CORE® National Association for Court Management

Curriculum Design

Purposes and Responsibilities

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Use of Curriculum Design

Taken together, the curriculum designs in this series provide an overarching plan for the education of court managers; this overarching plan constitutes a curriculum. Individually, each curriculum design and associated information provide faculty with resources and guidance for developing courses for court managers.

The designs are based on the NACM Core®. Each of the curriculum designs, based on the competency areas, may be used in its entirety or in segments to meet the needs of the individual circumstance or situation, the particular audience, and time constraints, among many other contextual factors.

Each curriculum design includes a series of learning objectives and educational content to support those learning objectives. Associated information for each curriculum design includes: (1) faculty resources, (2) participant activities, and (3) a bibliography. Each faculty resource and participant activity includes information explaining its use. Also included in each design is a section entitled "Special Notes to Faculty," which provides important information to assist faculty in effectively preparing to design and deliver a course, and a section entitled "Target Audience," which provides guidance on which audiences are most appropriate for the curriculum design.

Participant Activities
Participant activities have been designed to measure whether the learning objectives have been achieved. Participant activities include many types of group and individual interaction. Information on participant activities includes how to use, direct, and manage each activity. Instructions may be modified for the audience and setting, but the highest goal is to integrate each activity into the learning process and the content of the course. Faculty should incorporate additional activities to ensure that participants remain actively engaged throughout the course. Additional activities may include asking participants questions about the content, engaging them in sharing their experiences with the content, encouraging them to ask questions, and more.

Faculty Resources
Faculty Resources provide written information and/or graphics that support certain content and may also be used as handouts for associated topics in the **Educational Content**. Faculty Resources are a combination of resources referenced within the Educational Content and re-creations of those images embedded in the Educational Content as sample images or PowerPoint® slides. They may be used in any course, but their applicability and use need to be determined by faculty, based on the topics, length of the course, audience, and other factors. Faculty Resources often include examples of documentation and other data that are time-based. Faculty members are encouraged to update time-based material as well as use material that is specific to the presentation and/or audience. As with participant activities, faculty are encouraged to provide additional materials based on the needs of the participants.

Bibliography
While a bibliography may be viewed as optional by faculty, it is often an important adult learning tool that fosters reflection and offers follow up research and study.

Needs Assessment

A needs assessment gathers information about the participants' proficiency on the topic of the session. Without a needs assessment, faculty may provide content participants cannot or will not use, or already know, or that fails to satisfy their expectations.

Assessing needs enables faculty to choose and deliver content with much greater accuracy.

Conducting a needs assessment before your presentation may include a written survey or focus group discussion; and/or at the beginning of your presentation, faculty may conduct an informal question and answer exercise or a short pre-test.

Using surveys or focus groups in advance of a course is preferred as it provides faculty the opportunity to adapt and adjust the presentation to the audience in advance of the actual course. However, it is also advisable to use some time at the beginning of your presentation to seek information about your audience.

Whether faculty are able to conduct a needs assessment prior to the day of the session or not, the goal is to determine the essential knowledge, skills, and abilities the court managers who will be attending the session must have to perform their duties competently. Two key areas to explore are as follows:

- What level of knowledge, skills, and abilities do the participants currently have about the topic?
- What gaps in their knowledge would they like to close?

Questions enable the faculty member to make necessary adjustments to meet learning needs. If faculty find out that participants are much more knowledgeable about the topic than they thought, faculty can adapt the presentation to a higher-level discussion. If they are less knowledgeable, faculty can deliver a more basic presentation.

NACM Core® Reference

Competency: Purposes and Responsibilities

The most fundamental aspect of court leadership is an understanding of the purposes and responsibilities of the court and providing the leadership to ensure that these continually guide court operations, policies, and procedures. These fundamental purposes and responsibilities of courts apply regardless of the specific jurisdiction in which a court functions and provide both the philosophical and legal framework for the daily work of all court leaders. They also help differentiate between the roles of court leaders and the roles of professionals in other public sector positions.

Learning Objectives

The following learning objectives are designed for a comprehensive session that will require a minimum of 15 contact hours (see ***Special Notes to Faculty*** below). Faculty, who are developing curriculum for basic or shorter courses may simplify or reduce the number of learning objectives.

As a result of this education, participants will be able to:

1. Describe why courts exist and the major purposes that courts carry out.
2. Define the values, foundation, and historical perspectives underlying the American court system.
3. Define key concepts and terminology, especially the judicial system's dedication to the rule of law, equal protection, and due process as related to the purposes of courts.
4. Summarize the role of courts as an independent third branch of government, an institution, and an organization; and how its role impacts and complements the other two branches of government.
5. Identify trends in court reform and pressures forcing the courts to change and expand.

6. Apply the values and goals of the American judicial system to specific court administrative tasks and responsibilities including dispute resolution.
7. Explore quality court management concepts, accountability measures, and efficient processes in executing the role of courts in society.
8. Articulate the practical impact and relevance of the purposes and responsibilities of courts to their jurisdiction, day-to-day court operations, and their job.

Target Audience

This curriculum design is suitable for a broad audience including elected and appointed court managers and staff with court-wide and departmental responsibilities as well as leadership judges from every jurisdiction and type of court. The best class composition is a mix of court managers and judges from similar jurisdictions and types of courts.

Special Notes to Faculty

The full eight-section content of the curriculum design is intended to be presented at no less than a 2.5 day workshop. Faculty that seek to adapt the curriculum design to shorter formats or an overview may reference the special notes below.

The following examples of course types and lengths are not mutually exclusive and do not preclude creative approaches to session lengths or schedules.

Conference Session
Conference sessions are often 60-90 minutes in length. Faculty might use part of a short session to summarize Sections 1 and 2 as a way of introducing the content of the full course.

Alternatively, faculty might seek to highlight a current event that challenges our assumptions about the court and link it into a presentation or discussion about court purposes, using a targeted section of the curriculum.

1.5 Day Session
A 1.5 day session can cover about two-thirds of the curriculum. It is essential that each faculty determine the most applicable and relevant topics for the court, organization, or other audience. It is strongly recommended that at minimum, the following sections form the foundation of purposes and responsibilities training and instruction, with other sections used and adapted as needed.

Section 1 – Purposes of Courts

Section 2 – Sources of Liberty and Justice for All

Section 5 – Court Reform and Accountability

Section 6 – Management and Leadership in the Nation's Courts

2.5 to 4 Day Session
The entire curriculum is best adapted to a 2.5 day session or longer. A 2.5 day training session will demand some selectivity of topics and activities. Many of the participant activities require 30-45 minutes, and a few may take up to 90 minutes to complete successfully.

Educational Content

Overview

While the Purposes and Responsibilities competency requires knowledge of and reflection upon theoretic concepts, their history, and development over time, is practical in nature. The Purposes and Responsibilities competency gives meaning to court management and the other twelve competencies in the Core. All other twelve competencies are defined by Purpose. Purposes and Responsibilities guide courts on how to achieve their overarching mission of the administration of a fair and accessible system of justice.

The need for an impartial and independent judiciary is rooted in the human condition. Neither individuals, corporations, their officers, nor the government always do the right, or even legally correct, thing. Even when they play by the rules, or honestly think they do, there are conflicts and disagreements about legal obligations. When cases are moved from filing to disposition in such a way to ensure, among other court purposes, individual justice in individual cases and the appearance of individual justice in individual cases – consistency and predictability in the application of law and procedural rules – courts resolve ever present private and public conflicts.

Pushes and pulls flow from the requirements of the adversarial process balanced against the strength of informal, consensual dispute resolution. Courts reinforce the authority of the state and the legitimate use of force and protect individuals against the arbitrary use of government power. The tension between individual freedom and social order is perpetual. First-rate court leaders understand there is almost never one truth or one best way to proceed. They thrive on ambiguity and the need to preserve rights and freedoms. Accomplished court administration is a delicate marriage of incompatibles, a fusion of contradictions.

Courts are an independent branch of government in an interdependent world. In the words of Madison in Federalist 10, "If men were angels, no government would be necessary." (Madison, 1787) And, in a limited government of laws rather than men, Hamilton, in Federalist 78, agrees with Montesquieu: "there is no liberty if the power of judging be not separated from the legislative and executive powers." (Hamilton, 1788) Court leaders respect the other branches and their leaders because, in our compound republic, each of the branches is necessary in and of itself and acts as a check and balance on the other branches and their leaders.

The purposes and responsibilities of courts should never be confused with efficiency or even the constitutional means of the separation of powers, judicial independence, and the inherent powers of the courts. Courts exist to do justice, to guarantee liberty, to enhance social order, to resolve disputes, to maintain rule of law, to provide for equal protection, and to ensure due process of law. They exist so that the equality of individuals and the government is reality rather than empty rhetoric.

Efficient and even effective judicial administration is not an end unto itself. Courts do not exist so that court leaders, either judicial or civilian, can manage them. Rather, courts must be managed well so that judges and others acting in their stead and in their shadows can do justice.

Effective court leaders have a passion for justice and courts as institutions. Whether or not they are formally trained in the law, competent court leaders understand the legal, constitutional, and historical foundation of the American judiciary. They know that absent purpose, court management is merely a hollow concept. Court leaders take risks in the interest of justice and the courts as institutions.

Competent court managers cooperate with others, but they are tenacious and firm in their personal service to justice under law. They recognize as well that purposes, separation of powers, independence, and inherent powers demand courts that are efficient and accountable to others, both inside and outside the government. They blend purpose into each and every judicial process, office, activity, and function.

Section 1 – Purposes of Courts

Learning Objectives

As a result of this section, participants will be able to:

1. Describe why courts exist and the major purposes that courts carry out

***"Courts and only courts can definitively resolve society's inevitable conflicts."* (Core Competencies, 2003)**

Why Do Courts Exist?

Any discussion of the purposes of courts must begin with the threshold question of why do courts exist? Courts make decisions that touch the lives of everyone. Yet when asked about how the courts are structured and operate, Americans often cannot answer the question. Further, a majority of Americans cannot name the Chief Justice of the United States compared to their ability to identify on-air judicial personalities.

Courts are continually evolving. The past ten years has seen a tremendous transformation. The advent of problem-solving and therapeutic courts, the introduction of mandatory sentencing and new evidence-based sentencing have all impacted a changing court environment. Still, courts must always be rooted in the core mission or purposes for their existence. This section will explain those purposes and responsibilities.

Section 1 is structured through a series of four activities with one learning objective. Guidelines for conducting this activity are in the Participant Activities, following Educational Content.

Activity 1.1 Opening Questions (see Participant Activities)

Before beginning this section, participants should be asked two key questions:

Question 1: *What is my current understanding of the purposes and responsibilities of courts and its practical relevance to my day-to-day court duties?*

Question 2: *How important is it for me to understand purposes and responsibilities of courts as related to my job and job performance?*

Both of these questions should be debriefed and notes made on key responses raised by the group.

Activity 1.2 Needs Assessment – Why Courts Exist (see Participant Activities)

Another key activity for Section 1 is to administer the needs assessment for the purposes and responsibilities core competency as to why courts exist. This can be done as a pre-workshop assignment or in class depending on the time available. This activity can also be debriefed with key concepts noted.

Activity 1.3 Brainstorming Purposes (see Participant Activities)

The session should now move to Activity 1.3 that "explores the threshold question" identified earlier. Groups should be assigned for exploration the question, *why do courts exist?* The instructor should stress that each group should come up with 3-4 purposes as to what the key mission of a court is. If the course is being conducted in a public building, you may want to recruit two volunteers to leave the class area and interview at least two individuals, each trying to solicit answers to this question from the general public. It is best to allow 15-20 minutes for this discussion and activity. The instructor(s) should debrief the exercise and make a general list of purposes. Be sure to note duplicate purposes raised in multiple groups.

Once the list is constructed, the video of Ernest C. Friesen describing his forty plus years of seminal research regarding purposes of courts and caseflow management should be shown to the group. The video was prepared under the auspices of the Bureau of Justice Assistance (BJA) and is 19 minutes in length. The grantee was American University School of Public Affairs (Grant 2010-DB-BX-KO37). This video is available on YouTube https://m.youtube.com/watch?v=saHb06PNadQ. (American University, 2014)

Following the video, the instructor should review the key concepts stressed in the video.

Purpose of Courts

1. Do individual justice in individual cases
2. Appear to do justice in individual cases
3. Provide a final resolution of legal disputes
4. Protect individuals from the arbitrary use of government power
5. Make a formal record of legal status
6. Deter criminal behavior
7. Rehabilitate persons convicted of crimes
8. Separate persons convicted of crime from society

1.1 Do Individual Justice in Individual Cases

The word "individual" is important in this definition. Judges do not do justice in the abstract. They decide the case that is in front of them. They do that by applying the law to the facts. They consider all of the evidence and they study the law, if they do not already know it, and then make a decision. In jury cases, judges instruct the jury about the law and they take the jury's decision about the facts. In short, justice is applying the law to the facts in each individual case, fulfilling the promise that everyone is entitled to their day in court.

The concept of "case in controversy" is worth examining here. Courts must focus on disputes in front of them. The legal definition of controversy may be found in Article III, Section 2 of the Constitution. It describes the structure by which actual conflicting claims of individuals may be brought before the court for resolution, if the court can exercise its jurisdiction to provide relief. A justiciable controversy therefore must consist of an actual individual dispute between parties over their legal rights. That dispute or conflict must remain in effect at the time the case is presented so

that it is a proper matter for judicial determination. A dispute between parties that has already been resolved is moot as it is no longer in controversy and no longer represents a real conflict. It remains key that courts resolve matters in controversy quickly. Delay is the enemy of justice in that it impacts the court's ability to find out what really happened.

1.2 Appear to do Justice in Individual Cases

Justice must not only be done but it must be seen to be done. If you think about it, the law works in everyday life, not because judges decide what it means over and over again but because people believe that if they were to go to court they can predict the outcome. Predictable court rulings are the heart of a functioning legal system.

The appearance of justice has a purpose distinct from justice itself. The appearance of justice is the heart of a government of law. The predictability of the consistent application of laws to similar cases is the basis of order. People are able to obey the laws when they perceive that the courts will consistently apply them. Justice Holmes' observation that the law is what courts do, conveys succinctly the significance of courts finding the facts and visibly applying the law. When decisions are perceived as just, people have a basis for ordering their activity within the law.

1.3 Provide a Final Resolution of Legal Disputes

There are two basic values in our American legal system: justice and finality. The doctrine of finality holds that matters will not be litigated forever. People must be allowed to get on with their lives. Many know these ideas as legal phrases, res judicata and collateral estoppel. Res judicata is the legal concept that a final judgment rendered by a court of competent jurisdiction is conclusive. Collateral estoppel holds that when an issue of ultimate facts has been decided by valid judgment it cannot be re-litigated. Everyone recognizes statutes of limitations. The doctrine is that once a matter has been determined or time has passed since the dispute arose, the courts will not hear it.

When you really think about it, the doctrine of finality is in conflict with justice. It assumes that even if facts are uncovered that would change the outcome of a case, the judgment should stand. Many legal scholars have advocated for this kind of finality. The alternative, of course, is endless appeals.

Providing an official forum for the resolution of disputes is much more profound than finality. An orderly society depends on having an official and binding forum for the resolution of legal disputes. Courts fulfill the government's role of providing peaceful conflict resolution.

1.4 Protect Individuals from the Arbitrary Use of Government Power

The framers of the Constitution of the United States deemed the existence of an independent judiciary to be the safeguard against the excesses of the legislative and executive branches of government. A government of limited delegation of powers was inconceivable to them without an independent judicial branch. Of all the court purposes, this protective function may be the one most clearly damaged by court delay. A person held in custody for long periods of time awaiting trial is denied due process of law. When a person's property is taken by the government and that person remains uncompensated for long periods of time, he or she suffers the same loss by court delay as by the taking itself. In effect, delay in determining a government abuse prolongs the abuse.

This purpose may be unique to governments, such as the United States, which operate under constitutionally-restricted powers. The role of the judiciary in such governments is to judge the appropriate use of government power and protect individuals from its abuse. Familiar examples pertain to the abuse of executive power. Police may not search without satisfying a judicial officer that probable cause exists that the person to be searched may have committed a crime. Courts decide reasonable bail pending a disposition of an arrested person and ensure that a person is held only after a showing of probable cause. This purpose extends far beyond the protection of individual liberty to the protection of basic rights as well. Legislatures which exceed their powers make unenforceable laws. Agencies which exceed the powers granted to them may have their rulings overruled by the courts.

1.5 Make a Formal Record of Legal Status

A significant portion of every court's budget is spent making official records. Many cases are not disputed. Uncontested divorces constitute more than half of all divorces. Collection cases are filed to get an enforceable judgment that outlasts the statute of limitations. A majority of all civil cases are resolved without a trial, approximately ninety-five percent of all criminal arrests do not result in a trial. The cost of reporting hearings and trials is about making a record. Trusts and estates are administered in the court to make a record and are seldom disputed.

The accuracy of these records is critical to the continuing relations of the parties and their property rights. Ultimately judges are responsible to see that this documentation is accurate, available, and protected. A failure of integrity and accuracy in the record can be as destructive to peoples' rights as a bad judgment in a dispute.

1.6 Deter Criminal Behavior

The 6th, 7th, and 8th purposes all have to do with the work of the courts and judicial decisions in criminal cases.

The courts act as the public forum for the imposition of sentence and punishment when persons are convicted of a crime. Deterrence of crime is the product of the public's perception that crimes are regularly and swiftly punished. A prolonged period of time between public awareness of the commission of the crime and its punishment reduces the effectiveness of using public information as a deterrent to criminal behavior. There can be little doubt that people avoid crimes they perceive as being quickly punished. Anyone who has put down a cell phone in their car when approaching a police car or officer is deterred by the high probability of speedy apprehension and certain conviction. Courts that sentence criminals months and years after the offense convince the public that there is little relation between the crime and the punishment. "Justice delayed is justice denied." (William E. Gladstone, British Statesman)

1.7 Rehabilitate Persons Convicted of Crimes

The sentencing of a convicted person has more than one purpose. Hopefully it will bring about a change in the person's behavior. The sentence or, more appropriately for rehabilitation purposes, the program imposed on the criminal, is intended to return him to society as a law-abiding person.

Delay in establishing the program frustrates its purpose. The apprehension of the criminal is a serious and impactful event. Delay in getting the convicted person into a rehabilitation program or on probation makes the program less effective.

1.8 Separate Persons Convicted of Crimes from Society

When all else fails, courts are responsible for ordering convicted criminals to be separated from society to protect society from their behavior. Research shows that the longer persons wait on bail to have their sentence imposed, the more crimes they are likely to commit. (Pretrial Justice, 2009, 17) Further, the courts' practice of running sentences concurrently may encourage additional criminal behavior. There can be little doubt that delays in the incarceration of serious offenders increases the amount of crime committed.

1.9 Summary

The need for an impartial and independent judiciary is rooted in the human condition. Life is not, or does not always, seem to be fair. Neither individuals, corporations, their officers, nor the government always do the right, or even the legally correct, thing. Even when they play by the rules, or honestly think they do, there are conflicts and disagreements about legal obligations, rights, and wrongs. When cases are moved from filing to disposition in such a way to ensure, among other court purposes, individual justice in individual cases and the appearance of individual justice in individual cases – consistency and predictability in the application of law and procedural rules – courts resolve ever present private and public conflicts.

Only the judiciary can definitively determine who is to prevail in the inevitable conflicts that arise between individuals; between government and the governed, including those accused by the state of violating the law; between individuals and corporations; and between organizations, both public and private. The atmosphere surrounding courts and court events is formal and peculiar, because the courts are unique. They resolve disputes by applying the law to the facts of particular cases independently and impartially. When the law is applied to the facts in courts, every party has the absolute right to an arbiter who is independent of the parties to that case and their advocates.

Court processes must reflect established court purposes such as individual justice in individual cases, the appearance of individual justice in individual cases, provision of a forum for the resolution of disputes, the protection of individuals against the arbitrary use of government power, and the making of a record of legal status. Individual cases must receive individual attention. The law must be correctly applied to the facts. Regardless of economic or other status, there must be equal access. Everyone who comes to and before the court must be treated respectfully, fairly, and equally. Case processing and the application of law to the facts in individual cases must be consistent and predictable.

Activity 1.4 Concluding Questions (see Participant Activities)

1. Think of a person with whom you have worked with that exemplified the purpose of courts. What was it about them? (Point to be made here is that the courts are human creations that require the very best of their leaders who by their very actions can do and teach others what courts are at their very best.)

2. How does what you do (the position you were hired for) connect with the purposes of courts?

Section 2 – Sources of Liberty and Justice for All

Learning Objectives

As a result of this section, participants will be able to:

2. Define the values, foundation, and historical perspectives underlying the American court system.

***"Don't interfere with anything in the Constitution that must be maintained. For it is the only safeguard of our liberties."* -Abraham Lincoln**

To help courts deliver on the promise of rule of law, equal protection, and due process participants must know the theory, history of the common law, and concepts of justice delivery as well as their practical implications.

2.1 Magna Carta

One of the most important moments in the legal history of the Western world is the sealing of the Magna Carta on the fields of Runnymede in 1215. That moment has been captured in drawings and paintings, on monuments, and is even referenced in the tree depicted within the National Center for State Courts logo. The Magna Carta is one of the strongest early influences on the evolution of the U.S. Constitution and constitutional law.

Trial by jury – Article 39 of the Magna Carta provides that a free man cannot be deprived of life, liberty, or property "except by lawful judgment of his equals or by the law of the land." The idea of a verdict rendered by one's equals (or peers) is evident today in the constitutional right of every U.S. citizen charged with a serious crime to have a trial by jury. (Seventh Amendment to the U.S. Constitution).

Liberty to travel – The Magna Carta also provides for the basic right of free men to travel in and out of the kingdom. In a 1958 case, *Kent v. Dulles*, the U.S. Supreme Court cited the Magna Carta to demonstrate that the ancient roots of the right to travel is a part of the 'liberty' of which a citizen cannot be deprived without the due process of law set forth in the Fifth Amendment.

Declaration of human rights – Because the Magna Carta included a recitation of certain basic rights to be accorded all free men, it has over the years become shorthand for any declaration of human rights. For this reason, in introducing the Universal Declaration of Human Rights to the United Nations, Eleanor Roosevelt referred to it as a Magna Carta for all mankind.

The Magna Carta provides guarantees against arbitrarily denying "free men" of their life, liberty, or property without legal process. This basic, but important, principle is the foundation of the U.S. Constitution's guarantees of the right to due process, a speedy trial, trial by jury, and representation by counsel. It is also the basis of constitutional protections against unreasonable searches and seizures, excessive fines, and cruel and unusual punishment.

Article 40 of the Magna Carta is often frequently cited by legal historians: "To no one will we sell, to no one will we refuse or delay right or justice."

Activity 2.1 Magna Carta Video and Debrief (see Participant Activities)

This would be a good time (see Activity 2.1) to show one of the following two videos available on YouTube regarding the Magna Carta: Mr. Zoller's Podcast: Magna Carta 8:00 minutes https://www.youtube.com/watch?v=wUVnpe8uffs (Zoller, 2009) or 800 Years of Magna Carta 4:10 minutes https://www.youtube.com/watch?v=RQ7vUkbtlQA (British Library, 2015)

1) The Magna Carta is often credited for establishing the rule of law versus the rule of man. What is meant by this statement?

2) The Magna Carta only lasted 12 weeks before being repealed. Yet it has had a profound impact on U.S. Constitutional development. What are some of the constitutional rights and protections that have their basis in the Magna Carta?

2.2 Common Law

The concept of common law began centuries ago in England when judges rode the circuit. Decisions were shared in a type of oral history. Because of the problems inherent in this type of verbal tradition, court clerks were employed to write decisions down. Where no statute or constitutional provision controls, both federal and state courts must look to the common law, or case law – a collection of judicial decisions, customs and general principles that have developed over time. Case law has continued to develop and expand over time, particularly in civil cases where legislatures have not enacted legislation to cover every contingency. Oliver Wendell Holmes Jr. published a book entitled, "The Common Law." Justice Holmes said the law is what courts do. His thesis was that law was subject to an evolutionary framework and methodology. (Holmes, 1991)

2.3 Declaration of Independence

No historical document gives more emphasis to the concept of natural law than the Declaration of Independence. Natural law is the unwritten body of universal moral principles that underlie the ethical and legal norms by which human conduct is sometimes evaluated and governed. The right to defend ourselves and our property are examples of these principles. Natural law is often contrasted with positive law, which consists of the written rules and regulations enacted by government. The term natural law is derived from the Roman term *jus naturale*. This document catalogued a series of grievances against British Colonial Policy, appealing for rights and liberties granted under the English Constitution and the common law. Among the most notable grievances the document charged that: "He has refused his assent to laws, the most wholesome and necessary for the public good." (US Constitution, 1791)

Equality – One of the first principles articulated in the Declaration of Independence is that of equality. The Declaration asserts that "we hold these truths to be self-evident, that all men are created equal." The rule of equality is tied to the creation of mankind by God. It is a legal fact acknowledged to be "self-evident." The Declaration is a legal instrument. It is intended as a legal object and speaks of equality in a legal sense. The declaration asserts that mankind is created and

that as far as the law is concerned, mankind is created equally human by God. (Perry and Cooper, 1960, 311).

There are at least two corollaries to this proposition. The first is that all human beings are endowed with the right to enjoy equal legal rights, legal opportunity and legal protection. The second corollary of the rule of legal equality is that it neither mandates nor permits the civil government to ensure equal social position, economic well-being, or political power. The Declaration recognizes that "all men are created equal." (Declaration of Independence, 1776) It means that the law must guarantee the right of an individual to participate on an equal basis with other individuals in achieving the desired social economic condition or political strength. This in short is the rule of legal equality.

Unalienable rights – The Declaration of Independence restates an additional principle of the law of nature. It declares that all men are "endowed by their Creator with certain unalienable rights that among these are life, liberty, and the pursuit of happiness…" Unalienable (inalienable) means undeniable or inherent. Unalienable rights are incapable of being lost or sold. Unalienable rights are retained despite government decrees to the contrary because government does not grant them in the first case. Moreover, no future generation may be disenfranchised of any unalienable right by the present generation. The protection of unalienable rights is common in many state constitutions and the subject of countless court cases.

2.4 The Federalist Papers

The Federalist Papers are a treatise on free government. It is an outstanding American contribution to the literature on constitutional democracy and federalism. It is, by far, the most authoritative text concerning the interpretation of the American Constitution and an insight into the framers' intent.

Five basic themes can be discerned from the words of Hamilton, Madison, Montesquieu, and Jay, including federalism; checks and balances; separated powers; pluralism; and representation. Although they deal with different parts of the government, these themes are fairly consistent throughout the papers. Much has been written concerning the dual nature of the Federalist Papers, because they were written by multiple authors in a short amount of time. It is true, Madison later became the great state rights defender, while Hamilton was his principle opponent; but for the most part these essays are coherent, showing all sides of the proposed constitution.

Essay #10, the first of Madison's contributions to the series, developed the theme that a well-constructed union would break and control the violence of faction, a "dangerous vice" in popular government. (Madison, 1787) In Federalist No. 51, Madison asserts that "if men were angels, no government would be necessary." (Madison, 1788)

The inference to which we are brought is that the causes of faction cannot be removed; and that relief is only to be sought as a means of controlling its effects.

Separation of powers – Such effects could be better controlled in a large society under a representative form of government than in a small society under a popular form of government. The proposed constitution would check the power of factions by balancing one against the other. Factious leaders might "kindle a flame" in one state, but would be unable to spread a general conflagration throughout the states.

- Essay 51 asserts that the only way of assuring the separation of legislative, executive, and judicial powers was to contrive such an inner structure of government that the departments might, "by their mutual relations, be the means of keeping each other in their proper places."

- Each department should have a will of its own, and its members should have no "agency" in appointing members of the others. Those administering each department should have the constitutional means and "personal motives to resist encroachments of the others." Madison asserted, "A contriving… internal structure of government is… essential to the preservation of liberty."

- The proposed Constitution did just that – by so dividing and arranging the several offices that "each may be a check on the other; that the private interest of every individual, may be a sentinel over the public rights."

- Essay #78 – A first important consideration was the manner of appointing federal judges, and the length of their tenure in office. They should be appointed in the same way as other federal officers, which had been discussed before. As to tenure, the Constitution proposed that they should hold office "during good behavior," a provision to be found in the constitutions of almost all the states. (Hamilton, 1788) As experience had proved, there was no better way of securing a steady, upright, and impartial administration of the law. To perform its functions well, the judiciary had to remain "truly distinct" from both the legislative and executive branches of the government, and act as a check on both. "There is no liberty unless the power of judging be not separate from the legislative and executive power." (Montesquieu).

- Essay #80 – As to the jurisdiction of the federal courts, they should have the authority to overrule state laws contravening the Constitution. They should have the power to enforce uniformity in the interpretation of national laws. They should have jurisdiction in all cases involving citizens of other nations. And most important, in assuring domestic order and tranquility, federal courts should have jurisdiction in conflicts between the states, such as in boundary disputes.

- Essay #81 – Under the proposed constitution, judicial power was to be vested "in one supreme court, and in such inferior courts as the congress may from time to time obtain and establish." (Hamilton, 1788)

2.5 The U.S. Constitution

The purpose of all government is expressed in the preamble to the Constitution: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do obtain and establish this Constitution for the United States of America."

The Constitution is the basic and supreme law of the United States. It prescribes the structure of the U.S. Government, provides the legal foundation on which all its actions must rest, and enumerates and guarantees the rights due all its citizens. The Constitution is a document prepared by a convention of delegates from 12 of the 13 States that met at Philadelphia in 1787. The original charter, which replaced the Articles of Confederation and which became operative in 1789, established the United States as a federal union of States, a representative democracy within a republic. The framers provided a Government of three independent branches. The first is the legislature, which comprises a two-house or bicameral Congress consisting of a Senate, whose members are apportioned equally among the states, and a House of Representatives, whose members apportioned among the states according to population. The second, the executive branch, includes the President and Vice President and all subordinate officials of the executive departments and executive agencies. The third branch, the judiciary, consists of the Supreme Court and various subordinate Federal courts created by public law.

The Bill of Rights is a series of prohibitions on the enactment by Congress of laws infringing upon certain rights. The first ten amendments to the Constitution, ratified by the required number of States on December 15, 1791, are commonly referred to as the Bill of Rights. The first eight amendments set out or enumerate the substantive and procedural individual rights associated with the description. The Ninth and Tenth Amendments are general rules of interpretation of the relationships among the other rights. The ninth amendment provides that the "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other rights retained by the people." The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The following rights are enumerated in the Bill of Rights:

- Right to freedom of religion, speech, and press (First Amendment);
- Right to assemble peaceably, and to petition the government for redress of grievances (First Amendment);
- Right to keep and bear arms in common defense (Second Amendment);
- Right not to have soldiers quartered in one's home in peacetime without the consent of the owner, nor in time of war except as prescribed by law (Third Amendment);
- Right in general not to be held to answer criminal charges except upon indictment by a grand jury (Fifth Amendment);
- Right not to be put twice in jeopardy for the same offense (Fifth Amendment);
- Right not to be compelled to be a witness against oneself in a criminal case (Fifth Amendment);
- Right not to be deprived of life, liberty, or property without due process of law (Fifth Amendment);
- Right to just compensation for private property taken for public use (Fifth Amendment);

- Right in criminal prosecution to a speedy and public trial by an impartial jury, to be informed of the charges, to be confronted with witnesses, to have a compulsory process for calling witnesses in defense of the accused, and to have legal counsel (Sixth Amendment);
- Right to a jury trial in suits at common law involving over $20 (Seventh Amendment);
- Right not to have excessive bail required, nor excessive fines imposed, nor cruel and unusual punishments inflicted (Eighth Amendment).

Fourteenth Amendment

Establishes two important legal concepts: Due process and equal protection. As set forth, it states no person within the jurisdiction shall be denied equal protection of the laws.
Article III of the Constitution provides that there shall be one Supreme Court and such inferior courts as the Congress may ordain and establish. Additionally, Article I, Section 8 provides that Congress has the power "to constitute tribunals inferior to the Supreme Court." The Judiciary Act of 1789 formally established the Supreme Court and Federal court system.

Marbury v. Madison

Marbury v. Madison is considered by many to be the first great and most important decision in U.S. Supreme Court history. It secured the court's power of judicial review – the ability to uphold or deny the constitutionality of legislative or executive actions. It established the judiciary as an independent, co-equal branch of government. Chief Justice John Marshall's assertion that "It is emphatically the province….of the judicial department to say what the law is" is the most frequently quoted line from the Marbury opinion. (Marbury, 1803)

Activity 2.2 Concluding Questions and Discussion (see Participant Activities)

At the conclusion of Section 2, the instructor may review the section and pose questions for group discussion or written responses.

Section 3 – Key Concepts and Procedures

Learning Objectives

As a result of this section, participants will be able to:

3. Define key concepts and terminology, especially the judicial system's dedication to the rule of law, equal protection, and due process as related to the purposes of courts.

"The prophecies of what the courts will do in fact… are what I mean by the law." – **Oliver Wendell Holmes, Jr.** (Holmes, 1991)

Prior to moving into this section, the instructor should administer the Key Concepts Matching test – Activity 3.1. Instruct participants to read each factual statement in Column 1 and then select the source document from Column 2. The letter identifying the source document should be entered on the line next to each statement.

Activity 3.1 Key Concepts Matching Test (see Participant Activities)

This section should begin with the assignment of the key concepts matching test. Participants should be encouraged to complete the test individually first. Then time should be allowed to discuss individual answers in group settings to see if any responses need to change.

- Drawing from the Purposes of Courts developed in Section 1 and the key historical references discussed in Section 2, the facilitator should explore and summarize the overarching concepts that guide our justice system. For example, the preservation of the rule of law, protection of individual rights, and resolution of disputes to name a few salient points.

- Rather than provide a detailed discussion of each concept, a short synopsis is offered of the key points to be covered. The facilitator may add or amend as they see fit. A point to remember is that much of our understanding of law is based on the existence of the common law which is judge-made and influenced. The idea behind rule of law is to protect individual rights and liberties through courts that are fair and accessible.

3.1 Key Concepts

Justice: Protecting rights and punishing wrongs using fairness. In U.S. courts, justice is applying the law to facts in each individual case.

Rule of Law: The "Rule of Law" refers to a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards. (U.N. Security General, 2004)

Due Process of Law: A constitutional guarantee that prevents governments from impacting citizens in an abusive way. In its modern form, due process includes both procedural standards that courts

must uphold in order to protect peoples' personal liberty and a range of liberty interests that statutes and regulations must not infringe. It traces its origins to Article 39 of King John's Magna Carta, which provides that no free man will be seized, dispossessed of his property, or harmed except "by the law of the land," an expression that referred to customary practices of the court. (Magna Carta, 2015)

The Fifth and Fourteenth Amendments to the Constitution, which guarantee that no person shall "be deprived of life, liberty, or property, without due process of law," incorporated the model of the rule of law that English and American lawyers associated most closely with the Magna Carta for centuries.

Activity 3.2 - Electronic Definition Search in Today's Environment (see Participant Activities)

Course participants will come to class equipped with smartphones, notebook computers, and iPads. Most will be web-enabled. It would be good to find out if the training facility has Wi-Fi or whether a "hot-spot" device can be employed. Have participants follow the instructions on the activity sheet. Working in groups, ask participants to find definitions of some of the key concepts that support the main ideas developed. These terms are also defined in the glossary that accompanies the Core Curriculum.

Facilitators should choose from the following concepts:

Equal Protection	Habeas Corpus
Venue	Right Against Self-Incrimination
Justiciability	Right to Counsel
Controversy	Presumption of Innocence
Standing	Trial by Jury
Civil Case	Double Jeopardy
Criminal Case	Notice
Equity	Right of Appeal
Cross-Examination	Discovery
Right to Speedy Trial	Jurisdiction

Give groups at least 30 minutes to conduct their electronic research. Then debrief asking for definitions and allow participants to expand or modify based on alternative definitions found.

3.2 Court Procedures

We will explore some basic procedures here that can be utilized as discussion starters. Facilitators can draw more from the concepts section and from the glossary section.

Civil and Criminal Cases

The law deals with two kinds of cases. Civil cases involve disputes between people or institutions such as businesses. A civil case usually begins when a person or organization determines that a problem cannot be resolved without the intervention of the courts. In civil cases, one (or more) of these persons or organizations bring suit (i.e., files a complaint in court that begins a lawsuit).

There are several types of civil cases. Divorce and related lawsuits (child support, custody, etc.) account for a very large number of civil cases. Cases involving contracts are also frequent. Automobile collisions account for many tort (personal injury) cases, another common kind of civil case.

Criminal cases involve enforcing public codes of behavior as embodied in the laws with the government prosecuting individuals or institutions. In a criminal case, the government brings charges against the person alleged to have committed the crime.

Here are some of the key differences between a criminal case and a civil case:

1. Crimes are considered offenses against the state, or society as a whole. That means that even though one person might murder another person, murder itself is considered an offense to everyone in society. Accordingly, crimes against the state are prosecuted by the state, and the prosecutor (not the victim) files the case in court as a representative of the state. If it were a civil case, then the wronged party would file the case.
2. Criminal offenses and civil offenses are generally different in terms of their case dispositions measures. Criminal cases will have jail time as a potential punishment, whereas civil cases generally only result in monetary damages or orders to do or not do something. Note that a criminal case may involve both jail time and monetary punishments in the form of fines.
3. The standard of proof is also very different in a criminal case versus a civil case. Crimes must generally be proved "beyond a reasonable doubt", whereas civil cases are proved by lower standards of proof such as "the preponderance of the evidence" (which essentially means that it was more likely than not that something occurred in a certain way). The difference in standards exists because civil liability is considered less blameworthy and because the punishments are less severe.
4. Criminal cases almost always allow for a trial by jury. Civil cases do allow juries in some instances, but many civil cases will be decided by a judge.
5. A defendant in a criminal case is entitled to an attorney, and if he or she can't afford one, the state must provide an attorney. A defendant in a civil case is not given an attorney and must pay for one, or else defend him or herself.
6. The protections afforded to defendants under criminal law are considerable (such as the protection against illegal searches and seizures under the Fourth Amendment). Many of these well-known protections are not available to a defendant in a civil case.

In general, because criminal cases have greater consequences, such as the possibility of jail and even death, they have many more protections in place and are a higher burden of proof.

Although criminal and civil cases are treated very differently, many people often fail to recognize that the same conduct can result in both criminal and civil liability. Perhaps one of the most famous

examples of this is the OJ Simpson trial. The same conduct led to a murder trial (criminal) and a wrongful death trial (civil). In part because of the different standards of proof, there was not enough evidence for a jury to decide that OJ Simpson was guilty "beyond a reasonable doubt" in the criminal murder case. In the civil trial, however, the jury found enough evidence to conclude that OJ Simpson wrongfully caused his wife's death by a "preponderance of the evidence."

Courts resolve a wide panoply of matters within this general division of civil and criminal cases. Minor misdemeanor or traffic matters may be heard in municipal or justice courts. These are generally referred to as courts of limited jurisdiction. Probate and guardianship matters are also resolved in special courts hearing civil matters. Lastly, juvenile delinquency and child welfare cases are family related matters resolved in courts across this nation.

Legal and Equitable Remedies

The U.S. legal system affords a wide, but not unlimited range of remedies. The criminal statutes typically list the range of fines or prison time a court may impose for a given offense. Other parts of the criminal case may, in some jurisdictions, allow stiffer penalties for repeat offenders. Punishment for the most serious offenses or felonies is more severe than for misdemeanors.

In civil actions, most American courts are authorized to choose among legal and equitable remedies. Historically, "courts of law" were authorized to decree monetary remedies only. If a defendant's breach of contract cost the plaintiff a specific amount, a court could order the defendant to pay the sum to the plaintiff. These damages were sufficient in many instances, but not in all. What if the dispute involved artwork, land, or intellectual property? For this reason, "courts of equity" were formed. These tribunals fashioned equitable remedies like specific performance, which compelled parties to perform their obligations, rather than merely forcing them to pay damages for the injury caused by their nonperformance. Family matters are primarily based on equitable remedies.

3.3 The Structure of Courts

The courts of this country are divided into three levels:

- "limited" or "general jurisdiction" trial courts, where disputes or cases are adjudicated;
- "intermediate" (appellate) courts, where appeals are first heard; and "supreme" courts which have final judicial authority

There are two kinds of courts in this country--federal courts and state courts. The Federal Judicial Center provides these distinctions between the two.

Federal courts are established under the U.S. Constitution by Congress to decide disputes involving the Constitution and laws passed by Congress. State and local courts are established by a state (within states there are also local courts that are established by cities, counties, and other municipalities, which we are including in the general discussion of state courts).

The differences between federal courts and state courts are further defined by jurisdiction. Jurisdiction refers to the kinds of cases a court is authorized to hear.

Federal court jurisdiction is limited to the types of cases listed in the Constitution and specifically provided for by Congress. For the most part, federal courts only hear

- cases in which the United States is a party;

- cases involving violations of the U.S. Constitution or federal laws (under federal-question jurisdiction);
- cases between citizens of different states if the amount in controversy exceeds $75,000 (under diversity jurisdiction); and
- bankruptcy, copyright, patent, and maritime law cases.

State courts, in contrast, have broad jurisdiction, so the cases individual citizens are most likely to be involved in, such as robberies, traffic violations, broken contracts, and family disputes are usually tried in state courts. The only cases state courts are not allowed to hear are lawsuits against the United States and those involving certain specific federal laws: criminal, antitrust, bankruptcy, patent, copyright, and some maritime law cases. See the NCSC publication and online resource, State Court Organization, which provides detailed information about how state trial and appellate courts are organized. (State Court Organization, 2015)

In many cases, both federal and state courts have jurisdiction. This allows parties to choose whether to go to state court or to federal court.

Criminal cases involving federal laws can be tried only in federal court, but most criminal cases involve violations of state law and are tried in state court. We all know, for example, that robbery is a crime, but what law says it is a crime? By and large, state laws, not federal laws, make robbery a crime. There are only a few federal laws about robbery, such as the law that makes it a federal crime to rob a bank whose deposits are insured by a federal agency. Examples of other federal crimes are bringing illegal drugs into the country or across state lines and use of the U.S. mails to swindle consumers. Crimes committed on federal property, such as national parks or military reservations, are also prosecuted in federal court.

Federal courts may also hear cases concerning state laws if the issue is whether the state law violates the federal Constitution. Suppose a state law forbids slaughtering animals outside of certain limited areas. A neighborhood association brings a case in state court against a defendant who sacrifices goats in his backyard. When the court issues an order (called an injunction) forbidding the defendant from further sacrifices, the defendant challenges the state law in federal court as an unconstitutional infringement of his religious freedom.

Some kinds of conduct are illegal under both federal and state laws. For example, federal laws prohibit employment discrimination, and the states have added their own laws. A person can go to federal or state court to bring a case under the federal law or both the federal and state laws. A case that only involves a state law can be brought only in state court.

Appeals for review of actions by federal administrative agencies are also federal civil cases. Suppose, for example, that the Environmental Protection Agency issued a permit to a paper mill to discharge water used in its milling process into the Scenic River, over the objection of area residents. The residents could ask a federal court of appeals to review the agency's decision.

Adversarial System

The adversary process forms the basis of the U.S. legal system. The premise behind the adversarial system of dispute resolution is that the best way to find the truth is to allow two opposing sides to present their cases to a neutral third party (the court). The opposing attorneys or adversaries must follow formal rules of evidence when presenting their cases.

Jurisdiction and Venue

The plaintiff must decide where to file the case. A court has no authority to decide a case unless it has jurisdiction over the person or property involved. To have jurisdiction:

- a court must have authority over the subject matter of the case, and
- the court must be able to exercise control over the defendant, or
- the property involved must be located in the area under the court's control

The extent of the court's control over a person and property is set by law. The doctrine of primary jurisdiction applies where a case can originally be addressed in court but would be better addressed by an administrative body or tribunal.

Venue refers to the county or district within a state or the United States where the lawsuit is to be tried. The venue of a lawsuit is set by statute, but it can sometimes be changed by agreement or court order.

Pleadings

A lawsuit begins when the person bringing the action files a complaint. This first step begins what is known as the pleadings stage of the suit. Pleadings are certain formal documents filed with the court that state the parties' basic position. Common pre-trial pleadings include:

- Complaint (or petition or bill). Probably the most important pleading in a civil case, since by setting out the plaintiff's version of the facts and specifying the damages, it frames the issues of the case. It includes various counts, that is, distinct statements of the plaintiff's cause of action highlighting the factual and legal basis of the suit.

- Answer. This statement by the defendant usually explains why the plaintiff should not prevail. It may also offer additional facts, or plead an excuse.

- Reply. Any party in the case may have to file a reply, which is an answer to new allegations raised in pleadings.

- Counterclaim. The defendant may file a counter claim, which asserts that the plaintiff has injured the defendant in some way, and should pay damages. ("You're suing me? Well then, I'm suing you.") It may be filed separately or as part of the answer. If a counterclaim is filed, the plaintiff must be given the opportunity to respond by filing a reply.

Motions

Motions are requests for the judge to make a legal ruling. While motions are not pleadings, many courts use the term interchangeably.

Discovery

To begin preparing for trial, or pre-trial case resolution, both sides engage in discovery. This is the formal process of exchanging information between the parties about the witnesses and evidence that will be presented at trial.

Discovery enables the parties to know before the trial begins what evidence may be presented. It's designed to prevent "trial by ambush," where one side does not learn of the other side's evidence or witnesses until the trial, when there is no time to obtain answering evidence.

Judgment

In law, a judgment is a decision of a court regarding the rights and liabilities of parties in a legal action or proceeding. Judgments also generally provide the court's explanation of why it has chosen to make a particular court order.

Rights of Appeal

In a civil case, either party may appeal to a higher court. In a criminal case, only the defendant has a right to an appeal in most states.

Instructor Note - If you are presenting to a national audience you may want to draw a few examples from Federal Court Rules and Procedures. If presenting to a state audience, references to applicable rules by either instructor or participant will make content more relevant.

Activity 3.3 Due Process in the Courtroom (see Participant Activities)

How are the rights of procedural due process reflected in the courtroom?

> Note: If course is being delivered in a courthouse and a courtroom is available, bring the participants into the courtroom and place them in their groups in different locations. If not, give out the schematic of a typical courtroom. Ask them to list what rights/processes are reflected in the layout of a typical courtroom.

Notes for Debriefing

- Doorway: Right to adequate notice
- Seating: Right to public trial
- Litigation Area
  Two Tables: Adversary system
  Counsel Table: Right to counsel
- Jury Box: Trial by jury
- Witness Box: Right to bring witnesses/Confront witnesses
- Judges Chair: Neutral arbitrator
  Regulate discovery

Ensure speedy trial

Section 4 – Courts as an Institution and Organization

Learning Objective

As a result of this section, participants will be able to:

4. Summarize the role of courts as a third branch of government, an institution, and an organization and how its role impacts and complements the other two branches of government.

"The greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt or a dependent Judiciary." - **Chief Justice John Marshall**

Impartiality and independence demand courts that are separate from the executive and the legislature branches. But court purposes reflect a historical legacy that dictates both distinctive boundaries and interdependency. Competent court leaders understand separation of powers, judicial independence, and the inherent powers of the court. Alternative organizational arrangements to maintain the courts' boundaries and to permit their effective management are likewise known. Court managers must understand the implications of the court as an institution or third branch of government and of judicial decisions as immune from challenge. This concept must be separated from that of the court as an organization and bureaucracy.

Activity 4.1 Discussion Starters (see Participant Activities)

Facilitators may start this section with a group discussion focused on questions found in the Activities section.

4.1 Characteristics

Characteristics of an Organization

1. Specific name and identity
2. Physical plant
3. Staff
4. Funding sources and budgeting process
5. Specific purposes or goals
6. Established means (plans and procedures for achieving these purposes)
7. Established values, formal or informal
8. Accountable to someone or something

Characteristics of an Institution

1. Cultural purpose
2. Recognizes social values or customs
3. Established hierarchy
4. Transcends individuals
5. Clearly defined roles
6. Establishes and enforces rules that govern behavior

7. Formalizes cooperation

4.2 Making the Distinction

In order for any subject or profession to be organized into a science, it needs to evolve clear definitions, a basic philosophy, well-developed principles, and operative powers. The professionals within these fields applying these principles should also develop procedures, strategies, customs, and usages. Language permits a wide variation in the use of words. But for the purposes of theoretical clarity, precise distinctions which do not exist in everyday use need to be made. For example, the word caseflow has evolved in this manner.

The distinction proposed between organization and institution is essential for formulating a complete theory of social development. In common usage we refer to a school or college as an educational institution. At times we use the word with reference to institutions that are broad and physical, and at other times with reference to institutions that are less physical and more subtle. House and home are such words. A house is a physical building that is more organizational in nature. A home is a subtle concept (institutional).

An act is a direct movement of force or energy. In our context of courts, it could represent one person preparing a court order. Organization is born when more than one person coordinates to execute the work of case management from filing to disposition. People helping one another in work constitute an organization. Specialized tools or technology applied to do work, such as an effective caseflow management system, can also be referred to as an organization. When human resources and materials are arranged to act in a fixed relationships that can be endlessly repeated, an organization is born and is at work. A court is an organization.

The words organization and institution are often used synonymously. While language permits this usage, theory requires that we make a clear distinction between the broad form (organization) and the more subtle form (institution). A school is an organization; education is a national institution. Railways are an organization; transport is an institution. Courts are organizations; the law is an institution.

1. An organization is centrally administered by authority from above moving down through structure.
2. An institution is not centrally administered. It is governed by values of an organization that are widely accepted and honored by individuals.
3. An organization has rules that are enforced, an institution has customs that are honored.
4. Organization occupies the fourth stage, and institution the fifth stage, in the chain of social development that begins with an individual act and matures into social consciousness.
5. Over the centuries an organization matures into an institution.
6. An organization is controlled; an institution is self-sustaining.
7. An organization is partial; an institution is universal.

8. An organization is physical; an institution is subtle.

Act – Activities – System – Organization – Culture – Custom – Usage – Social Consciousness Represent the 8 stages of social development.

- An army is an organization; its traditions are subtle values.
- Elections are conducted by the government; festivals are celebrated by the people.
- Market is an organization; trade is an institution.
- A court is an organization; justice is an institution.

(Introduction to the Organization: MSS Research - March, 2007)

4.3 Judicial Institutions

Institution vs. Organization

- Institution is a bigger and deeper concept than an organization
- Institutions guide human behavior while organizations are formed to achieve special goals and purposes
- Marriage, democracy, colleges, and "third branch" are examples of institutions while courts, companies, and businesses are examples of organizations.
- Institutions have a bigger role to play in social lives in comparison to organizations

What is a Judicial Institution?

- Has its mission rooted in the values and customs related to justice
- Creates and protects the core purposes of justice within society
- Establishes and enforces rules that govern justice
- Defines rules and processes related to justice

4.4 Judicial Independence

Activity 4.2 Independent Courts/Judicial Review (see Participant Activities)

Facilitators may start off this section with a short video and group discussion about judicial independence. Alternatively, a longer video on judicial independence is available for viewing.

Definition of judicial independence

Competent court leaders must understand the concept of judicial independence. Judges need to be independent if courts are to do their work well. How can we define judicial independence?

Judicial independence is protected by the U.S. Constitution because the founders had first-hand experience being a persecuted minority, in courts they felt were unfairly controlled by the rulers.

Courts in the colonies were seen as instruments of oppression. Juries could be locked up until they reached the "right" decision. Judges were seen as puppets of the king. In fact, the Declaration of

Independence criticized King George III for making "judges dependent upon his will alone for the tenure of their offices and the amount and payment of their salaries."

This experience convinced the founders that Americans needed independent courts to be protected from unreasonable searches, rigged trials, and other examples of government power abuses.

In the Constitution, the founders protected judges from political and public pressure by:

- Specifying that they hold their office "during good behavior." This meant that their appointments are for life.
- Specifying that their salaries cannot be diminished during their tenure. This prevents Congress from retaliating against judges by cutting their pay.
- Making the removal process difficult (only on "impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.")

Judicial independence is addressed in state constitutions as well. In the words of the Declaration of Rights of the Massachusetts Constitution: "It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit."

Judicial independence assures that cases will be decided on their merits. Decisions are based on what is right and just under the law, not what is popular at the moment.

Throughout American history, the independence of the judiciary has protected individual liberties and prevented a tyranny of the majority. Examples include extending voting rights, ending segregation, and protecting the average citizen from unwarranted government intrusion.

See Law and the Court Volume 1: The Role of Courts (American Bar Association, 1998)

4.5 Threats to Judicial Independence

Judges often come under fire by politicians of both parties and the general public because their decisions seem inconsistent with the public's sense of justice. Some critics have even suggested that judges should be impeached for unfavorable rulings.

This has led to tension between the branches about the role of courts. Some charge that legislatures may:

- Hold up approval of nominees until the next election
- Approve only those nominees who have passed a "litmus test" on how they might decide cases
- Use the power of the purse to punish courts as a whole, if not specific judges

Judges in most states, unlike federal judges, are elected or have to face the voters periodically in retention elections. In recent years, well-funded campaigns in some states have removed judges who rendered unpopular decisions, especially on the death penalty or same-sex marriage cases. The "facts" of these decisions were often oversimplified or even distorted during the campaign. Judges

faced with criticism about specific decisions are often prevented by the Code of Judicial Conduct from responding to charges. Judges are limited in discussing cases on which they have ruled.

4.6 Justice Reform Organizations

Justice at Stake is the only national organization that focuses exclusively on keeping courts fair and impartial. Justice at Stake leads a nonpartisan national partnership of more than 50 organizations, protecting our justice system through public education, litigation, and reform. Their mission is "Helping Americans Keep Courts Fair and Impartial." This work builds on the work of the American Judicature Society, which disbanded in the early 21st century. Archived editions of "Judicature" are vital resources to review the history and ideas related to court reform.

Across America, the right to fair and impartial justice is at stake. Special interests are spending millions to influence decisions and elect judges to serve their narrow interest, not the public interest. Lawmakers and interest groups are trying to intimidate judges in retaliation for rulings they don't like, often with threats of impeachment. And some courts are being stripped of their powers to protect rights guaranteed by the constitution.

Our democracy depends on fair, impartial courts that can protect basic rights, guarantee equal justice, and make decisions based solely on the facts and the law - without fear of political intimidation. Our democracy also depends on access to justice, with courts safeguarded from harmful budget cuts that can erode not only the rule of law but ultimately, our freedom.

America's courts play a crucial, unique role in our democracy. They resolve criminal and civil cases, and they protect our constitutional rights. They must remain fair and impartial-accountable to the law, not to special interests. But federal and state courts are under attack.

Justice reform issues presently impacting the courts of this nation include the following:

<u>Federal Court Issues</u>

- Improper impeachment threats
- Court-stripping (banning courts from hearing specified issues)
- Partisanship over judicial appointments and delay in appointments

<u>State Court Issues</u>

- Special interest money flooding state court elections
- Pressure on judicial candidates to promise specific rulings
- Funding crisis threatens access to justice
- Key reforms: public financing, appointment/retention, recusal rules and new disclosure

<u>Diversity Issues</u>

- People of color, women, lesbian, gay, bisexual, and transgendered persons
- Persons with disabilities are underrepresented among state and federal judges.

- Lack of diversity on the bench and among court staff can lead to the appearance of bias, and even actual bias. A more diverse bench improves the quality of justice for all citizens.
- There is also a disproportionate number of minorities in correctional facilities across this nation.

Activity 4.3 Final Discussion Questions (see Participant Activities)

Facilitators may end this section with a group discussion focused on wrap-up questions found in the Activities section.

This section should end with the following quote from Chief Justice William Rehnquist:
"An independent judiciary… is one of the crown jewels of our system of government today." -1996

Section 5 – Court Reform and Accountability

Learning Objectives

As a result of this section, participants will be able to:

5. Identify trends in court reform and pressures forcing the courts to change and expand.

"Dissatisfaction with the administration of justice is as old as law." **-Roscoe Pound**

In this section, Roscoe Pound's 1906 speech to the American Bar Association entitled, "The Causes of Popular Dissatisfaction with the Administration of Justice" will be utilized to frame discussions on the public's opinion, dissatisfaction with the courts, and calls for reform regarding our nation's courts. (Pound, 2015) Pound's address discusses a set of issues society faced over one hundred years ago and how those issues relate to the judiciary. The address provides insight into why the public became dissatisfied with the courts, how we should think about that dissatisfaction, and lastly, how courts might respond to it.

Activity 5.1 Causes of Popular Dissatisfaction – Table Activity (see Participant Activities)

The activity includes questions and table discussions that revolve around the outline below. Pound's speech is by no means an easy read. For this reason, it should be assigned to be read as a pre-workshop assignment outside of class. The facilitator should reference the fact that the speech was given in 1906 in St. Paul, MN, during a time when crime was on the rise in large cities across the United States, and courts were seen as being "soft on crime." Many newspapers were highly critical of the judiciary. Do media-driven attacks on the courts seem relevant today? Of course they do. In fact, after over 100 years much of what Pound saw as problematic remains relevant to our courts today.

Pound outlined four causes of dissatisfaction in his speech

- Causes of dissatisfaction with *any* legal system
- Causes lying in the peculiarities of our Anglo-American legal system
- Causes lying in our American judicial organization and procedure
- Causes lying in the environment of our judicial administration

These causes were further detailed as follows:

#1 ANY LEGAL SYSTEM

- Mechanical Operation of Rules
- Rate of Progress - Law versus Morals
- Perception that Administration of Justice Is An Easy Task
- Popular Impatience with Restraint

#2 ANGLO-AMERICAN SYSTEM

- Individualistic Spirit of the Common Law in a Collectivist Age
- Contentious Spirit of the Common Law – Litigation as a Game
- Political Jealously Due to the Supremacy of Law
- No General Rule or Philosophy

- Defects of Form Inherent to the Case Law System

#3 AMERICAN SYSTEM ORGANIZATION AND PROCEDURE

- Multiplicity of Courts Characteristics of Archaic Law
- Concurrent Jurisdiction Diversity Cases
- Waste of Judicial Manpower
- Rigid Districts
- Points of Pure Practice
- Unnecessary Retrials - Trial De Novo

#4 ENVIRONMENT OF AMERICAN JUDICIAL ADMINISTRATION

- Jury Duty Is a Bore
- Strained to Do the Work of Morals
- Transition to a Period of Legislation
- Placing of the Courts into Politics
- Legal Profession as a Trade
- Public Ignorance Due to Sensational Press Reports

5.1 Other Twentieth Century Reform Efforts

National Commission on Civil Disorder
(Kerner Commission, 1967)

In many of the cities that experienced civil disorders during the 1960's, there were recurring breakdowns in the mechanisms for processing, prosecuting, and protecting the rights of arrested persons. These resulted mainly from long-standing structural deficiencies in criminal court systems, and from the failure of communities to anticipate and plan for the emergency demands of civil disorders.

In part, because of this, there were few successful prosecutions for serious crimes committed during the riots. In those cities where mass arrests occurred many arrestees were deprived of basic legal rights.

<u>The Commission recommends that the cities and states:</u>

- Undertake reform of the lower courts to improve the quality of justice rendered under normal conditions.
- Plan comprehensive measures by which the criminal justice system may be supplemented during civil disorders so that its deliberative functions are protected, and the quality of justice is maintained.

Such emergency plans require broad community participation and dedicated leadership by the bench and bar. They should include:

- Law sufficient to deter and punish riot conduct.
- Additional judges, bail and probation officers, and clerical staff.

- Arrangements for volunteer lawyers to help prosecutors and to represent riot defendants at every stage of proceedings.
- Policies to ensure proper and individual bail, arraignment, pre-trial, trial, and sentencing proceedings.
- Procedures for processing arrested persons, such as summons and release, and release on personal recognizance, which permit separation of minor offenders from those dangerous to the community, in order that serious offenders may be detained and prosecuted effectively.
- Adequate emergency processing and detention facilities.

Warren Burger
U.S. Chief Justice
1969-1986
Former Chief Justice

Warren Burger focused his efforts on reforming the administrative functions of his office and worked to improve the efficiency of the judicial system. Among his reforms were courts employing professional administrators to help run the courts and continuing education for judges.

In 1969 Chief Justice Warren Burger's monumental speech to the American Bar Association focused on a void in our current justice system. In his speech, Chief Justice Burger noted: "We have more trained astronauts than trained court administrators in this country today."

National Center for State Courts

At the First National Conference of the Judiciary, held in Williamsburg, Virginia, in 1971, Chief Justice Warren Burger called for the creation of a central resource for the state courts—a "national center for state courts." The National Center for State Courts began operations that same year at the headquarters of the Federal Judicial Center in Washington, D.C., before moving to its permanent headquarters in Williamsburg in 1978.

The National Center for State Court's current mission, improving judicial administration through leadership and service to the state courts, springs logically from its original purpose as an information clearinghouse so that innovations in one court can benefit all courts. Initially, the National Center concentrated on helping courts to reduce backlogs and delay. This work included the groundbreaking publication "Justice Delayed: The Pace of Litigation in Urban Trial Courts." (Church, 1978) The National Center also gave judges and court administrators a vital national perspective on court operations through its Court Statistics Project (started in 1978); the work of its Knowledge Information Service, which handled more than 1,000 requests for court-related information during its first year of operation (1979); and the holdings of its Library, the largest collection of court administration-related materials in the world.

Since its founding in 1971, the National Center for State Courts has played a key role in the development of court administration worldwide. Important National Center initiatives include:

1. Create new knowledge about judicial administration,
2. Disseminate knowledge and information about judicial administration, and

3. Apply its knowledge of judicial administration to help courts solve problems and meet future needs, and support the projects and policies of state courts and state court associations.
4. Developing the skills of more than 1,000 court leaders through the Court Executive Development Program of the Institute for Court Management
5. Improving how courts treat jurors through the work of its Center for Jury Studies and the promotion of innovations in jury system management
6. Promoting the use of technology to improve court operations through National Court Technology Conferences (starting in Chicago in 1984), original research, and direct technical assistance
7. Developing in partnership with courts standards for evaluating how well courts serve the public, such as the Trial Court Performance Standards (1987)
8. Working with court associations, such as the Conference of Chief Justices and National Association for Court Management, to improve public trust and confidence in the courts by conducting and building upon the first National Conference on Public Trust and Confidence in the Judiciary (1999)
9. Working with courts in other countries to improve the rule of law worldwide

National Association for Court Management (NACM)

NACM is a non-profit organization in the United States that promotes professional management education for court administrators and judges.

NACM was founded in 1985 through the combination of two pre-existing associations: the National Association of Trial Court Administrators (founded in 1965) and the National Association for Court Administration (founded in 1968). It appears to be the largest organization of court management professionals in the world, with more than 1,700 members from the United States, Canada, Australia, and other countries.

In the United States and most other countries in the common law tradition, supervising judges continue their traditional role as the presiding authorities in the bureaucracy of court systems. However, the latter half of the twentieth century saw the increasing professionalization of non-judicial court administrators and staff. In many court systems today, responsibility for court operations is delegated almost entirely to professional court managers, freeing judges and their legal clerks to devote their time to the work of interpreting and applying the law.

NACM offers education, training, and professional certification programs in the principles of court management. These educational programs are designed both for non-judicial managers and for judges in their capacity to oversee court managers. NACM collaborates in training programs with Michigan State University, the National Center for State Courts, and the Institute for Court Management. NACM is well known for its creation of the Core Competencies in the late 1990s, which were revised as the Core, in 2014. NACM has also drafted a Model Code of Conduct for Court Professionals.

Professional Development Advisory Committee

Among other initiatives, the NACM Professional Development Advisory Committee (NACM/PDAC) was formed in 1992. Drawing on the results of a 1990 Delphi survey of court professionals, this committee began work toward improved NACM educational programming by reaching consensus on the core areas of court management skill and responsibility. An initial list of 14 was re-formulated into 10 core competencies, areas in which court managers should have acceptable levels of knowledge, skill, and ability (KSAs). Over 10 years, these core areas evolved into 10 interrelated and interdependent core competencies.

Original core competencies

The 10 original core competencies were as follows: Purposes and Responsibilities of Courts because this competency properly grounds and orients the other nine Core Competencies. Caseflow Management, the first Curriculum Guideline developed and published by NACM/PDAC, is second because it reflects the most basic thing courts do—process cases from filing to closure. Next is Leadership, the energy behind every court system and court accomplishment. Court leaders use Visioning and Strategic Planning tools to avoid stagnation and keep focused on purpose, core values, and continuous improvement. Essential Components constitute the many services and programs managed by the judiciary and others, which while critical to court performance, are not dealt with by the other competencies. Court Community Communication link the courts to those they serve. Resources, Budget, and Finance is a core management function that impacts every court operation. It is followed by Human Resources Management, which is linked in order of presentation and as a matter of practice in high-performing courts to Education, Training, and Development --judicial branch education. Last, Information Technology Management, which while not an end unto itself, is essential because if managed well it can help all courts do what they do faster, cheaper, and better.

Trial Court Performance Standards

This standards framework was produced by the National Center for State Courts with Bureau of Justice Assistance funding in 1990. It represented a significant set of organizing ideas and concepts to ground the field of judicial administration. Attention shifted from the court system's structure, organization, funding, and authority relationships, to what services trial courts should provide, and their performance, regardless of structure, organization, funding, or authority relationships. The unit of analysis shifted focus from the court system as a whole to trial courts as organizations. These standards are discussed further in the text below.

ABA Model Time Standards

Courts must also be accountable for moving and resolving cases in a fair and timely manner.

Performance Measures are not new to the courts in the United States. For over three decades tools have been refined to help court leaders measure and manage court performance. This commitment to delivering fair and speedy justice with attendant accountability to the public started with the publication of the American Bar Association Time Standards (1976) and the COSCA Time Standards (1983). It continued through the release of the Trial Court Performance Standards (1990) and CourTools (2005) and persists through the formulations of the High Performance Court Framework (2010) and the Principles for Judicial Administration (2012). These products have been developed by the court community to help court leaders to not just measure performance, but manage for performance.

In August 2011, the Conference of Chief Justices, the Conference of State Court Administrators, the American Bar Association House of Delegates, and the National Association for Court Management approved a set of Model Time Standards for State Trial Courts. The standards are the product of a two-year review by the above organizations with the help of the National Center for State Courts, and support from a grant from the State Justice Institute.

Since the ABA first adopted time standards in 1968, it adopted time standards for other types of cases in 1976, updated them in 1984 and again in 1992. The Conference of State Court Administrators first established national time standards for state court cases in 1983.

Time standards are intended to establish parameters for the time required to dispose of cases from the date of filing to the date of disposition by entry of judgment. The model standards provide for a first tier time period within which 75 percent of the filed cases should be resolved; a second tier time period within which 90 percent of the filed cases should be resolved; and a third tier time period within which 98 percent of filed cases should be resolved. The 98 percent tier is meant to establish a backlog measure and to fix the maximum time that should be taken to decide and finalize all but the most highly complex cases.

The model time standards cover the full range of cases that are heard and decided by state trial courts, including all types of criminal, civil, family, juvenile and probate matters. Under the model standards, using criminal felonies as an example, 75% should be decided within 90 days; 90% within 180 days; and 98% within 365 days. The model standards are intended to establish a reasonable set of expectations for the courts, for lawyers, and for the general public. Model standards in criminal cases are also provided for misdemeanor, traffic and local ordinance, and habeas corpus and post-conviction proceedings.

Activity 5.2 Discussion Questions (see Participant Activities)

The instructor may choose to pose group questions that address current issues related to the two reform efforts identified above.

5.2 Courts Must Be Accountable

Purposes and Responsibilities of Courts require balance between independence and external and internal accountability. Courts do not serve their enduring purposes or continuing responsibilities unless their structure, governance, operations, programs, processes, and performance lead to the reality and deserved public perception that the judiciary is accountable. The justification of court control of the pace of litigation, the tracking and reporting of case disposition times, and adherence to judicial decisions is not merely efficiency. Rather it is the courts' responsibility for the proper use of public money to ensure rule of law, equal protection and due process, individual justice in individual cases, and the appearance of individual justice in individual cases.

Court managers establish, explain, and maintain the court's proper use of public resources. They report on court performance to the judiciary, the public, and the judiciary's political co-equals. Judges and court staff recognize the public's right to an accountable and transparent judiciary, which demonstrates fiscal integrity and service excellence.

In the next section, we will discuss accountability for resources as well as for caseload and service excellence.

Activity 5.3 Concluding Activity – Courts Speak Out (see Participant Activities)

The facilitator should leave at least 30 minutes to discuss the activity and for each table to produce a public service announcement (PSA).

Section 6 – Management and Leadership in the Nation's Courts

Learning Objectives

As a result of this section, participants will be able to:

6. Apply the values and goals of the American court system to specific court administrative tasks and responsibilities including dispute resolution.

"Justice delayed is justice denied."
-William E. Gladstone

"The true administration of justice is the firmest pillar of good government."
-George Washington

Russell Wheeler defines judicial or court administration as that which "enables courts to dispose – justly, expeditiously and economically – of disputes brought to them for resolution." It is also the ability to guide the organization and management to the court's structure, administration, procedures, alternative dispute resolution, and traditional case processing by the concepts of rule of law, equal protection, and due process.

It is important to distinguish here between the purposes of courts and the purposes of court administration. The original NACM Core Competencies puts forth the following admonition:

> "The purposes and responsibilities of courts should never be confused with efficiency or even the constitutional means of the separation of powers, judicial independence and the inherent powers of the courts. Courts exist to do justice, to guarantee liberty, to enhance social order, to resolve disputes, to maintain rule of law, to provide for equal protection, and to ensure due process. They exist so that the equality of individuals is reality rather empty rhetoric.
>
> Efficient and even effective judicial administration is not an end in itself. Courts do not exist so court leaders either judicial or civilian can manage them. Rather courts must be managed well so that judges and others acting in their stead and in their shadows can do justice."

Activity 6.1 Group Discussion (see Participant Activities)

The facilitator may wish to pose questions, related to court management and leadership, for discussion by the group at the beginning of this section.

6.1 Court Administration Duties

In the original treatise of court administration entitled "Managing the Courts" by Ernest C. Friesen, Jr., Edward C. Gallas, and Nesta Gallas, (Friesen, Gallas, Gallas, 1991) fourteen duties for court administration were defined as:

1. Administrative control of all non-judicial activities of the court, subject to the general supervision of the presiding judge.

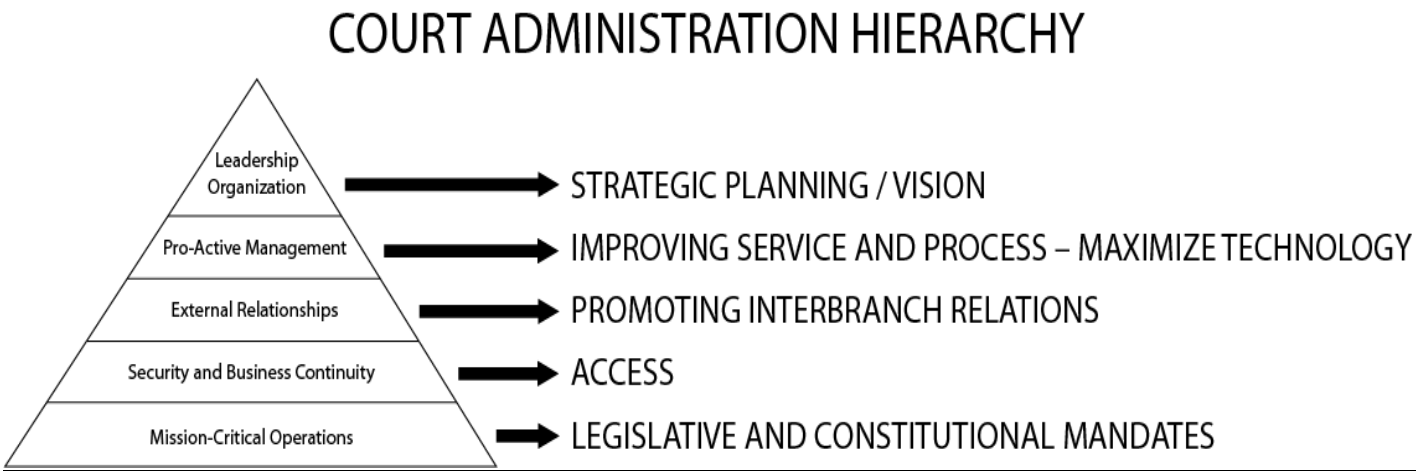
2. Assigning, supervising, and directing the work of the officers, and employees of the court except commissioners, hearing officers, and referees with respect to their quasi-judicial responsibilities.
3. Formulating and administering a system of personnel administration subject to guidelines established by the court and subject to limitations that may be imposed by law or higher state judicial authority.
4. Preparing and administering the budget of the court, including coordination of the court budget with guidelines and controls laid down by judicial administrative authorities, legislative bodies and constitutional restraints.
5. Maintaining a modern accounting and auditing system for the court with respect to government funds and trust accounts.
6. Establishing and maintaining property control records and conducting periodic inventories to assure that such records and physical inventories are reconciled.
7. Undertaking definition of the space management program, including space design, control, and requirement projections, and representing the court in its relationships with architects and builders.
8. Representing the court in its dealings with other government agencies and the State Court Administrator's Office with respect to the establishment, maintenance, and use of courtrooms, chambers, and offices.
9. Initiating organization, systems, and procedure studies relating to the business of the court and its administration and preparation of appropriate recommendations and reports to the presiding judge, the court, and the state judicial conference.
10. Defining management information requirements and collecting, compiling, and analyzing statistical data with a view to the preparation and presentation of reports based on such data as may be directed by the presiding judge, the court, and the state court administrator.
11. Representing the courts as its liaison on all management matters to other state courts, the state legislature, the state judicial conference, the local financing authority, the sheriff, the court clerk, the chief probation officer, bar associations, civic groups, news media, and other private and public groups having a reasonable interest in the administration of the court.
12. Arranging and attending committee meetings of the judges of the court and of the entire court, including preparation of the agenda and serving as secretary to the court in all plenary meetings.
13. Establishing procedures for the calling of trial jurors and grand jurors and controlling their utilization and payment.
14. Preparing an annual report to the court and to the public for the preceding calendar year, including recommendations for more expeditious disposition of the business of the court.

Robert W. Tobin in his book, "Creating the Judicial Branch: The Unfinished Reform," published by the National Center for State Courts, (Tobin, 1999) reduced and refined these responsibilities to six:

1. Goal setting and leadership.
2. Formulation and implementation of management policy.

3. Dealing with judges and staff.
4. Relationships with the bar.
5. Relationships with the other branches, non-court agencies, and the public.
6. Delegation and oversight of the detailed aspects of court administration.

Alexander B. Aikman in his book entitled "The Act and Practice of Court Administration" (Aikman, 2007) related the purposes of court administration to a hierarchy model similar to that developed by Maslow in his hierarchy of needs. Aikman's model put forth the following:



Aikman concludes "court administration that is effective requires a strong chief judge-administrator team that has two equals who recognize and respect each other's strengths and undertake to cover for each other's weaknesses."

Court Leaders Must Be Able To:

- Develop and use appropriate standards and measure of court performance and to assess and report on court performance internally, to funding authorities, the public, and the media.
- Align court performance, court structure, court operations, and court processes with court purposes.

Activity 6.2 Practical Impacts – Table Exercise (see Participant Activities)

The activity includes a set of questions that relate the functions and duties of court managers to the purposes and responsibilities of courts.

6.2 Trial Court Performance Standards

Courts must also be accountable for moving and resolving cases in a fair and timely manner.

Performance Measures are not new to the courts in the United States. For over three decades tools have been refined to help court leaders measure and manage court performance. This commitment to delivering fair and speedy justice with attendant accountability to the public started with the

publication of the American Bar Association Time Standards (1976) and the COSCA Time Standards (1983). It continued through the release of the Trial Court Performance Standards (1990) and CourTools (2005) and persists through the formulations of the High Performance Court Framework (2010) and the Principles for Judicial Administration (2012). These products have been developed by the court community to help court leaders to not just measure performance, but manage for performance.

Access to Justice

1. Public Proceedings
2. Safety, Accessibility, and Convenience
3. Effective Participation
4. Courtesy, Responsiveness, and Respect
5. Affordable Costs of Access

Expedition and Timeliness

1. Case Processing
2. Compliance with Schedules
3. Prompt Implementation of Law and Procedure

Equality, Fairness, and Integrity

1. Fair and reliable Judicial Process (Rule of Law and Due process)
2. Juries
3. Court Decisions and Actions (Equal Protection)
4. Clarity
5. Responsibility for Enforcement
6. Production and Preservation of Records

Independence and Accountability

1. Independence and Comity
2. Accountability for Public Resources
3. Personnel Practices and Decisions
4. Public Education
5. Response to Change

Public Trust and Confidence

1. Accessibility
2. Expeditious, Fair, and Reliable Court Functions

PURPOSE AND RESPONSIBILITIES	TRIAL COURT PERFORMANCE STANDARDS
Purposes of Courts	Access to Justice

Courts as an Institution and/Organization	Expedition and Timeliness
Key Concepts and Procedures	Equality, Fairness, and Integrity
Court Reform and Accountability	Independence and Accountability
Management and Leadership in the Nation's Courts	Public Trust and Confidence

3. Judicial Independence and Accountability

Relating the 1990 Trial Court Performance Standards to Purposes and Responsibilities

The National Center for State Courts developed CourTools by integrating the major performance goals defined by the Trial Court Performance Standards with relevant concepts from other successful public-sector and private-sector performance measurement systems. This balanced set of court performance measures provides courts with the tools to demonstrate effective stewardship of public resources. Being responsible and accountable is critical to maintaining the independence courts need to deliver fair and equal justice to the public. (CourTools – National Center for State Courts 2005)

THE TEN MEASURES

1. Access & Fairness	2. Clearance Rates
Ratings of court users on the court's accessibility and its treatment of customers in terms of fairness, equality, and respect.	The number of outgoing cases as a percentage of the number of incoming cases.
3. Time to Disposition	4. Age of Active Pending Caseload
The percentage of cases disposed or otherwise resolved within established time frames.	The age of the active cases pending before the court, measures as the number of days from filing until time of measurement.
5. Trial Date Certainty	6. Reliability & Integrity of Case Files
The number of times cases disposed by trial are scheduled for trial.	The percentage of files that can be retrieved within established time standards and that meet established standards for completeness and accuracy of contents.
7. Collection of Monetary Penalties	8. Effective Use of Jurors
Payment collected and distributed within established timelines, expressed as a percentage of total monetary penalties ordered in specific cases.	Juror Yield is the number of citizens selected for jury duty who are qualified and report to serve, expressed as a percentage of the total number of prospective jurors available. Juror Utilization is the rate at which prospective jurors are used at least once in trial or voir dire.
9. Court Employee Satisfaction	**10.** Cost Per Case
Ratings of court employees assessing the quality of the work environment and relations between staff and management.	The average cost of processing a single case, by case type.

There is both a video and resource tools on the National Center's website (www.ncsc.org) on the High Performance Court Framework. These can be incorporated into this lesson plan as the facilitator deems appropriate. In short, the High Performance Court Framework includes the following steps:

1. Focusing on key administration principles that clarify high performance;
2. Understanding how a court's managerial culture can promote common goals and collegial cooperation;
3. Developing the capacity to measure performance; and
4. Learning to use the results for procedural refinements and communication with a variety of stakeholders.

Activity 6.3 Final Questions (see Participant Activities)

The facilitator may wish to pose wrap-up questions for discussion by the group at the end of this section.

Section 7 – New Directions in Courts and Court Management

Learning Objectives

As a result of this section, participants will be able to:

1. Explore quality court management concepts, accountability measures, and efficient processes in effecting the role of courts in society.

***"Lawyers, of course, are completely comfortable with the notion that substantive law must change and adapt to meet changing social conditions. But they are distinctly less comfortable with the idea that the structures of the justice system may also need to evolve to meet current demands."* -Judith S. Kaye, Retired New York State Chief Judge**

7.1 Problem-Solving Courts

Over the past decade, there has been a significant transformation in the role of courts in society. Courts traditionally have functioned as government mechanisms of dispute resolution, resolving contracts, and tort damages, or between the government and an individual concerning allegations of criminal wrongdoing or regulatory violations. In these cases, courts typically have functioned as neutral arbiters, resolving issues of facts or supervising juries engaged in the adjudicatory process.

A new broad range of societal problems, some long-standing, that are social and psychological in nature, have been brought before the courts. These cases require the courts to not only resolve disputed issues of fact, but also to attempt to solve a variety of human problems that are responsible for bringing the case to court. Traditional courts limit their attention to the defined dispute in controversy. Courts recognized that simply resolving a dispute or using punitive sentencing options without addressing understanding human problems resulted in poor outcomes and recidivism. These newer courts, however, attempt to understand and address the underlying problem that is responsible for the immediate dispute, and to help the individuals before the court to effectively deal with the problem in ways that will prevent recurring court involvement.

The new courts, increasingly known as the therapeutic or problem solving courts, are specialized courts established to deal with specific problems, often involving individuals who need social, mental health, or substance abuse treatment services. These courts also include criminal cases involving individuals with drug or alcoholism problems, mental health problems, or problems of child neglect and domestic violence.

Drug Courts are a response to the recognition that processing nonviolent drug possession charges in the criminal courts and then sentencing the offender to prison does not succeed in changing the offender's drug addictive behavior. Instead of relying on the traditional criminal justice approach, the drug treatment court emphasizes the offender's rehabilitation, and places the judge as a member of the treatment team. Defendants accepting diversion to the drug court agree to several conditions: to remain drug-free, to participate in a prescribed course of drug treatment, to submit to routine drug testing in order to monitor their drug activity, and to report to court for judicial supervision of their progress. These courts have been successful in helping many addicts to obtain treatment and end their court involvement.

Another specialized treatment or problem solving court is the *Domestic Violence Court*. This court attempts to protect the victims of domestic violence, to motivate domestic violence defendants to attend batterer's treatment programs, and to monitor compliance with court orders and treatment.

Reentry Courts are another form of problem solving courts. These courts are designed to assist offenders released from prison into a form of court-supervised parole, to effect a successful integration into the community. A recently proposed application of the reentry court model deals with sex offenders and attempts to manage the risk of their reoffending through the use of polygraph examinations. Some reentry models stress the idea of a continuum of care and supervision. The goal is to integrate the treatment, training, supervision practices from sentencing through reentry into the community, regardless of whether they are incarcerated or on probation/parole. As important to that court is what happens after their probation or parole is completed.

Another example, the *Dependency Court*, is a component of family court that deals with issues of child abuse and neglect. This is a civil court that adjudicates whether child abuse or neglect has occurred, and when it has attempts to provide services designed to avoid its repetition. When such services are unsuccessful, the dependency court works to terminate parental rights and free the child up for adoption.

Teen Court, sometimes known as *Youth Court*, deals with cases involving juveniles charged with minor delinquency. It allows other juveniles who have been through the teen court process, and who have received special training, to play the role of prosecutor, defense attorney, or member of the jury. This special process diverts juveniles charged with minor offenses from the formal court process.

Mental Health Court is designed to deal with people arrested for a variety of criminal offenses whose major problem is mental illness rather than criminality. Mental health courts seek to divert them from the criminal justice system and to persuade them to voluntarily accept treatment while in the community. In addition, they link them with treatment resources, provide social service support and judicial monitoring to ensure treatment compliance, including the use of psychotropic medication.

Another problem-solving or specialty court is *Veterans Court*. Veterans Court assist veterans charged with crimes who are struggling with addiction, mental illness, or co-occurring disorders. Utilizing the drug court and mental health models, participants come before judges on a regular basis, receive support and guidance from veteran mentors, are supervised by specialized probation officers and receive treatment and support from the Veterans Administration.

All of these courts grew out of the recognition that traditional judicial approaches have failed, at least in the areas of substance abuse, domestic violence, certain kinds of criminality, child abuse and neglect, and mental illness.

The new problem solving courts are characterized by active judicial involvement, engagement of community stakeholders, interagency collaboration, and the explicit use of judicial authority to motivate individuals to accept needed services and to monitor their compliance and progress. They are concerned not merely with processing and resolving the court case, but in achieving a variety of tangible outcomes associated with avoiding reoccurrence of the problem.

Evidence-Based Practices

One of the most important reforms in state court sentencing and corrections practice taking place today is the incorporation of principles of evidence-based practices into state sentencing and

corrections policy and practice. This reform is sometimes referred to as smart sentencing and is directed toward reducing mandatory minimum sentences for drug offenses and expand the ability of judges to use their own discretion when sentencing defendants, so that judges can consider the unique facts of each case and each individual before them. It places an emphasis on treatment alternatives.

The term evidence-based practice (EBP) was used initially in relation to medicine, but has since been adopted by many fields including education, child welfare, mental health, and criminal justice.

EBP refers to approaches and interventions that have been scientifically tested in controlled studies and proven effective. EBP implies that there is a definable outcome(s); it is measurable; and it is defined according to practical realities (recidivism, victim satisfaction, etc.).

Interventions within corrections are considered effective when they reduce offender risk and subsequent recidivism. (Note - recidivism can be defined in many ways, i.e., re-arrest, re-conviction, parole revocation, return to incarceration, return to prison.) When offender risk is reduced, there are fewer victims of crime and public safety is enhanced.

Conviction Alternatives Programs (CAP)

Some courts now offer Conviction Alternatives Programs (CAP) for certain individuals at the pre-plea and post-plea phases of their criminal cases.

These CAP programs offer:

- Pre-Plea Diversion (often referred to as "Pretrial Diversion")
- Post-Plea Diversion and
- Deferred Sentencing.

Before a defendant pleads guilty, the prosecuting authority may offer him or her the opportunity to participate in a Pretrial or Post-Plea Diversion Program, which may include participation in the Diversion/Deferred Sentencing Court.

After a defendant has pleaded guilty, the Court may elect to defer sentencing and allow the defendant to participate in the Diversion/Deferred Sentencing Court prior to sentencing typically for a period of six months to one year. Upon successful completion of the Diversion/Deferred Sentencing Court program, the prosecuting authority may consider renegotiating the terms of the plea agreement, moving to dismiss the charges, moving to dismiss charges with mandatory minimums or sentence-enhancing allegation, or agree to recommend a lower sentence.

The collaborative process of supervision provides a greater level of enforcement and support from the judge who may eventually sentence the defendant and, at the same time, educates the judge and the prosecutor on the personal factors that affect the particular defendant. If a defendant is placed on probation, the Probation Office provides a seamless transition to supervision by an officer familiar with the Diversion/Deferred Sentencing Court program and the particular offender.

Activity 7.1 New Directions (see Participant Activities)

The activity is designed to pose thoughtful questions about the broadening and expansion of the role of courts to each table for discussion and to report back to the group.

7.2 Alternative Dispute Resolution (ADR)

ADR is an informal dispute resolution process where parties to a court action meet with a professional third party who helps to resolve disputes in a way that is less formal and often more consensual than the traditional court process.

There are three major types of ADR utilized in courts throughout this country:

Adjudicative ADR

In an adjudicative ADR proceeding, a quasi-judicial facilitator, called the "neutral," serves as the adjudicator or decision maker. This participation by an outside, impartial third-party is often desirable to parties unwilling to negotiate.

- Arbitration

  Arbitration is a form of adjudicative ADR that is generally conducted by a single arbitrator or a panel. Typically, arbitration is used in situations where the parties cannot agree on the facts or the dispute is strictly monetary.

- Neutral Fact-Finding

  Another form of adjudicative ADR is neutral fact-finding. In situations in which parties to a dispute cannot agree on the facts or technical expertise is essential to their determination, the parties may employ a third-party to inquire into the underlying facts of a case.

Evaluative ADR

The second category of ADR, evaluative ADR, is a process in which lawyers and litigants present their version of a particular case and receive feedback on the strengths and weaknesses of their claims and arguments.

- Panel Evaluation

  In panel evaluation, attorneys for each party appear before a neutral attorney or panel of peers experienced in the subject matter of the dispute, and present the case. In many instances, the panel may offer recommendations for settlement. Even if a settlement is not reached, the parties' decisions will be informed by these recommendations throughout any future litigation.

- Summary Jury Trial

  Summary jury trial ("SJT") is essentially an expedited and abbreviated jury trial. Attorneys for both sides of the dispute present to a pool of possible jurors opening arguments, a summation of the evidence, one witness each, and closing arguments. On that basis, the "jury" deliberates and returns a verdict, with time for the parties to then poll the panel. This approach allows parties to get a sense of how an actual jury may resolve a case, or in some cases may be binding by agreement of the parties.

- Judicial Evaluation

  Judicial evaluation is similar to an SJT, but in place of a jury it utilizes a retired judge who only provides feedback to the parties on the merits of a dispute.

Facilitative ADR

In facilitative ADR, the neutral serves as a referee or advisor to the parties, to encourage discussion, dialogue, and settlement. The three most common forms of facilitative ADR are mediation, conciliation, and consensus building.

- Mediation

  Mediation is the least adversarial form of ADR. The mediator helps the parties identify real issues, frame the discussion, and generate options for settlement. The goal of mediation is to provide a "win-win" resolution, enabling both parties to obtain a satisfactory remedy.

- Conciliation

  Conciliation is very similar to mediation, with much less formality. While mediation usually involves regular meetings between the parties, conciliation may be as informal as a telephone call. Moreover, conciliation usually assumes that the parties have already achieved some form of settlement and that the relationship has been mended, requiring only that the details of the matter be resolved.

- Consensus Building

  Consensus building may be thought of as mediation on a large scale, where a large number of parties are involved and representatives may be charged to appear and obtain decisions on behalf of their constituencies.

7.3 Restorative Justice

Restorative justice is a theory of justice that emphasizes repairing the harm caused or revealed by criminal behavior. It is best accomplished through cooperative processes that include all stakeholders.

Practices and programs reflecting restorative purposes will respond to crime by:

1. Identifying and taking steps to repair harm;
2. Involving all stakeholders; and
3. Transforming the traditional relationship between communities and their governments in responding to crime.

Some of the programs and outcomes typically identified with restorative justice include:

- Victim Offender Mediation
- Conferencing
- Circle Therapy
- Victim Assistance
- Ex-Offender Assistance
- Restitution
- Community Service

Three principles form the foundation for restorative justice:

1. Justice requires that courts work to restore those who have been injured.

2. Those most directly involved and affected by crime should have the opportunity to participate fully in the response if they wish.
3. The court's role is to preserve a just public order, and the community's is to build and maintain a just peace.

Criticism levelled against this model is that courts abrogate their sentencing authority to the victim, victim's family, or the community.

The trial rate (rate of cases that reach disposition by trial) in the United States is established at a rate of less than 15 percent. Conversely, the rate of cases that reach disposition by other means than a trial averages about 85 percent. Much of what has been discussed in this chapter speaks to new directions in courts across this country. This shift away from the courtroom as the forum of definitive case resolution alters the traditional role of court as primary neutral arbiter. The court now expands into therapeutic intervention, guided case settlement and restorative justice. Judges have assumed greater activist roles as a result of these changes. Many of these changes are valuable and will remain in our system. Courts have expanded their sphere of influence into the area of making social policy. These changes warrant a discussion here. There is an interesting roundtable discussion of some of these issues. The strongest statements made about the problems faced in the justice system are at about the 18:30 minute by the San Francisco prosecutor, George Gascón. He talks about 10 minutes. (MacArthur Foundation, 2015). https://www.youtube.com/watch?v=1RtglepyATI

Section 8 – Practical Application of Purposes

Learning Objectives

As a result of this section, participants will be able to:

2. Articulate the practical impact and relevance of the purposes and responsibilities of courts to their jurisdiction, day-to-day court operations, and their job.

"The ordinary administration of criminal and civil justice… contributes more than any other circumstance, to impressing upon the minds of the people affection, esteem, and reverence towards government." **-Alexander Hamilton**

Discussion Starter: Read or post the above quote from Federalist 17.

Who or what is the ordinary administration of justice?

Solicit responses from the group. In summarizing the responses, reinforce and remind participants of the judiciary's duty to provide four basic functions:

1. Protect citizen's constitutional rights;
2. Provide procedural due process;
3. Ensure each case receives individual justice; and
4. Preserve the rule of law.

Key Point: The Constitution comes to life every day in what judiciary leaders and staff do. We are the ordinary administration of justice.

Activity 8.1 Why Study Purposes? (See Participant Activities)

The activity consists of two questions designed for group discussion about the relevance of purposes and the meaning and use of canons of ethics.

8.1 Judicial Branch Ethics

ABA Code of Judicial Conduct

Canon 1: A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Canon 2: A judge shall perform the duties of judicial office impartially, competently, and diligently.

Canon 3: A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.

Canon 4: A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the integrity or impartiality of the judiciary**.**

NACM Model Code of Conduct for Court Professionals (2012)

Canon 1: Avoiding impropriety and the appearance of impropriety in all activities.

Canon 2: Performing the duties of position impartially and diligently.

Canon 3: Conducting outside activities to minimize the risk of conflict with official position.

Canon 4: Refraining from inappropriate political activity.

Activity 8.2 Survey of Time (see Participant Activities)

The activity is designed to introduce Section 8.2. Each individual should fill out the form in the activity and be prepared to discuss with the group.

8.2 Comments

This canon promotes the professional values of diligence, trustworthiness, courtesy, respect, and accountability. It also upholds the institution of courts as independent, fair, and responsive to the public.

Facilitator should try to emphasize the following key points:

- Difference between judges and court leaders.
- Potential problem areas and red flags.
- Relation to public trust and confidence.
- Civil service rules and codes.

One of the stated goals for this course is that participants will think about the purposes and responsibilities of court at least once a day when they return to their job.

One way to emphasize this point is to have them complete the survey of time questionnaire developed by NACM Past President Suzanne H. James.

Activity 8.4 Drawing Activity – A Judicial Brand (see Participant Activities)

The activity is designed as a fun and interesting way to end the course. Tables will work together to design and draw a judicial brand or logo illustrating what the courts represent.

- Reminder: Facilitator may want to revisit activity 1.4 – Think of a Person that Exemplified the Purposes of Courts. Key Point: They live it every day.

Faculty Resources

Faculty Resources are intended to be used as references and illustrations of content, methodology, and purpose for each topic. Faculty resources are annotated in the content outline in places where their use may be most effective. Faculty for a course based on this curriculum design may have supplemental resources that would be useful to court managers. These faculty resources are not intended to be the only participant materials; they are intended to provide some materials that are considered vital to the content.

Section One

1.0 Activity 1.3

Video of Ernest C. Friesen describing his forty plus years of seminal research regarding purposes of courts and caseflow management. This video is available on YouTube (American University, 2014): https://m.youtube.com/watch?v=saHb06PNadQ.

PURPOSES OF COURT

1. To do justice in individual cases
2. To adhere to standards of impartiality and fair procedure
3. To provide a forum for the resolution of disputes
4. To protect individuals from arbitrary use of government power
5. To make a formal record of legal status
6. To deter criminal behavior by people
7. To rehabilitate persons convicted of crime
8. To separate convicted persons from society
9. To inform the public, through court decisions, about what behavior is lawful and what behavior is unlawful

1.1 Do Individual Justice in Individual Cases

"The legal definition of controversy may be found in Article III, Section 2 of the Constitution"

U.S. Constitution; Article III, Section 2:

> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—* between a State and Citizens of another State,*—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.*
>
> *In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases*

before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

1.2 Appear to do Justice in Individual Cases

"The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."

— Oliver Wendell Holmes Jr., The Path of the Law (1897)

1.8 Separate Persons Convicted of Crimes from Society

See article on the following pages.

ljaf RESEARCH SUMMARY

Pretrial criminal justice research commissioned by the Laura and John Arnold Foundation (LJAF) has thrown new light on how critical the earliest decisions made in the criminal justice system may be for public safety, fairness, and cost effectiveness.

PRETRIAL CRIMINAL JUSTICE RESEARCH

Together, federal, state, and local corrections costs in the United States today exceed $80 billion per year. Pretrial detainees account for more than 60 percent of the inmate population in our jails. The cost to incarcerate defendants pretrial has been estimated at over $9 billion per year. Many pretrial detainees are low-risk defendants, who, if released before trial, are highly unlikely to commit other crimes and very likely to return to court. Others present moderate risks that can often be managed in the community through supervision, monitoring, or other interventions. There is, of course, a small but important group of defendants who should most often be detained because they pose significant risks of committing acts of violence, committing additional crimes, or skipping court.

The key, then, is to make sure that we accurately distinguish among the low-, moderate-, and high-risk defendants – and identify those who are at an elevated risk for violence. Moreover, it is important that, when we determine how to deal with defendants during the pretrial period, we appropriately assess what risk individual defendants pose. By making decisions in this manner, we can reduce crime, make wise use of public resources, and make our system more just.

Although police, prosecutors, and judges share the same objectives – to detain those who pose a risk to public safety and to release those who do not – this is not how our criminal justice system currently operates. Criminal justice decisionmakers do their best to achieve these goals, but they typically do not have sufficient information about defendants, the risks they pose, or the best methods to reduce these risks. Instead, key decisions are often made in a subjective manner, based on experience and instinct, rather than on an objective, data-driven assessment of a defendant's risk level and the most effective approach to protecting public safety in each case.

For two years, LJAF has been working to improve how decisions are made during the earliest part of the criminal justice process, from the time a defendant is arrested until the case is resolved. Our strategy has been to use data, analytics, and technology to promote a transition from subjective to more objective decision-making. To that end, we are developing easy-to-use, data-driven risk assessments

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for judges and prosecutors and are exploring tools to assist police in determining when to arrest an individual and when to issue a citation instead. In addition, we are pursuing research into key criminal justice issues, including the impacts of pretrial release and detention; and we are investigating the long-unanswered question of what approaches are successful at reducing future crime – and for whom they are most effective. The LJAF research released today – which was conducted in partnership with two of the nation's leading pretrial justice researchers, Dr. Marie VanNostrand and Dr. Christopher Lowenkamp – is a key part of this effort. The central findings of these three studies are summarized below:

The Effect of Pretrial Detention on Sentencing:

A study, using data from state courts, found that defendants who were detained for the entire pretrial period were over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than defendants who were released at some point pending trial. And their sentences were significantly longer – almost three times as long for defendants sentenced to jail, and more than twice as long for those sentenced to prison. A separate study found similar results in the federal system.

The Hidden Costs of Pretrial Detention:

Using statewide data from Kentucky, this study uncovered strong correlations between the length of time low- and moderate-risk defendants were detained before trial, and the likelihood that they would reoffend in both the short- and long-term. Even for relatively short periods behind bars, low- and moderate-risk defendants who were detained for more days were more likely to commit additional crimes in the pretrial period – and were also more likely to do so during the two years after their cases ended.

The Impact of Pretrial Supervision:

This study drew on data from two states, one eastern and one western, and found that moderate- and high-risk defendants who received pretrial supervision were significantly more likely to appear for their day in court than those who were unsupervised. In addition, long periods of supervision (more than 180 days) were related to a decrease in new criminal activity; however, no such effect was evident for supervision of 180 days or less.

These studies raise significant questions about the way our pretrial system currently works. They also demonstrate the tremendous need for additional research in this area. As part of our commitment to using data, analytics, and technology to transform the front end of the criminal justice system – what we call *Moneyballing* criminal justice – LJAF stands committed to pursuing a robust research agenda to answer these pressing questions and to make sure the system is as safe, fair, and cost-effective as possible.

Key decisions are often made in a subjective manner, based on experience and instinct, rather than on an objective, data-driven assessment of a defendant's risk level and the most effective approach to protecting public safety in each case.

I. THE EFFECT OF PRETRIAL DETENTION ON SENTENCING

Two recent studies funded by LJAF shed new light on the impact that a defendant's release or detention before trial can have on the eventual sentence in the case. These studies – one using data from federal courts and the other using data from state courts – demonstrate that pretrial detention is associated with an increase in the likelihood a defendant will be sentenced to jail or prison, as well as the length of incarceration.[1] The findings serve to underscore just how important judges' decisions regarding pretrial release and detention truly are.

The state study analyzed records of over 60,000 defendants arrested in Kentucky in 2009 and 2010. It found that defendants detained for the entire pretrial period were over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than defendants who were released at some point pending trial. Sentences were also significantly longer – nearly three times as long for defendants sentenced to jail and more than twice as long for those sentenced to prison.

The analysis focused on the relationship between detention and sentencing. The study controlled for the other variables in the data set, meaning that defendants who were compared to one another were similar in terms of age, gender, race, marital status, risk level, offense type, incarceration history and other factors. In other words, defendants who were similar in every known way – except for their pretrial release status – had different outcomes at sentencing.

Studies demonstrate that pretrial detention is associated with an increase in the likelihood a defendant will be sentenced to jail or prison, as well as the length of incarceration.

1 Jails are usually locally operated and are used to detain individuals prior to trial or can be used to incarcerated individuals who have been sentenced, typically for one year or less. Prisons are state or federally run and are used to incarcerate sentenced individuals typically for one year or more, and often for much longer.

The second study examined similar questions in the context of federal courts. The study, which is currently under review by a peer-reviewed journal, was conducted by Dr. Lowenkamp, Dr. VanNostrand, Dr. James Oleson of the University of Auckland, Timothy Cadigan of the Administrative Office of the United States Courts (retired), and Dr. John Wooldredge of the University of Cincinnati. Drawing on 1,798 cases from two United States District Courts, the research found that pretrial release reduces sentence length for all defendants, even if release is ultimately revoked due to a defendant's failure to adhere to conditions of release. Indeed, detained defendants' sentences are, on average, nearly two times longer than those of released defendants. And while defendants who were released and later revoked received longer sentences than defendants who completed pretrial release without incident, their sentences were still shorter than defendants who were never released at all. These findings were obtained while controlling for known factors.

The importance of these findings is clear when considering the state of our federal prison system. More than 110,000 defendants went through the federal court system in 2011, 86 percent of whom were sentenced to federal prison for an average sentence of almost 5½ years. Since 1980, the Bureau of Prison population has grown tenfold. The fiscal costs of this increase are staggering: Each prisoner in the system costs taxpayers between $21,006 (minimum security) and $33,930 (high security) annually.

II. THE HIDDEN COSTS OF PRETRIAL DETENTION

The primary goal of the American criminal justice system is to protect the public. But what if, rather than protecting society, the pretrial phase of the system is actually helping to create new repeat offenders?

That is the question raised by an LJAF-funded study that analyzed data on over 153,000 defendants booked into jail in Kentucky in 2009 and 2010. The analysis showed that low-risk defendants who were detained pretrial for more than 24 hours were more likely to commit new crimes not only while their cases were pending, but also years later. In addition, they were more likely to miss their day in court. Conversely, for high-risk defendants, there was no relationship between pretrial incarceration and increased crime. This suggests that high-risk defendants can be detained before trial without compromising, and in fact enhancing, public safety and the fair administration of justice.

Judges, of course, do their best to sort violent, high-risk defendants from nonviolent, low-risk ones, but they have almost no reliable, data-driven risk assessment tools at their disposal to help them make these decisions. Fewer than 10 percent of U.S. jurisdictions use any sort of risk-assessment tools at the pretrial stage, and many of the tools that are in use are neither data-driven nor validated. Kentucky provided a unique research opportunity because it used a validated tool that provided us with an understanding of the level of risk that individual defendants posed. While risk assessments could not be completed on approximately 30 percent of defendants, we were able to study whether, for the remaining 70 percent, the impact of pretrial detention varied depending on their risk levels.

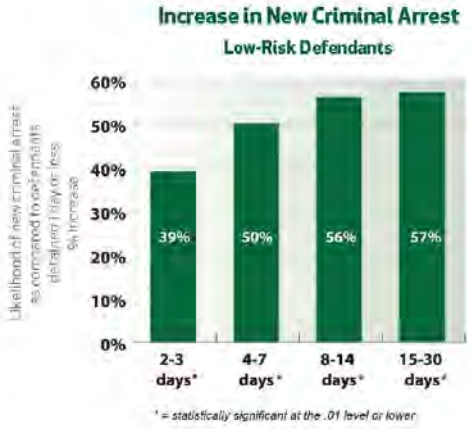
This study indicates that effectively distinguishing between low-, moderate-, and high-risk defendants at the pretrial stage could potentially enhance community safety.

The research findings are summarized below.

A. PRETRIAL DETENTION AND PRETRIAL OUTCOMES

This study explored whether there is a link between time spent in pretrial detention and the commission of new criminal activity or failure to appear in court. The study looked at 66,014 cases in which the defendants were released at some point before trial, and found that even very small increases in detention time are correlated with worse pretrial outcomes. The research controlled for other known variables. The study found that, when held 2-3 days, low-risk defendants were almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours. The study indicates that the correlation generally escalates as the time behind bars increases: low-risk defendants who were detained for 31 days or more offended 74 percent more frequently than those who were released within 24 hours. A similar pattern held for moderate-risk defendants, though the percentage increase in rates of new criminal activity is smaller.

Interestingly, for high-risk defendants, the study found no relationship between pretrial detention and increased new criminal activity. In other words, there is no indication that detaining high-risk defendants for longer periods before trial will lead to a greater likelihood of pretrial criminal activity.

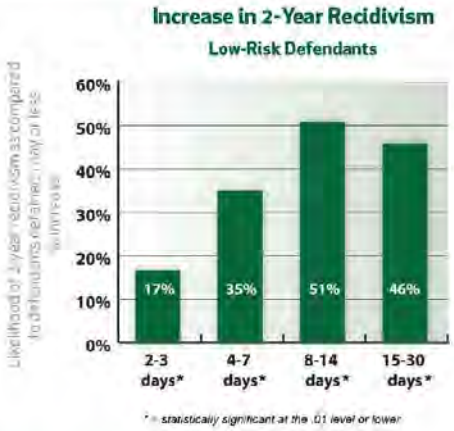


This same pattern emerged for failure to appear. Low-risk defendants held for 2-3 days were 22 percent more likely to fail to appear than similar defendants (in terms of criminal history, charge, background, and demographics) held for less than 24 hours. The number jumped to 41 percent for defendants held 15-30 days. For low-risk defendants held for more than 30 days, the study found a 31 percent increase in failure to appear. Again, however, detention was found to have no impact on high-risk defendants' rates of missing court, and for moderate-risk defendants, the effect was minimal.

B. PRETRIAL DETENTION AND LONG-TERM RECIDIVISM

Even for relatively short periods of detention, according to the study, the longer a low-risk defendant was detained before trial, the more likely he was to commit a new crime within two years of case disposition. Specifically, controlling for other known variables, the study found that pretrial detention is associated with long-term recidivism, particularly for low-risk defendants.

For detention periods of up to 14 days, according to the study, the longer a low-risk defendant was detained before trial, the more likely he was to commit a new crime within two years of case disposition. Compared to individuals released within 24 hours of arrest, low-risk defendants held 2-3 days were 17 percent more likely to commit another crime within two years. Detention periods of 4-7 days yielded a 35 percent increase in re-offense rates. And defendants held for 8-14 days were 51 percent more likely to recidivate than defendants who were detained less than 24 hours. Although the effects began to diminish slightly beyond 14 days, low-risk defendants remained significantly more likely to reoffend in the long run as compared to defendants released within 24 hours. Again, these effects were observed among defendants who were matched on all the other measurable variables. For high-risk defendants, however, more days spent in pretrial detention were not associated with an increase in recidivism.



C. POLICY IMPLICATIONS

In our criminal justice system today, judges frequently do not have an objective, scientific, and data-driven risk assessment to assist them in understanding the amount of risk that an individual defendant poses. Moreover, length of detention is frequently determined by factors totally unrelated to a defendant's risk level – for instance, the administrative speed with which a

given court system can process defendants. In some jurisdictions, defendants may be held up to three days before their first opportunity to go before a judge who will determine whether they are detained or released. What we see from this research is that the costs of these delays may potentially result in increased crime. The study finding regarding high-risk defendants is equally important: There appears to be no tradeoff between protecting the public during the pretrial period and improving public safety years later.

Although these studies do not demonstrate causation, they show correlations between length of detention and negative outcomes for low- and moderate-risk defendants. Additional studies are needed to further research these and other questions.

III. THE IMPACT OF PRETRIAL SUPERVISION

Although one of the most important decisions made before a criminal trial is whether to release or detain a defendant, the need for more data-driven tools does not end there. Judges frequently assign conditions to defendants they release, which may include pretrial supervision. There are many different models of pretrial supervision, some of which include periodic calls or meetings with a pretrial services officer, drug testing or treatment, or electronic monitoring. Currently, however, judges have very little data to help them determine who to assign to supervision, and what type of supervision works best for whom. With this in mind, LJAF is pursuing a number of studies of conditions of release including pretrial supervision.

In its initial study of pretrial supervision, LJAF researchers looked at 3,925 defendants from two states, one eastern and one western, and compared 2,437 defendants who were released without supervision with 1,488 who were released with supervision. In order to determine whether the effects of supervision varied based on defendants' risk levels, researchers used an existing validated risk assessment to assign defendants to risk categories.

The study found that moderate- and high-risk defendants who received pretrial supervision were significantly more likely to appear for their day in court. When controlling for state, gender, race, and risk, moderate-risk defendants who were supervised missed court dates 38 percent less frequently than unsupervised defendants. For high-risk defendants, the reduction was 33 percent. Analysis of various samples of the low-risk population generated inconsistent findings about the impacts of supervision on failure-to-appear rates – suggesting that the relationship between supervision for low-risk defendants and failure to appear is minimal or nonexistent.

In addition, pretrial supervision of more than 180 days was statistically related to a decrease in the likelihood of new criminal activity before case disposition. Defendants supervised pretrial for six months or more were 22 percent less likely to be arrested for new crimes before case disposition. While this finding is intriguing, the data set was not specific enough with regard to type of supervision to draw definite conclusions about the impact of supervision on new criminal activity pending case disposition.

This study is significant because it tells us that pretrial supervision may be effective in reducing failure to appear rates and, after a time, new criminal activity. However, while it appears that supervision generally helps prevent negative pretrial outcomes, details are scarce. For instance, in this study, no information was provided as to what type of supervision (minimal, moderate, or intensive) defendants received. And what types of supervision work for which defendants is something the field does not yet know. LJAF is committed to pursuing additional research in these important areas.

IV. CONCLUSION

This research demonstrates how critical it is to focus on the pretrial phase of the criminal justice system. Pretrial decisions made by judges, police, and prosecutors determine, as Caleb Foote stated in 1956, "mostly everything." These studies demonstrate that pretrial decisions may impact whether or not a defendant gets sentenced to jail or prison, and for how long; that an increased length of pretrial detention for low- and moderate-risk defendants is associated with an increased likelihood that they will reoffend both during the pretrial period and two years after the conclusion of their case; and that supervision may reduce failure to appear rates and, when done for 180 days or more, new criminal activity.

As important as these findings are, however, there remains an acute need for more research in this area. Moreover, for ethical and practical reasons, it would be difficult in many instances to conduct randomized controlled trials where judges would be asked to make detention, release, and supervision decisions based on research objectives. As a result, studies such as these do not prove causation. Although the findings noted above are observational, and not causal, the correlations are so striking that they merit further research.

LJAF is committed to researching questions that have arisen in these studies, and many others. This reflects our commitment to leveraging research, data, and technology to help jurisdictions improve public safety, reduce crime, make the best use of limited resources, and ensure that the justice system is working as fairly and efficiently as possible.

The full research reports for the studies can be accessed at:
www.arnoldfoundation.org/research/criminaljustice.

About Laura and John Arnold Foundation

Laura and John Arnold Foundation is a private foundation that currently focuses its strategic investments on criminal justice, education, public accountability, and research integrity.

LJAF has offices in Houston and New York City.

Section Two

2.1 Magna Carta

Magna Carta Text

Runnymede, England
June 15, 1215

JOHN, by the grace of God King of England, Lord of Ireland, Duke of Normandy and Aquitaine, and Count of Anjou, to his archbishops, bishops, abbots, earls, barons, justices, foresters, sheriffs, stewards, servants, and to all his officials and loyal subjects, Greeting.

KNOW THAT BEFORE GOD, for the health of our soul and those of our ancestors and heirs, to the honour of God, the exaltation of the holy Church, and the better ordering of our kingdom, at the advice of our reverend fathers Stephen, archbishop of Canterbury, primate of all England, and cardinal of the holy Roman Church, Henry archbishop of Dublin, William bishop of London, Peter bishop of Winchester, Jocelin bishop of Bath and Glastonbury, Hugh bishop of Lincoln, Walter Bishop of Worcester, William bishop of Coventry, Benedict bishop of Rochester, Master Pandulf subdeacon and member of the papal household, Brother Aymeric master of the knighthood of the Temple in England, William Marshal earl of Pembroke, William earl of Salisbury, William earl of Warren, William earl of Arundel, Alan de Galloway constable of Scotland, Warin Fitz Gerald, Peter Fitz Herbert, Hubert de Burgh seneschal of Poitou, Hugh de Neville, Matthew Fitz Herbert, Thomas Basset, Alan Basset, Philip Daubeny, Robert de Roppeley, John Marshal, John Fitz Hugh, and other loyal subjects:

(1) FIRST, THAT WE HAVE GRANTED TO GOD, and by this present charter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired. That we wish this so to be observed, appears from the fact that of our own free will, before the outbreak of the present dispute between us and our barons, we granted and confirmed by charter the freedom of the Church's elections - a right reckoned to be of the greatest necessity and importance to it - and caused this to be confirmed by Pope Innocent III. This freedom we shall observe ourselves, and desire to be observed in good faith by our heirs in perpetuity.

TO ALL FREE MEN OF OUR KINGDOM we have also granted, for us and our heirs forever, all the liberties written out below, to have and to keep for them and their heirs, of us and our heirs:

(2) If any earl, baron, or other person that holds lands directly of the Crown, for military service, shall die, and at his death his heir shall be of full age and owe a `relief', the heir shall have his inheritance on payment of the ancient scale of `relief'. That is to say, the heir or heirs of an earl shall pay £100 for the entire earl's barony, the heir or heirs of a knight l00s, at most for the entire knight's `fee', and any man that owes less shall pay less, in accordance with the ancient usage of `fees'

(3) But if the heir of such a person is under age and a ward, when he comes of age he shall have his inheritance without `relief' or fine.

(4) The guardian of the land of an heir who is under age shall take from it only reasonable revenues, customary dues, and feudal services. He shall do this without destruction or damage to men or property. If we have given the guardianship of the land to a sheriff, or to any person answerable to us for the revenues, and he commits destruction or damage, we will exact compensation from him, and the land shall be entrusted to two worthy and prudent men of the same `fee', who shall be answerable to us for the revenues, or to the person to whom we have assigned them. If we have

given or sold to anyone the guardianship of such land, and he causes destruction or damage, he shall lose the guardianship of it, and it shall be handed over to two worthy and prudent men of the same `fee', who shall be similarly answerable to us.

(5) For so long as a guardian has guardianship of such land, he shall maintain the houses, parks, fish preserves, ponds, mills, and everything else pertaining to it, from the revenues of the land itself. When the heir comes of age, he shall restore the whole land to him, stocked with plough teams and such implements of husbandry as the season demands and the revenues from the land can reasonably bear.

(6) Heirs may be given in marriage, but not to someone of lower social standing. Before a marriage takes place, it shall be' made known to the heir's next-of-kin.

(7) At her husband's death, a widow may have her marriage portion and inheritance at once and without trouble. She shall pay nothing for her dower, marriage portion, or any inheritance that she and her husband held jointly on the day of his death. She may remain in her husband's house for forty days after his death, and within this period her dower shall be assigned to her.

(8) No widow shall be compelled to marry, so long as she wishes to remain without a husband. But she must give security that she will not marry without royal consent, if she holds her lands of the Crown, or without the consent of whatever other lord she may hold them of.

(9) Neither we nor our officials will seize any land or rent in payment of a debt, so long as the debtor has movable goods sufficient to discharge the debt. A debtor's sureties shall not be distrained upon so long as the debtor himself can discharge his debt. If, for lack of means, the debtor is unable to discharge his debt, his sureties shall be answerable for it. If they so desire, they may have the debtor's lands and rents until they have received satisfaction for the debt that they paid for him, unless the debtor can show that he has settled his obligations to them.

(10) If anyone who has borrowed a sum of money from Jews dies before the debt has been repaid, his heir shall pay no interest on the debt for so long as he remains under age, irrespective of whom he holds his lands. If such a debt falls into the hands of the Crown, it will take nothing except the principal sum specified in the bond.

(11) If a man dies owing money to Jews, his wife may have her dower and pay nothing towards the debt from it. If he leaves children that are under age, their needs may also be provided for on a scale appropriate to the size of his holding of lands. The debt is to be paid out of the residue, reserving the service due to his feudal lords. Debts owed to persons other than Jews are to be dealt with similarly.

(12) No `scutage' or `aid' may be levied in our kingdom without its general consent, unless it is for the ransom of our person, to make our eldest son a knight, and (once) to marry our eldest daughter. For these purposes only a reasonable `aid' may be levied. `Aids' from the city of London are to be treated similarly.

(13) The city of London shall enjoy all its ancient liberties and free customs, both by land and by water. We also will and grant that all other cities, boroughs, towns, and ports shall enjoy all their liberties and free customs.

(14) To obtain the general consent of the realm for the assessment of an `aid' - except in the three cases specified above - or a `scutage', we will cause the archbishops, bishops, abbots, earls, and greater barons to be summoned individually by letter. To those who hold lands directly of us we will cause a general summons to be issued, through the sheriffs and other officials, to come together on

a fixed day (of which at least forty days notice shall be given) and at a fixed place. In all letters of summons, the cause of the summons will be stated. When a summons has been issued, the business appointed for the day shall go forward in accordance with the resolution of those present, even if not all those who were summoned have appeared.

(15) In future we will allow no one to levy an `aid' from his free men, except to ransom his person, to make his eldest son a knight, and (once) to marry his eldest daughter. For these purposes only a reasonable `aid' may be levied.

(16) No man shall be forced to perform more service for a knight's `fee', or other free holding of land, than is due from it.

(17) Ordinary lawsuits shall not follow the royal court around, but shall be held in a fixed place.

(18) Inquests of novel disseisin, mort d'ancestor, and darrein presentment shall be taken only in their proper county court. We ourselves, or in our absence abroad our chief justice, will send two justices to each county four times a year, and these justices, with four knights of the county elected by the county itself, shall hold the assizes in the county court, on the day and in the place where the court meets.

(19) If any assizes cannot be taken on the day of the county court, as many knights and freeholders shall afterwards remain behind, of those who have attended the court, as will suffice for the administration of justice, having regard to the volume of business to be done.

(20) For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood. In the same way, a merchant shall be spared his merchandise, and a husbandman the implements of his husbandry, if they fall upon the mercy of a royal court. None of these fines shall be imposed except by the assessment on oath of reputable men of the neighborhood.

(21) Earls and barons shall be fined only by their equals, and in proportion to the gravity of their offence.

(22) A fine imposed upon the lay property of a clerk in holy orders shall be assessed upon the same principles, without reference to the value of his ecclesiastical benefice.

(23) No town or person shall be forced to build bridges over rivers except those with an ancient obligation to do so.

(24) No sheriff, constable, coroners, or other royal officials are to hold lawsuits that should be held by the royal justices.

(25) Every county, hundred, wapentake, and tithing shall remain at its ancient rent, without increase, except the royal demesne manors.

(26) If at the death of a man who holds a lay `fee' of the Crown, a sheriff or royal official produces royal letters patent of summons for a debt due to the Crown, it shall be lawful for them to seize and list movable goods found in the lay `fee' of the dead man to the value of the debt, as assessed by worthy men. Nothing shall be removed until the whole debt is paid, when the residue shall be given over to the executors to carry out the dead man s will. If no debt is due to the Crown, all the movable goods shall be regarded as the property of the dead man, except the reasonable shares of his wife and children.

(27) If a free man dies intestate, his movable goods are to be distributed by his next-of-kin and friends, under the supervision of the Church. The rights of his debtors are to be preserved.

(28) No constable or other royal official shall take corn or other movable goods from any man without immediate payment, unless the seller voluntarily offers postponement of this.

(29) No constable may compel a knight to pay money for castle-guard if the knight is willing to undertake the guard in person, or with reasonable excuse to supply some other fit man to do it. A knight taken or sent on military service shall be excused from castle-guard for the period of this service.

(30) No sheriff, royal official, or other person shall take horses or carts for transport from any free man, without his consent.

(31) Neither we nor any royal official will take wood for our castle, or for any other purpose, without the consent of the owner.

(32) We will not keep the lands of people convicted of felony in our hand for longer than a year and a day, after which they shall be returned to the lords of the `fees' concerned.

(33) All fish-weirs shall be removed from the Thames, the Medway, and throughout the whole of England, except on the sea coast.

(34) The writ called precipe shall not in future be issued to anyone in respect of any holding of land, if a free man could thereby be deprived of the right of trial in his own lord's court.

(35) There shall be standard measures of wine, ale, and corn (the London quarter), throughout the kingdom. There shall also be a standard width of dyed cloth, russett, and haberject, namely two ells within the selvedges. Weights are to be standardised similarly.

(36) In future nothing shall be paid or accepted for the issue of a writ of inquisition of life or limbs. It shall be given gratis, and not refused.

(37) If a man holds land of the Crown by `fee-farm', `socage', or `burgage', and also holds land of someone else for knight's service, we will not have guardianship of his heir, nor of the land that belongs to the other person's `fee', by virtue of the `fee-farm', `socage', or `burgage', unless the `fee-farm' owes knight's service. We will not have the guardianship of a man's heir, or of land that he holds of someone else, by reason of any small property that he may hold of the Crown for a service of knives, arrows, or the like.

(38) In future no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it.

(39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

(40) To no one will we sell, to no one deny or delay right or justice.

(41) All merchants may enter or leave England unharmed and without fear, and may stay or travel within it, by land or water, for purposes of trade, free from all illegal exactions, in accordance with ancient and lawful customs. This, however, does not apply in time of war to merchants from a country that is at war with us. Any such merchants found in our country at the outbreak of war shall be detained without injury to their persons or property, until we or our chief justice have discovered

how our own merchants are being treated in the country at war with us. If our own merchants are safe they shall be safe too.

(42) In future it shall be lawful for any man to leave and return to our kingdom unharmed and without fear, by land or water, preserving his allegiance to us, except in time of war, for some short period, for the common benefit of the realm. People that have been imprisoned or outlawed in accordance with the law of the land, people from a country that is at war with us, and merchants - who shall be dealt with as stated above - are excepted from this provision.

(43) If a man holds lands of any `escheat' such as the `honour' of Wallingford, Nottingham, Boulogne, Lancaster, or of other `escheats' in our hand that are baronies, at his death his heir shall give us only the `relief' and service that he would have made to the baron, had the barony been in the baron's hand. We will hold the `escheat' in the same manner as the baron held it.

(44) People who live outside the forest need not in future appear before the royal justices of the forest in answer to general summonses, unless they are actually involved in proceedings or are sureties for someone who has been seized for a forest offence.

(45) We will appoint as justices, constables, sheriffs, or other officials, only men that know the law of the realm and are minded to keep it well.

(46) All barons who have founded abbeys, and have charters of English kings or ancient tenure as evidence of this, may have guardianship of them when there is no abbot, as is their due.

(47) All forests that have been created in our reign shall at once be disafforested. River-banks that have been enclosed in our reign shall be treated similarly.

(48) All evil customs relating to forests and warrens, foresters, warreners, sheriffs and their servants, or river-banks and their wardens, are at once to be investigated in every county by twelve sworn knights of the county, and within forty days of their enquiry the evil customs are to be abolished completely and irrevocably. But we, or our chief justice if we are not in England, are first to be informed.

(49) We will at once return all hostages and charters delivered up to us by Englishmen as security for peace or for loyal service.

(50) We will remove completely from their offices the kinsmen of Gerard de Athée, and in future they shall hold no offices in England. The people in question are Engelard de Cigogné', Peter, Guy, and Andrew de Chanceaux, Guy de Cigogné, Geoffrey de Martigny and his brothers, Philip Marc and his brothers, with Geoffrey his nephew, and all their followers.

(51) As soon as peace is restored, we will remove from the kingdom all the foreign knights, bowmen, their attendants, and the mercenaries that have come to it, to its harm, with horses and arms.

(52) To any man whom we have deprived or dispossessed of lands, castles, liberties, or rights, without the lawful judgment of his equals, we will at once restore these. In cases of dispute the matter shall be resolved by the judgment of the twenty-five barons referred to below in the clause for securing the peace (§ 61). In cases, however, where a man was deprived or dispossessed of something without the lawful judgment of his equals by our father King Henry or our brother King Richard, and it remains in our hands or is held by others under our warranty, we shall have respite for the period commonly allowed to Crusaders, unless a lawsuit had been begun, or an enquiry had been made at our order, before we took the Cross as a Crusader. On our return from the Crusade, or if we abandon it, we will at once render justice in full.

(53) We shall have similar respite in rendering justice in connexion with forests that are to be disforested, or to remain forests, when these were first a-orested by our father Henry or our brother Richard; with the guardianship of lands in another person's `fee', when we have hitherto had this by virtue of a `fee' held of us for knight's service by a third party; and with abbeys founded in another person's `fee', in which the lord of the `fee' claims to own a right. On our return from the Crusade, or if we abandon it, we will at once do full justice to complaints about these matters.

(54) No one shall be arrested or imprisoned on the appeal of a woman for the death of any person except her husband.

(55) All fines that have been given to us unjustly and against the law of the land, and all fines that we have exacted unjustly, shall be entirely remitted or the matter decided by a majority judgment of the twenty-five barons referred to below in the clause for securing the peace (§ 61) together with Stephen, archbishop of Canterbury, if he can be present, and such others as he wishes to bring with him. If the archbishop cannot be present, proceedings shall continue without him, provided that if any of the twenty-five barons has been involved in a similar suit himself, his judgment shall be set aside, and someone else chosen and sworn in his place, as a substitute for the single occasion, by the rest of the twenty-five.

(56) If we have deprived or dispossessed any Welshmen of lands, liberties, or anything else in England or in Wales, without the lawful judgment of their equals, these are at once to be returned to them. A dispute on this point shall be determined in the Marches by the judgment of equals. English law shall apply to holdings of land in England, Welsh law to those in Wales, and the law of the Marches to those in the Marches. The Welsh shall treat us and ours in the same way.

(57) In cases where a Welshman was deprived or dispossessed of anything, without the lawful judgment of his equals, by our father King Henry or our brother King Richard, and it remains in our hands or is held by others under our warranty, we shall have respite for the period commonly allowed to Crusaders, unless a lawsuit had been begun, or an enquiry had been made at our order, before we took the Cross as a Crusader. But on our return from the Crusade, or if we abandon it, we will at once do full justice according to the laws of Wales and the said regions.

(58) We will at once return the son of Llywelyn, all Welsh hostages, and the charters delivered to us as security for the peace.

(59) With regard to the return of the sisters and hostages of Alexander, king of Scotland, his liberties and his rights, we will treat him in the same way as our other barons of England, unless it appears from the charters that we hold from his father William, formerly king of Scotland, that he should be treated otherwise. This matter shall be resolved by the judgment of his equals in our court.

(60) All these customs and liberties that we have granted shall be observed in our kingdom in so far as concerns our own relations with our subjects. Let all men of our kingdom, whether clergy or laymen, observe them similarly in their relations with their own men.

(61) SINCE WE HAVE GRANTED ALL THESE THINGS for God, for the better ordering of our kingdom, and to allay the discord that has arisen between us and our barons, and since we desire that they shall be enjoyed in their entirety, with lasting strength, forever, we give and grant to the barons the following security:

The barons shall elect twenty-five of their number to keep, and cause to be observed with all their might, the peace and liberties granted and confirmed to them by this charter.

If we, our chief justice, our officials, or any of our servants offend in any respect against any man, or transgress any of the articles of the peace or of this security, and the offence is made known to four of the said twenty-five barons, they shall come to us - or in our absence from the kingdom to the chief justice - to declare it and claim immediate redress. If we, or in our absence abroad the chief justice, make no redress within forty days, reckoning from the day on which the offence was declared to us or to him, the four barons shall refer the matter to the rest of the twenty-five barons, who may distrain upon and assail us in every way possible, with the support of the whole community of the land, by seizing our castles, lands, possessions, or anything else saving only our own person and those of the queen and our children, until they have secured such redress as they have determined upon. Having secured the redress, they may then resume their normal obedience to us.

Any man who so desires may take an oath to obey the commands of the twenty-five barons for the achievement of these ends, and to join with them in assailing us to the utmost of his power. We give public and free permission to take this oath to any man who so desires, and at no time will we prohibit any man from taking it. Indeed, we will compel any of our subjects who are unwilling to take it to swear it at our command.

If-one of the twenty-five barons dies or leaves the country, or is prevented in any other way from discharging his duties, the rest of them shall choose another baron in his place, at their discretion, who shall be duly sworn in as they were.

In the event of disagreement among the twenty-five barons on any matter referred to them for decision, the verdict of the majority present shall have the same validity as a unanimous verdict of the whole twenty-five, whether these were all present or some of those summoned were unwilling or unable to appear.

The twenty-five barons shall swear to obey all the above articles faithfully, and shall cause them to be obeyed by others to the best of their power.

We will not seek to procure from anyone, either by our own efforts or those of a third party, anything by which any part of these concessions or liberties might be revoked or diminished. Should such a thing be procured, it shall be null and void and we will at no time make use of it, either ourselves or through a third party.

(62) We have remitted and pardoned fully to all men any ill-will, hurt, or grudges that have arisen between us and our subjects, whether clergy or laymen, since the beginning of the dispute. We have in addition remitted fully, and for our own part have also pardoned, to all clergy and laymen any offences committed as a result of the said dispute between Easter in the sixteenth year of our reign (i.e. 1215) and the restoration of peace.

In addition we have caused letters patent to be made for the barons, bearing witness to this security and to the concessions set out above, over the seals of Stephen archbishop of Canterbury, Henry archbishop of Dublin, the other bishops named above, and Master Pandulf.

(63) IT IS ACCORDINGLY OUR WISH AND COMMAND that the English Church shall be free, and that men in our kingdom shall have and keep all these liberties, rights, and concessions, well and peaceably in their fullness and entirety for them and their heirs, of us and our heirs, in all things and all places for ever.

Both we and the barons have sworn that all this shall be observed in good faith and without deceit. Witness the abovementioned people and many others.

Given by our hand in the meadow that is called Runnymede, between Windsor and Staines, on the fifteenth day of June in the seventeenth year of our reign (i.e. 1215: the new regnal year began on 28 May).

2.3 Declaration of Independence

IN CONGRESS, July 4, 1776.

The unanimous Declaration of the thirteen united States of America,

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.--Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.

He has affected to render the Military independent of and superior to the Civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:

For Quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing Taxes on us without our Consent:

For depriving us in many cases, of the benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended offences

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:
For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

Nor have We been wanting in attentions to our Brittish brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

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2.4 Federalist Papers (The Library of Congress: www.loc.gov)

Federalist No. 51

The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments
From the New York Packet.
Friday, February 8, 1788.

Author: **James Madison (1788)**

To the People of the State of New York:

TO WHAT expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. Without presuming to undertake a full development of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention. In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them. It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal. But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in

such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State. But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative on the legislature appears, at first view, to be the natural defense with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused. May not this defect of an absolute negative be supplied by some qualified connection between this weaker department and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department? If the principles on which these observations are founded be just, as I persuade myself they are, and they be applied as a criterion to the several State constitutions, and to the federal Constitution it will be found that if the latter does not perfectly correspond with them, the former are infinitely less able to bear such a test. There are, moreover, two considerations particularly applicable to the federal system of America, which place that system in a very interesting point of view. First. In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself. Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing a hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects;

and this may be presumed to depend on the extent of country and number of people comprehended under the same government. This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government, since it shows that in exact proportion as the territory of the Union may be formed into more circumscribed Confederacies, or States oppressive combinations of a majority will be facilitated: the best security, under the republican forms, for the rights of every class of citizens, will be diminished: and consequently the stability and independence of some member of the government, the only other security, must be proportionately increased. Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful. It can be little doubted that if the State of Rhode Island was separated from the Confederacy and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it. In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; whilst there being thus less danger to a minor from the will of a major party, there must be less pretext, also, to provide for the security of the former, by introducing into the government a will not dependent on the latter, or, in other words, a will independent of the society itself. It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practical sphere, the more duly capable it will be of self-government. And happily for the REPUBLICAN CAUSE, the practicable sphere may be carried to a very great extent, by a judicious modification and mixture of the FEDERAL PRINCIPLE.

PUBLIUS.

Federalist No. 78

The Judiciary Department

From McLEAN'S Edition, New York.

Author: **Alexander Hamilton (1788)**

To the People of the State of New York:

WE PROCEED now to an examination of the judiciary department of the proposed government.

In unfolding the defects of the existing Confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged, as the propriety of the institution in the abstract is not disputed; the

only questions which have been raised being relative to the manner of constituting it, and to its extent. To these points, therefore, our observations shall be confined.

The manner of constituting it seems to embrace these several objects: 1st. The mode of appointing the judges. 2d. The tenure by which they are to hold their places. 3d. The partition of the judiciary authority between different courts, and their relations to each other.

First. As to the mode of appointing the judges; this is the same with that of appointing the officers of the Union in general, and has been so fully discussed in the two last numbers, that nothing can be said here which would not be useless repetition.

Second. As to the tenure by which the judges are to hold their places; this chiefly concerns their duration in office; the provisions for their support; the precautions for their responsibility.

According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices DURING GOOD BEHAVIOR; which is conformable to the most approved of the State constitutions and among the rest, to that of this State. Its propriety having been drawn into question by the adversaries of that plan, is no light symptom of the rage for objection, which disorders their imaginations and judgments. The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power [1]; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." [2] And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as

permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their WILL to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an EQUAL authority, that which was the last indication of its will should have the preference.

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

Though I trust the friends of the proposed Constitution will never concur with its enemies, [3] in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness, yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a

greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws.

Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress.

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

There is yet a further and a weightier reason for the permanency of the judicial offices, which is deducible from the nature of the qualifications they require. It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very

considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them.

Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the government can have no great option between fit character; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity. In the present circumstances of this country, and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed, that they are far inferior to those which present themselves under the other aspects of the subject.

Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established GOOD BEHAVIOR as the tenure of their judicial offices, in point of duration; and that so far from being blamable on this account, their plan would have been inexcusably defective, if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution.

PUBLIUS.

1. The celebrated Montesquieu, speaking of them, says: "Of the three powers above mentioned, the judiciary is next to nothing." "Spirit of Laws." vol. i., page 186.

2. Idem, page 181.

3. Vide "Protest of the Minority of the Convention of Pennsylvania," Martin's Speech, etc.

Federalist No. 80 ||

The Powers of the Judiciary

From McLEAN'S Edition, New York.

Author: Alexander Hamilton

To the People of the State of New York:

To JUDGE with accuracy of the proper extent of the federal judicature, it will be necessary to consider, in the first place, what are its proper objects.

It seems scarcely to admit of controversy, that the judiciary authority of the Union ought to extend to these several descriptions of cases: 1st, to all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; 2d, to all those which concern the execution of the provisions expressly contained in the articles of Union; 3d, to all those in which the United States are a party; 4th, to all those which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves; 5th, to all those which originate on the high seas, and are of admiralty or maritime jurisdiction; and, lastly, to all those in which the State tribunals cannot be supposed to be impartial and unbiased.

The first point depends upon this obvious consideration, that there ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them? The States, by the plan of the convention, are prohibited from doing a variety of things, some of which are incompatible with the interests of the Union, and others with the principles of good government. The imposition of duties on imported articles, and the emission of paper money, are specimens of each kind. No man of sense will believe, that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the State laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former, and, I presume, will be most agreeable to the States.

As to the second point, it is impossible, by any argument or comment, to make it clearer than it is in itself. If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.

Still less need be said in regard to the third point. Controversies between the nation and its members or citizens, can only be properly referred to the national tribunals. Any other plan would be contrary to reason, to precedent, and to decorum.

The fourth point rests on this plain proposition, that the peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquility. A distinction may perhaps be imagined between cases arising upon treaties and the laws of nations and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the States. But it is at least problematical, whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the lex loci, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations of a treaty or the general law of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complexion and those of the other. So great a proportion of the cases in which foreigners are parties, involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.

The power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States, is perhaps not less essential to the peace of the Union than that which has been just examined. History gives us a horrid picture of the dissensions and private wars which distracted and desolated Germany prior to the institution of the Imperial Chamber by Maximilian, towards the close of the fifteenth century; and informs us,

at the same time, of the vast influence of that institution in appeasing the disorders and establishing the tranquility of the empire. This was a court invested with authority to decide finally all differences among the members of the Germanic body.

A method of terminating territorial disputes between the States, under the authority of the federal head, was not unattended to, even in the imperfect system by which they have been hitherto held together. But there are many other sources, besides interfering claims of boundary, from which bickerings and animosities may spring up among the members of the Union. To some of these we have been witnesses in the course of our past experience. It will readily be conjectured that I allude to the fraudulent laws which have been passed in too many of the States. And though the proposed Constitution establishes particular guards against the repetition of those instances which have heretofore made their appearance, yet it is warrantable to apprehend that the spirit which produced them will assume new shapes, that could not be foreseen nor specifically provided against. Whatever practices may have a tendency to disturb the harmony between the States, are proper objects of federal superintendence and control.

It may be esteemed the basis of the Union, that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." And if it be a just principle that every government OUGHT TO POSSESS THE MEANS OF EXECUTING ITS OWN PROVISIONS BY ITS OWN AUTHORITY, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

The fifth point will demand little animadversion. The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important part of them are, by the present Confederation, submitted to federal jurisdiction.

The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens. And it ought to have the same operation in regard to some cases between citizens of the same State. Claims to land under grants of different States, founded upon adverse pretensions of boundary, are of this description. The courts of neither of the granting States could be expected to be unbiased. The laws may have even prejudged the question, and tied the courts down to decisions in favor of the grants of the State to which they belonged. And even where this had not been done, it would be natural that the judges, as men, should feel a strong predilection to the claims of their own government.

Having thus laid down and discussed the principles which ought to regulate the constitution of the federal judiciary, we will proceed to test, by these principles, the particular powers of which, according to the plan of the convention, it is to be composed. It is to comprehend "all cases in

law and equity arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands and grants of different States; and between a State or the citizens thereof and foreign states, citizens, and subjects." This constitutes the entire mass of the judicial authority of the Union.

Let us now review it in detail. It is, then, to extend:

First. To all cases in law and equity, ARISING UNDER THE CONSTITUTION and THE LAWS OF THE UNITED STATES. This corresponds with the two first classes of causes, which have been enumerated, as proper for the jurisdiction of the United States. It has been asked, what is meant by "cases arising under the Constitution," in contradiction from those "arising under the laws of the United States"? The difference has been already explained. All the restrictions upon the authority of the State legislatures furnish examples of it. They are not, for instance, to emit paper money; but the interdiction results from the Constitution, and will have no connection with any law of the United States. Should paper money, notwithstanding, be emitted, the controversies concerning it would be cases arising under the Constitution and not the laws of the United States, in the ordinary signification of the terms. This may serve as a sample of the whole.

It has also been asked, what need of the word "equity. What equitable causes can grow out of the Constitution and laws of the United States? There is hardly a subject of litigation between individuals, which may not involve those ingredients of FRAUD, ACCIDENT, TRUST, or HARDSHIP, which would render the matter an object of equitable rather than of legal jurisdiction, as the distinction is known and established in several of the States. It is the peculiar province, for instance, of a court of equity to relieve against what are called hard bargains: these are contracts in which, though there may have been no direct fraud or deceit, sufficient to invalidate them in a court of law, yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties, which a court of equity would not tolerate. In such cases, where foreigners were concerned on either side, it would be impossible for the federal judicatories to do justice without an equitable as well as a legal jurisdiction. Agreements to convey lands claimed under the grants of different States, may afford another example of the necessity of an equitable jurisdiction in the federal courts. This reasoning may not be so palpable in those States where the formal and technical distinction between LAW and EQUITY is not maintained, as in this State, where it is exemplified by every day's practice.

The judiciary authority of the Union is to extend:

Second. To treaties made, or which shall be made, under the authority of the United States, and to all cases affecting ambassadors, other public ministers, and consuls. These belong to the fourth class of the enumerated cases, as they have an evident connection with the preservation of the national peace.

Third. To cases of admiralty and maritime jurisdiction. These form, altogether, the fifth of the enumerated classes of causes proper for the cognizance of the national courts.

Fourth. To controversies to which the United States shall be a party. These constitute the third of those classes.

Fifth. To controversies between two or more States; between a State and citizens of another State; between citizens of different States. These belong to the fourth of those classes, and partake, in some measure, of the nature of the last.

Sixth. To cases between the citizens of the same State, CLAIMING LANDS UNDER GRANTS OF DIFFERENT STATES. These fall within the last class, and ARE THE ONLY INSTANCES IN WHICH THE PROPOSED CONSTITUTION DIRECTLY CONTEMPLATES THE COGNIZANCE OF DISPUTES BETWEEN THE CITIZENS OF THE SAME STATE.

Seventh. To cases between a State and the citizens thereof, and foreign States, citizens, or subjects. These have been already explained to belong to the fourth of the enumerated classes, and have been shown to be, in a peculiar manner, the proper subjects of the national judicature.

From this review of the particular powers of the federal judiciary, as marked out in the Constitution, it appears that they are all conformable to the principles which ought to have governed the structure of that department, and which were necessary to the perfection of the system. If some partial inconveniences should appear to be connected with the incorporation of any of them into the plan, it ought to be recollected that the national legislature will have ample authority to make such EXCEPTIONS, and to prescribe such regulations as will be calculated to obviate or remove these inconveniences. The possibility of particular mischiefs can never be viewed, by a well informed mind, as a solid objection to a general principle, which is calculated to avoid general mischiefs and to obtain general advantages.

PUBLIUS.

Federalist No. 81

The Judiciary Continued, and the Distribution of the Judicial Authority
From McLEAN'S Edition, New York.

Author: **Alexander Hamilton (1788)**

To the People of the State of New York:

LET US now return to the partition of the judiciary authority between different courts, and their relations to each other, "The judicial power of the United States is" (by the plan of the convention) "to be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish." [1]

That there ought to be one court of supreme and final jurisdiction, is a proposition which is not likely to be contested. The reasons for it have been assigned in another place, and are too obvious to need repetition. The only question that seems to have been raised concerning it, is, whether it ought to be a distinct body or a branch of the legislature. The same contradiction is observable in regard to this matter which has been remarked in several other cases. The very men who object to the Senate as a court of impeachments, on the ground of an improper intermixture of powers, advocate, by implication at least, the propriety of vesting the ultimate decision of all causes, in the whole or in a part of the legislative body.

The arguments, or rather suggestions, upon which this charge is founded, are to this effect: "The authority of the proposed Supreme Court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the SPIRIT of the Constitution, will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous. In Britain, the judicial power, in the last resort, resides in the House of Lords, which is a branch of the legislature; and this part of the British government has been imitated in the State constitutions in general. The Parliament of Great Britain, and the legislatures of the several States, can at any time rectify, by law, the exceptionable decisions of their respective courts. But the errors and usurpations of the Supreme Court of the United States will be uncontrollable and remediless." This, upon examination, will be found to be made up altogether of false reasoning upon misconceived fact.

In the first place, there is not a syllable in the plan under consideration which DIRECTLY empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State. I admit, however, that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of the convention, but from the general theory of a limited Constitution; and as far as it is true, is equally applicable to most, if not to all the State governments. There can be no objection, therefore, on this account, to the federal judicature which will not lie against the local judicatures in general, and which will not serve to condemn every constitution that attempts to set bounds to legislative discretion.

But perhaps the force of the objection may be thought to consist in the particular organization of the Supreme Court; in its being composed of a distinct body of magistrates, instead of being one of the branches of the legislature, as in the government of Great Britain and that of the State. To

insist upon this point, the authors of the objection must renounce the meaning they have labored to annex to the celebrated maxim, requiring a separation of the departments of power. It shall, nevertheless, be conceded to them, agreeably to the interpretation given to that maxim in the course of these papers, that it is not violated by vesting the ultimate power of judging in a PART of the legislative body. But though this be not an absolute violation of that excellent rule, yet it verges so nearly upon it, as on this account alone to be less eligible than the mode preferred by the convention. From a body which had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them, would be too apt in interpreting them; still less could it be expected that men who had infringed the Constitution in the character of legislators, would be disposed to repair the breach in the character of judges. Nor is this all. Every reason which recommends the tenure of good behavior for judicial offices, militates against placing the judiciary power, in the last resort, in a body composed of men chosen for a limited period. There is an absurdity in referring the determination of causes, in the first instance, to judges of permanent standing; in the last, to those of a temporary and mutable constitution. And there is a still greater absurdity in subjecting the decisions of men, selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowledge. The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges; and as, on this account, there will be great reason to apprehend all the ill consequences of defective information, so, on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshalled on opposite sides will be too apt to stifle the voice both of law and of equity.

These considerations teach us to applaud the wisdom of those States who have committed the judicial power, in the last resort, not to a part of the legislature, but to distinct and independent bodies of men. Contrary to the supposition of those who have represented the plan of the convention, in this respect, as novel and unprecedented, it is but a copy of the constitutions of New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia; and the preference which has been given to those models is highly to be commended.

It is not true, in the second place, that the Parliament of Great Britain, or the legislatures of the particular States, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States. The theory, neither of the British, nor the State constitutions, authorizes the revisal of a judicial sentence by a legislative act. Nor is there any thing in the proposed Constitution, more than in either of them, by which it is forbidden. In the former, as well as in the latter, the impropriety of the thing, on the general principles of law and reason, is the sole obstacle. A legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases. This is the principle, and it applies in all its consequences, exactly in the same manner and extent, to the State governments, as to the national government now under consideration. Not the least difference can be pointed out in any view of the subject.

It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then

happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty, from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords, at the same time, a cogent argument for constituting the Senate a court for the trial of impeachments.

Having now examined, and, I trust, removed the objections to the distinct and independent organization of the Supreme Court, I proceed to consider the propriety of the power of constituting inferior courts, [2] and the relations which will subsist between these and the former.

The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance. It is intended to enable the national government to institute or AUTHORIZE, in each State or district of the United States, a tribunal competent to the determination of matters of national jurisdiction within its limits.

But why, it is asked, might not the same purpose have been accomplished by the instrumentality of the State courts? This admits of different answers. Though the fitness and competency of those courts should be allowed in the utmost latitude, yet the substance of the power in question may still be regarded as a necessary part of the plan, if it were only to empower the national legislature to commit to them the cognizance of causes arising out of the national Constitution. To confer the power of determining such causes upon the existing courts of the several States, would perhaps be as much "to constitute tribunals," as to create new courts with the like power. But ought not a more direct and explicit provision to have been made in favor of the State courts? There are, in my opinion, substantial reasons against such a provision: the most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover, that courts constituted like those of some of the States would be improper channels of the judicial authority of the Union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws. And if there was a necessity for confiding the original cognizance of causes arising under those laws to them there would be a correspondent necessity for leaving the door of appeal as wide as possible. In proportion to the grounds of confidence in, or distrust of, the subordinate tribunals, ought to be the facility or difficulty of appeals. And well satisfied as I am of the propriety of the appellate jurisdiction, in the several classes of causes to which it is extended by the plan of the convention. I should consider every thing calculated to give, in practice, an UNRESTRAINED COURSE to appeals, as a source of public and private inconvenience.

I am not sure, but that it will be found highly expedient and useful, to divide the United States into four or five or half a dozen districts; and to institute a federal court in each district, in lieu of

one in every State. The judges of these courts, with the aid of the State judges, may hold circuits for the trial of causes in the several parts of the respective districts. Justice through them may be administered with ease and despatch; and appeals may be safely circumscribed within a narrow compass. This plan appears to me at present the most eligible of any that could be adopted; and in order to it, it is necessary that the power of constituting inferior courts should exist in the full extent in which it is to be found in the proposed Constitution.

These reasons seem sufficient to satisfy a candid mind, that the want of such a power would have been a great defect in the plan. Let us now examine in what manner the judicial authority is to be distributed between the supreme and the inferior courts of the Union. The Supreme Court is to be invested with original jurisdiction, only "in cases affecting ambassadors, other public ministers, and consuls, and those in which A STATE shall be a party." Public ministers of every class are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation. Though consuls have not in strictness a diplomatic character, yet as they are the public agents of the nations to which they belong, the same observation is in a great measure applicable to them. In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal. Though it may rather be a digression from the immediate subject of this paper, I shall take occasion to mention here a supposition which has excited some alarm upon very mistaken grounds. It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation.

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual WITHOUT ITS CONSENT. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.

Let us resume the train of our observations. We have seen that the original jurisdiction of the Supreme Court would be confined to two classes of causes, and those of a nature rarely to occur. In all other cases of federal cognizance, the original jurisdiction would appertain to the inferior

tribunals; and the Supreme Court would have nothing more than an appellate jurisdiction, "with such EXCEPTIONS and under such REGULATIONS as the Congress shall make."

The propriety of this appellate jurisdiction has been scarcely called in question in regard to matters of law; but the clamors have been loud against it as applied to matters of fact. Some well-intentioned men in this State, deriving their notions from the language and forms which obtain in our courts, have been induced to consider it as an implied supersedure of the trial by jury, in favor of the civil-law mode of trial, which prevails in our courts of admiralty, probate, and chancery. A technical sense has been affixed to the term "appellate," which, in our law parlance, is commonly used in reference to appeals in the course of the civil law. But if I am not misinformed, the same meaning would not be given to it in any part of New England. There an appeal from one jury to another, is familiar both in language and practice, and is even a matter of course, until there have been two verdicts on one side. The word "appellate," therefore, will not be understood in the same sense in New England as in New York, which shows the impropriety of a technical interpretation derived from the jurisprudence of any particular State. The expression, taken in the abstract, denotes nothing more than the power of one tribunal to review the proceedings of another, either as to the law or fact, or both. The mode of doing it may depend on ancient custom or legislative provision (in a new government it must depend on the latter), and may be with or without the aid of a jury, as may be judged advisable. If, therefore, the re-examination of a fact once determined by a jury, should in any case be admitted under the proposed Constitution, it may be so regulated as to be done by a second jury, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the Supreme Court.

But it does not follow that the re-examination of a fact once ascertained by a jury, will be permitted in the Supreme Court. Why may not it be said, with the strictest propriety, when a writ of error is brought from an inferior to a superior court of law in this State, that the latter has jurisdiction of the fact as well as the law? It is true it cannot institute a new inquiry concerning the fact, but it takes cognizance of it as it appears upon the record, and pronounces the law arising upon it. [3] This is jurisdiction of both fact and law; nor is it even possible to separate them. Though the common-law courts of this State ascertain disputed facts by a jury, yet they unquestionably have jurisdiction of both fact and law; and accordingly when the former is agreed in the pleadings, they have no recourse to a jury, but proceed at once to judgment. I contend, therefore, on this ground, that the expressions, "appellate jurisdiction, both as to law and fact," do not necessarily imply a re-examination in the Supreme Court of facts decided by juries in the inferior courts.

The following train of ideas may well be imagined to have influenced the convention, in relation to this particular provision. The appellate jurisdiction of the Supreme Court (it may have been argued) will extend to causes determinable in different modes, some in the course of the COMMON LAW, others in the course of the CIVIL LAW. In the former, the revision of the law only will be, generally speaking, the proper province of the Supreme Court; in the latter, the re-examination of the fact is agreeable to usage, and in some cases, of which prize causes are an example, might be essential to the preservation of the public peace. It is therefore necessary that the appellate jurisdiction should, in certain cases, extend in the broadest sense to matters of fact. It will not answer to make an express exception of cases which shall have been originally tried by a jury, because in the courts of some of the States ALL CAUSES are tried in this mode [4] ; and such an exception would preclude the revision of matters of fact, as well where it might be

proper, as where it might be improper. To avoid all inconveniences, it will be safest to declare generally, that the Supreme Court shall possess appellate jurisdiction both as to law and FACT, and that this jurisdiction shall be subject to such EXCEPTIONS and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.

This view of the matter, at any rate, puts it out of all doubt that the supposed ABOLITION of the trial by jury, by the operation of this provision, is fallacious and untrue. The legislature of the United States would certainly have full power to provide, that in appeals to the Supreme Court there should be no re-examination of facts where they had been tried in the original causes by juries. This would certainly be an authorized exception; but if, for the reason already intimated, it should be thought too extensive, it might be qualified with a limitation to such causes only as are determinable at common law in that mode of trial.

The amount of the observations hitherto made on the authority of the judicial department is this: that it has been carefully restricted to those causes which are manifestly proper for the cognizance of the national judicature; that in the partition of this authority a very small portion of original jurisdiction has been preserved to the Supreme Court, and the rest consigned to the subordinate tribunals; that the Supreme Court will possess an appellate jurisdiction, both as to law and fact, in all the cases referred to them, both subject to any EXCEPTIONS and REGULATIONS which may be thought advisable; that this appellate jurisdiction does, in no case, ABOLISH the trial by jury; and that an ordinary degree of prudence and integrity in the national councils will insure us solid advantages from the establishment of the proposed judiciary, without exposing us to any of the inconveniences which have been predicted from that source.

PUBLIUS.

1. Article 3, sec. I.

2. This power has been absurdly represented as intended to abolish all the county courts in the several States, which are commonly called inferior courts. But the expressions of the Constitution are, to constitute "tribunals INFERIOR TO THE SUPREME COURT"; and the evident design of the provision is to enable the institution of local courts, subordinate to the Supreme, either in States or larger districts. It is ridiculous to imagine that county courts were in contemplation.

3. This word is composed of JUS and DICTIO, juris dictio or a speaking and pronouncing of the law.

4. I hold that the States will have concurrent jurisdiction with the subordinate federal judicatories, in many cases of federal cognizance, as will be explained in my next paper.

2.5 The U.S. Constitution

Amendments

THE U.S. NATIONAL ARCHIVES & RECORDS ADMINISTRATION

www.archives.gov December 1, 2015

On September 25, 1789, the First Congress of the United States proposed 12 amendments to the Constitution. The 1789 Joint Resolution of Congress proposing the amendments is on display in the Rotunda in the National Archives Museum. Ten of the proposed 12 amendments were ratified by three-fourths of the state legislatures on December 15, 1791. The ratified Articles (Articles 3–12) constitute the first 10 amendments of the Constitution, or the U.S. Bill of Rights. In 1992, 203 years after it was proposed, Article 2 was ratified as the 27th Amendment to the Constitution. Article 1 was never ratified.

Transcription of the 1789 Joint Resolution of Congress Proposing 12 Amendments to the U.S. Constitution

Congress of the United States
begun and held at the City of New-York, on
Wednesday the fourth of March, one thousand seven hundred and eighty nine.

THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.

RESOLVED by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States, all, or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution; viz.

ARTICLES in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

Article the first... After the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

Article the second... No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

Article the third... Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article the fourth... A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Article the fifth... No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Article the sixth... The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article the seventh... No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article the eighth... In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Article the ninth... In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Article the tenth... Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Article the eleventh... The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Article the twelfth... The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ATTEST,
Frederick Augustus Muhlenberg, Speaker of the House of Representatives
John Adams, Vice-President of the United States, and President of the Senate
John Beckley, Clerk of the House of Representatives.

Sam. A Otis Secretary of the Senate

Note: The capitalization and punctuation in this version is from the enrolled original of the Joint Resolution of Congress proposing the Bill of Rights, which is on permanent display in the Rotunda of the National Archives Building, Washington, D.C.

The U.S. Bill of Rights

The Preamble to The Bill of Rights
Congress of the United States
begun and held at the City of New-York, on
Wednesday the fourth of March, one thousand seven hundred and eighty nine.

THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.

RESOLVED by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States, all, or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution; viz.

ARTICLES in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

Note: The following text is a transcription of the first ten amendments to the Constitution in their original form. These amendments were ratified December 15, 1791, and form what is known as the "Bill of Rights."

Amendment I
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II
A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III
No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX
The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XI
Passed by Congress March 4, 1794. Ratified February 7, 1795.
Note: Article III, section 2, of the Constitution was modified by amendment 11.
The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XII

Passed by Congress December 9, 1803. Ratified June 15, 1804.
Note: A portion of Article II, section 1 of the Constitution was superseded by the 12th amendment.
The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; -- the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; -- The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. [And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President. --]* The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.
*Superseded by section 3 of the 20th amendment.

Amendment XIII
Passed by Congress January 31, 1865. Ratified December 6, 1865.
Note: A portion of Article IV, section 2, of the Constitution was superseded by the 13th amendment.

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV
Passed by Congress June 13, 1866. Ratified July 9, 1868.
Note: Article I, section 2, of the Constitution was modified by section 2 of the 14th amendment.

Section 1.All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,* and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

*Changed by section 1 of the 26th amendment.

Amendment XV
Passed by Congress February 26, 1869. Ratified February 3, 1870.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude--

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

Amendment XVI
Passed by Congress July 2, 1909. Ratified February 3, 1913.
Note: Article I, section 9, of the Constitution was modified by amendment 16.

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment XVII
Passed by Congress May 13, 1912. Ratified April 8, 1913.
Note: Article I, section 3, of the Constitution was modified by the 17th amendment.

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.
When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XVIII
Passed by Congress December 18, 1917. Ratified January 16, 1919. Repealed by amendment 21.
Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XIX
Passed by Congress June 4, 1919. Ratified August 18, 1920.
The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Amendment XX
Passed by Congress March 2, 1932. Ratified January 23, 1933.
Note: Article I, section 4, of the Constitution was modified by section 2 of this amendment. In addition, a portion of the 12th amendment was superseded by section 3.

Section 1. The terms of the President and the Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment XXI
Passed by Congress February 20, 1933. Ratified December 5, 1933.

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XXII
Passed by Congress March 21, 1947. Ratified February 27, 1951.

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Amendment XXIII
Passed by Congress June 16, 1960. Ratified March 29, 1961.

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:
A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXIV
Passed by Congress August 27, 1962. Ratified January 23, 1964.

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXV
Passed by Congress July 6, 1965. Ratified February 10, 1967.
Note: Article II, section 1, of the Constitution was affected by the 25th amendment.

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.
Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI
Passed by Congress March 23, 1971. Ratified July 1, 1971.
Note: Amendment 14, section 2, of the Constitution was modified by section 1 of the 26th amendment.

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXVII
Originally proposed Sept. 25, 1789. Ratified May 7, 1992.
No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

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Marbury v. Madison (1803)

Outgoing President John Adams had issued William Marbury a commission as justice of the peace, but the new Secretary of State, James Madison, refused to deliver it. Marbury then sued to obtain it. With his decision in Marbury v. Madison, Chief Justice John Marshall established the principle of judicial review, an important addition to the system of "checks and balances" created to prevent any one branch of the Federal Government from becoming too powerful. The document shown here bears the marks of the Capitol fire of 1898.

"A Law repugnant to the Constitution is void." With these words written by Chief Justice Marshall, the Supreme Court for the first time declared unconstitutional a law passed by Congress and signed by the President. Nothing in the Constitution gave the Court this specific power. Marshall, however, believed that the Supreme Court should have a role equal to those of the other two branches of government.

When James Madison, Alexander Hamilton, and John Jay wrote a defense of the Constitution in The Federalist, they explained their judgment that a strong national government must have built-in restraints: "You must first enable government to control the governed; and in the next place oblige it to control itself." The writers of the Constitution had given the executive and legislative branches powers that would limit each other as well as the judiciary branch. The Constitution gave Congress the power to impeach and remove officials, including judges or the President himself. The President was given the veto power to restrain Congress and the authority to appoint members of the Supreme Court with the advice and consent of the Senate. In this intricate system, the role of the Supreme Court had not been defined. It therefore fell to a strong Chief Justice like Marshall to complete the triangular structure of checks and balances by establishing the principle of judicial review. Although no other law was declared unconstitutional until the Dred Scott decision of 1857, the role of the Supreme Court to invalidate Federal and state laws that are contrary to the Constitution has never been seriously challenged.

"The Constitution of the United States," said Woodrow Wilson, "was not made to fit us like a strait jacket. In its elasticity lies its chief greatness." The often-praised wisdom of the authors of the Constitution consisted largely of their restraint. They resisted the temptation to write too many specifics into the basic document. They contented themselves with establishing a framework of government that included safeguards against the abuse of power. When the Marshall decision Marbury v. Madison completed the system of checks and balances, the United States had a government in which laws could be enacted, interpreted and executed to meet challenging circumstances.

(The order bears the marks of the Capitol fire of 1898.)

(Information excerpted from Milestone Documents in the National Archives [Washington, DC: National Archives and Records Administration, 1995] pp. 23-24.)

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Section Three

3.1 Key Concepts

Rule of Law

United Nations (2004)
Security Council
Distr.: General
23 August 2004

Original: English
The rule of law and transitional justice in conflict and post-conflict societies
Report of the Secretary-General
Summary

Recent years have seen an increased focus by the United Nations on questions of transitional justice and the rule of law in conflict and post-conflict societies, yielding important lessons for our future activities. Success will depend on a number of critical factors, among them the need to ensure a common basis in international norms and standards and to mobilize the necessary resources for a sustainable investment in justice. We must learn as well to eschew one-size-fits-all formulas and the importation of foreign models, and, instead, base our support on national assessments, national participation and national needs and aspirations. Effective strategies will seek to support both technical capacity for reform and political will for reform. The United Nations must therefore support domestic reform constituencies,
help build the capacity of national justice sector institutions, facilitate national consultations on justice reform and transitional justice and help fill the rule of law vacuum evident in so many post-conflict societies.

Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities. Approaches focusing only on one or another institution, or ignoring civil society or victims, will not be effective. Our approach to the justice sector must be comprehensive in its attention to all of its interdependent institutions, sensitive to the needs of key groups and mindful of the need for complementarity between transitional justice mechanisms. Our main role is not to build international substitutes for national structures, but to help build domestic justice capacities.
In some cases, international or mixed tribunals have been established to address past crimes in war-torn societies. These tribunals have helped bring justice and hope to victims, combat the impunity of perpetrators and enrich the jurisprudence of international criminal law. They have, however, been expensive and have contributed little to sustainable national capacities for justice administration. The International Criminal Court offers new hope for a permanent reduction in the phenomenon of impunity and the further ratification of its statute is thus to be encouraged. But while tribunals are important, our experience with truth commissions also shows them to be a potentially valuable complementary tool in the quest for justice and reconciliation, taking as they do a victim-centred approach and helping to

establish a historical record and recommend remedial action. Similarly, our support for vetting processes has shown them to be a vital element of transitional justice and, where they respect the rights of both victims and the accused, key to restoring public trust in national institutions of governance. Victims also benefit from well-conceived reparations programmes, which themselves help ensure that justice focuses not only on perpetrators, but also on those who have suffered at their hands. Strengthening United Nations support in all these areas will require efforts to enhance coordination among all actors, develop our expert rosters and technical tools and more systematically record, analyse and apply these lessons in Security Council mandates, peace processes and the operations of United Nations peace missions.

3.3 The Structure of Courts

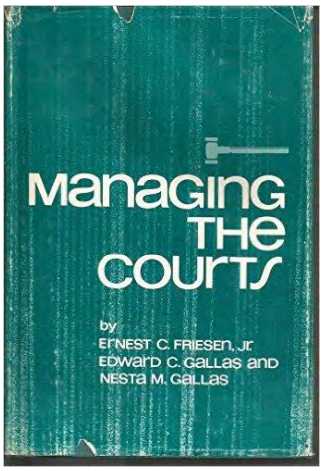
State Court Organization NCSC National Center for State Courts

State Court Organization (SCO) presents detailed comparative data about how state trial and appellate courts are organized and administered in the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the territories of Guam and Northern Mariana Islands. With topics ranging from the types of courts established in each state to specific aspects of law or procedure, State Court Organization is the source for authoritative answers to fundamental questions about the operations of each state's court system.

For the first time, the information compiled for SCO is available through a web-based, interactive application that allows users to customize the display of data so that it best answers their questions. Comparison is facilitated by the ability of users to sort and filter data to focus on specific issues of interest and characteristics of courts. This new, interactive approach to State Court Organization information facilitates the examination of differing state approaches to court administration and related procedures and rules.

Go to http://www.ncsc.org/microsites/sco/home for more information

Adversarial & Inquisitorial System



Managing the Courts by Ernest Freisen, Edward Gallas and Nesta Gallas provides a good explanation of the distinction between these systems.

Section Four

4.4 Judicial Independence

Law and the Court Volume 1: The Role of the Courts – The American Bar Association (1998)

Section Five

Roscoe Pound: The Causes of Popular Dissatisfaction with the Administration of Justice
Presented at the annual convention of the American Bar Association (1906)

Dissatisfaction with the administration of justice is as old as law. Not to go outside of our own legal system, discontent has an ancient and unbroken pedigree. The Anglo-Saxon laws continually direct that justice is to be done equally to rich and to poor and the king exhorts that the peace be kept better than has been wont, and that "men of every order readily submit … each to that law which is appropriate to him." The author of the apocryphal Mirror of Justices gives a list of one hundred and fifty-five abuses in legal administration, and names it as one of the chief abuses of the degenerate times in which he lived that executions of judges for corrupt or illegal decisions had ceased. Wyclif complains that "lawyers make process by subtlety and cavilations of law civil, that is much heathen men's law, and do not accept the form of the gospel, as if the gospel were not so good as pagan's law." Starkey, in the reign of Henry VIII, says: "Everyone that can color reason maketh a stop to the best law that is beforetime devised." James I reminded his judges that "the law was founded upon reason, and that he and others had reason as well as the judges." In the eighteenth century, it was complained that the bench was occupied by "legal monks, utterly ignorant of human nature and of the affairs of men." In the nineteenth century the vehement criticism of the period of the reform movement needs only to be mentioned. In other words, as long as there have been laws and lawyers, conscientious and well-meaning men have believed that laws were mere arbitrary technicalities, and that the attempt to regulate the relations of mankind in accordance with them resulted largely in injustice. But we must not be deceived by this innocuous and inevitable discontent with all law into overlooking or underrating the real and serious dissatisfaction with courts and lack of respect for law which exists in the United States today.

In spite of the violent opposition which the doctrine of judicial power over unconstitutional legislation at first encountered, the tendency to give the fullest scope to the common law doctrine of supremacy of law and to tie down administration by common law liabilities and judicial review, was, until recently, very marked. Today, the contrary tendency is no less marked. Courts are distrusted, and executive boards and commissions with summary and plenary powers, freed, so far as constitutions will permit, from judicial review, have become the fashion. It will be assumed, then, that there is more than the normal amount of dissatisfaction with the present-day administration of justice in America. Assuming this, the first step must be diagnosis, and diagnosis will be the sole purpose of this paper. It will attempt only to discover and to point out the causes of current popular dissatisfaction. The inquiry will be limited, foreover, to civil justice. For while the criminal law attracts more notice, and punishment seems to have greater interest for the lay mind than the civil remedies of prevention and compensation, the true interest of the modern community is in the civil administration of justice. Revenge and its modern outgrowth, punishment, belong to the past of legal history. The rules which define these invisible boundaries, within which each may act without conflict with the activities of his fellows in a busy and crowded world, upon which investor, promoter, buyer, seller, employer, and employee must

rely consciously or subconsciously in their every-day transactions, are conditions precedent of modern social and industrial organization.

With the scope of inquiry so limited, the causes of dissatisfaction with the administration of justice may be grouped under four main heads: (1) Causes for dissatisfaction with any legal system, (2) causes lying in the peculiarities of our Anglo-American legal system, (3) causes lying in our American judicial organization and procedure, and (4) causes lying in the environment of our judicial administration.

It needs but a superficial acquaintance with literature to show that all legal systems among all peoples have given rise to the same complaints. Even the wonderful mechanism of modern German judicial administration is said to be distrusted by the people on the time-worn ground that there is one law for the rich and another for the poor. It is obvious, therefore, that there must be some cause or causes inherent in all law and in all legal systems in order to produce this universal and invariable effect. These causes of dissatisfaction with any system of law I believe to be the following: (1) The necessarily mechanical operation of rules, and hence of laws; (2) the inevitable difference in rate of progress between law and public opinion; (3) the general popular assumption that the administration of justice is an easy task, to which anyone is competent; and (4) popular impatience of restraint.

The most important and most constant cause of dissatisfaction with all law at all times is to be found in the necessarily mechanical operation of legal rules. This is one of the penalties of uniformity. Legal history shows an oscillation between wide judicial discretion on the one hand and strict confinement of the magistrate by minute and detailed rules upon the other hand. From time to time more or less reversion to justice without law becomes necessary in order to bring the public administration of justice into touch with changed moral, social, or political conditions. But such periods of reversion result only in new rules or changed rules. In time the modes of exercising discretion become fixed, the course of judicial action becomes stable and uniform, and the new element, whether custom or equity or natural law, becomes as rigid and mechanical as the old. This mechanical action of the law may be minimized, but it cannot be obviated. Laws are general rules; and the process of making them general involves elimination of the immaterial elements of particular controversies. If all controversies were alike or if the degree in which actual controversies approximate to the recognized types could be calculated with precision, this would not matter. The difficulty is that in practice they approximate to these types in infinite gradations. When we eliminate immaterial factors to reach a general rule, we can never entirely avoid eliminating factors which will be more or less material in some particular controversy. If to meet this inherent difficulty in administering justice according to law we introduce a judicial dispensing power, the result is uncertainty and an intolerable scope for the personal equation of the magistrate. If we turn to the other extreme and pile up exceptions and qualifications and provisos, the legal system becomes cumbrous and unworkable. Hence the law has always ended in a compromise, in a middle course between wide discretion and over-minute legislation. In reaching this middle ground, some sacrifice of flexibility of application to particular cases is inevitable. In consequence, the adjustment of the relations of man and man according to these rules will of necessity appear more or less arbitrary and more or less in conflict with the ethical notions of individuals.

In periods of absolute or generally received moral systems, the contrast between legal results and strict ethical requirements will appeal only to individuals. In periods of free individual thought in morals and ethics, and especially in an age of social and industrial transition, this

contrast is greatly intensified and appeals to large classes of society. Justice, which is the end of law, is the ideal compromise between the activities of all in a crowded world. The law seeks to harmonize these activities and to adjust the relations of every man with his fellows so as to accord with the moral sense of the community. When the community is at one in its ideas of justice, this is possible. When the community is divided and diversified, and groups and classes and interests, understanding each other none too well, have conflicting ideas of justice, the task is extremely difficult. It is impossible that legal and ethical ideas should be in entire accord in such a society. The individual looks at cases one by one and measures them by his individual sense of right and wrong. The lawyer must look at cases in gross and must measure them largely by an artificial standard. He must apply the ethics of the community, not his own. If discretion is given him, his view will be that of the class from which he comes. If his hands are tied by law, he must apply the ethics of the past as formulated in common law and legislation. In either event, judicial and individual ethical standards will diverge. And this divergence between the ethical and the legal, as each individual sees it, makes him say with Luther, "Good jurist, bad Christian." A closely related cause of dissatisfaction with the administration of justice according to law is to be found in the inevitable difference in rate of progress between law and public opinion. In order to preclude corruption, to exclude the personal prejudices of magistrates, and to minimize individual incompetency, law formulates the moral sentiments of the community in rules to which the judgments of tribunals must conform. These rules, being formulations of public opinion, cannot exist until public opinion has become fixed and settled, and cannot change until a change of public opinion has become complete. It follows that this difficulty in the judicial administration of justice, like the preceding, may be minimized, but not obviated. In a rude age the Teutonic moots in which every free man took a hand might be possible. But these tribunals broke under pressure of business and became ordinary courts with permanent judges. The Athenians conceived that the people themselves should decide each case. But the Athenian dikastery, in which controversies were submitted to blocks of several hundred citizens by way of reaching the will of the democracy, proved to register its caprice for the moment rather than its permanent will. Modern experience with juries, especially in commercial causes, does not warrant us in hoping much from any form of judicial referendum. Public opinion must affect the administration of justice through the rules by which justice is administered rather than through the direct administration. All interference with the uniform and automatic application of these rules, when actual controversies arise, introduces an anti-legal element which becomes intolerable. But, as public opinion affects tribunals through the rules by which they decide and these rules once made, stand till abrogated or altered, any system of law will be made up of successive strata of rules and doctrines representing successive and often widely divergent periods of public opinion. In this sense, law is often in very truth a government of the living by the dead. The unconscious changes of judicial law making and the direct alterations of legislation and codification operate to make this government by the dead reasonably tolerable. But here again we must pay a price for certainty and uniformity. The law does not respond quickly to new conditions. It does not change until ill effects are felt; often not until they are felt acutely. The moral or intellectual or economic change must come first. While it is coming, and until it is so complete as to affect the law and formulate itself therein, friction must ensue. In an age of rapid moral, intellectual, and economic changes, often crossing one another and producing numerous minor resultants, this friction cannot fail to be in excess.

A third perennial source of popular dissatisfaction with the administration of justice according to law may be found in the popular assumption that the administration of justice is an easy task to

which anyone is competent. Laws may be compared to the formulas of engineers. They sum up the experience of many courts with many cases and enable the magistrate to apply that experience subconsciously. So, the formula enables the engineer to make use of the accumulated experience of past builders, even though he could not work out a step in its evolution by himself. A layman is no more competent to construct or to apply the one formula than the other. Each requires special knowledge and special preparation. Nonetheless, the notion that anyone is competent to adjudicate the intricate controversies of a modern community contributes to the unsatisfactory administration of justice in many parts of the United States. The older states have generally outgrown it. But it is felt in extravagant powers of juries, lay judges of probate and legislative or judicial law making against stare decisis, in most of the commonwealths of the South and West.

The public seldom realizes how much it is interested in maintaining the highest scientific standard in the administration of justice. There is no more certain protection against corruption, prejudice, class feeling, or incompetence. Publicity will avail something. But the daily criticism of trained minds, the knowledge that nothing which does not conform to the principles and received doctrines of scientific jurisprudence will escape notice, does more than any other agency for the every-day purity and efficiency of courts of justice.

Another necessary source of dissatisfaction with judicial administration of justice is to be found in popular impatience of restraint. Law involves restraint and regulation, with the sheriff and his posse in the background to enforce it. But, however necessary and salutary this restraint, men have never been reconciled to it entirely. The very fact that it is a compromise between the individual and his fellows makes the individual, who must abate some part of his activities in the interest of his fellows, more or less restive. In an age of absolute theories, monarchical or democratic, this restiveness is acute. A conspicuous example is to be seen in the contest between the king and the common law courts in the seventeenth century. An equally conspicuous example is to be seen in the attitude of the frontiersman toward state-imposed justice. "The unthinking sons of the sage brush," says Owen Wister, "ill tolerate anything which stands for discipline, good order and obedience; and the man who lets another command him they despise. I can think of no threat more evil for our democracy, for it is a fine thing diseased and perverted, namely, the spirit of independence gone drunk." This is an extreme case. But in a lesser degree the feeling that each individual, as an organ of the sovereign democracy, is above the law he helps to make, fosters everywhere a disrespect for legal methods and institutions and a spirit of resistance to them. It is "the reason of this our artificial man the commonwealth," says Hobbes, "and his command that maketh law." This man, however, is abstract. The concrete man in the street or the concrete mob is much more obvious; and it is no wonder that individuals and even classes of individuals fail to draw the distinction.

A considerable portion of current dissatisfaction with the administration of justice must be attributed to the universal causes just considered. Conceding this, we have next to recognize that there are potent causes in operation of a character entirely different. Under the second main head, causes lying in our peculiar legal system, I should enumerate five: (1) The individualist spirit of our common law, which agrees ill with a collectivist age;(2) the common law doctrine of contentious procedure, which turns litigation into a game; (3) political jealousy, due to the strain put upon our legal system by the doctrine of supremacy of law; (4) the lack of general ideas or legal philosophy, so characteristic of Anglo-American law, which gives us petty tinkering where

comprehensive reform is needed; and (5) defects of form due to the circumstance that the bulk of our legal system is still case law.

The first of these, conflict between the individualist spirit of the common law and the collectivist spirit of the present age, has been treated on another occasion. What was said then need not be repeated. Suffice it to point out two examples. From the beginning, the main reliance of our common law system has been individual initiative. The main security for the peace at common law is private prosecution of offenders. The chief security for the efficiency and honesty of public officers is mandamus or injunction by a taxpayer to prevent waste of the proceeds of taxation. The reliance for keeping public service companies to their duty in treating all alike at reasonable price is an action to recover damages. Moreover, the individual is supposed at common law to be able to look out for himself and to need no administrative protection. If he is injured through contributory negligence, no theory of comparative negligence comes to his relief; if he hires as an employee, he assumes the risk of the employment; if he buys goods, the rule is caveat emptor. In our modern industrial society, this whole scheme of individual initiative is breaking down. Private prosecution has become obsolete. Mandamus and injunction have failed to prevent rings and bosses from plundering public funds. Private suits against carriers for damages have proved no preventive of discrimination and extortionate rates. The doctrine of assumption of risk becomes brutal under modern conditions of employment. An action for damages is no comfort to us when we are sold diseased beef or poisonous canned goods. At all these points, and they are points of every-day contact with the most vital public interests, common law methods of relief have failed. The courts have not been able to do the work which the common law doctrine of supremacy of law imposed on them. A widespread feeling that the courts are inefficient has been a necessary result. But, along with this, another phase of the individualism of the common law has served to increase public irritation. At the very time the courts have appeared powerless themselves to give relief, they have seemed to obstruct public efforts to get relief by legislation. The chief concern of the common law is to secure and protect individual rights. "The public good," says Blackstone, "is in nothing more essentially interested than in the protection of every individual's private rights." Such, it goes without saying, is not the popular view today. Today we look to society for protection against individuals, natural or artificial, and we resent doctrines that protect these individuals against society for fear society will oppress us. But the common law guaranties of individual rights are established in our constitutions, state and federal. So that, while in England these common law dogmas have had to give way to modern legislation, in America they stand continually between the people, or large classes of the people, and legislation they desire. In consequence, the courts have been put in a false position of doing nothing and obstructing everything, which it is impossible for the layman to interpret aright.

A no less potent source of irritation lies in our American exaggerations of the common law contentious procedure. The sporting theory of justice, the "instinct of giving the game fair play," as Professor Wigmore has put it, is so rooted in the profession in America that most of us take it for a fundamental legal tenet. But it is probably only a survival of the days when a lawsuit was a fight between two clans in which change of venue had been taken to the forum. So far from being a fundamental fact of jurisprudence, it is peculiar to Anglo-American law; and it has been strongly curbed in modern English practice. With us, it is not merely in full acceptance, it has been developed and its collateral possibilities have been cultivated to the furthest extent. Hence in America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair,

even when in the interests of justice. The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he is merely to decide the contest, as counsel present it, according to the rules of the game, not to search independently for truth and justice. It leads counsel to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional football coach with the rules of the sport. It leads to exertion to "get error into the record" rather than to dispose of the controversy finally and upon its merits. It turns witnesses, and especially expert witnesses, into partisans pure and simple. It leads to sensational cross-examinations "to affect credit," which have made the witness stand "the slaughter house of reputations." It prevents the trial court from restraining the bullying of witnesses and creates a general dislike, if not fear, of the witness function which impairs the administration of justice. It keeps alive the unfortunate exchequer rule, dead in the country of its origin, according to which errors in the admission or rejection of evidence are presumed to be prejudicial and hence demand a new trial. It grants new trials because by inability to procure a bill of exceptions a party has lost the chance to play another inning in the game of justice. It creates vested rights in errors of procedure, of the benefit whereof parties are not to be deprived. The inquiry is not, What do substantive law and justice require? Instead, the inquiry is: Have the rules of the game been carried out strictly? If any material infraction is discovered, just as the football rules put back the offending team five or ten or fifteen yards, as the case may be, our sporting theory of justice awards new trials, or reverses judgments, or sustains demurrers in the interest of regular play.

The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law. Hence comes, in large measure, the modern American race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it. And this is doubly true in a time which requires all institutions to be economically efficient and socially useful. We need not wonder that one part of the community strain their oaths in the jury box and find verdicts against unpopular litigants in the teeth of law and evidence, while another part retain lawyers by the year to advise how to evade what to them are unintelligent and unreasonable restrictions upon necessary modes of doing business. Thus the courts, instituted to administer justice according to law, are made agents or abettors of lawlessness.

Another source of irritation at our American courts is political jealousy due to the strain put upon our legal system by the doctrine of the supremacy of law. By virtue of this doctrine, which has become fundamental in our polity, the law restrains, not individuals alone, but a whole people.

The people so restrained would be likely in any event to be jealous of the visible agents of restraint. Even more is this true in that the subjects which our constitutional polity commits to the courts are largely matters of economics, politics, and sociology upon which a democracy is peculiarly sensitive. Not only are these matters made into legal questions, but they are tried as incidents of private litigation. This phase of the common law doctrine was felt as a grievance in the seventeenth century. "I tell you plainly," said Bacon, as attorney general, in arguing a question of prerogative to the judges, "I tell you plainly it is little better than a by-let or crooked creek to try whether the king hath power to erect this office in an assize between Brownlow and Michell." King Demos must feel much the same at seeing the constitutionality of the Missouri Compromise tried in an action of trespass, at seeing the validity of the legal tender laws tried on pleas of payment in private litigation, at seeing the power of the federal government to carry on

the Civil War tried judicially in admiralty, at seeing the income tax overthrown in a stockholder's bill to enjoin waste of corporate assets and at seeing the important political questions in the Insular Cases disposed of in forfeiture proceedings against a few trifling imports. Nor is this the only phase of the common law doctrine of supremacy of law which produces political jealousy of the courts. Even more must the layman be struck with the spectacle of law paralyzing administration which our polity so frequently presents. The difficulties with writs of habeas corpus which the federal government encountered during the Civil War and the recent case of the income tax will occur to you at once. In my own state, in a few years we have seen a freight-rate law suspended by decree of a court and have seen the collection of taxes from railroad companies, needed for the every-day conduct of public business, tied up by an injunction. The strain put upon judicial institutions by such litigation is obviously very great.

Lack of general ideas and absence of any philosophy of law, which has been characteristic of our law from the beginning and has been a point of pride at least since the time of Coke, contributes its mite also toward the causes of dissatisfaction with courts. For one thing, it keeps us in the thrall of a fiction. There is a strong aversion to straightforward change of any important legal doctrine. The cry is interpret it. But such interpretation is spurious. It is legislation. And to interpret an obnoxious rule out of existence rather than to meet it fairly and squarely by legislation is a fruitful source of confusion. Yet the Bar are trained to it as an ancient common law doctrine, and it has a great hold upon the public. Hence if the law does not work well, says Bentham, with fine sarcasm, "it is never the law itself that is in the wrong; it is always some wicked interpreter of the law that has corrupted and abused it." Thus another unnecessary strain is imposed upon our judicial system and courts are held for what should be the work of the legislature.

The defects of form inherent in our system of case law have been the subject of discussion and controversy too often to require extended consideration. Suffice it to say that the want of certainty, confusion and incompleteness inherent in all case law, and the waste of labor entailed by the prodigious bulk to which ours has attained, appeal strongly to the layman. The compensating advantages of this system, as seen by the lawyer and by the scientific investigator, are not apparent to him. What he sees is another phase of the great game; a citation match between counsel, with a certainty that diligence can rake up a decision somewhere in support of any conceivable proposition.

Passing to the third head, causes lying in our judicial organization and procedure, we come upon the most efficient causes of dissatisfaction with the present administration of justice in America. For I venture to say that our system of courts is archaic and our procedure behind the times. Uncertainty, delay and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, direct results of the organization of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community. Our system of courts is archaic in three respects: (1) In its multiplicity of courts, (2) in preserving concurrent jurisdictions, (3) in the waste of judicial power which it involves. The judicial organizations of the several states exhibit many differences of detail. But they agree in these three respects. Multiplicity of courts is characteristic of archaic law. In Anglo-Saxon law, one might apply to the Hundred, the Shire, the Witan, or the king in person. Until Edward I broke up private jurisdictions, there were the king's superior courts of law, the itinerant justices, the county courts, the local or communal courts, and the private courts of lordships; besides which one might always apply to

the king or to the Great Council for extraordinary relief. When later the royal courts had superseded all others, there were the concurrent jurisdictions of King's Bench, Common Pleas, and Exchequer, all doing the same work, while appellate jurisdiction was divided by King's Bench, Exchequer Chamber, and Parliament. In the Fourth Institute, Coke enumerates seventy four courts. Of these, seventeen did the work that is now done by three, the County Courts, the Supreme Court of Judicature, and the House of Lords. At the time of the reorganization by the Judicature Act of 1873, five appellate courts and eight courts of first instance were consolidated into the one Supreme Court of Judicature. It was the intention of those who devised the plan of the Judicature Act to extend the principle of unity of jurisdiction by cutting off the appellate jurisdiction of the House of Lords and by incorporating the County Courts in the newly formed Supreme Court as branches thereof. The recommendation as to the County Courts was not adopted, and the appellate jurisdiction of the House of Lords was restored in 1875. In this way the unity and simplicity of the original design were impaired. But the plan, although adopted in part only, deserves the careful study of American lawyers as a model modern judicial organization. Its chief features were (1) to set up a single court, complete in itself, embracing all superior courts and jurisdictions; (2) to include in this one court, as a branch thereof, a single court of final appeal. In the one branch, the court of first instance, all original jurisdiction at law, in equity, in admiralty, in bankruptcy, in probate, and in divorce was to be consolidated; in the other branch, the court of appeal, the whole reviewing jurisdiction was to be established. This idea of unification, although not carried out completely, has proved most effective. Indeed, its advantages are self-evident. Where the appellate tribunal and the court of first instance are branches of one court, all expense of transfer of record, of transcripts, bills of exceptions, writs of error, and citations is wiped out. The records are the records of the court, of which each tribunal is but a branch. The court and each branch thereof knows its own records, and no duplication and certification is required. Again, all appellate practice, with its attendant pitfalls, and all waste of judicial time in ascertaining how or whether a case has been brought into the court of review is done away with. One may search the recent English reports in vain for a case where an appeal has miscarried on a point of practice. Cases on appellate procedure are wanting. In effect there is no such thing. The whole attention of the court and of counsel is concentrated upon the cause. On the other hand, our American reports bristle with fine points of appellate procedure. More than four per cent of the digest paragraphs of the last ten volumes of the American Digest have to do with Appeal and Error. In ten volumes of the Federal Reporter, namely volumes 129 to 139, covering decisions of the Circuit Courts of Appeals from 1903 till the present, there is an average of ten decisions upon points of appellate practice to the volume. Two cases to the volume, on the average, turn wholly upon appellate procedure. In the ten volumes there are six civil cases turning upon the question whether error or appeal was the proper mode of review, and in two civil cases the question was whether the Circuit Court of Appeals was the proper tribunal. I have referred to these reports because they represent courts in which only causes of importance may be brought. The state reports exhibit the same condition. In ten volumes of the Southwestern Reporter, the decisions of the Supreme Court and Courts of Appeals of Missouri show that nearly twenty percent involve points of appellate procedure. In volume 87, of fifty-three decisions of the Supreme Court and ninety-seven of the Courts of Appeals, twenty-eight are taken up in whole or in part with the mere technics of obtaining a review. All of this is sheer waste, which a modern judicial organization would obviate.

Even more archaic is our system of concurrent jurisdiction of state and federal courts in cases involving diversity of citizenship; a system by virtue of which causes continually hang in the air

between two courts, or, if they do stick in one court or the other, are liable to an ultimate overturning because they stuck in the wrong court. A few statistics on this point may be worth while. In the ten volumes of the Federal Reporter referred to, the decisions of the Circuit Courts of Appeals in civil cases average seventy-six to the volume. Of these, on the average, between four and five in a volume are decided on points of federal jurisdiction. In a little more than one to each volume, judgments of Circuit Courts are reversed on points of jurisdiction. The same volumes contain on the average seventy-three decisions of Circuit Courts in civil cases to each volume. Of these, six, on the average, are upon motions to remand to the state courts, and between eight and nine are upon other points of federal jurisdiction. Moreover, twelve cases in the ten volumes were remanded on the form of the petition for removal. In other words, in nineteen and three-tenths per cent of the reported decisions of the Circuit Courts the question was whether those courts had jurisdiction at all; and in seven per cent of these that question depended on the form of the pleadings. A system that permits this and reverses four judgments a year because the cause was brought in or removed to the wrong tribunal is out of place in a modern business community. All original jurisdiction should be concentrated. It ought to be impossible for a cause to fail because brought in the wrong place. A simple order of transfer from one docket to another in the same court ought to be enough. There should be no need of new papers, no transcripts, no bandying of cases from one court to another on orders of removal and of remand, no beginnings again with new process.

Judicial power may be wasted in three ways: (1) By rigid districts or courts or jurisdictions, so that business may be congested in one court while judges in another are idle; (2) by consuming the time of courts with points of pure practice, when they ought to be investigating substantial controversies; and (3) by nullifying the results of judicial action by unnecessary retrials. American judicial systems are defective in all three respects. The Federal Circuit Courts and Circuit Courts of Appeals are conspicuous exceptions in the first respect, affording a model of flexible judicial organization. But in nearly all of the states, rigid districts and hard and fast lines between courts operate to delay business in one court while judges in another have ample leisure. In the second respect, waste of judicial time upon points of practice, the intricacies of federal jurisdiction, and the survival of the obsolete Chinese Wall between law and equity in procedure make our federal courts no less conspicuous sinners. In the ten volumes of the Federal Reporter examined, of an average of seventy-six decisions of the Circuit Courts of Appeals in each volume, two turn upon the distinction between law and equity in procedure and not quite one judgment to each volume is reversed on this distinction. In an average of seventy-three decisions a volume by the Circuit Courts, more than three in each volume involve this same distinction, and not quite two in each volume turn upon it. But many states that are supposed to have reformed procedure scarcely make a better showing.

Each state has to a great extent its own procedure. But it is not too much to say that all of them are behind the times. We struck one great stroke in 1848 and have rested complacently or contented ourselves with patchwork amendment ever since. The leading ideas of the New York Code of Civil Procedure marked a long step forward. But the work was done too hurriedly and the plan of a rigid code, going into minute detail, was clearly wrong. A modern practice act lays down the general principles of practice and leaves details to rules of court. The New York Code Commission was appointed in 1847 and reported in 1848. If we except the Connecticut Practice Act of 1878, which shows English influence, American reform in procedure has stopped substantially where that commission left it. In England, beginning with 1826 and ending with 1874, five commissions have put forth nine reports upon this subject. As a consequence we have

nothing in America to compare with the radical treatment of pleading in the English Judicature Act and the orders based thereon. We still try the record, not the case. We are still reversing judgments for nonjoinder and misjoinder. The English practice of joinder of parties against whom relief is claimed in the alternative, rendering judgment against any that the proof shows to be liable and dismissing the rest, makes an American lawyer rub his eyes. We are still reversing judgments for variances. We still reverse them because the recovery is in excess of the prayer, though sustained by the evidence.

But the worst feature of American procedure is the lavish granting of new trials. In the ten volumes of the Federal Reporter referred to, there are, on the average, twenty-five writs of error in civil cases to the volume. New trials are awarded on the average in eight cases a volume, or nearly twenty-nine per cent. In the state courts the proportion of new trials to causes reviewed, as ascertained from investigation of the last five volumes of each series of the National Reporter system, runs over forty per cent. In the last three volumes of the New York Reports (180-182), covering the period from December 6, 1904, to October 24, 1905, forty-five new trials are awarded. Nor is this all. In one case in my own state an action for personal injuries was tried six times, and one for breach of contract was tried three times and was four times in the Supreme Court. When with this we compare the statistics of the English Court of Appeal, which does not grant to exceed twelve new trials a year, or new trials in about three per cent of the cases reviewed, it is evident that our methods of trial and review are out of date.

A comparison of the volume of business disposed of by English and by American courts will illustrate the waste and delay caused by archaic judicial organization and obsolete procedure. In England there are twenty-three judges of the High Court who dispose on the average of fifty-six hundred contested cases, and have before them, in one form or another, some eighty thousand cases each year. In Nebraska there are twenty-eight district judges who have no original probate jurisdiction and no jurisdiction in bankruptcy or admiralty, and they had upon their dockets last year forty-three hundred and twenty cases, of which they disposed of about seventy percent. England and Wales, with a population in 1900 of 32,000,000, employ for their whole civil litigation ninety-five judges, that is, thirty-seven in the Supreme Court and House of Lords and fifty-eight county judges. Nebraska, with a population in 1900 of 1,066,000, employs for the same purpose one hundred and twenty-nine. But these one hundred and twenty-nine are organized on an antiquated system and their time is frittered away on mere points of legal etiquette.

Finally, under the fourth and last head, causes lying in the environment of our judicial administration, we may distinguish six: (1) Popular lack of interest in justice, which makes jury service a bore and the vindication of right and law secondary to the trouble and expense involved; (2) the strain put upon law in that it has today to do the work of morals also; (3) the effect of transition to a period of legislation; (4) the putting of our courts into politics; (5) the making the legal profession into a trade, which has superseded the relation of attorney and client by that of employer and employee; and (6) public ignorance of the real workings of courts due to ignorant and sensational reports in the press.

Each of these deserves consideration, but a few points only may be noticed. Law is the skeleton of social order. It must be "clothed upon by the flesh and blood of morality." The present is a time of transition in the very foundations of belief and of conduct. Absolute theories of morals and supernatural sanctions have lost their hold. Conscience and individual responsibility are relaxed. In other words, the law is strained to do double duty, and more is expected of it than in a time when morals as a regulating agency are more efficacious. Another strain upon our judicial

system results from the crude and unorganized character of American legislation in a period when the growing point of law has shifted to legislation. When, in consequence, laws fail to produce the anticipated effects, judicial administration shares the blame. Worse than this is the effect of laws not intended to be enforced. These parodies, like the common law branding of felons, in which a piece of bacon used to be interposed between the branding iron and the criminal's skin, breed disrespect for law. Putting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the Bench. Finally, the ignorant and sensational reports of judicial proceedings, from which alone a great part of the public may judge of the daily work of the courts, completes the impression that the administration of justice is but a game.

There are honorable exceptions, but the average press reports distract attention from the real proceeding to petty tilts of counsel, encounters with witnesses and sensational by-incidents. In Nebraska, not many years since, the federal court enjoined the execution of an act to regulate insurance companies. In press accounts of the proceeding, the conspiracy clause of the bill was copied in extenso under the headline "Conspiracy Charged," and it was made to appear that the ground of the injunction was a conspiracy between the state officers and some persons unknown. It cannot be expected that the public shall form any just estimate of our courts of justice from such data. Reviewing the several causes for dissatisfaction with the administration of justice which have been touched upon, it will have been observed that some inhere in all law and are the penalty we pay for uniformity; that some inhere in our political institutions and are the penalty we pay for local self-government and independence from bureaucratic control; that some inhere in the circumstances of an age of transition and are the penalty we pay for individual freedom of thought and universal education. These will take care of themselves. But too much of the current dissatisfaction has a just origin in our judicial organization and procedure. The causes that lie here must be heeded.

Our administration of justice is not decadent. It is simply behind the times. Political judges were known in England down to the last century. Lord Kenyon, as Master of the Rolls, sat in Parliament and took as active a part in political squabbles in the House of Commons as our state judges today in party conventions. Dodson and Fogg and Sergeant Buzzfuzz wrought in an atmosphere of contentious procedure. Bentham tells us that in 1797, out of five hundred and fifty pending writs of error, five hundred and forty-three were shams or vexatious contrivances for delay. Jarndyce and Jarndyce dragged out its weary course in chancery only half a century ago. We are simply stationary in that period of legal history. With law schools that are rivaling the achievements of Bologna and of Bourges to promote scientific study of the law; with active Bar Associations in every state to revive professional feeling and throw off the yoke of commercialism; with the passing of the doctrine that politics, too, is a mere game to be played for its own sake, we may look forward confidently to deliverance from the sporting theory of justice; we may look forward to a near future when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all.

Source: Reprinted from 29 A.B.A. Rep., pt. I, 395-417, 1906.

Section Six

6.2 Trial Court Performance Standards

(Activity 6.1) – Question 3 "What is your role in assuring access to justice?"
Consider that there are movements across the nation to improve access and fairness, including access commissions and committees, self service centers, navigators, ombudsman offices, and more. Additional information can be found on the National Center for State Courts webpage "Center on Access to Justice for All" at www.ncsc.org/atj.

Section Seven

No faculty resources are included in the curriculum design.

Section Eight

Federalist No. 17
The Insufficiency of the Present Confederation to Preserve the Union
For the Independent Journal.
Tuesday, December 4, 1787.

Author: **Alexander Hamilton (1787)**

To the People of the State of New York:

AN OBJECTION, of a nature different from that which has been stated and answered, in my last address, may perhaps be likewise urged against the principle of legislation for the individual citizens of America. It may be said that it would tend to render the government of the Union too powerful, and to enable it to absorb those residuary authorities, which it might be judged proper to leave with the States for local purposes. Allowing the utmost latitude to the love of power which any reasonable man can require, I confess I am at a loss to discover what temptation the persons intrusted with the administration of the general government could ever feel to divest the States of the authorities of that description. The regulation of the mere domestic police of a State appears to me to hold out slender allurements to ambition. Commerce, finance, negotiation, and war seem to comprehend all the objects which have charms for minds governed by that passion; and all the powers necessary to those objects ought, in the first instance, to be lodged in the national depository. The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction. It is therefore improbable that there should exist a disposition in the federal councils to usurp the powers with which they are connected; because the attempt to exercise those powers would be as troublesome as it would be nugatory; and the possession of them, for that reason, would contribute nothing to the dignity, to the importance, or to the splendor of the national government.

But let it be admitted, for argument's sake, that mere wantonness and lust of domination would be sufficient to beget that disposition; still it may be safely affirmed, that the sense of the constituent body of the national representatives, or, in other words, the people of the several States, would control the indulgence of so extravagant an appetite. It will always be far more

easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the State authorities. The proof of this proposition turns upon the greater degree of influence which the State governments if they administer their affairs with uprightness and prudence, will generally possess over the people; a circumstance which at the same time teaches us that there is an inherent and intrinsic weakness in all federal constitutions; and that too much pains cannot be taken in their organization, to give them all the force which is compatible with the principles of liberty.

The superiority of influence in favor of the particular governments would result partly from the diffusive construction of the national government, but chiefly from the nature of the objects to which the attention of the State administrations would be directed.

It is a known fact in human nature, that its affections are commonly weak in proportion to the distance or diffusiveness of the object. Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State would be apt to feel a stronger bias towards their local governments than towards the government of the Union; unless the force of that principle should be destroyed by a much better administration of the latter.

This strong propensity of the human heart would find powerful auxiliaries in the objects of State regulation.
The variety of more minute interests, which will necessarily fall under the superintendence of the local administrations, and which will form so many rivulets of influence, running through every part of the society, cannot be particularized, without involving a detail too tedious and uninteresting to compensate for the instruction it might afford.

There is one transcendant advantage belonging to the province of the State governments, which alone suffices to place the matter in a clear and satisfactory light,--I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment. It is that which, being the immediate and visible guardian of life and property, having its benefits and its terrors in constant activity before the public eye, regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake, contributes, more than any other circumstance, to impressing upon the minds of the people, affection, esteem, and reverence towards the government. This great cement of society, which will diffuse itself almost wholly through the channels of the particular governments, independent of all other causes of influence, would insure them so decided an empire over their respective citizens as to render them at all times a complete counterpoise, and, not unfrequently, dangerous rivals to the power of the Union.
The operations of the national government, on the other hand, falling less immediately under the observation of the mass of the citizens, the benefits derived from it will chiefly be perceived and attended to by speculative men. Relating to more general interests, they will be less apt to come home to the feelings of the people; and, in proportion, less likely to inspire a habitual sense of obligation, and an active sentiment of attachment.

The reasoning on this head has been abundantly exemplified by the experience of all federal constitutions with which we are acquainted, and of all others which have borne the least analogy to them.
Though the ancient feudal systems were not, strictly speaking, confederacies, yet they partook of the nature of that species of association. There was a common head, chieftain, or sovereign, whose authority extended over the whole nation; and a number of subordinate vassals, or feudatories, who had large portions of land allotted to them, and numerous trains of INFERIOR vassals or retainers, who occupied and cultivated that land upon the tenure of fealty or obedience, to the persons of whom they held it. Each principal vassal was a kind of sovereign, within his particular demesnes. The consequences of this situation were a continual opposition to authority of the sovereign, and frequent wars between the great barons or chief feudatories themselves. The power of the head of the nation was commonly too weak, either to preserve the public peace, or to protect the people against the oppressions of their immediate lords. This period of European affairs is emphatically styled by historians, the times of feudal anarchy.
When the sovereign happened to be a man of vigorous and warlike temper and of superior abilities, he would acquire a personal weight and influence, which answered, for the time, the purpose of a more regular authority. But in general, the power of the barons triumphed over that of the prince; and in many instances his dominion was entirely thrown off, and the great fiefs were erected into independent principalities or States. In those instances in which the monarch finally prevailed over his vassals, his success was chiefly owing to the tyranny of those vassals over their dependents. The barons, or nobles, equally the enemies of the sovereign and the oppressors of the common people, were dreaded and detested by both; till mutual danger and mutual interest effected a union between them fatal to the power of the aristocracy. Had the nobles, by a conduct of clemency and justice, preserved the fidelity and devotion of their retainers and followers, the contests between them and the prince must almost always have ended in their favor, and in the abridgment or subversion of the royal authority.

This is not an assertion founded merely in speculation or conjecture. Among other illustrations of its truth which might be cited, Scotland will furnish a cogent example. The spirit of clanship which was, at an early day, introduced into that kingdom, uniting the nobles and their dependants by ties equivalent to those of kindred, rendered the aristocracy a constant overmatch for the power of the monarch, till the incorporation with England subdued its fierce and ungovernable spirit, and reduced it within those rules of subordination which a more rational and more energetic system of civil polity had previously established in the latter kingdom.

The separate governments in a confederacy may aptly be compared with the feudal baronies; with this advantage in their favor, that from the reasons already explained, they will generally possess the confidence and good-will of the people, and with so important a support, will be able effectually to oppose all encroachments of the national government. It will be well if they are not able to counteract its legitimate and necessary authority. The points of similitude consist in the rivalship of power, applicable to both, and in the CONCENTRATION of large portions of the strength of the community into particular DEPOSITS, in one case at the disposal of individuals, in the other case at the disposal of political bodies.

A concise review of the events that have attended confederate governments will further illustrate this important doctrine; an inattention to which has been the great source of our

political mistakes, and has given our jealousy a direction to the wrong side. This review shall form the subject of some ensuing papers.
PUBLIUS.

Participant Activities

The participant activities are one of the most important parts of the curriculum design as they are the tools faculty members are able to use to determine if participants have achieved the outcomes defined in the learning objectives. Also, participant activities provide tools to faculty to ensure that the training, course, or session is informative and interactive, consistent with elements for successful adult learning including experiential activities and cross-jurisdictional sharing.

Participant activities are annotated in the content outline in places they may be effectively used. Each activity has a cover page explaining its purpose, the specific learning objective being measured, and how to use the activity. The activities themselves are on a separate page(s) for ease of duplication.

The following activities are to measure achievement of stated learning objectives. Faculty are encouraged to incorporate additional strategies to engage court managers and keep them active during their educational experience, for example, asking questions about content before presenting it, having learners discuss content and provide feedback to faculty on their perspectives, and more.

Activities 1.1 – 1.4 Purposes and Responsibilities
Learning objective: Describe why courts exist and the major purposes that courts carry out.

Activity 1.1 Opening Questions
Activity 1.2 Needs Assessment – Why Courts Exist
Activity 1.3 Brainstorming Purposes
Activity 1.4 Concluding Questions

Activities 2.1 – 2.2 Sources of Liberty and Justice for All
Learning objective: Define the values, foundation, and historical perspectives underlying the American court system.

Activity 2.1 Magna Carta Video and Debrief
Activity 2.2 Concluding Questions and Discussion

Activities 3.1 – 3.3 Key Concepts and Procedures
Learning objective: Define the values, foundation, and historical perspectives regarding the American court system.

Activity 3.1 Key Concepts Matching Test
Activity 3.2 Electronic Definitions Search In Today's Environment
Activity 3.3 Due Process in the Courtroom

Activities 4.1 – 4.3 Courts as an Institution and Organization
Learning objective: Summarize the role of courts as a third branch of government, an institution, and an organization and how its role impacts and complements the other two branches of government.

Activity 4.1 Discussion Starters

Activity 4.2 Independent Courts/Judicial Review
Activity 4.3 Final Discussion Questions

Activities 5.1 – 5.3 Court Reform and Accountability
Learning objective: Identify trends in court reform and pressures forcing the courts to change and expand.

Activity 5.1 Causes of Popular Dissatisfaction – Table Activity
Activity 5.2 Discussion Questions
Activity 5.3 Concluding Activity – Courts Speak Out

Activities 6.1 – 6.3 Management and Leadership in the Nation's Courts
Learning objective: Apply the values and goals of the American court system to specific court administrative tasks and responsibilities including dispute resolution.
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Activity 6.1 Group Discussion
Activity 6.2 Table Exercise – Practical Impacts
Activity 6.3 Final Questions

Activity 7.1 New Directions in Courts and Court Management
Learning objective: Explore quality court management concepts, accountability measures, and efficient processes in executing the role of courts in society.

Activity 7.1 New Directions

Activities 8.1 – 8.3 Practical Application of Purposes
Learning objective: Articulate the practical impact and relevance of the purposes and responsibilities of courts to their jurisdiction, day-to-day court operations, and their job.

Activity 8.1 Why Study Purposes?
Activity 8.2 Survey of Time
Activity 8.3 Drawing Activity – A Judicial Brand

Section One Activities: Purposes and Responsibilities

Purpose
The goals of Section One activities are to link the purposes and responsibilities of courts to the day-to-day activities of court managers and to determine the learning needs of each participant, both for themselves and for the course.

Relevant Learning Objective

1. Describe why courts exist and the major purposes that courts carry out

Activity 1.1 Opening Questions

Notes about Using the Activity
Participants may wish to fill out the form to record their responses.

1. What is my current understanding of the purposes and responsibilities of the courts and its practical relevance to my day-to-day court duties? (check one response below):

   ☐ Very high; I am an expert on this subject

   ☐ Good, but I do not have a complete knowledge and understanding

   ☐ Fair

   ☐ Poor; I have a lot to learn about purposes and responsibilities of courts

2. How important is it for me to understand purposes and responsibilities of courts as related to my job and job performance? (check one response below):

   ☐ Absolutely critical; I cannot do my job well unless I understand the purposes and responsibilities of courts

   ☐ Important but not absolutely critical

   ☐ Somewhat important

   ☐ Not really important as a practical matter

Activity 1.2 Needs Assessment: Why Courts Exist

Courts and only courts can definitely resolve many of society's inevitable conflicts. When courts resolve disputes between individuals; individuals and the government, including those accused by the government of violating the law; individuals and corporations; and between organizations, both public and private, they do so in ways that preserve the courts independence and impartiality, enduring purposes and continuing responsibilities. The courts mediate society's interest in opposite but true mandates, in particular the tension between social order and individual freedom.

Notes about Using the Activity
Participants should fill out the following form, allowing 5-10 minutes. Faculty may ask willing participants to identify their strongest or weakest KSA and why.

	Knowledge, Skills and Abilities (KSA) Highest Ranking = 5 Lowest Ranking = 1	**Your Personal Learning Need and Interest (1-5)**	**Importance To Your Court Organization (1-5)**
A	Knowledge of accepted purposes underlying judicial process and the management of cases from filing to disposition, the heart of everyday judicial administration: 1) individual justice in individual cases; 2) the appearance of individual justice in individual cases; 3) provision of a forum for the resolution of legal disputes; 4) protection of individuals from the arbitrary use of governmental power; 5) a formal record of legal status; 6) deterrence of criminal behavior; 7) rehabilitation of persons convicted of crime; and 8) separation of some convicted people from society.		
B	Knowledge of the historical role the courts have played in balancing efficiency, stability, and social order against individual rights; preserving the equality of the individual and the state; bringing law in line with everyday norms and values; establishing the legitimacy of the law; and in guiding the behavior of individuals and organizations;		
C	Knowledge of the historical context which provided impartial and independent courts as a protection from the abuse of governmental power and as a safeguard of individual rights;		
D	Knowledge of each and every judge's independent responsibility for case decisions, the essential elements of judicial decision making, and judicial immunity;		
E	Knowledge of the implications of the court as an institution and judicial decisions as immune from challenge versus the court as an organization and a bureaucracy;		
F	Ability to maintain judicial and staff awareness that courts were not intended to be popular;		
G	Knowledge of the perpetual tensions inherent in the Purposes and Responsibilities of Courts including social order versus liberty, the adversarial process versus consensual or efficient case process, and the authority of the state versus the protection of individuals against governmental power.		

Activity 1.3 Brainstorming Purposes

The goal of this activity is to brainstorm the purposes of courts today.

Notes about Using the Activity
Participants should work in small groups, or collectively as a large group, to brainstorm 4-5 purposes of courts today. This activity should take 5-10 minutes. If done in small groups, faculty may allow 5-10 minutes, followed by an equal amount of time to seek feedback from each group. Faculty or a scribe may write purposes on a whiteboard or flipchart to return to them later as a reference.

Activity 1.4 Concluding Activity/Discussion Question

The goal of this activity is to think about people that you know who exemplify the purposes of courts, and to identify what you do that connects with the purposes of courts.

Notes about Using the Activity
With the large group, or in small groups organized by table or assigned by faculty, ask participants to respond to each question. This activity should take 5-10 minutes. If done in small groups, faculty may allow 5-10 minutes, followed by an equal amount of time to seek feedback from each group. Encourage specific and practical examples.

Question 1: Think of a person that you have worked with that exemplified the purpose of courts. What was it about them? (Point to be made here is that the courts are human creations that require the very best of their leaders who by their very actions can do and teach others what courts are at their very best.)

_____

_____

_____

Question 2: How does what you do (the position you were hired for) connect with the purposes of courts?

_____

_____

_____

Section Two Activities: Sources of Liberty and Justice for All

Purpose

The goal of Section Two activities are to review and discuss the sources of the U.S. judicial system and the underlying history that led to the purposes of courts and its relevance to our courts today.

Relevant Learning Objective

2. Define the values, foundation, and historical perspectives underlying the American court system.

Activity 2.1 Magna Carta Video and Debrief.

Participants will view one of the following two videos available on YouTube regarding the Magna Carta:

- Mr. Zoller's Podcast: Magna Carta[1] 8:00 minutes; or (Zoller, 2009)
- 800 Years of Magna Carta[2] 4:10 minutes (The British Library, 2015)

Notes about Using the Activity

Participants should work in small groups, or collectively as a large group. Participants should respond to each question, using specific and practical examples. This activity should take 5-10 minutes. If done in small groups, faculty may allow 5-10 minutes, followed by an equal amount of time to seek feedback from each group.

Question 1: Magna Carta is often credited for establishing the rule of law versus the rule of man. What is meant by this statement?

_____

_____

_____

Question 2: Magna Carta only lasted 12 weeks before being repealed. Yet it has had a profound impact on U.S. Constitutional development. What are some of the Constitutional rights and protections that have their basis in the Magna Carta?

_____

_____

_____

[1] https://www.youtube.com/watch?v=wUVnpe8uffs

[2] https://www.youtube.com/watch?v=RQ7vUkbtlQA

Activity 2.2 Concluding Discussion/Key Questions

Notes about Using the Activity
Participants should work in small groups, or collectively as a large group, and respond to each question. This activity should take 5-10 minutes. If done in small groups, faculty may allow 5-10 minutes, followed by an equal amount of time to seek feedback from each group. Encourage specific and practical examples.

Question 1: What is meant by the term judicial review?

Question 2: Do you agree with it? If not, what would you do about a law that violates the Constitution?

Question 3: How does judicial review add to the Constitution's system of checks and balances?

Question 4: Do you see evidence of Marbury v. Madison existing today?

Section Three Activities: Key Concepts and Procedures

Purpose
The goals of Section Three activities are to examine the structural foundations of courts, and to define concepts and definitions related to that structure.

Relevant Learning Objective

3. Define key concepts and terminology, especially the judicial system's dedication to the rule of law, equal protection, and due process as related to the purposes of courts.

Activity 3.1 Key Concepts Matching Test

On the line to the left of each factual statement in Column 1, write the letter of the document in Column 2 that best describes its source.

ANSWER	COLUMN 1	COLUMN 2
	ALL MEN ARE CREATED EQUAL	**A.** Bill of Rights
	TO NONE WILL WE SELL… DELAY… OR DENY JUSTICE	**B.** Magna Carta Article 40
	COLLECTION OF JUDICIAL DECISIONS, CUSTOMS, AND GENERAL PRINCIPLES	**C.** Marbury v. Madison
	JUDGES IN EVERY STATE SHALL BE BOUND THEREBY	**D.** Judicial Act of 1789
	CREATED 13 DISTRICT INFERIOR COURTS TO ASSIST SUPREME COURT	**E.** Federalist 10
	A CONTRIVING… INTERNAL STRUCTURE OF GOVERNMENT IS ESSENTIAL… TO PRESERVATION OF LIBERTY	**F.** Due Process Clause
	JUDICIAL POWER OF THE U.S. SHALL BE VESTED IN ONE SUPREME COURT	**G.** U.S. Constitution – Fourteenth Amendment
	PRINCIPLE THAT ALL PERSONS, INSTITUTIONS, AND ENTITIES ARE ACCOUNTABLE TO THE LAW	**H.** Declaration of Independence
	EQUAL PROTECTION CLAUSE	**I.** Federalist 18
	NO LIBERTY UNLESS THE POWER OF JUDGING BE NOT SEPARATED FROM THE LEGISLATIVE AND EXECUTIVE BRANCH	**J.** U.S. Constitution – Sixth Amendment
	FIRST 10 AMENDMENTS TO THE U.S. CONSTITUTION	**K.** Supremacy Clause U.S. Constitution Article VI
	SAFEGUARD FROM ARBITRARY DENIAL OF LIFE, LIBERTY, OR PROPERTY	**L.** Common Law
	RIGHT TO A SPEEDY PUBLIC TRIAL BY AN IMPARTIAL JURY IN CRIMINAL PROSECUTIONS	**M.** Rule of Law
	AUTHORITY TO DETERMINE WHETHER A LAW VIOLATES THE CONSTITUTION	**N.** U.S. Constitution Article III Section 1
	IF MEN WERE ANGELS NO GOVERNMENT WOULD BE NECESSARY	**O.** Federalist 51

Key Concepts Matching Test Answer Key

H	ALL MEN ARE CREATED EQUAL	**A.** Bill of Rights
B	TO NONE WILL WE SELL… DELAY… OR DENY JUSTICE	**B.** Magna Carta Article 40
L	COLLECTION OF JUDICIAL DECISIONS, CUSTOMS, AND GENERAL PRINCIPLES	**C.** Marbury v. Madison
K	JUDGES IN EVERY STATE SHALL BE BOUND THEREBY	**D.** Judicial Act of 1789
D	CREATED 13 DISTRICT INFERIOR COURTS TO ASSIST SUPREME COURT	**E.** Federalist 10
O	A CONTIVING… INTERNAL STRUCTURE OF GOVERNMENT IS ESSENTIAL… TO PRESERVATION OF LIBERTY	**F.** Due Process Clause
N	JUDICIAL POWER OF THE U.S. SHALL BE VESTED IN ONE SUPREME COURT	**G.** U.S. Constitution – Fourteenth Amendment
M	PRINCIPLE THAT ALL PERSONS, INSTITUTIONS, AND ENTITIES ARE ACCOUNTABLE TO THE LAW	**H.** Declaration of Independence
G	EQUAL PROTECTION CLAUSE	**I.** Federalist 18
I	NO LIBERTY UNLESS THE POWER OF JUDGING BE NOT SEPARATED FROM THE LEGISLATIVE AND EXECUTIVE BRANCH	**J.** U.S. Constitution – Sixth Amendment
A	FIRST 10 AMENDMENTS TO THE U.S. CONSTITUTION	**K.** Supremacy Clause U.S. Constitution Article VI
F	SAFEGUARD FROM ARBITRARY DENIAL OF LIFE, LIBERTY, OR PROPERTY	**L.** Common Law
J	RIGHT TO A SPEEDY PUBLIC TRIAL BY AN IMPARTIAL JURY IN CRIMINAL PROSECUTIONS	**M.** Rule of Law
C	AUTHORITY TO DETERMINE WHETHER A LAW VIOLATES THE CONSTITUTION	**N.** U.S. Constitution Article III Section 1
E	IF MEN WERE ANGELS NO GOVERNMENT WOULD BE NECESSARY	**O.** Federalist 51

Activity 3.2 Electronic Definitions Search In Today's Environment

Notes about Using the Activity

Course participants often come to class equipped with smartphones, notebook computers, and iPads. Most will be web-enabled. If the training facility has Wi-Fi or a "hotspot" device can be employed. participants should work in groups to find definitions of some of the key concepts below that support the main ideas developed. These terms are also defined in the glossary that accompanies the New Core Curriculum.

Facilitators should choose from the following concepts:

Equal Protection	Habeas Corpus
Venue	Right Against Self-Incrimination
Justiciability	Right to Counsel
Controversy	Presumption of Innocence
Standing	Trial by Jury
Civil Case	Double Jeopardy
Criminal Case	Notice
Equity	Right of Appeal
Cross-Examination	Discovery
Right to Speedy Trial	Jurisdiction

Give groups at least 30 minutes to conduct their electronic research. Then debrief asking for definitions and allow participants to expand or modify based on alternative definitions found.

Activity 3.3 Due Process in the Courtroom

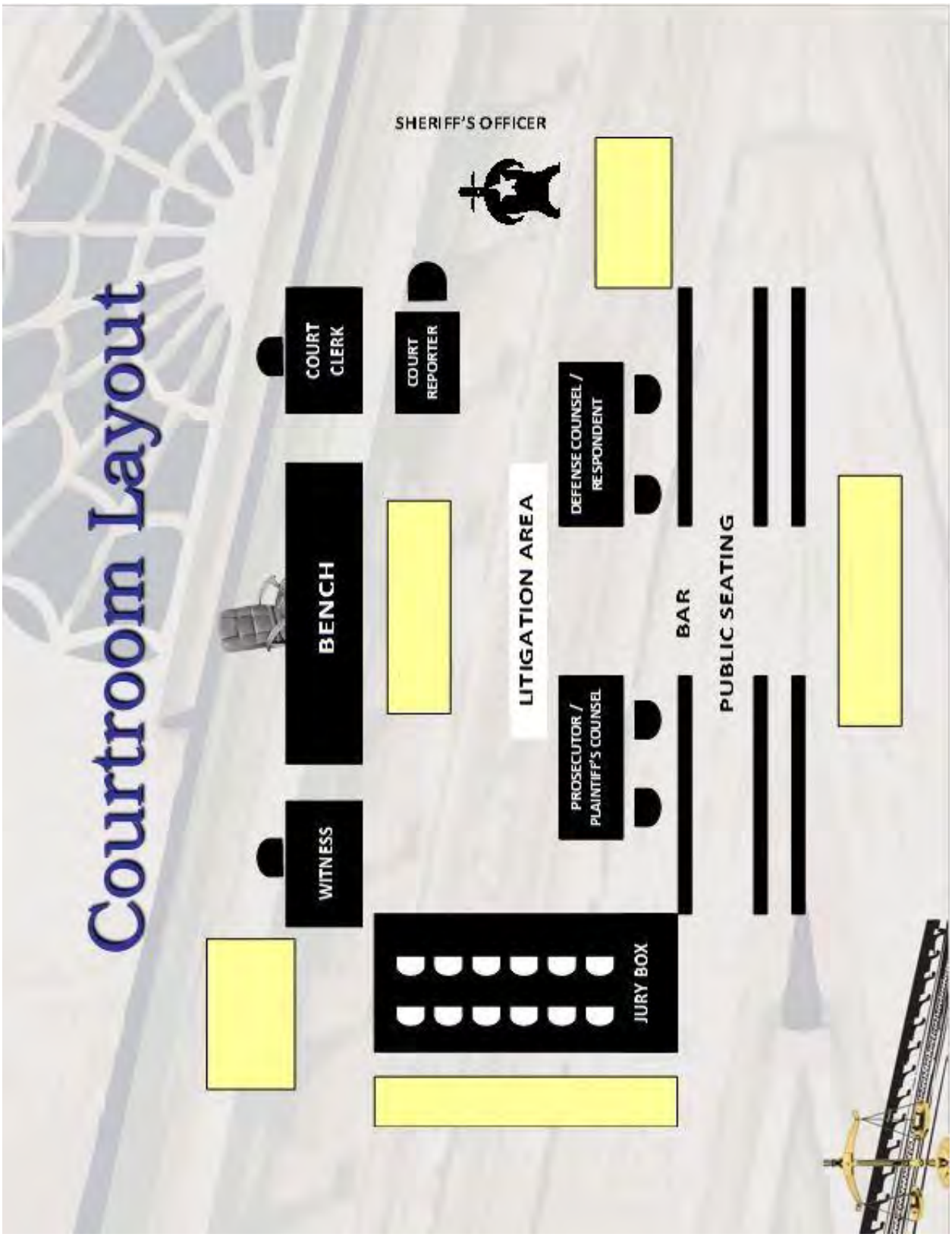
How are the rights of procedural due process reflected in the courtroom?

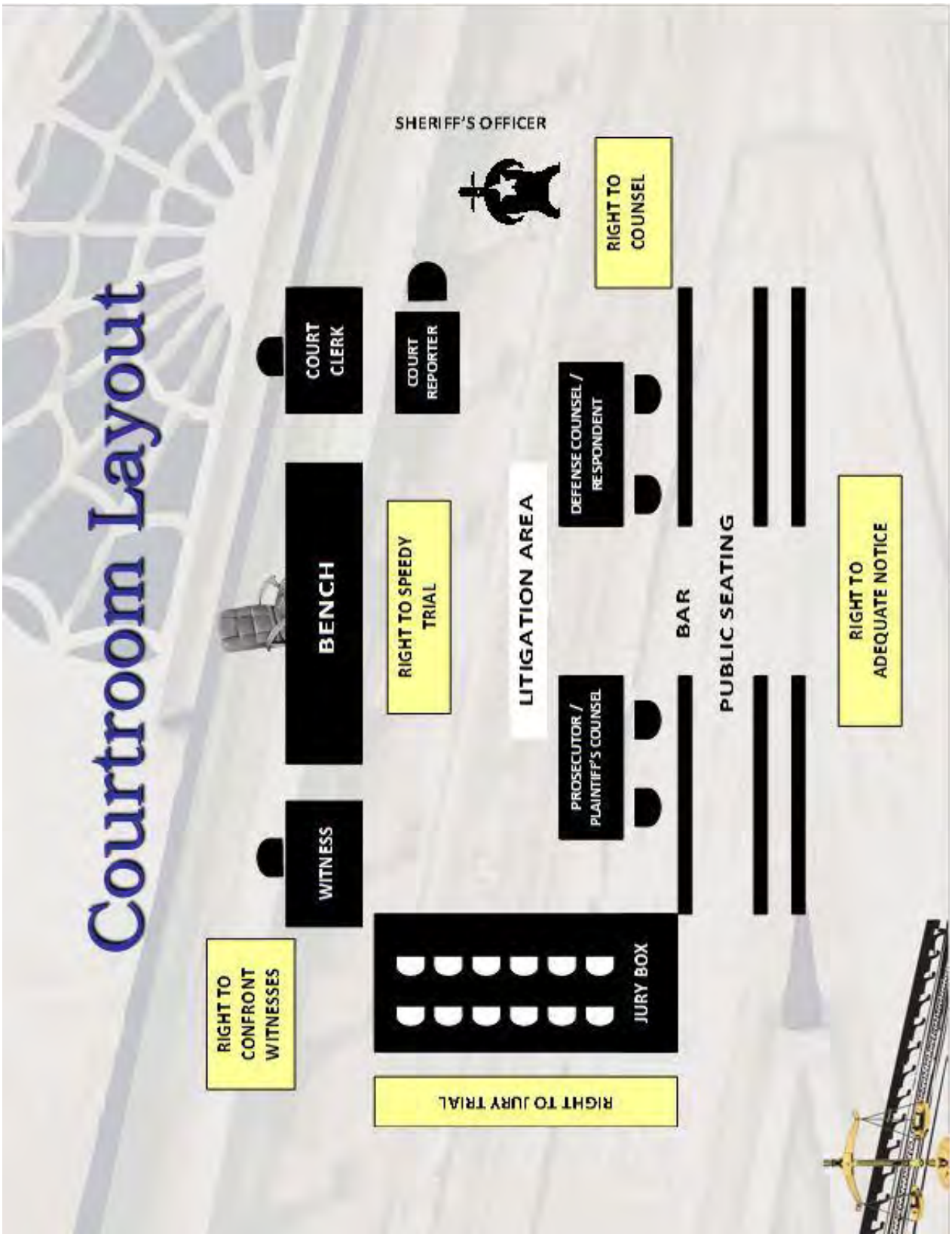
Notes about Using the Activity

If course is being delivered in a courthouse and a courtroom is available, participants will be brought into the courtroom and placed in groups in different locations. If not, participants will be given out the schematic of a typical courtroom. Participants should list what rights/processes are reflected in the layout of a typical courtroom.

Notes for Debriefing

Doorway:	Right to adequate notice
Seating:	Right to public trial
Litigation area Two tables: Counsel table:	 Adversary system Right to counsel
Jury box:	Trial by jury
Witness box:	Right to bring witnesses/Confront witnesses
Judge's chair:	Neutral arbitrator Regulate discovery Ensure speedy trial


Courtroom Layout
SHERIFF'S OFFICER
COURT CLERK
COURT REPORTER
BENCH
WITNESS
LITIGATION AREA
DEFENSE COUNSEL / RESPONDENT
PROSECUTOR / PLAINTIFF'S COUNSEL
BAR
PUBLIC SEATING
JURY BOX


Courtroom Layout
SHERIFF'S OFFICER
COURT CLERK
COURT REPORTER
BENCH
WITNESS
RIGHT TO CONFRONT WITNESSES
RIGHT TO SPEEDY TRIAL
LITIGATION AREA
PROSECUTOR / PLAINTIFF'S COUNSEL
DEFENSE COUNSEL / RESPONDENT
RIGHT TO COUNSEL
BAR
PUBLIC SEATING
RIGHT TO ADEQUATE NOTICE
JURY BOX
RIGHT TO JURY TRIAL

Section Four Activities: Courts as an Institution and Organization

Purpose
The goal of Section Four activities is to explore the role of courts as an institution and an organization and the impacts and implications of both ideas and concepts.

Relevant Learning Objective

4. Summarize the role of courts as a third branch of government, an institution, and an organization and how its role impacts and complements the other two branches of government.

Activity 4.1 Discussion Starters

Two key questions to begin the discussion:

1. Do most courts think of themselves as an organization or a series of courtrooms led by individual judges? Why does it matter so much?

2. Is an organization the same as an institution?

Have the groups discuss these two questions and report out. In debriefing the second question have someone process record any of the distinctions made between organizations and institutions.

Following the review of the key characteristics of an organization and an institution, the facilitator should have table groups discuss the following two questions:

3. Are all U.S. courts judicial institutions? Why or why not?

4. Are courts the only judicial institutions in the U.S.?

Activity 4.2 Independent Courts/Judicial Review

Video Activity (Short Version)

Participants will view the video "Separation of Powers" (4:37) from the Annenberg Classroom (http://www.annenbergclassroom.org/page/the-role-of-the-courts#) to help explain the concept of judicial independence.

Participants can find the full lesson guide for this video at http://www.annenbergclassroom.org. That guide suggests the following post-video review questions:

1. What is judicial review?

2. The founders sought to establish an independent judiciary by separating the branches. What are the benefits of having judges be independent of the President or Congress?

3. Why do you think people obey Supreme Court decisions?

Additional Resources
The Pursuit of Justice: Chapter 13 (12 pages)
http://www.annenbergclassroom.org/Files/Documents/Books/The%20Pursuit%20of%20Justice/108_119_Ch_13.pdf

Video Activity (Long Version)

An optional video, if time permits, is a 34 minute film on this topic at the website above that chronicles two Supreme Court cases, in which decisions were changed:

Cherokee Nation v. Georgia (1831) and (http://www.annenbergclassroom.org/page/an-independent-judiciary)

Aaron v. Cooper (1958)

Discussion Questions Include:

1. What is judicial independence?

2. How did the founders establish judicial independence?

3. Why do you think judicial independence is important?

Agree or Disagree:

1. Supreme Court judges are influenced by what the President or Congress does or by their opinions.

   Agree ☐ Disagree ☐

2. Judicial independence protects the majority and the minority.

   Agree ☐ Disagree ☐

3. Judicial independence protects principles that the founders believed to be fundamental.

   Agree ☐ Disagree ☐

4. The Justices decide cases based on their personal opinions of right and wrong.

   Agree ☐ Disagree ☐

Additional Resources:

The Pursuit of Justice: (Introduction) The Supreme Court as a Mirror of America (7 pages) (Annenberg Classroom, 2015)

http://www.annenbergclassroom.org/Files/Documents/Books/The%20Pursuit%20of%20Justice/5_11_intro.pdf

The Pursuit of Justice: (Chapter 1) The Rise of Judicial Review (10 pages) (Annenberg Classroom, 2015)

http://www.annenbergclassroom.org/Files/Documents/Books/The%20Pursuit%20of%20Justice/12_21_Ch_1.pdf

Activity 4.3 Final Discussion Questions

Notes about Using the Activity

Participants should work in small groups, or collectively as a large group to discuss the questions below. The discussion should take 10-15 minutes. If in small groups at their table each small group will be asked to debrief in the larger group.

Judges should decide cases based on their knowledge of the facts and the law.

1. What would be the impact of allowing partisan politics to influence their decisions?

2. What would be the impact of allowing public opinion to sway decisions?

3. Ask participants to electronically research the Caperton v. Massey case.

4. What would be the impact of allowing partisan politics to impact judicial branch funding?

5. Is it important to support the authority of a judge to make a decision, even when the decision does not agree with our sense of fairness or justice?

6. Can we have judicial independence and judicial accountability at the same time?

Section Five Activities: Court Reform and Accountability

Purpose
The goal of Section Five activities is to examine the reasons for court reform and the impacts on courts today, related to the role of courts in society.

Relevant Learning Objective

5. Identify trends in court reform and pressures forcing the courts to change and expand.

Activity 5.1 Causes of Popular Dissatisfaction – Table Activity

Read the excerpt of the speech "The Causes of Popular Dissatisfaction with the Administration of Justice" Roscoe Pound Speech; American Bar Association Annual Meeting (1906).

Your table will be assigned one cause as follows:

- Causes of dissatisfaction with any legal system [#1]
- Causes lying in the peculiarities of our Anglo-American legal system [#2]
- Causes lying in our American Judicial Organization and Procedure [#3]
- Causes lying in the environment of our judicial administration [#4]

In class assignment:

- Discuss and analyze the cause assigned to your group.

_____

_____

_____

- From Pound's 1906 speech, designate a reporter(s) who will explain the cause and review the points listed for your cause.

_____

_____

_____

- Each group should discuss the following as to the cause assigned:
  1. What are the 3 most important ideas?
  2. Is this still a challenge?
  3. Is this issue currently being addressed in your state?
  4. Discuss the role of the judiciary and your individual role in court reform.

_____

_____

_____

This should also be a part of your group report.

Activity 5.2 Discussion Questions

Notes about Using the Activity

Following the facilitator's review of reforms suggested by the Kerner Commission and Chief Justice Warren Burger, participants will discuss the following questions.

Two Discussion Questions:

Question 1: To what extent have courts implemented the reforms outlined by the Kerner Commission and Chief Justice Burger?

Question 2: What reforms are still needed today?

Activity 5.3 Concluding Activity – Courts Speak Out

Create a Public Service Announcement (PSA) for courts.

Notes about Using the Activity

In this activity, we will discuss accountability for resources, as well as for caseload and service excellence, as well as create a public service announcement.

Play the YouTube Video: http://www.youtube.com/watch?v=71GOdHtuido (KGTV 10 News Iteam, 2012)

Question For The Entire Group

- What should we say in a court management public service announcement (PSA)?

- In your group, create a 60 second PSA to citizens promoting the judiciary.

Section Six Activities: Management and Leadership in the Nation's Courts

Purpose
The goal of Section Six activities is to embed the functions of court management and leadership in the purposes of courts.

Relevant Learning Objective

6. Apply the values and goals of the American court system to specific court administrative tasks and responsibilities including dispute resolution.

Activity 6.1 Group Discussion

Notes about Using the Activity

Participants should work in small groups, or collectively as a large group to discuss the questions below. The discussion should take 10-15 minutes. If in small groups at their table each small group will be asked to debrief in the larger group.

Question 1: How do you define "court manager"?

Question 2: Why are court managers essential to the administration of justice?

Question 3: What is your role in assuring access to justice?

Activity 6.2 Practical Impacts – Table Exercise

Notes about Using the Activity

Discuss the practical impact of good court management and leadership grounded in mission-critical purposes and responsibilities and refined through performance management on the following:

- Caseflow management

- Relationship with other branches and justice system relationships

- Talent management and employee training and development

- Increasing accessibility through technology

- Managing limited resources to maximize service

- Strategic vision of where the courts are going based on its purpose and change in society

- Active engagement of court users and the community

- Good stewardship of court programs and judicial relationships

Remember: Courts are an independent branch of government living an interdependent world.

Activity 6.3 Final Questions

Notes about Using the Activity

Participants should work in small groups, or collectively as a large group to discuss the questions below. The discussion should take 5-10 minutes. If in small groups at their table each small group will be asked to debrief in the larger group.

Question 1: How can we help lead the courts with our agreed upon purpose?

Question 2: How can we help sort purposes for the court versus purpose of other branches and/or justice system partners?

Section Seven Activities: New Directions in Courts and Court Management

Purpose
The goal of Section Seven activities is to examine the implications of a broader role for courts to solve social problems with potential impacts on social policy and community outcomes, especially for adult criminal and juvenile cases.

Relevant Learning Objective

7. Explore quality court management concepts, accountability measures, and efficient processes in executing the role of courts in society.

Activity 7.1 New Directions – Table Activity

Notes about Using the Activity

Participants should work in small groups to discuss the questions below. Depending upon time available, faculty may break these questions into groups of two questions each and assign to different tables for discussion and report out. When reports are given, opportunity should be provided for other participants to weigh in.

In Section 1, we covered the purposes of courts. Looking back at the list generated, discuss the following:

- Are these new directions for courts discussed in Section 7 congruent or in conflict with the original purposes and responsibilities of courts? Please explain.

_____

_____

_____

- Is it possible for judges to apply the law in court cases without making or impacting social policy?

_____

_____

_____

- What is judicial activism?

_____

_____

_____

- To what extent should courts and judges take into account the broader societal effects of the cases before them?

- Thomas Jefferson referred to the jury system as "the only anchor yet imagined by man by which a government can be held to the principles of its constitution." Do all the diversionary mechanisms now utilized by the justice system now threaten this cornerstone of American democracy? Why or why not?

Section Eight Activities: Practical Application of Purposes

Purpose
The goal of Section Eight activities is to apply the purposes of courts to day-to-day court operations and the work of each court manager.

Relevant Learning Objective

8. Articulate the practical impact and relevance of the purposes and responsibilities of courts to their jurisdiction, day-to-day court operations, and their job.

Activity 8.1 Why Study Purposes?

Notes about Using the Activity

Participants should work together in small groups, or collectively as a large group to discuss the questions below. The discussion should take 5-10 minutes. If in small groups at their table each small group will be asked to debrief in the larger group.

- Why is it important for court leaders and staff to know the purposes and responsibilities of courts?

- Why is an ethical code essential for both judges and court management professionals?

Activity 8.2 Survey of Time

Notes about Using the Activity

Respond to the point listed below based upon the normal workday activities.

1. Percentage of your daily work which involves:

a.	Only the Judicial Branch:	%
b.	Other Branches of State/Federal Government:	%
c.	The Public:	%
	Total:	**100%**

2. Percentage of your daily work which relates to your court's mission or vision statement.

%

3. How often do you refer to a court rule or statute?

4. How often of you think of or refer to the public or whether an action was for the public good?

5. Did you think of or refer to one or more of the Trial Court Performance Standards or CourTools?

6. Did you think of or refer to one or more of the Trial Court Performance Standards or CourTools?

7. This is a forced choice question. Please fit 100% of your average daily work into the following categories:

a.	Why Courts Exist:	%
b.	Courts as Institutions:	%
c.	Rule of Law, Equal Protection & Due Process:	%
d.	Accountability:	%
e.	Interdependence & Leadership:	%
	Total:	**100%**

8. What do you do on a daily basis that brings you the most professional gratification?

9. If you have been in your current position with the court for several years, reflect on whether your answers would have been different 5 years ago? 10 years ago?

Discuss responses in groups and with the class as a whole.

Activity 8.3 Drawing Activity: A Judicial Brand

Optional activity for longer format courses.

> "The soul never thinks without a picture."
> -Aristotle

Notes about Using the Activity

Based on all the material reviewed during this course on purpose and responsibilities, think about your court and its mission. Draw a picture or logo that represents your brand.

Examples of some famous brands to get things started:

- Apple
- Google
- McDonalds
- Nike
- Starbucks

Have markers and poster pads at each table. Ask each group report out on its brand.

Bibliography

Abraham, Henry J. (1972). *Freedom and the Court: Civil Rights and Liberties in the United States*. New York, NY: Oxford University Press. (Available in the NCSC Library).

Aikman, Alexander B. (2007). *The Art and Practice of Court Administration*. Boca Raton, FL: Taylor & Francis Group.

American Bar Association (1998). *Law and the Courts: Court Procedures, Volumes I and II*. Chicago, IL: American Bar Association, Division for Public Education.

American Bar Association, Commission on Public Understanding About the Law (1991). *Understanding the Courts: Anatomy of a Criminal Case, Anatomy of a Civil Case: Instructor's Handbook.* American Bar Association.

American University School of Public Affairs (Bureau of Justice Assistance Grant 2010-DB-BX-KO37). (2014, March 31) *The Purposes of Courts, Ernest C. Friesen*. [Video file]. Retrieved from http://m.youtube.com/watch?v=saHb06PNadQ.

Annenberg Classroom (2015). *The Pursuit of Justice, The Rise of Judicial Review*. Retrieved from http://www.annenbergclassroom.org/Files/Documents/Books/The%20Pursuit%20of%20Justice/12_21_Ch_1.pdf.

Annenberg Classroom (2015). *Separation of Powers*. [Video file]. Retrieved from http://www.annenbergclassroom.org/page/the-role-of-the-courts#.

Annenberg Classroom (2015). *The Pursuit of Justice, The Supreme Court as a Mirror of America*. Retrieved from http://www.annenbergclassroom.org/Files/Documents/Books/The%20Pursuit%20of%20Justice/5_11_intro.pdf.

The British Library (2015, March 10). *800 Years of Magna Carta*. Retrieved from https://www.youtube.com/watch?v=RQ7vUkbtlQA.

Burger, Chief Justice Warren (1969). Court Administrators – Where Would We Find Them? 53 *Judicature* 53, 108. Retrieved from The Court Administrator: A Guide and Manual (2011). *National Association for Court Management*. Williamsburg, VA (Available in the NCSC Library).

Church, Thomas W. (1978). *Justice Delayed: The Pace of Litigation in Urban Trial Courts*. Williamsburg, VA: National Center for Trial Courts.

Commemorating The 200th Anniversary of Marbury v. Madison – The Supreme Court's First Great cases – February 1803 (2003). *American Bar Association (Publications)*. Chicago, IL: Public Education Division 2003. Retrieved from http://www.americanbar.org/content/dam/aba/migrated/publiced/lawday/marbury.authcheckdam.pdf.

Conference Papers: Managing Courts in Changing Times - Second National Conference on Court Management (2012). *National Association for Court Management 5th Annual Conference*. Retrieved from http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=536.

Core Competency Curriculum Guidelines *(2003)*. *National Association for Court Management (Publications)*. Retrieved from http://nacmnet.org/CCCG/index.html.

Core Competency Curriculum Guidelines: Application and Uses (2004). *National Association for Court Management, Toolboxes*. Retrieved from https://nacmnet.org/CCCG/cccg_toolboxes.htm.

The Court Administrator, A Manual (1992). *National Association for Court Management (Publications)*. Retrieved from http://www.fjc.gov/public/pdf.nsf/lookup/court_admin.pdf/$file/court_admin.pdf.

CourTools (2015). *A Project of the National Center for State Courts*. Retrieved from http://www.courtools.org/

Daly, Kathleen and Immarigeon, Russ (1998). The Past, Present, and Future of Restorative Justice: Some Critical Reflections. *Contemporary Justice Review*. 1, 21-45. Retrieved from http://restorativejustice.org/rj-library/the-past-present-and-future-of-restorative-justice-some-critical-reflections/1967/.

The Declaration of Independence (1776). Retrieved from www.constitution.org/us_doi.pdf.

De Muniz, Paul J. (2009). The Purposes and Responsibilities of Courts. *National Association for Court Management (Publications)*. Retrieved from https://www.nacmnet.org/conferences/speakers-2009-midyear.

Dineen, Patty (2001). And Justice for All: Ensuring Public Trust and Confidence in the Justice System. *American Bar Association, Standing Committee on Judicial Independence, Coalition for Justice*. Retrieved from http://www.ncbar.org/media/95337/And-Justice-For-All.pdf.

A Discussion of Issues Facing Our Nation's Courts (2015). *Justice at Stake*. Washington, D.C. Retrieved from www.justiceatstake.org/issues/index.cfm.

Federal Research Division, U.S.A. (1984). *What Changes Are Most Needed in the Procedures Used in the United States Justice System? - National Debate Topic for High Schools, 1983-1984 - Pursuant to Public Law 88-246*. Washington D.C.: Government Printing Office.

The Federalist Papers (2010). *Chris Whitten*. Retrieved from http://www.foundingfathers.info/federalistpapers/.

Fetter, Theodore J. (1978). State Courts: A Blueprint for the Future. *National Center for State Courts Library*. Retrieved from http://ncsc.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/127.

Friesen, Ernest C., Gallas, Edward C., and Gallas, Nesta M. (1971). *Managing the Courts*. New York, NY: The Bobbs-Merrill Co.

Griller, Gordon M. (2008). New Dimensions in Court Leadership. *National Center for State Courts Library*. http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/1282.

Hall, Dan (2011). Principles for Judicial Administration. *National Center for State Courts Library*. http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/1891.

Hall, Kermit and McGuire, Kevin T. (2005). *The Judicial Branch*. New York, NY: Oxford University Press. (Available in the NCSC Library.)

Hall, Kermit. *The Magic Mirror: Law in American History*. New York, NY: Oxford University Press, 1989.

Hall, Kermit L. and Patrick, John C. *The Pursuit of Justice, Supreme Court Decisions That Shaped America*. Rancho Mirage, CA: The Annenberg Foundation Trusts at Sunnylands. Retrieved from http://www.annenbergclassroom.org/page/the-pursuit-of-justice.

Hamilton, Alexander (1788). *The Federalist No. 78, The Judiciary Department*. Independent Journal, Constitution Society. Retrieved from http://www.constitution.org/fed/federa78.htm.

Hamilton, Alexander (1788). *The Federalist No. 81, The Judiciary Continued, and the Distribution of the Judicial Authority*. Independent Journal, Constitution Society. Retrieved from http://www.constitution.org/fed/federa81.htm.

History of the Federal Judiciary. *Federal Judicial Center (Publications)*. Retrieved from http://www.fjc.gov/history/home.nsf.

Holmes, Oliver Wendell (1897). *The Path of the Law*. Harvard Law Review, 10(457). Retrieved from http://www.constitution.org/lrev/owh/path_law.htm.

Holmes, Oliver Wendell (1991). *The Common Law*. Mineola, NY: Dover Publications, Inc.

Kerner Commission. Report of the National Advisory Commission on Civil Disorder – Report Summary (1967). *BlackPast.org*. New York, NY: Bantam Books (full report 1968). Retrieved from http://www.blackpast.org/primary/national-advisory-commission-civil-disorders-kerner-report-1967

KGTV 10 News Iteam (2012, June 28). *California Court Management Investigated*. Retrieved from https://www.youtube.com/watch?v=71GOdHtuido.

MacArthur Foundation (2015, April 21). *A Call to Action: A panel discussion on the state of local justice systems*. [Video file]. Retrieved from https://www.youtube.com/watch?v=1RtglepyATI.

Madison, James (1787). *The Federalist No. 10. Daily Advertiser*, Constitution Society. Retrieved from http://www.constitution.org/fed/federa10.htm.

Madison, James (1788). The Federalist No. 51. *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*, Independent Journal, Constitution Society. Retrieved from http://www.constitution.org/fed/federa51.htm.

Magna Carta 800 Law Day 2015 Planning Guide (2015). *American Bar Association (Publications)*. Retrieved from https://www.americanbar.org/content/dam/aba/images/public_education/LawDay2015/LawDayGuide2015.pdf.

Managing Courts in Changing Times (1990). *Second National Conference on Court Management, National Association for Court Management 5th Annual Conference*. Retrieved from http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/536.

Marbury v. Madison (1803). Citation 5 US 137 (1803) (1 Cranch) 137. Retrieved from https://supreme.justia.com/cases/federal/us/5/137/.

McManus, Michael and Silverstein, Brianna (2011, November 1). Brief History of Alternative Dispute Resolution in the United States. *Cadmus Journal.* 1(3), 100-105.

Model Code of Conduct for Court Professionals (2012). *National Association for Court Management (Publications)*. Retrieved from https://nacmnet.org/sites/default/files/membersonly/Model%20Code%20of%20Conduct%20for%20Professionals%20with%20commentary.pdf

Model Code of Judicial Conduct (2007). *American Bar Association (Publications)*. Retrieved from http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_MCJC_approved.authcheckdam.pdf.

Morgan, Kerry L. (2014). Unalienable Rights, Equality, and The Free Exercise of Religion, The Laws of Nature and of Nature's God. *Lonang Institute*. Retrieved from http://lonang.com/commentaries/conlaw/religious-liberty/rights-free-exercise-of-religion/.

Mount, Steve (2010). Constitutional Topic, Checks and Balances. *Craig Walenta*. Retrieved from http://www.usconstitution.net/consttop_cnb.html

Mount, Steve (2010). Constitutional Topic, Due Process. *Craig Walenta*. Retrieved from http://www.usconstitution.net/consttop_duep.html

MSS Research (2007). Introduction to Organization. *The Mother's Service Society, MSS Research*. Retrieved from http://www.mssresearch.org/?q=Introduction_to_Organization.

NACM Core Competency Curriculum Guidelines (2013). *National Association for Court Management (Publications)*. Retrieved from https://nacmnet.org/CCCG/cccg_CoreCompetencies.html.

NACM Website – Glossary (2013). *National Association for Court Management (Publications)*. Retrieved from http://nacmnet.org/glossary.html

Nolan, James L. (2001). *Reinventing Justice: The American Drug Court Movement*. Princeton, NJ: Princeton University Press.

Ostrom, Brian, Hanson, Roger, Ostrom, Charles, Kleiman, Matthew (2005). Court Cultures and their Consequences. *Court Manager, 20(1),* 14-23. Retrieved from http://www.ncsc.org/Topics/Court-Management/Court-Culture/Resource-Guide.aspx.

Ostrom, Brian J., Hanson, Roger, Kleiman, Matthew (2005, May). Examining Court Culture. *Caseload Highlights, Examining the Work of State Courts, 11*(2). Retrieved from http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/986.

Ostrom, Brian, Ostrom, Charles, W. Jr., Hanson, Roger, Kleiman, Matthew (2005, November). The Mosaic of Institutional Culture and Performance: Trial Courts as Organizations. *National Center for State Courts and National Institute of Justice (Publications)*. Retrieved from https://www.ncjrs.gov/pdffiles1/nij/grants/212083.pdf

Ostrom, Brian, Ostrom, Charles, W. Jr., Hanson, Roger, Kleiman, Matthew (2007, June). *Trial Courts as Organizations*. Philadelphia, PA: Temple University Press.

Our American Government (2003). U.S. Government Printing Office. Retrieved from https://www.gpo.gov/fdsys/pkg/CDOC-108hdoc94/pdf/CDOC-108hdoc94.pdf.

Perry, Richard L. and John C. Cooper (1960). *Sources of Our Liberties.* Chicago, IL: American Bar Foundation.

Position Paper on Effective Judicial Governance and Accountability: Conference of State Court Administrators (2001). *Conference of State Court Administrators (Publication).* Retrieved from http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/judgovwhitepapr.ashx

Pound Conference (1976). *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 1.* St. Paul, MN: National Center for State Courts. Retrieved from http://contentdm.ncsconline.org/cdm4/item_viewer.php?CISOROOT=/ctadmin&CISOPTR=1245&REC=2.

Pound Conference (1976). *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 2.* St. Paul, MN: National Center for State Courts. Retrieved from http://contentdm.ncsconline.org/cdm4/item_viewer.php?CISOROOT=/ctadmin&CISOPTR=1245&REC=2

Pound, Roscoe (1978). *Law and Morals: The McNair Lectures, Delivered at the University of North Carolina*. New York, NY: Rothman Reprints.

Pound, Roscoe (2015, December 23). The Causes of Popular Dissatisfaction with the Administration of Justice. *West's Encyclopedia of American Law*. Retrieved from http://www.encyclopedia.com/doc/1G2-3437704909.html

Pretrial Justice in America: A Survey of County Pretrial Release Policies, Practices, and Outcomes. (2009), *Pretrial Justice Institute* (Bureau of Justice Assistance grant). Retrieved from http://www.pretrial.org/download/research/PJIPretrialJusticeinAmerica-ScanofPractices2009.pdf.

Princeton Survey Research Associates, Intl. (2009). Separate Branches, Shared Responsibilities: A National Survey of Public Expectations on Solving Justice Issues. *National Center for State Courts (Publications)*. Retrieved from http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctcomm&CISOPTR=118.

Public Education Division, U.S.A. (1987). *Law and the Courts: A Handbook of Courtroom Procedures With a Glossary of Legal Terms.* American Bar Association.

Purposes and Responsibilities of Courts (2013). *National Association for Court Management (Publications)*. Retrieved from http://nacmnet.org/CCCG/cccg_1_corecompetency_purposes.html.

The Role of Courts in Government (2015). *FindLaw*. Retrieved from http://public.findlaw.com/library/legal-system/court-role.html

Rottman, David B. (1998, Winter). On Public Trust and Confidence: Does Experience with the Courts Promote or Diminish It? *Court Review 35(14), 14-22*. Retrieved from http://aja.ncsc.dni.us/courtrv/cr35-4/CR35-4Rottman.pdf

Trust and Confidence in the California Courts, A Survey of the Public and Attorneys, Commissioned by the Administrative Office of the Courts (2005). *National Center for State Courts*. Retrieved from http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctcomm&CISOPTR=25

State Court Organization, An Online Resource Database, (2015, January 9), *The National Center for State Courts.* Retrieved from http://www.ncsc.org/microsites/sco/home.

Steelman, David C., Goerdt, John A., and McMillan, James E. (2004). *Caseflow Management: The Heart of Court Management in the New Millennium.* Williamsburg, VA: National Center for State Courts.

Tobias, Carl W. (1996). Warren Burger and the Administration of Justice. *Villanova Law Review, 41, 505-519*. Retrieved from http://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1818&context=law-faculty-publications.

Tobin, Robert W. (1999). *Creating the Judicial Branch: The Unfinished Reform*. Williamsburg, VA: National Center for State Courts. Retrieved from http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1249

Tobin, Robert W. (1997). *An Overview of Court Administration in the United States*. Williamsburg, VA: National Center of State Courts. Retrieved from http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/101

Trends in State Courts (2015). *Reports on Trends in the State Courts, National Center for State Courts (n.v.).* Retrieved from http://www.ncsc.org/trends/.

Trial Court Performance Standards with Commentary (1990). *Bureau of Justice Assistance*. Retrieved from http://www.ncjrs.gov/pdffiles1/161570.pdf.

The United States Constitution (1791). *Legal Information Institute*. Retrieved from http://law.cornell.edu/constitution/constitution.overview.html

Tyler, Tom R. (2005). *Procedural Justice, Volumes I and II*. Burlington, VT: Ashgate Publishers.

United Nations Secretary General (2004). *The Rule of Law and Traditional Justice in Conflict and Post Conflict Societies*. New York, NY: United Nations. Retrieved from http://www.ipu.org/splz-e/unga07/law.pdf.

Van Duizend, Richard (2003, May). The American Court System: Long Traditions, New Directions. *The Changing Face of U.S. Courts, 8(1)*. Retrieved from http://www.4uth.gov.ua/usa/english/politics/ijde0503/vanduize.htm

Winick, Bruce J. (2002). Therapeutic Jurisprudence and Problem Solving Courts. *Fordham Urban Law Journal*, Article 4, 20(3), 1,055-1,103.

Zoller, Mr. (2009, January 29). *Magna Carta*. Retrieved from https://www.youtube.com/watch?v=wUVnpe8uffs.