

## The Federalist Papers, Number 78

*The Avalon Project at Yale Law School*  
The Judiciary Department, from McLEAN'S Edition, New York.

HAMILTON

To the People of the State of New York:

WE PROCEED now to an examination of the judiciary department of the proposed government.

In unfolding the defects of the existing Confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged, as the propriety of the institution in the abstract is not disputed; the only questions which have been raised being relative to the manner of constituting it, and to its extent. To these points, therefore, our observations shall be confined.

The manner of constituting it seems to embrace these several objects: 1st. The mode of appointing the judges. 2d. The tenure by which they are to hold their places. 3d. The partition of the judiciary authority between different courts, and their relations to each other.

First. As to the mode of appointing the judges; this is the same with that of appointing the officers of the Union in general, and has been so fully discussed in the two last numbers, that nothing can be said here which would not be useless repetition.

Second. As to the tenure by which the judges are to hold their places; this chiefly concerns their duration in office; the provisions for their support; the precautions for their responsibility.

According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices DURING GOOD BEHAVIOR; which is conformable to the most approved of the State constitutions and among the rest, to that of this State. Its propriety having been drawn into question by the adversaries of that plan, is no light symptom of the rage for objection, which disorders their imaginations and judgments. The 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

1 representative body. And it is the best expedient which can be devised in any  
2 government, to secure a steady, upright, and impartial administration of the  
3 laws.

4  
5 Whoever attentively considers the different departments of power must perceive,  
6 that, in a government in which they are separated from each other, the judiciary,  
7 from the nature of its functions, will always be the least dangerous to the  
8 political rights of the Constitution; because it will be least in a capacity to annoy  
9 or injure them. The Executive not only dispenses the honors, but holds the sword  
10 of the community. The legislature not only commands the purse, but prescribes  
11 the rules by which the duties and rights of every citizen are to be regulated. The  
12 judiciary, on the contrary, has no influence over either the sword or the purse; no  
13 direction either of the strength or of the wealth of the society; and can take no  
14 active resolution whatever. It may truly be said to have neither FORCE nor  
15 WILL, but merely judgment; and must ultimately depend upon the aid of the  
16 executive arm even for the efficacy of its judgments.

17  
18 This simple view of the matter suggests several important consequences. It  
19 proves incontestably, that the judiciary is beyond comparison the weakest of the  
20 three departments of power<sup>1</sup>; that it can never attack with success either of the  
21 other two; and that all possible care is requisite to enable it to defend itself  
22 against their attacks. It equally proves, that though individual oppression may  
23 now and then proceed from the courts of justice, the general liberty of the people  
24 can never be endangered from that quarter; I mean so long as the judiciary  
25 remains truly distinct from both the legislature and the Executive. For I agree,  
26 that "there is no liberty, if the power of judging be not separated from the  
27 legislative and executive powers."<sup>2</sup> And it proves, in the last place, that as liberty  
28 can have nothing to fear from the judiciary alone, but would have every thing to  
29 fear from its union with either of the other departments; that as all the effects of  
30 such a union must ensue from a dependence of the former on the latter,  
31 notwithstanding a nominal and apparent separation; that as, from the natural  
32 febleness of the judiciary, it is in continual jeopardy of being overpowered,  
33 awed, or influenced by its co-ordinate branches; and that as nothing can  
34 contribute so much to its firmness and independence as permanency in office,  
35 this quality may therefore be justly regarded as an indispensable ingredient in its  
36 constitution, and, in a great measure, as the citadel of the public justice and the  
37 public security.

38  
39 The complete independence of the courts of justice is peculiarly essential in a  
40 limited Constitution. By a limited Constitution, I understand one which contains  
41 certain specified exceptions to the legislative authority; such, for instance, as that  
42 it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations  
43 of this kind can be preserved in practice no other way than through the medium  
44 of courts of justice, whose duty it must be to declare all acts contrary to the

1 manifest tenor of the Constitution void. Without this, all the reservations of  
2 particular rights or privileges would amount to nothing.

3  
4 Some perplexity respecting the rights of the courts to pronounce legislative acts  
5 void, because contrary to the Constitution, has arisen from an imagination that  
6 the doctrine would imply a superiority of the judiciary to the legislative power. It  
7 is urged that the authority which can declare the acts of another void, must  
8 necessarily be superior to the one whose acts may be declared void. As this  
9 doctrine is of great importance in all the American constitutions, a brief  
10 discussion of the ground on which it rests cannot be unacceptable.

11  
12 There is no position which depends on clearer principles, than that every act of a  
13 delegated authority, contrary to the tenor of the commission under which it is  
14 exercised, is void. No legislative act, therefore, contrary to the Constitution, can  
15 be valid. To deny this, would be to affirm, that the deputy is greater than his  
16 principal; that the servant is above his master; that the representatives of the  
17 people are superior to the people themselves; that men acting by virtue of  
18 powers, may do not only what their powers do not authorize, but what they  
19 forbid.

20  
21 If it be said that the legislative body are themselves the constitutional judges of  
22 their own powers, and that the construction they put upon them is conclusive  
23 upon the other departments, it may be answered, that this cannot be the natural  
24 presumption, where it is not to be collected from any particular provisions in the  
25 Constitution. It is not otherwise to be supposed, that the Constitution could  
26 intend to enable the representatives of the people to substitute their WILL to that  
27 of their constituents. It is far more rational to suppose, that the courts were  
28 designed to be an intermediate body between the people and the legislature, in  
29 order, among other things, to keep the latter within the limits assigned to their  
30 authority. The interpretation of the laws is the proper and peculiar province of  
31 the courts. A constitution is, in fact, and must be regarded by the judges, as a  
32 fundamental law. It therefore belongs to them to ascertain its meaning, as well as  
33 the meaning of any particular act proceeding from the legislative body. If there  
34 should happen to be an irreconcilable variance between the two, that which has  
35 the superior obligation and validity ought, of course, to be preferred; or, in other  
36 words, the Constitution ought to be preferred to the statute, the intention of the  
37 people to the intention of their agents.

38  
39 Nor does this conclusion by any means suppose a superiority of the judicial to  
40 the legislative power. It only supposes that the power of the people is superior to  
41 both; and that where the will of the legislature, declared in its statutes, stands in  
42 opposition to that of the people, declared in the Constitution, the judges ought to  
43 be governed by the latter rather than the former. They ought to regulate their  
44 decisions by the fundamental laws, rather than by those which are not  
45 fundamental.

1  
2 This exercise of judicial discretion, in determining between two contradictory  
3 laws, is exemplified in a familiar instance. It not uncommonly happens, that  
4 there are two statutes existing at one time, clashing in whole or in part with each  
5 other, and neither of them containing any repealing clause or expression. In such  
6 a case, it is the province of the courts to liquidate and fix their meaning and  
7 operation. So far as they can, by any fair construction, be reconciled to each  
8 other, reason and law conspire to dictate that this should be done; where this is  
9 impracticable, it becomes a matter of necessity to give effect to one, in exclusion  
10 of the other. The rule which has obtained in the courts for determining their  
11 relative validity is, that the last in order of time shall be preferred to the first. But  
12 this is a mere rule of construction, not derived from any positive law, but from  
13 the nature and reason of the thing. It is a rule not enjoined upon the courts by  
14 legislative provision, but adopted by themselves, as consonant to truth and  
15 propriety, for the direction of their conduct as interpreters of the law. They  
16 thought it reasonable, that between the interfering acts of an EQUAL authority,  
17 that which was the last indication of its will should have the preference.

18  
19 But in regard to the interfering acts of a superior and subordinate authority, of an  
20 original and derivative power, the nature and reason of the thing indicate the  
21 converse of that rule as proper to be followed. They teach us that the prior act of  
22 a superior ought to be preferred to the subsequent act of an inferior and  
23 subordinate authority; and that accordingly, whenever a particular statute  
24 contravenes the Constitution, it will be the duty of the judicial tribunals to  
25 adhere to the latter and disregard the former.

26  
27 It can be of no weight to say that the courts, on the pretense of a repugnancy,  
28 may substitute their own pleasure to the constitutional intentions of the  
29 legislature. This might as well happen in the case of two contradictory statutes;  
30 or it might as well happen in every adjudication upon any single statute. The  
31 courts must declare the sense of the law; and if they should be disposed to  
32 exercise WILL instead of JUDGMENT, the consequence would equally be the  
33 substitution of their pleasure to that of the legislative body. The observation, if it  
34 prove any thing, would prove that there ought to be no judges distinct from that  
35 body.

36  
37 If, then, the courts of justice are to be considered as the bulwarks of a limited  
38 Constitution against legislative encroachments, this consideration will afford a  
39 strong argument for the permanent tenure of judicial offices, since nothing will  
40 contribute so much as this to that independent spirit in the judges which must be  
41 essential to the faithful performance of so arduous a duty.

42  
43 This independence of the judges is equally requisite to guard the Constitution  
44 and the rights of individuals from the effects of those ill humors, which the arts  
45 of designing men, or the influence of particular conjunctures, sometimes

1 disseminate among the people themselves, and which, though they speedily give  
2 place to better information, and more deliberate reflection, have a tendency, in  
3 the meantime, to occasion dangerous innovations in the government, and serious  
4 oppressions of the minor party in the community. Though I trust the friends of  
5 the proposed Constitution will never concur with its enemies,<sup>3</sup> in questioning  
6 that fundamental principle of republican government, which admits the right of  
7 the people to alter or abolish the established Constitution, whenever they find it  
8 inconsistent with their happiness, yet it is not to be inferred from this principle,  
9 that the representatives of the people, whenever a momentary inclination  
10 happens to lay hold of a majority of their constituents, incompatible with the  
11 provisions in the existing Constitution, would, on that account, be justifiable in a  
12 violation of those provisions; or that the courts would be under a greater  
13 obligation to connive at infractions in this shape, than when they had proceeded  
14 wholly from the cabals of the representative body. Until the people have, by  
15 some solemn and authoritative act, annulled or changed the established form, it  
16 is binding upon themselves collectively, as well as individually; and no  
17 presumption, or even knowledge, of their sentiments, can warrant their  
18 representatives in a departure from it, prior to such an act. But it is easy to see,  
19 that it would require an uncommon portion of fortitude in the judges to do their  
20 duty as faithful guardians of the Constitution, where legislative invasions of it  
21 had been instigated by the major voice of the community.

22  
23 But it is not with a view to infractions of the Constitution only, that the  
24 independence of the judges may be an essential safeguard against the effects of  
25 occasional ill humors in the society. These sometimes extend no farther than to  
26 the injury of the private rights of particular classes of citizens, by unjust and  
27 partial laws. Here also the firmness of the judicial magistracy is of vast  
28 importance in mitigating the severity and confining the operation of such laws. It  
29 not only serves to moderate the immediate mischiefs of those which may have  
30 been passed, but it operates as a check upon the legislative body in passing them;  
31 who, perceiving that obstacles to the success of iniquitous intention are to be  
32 expected from the scruples of the courts, are in a manner compelled, by the very  
33 motives of the injustice they meditate, to qualify their attempts. This is a  
34 circumstance calculated to have more influence upon the character of our  
35 governments, than but few may be aware of. The benefits of the integrity and  
36 moderation of the judiciary have already been felt in more States than one; and  
37 though they may have displeased those whose sinister expectations they may  
38 have disappointed, they must have commanded the esteem and applause of all  
39 the virtuous and disinterested. Considerate men, of every description, ought to  
40 prize whatever will tend to beget or fortify that temper in the courts: as no man  
41 can be sure that he may not be to-morrow the victim of a spirit of injustice, by  
42 which he may be a gainer to-day. And every man must now feel, that the  
43 inevitable tendency of such a spirit is to sap the foundations of public and  
44 private confidence, and to introduce in its stead universal distrust and distress.

45

1 That inflexible and uniform adherence to the rights of the Constitution, and of  
2 individuals, which we perceive to be indispensable in the courts of justice, can  
3 certainly not be expected from judges who hold their offices by a temporary  
4 commission. Periodical appointments, however regulated, or by whomsoever  
5 made, would, in some way or other, be fatal to their necessary independence. If  
6 the power of making them was committed either to the Executive or legislature,  
7 there would be danger of an improper complaisance to the branch which  
8 possessed it; if to both, there would be an unwillingness to hazard the  
9 displeasure of either; if to the people, or to persons chosen by them for the  
10 special purpose, there would be too great a disposition to consult popularity, to  
11 justify a reliance that nothing would be consulted but the Constitution and the  
12 laws.

13  
14 There is yet a further and a weightier reason for the permanency of the judicial  
15 offices, which is deducible from the nature of the qualifications they require. It  
16 has been frequently remarked, with great propriety, that a voluminous code of  
17 laws is one of the inconveniences necessarily connected with the advantages of a  
18 free government. To avoid an arbitrary discretion in the courts, it is  
19 indispensable that they should be bound down by strict rules and precedents,  
20 which serve to define and point out their duty in every particular case that comes  
21 before them; and it will readily be conceived from the variety of controversies  
22 which grow out of the folly and wickedness of mankind, that the records of those  
23 precedents must unavoidably swell to a very considerable bulk, and must  
24 demand long and laborious study to acquire a competent knowledge of them.  
25 Hence it is, that there can be but few men in the society who will have sufficient  
26 skill in the laws to qualify them for the stations of judges. And making the  
27 proper deductions for the ordinary depravity of human nature, the number must  
28 be still smaller of those who unite the requisite integrity with the requisite  
29 knowledge. These considerations apprise us, that the government can have no  
30 great option between fit character; and that a temporary duration in office, which  
31 would naturally discourage such characters from quitting a lucrative line of  
32 practice to accept a seat on the bench, would have a tendency to throw the  
33 administration of justice into hands less able, and less well qualified, to conduct  
34 it with utility and dignity. In the present circumstances of this country, and in  
35 those in which it is likely to be for a long time to come, the disadvantages on this  
36 score would be greater than they may at first sight appear; but it must be  
37 confessed, that they are far inferior to those which present themselves under the  
38 other aspects of the subject.

39  
40 Upon the whole, there can be no room to doubt that the convention acted wisely  
41 in copying from the models of those constitutions which have established GOOD  
42 BEHAVIOR as the tenure of their judicial offices, in point of duration; and that so  
43 far from being blamable on this account, their plan would have been inexcusably  
44 defective, if it had wanted this important feature of good government. The

1 experience of Great Britain affords an illustrious comment on the excellence of  
2 the institution.

3  
4 PUBLIUS.

5  
6 1 The celebrated Montesquieu, speaking of them, says: "Of the three powers  
7 above mentioned, the judiciary is next to nothing." "Spirit of Laws." vol. i., page  
8 186.

9 2 Idem, page 181.

10 3 Vide "Protest of the Minority of the Convention of Pennsylvania," Martin's  
11 Speech, etc.

12  
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## 16 Notes

### 17 *Barbara's Notes:*

18 Re. the relationship of **the three branches**, see page 2, line 4, for a wonderful discussion  
19 of the relationship of the judicial branch to the executive and legislative branches. Here  
20 is where Hamilton talks about the executive holding the sword and the legislature  
21 commanding the purse while the judiciary has "merely judgment."  
22

23 Re. the **province of the courts and interpreting laws**, see page 3 beginning with line 25.  
24 Get a glimpse of hierarchy of laws here. Hamilton says it is the job of the courts to  
25 interpret laws and that the fundamental laws are those expressed by the will of the  
26 people in the Constitution. Therefore, the Constitution "ought to be preferred to  
27 statute."  
28

29 Re. the necessity of the **independence of the judiciary**, see page 4, line 35. Hamilton  
30 asserts that the court must be independent in order to guard "from the effects of those ill  
31 humors" that are part of the legislative arena. "But it is easy to see," Hamilton says, "that  
32 it would require an uncommon portion of fortitude in the judges to do their duty as  
33 faithful guardians of the Constitution" when they are invaded by legislation reflecting  
34 the will of the majority.  
35

36 Re. the **requirements for a judge**, see the main paragraph on page 6. It extends the  
37 discussion of the necessity of the permanent appointment (life tenure except for "bad  
38 behavior") of judges. They must "unite the requisite integrity with the requisite  
39 knowledge" (line 17). After all, "records of those precedents must unavoidably swell to  
40 a very considerable bulk, and must demand long and laborious study to acquire a  
41 competent knowledge of them" (line 12).  
42

## 43 Summary

44  
45 *Excerpted from GradeSaver, ClassicNote on The Federalist Papers, 78, the following notes:*  
46 Hamilton begins by telling the readers that this paper will discuss the importance of an  
47 independent judicial branch and the meaning of judicial review. The Constitution

1 proposes the federal judges hold their office for life, subject to good behavior. Hamilton  
2 laughs at anyone who questions that life tenure is the most valuable advances in the  
3 theory of representative government. Permanency in office frees judges from political  
4 pressures and prevents invasions on judicial power by the president and Congress.

5  
6 The judicial branch of government is by far the weakest branch. The judicial branch  
7 possesses only the power to judge, not to act, and even its judgments or decisions  
8 depend upon the executive branch to carry them out. Political rights are least  
9 threatened by the judicial branch. On occasion, the courts may unfairly treat an  
10 individual, but they, in general, can never threaten liberty.

11  
12 The power of the Supreme Court to declare laws unconstitutional leads some people to  
13 assume that the judicial branch will be superior to the legislative branch. Hamilton  
14 examines this argument. The courts are the arbiters between the legislative branch and  
15 the people; the courts are to interpret the laws and prevent the legislative branch from  
16 exceeding the powers granted to it. The courts must not only place the Constitution  
17 higher than the laws passed by Congress, they must also place the intentions of the  
18 people ahead of the intentions of their representatives. This is not a matter of which  
19 branch is superior: it is simply to acknowledge that the people are superior to both.

20  
21 The independence of the courts is also necessary to protect the rights of individuals  
22 against the destructive actions of factions. Certain designing men may influence the  
23 legislature to formulate policies and pass laws that violate the Constitution or  
24 individual rights. The fact that the people have the right to change or abolish their  
25 government if it becomes inconsistent with their happiness is not sufficient protection;  
26 in the first place, stability requires that such changes be orderly and constitutional. A  
27 government at the mercy of groups continually plotting its downfall would be a  
28 deplorable situation. The only way citizens can feel their rights are secure is to know  
29 that the judicial branch protects them against the people, both in and outside  
30 government, who work against their interests.

31  
32 Hamilton cites one other important reason for judges to have life tenure. In a free  
33 government there are bound to be many laws, some of them complex and  
34 contradictory. It takes many years to fully understand the meaning of these laws and a  
35 short term of office would discourage able and honest men from seeking an  
36 appointment to the courts; they would be reluctant to give up lucrative law practices to  
37 accept a temporary judicial appointment. Life tenure, modified by good behavior, is a  
38 superb device for assuring judicial independence and protection of individual rights.

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