GLENDON SCHUBERT ★ THE POLITICAL ROLE OF THE COURTS

# Judicial Policy-Making

INTRODUCTION BY LEE LOEVINGER

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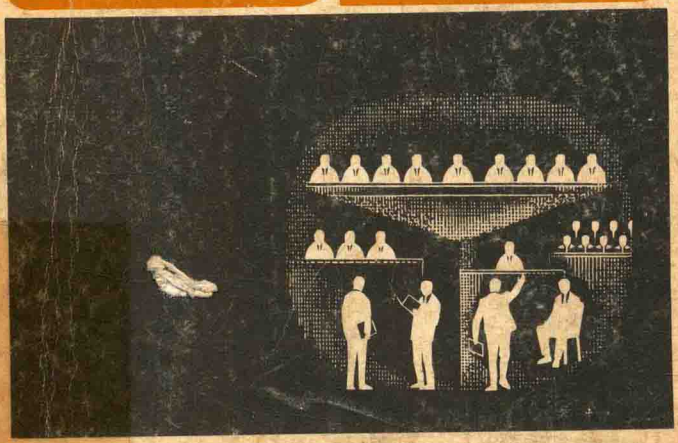

SCOTT, FORESMAN ★ AMERICAN GOVERNMENT SERIES

# THE POLITICAL ROLE OF THE COURTS
# JUDICIAL POLICY-MAKING

**GLENDON SCHUBERT**
*Michigan State University*

*with an introduction by*
**LEE LOEVINGER**



**SCOTT, FORESMAN AMERICAN GOVERNMENT SERIES**
*Joseph C. Palamountain, Jr., Editor*

Library of Congress Catalog Card No. 65-17728

Printed in the United States of America

# PREFACE

The American system of government strikes a balance between unity and diversity. There is a unity to our system, but it is a unity which tolerates—indeed, requires for its vigor and viability—a broad diversity of institutions, processes, and participants. By organizing the analysis of the sprawling complexity of the American system into smaller, coherent, but interlocking units, the Scott, Foresman American Government Series attempts to reflect this pluralistic balance.

This approach, we believe, has several important advantages over the usual one-volume presentation of analytical and descriptive material. By giving the reader more manageable units, and by introducing him to the underlying and unifying strands of those units, it puts him in a better position to comprehend both the whole and its components. It should enable him to avoid the not-uncommon circumstance of viewing the American system as a morass of interminable and unconnected facts and descriptions.

This approach certainly permits us to tap the expertise and experience of distinguished scholars in the fields of their special competence. Each writes about his specialties, and none is forced to deal with subjects remote from his ken or heart for the sake of "completeness." The unity of the series rests on the interlocking of the various volumes and, in the general emphasis on policy and policy-making, on the method of analysis as opposed to simple description. It does not rest on a unity of approach. The authors vary in their values, their accents, and the questions they ask. To have attempted to impose unity in these matters would have been to water down the series, for the diversity of approach reflects the diversity of the system, its participants, and its commentators. But the final value of this series and its ultimate balance between unity and diversity rest, of course, in the use to which it is put by the reader.

Glendon Schubert's volume forcefully illustrates the desirability of asking experts to write about their fields of special competence for the beginning student. He imparts to the reader the heady joy of new discoveries and the power of new analytical tools in an area often regarded as thoroughly explored and well understood. Casting a cool but sensitive eye on institutions and processes often obscured by myth and presumptions, he paints a clear but fresh picture.

Joseph C. Palamountain, Jr., *Editor*

# INTRODUCTION

It is the history of advance in science that conceptual schemes are successively refined and enlarged to encompass more data and to relate more phenomena. In that sense, this volume represents a scientific contribution to the study of the legal system. It makes a systematic presentation of data, theories, and methods, some of which are so new that they have not previously been related to the traditional body of legal theory or, indeed, even systematically surveyed.

Traditionally the study of the legal process has been concerned with examination and analysis of an abstract general category called "the law." The task which those undertaking such study have set themselves throughout the span of our intellectual history, from Aristotle through Aquinas and John Austin to Roscoe Pound and his contemporary disciples, has been to find the elements of consistency in the logical relationships among legal norms and to state the logical relationships in the form of generally applicable principles. The older, or classical, tradition in jurisprudence assumes an ideal model or order of legal norms which is of transcendent legitimacy and is known as "natural law." This derives its status either directly from divine promulgation and approval or indirectly from being immanent in the general order of nature or in human nature, in either of which it may be discerned or "found" by assiduous reflection and study. The major task of this traditional jurisprudence was to discover the general principles underlying judicial opinions and to harmonize these principles with each other and with the transcendent model of natural law.

In the course of time traditional jurisprudence came to be more concerned with the principles of "positive law"—the commands of sovereigns, including kings, legislators, and judges—than with those of natural law. The first emphasis on the importance of analysis of positive law was in the lectures of John Austin at Oxford early in the nineteenth century; hence, such an approach has come to be known as "analytical positivism," "Austinian jurisprudence," or "Austinism." In the view of this school, the basic judicial task is to examine the correspondence between actual human conduct (or reports of how people have acted) and laws (or statements of how people should act). This school takes its basic data from a limited part of the judicial output, namely the published opinions of appellate courts. This school has a theory of law but no methodology other than ratiocination. Nevertheless, the viewpoint of analytical positivism

was dominant in political science and among law professors until World War II and is still largely predominant among the practicing bar.

Two new schools of jurisprudence are products of twentieth-century thinking among lawyers and law professors. These are the schools of "sociological jurisprudence" and "realistic jurisprudence." Both schools have broadened the field of study by observing some elements of judicial input as well as judicial output, and both have assumed a deterministic relationship between input and output, which is generally taken to be a mechanistic cause-and-effect sequence. In other respects there are substantial differences between these schools. Sociological jurisprudence studies the sources of the norms that provide the policy content of judicial decisions and finds them in the needs and demands of society, or "social interests." In the view of this school, of which Pound is probably the leading prophet, law exists to secure social interests, so far as they may be secured by an ordering of men and their relations through organized political society. However, sociological jurisprudence makes no attempt to analyze the operational relationship between the needs and demands of society and the choices of individual judges. On the other hand, realism in jurisprudence shifts attention away from generalizing about law or judicial opinions to the study of individual decisions or particular cases. The great contribution of realism in American legal thinking has been to separate the philosophy of what law should be from the view of what it actually is in individual cases and to emphasize that judges are not merely governmental functionaries but also individuals and human beings. However, with all its emphasis on the specific case and the individual judge, realism has developed no methodology except a naïve and intuitive empiricism. It has attempted no systematic theoretical formulation and so has produced no theory of judicial decision-making.

Since the end of World War II there have been increasing calls for broader and more rigorous methods of studying the legal process. It has been pointed out that reasonably rigorous scientific methods are being used to study various aspects of human behavior in such fields as anthropology, psychology, sociology, and economics and that many of these methods might be found useful in the field of law. The present study by Professor Schubert is based on the analytical framework known in sociology and political science as "systems theory," "structural-functional analysis," or "systems analysis" for short. In this approach we study both the input and the output of the judicial process as well as the conversion process which relates the input to the output. It is in the conversion process that the issues presented by the raw data, or "facts," of an individual case are recognized, individual sets of values are brought to bear, and a

judicial decision is determined. This study employs the methods of anthropology, sociology, psychology, and statistical mathematics. It utilizes a sociopsychological conceptualism known as "behavioral theory." This assumes that the conversion structure in the judicial process—the individual judge—is the critical and independent variable in judicial policy-making, and it looks for consistency in the patterning of actions expressing individual sets of values.

Of course, the behavioral theory approach does not blind itself to the views of traditional and conventional jurisprudence. It could not consistently do so, since those viewpoints are still so widely held by professors, lawyers, and judges as to be significant influences in some aspects of judicial behavior. Thus the author here presents the viewpoints of traditional and conventional jurisprudence as well as the more encompassing viewpoint of behavioral theory. More importantly, Professor Schubert presents an overview of the structure of American judicial systems, of judicial functions, of the operation of judicial systems in decision-making procedures, of the relationship between decisions, on the one hand, and policies and ideologies, on the other hand, and, finally, of methodologies actually and potentially employed in examination of judicial structures, functions, and operations.

This book should be of interest to the intelligent and inquiring reader, whether lawyer, social scientist, student, or simply literate citizen. No special training or technical vocabulary is required or assumed. The detail presented should be adequate to satisfy the specialist; the observations ventured should be broad enough to challenge the philosopher. Many prejudices and presuppositions which pass for truisms in popular discussion will have to yield to the contrary evidence presented here.

It is shown that the structural theory which views judicial review as a means whereby the judiciary may impose a conservative check on liberal tendencies in the other branches of government is false. Although it is only in recent years that a majority of the Supreme Court have taken a more liberal position on some policy issues than Congress, it is now clear that judicial review is not restricted to serving as a conservative check on liberal policies. Similarly, the policy orientation of state governments and the national judiciary have changed so that judicial deference to state policy-making no longer has the general effect of upholding liberal values.

The general attitudes of judicial activism and restraint are also reviewed here from the viewpoint of functional theory and empirical data. It is shown that the Supreme Court's basic policies remain stable over long periods of time and that changes which occur reflect fundamental changes in the general political system of which the Court is a component part. So long as the basic goals of the justices

are the same as those of political actors in other components of the political system, the Court will accept the policies of other decision-makers and will exercise judicial restraint in dealing with the acts of other branches of government. However, when the majority of the Court disagrees with the fundamental decisions of legislative policy-makers, then it will tend to become judicially activist and to express the conflict through the technical device of judicial review. Thus the Court is activist when its decisions conflict with those of other policy-makers, and the Court exercises judicial restraint when it accepts the policies of other decision-makers. In any event, either course and its characterization is quite independent of whether the Court, Congress, or the executive is serving liberal or conservative values; and, at various times in history, both judicial activism and judicial restraint have served both liberal and conservative goals.

So we are confronted with one of the most significant conclusions to be derived from Professor Schubert's survey. There is no permanent or reliable congruence between institutional structures and functions and substantive values. This is of basic importance for theories and studies of legal subjects. It means that static structural theories are likely to be misleading and unlikely to be valid over an extended period of time. This conclusion has even greater significance for political philosophy. It means that there can be no assurance of securing particular social values by innovations in institutional structures. It is the easy and seductive assumption that if some particular institution of government is frustrating an objective that is sought, the remedy must surely lie in abolishing or changing the form of that institution. A companion illusion is that any ideal can be permanently assured by establishing an institution—a specialized agency—to serve that ideal. However, it is demonstrated here that even an institution as stable as the Supreme Court changes in time and comes to serve different values at one time than at another.

This brings us to the principal point of Professor Schubert's book. Mere observation will not suffice to establish the relations between institutional structures and functions and social values. The average person could observe every step in the construction of a complicated electronic device without having the slightest idea of how it works or how to replicate the structure. One who knows nothing of legal terminology and procedure is more likely to be confused than instructed by observing courtroom proceedings. But it is also true that one who knows nothing about the contemporary techniques of observing, recording, summarizing, and analyzing behavior is likely to give a very superficial account of judicial behavior, whatever he may know of legal terminology and procedure. That is one of the reasons that much, if not most, of the work currently being done in the scientific investigation of the legal field—jurimetrics—is being

done by political scientists and others with scientific training, rather than by lawyers. Science requires both observations and coherent theories to direct and relate the observations. Theories without observations are mere illusion; observations without theories are pure confusion.

In one sense science and the judicial process are similar. Science is man's effort to extend the powers of intellect in observing, describing, and analyzing his environment. It represents man's supreme effort to be rational in viewing the cosmos of which he is a part. The judicial system, on the other hand, is one of the most important institutions society has produced for rationalizing the myriad divergent forces operating within our culture and for reconciling the innumerable conflicts arising among them. As Professor Schubert observes (in Chapter Three), "By thus reducing relative chaos to relative order, the most basic function of judicial systems is to extend the bounds of rationality in human behavior." To extend the bounds of rationality in human behavior is surely one of the most important, if not the most important, objectives of organized society. It is at once one of the principal prerequisites and high ideals of civilized living. Yet, after centuries of pursuit, man still finds rationality an elusive goal.

The approach represented here is a new path toward rationality regarding judicial behavior. It brings to bear upon the study of judicial behavior the techniques and data of what have been called the behavioral sciences. To put it in a way that only seems tautological, this means that we are proceeding rationally to examine our efforts to act rationally in public affairs. This is not a mere academic exercise. The operation of the judicial system is at least in part an expression of the view that judges take of their function; and this, in turn, is largely a reflection of the view that society takes of their function. If our judicial systems are to extend the bounds of rationality in human behavior, then they must themselves be studied and regarded rationally.

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Federal Communications Commission

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CHAPTER ONE

# The Judiciary in the American Polity

## THE POLITICAL SYSTEM

### PUBLIC POLICY

Judges share with legislatures, chief executives, and heads of major administrative departments the political power and responsibility to make policy decisions that reflect certain priorities of values. Public policy reflects those values that are preferred, for the time being, by such decision-makers. Although public decisions may be enforced by coercion, the coercive aspects are not their most distinctive feature. Rather, public systems of decision-making are best distinguished from private systems by the relative heterogeneity of their constituencies and affected clienteles. The greater generality of governmental systems provides some justification for labeling as "public" decisions that usually are directly advantageous only to minorities of the relevant populace.

Governments have no monopoly of either authority or power. Authority is the consensually recognized right to make certain decisions; power is the ability to control the behavior of others through decisions. Authority and power frequently, but not necessarily, coincide; but even when they do, there is wide variation in the proportions

of each that may be associated with particular decision-making roles or with specific decision-makers, either public or private. With regard to one type of question, such as the establishment of a national policy of racial integration in public schools, most courts in the United States have little authority *or* power. The federal Supreme Court has considerably more authority than power in this matter: almost a decade after its basic decision in *Brown* v. *Board of Education,* not a single Negro child attended white public schools in one of the school districts that had been a party to the *Brown* case. On the other hand, courts (like other decision-making systems) may exercise more power than authority; note the federal Supreme Court's abortive attempt in *Dred Scott* v. *Sanford* to resolve the national conflict over slavery. There are some kinds of decisions, such as that to impose capital punishment, which in this country governments have a monopoly of authority (but not of power) to make; there are many others, such as excommunication, which American governments have neither the authority nor the power to make.

Certain functions and facilities, such as taxation and armies, often are suggested as examples of characteristically governmental activities. But only one of the thousands of public governments in the United States maintains armed forces in the form of an army, navy, and air force; and if we turn to armed forces designated as police, capable of undertaking offensive action only against individuals and very small social groups, then many private "governments" (such as the Ford Motor Corporation) also maintain police forces. Public police differ from private police in the broader scope of their responsibility and authority. Most public governments collect taxes, but many private organizations also exact compulsory fees and assessments from their membership. In either case, citizens and members must either pay, suffer pains and penalties for nonpayment, or withdraw from affiliation with the community. Again, the difference is that voluntary expatriation usually involves almost total withdrawal from the normal relationships within a complex society, because it entails a shift in one's physical residence as well as in his psychological allegiance, while the impact upon one's life that results from the resignation of membership in a fraternity or professional society is much more selective and usually is perceived to be so. Many examples can be given, however, of activities that are sponsored jointly or concurrently by public and private governments; the differences among public universities and among private universities certainly are much greater than the differences between them.

When we study policy-making by judges, we focus upon a type of activity that is by no means peculiarly governmental. Adjudication takes place in a wide variety of social groups, including the family. It is in governmental systems, however, that courts are most sharply

differentiated in structure from other decision-making agencies; this high specialization of judicial structure and function both justifies and necessitates the analysis of judicial behavior as one focal point in the study of public policy-making. Since judges play particularly critical roles in the formulation of United States governmental policy, the study of the judiciary is an essential and fundamental part of the study of American government.

## SYSTEMS THEORY

This study of the judiciary is based upon an analytical framework known in sociology and political science as "systems theory" or "structural-functional analysis." This basis is chosen in preference to the legal, historical, and institutional categories that in the past have dominated inquiry into the policy-making processes of American government. A major advantage of this strategy is that it diverts attention both from a preoccupation with the substance of judicial policy and from a description of the legal structure of courts in isolation from the rest of the political system. Both of these subjects are relevant to an understanding of judicial policy-making; but the use of systems theory can, it is hoped, expand the relevant field of inquiry to the processes and sources of judicial policy-making as well as to its results. Thus this mode of analysis should facilitate a more general and more comprehensive examination of American judicial institutions and behavior than would be produced by a less inclusive and less consistent conceptual framework.

Systems analysis focuses upon political behavior and upon empirically observable action. Norms and institutions are relevant only to the extent that they affect the behavior of actors within a system under analysis. A "system" consists of the structure or pattern of interaction among the actors. "Interaction" consists of the ways in which two or more people affect each other's behavior; the participants are called "actors" because we are interested not primarily in their individual idiosyncrasies but rather in the extent to which they conform to their socially defined roles. A "role" is socially defined because it consists of the combined expectations, of both what he *ought* to do and what he is *likely* to do, of an individual actor and of those people with whom he interacts; in a reciprocal manner, the complementary expectations of the individual actor help to define the roles of those other persons with whom he interacts. In sociopsychological terms, an actor's role is his orientation toward political action. The limits that define the universe of data deemed relevant for the examination of a particular system are called "boundaries"; the boundaries, in other words, enclose the variables directly related to the making of decisions within the system. The demands and sup-

port that function as stimuli to which the actors within the system react are called "inputs," and the policy-making decisions of the actors are called "outputs." Outputs from one system may be inputs for other systems; when the outputs of a system affect the systems that are its sources of demands and support, the process is known as "feedback." In sum, "political institutions or persons performing political roles are viewed in terms of what it is that they do, why they do it, and how what they do is related to and affects what others do."[1]

One major qualification is in order, however, concerning our use of the systems model. The fundamental metaphor upon which systems theory is based is biological, and it thus reflects the impact of the work of Charles Darwin upon nineteenth-century scientific thinking.[2] It is one thing to hypothesize homeostasis—the tendency for a set of interacting systems to maintain equilibrium—in a living and healthy organism. It is quite another matter to assume that patterns of social organization and behavior, which we analogize to living organisms when we adopt the Darwinian metaphor and speak of social systems, necessarily will seek to maintain a natural balance and remain in some state of equilibrium.[3] Although some form of homeostasis usually is explicitly assumed by social scientists who have adopted systems theory to guide their analyses, we make no such assumption here. We shall, however, seek to discover the kinds of influences that both shape and lead to changes in judicial systems, and the correlative kinds of influences that judicial systems bring to bear upon other systems, both public and private, with which they interact.

## STRUCTURE OF THE AMERICAN POLITY

The American system of government is characterized by a great deal of pluralism and exceptional fragmentation of both authority and power. The Constitution of the United States recognizes no less than fifty-one different governmental subsystems: those of the fifty states remain largely independent of each other and, to a substantial but diminishing degree, independent of the national government as well. This large measure of constitutional independence has become increasingly sublimated in practice, however, by a vast network of policy interaction in such major fields as agriculture, highways, welfare, education, law enforcement, utilities regulation, and taxation. Each of the fifty-one governments accepts the constitutional principle of the "separation of powers": the Constitution of the United States explicitly provides for differentiated legislative, executive, and judicial organizational structures, and all of the state constitutions do likewise. Most of the states substitute what is in effect a plural executive

for the unitary executive system authorized by the national Constitution. Most of the institutional patterns that link the national government with the states and the states with each other involve policy interaction among executive systems. Since the adoption in 1913 of the Seventeenth Amendment (which provided for direct election of United States senators by the people rather than by state legislatures), the communication channels linking national and state legislative systems have been minimal, as the direct communication channels among state legislative systems always have been. Judicial (like executive) interaction is relatively extensive between the national and state systems, while interaction among state judicial systems is relatively slight, thus resembling the relationships among state legislatures.

In a similar mode, we can discuss the patterns of policy-making that obtain within each state. Both the constitutional and the operating relationships between a state government and its multitudinous units of local government are even more complex that the national-state and interstate relationships summarized above. It is generally true that, except among geographically contiguous units of local government, the horizontal patterns of interaction among either local legislative, executive, or judicial systems are not extensive. The same is true of interaction between the state and local legislative systems. But interaction between the state and local executive and judicial systems is even greater than that between national and state executive systems and between national and state judicial systems.

Legislative systems—national, state, and local—operate in terms of certain common assumptions and attributes. Individuals or small groups of legislators are elected for fixed terms from particular geographic areas defined in constitutions or in statutes, by executive commissions, or by judicial decision. The national legislative system, and that of all but one of the states, includes two independent "houses" of legislators with largely duplicating functions; but local legislative systems usually include only a single structure. Inputs to the system consist of what usually are described as "interests" and "pressures" from other governmental systems (such as executive, judicial, or municipal systems) and from constituents, lobbyists, and political parties (as well as the outputs of other governmental subsystems within the individual legislative districts). On the basis of the estimated support for legislative action from the same sources, the legislature transforms such demands into outputs such as substantive statutory norms, appropriations, taxes, committee and subcommittee investigations, resolutions, and the approval of executive and judicial appointments. Thus the outputs of the legislative system serve as inputs for executive and judicial systems, for non-governmental systems of decision-making (such as those of polit-

ical parties, corporations, and labor unions), and for other legislative systems.

There is considerably more diversity in the structuring of national and state executive systems and still more in the structuring of local executive systems. The Constitution of the United States provides for a single executive system, whose most conspicuous decision-maker is a President who is now selected, in effect, by a national constituency whose votes are tabulated on the basis of fifty-one electoral districts (consisting of the states plus the District of Columbia). From an operational point of view, however, the executive system of the national government is a vast congeries of largely autonomous subsystems with many overlapping functions. Each subsystem depends in fact upon very complex processes of group decision-making, although legal authority to "make decisions" typically is vested in individual officials with such status designations as "secretary" (department head), "director" (bureau chief), or "commissioner" (board member). If we inquire concerning the source of outputs to which these various types of administrative subsystems are most responsive, we discover that the constitutional principle of "separation of powers" is a most misleading basis for understanding the primary articulations of administrative subsystems for policy-making purposes. *Departmental* subsystems do interact most closely with each other and with the executive subsystems (e.g., the Executive Office of the President) that function in the name of the President; but many bureau subsystems interact more intimately with their counterpart legislative subsystems (congressional subcommittees) than with the departmental systems of which they are—from a legal point of view—components; and, similarly, the source of policy guidance for many boards (particularly for several of the "regulatory commissions") is first legislative, second judicial, and least executive subsystems. This brief sketch of some of the most salient aspects of the public policy-making process in the United States makes it evident that judicial systems are structured and function in an environment that is extremely complex and dynamic and that is itself the product of a highly pluralistic political universe.

## BOUNDARIES OF THE JUDICIAL SYSTEM

Interaction is extensive and pervasive between the judicial system and the legislative and executive systems, as well as between the judicial system and a vast array of private systems of policy-making. The conventional conception of judicial action as consisting of a judge or small group of judges sitting at a bench and presiding over a trial in a courtroom portrays judicial behavior as essentially static, like a still-life portrait. Thereby it sacrifices a concern for what is most

significant to a preoccupation with the manifest elements of a ritual which—though not unimportant—is only the most conspicuous scene of a drama with many other acts. As in Shakespearian tragedy, the soliloquies, which are easy to present, occur on-stage; the great and decisive battles are fought off-stage, and we learn of them only through an occasional clamor from the wings and through the formal announcements of heralds, replete with fanfare and flourishes. Likewise, most politically significant governmental action takes place outside the courtroom. It occurs in the establishment of courts and the selection of judges; in the interplay between judicial, legislative, and executive systems, and between national and state judicial systems; and in the effect of judicial decisions upon society and the economy, and vice versa. It is not possible to learn much about legislative policy-making by observing the chamber of the United States Senate from the gallery or to understand presidential decision-making by attending press conferences conducted by the President—or even the usual meetings of the cabinet, for that matter. Yet the predominant tendency, until recently, has been to study judges as though they performed their roles in splendid isolation not only from the rest of the political system but from each other as well.[4]

If we are to extend the relevant boundaries of the judicial system beyond the confines of the courtroom, then we must observe the interaction of constituent assemblies, chief executives, and legislatures with political parties and other private groups in actions that establish the legal bases of organization for courts. The "establishment" characteristically takes the form of reorganization of an ongoing judicial structure whose official incumbents invariably evince the most profound interest in such proceedings and claim to be the most expert witnesses available on the subject. The judges themselves, therefore, are either protagonists or major lobbyists in the consideration of any proposals to change their authority and power.

Judges acquire office either by appointment (as in the national system) or by election (as in most of the state systems). To be appointed, a judicial candidate usually must be sponsored by party officials, bar organizations, and legislators in order to receive serious consideration by a chief executive; in subsequent legislative committee hearings on confirmation, private groups frequently lobby to support or to oppose nominations. Similarly, candidates for elective judicial office must be sponsored by political parties and private groups, and frequently by chief executives and legislators as well. Where there are "nonpartisan" systems of election, similar sponsorship usually is worked out covertly, behind the facade of "citizens' committees for good government."

Once selected, judges like other public officials have a continuing need for legislative support in the form of appropriations. Legis-