

## VIII. The Judiciary Act

Among the six delegates who had promoted judicial review at the Constitutional Convention, Wilson and Rutledge were appointed to the Supreme Court, and Sherman was elected to the House of Representatives. The remaining three—Ellsworth, Johnson, and Paterson—were elected to the Senate, where the Judiciary Act was drawn up as specified by Madison's compromise and the exceptions and regulations clause Article III, Section 2, of the Constitution.

The central figure in the passage of the Judiciary Act turns out to have been Ellsworth, who was chosen with Paterson and six others (with two more added six days later) to serve on the ad hoc committee for drafting the Judiciary Act, described as Senate Bill No.1. This was the first such committee appointed by the new Senate, and its formation was the very first order of business on the first day of its First Session.

Truly, the Judiciary Act was at the top of the Senate's agenda at its very inception in 1789. Former Convention delegates appointed to this committee included, besides Ellsworth and Paterson, Richard Bassett of Delaware, William Few of Georgia, Caleb Strong of Massachusetts, and Paine Wingate of New Hampshire.

Ellsworth himself was elected to serve as chairman of this committee. He already composed his own preliminary draft of the Judiciary Act preceding the version of the drafting subcommittee on which he served, as indicated by his letter to Judge Richard Law on April 30, twelve days before this subcommittee was chosen. Here he sketched out many of the provisions later found in the committee's original draft (Brown, 185; Warren's "History," 60–61). Portions of the original draft survive in the handwriting of Ellsworth, Paterson, and Strong—Sections 1 to 9 in Paterson's handwriting, Sections 10 to 23 in Ellsworth's, and Section 24 in Strong's (Warren, "History," 50). The rest, including Section 25, survive in the handwriting of a clerk.

One can assume that Ellsworth himself authored Section 25 in its original draft, since a clerk would not have been able to belabor its content to such an extreme. The imposition of judicial review is, arguably,

the initial bulwark of federal sovereignty in the history of constitutional law.

Ellsworth led Senate debate in support of the Judiciary Act through June and the first half of July, and his persistent defense of its wording is reported to have been extraordinarily aggressive. His primary responsibility for the Act was acknowledged in several entries of William Maclay's journal, the only systematic record that survives of Senate proceedings. Maclay emphasized Ellsworth's singular role perhaps most emphatically in his remark, "This vile bill is a child of his [Ellsworth's], and he defends it with the care of a parent, even with wrath and anger" (Maclay, 91; also 94, 101, and 152). In 1836, Madison also singled out Ellsworth as the author of the Judiciary Act:

It may be taken for certain that the bill organizing the judicial department originated in his [Ellsworth's] draft, and that it was not materially changed in its passage into law (Brown, 185).

Among opponents to the Act, Ellsworth was cast as the principal villain, and the Judiciary Act as a dangerous nationalist takeover strategy—in Maclay's words, the American equivalent to the gunpowder conspiracy.

In retrospect, it can be recognized that Ellsworth quickly took a dominant role in the Senate regarding other issues as well. He forced the passage of every feature in Hamilton's economic program except for those minor changes he himself felt were important. He sponsored Madison's Bill of Rights in the Senate and singlehandedly sponsored and forced the passage of legislation which pressured Rhode Island into joining the union despite heavy opposition by a majority of its citizens. John Adams praised Ellsworth as "the firmest pillar of his [Washington's] whole administration in the Senate," and Aaron Burr complained, "If Ellsworth had happened to spell the name of the Deity with two d's, it would have taken the Senate three weeks to expunge the superfluous letter" (Brown, 231, 225).

Why, then, did Ellsworth make the Judiciary Act his very first task in the Senate? Why was this his dominant concern? The answer seems evident that he treated the Constitution as unfinished business without the Judiciary Act and that he swiftly worked to bring it to its completion. Because of his experience on the Committee of Detail, he was the most qualified in the Senate to promote the Judiciary Act, and he knew exactly what needed to be done.

Now that the Constitution had passed muster at the state ratifying conventions,

its less attractive enabling features could be imposed, the most important of which was judicial review permitted by the vertical organization of state and federal judiciaries. The Constitution itself had provided a central government based on an elaborate model of checks and balances, and now, with the Judiciary Act, this government would be able to defend its sovereignty through an interlocking hierarchy of state and federal courts with a Supreme Court at the top able to revoke state laws in conflict with the Constitution. It was thus the passage of the Judiciary Act that gave teeth to the Constitution and helped to extricate the nation from its powerlessness under the Articles of Confederation.

Amazingly, all references to the principle of judicial review were buried in the 25th section of the Judiciary Act and spelled out in just two sentences, the first an elaborate and almost indecipherable 307-word explanation of the procedures of judicial review, and the second a brief amendment added during Senate debate which limited the application of judicial review to issues featured in the written opinions of lower courts. The heart of the Judiciary Act lay in the first of these two sentences, since it outlined the circumstances and procedures for appealing state Supreme Court decisions upon state law to the federal Supreme Court

for its final determination. Probably drafted by Ellsworth, this overlooked keystone (and linchpin) of constitutional law defied both revision and effective opposition, and this was undoubtedly its principal value in declaring the application of judicial review without submitting it to debate. For in fact it was neither discussed nor amended by either the Senate or House of Representatives. Members of the latter body later proposed a number of changes for other portions of the Judiciary Act, but none that was relevant to this particular sentence, perhaps the most important—certainly the most gnarled—provision in the history of constitutional law.

Independent of the Constitution first authored by Ellsworth and four others on the Committee of Detail, the Judiciary Act established the only enforceable defense of our nation's sovereignty, of necessity based on the vertical organization of state and federal courts. The labyrinthine precision of this remarkable sentence guaranteed its obscurity in simultaneously specifying the function of judicial review and crowding from recognition the enormous powers conferred by the wording italicized here:

[Be it enacted,] *That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the*

*validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be reexamined, and reversed or affirmed by the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in*

a circuit court, and the proceedings upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution [*italics added*].

Experienced judges and constitutional historians may have been able to fathom the process of judicial review described in this context. However, most laymen could only have been puzzled by the wording. Even today, reputable constitutional historians seem unaware of the full scope of powers conferred by it.

Close scrutiny, however, reveals that three legal clauses were embedded in this sentence, respectively submitting,

- Federal laws and treaties,
- State laws, and
- The constitutional rights of individual parties,

to a process of judicial review that originates in state courts and can then be appealed to the Supreme Court. It turns out that the veto of international treaties by state and

federal courts has never been exercised, while the veto of federal law did not gain general acceptance until the 1803 *Marbury v. Madison* decision.

Of immediate importance, however, was the second clause, the veto of state laws, since it guaranteed federal sovereignty over the separate states. Amazingly, one hundred and fifty-six words separate its compound subject (“final judgment or decree”) from its compound verb (“be reexamined, and reversed or affirmed”). If all intervening qualifications can be ignored, an inner syntax emerges expressing the simple principle in exactly the same words:

. . . that a final judgment . . . in the highest court of law . . . of a State . . . where is drawn in question the validity of a statute . . . on the ground of [its] being repugnant to the constitution . . . and the decision is in favor of such their validity . . . may be reexamined, and reversed . . . by the Supreme Court of the United States.

Even more simply translated, the favorable review of state law by state supreme courts could be reversed by the federal Supreme Court. A relatively brief sentence to this effect could easily have been inserted in Article III, Section 2, of the Constitution, but to do so prematurely would have guaranteed

the rejection of the Constitution as a whole in either the Convention or the state ratifying conventions the following year.

On the other hand, if a state supreme court rejects a law as being unconstitutional, there is nothing the federal Supreme Court can do about it. The state supreme court's decision stands as having been decided. Only if the state supreme court accepts this law as being constitutional can its decision be appealed to the federal Supreme Court for its final decision. A substantial compromise was thus brought into play. State courts retained an initial negative power over state laws, but if and when they exercised positive support for these laws, the federal Supreme Court was able to exercise negative power at a final level. As a result the federal Supreme Court seemed relatively impotent at the time, but cumulative weight of its decisions over the following decades substantially enlarged its authority.

Everything was finally in place: Rutledge's August 23 amendment to the supremacy clause had permitted state courts to judge the constitutionality of state laws, and Johnson's August 27 amendment to Article III had guaranteed the Supreme Court's comparable powers. Now Section 25 established the procedures and circumstances for appealing state court decisions to the Supreme Court. As

Wilson's August 27 amendment would have done, Section 25 bridged the gap between the two earlier amendments, specifically by providing for the use of a writ of error signed by a justice of the Supreme Court for challenging favorable decisions by state courts at the federal level. This was a bold innovation—both too detailed and too dangerous to have been included in the Constitution.

It has been suggested that the assignment of original jurisdiction to state courts and appellate jurisdiction to the Supreme Court was a concession to anti-federalists such as Richard Henry Lee. However, the exclusive use of state courts in the first instance had been featured as early as Rutledge's June 5 amendment, and it seems probable that Ellsworth was both willing and eager to bring this arrangement into the Judiciary Act. Anti-nationalists could take satisfaction in having granted state courts the power to initiate judicial review, but, as recognized by Yates, Mason and Martin, such an arrangement contained the seeds of even greater powers accruing to the Supreme Court over subsequent decades based on its cumulative authority.

Fortunately, few fathomed the full implications of Ellsworth's sentence reduced to its essential components. Unlike the elegant lucidity of the Constitution's

final draft crafted by Gouverneur Morris, Ellsworth's tangled syntax repelled attention in the very act of establishing the federal government's defense of its sovereignty through judicial review. The resulting opacity seems to have been typical of Ellsworth's legal style and was later ridiculed by Maclay because it resisted amendment except by imposing completely new wording:

This bill [a later bill upon consuls and vice-consuls] was drawn and brought in by Elsworth, and, of course, he hung like a bat to every particle of it. The first clause was a mere chaos—style, preamble, and enacting clause all jumbled together. It was really unamendable; at least, the shortest way to amend it was to bring in a new one (Maclay, 368–69).

The problem, Maclay suggested, very likely resulted from a peculiar lopsidedness in Ellsworth's talents: "All-powerful and eloquent in debate, he is, notwithstanding, a miserable draftsman."

In Section 25 of the Judiciary Act, Ellsworth apparently exceeded himself as a miserable draftsman, but with salutary results, since judicial review was far less likely to be challenged and rejected than if explained in a simpler construction. The

Constitution itself had been gracefully elucidated for the benefit of the American public. In contrast, the wording of Section 25 was delayed two years and then smuggled aboard in this fashion, an obscure rider to an elaborate bill for creating inferior courts as provided by Article III of the Constitution.

President Washington signed the Judiciary Act on September 24, 1789, just two years after the Constitution was adopted, and it effectively complemented Articles III and VI of the Constitution. The contents of the Judiciary Act were both too elaborate and too controversial to be brought into the Constitution except as a kind of appendix provided by the Judiciary Act. But in the end everything more or less fit.

Article III, Section 2, of the Constitution had broadly assigned to Congress the task of giving the Supreme Court “appellate jurisdiction, both as to Law and Fact with such Exceptions and under such Regulations as the Congress shall make.” With such generous latitude, the Judiciary Act could be framed to impose the vertical integration of state and federal supreme courts. The initial review of both state and federal laws was limited to state courts, and their final acceptance on constitutional grounds could only be provided by the federal Supreme Court once state supreme courts had found them acceptable. Those laws rejected by

state supreme courts could not be appealed to the Supreme Court. This concession might seem to have reinforced states rights, but at last the federal government acquired what might be described as defensible sovereignty based on the Supreme Court's authority to dispense final judgments.

As to be expected, this system was initially weak—so weak, in fact, that John Jay, the first Chief Justice, resigned in disgust in 1795. Only a half dozen cases required judicial review by the Supreme Court in the decade following the passage of the Judiciary Act. Nevertheless, the gradual accumulation of judicial decisions since then has indeed expanded the veto of the federal judiciary over state and local laws, and to such an extent that Supreme Court rulings today bear a mounting influence on every aspect of life in the United States.