ALEXANDER HAMILTON, FEDERALIST NO. 78 (1788)

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On May 28, 1788, Alexander Hamilton published *Federalist* No. 78—titled "The Judicial Department." In this famous *Federalist Paper* essay, Hamilton offered, perhaps, the most powerful defense of judicial review in the American constitutional canon. On the one hand, Hamilton defined the judicial branch as the "weakest" and "least dangerous" branch of the new national government. On the other hand, he also emphasized the importance of an independent judiciary and the power of judicial review. With judicial independence, the Constitution put barriers in place—like life tenure and salary protections—to ensure that the federal courts were independent from the control of the elected branches. And with judicial review, federal judges had the power to review the constitutionality of the laws and actions of the government—ensuring that they met the requirements of the new Constitution. Other than *Marbury v. Madison* (1803), Hamilton's essay remains the most famous defense of judicial review in American history, and it even served as the basis for many of Chief Justice John Marshall's arguments in *Marbury* itself.

Excerpt:

Life tenure promotes judicial independence and is an essential feature of the federal judiciary. 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. . . . 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 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.

The judicial branch is the least dangerous of the three branches. 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. . . .

The judiciary must exercise judicial review to strike down unconstitutional laws, actions, and practices by the government; when it does so, it enforces our nation's highest law set out by the American people in the Constitution. There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

On its own, Congress can't be trusted to decide on the constitutionality of its own laws; we need a check like judicial review as an additional layer of constitutional protection; the judiciary helps to ensure that Congress acts within the limits set out by the people in the Constitution. If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their WILL to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

This doesn't make the judiciary supreme; instead, it simply acknowledges that the Constitution's commands, as set out by the people, are superior to any branch of government. Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental. . . .

Life tenure gives federal judges the independence necessary to check the legislative branch. If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

Judicial independence is essential to protecting the rights of the people from abuses by the government. This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. . . . Until the people have, by some solemn and authoritative act, annulled or changed the established form [of government], it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

***Bold sentences give the big idea of the excerpt and are not a part of the primary source.**