

FIFTH EDITION

# COURTS, JUDGES, & POLITICS

an introduction to the judicial process



Walter F.  
Murphy

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# *Courts, Judges, & Politics*

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## *An Introduction to the Judicial Process*

FIFTH EDITION

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## *Preface to the Fifth Edition*

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This book had its origin during the academic year 1956–1957, when I was writing my dissertation at the University of Chicago and serving as C. Herman Pritchett's research assistant. He mentioned in a casual (and, as it turned out, also causal) conversation, probably generated by my having recently read Jack W. Peltason's *The Federal Courts in the Political Process* (New York: Random House, 1955), that he would love to teach a course on the politics of the judicial process, but the materials were too scattered even for a graduate seminar.<sup>1</sup> Because my dissertation was proceeding rapidly, I had begun to think not only of my next project but how my scholarship would develop over the next decades. Thus my application for a fellowship from the Brookings Institution detailed a project for the following year (the uses of *stare decisis*) and explained how it would fit with plans for a series of books and articles. That scheme closely resembled the table of contents of the first edition of *Courts, Judges, & Politics*.

The year at Brookings provided the opportunity not only to revise my dissertation and get most chapters published in law reviews and journals of political science but also to spend mornings in the Library of Congress or the library of the Supreme Court seeking out materials for a text on the judicial process. (Afternoons were often taken up with attending oral arguments.) By the time I came to Princeton in the late summer of 1958, I had filled in many readings to fit my earlier outline. Then I mustered the courage to invite Herman (who was still, in good Chicago style, "Mr. Pritchett"<sup>2</sup>) to join. He readily agreed

<sup>1</sup>Henry M. Hart, Jr., and Albert M. Sachs's, *The Legal Process* did not come out in its mimeographed form (labeled "tentative edition") until 1958; it did not come out as a book in "normal" form until Foundation Press published a much revised edition 1994, edited by William N. Eskridge, Jr., and Philip P. Frickey. For an evaluation of the impact of this very important "book," see Anthony J. Sebok, *Legal Positivism in American Jurisprudence* (New York: Cambridge University Press, 1998). Carl A. Auerbach, Lloyd K. Garrison, Willard Hurst, and Samuel Mermin's, *The Legal Process: An Introduction to Decision-Making by Judicial, Legislative, Executive, and Administrative Agencies* was available only in multilith form and we were not aware of its existence. It was published in 1961 by Chandler Publishing Co. of San Francisco.

and provided three necessary gifts: superb judgment about what would and would not be intelligible to students, money to photocopy the materials we agreed on, and a professional reputation for excellence that attracted Random House's editor, Charles Lieber.

During the next two years, we both tried out many of the materials on our students, and by the summer of 1960 we were able to send the manuscript off to the publisher. That edition was more mine than Herman's, though having studied under and worked for him I am certain that he influenced anything I have written. (Were he alive, he might insist on certain exceptions to that statement.) The second edition represented pretty much equal labor. The third and fourth editions, however, were much more Herman's than mine. My interests had moved to constitutional theory and to comparative politics; in fact, I taught a course on the judicial process only once after the first edition appeared. Although I continued to teach constitutional interpretation, I did so as a form of political jurisprudence rather than as a course in traditional constitutional law. Still, the two of us arrived at a productive arrangement: Herman did the work and I carped.

Alas, he died in 1995, as we, under prodding from McGraw-Hill, who had bought Random House's college list, were thinking of how to organize a fifth edition. My own health did not allow me to do the revisions alone. When, in 1958, I initially approached Herman about co-authoring/co-editing the first edition, I had read almost every directly relevant article and book published in the preceding three decades. By 1995, the field had burgeoned so that I would have had to spend at least a year, probably two, just to catch up. I decided to wait and hope that McGraw-Hill would forget about the book. Happily, Bert Lummus and his successors, especially Monica Eckman, had long and stubborn memories. The only escape was to undertake the task of revising and to do so in a way that would minimize my burdens. I talked to Sotirios A. Barber of Notre Dame, an old friend with whom I had worked on another project.<sup>3</sup> The two of us sputtered around for almost a year, outdoing each other in producing excuses. Finally, it became clear to both of us that, if the book were going to be reborn, it needed a fresh mind. I then consulted another old friend, Harry P. Stumpf, who had retired from the University of New Mexico in 1995. He knew almost everyone in the field, what each had written, and was willing to share that knowledge as well as his judgments about people and their work. Our discussions convinced both of us that the ideal person was Lee Epstein, the Mallinckrodt Distinguished University Professor of Political Science and Professor of Law at Washington University. Her then-recent publication (with Jack Knight) of *The Choices Justices Make* (Washington, DC: Congressional Quarterly Press, 1998),

<sup>2</sup>At the University of Chicago of the 1950s, graduate students addressed a member of the faculty as "Mister" not "Professor." (There were then no women teaching in the Department of Political Science.) After a few months of collaboration, "Mr. Pritchett" sent me a note saying that "someone named Herman" was answering my mail.

<sup>3</sup>Walter F. Murphy, James E. Fleming, and Sotirios A. Barber, *American Constitutional Interpretation* (2nd ed; Westbury, NY: Foundation Press, 1995).

with its roots reaching back to my own *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964), indicated we shared similar interests, even if her knowledge was far superior to mine. Much to my joy, and that of Monica Eckman at McGraw-Hill, Prof. Epstein accepted the challenge.

The choice turned out to be wonderfully wise, at least for the book and for my peace of mind. She played—brilliantly, patiently, and indefatigably—Herman's role for the third and fourth editions and I resumed mine: She did the work and I carped. I am sure Herman would have been delighted with the final product and both relieved and amused to see someone else subjected to my compulsions about grammar and syntax. That *Courts, Judges, & Politics* has entered its fifth incarnation is largely due to Prof. Epstein's energy, erudition, and patience in dealing with a nearly dead, though still obsessive, white European male.

Walter F. Murphy

Albuquerque, NM

10 November 2000

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