

Alexander Hamilton on the Judicial Power and Its Intrinsic Limitations

In Federalist Paper No 78, Alexander Hamilton defended the provisions in the U.S. Constitution establishing the judicial branch against concerns that the judicial power would prove too great and would become destructive of the people's right to govern themselves. He wrote:

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, *from the nature of its functions*, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.

In comparing the “different departments,” he said “[t]he Executive not only dispenses the honors, but holds the sword of the community,” and, with respect to the legislature, he said it “not only commands the purse, but *prescribes the rules* by which the duties and rights of *every citizen* are to be regulated.”

But, he said, “The judiciary, on the contrary, has no influence over either the sword [executive] or the purse [legislative],” and he further said the judiciary, in comparison to the legislative, has “no direction either of the strength or of the wealth of the society; and *can take no active resolution whatever*.”

Thus, said Hamilton, the judiciary “may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm *even for the efficacy of its judgments*.” In other words, and by way of example, a monetary judgment by a court cannot even be collected if the legislature does not enact a debt collection system that falls within the duty of the executive branch to “take care that the laws be faithfully executed” (Tennessee Constitution, Art. 3, sec. 10).

I would suggest that deciding for “every citizen” whether they can vote by absentee ballot is going beyond a judgment resolving a dispute between particular parties. A judgment that encompasses all Tennesseans is a “direction” regarding “society” and “active resolution” of matters pertaining to “society” as a whole. It is an exercise of a legislative type “Will.” And to threaten any official with contempt for not carrying out an order that goes beyond the parties who sued is an exercise of executive type “Force.”

Doing that a second time after being reversed by the Tennessee Supreme Court, as Chancellor Lyle did, seems particularly troubling.¹

¹ It is equally troubling to me as a citizen that other officials gave efficacy to that extra-judicial judgment as if it were a law; however, rectifying a misunderstanding by those officials of the limited nature of the judicial power is not now the issue. They can be a check and balance if they are willing.

Finally, Hamilton agreed that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." . . . [L]iberty . . . would have every thing to fear from its union with either of the other departments." But he sought to assuage that fear by stating that "all the effects of *such a union must ensue from a dependence of the former on the latter*, notwithstanding a nominal and apparent separation."

In other words, the judiciary cannot claim more power than that of issuing a judgment resolving a dispute between particular parties without being aided in that claim by one of the other two branches of government.

Thus, the liberty-threatening union of the judicial power with the legislative power can be achieved by the legislature according to the judiciary powers it does not have and by abdicating the power the people gave their representatives to serve as a check and balance on serious abuses of the judicial powers, those which, in the words of Hamilton, "affect the order of the political system" (Federalist No. 81).

When that kind of abuse takes place, representatives who right the order of the political system established by the people for their liberty may actually serve to increase the public's confidence in the legal system and the rule of law.