

Five Judicial Myths

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Talking Points About the Judiciary

Despite what we hear today . . .

1. THE JUDICIARY IS NOT A CO-EQUAL BRANCH OF GOVERNMENT

- **A.** Federalist #51: "the legislative authority necessarily predominates."¹
- **B.** Federalist #78: "The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will. . . . The judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution. . . . [T]he judiciary is, beyond comparison, the weakest of the three departments of power. . . . [and] the general liberty of the people can never be endangered from that quarter."²
- **C.** Congress determines the operation of the Judiciary, not vice versa (Congress sets the number of judges and courts; what issues may come before the courts; judges' salary and compensation; how often the courts meet and the length of their sessions; and just as Congress can establish and set the number of lower courts, so, too, can Congress also abolish them; etc.)
- **D.** Robert Wright, officer in the Revolution, Maryland judge, early U. S. Senator: "[C]ongress can establish legislatively a court, and thereby create a judge; so they can legislatively abolish the court and eventually annihilate the officer...the inferior courts are creatures of the legislature, and that the creature must always be in the power of the creator – that he who createth can destroy."³
- **E.** William Giles, member of the first federal Congress under the Constitution: "Is that [the Judiciary department] formed by the Constitution? It is not...It is only declared that there shall be such a department, and it is directed to be formed by the two other departments, who owe a responsibility to the people...The number of judges, the assignation of duties, the fixing of compensations, the fixing the times when, and the places where, the courts shall exercise the functions, &c., are left to the entire discretion of Congress. The spirit as well as the words of the Constitution are completely satisfied, provided one Supreme Court be established...Congress may postpone the sessions of the courts for eight or ten years, and establish others to whom they could transfer all the

powers of the existing courts.⁴

- **F.** As Rep. Steve King correctly explains, “Constitutionally, Congress can reduce the Supreme Court to nothing more than Chief Justice Roberts sitting at a card table with a candle” – a power that the Judiciary cannot reciprocally exercise over Congress.

2. THE JUDICIARY IS NOT TO BE AN INDEPENDENT BRANCH OF GOVERNMENT

- **A.** John Dickinson, signer of the Constitution: “[W]hat innumerable acts of injustice may be committed – and how fatally may the principles of liberty be sapped – by a succession of judges utterly independent of the people?⁵
- **B.** Thomas Jefferson: “It should be remembered as an axiom of eternal truth in politics that whatever power in any government is independent is absolute also; in theory only, at first, while the spirit of the people is up, but in practice as fast as that relaxes. Independence can be trusted nowhere but with the people in mass.⁶
- **C.** Nathaniel Chipman, office in the Revolution, early Member of Congress, U. S. federal judge, Chief Justice of Vermont Supreme Court: “If the judges are made thus independent . . . they will become a dangerous body.⁷
- **D.** Jonathan Mason, law student trained by John Adams and an early Member of Congress: “The independence of the judiciary so much desired will – if tolerated – soon become something like supremacy. They will, indeed, form the main pillar of this goodly fabric; they will soon become the only remaining pillar, and they will presently be so strong as to crush and absorb the others into their solid mass.⁸
- **E.** Thomas Jefferson: “We think, in America, that it is necessary to introduce the people into every department of government. . . Were I called upon to decide whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making them.⁹
- **F.** Joseph Nicholson, early Member of Congress, successfully managed the impeachment of multiple early federal judges: “Give [judges] the powers and the independence now contended for and . . . your government becomes a despotism and they become your rulers. They are to decide upon the lives, the liberties, and the property of your citizens; they have an absolute veto upon your laws by declaring them null and void at pleasure; they are to introduce at will the laws of a foreign country...after being clothed with this arbitrary power, they are beyond the control of the nation. . . . If all this be true – if this doctrine be established in the extent which is now contended for – the Constitution is not worth the time we are now spending on it. It is – as it has been called by its enemies – mere parchment. For these judges, thus rendered omnipotent, may

overlap the Constitution and trample on your laws.¹⁰

3. THE JUDICIARY IS NOT THE SOLE BRANCH CAPABLE OF DETERMINING CONSTITUTIONALITY

- **A.** James Madison: "But the great objection . . . is that the Legislature itself has no right to expound the Constitution – that wherever its meaning is doubtful, you must leave it to take its course until the Judiciary is called upon to declare its meaning. . . . I beg to know upon what principle it can be contended that any one department draws from the Constitution greater powers than another in marking out the limits."¹¹
- **B.** Elbridge Gerry, signer of the Declaration and a framer of the Bill of Rights: "It was quite foreign from the nature of [the judiciary's] office to make them judges of the policy of public measures."¹²
- **C.** Luther Martin, framer of the Constitution and Attorney General of Maryland: "A knowledge of mankind and of legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the Legislature."¹³
- **D.** John Randolph of Roanoke: "[I]f you pass the law, the judges are to put their veto upon it by declaring it unconstitutional. Here is a new power of a dangerous and uncontrollable nature contended for...The power which has the right of passing – without appeal – on the validity of laws is your sovereign."¹⁴
- **E.** Thomas Jefferson: "[O]ur Constitution. . . . has given – according to this opinion – to one of [the three Branches] alone the right to prescribe rules for the government of the others – and to that one, too, which is unelected by and independent of the nation. . . . The Constitution, on this hypothesis, is a mere thing of wax in the hands of the Judiciary which they may twist and shape into any form they please."¹⁵
- **F.** Rufus King, signer of the Constitution, framer of the Bill of Rights: "The judges must interpret the laws; they ought not to be legislators."¹⁶
- **G.** John Randolph of Roanoke: "The decision of a constitutional question must rest somewhere. Shall it be confided to men immediately responsible to the people – the Congress, or to those who are irresponsible...the judges?...[a]re we [Congress] not as deeply interested in the true exposition of the Constitution as the judges can be? With all the deference to their talents, is not Congress as capable of forming a correct opinion as they are? Are not its members acting under a responsibility to public opinion which can, and will, check their aberrations from duty?"¹⁷
- **H.** Thomas Jefferson: "[T]he 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 and Executive also in their spheres, would make the Judiciary a despotic branch."¹⁸
- **I.** James Madison: "[R]efusing or not refusing to execute a law, to stamp it with

its final character. . . . makes the Judiciary department paramount in fact to the Legislature, which was never intended and can never be proper.¹⁹

- **J.** Federalist #81: “[T]here is not a syllable in the plan [the Constitution] which directly empowers the national courts to construe the laws according to the spirit of the Constitution.²⁰
- **K.** Thomas Jefferson: “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. . . . [A]nd their power the more dangerous as they are in office for life and not responsible, as the other functionaries are, to the elective.²¹
- **L.** President Andrew Jackson: “Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. . . . The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive.²²
- **M.** Abraham Lincoln: “I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court. . . . At the same time, the candid citizen must confess that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made . . . the people will have ceased to be their own rulers, having . . . resigned their government into the hands of that eminent tribunal.²³

4. FEDERAL JUDGES DO NOT HOLD LIFETIME APPOINTMENTS

- **A.** The Constitution says that judges hold their office only during “good behavior” (Art. III, Sec. 1).
- **B.** Federal judges may be removed by Congress for misbehavior, which, historically, did not include only criminal behavior but also other misbehavior.
- **C.** Historically, federal judges have been removed from the bench by Congress for contradicting an order of Congress, for profanity, for rude treatment of witness in a courtroom, for drunkenness, for judicial high-handedness and a variety of other reasons.²⁴
- **D.** The Constitution provides six clauses on impeachment – the most often-mentioned subject in the Constitution.²⁵
- **E.** The Founding Fathers and early legal authorities were clear about the ground for impeachment:
 - **1.** James Wilson, signer of the Constitution, original Justice on the U. S. Supreme Court: “[I]mpeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments.²⁶
 - **2.** Justice Joseph Story, a “Father of American Jurisprudence” appointed to

- the Supreme Court by President James Madison: "The offenses to which the power of impeachment has been and is ordinarily applied as a remedy. . . . are aptly termed political offences, growing out of personal misconduct, or gross neglect, or usurpation, or habitual disregard of the public interests."²⁷
- **3.** John Marshall, Chief Justice of the U. S. Supreme Court: "[T]he present doctrine seems to be that a Judge giving a legal opinion contrary to the opinion of the legislature is liable to impeachment."²⁸
 - **4.** George Mason, the "Father of the Bill of Rights": "attempts to subvert the Constitution."²⁹
 - **5.** Alexander Hamilton: "the abuse or violation of some public trust. . . . [or for] injuries done immediately to the society itself."³⁰
 - **6.** George Mason, "Father of the Bill of Rights," and Elbridge, signer of the Declaration and Framers of the Bill of Rights: "mal-administration."³¹
 - **7.** William Rawle, legal authority and author of early constitutional commentary: "the inordinate extension of power, the influence of party and of prejudice"³² as well as attempts to "infringe the rights of the people."³³
 - **8.** Justice Joseph Story, a "Father of American Jurisprudence" appointed to the Supreme Court by President James Madison: "unconstitutional opinions" and "attempts to subvert the fundamental laws and introduce arbitrary power."³⁴
 - **F.** Federalist #65: "[T]he practice of impeachments [is] a bridle in the hands of the Legislative body."³⁵
 - **G.** Justice James Iredell, a ratifier of the Constitution, placed on the Supreme Court by President Washington: "Every government requires it [impeachment]. Every man ought to be amenable for his conduct. . . . It will be not only the means of punishing misconduct but it will prevent misconduct. A man in public office who knows that there is no tribunal to punish him may be ready to deviate from his duty; but if he knows there is a tribunal for that purpose although he may be a man of no principle, the very terror of punishment will perhaps deter him."³⁶

5. THE PURPOSE OF THE SUPREME COURT IS NOT TO PROTECT THE MINORITY FROM THE MAJORITY, AND CONGRESS IS A BETTER PROTECTOR OF MINORITY RIGHTS THAN IS THE JUDICIARY

- **A.** George Washington: "[T]he fundamental principle of our Constitution... enjoins [requires] that the will of the majority shall prevail."³⁷
- **B.** Thomas Jefferson: "[T]he will of the majority [is] the natural law of every society [and] is the only sure guardian of the rights of man. Perhaps even this may sometimes err. But its errors are honest, solitary and short-lived."³⁸
- **C.** The Judiciary is now regularly anti-majoritarian.
- **D.** The primary purpose of the Supreme Court is not to protect the minority from

the majority.

- **E.** The primary purpose of the Bill of Rights is not to protect the minority from the majority; the purpose of the Bill of Rights is to protect every citizen, whether in the minority or the majority, from the intrusion upon their rights by government.
- **F.** Congress is a better guardian of the people and the minority than are the courts.
- **G.** Federalist #51: "The members of the Legislative department . . . are numerous. They are distributed and dwell among the people at large. Their connections of blood, of friendship, and of acquaintance embrace a great proportion of the most influential part of the society. . . . they are more immediately the confidential guardians of their rights and liberties."³⁹
- **H.** In 1875, Congress banned all segregation,⁴⁰ but in 1882, the Supreme Court struck down that law.⁴¹ While the Court is often praised today for ending segregation in *Brown v. Board of Education* in 1954, what the Court actually did in that case was only to reverse its own position that had kept segregation alive 70 longer than Congress' ban.
- **I.** Thomas Jefferson: "When the Legislative or Executive functionaries act unconstitutionally, they are responsible to the people in their elective capacity. The exemption of the judges from that is quite dangerous enough. I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them [the people] 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. This is the true corrective of abuses of constitutional power."⁴²

Endnotes

1. James Madison, John Jay & Alexander Hamilton, *The Federalist* (Philadelphia: Benjamin Warner, 1818), p. 281.[\(Return\)](#)
2. James Madison, John Jay & Alexander Hamilton, *The Federalist* (Philadelphia: Benjamin Warner, 1818), pp. 419-420.[\(Return\)](#)
3. *The Debates and Proceedings in the Congress of the United States* (Washington: Gales & Seaton, 1851), Seventh Congress, 1st Session, p. 114, January 15, 1802.[\(Return\)](#)
4. *The Debates and Proceedings in the Congress of the United States* (Washington: Gales & Seaton, 1851), Seventh Congress, 1st Session, pp. 585-586, 593, February 18, 1802.[\(Return\)](#)

5. John Dickinsonn, *Leters from a Farmer in Pennsylvania, to the Inhabitants of the British Colonies* (New York: The Outlook Company, 1903), p. 92, Letter IX.[\(Return\)](#)
6. *The Writings of Thomas Jefferson*, Andrew A. Lipscomb, editor (Washington DC: The Thomas Jefferson Memorial Association, 1904), Vol. XV, p. 137, to Spencer Roane, September 6, 1819.[\(Return\)](#)
7. *The Debates and Proceedings in the Congress of the United States* (Washington: Gales & Seaton, 1851), 7th Congress, 1st Session, p. 131, January 19, 1802.[\(Return\)](#)
8. *The Debates and Proceedings in the Congress of the United States* (Washington: Gales & Seaton, 1851), 7th Congress, 1st Session, p. 63, January 13, 1802.[\(Return\)](#)
9. *The Papers of Thomas Jefferson*, Julian P. Boyd, editor (Princeton: Princeton University Press, 1958), Vol. 15, p. 283, to the Abbe Arnoux, July 19, 1789.[\(Return\)](#)
10. *The Debates and Proceedings in the Congress of the United States* (Washington: Gales & Seaton, 1851), Seventh Congress, 1st Session, pp. 823-824, February 27, 1802.[\(Return\)](#)
11. *The Debates and Proceedings in the Congress of the United States* (Washington: Gales & Seaton, 1834), Vol. 1, First Congress, 1st Session, p. 520, June 17, 1789.[\(Return\)](#)
12. *The Papers of James Madison*, Henry D. Gilpin, editor (Washington: Langtree & O'Sullivan, 1840), Vol. II, p. 783, "Debates in the Federal Convention," June 4, 1787.[\(Return\)](#)
13. *The Papers of James Madison*, Henry D. Gilpin, editor (Washington: Langtree & O'Sullivan, 1840), Vol. II, p. 1166, "Debates in the Federal Convention," July 21, 1787.[\(Return\)](#)
14. *The Debates and Proceedings in the Congress of the United States* (Washington: Gales & Seaton, 1851), Seventh Congress, 1st Session, p. 661, February 20, 1802.[\(Return\)](#)
15. *The Writings of Thomas Jefferson*, Andrew A. Lipscomb, editor (Washington DC: The Thomas Jefferson Memorial Association, 1904), Vol. XV, p. 213, to Spencer Roane, September 6, 1819.[\(Return\)](#)
16. *The Records of the Federal Convention of 1787*, Max Farrand, editor (New Haven: Yale University Press, 1911), Vol. I, p. 108, from Rufus King's records of the

Convention from Monday, June 4, 1787.[\(Return\)](#)

17. *The Debates and Proceedings in the Congress of the United States* (Washington: Gales & Seaton, 1851), Seventh Congress, 1st Session, p. 661, February 20, 1802.[\(Return\)](#)

18. *The Writings of Thomas Jefferson*, Andrew. A. Lipscomb, editor (Washington DC: The Thomas Jefferson Memorial Association, 1904), Vol. XI, p. 51, to Mrs. John Adams, September 11, 1804.[\(Return\)](#)

19. James Madison, *Letters and Other Writings of James Madison* (New York: R. Worthington, 1884), Vol. 1, p. 194, "Remarks on Mr. Jefferson's Draught of a Constitution for Virginia," October 1788.[\(Return\)](#)

20. James Madison, John Jay & Alexander Hamilton, *The Federalist* (Philadelphia: Benjamin Warner, 1818), p. 436.[\(Return\)](#)

21. *Writings of Thomas Jefferson*, Andrew A. Lipscomb, editor (Washington DC: The Thomas Jefferson Memorial Association, 1904), Vol. XV, p. 277, to William Charles Jarvis, September 28, 1820.[\(Return\)](#)

22. James D. Richardson, *A Compilation of the Messages and Papers of the Presidents* (Published by Authority of Congress, 1899), Vol. III, p. 1145, "Veto Message," July 10, 1832.[\(Return\)](#)

23. *The Works of Abraham Lincoln*, John H. Clifford, editor (New York: The University Society Inc., 1908), Vol. V, pp. 142-143, "First Inaugural Address," March 4, 1861.[\(Return\)](#)

24. *Congressional Record* (Washington: Government Printing Office, 1933), Volume 76, pp. 4914-4916, Impeachment articles against Harold Louderback, district judge for northern California, February 24, 1933; *Congressional Record* (Washington: Government Printing Office, 1905), Vol. XXXIX, pp. 1281-1283, Impeachment articles against Charles Swayne, district judge for northern Florida, January 24, 1905; *Congressional Record* (Washington: Government Printing Office, 1912), Vol. XLVIII, pp. 9051-9053, Impeachment articles against Robert W. Archbald, third circuit judge, July 15, 1912; *Congressional Record* (Washington: Government Printing Office, 1926), Vol. LXVII, pp. 6585-6589, Impeachment articles against George W. English, district judge for eastern Illinois, March 30, 1926; Floyd Riddick, *Procedure and Guidelines for Impeachment Trials in the United States Senate* (Washington: Government Printing Office, 1974), pp. 10-13.[\(Return\)](#)

25. See *The Constitution of the United States of America*, available online at

<http://www.archives.gov/national-archives-experience/charters/constitution.html>;
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26. *The Works of the Honorable James Wilson*, Bird Wilson, editor (Philadelphia: Bronson and Chauncey, 1804), Vol. II, p. 166, "Of the Constitution of the United States and of Pennsylvania—of the Legislative Department." [\(Return\)](#)

27. Joseph Story, *Commentaries on the Constitution of the United States* (Boston: Hilliard, Gray & Co, 1833), Vol. II, pp. 233-234, Sec. 762. [\(Return\)](#)

28. *The Papers of John Marshall*, Charles F. Hobson, editor (Chapel Hill, VA: The University of North Carolina Press, 1990), Vol. VI, p. 347, to Samuel Chase, January 23, 1805. [\(Return\)](#)

29. *The Papers of James Madison*, Henry D. Gilpin, editor (Washington: Langtree & O'Sullivan, 1840), Vol. III, p. 1528, "Debates in the Federal Convention, 1787." [\(Return\)](#)

30. James Madison, John Jay & Alexander Hamilton, *The Federalist* (Philadelphia: Benjamin Warner, 1818), p. 352. [\(Return\)](#)

31. *The Papers of James Madison*, Henry D. Gilpin, editor (Washington: Langtree & O'Sullivan, 1840), Vol. III, p. 1528, "Debates in the Federal Convention, 1787." [\(Return\)](#)

32. William Rawle, *A View of the Constitution of the United States of America* (Philadelphia: Philip H. Nicklin, 1829), p. 211. [\(Return\)](#)

33. William Rawle, *A View of the Constitution of the United States of America* (Philadelphia: Philip H. Nicklin, 1829), p. 210. [\(Return\)](#)

34. Joseph Story, *Commentaries on the Constitution of the United States* (Boston: Hilliard, Gray & Co, 1833), Vol. II, p. 268. [\(Return\)](#)

35. James Madison, John Jay & Alexander Hamilton, *The Federalist* (Philadelphia: Benjamin Warner, 1818), p. 353. [\(Return\)](#)

36. *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787*, Jonathan Elliot, editor (Washington: Printed for the Editor, 1836), Vol. IV, p. 32, July 24, 1788. [\(Return\)](#)

37. James D. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789-1897* (Published by Authority of Congress, 1899), Vol. I, p. 156, from the "Sixth Annual Address" of November 19, 1794.[\(Return\)](#)

38. *The Papers of Thomas Jefferson*, Julian P. Boyd, editor (NJ: Princeton University Press, 1961), Vol. XVI, p. 179, "Response to the Citizens of Albermarle," February 12, 1790.[\(Return\)](#)

39. James Madison, John Jay & Alexander Hamilton, *The Federalist* (Philadelphia: Benjamin Warner, 1818), p. 275.[\(Return\)](#)

40. *The Statutes at Large* (Washington: Government Printing Office, 1875), Vol. XVIII, Part 3, pp. 335-337, "An Act to protect all citizens in their civil and legal rights," March 1, 1875.[\(Return\)](#)

41. *The Civil Rights Cases*, 109 U.S. 3 (1883).[\(Return\)](#)

42. *The Writings of Thomas Jefferson*, Andrew A. Lipscomb, editor (Washington, DC: The Thomas Jefferson Memorial Association, 1904), Vol. XV, p. 278, to William Charles Jarvis, September 28, 1820.[\(Return\)](#)