Cases that Shaped the Federal Courts

Hayburn's Case

1792

Chief Justice John Jay

Federal Judicial Center
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Central Question

Could Congress require the federal courts to perform nonjudicial duties?

Historical Context

Hayburn's Case is unusual among influential constitutional cases, as the Supreme Court of the United States did not reach a definitive decision on many of the most important issues the case presented. Nevertheless, the decisions of lower courts and correspondence between several judges and President George Washington influenced later conceptions of the scope of federal judicial power. The Constitution of the United States defined the broad parameters of that power, but left many questions about the judicial branch unresolved. It was not clear, for example, whether Congress could use the courts for governmental roles other than those specified in Article III of the Constitution. *Hayburn's Case* suggested an answer when two of the three circuit courts to consider the question stated that judges could perform such work, but not in their official capacities. While the case has proved influential in this field, courts continue to grapple with related questions today.

Legal Debates Before *Hayburn's Case*

Debates over the scope of judicial power and Congress's ability to frame and modify that power were an important part of the Constitutional Convention in Philadelphia and debates over the ratification of the Constitution. For the most part, however, these debates focused on judges' independence, the ability of the courts to invalidate legislation, and the federal judiciary's relationship with its state counterparts. The founders did not discuss at length the question of Congress's power to assign nonjudicial work to the courts. Nevertheless, the issue arose quite soon after the Constitution's ratification, as Congress attempted to use the judges' legal skills for other governmental work at a time when the new judicial system was not yet burdened with a heavy caseload.

Should the courts find that this practice violated the Constitution, moreover, it was unclear what course the judges should take. During its ratification, some prominent figures argued that the Constitution implicitly required courts to strike down unconstitutional legislation. In *Federalist* no. 78, for example, Alexander Hamilton asserted that "[n]o legislative act . . . contrary to the constitution can be valid" and defended "the right of the courts to pronounce legislative acts void." In 1788, future Chief Justice Oliver Ellsworth assured delegates at Connecticut's ratifying convention (a body formed to debate the adoption of the Constitution) that "upright, independent judges" would guard the Constitution by striking down laws violating its protections. Chief Justice John Marshall made similar statements to the Virginia convention. Some critics of the new Constitution

also suggested that judges would invalidate state and federal legislation, though they saw this as a flaw in the document's design. The Anti-Federalist "Brutus," for example, referred to judicial review as an "uncontroulable power." In the years following ratification, a few state courts struck down statutes on constitutional grounds; scholars debate how much weight these precedents carried.

The Case

In 1791, Congress passed a law authorizing Revolutionary War veterans and their heirs to claim government pensions by applying to the U.S. circuit courts. The courts' decisions on pension claims were not like ordinary judgments in cases between two adverse parties. Instead, the judges simply determined whether the claims were meritorious, and these determinations went to the Secretary of War for further review. If the Secretary disagreed with the court's decision, he could submit the matter to Congress for further review.

Now defunct, the circuit courts were the primary federal trial courts in early America. At the time of *Hayburn's Case*, they were composed of two Supreme Court justices and one district court judge. Circuit courts in New York, Pennsylvania, and North Carolina refused to implement the pension plan, reasoning that the role Congress had assigned to the courts was not an exercise of the "judicial power" given the courts by Article III of the Constitution. In two of the courts, the judges did not wait for a veteran or his family to make a claim, but instead wrote letters to President George Washington explaining that the law unconstitutionally assigned nonjudicial roles to the courts. The judges reasoned that it was important for all government actors to stick to their constitutionally assigned roles, rather than exercise powers that should be wielded by members of other branches of government. The U.S. Circuit Court for the District of Pennsylvania rejected the claim of Revolutionary War veteran William Hayburn on similar grounds. The New York and North Carolina courts differed slightly in their approach, as they determined that they could decide claims cases sitting as "commissioners," a role distinct from their judicial offices. Though not a formal judgment by a court, many scholars regard the judges' letters to Washington as an important statement of the principle of separation of powers and an influential early discussion of the nature of judicial power. Washington forwarded the judges' concerns to Congress, which considered options to change the statutory scheme as the Supreme Court heard *Hayburn's Case*.

The Supreme Court's Ruling

Attorney General Edmund Randolph sued in the Supreme Court of the United States, seeking a writ of mandamus against the circuit court that had rejected Hayburn's claim. Writs of mandamus are orders commanding that officials perform their duties. In this

instance, Randolph sought to have the full Supreme Court order the circuit court to hear pension claims. Before the Court reached that issue, however, the justices disagreed as to whether Randolph had the legal authority to request the writ without prior approval from Washington. The six justices split 3–3 on that question, meaning Randolph could not proceed. Unable to proceed in his official capacity, Randolph appeared later that day as counsel for Hayburn himself. The Court agreed to hold over the case to its next term, presumably hoping that Congress would act in the interim.

It remains slightly unclear what happened next. Congress amended the law to authorize the Attorney General to sue to determine its validity in the Supreme Court. The Supreme Court decided a case based on this statute, but the case was not publicly reported. Though some sources, including subsequent Supreme Court decisions, suggested that the Court had held the law unconstitutional, others have claimed the Court must have held that the pensions statute required judges to act as commissioners, since they continued to serve in that role for some time. Chief Justice Roger B. Taney adopted this interpretation in his opinion for the Court in *United States v. Ferreira* (1851).

Aftermath and Legacy

It is important to note that the Supreme Court's opinion in *Hayburn* only related to the issue of the Attorney General's ability to argue the case. Nevertheless, the Court's reporter, Alexander Dallas, included the judges' letters to Washington as a footnote in the report of the case. Subsequent judges and scholars have looked to those letters in attempting to recreate the early judiciary's understanding of the meaning of "judicial power" under Article III of the Constitution and the separation of powers between the branches. Some have also found a requirement that every case involve interested parties in the Court's reluctance to allow Randolph to proceed without a client or authorization from the President. This doctrine, known as "standing," has become an important component of federal law, though scholars disagree as to whether its origins can be traced to *Hayburn's Case*. Congress has occasionally assigned other nonjudicial roles to judges and courts, though these have usually been performed outside of the judges' offices. A notable exception was the Ethics in Government Act of 1978, which empowered a panel of federal judges to appoint an attorney to investigate allegations of official wrongdoing. The Supreme Court upheld this law in *Morrison v. Olson* (1988), though the statute has since expired.

Discussion Questions

- Given that the Supreme Court did not reach a final determination of the major issues in *Hayburn's Case*, how much weight should the case hold? Were later courts right to cite it as precedent on these issues?
- Several of the judges involved in *Hayburn's Case* appear to have believed it constitutional for them to hear pension claims as "commissioners," but not as "judges." Does this make a difference if the same people heard the claims? Are there reasons Congress might have wanted the judges to hear the claims in their judicial capacities?
- The issue the Supreme Court actually decided—that the Attorney General could not appear in the case unless instructed to do so by the President or a client—is often forgotten in discussions of the case. Bearing in mind that the modern Attorney General runs the Department of Justice (founded in 1870) and is the most senior law enforcement officer in the United States, how might the legal system have been different if the Attorney General could initiate legal challenges at his or her own discretion?

Documents

Supreme Court of the United States, Opinion in *Hayburn's Case*, August 11, 1792

The first four paragraphs of this report of the case describe the proceedings in the Supreme Court of the United States. The note beginning with the "†" symbol reflects the proceedings in the lower court, in which the justices gave more concrete views on the constitutionality of Congress's attempt to enlist judges in the veterans pensions system.

The Attorney General (Randolph) who made the motion for the mandamus, having premised that it was done ex officio, without an application from any particular person, but with a view to procure the execution of an act of Congress, particularly interesting to a meritorious and unfortunate class of citizens, The Court declared that they entertained great doubt upon his right, under such circumstances, and in a case of this kind, to proceed ex officio; and directed him to state the principles on which he attempted to support the right. The Attorney General, accordingly, entered into an elaborate description of the powers and duties of his office:—

But The Court being divided in opinion on that question, the motion, made ex officio, was not allowed.

The Attorney General then changed the ground of his interposition, declaring it to be at the instance, and on behalf of Hayburn, a party interested; and he entered into the merits of the case, upon the act of Congress, and the refusal of the Judges to carry it into effect.

The Court observed, that they would hold the motion under advisement, until the next term; but no decision was ever pronounced, as the Legislature, at an immediate session, provided, in another way, for the relief of the pensioners.

† … As the reasons assigned by the Judges, for declining to execute the first act of Congress, involve a great Constitutional question, it will not be thought improper to subjoin them, in illustrating Hayburn's case. The Circuit Court for the district of New York (consisting of Jay, Chief Justice, Cushing, Justice, and Duane, District Judge) proceeded on the 5th of April, 1791, to take into consideration the act of Congress entitled "An act to provide for the settlement of the claims "of widows and orphans barred by the limitations heretofore established, "and to regulate the claims to invalid pensions;" and were, thereupon, unanimously, of opinion and agreed.

"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 at War, and then to the revision of the Legislature; whereas by the Constitution, neither the Secretary at War, nor any other Executive officer, nor even the Legislature, are authorized to sit as a court or 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 act 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.

"That as the Legislature have a right to extend the session of this court for any term, which they may think proper by law to assign, the term of five days, as directed by this act, ought to be punctually observed.

"That the judges of this court will, as usual, during the session thereof, adjourn the court from day to day, or other short periods, as circumstances may render proper, and that they will, regularly, between the adjournments, proceed as commissioners to execute the business of this act in the same court room, or chamber."

The Circuit court for the district of Pennsylvania, (consisting of WILSON, and BLAIR, Justices, and PETERS, District Judge) made the following representation, in a letter jointly addressed to the President of the United States, on the 18th of April, 1792.

"To you it officially belongs to "take care that the laws" of the United States "be faithfully executed." Before you, therefore, we think it our duty to lay the sentiments, which, on a late painful occasion, governed us with regard to an act passed by the legislature of the union.

"The people of the United States have vested in Congress all legislative powers "granted in the constitution."

"They have vested in one Supreme Court, and in such inferior courts as the Congress shall establish, "the judicial Power of the United States."

"It is worthy of remark, that in Congress the whole legislative power of the United States is not vested. An important part of that power was exercised by the people themselves, when they "ordained and established the Constitution."

"This Constitution is "the Supreme Law of the Land." This supreme law "all judicial officers of the United States are bound, by oath or affirmation, to support."

"It is a principle important to freedom, that in government, the judicial should be distinct from, and independent of, the legislative department. To this important principle the people of the United States, in forming their Constitution, have manifested the highest regard.

"They have placed their judicial power not in Congress, but in the "courts." They have ordained that the "Judges of those courts shall hold their offices during good behavior," and that "during their continuance in office, their salaries shall not be diminished."

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

"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 o fthe power vested by the Constitution in the courts of the United States; the Circuit court must, consequently, have proceeded without constitutional authority.

"2nd. Because, if, upon that business, the court had proceeded, its judgments (for its opinions are it judgments) might, under the same act, have been revised and controuled 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."

The Circuit court for the district of North Carolina, (consisting of Iredell, Justice, and Sitgreaves, District Judge) made the following representation in a letter jointly addressed to the President of the United States, on the 8th of June, 1792.

"We, the judges now attending at the Circuit court of the United States for the district of North Carolina, conceive it our duty to lay before you some important observations which have occurred to us in the consideration of an act of Congress lately passed, entitled "an act to provide for the settlement of the claims of widows and orphans barred by the limitations heretofore established, and to regulate the claims to invalid pensions.

"We beg leave to premise, that it is as much our inclination, as it is our duty, to receive with all possible respect every act of the Legislature, and that we never can find ourselves in a more painful situation than to be obliged to object to the execution of any, more especially to the execution of one sounded on the purest principles of humanity and justice, which the act in question undoubtedly is. But, however lamentable a difference in opinion really may be, or with whatever difficulty we may have formed an opinion, we are under the indispensable necessity of acting according to the best dictates of our own judgment, after duly weighing every consideration that can occur to us; which we have done on the present occasion.

"The extreme importance of the case, and our desire of being explicit beyond the danger of being misunderstood, will, we hope, justify us inflating our observations in a systematic manner. We therefore, Sir, submit to you the following: —

"1. That the Legislative, Executive, and Judicial departments, are each formed in a separate and independent manner; and that the ultimate basis of each is the Constitution only, within the limits of which each department can alone justify any act of authority.

"2. That the Legislature, among other important powers, unquestionably possess that of establishing courts in such a manner as to their wisdom shall appear best, limited by the terms of the constitution only; and to whatever extent that power may be exercised, or however severe the duty they may think proper to require, the Judges, when appointed in virtue of any such establishment, owe implicit and unreserved obedience to it.

"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 act) any power not in its nature judicial, or, if judicial, not provided for upon the terms 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 at 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 at 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 occasion, 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 o fthe 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 act in that manner, in case an application should be made.

"No application has yet been made to the court, or to ourselves individually, and therefore we have had some doubts as to the propriety of giving an opinion in a case which has not yet come regularly and judicially before us. None can be more sensible than we are of the necessity of judges being in general extremely cautious in not intimating an opinion in any case extra-judicially, because we well know how liable the best minds are, notwithstanding their utmost care, to a bias, which may arise from a pre-conceived opinion, even unguardedly, much more deliberately, given: But in the present instance, as many unfortunate and meritorious individuals, whom Congress have justly thought proper objects of immediate relief, may suffer great distress even by a short delay, and may be utterly ruined by a long one, we determined at all events to make our sentiments known as early as possible, considering this as a case which must be deemed an exception to the general rule, upon every principle of humanity and justice; resolving however, that so far as we are

concerned individually, in case an application should be made, we will most attentively hear it; and if we can be convinced this opinion is a wrong one, we shall not hesitate to act accordingly, being as far from the weakness of supposing that there is any reproach in having committed an error, to which the greatest and best men are sometimes liable, as we should be from so low a sense of duty, as to think it would not be the highest and most deserved reproach that could be bestowed on any men (much more on Judges) that they were capable, from any motive, of persevering against conviction, in apparently maintaining an opinion, which they really thought to be erroneous."

Document Source: *Hayburn's Case*, 2 U.S. (Dall.) 409, 409–14 (1792).

General Advertiser (Philadelphia), April 13, 1792

This contemporaneous account of the circuit court proceedings in Hayburn's Case *notes that the pensions controversy led to the first instance of a federal judge declaring a law unconstitutional. Some debate exists as to whether this distinction belongs to* Hayburn's Case *or the Supreme Court's later decision in* Marbury v. Madison *(1803).*

A Memorial was then presented from an Invalid Officer, setting forth that he had applied yesterday to the Judges of the Circuit Court in this city, to be put on the pension list pursuant to a late Act of Congress; and that the court having refused to take cognizance of his case, he was obliged to apply to Congress for relief.

The sitting Judges were Messrs Wilson, Blair, and Peters, and, from an account which Mr. Boudinot gave in his place, it appeared that the Court thought the examination of Invalids a very extraordinary duty to be imposed on the Judges: and looked on the law, which imposes that duty, as an unconstitutional one, inasmuch as it directs the Secretary of War to state the mistakes of the Judges to Congress for their revision: they could not therefore accede to a regulation tending to render the Judiciary subject to the legislative and executive powers, which from a regard for liberty and the constitution, ought to be kept carefully distinct; it being a primary principle of the utmost importance, that no decision of the Judiciary Department should, under any pretext, be brought in revision before either the legislative or executive departments of the government, neither of which have in any instance a revisionary authority over the judicial proceedings of the Courts of Justice.

Another objection, on the part of the Judges, was, that whereas there are laws now in force, prescribing a day, beyond which the court shall not sit, this new law declares that the court shall not sit five days for the purpose of hearing claims, whether they be offered or

not; and leaves nothing to the discretion and integrity of the Judges, to sit as long as they have public business to do.

This being the first instance, in which a court of justice had declared a law of Congress to be unconstitutional, the novelty of the case produced a variety of opinions with respect to the measures to be taken on the occasion. At length a committee of five was appointed to enquire into the facts contained in the memorial, and to report thereon.

During the course of the debate, it was mentioned, that the Judges of the circuit court in the state of New York had consented to examine invalids pursuant to the law in question; but on this principle: Congress they thought, had a right, in appointing commissioners for any special purpose, to designate the persons, as well by any official titles with which they are vested, as by their proper names: Wherefore, although they would not, in their judicial capacity, undertake the examination of invalids, yet, as commissioners, they devoted each day an hour to the business, after the adjournment of the court.

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.

No regular motion however was made on the subject, which lies over for further consideration.…

Document Source: *General Advertiser*, April 13, 1792, quoted in Maeva Marcus, ed., *Documentary History of the Supreme Court of the United States, 1789–1800, Volume Six, Cases: 1790–1795* (New York: Columbia University Press, 1998), 48–49.

Letter from William Vans Murray to [John Gwinn], April 15, 1792

This correspondence from a Maryland statesman articulates several criticisms of the Hayburn *courts' apparent decision that the invalid pension law violated the Constitution.*

The Judges of the Circuit court, now sitting,… on the 12th refused to execute or Judge under a late and very humane act of Congress appointing the Circuit Courts to examine into the disabilities of Invalid Soldiers of the last war & to declare their respective pensions_ on the ground of the law's being unconstitutional! It came before the House on a petition from one Hayburn, an old Soldier, who apply'd by petition to the court, for a pension on [account] of disability arising from wounds … The novelty & consequence of the case both surprised and embarrassed every body[.] We found, the next day, that the court had that morning admitted their refusal to be entered on their Records (which the day before they would not permit the Clerk to do)[.] This gave a turn to the whole affair[,]

as the Attorney Gen. may now by error or mandamus carry the point into discussion before the Supreme Court[.] In the mean time a bill will be brought in to relieve the unhappy invalids by a provision which will give an alternative to them of either applying to certain commissioners or to the court[,] leaving the question of the propriety or right of the court on neutral ground[.] If such as right exists in the Judges, without limit, it is an extraordinary controul[,] but without entering on that great question[, i]t seems pretty generally admitted that the Judges chose rather a singular occasion[,] as it is merely a personal duty which they avoid by the exercise of the right.…

Document Source: William Vans Murray to [John Gwinn], April 15, 1792, quoted in Maeva Marcus, ed., *Documentary History of the Supreme Court of the United States, 1789–1800, Volume Six, Cases: 1790–1795* (New York: Columbia University Press, 1998), 50–51.

Letter from Fisher Ames to Thomas Dwight, April 25, 1792

This brief correspondence from a Massachusetts congressman reports that the decisions of the lower courts in the pension cases were unpopular. To Ames, the decision also suggested that the courts might weaken congressional power.

The decision of the Judges, on the validity of our pension law, is generally censured as indiscreet and erroneous. At best, our business is up hill, and with the aid of our law courts the authority of Congress is barely adequate to keep the machine moving; but when they condemn the law as invalid, they embolden the States and their courts to make many claims of power, which otherwise they would not have thought of.…

Document Source: Fisher Ames to Thomas Dwight, April 25, 1792, quoted in Maeva Marcus, ed., *Documentary History of the Supreme Court of the United States, 1789–1800, Volume Six, Cases: 1790–1795* (New York: Columbia University Press, 1998), 57–58.

James Iredell's "Reasons for acting as a Commissioner on the Invalid Act," September 26, 1792

In this document, Justice James Iredell articulated his rationale for acting as a pension commissioner. Iredell drew a distinction between operating as a commissioner in his personal capacity and doing so while representing his court.

Before I act as a Commissioner in this case, I think it proper to assign the reasons of my doing so. My resolution has not been formed without mature reflection nor, I confess,

but after considerable hesitation. (My mind indeed until I came here was rather strongly inclined against the exercise of the Power, not from an unwillingness to undertake the task however difficult, but from very serious doubts as to such a construction of the Act as would justify it.) I have felt the greater embarrassment, as authorities for whom I have the highest respect have differed in the construction. My own reasons for the construction I now think myself warranted in giving are as follow.

I perfectly concur with the opinion given by the Circuit Court at a former Term, that the Circuit Court cannot constitutionally exercise the authority in question. It would be easy for me to assign the particular reasons upon which I ground this opinion, but as that is not now absolutely necessary I wish to avoid it, as it is a point now depending judicially before the Supreme Court, after a very full argument, and there I shall think it my duty to give my reasons at large.

The Question then is, Whether, inasmuch as it is an Authority not exerciseable by the Court, the Act will be bear such a construction as that the Judges will be warranted in exercising the authority individually, as Commissioners, out of Court.

It must be confessed, that this not an obvious construction.… Here the allowance is directed to be (within the restrictions mentioned) as the Circuit Court of the District may think just. Every applicant shall attend the Court in person. The proofs are to be produced to the Circuit Court[.] The Circuit Court, upon receipt of the proofs, are to proceed to examine into the nature of the wound, or other cause of disability; and to transmit a Certificate to the Secretary at War, if the Applicant appears a proper object of the Act, and an opinion such as the nature of the case may require.

These expressions are so strong, that if there were not others in the Act to induce an opinion that Congress may probably have meant in using the expression "Circuit Court", rather than a designation of the Persons in whom they chose to repose such confidence, than a description to be strictly confined to its legal import, I should deem it utterly unwarrantable to say that the authority could be exercised otherwise than in Court. But there are expressions in the Act which in my opinion lead to a very probable supposition, that Congress may have contemplated it as a personal rather than a judicial exercise of power.…

Nothing would be more painful than to find any Act of a Legislature I respect so much incapable of execution, altho' nothing would be more clearly [my?] duty than if I found it so to declare my opinion freely, and decline an authority I could not constitutionally exercise. There is however one circumstance I think it my duty to mention. This not being any part of my duty as a Judge (for I so consider it), but a Trust which I may or may not execute, I ought not to do it if it will be in any manner inconsistent with my Judicial Duty. If therefore it appeared to me that this question could by any … possibility come before me as a Judge, either in the Circuit or the Supreme Court, I ought not to exercise

the authority. But I do not think it can. Therefore, [having] no reason of a public nature to decline the execution of the Trust, I readily accept it.

Document Source: James Iredell's "Reasons for acting as a Commissioner on the Invalid Act," September 26, 1792, quoted in Maeva Marcus, ed., *Documentary History of the Supreme Court of the United States, 1789–1800, Volume Six, Cases: 1790–1795* (New York: Columbia University Press, 1998), 288–91.

Russell Wheeler, *Supreme Court Review*, 1973

In this piece, a legal scholar and political scientist argues that Hayburn's Case *was one of several important events that shaped the justices' reluctance to perform certain types of nonjudicial roles.*

Historians have, of late, taken another look at the pre-Marshall Court and have concluded that its judicial work was not as unimportant as has been believed. Yet the suspicion remains that the early judges were more anxious to be politicians than judicial statesmen.

It is surely true, and often noted, that [Chief Justice John] Jay and [Chief Justice Oliver] Ellsworth served as diplomats, that [Justice] Bushrod Washington and [Justice Samuel] Chase made partisan speeches. What deserves recognition, though, are the occasions on which the members of the early Court rejected demands for extrajudicial service, and why they did so. The Jay Court faced a President and Congress anxious to adopt a basic assumption of the English constitution, the assumption that judges were obligated to serve the nation extrajudicially in various ex officio capacities in which their judicial skills would be of use. When faced with demands for extrajudicial activity they thought would violate the American philosophy of separation of powers, the judges refused to comply. Yet they did not regard obligatory extrajudicial service as unconstitutional per se. The American Constitution created a unique judicial office, and it fell to the Jay Court to explain its character. Thus, not only was the early Court a special kind of "schoolmaster," teaching the "people how to be good republicans," it also lectured the high officials of the government, teaching them of the limits that the American philosophy of government placed on judges.…

[Federal judges] regarded the statute in [Hayburn's Case] as an attempt to put the judges to nonjudicial use. The judges refused to perform this nonjudicial task on the bench. They did recognize an obligation for nonjudicial service, and thus agreed to perform the task, not as judges, but as ex officio commissioners. Their performance, however, raises questions about the wisdom of having judges perform nonjudicial tasks ex officio.…

The judges did not specifically say what it was about the pension duty that made its performance by judges unconstitutional. Yet their refusal is explainable in terms of the

separation of powers theory.… [C]ourts should not have their actions checked by nonjudicial officers. More important, however, a determination of the proper pension rate seemed to require the exercise of other than judicial discretion. Congress told the ju8dges not only to find the facts of a medical disability, but also to recommend a pension rate which they "may think just." But the statute gave no legal standards by which the judges were to determine if the applicant deserved a pension, or what pension rate would be "just," beyond the vague standard of "comparability" with the applicant's "degree of disability." The fact that the Secretary of War, and Congress, were to review the judge's determinations of "just" pension rates no doubt confirmed suspicions that more than a judicial discretion was to operate.…

Note, however, that the judges' purpose was to separate themselves from the other branches, not to insulate themselves from all nonjudicial activity. They did not claim that the Constitution forbade all extrajudicial service; it only "afford[ed] strong arguments against the propriety of our extrajudicially deciding the questions alluded to." The judges still felt obligated to render what extrajudicial service they could, provided that they would not be led to endanger the separation of powers. They were "not only disposed but desirous to promote the welfare of our country in every way that may consist with our official duties." This left it to the judges' discretion when extrajudicial service could be undertaken with the judicial function.…

[*Hayburn's Case* and other early actions by federal judges were attempts] to point out to non-judges and future judges that the duties of the American judge were best limited to judging cases and controversies. It remained for later judges, most notably [Chief Justice John] Marshall, to show how encompassing that single duty could be.

Document Source: Russell Wheeler, "Extrajudicial Activities of the Early Supreme Court," *Supreme Court Review* 1973 (1973): 123–24, 135, 137, 154–55, 158 (footnotes omitted).

Maeva Marcus and Robert Tier, *Wisconsin Law Review*, 1988

In this article, two scholars argue that Hayburn's Case *has been misunderstood as adopting a narrow view of judicial power. The authors argue that the case actually reflects a more fluid, and perhaps more broad, concept of judges' ability to hear and decide controversies. They also suggest that the justices' actions in* Hayburn's Case *could have been interpreted to support a broader role for the Attorney General than currently employed.*

Hayburn's Case was argued only briefly, was mentioned only in passing in the Court's record, and was reported in only a few pages of Dallas's reports. Yet, it has been used as

precedent for a number of legal propositions, all in support of judicial restraint. The case has been cited for the idea that the three branches of the federal government must remain separate and autonomous from each other; that the courts should not issue advisory opinions; that the federal courts do, indeed, have the power to review the constitutionality of laws passed by Congress; and that specific "case or controversy" requirements are needed to establish the jurisdiction of federal courts.

This Article will show that Supreme Court justices frequently have used *Hayburn's Case* incorrectly—that what the Supreme Court actually did was not what later Justices thought the 1792 Court had done. Moreover, what the later Justices actually decided in Hayburn reflects (at least in that instance) a judicial philosophy that differs substantially from the attitude ascribed to them by their successor Justices.…

Although the Supreme Court employed *Hayburn's Case* occasionally as authority in the nineteenth century, it was not until the twentieth century that the use of the case as precedent blossomed. During the nineteenth century the Supreme Court cited *Hayburn's Case* mainly to support separation-of-powers arguments, usually in the context of a debate over the proper role of the federal judiciary. In these cases the justice seemed to be referring to the views of the United States circuit court judges, as the Supreme Court never decided the constitutional separation-of-powers question on the merits in *Hayburn*. In the twentieth century, however, the Supreme Court began to use *Hayburn* in a decidedly different manner. The case became a weapon in the arsenal deployed by judges advocating judicial restraint. As such, it was cited as an example of eighteenth century justices carefully limiting their jurisdiction by defining the constitutional "case or controversy" requirement narrowly or refusing to issue advisory opinions.…

It would probably have been disturbing for [Justice Felix] Frankfurter[, one of the leading modern exponents of judicial restraint,] to realize that the Supreme Court of 1792 may not have felt that way at all. The Court, probably without any fears of becoming too powerful a branch of government, seemed willing to hear cases in which there were not two well-defined adverse parties, as long as the President wanted the Court to decide an issue. Furthermore, at least half of that Court approved of allowing the Attorney General to bring forth a legal issue for them to decide, with or without a client. The other half may not have believed that a client was necessary at all, but thought that the Attorney General could not proceed without prior authorization from the President.…

The idea that the Supreme Court must limit itself when it chooses cases to hear and decide is repeated often in Court opinions. While Justice Frankfurter may have been the most persistent oracle of judicial restraint, incantations of the need for a defined and limited role for the federal judiciary can be found in opinions of justices along the entire spectrum of judicial philosophy. It seems the justices feel the need to reassure the public,

other branches of government, the states, and perhaps even themselves, that there is a limit to their power.…

The courts have followed a tradition of reading a jurisdictional limitation in the "case or controversy" clause, and have frequently cited *Hayburn's Case* in doing so. Supreme Court justices have interpreted the history of that case in a way that now appears dubious. In short, *Hayburn's Case* may actually stand for the polar opposite of the proposition for which it has been cited. If Attorney General Randolph had gone to President Washington and sought authorization to proceed and then been permitted by the Court to bring his mandamus motion …, the "case or controversy" requirement might look very different today. The Attorney General's role as a litigant would have been strengthened; he would have been able to bring important cases before the court without waiting for private parties to materialize. Quite possibly the Court's role also would have been enlarged, with additional opportunities to decide significant questions. Although the Court would still have had to wait until a case was presented to it, such occasions presumably would have come more often.…

Hayburn's Case has become a symbol for judicial restraint, but a closer look at its background and facts reveals that the early Court may have had contrary principles in mind.

Document Source: Maeva Marcus & Robert Tier, "*Hayburn's Case*: A Misinterpretation of Precedent," *Wisconsin Law Review* 1988 (1988): 528, 541–42, 544–46 (footnotes omitted).

Cases that Shaped the Federal Courts

This series includes case summaries, discussion questions, and excerpted documents related to cases that had a major institutional impact on the federal courts. The cases address a range of political and legal issues including the types of controversies federal courts could hear, judicial independence, the scope and meaning of "the judicial power," remedies, judicial review, the relationship between federal judicial power and states' rights, and the ability of federal judges to perform work outside of the courtroom.

- *Hayburn's Case* (1792). Could Congress require the federal courts to perform non-judicial duties?
- *Chisholm v. Georgia* (1793). Could states be sued in federal court by individual citizens of another state?
- *Marbury v. Madison* (1803). Could federal courts invalidate laws made by Congress that violated the Constitution?
- *Fletcher v. Peck* (1810). Could federal courts strike down state laws that violated the Constitution?
- *United States v. Hudson and Goodwin* (1812). Did the federal courts have jurisdiction over crimes not defined by Congress?
- *Martin v. Hunter's Lessee* (1816). Were state courts bound to follow decisions issued by the Supreme Court of the United States?
- *Osborn v. Bank of the United States* (1824). Could Congress grant the Bank of the United States the right to sue and be sued in the federal courts?
- *American Insurance Co. v. Canter* (1828). Did the Constitution require Congress to give judges of territorial courts the same tenure and salary protections afforded to judges of federal courts located in the states?
- *Louisville, Cincinnati, and Charleston Rail-road Co. v. Letson* (1844). Should a corporation be considered a citizen of a state for purposes of federal jurisdiction?
- *Ableman v. Booth* (1859). Could state courts issue writs of habeas corpus against federal authorities?
- *Gordon v. United States* (1865). Could the Supreme Court hear an appeal from a federal court whose judgments were subject to revision by the executive branch?
- *Ex parte McCardle* (1869). Could Congress remove a pending appeal from the Supreme Court's jurisdiction?
- *Ex parte Young* (1908). Could a federal court stop a state official from enforcing an allegedly unconstitutional state law?
- *Moore v. Dempsey* (1923). How closely should federal courts review the fairness of state criminal trials on petitions for writs of habeas corpus?

- *Frothingham v. Mellon* (1923). Was being a taxpayer sufficient to give a plaintiff the right to challenge the constitutionality of a federal statute?
- *Crowell v. Benson* (1932). What standard should courts apply when reviewing the decisions of executive agencies?
- *Erie Railroad Co. v. Tompkins* (1938). What source of law were federal courts to use in cases where no statute applied and the parties were from different states?
- *Railroad Commission of Texas v. Pullman Co.* (1941). When should a federal court abstain from deciding a legal issue in order to allow a state court to resolve it?
- *Brown v. Allen* (1953). What procedures should federal courts use to evaluate the fairness of state trials in habeas corpus cases?
- *Monroe v. Pape* (1961). Did the Ku Klux Klan Act of 1871 permit lawsuits in federal court against police officers who violated the constitutional rights of suspects without authorization from the state?
- *Baker v. Carr* (1962). Could a federal court hear a constitutional challenge to a state's apportionment plan for the election of state legislators?
- *Glidden Co. v. Zdanok* (1962). Were the Court of Claims and the Court of Customs Appeals "constitutional courts" exercising judicial power, or "legislative courts" exercising powers of Congress?
- *United States v. Allocco* (1962). Were presidential recess appointments to the federal courts constitutional?
- *Walker v. City of Birmingham* (1967). Could civil rights protestors challenge the constitutionality of a state court injunction, having already been charged with contempt of court for violating the injunction?
- *Bivens v. Six Unknown Named Agents* (1971). Did the Fourth Amendment create an implied right to sue officials who conducted illegal searches and seizures?
- *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* (1982). Did the Bankruptcy Reform Act of 1978 violate the Constitution by granting too much judicial power to bankruptcy judges?
- *Morrison v. Olson* (1988). Could Congress empower federal judges to appoint independent counsel investigating executive branch officials?
- *Mistretta v. United States* (1989). Could Congress create an independent judicial agency to guide courts in setting criminal sentences?
- *Lujan v. Defenders of Wildlife* (1992). Could an environmental organization sue the federal government to challenge a regulation regarding protected species?
- *City of Boerne v. Flores* (1997). Could Congress reverse the Supreme Court's interpretation of the Constitution through a statute purportedly enforcing the Fourteenth Amendment?