JUDICIAL PROCESS IN AMERICA

Second Edition

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Judicial Process in America

To my longtime and much loved friends,
Melvin and Josephine White

R.A.C.

To Laquita

R.S.

Preface

Since the publication of the first edition of *Judicial Process in America,* many things have happened that affect our understanding of the work and significance of the courts. At the state level, more interest groups have begun to seek relief in the belief that state courts are more sympathetic than federal courts to their respective policy concerns. As a result, state courts are beginning to play an ever-increasing role in making decisions having policy implications that affect virtually all Americans. At the federal level, major changes have also been occurring. The judges of almost half of the lower federal courts have been replaced and two Supreme Court justices have stepped aside; the jurists appointed by presidents Reagan and Bush now constitute over three-fourths of the U.S. judiciary. Their policy impact on the output of the federal courts has been felt more and more during the past several years as an increasing number of conservative opinions have been handed down in such important policy areas as civil rights, the right to privacy, freedom of religion, and the rights of property owners. We are now in a position to examine and assess, in a way not possible just a half decade ago, the policy impact of a working conservative majority. Moreover, judicial scholars have learned and published much during this period about the judicial process and behavior of state and federal judges, and these new findings need to be reflected in an up-to-date text. Indeed, our own unique database on the voting patterns of U.S. trial judges has been expanded by almost 50 percent, and we now for the first time have empirical data on the judicial behavior of President Bush's judicial appointees. We present our analysis of these data in the chapters that follow.

Our goal has been to prepare a comprehensive and highly readable textbook about the judicial process in the United States. The primary emphasis is on the federal courts, but we offer full coverage of state judicial systems, the role of the lawyer in American society, the nature of crime, and public policy concerns that color the entire judicial fabric. The book is designed as a primary text for courses in judicial process and behavior; it will also be useful as a supplement in political science classes in constitutional law, American government, and law and society. Likewise it may serve as interesting reading in law-related courses in sociology, history, psychology, and criminology.

In preparing this text we have been careful to minimize the use of jargon and the theoretical vocabulary of political science and the law, without condescending to the student. We believe it is possible to provide a keen and fundamental understanding of our court systems and their impact on our daily lives without assuming that all readers are budding political scientists or lawyers. At times, of course, it is necessary and useful to employ technical terms and evoke theoretical concepts; still, we address the basic questions on a level that is meaningful to an educated layperson. For students who may desire more specialized explanations or who wish to explore more deeply some of the issues we touch on, the notes and selected bibliography contain ample resources.

We have also tried to avoid stressing any one theoretical framework for the study of courts and legal questions, such as a systems model approach or a judicial realist perspective. Instructors partial to the tenets of modern behavioralism will find much here to gladden their hearts, but we have also tried to include some of the insights that more traditional scholarship has provided over the years. The book reflects the contributions not only of political scientists and legal scholars but also of historians, psychologists, court administrators, and journalists.

Throughout the text we are constantly mindful of the interrelation between the courts and public policy. We have worked with the premise that significant portions of our lives—as individuals and as a nation—are affected by what our state and federal judges choose to do and what they refrain from doing. We reject the common assumption that only liberals make public policy whereas conservatives practice restraint; rather, we believe that to some degree all judges engage in the inevitable activity of making policy. The question, as we see it, is not whether American judges make policy but rather which direction the policy decisions will take. In the chapters that follow we shall explain why this has come to be, how it happens, and what the consequences are for the United States today.

In Chapter 1 we set the theoretical stage. We note Americans' great respect for the law, but we also document the traditional willingness of Americans to violate the law when it is morally, economically, or politically expedient to do so. We also examine sources of law in the United States and several of the major philosophies concerning the role and function of law.

Chapter 2 provides a brief sketch of the organizational structure of the federal and state judiciaries, placed in historical perspective. As we shall see, the state and federal judicial systems are the product of two centuries of evolution, trial and error, and a pinch of serendipity. The distinction between routine norm enforcement and policy making by judges is first addressed in this chapter.

The third chapter underscores the theme that "judging" is more and more a team effort. In this chapter we describe the duties and contributions of the staff and administrative agencies that support the federal and state courts today, including law clerks, state judicial councils, magistrates, the Federal Judicial Center, and the Administrative Office of the U.S. Courts.

Chapter 4 examines the role of the lawyers in American society—their training, their values and attitudes, and the public policy goals of their professional associations. In this chapter we also explore the impact of interest groups on the judicial process and the importance of judicial lobbying.

Chapter 5 outlines the jurisdiction of the several levels of U.S. courts and provides current data about the work load of state and federal tribunals. We believe that a full understanding of how judges affect citizens' daily lives also requires us to outline those many substantive areas into which state and federal jurists may not roam.

In Chapter 6 we focus on the criminal court process at both the state and federal levels. We begin with a discussion of the nature and substance of crime; we then examine, step by step, the key stages of the criminal court process. Chapter 7 examines the civil court process. We begin with a discussion of the various types of civil cases and the options available to the complainant and the respondent. Then we proceed through the pretrial hearing and jury selection. After a look at the trial and judgment we turn to the alternative methods available to resolve civil disputes, such as mediation and arbitration.

In Chapter 8 we take a close look at the men and women who wear the black robe in the United States. What are their background characteristics and qualifications for office? How are they chosen? What are their values, and how do these values manifest themselves in their behavior as judges and justices? In a key section on the federal courts, we find a discernible policy link among the values of a majority of voters in a presidential election, the values of the appointing president, and the subsequent policy content of decisions made by judges nominated by the chief executive.

Chapter 9 is the first of two on judicial decision making. Here we outline those aspects of the decision-making process that are common to all judges, in the context of the "legal subculture" (the traditional legal reasoning model for explaining judges' decisions) and the "democratic subculture" (a number of extralegal factors that appear to be associated with judges' policy decisions). Chapter 10 examines the special case of decision making in collegial appellate courts. We explore the assumptions and contributions of small-group theory, attitude and bloc analysis, and the fact pattern approach to understanding the behavior of multijudge tribunals.

Chapter 11 explores the policy impact of decisions made by federal and state courts and analyzes the process by which judicial rulings are implemented—and why some are not implemented.

The last chapter has two general goals: to outline the primary factors that impel judges to engage in policy making, and to suggest the variables that determine the ideological direction of such policy making.

Many people contributed to the writing of this book, and to all of them we offer sincere thanks. Russell R. Wheeler of the Federal Judicial Center read the entire manuscript and provided us with many useful criticisms and additions. Houston police officer Robert Nelson read our chapter, "The Criminal Court Process," and suggested numerous ways to improve the accuracy of our discussion of police procedures and the law. Richard C. Cortner, University of Arizona; T. E. Shoemaker, California State University, Sacramento; and Lettie M. Wenner, Northern Illinois University, read the first edition and offered helpful suggestions for updating and improving the text. For any errors that remain, we assume responsibility.

Our relationship with CQ Press has been a most pleasant one. We would like to thank Brenda Carter, Shana Wagger, Chris Karlsten, and Kate Quinlin for their assistance and professionalism. We also appreciate the fine work of our copy editor, Lydia Duncan.

Stidham would like to express a deep debt of gratitude to his personal support group: Laquita, Sam, and Heather. Their constant love, encouragement, and understanding during the long periods when "Dad was working on the book" made the project much easier.

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1 Foundations of Law in the United States

Alene Brackman is a hospice nurse; that is, she works for a medical facility that cares for the terminally ill. In June of 1991 she and five of her colleagues were convicted by the Montana Nursing Board of a series of crimes and ethical violations pertaining to administering drugs to pain-ridden, dying patients. A "whistle blower" at the hospice had observed that the nurses often did not follow the cumbersome but legally required procedures to obtain medication for patients whose misery was described as "out of control." (The nurses often dispensed pain-killing medication without first obtaining specific doctors' prescriptions and failed to follow other mandated protocols.)

When authorities were informed of the complaint, a somewhat reluctant prosecutor brought formal charges, saying, "My job is to follow the law, not to worry about public relations." That touched off five months of hearings and bitter controversy that split the quiet, mountain-ringed town of Helena. The local newspaper, the *Independent Record*, got hundreds of letters, mostly from those who contended that the nurses were "angels of mercy." Local residents began sporting lapel buttons that read "Free the Hospice Six." Nurse Brackman did not believe her "crimes" were really crimes: "I know in my heart I would do it again. If they want to crucify me for it, so be it." In the end the state gave the nurses stiff—but probated—sentences so that, in effect, the nurses could resume their duties at the hospice.

This factual account[1] reveals much about the United States and the rule of law, and it suggests themes that we shall articulate not only in this chapter but throughout much of the rest of the text: How should the individual respond when law and morality are not seen as synonymous? How much discretion do district attorneys have in determining whether to prosecute the violators of a given law, and how do they exercise this discretion? What options are available to judges and juries in determining what evidence to consider at a trial? What legal and purely personal factors affect their final verdict and, if appropriate, the punishment assessed?

We begin our discussion of the "Foundations of Law in the United States" with a look at the law itself. This is appropriate because without

law there would be no courts and no judges; there would be no political or judicial system through which disputes could be settled and decisions rendered. In this chapter we examine the sources of law in the United States, that is, the institutions and traditions that establish the rules of the legal game. We discuss the particular types of law that are used and define some of the basic legal terms. Likewise we shall explore the functions of law for society—what it enables us to avoid and accomplish as individuals and as a people that would be impossible without the existence of some commonly accepted rules. Finally we examine America's ambivalent tradition vis-à-vis the law, that is, how a nation founded on an *illegal* revolution and nurtured with a healthy tradition of civil disobedience can pride itself on being a land where respect for the law is ideally taught at every mother's knee. We also take note of the degree to which American society has become highly litigious and why this is significant for the study of the American judicial system.

Sources of Law in the United States

Where does law come from in the United States? At first the question seems a bit simpleminded. A typical response might be: "We get it from legislatures; that's what Congress and the state legislatures do." This answer is not wrong, but it is far from adequate—in fact, law comes from a large variety of sources in this country.

Constitutions

The U.S. Constitution is the primary source of law in the United States, as indeed it claims to be in Article VI: "This Constitution . . . 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." Thus none of the other types of law that we shall subsequently mention may stand if it is in conflict with the Constitution of the United States. Similarly, each state has its own separate constitution and all local laws must yield to its supremacy.

Acts of Legislative Bodies

Laws passed by Congress and by the various state legislatures constitute a sizable bulk of law in the United States. Statutes requiring us to pay income tax to Uncle Sam and state laws forbidding us from robbing a bank are both examples. But there are many other types of legislative bodies that also enact statutes and ordinances that regulate our lives as citizens. County commissioners (also known as county judges or boards of selectmen) act as legislative bodies for the various counties within the states. Likewise city councils serve in a legislative capacity when they pass

ordinances, fix property tax rates, establish building codes, and so on, at the municipal level. Then there are the thousands upon thousands of "special districts" throughout the country, each of which is headed by an elected or appointed body that acts in a legislative capacity. Examples of these would be school districts, fire prevention districts, water districts, and municipal utility districts.

Decisions of Quasi-Legislative and Quasi-Judicial Bodies

Sprinkled vertically and horizontally throughout the U.S. governmental structure are thousands of boards, agencies, commissions, departments, and so on, whose primary function is not to legislate or to adjudicate but that still may be called on to make rules or to render decisions that are semilegislative or semijudicial in character. The job of the U.S. Postal Service is obviously to deliver the mail, but sometimes it may be called on to act in a quasi-judicial capacity. For example, a local postmaster may refuse to deliver a piece of mail because he or she believes it to be pornographic in nature, for Congress has mandated that pornography may not be sent through the mails. The postmaster is acting in a semi- or quasi-judicial capacity in determining that a particular item is pornographic and hence not protected by the First Amendment.

The Securities and Exchange Commission is not basically a lawmaking body either, but when it determines that a particular company has run afoul of the securities laws or when it rules on a firm's qualification to be listed on the New York Stock Exchange, it becomes a source of law in the United States. That is, it makes rules and decisions that affect a person's or a company's behavior and for which there are penalties for noncompliance. Although decisions of agencies such as this may be appealed to or reviewed by the courts, they are binding unless and until they are overturned by a judicial entity.

A university's board of regents may also be a very real source of law for the students, faculty, and staff members covered by its jurisdiction. Such boards may set rules on such matters as which persons may lawfully enter the campus grounds, procedures to be followed before a staff member may be fired, or definitions of plagiarism. Violations of these rules or procedures carry with them penalties backed by the full force of the law, for such boards are themselves a source of law.

Orders and Rulings of Political Executives

We learn in our school history classes that legislatures make the law and executives enforce the law. That is essentially true, but it is also a fact that political executives have some lawmaking capacity. This lawmaking occurs whenever presidents, governors, mayors, or others are called upon to fill in

the details of legislation passed by legislative bodies, and sometimes when they promulgate orders purely in their executive capacity.

When Congress passes reciprocal trade agreement legislation, the goal is to encourage other countries to lower trade and tariff barriers to U.S.-produced goods, in exchange for which the United States will do the same. But there are so many thousands of goods, hundreds of countries, and countless degrees of setting up or lowering trade barriers. What to do? The customary practice is for Congress to set basic guidelines for the reciprocal lowering of trade barriers but also to allow the president to make the actual decisions about how much to regulate a given tariff on any given commodity for a particular country. These "executive orders" of the president are published regularly in the *Federal Register* and carry the full force of law. Likewise at the state level, when a legislature delegates to the governor the right to "fill in the details of legislation," the state executive uses what is termed "ordinance making power," which also is a type of lawmaking capacity.

Political executives may promulgate orders that, within certain narrow but important realms, constitute the law of the land. For example, in the wake of a natural disaster such as a flood or tornado, a mayor may declare an official state of emergency that empowers him or her to issue binding rules of behavior for a limited period of time. A curfew ordering persons to be off the streets at a given hour is an example of a "law" made by a municipal chief executive. Though limited and usually temporary, such orders are indeed law and violations invoke penalties.

Judicial Decisions

When we learned in school that legislatures make the law and executives enforce the law, we were told that judges are supposed to *interpret* the law. So they do, but as we shall see again and again throughout this text, judges in fact make law as they interpret it. And we must note that judicial decisions themselves constitute a body of law in the United States. All the thousands upon thousands of court decisions that have been handed down by federal and state judges for the past two centuries are part of the *corpus juris*—the body of law—of the United States.

Judicial decisions may be grounded in or surround a variety of entities: any of the above-mentioned sources of law, past decisions of other judges, or legal principles that have evolved over the centuries. (For example, one cannot bring a lawsuit on behalf of another person unless that person is one's minor child or ward.) Judicial decisions may also be grounded in what is called "the common law," that is, those written (and sometimes unwritten) legal traditions and principles that have served as the basis of court decisions and accepted human behavior for many centuries. For