
I. ADDRESS TO THE SUPREME COURT OF MEXICO ON THE AMERICAN JUDICIAL SYSTEM

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Thank you for that gracious introduction.

It is my pleasure to be invited to speak at this important and worthwhile conference. It is also my distinct honor to be in the presence of so many distinguished jurists from all over Mexico and Latin America.

My purpose this evening is to speak briefly about the doctrine of judicial review in the United States and in the state of California, where I now sit on the Supreme Court of California.

Before making my substantive comments, however, I wanted to say a few brief words about my background.

I was born in Los Angeles to Mexican parents. My parents left Mexico during the historic Mexican Revolution and settled in the city of Los Angeles area where I was born. Although I learned to speak Spanish fairly early in my life, I have not had the benefit of having to use Spanish in my daily work, so you will forgive me when I make my substantive comments in English and have those comments translated into Spanish.

As a lawyer for approximately eleven years, I practiced in the fields of criminal prosecution as a city prosecutor and later litigated civil business disputes in private practice.

I subsequently served as a judge at the state trial court level for twelve years and handled a variety of civil and criminal cases and jury trials.

In 1998 I was appointed by President Clinton to serve as a federal District Court judge at the trial level in Los Angeles, where I handled both civil and criminal cases arising under our federal law.

And for the last six months, I have served as a justice of the California Supreme Court which handles appeals from the trial and intermediate appellate state courts. The California Supreme Court is the highest court in California and is the court of last resort for all disputes arising under state law.

As an aside, I should also mention that the state of California comprises approximately 13 percent of the entire population of the United States. As an economic engine it represents the fifth largest economy in the world. It is an extremely diverse state in terms of its industry and population. Therefore, the appeals heard by the California Supreme Court comprise a wide and interesting selection of legal issues.

My service in both the state judicial system and federal judicial system gives me a unique firsthand experience in addressing how the two similar but distinct judicial systems interact.

ORIGINS OF JUDICIAL REVIEW

“It is emphatically the province and duty of the judicial department to say what the law is.” This statement, made in 1803 by Chief Justice John Marshall in the case of *Marbury v. Madison*,³ established the power of the courts to exercise judicial review.

The doctrine of judicial review is what gives federal courts their power. It is through this doctrine that federal courts can strike down laws that violate the U.S. Constitution. In addition, federal courts, especially the U.S. Supreme Court, can review the rulings of state courts to determine whether they meet requirements of the federal constitution. In this way, the judiciary serves as a check against the two other branches of government, the executive and the legislative branches.

Today, the power of courts to review the laws is unquestioned. But unlike the powers of the president and the Congress, the power of judicial review is not found in the Constitution. Article I of the Constitution creates the United States Congress and endows it with its enumerated powers, through which it can create legislation. Article II creates the United States president and endows him with certain powers, including the power to make certain appointments.

Article III of the Constitution creates the judicial branch of the federal government. It gives federal courts broad, though limited, jurisdiction to decide certain “cases and controversies.” Article III specifies a federal judge’s term in office; they are appointed by the president, subject to

³ 5 U.S. (1 Cranch) 137 (1803).

confirmation by the United States Senate, and they serve until they decide to retire, they die, or they are removed from office through Congress's Article I impeachment and removal process.

However, nowhere in Article III, or anywhere else in the Constitution, are federal courts expressly granted the power of judicial review. Instead, this most significant power of the judiciary exists because the United States Supreme Court itself has decided that the federal judiciary possesses this power.

In establishing the power of judicial review, *Marbury v. Madison* made the judiciary a co-equal branch of the federal government. In this case, Chief Justice Marshall reasoned that our federal government is one of limited or enumerated powers set out in a written constitution. Marshall stated that the Constitution is a supreme, paramount law. If this is true, then a legislative act contrary to the Constitution is not law. Because it is "the duty of the judicial department to say what the law is," Marshall concluded that it is up to the federal courts to adjudicate conflicts between federal statutes and the United States Constitution and to reject statutes that conflict with the Constitution.

Once the principle of judicial review was established, there were still unsettled questions. Over which governmental actions did federal courts possess the power of judicial review? At the center of this question is the division between the federal and the state governments. The founders of the American Republic wanted to ensure that the new national government would be powerful enough to deal with the nation's problems, but they did not want it to be so powerful that it would threaten the rights of the people. The system they created was one of dual sovereignty between the governments of the nation and the states. A national government was created with a federal constitution and a Congress to make federal laws. Each state, however, retained its own government, constitution, and laws. Article IV of the Constitution, known as the Supremacy Clause, established that the Constitution, laws, and treaties of the United States are the supreme law of the land. However, the Tenth Amendment to the Constitution provided that all powers not delegated to the federal government by the Constitution are reserved to the states.

One central question in the development of judicial review is how conflicts between the laws of the federal government and the states would be

resolved. In later decisions after *Marbury v. Madison*, the Supreme Court established that it had the power to review decisions by state legislatures and by state courts. In 1810, in *Fletcher v. Peck*,⁴ the Court struck down a state statute, thus establishing the Supreme Court's power to hold unconstitutional laws made by the state legislatures.

In *Martin v. Hunter's Lessee*,⁵ the U.S. Supreme Court established that it could review decisions made by state courts. In this case, the Supreme Court reversed a decision by a state appellate court in Virginia. The Virginia court had claimed that a decision of the U.S. Supreme Court could not bind the state courts. The U.S. Supreme Court reversed this decision, stating that the Supreme Court is the ultimate interpreter of the Constitution. In this way, the problem of conflicting decisions about the ultimate interpretation of the Constitution was resolved by giving the Supreme Court the power to review any decision issued by a lower court.

The power of federal judicial review is therefore very significant; courts have the power to decide what the Constitution means, and they have the power to declare unconstitutional all governmental actions that exceed constitutional limits. With such a great power, the checks on the federal judiciary are small. First, the president has the power to appoint judges, and the Senate has the power to confirm the judges. Second, the Congress has the power to remove a federal judge for "treason, bribery, or other high Crimes and Misdemeanors." These two limitations are the only checks on the power of the unelected federal judges who serve with lifetime tenure.

JURISDICTION

While the power of federal judges to exercise judicial review is great, this power is checked by the limited nature of federal jurisdiction. State courts have unlimited jurisdiction; they can hear any case before them. Federal courts, however, can only hear certain types of cases. Under Article III, federal courts have jurisdiction over nine categories of cases and controversies. The three most important categories in everyday practice are: (1) the power to decide controversies between citizens of different states; (2) the power to decide controversies in which the United States itself is a

⁴ 10 U.S. (6 Cranch) 87 (1810).

⁵ 14 U.S. (1 Wheat.) 304 (1816).

party; and (3) the power to decide cases arising under the Constitution, the laws of the United States, and United States treaties.

What this limited jurisdiction means is that the large majority of cases in the U.S. judicial system are decided by state courts. State courts handle ordinary criminal cases such as for burglary or murder, as well as civil cases involving a contract dispute, or a car accident, for example. Most of these cases could not be heard by federal courts, because they do not involve a federal law or citizens of different states. Only cases fitting into the limited requirements for federal jurisdiction can be heard by federal courts. For example, a federal case can involve a claim arising under a federal law, such as a copyright claim under the U.S. Copyright Act; or a civil rights claim arising under the Fourteenth Amendment to the U.S. Constitution. These types of cases would be subject to federal jurisdiction. All cases not meeting the strict requirements of federal jurisdiction can only be heard by the state courts.

THE APPELLATE PROCESS

Cases heard in federal court are subject to the federal process of judicial review. Every party is entitled to one level of judicial review. A party can appeal the trial court's decision for review by a federal appeals court. The party who loses at the federal appellate court level has a right to appeal to the U.S. Supreme Court. However, the U.S. Supreme Court generally has discretion over whether to hear a case. This discretionary jurisdiction is invoked by filing a petition for a writ of certiorari. The votes of four of the nine justices are needed to grant certiorari. The Supreme Court receives thousands of petitions every year, but it decides less than 100 cases. Generally, then, the decision of a federal appeals court is the last level of judicial review in a federal case.

State court decisions go through a parallel process of judicial review. A state trial court's decision is reviewed by a state appellate court. The state appellate court's decision can be appealed to the state supreme court. However, like the U.S. Supreme Court, the state supreme court can usually decide whether it wishes to hear a case or not. In California, our state supreme court gets over 6,000 petitions for review each year. Typically, we decide over 100 cases (which is more than the U.S. Supreme Court, I might add).

Except for appeals from cases in which the defendant was sentenced to death, the California Supreme Court can decide whether or not a case is important enough to review. In deciding whether to exercise our power of review, we look to see whether the case presents an issue of statewide importance, or whether it presents an area where the law is unclear, or whether it presents a case where the lower appellate courts are misinterpreting the law. In choosing which cases to decide, we select cases where an opinion from the California Supreme Court will help clarify the law of California and give guidance to the lower state appellate courts.

FEDERAL REVIEW OF STATE COURT DECISIONS

The federal and the state court systems are not completely separate. As I discussed earlier, the decision of *Martin v. Hunter's Lessee* established the ability of the Supreme Court to review state court decisions. This power of the Supreme Court has evolved over time. During the nineteenth century, the Supreme Court did not have discretion in selecting the state court decisions it would review. Instead, the Court was compelled to hear all cases within the jurisdictional statutes. Beginning in the early twentieth century, Congress granted the Court the discretion to decide whether to review certain state court judgments deciding federal issues.

There are limits on the Supreme Court's ability to review state court decisions. The Court has long held that it lacks power to review state court decisions that rest on "adequate and independent state grounds." Efforts to obtain review of such decisions are dismissed for lack of jurisdiction. Thus, when a state court decision rests on state law grounds, it is not reviewable by the Supreme Court. The Supreme Court's review of a state court judgment is restricted to cases where the state court's decision is based on an interpretation of a *federal* law or the *federal* constitution. Since the Supreme Court is the ultimate interpreter of the Constitution and federal law, the Supreme Court has jurisdiction to review such a case.

Another means of federal review of state court decisions is through a writ of habeas corpus. Habeas corpus is a Latin phrase literally meaning "you have the body." Habeas corpus is a civil remedy under which a prisoner can challenge his or her imprisonment in federal court. In order to

petition in federal court for habeas relief, a state criminal defendant must have exhausted all of his remedies in state courts. A writ of habeas corpus challenges a conviction based on circumstances outside the record of the defendant's case, challenging the constitutionality of a law, for example. Through federal habeas relief, federal courts are able to review whether a state defendant is unconstitutionally imprisoned.

CONCLUSION

Judicial review, then, provides a means of checks and balances throughout the judicial system. Through judicial review, federal courts can ensure that state courts are following the Constitution and federal laws. Also, it allows appellate courts at both the state and federal levels to provide for uniform and consistent application of the laws.

The concept of judicial review is constantly evolving. And the level of judicial review differs depending on the law that a court is evaluating. With respect to equal protection under the Fourteenth Amendment of the U.S. Constitution, for example, courts use three levels of review to determine whether a particular law violates the Constitution's equal protection provision. Generally, the standard for judicial review is deferential; the government must have a rational basis for classifying groups in a particular way, and it must not act arbitrarily or capriciously. However, the judicial review standard is stricter when courts examine governmental classifications based on race, ethnicity, or gender. In these cases, in order to prevent discrimination by the majority against the minority, the government must demonstrate that there was a particularly compelling reason for the government's classification. If the government cannot provide a compelling reason, a court will strike down the law.

While judicial review changes and develops along with the development of the United States, one thing has held constant since *Marbury v. Madison*: the unquestioned power of the courts to say what the law is.