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August 28, 2014: Constitutional Passivity

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8/28/2014—Marbury v. Madison (1803) is celebrated as the case that established judicial review in the United States. Actually, there had been instances of judicial review before. I believe there is a plaque in New Bern, N.C. celebrating the first instance of judicial review on the continent, during the colonial period. Marbury is also celebrated for its cleverness. The Supreme Court was weak in a political sense at this time—-the 1802 term was cancelled by statute. If the Justices had ordered Jefferson's Administration to do anything, they would probably have been ignored. So, the assertion of judicial review was passive—-the Justices held that a statute granting the Court jurisdiction over the case was unconstitutional because the Court could not have that jurisdiction under the Constitution. (The statute need not have been read to grant jurisdiction in the first place). It was impossible for Jefferson to get at this assertion of authority. Something similar may be happening with regard to immigration policy. When Congress is functioning and not paralyzed by partisanship and ideology, as it is now, Presidential power is restricted by positive legislation. Even without legislation, Presidential actions can be challenged in court, as in the steel seizure in the 1950's. But if President Obama announces that he will not deport some class of people, he will be acting passively. It will not be possible to directly confront such an action. To register disapproval of Presidential policy making, Congress can only begin impeachment proceedings. This is clever Presidential maneuvering, but dangerous, for two reasons. First, it ups the ante by encouraging impeachment, which used to be rare, very rare. Second, partisans of Obama, of which I consider myself to be one, should be warning him that Presidential policy making really is unconstitutional. Just because unconstitutional passivity cannot be challenged, does not make it right.