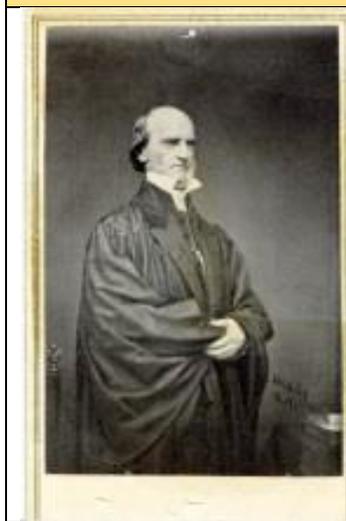


Chapter 19 -- A Vaguely Described Judicial Branch Is Approved



Dates:
1787

Sections:
• Advent Of The Supreme Court

Time: Late August 1787

Advent Of The Supreme Court



As time begins to run out on the Convention, delegates return to the third branch of government identified in the “Virginia Plan,” the so-called Resolve Eleven:

11. That a national Judiciary be established to consist of One Supreme Tribunal. The Judges of which to be appointed by the second Branch of the National Legislature, to hold their offices during good behavior.

The idea for a Judicial Branch at the Federal level springs from the conviction that Legislatures – locally or nationally – must be prohibited from passing laws that violate the principles laid out in the Constitution. As Alexander Hamilton says:

A Supreme Arbiter of the Law

No legislative act contrary to the Constitution can be valid...It therefore is the duty of the courts of justice...to declare all acts contrary to the Constitution void.

But who would be responsible for policing the violations?

The “Virginia Plan” posits a “Council of Revision,” composed of the Executive and several members of a National Judiciary, who would review new laws before they are finalized, and then “nullify” any deemed to be contradictory to the “intent” of the Constitution.

Resistance to this “Council” is widespread and varied.

- A review of every new law before it takes effect will paralyze the entire system.
- It would signal distrust and disrespect for the good intentions of the Legislative Branch.
- Power over the law would be transferred to a handful of judges, none of whom are elected by the people.
- Including an Executive who may have no legal training makes little sense.

Eventually a proposal to review laws only *after* they have taken effect, and only if they are challenged for non-compliance with the Constitution, wins support, as does dropping the Executive from the “Council” in favor of trained lawyers only.

As time runs out on the Convention, the assembly settles for Article III of the Constitution:

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 effect of this is to signal the wish for a Supreme Court, with details to be worked out later by the Congress.

Two years will pass before the Judiciary Act of 1789 provides some definition. The Supreme Court will consist of a Chief Justice and five associates who will be nominated by the President and approved by the Senate. Their duties will include “riding the circuit” – traveling twice a year to each of thirteen “judicial districts” across the country to identify laws that may be violating the Constitution. This Act also creates the office of Attorney General, the chief Federal lawyer, whose role is to prosecute all suits that come before the Supreme Court, and to provide general legal advice the President and other government officials.

Over time the Supreme Court will define its own scope and authority, often to the dismay of future Presidents, Legislators and various segments of the public.