Chapter Four

The Judicial Branch: It’s a Group of Lawyers, Not Platonic Guardians

Article III of the US Constitution has fewer sections (three) and is far briefer than the two articles that preceded it. Whereas the first two articles describe the elected branches, Article III outlines an appointed branch that is further removed from the people. Rather than hash out all the details of this branch, the Framers left many of the issues for the first Congress to resolve. Full understanding of the judicial branch thus requires as much knowledge of the Judiciary Act of 1789 and subsequent acts of congressional legislation as of the Constitution itself.

How Many Federal Courts Should There Be and How Should They Be Organized?

When the Framers wrote the US Constitution, they believed that the number of legislators would have to grow as did the number of individuals whom they represented. Similarly, they believed that concentrating executive power in a single set of hands would increase the “energy” and effectiveness of the office. They seemed less certain about the size of the federal judiciary. This stemmed from two factors. First, aside from agreeing on the need for at least one Supreme Court, they disagreed among themselves as to the need to create federal courts rather than relying upon existing state bodies. Second, they wanted to leave room for greater specialization as the nation grew.

As a consequence, Article III, Section 1, simply vests “the judicial Power in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” The parallel may be merely coincidental, but the use of the phrase “ordain and establish,” which the Preamble used to the Constitution for establishing the document itself, suggests that, with respect to the judicial branch, the Constitution
vested Congress with completing the job of outlining institutions that the Constitution had begun.

Article III’s designation of a “Supreme Court” as well as its further reference to “inferior courts” indicate that the Framers envisioned the judiciary as a hierarchical institution, with tiers. The Judiciary Act of 1789 and subsequent acts have divided the federal judiciary into three such levels. These include a set of district courts (of which there are currently 94, with each state having from one to four, and each presided over by a single judge) that initially hear most cases; a set of appellate, or circuit, courts (of which there are currently 13, 12 of which are geographically based and the other that hears specialized subject matter) that hear appeals from them; and the Supreme Court, which oversees the system as a whole. Federal courts may also hear appeals relative to the US Constitution and laws from the states’ highest courts, generally, but not always, designated as state supreme courts. Just as the president heads the entire executive branch, so too, the Supreme Court oversees the entire judicial branch. Similarly, Article I, Section 3, had previously specified that the chief justice would preside over impeachment trials of the president in the US Senate.

**How Many Members Should Be on the Supreme Court?**

Just as the Constitution did not enumerate the permanent number of members of Congress, so too, it did not specify how many justices would sit on the Supreme Court. Throughout US history, this number has varied from a low of six under the original Judiciary Act of 1787 to a high of ten in 1863. Congress set the current number of nine in 1866. Just as the Framers intended for the presidency to reflect the virtues of unity and speed that classical philosophers attributed to rule by the one, and the Congress to approximate the democratic representation of the rule of the many, so too, they designed the Court to reflect the wisdom of the few.

The Constitution’s failure to specify the number of justices makes it subject to potential political manipulation. When the US Supreme Court voided significant parts of his New Deal program, President Franklin D. Roosevelt proposed adding one justice for every justice 70 years or older, up to a total of 15 justices. Although Congress rejected this plan, some individuals have proposed fixing the number of justices within the Constitution rather than leaving it subject to future changes.

**How Should Judges be Selected and How Long Should They Serve?**

Whereas the people elect members of the legislative and executive branches, the president appoints members of the judicial branch with the