

# The Origins of the National Judiciary

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A reading of the Constitution as originally drafted and as it has existed for almost two hundred years quickly reveals that the judicial branch was probably the least well-defined of the three great divisions of national government in terms of its organization and its powers. The provisions of Article III, although listing the various jurisdictional categories, made few of them compulsory on the national courts. Only some original jurisdiction of the Supreme Court was made compulsory. But no constitutional provision established any national courts other than the Supreme Court. The Convention of 1787 could not reach agreement as to whether there should be such national courts. The Founders were certainly ambivalent about the utility of a national judiciary and compromised the question by leaving the issue for resolution by Congress.

There can be little doubt that the statesmen no less than the people of the time feared a strong judiciary. But they also recognized that some judicial power had to be vested in central government because the national government could founder without tribunals to resolve questions that could not be left to the partisanship of State courts--this lack had been one of the weaknesses of the Articles of Confederation. Yet history had shown that the judiciary, if it had a great potential for centralization of power, also stood fair to become engine of repression. Thus, the Founders included provisions in the Constitution specifically to limit the authority of the judges. They carefully defined the crime of treason, lest that concept be allowed to grow as inordinately as it had under royal tutelage in the mother country. They also provided for jury trials in the original document. Insistent demands for still more assurance of the supremacy of the jury over the judiciary led to the addition of the Sixth and Seventh Amendments as well. "We, the People," were to safeguard the freedoms of the citizenry from invasion by the judiciary.

In Anglo-American history, the judiciary had always been the hand maiden of the Crown. It enforced the wishes of the King, serving him as a political tool, whether enhancing the royal treasury, or punishing the King's, political enemies, or imposing the "king's peace" on the barons and their vassals. Two particularly egregious examples of judicial tyranny remained well-remembered bugaboos for those who had the task of framing a new government--"Bloody Jeffreys," the Chief Justice under James II known for his profligate imposition of the death penalty, and the Star Chamber, a political court completely devoid of judicial temper used by the Crown to punish its enemies.

The Declaration of Independence iterates charges against the Crown for imposing its despotism, in no small part through the machinations of the royal courts at Westminster and the Vice-Admiralty courts in the colonies themselves. Americans clearly saw that the courts were devices for centralization of power, no less than tools for subordination of the popular will. Concentration of political power was one of the great fears of the constitutional era, but so, too, was the danger of disseminating that power among the people. "Democracy" was as dirty a word at the end of the eighteenth century as "elitism" has become in the twentieth. With the examples of the abuse of judicial power under the Crown on the one hand, and the problems of operating without a centralized judicial authority under the Articles of Confederation on the other, there were good reasons for the ambivalence about making provision for a judicial branch in the original Constitution.

In order to overcome resistance to the notion of a judicial branch in the new government, the framers contended that this branch of government would be innocuous, rather than desirable or

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useful. In a famed passage from *The Federalist* No. 78, Alexander Hamilton argued:

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

However inaccurate a description of the judicial power of today, such rhetoric sounded good in its own time.

Perhaps Hamilton meant what he said--although *The Federalist* did have the aura of propaganda about it. Perhaps Hamilton's arguments were even valid. But their validity depended on the dubious proposition--dubious even then--that the sole function of a judicial body was to resolve the particular "case" or "controversy" before it on the basis of law that was already existent. When, however, one takes into account the well-known dictum that he who interprets and applies the law is the true lawmaker and not he who promulgates it, the Hamiltonian argument seems more preachment than substance. If one looks backward from the Hamiltonian argument adopted by Marshall in *M'Culloch v. Maryland*, doubts about the candor of *The Federalist* No. 78 are turned into certainties about its sophistical nature.

In any event, in *Marbury v. Madison*, John Marshall announced, in the great tradition of Louis XIV, that "le loi, c'est moi," and this dictum has been accepted by every court since, right down to the Burger Court. "It is emphatically the province and duty of the judicial department to say what the law is," said Marshall. From *Marbury* to date there has been continual debate about the legitimacy of the power of judicial review, the power to declare national statutes to be invalid because they contravene the Constitution. And none has gainsaid Judge Learned Hand's proposition: "There was nothing in the United States Constitution that gave courts any authority to review the decisions of Congress; and it was a plausible--indeed to my mind an unanswerable--argument that [judicial review] invaded that 'Separation of Powers' which, as so many then believed, was the condition of all free government." But then, "there was nothing in the United States Constitution" that provided for the doctrine of "Separation of Powers." Judicial review, like separation of powers, was part of the background against which the Constitution was painted. Failure to include either in the words of the text did not bespeak their rejection.

With all respect to the gallons of ink and forests of paper spent on the subject, the legitimacy of judicial review is not now, and has never been, the real issue. The question is what the scope of that power should be. We do know that the authors of the Constitution specifically rejected the concept of a council of revision, that is, a government body, whether judicial in whole or part, which would substitute its judgment for the legislature's--as to the desirability of the legislation. If not so broad a discretion, what limits of the judicial power did the Founders intend in determining when a law contravened the Constitution and was, therefore, invalid? To say that courts could pass on the question of Congressional power is not the same as saying that their discretion is unlimited on this score. The Justices were to measure infringement of the Constitution, not the degree to which their own sensibilities had been violated.

At the same time that Marshall proclaimed the power of judicial review, he announced the limited way in which it could be invoked:

If two laws conflict with each other, the courts must decide on the operation of each. So if

a law be in opposition. to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary Act of the Legislature, the Constitution, and not such ordinary Act, must govern the case to which they both apply.

Marshall's argument, here as in other important decisions that he wrote, closely parallels Hamilton's arguments. Neither of them charge the Court with the function of rewriting the Constitution to the taste of the Justices. Both of them justify judicial review of national legislation within the context of deciding a case or controversy properly before the court for adjudication. There is no suggestion that such decision was to be treated as a general rule of public policy for the governance of other branches of the national government or of the behavior of persons who had not submitted the cause for judgment.

Clearly, however, the power of judicial review did invoke some discretion on the part of the judiciary. Neither the Constitution nor most legislation was so lucidly written that their meanings were obvious to anyone who read them. Thus, when a question arose as to whether a tax on carriages was a "direct tax" which had to be apportioned to meet the terms of the Constitution, the courts had to decide what a "direct tax" was. This was a judicial problem that had to be resolved before the conflict between the Constitution and the legislation could be said to exist.

There was less doubt about the authority of the national courts to review state legislation. The Supremacy Clause specifically subordinates the actions of state courts as well as state legislatures to the terms of the Constitution, and section 25 of the first Judiciary Act makes specific provision for such judicial review. Section 25 was promulgated by those who were "present at the creation." Even so, our earliest constitutional history records the hard-pressed efforts of the states to negate the provisions of section 25 as invalid. This effort was unavailing, not least for the reason that the Supreme Court had the last word on the subject. As Justice Holmes once said: "I do not think that the United States would come to an end if we lost our power, to declare an Act of Congress void. I do think that the Union would be imperilled if we could not make that declaration as to the laws of the several states."

However often the fight has been joined over judicial review during the course of American history, the First Congress faced more pressing difficulties in creating a judicial system from scratch. The system had to serve as a cement and not a solvent of the Union; it had to disperse its courts among the countryside and not emulate Westminster by compelling the people to come to the capital for justice; it had to mediate disputes largely without a body of law of its own, for there was little legislation and the common law was not a property of the national judiciary. The First Congress did well; its Judiciary Act has long been admired as a remarkably effective response to practical needs. Some of the original law remains in effect today.

The keystone of the Judiciary Act provided for national courts in addition to the Supreme Court which the Constitution itself created . This national court system, together with judicial review by the Supreme Court of state court action on matters of federal concern, lay at the center of the conception of a national judicial function. No other modern confederation of states has established national courts for trial and intermediate appellate review, not even in nations covering so wide a territorial expanse, as do Australia and Canada. The decision of the First Congress to afford such national courts was probably a response to the deficiencies of the, Articles of Confederation, which lacked any such system. The plan devised by the First Congress under the leadership of Oliver Ellsworth consisted of three judicial components to be administered by two sets of judges. District courts were to be manned by district judges. Circuit courts were to be presided over by a district court judge and one or two Supreme Court Justices.

Since marine commerce was at the heart of the nation's economic structure, the district courts

were given jurisdiction over cases in admiralty, a body of judge-made law common to the United States, England, and compatible with the law of most maritime nations of that era. The protection of internal but interstate commerce was effected by giving jurisdiction to the federal circuit courts when residents of different states were involved in litigation. This tactic protected merchants and creditors from the parochialism of state courts which might diminish their willingness to engage in interstate trade. Again, the applicable law was largely judge-made law in the form of the common law of the state of trial. The circuit courts were also given a modest role of appellate review of district court judgments.

Admiralty and maritime causes, and disputes between citizens of different states, formed the bulk of the national judicial realm, although there was provision too for other areas such as enforcement of national criminal law, which included only federal statutory offenses and not common-law crimes. The Supreme Court exercised appellate review of the judgments of the lower federal courts and the highest state courts.

The burden on Supreme Court Justices, if not on the Supreme Court itself, was inordinate because of the need for the Justices to ride circuit. From the beginning the Justices sought relief from some or all of their circuit-riding duties, which tested their endurance and capacities to the limit, and made the position of a Supreme Court Justice less than attractive to the lawyers of greatest capacity in the new nation. Still, relief from circuit riding was not fully obtained until well into the nineteenth century.

With the advent of the "second American Revolution," when the states'-rights Jeffersonians replaced the nationalists in the executive and legislative branches, the federal judiciary became the bulwark of nationalism. The judges of the federal courts, both in their lawmaking roles and as administrators of the national grand jury system, took every chance they got to forward the idea of centralized power. The effort of the Jeffersonians to reduce the federal courts' power resulted in several constitutional crises but did not control the courts. Thus, the Federalists retained an imposing nationalist counterforce against the Jeffersonians which helped shape the new nation.

The origins of the national judiciary are to be found in the words of the Constitution and the Judiciary Act of 1789, but they were only adumbrated there. Like the national executive, if not the national legislature, the national judiciary has created itself in its own image. The words of Thomas Reed Powell describing the development of the power of judicial review are equally applicable to the development of the national judicial power generally: "Those of you who recall how Topsy characterized her own genetic process may not be offended if I find a similarity between her origin and that of what we know as [the judicial power] Like Topsy, it just 'grewed.'"

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