

LECTURE #2 – LEGAL HISTORY OF THE U.S.

Lecture #2 I have listed as the subject of Legal History of the USA. It's an enormous subject and would certainly be worthy of at least one full semester of 30 hours of classes and possibly even 2 if we were to start with the American colonial period and go all the way up through the modern period because there have been so many changes. But all I have is a short 3 or 4 page reading about the colonial period in America, the 1600's and 1700's, before there was a Constitution, before there was a USA. Just so you will get a little bit of a flavor of the anti-lawyer feeling. Then as America grew from the 1600's & 1700's into a more formal association of English colonies, in the 1770's all of the colonies revolted against England because they did not want to pay taxes to England, they did not want to be subject to the laws and government there. In fact it was a monarchy in England and monarchies had become very unpopular in the Americas and in much of Europe at that time. So America had a revolutionary war, a fight with England, and we defeated the English and the 13 colonies formed a country which eventually became the USA. The original 13 states which broke off from England formed the US and adopted the US Constitution. At that time they invited parts of Canada which had broken off from France to join them, but the Canadians refused and continued to be a colony of England. In fact many people who were English sympathizers left America and went to parts of Canada and the Bahamas, the islands of the Caribbean off the coast of Florida, and their descendants are still there today. America was very very anti-English for at least 100 to 150 years from 1780 to 1914, and so you wonder how and why did early America from 1789 to 1800 adopt what we call the common law of England?

I. FROM ENGLAND - COMMON LAW - The common law of England, which is what we adopted in the Constitution, you'll even see it stated in the Constitution which is my Reading #5 that the US follows the common law as it existed in 1789 when we adopted our Constitution. Many states even said they adopted the common law of England as it existed in 1789. The reason being that the common law of England was 2 things, #1, it was all the laws and rulings of the courts that had been printed up in England and circulated and become the law of all of England, and had actually been brought to the US. Because there wasn't much printing, especially in the US, at the time, nor much printing of law books the written opinions from England and the books from England such as Blackstone's Commentaries on the Law, which were from England, were the only books that most lawyers in America would have to argue cases with and judges to decide cases with. So this was one of the reasons – printing. This was the only written law able to be used in early America. The second reason for English common law even in an anti-English nation was that the majority of people who came to the American colonies at that time, the 1700's, were English and English speaking and they were the laws familiar to those people.

America for at least 100 years was very anti-English. In 1812, 20 years after the Constitution was adopted, the British army came and attacked Washington, D.C. and burned the capital building and the Whitehouse. So America has been very anti-English until the 1900's when we were on the same side as England in WWI and WW II, but all the way through the 1800's right up until the 1900's, America was very anti-British. Even in the US Civil War when the North favored keeping the union together, and the South, favored states' rights and keeping it separate. The English backed, and tried to help the South in the Civil War. Well, the South lost and the British chose the wrong side, so it was at least 2 generations – 40+ years before the US and England became friends again, even though they spoke the same language.

II. US CONSTITUTION AND SEPARATION OF POWER - In any event, the US in 1789 adopted the Constitution which became the supreme law of the land. In that Constitution, which I reproduced for you as Reading #5 and you can find on my website, johnaritter.com, you will see one of the basic doctrines of that Constitution, other than the one we talked about yesterday – due process of law - one of its more important functions was to divide the US government into 3 branches. They call it separation of powers, a balance of power among the Legislative which is the US Congress, Executive, which is our President, and the Judicial, which is our federal judiciary, and one of the most powerful judiciaries in the world. Separation of government power into 3 branches is a way of keeping any 1 person in government from being too powerful. It is a way of limiting government power. The judicial branch in America is the strongest because we have adopted the concept of judicial review, which allows the judges in the judicial branch to overrule and invalidate acts of the Executive branch and the Legislative branch. We have equal branches of government; we call it the balance of power and they are always disagreeing with each other and finding ways to use one branch against the other. It fits right in with the general American theory of being mistrustful of government, not wanting to allow anyone in government to become too powerful. We definitely don't want our President to be too powerful so we give the judges power over him.

III. ADMINISTRATIVE BRANCH OF GOVERNMENT - Many people say there is a 4th branch of government now. In America we feel like we have a 4th branch – the Administrative branch. We have whole social security departments, the pension system in the US. We have the most feared agency of government in the US by all Americans and all lawyers - it's the IRS (Internal Revenue Service), our taxing authority. The Immigration and Naturalization authority is very important in a country like the US, which is similar to Russia. We have many immigrants coming into the country all the time and claiming they have a right to be there. We have all kinds of administrative judges. People say that these administrative agencies have become so powerful that they're like a 4th branch of government. Sometimes Congress creates them. Sometimes the President creates them. What are they? When you do create them, you often will find that a department like the INS, regulating immigrants and refugees, will have the

legislative, executive and judicial powers all right there in the same branch because you've got the immigration authorities making rules as to when it is valid for a refugee to achieve valid immigration status in the US, you have the people right in the agency investigating and prosecuting whether or not a refugee is here validly, and you have immigration judges right within that agency deciding whether or not they have violated those rules.

We have something that I'm sure you have in this country, the EPA (Environmental Protection Agency), one of our most important agencies. There has been much litigation over whether or not it is invalid constitutionally because it is executive, legislative, and judicial all in one. We had a lawsuit stating that the EPA which promulgated rules about putting smoke in the air and pollution in the water, had done this illegally; that the administrative agency and all the experts in the administrative agency shouldn't do this. That's invalid delegation of legislative power. The theory was and the argument of opponents was that only elected officials in congress can make all the rules, that is was a legislative function and not an administrative one for appointed administrative agency officials. Many of the factories and industries were very unhappy about the ruling authority in this agency. So they fought it and they went before the agency to say the rules were wrong. But they lost and were actually enjoined by the agency in court proceedings and ordered to close their factories down or change smokestacks and the amount of smoke put in the air.

The US has reluctantly permitted what some people would call this 4th branch of government, the Administrative branch. We've been much slower than Europe and probably Russia because the US has this principle that I talked about yesterday, a mistrust of government – no one wants to give too much power to government. No one trusts government officials. Everybody thinks that people in government 1.) are corrupt at worst and 2.) lazy at best, they don't work hard and don't want to work hard; they just want to collect salaries without working. I was a government city attorney for 4 years and it seemed to me that half the people around the City Hall that I was the lawyer for really just wanted to sit and count paperclips, watch the clock, and count their hours and get their paychecks and not work very hard. We all have this attitude in America that private industry and private enterprise works much harder, partly because people can make much more money working in private enterprise than they can working in government in the US. So we have been slow in the USA to allow administrative law to come into our society and government. We're probably a hundred years behind Europe because of this principle of distrust of government and not wanting to put too much power in government. But just like Europe, we find that for consumer protection, the consumer can't possibly know what goes into medicine, pills, drugs, food, it has got to have experts in administrative agencies to do that. The consumer can't possibly take care of protecting the air that he breathes and the water that he drinks. There must be a large administrative agency with scientists and modern technology to protect our water and keep it clean and to protect our air and keep it clean. I'm sure that's been the case in this country and it's

certainly been the case in every industrial county in the world. The US has been much slower than other countries and it's only been since the year 2000 that there was a decision saying it was not a violation of separation of power to allow the EPA to adopt rules and allow it to stop big corporations and industries from putting smoke into the air from their smoke stacks and dirty and polluted water into the rivers and lakes. The courts actually had a major lawsuit that went on for 5 years over whether the EPA establishing rules about how much smoke and dust could go into the air was an illegal delegation of legislative power, whether it was something only Congress could do. This is a big legal issue still going on as to whether or not our Constitution stops Congress from giving administrative agencies too much power. You'll see in my little book, *You Be The Judge IV* at page 34, a case of an administrative agency that tried to stop illegal poison from being used by farmers to keep bugs away. The administrative agency was upheld in its role and duty to police the types of fertilizer that can be used by farmers all over the US to protect consumers from cancer causing foods being sold. And we really have to rely on government administrative agencies to police the kind of drugs we can put into our mouths and buy at the drugstores and pharmacies because the average consumer can't know that. We will talk more about America's slow development of administrative agencies.

IV. FEDERALISM - Another principle that is important in American history is Federalism. There are 50 states and one federal government. When the US Constitution was adopted in 1789, it wasn't even a full year before one of the states, the state of Pennsylvania, decided it didn't want to go along with the federal government, the central government. So they flew the American flag upside down from the state capital in Pennsylvania. It was called the whiskey rebellion. The farmers, who were the majority of people in the state of PA, did not want the central government putting a tax on whiskey because all the farmers raised corn and made bourbon whiskey. American whiskey was very popular and many farmers made it personally then on their farms from the corn they grew. (And still do today as a matter of fact.) It's one of the biggest issues and one of the biggest jobs the federal government has - policing whiskey and stills where American farmers make illegal whiskey from corn. One of George Washington's first jobs was to send the army, the same army who had fought the English, to PA to take down the flag, fly it upright and to take prisoner anyone who didn't want to pay the whiskey tax. This was the first battle between the federal government and the states over state rights. There has always been a battle in the US over states' rights. The Civil War was fought over states' rights. The states in the South wanted the right to have slaves - to have black people, negroes, from Africa to be slaves and have no due process rights. People in the North, almost from day 1, did not want to have slaves, but because of a compromise they gave in and allowed states' rights. Finally, the states in the South decided they did not want to give up so many rights to the federal central government and that central government went to war against the Southern states. You may know that the Civil War in the US from 1860-1865 established federal supremacy and the fact

that the federal central government was supreme and states' rights were minor. We still fight every 10 or 20 years, just how much rights the states have.

I'll give you a big example and a little example. One big example is that in 1960, 50 years ago, the states had the right to have state universities and state law schools, just like this state law school, and in 1960 the state of Mississippi did not allow black people to go to the state University of Mississippi law school – they had a separate law school for black people. That was a doctrine that was considered legal at the time. For 90 years after the Civil War, it had been considered legal to have separate but equal schools, but was ruled illegal in 1954. So a black man went and enrolled in the Mississippi state law school. But the governor of Mississippi stood in the door of the law school and barred his way into the law school in 1960, and the photo was in all the newspapers. At that time the President of the US was John F. Kennedy. Just like George Washington sent the US Army to PA in 1789, Kennedy sent the US Army to the state of Mississippi in 1960 to the state law school and had his brother, Robert F. Kennedy, who was the Attorney General walk alongside the black man right to the door of the law school, and asked the Governor to stand aside. The Governor of the state of Mississippi stepped aside and let a black man into the law school. This is the kind of battle we still have to fight in the US as to the meaning of federal government supremacy over the states.

A lesser example is one of my favorites. I don't know if you have drinking laws in Russia where young people are not allowed to drink until the age of 18 or 21, but everywhere in the US there was a law that you could not drink until the age of 18. The federal government decided 30 years ago because of so many automobile accidents involving alcohol that the drinking age should be raised to 21 around the whole country. The age of drinking alcohol is considered a state matter and not federal and the states were the ones who could pass laws about when someone could drink, within the borders of the state. The state of Wisconsin, which was a big beer brewing and distributing state, did not want to change its law. The federal government had just asked the states to change their drinking age to 21 and most of the states did it, but to those who didn't they said they would not give federal highway funds to build federal highways in their state unless they raised their drinking age from 18 to 21. Seems like a trivial thing and all the states did it, but one state didn't – the state of Wisconsin. They held out forever but eventually they decided they needed money to build better highways through the state because we have a beautiful federal interstate highway system that runs through the entire US and even the state of Wisconsin (which is very similar to the state of Karelia, it's beautiful, cold and in the north, has a lot of outdoor activities, and a lot of lakes). They finally gave in and raised the drinking age from 18 to 21. Even though most of the beer manufacturers in the US are located there and they have a lot of influence and they didn't want to raise their drinking age, but the age was raised to 21 because the state of Wisconsin needed federal money and they couldn't get it from the federal government until they complied. That's a new way the federal government is being more powerful than state

governments, through the power of enticement with the large amount of tax money it collects.

V. JURY SYTEM - The strangest thing we inherited from England in the US and which is in the Constitution is the jury system. You probably know about juries in criminal cases. In a trial for murder a person is entitled to 12 jurors and he has to have a unanimous verdict to find him guilty. In some states, as in my own state of Florida, we changed it to 6 jurors in criminal cases so it's a unanimous verdict of 6 in criminal courts in Florida. In Florida and many states we have modified civil jury verdicts to require only a majority vote of the jurors. The majority of law and of lawyers in the US are involved in civil law. 90% of law and 90% of lawyers are out bringing and defending lawsuits over car accidents, bringing lawsuits against government, suing over contracts in civil cases, suing over divorces. The majority of law and lawyers are involved in civil law. A strange thing is in the US Constitution, if you read it which I have printed out on the website AS Reading #5 from the 7th Amendment to the US Constitution says that the right of trial by jury shall be preserved in all cases at common law exceeding \$10. In 1791 when this was adopted that was a lot of money. Today that means anyone who is involved in a lawsuit involved with money can ask for a jury. And that is one of the reasons why, we will find out in Lecture #7, we have so many lawyers in the US and we have a litigation explosion. Lawyers make a lot of money because in a court case involving a contract, a lease, a car accident, they can ask for a jury trial and get 12 people to sit on a jury and decide whether or not they should win the money. We actually had a famous case 10 years ago of a famous American named O.J. Simpson. I don't know how many of you have heard of that, but I shared a short one page article I wrote about it once, *The Lessons of the Simpson Trial Reading #4* on the website johnaritter.com. The main lesson being that there were 2 trials, a criminal one and a civil one and there was a different jury in each one. The criminal jury found him NOT guilty, but the civil jury found him liable to pay \$35 million. Simpson was accused of murdering his wife and her boyfriend and was found not guilty by a jury of 12 people because they did not find him guilty beyond a reasonable doubt. However, a second trial was held a year later where the parents of the man he killed sued him for civil damages for \$35 million. They won \$35 million from a second jury who found Simpson liable to pay them. Anyone have any idea how that could be? How could jury #2 could rule differently and have it stick when jury #1 said he was not guilty of murder? The reason is that there are 2 totally different trials. In the criminal trial, the burden of proof on the prosecution is to prove a person guilty beyond a reasonable doubt. In a civil trial it is only to prove him liable or responsible by a preponderance of the evidence. So the jury in trial #1 did not find Simpson guilty beyond a reasonable doubt. (I often describe it as 90-95% certain that he is guilty.) But the jury in the 2nd trial was asked do you think this man killed and you only need to believe that a preponderance of the evidence shows his responsibility (51% certain that he did it). They found him liable to pay \$35 Million for the murder. Not only that, but in the second trial where the jury had to find by preponderance of the evidence that he committed the murder, they

didn't have to have a unanimous verdict – only a majority, only $\frac{3}{4}$ of the jury had to find him guilty – 9 out of 12. The difference between civil and criminal law can be substantial and can make a big difference. There's a 3rd reason, the rules are different. In a criminal trial we have a rule that a man does not have to testify against himself. It's a constitutional right and legal technicality that keeps jurors from knowing the truth and from making correct decisions. So O.J. Simpson never got up after all the evidence was in that he committed this murder, and said, "No, I did not do it." He remained silent. You have a right to remain silent and to not testify in court and it can't be used against you in a criminal trial. But, in a civil trial, it can be used against you. If you don't get up and say, "I didn't do it.", what's the chance a jury is going to believe you didn't do it? About zero. So Simpson got up and tried to say he didn't do it and let me tell you the people didn't believe it – almost unanimously this jury decided against him for \$35 million that he committed the murder. So we have a very strange system in America that we'll hear about over and over and we'll often forget about it, but the lawyers have become rich in America, and the reason they become rich is that they are allowed to have juries decide whether or not an insurance company must pay for the damages for someone hurt in a car accident. The juries are certainly drawn from the average man and the average man is much more likely to decide that an insurance company has to pay than to decide an injured person must pay his own medical bills. This principle of American law to have juries decide civil court cases we inherited from England, but interestingly even though England and many countries still have juries in criminal cases (I understand even Japan is now considering adopting juries in criminal cases), England abolished the jury in civil trials 50 years ago. America cannot abolish it because it is so difficult in America to change our Constitution. If we started an Amendment to change the Constitution, it might take 10-20 years to change it. A Constitutional Amendment would be necessary to abolish the jury system, but difficult to pass.

So when we look at the jury system again in future lectures, remember juries in America exist in both civil and criminal court trials. (But remember – NOT in administrative hearings.)