

The Federalist Papers Summary and Analysis

by [Alexander Hamilton](#) and [John Jay](#) and [James Madison](#)

Essay 78

Summary

Hamilton begins by telling the readers that this paper will discuss the importance of an independent judicial branch and the meaning of judicial review. The Constitution proposes the federal judges hold their office for life, subject to good behavior. Hamilton laughs at anyone who questions that life tenure is the most valuable advance in the theory of representative government. Permanency in office frees judges from political pressures and prevents invasions on judicial power by the president and Congress.

The judicial branch of government is by far the weakest branch. The judicial branch possesses only the power to judge, not to act, and even its judgments or decisions depend upon the executive branch to carry them out. Political rights are least threatened by the judicial branch. On occasion, the courts may unfairly treat an individual, but they, in general, can never threaten liberty.

The Constitution imposes certain restrictions on the Congress designed to protect individual liberties, but unless the courts are independent and have the power to declare laws in violation of the Constitution null and void, those protections amount to nothing. The power of the Supreme Court to declare laws unconstitutional leads some people to assume that the judicial branch will be superior to the legislative branch. Hamilton examines this argument, starting with the fact that only the Constitution is fundamental law. To argue that the Constitution is not superior to the laws suggests that the representatives of the people are superior to the people and that the Constitution is inferior to the government it gave birth to. The courts are the arbiters between the legislative branch and the people; the courts are to interpret the laws and prevent the legislative branch from exceeding the powers granted to it. The courts must not only place the Constitution higher than the laws passed by Congress, they must also place the intentions of the people ahead of the intentions of their representatives. This is not a matter of which

branch is superior: it is simply to acknowledge that the people are superior to both. It is futile to argue that the court's decisions, in some instances, might interfere with the will of the legislature. People argue that it is the function of Congress, not the courts, to pass laws and formulate policy. This is true, but to interpret the laws and judge their constitutionality are the two special functions of the court. The fact that the courts are charged with determining what the law means does not suggest that they will be justified in substituting their will for that of the Congress.

The independence of the courts is also necessary to protect the rights of individuals against the destructive actions of factions. Certain designing men may influence the legislature to formulate policies and pass laws that violate the Constitution or individual rights. The fact that the people have the right to change or abolish their government if it becomes inconsistent with their happiness is not sufficient protection; in the first place, stability requires that such changes be orderly and constitutional. A government at the mercy of groups continually plotting its downfall would be in a deplorable situation. The only way citizens can feel their rights are secure is to know that the judicial branch protects them against the people, both in and outside government, who work against their interests.

Hamilton cites one other important reason for judges to have life tenure. In a free government there are bound to be many laws, some of them complex and contradictory. It takes many years to fully understand the meaning of these laws and a short term of office would discourage able and honest men from seeking an appointment to the courts; they would be reluctant to give up lucrative law practices to accept a temporary judicial appointment. Life tenure, modified by good behavior, is a superb device for assuring judicial independence and protection of individual rights.

Analysis

With a view toward creating a judiciary that would constitute a balance against Congress, the Convention provided for the independence of the courts from Congress. Hamilton opposes vesting supreme judicial power in a branch of the legislative body

because this would verge upon a violation of that "excellent rule," the separation of powers. Besides, due to the propensity of legislative bodies to party division, there is "reason to fear that the pestilent breath of faction may poison the fountains of justice." Hamilton, therefore, praises the Constitution for establishing courts that are separated from Congress. He is pleased to note that to this organizational independence there is added a financial one.

Another factor contributing to the independence of the judiciary is the judges' right to hold office during good behavior. It is in connection with his advocacy of that "excellent barrier to the encroachments and oppressions of that reprehensive body," that "citadel of the public justice," that Hamilton pronounces judicial review as being part of the Constitution. Judicial review is another barrier against too much democracy. Exercised by state courts before the Federal Convention met, and taken for granted by the majority of the members of the Convention, as well as by the ratifying conventions in the states, judicial review is expounded by Hamilton as a doctrine reaching a climax and a conclusion in this Federalist paper.

Starting out from the premise that "a constitution is, in fact, and must be regarded by the judged, as a fundamental law," Hamilton considers judicial review as a means of preserving that constitution and, thereby, free government. To be more concrete, when Hamilton considers the judiciary both as a barrier to the encroachments and oppressions of the representative body and as the citadel of public justice, i.e., the citadel for the protection of the individual's life, liberty, and property, he states that judicial review means a curb on the legislature's encroachments upon individual rights. Parallel to every denial of legislative power in essay seventy-eight goes an assertion of vested rights. Note that the Supreme Court did not ultimately grant itself the explicit power of judicial review until the case *Marbury v. Madison* in 1803.

Although he considers a power-concentration in the legislature as despotism, Hamilton does not perceive a strong judiciary as a threat to free government. He admits that individual oppression may now and then proceed from the courts, but he is emphatic in adding that the general liberty of the people can never be endangered from that quarter. When the judge unites integrity with knowledge, power is in

good hands. As the "bulwarks of a limited Constitution against legislative encroachments," they will use that power for the protection of the individual's rights rather than for infringements upon those rights.

Through judicial review vested rights are protected not only from the legislature, they are also protected from the executive. An executive act that is sanctioned by the courts and -- since it is the duty of the judges to declare void legislative acts contrary to the Constitution -- that is thus in conformity with the will of the people as laid down in the Constitution, cannot be an act of oppression.