Dallas Bar Association's CLE Series

A Brief History of the Concept of the

INDEPENDENCE OF THE JUDICIARY IN THE UNITED STATES

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The Declaration of Independence

Judicial independence was a major driving issue which led to the American Declaration of Independence. Among the "facts [it] submitted to a candid world" were these:

> "He (King George III) has made judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.
>
> He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance."

The Leadership of John Adams

Under Massachusetts Bay Colony Charter of 1691, the Royal Governor had the authority to remove judges without cause. Under that system, the tenure of judges was at the mercy or whim of the Crown. John Adams, following the teaching of French philosopher, Montesquieu, warned that this system would lead to absolutism, Parliament tried to seize complete control of the Massachusetts Bay Colony's judiciary by circumventing the Massachusetts legislature and pledging to pay the judges directly from royal revenue. This power play by England incited more indignation not only in Massachusetts but in all the colonies. It put judicial independence at the forefront of issues.

John Adams' ideas regarding judicial independence were incorporated into the Massachusetts Declaration of Rights as part of the Constitution of the Commonwealth of Massachusetts. This Constitution, in effect since October 25, 1780, is the oldest continuously functioning written constitution in the world. It states in Article XXX that an independent judiciary is "a fundamental article of liberty." The Constitution of the Massachusetts Bay Colony had great influence on the other Founding Fathers of our nation.

Among current scholars of America's Founding, there is consensus agreement that the most significant contributions towards the concept of an independent judiciary were made by John Adams. He wrote on the subject at least as early as January 1773. He engaged in a series of exchanges on this subject in the newspapers of Boston with William Brattle. Brattle was a loyalist and insisted that the proposed payment of judicial salaries by the Crown should not be of concern to the people of Massachusetts Bay Colony. He reasoned that because these judges enjoyed life tenure, they were sufficiently independent, as long as they exercised "good behavior."

Adams conducted an intensive historical review on the subject of judicial independence. He disagreed with Brattle about the independence of English judges. Adams argued that control by the Crown over judicial salaries was an additional threat to the independence of the judiciary and, therefore, also a threat to the rights and liberty of the inhabitants of the Massachusetts Bay Colony.

In 1776, Adams published a paper entitled Thoughts on Government. This pamphlet called for the separation of powers. In this publication, Adams disagreed with Thomas Paine's recommendation in Common Sense, that all government powers should be vested in a unicameral legislature. Adams wrote:

> "The dignity and stability of government and all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and the executive, and independent upon both, that so it may be a check upon both as both should be a check on that."

Biographer David McCullough wrote in his biography of Adams, "Little that Adams ever wrote had such affect as his Thoughts on Government." In other words, this pamphlet Thoughts on Government written by Adams well before the Constitutional Convention was his most influential contribution to our constitution, according to McCullough. It was Adams who articulated the need for the three separate branches of government. The Constitution of Massachusetts also established a bicameral legislature. Of course, Adams was not at the Constitutional Convention. He was serving at that time as America's Minister to England.

The Power of Judicial Review

Judicial review as established by the holding of *Marbury v. Madison* in1803 fits into the theory of the importance of an independent judiciary because it is the ultimate expression of independence that the judiciary should have the power to declare an act of the legislative branch and the executive branch repugnant to the U.S. Constitution. The power of judicial review by the Supreme Court is not clearly stated in the Constitution, but Chief Justice John Marshall interpreted Articles III and IV to include that power. The Founding Fathers incorporated Adams' theories of judicial independence into Article III of the Constitution.

Following the adoption of the Constitution on September 17, 1787, it was obvious to all of the Founding Fathers that the largest hurdle may yet be before them, namely, a ratification of the Constitution as required by Article VII by at least nine of the 13 states before the constitution could go into effect. The early unanimous ratification by Delaware was not a good prediction of how things would go elsewhere. One of the states where substantial problems existed was New York. It must be remembered that two of the three New York delegates, Lansing and Yates, left the Convention early and reported back to Governor Clinton in New York that the Convention was essentially a conspiracy to do away with the Articles of Confederation. That left Alexander Hamilton as the sole New York delegate. He had no authority to cast a vote for New York. Since Rhode Island never sent any delegates, there were only 11 voting states at the Constitutional Convention. Each state had one vote.

In an effort to garner support among the citizens of New York and its delegates to its Ratifying Convention, Alexander Hamilton conceived the idea of a series of papers or articles to be published in newspapers discussing the advantages of the new Constitution. These 85 essays in defense of the new constitution known as The Federalist were written by Alexander Hamilton, John Jay and James Madison. Hamilton originally planned to have all three authors be citizens of New York. His proposed third writer was Gouverneur Morris who represented Pennsylvania at the Convention but who was, in fact, a resident of New York. Morris declined the offer, so Hamilton invited James Madison to become the third author. That turned out to be a very wise choice.

In Federalist 78, entitled "The Judiciary Department," Hamilton wrote, in part:

> "The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the

> legislative authority; such for instance, as that it shall pass no bills of attainder, no ex post facto laws and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice whose duty it must to declare all acts, contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing… [A]ccordingly, whenever a particular statute contravenes the Constitution, it would be the duty of the judicial tribunals to adhere to the latter and disregard the former. . .” (Emphasis added)

In Federalist 48, the argument is made that the president checks the legislative branch by his power to veto bills and his authority to nominate federal judges. Congress has among its checks, the power to override a presidential veto and to control the size and the jurisdiction of the federal courts. The congress also has the power to impeach all federal officials, including federal judges and the president. The executive branch has no role in the impeachment process. Unless the judiciary is given a similar power, it cannot play a role in the system of checks and balances. The vital power the judicial branch needs is the power of judicial review. It is in this manner that the legislative and executive branches are checked by the judicial branch.

The Leadership of George Wythe

In the early case of *Commonwealth v. Caton*, Judge George Wythe (America’s first law professor at the College of William and Mary), wrote the following:

> “Among all the advantages, which have arisen to mankind, from the study of letters, and the universal diffusion of knowledge, there is none of more importance than the tendency they have had to produce discussions upon the respective rights of the sovereign and the subject, and upon the powers which the different branches of government may exercise. For by this means, tyranny has been sapped, the departments kept within their own spheres, the citizens protected and the general liberty promoted. . . If the whole legislature, an event to be deprecated, should attempt to overlap the bounds ascribed to them by the people, I, in administering the public justice of the country, will meet the united powers of my seat in this tribunal; and pointing to the constitution, would say to them ‘here is the limit of your authority; and hither shall you go but no further.’”

It is clear therefore that before *Marbury v. Madison* came before the Supreme Court, the doctrine of judicial review was being considered and discussed.

The Virginia Constitution of 1776 was the first state constitution to establish an independent judiciary in the concept expressed by John Adams in his Thoughts on Government. George Mason, the person generally credited with being the principle author of Virginia's initial state constitution, borrowed heavily from John Adams's pamphlet. Patrick Henry was so taken with it that he wrote Adams a letter that said "Were to God you and your Sam Adams were here."

Adams believed that judges should have their appointments for life so long as they maintain good behavior and that their salaries should be set by law and should not be subject to a reduction. This brief found its way into our Constitution in Article III, Section 1. A thorough discussion of the importance of permanent salaries of judges can be found in Federalist 79. Adams suggested that judges who misuse their office should be impeached by the House of Representatives, and if convicted, should be removed from office.

Adams was pleased with the outcome of *Marbury v. Madison*. Years later he wrote that selecting John Marshall as the chief justice was "the pride of my life." The line in *Marbury v. Madison* which reads "To the end that it may be a government of laws and not of men" was actually a quotation from an earlier writing by John Adams.

In May 1776, Adams wrote a letter in which he stated "But my friend between you and me, there is one Point that I cannot give up. You must establish your judges' salaries – as well as commissions – otherwise justice will be a Proteus. Your liberties, lives and fortunes will be sport of the winds."

Proteus was, in Greek mythology, a sea god who could change his shape at will.

The Impeachment of Justice Samuel Chase

Samuel Chase was selected by President George Washington to serve as an associate justice of the United States Supreme Court. He was a signer of the U.S. Declaration of Independence representing Maryland. While serving on the Supreme Court, he was an outspoken supporter of the Federalist party and let his partisan opinions affect some of the decisions he rendered on the Court.

Before being appointed to the Supreme Court, Chase won election to the Continental Congress and later served as a judge in the Baltimore District Criminal Court and the Maryland General Court.

After the elections in 1800, President Thomas Jefferson and his Democratic – Republican party, sought to weaken Federalist influence on the federal courts. Chase's actions and words offended Jefferson and caused Jefferson to believe that Chase should be removed from the Court. Eight Articles of Impeachment were drawn up and passed by the House of Representatives. They accused Chase of illegal and unfair political bias in the discharge of his judicial duties. Chase's defense was that he had not committed any crime and had not even been accused of any "high crime or misdemeanor."

The Senate voted to acquit Chase on all counts. He remained on the Supreme Court until his death in 1811. Most historians agree that Justice Chase's acquittal set an important precedent and helped solidify the independence of the federal judiciary. No Supreme Court justice can be removed simply because of his or her political beliefs and not because of an outspoken controversial opinion.

The Challenge from the State of Arkansas

Having proclaimed its independence from the other two branches of the Federal government, the Supreme Court faced yet another challenge to its authority. Following the famous incident in Little Rock in 1957, where an all white mob prevented nine black students from attending the all white Central High School, the State of Arkansas sued. This was the case of *Cooper v. Aaron* (1958). It took the position that the ruling in *Brown v. The Board of Education* was not binding on the State of Arkansas because that state was not a party to that suit. Arkansas argued that the Governor of Arkansas had just as much power to interpret the U.S. Constitution as did the Supreme Court. This was a throwback to the antebellum notion of "nullification." In the only Supreme Court opinion ever signed by all sitting justices, the Court restated the famous phrase of *Marbury v. Madison* that it is "the province and duty of the judicial department to say what the law is."

Ultimately, Arkansas complied with the Court's ruling. This "nullification" argument has not been raised again.

The South Dakota Judicial Accountability Initiative

In October 2006, Ron Branson of California obtained the necessary number of signatures to have an item placed on the ballot for a proposed constitutional amendment to the South Dakota State Constitution, initially known as "Amendment E." Branson decided to target South Dakota because it was a small state and the required number of signatures would be much easier to obtain than in California. Later on the law became known as the "Judicial Accountability Initiative Law," or "JAIL4Judges." If passed, this constitutional amendment would strip judges and juries of their immunity from liability arising from the discharge of their official duties in either civil or criminal trials.

A proponent in South Dakota, William Stegmaier, campaigned for the measure. He explained that this new amendment would create a special grand jury to review petitions from disappointed litigants. It went on to provide that this grand jury would review the evidence weighing it "liberally in favor of the complainant." If the complaint was found to be of merit by this special grand jury, there could be criminal prosecution or civil suits for the offending judge, juror or other state official. The other state officials which would fall within the gambit of the proposed amendment were county or city council members, school board members, and possibly others. The amendment would make it clear that the grand jurors selected to serve could not include lawyers or judges. The whole idea would be funded by deducting 2% from the salaries of all judges in South Dakota.

Former Supreme Court Justice Sandra Day O'Connor said that JAIL4JUDGES was "an attempt to intimidate judges in South Dakota.

Fortunately, in the election of November 8, 2006, the voters in South Dakota voted down this proposal. Only about 10% of the voters supported it. This ill-conceived scheme illustrates the point that attacks on the independence of judges can come from many directions and in a variety of ways.

ABOTA'S Protocol for Responding to Unfair Criticism of Judges

The American Board of Trial Advocates is a nationwide invitation-only organization of over 7000 experienced trial lawyers, evenly balanced between plaintiffs and defense advocates. For years it has promoted a program to respond to unfair criticism of judges who are prohibited from publicly defending themselves.

Each of the 97 ABOTA chapters has a three-person committee to implement this program. One recent example is the defense ABOTA published to defend Judge George W. Greer of the State of Florida Circuit Court. He handled the famous and controversial Terri Schiavo case involving a patient in a persistent vegetative state. His powerful story can be found in Volume 25 of ABOTA's magazine Voir Dire.

On the ABOTA website, one can easily find this protocol. It has been used numerous times and will no doubt be used in the future. It is one of the ways ABOTA supports the independence of both the state and federal judiciary of the United States. We strive to preserve our system of justice which is the envy of the world. John Adams said it best:

> "The dignity and stability of government and all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skillful administration of justice . . ."