

Founders on Judicial Supremacy, Lawyers, and the Danger of Lawfare

Thomas Jefferson — The Most Extensive Warnings

Judicial Supremacy = Oligarchy

Letter to Judge Spencer Roane, 1821 (Vol 12, p. 2749)

"You seem... to consider the judges as the ultimate arbiters of all constitutional questions; a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps. Their maxim is 'boni judicis est ampliare jurisdictionem' [it is the duty of a good judge to expand his jurisdiction], and their power the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control."

"The constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all the departments co-equal and co-sovereign within themselves."

"I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education."

The Judiciary as the "Dangerous Branch"

Marginal note in Taylor's *Construction Construed* (Vol 12, p. 339)

"Judiciary the dangerous branch of the United States Government."

The Judiciary Working "Like Gravity"

Letter to Judge Spencer Roane, 1819 (Vol 12, p. 3087)

"The judiciary branch is the instrument which, working like gravity, without intermission, is to press us at last into one consolidated mass."

"If Congress fails to shield the States from dangers so palpable and so imminent, the States must shield themselves, and meet the invader foot to foot."

On Judges Deciding Constitutionality for All Branches

Letter, 1804 (Vol 10, p. 8383)

"The opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislature & Executive also, in their spheres, would make the judiciary a despotic branch."

"The Constitution intended that the three great branches of the government should be co-ordinate, & independent of each other. As to acts, therefore, which are to be done by either, it has given no control to another branch."

Direct Attack on *Marbury v. Madison*

Letter on the Burr trial, 1806 (Vol 10, p. 9827)

"I observe that the case of Marbury v. Madison has been cited, and I think it material to stop at the threshold the citing that case as authority, and to have it denied to be law."

Jefferson gives two reasons: (1) it was an extrajudicial opinion since the judges disclaimed jurisdiction then opined anyway; (2) the Constitution made the three branches co-ordinate, giving no branch control over another's acts.

On the Lawyer Class Becoming Tories

Letter, 1825 (Vol 12, p. 6153)

"When his black-letter text, and uncouth but cunning learning got out of fashion, and the honied Mansfieldism of Blackstone became the student's hornbook, from that moment, that profession (the nursery of our Congress) began to slide into toryism, and nearly all the young brood of lawyers now are of that hue. They suppose themselves, indeed, to be whigs, because they no longer know what whigism or republicanism means."

Context: Jefferson is writing about selecting a law professor for the University of Virginia and insisting that political principles be a factor — because the legal profession had become the nursery of anti-republican sentiment.

"Confidence Is Everywhere the Parent of Despotism"

Kentucky Resolutions, 1798 (Vol 8, p. 6879)

"Confidence is everywhere the parent of despotism — free government is founded in jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited constitutions, to bind down those whom we are obliged to trust with power."

"In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."

On Marshall's Court and the Need for Independent Judges

Letter, 1810 (Vol 11, p. 2857)

"It will be difficult to find a character of firmness enough to preserve his independence on the same bench with Marshall."

Jefferson lamented that Virginia had "suffered long enough by having such a cypher in so important an office" (referring to a weak judge) and warned that "a milk & water character in that office would be seen as a calamity."

On Federal Courts Usurping State Jurisdiction

Letter, 1821 — Cohens v. Virginia (Vol 12, p. 7167)

Jefferson analyzed Chief Justice Marshall's opinion in *Cohens v. Virginia*, where Marshall went beyond the case to argue that states could be sued in federal court and that Congress could authorize corporations to legislate within states. Jefferson said Marshall's arguments had been:

"so completely refuted by Roane, that if he can be answered, I surrender human reason as a vain and useless faculty, given to bewilder, and not to guide us."

He added: *"But this case is not dead, it only sleepeth."*

James Madison — More Measured, But Consistent

On the Judiciary as the Weakest Branch

Virginia Ratifying Convention, 1788 (Vol 5)

“In our Government it is, perhaps, less necessary to guard against the abuse in the Executive Department than any other; because it is not the stronger branch of the system, but the weaker.”

Madison believed the **Legislature** was the greater danger (because it was closest to the people and most likely to be abused by faction). But he still insisted on structural separation.

On Separation of Powers Being Essential

Convention Notes (Vol 3, p. 3181)

“If it be essential to the preservation of liberty that the Legislative, Executive, & Judiciary powers be separate, it is essential to a maintenance of the separation, that they should be independent of each other.”

On the Danger of Any Department Overleaping Its Bounds

Memorial and Remonstrance, 1785 (Vol 2, p. 2761)

“The preservation of a free government requires not merely, that the metes and bounds which separate each department of power may be invariably maintained; but more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves.”

Gerry’s Observation on Judicial Review (recorded by Madison)

Convention Notes (Vol 3, p. 997)

“Mr. Gerry doubted whether the Judiciary ought to form a part of it, as they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality. In some States the Judges had actually set aside laws as being against the Constitution. This was done too with general approbation.”

On Law and Justice in Extended Republic

Notes on Confederacy (Vol 5)

“The line of distinction between the power of regulating trade and that of drawing revenue from it, which was once considered the barrier of our liberties, was found on fair discussion, to be absolutely undefinable.”

“Even the boundaries between the Executive, Legislative, & Judiciary powers, though in general so strongly marked in themselves, consist in many instances of mere shades of difference.”

The Declaration of Independence — The Original Indictment

Charges Against British Judges (Original Draft)

Jefferson’s original draft of the Declaration (Vol 2) includes multiple specific charges against the British judiciary:

“He has made judges dependent on his will alone, for the tenure of their offices, and the amount and

payment of their salaries.”

“They have extended the jurisdiction of courts of admiralty beyond their ancient limits, thereby depriving us of trial by jury in cases affecting both life & property, & subjecting both to the arbitrary decision of a single & dependent judge.”

“They have declared that American subjects charged with certain offenses shall be transported beyond sea to be tried before the very persons against whose pretended sovereignty the offense is supposed to be committed.”

These three charges — dependent judges, arbitrary jurisdiction, and venue manipulation — were considered sufficient grievances to justify revolution.

The Kentucky Resolutions of 1798 (authored by Jefferson)

The most comprehensive founding-era statement against judicial overreach:

On transferring judicial power to the President:

“Transferring the power of judging any person who is under the protection of the laws, from the Courts to the President of the United States... is against the article of the Constitution which provides that ‘the judicial power of the United States shall be vested in Courts, the judges of which shall hold their offices during good behavior,’ and that the said act is void for that reason also.”

On the Sedition Act and what follows:

“The friendless alien has indeed been selected as the safest subject of a first experiment: but the citizen will soon follow, or rather has already followed; for already has a Sedition act marked him as its prey.”

On the cycle of lawfare:

“These and successive acts of the same character, unless arrested at the threshold, necessarily drive these states into revolution and blood, and will furnish new calumnies against republican government, and new pretexts for those who wish it to be believed that man cannot be governed but by a rod of iron.”
