

## Constitutional Corner – The War in the Courts

In his 1833 [Commentaries on the Constitution](#),<sup>1</sup> the eminent jurist Joseph Story wrote:

"The truth is, that, even with the most secure tenure of office, during good behavior, the danger is not, that the judges will be too firm in resisting public opinion, and in defence of private rights or public liberties; but, that they will be ready to yield themselves to the passions, and politics, and prejudices of the day."

It is no secret that the Left has declared war on Donald Trump. From his election on November 8<sup>th</sup> onward it has been "open season" on all things Trump, whether rampant [vandalism](#)<sup>2</sup> at his various commercial properties to perpetual protests to snide remarks over Melania's [choice of apparel at official functions](#).<sup>3</sup>

It is also no secret that certain federal judges have "*yield[ed] themselves to the passions, and politics, and prejudices of the day.*" Not content with that, some seem to have actively enlisted in the Left's "army." While rank-and-file Progressives can only don sackcloth, wail and gnash their teeth over Trump's dismantling of the Progressive edifice Obama labored eight years to erect, progressive federal judges are actually in a position to act with effect.

Not that they should be. Alexander Hamilton, in one of his most famous statements, called the judiciary the "least dangerous branch." How wrong he was. Today, federal judges are the "go-to guys" for bypassing representative government; helping Progressives achieve in the courtroom what they have no chance of achieving in the Congress. But this is the doctrine the American people have been lulled into embracing:

"To consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy," said Jefferson.

Progressives seem quite comfortable with "despotism of an oligarchy" – particularly when the oligarchs share their own progressive views.

Which brings us to District Judge Mark A. Goldsmith.

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<sup>1</sup> [https://en.wikipedia.org/wiki/Commentaries\\_on\\_the\\_Constitution\\_of\\_the\\_United\\_States](https://en.wikipedia.org/wiki/Commentaries_on_the_Constitution_of_the_United_States)

<sup>2</sup> <http://www.newsweek.com/donald-trump-vandalism-golf-courses-walk-fame-star-567057>

<sup>3</sup> <http://www.westernjournalism.com/melania-trumps-fashion-choice-at-wounded-warrior-event-makes-waves-on-social-media/>

Judge Goldsmith, nominated by Barack Obama, [has ordered a temporary injunction](#)<sup>4</sup> against the Justice Department's attempts to deport hundreds of illegal immigrants they either have in custody or whose locations are known. Judge Goldsmith believes that the courts should have a say in whether a particular alien should or should not be deported. He even carved out a new Constitutional duty for the courts: "Constitutional First Responders:" *"Under the law, the federal district courts are generally the 'first responders' when rights guaranteed by the Constitution require protection."* Really? I've searched Article III high and low; neither the term "First Responder" nor the concept are to be found therein. I can't think of a better example of a "judicial activism."

"First Responder?" Congress takes a different view. The law in question, Title 8 U.S. Code § 1227, prohibits interference in deportation cases; it flat out says:

"No court shall have jurisdiction to review a [deportation] decision of the Attorney General to grant or deny a waiver ..."

This is called "jurisdiction stripping," a power the Congress was granted in Article 3, Section 2:

"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." (Emphasis added)

This little-known provision of the Constitution has even been tested in the Supreme Court. During the Reconstruction period, Congress withdrew jurisdiction from a case the U.S. Supreme Court was in the process of adjudicating ([ex parte McCordle](#)).<sup>5</sup> They had heard oral arguments but had not yet rendered a decision. Upon being informed of the bill Congress had just passed limiting their jurisdiction in the matter at hand, lo and behold, the high court shut down the case mid-stream. Congress has the power and the Supreme Court agrees. Or you could say: the people, through their elected representatives, have the power, the courts must follow orders. Abraham Lincoln would agree:

"We the people are the rightful masters of both Congress and the courts, not to overthrow the Constitution but to overthrow the men who pervert the Constitution." (Emphasis added)

One might argue that judicial stripping only applies to the Supreme Court, since that is the only court mentioned in the clause, that it does not apply to the federal courts below. But recall that

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<sup>4</sup> <http://www.washingtontimes.com/news/2017/jul/12/judge-rules-courts-can-stop-trump-deportations/>

<sup>5</sup> [https://en.wikipedia.org/wiki/Ex\\_parte\\_McCardle](https://en.wikipedia.org/wiki/Ex_parte_McCardle)

the Constitution requires only “one supreme Court, and ... such inferior Courts as the Congress may from time to time ordain and establish.” All these “inferior” courts exist at the pleasure of Congress; Congress created them and Congress can dissolve them through a simple act of Congress (provided the bill survives a Presidential veto). Sort of like the angry Mom saying to the up-start child: “I brought you into this world, I can take you out.” Does it make sense that the lower courts would enjoy a power denied the Supreme Court?

Apparently Judge Goldsmith believes this feature of the Constitution is, well, unconstitutional. To be clear, he admitted he was not completely certain whether or not he had jurisdiction in deportation matters, but he then went on to announce that it was up to him to decide this question! Say what? To give him time to figure it out, he ordered a stay to the deportations. Wrong answer, judge.

Certainly when Judge Goldsmith went through law school he was exposed to a legal principle called: “Nemo judex in causa sua;” which translates to “no man should be a judge in his own cause.” This is a universal principle of justice; the saying itself was first attributed to Sir Edward Coke in the 17th century. Rendered another way: “no person should judge a case in which they have an interest.”

So what do we the people do when we have federal judges “going rogue,” making indefensible decisions, judging their own jurisdiction in a matter? The word that comes to mind is “impeachment.” In [Federalist 65](#), Alexander Hamilton calls impeachment “a method of national inquest into the conduct of public men.”

Can you impeach a judge for an improper decision? That’s where it gets tricky.

We’ve impeached a bunch of federal judges and justices over the years. [Wikipedia](#) puts the count at sixty-one as of 2003.<sup>6</sup> But none of these were impeached for their decisions, only for misbehavior. There’s an unwritten rule – a sort of “gentlemen’s agreement” -- to help keep the courts separate from partisan politics, judges (and justices) will not be impeached for their decisions.

But where is the line between a horrendous decision and judicial malpractice? Dred Scott, Plessy v. Ferguson, Roe v. Wade, and few other decisions come to mind.

Over the years Congress has impeached (and the Senate convicted) federal judges for all sorts of misbehavior; Drunkenness, graft/corruption, Tax evasion, to name just a few. There have also been judges impeached for “abuse of power.” The [impeachment of district Judge James H. Peck](#)<sup>7</sup> provides an example. Peck was impeached for “usurping a power which the laws of the

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<sup>6</sup> [https://en.wikipedia.org/wiki/Impeachment\\_investigations\\_of\\_United\\_States\\_federal\\_judges](https://en.wikipedia.org/wiki/Impeachment_investigations_of_United_States_federal_judges)

<sup>7</sup> <http://tinyurl.com/y99vts4h>

land did not give him.” He was subsequently acquitted, but “usurping power” sounds suspiciously similar to “deciding one’s own jurisdiction.”

If there is any good news to this story, it is that there are over a hundred vacancies in the federal court system (120) and Trump has begun to fill them, with conservatives. The only wrinkle is an archaic Senate rule that requires both of a state’s senators to agree to advance a judicial nomination of someone from their state by forwarding what are called “[Blue Slips](#).”<sup>8</sup> No “Blue Slips,” no nomination. To their credit, Republicans have threatened to revoke the rule if Democrats start using it to stop otherwise qualified nominations. Like the filibuster, time to get rid of another archaic Senate rule.

If you are upset by any of this, what can you do? Term limits on federal judges might solve some of the problem, or at least minimize the chances for continued judicial malpractice, but even that could backfire. Might a judge facing a limited term be even more tempted to misbehave knowing he has only a short time to do so and face any consequences?

Opening up impeachment in response to decisions which clearly do not respect the original understanding of the Constitution (its not that hard to discern) would be another remedy. One or two impeachment proceedings would send a strong message to judges that it’s time to dust off those old copies of Federalist.

And of course you can ask your two Senators whether they intend to use the Blue Slip method to block judicial appointments.

The last remedy I’ll mention comes from my co-commentator on my radio show: “[We the People – the Constitution Matters](#),”<sup>9</sup> Phil Duffy. Phil is convinced that Article 3 was drafted in haste and is woefully deficient in delineating the powers of the judiciary. It is hard to argue given the problems we’re experiencing today with these black-robed tyrants. Article 3 begs a complete re-write. That would require either an Article V convention or a full-blown Constitutional Convention, both extremely high hurdles in today’s environment.

America has to come to grips with what the federal judiciary has become. It is not what the Framers intended. Both sides of the aisle are guilty of “judge-shopping” and that only exacerbates the problem. Only judges who pledge to interpret the Constitution in the context of its original meaning should sit on the federal bench.

The American people need to step up to the plate and once again become “the rightful masters of both Congress and the courts.” Just saying.

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<sup>8</sup> <https://www.getamericapraying.com/blog/senate-blue-slip-procedure-and-judicial-appointments/>

<sup>9</sup> <http://www.1180wfyl.com/programs.html>

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