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The Judiciary: Nine Justices and the Last Word



Dear United States of America,

One of the things that strikes a European student of American law like myself back in the day – and it struck me quite forcefully in Charlottesville – is how much of the constitutional order depends on an institution that the Constitution itself describes in fewer words than almost anything else. Article III, which establishes the federal judiciary, is the shortest of the three articles defining the branches of government. And yet the Supreme Court has become, over two hundred and fifty years, perhaps the most consequential court in the world. Nine justices. No fixed term – they serve for life, or until they choose to leave. No electoral mandate. No sword, no purse. Just the authority to say what the law means. In most European legal traditions, courts of this kind exist within more clearly defined limits. The idea that a handful of unelected judges can strike down an act of Congress, override a presidential decision, or reshape the social landscape of an entire nation – definitively, with no practical appeal – takes some getting used to. I am not sure I ever entirely did.

The power of the Court was not handed to it – it was claimed. In 1803, Chief Justice John Marshall used a seemingly minor dispute over an undelivered appointment to establish something far larger: that it is the Supreme Court, and not Congress or the President, that has the final say on whether a law is constitutional. The case was *Marbury v. Madison*. William Marbury was one of the so-called “midnight appointees” – men rushed into office by the outgoing President Adams in his final hours, whose commissions the incoming Jefferson administration simply refused to honour. Marbury sued. Marshall, writing for a unanimous Court, ruled against his own political allies in the narrow question of the case in order to assert a far greater principle on behalf of the judiciary itself. Mr. Jefferson won the immediate battle. The Court won everything else. Mr. Jefferson’s specific objection, interestingly, was not to the outcome but to Marshall’s method: he believed the opinion should have begun and ended with the finding that the Court lacked jurisdiction, and that everything else Marshall wrote was unnecessary editorialising. He was not wrong, technically. But Marshall’s “unnecessary” passages were precisely the point – they established judicial review as a principle, not merely as an outcome. It held. It holds still.

What has always impressed me about the American judicial system – and what I think is genuinely underappreciated outside the United States – is the degree to which it functions on trust. The Court has no mechanism to enforce its own rulings. When it decides, the decision stands only because the President, Congress, and the public accept that it stands. This sounds fragile. In practice, over two and a half centuries, it has proven remarkably durable. Presidents have disagreed with rulings, sometimes bitterly. Congresses have pushed back. But the framework has held – the understanding that whatever one thinks of a particular decision, the institution itself is legitimate and its authority real.

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The intellectual foundation for all of this was laid, before any of it existed, by Alexander Hamilton. On May 28, 1788, he published Federalist No. 78 – titled simply “The Judicial Department” – and in it he offered what remains perhaps the most powerful written defence of judicial independence in the American canon. He argued for life tenure and salary protections as essential barriers against political interference, and he made the case for judicial review – the power of federal courts to measure the acts of government against the Constitution itself – with a clarity that has never really been surpassed. When the Supreme Court delivered its unanimous decision in *Marbury v. Madison* fifteen years later, it was Chief Justice Marshall who authored the opinion – and in doing so drew extensively on Hamilton’s arguments. The essay had laid the intellectual groundwork; the Court’s ruling gave it the force of law. Hamilton thought the judiciary was the “least dangerous branch” because it had, in his own words, “no sword or purse”. Marshall’s *Marbury* opinion proved that a well-reasoned argument could be just as powerful – something Mr. Jefferson, who criticized Marshall’s expansive reasoning, understood all too well.

Today, the Supreme Court sits at the center of American public life in a way that would have surprised even Marshall. Its decisions are reported as major news events. Its justices are public figures in a way that judges elsewhere rarely are. Its legitimacy is debated with an openness that reflects both the health and the tension of the system. This is uncomfortable, and probably right. A court beyond scrutiny is not a court – it is something else. The founders built in the appointments process, the Senate confirmation, the amendment procedure, precisely because they understood that no institution should be beyond question. What they asked, and what has largely been delivered, is that it be worth questioning. Sitting in those Charlottesville classrooms, working through the cases and the history, I came to think that this – an institution serious enough, and consequential enough, to argue about – is one of America’s genuinely great gifts to the theory of governance. One likes to think Marshall would have agreed.

Yours, with great admiration and transatlantic devotion,

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Vienna, 2026 · Letter XII of XXV

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