UNLOCKING THE FEDERALIST PAPERS

Edited by

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We attempt in this volume to accomplish what the subtitle suggests: unlock the full wisdom, thought and power of the *Federalist Papers* to countless generations of young Americans.

6

The Judiciary has Neither Force nor Will, but Merely Judgment

The Independent Judiciary

by John Shu

Federalist Papers referenced in essay: #27, 78, 79, 81

A. As Alexander Hamilton wrote in *Federalist* No. 78, *"WE PROCEED now to an examination of the judiciary department of the proposed government."*

B. The U.S. Constitution does not contain much text about the U.S. Supreme Court or any other federal court. Article III is the shortest of the first three articles, and only the first two sections of Article III cover the judiciary's structure, even though the judiciary is the third and co-equal branch of our national government. Federal judges— those nominated and confirmed under Article III— are responsible for interpreting the law and the U.S. Constitution. The U.S. Supreme Court is the highest court in the land, but the Constitution only specifically mentions the chief justice in Article II, not Article III — and that is with respect to presidential impeachment. The Constitution does not even specifically mandate the size of the U.S. Supreme Court, which currently has eight associate justices and one chief justice. In the past the number of Supreme Court justices has fluctuated from as few as five to as many as ten. Some constitutional scholars believe the framers of the proposed constitution put the judiciary in Article III because it was to be the weakest of the three branches, although

in some ways the federal judiciary has enormous authority and power.

C. The Constitution does not mandate age, residency, or citizenship requirements for federal judges as it does for elected officials. In fact, the Constitution does not even specifically mandate a federal judge need be a lawyer, although practically speaking it probably would be best for a judge to first have been a lawyer. While all Supreme Court justices were lawyers, not all previously served as judges.

D. The U.S. Constitution requires the president of the United States to nominate judicial candidates, and the Senate, through its "advice and consent" role, confirms or rejects them. Once confirmed, federal judges have lifetime tenure during "good behavior" and their salaries "shall not be diminished during their continuance in office." The House of Representatives may impeach a judge, and if impeached, the Senate would preside over the trial.

E. Article III courts consist entirely of certain federal courts, namely the United States Supreme Court and the "inferior courts" that Congress established as Article III courts, currently composed of the thirteen U.S. Courts of Appeals, the ninety-four U.S. District Courts, and the U.S. Court of International Trade. The U.S. Supreme Court has original jurisdiction "in all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party" (Article III, Section 2, Clause 2 of the U.S. Constitution).

F. Alexander Hamilton wrote the *Federalist Papers* about the judicial branch. In them, he discussed the importance of an independent judiciary and of constitutional supremacy. In Hamilton's view, federal judges are the "*faithful guardians*" of the "*rights of the Constitution, and of individuals* (No. 78)." Hamilton

also viewed the Constitution as the fundamental law which is supreme to any legislative statute and the most accurate expression of the people's will. *"[The Constitution] will become the SUPREME LAW of the land; to the observance of which all officers, legislative, executive, and judicial in each State, will be bound by the sanctity of an oath* (No. 27)."

G. Hamilton discusses the judiciary's place in government and the importance of judges being financially independent from both the executive and legislative branches, which would insulate them from pressure from the executive branch, the legislative branch, or the popular vote. This is why the Constitution, in Article III, Section 1, states, "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Thus, a federal judge's salary may not be reduced as long as he or she is in office, and federal judges hold their jobs for life, assuming "good Behaviour." The House of Representatives may impeach a federal judge, and when that happens the Senate oversees the trial.

H. As Hamilton puts it, using "good behavior" is the correct standard to use for judicial tenure because

> *[t]he standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.* (No. 78)

Hamilton also explains why judges with lifetime tenure must be financially independent of the executive and legislative branches so they can do their jobs without undue influence. Hamilton notes that, next to lifetime tenure,

> *nothing can contribute more to independence of the judges than a fixed provision for their support .... In the general course of human nature, A POWER OVER A MAN's SUBSISTENCE AMOUNTS TO A POWER OVER HIS WILL. And we can never hope to see realized in practice, the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter.* (No. 79)

Thus, Congress can increase the judges' salaries but never reduce them.

I. Forcibly removing a federal judge from office is as difficult as removing a president, perhaps even more so, requiring the House of Representatives to impeach the judge and the Senate to try and convict the judge. Combining lifetime tenure, financial security, and the difficulty of removing a judge at whim allows judges to be insulated from pressures of the executive and legislative branches. They are also freed from the pressures of popular politics, which is sometimes described as tyranny of the majority. Hamilton believed that an independent judiciary would protect the rights of individuals when threatened by the majority. Hamilton and the other Framers were astute enough to see that having an impartial judiciary to prevent the other two branches from passing and executing laws that harm individual liberties or harmed the constitutionally safeguarded republican government, was essential. The independent judiciary is free to preserve the liberty of citizens and states.

J. Hamilton also noted that judges should have lifetime tenure because no one could predict or reliably say at what age a judge could no longer serve. Moreover, some laws or decisions require several years before their full meaning and effect can be appreciated. A short or unsure term of judicial office would likely discourage talented and honest people from accepting an appointment to the Article III courts because, for example, they would be reluctant to give up lucrative private law practices to accept a temporary or short-term judicial appointment.

K. In No. 78, Hamilton wrote if *"the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments"* lifetime tenure for federal judges is essential for the *"independent spirit in the judges which must be essential to the faithful performance of so arduous a duty."* Hamilton noted many states already had constitutions where their respective judiciaries were distinct and independent bodies, not part of the legislature. An independent judiciary also shields the courts from factionalism within Congress, so that, as Hamilton puts it, there would be less *"reason to fear that the pestilential breath of faction may poison the fountains of justice* (No. 81)."

L. In Hamilton's view, judges are required to void legislative and executive acts that are contrary to the Constitution. He noted an independent judiciary protects individual rights from the executive branch as well as from the legislative branch. Without the judiciary, Hamilton wrote *"all the reservations of particular rights or privileges would amount to nothing* (No. 78)." Hamilton saw the courts to be an intermediary between the people and the other two branches so, among other things, the courts could keep the other branches within their constitutional limits. As Hamilton wrote, *"The interpretation of the laws is the proper and peculiar province of the courts* (No. 78)."

M. In Hamilton's view, the courts are responsible for determining what a law means, or interpreting the law. Hamilton believed federal judges may not "legislate from the bench," meaning they may not substitute their own policy or political preferences for the legislature's. As Hamilton wrote in No. 78, *"The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGEMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body."* Thus, Congress passes legislation, and the president either signs or vetoes it, usually in response to constituents' demands. The judges are to interpret the laws, apply those laws to the particular facts in the litigation, and decide whether the laws are constitutional.

N. In the Framers' eyes, judges were not to be affected by popular will, unless directly expressed in the Constitution itself. In Hamilton's view, this meant the judiciary was the branch most closely tied to the Constitution, which is both a recipient and source of superior law. Hamilton also notes, however, *"By a limited Constitution, I understand one which contains specific exceptions to the legislative authority* (No. 78)." Hamilton's use of the term "limited" instead of "limiting" suggests he viewed certain principles that secure individual rights and the protection of the states, along with certain restrictions on the government branches, limited by the Constitution itself.

O. The Constitution neither explicitly grants nor forbids the power of judicial review, which is the power of the federal courts to rule on the constitutionality of laws. The *Federalist Papers*, however, discuss judicial review. For example, in No. 78, Hamilton wrote the federal courts have a duty to *"declare all acts contrary to the manifest tenor of the constitution void."* Hamilton further discusses judicial review in No. 80, writing that *"there ought always to be a constitutional method of giving efficacy to*

constitutional provisions …. This power must either be a direct negative on the State laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union [i.e., the Constitution].” Because the proposed constitution did not grant the national government the power to veto state laws, Hamilton believed the federal courts had the power to determine the constitutionality of law.

P. *Marbury v. Madison* (1803) was the first time the U.S. Supreme Court invalidated a federal law by declaring it unconstitutional. Chief Justice John Marshall’s decision established the court’s right of judicial review under Article III of the Constitution.

Q. *Marbury* is important because the protections and limitations that the Constitution imposes on Congress and the president would be ineffective if the courts did not have the power to declare laws unconstitutional. Hamilton recognizes in No. 81 that critics of the proposed constitution feared the Supreme Court’s authority would be greater than the legislature’s, especially because the Court’s *“decisions will not be in any manner subject to the revision or correction of the legislative body.”* This concern still exists today. Hamilton responds to the critics by noting the legislature has the power of confirmation, or “advice and consent,” in the selection of judges, and also has the power of impeachment and conviction to remove judges from their offices.

R. Hamilton never viewed the judiciary as “superior” to the legislature. Hamilton’s view was the Constitution was the ultimate expression of the people, and thus *“the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents* (No. 78).” Hamilton believed the judiciary, by interpreting the laws, would protect the people by preventing the legislature from overreaching or exceeding its constitutional

powers and encroaching upon individual rights.

S. Hamilton foresaw *"particular misconstructions and contraventions of the will of the legislature may now and again happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system* (No. 81)." Hamilton viewed the legislature's power of impeachment as a significant deterrent against judges usurping their authority, along with the judiciary's *"comparative weakness, and from its total incapacity to support its usurpations by force* (No. 81)."

T. Hamilton, then, viewed the judiciary as the "weakest of the three departments of power" and

> *the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution … 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.* (No. 78)

U. Throughout American history, the judiciary has been both ignored and supported by the other two branches, as well as the states. In 1832, President Andrew Jackson, upset at the Supreme Court's decision in *Worcester v. Georgia*, reportedly said "[Chief Justice] John Marshall has made his decision, now let him enforce

it!" Of course, Marshall had no way of enforcing his decision and Jackson won the day. After the Supreme Court decided the landmark case of *Brown v. Board of Education* of Topeka in 1954, which struck down segregation, several southern governors refused to desegregate their state's schools. Eventually, Presidents Dwight D. Eisenhower and John F. Kennedy used the threat of military action to enforce the judiciary's decisions and orders.

V. Although the debate continues over the role and reach of the judicial branch, in general, most would agree the federal judiciary remains the guardian of the Constitution, and ideally interprets laws with a view towards preserving the Constitution for future generations.