Welcome to the mini-course in the American civil litigation process. Our sessions will focus on the rules, practices and procedures by which the United States legal system resolves civil disputes as well as on the role of judges in the civil litigation system.

Our subject is called “civil” procedure because it concerns the procedures governing civil, rather than criminal, disputes within the legal system. Civil actions in the United States can be brought to address a wide range of conflicts – 54 among others, these include disagreements between neighbors regarding property lines, between car owners involved in an accident, between individuals and employers regarding workplace discrimination or unsafe work conditions, between corporations regarding trademark or copyright infringement, between an individual and the government regarding deprivation of welfare benefits, termination of parental rights, the sufficiency of income tax payments, incidents of police brutality and other civil rights violations, and between presidential candidates regarding vote-counting procedures.

During our meetings, we will look to several sources for the rules of litigation – from the Federal Rules of Civil Procedure to the American common law to the U.S. Constitution and statutes. With these sources, we will review, in broad brush, the procedures for bringing problems into and through the legal system and the doctrines governing the power of courts to resolve these disputes. In addition to examining how procedural rules operate, we will consider the ways in which procedural rules implement competing values, policies, and conceptions of justice, and the ways in which these underlying considerations may affect the substantive outcome of cases.
Important Instructions for Class:

a. You should READ CAREFULLY all materials marked with an asterisk (*) and designed in bold type.

b. Please SKIM all other materials. That is, I want you to look at these only enough to understand in a basic way what they cover. I use the “skim” materials to help familiarize you with the U.S. legal system, litigation documents, and arguments in the field. To be clear, “skim” does not mean “skip” these readings! We will not discuss these readings in depth but I will refer to them in class.

c. Please read this entire syllabus and prepare the assignment for Class 1 before the first class.

Syllabus and Assignments

Class 1 - Overview of Civil Litigation, Civil Remedies, and Due Process
This class will cover three topics: an overview of American civil litigation; remedies in civil lawsuits; and the foundational concept of due process.

1. Overview of the Process

The Stages and Essential Concepts of a Civil Litigation

Federal Rules of Civil Procedure (FRCP): Table of Rules (the summary list of all of the federal rules)

Background information about federal judges, the U.S. Circuit Courts, and selected state court systems. (You can skim this.)

2. Remedies

For this part of class, please think about various legal problems that might be the subject of civil suits and decide which types of remedies might be appropriate.

Preliminary Relief (temporary restraining orders, preliminary injunctions, and restrictions on the use of money and real property)

Legal and Equitable Remedies (damages and permanent injunctions)

* FRCP Rules 64, 65
3. Due Process – The Cornerstone Value in Civil Litigation

* Goldberg v. Kelly

* Hamdi v. Rumsfeld

* US Constitution, 5th Amendment and 14th Amendment

Class 2 – Getting the Lawsuit Started

1. Starting a Lawsuit by Filing the Complaint – Why Notice Pleading?

* Ashcroft v. Iqbal

First Moves, Schulansky Goes to Court
(You should look carefully at the part of this chapter called “Resulting Documents,” which shows you a copy of a civil litigation complaint.)

* FRCP Rules 1, 3, 7, 8, 10

2. Responding to the Complaint: Motions to Dismiss and Answers

The Defendant’s Perspective: Ronan’s Answer and Counterclaim
(You should look carefully at the part of this chapter called “Resulting Documents,” which shows you a copy of a civil litigation answer and counterclaim.)

Preliminary Objections: Jones Seeks a Way Out
(You should look carefully at the part of this chapter called “Resulting Documents,” which shows you a copy of a civil litigation motion to dismiss a claim.)

* In-Class Problem Solving: Flannel v. JC Penny
  Please be prepared to discuss the steps necessary to decide the question posed by this problem. You might want to try writing out your answer before class. Remember that, in deciding a motion to dismiss, the court considers the allegations and all reasonable inferences that can be drawn from them in the light most favorable to the non-moving party (i.e. to the plaintiff, in this case)

* FRCP Rules 8, 12
3. Discovery

Discovery Techniques

A Practical Perspective: Sample Interrogatories, Answers, and Comments

FRCP Rules 26-37 (These are all of the Federal Rules of Civil Procedure that govern discovery in federal courts. You should read the parts in bold and skim the rest.)

* Zubulake v. UBS Warburg

Ethical Issues in Discovery

Discovery Exercise

Please see the information sheet that is attached to this syllabus. This exercise should take between 90 minutes and two hours to complete. You must complete this before Class 3. You can do this exercise at any time, but it will probably be easier and more enjoyable after we have had our discovery discussion in class.

Class 3 – Moving the Lawsuit through the Trial Court

This class will cover the remainder of the civil litigation process, through summary judgment, trial, and post-trial motions, and will also include some discussion of settlement of civil actions. We will also begin our discussion of jurisdiction.

1. Summary Judgment

* Weinstock v. Columbia University

* Celotex v. Catrett

Elizabeth Schneider, The Dangers of Summary Judgment

* FRCP Rule 56

2. Jury Trials and Mid- and Post-Trial Motions (including Motions for Judgment as a Matter of Law)

Notes on the litigation process

The Debate over the American Civil Jury
Excerpt from New York State Unified Court System Petit Juror’s Handbook

FRCP Rules 50, 52, 59, 60

US Constitution, 7th Amendment

3. Settlement

Assorted clippings on settlement of civil litigation

Class 4 – Jurisdiction, Class Actions, and Managerial Judging

1. Personal Jurisdiction

*World-Wide Volkswagen v. Woodson

Review “Preliminary Objections” from Class 2

2. Subject Matter Jurisdiction (Federal Question and Diversity Jurisdiction)

*U.S. Constitution Article III and Federal Subject Matter Jurisdiction Statutes

Diversity Jurisdiction

3. Class Actions

*FRCP Rule 23

The Federal Rule (we will focus especially on 23(b2) and 23(b3) class actions

*General Telephone v. Falcon

4. Managerial Judging and Alternate Dispute Resolution

FRCP Rule 16

Sample court-sponsored ADR letter

Alternate Dispute Resolution

Managerial Judging
Discovery Assignment

**WOBURN: A GAME OF DISCOVERY**

Instructions

This is a web-based computer game, based on discovery issues that arose in an actual case. It should take approximately 1 ½ hours to complete. I suggest that you play the game in pairs, though it is also possible for one person to represent both parties. To start the game, go to [http://www2.cali.org](http://www2.cali.org) and then follow these steps:

1. The first time you log on, one student will need to register with the site. Click on the “Not a Registered User Yet?” link on the right hand side of the page. The Law School Authorization Code is: COLUMBstu46 (It is case sensitive). You will also be asked to enter your email address and a password of your choosing. (In future visits to the site, you will only need to enter your email address and password on the home screen).

2. You will be asked to register and, after that, to accept a license agreement. (If you are asked to pick the state you are in, please do (it’s New York). If you are asked “Are you affiliated with a CALI member school?,” answer YES and select Columbia Law School in the school selection window.

3. Accept the license agreement.

4. You will now be taken to a screen with a shaded box on the right hand side that says “My Cali” and “Quick Links.” Under “Quick Links,” click on “Lessons.” On the next screen, under the column entitled “First Year” on the left hand side, click on “Civil Procedure.” The screen that opens will list a number of civil procedure games. Scroll down to the last game, “Woburn: A Game of Discovery.” To the left of the game, under “Select Version to Run,” click on “web/html” to activate the game. (If at this point you receive a screen that says “Go To Game,” but you are not allowed to proceed, you will need to adjust your computer to allow pop-ups. You should have a screen that says “Do not close this window,” with a message above at the top left that says “pop up blocked.” Click on those words, and indicate that you want to allow pop-ups from this source.)

5. When the game starts, you will go through a series of introductory screens, photos, and instructions, and eventually you will be asked if you want to continue an existing game or start a new one. Click on "START," and follow the instructions, which should be self-explanatory. (If you are returning to the game after you have already started, click “CONTINUE” at this point and enter your account and password, per instruction #6, below).

6. If at some point you wish to stop playing the game before it is completed and resume it later, click on the "SAVE" button in the upper right hand corner of the screen. (The best time to save is at the start of a new problem.) You will be asked to enter an account name and a password of your choice. These can be anything; just make sure you write them down, because you will need them to continue your game at a later time.
When you have completed the game, please print out your final score (or write the scores on a piece of paper if you can’t print them out), write your name(s) on the sheet, and turn it in to your TA.

If you encounter any problems running the game, or with these instructions, please contact your TA as soon as possible, because others will probably have the same difficulty.
Class 1 - Overview of Civil Litigation, Civil Remedies, and Due Process
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   * FRCP Rules 64, 65

3. Due Process – The Cornerstone Value in Civil Litigation

   * Goldberg v. Kelly

   * Hamdi v. Rumsfeld

   * US Constitution, 5th Amendment and 14th Amendment
Thinking Like a Trial Lawyer, Pleadings, and Joinder

A. INTRODUCTION

In Chapters 3, 4, and 5, we turn to the major steps in civil litigation. Chapter 3 covers the requirements for a complaint and also considers how many plaintiffs and defendants must, can, and should be joined, and what responses the defendant can and should make. Chapter 4 addresses the discovery process, which is central to civil litigation. Chapter 5 discusses the right of trial by jury and the many methods that have evolved to instruct and constrain juries.

It is important that you begin to internalize your own sense of the chronological flow of a civil lawsuit from the filing of the initial pleadings; through discovery and motions; through trial, verdict, and judgment; and then to the concept of finality. To this end, we have provided various ways in which you can gain perspective on the entire process. After this introduction, we provide a brief description of the major aspects of a case in the chronological order in which they typically take place. You may find it helpful to refer back to this section whenever you are learning a new topic, so that you can appreciate where the concept that you are studying fits into the larger picture.

B. THE STAGES AND ESSENTIAL CONCEPTS OF A CIVIL LITIGATION

Most civil cases are introduced to plaintiffs' lawyers when a client comes to the office and expresses dissatisfaction with the behavior of others. As the client
describes what is wrong, the lawyer considers whether this is a situation for which the law gives any relief. Assume, for instance, the potential client, Joe, says, “I was in an elevator yesterday, and a passenger, Sally, didn’t say hello to me.” If this is the whole story, the lawyer would probably think that the law does not recognize snubbing as a wrong. In other words, the action of Sally the passenger was not legally “cognizable.” Thus, whether the law will give relief is sometimes called a question of cognizability.

The underlying concept (or “unit of measurement” if you like scientific analogies) the lawyer would use in reaching this result is called the cause of action or claim showing that the pleader is entitled to relief. Causes of action are a shorthand for what events or circumstances must have taken place (or, in some instances, will take place) before a court will grant relief under some applicable substantive law.

Each cause of action or claim has components, called elements. Suppose Joe said instead: “I was walking down the street and I think Sally tripped me, or perhaps she was just careless in sticking out her leg.” The attorney might now think about two potential causes of action: negligence and battery. The lawyer might say to herself: “Sally, as another pedestrian, had a ‘duty’ to Joe to refrain from unreasonable conduct, and perhaps she breached that duty by acting ‘unreasonably’ in tripping Joe, and that caused him harm (‘cause in fact’) which was foreseeable or within the risk Sally took (‘proximate cause’), and since he broke his leg as a result of her action, he has suffered ‘harm’ or sustained ‘damages.’ So if the facts are true, there may be a cause of action for negligence because all five elements (of the negligence cause of action) are present: duty, unreasonable conduct (breach of duty), cause in fact, proximate cause, and harm or damages.”

Perhaps Sally acted intentionally. If so, there may be a cause of action for battery with these elements: (1) an intentional act by defendant; (2) resulting in harmful or offensive contact; (3) without consent; and (4) causing injury. Of course, even within this single cause of action there may be multiple factual theories of the case. For instance, a battery could result from a punch in the face, pulling a chair out from underneath someone, creating an electric shock, tainting someone’s food, and so forth. Multiple factual theories could arise even within a single case.

Throughout this course, we will deal with many causes of action from many different substantive areas of the law. This will require us to consider what are the elements of those causes of action. Please remember that different jurisdictions, lawyers, and law professors choose to treat or express the elements somewhat differently. So, do not be alarmed if in your torts class “negligence” and “battery” are explained a bit differently than in this rendition.

If, after talking to the potential client and possibly performing further investigation, a lawyer is satisfied that there is at least one provable cause of action, she will discuss fees and perhaps take the case. Joe’s lawyer, at some point, will want to discuss with Joe whether commencing a lawsuit is the best way to begin. Perhaps a call to Sally, or to her insurance company or her lawyer, if they exist, makes more sense. A demand letter, and perhaps the suggestion of mediation or some other method of alternative dispute resolution (“ADR”), should be considered. ADR is a major topic in Chapter 6.
If the litigation route is chosen, then the lawyer will have to decide in which states the defendant can be sued; this is a question of personal jurisdiction. Let's say you are an Oregon lawyer, and Sally, who lives in California, allegedly caused Joe to trip on a street in Oregon. He has come to discuss the case with you in Oregon. You would probably conclude quickly, since Oregon has typical personal jurisdiction statutes, that Sally could be sued on the facts of this case either in Oregon or in California. If you decide California is a better forum state—a state in which a court sits, and where a suit has been or will be brought—you would help Joe find a lawyer in California, since you have probably not been admitted to practice law there.

It probably makes sense to sue in Oregon, where your client lives and where the accident occurred; this would also mean that you could handle the case and earn a fee. Next, you would have to decide in which Oregon court to commence suit. Oregon, like all other states, has a state court system and at least one federal district court (remember, federal district courts are trial courts). The issue of “what court is empowered to hear this type of case” is called a question of subject matter jurisdiction. A combination of constitutional provisions and statutes grant different courts the right to hear different types of cases. For instance, in any given state, either the state constitution or statutes will give at least one trial court the authority to hear most types of cases. This broad grant of power to a trial court is called a grant of general subject matter jurisdiction.

Article III of the U.S. Constitution describes what cases Congress is permitted to authorize the federal district courts to hear. This grant of power is considerably narrower than the authorization provided in state constitutions and statutes. Thus, subject matter jurisdiction in the federal courts is commonly called limited subject matter jurisdiction. The limited subject matter jurisdiction for federal district courts can be found primarily in Title 28, in the “1330” sections of the U.S. Code. (After Congress passes a bill, it becomes an Act. Acts are assigned to a Title, by subject matter. Peruse these sections either in your rules supplement or in the U.S. Code volumes in the library.) The two major grants of limited subject matter jurisdiction to the federal district courts are called federal question and diversity of citizenship. See if you can find where these grants appear in your rules supplement. Sometimes, grants of limited subject matter jurisdiction to the federal district courts appear in various substantive statutes granting specific rights (scattered throughout the Code), so that Title 28 is not the only title in which one can find such grants of federal subject matter jurisdiction.

Even after the lawyer decides in what court system and in what state to commence a suit (and please keep in mind that litigation is not the only rational alternative to resolve disputes), she must determine where within the state or within the federal system the case can be brought. This question is geographic, but it is different from personal jurisdiction or subject matter jurisdiction. This additional issue is called venue. For instance, if the suit of Joe against Sally is brought in an Oregon Circuit Court, a trial court of the Oregon state judicial system, one still must decide in which geographic section of the state to bring the case. Typical state venue statutes look to the county in which the cause of action arose (in this instance, it would be where Sally allegedly tripped Joe) or
where the defendant resides. (See, e.g., Or. Rev. Stat. § 14.080.) Congress has placed venue restrictions on where plaintiffs can commence cases in federal court. Again, try to find the relevant section(s) in your rules supplement.

The plaintiff must have not only personal jurisdiction over the defendant or defendants, subject matter jurisdiction in the appropriate court, and proper venue, but the defendants must also be appropriately notified of the commencement of suit. The “due process” requirements of notice and the right to be heard were explored at length in Chapter 1 and again in several cases concerning provisional relief in Chapter 2. These issues of personal jurisdiction, subject matter jurisdiction, venue, and notice raise fascinating and complex issues of federalism, separation of powers, and elemental fairness, and they occupy much of the second half of the materials in this book.

In the case of Joe v. Sally, as Joe’s lawyer, you may have the opportunity to choose either a state court in Oregon or California, or a federal court in either state, if the potential damages were in excess of $75,000. Assuming Joe is a citizen of Oregon and Sally is a citizen of California, and the potential damages were sufficient, there would be diversity of citizenship within the meaning of Title 28, § 1332. Note that this would then be a case where there is concurrent subject matter jurisdiction among state courts and federal courts. Unless Congress makes a grant of exclusive subject matter jurisdiction, then a case that would have federal subject matter jurisdiction will also have state subject matter jurisdiction. On the other hand, if, for instance, Congress says that only federal courts can hear a certain type of case, such as actions alleging certain types of anti-competitive behavior specifically prescribed in the Sherman Anti-Trust Act (15 U.S.C. § 4), then the plaintiff’s lawyer would be unable to bring that exact violation into a state trial court. Many first-year law students assume that if there is a federal question, such as a violation of a federal civil rights act, then the case can only be brought in federal court. This is not true. Again, unless Congress grants exclusivity to the federal court system, there is concurrent subject matter jurisdiction and the plaintiff has its choice of state or federal courts.

Returning to the case of Joe v. Sally, let us assume as Joe’s lawyer that you have decided to bring the case in the Circuit Court of Oregon (a state court with general subject matter jurisdiction) sitting in the County of Yamhill. You will have checked what is called the long-arm statute of Oregon to make sure that Sally, a California citizen, can be sued in Oregon for a tort she allegedly committed there (Rule 4(c) of the Oregon Rules of Civil Procedure would indeed permit this exercise of personal jurisdiction). Also, you will have checked the applicable Oregon venue statute and complied with it in choosing the location of the court in Oregon in which to sue. You will then draft a complaint in accordance with Oregon’s procedural rules. If the case were in a federal court, such pleading rules would appear in the Federal Rules of Civil Procedure. The pleading rules and cases interpreting them (as well as local culture, and in some instances, local rules) will tell you how precise you must be in your complaint about the facts and the specific relevant causes of action and their elements. You will have to check the applicable statute of limitations to make certain that the complaint has been filed within a statutorily prescribed time or, depending on the state law, that each defendant (in this case “Sally”) is “served” the complaint (service of process) or (again depending on statutes
and their constitutionality) otherwise notified about the case. You will also have to decide whether you can and desire to demand a jury trial. This is usually a question of both constitutional right and trial strategy.

A plaintiff’s lawyer also must consider joinder issues at the beginning of a case. If you choose to raise both negligence and battery causes of action against Sally, that would be called joinder of causes of action or, in the language of the Federal Rules, joinder of claims. If Joe tells you that the doctor who treated him for his broken leg after Sally tripped him did a bad job in setting the splint, then you will consider whether Joe has a negligence action against the doctor (often called a malpractice cause of action). Whether one can and should join Sally and the doctor as defendants in the same lawsuit is called a joinder of parties issue.

One reason that plaintiffs’ lawyers begin their analysis of potential cases by considering causes of action is that the defendant, in answering the plaintiff, can promptly bring a motion to dismiss the case because of the plaintiff’s failure to state a cause of action, or, in the words of Fed. R. Civ. P. 12(b)(6), “failure to state a claim upon which relief can be granted.” This is, again, the concept of cognizability. Even if what the complaint says is true, is it the type of circumstance recognized by substantive laws and, thus, of which the courts take cognizance?

As you will find out, the defendant, either by motion or in its answer, has many options and many responsibilities. The defendant can challenge personal jurisdiction, subject matter jurisdiction, venue, and notice (service of process). The defendant, if filing an answer, must admit or deny the allegations. The defendant must state, or risk waiving by not stating, affirmative defenses. Affirmative defenses are defenses that the defendant has to the plaintiff’s causes of action, even if the case is in an appropriate court and the plaintiff otherwise has a good cause of action. In the case of Joe against Sally, Sally might claim, for example, that Joe’s own negligence contributed to the fall, or that he consented to contact, or that the applicable statute of limitations has already run. The defendant can also counterclaim against the plaintiff for damages or relief that the defendant seeks from the plaintiff. In some instances, such counterclaims are compulsory, in the sense that if the defendant does not bring the claim within the restricted period of time, it will be treated as waived and not permitted in the future. In federal court, for example, Fed. R. Civ. P. 13(a) mandates compulsory counterclaims if the defendant has a claim that “arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim” (although the rule is more complicated than this abbreviated statement of it). Perhaps Joe slandered Sally immediately after the incident. Lawyers might then debate whether this is a compulsory or permissive counterclaim.

Sally may have good reason to believe that if she is responsible to Joe, someone else is responsible to her for what she owes Joe. Let’s say that Sally was acting as a messenger for a delivery company when the accident happened, and that the company had agreed to indemnify her for any harm caused while she made deliveries. Sally could bring a complaint for indemnification against the company, called an impleader or third-party practice. In federal court, impleader is covered by Fed. R. Civ. P. 14. If there are co-defendants, they may have claims against each other, which are called cross-claims in some states and in Fed. R. Civ. P. 13(g).
In some instances a plaintiff must join certain parties, or the case cannot go forward. These are called issues of necessary and indispensable parties, and are covered by Fed. R. Civ. P. 19. There are also more complex joinder issues, such as intervention (Fed. R. Civ. P. 24), interpleader (Fed. R. Civ. P. 22), and class actions (Fed. R. Civ. P. 23). These devices are introduced in this text but are explored more fully in a Complex Litigation course.

Assuming that the case survives preliminary motions that challenge the pleadings, the parties may then engage in discovery. Most states, as well as the federal courts, have a group of procedures whereby one party may gain information from the other parties, and, in some instances, even from nonparty witnesses. Fed. R. Civ. P. 26 through 37 cover the discovery provisions, and are drafted to permit quite liberal discovery. In federal courts and some state courts, selected information is subject to mandatory disclosure in the earliest stages of the litigation. Additional discovery is obtained by other methods, including written questions to opposing parties called interrogatories, written and oral depositions, requests to inspect documents, and motions to inspect real or personal property. In oral depositions, one party normally forces another and/or other witnesses to appear in person before a stenographer (or another method of recording) to answer a series of oral questions under oath. Court orders may limit the amount and scope of discovery; there are sanctions for interfering with legitimate discovery and for abuse of the discovery rules; and many district courts also have local rules that limit discovery. All 94 federal district courts, and many state trial courts, have local rules and standing orders of judges that supplement the rules found throughout the country or in a given state. Consequently, a lawyer in federal court, for example, must know not only the Federal Rules of Civil Procedure, but also the applicable local rules and standing orders of the individual judges.

To understand the procedure that logically likely comes next, you must understand the concepts of the burden of production and the burden of persuasion. At the trial of a case, the party with the burden of proof, usually the plaintiff, must have a sufficiency of evidence as to each element of at least one cause of action to permit a reasonable fact finder to find that each element is true. This is called the burden of production. Let’s say that Joe in fact sued Sally for negligence, the case reached a jury trial, and Joe’s lawyer examined the witnesses in court and offered whatever evidence she had in favor of Joe. Assume that she was done with her part of the case, which is called resting. If the defendant’s lawyer does not think there was a sufficiency of evidence to permit reasonable juries to find that all of the elements are true, that lawyer can move for a judgment as a matter of law under Fed. R. Civ. P. 50(a). (This motion was once labeled and is still often referred to as a motion for a directed verdict.) For instance, in the case of Joe against Sally, if Joe’s lawyer offered no evidence from which reasonable people could infer that Sally acted intentionally or unreasonably, then the trial judge, upon the defendant’s motion, would grant a directed verdict, meaning that the jury would have to find for the defendant. This is because Joe would not have met his “production” burden.

But it is logical that even if Joe survives a motion for directed verdict, he may not ultimately win. Let’s say that Joe describes in open court how Sally carelessly tripped him, and also presents other potentially believable evidence of each element of his negligence case. This would mean that he would survive a
directed verdict motion because he has met his production burden, that is, produced a sufficiency of evidence to permit reasonable jurors to find that each element is true. But the jury may not actually believe all or part of Joe's testimony, or it may find that what he said to Sally did not in their minds add up to negligence or unreasonable conduct. Thus the jury might find for the defendant, because Joe did not persuade them that each element is true. In that instance, Joe did not meet the persuasion burden. In civil cases, the plaintiff must ordinarily persuade the fact finder by a preponderance of the evidence that each element is more likely than not to be true (or, as it is sometimes said, that the scale of justice tips at least a little bit in favor of the plaintiff as to each and every element of the plaintiff's cause of action). You can now see that in the normal case, the plaintiff has three burdens with respect to the merits of his or her case: He or she must plead correctly in the complaint, then meet the production burden, and then, in order to ultimately win, meet the persuasion burden.

If, after discovery, it appears that there is no way a plaintiff can win his or her case because it is predictable that at the trial the plaintiff will not have a sufficiency of evidence to meet the production burden, the defendant can then bring a motion for summary judgment. This will dispose of the case after (or during) discovery but before trial. This motion is described in Fed. R. Civ. P. 56.

A plaintiff can win a case at summary judgment or directed verdict, though this is far less common than a defendant prevailing on such motions. But let's say that the cause of action is nonpayment of a promissory note, and that it is undisputed after discovery that the plaintiff lent the defendant money, got a valid promissory note in return, and that the defendant, without any affirmative defense, has not paid. If the elements of a plaintiff's cause of action are self-evident, why have a trial? The plaintiff should win on a summary judgment motion. And if the plaintiff has not filed a summary judgment motion, she could still win this case, after defendant has rested, at the directed verdict stage.

There are other important motions, such as the motion for renewed judgment as a matter of law under Fed. R. Civ. P. 50(b). (This motion was once labeled and is still often referred to as a motion for a judgment notwithstanding the verdict or JNOV.) Other motions include new trial motions and motions to vacate judgment; we will tackle all of these later, in Chapter 5. The JNOV motion raises precisely the same question as a directed verdict motion, and requires the judge to apply exactly the same test, but the motion is brought after the jury has rendered its verdict. (The Federal Rules refer to both directed verdict and JNOV as motions for judgment as a matter of law, with the latter being a renewed form of the former.) You will discuss later in the course why a judge might deny a motion for directed verdict, and then, after the jury has found for one party (usually the plaintiff), grant a JNOV on behalf of the opposing party (usually the defendant).

Before you read what happens at trial, we want to caution that civil trials have become very rare. Fewer than 3 percent of commenced cases in state and federal courts are terminated by a trial. Many cases are disposed of through a dispositive motion, such as a motion to dismiss for failure to state a claim for which relief can be granted or a motion for summary judgment; some cases are dismissed because the plaintiff has failed to prosecute the claim for a prolonged
period of time. About 70 percent of the commenced cases are terminated by settlement. Most settlements are achieved solely by the lawyers or the parties, but increasingly mediators (often judges or magistrates) assist the lawyers and the parties in their negotiations.

You should also be aware that in federal courts, and increasingly in state courts as well, the cases do not just go, unsupervised by the courts, from pleadings, discovery, and motions to settlement or trial. There are often several stages of case management in which the judges or other court personnel exercise control over the time sequence of the case and the amount and order of pretrial discovery. Much litigation time and expense is spent on pretrial conferences and documents that are designed to focus the case, whittle it down to essentials, and provide the opposing lawyers and the judge with a description of the witnesses, evidence, and potential evidentiary problems that would be present in the unlikely event a trial actually occurs. You might wish to look at this time at Fed. R. Civ. P. 16 in order to get a preliminary sense of the ways in which case management has become an essential characteristic of much civil litigation.

That most cases settle does not mean that litigators are not concerned about the facts that would likely come out, the law that would be applied, or the verdicts or orders that might be rendered after a full-scale trial. It is frequently said that settlement discussion is "in the shadow of the law," in an attempt to indicate how lawyers, and mediators or judges who assist them in helping to achieve settlement, tend to think and talk in terms of what the results might be if the case is ultimately decided by a judge or jury. Trials are important to the disposition of civil cases in several ways. A firm trial date is one of the strongest inducements to serious settlement talk. The costs of trial, and the uncertainty of trial results, also encourage settlement. What has happened in the trial of similar cases, and the potential verdicts in the case at hand, inform settlement discussion. That one is willing to try a case and fully prepared for trial influences settlement demands and offers. And sometimes, trials actually happen.

Trials usually begin with each side giving opening statements. The plaintiff's lawyer then introduces her case first, with direct examination of each witness. Then the defendant's lawyer will ordinarily cross-examine those witnesses. At the trial, as the parties introduce evidence, the attorneys may raise objections to some of the questions asked or exhibits offered. The judge will apply rules of evidence in assessing the validity of the counsel's objections. If the question is a proper one, the judge will overrule the objection, and the witness must answer the question. If the judge finds that the question is improperly framed by counsel or that counsel seeks inadmissible testimony, she will sustain the objection, which means that the lawyer will have to reframe the question or move on to another matter.

*This expression comes from the oft-cited article, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950 (1979). The authors, Robert Mnookin and Lewis Kornhauser, discuss how divorce negotiations occur "in the shadow of the law" in the sense that they are shaped by what the parties suspect a court will do if no agreement is reached and they are forced instead to go to trial.
Assume this is a jury case. Once both sides rest, assuming neither side wins on a motion for directed verdict, each side will give closing arguments. These will be preceded or followed by the judge's instructing the jury. The jury will render its verdict. The verdict will later become a judgment. If the plaintiff wins, he, she, or it can use formal methods to execute on the judgment—that is, force the defendant to pay it. Bear in mind, though, that in some cases the plaintiff will be seeking injunctive relief. She may seek a temporary restraining order at the beginning of the case to stop the defendant from doing irreparable harm, and then seek to have that judgment become a preliminary injunction, stopping the defendant from doing something prior to trial. If the plaintiff wins, the injunction may become a permanent injunction.

In most instances, in both state and federal courts, the losing party can appeal only from a final judgment. In the federal court system, the party that loses at the district court level has a right to appeal to the U.S. Court of Appeals. If the appeal is lost at this level, the losing party can apply to the U.S. Supreme Court for review. This is called a petition for a writ of certiorari. (Supreme Court review is governed by 28 U.S.C. §§ 1253-1258.)

If a party loses in the state trial court of general jurisdiction, then the party usually has the right to appeal to an intermediate appellate court. If the appeal is lost at this level, the losing party can appeal to the state's highest court, but that court usually has discretion over which cases it will hear. Some of the appellate decisions at the highest state court level can be reviewed by the U.S. Supreme Court, but only if that decision involved federal law. See 28 U.S.C. § 1257.

Generally, appellate courts insist that the party seeking review has objected to the decision or ruling it is appealing at the time the decision was originally made. Additionally, appellate courts usually require that the trial court's decision be based on the same point: Consequently, a good trial lawyer is always keeping a close eye on the proceedings, looking to object to questionable decisions so that she has a viable, appealable point in the event of a later unfavorable final judgment.

Can you imagine why appellate courts are reluctant to let a party who only loses on a preliminary matter appeal that point at that time to an appellate court? What if, for instance, Sally files a motion to dismiss for improper venue and loses. Why shouldn't she be permitted to appeal then on this matter? This would be called an interlocutory appeal. Still, appeals of interlocutory orders sometimes are allowed under 28 U.S.C. § 1292(b) if (i) the question involved is one of law; (ii) the question is controlling; (iii) there are substantial grounds for a difference of opinion; and (iv) immediate appeal materially advances the ultimate termination of litigation. For example, appeals from interlocutory orders of the district courts regarding injunctions are sometimes allowed because of the final and irreparable effect on the rights of the parties, and because the evaluation is completely separate from the merits of the case and is unreviewable on appeal. 28 U.S.C. § 1292(a).

Once a case reaches final judgment, the concept of res judicata (literally "a matter adjudged") applies. Let's say that a jury renders a defendant's verdict in the case of Joe v. Sally, which then becomes a judgment. A year later, Joe decides to go to another lawyer to try again. Intuitively, this would be both unfair to Sally and expensive for the court system. The defense to the second
case would be res judicata, because plaintiffs are not permitted to bring the same case twice. Even if Joe decided to sue in case one alleging only battery, and now tries to bring a case for negligence arising from the same incident, res judicata would apply. In modern parlance, one would say that Joe is not permitted to split his claim, a concept also called claim preclusion.

Sometimes, an issue is decided in one case, and is relevant to a new claim between the same parties in a subsequent case. Assume that A sues B on a promissory note and wins a case for installments not paid up until the time of the verdict. (Assume further that the note does not have an "acceleration clause" making all of the installments due upon any single failure to pay.) Subsequently, B continues not to pay, and A sues for the subsequent installments owed. A will probably not have to reprove the validity of the promissory note, because that issue has already been litigated between the same parties. The second court would say that A can collaterally estop B from denying that the note was valid. In other words, the second factfinder, whether judge or jury, would summarily have to find that the note was a valid one. This concept is usually called issue preclusion.

Unfortunately some courts use the term res judicata to cover both claim preclusion and issue preclusion. In any event, the issues of res judicata and collateral estoppel are covered near the end of this book — appropriate, given their finality.

It is now time to explore more deeply the concepts of claims, causes of action, and elements as a prelude to lessons on pleading and the history of pleading.

C. CLAIMS, CAUSES OF ACTION, AND ELEMENTS

At the heart of a trial lawyer's thinking and strategy about civil litigation are the fundamental concepts of claims, causes of action, and elements. A lawsuit usually begins when there has been a dispute and a party or parties to that dispute, and their lawyers, believe that they are entitled to relief because the law recognizes the injury they have suffered, and permits the court to intervene and provide injunctive, monetary, or declaratory relief. A cause of action is one shorthand term for what the plaintiff must prove in order to win a litigation. The corresponding term used by the Federal Rules of Civil Procedure, however, is a claim showing the pleader is entitled to relief. Why the Federal Rules use the phrase "claim showing the pleader is entitled to relief" rather than the previously used term, "cause of action," is something you should consider throughout this chapter. (One relevant factor is the time period during which the Federal Rules were drafted, 1935-1937. The New Deal, which enlarged the power of the federal government through a myriad of new agencies and programs, was in full swing.) Each cause of action or claim connotes a group of circumstances for which a court will grant relief. These circumstances, in turn, are divided into parts called elements. In this section, we will provide several examples of causes of action and their elements. In civil litigation, a judge often asks the plaintiff's lawyer what her prima facie case is. This can mean that the judge is asking either for an enumeration of the elements of the plaintiff's claim (or cause of action) or for a short description of the evidence as to each of those elements.
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FOR THE
UNITED STATES
DISTRICT COURTS

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Federal judges and how they get appointed

Supreme Court justices and court of appeals and district judges are appointed to office by the President of the United States, with the approval of the U.S. Senate. Presidents most often appoint judges who are members, or at least generally supportive, of their political party, but that doesn’t mean that judges are given appointments solely for partisan reasons. The professional qualifications of prospective federal judges are closely evaluated by the Department of Justice, which consults with others, such as lawyers who can evaluate the prospect’s abilities. The Senate Judiciary Committee undertakes a separate examination of the nominees. Magistrate judges and bankruptcy judges are not appointed by the President or subject to Congress’s approval. The court of appeals in each circuit appoints bankruptcy judges for fourteen-year terms. District courts appoint magistrate judges for eight-year terms.

Here are some frequently asked questions regarding federal judges.

What is an Article III judge?
The U.S. Supreme Court, the federal courts of appeals and district courts, and the U.S. Court of International Trade are established under Article III of the Constitution. Justices and judges of these courts, known as Article III judges, exercise what Article III calls "the judicial power of the United States."

Are there judges in the federal courts other than Article III judges?
Bankruptcy judges and magistrate judges conduct some of the proceedings held in federal courts. Bankruptcy judges handle almost all bankruptcy matters, in bankruptcy courts that are technically included in the district courts but function as separate entities. Magistrate judges carry out various responsibilities in the district courts and often help prepare the district judges’ cases for trial. They also may preside over criminal misdemeanor trials and may preside over civil trials when both parties agree to have the case heard by a magistrate judge instead of a district judge. Unlike district judges, bankruptcy and magistrate judges do not exercise "the judicial power of the United States" but perform duties delegated to them by district judges. The judges on the U.S. Court of Federal Claims are also not Article III judges. Their court is a special trial court that hears mostly claims for money damages in excess of $10,000 against the United States. With the approval of the Senate, the President appoints U.S. Court of Federal Claims judges for fifteen-year terms.

How many federal judges are there?
Congress authorizes a set number of judge positions, or judgeships, for each court level. Since 1869, Congress has authorized 9 positions for the Supreme Court. It currently authorizes 179 court of appeals judgeships and 678 district court judgeships. (In 1950, there were only 65 court
of appeals judgeships and 212 district court judgeships.) There are currently 352 bankruptcy judgeships and 551 full-time and part-time magistrate judgeships. It is rare that all judgeships are filled at any one time; judges die or retire, for example, causing vacancies until judges are appointed to replace them. In addition to judges occupying these judgeships, retired judges often continue to perform some judicial work.

**What are the qualifications for becoming a federal judge?**
Although there are almost no formal qualifications for federal judges, there are some strong informal ones. For example, while magistrate judges and bankruptcy judges are required by statute to be lawyers, there is no statutory requirement that district judges, circuit judges, or Supreme Court justices be lawyers. But it would be unheard-of for a president to nominate someone who is not a lawyer. Before their appointment, most judges were private attorneys, but many were judges in state courts or other federal courts. Some were government attorneys and a few were law professors.

**Can a federal judge be fired?**
Justices and judges appointed under Article III of the Constitution (Supreme Court justices, appellate and district court judges, and Court of International Trade judges) serve "during good behavior." That means they may keep their jobs unless Congress decides to remove them through a lengthy process called impeachment and conviction. Congress has found it necessary to use this process only a few times in the history of our country. From a practical standpoint, almost all of these judges hold office for as long as they wish. Article III also prohibits lowering the salaries of federal judges "during their continuance in office." Bankruptcy judges, in contrast, may be removed from office by circuit judicial councils, and magistrate judges may be removed by the district judges of the magistrate judge's circuit. Bankruptcy judges and magistrate judges don’t have the same protections (lifetime appointment and no reduction in salary) as judges appointed under Article III of the Constitution.

**Why are some federal judges protected from losing their jobs and having their pay cut?**
Federal judges appointed under Article III of the Constitution are guaranteed what amounts to life tenure and unreduced salary so that they won’t be afraid to make an unpopular decision. For example, in *Gregg v. Georgia*, the Supreme Court said it is constitutional for the federal and state governments to impose the death penalty if the statute is carefully drafted to provide adequate safeguards, even though many people are opposed to the death penalty.

The constitutional protection that gives federal judges the freedom and independence to make decisions that are politically and socially unpopular is one of the basic elements of our democracy. According to the Declaration of Independence, one reason the American colonies wanted to separate from England was that King George III "made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."

**For judges who are appointed for life, what safeguards ensure that they remain fair and impartial?**
Judges must follow the ethical standards set out in the *Code of Conduct for United States Judges*, which contains guidelines to make sure a judge does not preside over a case in which he or she
has any reason to favor one side over the other. For example, a judge must withdraw or recuse himself or herself from any case in which a close relative is a party, or in which he or she has any financial interest, however remote. Judges are required to file a financial disclosure form annually, so that all their stock holdings, board memberships, and other financial interests are on public record. They must be careful not to do anything that might cause people to think they would favor one side in a case over another. For this reason, they can’t give speeches urging voters to pick one candidate over another for public office or ask people to contribute money to civic organizations. Judges without life tenure are also subject to the *Code of Conduct for United States Judges*.

**When do judges retire?**
Most federal judges retire from full-time service at around sixty-five or seventy years of age and become senior judges. Senior judges are still federal judges, eligible to earn their full salary and to continue hearing cases if they and their colleagues want them to do so, but they usually maintain a reduced caseload. Full-time judges are known as active judges.

**How are cases assigned to judges?**
Each court with more than one judge must determine a procedure for assigning cases to judges. Most district and bankruptcy courts use random assignment, which helps to ensure a fair distribution of cases and also prevents "judge shopping," or parties’ attempts to have their cases heard by the judge who they believe will act most favorably. Other courts assign cases by rotation, subject matter, or geographic division of the court. In courts of appeals, cases are usually assigned by random means to three-judge panels.
Problem-Solving Courts look to the issues that bring litigants into the justice system and seek to implement new approaches, including judicial monitoring and the incorporation of community resources. This comprehensive approach increases offender accountability, enhances community safety and improves outcomes while protecting the rights of all litigants.

Hon. Judy Harris Kluger, Deputy Chief Administrative Judge for Court Operations and Planning, is responsible for implementation and oversight of all Problem-Solving Courts in New York State.

Problem-Solving Courts in New York State include:
- Integrated Domestic Violence Courts
- Domestic Violence Courts
- Drug Treatment Courts
- Mental Health Courts
- Sex Offense Courts
- Youthful Offender Domestic Violence Courts
- Community Courts

Hallmarks of all Problem-Solving Courts include a dedicated judge who, along with court staff, is trained in issues unique to that court type; increased engagement with litigants; and close coordination between the Problem-Solving Court and outside groups, including prosecutors, defense attorneys, civil attorneys, law guardians, service providers, victim services organizations and law enforcement, as well as other courts in the county and state.

Integrated Domestic Violence (“IDV”) Courts serve families by allowing a single judge to hear multiple case types - criminal, family and matrimonial - which relate to one family where the underlying issue is domestic violence. Dedicated to the "one family – one judge" model, IDV Courts respond to a historic problem in the court system, where domestic violence victims and their families traditionally had to appear in different courts before multiple judges, often located in different parts of a county, to address their legal issues. By connecting one judge with one family, IDV Courts aim to provide more informed judicial decision-making and greater consistency in court orders, while reducing the number of court appearances. In addition, these courts facilitate access to enhanced services for litigants and help to ensure offender accountability.
Sex Offense Courts

Sex Offense Courts handle eligible criminal cases where the defendant has been charged with a sex offense. These courts seek to enhance public safety through monitoring offenders on probation supervision, providing consistent and swift intervention and enhancing offender accountability. Sex Offense Courts work with probation departments to encourage the use of a combination of intensive supervision, treatment and behavioral verification to control offending behavior.

Sex Offense Court Judges and Staff coordinate with all relevant stakeholders, such as prosecutors, departments of probation, defense attorneys and victim service agencies to ensure a uniform approach to the management of eligible sex offense cases and to promote the development and use of best practices.

Domestic Violence Courts

Domestic Violence ("DV") Courts adjudicate criminal offenses involving intimate partners. Domestic Violence Courts have been developed as part of the justice system’s coordinated response to domestic violence. Dedicated to enhancing safety and offender accountability, DV Courts facilitate access to needed services, ensure intensive judicial monitoring and promote increased coordination among the courts, community stakeholders and service providers.

Youthful Offender Domestic Violence ("YODV") Courts handle exclusively those domestic violence cases involving defendants aged 16 through 19. Like in all DV Courts, the presiding judge in a YODV Court is trained in the dynamics of domestic violence and in addition is sensitive to the characteristics of the population of adolescent defendants. YODV Courts work closely with providers of mandated programs geared toward young offenders and the distinct issues they face.

Drug Treatment Courts

Drug Treatment Courts provide court-mandated substance abuse treatment to non-violent addicted offenders, as well as to juveniles and to parents charged in Family Court child neglect cases, in an effort to end the cycle of addiction and recidivism. What distinguishes Drug Courts is their uniquely collaborative approach to treatment: upon voluntary entry into court-supervised programs, appropriate non-violent addicted offenders become part of an intervention process. This process involves coordination between defense attorneys, prosecutors, treatment and education providers and law enforcement officials. Rules of participation are defined clearly in a contract agreed upon by the defendant, the defendant’s attorney, the district attorney and the court.

Mental Health Courts

The goal of Mental Health Courts is to link defendants to treatment when mental illness is the underlying cause of their criminal activity. These courts build on the Drug Court model by seeking to break the cycle of criminal behavior through treatment. Mental Health Courts facilitate access to psychological services, provide intensive judicial monitoring and promote collaboration among the court, community stakeholders, local mental health departments, mental health service providers and social service providers.
The vast majority of cases in the California courts begin in one of the 58 superior, or trial, courts — located in each of the state's 58 counties. With facilities in more than 450 locations, these courts hear both civil and criminal cases, as well as family, probate, and juvenile cases.

The next level of judicial authority resides with the Courts of Appeal. Most cases before the Courts of Appeal involve the review of a superior court decision being contested by a party to the case. The Legislature divided the state geographically into six appellate districts.

The Supreme Court sits at the apex of authority in the state's judicial system, and as such it may review decisions of the Courts of Appeal in order to settle important questions of law and ensure that the law is applied uniformly. The Supreme Court has considerable discretion in deciding which decisions to review, but it must review any case in which a trial court has imposed the death penalty.
Important Principles of the New Jersey Court System

http://www.judiciary.state.nj.us/process.htm

In every case, New Jersey's courts strive to achieve one thing: justice. To achieve justice, our courts must be independent, open and impartial.

Judicial Independence

Judicial independence permits judges to make decisions that they believe are correct, fair and just even though their decisions may sometimes be unpopular.

Open Proceedings

Not only must the court system work and be fair, but it is important that people see that it works and is fair. When people have confidence in the legal system, they will support it and their respect for the law will grow. For this reason, most court proceedings, including trials, are open to the public.

Equal Treatment

For our courts to be fair, judges must be impartial -- that is, they may not favor either side in a case. The goal of our courts is to provide equal treatment for all people, regardless of their wealth, position, race, gender, religion, ethnic background or physical disability.

Types of Courts, Types of Cases

In New Jersey, there are several different kinds of courts. They include the New Jersey Supreme Court, the Superior Court, which includes the Appellate Division, the Tax Court, and the Municipal Courts.

Superior Court

Cases involving criminal, civil and family law are heard in the Superior Court. The Superior Court is sometimes called the trial court because it is where trials are conducted. There is a
Superior Court in each of New Jersey's 21 counties. There are approximately 360 Superior Court trial judges in New Jersey.

Criminal Cases

Criminal cases are those in which a defendant is accused of a serious crime, such as robbery, theft, drug possession or murder. In a criminal case, a prosecutor tries to prove that the defendant committed a crime. The prosecutor is an attorney who represents the State of New Jersey, and the defense attorney represents the defendant. The judge oversees the proceedings and ensures that they are conducted according to the law and the rules of court.

Most criminal trials are decided by a jury consisting of 12 citizens. The jury represents the community in which the crime occurred. The jury's role is to hear the evidence presented by the prosecutor and the defense attorney. Evidence is presented to the jury by witnesses who testify.

After all the evidence has been presented, the jury discusses the case in private. If all the jurors believe the evidence proves the defendant committed the crime, the jury convicts the defendant by returning a guilty verdict. After a defendant is convicted, the judge imposes a sentence, such as a term in prison.

If the jurors do not believe the evidence proves the defendant committed the crime, then the jury acquits the defendant by returning a verdict of not guilty. If the jurors are unable to decide between conviction and acquittal, the judge can declare a mistrial, and a new trial can be held with different jurors.

Not every criminal case is decided by a trial. Many cases are resolved through a plea bargain. In a plea bargain, the defendant agrees to plead guilty by admitting that he or she committed a crime. In return, the prosecutor asks the judge to impose a sentence that is less severe than if the defendant had gone to trial and been convicted. The judge, however, is not required to agree to the recommendation and may choose to ignore it. A plea bargain ensures that a guilty defendant is punished. Plea bargains can be entered either before or even during the trial.

Civil Cases

Civil lawsuits are cases in which a plaintiff claims that he or she has been injured by the actions of the defendant. Injury is a legal term meaning any harm done to a person's body, property, reputation or rights.

In some civil cases, the plaintiff seeks damages, or money, from the defendant as compensation for injuries allegedly caused by the defendant. Examples are cases involving car accidents, age, race or gender discrimination in the workplace, medical malpractice, defective products,
differences over the terms of contracts, and disputes between landlords and tenants. Civil juries consist of six members.

Not all civil cases, however, involve attempts to receive compensation for injuries. People also file lawsuits to enforce their rights. In New Jersey, these kinds of non-monetary lawsuits are called General Equity cases. A General Equity case may involve a terminally ill person’s right to refuse life-sustaining medical treatment, or a dispute between labor and management over rights in the workplace, or even a company’s ability to protect its trade secrets, such as how it makes or markets a product.

Instead of money, the plaintiff in a General Equity case may ask the court to order the defendant to do something: remove a feeding tube, for instance, or end a strike and return to work. General Equity cases are decided by judges instead of juries.

As in criminal cases, the parties in civil cases often agree to settle their disputes without a trial. Settlements may occur before a trial starts or even during a trial. A settlement allows each side to resolve the dispute satisfactorily rather than risk losing at a trial.

**Family Cases**

Family cases are civil cases in which the disputes involve children, spouses or domestic partners. Examples of family cases are those involving divorce, adoption, juvenile delinquency, child abuse, child support, and domestic violence. Most cases in the Family Court are decided by a judge instead of a jury. To protect the privacy of children, judges are permitted to close some types of Family Court cases to the public.

**Tax Court**

Tax Court judges review the decisions of county boards of taxation, which determine how much a property should be taxed. Tax Court judges also review the decisions of the State Division of Taxation on such matters as the state income tax, sales tax and business tax. There are 12 Tax Court judges in New Jersey.

**Appeals Courts**

When people do not agree with the outcome of their cases in the trial court or Tax Court, they may appeal their case to a higher court. These higher courts are called appellate courts.

Appellate courts review the decisions of lower courts to determine whether those decisions were correct under the law. In reviewing lower-court decisions, appellate courts, like the trial courts,
interpret the New Jersey and United States constitutions. They also interpret statutes, or laws enacted by the State Legislature.

Appellate review helps to ensure that our courts and laws are fair. It is one of the hallmarks of America's legal system.

There are two appellate courts in New Jersey: the Appellate Division of Superior Court and the New Jersey Supreme Court.

**Appellate Division of Superior Court**

In the Appellate Division, cases are reviewed and decided by panels of two or three judges. There are no juries or witnesses in Appellate Division cases, and no new evidence is considered. Instead, lawyers make their legal arguments to the judges.

In reviewing a case, Appellate Division judges ask hard but important questions: Did the evidence support the jury's verdict? Were the attorneys competent? Was the judge fair and impartial? Did the judge properly explain the law to the jurors? There are 36 Appellate Division judges in New Jersey.

**New Jersey Supreme Court**

If either side in a case is unhappy with the outcome in the Appellate Division, it may appeal the case to the New Jersey Supreme Court. The Supreme Court is the highest court in New Jersey. The Supreme Court reviews the decisions of New Jersey's other courts. The Supreme Court, like the Appellate Division, often must interpret laws that are unclear or that conflict with other laws. For example, when does one person's right to protest interfere with the privacy rights of the person who is the target of the protest? When may the police search someone's home or car? What did the Legislature intend when it enacted a particular law?

In the Supreme Court, cases are decided by a Chief Justice and six Associate Justices. As in the Appellate Division, there are no juries or witnesses, and no new evidence is considered. Instead, the Supreme Court examines whether the proceedings and outcomes in the lower courts were fair, unbiased and conducted in accordance with the law, and whether the outcomes were correct under the law.

**Municipal Court**

By far, most of the cases filed in New Jersey's courts are heard in the Municipal Courts. In fact, about six million of the seven million cases filed in New Jersey's courts each year are filed in the Municipal Courts.
The Municipal Courts hear a great variety of cases. Municipal Court is where cases involving motor-vehicles offenses, such as illegal parking, speeding and driving while intoxicated, are heard.

Municipal Courts also hear cases involving minor criminal offenses such as simple assault, trespassing and shoplifting. In New Jersey, these minor crimes are known as disorderly persons offenses. Cases involving hunting, fishing and boating laws and even minor disputes between neighbors are also heard in Municipal Courts.

Municipal Courts are operated by the city, township or borough in which the courts are located. There are 539 Municipal Courts in the state.

**Judges**

**Supreme Court Justices, Superior Court Judges and Tax Court Judges**

The New Jersey Constitution determines how people become Supreme Court justices or Superior Court or Tax Court judges. Under this process, the Governor nominates a person to be a justice or a judge. The Governor submits the nomination to the state Senate, which then votes whether to confirm the nominee for the position. If confirmed by the Senate, the nominee is sworn in for an initial term of seven years.

**Reappointment**

After seven years, justices and judges can be reappointed. Again, the Governor submits a nomination to the state Senate, which votes whether to confirm the nominee for reappointment.

Justices and judges who are reappointed have tenure, which allows them to remain in their posts until they reach the age of 70, when the New Jersey Constitution requires that they retire. The appointment process and tenure strengthen judicial independence.

**Municipal Court Judges**

Municipal Court judges are appointed by the town's governing body. Terms are for three years. Municipal Court judges may be reappointed, but there is no tenure.
Remedies
Rule 64  RULES OF CIVIL PROCEDURE

VIII. PROVISIONAL AND FINAL REMEDIES

Rule 64.

SEIZING A PERSON OR PROPERTY

(a) Remedies Under State Law—In General. At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.

(b) Specific Kinds of Remedies. The remedies available under this rule include the following—however designated and regardless of whether state procedure requires an independent action:

- arrest;
- attachment;
- garnishment;
- replevin;
- sequestration; and
- other corresponding or equivalent remedies.

As amended 2007.

Rule 65.

INJUNCTIONS AND RESTRAINING ORDERS

(a) Preliminary Injunction.

(1) Notice. The court may issue a preliminary injunction only on notice to the adverse party.

(2) Consolidating the Hearing with the Trial on the Merits. Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party’s right to a jury trial.

(b) Temporary Restraining Order.

(1) Issuing Without Notice. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:
(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) Contents; Expiration. Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(3) Expediting the Preliminary-Injunction Hearing. If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) Motion to Dissolve. On 2 days' notice to the party who obtained the order without notice—or on shorter notice set by the court—the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(c) Security. The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

(d) Contents and Scope of Every Injunction and Restraining Order.

(1) Contents. Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.
Rule 65  RULES OF CIVIL PROCEDURE

(2) Persons Bound. The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

(e) Other Laws Not Modified. These rules do not modify the following:

(1) any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee;

(2) 28 U.S.C. § 2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader; or

(3) 28 U.S.C. § 2284, which relates to actions that must be heard and decided by a three-judge district court.

(f) Copyright Impoundment. This rule applies to copyright-impoundment proceedings.


Rule 65.1.

PROCEEDINGS AGAINST A SURETY

Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given through a bond or other undertaking with one or more sureties, each surety submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the bond or undertaking. The surety's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly mail a copy of each to every surety whose address is known.


Rule 66.

RECEIVERS

These rules govern an action in which the appointment of a receiver is sought or a receiver sues or is sued. But the practice in
is that the sanction of dismissal may validly be imposed for sufficiently serious noncompliance with discovery orders.

New trial

Disputes about discovery never end. Even after a case has been tried, a party discovering that its opponent concealed important information properly sought in discovery may seek sanctions\(^\text{60}\) or a new trial.\(^\text{61}\) To prevail on a motion for a new trial, the movant must prove by clear and convincing evidence that the verdict was obtained "through fraud, misrepresentation or other misconduct" and that the "conduct complained of prevented the losing party from fully and fairly presenting his case or defense ... but 'when the case involves the withholding of information called for by discovery, the party need not establish that the result in the case would be altered.'"\(^\text{62}\)

B. PRELIMINARY RELIEF

Although the procedures described in this book constitute the normal path by which a party may obtain judicial relief, various shortcuts allow parties under certain conditions to obtain preliminary or interlocutory relief before the merits of the case have been finally decided. These forms of relief respond to some claimed need for immediate action. For example, the defendant may be ready to chop down a tree where land ownership is disputed or to consummate a corporate merger difficult to disentangle later, or defendant may be using an automobile for which he or she has stopped paying. The defendant, however, often rejoins that the plaintiff's claimed emergency does not exist and that granting the plaintiff immediate relief will infringe the defendant's own rights. The defendant will lose, or at least have to postpone, the chance to complete its merger, drive his or her car, or engage in a protest march.

The fundamental dilemma of preliminary relief is that the court must pass on such claims and rejoinders before it holds a final hearing on the factual and legal issues in dispute. Whether it grants or withholds relief, the court may turn out to have denied one or the other party its legal rights. One way to avoid this dilemma is to decide the merits of the dispute immediately, but the complexity of disputes and the length of court backlogs often discourage this. Indeed, although both court delays and preliminary relief long antedate modern civil procedure, that procedure's creation of a pretrial phase institutionalizes a pretrial phase between pleading and trial during which decision on the merits is not yet possible. So, courts often base their decisions concerning preliminary

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remedies on a rough preliminary assessment of the merits, balanced with the irreparable harm—that is, harm that later relief cannot remedy—that granting or denying relief would inflict.

§ 10.6 Preliminary Injunctions and Temporary Restraining Orders

A preliminary injunction is a court order directing a party to avoid certain conduct or perform specified acts before the court decides the merits of the case. It is issued after a relatively brief hearing, which the judge may sometimes confine to written evidence.

A temporary restraining order (TRO) is a similar but earlier court order limited to a time period that will allow the court to decide whether to grant a preliminary injunction. In the federal courts, that period is ten days, with a possible further ten-day extension. Because a temporary restraining order lasts such a short time and should be granted only in an emergency, courts traditionally entered such orders even though the restrained party had received no notice or hearing. Today many jurisdictions require that the restrained party must be given a chance to be heard unless the court finds it impractical to do so. The Constitution has been found to impose this requirement when a temporary restraining order limits the exercise of speech.

Bonds

An enjoined party may be protected against an unwarranted injunction not only by requiring a notice or hearing but also by requiring the party seeking a preliminary injunction or temporary restraining order to post a bond. Such a bond binds the party seeking the injunction to pay the enjoined party for damages suffered from the interruption caused by what turns out to be an improper injunction. Courts have, however, granted preliminary injunctions without requiring a bond. This occurs, for example, in environmental suits in which the plaintiffs seek an injunction in the public interest and have too little of their own at stake to make it worthwhile for them to post a bond.

§ 10.6


Standards for relief

Assuming that the procedural requirements for a preliminary injunction or temporary restraining order have been met, whether the court grants relief depends on several factors. These include the plaintiff’s likelihood of succeeding on the merits, how much irreparable injury the plaintiff will suffer if relief is denied and plaintiff ultimately prevails, how much irreparable injury the defendant will suffer if relief is granted but defendant ultimately prevails, and the impact of relief on the public interest. Although different courts announce different formulas for combining these factors, the differences do not seem to have much bearing on the results judges reach. In general, a strong showing on one factor will compensate for a weaker showing on another. For example, even though a showing that irreparable harm is likely is a prerequisite to relief, a plaintiff who persuades a judge that a defendant is almost certainly violating the plaintiff’s patent may obtain a preliminary injunction against infringement during the suit on a relatively weak showing that damages will not adequately remedy the infringement—for instance, because the defendant’s impact on the plaintiff’s share of the market will be hard to compute. A plaintiff less likely to prevail can obtain preliminary relief by making a stronger showing that denying relief will inflict irreparable injury. Judges, in short, try to shape relief to minimize the extent to which parties are irreparably injured by what ultimately turn out to be violations of their legal rights.

The Supreme Court injected a dose of technicality into this flexible and pragmatic approach by holding that a federal court may not grant preliminary relief preventing a defendant from dissipating assets during an action when the plaintiff’s underlying claim is what used to be a claim at law for monetary damages. The Court’s reason was that English equity courts traditionally did not grant such relief, and that this limit was a matter of “substantive” law unaffected by the merger of law and equity. As a matter of policy, this makes little sense. Although a preliminary injunction of this sort can raise problems, for example by giving the party obtaining it an advantage over other creditors, it can also be a useful way to prevent an unscrupulous defendant from dispers-

6. E.g., Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd., 596 F.3d 30 (2d Cir. 2010); Alliance for the Wild Rockies v. Cottrell, 622 F.3d 1045 (9th Cir. 2010). But see Real Truth About Obama, Inc. v. Federal Election Comm’n, 575 F.3d 342 (4th Cir. 2009).
ing its assets while litigation winds its lengthy way. The Court's opinion exaggerates the reluctance of equity courts to protect the right to a money judgment. It can also be argued that, if the right to preliminary relief is indeed substantive, it should be governed by state law, as Federal Rule 64 seems to say. Most importantly, the Court's narrow reading of the merger of law and equity could entangle the courts in antiquarian obscurities, for example those that governed just when an equity court would grant preliminary relief in various kinds of claims.

Contempt and its anomalies

Preliminary injunctive relief has often given rise to controversy, notably in labor cases. Although courts grant such relief without a full hearing on the merits, a violator may be held in contempt of court and receive stringent sanctions. These sanctions include remedial civil contempt sanctions (payment of the damages and attorney's fees incurred by the other party as a result of the contumacious behavior), coercive civil contempt (imprisonment or daily fines continuing until the enjoined party stops violating the injunction), and criminal contempt (imprisonment or fines imposed for past violation). The judge who issued the injunction usually also presides over the contempt proceeding enforcing it. Because an injunction is a remedy traditionally granted by courts of equity, there is no constitutional right to a jury trial in contempt proceedings for violation of an injunction unless criminal rather than civil contempt is charged and imprisoned for more than six months is imposed. A party held in civil contempt while a suit is pending—for violating a temporary restraining order, for example—usually cannot appeal until the suit is finally decided.

These rules and practices, originating in the courts of equity, are often defended today as essential to preserve the power of courts to enforce their interlocutory and final decrees. A striking example is Walker v. City of Birmingham, in which the Supreme Court declined to set aside the criminal contempt convictions of associates of Martin Luther King for demonstrating in violation of a temporary restraining order.


14. For the rules stated in this paragraph, see generally Rendleman, Complex Litigation: Injunctions, Structural Remedies and Contempt, chs. 8–11 (3d ed. 2010); § 10.5, supra.

order, even though that order violated the First Amendment.\textsuperscript{16} The Court reasoned that the demonstrators' remedy was to appeal the order, not to take the law into their own hands. It rejected the argument that a court order inconsistent with the Constitution is no more "law" than an unconstitutional statute.

\section{Garnishment and Replevin}

Garnishment is a court order requiring one who owes a debt to withhold paying it to the original obligee until the court can determine whether the sum should be paid over to a creditor of the original obligee. A familiar example is an order barring an employer from paying an employee all or part of the employee's wages, requiring the amount to be paid instead into the court or directly to someone to whom the employee owes money. Replevin is a court order that requires a defendant to surrender goods to the court or the plaintiff, usually goods that the defendant has bought but assertedly not paid for. In some states, similar remedies are given different names.

Both remedies were formerly readily available to plaintiffs, often on the filing of an affidavit. They were widely used by creditors of workers and by installment sellers. The amounts in dispute were usually small, the defendants were often poor or legally unsophisticated, and the preliminary remedies usually gave plaintiffs all they sought in the litigation. Hence, the supposedly preliminary relief often ended the suit and no tribunal passed on the merits. This led to calls for reform.

\textbf{Wage garnishment}

In \textit{Sniadach v. Family Finance Corp.}\textsuperscript{1} the Supreme Court held that wage garnishment before a suit has been adjudicated on the merits violates the Due Process Clause of the Fourteenth Amendment unless the defendant is given prior notice and hearing. The Court reasoned that garnishment deprives the employee of the use of the wages during an action even if the defendant ultimately prevails and the wages are released. Such a deprivation requires the procedural safeguards of notice and opportunity to be heard to insure that the plaintiff is actually entitled to the money. Congress has also regulated wage garnishments, forbidding garnishment of certain basic wages.\textsuperscript{2}

\textbf{Repossession of goods}

When the Supreme Court heard cases raising similar due process challenges to replevin, it found them more difficult. A typical case involved an attempt by the seller of a household appliance that had been

sold on credit to replevin the appliance when the buyer failed to make payments. Taking away the buyer’s refrigerator without a hearing seems to deprive the buyer of his or her property without due process of law; the refrigerator store can reply, however, that the disputed refrigerator is not defendant’s property but belongs to the store because the purchaser defaulted on the payments. This is the recurring dilemma of preliminary relief: The court is forced to grant or deny relief before finally deciding which party is in the right.

The Supreme Court responded by allowing replevin for plaintiffs who could make some showing on the merits, but only when an improperly deprived defendant could then obtain speedy and effective relief against the replevin. Thus the Court upheld a statute allowing a plaintiff to obtain replevin when a judge upheld the plaintiff’s detailed affidavit, but only on the following terms: The defendant was entitled to a speedy hearing after repossession at which the plaintiff bore the burden of establishing its case, and plaintiff was required to post bond in advance to recompense the defendant for replevin later held improper.³

State legislatures have rewritten their statutes to provide at least the safeguards required by these decisions.⁴ It remains to be seen whether sellers try to bypass due process safeguards by repossessing without a court order or by inserting waivers of the safeguards into sales contracts, and how courts and legislatures react to such waiver contracts.⁵

§ 10.8 Attachment

Another form of preliminary relief is attachment. An attachment is a seizure of defendant’s property by the sheriff or similar officer early in an action so that the property will be available to pay the plaintiff’s claim. If the defendant’s bank account is attached, for example, the defendant cannot use it unless he or she gets the attachment released. This can be done if the defendant provides other assets of equal value or shows that no difficulty will ensue in collecting a judgment. If land is attached and proper notice (often called a *lis pendens*) is filed in the registry of deeds, the land can be sold to pay for a judgment even though the defendant has already sold the property to someone else. The Supreme Court has held that, in the absence of exigent circumstances, a state may not attach land without notice and a hearing.¹


§ 10.8

Attachment is not only a way to insure that the plaintiff's judgment is collectible; it also is a way for a court to acquire jurisdiction to enter a judgment on a claim against a defendant up to the value of the attached property. Attachment thus raises two kinds of constitutional questions under the Due Process Clause. First, are the procedural safeguards accompanying attachment sufficient to protect the defendant against improper attachments? Second, is the defendant's possession of property in the forum state, together with any other ties to that state, constitutionally sufficient to warrant the state in asserting jurisdiction? This book discusses the second question in connection with the standards governing jurisdiction.\(^2\)

C. DISPOSITION OF CASE WITHOUT TRIAL

§ 10.9 Default and Dismissal

Although the vast bulk of cases never reach trial, that does not mean that all of them are disposed of through agreement by settlement, or on the merits by dismissal of the complaint, judgment on the pleadings, or summary judgment. There are other ways in which an action can come to an end without being tried.

**Default judgment**

There are several reasons why a defendant may not defend, usually by failing to answer the complaint or occasionally at a later stage. Sometimes this reflects a deliberate decision. The defendant decides that there is no defense, or that she lacks the means or the willingness to spend what defending would cost, or that an adverse judgment would do her no harm, for example because she lacks assets from which it could be paid. In suits for small amounts, for example suits for failure to pay for consumer goods, many defendants default for one of these reasons. Sometimes, a defendant would defend if given the chance but has not received Constitutionally adequate notice, or has not succeeded in arranging for counsel to file an answer on time. And sometimes the defendant is playing the risky game of delaying the lawsuit by defaulting and later seeking to have the default removed.

The Federal Rules prescribe a complex procedure designed to enter judgment against defendants who default without adequate excuse, while allowing others a second chance to defend.\(^1\) This procedure has two


2. See Shaffer v. Heitner, 433 U.S. 186 (1977); § 3.6, supra. On the history of attachments, see Millar, Civil Procedure of the Trial Court in Historical Perspective 481-97 (1952).

§ 10.9
Due Process
3. The Supreme Court's Response

GOLDBERG v. KELLY
397 U.S. 254 (1970)

Justice BRENNAN delivered the opinion of the Court:

The question for decision is whether a State that terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment.

This action was brought in the District Court for the Southern District of New York by residents of New York City receiving financial aid under the federally assisted program of Aid to Families with Dependent Children (AFDC) or under New York State's general Home Relief program. Their complaint alleged that the New York State and New York City officials administering these programs terminated, or were about to terminate, such aid without prior notice and hearing, thereby denying them due process of law. At the time the suits were filed there was no requirement of prior notice or hearing of any kind before termination of financial aid. However, the State and city adopted procedures for notice and hearing after the suits were brought, and the plaintiffs, appellees here, then challenged the constitutional adequacy of those procedures.

The State Commissioner of Social Services amended the State Department of Social Services' Official Regulations to require that local social services officials proposing to discontinue or suspend a recipient's financial aid do so . . . [by] giving notice to the recipient of the reasons for a proposed discontinuance or suspension at least seven days prior to its effective date, with notice also that upon request the recipient may have the proposal reviewed by a local welfare official holding a position superior to that of the supervisor who approved the proposed discontinuance or suspension, and, further, the recipient may submit, for purposes of the review, a written statement to demonstrate why his grant should not be discontinued or suspended. The decision by the reviewing official whether to discontinue or suspend aid must be made expeditiously, with written notice of the decision to the recipient . . .

[Under an additional city procedure, a] caseworker who has doubts about the recipient's continued eligibility must first discuss them with the recipient. If the caseworker concludes that the recipient is no longer eligible, he recommends termination of aid to a unit supervisor. If the latter concurs, he sends the recipient a letter stating the reasons for proposing to terminate aid and notifying him that within seven days he may request that a higher

1. AFDC was established by the Social Security Act of 1935, 49 Stat. 627, as amended, 42 U.S.C. § 601-610 (1964 ed. and Supp. IV). It is a categorical assistance program supported by federal grants-in-aid but administered by the state according to regulations of the Secretary of Health, Education and Welfare. . . . Home Relief is a general assistance program financed and administered solely by New York state and local governments. . . .
official review the record, and may support the request with a written statement prepared personally or with the aid of an attorney or other person. If the reviewing official affirms the determination of ineligibility, aid is stopped immediately and the recipient is informed by letter of the reasons for the action. Appellees’ challenge to this procedure emphasizes the absence of any provisions for the personal appearance of the recipient before the reviewing official, for oral presentation of evidence, and for confrontation and cross-examination of adverse witnesses. However, the letter does inform the recipient that he may request a post-termination “fair hearing.” This is a proceeding before an independent state hearing officer at which the recipient may appear personally, offer oral evidence, confront and cross-examine the witnesses against him, and have a record made of the hearing. If the recipient prevails at the “fair hearing” he is paid all funds erroneously withheld.... A recipient whose aid is not restored by a “fair hearing” decision may have judicial review....

The constitutional issue to be decided, therefore, is the narrow one whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing before the termination of benefits. The District Court held that only a pre-termination evidentiary hearing would satisfy the constitutional command, and rejected the argument of the state and city officials that the combination of the post-termination “fair hearing” with the informal pre-termination review disposed of all due process claims.... Although state officials were party defendants in the action, only the Commissioner of Social Services of the City of New York appealed. We noted probable jurisdiction.... We affirm....

Appellant does not contend that procedural due process is not applicable to the termination of welfare benefits. Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are “a ‘privilege’ and not a ‘right.’” Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969). Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, Sherbert v. Verner, 374 U.S. 398 (1963); or to denial of a tax exemption, Speiser v. Randall, 357 U.S. 513 (1958); or to discharge from public employment, Slochower v. Board of Higher Education, 350 U.S. 551 (1956). The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be “condemned to suffer grievous loss,” Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient’s interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961), “consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been...

It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing. But we agree with the District Court that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. Thus the crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

Moreover, important governmental interests are promoted by affording recipients a pre-termination evidentiary hearing. From its founding the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to “promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.” The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

Appellant does not challenge the force of these considerations but argues that they are outweighed by countervailing governmental interests in conserving fiscal and administrative resources. These interests, the argument goes, justify the delay of any evidentiary hearing until after discontinuance of the grants. Summary adjudication protects the public fisc by stopping payments promptly upon discovery of reason to believe that a recipient is no longer eligible. Since most terminations are accepted without challenge, summary adjudication also conserves both the fisc and administrative time and energy by reducing the number of evidentiary hearings actually held.

We agree with the District Court, however, that these governmental interests are not overriding in the welfare context. The requirement of a prior hearing doubtless involves some greater expense, and the benefits paid to
ineligible recipients pending decision at the hearing probably cannot be recouped, since these recipients are likely to be judgment-proof. But the State is not without weapons to minimize these increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities. Indeed, the very provision for a post-termination evidentiary hearing in New York's Home Relief program is itself cogent evidence that the State recognizes the primacy of the public interest in correct eligibility determinations and therefore in the provision of procedural safeguards. Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens....

II

We also agree with the District Court, however, that the pre-termination hearing need not take the form of a judicial or quasi-judicial trial. We bear in mind that the statutory "fair hearing" will provide the recipient with a full administrative review.14 Accordingly, the pre-termination hearing has one function only: to produce an initial determination of the validity of the welfare department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits.... Thus, a complete record and a comprehensive opinion, which would serve primarily to facilitate judicial review and to guide future decisions, need not be provided at the pre-termination stage. We recognize, too, that both welfare authorities and recipients have an interest in relatively speedy resolution of questions of eligibility, that they are used to dealing with one another informally, and that some welfare departments have very burdensome caseloads. These considerations justify the limitation of the pre-termination hearing to minimum procedural safeguards, adapted to the particular characteristics of welfare recipients, and to the limited nature of the controversies to be resolved. We wish to add that we, no less than the dissenters, recognize the importance of not imposing upon the States or the Federal Government in this developing field of law any procedural requirements beyond those demanded by rudimentary due process....

In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.

14. Due process does not, of course, require two hearings. If, for example, a State simply wishes to continue benefits until after a "fair" hearing there will be no need for a preliminary hearing.
We are not prepared to say that the seven-day notice currently provided by New York City is constitutionally insufficient per se, although there may be cases where fairness would require that a longer time be given. Nor do we see any constitutional deficiency in the content or form of the notice. New York employs both a letter and a personal conference with a caseworker to inform a recipient of the precise questions raised about his continued eligibility. Evidently the recipient is told the legal and factual bases for the Department's doubts. This combination is probably the most effective method of communicating with recipients.

The city's procedures presently do not permit recipients to appear personally with or without counsel before the official who finally determines continued eligibility. Thus a recipient is not permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses. These omissions are fatal to the constitutional adequacy of the procedures.

The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decision maker in writing or secondhand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The secondhand presentation to the decision maker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore a recipient must be allowed to state his position orally. Informal procedures will suffice; in this context due process does not require a particular order of proof or mode of offering evidence.

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department.

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." Powell v. Alabama, 287 U.S. 45, 68-69 (1932). We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires.

Finally, the decision maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he
relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law. And, of course, an impartial decision maker is essential. We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review. Affirmed.

Justice BLACK, dissenting: FOR CLASS.

In the last half century the United States, along with many, perhaps most, other nations of the world, has moved far toward becoming a welfare state, that is, a nation that for one reason or another taxes its most affluent people to help support, feed, clothe, and shelter its less fortunate citizens. The result is that today more than nine million men, women, and children in the United States receive some kind of state or federally financed public assistance in the form of allowances or gratuities, generally paid them periodically, usually by the week, month, or quarter. Since these gratuities are paid on the basis of need, the list of recipients is not static, and some people go off the lists and others are added from time to time. These ever-changing lists put a constant administrative burden on government and it certainly could not have reasonably anticipated that this burden would include the additional procedural expense imposed by the Court today.

... [W]hen federal judges use this judicial power for legislative purposes, I think they wander out of their field of vested powers and transgress into the area constitutionally assigned to the Congress and the people. That is precisely what I believe the Court is doing in this case. Hence my dissent.

The more than a million names on the relief rolls in New York, and the more than nine million names on the rolls of all the 50 States were not put there at random. The names are there because state welfare officials believed that those people were eligible for assistance. Probably in the officials’ haste to make out the lists many names were put there erroneously in order to alleviate immediate suffering, and undoubtedly some people are drawing relief who are not entitled under the law to do so. Doubtless some draw relief checks from time to time who know they are not eligible, either because they are not actually in need or for some other reason. Many of those who thus draw undeserved gratuities are without sufficient property to enable the government to collect back from them any money they wrongfully receive. But the Court today holds that it would violate the Due Process Clause of the Fourteenth Amendment to stop paying those people weekly or monthly allowances unless the government first affords them a full “evidentiary hearing” even though welfare officials are persuaded that the recipients are not rightfully entitled to receive a penny under the law. In other words, although some recipients might be on the lists for payment wholly because of deliberate fraud on their part, the Court holds that the government is helpless and must continue, until after an evidentiary hearing, to pay money that it does not owe, never has owed, and never could owe. I do not believe there is any provision in our Constitution that should thus paralyze the
government's efforts to protect itself against making payments to people who are not entitled to them.

Particularly do I not think that the Fourteenth Amendment should be given such an unnecessarily broad construction. That Amendment came into being primarily to protect Negroes from discrimination, and while some of its language can and does protect others, all know that the chief purpose behind it was to protect ex-slaves.

I would have little, if any, objection to the majority's decision in this case if it were written as the report of the House Committee on Education and Labor, but as an opinion ostensibly resting on the language of the Constitution I find it woefully deficient.

The procedure required today as a matter of constitutional law finds no precedent in our legal system. Reduced to its simplest terms, the problem in this case is similar to that frequently encountered when two parties have an ongoing legal relationship that requires one party to make periodic payments to the other. Often the situation arises where the party “owing” the money stops paying it and justifies his conduct by arguing that the recipient is not legally entitled to payment. The recipient can, of course, disagree and go to court to compel payment. But I know of no situation in our legal system in which the person alleged to owe money to another is required by law to continue making payments to a judgment-proof claimant without the benefit of any security or bond to insure that these payments can be recovered if he wins his legal argument.

The Court apparently feels that this decision will benefit the poor and needy. In my judgment the eventual result will be just the opposite. Thus the end result of today's decision may well be that the government, once it decides to give welfare benefits, cannot reverse that decision until the recipient has had the benefits of full administrative and judicial review, including, of course, the opportunity to present his case to this Court. Since this process will usually entail a delay of several years, the inevitable result of such a constitutionally imposed burden will be that the government will not put a claimant on the rolls initially until it has made an exhaustive investigation to determine his eligibility.

For the foregoing reasons I dissent from the Court's holding. The operation of a welfare state is a new experiment for our Nation. For this reason, among others, I feel that new experiments in carrying out a welfare program should not be frozen into our constitutional structure. They should be left, as are other legislative determinations, to the Congress and the legislatures that the people elect to make our laws.

[Chief Justice BURGER and Justice STEWART also dissented.]

**Comments and Questions**

1. In what court did this case start—and where did it end?
2. Which Due Process Clause is invoked in this case—from the Fifth or Fourteenth Amendment—and why?
3. Describe the underlying story: Who are the plaintiffs and defendants, and how do they disagree? What happened that led to the disagreement, and what do the parties want to achieve through the lawsuit?

4. Does the Supreme Court rule that welfare is property for purposes of triggering the due process protections? How does the majority on the Court deal with this question? Does the Court respond to Justice Black's argument in dissent? What are the strongest elements of Justice Black's view?

5. What would be the “full service,” maximum elements of procedure that could ever be “due”? Use the formal court trial as a model for comparing expansive elements of process with the narrower elements at issue in Goldberg v. Kelly. How important are the following: advance notice, access to counsel, the opportunity to testify in person, language translation services, the opportunity to cross-examine witnesses, the requirement of a written record of testimony, and the requirement of a statement of reasons accompanying the decision? Which elements of process does the Goldberg Court find necessary in the termination of welfare benefits, and which ones not necessary? What principles or factors affect this set of distinctions?

6. Who will pay for the additional process required by the Court? Will the moneys available for benefits need to be reduced by the administrative costs in conducting pre-termination hearings? How will the Court’s opinion influence termination decisions by the state agency? How will the Court’s opinion influence the agency’s initial decisions about who is eligible for benefits?

7. What values are served by the particular elements of process discussed by the majority? Remember Justice Frankfurter’s emphasis on arriving at the truth and on generating the feeling that justice has been done (Joint Anti-Fascist Refugee Committee v. McGrath, supra)? Some researchers have found that people report greater perceptions of satisfaction with dispute resolution based on their perceptions of the process than on the actual results. See, e.g., E. Allan Lind and Tom R. Tyler, The Social Psychology of Procedural Justice (1988); John Thibaut and Laurens Walker, Procedural Justice: A Psychological Analysis (1975). But see Dan Simon and Nicholas Scurich, Lay Judgment of Judicial Decision-Making, 8 J. of Empirical Legal Stud. 709 (2011) (presenting findings that evaluation of the merits of a judicial decision by lay persons correlates with their evaluation of the process of decision making in that case).

8. In 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105, which explicitly declared that welfare benefits under the law are not entitlements and also granted flexibility to the states to limit the benefits, based on fiscal constraints. Given that the decision in Goldberg was based on the finding that welfare benefits were an entitlement, some observers predicted that this change would lead courts to find that no due process protections attach when an individual is denied or terminated from the temporary assistance program. See, e.g., Christine N. Cimini, Welfare Entitlements in the Era of Devolution, 9 Geo. J. on Poverty L. & Pol'y 89
Supreme Court of the United States


No. 03-6696.


Background: Father of American citizen captured as alleged enemy combatant during military operations in Afghanistan, petitioned, as detainee's next friend, for writ of habeas corpus. The United States District Court for the Eastern District of Virginia, Robert G. Doumar, Senior Judge, ordered production of additional material regarding detainee's status, and government petitioned for interlocutory review. The Fourth Circuit Court of Appeals, 316 F.3d 450, reversed and remanded. Certiorari was granted.

Holding: The Supreme Court, Justice O'Connor, held that due process required that United States citizen being held as enemy combatant be given meaningful opportunity to contest factual basis for his detention.

Vacated and remanded.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Justice O'CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice KENNEDY, and Justice BREYER join.

At this difficult time in our Nation's history, we are called upon to consider the legality of the Government's detention of a United States citizen on United States soil as an "enemy combatant" and to address the process that is constitutionally owed to one who seeks to challenge his classification as such. The United States Court of Appeals for the Fourth Circuit held that petitioner's detention was legally authorized and that he was entitled to no further opportunity to challenge his enemy-combatant label. We now vacate and remand. We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.

**12 Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status. Hamdi argues that he is owed a meaningful and timely hearing and that "extra-judicial detention [that] begins and ends with the submission of an affidavit based on third-hand hearsay" does not comport with the Fifth and Fourteenth Amendments. ** ** Our resolution of this
dispute requires a careful examination both of the writ of habeas corpus, which Hamdi now seeks to employ as a mechanism of judicial review, and of the Due Process Clause, which informs the procedural contours of that mechanism in this instance.

* * * C

* * * At most, the Government argues, courts should review its determination that a citizen is an enemy combatant under a very deferential "some evidence" standard. Id., at 34 ("Under the some evidence standard, the focus is exclusively on the factual basis supplied by the Executive to support its own determination") (citing Superintendent, Mass. Correctional Institution at Walpole v. Hill, 472 U.S. 445, 455-457, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985) (explaining that the some evidence standard "does not require" a "weighing of the evidence," but rather calls for assessing "whether there is any evidence in the record that could support the conclusion")). Under this review, a court would assume the accuracy of the Government's articulated basis for Hamdi's detention, as set forth in the Mobbs Declaration, and assess only whether that articulated basis was a legitimate one. * * *

In response, Hamdi emphasizes that this Court consistently has recognized that an individual challenging his detention may not be held at the will of the Executive without recourse to some proceeding before a neutral tribunal to determine whether the Executive's asserted justifications for that detention have basis in fact and warrant in law. * * He argues that * * due process demands that he receive a hearing in which he may challenge the Mobbs Declaration and adduce his own counter evidence. The District Court, agreeing with Hamdi, and his detention by U.S. military forces. * Ibid*

Mobbs then set forth what remains the sole evidentiary support that the Government has provided to the courts for Hamdi's detention. The declaration states that Hamdi "travel to Afghanistan" in July or August 2001, and that he thereafter "affiliated with a Taliban military unit and received weapons training." * Ibid* It asserts that Hamdi "remained with his Taliban unit following the attacks of September 11" and that, during the time when Northern Alliance forces were "engaged in battle with the Taliban," "Hamdi's Taliban unit surrendered" to those forces, after which he "surrendered" his Kalishnikov assault rifle to them. * Ibid*, at 148-149. The Mobbs Declaration also states that, because al Qaeda and the Taliban "were and are hostile forces engaged in armed conflict with the armed forces of the United States," "individuals associated with" those groups "were and continue to be enemy combatants." * Ibid*, at 149. Mobbs states that Hamdi was labeled an enemy combatant "based upon his interviews and in light of his association with the Taliban." * Ibid* According to the declaration, a series of "U.S. military screening team[s]" determined that Hamdi met "the criteria for enemy combatants," and "a subsequent interview of Hamdi has confirmed that he surrendered and gave his firearm to Northern Alliance forces, which supports his classification as an enemy combatant." * Ibid*, at 149-150.

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1 The government submitted a declaration from Michael Mobbs (hereinafter "Mobbs Declaration"), who identified himself as Special Advisor to the Under Secretary of Defense for Policy. Mobbs indicated in this position, he has been "substantially involved with matters related to the detention of enemy combatants in the current war against the al Qaeda terrorists and those who support and harbor them (including the Taliban)." App. 148. He expressed his "familiarity" with Department of Defense and United States military policies and procedures applicable to the detention, control, and transfer of al Qaeda and Taliban personnel, and declared that "[b]ased upon my review of relevant records and reports, I am also familiar with the facts and circumstances related to the capture of ... Hamdi
apparently believed that the appropriate process would approach the process that accompanies a criminal trial. It therefore disapproved of the hearsay nature of the Mobbs Declaration and anticipated quite extensive discovery of various military affairs. Anything less, it concluded, would not be "meaningful judicial review." App. 291.

**14 Both of these positions highlight legitimate concerns. And both emphasize the tension that often exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right. The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not "deprived of life, liberty, or property, without due process of law," U.S. Const., Amdt. 5, is the test that we articulated in Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). * * * Mathews dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the Government's asserted interest, "including the function involved" and the burdens the Government would face in providing greater process. 424 U.S., at 335, 96 S.Ct. 893. The Mathews calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute safeguards." Ibid. We take each of these steps in turn.

**15 It is beyond question that substantial interests lie on both sides of the scale in this case. Hamdi's "private interest ... affected by the official action," ibid., is the most elemental of liberty interests—the interest in being free from physical detention by one's own government. * * *

Nor is the weight on this side of the Mathews scale offset by the circumstances of war or the accusation of treasonous behavior, for "[i]t is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection," Jones v. United States, 463 U.S. 354, 361, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983) (emphasis added; internal quotation marks omitted), and at this stage in the Mathews calculus, we consider the interest of the erroneously detained individual. Carey v. Piphus, 435 U.S. 247, 259, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property"); see also id., at 266, 98 S.Ct. 1042 (noting "the importance to organized society that procedural due process be observed," and emphasizing that "the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions"). Indeed, as amicus briefs from media and relief organizations emphasize, the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process here is very real. * * * Moreover, as critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the
potential to become a means for oppression
and abuse of others who do not present that
sort of threat. * * * We reaffirm today the
fundamental nature of a citizen's right to be
free from involuntary confinement by his
own government without due process of
law, and we weigh the opposing
governmental interests against the
curtailment of liberty that such confinement
entails.

2

**16 On the other side of the scale are the
weighty and sensitive governmental interests
in ensuring that those who have in fact
fought with the enemy during a war do not
return to battle against the United States. *
* * * Without doubt, our Constitution
recognizes that core strategic matters of
warmaking belong in the hands of those who
are best positioned and most politically
accountable for making them. * * *

The Government also argues at some length
that its interests in reducing the *2648
process available to alleged enemy
combatants are heightened by the practical
difficulties that would accompany a system
of trial-like process. In its view, military
officers who are engaged in the serious work
of waging battle would be unnecessarily and
dangerously distracted by litigation half a
world away, and discovery into military
operations would both intrude on the
sensitive secrets of national defense and
result in a futile search for evidence buried
under the rubble of war. * * * To the extent
that these burdens are triggered by
heightened procedures, they are properly
taken into account in our due process
analysis.

3

Striking the proper constitutional balance
here is of great importance to the Nation
during this period of ongoing combat. But it
is equally vital that our calculus not give
short shrift to the values that this country
holds dear or to the privilege that is
American citizenship. It is during our most
challenging and uncertain moments that our
Nation's commitment to due process is most
severely tested; and it is in those times that
we must preserve our commitment at home
to the principles for which we fight abroad.
* * *

With due recognition of these competing
concerns, we believe that neither the process
proposed by the Government nor the process
apparently envisioned by the District Court
below strikes the proper constitutional
balance when a United States citizen is
detained in the United States as an enemy
combatant. That is, "the risk of erroneous
deposition" of a detainee's liberty interest is
unacceptably high under the Government's
proposed rule, while some of the "additional
or substitute procedural safeguards"
suggested by the District Court are
unwarranted in light of their limited
"probable value" and the burdens they may
impose on the military in such cases.

Mathews, 424 U.S., at 335, 96 S.Ct. 893.

**17 [2] We therefore hold that a citizen-
detainee seeking to challenge his
classification as an enemy combatant must
receive notice of the factual basis for his
classification, and a fair opportunity to rebut
the Government's factual assertions before a
neutral decisionmaker. See Cleveland Bd. of
Ed. v. Loudermill, 470 U.S. 532, 542, 105
S.Ct. 1487, 84 L.Ed.2d 494 (1985) ("An
essential principle of due process is that a
deposition of life, liberty, or property be
preceded by notice and opportunity for
hearing appropriate to the nature of the case")
(quotating Mullane v. Central Hanover

Bank & Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 8.65 (1950); * * * "For more than a century the central meaning of procedural due process has been clear: *2649 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' " Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) * * * These essential constitutional promises may not be eroded.

At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant. In the words of Mathews, process of this sort would sufficiently address the "risk of erroneous deprivation" of a detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government. 424 U.S., at 335, 96 S.Ct. 893. * * *

We think it unlikely that this basic process will have the dire impact on the central functions of warring that the Government forecasts. * * * Any factfinding imposition created by requiring a knowledgeable affiant to summarize these records to an independent tribunal is a minimal one. Likewise, arguments that military officers ought not have to wage war under the threat of litigation lose much of their steam when factual disputes at enemy-combatant hearings are limited to the alleged combatant's acts. This focus meddles little, if at all, in the strategy or conduct of war, inquiring only into the appropriateness of continuing to detain an individual claimed to have taken up arms against the United States. While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally *2650 mandated roles of reviewing and resolving claims like those presented here. * * *

**18 In sum, while the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge
meaningfully the Government's case and to be heard by an impartial adjudicator.

* * * Justice Souter's concurrence and Justice Scalia's dissent are omitted. * * *

Justice THOMAS, dissenting.

* * *

Although I do not agree with the plurality that the balancing approach of Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), is the appropriate analytical tool with which to analyze this case, [FN5] I cannot help but explain that the plurality misapplies its chosen framework, one that if applied correctly would probably lead to the result I have reached. The plurality devotes two paragraphs to its discussion of the Government's interest, though much of those two paragraphs explain why the Government's concerns are misplaced. See ante, at 2647. But "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." * * *

Undeniably, Hamdi has been deprived of a serious interest, one actually protected by the Due Process Clause. Against this, however, is the Government's overriding interest in protecting the Nation. If a deprivation of liberty can be justified by the need to protect a town, the protection of the Nation, a fortiori, justifies it.

I acknowledge that under the plurality's approach, it might, at times, be appropriate to give detainees access to counsel and notice of the factual basis for the Government's determination. * * * But properly accounting for the Government's interests also requires concluding that access to counsel and to the factual basis would not always be warranted. Though common sense suffices, the Government thoroughly explains that counsel would often destroy the intelligence gathering function. See Brief for Respondents 42-43. See also App. 347-351 (affidavit of Col. D. Woolfolk). Equally obvious is the Government's interest in not fighting the war in its own courts and protecting classified information. * * *

[Ibid] 

* * *

Although the plurality is correct in explaining why individual counsel would be harmful, it misapplies its chosen framework by ignoring the many other reasons why the Government's concerns are misplaced. The plurality devotes two paragraphs to its discussion of the Government's interest, though much of those two paragraphs explain why the Government's concerns are misplaced. See ante, at 2647. But "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." * * *

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[FN7] These observations cast still more doubt on the appropriateness and usefulness of Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), in this context. It is, for example, difficult to see how the plurality can insist that Hamdi unquestionably has the right to access to counsel in connection with the proceedings on remand, when new information could become available to the Government showing that such access would pose a grave risk to national security. In that event, would the Government need to hold a hearing before depriving Hamdi of his newly acquired right to counsel even if that hearing would itself pose a grave threat?

* * *

**54 For these reasons, I would affirm the judgment of the Court of Appeals.

or more States;—between a State and Citizens of another State;—
between Citizens of different States;—between Citizens of the same
State claiming Lands under Grants of different States, and between a
State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and
Consuls, and those in which a State shall be Party, the supreme Court
shall have original Jurisdiction. In all the other Cases before men-
tioned, the supreme Court shall have appellate Jurisdiction, both as to
Law and Fact, with such Exceptions, and under such Regulations as the
Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by
Jury; and such Trial shall be held in the State where the said Crimes
shall have been committed; but when not committed within any State,
the Trial shall be at such Place or Places as the Congress may by Law
have directed.

* * *

ARTICLE IV.

Section 1. Full Faith and Credit shall be given in each State to the
public Acts, Records, and judicial Proceedings of every other State. And
the Congress may by general Laws prescribe the Manner in which such
Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privi-
eges and Immunities of Citizens in the several States.

* * *

ARTICLE VI.

This Constitution, and the Laws of the United States which shall be
made in Pursuance thereof; and all Treaties made, or which shall be
made, under the Authority of the United States, shall be the supreme
Law of the Land; and the Judges in every State shall be bound thereby,
any Thing in the Constitution or Laws of any State to the Contrary
notwithstanding.

* * *

AMENDMENT I.

Congress shall make no law respecting an establishment of religion,
or prohibiting the free exercise thereof; or abridging the freedom of
speech, or of the press; or the right of the people peaceably to assemble,
and to petition the Government for a redress of grievances.
AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Comparative State Provisions
See the state provisions as set out following Federal Rule of Civil Procedure 38, supra p. 119.

AMENDMENT IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States
and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *  

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Selected Provisions of Title 28, United States Code—Judiciary and Judicial Procedure

§ 471. Requirement for a district court civil justice expense and delay reduction plan

There shall be implemented by each United States district court, in accordance with this chapter, a civil justice expense and delay reduction plan. The plan may be a plan developed by such district court or a model plan developed by the Judicial Conference of the United States. The purposes of each plan are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.

§ 472. Development and implementation of a civil justice expense and delay reduction plan

(a) The civil justice expense and delay reduction plan implemented by a district court shall be developed or selected, as the case may be, after consideration of the recommendations of an advisory group appointed in accordance with section 478 of this title.

(b) The advisory group of a United States district court shall submit to the court a report, which shall be made available to the public and which shall include—

(1) an assessment of the matters referred to in subsection (c)(1);
(2) the basis for its recommendation that the district court develop a plan or select a model plan;
(3) recommended measures, rules and programs; and
(4) an explanation of the manner in which the recommended plan complies with section 473 of this title.

(c)(1) In developing its recommendations, the advisory group of a district court shall promptly complete a thorough assessment of the state of the court’s civil and criminal dockets. In performing the assessment for a district court, the advisory group shall—

(A) determine the condition of the civil and criminal dockets;