AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 4: The Early National Era – Judicial Power and Constitutional Authority



## **Hayburn's Case, 2 U.S. 409** (1792)

*Congress in 1792 passed an act requiring the circuit courts of the United States to determine who was eligible for pensions based upon their service in the Revolutionary War. These determinations were then subject to review by either Congress or the secretary of war. Supreme Court justices riding circuit uniformly agreed that the act was unconstitutional. Chief Justice Jay, Justice Cushing, and Judge Duane, members of the Circuit Court for the New York District, ruled that Congress could not constitutionally assign such responsibilities to the judiciary and that judicial decisions could not constitutionally be subject to review by the national legislature or by an executive officer. They nevertheless agreed to make pension decisions in an extrajudicial capacity as commissioners. Justice Wilson, Justice Blair, and Judge Peters, members of the Circuit Court for the North Carolina District, sent a letter to President George Washington, informing him that they also believed the assignment of such duties to the circuit courts was "unwarranted by the Constitution." They did not take any additional action because no applications for pensions were pending in their district. Justice Iredell and Judge Sitgreaves, members of the Circuit Court for the Pennsylvania District, sent a similar letter to President Washington. They then refused to act when William Hayburn applied for a pension. Attorney General Edmund Randolph appealed to the Supreme Court to issue a writ of mandamus compelling the judges to act. After hearing arguments, the Supreme Court postponed a decision to the next term. Congress then amended the legislation in question, providing an alternative method for determining the eligibility of veterans for pensions. That method would be tried and fail in* Chandler v. Secretary of War, *excerpted below.*[1]

*In the wake of the decision, discussion in Congress noted that this was "the first instance in which a court of justice has declared a law of Congress to be unconstitutional." While Congress seemed interested in reaching an acceptable accommodation of the concerns of the various justices, there was no recorded outcry at the principle of judicial review of legislation. The only noteworthy comment in the Congressional Record was that "Mr. Murray urged the necessity of passing a law to point out some regular mode in which the Judges of the Courts of the United States shall give official notice of their refusal to act under any law of Congress, on the ground of unconstitutionality." Far from opposing it, it appears as though the main response was to consider whether a judicial declaration of unconstitutionality could be made in a more formal and efficient manner. (The record goes on to say, "No regular motion, however, was made on the subject, which lies over for future consideration.")*[2] *The federal government later sought to recover payments that had been dispersed under the Invalid Persons Act—a strong indication that the rest of the government had acquiesced, without much fuss, to the fact that these judges had voided a law passed by Congress.*

*Still, some party leaders were divided in their response to this development. Prominent Jeffersonians defended and prominent Federalists questioned the judicial power to declare federal laws unconstitutional. James Madison writing to Henry Lee celebrated this effort to call "the attention of the Public to Legislative fallibility." "[P]erhaps they may be wrong in the exertion of their power," he stated, "but such an evidence of its existence gives inquietude to those who do not wish Congress to be controuled or doubted."*[3] The National Gazette, *a Jeffersonian newspaper, was even more enthusiastic about this exercise of legal authority. The editor declared that a judicial decision holding a federal law "unconstitutional, must be a matter of high gratification to every Republican and*

[1] For more information on Hayburn's Case, see Maeva Marcus and Robert Teir, "*Hayburn's Case*: A Misinterpretation of Precedent," *Wisconsin Law Review* 1988 (1988): 527.
[2] *3 ANNALS OF CONG. 556–57 (April 13, 1792).*
[3] James Madison to Henry Lee, April 15, 1792, in *The Documentary History of the Supreme Court of the United States, 1789–1800*, vol. 6, ed. Maeva Marcus (New York: Columbia University Press, 1998), 50.

*friend of liberty: since it assures the people of ample protection to their constitutional rights and privileges, against any attempt of legislative and executive oppression."*[4] *Federalists were less excited about the first federal decision declaring congressional legislation unconstitutional. Fisher Ames wrote Thomas Dwight that the "decision of the Judges, on the validity of our pension law, is generally censured as indiscrete and erroneous."*[5]



Opinion of CHIEF JUSTICE JAY, JUSTICE CUSHING and JUDGE DUANE

That by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either.

That neither the Legislative nor the Executive branches, can constitutionally assign to the Judicial any duties, but such as are properly judicial, and to be performed in a judicial manner.

That the duties assigned to the Circuit courts, by this act, are not of that description; and that the act itself does not appear to contemplate them as such; in as much as it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the Secretary of War, and then to the Secretary of the Legislature; whereas by the Constitution, neither the Secretary at War, nor any other Executive officer, nor even the Legislature, are authorized to fit as a court of errors on the judicial acts or opinions of this court.

As, therefore, the business assigned to this court, by the act, is not judicial, nor directed to be performed judicially, the acts can only be considered as appointing commissioners for the purposes mentioned in it, by official instead of personal descriptions.

That the Judges of this court regard themselves as being the commissioners designated by the act, and therefore as being at liberty to accept or decline that office.

That as the objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress; and as the Judges desire to manifest, on all proper occasions, and in every proper manner, their high respect for the National Legislature, they will execute this act in the capacity of commissioners.

Letter of JUSTICE WILSON, JUSTICE BLAIR, and JUDGE PETERS to George Washington, April 18, 1792

Congress have lately passed an act, to regulate, among other things, "the claims to invalid persons."

Upon due consideration, we have been unanimously of opinion, that, under this act, the Circuit court held for the Pennsylvania district could not proceed;

1st. Because the business directed by this act is not of a judicial nature. It forms no part of the power vested by the Constitution in the courts of the United States; the Circuit court must, consequently, have proceeded without constitutional authority.

2d. Because, if, upon that business, the court had proceeded, its judgments (for its opinions are its judgments) might, under the same act, have been revised and controlled by the legislature, and by an officer in the executive department. Such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and, consequently, with that important principle which is so strictly observed by the Constitution of the United States.

These, Sir, are the reasons of our conduct. Be assured that, though it became necessary, it was far from being pleasant. To be obliged to act contrary, either to the obvious directions of Congress, or to a constitutional principle, in our judgment equally obvious, excited feelings in us, which we hope never to experience again.

Letter of JUSTICE IREDELL and JUDGE SITGREAVES to George Washington, June 8, 1792

[4] *National Gazette*, April 16, 1792, in *Documentary History*, 6: 52.
[5] Fisher Ames to Thomas Dwight, April 25, 1792, in *Documentary History*, 6: 57.

3. That at the same time such courts cannot be warranted, as we conceive, by virtue of that part of the Constitution delegating Judicial power, for the exercise of which any act of the legislature is provided, in exercising (even under the authority of another art) any power not in its nature judicial, or, if judicial, nor provided for upon the terms of the Constitution requires.

4. That whatever doubt may be suggested, whether the power in question is properly of a judicial nature, yet inasmuch as the decision of the court is not made final, but may be least suspended in its operation by the Secretary at War, if he shall have cause to suspect imposition or mistake; this subjects the decision of the court to a mode of revision which we consider to be unwarranted by the Constitution; for, though Congress may certainly establish, in instances not yet provided for, courts of appellate jurisdiction, yet such courts must consist of judges appointed in the manner the Constitution requires, and holding their offices by no other tenure than that of their good behavior, by which tenure the office of Secretary of War is not held. And we beg leave to add, with all due deference, that no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the Constitution, be liable to a reversion, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachments.

These, sir, are our reasons for being of opinion, as we are at present, that this Circuit court cannot be justified in the execution of that part of the act, which requires it to examine and report an opinion on the unfortunate cases of officers and soldiers disabled in the service of the United States. The part of the act requiring the court to sit five days, for the purpose of receiving applications from such persons, we shall deem it our duty to comply with; for, whether in our opinion such purpose can or cannot be answered, it is, as we conceive, our indispensable duty to keep open any court of which we have the honor to be judges, as long as Congress shall direct.

The high respect we entertain for the Legislature, our feelings as men for persons, whose situation requires the earliest, as well as the most effectual relief, and our sincere desire to promote, whether officially or otherwise, the just and benevolent views of Congress, so conspicuous on the present as well as on many other occasions, have induced us to reflect, whether we could be justified in acting, under this act, personally in the character of commissioners during the session of a court; and could we be satisfied that we had authority to do so, we would cheerfully devote such part of our time as might be necessary for the performance of the service. But we confess we have great doubts on this head. The power appears to be given to the court only, and not to the Judges of it; and as the Secretary at War has not a discretion in all instances, but only in those where he has cause to suspect imposition or mistake, to with-hold a person recommended by the court from being named on the pension list, it would be necessary for us to be well persuaded we possessed such an authority, before we exercised a power, which might be a means of drawing money out of the public treasury as effectually as an express appropriation by law. We do not mean, however, to preclude ourselves from a very deliberate consideration, whether we can be warranted in executing the purposes of the acts in the manner, in case an application should be made.