
THE JUDICIAL PROCESS

Sixth Edition

HENRY J. ABRAHAM

The Judicial Process

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of the Courts of the
United States, England,
and France

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Preface

Initially published in 1962 and subsequently revised in 1968, 1975, 1980, and 1986, *The Judicial Process's* continued popularity at home and abroad has justified a sixth edition. Indeed, the six years that have elapsed since the appearance of the fifth edition have borne witness to such major—in fact, dramatic—developmental changes in the nature and application of the judicial process, both domestic and foreign, that a new edition had become all but mandatory.

This latest edition has accordingly been thoroughly revised and updated through mid-summer 1992. Thus, the work of the Supreme Court of the United States is analyzed through its 1991–92 term (e.g., the impact of the four new Justices who have mounted the high tribunal since 1986: Antonin Scalia, Anthony M. Kennedy, David H. Souter, and Clarence Thomas; and the promotion of William H. Rehnquist to the center chair, succeeding Warren Earl Burger in 1986). Acceding to long-standing requests by the judicial branch, Congress provided significant changes in the jurisdiction of, and access to, the federal courts in 1988–89. Major changes in court personnel also naturally took effect during the six-year interim. These and a good many other apposite matters are fully addressed in this edition, resulting in a detailed revision of chapters 2, 3, 4, 5, 7, 8, and 9.

Significant political changes also necessarily affected those materials dealing with the judicial process in sister democracies abroad—especially England, Wales, and France—as well as in the special constitutional courts of Austria, Germany, and Italy; these developments are elucidated in chapters 2, 3, 6, and 7. One major excision was necessitated by the historic decline and dissolution of the Soviet Union. That cataclysmic event dictated the deletion of the section on the Soviet Union's judiciary that had been present in the first five editions.

The realities of economics and the availability of electronic data retrieval resulted in the reluctant decision to discontinue the bibliographical listings at the

end of this book. It had become increasingly unwieldy, and since it was simply a vast compilation of publications rather than an annotated bibliography, both publisher and author agreed that it should be dropped in the present and future editions. In its place is a relatively brief annotated bibliography of key works in the constellation of the judicial process. The now familiar figures, tables, charts, graphs, and appendixes have all been retained and updated.

Once again I happily acknowledge my profound debt to a host of new and old colleagues—far too numerous to mention—who not only encouraged me to undertake this sixth edition but generously and readily provided expert assistance. I am especially beholden to two esteemed friends and colleagues—Margherita Rendel, Barrister at Law of the Institute of Education of the University of London, and Dr. Nicole de Montricher of the Observatoire Interrégional du Politique and the Fondation Nationale des Sciences Politiques in Paris—for their indispensable information on the many recent changes in their respective nations' judicial developments; and to two young associates—John C. Blakeman and Vincent Michelot—on the judiciaries of England and France, respectively. My fellow political scientists and devotees of the comparative judicial process, Professor Donald P. Komers of the Notre Dame University and Professor Roberto Toniatti of the University of Bologna, provided generous and deeply appreciated assistance on the German and Italian judiciary, as did Mag. Jur. Helgar G. Schneider of Graz, Austria, on that nation's judicial structure. For particularly valued advice and counsel I wish to single out my colleagues David O'Brien of the University of Virginia, Barbara Ann Perry of Sweet Briar College, and Tinsley Eugene Yarbrough of East Carolina University, a trio on whom I could always count for objective critiques and suggestions.

The Mayer and Arlene Mitchell and Abraham A. Mitchell Fund of the Mobile Community Foundation provided much-appreciated financial support—as it has done so generously for decades. My research assistants, Craig J. Powell and Mark D. Hall—with an assist from the Lynde and Harry Bradley Foundation—proved to be unfailingly good-natured and cooperative, and Russell DePalma compiled the index expertly. David Roll and Valerie Aubry of Oxford University Press were delightful editors. My students, of course, were an unceasing source of inspiration and resolve, and my wife, Mildred, and our son, Peter, and his wife, Anne, never failed to be both supportive and constructively critical.

When I wrote the first edition of this book more than thirty years ago, I dedicated it to our older son, Philip, then a four-year-old. Now a practicing attorney, married to Janet, and the proud father of their son, Benjamin, he remains a staunch fan of this book, which is rededicated to him with pride and love.

Charlottesville, Va.
Summer 1992

H.J.A.

Preface to the First Edition

When my *Courts and Judges: An Introduction to the Judicial Process* appeared in 1959, I began its preface by pointing to the general absence of even the most rudimentary knowledge of the judicial process on the part of the vast majority of students of political science entering elementary or even advanced courses and observed that equally striking was the unavailability of accessible materials providing basic data in the field. The measure of success my small book has enjoyed encouraged the writing of the present volume, which is far more ambitious in scope than its predecessor.

This new book is a selective comparative introduction to the judicial process and seeks to analyze and evaluate the main institutions and considerations that affect the administration of justice under law. The rather extensive coverage of certain significant features and elements of comparative judicial processes was prompted not only by several helpful suggestions by users of the earlier book but by the continued neglect of these processes in basic textbooks.

An important segment of this work is thus devoted to the judicial process in England and Wales, France, and—to a necessarily considerably lesser extent in this context—the Soviet Union. Other states are included whenever appropriate, especially in connection with the doctrine and practice of judicial review. Nonetheless, over half of the material deals with the judicial process in the United States.

The detailed Contents obviates capsule explanations of the substance of each chapter in this volume. I have compiled numerous graphs, figures, and charts, all designed to facilitate comprehension. There are two indices—one general and one for cases. And there are four extensive bibliographies dealing with (1) works in general on American constitutional law, (2) biographies and autobiographies of and by Justices of the U.S. Supreme Court, (3) comparative constitutional law, and (4) civil liberties.

Although I have endeavored to be objective in analysis and presentation throughout, in some circumstances it is neither possible nor desirable to shun value judgments; I have thus stated frankly my own opinions where it seemed appropriate to do so.

Once again I express my profound appreciation to the many colleagues who stimulated and urged me on in the writing of this book and whose generous suggestions were so helpful. I am especially grateful to Professors William M. Beaney, David Fellman, Wallace Mendelson, Jewell Cass Phillips, and R. J. Tresolini. Above all, I owe a particular debt of gratitude to Mr. James Wellwood, M.A., of Gray's Inn, Barrister-at-Law, Lecturer in Law at King's College, University of London, for his unselfish counsel and essential criticism on the sections on England and Wales. As they have been throughout my pleasant association with Oxford University Press, Mr. Byron S. Holinshead, Jr., and Miss Leona Capeless have been delightful and invaluable co-workers. Mrs. Helen White performed the thankless but essential task of typing the entire manuscript cheerfully and efficiently. Whatever errors remain are mine. My wife, Mildred, gave me the kind of constant encouragement and confidence that only a devoted partner can provide.

And the book is happily dedicated to one who also helped in his own way.

*Wynnewood, Pa.
February 1962*

H.J.A.

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The Judicial Process

Introduction: The Law and the Courts

Respect for the law is one of the select group of principles that we have come to regard as essential to the effective and equitable operation of popular government. As a democratic principle it is recognized as binding on both the governed and those who govern.

In fostering this principle the role of the judiciary is crucial, for, in the words of Mr. Justice Arthur T. Vanderbilt:

it is in the courts and not in the legislature that our citizens primarily feel the keen, cutting edge of the law. If they have respect for the work of their courts, their respect for law will survive the shortcomings of every other branch of government; but if they lose their respect for the work of the courts, their respect for law and order will vanish with it to the great detriment of society.¹

This is true whether the judicial branch be technically separated from the other two branches of government, as in the United States, partly fused with them, as in France, or largely fused, as in England. The law will be respected as long as it is interpreted and applied within the structures of justice as accepted by the majority of society—in the long run, if not always in the short. Law is, after all, the expressed will of those who rule society.

But the law, in its procedural as well as its substantive aspects, is essentially made and administered by persons whose views and interpretations are buffeted by the winds of change through the years, so that it has become a “truism that the quality of justice depends more on the quality of the [persons] who administer the law than on the content of the law they administer.”² Judicial activity, observed

1. *The Challenge of Law Reform* (Princeton, NJ: Princeton University Press, 1955), pp. 4–5.

2. Evan Haynes, *The Selection and Tenure of Judges* (Newark, NJ: National Conference of Judicial Councils, 1944), p. 5.

Roscoe Pound in one of his lectures, is really the creative element in law. Accordingly, if humankind's great interest on earth is justice, as Daniel Webster put it, then perhaps a more immediate interest is the securing of the most highly qualified individuals to administer justice impartially with a minimum of chicanery and obfuscation. It follows logically that judges must be assured of an optimal degree of independence and relative freedom from prejudicial pressures from forces both inside and outside government. Moreover, they must be able to function in a hierarchical structure that is effectively conducive to the performance of the basic task at hand—the impartial administration of justice under law.

They pursue this task through the medium of a court, an institution of government. As Carl Brent Swisher noted concisely, along with such other characteristics as it may incidentally possess, a court

determines the facts involved in particular controversies brought before it, relates the facts to the relevant law, settles the controversies in terms of the law, and more or less incidentally makes new law through the process of decision. Over the centuries of Anglo-American history our judiciary has been developed and geared to this process so that it has an integrity or integratedness peculiarly its own. In particular it has a mode of informing the minds of the responsible officers—in this instance the judges—which is unique and which must be kept in sharp focus in any attempt to estimate the capacity of a judiciary to perform competitively in the gray areas which lie between it and institutions which are primarily legislative or executive.³

THE NATURE OF LAW

For centuries humankind has discussed the nature of law. In one way or another, it touches every citizen of every nation. The contact may be pleasant or unpleasant, tangible or intangible, direct or indirect, but it is nonetheless a constant force in the lives of people everywhere on the globe. It is essential that we have some understanding of its nature and of the human beings who interpret and administer it.

“What is Law?” has been asked by priests and poets, philosophers and kings, by masses no less than by prophets. A host of answers might be given, yet the answer to the question remains one of the most persistent and elusive problems in the whole range of thought. For one may well view the entire gamut of human life, both in thought and in action, as being comprised within the concept Law⁴ (although a legal system is in fact but part of a larger social order).

It may seem strange that the true essence of such a ubiquitous phenomenon as law should be beyond the grasp of general human understanding. Because law deals with human conduct, to grasp its nature it would appear necessary merely to distinguish it from the other factors relating to that conduct: religion, science, morals, ethics, customs. Yet herein lies the difficulty, so ably stated by James Coolidge Carter more than half a century ago:

3. Presidential Address, delivered before the American Political Science Association, New York City, September 8, 1960 (reprinted in 54 *American Political Science Review* 879–80, December 1960).

4. William A. Robson, *Civilization and the Growth of Law* (New York: Macmillan, 1935), p. 3.