New American

Written by **Joe Wolverton, II, J.D.** on November 6, 2020

Published in the November 23, 2020 issue of the New American magazine. Vol. 36, No. 22

The Supreme Court's Powers

On October 26, 2020,the same day the U.S. Senate confirmed by a vote of 52-48 President Donald Trump's nomination of Amy Coney Barrett to the U.S. Supreme Court, she was sworn in at the White House.

On that occasion, Donald Trump told her:

> Justice Barrett, as you take your oath tonight, the legacy of our ancestors falls to you. The American people put their trust in you and their faith in you, as you take up the task of defending our laws, our Constitution, and this country that we all love.

It is strange indeed that in a republic of 250 million citizens of voting age, the protection of their fundamental liberty should be declared by the president to depend upon the opinion of one unelected judge.

Strange, but true.

It wasn't intended to be this way, though. No, the men who drafted and ratified the current Constitution were by no means establishing an oligarchy, a government that would be under the control of men (and women) over whom the people could exercise no electoral control. That, they rightly believed, would be government without consent of the governed, and such a government was the antithesis of the republican form created by our patriarchs.

Knowing that our Founding Fathers would never have ratified a plan of government establishing rule by an unaccountable cabal of judges, the obvious question is, "What sort of Supreme Court did they intend to create?"

The first obvious and overt evidence of the intended power of the Supreme Court that the Framers and ratifiers of the U.S. Constitution left for us is found in Article VI of that document. Article VI reads, in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

In that list of those things that would, upon ratification, be afforded the respect of "supreme law of the land," you will not find opinions of the Supreme Court. That was not an oversight. The fact that the Framers purposefully left the decisions of the Supreme Court off the list of things constituting the

supreme law of the land should be persuasive. The 55 (some days more, some days less) men who sat in the State House in Philadelphia in 1787 would not have endured that sweltering summer only to have accidentally left off something that they intended to have supreme authority in the new government they were creating.

For additional evidence that these men never intended the Supreme Court's decisions to be granted the deference due the law, it should be recalled that at least 33 of the 55 delegates chosen to represent the states at the convention of 1787 were lawyers. A very commonly invoked legal maxim known to the lawyers in the room — as well as to many others who would have had substantial legal knowledge without ever practicing law (James Madison, for example) — should prove persuasive, as well.

Her duty: On October 26 at the White House, federal judge Amy Coney Barrett, nominated by President Donald Trump to the Supreme Court and confirmed by the U.S. Senate, took the oath of office, swearing to God that she would "defend the Constitution of the United States against all enemies, foreign and domestic." *(Photo credit: AP Images)*

That oft-cited legal maxim is: *Designatio unius (est) exclusio alterius*, meaning, "The designation of one (is) the exclusion of the other." In other words, the fact that Supreme Court decisions were not listed among those things that would be considered the supreme law of the land means that it was intentionally left off. Article VI omitted Supreme Court opinions, therefore, they were not to be viewed as part of the supreme law of the land.

A real-world application of this maxim will bring its meaning into clearer view. If you tell your son to take out the trash, sweep the garage, and walk the dog before he can go to his friend's house, you did not intend for him to have to wash the car before he headed out. If your son left after performing all the tasks you set out for him, you wouldn't ground him for not washing the car before he left. If you had intended for him to have to wash the car, you would have included that task on the list you gave him. You didn't, so it isn't required of him.

While anyone can look to the record of the debates of the convention of 1787 for evidence that the drafters of the Constitution did not intend the decisions of the national judiciary to rise to the level of legislation, I'll include here a few of the clearest statements to that effect.

On July 18, the convention took up the question of the federal judiciary and its powers. On that day, James Wilson of Pennsylvania declared his understanding of the relative authority of the legislature and

the judiciary: "Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet may not be so unconstitutional as to justify the judges in refusing to give them effect."

Read that again. Congress might pass some truly poor and, in fact, bad, laws, but that did not justify judicial interposition.

Wilson's understanding is seconded and supported by the very first sentence of the U.S. Constitution following the preamble: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Here again, had the Framers intended for the Supreme Court to have any hand in drafting or defining acts passed by Congress, they would have noted that authority in Article I (the list of legislative powers) or Article III (the list of powers of the federal judiciary). They did not, so it must be accepted that they did not intend to endow the courts with such authority.

Later during that same debate on the proposed power of the federal courts, Elbridge Gerry of Massachusetts said, "The power of making laws ought to be kept distinct from that of expounding the laws."

A quick jump over to Samuel Johnson's Dictionary of the English Language (1785 edition) reveals that the word *expound* means, simply, "to explain."

No one today or in 1787 would have believed that explaining is the same as making. I can explain the way the engine in a 1964 Chevy BelAir works, but I couldn't begin to make one.

Later that summer, when the subject of judicial authority was taken up again, Charles Pinckney of South Carolina summed up his understanding of the issue, saying that he "opposed the interference of the judges in the legislative business; it would involve them in parties and give a previous tincture to their opinions."

Are we not living Pinckney's prediction today? Would anyone care whether a Supreme Court judge was nominated by a Republican or a Democrat if judges weren't already tainted with the presumption of partisanship? The fact that the Barrett confirmation vote was along party lines is enough to testify to the truth of Pinckney's proposition.

Finally, on September 17, 1787, 39 of the 42 remaining delegates agreed to the final form of the U.S. Constitution, the form we know today. With that vote, the document was sent to Congress and then to the states for their consideration.

Thus began the several states' deliberation of the Constitution as delivered to them by the delegates in Philadelphia. It is during the months of these debates that we find many of the statements from advocates and adversaries of the Constitution as to the power we are to understand the federal judiciary to possess.

Beginning in October 1787, Alexander Hamilton, James Madison, and John Jay took up their pens and wrote a series of 85 letters expounding the Constitution and recommending its ratification. These letters are commonly known as *The Federalist Papers*. It is in these missives that we find the meaning of many constitutional provisions as understood by the men who supported its adoption. Accordingly, we can afford great authority to these letters.

In *The Federalist*, No. 78 Alexander Hamilton expounded on the intended relationship between the

judicial branch and the legislative branch created by the newly endorsed Constitution, and whether the former could override the will of the latter when it came to the laws of the United States:

> It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body. [Emphasis in original.]

Did you notice the restriction Hamilton recognized on judicial power? He declared that the Supreme Court (or any federal court) could not substitute its will for the intention of the legislature. The justices would be limited to judging the law, not making the law, even, Hamilton writes, if that law was "repugnant."

Later in that same essay, Hamilton doubled down on his demarcation of the limits on judicial power:

> 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 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.
>
> This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." [Emphasis in original; the statement quoted by Hamilton is from Montesquieu's *Spirit of the Laws*.]

Written by **Joe Wolverton, II, J.D.** on November 6, 2020

Published in the November 23, 2020 issue of the New American magazine. Vol. 36, No. 22

Limitations: John Jay was the first chief justice of the United States and co-author of the essays known as ***The Federalist Papers***. In those essays, the limited role of the federal judiciary was explained, including the prohibition on any law-making from the bench. *(Photo credit: The National Gallery of Art)*

Could there be any clearer condemnation of the modern behavior of the federal courts? Federal judges today most certainly *do* "annoy" and "injure" our rights, regardless of the plain and printed intent of the men who drafted the U.S. Constitution!

While these expositions should be enough to define the metes and bounds of the judicial branch created by the current Constitution, there were those of the founding generation who worried that those limits weren't as clearly marked as the proponents professed.

The men who opposed the ratification of the proposed Constitution, fearing that the document delegated too much power to the national government, are called the Anti-Federalists. Most wrote under pseudonyms. One of the most prolific and persuasive of those anonymous authors is Brutus.

In Brutus' 11th letter (published in January 1788), the author predicted tyranny if the judiciary escaped its bounds and gained the power to oppose the legislature:

> When the courts will have a precedent before them of a court which extended its jurisdiction in opposition to an act of the legislature, is it not to be expected that they will extend theirs, especially when there is nothing in the constitution expressly against it? And they are authorized to construe its meaning, and are not under any control?
>
> This power in the judicial, will enable them to mold the government, into almost any shape they please.

Again, readers, can anyone cogently and convincingly argue that the federal courts have not molded the Constitution into a new shape, a shape that would be unrecognizable to the Founders?

I will conclude with statements from James Madison and Thomas Jefferson.

James Madison has been given the honor of being called "The Father of the Constitution." His authority in defining constitutional powers is nearly irrefutable, given that he not only was present every day of

the Convention of 1787, but was a delegate at the Virginia ratifying convention and was the member of the First Congress to propose the Bill of Rights.

In 1800, Madison published a document known to history as the "Report of 1800." In that paper, Madison addressed the issue of power placed by the Constitution in the judiciary:

> However true therefore it may be that the Judicial Department, is, in all questions submitted to it by the forms of the constitution, to decide in the last resort, this resort must necessarily be deemed the last in relation to the authorities of the other departments of the government; not in relation to the rights of the parties to the constitutional compact, from which the judicial as well as the other departments hold their delegated trusts. On any other hypothesis, the delegation of judicial power, would annul the authority delegating it; and the concurrence of this department with the others in usurped powers, might subvert forever, and beyond the possible reach of any rightful remedy, the very constitution, which all were instituted to preserve.

No, no, no: In his "Report of 1800," James Madison explained that the Constitution would be subverted "beyond the possible reach of any rightful remedy" if the Supreme Court were considered the final and authoritative word on the constitutionality of a law. *(Photo credit: LibraryofCongress)*

In case there was anyone lost in the weeds of his syntax, what Madison said was that if we were to accept that the Supreme Court (or any federal court) had the power to define the limits of its own power, then we believe that there truly are no limits of that authority and that was most affirmatively *not* the will of the Framers of the Constitution.

Think about it: If we turn to the justices of the Supreme Court to have the final word on whether abortion, gun control, federally mandated health insurance, marriage, or life itself are legal in the United States, we simultaneously have granted to that body unlimited power over everything dear to human existence.

This was never intended.

Next, consider this statement by Thomas Jefferson on the danger of placing liberty at the mercy of even

the most trusted, respected, religious, and right-minded federal judges:

> To consider the judges as the ultimate arbiters of all constitutional questions: a very dangerous doctrine indeed and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privileges of their corps. Their maxim is '*boni judicis est ampliare jurisdictionem*,'[Good justice expands its jurisdiction] and their power the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control. The Constitution has erected no such single tribunal knowing that, to whatever hands confided, with the corruptions of time and party its members would become despots. It has more wisely made all the departments co-equal and co-sovereign within themselves.

So, what did the Framers intend that federal judges would do?

The relevant part of the U.S. Constitution listing the federal judiciary's powers is Article II, which readers should read on their own. But the Framers (and others of the Founding Generation) had their say as well.

As noted law professor Raoul Berger wrote in his influential book *Government by Judiciary*, "The judicial role, it cannot be unduly emphasized, was limited to policing constitutional boundaries" — and no more.

But how was the judiciary to be kept in check? The answer: through one of the chief strengths of the U.S. Constitution — the check and balance given to each branch over its sister branches.

So, how is the Supreme Court checked? Congress and the president may pass and sign a bill into law. If that law is thought by some to be unconstitutional, then that law is presented to the federal judiciary for constitutional analysis. If the law is judged constitutional, then no further action is taken. The law is enforced as every other constitutional law.

If, however, the federal judges declare that in their opinion the law is unconstitutional, then the matter was meant to return to the legislature (Congress), where representatives and senators would decide if they should take the Supreme Court's advice (opinion) and alter the text of the law, or whether to ignore that opinion.

The Supreme Court, through issuing an opinion that a law is unconstitutional, checks the legislature and the executive. The belief of the Founders was that such a check would generally give pause to the president and Congress, convincing them that they should, in the name of being bound by the Constitution, re-work a bill. Whether they actually do it or not, is a risk we run as a republic where laws are written, passed, and executed by flawed people, some of whom may decide to act tyrannically.

Moreover, if, let's imagine, a judge or a group of judges begins issuing opinions that laws passed by Congress and signed by the president are unconstitutional, how are such judges to be prevented from usurping the authority of the legislature and the executive? Article II, Section 4 combined with Article III, Section 1 reveals the answer.

Judges who trespass beyond the borders of their constitutional authority into the territory of authority of the other branches may be impeached by Congress. The standard for impeachment is "good

behavior." What does that mean? Good behavior, as that phrase is used in the Constitution, would be behavior whereby one keeps within the boundaries of his authority. To usurp powers not granted to him would be bad behavior for a judge.

What it says: Article VI of the U.S. Constitution clearly defines the federal acts that states should accept as the supreme law of the land: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States." Purposefully missing from that list: opinions of the Supreme Court. *(Photo credit: artisteer/iStock/GettyImagesPlus)*

Finally, I offer the following quotes from the men who framed the Constitution or who played a significant role in its ratification as to what they intended to be the legitimate constitutional role of federal judges. These statements, when read with the material above, should illuminate for the reader the scope of the Supreme Court's authority, thus revealing the real threat posed to the Constitution and to the liberty it was designed to protect by federal judges on any level who take to themselves the powers granted to the legislature or to the executive.

James Wilson said that Congress would be kept inside its constitutional cage "by the interposition of the judicial department."

Oliver Ellsworth said the court would be a "check" on any attempt by legislators to "overleap their limits."

Alexander Hamilton declared that the purpose of the Supreme Court was to serve as "bulwarks of a limited Constitution against legislative encroachments."

John Marshall wrote, "Courts are mere instruments of the law and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law."

To sum up, then, the power of the Supreme Court is to check and balance the other two branches, opining on the constitutionality of the acts of the other two branches. There is no power in the Supreme Court (or any federal court) to usurp the powers granted to the other two branches of the federal government. As Thomas Jefferson said, "If [power is boundless] then we have no Constitution. If it has bounds, they can be no other than the definition of the powers which that instrument gives."

As with all questions pertaining to the limit of the federal government's power, the only true check is the states who created the federal government in the first place. If all three branches of the federal government should combine to deny the people of their rights through the passage of unconstitutional acts, programs, or policies, the states have the power and the duty to stop such tyranny at the state border. At the end of the day, vigorous and active state sovereignty is the only reliable restraint on federal overreach, including that of the Supreme Court.

Congratulations to Justice Amy Coney Barrett. May she always be faithful to the oath she swore to God to be faithful to the Constitution, and may Americans never ask her to violate the boundaries of her constitutional authority by requiring her to decide questions never meant to be within the purview or power of the Supreme Court of the United States.

Written by **Joe Wolverton, II, J.D.** on November 6, 2020
Published in the November 23, 2020 issue of the New American magazine. Vol. 36, No. 22