

Judicial Independence



THERE MAY NOT BE A MORE important concept in the American constitutional form of government than the notion of an independent judiciary. The notion is straight forward, and yet we need to be reminded from time-to-time of its deep roots and essential function in our constitutional democracy.

We need first to remember that our Constitution was a second try at a governing document. The Articles of Confederation, proposed at the time of the Declaration of Independence and not formally adapted until after the War of Independence, created a loose confederation which was on the road to failure when Alexander Hamilton and others engineered a conference which ended in the Constitution which governs us today. The convention ostensibly was called to amend the Articles of Confederation, but, in reality, the goal was to write a wholly new document.

Second, the more radical democratic ideas of Thomas Paine (*Common Sense*) did not prevail. The Constitution limits the power of the people as well as that of the government. Our Founding Fathers were steeped in the theories of governance articulated by the great minds of the time. They were working from careful consideration of the theories of governance which wonderfully were the meat and grist of intellectual thought of the day. They wrestled mightily to make the theories into a practical document – our Constitution. Moreover, it was a great time of constitution writing – each of the states had its own constitution and many of the Founders had experience in their home states on how the task could best be carried out. While we think of writing a constitution as a rare and wonderful event, they were doing quite a lot of it!

Third, the tension between liberty and government was understood in theory and in practice. The Constitution embodies the tension between the freedom of the people and the institutions of government. Thomas Paine may have been pushed aside but his spirit lingered. The “people” clamored for liberty. But good governance held that the will of the people must be balanced against protection for the minority and

the rule of law. This is achieved in part in the Constitution by balancing three branches of government: the legislative (U.S. Constitution Article I), the executive (U.S. Constitution Article II), and the judicial (U.S. Constitution Article III). Article III Section 1 provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behavior, and shall, at stated Times, receive for their Services Compensation, which shall not be diminished during their Continuance in Office.

It is the essence of our democracy that the judiciary is established as a third and co-equal branch of government. The importance of this was clear to the Founding Fathers, steeped in the political theory of the day. Once the Constitution was finally written, it was not at all a foregone conclusion that it would be approved by the requisite number of state conventions called for that purpose. After all, the Constitutional Convention was called on the pretense of refining and improving the Articles of Confederation. It met in secret. The resulting document created a government much more centralized than that with which many people felt comfortable. They had fought a war against a monarchy and most had no desire to return to a strong centralize form of government.

Alexander Hamilton, John Jay and James Madison wrote a series of 83 pamphlets under the pseudonym Publius explaining the Constitution and arguing for its adoption. (Both pamphlets and pseudonyms were common in that day – what a glorious time it must have been.) Hamilton had the foresight to gather the articles together and publish them as a group – *The Federalist* or *The Federalist Papers*. Today, we frequently look to *The Federalist* to find the meaning the Founding Fathers ascribed to various parts of the Constitution. *The Federalist* was written by the most brilliant minds of the time, who had participated in

drafting the Constitution, and was virtually contemporaneous with the Constitution itself. What *The Federalist* says about judicial independence is simple and straight forward in *Federalist* No. 78 - 83.

Federalist No. 78 (written by Hamilton) discusses the judiciary as established by the Constitution. First reminding us that the judicial branch has neither force (as the executive) nor will (as the legislative), “but merely judgment.” As long as the judiciary remained truly distinct from the other branches, the freedom of the people would be protected: “For I agree that ‘there is no liberty, if the power of judging be not separated from the legislative and executive powers.’” (Citing Montesquieu, *Spirit of Laws*, vol.1, page 186.)

Hamilton continues: “The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.”

Hamilton goes on to argue that the Constitution being the supreme law of the land is superior to the momentary whims of a legislative body. If there is a conflict between the Constitution and legislative enactment, the Constitution controls because it is the ultimate intention of the people. It is not that the judiciary is superior to the legislative branch, but, rather, that the people as their will is expressed in the Constitution, are superior to both. “The interpretation of laws is the proper and peculiar province of the courts.” This does not mean that the courts are superior to the legislature. “It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes,

stands in opposition to that of the people declared in the Constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.” “The courts must declare the sense of the law...” The courts, Hamilton argues, are “the bulwarks of a limited Constitution against legislative encroachments . . .”

Therefore, this independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctions, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the mean time, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

While the people have the power to change their Constitution, until they do so formally, the written constitution controls (even over the otherwise expressed desires of the populace) and the judiciary is its guardian. Therefore, the independence of the judiciary is essential.

Hamilton continues: “But it is not with a view to infractions of the Constitution only, that the independence

of the judges may be an essential safeguard against the effects of occasional ill humours in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may imagine. The benefits of the integrity and moderation of the judiciary have already been felt in more states than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be tomorrow the victim of a spirit of

injustice, by which he may be a gainer to-day And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress.”

In Federalist No. 80, Hamilton continues this argument. What good are limits on the authority of the legislature if there is no method of enforcing them? It is the role of the judiciary to “restrain or correct the infractions” of the legislature. “If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number.”

Therefore, when *Marbury vs. Madison*, 5 U.S. 137 (1803) established the principal that the court has the authority to interpret the Constitution and issue a writ against the executive branch based thereon, Chief Justice Marshall argues along the same lines as Hamilton in *The Federalist*. The legislature cannot oversee itself if liberty is to be preserved. That is the job of the judicial branch. “It is emphatically the province and duty of the judicial department to say what the law is.” Where a law is in opposition to the Constitution, the Constitution, being superior, controls.

“Certainly all those who have framed a written constitution contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void.” [5 U.S. 137, 177.] The constitution being supreme, the court is bound to follow it (and issue the writ against the executive branch). “Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument.” [5 U.S. 137, 178.]

To bring us back to the present day, *Marbury vs. Madison* arose when John Adams appointed several magistrates on the eve of leaving office as president. James Madison, as Secretary of State, refused to issue their commissions and they sued for a writ. Much the same thing is being played out in Chicago as I write this. The governor has appointed someone to a vacant senate seat. The Secretary of State of Illinois has refused to certify the appointment.

By the way, *The Federalist*, makes great bed time reading. Go get a copy and let me know what you think. 🐱

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