



# Judicial Process In America

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# Preface

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 footnotes 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 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 refrain from doing. We reject the common assumption that only liberals make

public policy while 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. While noting Americans' great respect for the law, 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 of 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. This chapter describes 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 discusses 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 in 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 workload of state and federal tribunals. We believe that a full understanding of how judges affect our 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 segment 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 characteristic of 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 discusses 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 then 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. Thomas G. Walker, Emory University, and Wayne V. McIntosh, University of Maryland, provided detailed suggestions that added greatly to the scope and precision of the text. For any errors that remain, we assume responsibility.

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# Contents

Preface xi

## **1 Foundations of Law in the United States 1**

Sources of Law in the United States 1

Types of Law in the United States 4

Functions of Law 6

The United States and the Rule of Law 9

A Litigious Society 12

Summary 14

## **2 History, Function, and Organization of the Federal and State Judicial Systems 17**

The Historical Context 17

The U.S. Supreme Court 19

The U.S. Courts of Appeals 31

U.S. District Courts 40

Constitutional Courts and Legislative Courts 45

The Federal Courts in the American Political System 47

State Court Systems 49

State Court Organization 52

Summary 55

## **3 Administrative and Staff Support in the Judiciary 59**

The Judicial Administration Movement 59

Major Administrative Support Structures 63

Personnel Support 73

Summary 81

## **4 Lawyers, Litigants, and Interest Groups in the Judicial Process 85**

Lawyers and the Legal Profession 85

Litigants 99

Interest Groups in the Judicial Process 101

Summary 105

## **viii Contents**

- 5 Jurisdiction, Workload, and Policy-Making Boundaries of Federal and State Courts 109**
  - Federal Courts 109
  - Jurisdiction and Workload of State Courts 117
  - Jurisdiction and Legislative Politics 119
  - Judicial Self-Restraint 120
  - Summary 131
  
- 6 The Criminal Court Process 135**
  - The Nature and Substance of Crime 135
  - Categories of Crime 136
  - Elements of a Crime 140
  - Procedures Before a Criminal Trial 144
  - Procedures During a Criminal Trial 158
  - Procedures After a Criminal Trial 168
  - Summary 173
  
- 7 The Civil Court Process 177**
  - The Nature and Substance of Civil Law 177
  - The Main Categories of Civil Law 178
  - The Courts and Other Institutions Concerned with Civil Law 183
  - The Civil Trial Process 185
  - Summary 198
  
- 8 The Federal and State Judges 201**
  - Background Characteristics of Federal Judges 201
  - Formal and Informal Qualifications of Federal Judges 210
  - Qualifications and Backgrounds of State Judges 214
  - The Federal Selection Process and Its Participants 215
  - The Selection Process for State Judges 224
  - Policy Links Between the Citizenry, the President, and the Federal Judiciary 229
  - The Judicial Socialization Process 240
  - The Retirement and Removal of Judges 244
  - Summary 249
  
- 9 The Decision-Making Process 255**
  - The Legal Subculture 257
  - The Democratic Subculture 263
  - Summary 292

<b>10</b>	<b>Decision Making: The Special Case of Collegial Courts</b>	<b>297</b>
	Cue Theory	297
	Small-Group Analysis	300
	Attitude Theory and Bloc-Formation Analysis	315
	Fact Pattern Analysis	319
	Summary	321
<b>11</b>	<b>Implementation and Impact of Judicial Policies</b>	<b>327</b>
	The Impact of Upper-Court Decisions on Lower Courts	327
	Congressional Influences on the Implementation Process	335
	Executive Branch Influences on the Implementation Process	338
	Other Implementors	341
	The Impact of Judicial Policies	344
	Summary	350
<b>12</b>	<b>Policy Making by American Judges: An Attempt at Synthesis</b>	<b>355</b>
	The Nature of the Case or Issue	355
	The Values and Orientations of the Judges	358
	The Nature of the Judicial Decision-Making Process	361
	The Impact of Extraneous Influences	364
	Selected Bibliography	367
	Index	377

# 1 Foundations of Law in the United States

Law is an appropriate subject to begin this text with 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 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.

## 2 Judicial Process in America

### *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 of this. But there are many other types of legislative bodies that also enact statutes and ordinances that regulate our lives as citizens. Country 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 which 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 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 has lawmaking capacity.

Political executives may promulgate orders which 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

#### 4 Judicial Process in America

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 instance, if a couple lives together as husband and wife for a specified period of years, the common law may be invoked to have their union recognized as a legal marriage.

#### *Types of Law in the United States*

Now that we have examined the wellsprings of American law, it is appropriate to take a brief look at the vessels wherein such laws are contained, that is, to examine the formal types or categories of law in the United States. What follows are definitions or explanations of the primary kinds of law that we shall make reference to subsequently in this text. (Note that types of law are not necessarily mutually exclusive.)

##### *Statutory Law*

Whereas the common law has dealt traditionally with matters of a private character (such as the relations between individuals), statutory law is concerned more frequently with society as a whole. It is law that originates with specifically designated, authoritative lawmaking bodies such as legislatures, but it may also take in executive-administrative decrees, ordinances, treaties, and protocols, all of which are committed to paper. Statutes outlawing murder or burglary would be examples of statutory law.

##### *Civil Law and Criminal Law*

We shall have much more to say about these terms in Chapters 6 and 7, but suffice it to say here that the former deals with relations between individuals, such as ownership of private property. It also deals with corporations, admiralty matters, and contracts. Criminal law, on the other hand, pertains to offenses against the state itself—actions that may be directed against a person but that are deemed to be offensive to society as a whole. Crimes, such as drunken driving, armed robbery, and so on, are punishable by fines or imprisonment.

### ***Equity***

Equity is best understood when contrasted with law; the primary difference between the two terms is, as we shall see, in the remedy involved. Equity begins where the law ends. It takes the form of a judicial decree—not of an ordinary yes or no judgment. Equity leaves the judge reasonably free to order *preventive* measures—and under some circumstances even *remedial* ones. Such measures are in the form of special writs, such as injunctions or restraining orders, that are designed to afford a remedy not otherwise obtainable. For example, let's say you were the owner of an old cabin located in the center of town and that this structure was the first built in the community. You wish to preserve it because of its historic value, but the city decides to expand the adjacent street and thereby destroy the cabin. Your remedy at law is to ask the city for monetary compensation, but to you this is totally inadequate. The cabin has little intrinsic value, although as a historic object it is priceless. Thus you may wish to ask a judge to issue a writ in equity which might order the city to move the cabin to another site or perhaps even to order the city to reconsider its plan to widen the street.

### ***Private Law***

Private law governs the relationship between private citizens or persons, that is, it regulates the relations of individuals with each other. Much civil law is obviously in this category, for it deals with subjects such as contracts between individuals and corporations and statutes pertaining to marriage and divorce.

### ***Public Law***

In contrast to private law, public law is a branch or department of law very much concerned with the state in its political or sovereign capacities—including the important two subheadings of administrative law and constitutional law. Public law deals with the regulation and enforcement of rights in those cases where the state is viewed as the subject of the right or the object of the duty, including criminal law and procedures. Public law applies and affects the entire people of a nation that adopts it. Thus the vast majority of legislation enacted by Congress is in the category of public law; indeed, when it is codified, it is preceded by the term "Public Law" and a number. Social welfare legislation, defense appropriations, aid to farmers, and the control of subversive activities are all illustrations of the vast and diversified content of public law.

### ***Administrative Law***

Administrative law consists of those rules and regulations that are promulgated by the various administrative agencies that have been

## 6 Judicial Process in America

empowered to deal with the operation of government under the delegated rule-making authority of a legislative body. This branch of law prescribes in detail the activities of the agencies involved, such as those concerned with the collection of revenue, regulation of competitive practices, public health, and the armed forces.

### *Constitutional Law*

Basically, constitutional law prescribes the plan and method under which the public business of the political organ, known as the state, is conducted. In the United States, with its written constitution, constitutional law consists of the application of fundamental principles of law based on that document, as finally interpreted by the Supreme Court. For example, in 1952 the Supreme Court ruled that nothing inherent in Article II of the Constitution gave the president the right to seize and run the steel mills—even in time of emergency—without specific congressional authorization.<sup>1</sup>

### *Functions of Law*

What is the function of law in the United States (or in any country, for that matter, because the function of law is more or less universal)? That is, what dire things would occur in this land were there no law or, conversely, what positive things can we do as a people through law that would be impossible without it?

Some persons in history have believed that there should be no government (and hence no laws) at all. Such individuals, called anarchists, have argued that governments by nature make rules and laws and that such restrictions impinge on personal freedom. In the past anarchists have used violence to overthrow governments and have assassinated heads of state. Such attempts to abolish law and authority have resulted in much destruction of life and property and temporary reigns of terror, but they have never brought about the elimination of law or government. Instead of increasing personal freedom, a state of anarchy virtually destroys personal freedom for all but the most powerful and savage of individuals. Few would deny that in today's world if people are to live together amicably, law must be an essential part of life. As our population expands and modern transportation and communication link us all together, every action that each of us takes affects another either directly or indirectly and may even cause harm. When the inevitable conflict results, it must be resolved peaceably using a rule of law. Otherwise there is just disorder, death, and chaos. We must have some common set of rules that we agree to live by—a rule of law and order.

But what kind of law and order? There is truth to the anarchist's argument that laws restrict personal freedom. If there are too many rules,

laws, and restrictions, totalitarianism results. That may be just about as bad as a state of anarchy. The trick is to strike a balance so that the positive things that law can do for us are not strangled by the tyranny of the “law and order” offered by the totalitarian state.

Assuming, then, that we reject both anarchy and totalitarianism, what are the positive functions of law when it exists in a reasonable degree? Legal theorists tell us that there are several.

### ***Resolving Disputes***

No matter how benign and loving people can be at times, altercations and disagreements are inevitable. How disputes are resolved between quarreling individuals, corporations, or governmental entities tells us much about the level and quality of the rule of law in a society. Without an orderly, peaceful process for dispute resolution there is either chaos or a climate in which those with the strongest fists or the largest gang of thugs prevail.

Let us say that big, rugged New England fisherman Cabot Quincy suspects that his frail neighbor, Angus Shortfellow, has been tampering with the lobster pots that lie in the waters along Cabot’s jetty. Cabot has the strong desire and the physical capacity to “thrash that little wimp within an inch of his life.” But what will happen to Shortfellow’s wife and children if their breadwinner and father is beaten near to death? And indeed what might happen twenty years hence when Cabot is ailing and elderly and Shortfellow’s now grown son decides to take revenge on the once powerful man who pummeled his father? Better that the original matter be taken before a justice of the peace and settled quietly by rules of law on which all agree.

### ***Providing Order and Predictability in Society***

We live in a chaotic and uncertain world. People win lotteries while stock markets collapse; more and more persons are living to the age of a hundred while babies die of AIDS; some ranchers manage to enlarge their herds just at the time of a beef shortage while corn farmers suffer from the worst drought in decades. Laws cannot avert most natural disasters, nor can they prevent random episodes of ill fortune, but they can create an environment in which people can work and invest and pursue pleasure with a reasonable expectation that their activity is worth the effort. Without an orderly environment based on and backed by law the normal activities of life would be lacerated with chaos.

When we drive a car, for example, there must be rules to tell us which side of the road to drive on, how fast we can safely go, and when to slow down and stop. Without rules of the road there would be horrible traffic jams and terrible accidents because no driver would know what to expect

## 8 Judicial Process in America

from the others. Or, for example, without a climate of law and order no parent would have the incentive to save for a child's college education. The knowledge that the bank will not simply close and that one's saving account will not be arbitrarily confiscated by the government or by some powerful party gives the parent an environment in which to save. Law and the predictability it provides cannot guarantee us a totally safe and predictable world, but it can create a climate in which people believe it is worthwhile to produce, to venture forth, and to live for the morrow.

### *Protecting Individuals and Property*

Even libertarians, who take a very narrow view of the role of government, will readily acknowledge that the state must protect citizens from the outlaw who would inflict bodily harm or who would steal or destroy their worldly goods. Because of the importance to us of the safety of our persons and our property, many laws on the books deal with protection and security. Not only are laws in the criminal code intended to punish those who steal and do bodily harm, but civil statutes permit many crime victims to sue for monetary damages. The law has created police and sheriffs' departments, district attorneys' offices, courts, jails, and death chambers to deter and punish the criminal and to help people feel secure. This is not to say that there is no crime; everyone knows differently. But without a system of laws, crime would be much more prevalent and the fear of it would be much more paralyzing. Unless we could afford to hire our own bodyguards and security teams we would be in constant anxiety of loss of life and limb and property. However imperfect our system of law prevention and enforcement may be, it is certainly better than none.

### *Providing for the General Welfare*

Laws and the institutions and programs they establish enable us to do corporately what would be impossible, or at least prohibitive, to do as individuals. Providing for the common defense, educating young people, putting out forest fires, controlling pollution, and caring for the sick and aged are all examples of activities that we could do only feebly, if at all, acting alone but that we can do efficiently and effectively as a society. As citizens we may disagree about which endeavors should be undertaken through the government by law. Some may believe, for example, that the aged should be cared for by family members or by private charity; others see such care as a corporate responsibility. But while we can disagree about the precise activities that the law should require of government, few would deny that there are many significant and beneficial results that are achieved through corporate endeavors. After all, the foundation of our legal system, the U.S. Constitution, was ordained to "establish Justice, insure domestic