CHAPTER

2

Introduction to Law

Laws are the very bulwarks of liberty; they define every man's rights, and defend the individual liberties of all men.

J. G. Holland

This chapter introduces the health care professional to the development of U.S. law, the functioning of the legal system, and the roles of the different branches of government in creating, administering, and enforcing the law. It is important to understand the foundation of the U.S. legal system before one can appreciate or comprehend the specific laws and principles relating to health care.

U.S. Supreme Court Justice Oliver Wendell Holmes said that the law "is a magic mirror, wherein we see reflected not only our own lives but also the lives of those who went before us."[1] Chief Justice Marshall in delivering his opinion to the Court in *Marbury v. Madison* said "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. [The] government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested right."[2]

Most define the law as a system of principles and processes by which people in a society deal with disputes and problems, seeking to solve or settle them without resorting to force. Simply stated, laws are rules of conduct enforced by government, which imposes penalties when prescribed laws are violated.

Laws govern the relationships between private individuals and organizations and between both of these parties and government. *Public law* deals with relationships between individuals and government; *private law* deals with relationships among individuals.

The thrust of most public law is to attain what society deems to be valid public goals. One important segment of public law, for example, is criminal law, which prohibits conduct deemed injurious to public order and provides for punishment of those proven to have engaged in such conduct.

In contrast, private law is concerned with the recognition and enforcement of the rights and duties of private individuals. Tort and contract actions are two basic types of private law. In a *tort action,* one party asserts that the wrongful conduct of another has caused harm, and the injured party seeks compensation for the harm suffered. A *contract action* usually involves a claim by one party that another party has breached an agreement by failing to fulfill an obligation. Either remuneration or specific performance of the obligation may be sought as a remedy. Without an organized, clear system of laws that regulate society, anarchy would clearly arise.

SOURCES OF LAW

The sources of law are:

1. *common law,* which is derived from judicial decisions
2. *statutory law,* which emanates from federal and state legislatures
3. *administrative law,* prescribed by administrative agencies

In those instances in which written laws are silent, vague, or contradictory to other laws, the judicial system is called on to resolve those disputes. The following sections discuss the sources of law that formed the foundation of the U.S. legal system.

Common Law

Common law refers to the body of principles that evolved and expanded from judicial decisions that arise during the trial of court cases. Many of the legal principles and rules applied today by courts in the United States have their origins in English common law.

Because a law could never cover every potential human event that might occur in society, the judicial system is doubly necessary. It not only serves as a mechanism for reviewing legal disputes that arise in the written law, but it is also an effective review mechanism for those issues on which the written law is silent or in instances of a mixture of issues involving both written law and common-law decisions. For example, in the *Cruzan* case, discussed in Chapter 17, the U.S. Supreme Court based its decision on the consideration of existing statutory law and prior judicial decisions.[3]

Common Law in England

> Law reflects to a large degree the civilization of those that live under it. Its progress and development are mirrors not merely of material prosperity but of the method of thought and of the outlook of the age.[4]

The common law of England is much like its language. It is as varied as the nations that peopled its land in different locations and different periods. Some common law is derived from the Britons, the Romans, the Saxons, the Danes, and the Normans.

> To recount what innovations were made by the succession of these different nations, or estimate what proportion of the customs of each go to the composing of our body of common law, would be impossible at this distance of time. As to a great part of this period, we have no monuments of antiquity to guide us in our inquiry; and the lights which gleam upon the other part afford but dim prospect. Our conjectures can only be assisted by the history of the revolutions effected by these several nations.[5]

The Romans governed the island as a province from the time of Claudius (A.D. 43) until A.D. 448. It was a time of peace and cultivation of the arts. Roman laws were administered as laws of the country. When the Romans left Britain to attend to their own domestic safety, the Picts and the Scots clashed with inhabitants of southern England. Unable to oppose the attack, these southern inhabitants appealed to the Saxons for assistance. The Saxons, who came from German lands, drove the northern invaders back inside their own borders.[6] The Saxons contended with Danish raiders from the 8th to the 11th centuries.

The law in England before the Norman Conquest in 1066 was dispensed primarily by tradition and local customs and mostly dealt with violent crimes. The kings during this period were concerned more with enforcing customary law than with amending it. The courts mainly consisted of open-air meetings where no records were maintained. "For the Anglo-Saxons justice was a local matter, administered chiefly in the shire courts, and was largely dependent upon local customs, preserved in the memory of those persons who declared the law in the court."[7] The Saxons operated with the goal of exterminating the Britons and destroying all their monuments and establishments. Subsequently, the native Briton customs and laws fell out of favor. The Britons were forced into the mountains of Wales, dividing the remainder of the dominion into seven independent kingdoms.[8]

These kingdoms were, for a time, independent of one another. A variety of laws grew among the Saxons themselves, as well as among the Danes, who following a treaty in Northumberland, were considered in some measure to be part of the nation. Toward the later part of Saxon times, the kingdom was governed by a variety of laws (Mercian Law, West-Saxon Law, and Danish Law) and local customs. All British and Roman customs that survived the times were buried within one of the three laws, which governed all of England.[9]

Following their conquest in 1066, the Normans had little regard for Anglo-Saxon laws. They considered themselves apart from such laws.

> It is obviously impossible to attempt an adequate picture of Anglo-Saxon life. It was a wild time. Men lived in terror of the vast forests, where it was easy to be lost and succumb to starvation, of their fellow man who would plunder and slay, and above all of the Unknown, whose inscrutable ways seemed constantly to be bringing famine and disaster. The uncertainties of modern life pale into insignificance when regarded from the standpoint of these men. It is natural, therefore, that their law should reflect their reaction against the environment. It was conservative and harsh. Violence, robbery and death formed its background.[10]

The principal change introduced by the Norman Conquest was that the king's court opened for disputes about land-tenure. Land disputes involved the Saxons who held the land before the conquest and the Normans who dispossessed them. Evidence in such disputes was often the result of oral testimony from neighboring landowners. Although no professional judiciary yet existed, trials were held before the county courts by the king's representatives and a cleric often presided.

Soon, a system of national law began to develop based on custom, foreign literature, and the rule of strong kings. The first royal court was established in 1178. This court, enlisting the aid of a jury, heard the complaints of the kingdom's subjects. Because there were few written laws, a body of principles evolved from these court decisions, which became known as common law. Judges used these court decisions to decide subsequent cases. As Parliament's power to legislate grew, the initiative for developing new laws passed from the king to Parliament.

Common Law in the United States

During the colonial period, English common law began to be applied in the colonies. In the vast new country with its abundance of natural resources, English common law could not be adopted exactly; the law was thus adapted to meet the needs of the new land. Compared to England, the New World glistened with land, timber, and minerals, so the law would have to aid the new society in mastering the land.

In an 1829 U.S. Supreme Court decision, Joseph Story wrote, "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright but they brought with them and adopted only that portion which was applicable to their situation."[11]

After the Revolution, each state, with the exception of Louisiana, adopted all or part of the existing English common law and added to it as needed. Louisiana civil law is based to a great extent on the French and Spanish laws and, especially, on the Code of Napoleon. As a result there is no national system of common law in the United States and common law on specific subjects may differ from state to state.

> Case law court decisions did not easily pass from colony to colony. There were no printed reports to make transfer easy, though in the 18th century some manuscript materials did circulate among lawyers. These could hardly have been very influential. No doubt custom and case law slowly seeped from colony to colony. Travelers and word of mouth spread knowledge of living law. It is hard to say how much; thus it is hard to tell to what degree there was a common legal structure.[12]

Judicial review became part of the law in the decade before the federal Constitution was adopted. Courts began to assert their power to rule on the constitutionality of legislative acts and to void unconstitutional statutes.

Today, cases are tried applying common-law principles unless a statute governs. Even though statutory law has affirmed many of the legal rules and principles initially established by the courts, new issues continue to arise, especially in private-law disputes, which require decision making according to common-law principles. Common-law actions are initiated mainly to recover money damages or possession of real or personal property.

When a higher state court has enunciated a common-law principle, the lower courts within the state where the decision was rendered must follow that principle. A decision in a case that sets forth a new legal principle establishes a precedent. Trial courts or those on equal footing are not bound by the decisions of other trial courts. Also, a principle established in one state does not set precedent for another state. Rather, the rulings in one jurisdiction may be used by the courts of other jurisdictions as guides to the legal analysis of a particular legal problem. Decisions found to be reasonable will be followed.

The position of a court or agency, relative to other courts and agencies, determines the place assigned to its decision in the hierarchy of decisional law. The decisions of the U.S. Supreme Court are highest in the hierarchy of decisional law with respect to federal legal questions. Because of the parties or the legal question involved, most legal controversies do not fall within the scope of the Supreme Court's decision-making responsibilities. On questions of purely state concern—such as the interpretation of a state statute that raises no issues under the U.S. Constitution or federal law—the highest court in the state has the final word on proper interpretation. The following are explanations of some of the more important common-law principles:

- *Precedent.* A *precedent* is a judicial decision that may be used as a standard in subsequent similar cases. A precedent is set when a court decision is rendered that serves as a rule for future guidance when deciding similar cases.
- *Res Judicata.* In common law, the term *res judicata*—which means the thing is decided—refers to that which has been previously acted on or decided by the courts. According to *Black's Law Dictionary,* it is a rule where "a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to subsequent action involving the same claim, demand, or cause of action."[13]
- *Stare Decisis.* The common-law principle *stare decisis* (let the decision stand) provides that when a decision is rendered in a lawsuit involving a particular set of facts, another lawsuit involving an identical or substantially similar situation is to be resolved in the same manner as the first lawsuit. The resolution of future lawsuits is arrived at by applying rules and principles of preceding cases. In this manner, courts arrive at comparable rulings. Sometimes slight factual differences may provide a basis for recognizing distinctions between the precedent and

the current case. In some cases, even when such differences are absent, a court may conclude that a particular common-law rule is no longer in accord with the needs of society and may depart from precedent. Principles of law are subject to change, whether they originate in statutory or in common law. Common-law principles may be modified, overturned, abrogated, or created by new court decisions in a continuing process of growth and development to reflect changes in social attitudes, public needs, judicial prejudices, or contemporary political thinking.

Medical Malpractice

The first common-law case in the United States in which a physician was held legally responsible for a negligence-related action occurred as early as 1794. In *Cross v. Guthery,* 2 Root 90, 92 (Conn. 1794), the court heard that when Mrs. Cross complained that there was something wrong with her breast, her husband sent for Dr. Guthery. The doctor examined Mrs. Cross, diagnosed her ailment, and amputated her breast. Shortly after the surgery, she bled to death. Guthery expressed his regrets to her husband and then sent him a bill for 15 pounds. Cross hired a lawyer, who persuaded a jury to dismiss Guthery's bill and awarded Cross 40 pounds as compensation for the loss of his wife's companionship. Since that time, physicians have experienced recurring periods of substantial increases in the number of malpractice cases. The first such increase occurred in the 15 years prior to the Civil War.[14] Increases in malpractice cases and concern about them occurred at the beginning of this century and also in the years before World War II.

By 1941, *The Journal of the American Medical Association* published studies showing that 1,296 malpractices had occurred between 1900 and 1940, with more than 500 between 1930 and 1940. The increases in malpractice cases were attributed to opinions expressed about the current malpractice situation involving high patient expectations, new diagnostic procedures, and erosion of the physician-patient relationship.[15]

The Harvard Medical Malpractice Study, commissioned by the state of New York to determine the rate of medical injury in New York hospitals, revealed that 3.7 percent of patients entering New York hospitals in 1984 were injured by the care provided. A tenth of those who were treated negligently filed malpractice suits.[16] The research group conducting the study suggested that "only one claim makes its way into the tort system for every eight cases of injury caused by medical negligence."[17] The study, which cost $3.1 million and ran 1,200 pages, was funded by the state and a grant from the Robert Wood Johnson Foundation. It involved four years of research and included the review of more than 30,000 medical records.[18]

The number of malpractice suits is staggering. Critics say that the system fails by making too little information known.[19] A report by the Physicians Insurers of America, which represents 50 malpractice insurance companies covering 50 percent of private physicians in the United States, claims that breast cancer accounts for more medical malpractice claims than any other medical condition. Delayed diagnosis is common among both younger and older women. The report focuses on 487 lawsuits in which damages were awarded for delayed diagnosis. The most common reasons for delay were misdiagnosis, failure to follow up, and false negative mammograms. The next most common medical diagnoses involving malpractice suits were infant brain damage, pregnancy, and heart attacks.[20] Nothing much has changed since this study was conducted. Misdiagnosis and failure to follow up remain high on the list of common malpractice claims.

Statutory Law

Statutory law is written law emanating from a legislative body. Although a statute can abolish any rule of common law, it can do so only by express words. The principles and rules of statutory law are set in hierarchical order. The Constitution of the United States adopted at the Constitutional Convention in Philadelphia in 1787 is highest in the hierarchy of enacted law. Article VI of the Constitution declares:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[21]

The clear import of these words is that the U.S. Constitution, federal law, and federal treaties take precedence over the constitutions and laws of specific states and local jurisdictions.

Statutory law may be amended, repealed, or expanded by action of the legislature. States and local jurisdictions can only enact and enforce laws that do not conflict with federal law. Statutory laws may be declared void by a court; for example, a statute may be found unconstitutional because it does not comply with a state or federal constitution, because it is vague or ambiguous, or, in the case of a state law, because it is in conflict with a federal law.

In many cases involving statutory law, the court is called on to interpret how a statute applies to a given set of facts. For example, a statute may state merely that no person may discriminate against another person because of race, creed, color, or sex. A court may then be called on to decide whether certain actions by a person are discriminatory and therefore violate the law.

Administrative Law

Administrative law is the extensive body of public law issued by either state or federal agencies to direct the enacted laws of the federal and state governments. It is the branch of law that controls the administrative operations of government. Congress and state legislative bodies realistically cannot oversee their many laws; therefore, they delegate implementation and administration of the law to an appropriate administrative agency. Health care organizations in particular are inundated with a proliferation of administrative rules and regulations affecting every aspect of their operations.

The *Administrative Procedures Act*[22] describes the different procedures under which federal administrative agencies must operate.[23] The act prescribes the procedural responsibilities and authority of administrative agencies and provides for legal remedies for those wronged by agency actions. The regulatory power exercised by administrative agencies includes power to license, power of rate setting (e.g., Centers for Medicare and Medicaid Services [CMS]), and power over business practices (e.g., National Labor Relations Board [NLRB]).

Rules and Regulations

Administrative agencies have legislative, judicial, and executive functions. They have the authority to formulate rules and regulations considered necessary to carry out the intent of legislative enactments. Regulatory agencies have the ability to legislate, adjudicate, and enforce their own regulations in many cases.

Rules and regulations established by an administrative agency must be administered within the scope of authority delegated to it by Congress. Although an agency must comply with its own regulations, agency regulations must be consistent with the statute under which they are promulgated. An agency's interpretation of a statute cannot supersede the language chosen by Congress. An executive regulation that defines some general statutory term in a too-restrictive or unrealistic manner is invalid. Agency regulations and administrative decisions are subject to judicial review when questions arise as to whether an agency has overstepped its bounds in its interpretation of the law.

> §*702: Right to Review*
>
> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . .[24]

> §*706: Scope of Review*
>
> To the extent necessary . . . the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.[25]

Recourse to an administrative agency for resolution of a dispute is generally required prior to seeking judicial review. The Pennsylvania Commonwealth Court held in *Fair Rest Home v. Commonwealth, Department of Health*[26] that the department of health was required to hold a hearing before it ordered revocation of a nursing home's operating license. The department of health failed in its responsibility when "in a revocation proceeding it [did] not give careful consideration to its statutorily mandated responsibility to hear testimony."[27]

Regulations and decisions of administrative agencies reviewed by the courts may be upheld, modified, overturned, or reversed and remanded for further proceedings. For example, the owner and operator of a licensed residential care facility brought an action challenging regulations governing administration of medicines in residential care facilities, promulgated by the U.S. Department of Health and Human Services (DHHS) through its Office of Long-Term Care (OLTC).[28] The owner challenged two OLTC regulations that required:

> 3. Under no circumstances shall an operator or employee or anyone solicited by an operator or employee be permitted to administer any oral medications, injectable medications, eye drops,

ear drops, or topical ointments (both prescription and nonprescription drugs).

4. In addition, any owner and/or operator of a Residential Care Facility who is a licensed nurse who administers any medication to a resident will be in violation of operating an unlicensed nursing home.[29]

The circuit court in this case held that the regulations were invalid and DHHS appealed. The Supreme Court, reversing the circuit court's decision, held that the regulations were reasonable in light of the distinctions between residential care facilities and nursing homes.

Conflict of Laws

The following case illustrates how federal and state laws may be in conflict. The plaintiff in *Dorsten v. Lapeer County General Hospital*[30] brought an action against a hospital and certain physicians on the medical board alleging wrongful denial of her application for medical staff privileges. The plaintiff asserted claims under the U.S. Code for sex discrimination, violations of the Sherman Antitrust Act, and the like. The plaintiff filed a motion to compel discovery of peer-review reports to support her case. The U.S. District Court held that the plaintiff was entitled to discovery of peer-review reports despite a Michigan state law purporting to establish an absolute privilege for peer-review reports conducted by hospital review boards.

GOVERNMENT ORGANIZATION

The three branches of the federal government are the legislative, executive, and judicial branches (Figure 2–1). Figure 2–2 illustrates a typical example of a state government organization. A vital concept in the constitutional framework of government on both federal and state levels is the separation of powers. Essentially, this principle provides that no one branch of government is clearly dominant over the other two; however, in the exercise of its functions, each may affect and limit the activities, functions, and powers of the others.

Legislative Branch

On the federal level, legislative powers are vested in the Congress of the United States, which consists of the Senate and the House of Representatives. The function of the legislative branch is to enact laws that may amend or repeal existing legislation and to create new legislation. The legislature determines the nature and extent of the need for new laws and for changes in existing laws. Committees of both houses of Congress are responsible for preparing federal legislation. There are 16 standing committees in the Senate and 19 in the House of Representatives, all of whose membership are appointed by a vote of the entire body.

Legislative proposals are assigned or referred to an appropriate committee for study. The committees conduct investigations and hold hearings where interested persons may present their views regarding proposed legislation. These proceedings provide additional information to assist committee members in their consideration of proposed bills. A bill may be reported out of a committee in its original form, favorably or unfavorably; it may be reported out with recommended amendments; or the bill might be allowed to lie in the committee without action. Some bills eventually reach the full legislative body, where, after consideration and debate, they may be approved or rejected.

The U.S. Congress and all state legislatures are *bicameral* (consisting of two houses), except for the Nebraska legislature, which is unicameral. Both houses in a bicameral legislature must pass identical versions of a legislative proposal before the legislation can be brought to the chief executive.

Executive Branch

The primary function of the executive branch of government on the federal and state level is to administer and enforce the law. The chief executive, either the President of the United States or the governor of a state, also has a role in the creation of law through the power to approve or veto legislative proposals.

The U.S. Constitution provides that the President of the United States of America holds the executive power. The president serves as the administrative head of the executive branch of the federal government. The executive branch includes 15 executive departments (see Figure 2–1), as well as a variety of agencies, both temporary and permanent.

The cabinet is composed of the 15 executive department heads.[31] Each department is responsible for a different area of public affairs, and each enforces the law within its area of responsibility. For example, the DHHS administers much of the federal health law enacted by Congress. Most state executive branches are also organized on a departmental basis. These departments administer and enforce state law concerning public affairs.

On a state level, the governor serves as the chief executive officer. The responsibilities of a state governor are provided for in the state's constitution. The Massachusetts State Constitution, for example, describes the responsibilities of the governor as:[32]

- presenting an annual budget to the state legislature
- recommending new legislation
- vetoing legislation

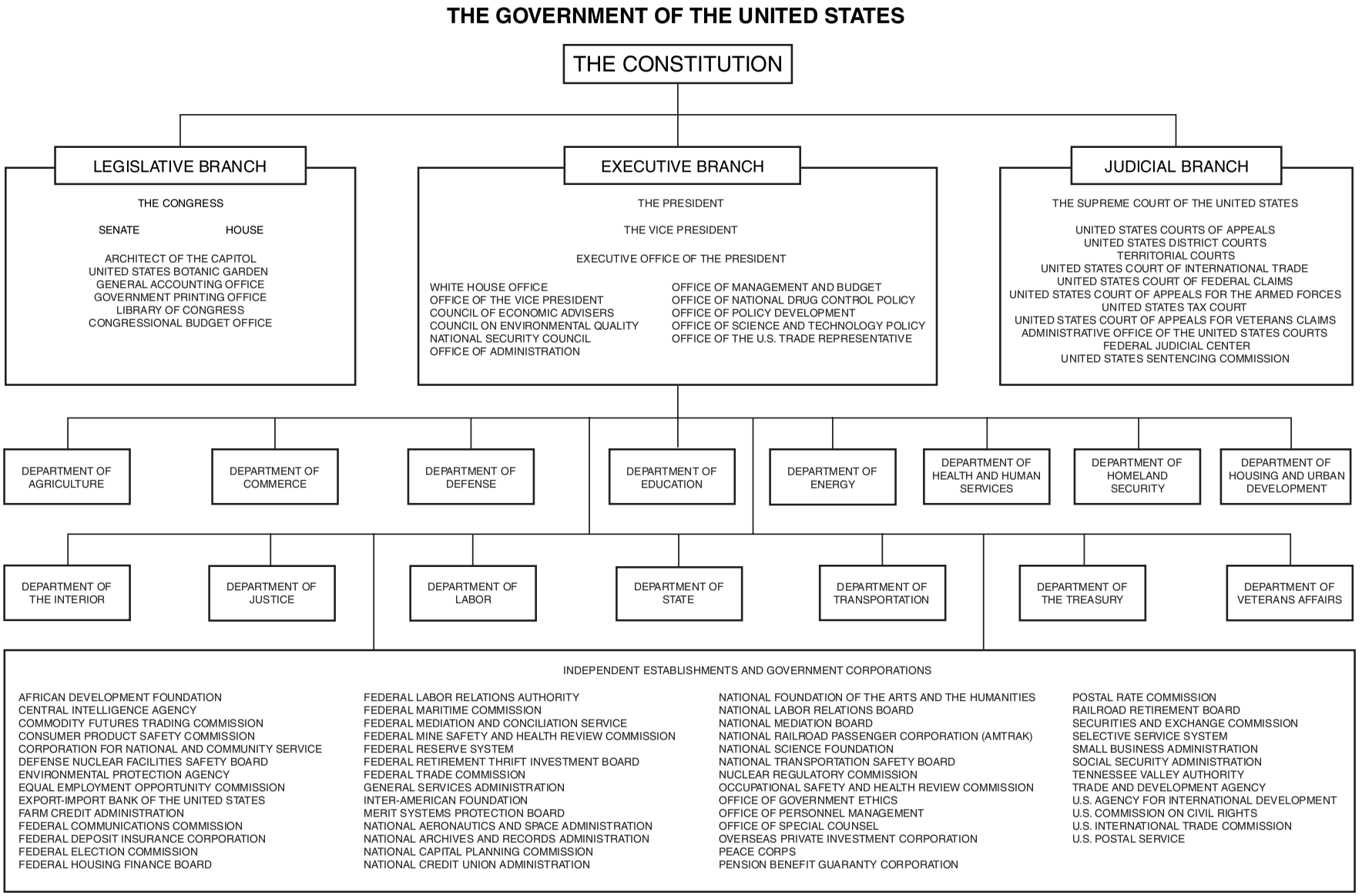

Figure 2–1 The Government of the United States

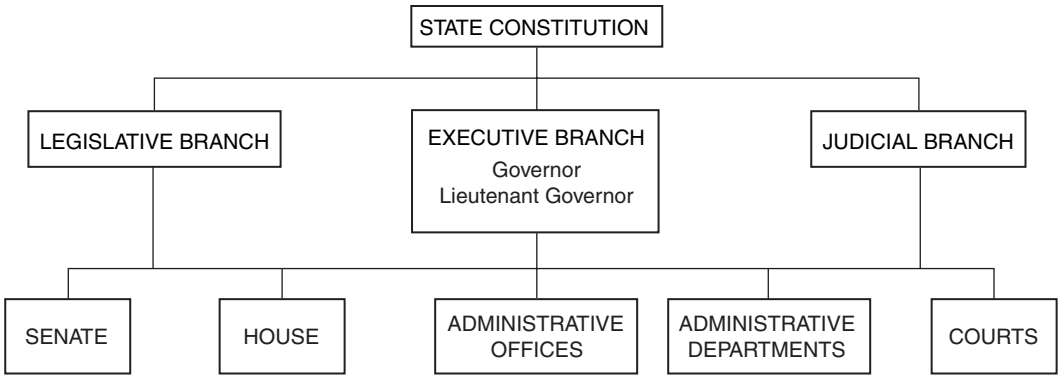

Figure 2–2 State Government Organizations

- appointing and removing department heads
- appointing judicial officers
- acting as Commander-in-Chief of the state's military forces (the Massachusetts National Guard)

Judicial Branch

> *As I have said in the past, when government bureaus and agencies go awry, which are adjuncts of the legislative or executive branches, the people flee to the third branch, their courts, for solace and justice.*[33]
>
> Justice J. Henderson,
> Supreme Court of South Dakota

The function of the judicial branch of government is *adjudication*—resolving disputes in accordance with law. As a practical matter, most disputes or controversies that are covered by legal principles or rules are resolved without resort to the courts.

Alexis de Tocqueville (1805–1859), a foreign observer commenting on the primordial place of the law and the legal profession, stated, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[34]

The decision as to which court has *jurisdiction*—the legal right to hear and rule on a particular case—is determined by such matters as the locality in which each party to a lawsuit resides and the issues of a lawsuit. Each state in the United States provides its own court system, which is created by the state's constitution and statutes. Most of the nation's judicial business is reviewed and acted on in state courts. Each state maintains a level of trial courts that have *original jurisdiction,* meaning the authority of a court to first conduct a trial on a specific case as distinguished from a court with *appellate jurisdiction,* where appeals from trial judgments are held. This jurisdiction may exclude cases involving claims with damages less than a specified minimum, probate matters (i.e., wills and estates), and workers' compensation. Different states have designated different names for trial courts (e.g., superior, district, circuit, or supreme courts). Also on the trial court level are minor courts such as city, small claims, and justice of the peace courts. States such as Massachusetts have consolidated their minor courts into a statewide court system.

Each state has at least one appellate court. Many states have an intermediate appellate court between the trial courts and the court of last resort. Where this intermediate court is present, there is a provision for appeal to it, with further review in all but select cases. Because of this format, the highest appellate tribunal is seen as the final arbiter in cases that possess importance in themselves or for the particular state's system of jurisprudence. Figure 2–3 depicts a typical state court system.

The trial court of the federal system is the U.S. District Court. There are 89 district courts in the 50 states (the larger states having more than one district court) and one in the District of Columbia. The Commonwealth of Puerto Rico also has a district court with jurisdiction corresponding to that of district courts in the different states. Generally, only one judge is required to sit and decide a case, although certain cases require up to three judges. The federal district courts hear civil, criminal, admiralty, and bankruptcy cases.

The U.S. Courts of Appeals are appellate courts for the 11 judicial circuits. Their main purpose is to review cases tried in federal district courts within their respective circuits, but they also possess jurisdiction to review orders of designated administrative agencies and to issue original writs in appropriate cases. These intermediate appellate courts were created to relieve the U.S. Supreme Court of deciding all cases appealed from the federal trial courts.

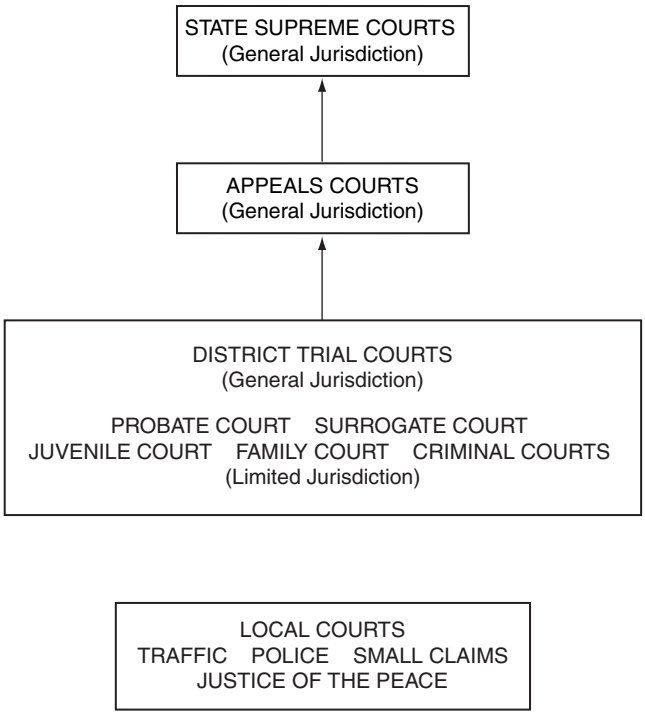

Figure 2–3 State Court System

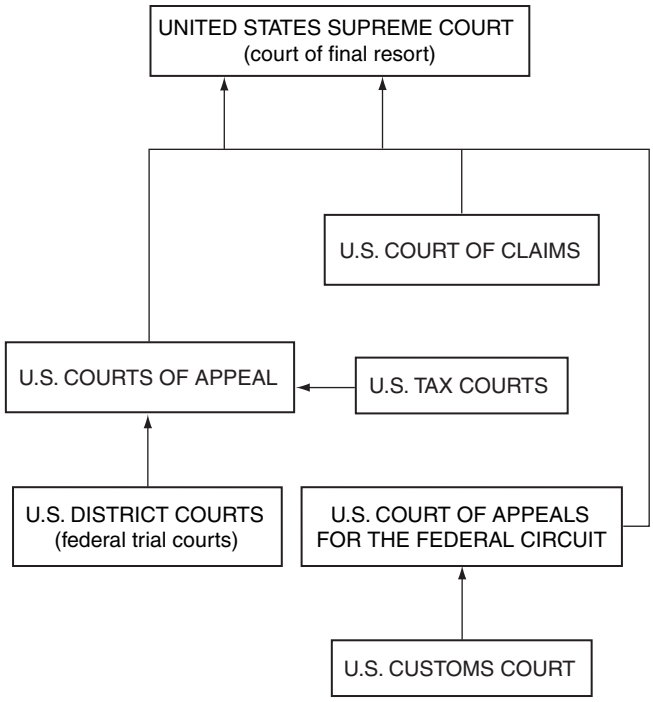

Figure 2–4 Federal Court System

The Supreme Court, the nation's highest court, is the only federal court created directly by the Constitution. Eight associate justices and one chief justice sit on the Supreme Court. The court has limited original jurisdiction over the lower federal courts and the highest state courts. In a few situations, an appeal will go directly from a federal or state court to the Supreme Court, but in most cases, review must be sought through the discretionary writ of certiorari, an appeal petition. In addition to the aforementioned courts, special federal courts have jurisdiction over particular subject matters. The U.S. Court of Claims, for example, has jurisdiction over certain claims against the government. The U.S. Court of Appeals for the Federal Circuit has appellate jurisdiction over certain customs and patent matters. The U.S. Customs Court reviews certain administrative decisions by customs officials. Also, there is a U.S. Tax Court and a U.S. Court of Military Appeals. The federal court system is illustrated in Figure 2–4.

Separation of Powers

The concept of separation of powers, a system of checks and balances, is illustrated in the relationships among the branches of government with regard to legislation. On the federal level, when a bill creating a statute is enacted by Congress and signed by the president, it becomes law. If the president vetoes a bill, it takes a two thirds vote of each house of Congress to override the veto. The president also can prevent a bill from becoming law by avoiding any action while Congress is in session. This procedure, known as a *pocket veto,* can temporarily stop a bill from becoming law and may permanently prevent it from becoming law if later sessions of Congress do not act on it favorably.

A bill that has become law may be declared invalid by the Supreme Court if the law violates the Constitution. "It is not entirely unworthy of observation, that in declaring what shall be the Supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only made in pursuance to the Constitution, have that rank."[35]

Even though a Supreme Court decision is final regarding a specific controversy, Congress and the president may generate new, constitutionally sound legislation to replace a law that has been declared unconstitutional. The procedures for amending the Constitution are complex and often time consuming, but they can serve as a way to offset or override a Supreme Court decision.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

The DHHS (Figure 2–5), a cabinet-level department of the executive branch of the federal government, is concerned with people and is most involved with the nation's human concerns. The DHHS is responsible for developing and implementing

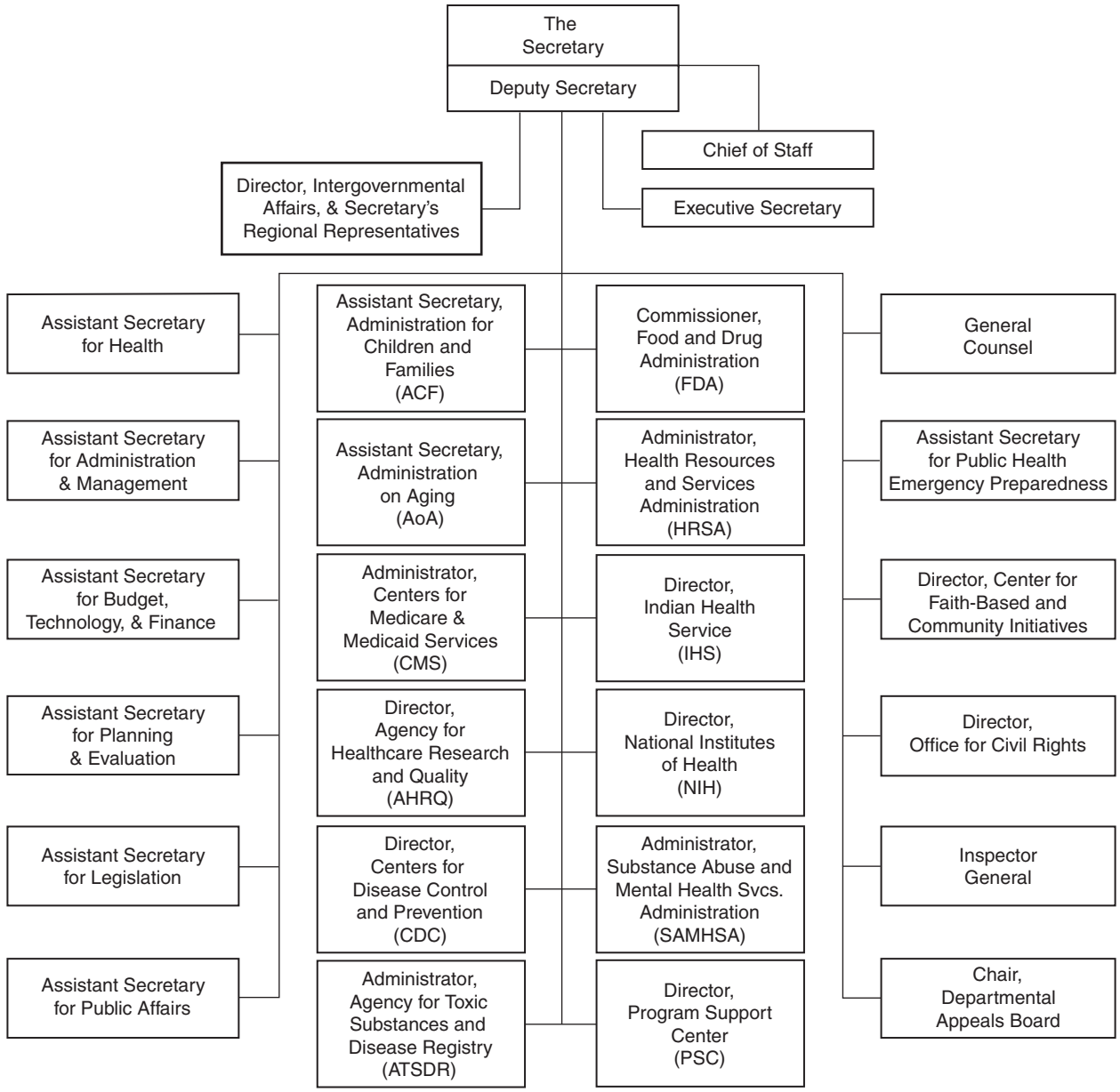

Figure 2–5 Department of Health and Human Services. *Source:* Reprinted from *U.S. Government Manual*, Department of Health and Human Services.

appropriate administrative regulations for carrying out national health and human services policy objectives. It is also the main source of regulations affecting the health care industry. The secretary of the DHHS, serving as the department's administrative head, advises the president with regard to health, welfare, and income security plans, policies, and programs.

The DHHS also is responsible for many of the programs designed to meet the needs of senior citizens, including Social Security benefits (e.g., retirement, survivors, and disability), Supplemental Security Income (which ensures a minimum monthly income to needy persons and is administered by local Social Security offices), Medicare, Medicaid, and programs under the Older Americans Act (e.g., in-home services, such as home health and home-delivered meals, and community services such as adult day care, transportation, and ombudsman services in long-term care facilities).

Administration on Aging

The Administration on Aging (AOA) is the principal agency designated to carry out the provisions of the Older Americans Act of 1965, which as amended focuses on

improving the lives of senior citizens in areas of income, housing, health, employment, retirement, and community services. The AOA develops policies, plans, and programs designed to promote the welfare of the elderly. It promotes their needs by planning programs and developing policy, procedural direction, and technical assistance to states and Native American tribal governments.

The Centers for Disease Control and Prevention

The Centers for Disease Control and Prevention (CDC) is recognized as the lead federal agency for protecting the health and safety of people at home and abroad, providing credible information to enhance health decisions and promoting health. The CDC serves as the national focus for developing and applying disease prevention and control, environmental health, and health promotion and education activities designed to improve the health of the people of the United States.

The Centers for Medicare and Medicaid Services

The Centers for Medicare and Medicaid Services (CMS), formerly the Health Care Financing Administration, was created to combine under one administration the oversight of the Medicare program, the federal portion of the Medicaid program, the State Children's Health Insurance Program, and related quality-assurance activities.

Medicare

Medicare is a federally sponsored health insurance program for persons older than 65 years of age and certain disabled persons. It has two complementary parts: Medicare Part A helps cover the costs of inpatient hospital care and, with qualifying preadmission criteria, skilled nursing facility care, home health care, and hospice care. Medicare Part B Medical Insurance helps pay for physicians' services, outpatient hospital services, and so forth.

Medicare is funded through Social Security contributions (Federal Insurance Contributions Act payroll taxes), premiums, and general revenue. The program is administered through private contractors, referred to as *intermediaries* under Part A and *carriers* under Part B. The financing of the Medicare program has received much attention by Congress because of its rapidly rising costs and drain on the nation's economy.

Medicaid

The Medicaid program, Title XIX of the Social Security Act Amendments of 1965, is a government program administered by the states providing medical services (both institutional and outpatient) to the medically needy. Federal grants, in the form of matching funds, are issued to those states with qualifying Medicaid programs. In other words, Medicaid is jointly sponsored and financed by the federal government and several states. Medical care for needy persons of all ages is provided under the definition of need established by each state. Each state has set its own criteria for determining eligibility for services under its Medicaid program.

The Health Insurance Portability and Accountability Act of 1996

The CMS is responsible for implementing various provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The administrative simplification provisions of HIPAA require that the DHHS establish national standards for electronic health care transactions and national identifiers for providers, health plans, and employers. It also addresses the privacy of health data.

Public Health Service

The mission of the Public Health Service (PHS) is to promote the protection of the nation's physical and mental health. The PHS accomplishes its mission by coordinating with the states in setting and implementing national health policy and pursuing effective intergovernmental relations; generating and upholding cooperative international health-related agreements, policies, and programs; conducting medical and biomedical research; sponsoring and administering programs for the development of health resources, the prevention and control of diseases, and alcohol and drug abuse; providing resources and expertise to the states and other public and private institutions in the planning, direction, and delivery of physical and mental health care services; and enforcing laws to ensure drug safety and protection from impure and unsafe foods, cosmetics, medical devices, and radiation-producing objects.

Within the PHS are smaller agencies responsible for carrying out the purpose of the division and DHHS, and include the following:

- *Agency for Healthcare Research and Quality*

  The Agency for Healthcare Research and Quality (AHRQ) research provides evidence-based information on health care outcomes, quality, cost, use, and access. Information from AHRQ's research helps people make more informed decisions and improve the quality of health care services.

- *Food and Drug Administration*

  The Food and Drug Administration (FDA) supervises and controls the introduction of drugs, foods, cosmetics, and medical devices into the marketplace and protects society from impure and hazardous items. The FDA regulates nearly every consumer product.

- *National Institutes of Health*

  The National Institutes of Health (NIH) is the principal federal biomedical research agency. It is responsible for conducting, supporting, and promoting biomedical research.

CHAPTER REVIEW

1. A *law* is a general rule of conduct that is enforced by the government. When a law is violated, the government imposes a penalty.
   - *Public laws* deal with the relationships between individuals and the government.
   - *Private laws* deal with relationships among individuals. Two types of private law are tort and contract actions. In a tort action, one person holds that wrongful conduct caused another person and the victim seeks compensation. Contract action deals with the accusation of a breach of agreement between two parties. Compensation can come in the form of remuneration or performance of the contracted obligation.
2. *Common law* is derived from judicial decisions. U.S. common law has as its roots the English common-law system. The first English royal court was established in 1178. There were few written laws at the time, and a collection of principles evolved from the decisions of the court. These principles, known as common law, were used to decide subsequent cases. During the colonial period, the United States based its law on English common law, but states had the authority to modify their legal systems. As a result, there is no uniform system of common law among the states.
3. A common-law principle established in a higher state court must be followed by the lower courts in that state. However, trial courts or those otherwise on equal footing are not bound by the decisions of other trial courts, and a principle established in one state does not set precedent within another state. Common-law principles can be modified, overturned, abrogated, or created by new court decisions. These changes help the law keep pace with changes in society.
4. *Statutory law* is written law that emanates from legislative bodies. Using express words, a statute can abolish any rule of common law. The Constitution is the highest level of enacted law; it takes precedence over the constitutions and laws of specific states and local jurisdictions.
5. Statutory law can be amended, repealed, or expanded by the legislature. States and local jurisdictions can enact and enforce only laws that do no conflict with federal laws.
6. *Administrative law* is public law issued by administrative agencies to administer the enacted laws of the federal and state governments. This branch of law controls the administrative operations of the government.
7. Administrative agencies implement and administer the administrative law. The rules and regulations established by an agency must be administered within the scope of the authority delegated to the agency by Congress. Agency regulations and decisions can be subject to judicial review.
8. Each state has its own system of administrative law.
9. The concept of *separation of powers* provides that no one branch of the government—legislative, executive, or judicial—will be clearly dominant over the other two. The *legislative branch* enacts, amends, and/or repeals existing laws. The *executive branch* administers and enforces the law. The *judicial branch* resolves disputes in accordance with the law.
10. The Department of Health and Human Services develops and implements administrative regulations for carrying out national health and human services policy objectives.

REVIEW QUESTIONS

1. Define the term *law* and describe the sources from which law is derived.
2. Define the legal terms *precedent, res judicata, stare decisis, original jurisdiction,* and *appellate jurisdiction.*

3. Describe the function of each branch of government.
4. What is the meaning of separation of powers?
5. What is the function of an administrative agency?
6. Describe the responsibilities of the DHHS.

NOTES

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4. A. K. R. Kiralfy, Potter's Historical Introduction to English Law 9 (1962).
5. J. Reeves, History of the English Law 2 (1814).
6. *Id.*
7. G. W. Keeton, English Law 70 (1974).
8. *Id.*
9. *Id.*
10. Kiralfy, *supra* note 4, at 9–10.
11. Schwartz, *supra* note 1, at 29.
12. L. Friedman, A History of American Law 92 (1985).
13. Black's Law Dictionary 1305 (6th ed. 1990).
14. U.S. Dept. of Health & Human Services, Task Force on Medical Liability and Malpractice 3 (1987).
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16. Zinman, *Study Finds Hospitals "Harm" Some,* NEWSDAY, March 1, 1990, at 17.
17. The Robert Wood Johnson Foundation, *The Tort System for Medical Malpractice: How Well Does It Work, What Are the Alternatives?,* ABRIDGE, Spring 1991, at 2.
18. The Robert Wood Johnson Foundation, *Negligent Medical Care: What Is It, Where Is It, and How Widespread Is It?,* ABRIDGE, Spring 1991, at 6.
19. D. Sharp, *Errors Renew the Call for Doctor Review,* USA TODAY, March 27, 1995, at 2.
20. K. Painter, *Breast Cancer Top Cause of Malpractice Complaints,* USA TODAY, June 15, 1996, at 1.
21. U.S. CONST. art. VI, § 1, cl. 2.
22. 5 U.S.C.S. §§ 500–576 (Law. Co-op. 1989).
23. An "agency means each authority of the Government of the United States, . . . but does not include (A) the Congress; the Courts of the United States; . . ." 5 U.S.C.S. § 551(1) (Law. Co-op. 1989).
24. 5 U.S.C.S. § 702 (Law. Co-op. 1989).
25. 5 U.S.C.S. § 706 (Law. Co-op. 1989).
26. 401 A.2d 872 (Pa. Commw. Ct. 1979).
27. *Id.* at 873.
28. *Department of Human Serv. v. Berry,* 764 S.W.2d 437 (Ark.1989).
29. *Id.* at 439.
30. 88 F.R.D. 583 (E.D. Mich. 1980).
31. http://dir.yahoo.com/Government/U_S_Government/Executive_Branch/Departments_and_Agencies/.
32. D. Levitan, Your Massachusetts Government 14 (10th ed. 1984).
33. *Heritage of Yankton, Inc. v. South Dakota Dep't. of Health,* 432 N.W.2d 68, 77 (S.D. 1988).
34. Schwartz, *supra* note 1, at 15.
35. *Marbury v. Madison,* 5 U.S. (Cranch) 137, 180 (1803).