# JUDICIAL REVIEW

Dr. Heinz R. Hink

Judicial review is the power of a court to declare null and void a statute, or an adminstrative or executive action based upon such statute, that the court finds to be in conflict with the Constitution of the United States or of one of the states forming the Union. In theory, judicial review in the United States may be exercised by any state or federal court. In practice, the power of judicial review is most significant when it is used by the Supreme Court of the United States. In using this power to review acts of the legislature and actions of the executive branch, the Supreme Court performs in essence a political function as one of the three coequal branches of government under the American system of separation of powers.

Though the view that the courts could declare acts of Parliament null and void was first expressed by the great English jurist, Sir Edward Coke, in *Dr. Bonham's Case* in 1610, this view was never accepted in English law. Certainly the Glorious Revolution of 1688, and specifically the Act of Settlement of 1701, established firmly the principle of the supremacy of Parliament as the guiding principle of British conrstitutionalism. As a tried principle of government, judicial review is most specifically an American institution. In fact, it may be and has been described as "the cornerstone of American constitutionalism," no less significant than federalism and the presidential form of government. The success of judicial review in the United States has led three other democracies, Austrlaia, Canada and India, to grant the same power to their ordinary courts. Three other countries, France, the Federal Republic of Germany and Italy, in their post-war constitutions, have established special tribunals outside the system of ordinary courts to perform a similar function. In Germany and Italy, special constitutional courts have been created to provite protection against legislation passed with simple majorities which, in the opinion of the constitutional court, in effect would change the constitution of these countries and, therefore, should follow the special electoral procedure provided for such legislation.

In France, the same purpose was accomplished under the constitution

of the Fourth Republic by the Constitutional Committee, a body composed of twelve members, including the presiding officers of both house of the French legislature, three members selected by the Council of the Republic, and seven members chosen by the National Assembly, with the provision that the members selected by the two houses of the legislature had to be chosen from persons outside the legislature itself. The de Gaulle Constitution of the Fifth Republic now provides in Articles 56-63 for a Constitutional Council (*Le Conseil Constitutionnel.*) This body is composed of all the ex-presidents of the French Republic, plus nine other persons, of whom three each are selected because of their distinction by the President of the Republic, the President of the National Assmerbly, and the President of the Senate. Again, this *Conseil Constitutionnel* lies outside the ordinary system of courts, but has genuine powers of judicial review in that it may declare unconstitutional any organic law and any ordinary law submitted to its review by the French President, the Premier, or the Presidents of the two houses of the legislature,

There are instances, then, where other countries have adopted some form of judicial review, But in its purest and most significant form the power of judicial review is identified with the governmental system of the United States, and it is to this system we shall return in the following. A surprising fact has to be noted at the beginning. The power of judicial review is nowhere expressly mentioned in the United states Constitution. It was read into the Constitution, and has become a firmly established principle of American constitutional law ever since, by Chief Justice John Marshall in his decision in the famous case of *Marbury v. Madison*, decided in 1803.[1] Chief Justice Marshall, of coures, did not invent the idea of judicial review, a procedure that would have been against the very Constitution judicial review is intended to protect. Rather, he interpreted the Constitution in a way that would permit judicial review. The pertinent sections of the United States Constitution of 1787 read as follows:

> Article III, Section 1. The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good

1 1Cranch 137, 2 L.Ed. 60.

behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2. The judicial power shall extend to all cases, in law and equity arising under this constitution.……

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 other cases before mentioned, the supreme court shall have appellate jurisdiction, 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.……

Article VI.…… This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.……

It will be seen from the foregoing that judicial review of *state* legislation was clearly written into Article VI of the Constitution; but that there cannot be found an equally explicit statement of judicial review of Congressional statutes. The pertinent clauses, however, could be interpreted to give the federal courts the authority to exercise judicial review also over acts of Congress. In *Marbury v. Madison,* Chief Justice Marshall chose to adopt that interpretation. The facts in this celebrated case are relatively simple. In 1800, President John Adams, a member of the Federalist Party, lost in his attempt at reelection to Thomas Jefferson, the leader of the Anti-Federalist faction, which became known as Democratic-Republican. Unitl the 20th Amendment, adopted in 1933, provided that a president shall take office on January 20th of the year following his election, an outgoing president did not leave office until early in March of the year following the election of the new president. With the cooperation of a Federalist-controlled Congress, President Adams used the three months between his defeat and Mr. Jefferson's assumption of the presidency to nominate, have

confirmed by the Senate, and commission into office a new Chief Justice of the Supreme Court, namely John Marshall, who had been Mr. Adams' Secretary of State, 16 new circuit judges, and 42 justices of the peace. It was incumbent upon Mr. Marshall as Secretary of State to seal and deliver the commissions of appointment to the new judges. Working under great pressure of time, Marshall did not succeed in delivering all commissions, and left the undelivered commissions to his successor as Secretary of State, James Madison.

President Jefferson and Mr. Madison, upon assuming office, decided to withhold a number of these commissions to office and the commissions remained undelivered. Jefferson had no interest, of course, of seeing the federal judiciary increased by so large a number of judges with sympathies to the Fedoralist cause. One of the persons who did not receive his commission was Williarm Marbry, who was to have become a justice of the peace for the District of Columbia, Marbury thereupon sought to compel Secretary of State Madison to deliver the commission which had already been signed. He brought suit against Mr. Madison directly in the Supreme Court of the United States, relying for his right to do soon Section 13 of the Judiciary Act of 1789, which extended the original jurisdiction of the Supreme Court, beyond the cases mentioned in Article VI of the Constitution, to issue writs of mandamus to officers of the United States. In Anglo-American law, a writ of mandamus is an order of the court addressed to an inferior court or to a public official commanding the performance of a specified act. Marbury's claim was that Madison had an official, non-discretionary, and ministerial duty to deliver to him the commission already signed and sealed by the Adams administration.

The Supreme Court was faced with a difficult situation. If it issued the writ, Secretary Madison, with the support of President Jefferson, might refuse to obey the court, and the court would be without any practical remedy of enforcing its decision. On the other hand, if the court refused to issue the writ of madamus, it would admit officially that it was without any authority to control the executive branch of government. In either case, the Supreme Court and the Federalist Party would suffer humiliation, and irreparable damage might have been done to the judiciary. Chief Justice

Marshall solved the problem in a brilliant fashion. He agreed with Marbury's clairm that Marbury had a legal right to receive the commission and that the laws of the United States afforded him a remedy to satisfy this right. But Marshall went on to say, speaking for an unanimous Supreme Court, that a writ of mandamus under Section 13 of the Judiciary Act was not the proper remedy. By including in the Judiciary Act the power to issue a writ of mandamus, Congress had added to the original jurisdiction of the Supreme Court—and to do so was unconstitutional, since the Constitution ifself had defined the original jurisdiction of the Supreme Court. Marshall continued to say that "an act repugnant to the Constitution is void" and must be declared to be so by the courts. In reaching this conclusion, he clearly expressed the doctrine of judicial review. In an often quoted passage, the Chief Justice said:

> "It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the law to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the courts must either decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the courts must decide which of these conflicting rules governs the case; this is of the very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution is superior to an ordinary act of the legislature, the constitution, and not such ordinary act, must govern the cause to which they both apply."



In essence, the Supreme Court, in the cose of *Marbury v. Madison*, denied Marbury the remedy he had applied for, with the result that no action was required of thd Jeffeson administration. But, in reaching this decision, the Supreme Court also concluded that the courts are charged by the United States Constitution to uphold the Constitution as the supreme law of the land, and that the courts can do so only by having the power of judicial review. Thus, by denying themselves the right to issue an order against the Secretary of State in this particular instance, the Supreme Court

asserted the much more fundamental power of passing on the constitutionality of an act of Congress and, indirectly, acts of executive offices based upon an act of Congress. The decision in *Marbury v. Madison* has never been overruled, and judicial review has become a firmly established principle of American constitutional law. From the federal courts, the rule of judicial review quickly spread to state jurisdictions, and by the middle of the nineteenth century, the practice of judicial review by state courts of state and local legislation in relation to state constitutions was firmly established.. In the work of the United States Supreme Court itself, the power to declare state laws to be null and void as being in contradiction to the federal Constitution or to federal law has been more important than the power of the Court to declare acts of Congress to be unconstitutional, Until the present time, only 89 provisions of federal laws have been declared unconstitutioal in a total of 80 cases; while more than 700 state laws have been voided through the exercise of judicial review.

If the power of judicial review is firmly established in American constitutional practice, it has not gone unchallened. In fact, if often has been severely criticized. In writing the opinion of the Court In *Marbury v. Madison*, Chief Justice Marshall had relied heavily on the fact that many of the men who wrote the American Constitution were on record as favoring the right of the courts to pass on the validity of acts of Congress. The argument for judicial review was first elaborately stated by Alexander Hamilton in No. 78 of *The Federalist*, a document containing perhapes the most famous collection of American political thought and was written while the Constitution was awaiting ratification by Hamilton, James Madison, and John Jay (Governor of New York and first Chief Justice of the Supreme Court.) Hamilton wrote:

> "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as a fundamental law. It must therefore belong to them (the judges) to ascretain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that preferred; or in other words, the Constitution ought to be preferred to the statute, the intention

of the people to the intention of their (legislative) agents."

But if Hamilton eloquently spoke in favor of judicial review, other fathers of the republic were equally opposed to it—among them, Thomas Jefferson, who felt that the founding fathers never had intended to give the courts this power. In his opinion, judicial review violated the concept of the separation of powers, and, moreover, was undemocratic. It permitted one branch of government, and at that the only one not elected by the people, to enforce its will on the elected representatives. This argument gets to the heart of a most basic problem in American government--the fact that the United States is both a republic and a democracy. Mr. Hamilton felt that the principle intention of the people is expressed in the constitutional document ifself, which establishes barriers against all governmental action contrary to the Constitution, not only by providing for separations of powers, but also by making the Supreme Court the guardian of the Constitution. Mr. Jefferson, on the other hand, expressed the belief that behind the principle of separation of powers there is always some primacy of the legislative branch because that branch more than the other two more diectly expresses the will of the people. Both the republican and the demorcratic notion clearly are present in the American constitutional system.

The issue is further complicated by the fact that under the Anglo-American common law system the courts traditionally have been looked upon as the protectors of individual rights. This is in marked contrast to the French distrust of the courts following the Revolution of 1789 and, in part at least, explains the different interpretation given to the separation of powers doctrine in France and in the United States. Because the courts in this country have been the protectors of individual rights, and because the rights and liberties written into the United States Constitution have always been looked upon as directly enforceable in the courts of law, a nurnber of social and political questions that also have a legal dimension have not been left to the legislature, but have been litigated in the courts. Two good examples are the great controversy of the 1950's over integration, and the equally significant controversy which got under way in the early 1960's and pertains to the question of legislative reapportionment. Clearly, the problem of equal rights for all Americans regardless of color, race, or religion, is

basically of a political, social, and economic nature. It should have been dealt with by Congressional legislation, were it not for the fact that the political forces predominant in Congress made such a solution impossible. Consequently, the legal and constitutional aspects of discrimination were seized upon and brought into court, with the result that segregation in public schools and elsewhere was discontinued, not because it was politically unjust, socially harmful, and economically dangerous, but because segregation was in violation of the constitutional right of all Americans to enjoy the equal protection of the laws as guaranteed by the 14th Amendment to the Constitution. Instead of an act of Congress, we have the Supreme Court case of *Brown v. Board of Education*, decided in 1954.

A similar process is taking place right now. During the twentieth century, America has changed from a predominantly rural country to a largely urban civilization. But in many states legislative districts for representation in the state legislatures and in the national Congress were drawn up before the majority of the population shifted to the urban centers. Consequently, the rural districts in many instances are largely overrepresented, while the urban districts do not have their fair share of representation. It is, of course, highly debatable whether population should be the sole criterion of representation, though most people are agreed that in a bicameral system at least one house should be so organized. In any case, the problem of reapportioning legislative districts essentially is a political one and should be taken care of by legislators or the people through initiative legislation. However, for reasons well-known to students of government, legislatures as a rule are reluctant to reapportion. Until 1962 the electorate, in the absence of political and legislative action, was helpless. In that year, however, the United States Supreme Court decided the case of *Baker v. Carr*, [3]in which it ruled that citizens and voters as a matter of the equal protection of the laws guaranteed to them by the United States Constitution have a legal right to equal representation which, in the absence of legislative action, the courts are prepared to provide--if necessary, by doing the redistricting themselves. Again, we have an example were proper legislative action would be wiser,



2 247 U.S. 483, 74 S. Ct. 686, 98 L.Ed. 873.

3 369 U.S. 186.

but where the power of judicial review is used to protect a political interest which also is a constitutional right.

This type of far-reaching use of the power of judicial review in recent years not only has subjected the courts to the criticism that judicial review itself is undemocratic, but also to the charge that the federal courts, above all the Supreme Court, are willfully usurping the functions of the legislative branch. Indeed, the line between judging(a process involving the interpretation of statutes) and legislating (a process of substituting judicial will for judicial interpretation) is a very fine one. Unless one wants to accept the notion that judges in making a decision simply pronounce the law that was there all along (an assumption difficult to believe in a common law system), all judging probably involves some judicial legislating. This facs was recognized in the famous dictum of Justice Oliver Wendell Holmes, Jr., when he said that judges do and must legislate, but also indicated that they do so subject to clearly understood restrictions.

The truth of the matter is that in the actual practice of the American legal process the question of restraint in the exercise of the power of judicial review becomes more important than a search for the theoretical line that divides judging from legislating. Restraint upon the courts comes about through a number of facture. In the first place, there has to be a "case or controversy" before the courts will take jurisdiction in a case presented to them. In other words, there has to be a plaintiff who moreover has to have "standing" in court. The federal courts do not render "advisory opinions." Next, the judges are the product of a long tradition of Anglo American common law, operating within a framework much more restrictive than that of the legislative branch. Firmly established in American law is the rule of *stare decisis* which makes adherence to precedent a requirement from which the courts do not depart very easily. It is true, though, that the rule *stare decisis* is not as absolute in the United States as it is held to be in England, and in almost 100 cases so far, the Supreme Court of the United States has overruled its own precedent. But, then, the Constitution of the United States has endured for a century and three quarters without sub-stantial or Extensive changes, and it could not have done so without the Court's willingness to allow extra-constitutional changes brought about by

the changing nature of society.

Another and even more direct form of restraint lies in the fact that the Supreme Court "has the last say only for a time," A decision rendered by the Supreme Court is the supreme law of the United States and is binding at least upon the parties that were involved in the controversy, and, in practice, is binding in all cases similar in nature. But a decision of the Supreme Court is the valid expression of the land law of the only until suchtime as the law of the land is changed. Changes can be brought about in a number of ways. The most serious change is by constitutional amendment. A good example here is the legality of the federal income tax. In 1895, such a tax was declared unconstitutional because it was based on a graduated scale and not levied on the basis of equal per capita distribution among the several states. But in 1913 the Sixteenth Amendment to the Constitution removed the constitutional obstacle by saying that an income tax may be laid without regard to enumeration and apportionment among the states, and the 1895 decision of the Supreme Court was in effect reversed.

The reversal of a Supreme Court decisional also may come about as the result of congressional legislation, legislation, worded in such a fashion as to remove the element of unconstitutionality from a previously unconstitutional statute. In 26 out of the 89 instances in which a federal statutory provision has been found unconstitutional by the Supreme Court, congress has in effect reversed the Court's decision. In another number of cases, the Supreme Court has either specifically, or in effect, overruled its own previous interpretation, and thus has changed the law of the land itself. In the famous case of *Plessy v. Ferguson*, decided in 1896, the judges had interpreted the equal protection clause of the 14th Amendment to mean that so-called "separate but equal facilities are not in violation of the required equality. The result was legal sanction of racial discrimination in public transportation, education, and elsewhere. But in 1954, in *Brown v Education*, an unanimous Superme Court specifically reversed the separate but equal formula as far as it applied to public education and ruled that separate facilities were inherently unequal, thus signalling the end of segregation.



4 Pollock v. Farmers' Loan and Trust Company, 158 U. S. 601' 15 S. Ct. 673, 39 L.Ed. 1108.
5 163 U.S. 537, 16 S Ct. 1138, 14 L.Ed. 256.

Finally, the power of the courts to exercise judicial review is checked by the judges themselves in what is known as judicial self-restraint or the process of autolimitation. As a rule, the judges use the power of judicial review very sparingly. They will determine the constitutionality of a statute only where this determination is crucial to the disposition of the case. If there is any doubt concerning the possible interpretation of the statute, by one of which it would be constitutional and by another one not, the former construction will be preferred. The courts will determine constitutional questions as narrowly as possibie. Whenever a case also could be decided upon another ground than the alleged unconstitutionality, the courts will dispose of it on that other ground. If a statute is valid on its face, the courts will not declare it unconstitutional because the motives which have influenced the legislature were uncosstitutional. And lastly, if a statute is constitutional in pasrt and unconstitutional in part, only that part which is unconstitutional is null and void; the rest of the statute remains valid.

To sum up: the power of judicial review is a function by which the courts, especially the Supreme Court of the United States, arbitrate claims which often are political in nature, but, in the American system of government, are presented in justiciable form. It is the virtue of Amenican statecraft to have entrusted this function to these courts, and it is the experience of the American people that on the whole the courts have discharged their mandate dispassionately and wisely.