

THE ANTIFEDERALIST PAPERS NUMBER 78 79

THE POWER OF THE JUDICIARY (PART 1)

1788

THE SUPREME COURT UNDER THIS CONSTITUTION WOULD BE EXALTED ABOVE ALL OTHER POWER IN THE GOVERNMENT, AND SUBJECT TO NO CONTROL. THE BUSINESS OF THIS PAPER WILL BE TO ILLUSTRATE THIS, AND TO SHOW THE DANGER THAT WILL RESULT FROM IT. I QUESTION WHETHER THE WORLD EVER SAW, IN ANY PERIOD OF IT, A COURT OF JUSTICE INVESTED WITH SUCH IMMENSE POWERS, AND YET PLACED IN A SITUATION SO LITTLE RESPONSIBLE. CERTAIN IT IS, THAT IN ENGLAND, AND IN THE SEVERAL STATES, WHERE WE HAVE BEEN TAUGHT TO BELIEVE THE COURTS OF LAW ARE PUT UPON THE MOST PRUDENT ESTABLISHMENT, THEY ARE ON A VERY DIFFERENT FOOTING.

THE JUDGES IN ENGLAND, IT IS TRUE, HOLD THEIR OFFICES DURING THEIR GOOD BEHAVIOR, BUT THEN THEIR DETERMINATIONS ARE SUBJECT TO CORRECTION BY THE HOUSE OF LORDS; AND THEIR POWER IS BY NO MEANS SO EXTENSIVE AS THAT OF THE PROPOSED SUPREME COURT OF THE UNION. I BELIEVE THEY IN NO INSTANCE ASSUME THE AUTHORITY TO SET ASIDE AN ACT OF PARLIAMENT UNDER THE IDEA THAT IT IS INCONSISTENT WITH THEIR CONSTITUTION. THEY CONSIDER

THEMSELVES BOUND TO DECIDE ACCORDING TO THE EXISTING LAWS OF THE LAND, AND NEVER UNDERTAKE TO CONTROL THEM BY ADJUDGING THAT THEY ARE INCONSISTENT WITH THE CONSTITUTION-MUCH LESS ARE THEY VESTED WITH THE POWER OF GIVING AN EQUITABLE CONSTRUCTION TO THE CONSTITUTION.

THE JUDGES IN ENGLAND ARE UNDER THE CONTROL OF THE LEGISLATURE, FOR THEY ARE BOUND TO DETERMINE ACCORDING TO THE LAWS PASSED UNDER THEM. BUT THE JUDGES UNDER THIS CONSTITUTION WILL CONTROL THE LEGISLATURE, FOR THE SUPREME COURT ARE AUTHORISED IN THE LAST RESORT, TO DETERMINE WHAT IS THE EXTENT OF THE POWERS OF THE CONGRESS. THEY ARE TO GIVE THE CONSTITUTION AN EXPLANATION, AND THERE IS NO POWER ABOVE THEM TO SET ASIDE THEIR JUDGMENT. THE FRAMERS OF THIS CONSTITUTION APPEAR TO HAVE FOLLOWED THAT OF THE BRITISH, IN RENDERING THE JUDGES INDEPENDENT, BY GRANTING THEM THEIR OFFICES DURING GOOD BEHAVIOR, WITHOUT FOLLOWING THE CONSTITUTION OF ENGLAND, IN INSTITUTING A TRIBUNAL IN WHICH THEIR ERRORS MAY BE CORRECTED; AND WITHOUT ADVERTING TO THIS, THAT THE JUDICIAL UNDER THIS SYSTEM HAVE A POWER WHICH IS ABOVE THE LEGISLATIVE, AND WHICH INDEED TRANSCENDS ANY POWER BEFORE GIVEN TO A JUDICIAL BY ANY FREE GOVERNMENT UNDER HEAVEN.

I DO NOT OBJECT TO THE JUDGES HOLDING THEIR COMMISSIONS DURING GOOD BEHAVIOR. I SUPPOSE IT A PROPER PROVISION PROVIDED THEY WERE MADE PROPERLY RESPONSIBLE. BUT I SAY, THIS SYSTEM HAS FOLLOWED THE ENGLISH GOVERNMENT IN THIS, WHILE IT HAS DEPARTED FROM ALMOST EVERY OTHER PRINCIPLE OF THEIR JURISPRUDENCE, UNDER THE IDEA, OF RENDERING THE JUDGES INDEPENDENT; WHICH, IN THE BRITISH CONSTITUTION, MEANS NO MORE THAN THAT THEY HOLD THEIR PLACES DURING GOOD BEHAVIOR, AND HAVE FIXED SALARIES . . . [THE AUTHORS OF THE CONSTITUTION] HAVE MADE THE JUDGES INDEPENDENT, IN THE FULLEST SENSE OF THE WORD. THERE IS NO POWER ABOVE THEM, TO CONTROL ANY OF THEIR DECISIONS. THERE IS NO AUTHORITY THAT CAN REMOVE THEM, AND THEY CANNOT BE CONTROLLED BY THE LAWS OF THE LEGISLATURE. IN SHORT, THEY ARE INDEPENDENT OF THE PEOPLE, OF THE LEGISLATURE, AND OF EVERY POWER UNDER HEAVEN. MEN PLACED IN THIS SITUATION WILL GENERALLY SOON FEEL THEMSELVES INDEPENDENT OF HEAVEN ITSELF. BEFORE I PROCEED TO ILLUSTRATE THE TRUTH OF THESE REFLECTIONS, I BEG LIBERTY TO MAKE ONE REMARK. THOUGH IN MY OPINION THE JUDGES OUGHT TO HOLD THEIR OFFICES DURING GOOD BEHAVIOR, YET I THINK IT IS CLEAR, THAT THE REASONS IN FAVOR OF THIS ESTABLISHMENT OF THE JUDGES IN ENGLAND, DO BY NO MEANS

APPLY TO THIS COUNTRY.

THE GREAT REASON ASSIGNED, WHY THE JUDGES IN BRITAIN OUGHT TO BE COMMISSIONED DURING GOOD BEHAVIOR, IS THIS, THAT THEY MAY BE PLACED IN A SITUATION, NOT TO BE INFLUENCED BY THE CROWN, TO GIVE SUCH DECISIONS AS WOULD TEND TO INCREASE ITS POWERS AND PREROGATIVES. WHILE THE JUDGES HELD THEIR PLACES AT THE WILL AND PLEASURE OF THE KING, ON WHOM THEY DEPENDED NOT ONLY FOR THEIR OFFICES, BUT ALSO FOR THEIR SALARIES, THEY WERE SUBJECT TO EVERY UNDUE INFLUENCE. IF THE CROWN WISHED TO CARRY A FAVORITE POINT, TO ACCOMPLISH WHICH THE AID OF THE COURTS OF LAW WAS NECESSARY, THE PLEASURE OF THE KING WOULD BE SIGNIFIED TO THE JUDGES. AND IT REQUIRED THE SPIRIT OF A MARTYR FOR THE JUDGES TO DETERMINE CONTRARY TO THE KING'S WILL. THEY WERE ABSOLUTELY DEPENDENT UPON HIM BOTH FOR THEIR OFFICES AND LIVINGS. THE KING, HOLDING HIS OFFICE DURING LIFE, AND TRANSMITTING IT TO HIS POSTERITY AS AN INHERITANCE, HAS MUCH STRONGER INDUCEMENTS TO INCREASE THE PREROGATIVES OF HIS OFFICE THAN THOSE WHO HOLD THEIR OFFICES FOR STATED PERIODS OR EVEN FOR LIFE. HENCE THE ENGLISH NATION GAINED A GREAT POINT, IN FAVOR OF LIBERTY, WHEN THEY OBTAINED THE APPOINTMENT OF THE JUDGE, DURING GOOD BEHAVIOR. THEY GOT FROM THE CROWN

A CONCESSION WHICH DEPRIVED IT OF ONE OF THE MOST POWERFUL ENGINES WITH WHICH IT MIGHT ENLARGE THE BOUNDARIES OF THE ROYAL PREROGATIVE AND ENCROACH ON THE LIBERTIES OF THE PEOPLE. BUT THESE REASONS DO NOT APPLY TO THIS COUNTRY. WE HAVE NO HEREDITARY MONARCH; THOSE WHO APPOINT THE JUDGES DO NOT HOLD THEIR OFFICES FOR LIFE, NOR DO THEY DESCEND TO THEIR CHILDREN. THE SAME ARGUMENTS, THEREFORE, WHICH WILL CONCLUDE IN FAVOR OF THE TENURE OF THE JUDGE'S OFFICES FOR GOOD BEHAVIOR, LOSE A CONSIDERABLE PART OF THEIR WEIGHT WHEN APPLIED TO THE STATE AND CONDITION OF AMERICA. BUT MUCH LESS CAN IT BE SHOWN, THAT THE NATURE OF OUR GOVERNMENT REQUIRES THAT THE COURTS SHOULD BE PLACED BEYOND ALL ACCOUNT MORE INDEPENDENT, SO MUCH SO AS TO BE ABOVE CONTROL.

I HAVE SAID THAT THE JUDGES UNDER THIS SYSTEM WILL BE INDEPENDENT IN THE STRICT SENSE OF THE WORD. TO PROVE THIS I WILL SHOW THAT THERE IS NO POWER ABOVE THEM THAT CAN CONTROL THEIR DECISIONS, OR CORRECT THEIR ERRORS. THERE IS NO AUTHORITY THAT CAN REMOVE THEM FROM OFFICE FOR ANY ERRORS OR WANT OF CAPACITY, OR LOWER THEIR SALARIES, AND IN MANY CASES THEIR POWER IS SUPERIOR TO THAT OF THE LEGISLATURE.

1ST. THERE IS NO POWER ABOVE THEM THAT CAN CORRECT THEIR ERRORS OR CONTROL THEIR DECISIONS. THE ADJUDICATIONS OF THIS COURT ARE FINAL AND IRREVERSIBLE, FOR THERE IS NO COURT ABOVE THEM TO WHICH APPEALS CAN LIE, EITHER IN ERROR OR ON THE MERITS. IN THIS RESPECT IT DIFFERS FROM THE COURTS IN ENGLAND, FOR THERE THE HOUSE OF LORDS IS THE HIGHEST COURT, TO WHOM APPEALS, IN ERROR, ARE CARRIED FROM THE HIGHEST OF THE COURTS OF LAW.

2ND. THEY CANNOT BE REMOVED FROM OFFICE OR SUFFER A DIMINUTION OF THEIR SALARIES, FOR ANY ERROR IN JUDGMENT [DUE] TO WANT OF CAPACITY. IT IS EXPRESSLY DECLARED BY THE CONSTITUTION, "THAT THEY SHALL AT STATED TIMES RECEIVE A COMPENSATION FOR THEIR SERVICES WHICH SHALL NOT BE DIMINISHED DURING THEIR CONTINUANCE IN OFFICE."

THE ONLY CLAUSE IN THE CONSTITUTION WHICH PROVIDES FOR THE REMOVAL OF THE JUDGES FROM OFFICES, IS THAT WHICH DECLARES, THAT "THE PRESIDENT, VICE- PRESIDENT, AND ALL CIVIL OFFICERS OF THE UNITED STATES, SHALL BE REMOVED FROM OFFICE, ON IMPEACHMENT FOR, AND CONVICTION OF TREASON, BRIBERY, OR OTHER HIGH CRIMES AND MISDEMEANORS." BY THIS PARAGRAPH, CIVIL OFFICERS, IN

WHICH THE JUDGES ARE INCLUDED, ARE REMOVABLE ONLY FOR CRIMES. TREASON AND BRIBERY ARE NAMED, AND THE REST ARE INCLUDED UNDER THE GENERAL TERMS OF HIGH CRIMES AND MISDEMEANORS. ERRORS IN JUDGMENT, OR WANT OF CAPACITY TO DISCHARGE THE DUTIES OF THE OFFICE, CAN NEVER BE SUPPOSED TO BE INCLUDED IN THESE WORDS, HIGH CRIMES AND MISDEMEANORS. A MAN MAY MISTAKE A CASE IN GIVING JUDGMENT, OR MANIFEST THAT HE IS INCOMPETENT TO THE DISCHARGE OF THE DUTIES OF A JUDGE, AND YET GIVE NO EVIDENCE OF CORRUPTION OR WANT OF INTEGRITY. TO SUPPORT THE CHARGE, IT WILL BE NECESSARY TO GIVE IN EVIDENCE SOME FACTS THAT WILL SHOW, THAT THE JUDGES COMMITTED THE ERROR FROM WICKED AND CORRUPT MOTIVES.

3D. THE POWER OF THIS COURT IS IN MANY CASES SUPERIOR TO THAT OF THE LEGISLATURE. I HAVE SHOWED, IN A FORMER PAPER, THAT THIS COURT WILL BE AUTHORISED TO DECIDE UPON THE MEANING OF THE CONSTITUTION; AND THAT, NOT ONLY ACCORDING TO THE NATURAL AND OBVIOUS MEANING OF THE WORDS, BUT ALSO ACCORDING TO THE SPIRIT AND INTENTION OF IT. IN THE EXERCISE OF THIS POWER THEY WILL NOT BE SUBORDINATE TO, BUT ABOVE THE LEGISLATURE. FOR ALL THE DEPARTMENTS OF THIS GOVERNMENT WILL RECEIVE THEIR POWERS, SO FAR AS THEY ARE EXPRESSED IN THE CONSTITUTION, FROM THE PEOPLE IMMEDIATELY, WHO ARE

THE SOURCE OF POWER. THE LEGISLATURE CAN ONLY EXERCISE SUCH POWERS AS ARE GIVEN THEM BY THE CONSTITUTION; THEY CANNOT ASSUME ANY OF THE RIGHTS ANNEXED TO THE JUDICIAL; FOR THIS PLAIN REASON, THAT THE SAME AUTHORITY WHICH VESTED THE LEGISLATURE WITH THEIR POWERS, VESTED THE JUDICIAL WITH THEIRS. BOTH ARE DERIVED FROM THE SAME SOURCE; BOTH THEREFORE ARE EQUALLY VALID, AND THE JUDICIAL HOLD THEIR POWERS INDEPENDENTLY OF THE LEGISLATURE, AS THE LEGISLATURE DO OF THE JUDICIAL. THE SUPREME COURT THEN HAVE A RIGHT, INDEPENDENT OF THE LEGISLATURE, TO GIVE A CONSTRUCTION TO THE CONSTITUTION AND EVERY PART OF IT, AND THERE IS NO POWER PROVIDED IN THIS SYSTEM TO CORRECT THEIR CONSTRUCTION OR DO IT AWAY. IF, THEREFORE, THE LEGISLATURE PASS ANY LAWS, INCONSISTENT WITH THE SENSE THE JUDGES PUT UPON THE CONSTITUTION, THEY WILL DECLARE IT VOID; AND THEREFORE IN THIS RESPECT THEIR POWER IS SUPERIOR TO THAT OF THE LEGISLATURE. IN ENGLAND THE JUDGES ARE NOT ONLY SUBJECT TO HAVE THEIR DECISIONS SET ASIDE BY THE HOUSE OF LORDS, FOR ERROR, BUT IN CASES WHERE THEY GIVE AN EXPLANATION TO THE LAWS OR CONSTITUTION OF THE COUNTRY CONTRARY TO THE SENSE OF THE PARLIAMENT -THOUGH THE PARLIAMENT WILL NOT SET ASIDE THE JUDGMENT OF THE COURT-YET, THEY HAVE

AUTHORITY, BY A NEW LAW, TO EXPLAIN THE FORMER ONE, AND BY THIS MEANS TO PREVENT A RECEPTION OF SUCH DECISIONS. BUT NO SUCH POWER IS IN THE LEGISLATURE. THE JUDGES ARE SUPREME AND NO LAW, EXPLANATORY OF THE CONSTITUTION, WILL BE BINDING ON THEM.

WHEN GREAT AND EXTRAORDINARY POWERS ARE VESTED IN ANY MAN, OR BODY OF MEN, WHICH IN THEIR EXERCISE, MAY OPERATE TO THE OPPRESSION OF THE PEOPLE, IT IS OF HIGH IMPORTANCE THAT POWERFUL CHECKS SHOULD BE FORMED TO PREVENT THE ABUSE OF IT.

PERHAPS NO RESTRAINTS ARE MORE FORCIBLE, THAN SUCH AS ARISE FROM RESPONSIBILITY TO SOME SUPERIOR POWER. HENCE IT IS THAT THE TRUE POLICY OF A REPUBLICAN GOVERNMENT IS, TO FRAME IT IN SUCH MANNER, THAT ALL PERSONS WHO ARE CONCERNED IN THE GOVERNMENT, ARE MADE ACCOUNTABLE TO SOME SUPERIOR FOR THEIR CONDUCT IN OFFICE. THIS RESPONSIBILITY SHOULD ULTIMATELY REST WITH THE PEOPLE. TO HAVE A GOVERNMENT WELL ADMINISTERED IN ALL ITS PARTS, IT IS REQUISITE THE DIFFERENT DEPARTMENTS OF IT SHOULD BE SEPARATED AND LODGED AS MUCH AS MAY BE IN DIFFERENT HANDS. THE LEGISLATIVE POWER SHOULD BE IN ONE BODY, THE EXECUTIVE IN ANOTHER, AND THE JUDICIAL IN ONE DIFFERENT FROM

EITHER. BUT STILL EACH OF THESE BODIES SHOULD BE ACCOUNTABLE FOR THEIR CONDUCT. HENCE IT IS IMPRACTICABLE, PERHAPS, TO MAINTAIN A PERFECT DISTINCTION BETWEEN THESE SEVERAL DEPARTMENTS. FOR IT IS DIFFICULT, IF NOT IMPOSSIBLE, TO CALL TO ACCOUNT THE SEVERAL OFFICERS IN GOVERNMENT, WITHOUT IN SOME DEGREE MIXING THE LEGISLATIVE AND JUDICIAL. THE LEGISLATURE IN A FREE REPUBLIC ARE CHOSEN BY THE PEOPLE AT STATED PERIODS, AND THEIR RESPONSIBILITY CONSISTS, IN THEIR BEING AMENABLE TO THE PEOPLE. WHEN THE TERM FOR WHICH THEY ARE CHOSEN SHALL EXPIRE, WHO [THE PEOPLE] WILL THEN HAVE OPPORTUNITY TO DISPLACE THEM IF THEY DISAPPROVE OF THEIR CONDUCT. BUT IT WOULD BE IMPROPER THAT THE JUDICIAL SHOULD BE ELECTIVE, BECAUSE THEIR BUSINESS REQUIRES THAT THEY SHOULD POSSESS A DEGREE OF LAW KNOWLEDGE, WHICH IS ACQUIRED ONLY BY A REGULAR EDUCATION; AND BESIDES IT IS FIT THAT THEY SHOULD BE PLACED, IN A CERTAIN DEGREE IN AN INDEPENDENT SITUATION, THAT THEY MAY MAINTAIN FIRMNESS AND STEADINESS IN THEIR DECISIONS. AS THE PEOPLE THEREFORE OUGHT NOT TO ELECT THE JUDGES, THEY CANNOT BE AMENABLE TO THEM IMMEDIATELY, SOME OTHER MODE OF AMENABILITY MUST THEREFORE BE DEvised FOR THESE, AS WELL AS FOR ALL OTHER OFFICERS WHICH DO NOT SPRING FROM THE IMMEDIATE

CHOICE OF THE PEOPLE. THIS IS TO BE EFFECTED BY MAKING ONE COURT SUBORDINATE TO ANOTHER, AND BY GIVING THEM COGNIZANCE OF THE BEHAVIOR OF ALL OFFICERS. BUT ON THIS PLAN WE AT LAST ARRIVE AT SOME SUPREME, OVER WHOM THERE IS NO POWER TO CONTROL BUT THE PEOPLE THEMSELVES. THIS SUPREME CONTROLLING POWER SHOULD BE IN THE CHOICE OF THE PEOPLE, OR ELSE YOU ESTABLISH AN AUTHORITY INDEPENDENT, AND NOT AMENABLE AT ALL, WHICH IS REPUGNANT TO THE PRINCIPLES OF A FREE GOVERNMENT. AGREEABLE TO THESE PRINCIPLES I SUPPOSE THE SUPREME JUDICIAL OUGHT TO BE LIABLE TO BE CALLED TO ACCOUNT, FOR ANY MISCONDUCT, BY SOME BODY OF MEN, WHO DEPEND UPON THE PEOPLE FOR THEIR PLACES; AND SO ALSO SHOULD ALL OTHER GREAT OFFICERS IN THE STATE, WHO ARE NOT MADE AMENABLE TO SOME SUPERIOR OFFICERS....

BRUTUS