.S. 260 (1988). Use italics for the case name, and put the date in parenthesis.³
- For oral argument, or if there is no book or page citation provided in the materials, just use the full case name: *Hazelwood School District v. Kuhlmeier*.⁴

³ Some courts, such as those in California, put the year before the citation; and others, like the federal courts, put the year after the citation.

⁴ In real life there would always be a reference to the set of books in which this case can be found.

Student Instructions – Criminal

Criminal Appeals

When a criminal defendant is convicted, he/she has the right to appeal that conviction.¹ Appeals at both the state and federal levels are heard by three-judge courts. In *People v. Alvarez*, for example, Mr. Alvarez, who was wanted for homicide in California, was stopped at a routine license and registration checkpoint in Mississippi. An officer observed that the defendant appeared drunk, and asked him to exit the car for a sobriety test. The defendant refused and drove away. When apprehended later, the murder weapon was discovered in the car. The gun was admitted into evidence at Mr. Alvarez’s trial and he was convicted. On appeal he argued that admitting the gun into evidence was a violation of his Fourth Amendment rights.

The court disagreed, holding² that a stop of a vehicle by a law enforcement officer is a reasonable seizure under the Fourth Amendment, “if it is made at a checkpoint for routine license and registration inspection of all passing vehicles.”

What You’ll Be Doing

You and your classmates will write and/or argue constitutional law, using actual court cases on issues like defendants making statements to the police, search and seizure, privacy, and First Amendment free speech. You’ll be either a judge or a lawyer.

This packet contains:

- Instructions on how to do an appeal.
- A trial packet, including the transcript from a mock trial case, a statement of the facts, relevant witness testimony, and evidence.
- Excerpts from actual USSC and other cases for use in your argument and opinion.
- A set of sample forms to use as a formatting guide.
- Some blank and/or PDF forms to use when typing your brief.

LAWYER PREPARATION AND ROLE

Begin by reading the “Trial Transcript,” the “Trial Outcome,” and the “Appellate Issues,” to learn what happened at the trial level and what issues to raise. Next read the case excerpts.

As a lawyer, you’ll write a brief explaining why your side should win. The lawyer representing the defendant (who is now the appellant) writes the Appellate Brief, which explains what went wrong in the lower court and why the higher court should reverse that decision. The prosecutor (or attorney general) writes a Reply Brief, which explains why the lower court’s decision should be upheld (kept in place). Then you’ll argue your case before a three-judge appellate court. (This is called “oral argument.”) Be ready to respond to the judges’ questions and counter your opponents’ arguments

¹ In a criminal case, only the defendant can appeal a conviction. The state cannot appeal an acquittal, as this would violate the Fifth Amendment’s “double jeopardy” provision.

² A “holding” is the court making law.

THE JUDGE'S JOB

You'll sit in the fictitious Seventh District Court of Appeals for the State of California and hear two or three cases. You'll prepare for oral argument by reading the Case Packet and the briefs written by your fellow classmates. You'll also write out some tough, probing questions to ask the attorneys appearing before you. After the oral arguments, the three of you will discuss the cases and see where you stand. When two or three judges agree on the outcome (who won), one of those judges volunteers to write the (majority) opinion, lays out not only the "holdings" (rulings) in the case, but also the legal rationale for their decision. A judge who agrees with the outcome but has a different rationale can write a concurring opinion. A judge who disagrees with the outcome can write a dissenting opinion.

In this activity, each of you will write at least one opinion—majority, concurring, or dissenting. Using the *People v. Alvarez* case again, if two of you agreed with the trial court and one didn't, one of you would write the opinion. The person disagreeing could write a dissenting opinion. The third member would write an opinion in one of the other cases.

How Court Opinions Are Organized and Used in Real Life

After the opinions are written they're usually published in large books (often more than 1500 pages). The books are numbered consecutively, and contain opinions going back to the beginning of the court system. The opinions can be then cited (quoted) by later courts when those courts are in the process of deciding the same or a related issue. The earlier case opinions are "precedent" for the later ones. For example, when the USSC (which is the highest court in the land) decided *Roe v. Wade*, all the other (lower) courts are now bound to follow the holding in this case. The same is true for state supreme courts when they interpret state law.

Federal District Court trials can be found in volumes called "Federal Supplement," which is currently in its third series so it's called "F.Supp.3d." The same is true for the circuit court opinions, which are published in Federal Reporter 3rd (F.3d). The U.S. Supreme Court opinions are published in volumes entitled "United States" (U.S.).

In California (where the mock trial cases take place), trial court decisions are generally not published. State appellate and supreme courts use a system similar to the federal one. For example, if *People v. Brunetti* were a real case, the opinion written by your appellate-judge students would be published in a set of books called the "California Appellate Reports." The California Courts of Appeal and the California Supreme Court reports are in their fourth set and are called "California Appellate Reports 4th" (Cal.App.4th) and "California Reports 4th" (Cal.4th), respectively.

An example of a real 1996 California case would be *People v. Alvarez*, which is cited as *People v. Alvarez* (1996) 14 Cal.4th 155. (That's volume 14 of California Reporter 4th. The case begins on page 155.) By looking at the citation, you can tell which court it came from.

Overview of Appeals in the United States Supreme Court¹

A Stand-Alone Activity

How Cases Get to the Supreme Court

With rare exceptions, getting to the USSC usually takes several years. It begins at the trial level (see both flowcharts on “How a Case Goes Through the Court Systems, Tab #1, for more details). The purpose of a trial is to figure out the facts (what happened and who is responsible). Things like car accidents, divorce and burglary are usually heard in state court. Federal courts only hear “federal questions,” meaning cases involving federal law or the U. S. Constitution. The side that loses or is unhappy with some aspect of the outcome can appeal.²

THE FEDERAL ROUTE

Cases heard in Federal District (or “trial”) Court get appealed to the circuit courts. After the circuit (three-judge) court has heard a case and rendered a written decision (this court must hear all appeals), the side that loses or is unhappy with some aspect of that decision can appeal to the next (and final) court—the U. S. Supreme Court (USSC).

THE STATE JOURNEY

The state court journey is longer and more complicated. Trials in state court get appealed to state courts of appeal like the California Court of Appeal (this court also must hear all appeals). The step after that is the state’s highest (or “supreme”) court—for example, the Supreme Court of California. For most cases, this would be the final step. But if the case also involves “federal questions” or the U. S. Constitution, then a case that began in state court could be appealed to the USSC.

THE WRIT PROCESS

Unlike the courts of appeal (both state and federal), the USSC only takes the cases it wants to hear. For example in the case of *Kuhlmeier v. Hazelwood School District*, when the Eighth Circuit reversed the trial court and found in favor of Ms. Kuhlmeier, the Hazelwood School District appealed to the USSC. Following a protocol that dates from the Middle Ages,³ when lawyers want the Supreme Court to hear their cases, they file a “Petition for a Writ of Certiorari” (sur-shee-oh-RAH-rye). If the court wants to hear the case, it grants petition and issues the writ. This is often called “granting cert.” In the *Kuhlmeier* case, the USSC did grant the writ. After briefs and argument, the USSC reversed the Eighth Circuit, siding with the school district.

1 Use these instructions if you have NOT done the appellate level (Tab #3). If you’ve done the appellate level, then use the instructions entitled “Overview of the United States Supreme Court – The Final Appeal.”

2 An appeal only deals with legal issues, not factual ones. For example, if the jury finds X had a blood alcohol level above the legal limit, that is a fact and therefore not appealable. But the issue of whether the blood test was properly admitted into evidence, is a legal issue and therefore, subject to appeal.

In a criminal case, only the defendant can appeal a conviction. The state cannot appeal an acquittal, as this would violate the Fifth Amendment’s “double jeopardy” provision.

3 Knights would petition the king to issue an order. If the king granted the petition, he issued what was called a “writ.” That terminology survives in the legal world today.

Basic Scheme

In this activity, nine students portray the actual sitting justices (you can use the “USSC Request Form,” Tab #4). You can either ask for volunteers or just assign the roles. Have the student-justices research their real-life counterparts. Students portraying the justices should be able to ask good questions and be comfortable with the political leanings of their chosen justice.

On the day of the oral argument, (see the “USSC Justice Seating Chart,” Tab #4) the rest of the class listens while the lawyers plead their cases and the justices **grill** them. The whole class listens, not only to the arguments, but also to the justices’ discussion afterwards, including the assigning of the opinion writing. The activity takes two or three days (see the Timeline, Tab #1, for more details).

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- Forms for the *Hopwood* and *People v. Brunetti* appeals.
- Sample student-written appellate and reply briefs, and opinions for three of the cases and one criminal appeal (indicated with a *) see Tab #5, Section K.
- **Case Packets** (see Tab #5) from 10 well-known (mostly USSC) court cases that focus on constitutional principles such as religion in schools, reverse discrimination, gender equality in college sports, gays in the military and the Boys Scouts, abortion clinic protests and parental notification, and flag-burning.
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Student Instructions for Appeals in the USSC

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THE FEDERAL ROUTE

Cases heard in Federal District (or “trial”) Court get appealed to the circuit courts. After the circuit (three-judge) court has heard a case and rendered a written decision (this court must hear all appeals), the side that loses or is unhappy with some aspect of that decision can appeal to the next—and final—court, the U. S. Supreme Court (USSC).

THE STATE JOURNEY

The state court journey is a bit longer and more complicated. Trials in state court to state courts of appeals, like the California Court of Appeal (this court also must hear all appeals). The step after that is the state’s highest court, usually called the “supreme” court (Supreme Court of California, for example). For most cases, this would be the final step. But if the issues involve “federal questions” (federal law) or the U. S. Constitution, then a case that began in state court could be appealed to the USSC.

THE WRIT PROCESS

Unlike the courts of appeal (both state and federal), the USSC only takes the cases it wants to hear. For example in the case of *Kuhlmeier v. Hazelwood School District*, when the Eighth Circuit reversed the trial court and found in favor of Ms. Kuhlmeier, the Hazelwood School District appealed to the USSC. Following a protocol that dates from the Middle Ages,² when lawyers want the Supreme Court to hear their cases, they file a “Petition for a Writ of Certiorari” (sur-shee-oh-RAH-rye). If the court wants to hear the case, it grants petition and issues the writ. This is often called “granting cert.” In the *Kuhlmeier* case, the USSC did grant the writ. After briefs and argument, the USSC reversed the Eighth Circuit, siding with the school district.

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JUSTICES' ROLE

Nine of you will portray the actual USSC justices. (You'll have to do some research to see where "your" justice stands politically and on important issues.) The Chief Justice will convene a conference where you'll review the writs and the case packets and decide which cases to hear "this term." A USSC term begins, "the first Monday in October" and goes until late June. Then you'll issue the writs for those cases. Attorneys will write briefs and then argue before you. During this oral argument, you need to ask the lawyers tough questions. After each case, the court discusses it and figures out where each justice stands. The class listens in during both oral argument and the discussion. The work of writing the majority, concurring and dissenting opinions gets divided up among the justices (each of you needs to write at least one opinion). The Chief Justice presides and assigns the writing tasks (taking requests from the other justices about which case opinions they'd like to write). But if the Chief Justice is in the minority, then the most senior justice on the majority side assigns the case. Your teacher will tell you the seniority order and where to sit.

How Court Opinions Are Organized and Used in Real Life

After the opinions are written they're usually published in large books (often more than 1500 pages). The books are numbered consecutively, and contain opinions going back to the beginning of the court system. The opinions can be then cited (quoted) by later courts when those courts are in the process of deciding the same or a related issue. The earlier case opinions are "precedent" for the later ones. For example, when the USSC (which is the highest court in the land) decided *Roe v. Wade*, all the other (lower) courts are now bound to follow the holding in this case. The same is true for state supreme courts when they interpret state law.

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