28. The Judicial Process

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THE judicial process consists of the practices that are followed by a given court system in hearing and judging the cases before it. Details of the judicial process vary widely from one country to another. The countries of Western legal type fall into three main classes with regard to the judicial process they maintain: (1) the United States, Great Britain, and other nations such as Canada and Australia that adhere to Anglo-American legal procedures and ideas; (2) France, the Lowlands, Italy, Germany under the Bonn government, Latin-American states such as Uruguay that are not dictatorial, and Japan—all governments that have adopted some form of the Napoleonic Code; and (3) the Soviet Union and the countries in its orbit. Within each class of countries there are important differences; and between any two classes there are numerous similarities. For instance, the French trial process contains features that are familiar to an American attorney. Also, for example, the Soviet Union has a federal court structure comprising supreme courts of the republics, that resembles the American dual court system more than it does the French or English.

It is probably true, however, that the *theory* of Anglo-American justice is extremely generous to the defendant and to private property, that the Franco-Roman theory is less so, and that the Soviet theory is least so. To put it in other terms, from the first to the third class one finds diminishing amounts of sensitivity, especially in criminal trials, to the protection of the defendant from the caprice of the state. Often the difference is purely philosophical, for in the states depending on the Napoleonic Code (itself derived largely from Roman Law principles) more orderly court processes exist than are to be found in America; these may in the end give greater protection in law both to the defendant and to those whom he has been alleged to harm. On the other hand, it cannot be denied that orderly and fair judicial procedures are not available in many political cases in the Soviet Union. Perhaps not even the Nazi ruling group has surpassed that of Soviet Russia in utilizing the judicial process to dispose of leaders, such as Minister of the Interior Lavrenty Beria, who have fallen from grace.

A rule of thumb is that the judicial process mirrors the extent to which a government permits general freedom to individuals. A despotic government usually has a prejudiced court system. A government that upholds the freedom of speech is apt to provide numerous assurances against judicial whim in the courtroom. In turn, the protection of a person inside the courtroom assists him in exercising freedom outside the courtroom. For example, the institution of *habeas corpus* makes it difficult for the police to hold an individual without a specific charge, and thus is one more defense for freedom of speech.

The judicial process includes three principal steps. (1) A case must be brought to court. Courts do not seek business; they must be persuaded that there is a legal dispute that merits a court hearing. (2) The case must be heard in court; facts must be presented, law applied, and a decision reached. (3) The losing side must be permitted to appeal the decision to a higher court. American courts deal with three types of law: criminal, civil, and equity. Each type of law possesses its own judicial process; yet the process for each type includes the above three steps.

The processes for civil and for equity law are relatively simple. Since cases under each of these types of law usually involve private disputants who are theoretically equal before the law, the judicial process is chiefly concerned with guaranteeing that equality. The process for criminal law has far more ramifications, for in a criminal case one party is the government, and the court in which the accused is being tried is a gear in the machinery of that government. Many phases of the criminal judicial process were devised as protections in an era in which governments used courts to dispose of political opponents, as English kings of the sixteenth and seven-

The Supreme Court, 1955. Left to right, seated: Associate Justices Felix Frankfurter, Hugo L. Black; Chief Justice Earl Warren, Stanley F. Reed, and William O. Douglas. Back row: Tom C. Clark, Sherman Minton, Harold H. Burton, and John Marshall Harlan.

teenth century were wont to do, a fact well known to the authors of the Constitution. Even today, when the number of crimes against the state is very small by comparison with the number of those against the person and against property, these safeguards remain in the criminal judicial process.

CRIMINAL PROCEDURE

Criminal procedure is hedged about with many barriers for the protection of the accused. In practice these barriers have been much more difficult to surmount in the federal than in the State courts, for, acting under their reserved police power, the States enact most laws regarding crimes such as murder and robbery. However, Congress has found authority to enact statutes defining federal crimes and establishing penalties in two fields: (1) offenses against federal property and services, as counterfeiting the money of the United States or failing to pay income taxes; and (2) offenses that are interstate in nature, as the transportation of stolen property across State lines. Federal criminal procedure, then, applies to trials of persons accused of federal offenses.

Preliminary guarantees

Ban on Ex Post Facto *Legislation:* Any person accused of a crime is assured that the act with which he is charged constituted a crime when he committed it, and that no law has been passed after he committed the act making it easier to convict him or increasing the penalties that he might suffer. Legislation that transforms a previously innocent act into a crime to the disadvantage of the accused, which is termed *ex post facto* (Latin, "from what is done afterward"), is prohibited by the Constitution (Art. I, sec. 9, cl. 3). The ban on *ex post facto* legislation applies only to criminal law, and only to laws that would work to the disadvantage of the accused. Civil law, and laws working to the advantage of the accused, do not fall under this ban. An example of an *ex post facto* law that the Supreme Court held to be unconstitutional was a Missouri statute of the 1860's. This law required public officials, clergymen, teachers, and others to swear an oath, in order to practice their calling. The oath stated that they had *not* committed in times past a large number of acts, some of which were not previously crimes and others of which had been. The Court, in striking down the law and oath, declared that many people might now be penalized (through losing their profession) for acts that were legal at the time they were performed. The Court added that even when certain of the acts had been *illegal* before, the individuals concerned were now being given further penalties that applied to their past actions.

Guarantee of a Court Trial: Any person charged with a crime is guaranteed a court trial for his offense. This provision was not written idly; history is full of trials by torture, duels, mobs, tyrants, and police. The Fifth Amendment, however, plainly demands a court trial in declaring that no person may be deprived of life, liberty, or property, without due process of law. Conceivably, without this Amendment, some agency apart from the judiciary might pass sentence on the accused man; he might, for example, be sent to prison for an indefinite term by the arresting officials, quite a common happening in Europe three centuries ago in the epoch of the absolute monarchies.

Ban on Bills of Attainder: Another once-common device for procuring convictions without court trials was the *bill of attainder,* which was simply an act by a legislature stating that an individual was guilty of a certain crime. The name of this action stems from the practice of extending guilt to the individual's descendants, so that their blood was "attainted." The Constitution (Art. I, sec. 9, cl. 3) prohibits Congress from enacting bills of attainder, thus guarding against one method for securing convictions that was peculiar to certain eras.

In 1943, in order to remove from office three government employees who had been accused of affiliation with the communist movement, Congress in a bill appropriating money for government employees' salaries provided that none of this money was to be used to pay the salaries of any of the three employees unless they were reappointed by the President and reconfirmed by the Senate. The assumption was that the Senate would not confirm their appointment in light of the charges brought against them. After working for a short period without receiving their salaries, the employees brought suit for the sums due them; and ultimately the Supreme Court upheld their plea, ruling that the congressional act was a bill of attainder.

Pre-trial guarantees

After it is known, or even suspected, that a federal law has been violated, two acts must be carried out before a trial may begin. One or more persons must be arrested, and he or they must be formally charged with the crime, or indicted by a grand jury. These steps are essential for demonstrating to a court of proper jurisdiction that it should hold a trial. The arrest may precede or follow the grand jury charge, depending strictly upon the circumstances of the crime; hence the order followed in the subsequent paragraphs is purely arbitrary.

Prohibition on Arbitrary Arrest: A police officer must have solid ground for arresting a suspect. Of course, an officer finding any person in the act of committing a crime may seize him forthwith. However, an officer may not take an individual from his home without first obtaining from a court a warrant for arrest that specifically names the suspect (Fourth Amendment). Yet the courts have ruled that a person in a public place such as a hotel or restaurant does not enjoy the protection he has under his own roof, since he may leave a public place never to return.

Prohibition on Arbitrary Search: Usually it is necessary to provide material evidence of guilt to secure court conviction of a suspect. According to the Fourth Amendment, a police officer may not search any place for such evidence without procuring a warrant describing the place to be searched and the object or objects being sought. This guarantee is designed to buttress the common-law principle that "a man's home is his castle." The fact is that in recent times and with the development of certain mechanical devices, court decisions have in some instances relaxed this prohibition. For example, an officer may search an automobile, or any other vehicle, without a warrant; otherwise, while the warrant was being procured the vehicle with its incriminating evidence might disappear. Courts are also tending to legalize searches resulting in the discovery of items illegally in the possession of an individual, such as forged stamps, even though the search has not been authorized by a warrant.

One modern technique for securing evidence is a tap on a suspect's telephone line, so that police officers may listen to and record private conversations. As matters stood in 1956, federal courts refused to admit evidence gained through wire-tapping; however, it was then notorious that officers commonly employed such evidence as a guide to further evidence that would be admissible in court. Considerable pressure has been exerted upon Congress to enact legislation authorizing the use of wire-taps for the detection of communist activities. It is obvious that the telephone, by supplanting letters as a means of correspondence, has imposed a considerable handicap upon police officials. A letter is tangible evidence, but a private telephone call, unless recorded, has disappeared forever.

Assurance of the Writ of Habeas Corpus: Police officers must be able to show reasonable cause for arresting and detaining any person; that is, they may not summarily arrest an individual and hold him indefinitely without being able to show grounds for suspicion. Now, in the case of any person who has been formally charged with a crime through a grand jury indictment, that indictment suffices as a basis for detention until trial. However, when a person who has not been so charged is arrested and, according to his own reasoning, is unjustly held, he may (with certain exceptions) procure from a court, through his attorney, a writ of *habeas corpus* (Latin, "that you have the body" in an imperative sense). This writ is an order from a court to the arresting officers that they bring the person arrested before the court to show that there are grounds for suspicion. If the police can show no such grounds, they must release the individual concerned.

The writ of *habeas corpus* is a traditional and jealously guarded part of the judicial process in criminal trials. Even in 1787 it had become customary procedure to such a degree that the Constitution, rather than authorizing its issuance, provides instead that the privilege "shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it [suspension]" (Art. I, sec. 9, cl. 2). Admittedly, then, in time of war or revolution, when police officers have arrested persons who might overthrow the government, the privilege may be denied those persons. Presumably, too, any section of the United States that is menaced by war or revolution may be placed under martial law, and the ordinary judicial process does not prevail under military rule.

However, it is nowhere specified *who* shall be empowered to suspend this privilege. During the Civil War, President Lincoln on his own authority suspended the writ, but a federal circuit court ruled that this suspension was illegal. Subsequently Congress enacted legislation permitting Lincoln to suspend the writ; this legislation after the war was pronounced constitutional, with respect to actual theaters of military operations, or areas under martial law where the regular courts are not in session. Outside these theaters, however, the Court held that the writ may not be suspended. The writ was also temporarily suspended in the Hawaiian Islands during World War II, but following the war the Supreme Court ruled that the suspension had been illegal. Evidently, then, the writ may be suspended only in an area of warfare and only by act of Congress.

Guarantee of a Grand Jury Indictment: Every person, apart from members of the armed forces, who is charged with a federal crime that may result in a long prison term or a death sentence upon conviction, must be indicted by a grand jury before being brought to trial, as required by the Fifth Amendment. The grand jury, which is an old English institution, was first designed to prevent police officials or executives from bringing persons into court for purely arbitrary causes. A federal grand jury today consists of from sixteen to twenty-three persons selected from the tax rolls or registration lists of a federal court district. The grand jury is the instrument through which the federal district attorney notifies the court that a crime has been perpetrated and that some individual is suspected as the perpetrator. To achieve this end the attorney submits to the grand jury the evidence that has been gathered by the police and by whatever detective forces he may have attached to his own office. The accused himself rarely appears at the grand jury hearing; he may do so only with the permission of the district attorney. The grand jury examines the evidence; and if it then decides that there is such an aroma of suspicion about some individual or individuals that a trial should be held, and that justice would be served by a conviction, it votes a true bill or indictment, which is a formal charge. The indictment must state the exact nature of the crime, for an individual may not be tried for any offense not contained in the grand jury charge.

A grand jury has powers whose enormous force is often not appreciated by the jury members themselves. It need not limit itself to the crime presented by the prosecuting attorney, and can strike out independently to make broad investigations. The grand jury has the authority to issue subpenas to compel the attendance of witnesses and the producing of testimony. Because of this authority a grand jury may initiate a study of allegedly corrupt public officials and of law enforcement programs. Hence it may transform itself from the prosecuting attorney's handmaiden into his nemesis. The relationships between the district attorney and the grand jury are thus delicately balanced. Political considerations sometimes cause trouble too, for the office of district attorney at any level lends a politically ambitious lawyer a stage and a usually sympathetic audience among the public.

Guarantee of Reasonable Bail: After the accused has been indicted, he is normally brought before a court for "arraignment": that is, he is asked by the judge whether he will plead guilty or not guilty to the charge. If he pleads guilty, the case is usually concluded on the spot; the judge passes sentence and the individual is remanded to jail to await transportation to a more permanent prison. If, on the other hand, the accused pleads not guilty, the court is obliged in most cases to fix a reasonable bail, or bond, that shall not be "excessive" (Eighth Amendment). That is, the amount must not be beyond the ability of the person to supply it. Bail consists of a deposit of money or some other token of wealth as a guarantee that the accused will appear at court for his trial. If he fails to appear, his bail is forfeited; yet he may be rearrested and still tried for the offense charged. The probable aim of allowing release on bail is to grant the accused the opportunity to seek evidence and witnesses in his own defense, on the principle that he is innocent until proved guilty. However, when the crime is murder or an especially outrageous crime, or when the suspect has already forfeited bail, or if it appears for some reason that he may forfeit bail, the judge may order that he be held in jail until his trial. The amount of bail fixed usually depends upon the nature of the crime. The judge himself sets the amount, usually a compromise figure between those asked by the district attorney and by the lawyer for the accused.

Trial guarantees

Assurance of a Speedy and Public Trial: A person accused of a federal offense is guaranteed a "speedy and public trial" (Sixth Amendment). No person may be tried behind closed doors, save in the rare cases in which a judge may decide that the nature of the evidence is such that it may prove harmful to public morals. In fact, a judge is very hestitant to bar the public since by that act he will also bar the press, thereby possibly winning himself hostile newspaper treatment; however, this consideration is less important for appointed federal judges than it is for elected State judges. The guarantee of a public trial constitutes one more attempt to block partisan justice.

Despite the constitutional provision for a "speedy trial," American justice is probably the slowest in the world. In fact, it is almost always the accused, for whose protection this guarantee was designed, who slows proceedings. There are many apparent advantages that the accused may win through delay: for example, public pressure on a jury to return a guilty verdict will diminish in time; witnesses may die, move away, or forget evidence; superior evidence of innocence may be unearthed. By the same token, it is with the aim of counteracting these potential advantages that the prosecution, once it has its evidence and witnesses, may demand a speedy trial. A remarkable case evoking the Sixth Amendment recently was that of ex-Sergeant John D. Provoo who was indicted in 1949 for treason committed in World War II, and who was sentenced to life imprisonment in 1953. The Supreme Court in 1955 upheld a district court ruling that he had been denied a speedy trial and confirmed the dismissal of charges against him.

Assurance of a Trial by Jury: Every person accused of a federal crime is assured of a trial by jury (Sixth Amendment). The trial jury, which is also termed a petty jury (French *petit*, "small") to distinguish it from the grand jury, consists of twelve persons residing in the district in which the crime was committed. The jury must be impartial; when its members are being chosen, both the district attorney and the counsel for the accused may dismiss a specified number of individuals for no particular cause and an almost indefinite number for possible bias, such as exceptional knowledge of the crime or previous conviction on a charge similar to that faced by the accused. The average petty jury ranks considerably below the average grand jury with respect to economic, social, and educational status. (Some say this situation prevails because lawyers find college graduates difficult to treat with as jurors.)

The function of the jury is to hear the evidence submitted by the prosecution and the defense, and upon the basis of these arguments to decide whether the accused is guilty or innocent. The decision of the jury must be unanimous; if the jury cannot reach a decision, or is "hung," it is discharged, and a new trial must be held to obtain a conviction. (A famous instance of a hung jury in recent years in a federal case was that in the first trial of Alger Hiss for perjury. A subsequent jury unanimously agreed to his guilt.) The jury is supposed to deal only in matters of *fact;* the court is held responsible for all matters of *law,* and must instruct the jury concerning disputed questions of law that may be related to the process of arriving at a decision.

Right of the Accused to Defend Himself: Any court trial essentially is a contest between two opposing parties, each striving to show itself in the right. To vie in this contest, each party must have witnesses and material evidence as troops for the fray, and an attorney to marshal these troops. In a criminal proceeding the government is certain to have witnesses, evidence, and an attorney, for without these elements it could not have procured an indictment from the grand jury. So that the contest may be waged on equitable terms, the accused must be allowed to produce the same elements for his defense. Hence, in a criminal trial the defendant has the right to have a lawyer; if he cannot afford to pay a lawyer's fee, the court must provide counsel for him. The defendant also must know the nature of the charges against him, and hear the testimony of adverse witnesses, so that with his attorney he can prepare a rebuttal. He may compel witnesses to attend court through the writ of subpoena, for ignoring which an offender may receive a summary conviction on the ground of contempt of court. With these rights, which are guaranteed by the Sixth Amendment, the defendant may have his side presented after the prosecution has made its plea for a conviction.

Ban on Self-Incrimination: The burden of producing evidence that proves guilt is entirely the responsibility of the prosecution. Neither before nor during the trial may the state force a defendant to testify so as to incriminate himself (Fifth Amendment). The original purpose of this guarantee was to bar confessions that had been extorted from the accused before the trial. Today, whereas it must be admitted that torture is sometimes employed upon suspects by State authorities, federal officers can rarely be charged with attempting to obtain pretrial confessions by this means.

In federal courts, then, the bar on self-incrimination operates chiefly with respect to trial proceedings. In late years this right has been invoked more frequently not in federal courts, but in hearings before congressional committees investigating charges of communism. A defendant may waive this protection so as to testify in his own defense; however, he must expose himself to the rigors of cross-examination by the prosecuting attorney, an interrogation in which he may lose more than he gained by his defense testimony. By a 1954 law, the Attorney General may apply to a federal court for permission to grant immunity from prosecution to a witness in a case involving the national security. If permission is granted, the witness may not refuse to answer on the grounds of self-incrimination, and may be punished if he does refuse.

Ban on Cruel and Unusual Punishments: The essence of the trial procedure thus comprises a series of witnesses, first for the prosecution and then for the defense. Each side has the right to cross-examine the witnesses of the other side, in an effort to shake their certainty about the facts they have presented or to demonstrate their personal unreliability to the jury. After all the evidence has been submitted, each attorney summarizes his case. The judge then instructs the jury respecting points of law related to the facts of the case, and the jury retires to determine the question of guilt or innocence. When the jury has reached a decision, it returns to the courtroom where the foreman of the jury states the decision.

If the jury finds the defendant guilty as charged, the judge sentences him according to the penalty for the offense that is established by law. Although the law usually grants the judge some discretion in setting the penalty, the judge may not fix any "cruel or unusual punishment" (Eighth Amendment). This provision again is chiefly a relic of the eighteenth century, when in England there were many comparatively minor crimes for which a death sentence was mandatory. Today this prohibition is rarely invoked. In one recent case involving a death sentence the electric chair failed to operate; counsel for the condemned man argued that to subject him again to the electric chair would constitute a cruel and unusual punishment. However, the Supreme Court rejected this plea.

Prohibition on Double Jeopardy: If the jury decides that the accused is innocent, the case has been concluded. The government may not try a defendant twice on the same charge, or, in the words of the Constitution, put him "twice . . . in jeopardy of life or limb" (Fifth Amendment). This ban is designed to prevent the government from trying a defendant several times on the same charge until it finally convicts him. The ban operates regardless of what new evidence may appear, after the jury has arrived at a verdict of innocence. However, there are certain loopholes in this prohibition. One is that in the commission of a single crime an individual may perform several indictable acts. A man who illegally brings five immigrants into the United States has committed five federal crimes, for each of which he may be tried and sentenced.

Another loophole exists in the federal form of government, wherein there are two distinct legal and judicial systems. A man who robs a national bank has violated both a federal law and a State law; he has committed two crimes. Indeed, in this type of case, if he happens to be tried and sentenced first in a federal court, he is apt to find authorities of the State government waiting for him when he steps out of a federal prison after completing his sentence, to return him for trial by the State. Also, the ban on double jeopardy does not apply when there is a hung jury or when the judge proclaims a mistrial, as he might if he were to discover, for instance, that a member of the jury was a cousin of the defendant. Finally, the defendant waives this protection if, after being found guilty, he appeals his case to a higher court.

Guarantee of the Due Process of Law: The entire judicial procedure must adhere to a broad group of principles known as the "due process of law." Due process is nowhere defined; the federal Supreme Court once asserted of due process that "the full meaning of the term should be gradually ascertained by the process of inclusion and exclusion in the course of decisions as they arise." Hence, due process is what the Supreme Court has said and now says it is, based on rulings which state that some practices are due process and that others are not. Due process is commonly identified with the "law of the land" mentioned in the Magna Carta, and with the rule of law, or constitutionalism. It is enforced upon federal courts by the Fifth Amendment, which forbids that any person "be deprived of life, liberty or property, without due process of law;" it is enforced upon State courts by a similar phrase in the Fourteenth Amendment. It refers to both criminal and to civil cases, to the *procedure* in these cases and to the *substance* of the law itself. At this juncture we are concerned with due process only as it is related to federal criminal *procedure.*

In criminal proceedings, due process can be said in the main to reinforce the constitutional guarantees regarding judicial procedure by peering into the spirit in which those guarantees have been executed. There are, however, some constitutional guarantees that are not due process. For example, although the Constitution assures a grand jury indictment for all persons charged with federal crimes, the Supreme Court has ruled that a State does not deny due process by reaching an indictment through other means.

Due process does insist that certain among the constitutional guarantees be observed not merely in form but also in spirit. As an illustration, the Constitution provides that a defendant must be allowed counsel for his defense. However, even if the accused has been provided with a lawyer, he has been denied due process if the lawyer has not had the time to prepare himself adequately for the trial. The Constitution requires that a defendant have a speedy and public trial and that his guilt be pronounced by a jury of his peers. However, if his whole trial has been completed in a very short time, if the public is extremely hostile, if it is known that any member of the jury voting for acquittal will incur great public rancor, the defendant again has been denied due process. An important requirement of due process that extends beyond sheerly procedural matters in criminal cases is that the law which the defendant is accused of violating is specific and comprehensible; a law that does not make clear precisely what act is a crime is a denial of due process. It is in its demand that criminal laws and proceedings be fair and predictable that due process can be identified with the rule of law.

Appeal proceedings

An individual convicted of violating a federal statute may not appeal his conviction simply as a matter of right. However, a fairly small percentage of the decisions in the federal district courts are brought into the courts of appeal; and a few bearing upon constitutional issues reach the Supreme Court. Since apart from the President (see below) the Supreme Court is the last resort of those convicted of federal offenses, and since it stands at the apex of the federal court system, its proceedings as an appellate court merit description. However, it should be recognized that a federal court of appeals conducts its hearings in much the same fashion, with variations in detail.

Sessions of the Supreme Court: The Supreme Court meets in regular annual sessions that open about the first of October and close in June of the following year. During these sessions, the Court sits five days a week, from Monday through Friday. The Court convenes at noon on these days and recesses about 4:30 P.M., with the half hour from 2:00 until 2:30 taken for lunch. A part of each Monday on which the Court sits is devoted to reading the decisions that have been reached during the previous week. The members of the Court generally spend Saturday in conference. The Court also ordinarily recesses for approximately two weeks out of each month during the session for conferences and the writing of decisions.

Court Hearings: During each Court hearing all nine members of the Supreme Court sit on individual chairs behind a single long desk, or "bench." The Chief Justice sits in the center of the nine; the senior associate justice, or associate justice with the longest term of service, sits at his right hand; the second senior associate at his left hand; and so on, in such a manner that the associate justice with the least seniority sits at the extreme left end of the bench. By contrast even with trial proceedings in a federal district court, appellate procedure in the Supreme Court is decorous. There is no jury in appellate hearings; indeed, there is no record that any jury has ever heard a case before the federal Supreme Court. The purpose of an appellate hearing is to resolve disputes that have arisen over questions of law; consequently only lawyers and the justices participate, since the facts have already been disclosed at the original trial. Therefore, the aim of the lawyer for the appellant (the person who claims that the original decision should be overturned) is simply to present his argument respecting the alleged faults of the trial; and the aim of the lawyer for the appellee or respondent (who is more or less analogous to a defendant in a trial hearing) is to rebut this argument and to support the procedure and the decision in the trial court.

Because of the amount of business before the Supreme Court, lawyers are rarely allowed more than an hour to present their case; and frequently this hour is punctuated by numerous questions from the members of the

Court respecting the points at issue. Hence lawyers orally can do little more than summarize their argument. However, each lawyer must present a brief of his argument in print, citing in full his authorities. Moreover, the trial court is obliged to send up the entire record of the original hearing, so that the Supreme Court justices may have access to the facts of the case. The justices, then, reach their decisions on the basis of the lawyers' oral presentations, the briefs, and the records from the trial courts.

Precedents: A great part of the argument of the lawyers is concerned with precedents, for precedents are the supreme guides to the Court's thinking. A precedent is the decision of the Court in the last case that most closely resembles the case at issue. Since life has infinite variety, a former case that is exactly the same as the one in hand is almost unheard of. Hence the lawyers on both sides compete with each other to find in the history of this Court, or a related court, precedents that will so closely resemble this case as to "rule" it. The judges will hardly ever defy a close precedent. On rare occasions a court will reverse itself and reject its own precedent; such an occasion always excites widespread comment and is looked upon as most dangerous to the rule of law. In many another case, however, the Court, without confessing to previous error, will find some distinctions between a precedent case and the one at hand, if the justices are absolutely bent on altering the law.

Decisions of the Supreme Court: The formulation of decisions commences in the Saturday conferences. There the justices advance their opinions regarding the cases that have been heard during the past week, the Chief Justice speaking first and the associate justices following in the order of their seniority. After each justice has aired his position on a case, all vote in reverse order of seniority, the Chief Justice voting last. Six justices must be present to make a quorum. One might expect that since there is an odd number of justices, one should always find one side having a majority. However, one justice may be absent; there may be an unfilled vacancy; or one or more justices may have disqualified themselves for one reason or another, such as having been Attorney General when the case was first prosecuted, and therefore being liable to prejudice. If under these circumstances the justices divide evenly in their vote, the case must be reargued; otherwise the decision of the lower court will stand.

If, as is much more common, one side of the dispute has a clear majority, the Chief Justice, if he is of the majority, will assign the writing of the majority opinion to one of the justices. He normally chooses the justice who has shown the greatest skill in presenting his argument at the conference, and whose field of specialization most nearly approaches the subject of the particular case. If the Chief Justice is not in the majority, the senior associate justice among the majority assigns the writing of the opinion. The senior associate justice among the minority of the Court assigns the writing of a minority or dissenting opinion.

It must be remembered that in the field of law there may be various ways of reaching the same decision, differing perhaps in the choice of legal precedents used to support an argument. In these instances, additional opinions may be written, which will be known as either concurring majority or concurring minority opinions. It must not be thought that dissenting opinions are wrong, or that in some way they lack judicial merit. Nor must it be thought that they are voices lost in the wilderness; as will be shown in the next chapter, with the evolution of political, economic, and social ideas, the dissenting opinion of one era may become the majority opinion of a later day.

Judicial Role of the President: In cases involving federal crimes, the President of the United States is the court of last appeal. It must not be thought that the President can or does intervene only after all other judicial resources have been exhausted. Rather, the President may intercede at any point in the judicial process, before, during, or after a trial. However, like most chief executives through history, the President has judicial authority superior to that of any court. There are only two constitutional limitations upon the judicial functioning of the President: (1) he has power only with respect to violations of federal law; and (2) he has no control over convictions following impeachment. Of course, there are many cases in which he is constitutionally empowered to act but where he is restrained by political obligations.

The President has four judicial weapons at his command: pardon, commutation, reprieve, and amnesty (Art. II, sec. 2, cl. 1). The pardon is an absolute weapon that restores the individual to the status he previously occupied in society, as if the event had never occurred; the individual regains all civil rights and privileges such as those of voting and of holding public office. Commutation is a relative instrument, through which the President may reduce a sentence from, for example, capital punishment to life imprisonment. Reprieve is a delaying implement, whereby the President may postpone the execution of a sentence so that the counsel for the convicted man may have more time to secure evidence for an appeal. Amnesty is a form of collective pardon customarily used with regard to political crimes, whereby the President may order the release of a group of persons convicted of rebellion.

The President exercises his judicial role only after consultations with a considerable number of people, for he has too many other burdens to be able to familiarize himself with the details of a criminal trial. Petitions for presidential action go to the Office of the Pardon Attorney in the Department of Justice, who prepares and analyzes the relevant data. The President also confers with the district attorney who prosecuted the trial and the district judge who heard it, as well as with the Attorney General. Ultimately, the President almost always follows the recommendations he is given by these officials.

CIVIL PROCEDURE

A case at civil law bears a strong resemblance to one at criminal law, in that two parties are contending before a theoretically neutral arbiter, each seeking to depict itself as in the right. The great distinction between the two lies in the fact that in civil cases the defendant does not stand in peril of life or limb; since civil cases deal chiefly with money or property, one or the other, or both, might be the defendant's principal loss. Too, whereas one party to criminal cases is always the government, both parties to civil cases are usually private persons or organizations. However, the federal government may be the plaintiff in a civil case, as when it brings suit for recovery against a person charged with income tax evasion; yet the defendant still foresees only a monetary loss. As a result, the constitutional and legal controls over civil proceedings are much less numerous and complicated than those over criminal proceedings.

Pre-trial proceedings

A civil case opens when one individual, who is termed the plaintiff, believes that he has suffered damages from an unlawful action by a second individual, to be known as the defendant. Such damages generally result from a *tort,* such as slander, or a breach of contract. This type of civil case reaches a federal court because of the diversity of citizenship among the parties, who come from different States or countries, and the sum of money involved. The plaintiff initiates action by filing a complaint with a court, stating the grounds on which he seeks recovery or compensation for his damages. The court informs the defendant of the action that has been taken against him; the defendant may now file with the court an answer, in which he endeavors to show his side in the dispute. There may ensue a series of amendments to the complaint and to the answer, until the court at last assumes jurisdiction over the dispute and orders a trial.

Trial proceedings

Trial proceedings at civil law have many of the elements of criminal trial proceedings. However, only one of these elements is guaranteed by the Constitution: the defendant is assured of the right to a jury trial in any case in which the stake is larger than twenty dollars, as provided by the Seventh Amendment. Actually, this figure is rather meaningless today; for any case arising out of the diversity of citizenship cannot come into the federal courts unless the controversy involves a sum greater than three thousand dollars, and cases of diversity of citizenship make up about half the work of the federal courts. Indeed, the jury is being discarded in civil suits just as it is in many criminal cases.

In a case at civil law, the plaintiff first presents his side, through witnesses and evidence; then the defendant states his side. Attorneys for each side may cross-examine witnesses for the other side. After all the evidence has been submitted each attorney makes a final plea to the jury, or, when there is no jury, to the judge. In the first instance, the judge then informs the jury concerning the law in the dispute. The jury withdraws to reach judgment favoring either the plaintiff or the defendant. If it agrees that the plaintiff is entitled to receive damages, it sets the figure. Where there is no jury, the judge, after studying the case, returns the judgment and the amount of damages, if any. Once a judgment in favor of the plaintiff has been pronounced, it is now the task of the plaintiff to discover what assets the defendant has that can make up the sum awarded to him.

Appeal proceedings

Appeal proceedings in civil law are also like those in criminal cases. Supposedly the trial court has discovered all the facts, so that only legal questions may supply a basis for appeal. The federal courts of appeal are the last resort for most civil cases; however, those revolving about a constitutional issue may come to the Supreme Court. In any case, hearings in an appeal follow approximately the same procedure, whether at civil or at criminal law. One outstanding difference, however, is that the President has no part in civil suits analogous to his role in criminal cases.

EQUITY PROCEDURE

Equity procedure today is considerably different from civil procedure, although the difference is not so great as it was some centuries ago. The most notable distinction is that in equity there is no jury; the judge renders the decision, which in equity is termed a *decree*. This difference is largely the result of the aim of a case at equity, that is, the prevention of damages before they occur; hence equity procedure is a great deal more summary than civil procedure. A case at equity is initiated when an individual who, as plaintiff, seeks to avoid suffering damages files a *bill* with a court of proper jurisdiction petitioning for aid and stating the circumstances of the case. The defendant must now file an *answer* under oath. At an equity hearing, which is held before a judge, the disputants are interrogated concerning the case. However, the written statements form a major portion of the testimony. In an equity proceeding the defendant enjoys a considerable advantage, in that his statements are presumed to be true unless there is strong evidence to the contrary.

Having heard and considered the evidence, the judge, if he decides in favor of the plaintiff, hands down the decree, which is an order of the court. A typical decree is an *injunction*, which is a command to the defendant not to perform a certain act. For example, a court may issue an injunction to the owners of a railroad that is under construction, ordering them not to lay their right of way across a certain field because the owner of the field, appearing as plaintiff, has shown that he will suffer damages if the railroad should cross it. Judges have extraordinary power to force obedience to an injunction. If the defendant can be shown to have disobeyed this order, the judge may immediately find him guilty of contempt of court, and without a jury trial may impose a fine or jail sentence upon him.

QUESTIONS AND PROBLEMS

1. Define briefly the following terms: *ex post facto* legislation; bill of attainder; *habeas corpus;* injunction; grand jury; petty jury.
2. Define briefly the following terms: bail; appeal; double jeopardy; plaintiff; a bill in equity; warrant.

3. Distinguish a "question of fact" from a "question of law" in the federal judicial process. What is the importance of the distinction in appellate trials?

4. What protections are afforded a person against *arbitrary* arrest, search, and detention?

5. When and by whom may the writ of *habeas corpus* be suspended?

6. Distinguish between civil and criminal procedure in the federal court system.

7. Does the doctrine of "due process of law" permit the courts to look behind the correct surface of police practices into the actual conduct of the police? Can you cite examples?

8. What are some arguments that might be made for and against the practice of publicizing dissenting opinions in Supreme Court cases?