

### Three Things Others Should Know About The U.S. Legal System

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Most legal scholars are aware that the U.S. legal system is a Common Law system, which traces its origins to seventeenth century England. Not surprisingly, many of the basic concepts of the American legal system will initially appear familiar to those acquainted with the legal systems of Britain or former Commonwealth nations. Nonetheless, in actual application, the U.S. legal system functions quite differently from these Common Law systems. Thus, because the approach of the American legal system is distinct in many respects from its Common Law antecedents and differs even more from Civil Law systems, it may well be unique among the world's legal systems. For Americans, who suffer from an insularity caused by a large continent as well as a lack of experience with other nations, the unique features of the U.S. legal system can often pose problems in understanding other nations' legal systems. Equally, the unusual approach of the American system is often difficult to understand for those from other nations.

A. Fundamental Character of the U.S. Legal System. The U.S. government is often described as "a government of limited powers." To understand the meaning of this phrase in actual practice, it is necessary to recognize the more basic fact that, insofar as the individual citizen is concerned, the U.S. system of laws is proscriptive, rather than prescriptive. In other words, unless a law prevents a citizen from acting, the assumption on which the U.S. system is based is that the citizen is free to act as he or she wishes. A citizen does not need a law to allow him or her to act. In contrast, unless there is a law which affirmatively permits the government to act, it has no power to do so. Thus, for a government official, the search for legal authority is paramount and the first question asked by a government official must always be, "Where is there legal authority which permits me to act?"

All laws, whether preventing citizen action or permitting government action, must, of course, be tested against the overarching policy embodied in the U.S. Constitution. Laws found to be in conflict with constitutional provisions can be declared "unconstitutional" and will have no effect, if an appropriate court so decides.

B. Separation of Powers. In theory, all power enjoyed by the U.S. government, whether federal or state, was originally possessed by the people. Thus, the U.S. Constitution might be described as a trust document, which has transferred certain of the people's power to the government, in trust to be used for their benefit. Yet the Framers of the U.S. Constitution also recognized that transferring so much power to a single governmental entity would create a risk that the power would be misused and tyranny result. To address this problem, like many nations today, the U.S. legal system took advantage of the idea of separation of power, a concept first introduced by eighteenth-century European thinkers such as Montesquieu. Some nations divide power among different parts of society. In the U.S. legal system, however, the Constitution divides power between different parts of the state and national governments. Thus, while all power

flows originally from the citizenry—the people—it is distributed between two levels of government (state and federal) and among three distinct governmental branches at each level, each possessing a distinct purpose. These, of course, are the executive, the legislative and the judicial functions.

While most governments are structured with these three governmental functions in mind, in the American system, the scope of the responsibility of each differs markedly from that found in most of the world's parliamentary systems. In addition, many authorities assigned to the Executive Branch in other legal systems are shared between the Executive and Legislative Branches in the U.S. legal system. For example:

i. *Executive.* The President functions as both chief executive officer and representational head of government in the American system, as there is no elected or hereditary head of state. Typically the President is also the head of his private political party (Republican or Democrat), but often his party does not control the legislative branch, i.e. Congress. Thus, in the American system, a president may confront a political party in control of Congress that is different from his own, making governing more difficult.

Further, the Constitution divides many powers which are normally the responsibility of a chief governmental executive officer, between the President and the Congress. In this way, there is a further limitation on the way in which power is used. For example, a President is the governmental official principally charged with representing the U.S. in foreign affairs. As such, he is empowered to nominate ambassadors and negotiate treaties with other nations. Yet the ambassadors must be approved (or “confirmed”) by the Senate (i.e. the upper house of the legislature) before they are empowered to take on the responsibilities of their positions. In similar fashion, a President is authorized to negotiate and agree upon treaties with other nations on behalf of the United States, but a treaty under the U.S. legal system does not become operational until the Senate, the upper house of the U.S. Congress, votes to ratify it. Only then does it also become national law.

ii. *Legislative.* The Congress has the sole responsibility for funding the government (this is called “the power of the purse”). It levies all taxes and also decides where resulting funds will be spent by the Executive Branch. As a result, while the President submits a budget for all governmental needs, except those of the Congress itself, that budget is subject to review and revision by the Congress. The final funds which are available to the President for his use in his role as the chief executive officer is determined by a budget which the Congress ultimately passes as an appropriations law. Often this budget is quite different than that which the President originally submitted. The Congress jealously guards this “power of the purse” and has even passed laws to prevent the President from increasing the funding available for Executive Branch needs from non-governmental sources. As a result, the Congress is in complete control of the funding which the President may use—either from taxes or private funds. Acting contrary to the will of Congress in these matters will cause the President and executive branch staff to violate a public law and criminal penalties can result.

So too, the President shares with the Congress responsibility for equipping and

authorizing the use of the military. The Constitution empowers the Congress to “declare war” (although the President may act to defend the nation in emergencies even without such a declaration). Congress also has authority to pass laws governing the operation of the military and providing the funding needed to support them in peace and war time. Appointment of high level military leadership, such as general officers, also falls within the power of the Congress, even though the Constitution assigns to the President the role of “commander-in-chief”.

iii. *Judiciary*. Under the U.S. Constitution the Supreme Court and the federal court system constitute a separate and equal branch of government with the Executive and Congressional branches. There are three levels of federal courts: federal district trial courts, at least one of which exists in each state; twelve circuit appellate courts, each with its own geographic jurisdiction including several states and numerous trial courts; and the Supreme Court, a court of limited review for all twelve circuit appellate courts. Together all three levels of these courts function to interpret the U.S. Constitution and also federal (or national) law. Occasionally they may also find the need to interpret the law of an individual state as well. Although the federal courts are independent from the other two branches of government, as in the case of ambassadors, these judges must first be nominated by the President and then be approved by the Senate before they may take office. Unlike all other governmental officials, federal judges serve for life. “Life tenure” is seen as a way to protect them from political interference by either the President or members of Congress. Life tenure also acts to insure that the Judiciary is truly an independent branch of government. The goal of this independence is to insure fair decisions, consistent with the law, and to avoid interference with the judicial process or retribution, if a decision is unpopular. Like the Executive Branch, however, the federal courts must rely on Congress for their funding. And they must rely on the Executive Branch, and in particular the U.S. Marshall’s Service, to enforce many of their judgments.

Other parts of the legal system, notably the Attorney General and all federal prosecutors, are part of the Executive Branch, but are not part of the judiciary. Thus, federal judges hear and decide cases, both criminal and civil, that are developed and presented by another branch of government and over whom they have no day-to-day control.

With the limited exception of when two states are suing one another, the Supreme Court sits as a court of appeal, not as a trial court. In most, but not all cases, review is not “of right”, but discretionary and the decision of the Court itself. The Supreme Court reviews the law, but only in exceptional cases will it also reconsider the facts. Hearing and deciding the facts in a case is the responsibility of the federal district courts which are the first level court in this three tiered system. Appeals from the federal district courts go first to the Circuit Court of Appeals in the geographic area where the trial court sits and then to the U.S. Supreme Court. The Supreme Court’s decision to hear a case is based on a number of factors; key among them, however, is the fact that there is a “conflict in the circuits”—i.e. different decisions on the same question of law have been reached by several of the circuit courts of appeals.

A particularly confusing feature of the U.S. legal system is the fact that state and

federal courts have over-lapping jurisdiction on many issues, although each case may only be litigated in one of the two systems. Nonetheless, a state court may decide a question of federal law and a federal court may decide a state question. Appeals in the state court system proceed according to the individual state's specific system, usually a three tiered system with the state supreme court the final level of review. An exception to this, however, is an appeal from a decision by the highest state court on questions of federal constitutional interpretation. This may be appealed to the U.S. Supreme Court as a matter of right.

While not the most efficient or easily understood system, these various possibilities of court review provide insurance against quick decisions without adequate reflection. The structure dividing judges from prosecutors insures that the person selecting cases for prosecution is separate from the person sitting in review.

iv. *State Governments.* A further feature of the separation of powers in the U.S. system is found in the fact that governmental authority is divided between a national federal system and the governing systems of the individual states. The U.S. Constitution preserves all power not explicitly placed in the federal system for the individual state systems. Thus, while only the federal government has the power to create and equip a military or to appoint ambassadors and negotiate treaties, the majority of more local responsibilities (i.e. schooling) are left to the states. Each state has its own executive, legislative and judicial branch. These operate pursuant to the specific constitutions adopted by each state. These constitutions are similar to one another and the federal constitution, but not identical. For example, the Constitution of the State of California permits a law to be adopted by a proposal (called an "initiative") directly voted upon by its citizens. This would not be permissible at the federal level nor in many other states.

- C. The Role of Private Parties. Private entities, such as independent membership organizations of lawyers, citizens, academics and the press have, over time, become increasingly significant to the successful functioning of the American legal system. They are particularly important to insuring the quality of those whom become lawyers and to maintaining the independence of the judiciary and the court system.
- i. American legal education is carefully regulated nationally by private voluntary organizations which establish standards and monitor performance. National law schools are reviewed and certified by a private organization made up of lawyers from all walks of life, the American Bar Association (the ABA). The Department of Education has granted the ABA the authority to review and supervise the delivery of legal education in all national American law schools. It conducts reviews of each law school every seven years, according to standards which set forth required hours of study and recommend a variety of curricular and support activities. Legal education is considered a "post graduate professional degree" and so all ABA-approved law schools are limited to accepting only those students who have already earned an undergraduate university degree. The approximately 200 national U.S. law schools are almost equally divided between government supported and private schools. Tuition is required by all of these schools, although some schools are able to grant generous scholarship aid and state supported schools are generally less expensive than private schools.

- ii. Law school graduates must pass a state Bar Examination before being admitted to practice. Creation, administration and grading of bar exams is the responsibility of organizations of Bar Examiners which are established by each individual state and are composed of both private and public lawyers. After passing such a state bar examination, a lawyer takes an oath to uphold the Constitution and laws of both state and federal governments and then becomes a “member of the bar”, entitled to represent clients in and out of court. Such admitted lawyers are considered “officers of the court”, with an obligation to behave according to rules developed by groups of private and public lawyers; they are subject to punishment if they fail to follow the rules or behave ethically. Typically this punishment is meted out by the state’s privately operated membership organization for lawyers, the State Bar Association, which typically also bears responsibility for the professional character and conduct of both private and public lawyers.
  
- iii. Thus, state and national bar organizations, which are private in nature, nonetheless serve as a further check on the power of the government. Often they are involved in reviewing the qualifications of candidates for judgeships as well. The American legal system does not have a separate educational program for the preparation of judges. Instead, most judges are drawn from the senior ranks of the practicing bar, whether privately or publicly employed. Selection can be made by the President or governor of a state or commission; elections are also increasingly used. In the American legal system, service as a judge, particularly in the highest state court or in one of the levels of the federal court system, is a great honor, reserved for those in the legal profession whose prior careers have been distinguished. The scrutiny of such nominations by private bar associations serves both to eliminate those of questionable character or skill, and also to insure the independence of the judiciary from undue influence by the executive and legislative branches of government in the appointments process.

The vast majority of decisions made by U.S. judges on other than minor matters (i.e. traffic offenses) are available in written form. As a Common Law jurisdiction, these judicial rulings become part of the “judge made law” that evolves and grows over time, as the constitution, laws, regulations and earlier judicial decisions are interpreted and applied to new facts. These written decisions become legally binding on other subsequent cases as well and so are of great interest where their impact is likely to be significant. As a result they are often the subject of considerable discussion and review by practicing lawyers, law professors and the media. The public scrutiny judicial decisions receive in this way is yet another manner in which the independence and fairness of judicial decisions are insured.

Finally, in almost all non-trivial cases, a litigant has the right to request that a jury of citizens review and decide upon the facts of the case. While a judge will be responsible for applying the law to the facts that a jury thus finds, the ability of citizens to participate in individual cases is another way in which private parties are able to insure the fairness and appropriate functioning of the judicial system.