

8 *The Constitution: That Delicate Balance*

It had been practiced by some courts in the colonial period and some of the delegates at the Constitutional Convention had suggested that the Supreme Court should have a "negative" on the legislature. Nevertheless, judicial review was not specifically written into the Constitution. But where explicit language failed, interpretation stepped in. In *The Federalist*, No. 78, Alexander Hamilton discussed the concept of judicial review. "There is no position which depends on a clearer principle than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised is void," he wrote. "No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principle; that the servant is above his master; that the representatives of the people are superior to the people themselves." Hamilton explained that the legislature could not be the judge of the constitutionality of its own acts. It was necessary, he argued, to interpose the courts between the people and the legislature "to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts."

Marshall too had made his position clear very early on. As a 33-year-old lawyer arguing for the adoption of the Constitution at the Virginia Ratifying Convention of 1788, he had spelled out the doctrine of judicial review. "If Congress makes a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law coming within their jurisdiction. They would declare it void." Fifteen years later, in 1803, Marshall would have the chance to solidify that sentiment in his first opinion of constitutional magnitude, *Marbury v. Madison*.

The case of the midnight judges might have gone down in the annals of history as the sloppiness of lame duck Secretary of State John Marshall had it not been for that same man's ability "to turn a dilemma into a victory."²³

What appeared to be at stake in the *Marbury* case was the appointment of William Marbury to the prosaic office of a justice of the peace for the District of Columbia.²⁴ The appointment had been signed by outgoing President John Adams late in the evening on March 3, 1801, the night before Thomas Jefferson's inauguration. However, the formal appointment documents had never been delivered to Marbury and some other appointees; ironically, that oversight was largely the fault of then Secretary of State John Marshall. Almost 10 months after Jefferson took office, Marbury asked the Supreme Court to order James Madison, Jefferson's secretary of state, to deliver the documents so that he could be sworn in to his new post.²⁵

One wonders why Chief Justice Marshall even participated in the arguments and decision, since the case dealt with his own responsibilities

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