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ABSTRACT

Article III of the U.S. Constitution called for a federal judiciary that would dispense and administer justice in accordance with the principles on which the United States was founded. There was considerable ambivalence among the Founding Fathers as to what was the appropriate role for the judiciary, an ambivalence that has continued to the present day. Some regarded the new federal judiciary as a potentially dangerous instrument, while others believed that judicial power would be limited as compared with that of the legislative and the executive powers. The relatively weak power of the Supreme Court was enhanced tremendously by Chief Justice John Marshall and the case of Marbury v. Madison which asserted the Court's power of judicial review. The federal court system evolved to meet the needs of the expanding nation. Many judicial issues remain controversial today, including what should guide federal judges in their interpretation of the Constitution, the procedure for selecting and confirming federal judges, and whether there is a need for more courts and more judges to meet the growing mass of litigation. A list of 19 references is included. (DB)

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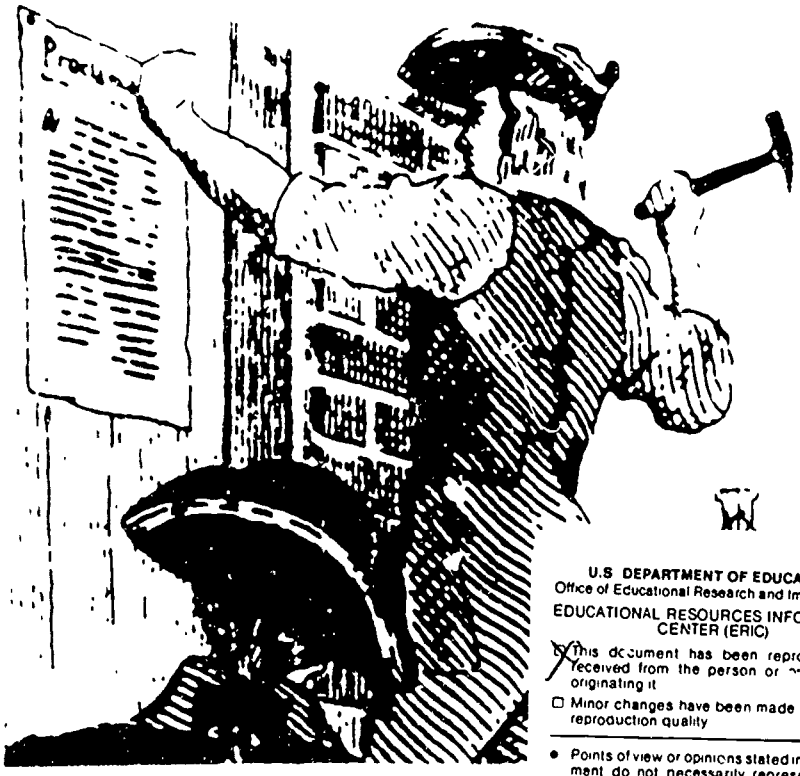

The Judicial Branch and the Constitutional Order

Commission on the Bicentennial
of the United States Constitution
808 Seventeenth Street, N.W.
Washington, D.C. 20006

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Article III, Section 1

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. 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 the very essence of judicial duty."

Chief Justice John Marshall
Marbury v. Madison, 1803

INTRODUCTION

"If the blessings of our political and social condition have not been too highly estimated, we cannot well overrate the responsibility and duty which they impose upon us. We hold these institutions of government, religion, and learning to be transmitted, as well as enjoyed. We are in the line of conveyance, through which whatever has been obtained by the spirit and efforts of our ancestors is to be communicated to our children."

Daniel Webster
From a speech delivered at Plymouth, December 22, 1820

Two hundred years ago, the American people became the first to establish government by acts of popular consent. That consent was the product of an extraordinary national dialogue on the elementary principles of the government being established, led by men who had experience in local and state affairs. From the fall of 1787 through the summer of 1788, Americans debated the merits of the new constitution framed in Philadelphia. On both sides, opinions were stated, challenged, and defended. And once the decision was made, something remarkable happened: the losing side, the Antifederalists, who had claimed that the new government would destroy their freedom and rights, joined their opponents in making the government work.

Today, we still have a government that thrives on argument, dispute, and debate. But is it still working? In 1789, the responsibilities of the new federal government could be managed by a part-time Congress and a small executive branch. The minuscule federal judiciary of just 19 judges, created in 1790, carried a case-load so light that some justices thought it scarcely worth their time. Today, the federal government's work-load is vast; in fact, the government payroll today exceeds the population of the United States in 1789. How have our institutions of government, designed in the eighteenth century, adapted to the requirements of the nineteenth and twentieth? How will they respond to those of the twenty-first? If the adoption of the Constitution was worthy of a solemn national debate, its adaptation to conditions, past, present, and future, seems equally deserving.

To facilitate this discussion, the Commission on the Bicentennial of the United States Constitution sponsors the College-Community Bicentennial Forums. Public awareness of the Constitution and its continuing importance can best be fostered by linking the political issues of the moment to its underlying principles and historical development. The idea of constitutional government is, in America, the foundation of all attempts to resolve questions of public policy. Today as in 1787 it provides the frame for all our ideas about politics. Yet the Constitution is often left out of current discussions of politics -- its influence, though profound, is unconscious. The College-Community Forums are designed to provide an avenue for public reflection about our institutions of government and to promote a deeper and more widely shared understanding of the Constitution among the general public. It is the Commission's hope that through these Forums, not only the institutions of government, but also the inquiring, experimental spirit of the Founding generation, can be enhanced for generations to come.

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THE JUDICIAL BRANCH AND THE CONSTITUTIONAL ORDER

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.

Alexander Hamilton
The Federalist No. 78, 1787

It is emphatically the province and duty of the judicial department to say what the law is.

John Marshall
Marbury v. Madison, 1803

A stated purpose of the Constitution is to "establish justice." To carry out this purpose Article III of the Constitution called for a federal judiciary that could dispense and administer justice in accordance with the principles on which the United States was founded. In shaping Article III, the framers of the Constitution applied their knowledge of history and other judicial systems, including those of Great Britain and of the states, in their quest to establish a suitable judiciary.

In 1787 there was no American federal judiciary to serve as the new national judicial system. The Articles of Confederation had not created any federal courts. Instead, committees of the Confederation Congress adjudicated disputes between states, and a special "Court of Appeals in the Cases of Capture" heard cases dealing with piracy, shipping, and admiralty law. Most other legal matters were left to state and local courts, which then as today saw to almost all of the nation's judicial business. By the mid-1780s it became clear to many Americans, however, that a new system of federal courts, with limited jurisdiction, was needed; among other things it was thought this would minimize the effect of local or regional interest, as when a citizen from Boston or Richmond had a case in a distant state.

The delegates to the Constitutional Convention of 1787 were ambivalent, however, about creating a strong federal judiciary. It was a step into the unknown, but they agreed that some kind of a

national judiciary was necessary. Yet their study of history had also shown that the idea of a national judiciary should be approached with caution. Without a truly independent judiciary, several British monarchs had blatantly employed the judicial system to punish political enemies and impose their will in an arbitrary manner. The Stuarts' misuse of the Court of Star Chamber was well known to the American leaders. Conversely, they were also familiar with the fruits of the "Glorious Revolution" that had established an independent judiciary, to hold office "during good behavior." The delegates decided to emulate the British attempt to separate the judiciary from the other branches of government. Nevertheless, the perception of Britain's abuse of judicial power, especially during the American Revolution, made the delegates want to make the principle of an independent judiciary even more secure in the new Constitution.

Article III of the Constitution reflected these concerns. The delegates left many of the specifics of structure and jurisdiction of the federal judiciary for the new Congress to resolve. The Constitution addressed only those aspects of the federal judiciary that were necessary to create and maintain fair and independent courts. It called for the creation of a federal judiciary headed by a Supreme Court, and defined areas of original jurisdiction for that body, allowing for the creation of "such inferior Courts as the Congress may from time to time ordain and establish," granting the Congress power to define jurisdiction, subject to Section 2 of Article III.

Important in securing judicial independence were the two provisions of the Constitution that judges' salaries not be reduced and that judges be appointed to the bench "for life," i.e., "during good behavior." These would ensure that judges would not be subject to the whims of the legislative or executive branches, or, indeed, of popular opinion or polls purporting to measure public opinion as is done in modern times. Moreover, the appointment process, requiring nomination by the President and Senate confirmation, assured that the judges would be persons of integrity, independence, and learning. As additional safeguards against judicial tyranny, treason -- the only crime mentioned in the Constitution -- was carefully defined, and the delegates affirmed that "the Trial of all Crimes, except in Cases of Impeachment; shall be by Jury." The size of juries was not defined.

The Constitution was silent on several important issues directly relating to the establishment of the federal judiciary. It

gave Congress the power to create and alter the particular courts to meet needs and define the purpose and jurisdiction of the courts, excepting the areas specifically within the original jurisdiction of the Supreme Court. Even the number of members of the Supreme Court was left for Congress to determine. It began with six and is now nine.

Although Antifederalists and some influential leaders, including Thomas Jefferson, regarded the new federal judiciary as a potentially dangerous instrument, the Federalists emphasized its powerlessness in relation to the other branches. Indeed. in 1787 Alexander Hamilton wrote in *The Federalist*:

> *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 a capacity to annoy or injure them.... The judiciary... 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. (The Federalist No. 78)*

The assumption seems to have been that this "least dangerous" branch would interpret and apply the Constitution, laws and treaties, but that judicial power would be limited as compared with that of the legislature and the executive.

Once the Constitution was ratified, Congress quickly passed legislation instituting the federal court system. The Judiciary Act of 1789 established the structure of the system, creating the Supreme Court and two types of lower judicial bodies, Circuit Courts and District Courts, but provided no judges for the Circuit Courts. The Supreme Court was given authority to hear and decide appeals from the lower federal courts, the ad hoc appellate courts, and the state courts on matters concerning federal law and the Constitution.

Because the government created by the Constitution was new, the Supreme Court had few cases to review in the early years of its existence. In fact, the full Court decided only fourteen cases in its first ten years. The Justices were kept busy, however, because of the requirement that they "ride circuit." Each Justice was

assigned to travel twice a year to hear cases on trial or appeal in an assigned circuit. For some the requirement was more onerous than for others, but all agreed that it was the least desirable aspect of serving on the Court. For example, the Justices assigned to the Southern circuit had to travel over 2,000 miles under primitive conditions, including poor roads, inclement weather and shoddy accommodations. They soon asked Congress to eliminate this feature of their jobs, but circuit riding remained a part of a Supreme Court Justice's responsibilities until 1891 when judgeships were provided for the Courts of Appeals.

It is not surprising, therefore, that appointment to the Court did not possess the allure it was later to acquire. John Jay, the first Chief Justice, resigned his post, preferring to be Governor of New York. Jay was offered the position of Chief Justice again, after the resignation of the third Chief Justice, Oliver Ellsworth, but he declined, asserting that the Supreme Court "would not obtain the energy, weight, and dignity which are essential . . . nor acquire the public confidence and respect which. . . it should possess."

The fourth Chief Justice, John Marshall, was to change all that. When Marshall began his tenure as Chief Justice in 1801, the Court was the relatively weak institution Jay described; when Marshall died 34 years later, the Supreme Court had established its place as a powerful co-equal branch, and, for all practical purposes, the final authority on the meaning of the Constitution. The importance of the Marshall years can hardly be overstated; indeed, Justice Oliver Wendell Holmes, Jr., wrote, "If American law were to be represented by a single figure, skeptic and worshipper alike would agree without dispute that the figure could be one alone, and that one, John Marshall." For a century and a half John Marshall has been identified as "the great Chief Justice."

Many important cases were heard by the Court in Marshall's tenure, but the case which did more to establish the role and power of the Supreme Court than any other was *Marbury v. Madison* (1803). There Marshall asserted the Supreme Court's power of judicial review by declaring an Act of Congress unconstitutional and void. In subsequent cases, the Court's power of judicial review was also extended to actions of the executive branch, as well as to state laws and the decisions of state courts. Judicial review, as articulated by John Marshall, became the Court's most formidable

instrument for checking the actions of the legislative and executive branches.

It had been assumed by such different commentators as Alexander Hamilton and Thomas Jefferson that the Court would exercise some power of review over federal legislation. Except for the broad language of Article III, Section 2, the power was not otherwise defined in the Constitution. The Court was on firmer ground when it began to review state laws. Specific prohibitions had been placed on the states in the Constitution, and the Court was the most logical body to enforce them. In its first century, instances of Supreme Court review of state legislation often had to do with prohibitions on states "impairing the obligation of contracts" or with setting the boundaries between state and federal jurisdiction over interstate commerce.

During the 19th and 20th centuries, the federal court system slowly evolved to meet the needs of the expanding nation. As new states joined the Union, they were added to the existing circuits or new circuits were created. At first, as Congress created new circuits, it also added members to the Supreme Court to meet growing needs. Eventually, in 1891, Congress recognized the need to end the requirement that the Justices ride circuit, and created additional judgeships to review appeals from the District Courts. The current federal court system consists of the Supreme Court; the United States Courts of Appeals; and federal District Courts, which are trial courts of general federal jurisdiction. There are also other federal courts, created under Article I, that deal with specialized issues, including the United States Court of International Trade, the United States Claims Court, the United States Tax Court, and the Court of Appeals for the Federal Circuit.

The federal judicial system, though extensive, deals with only a small fraction of the number of cases that are heard in state court systems. Indeed, 97% or more of all civil and criminal cases in the United States are heard in state or local courts. These state court systems are integral parts of the entire judiciary of the United States, and -- at least in the original thirteen states -- have records of practice and precedent that date from more than a century before the Constitution. There is much more to the judicial system than just the Supreme Court, and most judicial business is disposed of without fanfare. Yet, for better or for worse, public awareness of what courts do derives from the controversial decisions of the courts that receive the greatest amount of media attention.

The very nature of the Supreme Court's function is to try to resolve difficult questions as to what the Constitution means and what Congress provides in the laws it enacts. The Supreme Court does not reach out and pick cases; it reviews cases which have been decided in lower federal courts and state court decisions on federal constitutional questions. There are approximately 30,000 local and state judges, magistrates, and justices of the peace, whose decisions could potentially reach the Court through the appellate process.

What should guide federal judges in their interpretations of the Constitution? Is consideration of the original intent of the men who framed it and its subsequent amendments controlling or crucial? Is a consideration of the statements and speeches of the delegates to the Constitutional Convention an appropriate factor to guide federal judges' decisions on contemporary issues? Should the federal judiciary consider factors other than "original intent" in interpreting the Constitution? John Marshall said it is "a living Constitution." What does that mean?

Some have claimed, with Jefferson, that the Constitution should be interpreted through the democratic process: that the elected representatives of the people should make the policies, and the courts should resist invalidating them, except in compelling or extraordinary circumstances. Should judicial deference to the legislative function be carried to the point of rejecting the intent of the framers to create three co-equal branches of government? Should the approach to constitutional interpretation be, as one observer claims, "in the only way that we can: as twentieth century Americans"? Does this method of Constitutional interpretation, as some suggest, allow the judiciary too much latitude in interpreting the Constitution?

The great changes in criminal procedure that have occurred in the last three decades have been termed by some "the due process revolution." Supreme Court opinions altered the way in which law enforcement agencies and local and state courts carry out their responsibilities by prescribing new procedures for treating those accused or suspected of committing crimes. Assurance of the right to counsel and the right to remain silent are the most important of these guarantees. Although their applications have been narrowed in recent years, these changes have affirmed that the accused have certain rights that must be protected by both the federal government and the states. Do these decisions protect the criminal at the expense of society? Has the "due process

revolution" extended the Constitution beyond a reasonable protection of the rights of the accused, as some claim?

The procedure for selecting and confirming federal judges has also been controversial in recent years. The Constitution provides for selection of federal judges by the President, with the "advice and consent of the Senate." Although the Senate has traditionally exercised some deference towards the President in assessing nominees to the federal bench, periodically we have seen acrimonious conflicts over judicial nominations. How should the President choose a nominee for the federal courts? Should he seek nominees primarily from among those who share his political opinions? How should the Senate carry out its Constitutional responsibility to advise and consent to the nomination of a federal judge? Should Senators solely consider the nominee's legal qualifications, or should partisan considerations also influence the Senate's confirmation or rejection of a judicial appointment? Has the nomination process been unduly affected by media coverage and public pressure?

The federal courts today are busier than ever before, and their workload increases each year. Today about 150 Supreme Court cases each year are the subject of signed opinions, a number which has slowly increased over 50 years. The number of cases on the docket, however, has greatly increased. There were 1,321 cases on the Supreme Court docket in 1950; 2,296 in 1960; 4,212 in 1970; 311 in 1981; and 5,657 in 1988. The explosion of federal litigation and cases seeking Supreme Court review, and the increasing gap between the number of cases on the Supreme Court docket and the number for which oral arguments are actually heard, has created a severe burden in judicial case loads, and has led to a number of proposals for change.

Perhaps the most frequently suggested reform argues for the addition of a new Appeals Court between the present Courts of Appeals and the Supreme Court. This court would decide cases in which the different Circuits had arrived at different decisions or rulings in the interpretation of statutes. Other suggestions include increasing the number of Justices on the Supreme Court, and reducing the number of cases decided by the full Court. Still others point out that the Court's discretion over the number of cases it hears remains vast, and that the Justices could hear proportionally fewer cases if they so desired.

Do we need more courts and more judges? Or is the answer to e mass of litigation to be found, for example, in alternate

methods of resolving disputes and greater deference to legislatures? Does the great increase in the number of legal regulations, procedures, and rules produce only confusion about what the law is? And in a republic, where the law is, at least in theory, the result of a deliberative, legislative process, does the increasing amount of judge-made law pose a threat to popular control of the legislative process? Are legislative bodies, especially Congress, using appropriate care in the drafting of law?

The Supreme Court has been described as "the quiet of a storm center." As we celebrate the bicentennial of the establishment of the federal judiciary, we must consider these and other pressing questions concerning the courts of the United States. In *The Federalist* James Madison commented:

> *Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger. . . . (The Federalist, No. 51)*

How well is our judiciary fulfilling the "end of government" reflecting the principles embodied in our Constitution?

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"I have always been persuaded that the stability and success of the National Government, and consequently the happiness of the people of the United States, would depend in a considerable degree on the Interpretation and Execution of its laws. In my opinion, therefore, it is important that the Judiciary system should not only be independent in its operations, but as perfect as possible in its formation."

George Washington
To Chief Justice Jay
and Associate Justices
April 3, 1790

"The American judicial system in our federal structure is a pyramid with the State and Federal trial courts at the base where more than 95% of all cases are disposed of. The unique duality has worked effectively for two hundred years."

Warren E. Burger
Chairman

The Commission has also printed a College-Community Forums Handbook for Forum organizers and booklets on the Legislative and Executive Branches. A booklet on the Bill of Rights is currently under development. To obtain copies of any of the Forum publications, call or write:

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Commission on the Bicentennial of
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