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**Civics 101**

**Episode 27 - HOW A CASE GETS TO THE SUPREME COURT**

**Virginia Prescott:** [00:00:18] I'm Virginia Prescott and this is Civics 101. It's the podcast refresher course on some basics you may have forgotten or slept through in school today. How does a case get to the Supreme Court? Cases get kicked up the chain. How does the highest court in the country decide which wants to hear. And our guide for today is Behzad Mirhashem from the University of New Hampshire School of Law. Hello and welcome.

**Behzad Mirhashem:** [00:00:42] Hi thank you for having me.

**Virginia Prescott:** [00:00:43] First a little reminder. Supreme Court is the pinnacle of the judiciary branch. That's one of the three pillars of government. It is established in the constitution though pretty lightly or loosely right?

**Behzad Mirhashem:** [00:00:55] I mean it's specifically referred to in Article 3 as the judicial power of the United States being vested in the Supreme Court and such other courts as Congress meets set up basic rights but they don't say how many justices have any of that.

**Virginia Prescott:** [00:01:11] So from what I understand there are a couple of different routes to get to the Supreme Court and have I got that right?

**Behzad Mirhashem:** [00:01:16] Right. The fundamental distinction is a courts power is called jurisdiction. What kind of cases can they hear and courts can have original jurisdiction or appellate jurisdiction. Original jurisdiction means let's say our interview doesn't go well and you hit me over the head with a baseball bat and you end up getting arrested. You're going to be brought to court for trial. That might be the Merrimack County Superior Court here in Concord. That's a court that has original jurisdiction over that criminal case. Then at the end of the trial if you're found guilty you can appeal to the New Hampshire Supreme Court. That is a court that has appellate jurisdiction. The U.S. Supreme Court has both original and appellate jurisdiction in its original jurisdiction it's basically over a few kinds of cases say you know there's a dispute between New Hampshire and Maine over where the boundary line is and so that kind of a controversy between two states, the Supreme Court has original jurisdiction over it but mostly its jurisdiction is appellate. It reviews cases that come to it from the lower courts. It has broad powers to basically exercise that kind of jurisdiction over cases that are deciding issues of federal law or federal constitution. But as you can imagine there's like tens of thousands hundreds of thousands of cases like that every year. And so the kind of cases that they take, agree to review, generally speaking are either cases where the lower courts have strongly disagreed, a federal appeals court may disagree with another federal appeals court, you have those kinds of splits in authority, or very occasionally if there is an issue that they consider have such enormous importance that they decide to hear the case even before such a split has developed.

**Virginia Prescott:** [00:03:22] Ok so first of all this interview better go well because if I have to hit you over the head with the baseball bat that sounds like a really complicated process. OK. So we have original jurisdiction. That is something that may not necessarily be argued in lower courts but may be a dispute between states. For example. I know this came up with the state of New Jersey versus New York some years ago over Ellis Island for example. And then there are constitutional issues that also come up in those lower courts.

**Behzad Mirhashem:** [00:03:51] Right. So a case that's decided by a lower court can be decided as a matter of federal law. Supreme Court will hear a case like that or as a matter of federal constitution. So for example.

**Virginia Prescott:** [00:04:05] Yeah, I need an example.

**Behzad Mirhashem:** [00:04:07] Let's say I arrive at an airport from outside the country tomorrow and say they detained me and they say we want to search your cell phone. This is something that's been in the news recently and they say you have to give us your password or we're not going to let you go. And you know eventually I feel compelled to give them my password and they look through my cell phone and let's say they learn from looking at my messages that I violated say, a tax law or I'm like texting my drug dealer, and they end up arresting me and charging me with a crime. In the trial court I would ask the court to exclude the evidence against me because it was obtained in violation of my federal search and seizure rights. So I bring the Fourth Amendment claim in the trial court. And the trial court would hear that and say you know you were at an international border you know your Fourth Amendment rights are very limited there. We think that there was no violation of your rights. And I get convicted and I appeal and I lose in the New Hampshire Supreme Court on appeal say if it's in the state court system and then I asked the U.S. Supreme Court to review that Fourth Amendment issue. Now it may be somebody else was convicted someplace else and their case had been decided differently.

**Behzad Mirhashem:** [00:05:32] So the Supreme Court in deciding whether to review my case will look at cases around the country and see Hey as there have been a split of authority on this issue of the extent of your rights at the border and decide to perhaps hear that case.

**Virginia Prescott:** [00:05:48] OK so one big distinction here is that the supreme court has discretion to decide on which cases it will hear. Do other courts. I mean if you bring a case and a local court they don't really have a choice of whether they want to hear it, do they?

**Behzad Mirhashem:** [00:06:03] The legal terms are mandatory jurisdiction and discretionary. So for example the New Hampshire Supreme Court if you get convicted after a jury trial in a criminal case in New Hampshire they will review that case. In every instance. But if you say you are found you know to have violated the conditions of your probation in a lower court they have discretionary jurisdiction over that they may or may not hear that that. The jurisdiction of the U.S. Supreme Court is almost entirely discretionary. They get many thousands of these so-called cert petitions every year and they grant cert in a small fraction of those cases. I think it's important to understand that most people think of appellate courts as being in the business of correcting errors of lower courts. The Supreme Court has said many times they don't have the manpower to do that. There's too many errors so they don't take cases just to correct errors. They take cases to resolve these sort of important disagreements that emerged among the lower courts.

**Virginia Prescott:** [00:07:13] And when you say that the Supreme Court will grant cert meaning they will hear a case this term. OK. And so what kind of cases are interesting to them.

**Behzad Mirhashem:** [00:07:23] I mean I think that there's different categories of cases. Obviously one major category is cases arising under the federal Constitution, First Amendment issues about free speech or religion, Second Amendment gun rights, Fourth Amendment search and seizure. So federal constitutional rights are a big part of their docket but they also have to decide all sorts of questions of just federal law. Congress has passed a law. There's disagreement among the lower courts about what that law means, say the Affordable Care Act. And so they're interested in important issues of you know federal statutory law as well.

**Virginia Prescott:** [00:08:06] OK. Then the exciting part the case gets heard an oral argument is that what happens next.

**Behzad Mirhashem:** [00:08:12] Oral argument is certainly the most exciting and most heavily covered part of it but most of the work of an appellate court is done in writing. What happens is if they agree to hear a case then the parties submit briefs. Those are documents in which both sides present their arguments in writing.

**Virginia Prescott:** [00:08:35] Is this what they call amicus brief?

**Behzad Mirhashem:** [00:08:37] Amicus briefs or briefs filed not by the parties but by friends of the court, some organizations that have an interest in the issue. So the Supreme Court justices and more realistically with the help of their clerks review all of these briefs and you know depending on the issue they may or may not come to some sort of firm conclusion about how the case should be decided. The sort of ultimate stage is the oral argument where each side gets a limited amount of time typically in the U.S. Supreme Court 30 minutes to present oral argument and address any questions that the judges may have about certain issues that about the record what happened to the lower courts or hypotheticals they may have about you know how would you handle this and you know such and such a situation.

**Virginia Prescott:** [00:09:32] And that's when the justices go back and forth with each other and ask questions of...only 30 minutes that's interesting.

**Behzad Mirhashem:** [00:09:38] Right. I mean they can you know in major cases they've certainly given more time. But you know in other appellate courts it's even shorter because again the main part of the work is really done in writing.

**Virginia Prescott:** [00:09:55] So then they have these oral arguments. They talk things over and then the justices meet in closed session.

**Behzad Mirhashem:** [00:10:02] Right. Different appellate courts you know sometimes the judges have already pretty much decided the case. Sometimes they still have an open mind until the argument. The practice in the Supreme Court is right after the oral argument they meet, have a discussion, take at least a preliminary vote and then the chief justice if he's in the majority assigns the writing of the opinion to one of the justices.

**Behzad Mirhashem:** [00:10:31] And if he's in the minority.

**Behzad Mirhashem:** [00:10:33] Then the most senior judge who's in the majority assigns the writing of the opinion. Many decisions of the court are unanimous. But in the Supreme Court more than other courts you have a majority opinion and often a dissenting opinion, one or more. And then there could be concurring opinions that judge agrees maybe with the result. But it has a somewhat different take on the analysis so such a such a justice may write a concurring opinion. And then those are draft opinions and a lot of times as the case moves along and these drafts get circulated among the chambers of the various justices, coalitions can shift and opinions can get edited and and out eventually comes the final product.

**Virginia Prescott:** [00:11:18] Well Behzad, I'm going to put away my bat and avoid all the legal trouble that was terrific. Thank you so much. .

**Behzad Mirhashem:** [00:11:23] Thank you.

**Virginia Prescott:** [00:11:24] Behzad Mirhashem. He's assistant professor of law and director of the criminal practice clinic at the University of New Hampshire School of Law.