
NEWS

Least Dangerous Branch or Imperial Judiciary?

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It was "the least dangerous branch" of government. That's how Alexander Hamilton, one of the Framers of the U.S. Constitution, described the Supreme Court. Federal judges, he argued, lacked two important powers: that of appropriating money and the ability to enforce its decisions.

But the direction of the court began to change soon after the Republic was founded. Although the Constitution is silent on whether the Supreme Court can nullify an act of Congress, the court simply claimed that role in an 1803 decision, establishing the practice of judicial review and paving the way for an even more aggressive court.

"There certainly is a difference between judicial review and judicial activism," says Douglas Kmiec who teaches constitutional law at Pepperdine University.

"What we mean by activism is judges who are willing to read into the Constitution things that aren't in the text or judges who disregard the obvious intent of a Constitutional provision or judges who are committed to keeping the Constitution, as it were, 'up-to-date' -- 'up-to-date' not in terms of the people's perspective, but in terms of their own," says Professor Kmiec.

The passage of what are often called the "Reconstruction Amendments" to the Constitution soon after the Civil War was a springboard for the expansion of the Judiciary's powers. But constitutional scholar A.E. Dick Howard of the University of Virginia Law School says the modern era judicial activism began under Chief Justice Earl Warren.

According to Professor Howard, "From about the early 1960s onward, the court became very active in a number of areas -- civil rights, free speech, separation of church and state. And indeed, I think that in many ways the cases of the Warren court of the 1960s are the benchmark by which today we debate judicial power and judicial activism."

During much of its history, the Supreme Court was seen as inaccessible to ordinary citizens. In order to bring a case to the high court, a person had to meet strict rules of "standing." But since the 1960s, the court has been more willing to hear cases from

individuals and special interest groups.

Pepperdine University's, Douglas Kmiec adds, "The more generous the justices are in defining standing, the more likely it is that the justices will find themselves questioning the policies of the legislature because people will start to look at the court as an alternative legislature. If they didn't get what they wanted from Congress, they'll just cross the street and go to the justices and have them mandate it by virtue of an interpretation of one of these broadly worded statutes."

The Supreme Court institutionalized its political base during the last half of the 20th century by hearing and deciding cases in favor of civil rights activists, consumer advocates, women's groups and environmentalists.

According to Benjamin Ginsberg, Director of the Center for the Study of American Government at The Johns Hopkins University, Congress has also strengthened federal courts.

Professor Ginsberg notes, "Congress has discovered that it's possible to give people benefits without spending money. If you give them a right instead of a subsidy, you're saying to them, 'Here, this is your right. You go out and get it. And somebody will pay for it. We don't have to spend the money'. A second factor is that within Congress, competing forces often are looking for ways to institutionalize their victories. And sometimes giving it over to the courts can be seen as a way of taking the policy area out the hands of future [political] opponents."

In recent years, federal courts have also developed ways to enforce many of their decisions themselves. Judges have administered school desegregation plans and overseen prison systems, and even mandated a tax increase to finance a court's ruling, giving rise to what many scholars call an "Imperial Judiciary".

The University of Virginia's A.E. Dick Howard says the current Supreme Court, headed by Chief Justice William Rehnquist, has been just as activist as previous courts.

"The present court -- the Rehnquist court -- is a more conservative tribunal," adds Professor Howard. "The results of their cases often are to the right of where the Warren court would have come out on an issue. But there's no particular sign that the Rehnquist court has made any particular effort to cut back on the sweep and breath of the kinds of cases that they decide. Judicial activism is clearly being used by conservatives on the court as it was used by liberals on the court in an earlier generation."

But whether judges are liberal or conservative, most scholars agree the Judiciary will likely continue to broaden its powers and that judicial activism will remain a hallmark of American government.
