

VIDEO #1 PDF

MARBURY V MADISON , 1 Cranch - 5 U.S. 137 (1803)

The Historical Foundation of Judicial Power to Interpret the Law in the United States ^{FN 1}

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The purpose of this essay is to provide a brief summary of the foundation of Judicial Power in the United States, which was established about 225 years ago in 1803 in the case of Marbury v Madison, 5 U.S. 137 (1803). It became the cornerstone of how the Judiciary functions and the all-encompassing power it has over the other two branches. The decision was handed down by the US Supreme Court in 1803. It's really the basis of our entire legal system and Judiciary. And it's also a very controversial case. As a result of Marbury, the Judiciary carved out for itself the exclusive power to interpret the law. Now, first I present a bit of general background about each of our three branches of government.

Our Laws are enacted by Legislatures. For Federal purposes that would be Congress, and for State governments that would be State Legislatures. Laws are then administered by the Executive branch of government. The Executive branch is headed by the President for the Federal government, and the Governor for each State. So the Executive Branch administers the laws, (i.e. by the police and other agencies). The Legislatures enact the law. However, when it comes to interpreting the law, that sole and exclusive power was allotted to the Judiciary. And it was allotted to the Judiciary, by the Judiciary itself. Nobody else and no document gave them that power. It was not given to the Judiciary by Congress or the President. The Judiciary itself in Marbury v Madison, decided all on its own, unilaterally, that they had Sole and Exclusive power to interpret the law.

To properly understand Marbury v. Madison, it is necessary to delineate the historical facts leading up to it. I start in early 1787, when Founding Father James Madison persuaded Alexander Hamilton to call to the States to "**render the Constitution adequate to the exigencies of the Union.**" However, the Constitution he referred to was NOT the U.S. Constitution as we know it today. Rather, the Constitution he referred to was known as the "Articles of Confederation." For the most part, the Articles of Confederation treated the States like individual nations. But, it also established a Federal Government to accomplish certain goals with Consent of the States. Those goals consisted primarily of defending the States jointly against European nations when necessary. Thus, the Articles of Confederation were predicated upon an immensely weaker Federal Government compared to State Governments. The States pragmatically controlled everything within their own geographic boundaries. Madison asserted this was needed in a paper titled "The Vices of the Political System of the U.S." because the 13 colonies constantly quarreled, defied federal measures; and violated international agreements. Most particularly, the Federal government lacked logistical power to impose taxes. Rather, it had to rely upon the goodwill of the States to fund its activities. James Madison worked in close conjunction with Alexander Hamilton to provide for a stronger federal government by amending the Articles of Confederation. However, in later years, Madison and Hamilton would become fierce rivals.

On February 21, 1787 the Congress that was established by the Articles of Confederation voted to call for a Convention. But, the stated purpose of the Convention was only to "revise" the Articles of Confederation. The intent was only that the "Articles of Confederacy" be "amended." It was not supposed to have any power to entirely eliminate the Articles. Yet, that is precisely what it did. Thus, to a large extent, the U.S. Constitution as we know it today was largely built upon a blatant lie and deceptive trick that led to its enactment. Many of the Patriots who helped win our Independence, including most

FOOTNOTE 1 - Based on Notes Compiled From Reading Well-Acclaimed Presidential Biographies - (See Bibliography Attached)

particularly Patrick Henry staunchly opposed adoption of the U.S. Constitution. In fact, Patriot Patrick Henry who played a key role in winning the Revolutionary War against Britain so staunchly opposed amending the Articles of Confederation that he expressly declined to even attend the Constitutional Convention of 1787. In hindsight, that was a major strategic error on his part, because without his presence to oppose, the Articles were not just amended. Rather instead, without his presence the Articles were entirely abolished and replaced by the U.S. Constitution. This is notwithstanding that the convention had no such power to do so, and it occurred despite the false express representations of the Congress as it existed at the time.

The Virginia representatives initially dominated at the 1787 Convention. However, that would change during the Convention itself and power would shift to the smaller Colonies. The Virginians were each key players and Patriots in winning Independence from Britain in the Revolutionary War. But, they were somewhat split amongst themselves with some wanting a new Constitution and some opposing it. Those who supported a new Constitution would later be known as Federalists and those who opposed a new Constitution would come to be known as Anti-Federalists. Specifically, James Monroe (later to be a President), George Mason, Patrick Henry (who as stated declined to even attend), Benjamin Harrison and Governor Edmund Randolph were all Anti-Federalists. On the other hand, James Madison (also later to be a President) was a staunch Federalist (at least initially). However, James Madison who played a key role in promoting adoption of the U.S. Constitution would later change his views substantially.

The Constitutional Convention took place in Philadelphia from in 1787. As stated, it was supposed to only be a Convention to "AMEND" the Articles of Confederacy, but it ultimately eliminated them entirely. A policy was adopted at the Convention that to maintain secrecy nothing spoken was to be printed or publicized. The primary plan for adoption of a new Constitution was known as the Virginia Plan. It provided for superiority of a Federal Government by holding that State Laws could be "Negatived" (i.e. declared Void) by a National Legislature. That particular provision of the Virginia Plan was rejected. In its place was a proposal that Federal laws would be "Supreme" to State laws, rather than State laws being declared entirely "Void." Taken as a whole, the Virginia Plan would become the foundation for the new U.S. Constitution, but with certain other key and quite important revisions. The process of writing a new U.S. Constitution was given to a Committee of Five.

Another key point of contention was whether the States would be equally represented in the Federal Government (Congress), or represented based upon their populations. If represented based upon population, the larger States would have an enormous advantage. The New Jersey Plan, in contrast to the Virginia Plan based representation on State equality, rather than by population. The disparity between the Virginia and New Jersey plans resulted in the "**Great Compromise**." It provided for representation in the Lower House (House of Representatives) based upon population. However, in the Upper House (the Senate) the States would be equal. The 3/5 rule was adopted for purposes of determining population. The morally despicable 3/5 rule stood for the premise that in determining population for purposes of representation, that Five Slaves would be equal to Three Whites. Thus, although Slaves could not vote, they would be considered part of the population to the extent of being 3/5th of a person.

On June 27, 1787 the entire legitimacy of the convention was challenged. It was contended the convention had no authority to diminish the equal power of the States and the three large States were plotting to oppress smaller States by basing representation in both Houses of Congress on population only. The small States were not fighting a stronger union. Rather, they were opposing their own decrease in power. A resolution was reached, known as the "Great Compromise." James Madison viewed the "Great Compromise" as a surrender to the smaller States. He was dissatisfied because his home State of Virginia would have benefitted greatly if representation in both Houses was based only on population. The New York representatives (also a large State) disliked the Great Compromise so much they left the convention. That was a strategic error, because by leaving they deprived their State of a vote. Smaller States loved the Great Compromise and when it was adopted they became dominant at the Convention. On July 16, 1787, the Great Compromise was formally adopted. New York had left. New Hampshire never arrived. And Rhode Island took no part. Revolutionary Hero Patrick Henry of Virginia

was so much against abolishing the Articles of Confederation that he opposed the entire Convention and thus refused to even attend from inception. The moment the small States were made equal in one branch of Congress (the Senate), they became the strongest supporters of increased national authority. Madison's Federalist beliefs peaked when representation was to be based on population. After the Great Compromise he became more cautious about granting the federal government overly extensive powers.

On September 8, 1787, a Committee was appointed to write the new U.S. Constitution. It consisted of Alexander Hamilton, James Madison, and three others. The Constitution itself was widely considered to be the brainchild of Madison. Thomas Jefferson was not even present as he was in Europe, even though he had written the Declaration of Independence in the 1770s. Revolutionary Heroes Sam Adams and John Hancock opposed ratification. James Monroe and Patrick Henry were also against it. In general, Rich Men Favored it, and Poor Men Opposed it. Governor Edmund Randolph of Virginia refused to sign it. Governor George Clinton of New York wrote a letter calling on Virginia to join New York in refusing to ratify, unless amendments were first made. Virginia was sharply split. It was the key State and totally split between the Federalists who supported it and Anti-Federalists who opposed it.

The political forces behind Anti-Federalism consisted of groups who saw their own State government power being diminished. Federalism, on the other hand, was strongest in the smaller States that were least able to deal with their own problems. Hence, the overwhelming Federalism in smaller States of Delaware, New Jersey, Georgia, Connecticut, New Hampshire and Maryland. The next issue was Ratification by the States because without ratification it would be a nullity. Madison, Hamilton and John Jay (the first Chief Justice of the U.S. Supreme Court) wrote the historic document known as the "FEDERALIST PAPERS." It consisted of essays urging Ratification. Jay, stricken by rheumatism only wrote 5 of the papers. Madison's essays #8-#20 spoke on the deficiencies of the Articles of Confederation. Madison pointed out the Declaration of Independence urged the right of the people to "abolish or alter their governments." In Federalist #45, he asserted powers delegated to the Federal Government were "few and defined." Hamilton wrote the sections on the Judiciary. Thomas Jefferson considered The Federalist Papers to be the best commentary on the principles of government ever written.

The key fights over Ratification were in the larger States consisting of Massachusetts, New York and Virginia. In Virginia, Antifederalists (led by Patrick Henry), contended the Constitution should be debated clause by clause. Federalists surprised him by immediately agreeing. Patrick Henry thundered about Endangered Rights, the Forfeit of Trial by Jury, and that federal tax collectors would infest the land oppressing the poor. Patrick Henry and George Mason used sweeping random attacks against the Constitution. In contrast, James Madison in urging Ratification calmly supported the Constitution meticulously point by point. Anti-Federalists contended that Thomas Jefferson who had written the Declaration of Independence was totally on their side. But, Jefferson was in France at the time, and thus was not able to play any role to express his opinions on the dispute of whether the Constitution should be adopted. Madison purported to speak on behalf of Jefferson by denying the assertion of Anti-Federalists that Jefferson would oppose ratification. Madison also reminded everyone George Washington supported the Constitution. Near the end of the debates the staunchest opponent of adopting the U.S. Constitution, the honored Patriot Henry spoke as follows:

"I see the awful immensity of the dangers with which it is pregnant. I see it - I feel it. I see beings of a higher order anxious concerning our decision."

Shortly thereafter, a witness noted that as if responding to Henry's invocation :

"a storm suddenly arose. It grew dark. The doors came to with a rebound, the windows rattled, and the huge wooden structure rocked."

Patrick Henry seemed to have seized upon the **Artillery of Heaven** and directed its fiercest thunders against his adversaries. James Madison wrote to Thomas Jefferson who was not present, that a

Bill of Rights might serve two purposes. First, rights solemnly declared might become so incorporated within national sentiments as to deter violations. Second, on occasions when the government exceeds its limits, a Bill of Rights would be a good ground for appeal to the public. Madison also noted that to give Courts the final power over Legislation, makes the Judiciary paramount to the legislature. In Federalist #51, Madison noted if men were Angels, no government would be necessary. And if men were absolutely Evil "we are in a wretched condition where no form of government can render us secure." The difficult problems of government existed precisely because of the mixed character of mankind. The "Great Compromise" resulted in a switch from broad support of a Federal government to a belief its powers be limited. Washington became President; Alexander Hamilton became Secretary of Treasury; and Thomas Jefferson became Secretary of State. John Jay became the first Chief Justice of the U.S. Supreme Court. The Federalists supporting broad Federal Power consisted primarily of Financiers, Slave Owners and affluent property holders. The defeated Anti-Federalist became known as the "Republican" Party and believed the solution to rid society of evil, was to rid itself of a large, powerful government.

Federalists were led by Alexander Hamilton (Secy. of Treasury); and the Anti-Federalists now known as Republicans were led by Thomas Jefferson. By 1792, President George Washington was openly criticized as having a "Pomp" tending toward Monarchism. Hamilton asserted it was the Media responsible for beginning political party warfare. James Madison who by this time had switched from being a staunch Federalist to a Republican in Thomas Jefferson's corner, was now consistently opposing Federalist programs. He was acknowledged as the Opposition Leader to the Federalists in Congress. Madison further historically noted if Hamilton's Implied Power theories became governmental policy **"every power that may be deduced, will be deduced."**

The French Revolution beginning in 1792 then began to play a prominent role in U.S. Politics. The French Minister of the new French Government requested payment from the U.S. of all debts owed to France from the Revolutionary War. Federalists who had supported the French Monarchy were distressed upon learning King Louis XVI was executed. However, Republicans were delighted by it. A massive European War then broke out when the new government of France declared War on England, Spain and Holland. President Washington in 1793 declared the U.S. would be Neutral in the European War. A dispute then broke out in Congress as to whether the President had legal Power to issue a Neutrality proclamation since the War Power constitutionally belonged to Congress.

The French Revolution created an interesting dilemma. The Revolutionary War Debt and the 1778 Treaty by which France became a U.S. Ally was made with the PRIOR French Government. Thus, the issue was whether the U.S. was bound by debts and Treaty provisions with a PRIOR Government. Alexander Hamilton as Secretary of the Treasury contended the U.S. could Renounce the 1778 Treaty with France; because it was a Monarchy in 1778 and was now a Republic. Thomas Jefferson in contrast, contended Treaties bind Nations, not just particular governments in control at a particular time.

In 1794, John Jay, was sent to Britain as a Peace Commissioner for the War between France and Britain. James Monroe, was sent to France to assure the French they were our first ally. However, when Monroe goes to France he is not told that when Jay goes to Britain; Jay is allowed to discuss commercial affairs. Thus, Jay going to Britain has instructions contradicting the instructions of Monroe who is going to France. Monroe is falsely instructed to inform the French that Jay was forbidden to make commercial deals with Britain. So essentially, Monroe was unwittingly told to Lie to France. Upon arrival, Monroe gives the French government a copy of his letter of instructions. Meanwhile, Jay in Britain agrees to a Treaty affecting commercial articles of the 1778 Treaty with France. When the French learn, they inform Monroe that Jay's Treaty with Britain was a breach of the 1778 Treaty with France.

At this time, the Federalists are on the side of Britain; but the Republican Party is on the side of France. In 1795, John Jay presents President Washington, the Treaty he made with Britain. Federalists favor ratification and Republicans oppose it. Ultimately, Washington decide to ratify the Jay Treaty. Republicans were furious. After ratification, France (our former ally) starts seizing American ships to retaliate. American Neutrality thus collapses entirely. Monroe is recalled for not presenting U.S. views faithfully to France. He then publishes a document to vindicate himself titled "View of the Conduct of the

Executive of the U.S." which is sharply critical of President Washington. France asserts the U.S. violated the 1778 Treaty that won U.S. Independence. The ratification of Jay's Treaty totally infuriates France.

In 1797, in the hope of smoothing matters over with France, President John Adams sends Federalists John Marshall and Francis Dana; along with Republican Elbridge Gerry; to France on a diplomatic mission. This begins the infamous X, Y, Z affair. The three American diplomats seeking an audience with the French Government are told if they will pay a Bribe they will be granted an audience. Federalist John Marshall is outraged, but Republican Gerry displays interest. In December, 1797 Marshall blows the whistle on the Bribery attempt. Federalists are delighted by the exposed Bribery attempt because they are Pro-British. Republicans who were Pro-French are embarrassed by Gerry's expression of interest in considering to pay a Bribe. Federalist John Marshall becomes a Hero and Republican Gerry is blamed. President John Adams then announces the French diplomatic mission was at an end. Adams then asks former President George Washington to resume his position as a Military Chief to prepare for a possible War with France. After the X, Y, Z affair, Americans were Anti-French and Pro-British, even though less than 20 years earlier they were at War with Britain seeking French help.

In February, 1799 after immense public embarrassment over the diplomatic fiasco, President Adams announces he is sending a second diplomatic envoy to France in the hope of avoiding war. This splits the Federalist party in half to the delight of the Republicans. Nobody expected Adams to send another commission. It was a quite brave act because he defied his own Federalist Party. Adams then begins to denounce his own Federalist Cabinet and questions the loyalties of his Secretaries of State, War and Treasury. Republicans now gained immense popularity.

The Presidential election of 1800 was hotly contested. It almost resulted in a Civil War. The candidates consisted of sitting President John Adams, his Vice-President Thomas Jefferson and a third candidate Aaron Burr. Typically in today's world, we think of the President and Vice President as being in the same political party. However, back then such was not the case. President John Adams was a Federalist, and his Vice-President was Republican Thomas Jefferson. And they ran against each other, along with Aaron Burr. Now what makes it more confusing is the Republican party at that time was not what became the Republican party today. The Republican party at that time would ultimately become the forerunner of today's Democratic party. And the Federalists, after many changes over the years, were basically the forerunners of today's Republican party.

So you have this hotly contested election in 1800 between Federalist Adams, Republican Jefferson, and the third candidate, Aaron Burr. The election itself would be decided by electoral votes, rather than popular votes. The result was that Thomas Jefferson and the third candidate, Aaron Burr, tied in a dead heat with each having 73 electoral votes. John Adams was a distant third. The reason Adams lost miserably was because he had alienated his own party by sending the second peace commission to France after the "X, Y Z" affair described above. That began the demise of the Federalist party.

As a result of Jefferson and Aaron Burr' tying, the election went to the House of Representatives. After 35 ballots, they were still tied. So even the House could not decide. There were reports that Federalists who were still in control of the government intended to elect a Federalist instead of either Jefferson or Burr. That would have resulted in a Civil War. Republicans suspected federal troops might be employed against them. However, on the 36th ballot, representative James Bayard from Delaware changed his vote to an abstension. As a result, Jefferson won. So Thomas Jefferson, who was a Republican, became our third President. Federalist John Adams, his fierce rival, became an unpopular lame duck president until leaving office.

Now, here's where this all starts to affect the Judiciary in a major way. Before leaving office, President Adams appoints Federalist John Marshall to be Chief Justice of the U.S. Supreme Court. Previously, Marshall was Adams' Secretary of State. The new President Thomas Jefferson appoints James Madison to be his Secretary of State. Keep in mind that in 1801, the Judiciary did not have the exclusive power to interpret the law. That power was not expressly given to the Judiciary in the Constitution neither then, nor in today's world. As a point of fact, the Judiciary in 1801 was pretty much disregarded as an almost a inconsequential branch of government. In "form," it was co-equal to the other

two branches, but "substantively" it was clearly weaker. It had no real logistical power. All it could do was render opinions that "might" be complied with; depending upon who was in office.

But, when Federalist President John Adams leaves office, he does kind of a tricky little thing. Right before he leaves office, he appoints a large number of people to be Judges. And those Judges, who were all Federalists (because Adams was a Federalist), became known as the Midnight Judges. This is a famous event in history, because the question becomes whether they were legitimately appointed. And the reason it becomes an issue is because the document evidencing the appointments (known as the "commissions") were never delivered. Now President Adams had appointed his Secretary of State John Marshall to be Chief Justice. But, before John Marshall became Chief Justice, he was supposed to deliver the commissions for the Midnight Judges. And he doesn't do it. When Jefferson and Madison come into office as the new President and Secretary of State, the commissions are literally just lying on a table, undelivered. And the individual who was supposed to deliver them was John Marshall, the new Chief Justice. To this day, it is unknown why he did not deliver the commissions.

So what happens is that one of the appointed Judges who is named Marbury, sues to get his commission. And the case is going to go to the U.S. Supreme Court, where it will effectively be decided by John Marshall. Yet Marshall is the exact person who was supposed to deliver the commissions in the first place. You could not possibly have a case more warranting judicial disqualification. Because Marshall was the key person involved in the facts giving rise to case itself. Chief Justice Marshall was a Federalist and President Jefferson is a Republican. Marshall knows even if he Orders Jefferson to deliver the commissions, Jefferson will not comply. Put simply, Marshall had no logistical power to enforce such an Order and Jefferson was immensely popular.

So, what Marshall does is as follows. He Orders the new Secretary of State, Republican James Madison, to appear before the court. Jefferson tells Madison, just ignore him, don't go. So essentially Jefferson is kind of just treating the U.S. Supreme Court like a piece of worthless garbage and spitting in the face of Chief Justice Marshall. Accordingly, Secretary of State James Madison ignores the Court's Order and doesn't even show up. Marshall then pulls off one of the most brilliant, yet nefarious maneuvers in American history. Knowing full well he can't take on Jefferson because of his popularity, and knowing Jefferson will never deliver the commissions, Marshall issues an opinion as follows. He asserts the only way Marbury's commission can be valid is if the enabling statute, which was the Judiciary Act of 1801, was valid. He then proceeds to declare the Judiciary Act of 1801 to be Unconstitutional.

This tricky maneuver allows Marshall to save face from the embarrassment of his own failure to deliver the commissions. Jefferson doesn't care because all he wanted was to ensure that Marbury and the other Midnight Judges don't take office. Marshall accomplishes this maneuver by basing his opinion on the premise that it is the Sole and Exclusive Power of the Judiciary to interpret the law. So essentially he gives Jefferson the small win. It appeared to be a big win at the time because the Federalist Judges that Jefferson opposed didn't get to take office. But in all fairness, it was really the small win. Because what Marshall established was a precedent standing for the proposition the Judiciary, has the Sole and Exclusive power to interpret the law. And once you have the power to interpret the law, (as we see in today's world), that is immensely more important than the power to enact law. It's more important than the power to administer law that the executive has; because the power to interpret law is effectively the power to make law. That's because the law is interpreted by defining words. Once you can define words in a statute to mean anything you want, you substantively have the power to make law. The words Congress wrote don't mean anything. It's only the words the Judiciary uses to interpret them, that becomes the mechanism by which laws are administered.

So remember, the power to interpret the law is the power to make law. It virtually neutralizes Congress as well as the Executive branch. The law becomes exactly what Judiciary says it's going to be. And this all occurred because John Marshall, approximately 225 years ago, pulled a fast one in Marbury v. Madison by giving Jefferson the "small win" by declaring a statute unconstitutional and establishing as precedent the only branch of government with the power to interpret law is the Judiciary.

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