EXTRAJUDICIAL ACTIVITIES AND THE PRINCIPLE OF THE SEPARATION OF POWERS

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The constitutional doctrine of the separation of powers[1] has been, throughout the course of American history, a source of keen controversy between the executive and legislative branches of government. Rarely, however, has the doctrine provoked difficulties in relation to the judiciary or any of its members. Indeed, it is a curious fact that judges, since the earliest days of the republic, have assumed non-judicial functions in the service of the executive branch of government.[2] To cite a few examples: John Jay was simultaneously Ambassador to England and Chief Justice of the Supreme Court. Oliver Ellsworth in 1799 held the posts of Chief Justice and Minister to France. John Marshall served, for a period in 1801, both as Secretary of State and Chief

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[1] This doctrine is, of course, nowhere mentioned in the Federal Constitution; it is, nevertheless, firmly enshrined as one of the "great structural principles of American Constitutional Law." Edward S. Corwin, *Introductory Essay*, CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 9 (1953).

[2] For a careful examination of the manifold activities of the members of the pre-Marshall Court, see Wheeler, *Extrajudicial Activities of the Early Supreme Court*, SUPREME COURT REVIEW 123-58 (1973). See also Wheeler, *Extrajudicial Behavior and the Role of the Supreme Court Justice*, UNIVERSITY PROGRAMS MODULAR STUDIES (1975).

For a rather comprehensive list of judges who have served the executive while still on the bench, see REPORT OF SENATE JUDICIARY COMMITTEE ON ABE FORTAS, 90th Congress, 2nd Session 6-8 (Sept. 20, 1968) (Hereinafter cited as SENATE REPORT ON NOMINATION OF ABE FORTAS.) See also the list of more recent judges noted in H. HART and H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 75-77 (1953). For extensive discussion of this subject, see NONJUDICIAL ACTIVITIES OF SUPREME COURT JUSTICES AND OTHER FEDERAL JUDGES, HEARINGS BEFORE THE SUBCOMMITTEE ON SEPARATION OF POWERS OF THE COMMITTEE ON THE JUDICIARY, 91st Congress, 1st Session (July 14, 15 and 16, and Sept. 30, 1969). (Hereinafter cited as SEPARATION OF POWERS HEARINGS).

Justice of the Supreme Court.[3] (Marshall's role as Secretary of State, in fact, involved him directly in the events surrounding the appointment of the "midnight" Justices of the Peace which led to the celebrated case of *Marbury v. Madison*).[4] In more recent times, Justice Owen J. Roberts, in 1942, served as chairman of a committee to investigate the Pearl Harbor disaster; Justice Robert H. Jackson was chief counsel for the United States in the prosecution of Nazi War criminals of Nuremberg in 1945-46;[5] and, of course, Chief Justice Earl Warren in 1964 served as head of the Commission appointed by President Johnson to investigate the assassination of President Kennedy. Moreover, on occasions too frequent to enumerate, judges have advised presidents privately on matters of national and of international importance. Chief Justice Taft was particularly active on this score. Indeed, he not only counselled presidents, he actively engaged in promoting their election. It has been said of Taft that he "was the most extra-judicially active Justice of this century"[6] and "exerted enormous influence on legislators, Presidents, Cabinet members, editors, lawyers and friends"[7] while serving as Chief Justice. The close relation-

[3] See C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY Vol. I, 178, 184-5, 200-1 (1926). Marshall's appointment as Chief Justice was confirmed by the Senate on January 27, 1801. The new Administration entered into office on March 4. See also A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 558-59 (1929). Beveridge notes that this was the second time in the history of the U. S. that the two offices were held simultaneously by the same person. Jay had held the two offices for some six months in 1789-1790 until Jefferson returned from France to assume his post as Secretary of State. Technically, however, Jay's role as Secretary of State was a mere carry-over of his role as Secretary for Foreign Affairs under the Confederation. See F. MONAGHAN, JOHN JAY, DEFENDER OF LIBERTY 300 (1935).

[4] Warren notes that Marshall had continued to act as Secretary of State at the request of Jefferson. WARREN, *id.* at 201, n. 1.

[5] For the position of Chief Justice Stone on this matter, see Mason, *Extra Judicial Work for Judges: The Views of Chief Justice Stone*, 67 HARVARD LAW REVIEW, 193-216 (1953), and HARLAN FISKE STONES: PILLAR OF THE LAW, Chapt. 42 (1956).

[6] Bell, *Extrajudicial Activity of Supreme Court Justices*, 22 STAN. L. REV. 604 (1969-70).

[7] A. MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 287 (1965).

ship which Justice Felix Frankfurter maintained with President Franklin D. Roosevelt after the latter appointed him to the Court is also a matter of renown.[8] Justice Frankfurter's messages influenced many presidential decisions, one of the more famous of which was the appointment of Henry L. Stimson as Secretary of War in 1940.[9]

On occasion, the extrajudicial executive role of individual judges has given rise to rumblings in Congress. Thus, in 1800 the anti-Federalist Senator Charles Pinckney, angered by the fact that two Federalist judges (Chief Justices Jay and Ellsworth) had successively served as ambassadors, proposed a constitutional amendment to prohibit judges from holding any outside office or appointment. Subsequently he introduced legislation to the same effect. (Nothing came of either of these efforts.)[10]

In 1968, during Senate consideration of the nomination of Associate Justice Fortas to the position of Chief Justice, the issue reached new heights when it was revealed in the course of committee hearings that the Justice had helped draft the 1966 State of the Union message as well as various items of legislation and had also participated in White House discussions on matters relating to the Vietnam war and to the riots in Detroit.[11] Those opposing the nomination

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[8] See in this regard M. Freedman (ed.) ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE 1928-1945 485-744 (1967).

[9] *Id.* at 524-25, 529. See also the testimony of Dean Adrian S. Fisher, SEPARATION OF POWERS HEARINGS, p. 87.

Former Secretary of State Dean Acheson, one of Frankfurter's closest friends, vigorously condemned in Senate testimony the Justice's "intimate and notorious friendship with President Roosevelt." His letters to the President, Acheson declared, "should never have been written, preserved or published." *Id.* at [illegible].

[10] *See* Warren, *supra* note 3, at Vol. I, pp. 167-168. In 1804, an attempt to provide for similar legislation was made in the House. *Id.* at 168, n. 1.

[11] This episode should be distinguished from the subsequent events and revelations of May 1969 which led to the resignation of Justice Fortas from the bench. The Fortas nomination to the position of Chief Justice was never acted upon by the Senate due to a filibuster from opposing Senators. On October 2, 1968, Mr. Fortas requested President Johnson to withdraw the nomination, which he reluctantly did.

charged, inter alia, that Justice Fortas had violated the principle of the separation of powers, and cited in this context a letter sent by Chief Justice Jay to President Washington on the matter of advisory opinions.[12] (Secretary of State Thomas Jefferson had written the Justices in the name of President Washington requesting their advice on a series of international law questions which the conflict then raging between the British and French had given rise to. Jay and the Associate Justices indicated that the rendering of advisory opinions would be inconsistent "with the lines of separation drawn by the Constitution between the three departments of government.")[13] Other Senators, however, maintained that Justice Fortas had committed no wrong in counselling the President and cited the long list of Justices, including Chief Justice Jay himself, who had served the Executive in one capacity or another.[14]

With regard to the Fortas episode itself, it is arguable that

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12 See "Individual Views of Senator McClellan," SENATE REPORT ON ABE FORTAS, pp. 29-30; "Individual Views of Senator Ervin," p. 34; and "Individual Views of Senator Thurmond," p. 43.

13 H. HART AND H. WECHSLER, *supra* note 2, at 75-77. For detailed consideration of this episode see Wheeler *Extrajudicial Activities of the Early Supreme Court, supra* note 2, at 148-54.

14 See *Senate Report on Nomination of Abe Fortas*, pp. 6-8. Senator Ervin subsequently argued that Jay's letter on advisory opinions was not consistent with "the Chief Justice's proclivity on other occasions to engage in extrajudicial public service." SEPARATION OF POWERS HEARINGS, p. 85. See also in this regard Wheeler, *Extrajudicial Activities of United States Supreme Court Justices: The Constitutional Period, 1790-1809*, cited in *id.* at 783, who considers it "puzzling" that Jay, despite his stand on advisory opinions, was prepared to fulfill the nonjudicial duties of Commissioner of the Sinking Fund and inspector of the United States Mint. See also Wheeler, *Extrajudicial Activities of the Early Supreme Court*, pp. 140-44. As a result of these inconsistencies in the conduct of the early Justices in regard to extrajudicial activities Wheeler is led to the conclusion that it was "at bottom [considered] a question of discretion". Wheeler, p. 131. Fundamentally, it depended on the determination "whether the judge can maintain judicial independence while serving the nation off the bench." *Ibid.* It is submitted that a careful analysis of the rule in Hayburn's Case (see below) removes any basis for a charge of inconsistency in Jay's conduct. Moreover, as will be seen below, the extrajudicial activity of judges was not a matter of simple discretion or whimsy, but derived from sound and consistent constitutional principles.

the invocation of the separation of powers doctrine—whether by detractors or defenders of the Justice – was quite misplaced. For clearly the separation of powers principle relates to exercise of *powers*, to the performance of *official* acts appertaining to a department other than the one to which the individual concerned belongs; it does not relate to informal, private and unofficial contacts on a personal level. Such informal contacts, however, can, in particular instances, raise acutely the issues of judicial ethics, propriety and conflict-of-interest. And, in fact, in the Fortas case it was this aspect which was central – though it was unjustifiably confused by the Senators with the "separation of powers" doctrine.

Nevertheless, the debates in the Senate on that occasion and the subsequent general Senate deliberations on the separation of powers principle[15] served to highlight a wider question regarding the scope of the separation of powers principle as instituted by the Founding Fathers: was the principle intended to embrace not only the "separation of institutions" – with each branch of government limited to its own proper sphere of operation[16] – but also, as is com-

[15] Beginning in 1969 the Senate Judiciary Subcommittee on the Separation of Powers, under the chairmanship of Senator Sam Ervin, Jr., conducted extensive hearings on the subject of non-judicial activities of judges. See SEPARATION OF POWERS HEARINGS. Senator Ervin introduced a bill (S.1097) into the Senate "to enforce the principle of separation of powers . . . to prohibit the exercise or discharge by justices and judges of the United States of nonjudicial governmental powers and duties." *Id.* at 7-8. This bill was never reported out of the Senate Committee on the Judiciary. See also in this regard the symposium entitled *Judicial Ethics* in LAW AND CONTEMPORARY PROBLEMS, Vol. 35 (1970), and, in particular, the article by Senator Ervin, *Separation of Powers: Judicial Independence*, therein at 108-27.

[16] The classical expression of the "institutional" separation of powers is that found in Part I, Article XXX, of the 1780 Constitution of Massachusetts, which reads as follows: "The legislative departments shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them." Reproduced in Ben Poore (ed.) THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES (1877), vol. 1, 1960. Also cited in THE FEDERALIST NO. 47 (James Madison).

monly assumed, the "separation of personnel" so as to bar an individual from belonging to, and exercising the powers of, more than one branch of government?[17] Are, then, judges indeed constitutionally barred from serving, even in an official capacity, in another branch of government? Considerable historical and legal evidence, it is submitted, points decisively to negative answers to these questions. This evidence is provided by the discussions at the Constitutional Convention and the state ratifying conventions; Senate confirmation of the nominations of Jay, Ellsworth and Marshall; Pinckney's proposed amendment; and Hayburn's case and subsequent Supreme Court jurisprudence.

The Constitutional Convention

At first glance the "separation of personnel" idea would appear to be embodied in Article I, Section 6, Clause 2, of the Constitution, which states:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a Member of either House during his continuance in office.

But upon closer scrutiny it becomes evident that this clause is not at all related to the separation of powers doctrine. For if, indeed, the purpose of the provision was the "separation of personnel," then why was it limited by its terms to the legislative and executive departments and not extended to the judiciary? The answer to this lies in the distinction which must be made between the motivation behind the provision and the ultimate consequences of the

[17] This aspect is best reflected in the Virginia Constitution of 1776, in the following terms: "The legislative, executive and judiciary departments shall be separate and distinct; so that neither exercise the powers properly belonging to the other; *Nor shall any person exercise the powers of more than one of them at the same time.*" (Emphasis supplied.) For text, see POORE, *id.* at Vol. II. 1910. Also cited in THE FEDERALIST No. 47.

provision. Admittedly the *result* of the Constitutional prohibition was effectively to bar the development of any system of cabinet responsibility. Therein, as Clinton Rossiter has noted,[18] lay "its real significance" for the American system of government. But, as Rossiter also observed, the true implications of the clause "naturally escaped their [the Constitutional delegates'] notice." For their concern was *not* with the separation of powers principle but with "'corruption and the low arts of intrigue.'"

There were, in fact, two kinds of corruption which the two parts of Article I, Section 6, Clause 2, were intended to counteract. On the one hand there was the danger that the members of Congress might create new offices or increase the salaries of old ones and fill these positions themselves. This possibility was precluded by the first half of the provision. The second danger was that the members of Congress could fall prey to the allurements of a patronage-wielding Executive, free to bestow offices upon them. This avenue of Congressional corruption was excluded by the second half of the provision.[19]

The historical roots of Article I, Section 6, Clause 2, can be traced back to the moves in the British parliament at the beginning of the 18th century to reduce the corrupt influence of the Crown in the lower house.[20] Under the Act of Settlement adopted in 1701, it was provided that "placemen," *i.e.*, persons holding offices of profit under the Crown,

[18] C. ROSSITER, THE AMERICAN PRESIDENCY 75 (2nd ed. Rev. 1964).

[19] There can, of course, be more than a little affinity present between the separation of powers and the prevention of undue executive influence on the legislature. They are, however, quite distinct, at least in their purposes. The former aims to ensure that each of the three branches of government is separately administered so as to prevent, as Madison explained, the tyranny which otherwise must arise from the accumulation of all governmental powers in the same hands; the latter is concerned with the probity of the legislator and ensuring that he is not given to temptation by office-seeking. Whatever affinity exists, in relation to the independence of the legislature, is thus once again more a matter of result than design.

[20] *See* CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 21-22 (1965).

should be ineligible for membership in the House of Commons.[21] This provision which, by barring ministers from Parliament, would have prevented the development of the British cabinet system, was repealed before it took effect. However, the spirit of reform which inspired its adoption in England struck deep roots in the American colonies,[22] and when, subsequently, the Articles of Confederation were drafted, an express provision was included to the following effect: Article V . . . "nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit receives any salary, fees or emolument of any kind." The inclusion of such a provision in the Articles of Confederation confirms that its purpose was the prevention of legislative corruption and not enforcement of the doctrine of the separation of powers, since the latter doctrine was, of course, never instituted under the Articles at all.[23]

The Virginia Plan strengthened the barrier against venality by proposing that members of Congress be ineligible to hold office under the United States, not only during their term of office, but for a space of time after the expiration thereof.

The debates in the Federal Convention on what ultimately became Article I, Section 6, Clause 2, fully establish that the overriding concern was with the dangers of bribery and corruption. On a motion to eliminate the foregoing provision of the Virginia plan, Mr. Butler declared:[24]

> This precaution agst. intrigue was necessary. . . . We have no way of judging mankind but by experience. Look at the history of the government of Great Britain,

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[21] *See* KEIR, THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN 1485-1937 268-69 (3rd ed. 1947); and WADE, CONSTITUTIONAL LAW (5th ed. 1955).

[22] *See* discussion in BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION, 86-92, 102-104. (1967).

[23] See, on this point, the discussion in FRIEDRICH AND MCCLOSKEY, FROM THE DECLARATION OF INDEPENDENCE TO THE CONSTITUTION: THE ROOTS OF AMERICAN CONSTITUTION xi-xiii (1954).

[24] FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (1911)

> where there is a very flimsy exclusion – Does it not ruin their government? A man takes a seat in parliament to get an office for himself or friends, or both; and this is the great source from which flows its great venality and corruption. . .[25]
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> Mr. Mason. It seems as if it was taken for granted, that all offices will be filled by the executive, while I think many will remain in the gift of the legislature. In either case, it is necessary to shut the door against corruption. If otherwise, they may make or multiply offices, in order to fill them. . . . If not checked we shall have ambassadors to every petty state in Europe – the little republic of *St. Marino* not excepted. We must . . . remove the temptation.[26]

When Charles Pinckney argued that denying members of Congress the right to accept office was degrading, inconvenient, and impolitic[27] Colonel Mason "ironically proposed to strike out the whole section, as a more effectual expedient for encouraging that exotic corruption which might not otherwise thrive so well in the American soil . . . for inviting into the Legislative service, those generous and benevolent characters who will do justice to each other's merit, by carving out offices and rewards for it."[28]

Madison himself fought strongly to allow members of Congress to hold office under the United States and wished to limit the scope of the exclusion to newly created positions or those whose salaries had been increased. "He supposed that the unnecessary creation of offices, and increase of salaries, were the evils most experienced, and that if the door was shut agst. them, it might properly be left open for the appointt. of members to other offices as an encouragnt. to the Legislative service."[29] Madison's proposal evoked the only reference to the doctrine of the separation of powers heard in the entire debate, and even then, it was only as

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[25] *Id.* at 379.

[26] *Id.* at 380.

[27] *Id.* Vol. II, 283-84. *But, cf.* below, Pinckney's views on judges holding outside offices.

[28] *Id.* at 284.

[29] *Id.* at Vol. I, 386.

a secondary consideration. Mr. Gerry responded as follows to Madison's suggestion:

> This amendment is of great weight, and its consequences ought to be well considered. At the beginning of the war we possessed more than Roman virtue. It appears to me it is now the reverse. We have more land and stock-jobbers than any place on earth. It appears to me, that we have constantly endeavored to keep distinct the three great branches of government; but if we agree to this motion, it must be destroyed by admitting the legislators to share in the executive, or to be too much influenced by the executive, in looking up to him for office.[30]

This reference to the doctrine of the separation of powers made no impression upon Madison, who continued to fight for his amendment; nor was the argument adverted to by any of the other delegates. Those opposing Madison's motion concentrated on the central issue which had been the mainspring of the provision in the first place – namely, the fear of legislative corruption.[31]

In the respective State Conventions the discussions on Article I, Section 6, Clause 2, likewise revolved around the question of corruption and bribery. Patrick Henry, in the Virginia Convention, complained that the provision was inadequate – "there is no restraint on corruption." After quoting the provision, he went on to say: "This is an idea strangely expressed . . . . If we wish to preclude the inticement to getting offices, there is a clear way of expressing it."[32] It fell to Madison to prove that "the chance of getting an office is . . . so remote, and so very distant, that it cannot be considered as a sufficient reason to operate on their minds to deviate from their duty."[33]

Consequently, since the purpose of the provision was to scotch office-hunting by avaricious Congressmen and not to bolster the doctrine of the separation of powers, it can be

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[30] *Id.* at 393.

[31] See, for instance, the remarks of Governor Rutledge, *id.* at 386 and 392; Mr. Mason, *id.* at 387 and 392; and Mr. Sherman, *id.* at 387-88 and 393.

[32] *Id.* at Vol. III, 313.

[33] *Id.* at 315-16.

readily understood why the provision was limited in its terms to the legislative branch of government. By the same token this explains why the provision was inserted in Article I, dealing with the legislature, and no other[34]

But perhaps the most significant evidence emerging from the Constitutional Convention is the fact that a specific proposal barring judges from holding outside offices was submitted to the convention, but was never acted upon. On August 20, Charles Pinckney, delegate from South Carolina, presented a motion to the following effect:[35]

> No person holding the office of President of the U.S., a Judge of their Supreme Court, Secretary for the department of Foreign Affairs, of Finance, of Marine, of War, . . . shall be capable of holding at the same time any other office of Trust or Emolument under the U.S. or an individual State.

This proposal, together with various other matters, was referred to the Committee of Detail. Nothing more was heard of the suggestion, nor, of course, was anything resembling it ever introduced in the Constitution.[36]

Ambassadorial Nominations and the Pinckney Amendment

The nominations of Chief Justices Jay and Ellsworth as ambassadors to England and France, respectively, received, of course, the "advice and consent" of the Senate. Quite ob-

[34] In the light of the material and analysis presented in the text, it is respectfully submitted that the suggestion by E. S. Corwin in THE CONSTITUTION AND WHAT IT MEANS TODAY, 22 (1965), to the effect that Article I, Section 6, Clause 2, was introduced into the Constitution "in conformity with the doctrine of the Separation of Powers" does not fully accord with the facts. The earlier-cited comment by Clinton Rossiter, it is submitted, more accurately describes the pattern of events surrounding the introduction of this provision into the Constitution.

[35] FARRAND, *supra* note 24, at 341-342.

[36] Earlier, as noted above, Charles Pinckney had fought for the right of members of the Legislature to hold office under the United States. Obviously, he does not appear to have been overly concerned with strict enforcement of the doctrine of the separation of powers. The proposal cited in the text, upon closer examination, seems directed at preventing double office-holding by members of the Executive or Judiciary and not really related to the separation of powers at all.

viously neither President Washington, nor President Adams, nor the nominees, nor the Senate itself, regarded the appointment of an active Justice to an office under the United States as a violation of the Constitution. Neither nominee found it necessary to resign his position on the bench before assuming his ambassadorial post. Each expected to return to the Court upon completion of his tour of duty abroad. (By coincidence, neither subsequently participated in Court proceedings. Jay, after concluding the negotiations for the treaty, was, in 1795, elected Governor of New York, and then resigned from the Court.[37] Ellsworth, in late 1800, after becoming ill in France, informed President Adams that he would no longer be able to serve as Chief Justice.)[38] Similarly, the confirmation of Chief Justice Marshall was not barred because he was Secretary of State. Nor would it be correct to assume that the Senate was unmindful of the constitutional issue involved. The Records of Congress contain no reference to the Senate's discussion on these nominations, but Charles Warren's history of the Supreme Court offers the following information regarding the Jay appointment:[39]

> The choice of a member of the Court for such a mission was not received favorably by the Senate; but after three days' debate, in the course of which a resolution was offered that 'to permit Judges of the Supreme Court to hold at the same time any other office of employment emanating from and holden at the pleasure of the Executive is contrary to the spirit of the Constitution, and as tending to expose them to the influence of the Executive, is mis-

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[37] WARREN, *supra* note 3, at Vol. I, 124. Thus, Jay not only served as Ambassador, but even ran for the office of Governor, without retiring from the Court. In 1792 he had also run for Governor without resigning, but lost to Clinton. MONAGHAN, *supra* note 3, at chap. XVI. It is to be noted, however, that Jay did not actively campaign in either contest. MONAGHAN, at 326-27, 405.

[38] WARREN, *supra* note 3, at Vol. I, 171-72; and see Turner, *The Appointment of Chief Justice Marshall*, WM. & MARY QUARTERLY, 3rd Series, Vol. XVII, 143 (1960).

[39] WARREN, *supra* note 3, at Vol. I, 119. Also see MONAGHAN, *supra* note 3, at 367.

> chievous and impolitic,' the nomination was finally confirmed by a vote of 18 to 8, on April 19, 1794.

Senator Pinckney's efforts to promote a constitutional amendment or Act of Congress to prohibit office-holding by judges while serving on the bench only serve to confirm that the Constitution, as such, was not seen as an effective barrier against such office-holding on the basis of the separation of powers. As Pinckney concedes: "The not preventing, by the Constitution, the Judges from holding other offices may possibly be considered as an omission: it is true, it might as well have been there."[40]

Hayburn's Case and Its Subsequent Application

Hayburn's Case, decided in 1792, is early authority for the application of the separation of powers to the judiciary.[41] In that case the Justices of the Supreme Court, sitting in Circuit, held that they would be unable to fulfill a 1792 Act of Congress directing them to rule upon the pension claims of disabled veterans, since the Court's determination would not be final; it would, in fact, be subject to the review of the Secretary of War. The function thus assigned the Court under the Act was deemed to be "not judicial" but adminis-

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[40] ANNALS OF THE CONGRESS OF THE UNITED STATES, 6th Congress, March 5, 1800, p. 100. For the text of his proposed amendment to the Constitution, see *ibid.*, February 3, 1800, pp. 41-42. Adoption of Pinckney's motion at the Constitutional Convention would, of course, have rendered an amendment unnecessary. In discussing the dangers inherent in members of the Judiciary holding office under the Executive, Pinckney alluded to the possibility of judges declaring laws unconstitutional so as to curry favor with the President. His comments on the power of judicial review, made as they were *before Marbury v. Madison*, are quite illuminating: "It is our duty to guard against . . . this bias, which a Judge, from the nature of his appointment, must inevitably feel in favor of the President. It is more particularly incumbent on us when we recollect that our Judges claim the dangerous right to question the constitutionality of the laws; and either to execute them or not, as they think proper; a right in my judgment as unfounded and as dangerous as any that was ever attempted in a free government; they however do exercise it, and while they are suffered to do so, it is impossible to say to what extent it might be carried." *Ibid.*, March 5, 1800, p. 101.

[41] 2 Dall. 409, 1 L. Ed. 436 (U.S. 1792).

trative, and hence in conflict with the principle of the separation of powers. "That by the Constitution of the United States," declared the Court, "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 of either. 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."[42] Upon a careful reading of the case, however, it becomes clear that that decision does not bar an *individual* judge from undertaking nonjudicial functions. To the contrary, the case appears to establish a distinction between the exercise of nonjudicial powers by the court, as a *body*, or as an *institution*, which is proscribed, and the exercise of such powers by an *individual* judge, in his *personal* capacity, which is permitted.

The facts in *Hayburn's Case* were as follows: The circuit court for the district of Pennsylvania (together with other circuit courts) had refused to execute the 1792 Pensions Act. Attorney-General Randolph presented a motion for mandamus to the Supreme Court, on behalf of Wm. Hayburn, commanding the Pennsylvania court to examine his petition for his name to be placed on the pension list. The motion was held under advisement by the Supreme Court until the next term, but in the meantime Congress provided in a different manner for the relief of the invalid pensioners. Thus the Supreme Court never ruled on the motion for mandamus. But in a footnote to the case the reporter indicated that each of three circuit courts which had considered the 1792 Act had concluded that it violated the doctrine of the separation of powers by assigning a nonjudicial function to the court. Two of the circuit courts, however – those for the districts of New York and North Carolina – raised the question whether the statute might not yet be saved, by interpreting it as a directive to the judges personally to act as

[42] *Id.*

commissioners in reviewing the pensioners' claims. The members of the Court for the district of New York (Chief Justice Jay, Associate Justice Cushing, and District Judge Duane) were of the opinion that the Act could indeed be interpreted "as appointing commissioners for the purposes mentioned in it, by official, instead of personal, descriptions." These judges were prepared to "regard themselves as being the commissioners designated by the act."[43] In contrast, the members of the circuit court for the district of North Carolina (Justice Iredell and District Judge Hargreaves) concluded that the Act could not bear such an ininterpretation to be accorded the statute had ever been fi-court only, and not to the judges of it."[44]

For more than half a century there was no evidence that the difference of opinion between the circuit courts over the interpretation to be accorded the statute had ever been finally resolved. But in 1852, Chief Justice Taney, in the course of deciding the case of *U. S. v. Ferreira*[45] (to be discussed presently) came upon the unreported Supreme Court decision of *U. S. v. Yale Todd* decided in 1794, and, recognizing its importance for "the nature and extent of judicial power," ordered it to be inserted in the reports immediately after the *Ferreira* decision.[46] The facts of the *Yale Todd* decision were as follows: In 1793, Congress, as noted above, had repealed the 1792 veterans pensions law and had provided for a different method, without recouse to the courts, for determining the strength of veterans' claims. One section, however, of the new act "saved all rights to pensions which might be founded 'upon any legal adjudication,' under the Act of 1792," and defined procedures for obtaining a Supreme Court ruling "on the validity of such rights . . . by the determination of certain persons styling themselves commissioners." Obviously Chief Justice Jay and Justice

[43] *Id.* at 411.
[44] *Id.* at 415.
[45] 13 How. 40 (U.S. 1852).
[46] *Id.* at 51.

Cushing, in accordance with their interpretation of the statute, had proceeded to act as commissioners and in this capacity had awarded pensions, including one to Yale Todd. Hence the law of 1793 provided for the legal testing of the validity of these awards. The United States now brought an action against Yale Todd for the sum of one hundred and seventy-two dollars and ninety-one cents, this being the amount he had received since being placed on the pension list. The sole question at issue was whether the judges had been entitled to interpret the 1792 act as a personal designation to them to act as commissioners. In a unanimous decision the Supreme Court ruled for the United States. "It would seem, therefore, . . . that Chief Justice Jay and Justice Cushing became satisfied, on further reflection, that the power given in the Act of 1792 to the Circuit Court, as a court, could not be construed to give it to the judges out of court as commissioners."[47]

What emerges from these decisions is that a statute which assigns, in unambiguous terms, a nonjudicial task to individual judges, in their personal capacity, would not be held to violate the principle of the separation of powers although the assignment of such a task to a court, in its institutional capacity, would be struck down. This conclusion is confirmed by the Supreme Court decision of *U. S. v. Ferreira*, delivered by Chief Justice Taney in 1852 on behalf of a unanimous court. This case related to the following events:

In 1849, Congress, in accordance with the 1819 peace treaty between the United States and Spain, provided for the settlement of certain outstanding claims by Spanish citizens arising out of the conflict over Florida. Under the terms of the statute, the claims were first to be examined by the Fed-

[47] *Id.* From the record of the case it would appear that the Court declared categorically that the 1792 Act had been unconstitutional. This case would thus represent a very early instance of judicial review. Warren, however, notes that legal writers, including James B. Thayer and Max Farrand, do not interpret the Court opinion as having declared the Act unconstitutional. *Op. cit.*, I, p. 81 n. 2. The statute, of course, had been repealed in the meantime, in any case.

eral Judge for the Northern District of Florida and then reviewed by the Secretary of the Treasury. On being satisfied that the same were "just and equitable" he was to pay out the amount due. The question posed before the Supreme Court was whether an appeal lay from the decision of the District Judge to the Supreme Court. The Court ruled that it did not, since "the decision is not the judgment of a court of justice; it is the award of a commissioner." [48] Naturally, enough, in reaching this conclusion, C. J. Taney had occasion to refer to *Hayburn's Case*. He went on to say:

> Every judge (in Hayburn's Case) . . . formally expressed his opinion in writing that the duty imposed, when the decision was subject to the revision of a secretary and Congress, could not be executed by the court as a judicial power; and the only question upon which there appears to have been any difference of opinion, was whether it might not be construed as conferring the power on the judges personally as commissioners. And if it would bear that construction, there seems to have been no doubt, at that time, but that they might constitutionally exercise it . . . . This law (of 1792) is the same in principle with the one we are now considering, with this difference only, that the Act of 1792 imposed the duty on the court eo nomine, and not personally on the judges. In the case before us it is imposed upon the judge.[49]

Interestingly enough, Taney, in the course of his opinion, adverted to only one constitutional difficulty which might be raised in regard to a judge performing an extrajudicial function, such as that of commissioner – namely, whether the role of commissioner did not constitute the judge "an officer of the United States" warranting appointment by the President, by and with the advice and consent of the Senate, and not by Act of Congress. Taney did not attempt to answer this question since it was not at issue in the case. But what is relevant to the present discussion is that he found no difficulty, on the grounds of the separation of powers, in the judge personally assuming a nonjudicial task.

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[48] 13 How. 47 (U.S. 1852).

[49] *Id.* at 49-50.

Thus, Taney made explicit the distinction implicit in *Hayburn's Case* between the actions of the court, qua court, and the actions of individual members of the Judiciary.

Conclusions

The principle of the separation of powers as it was established under the Constitution embraces all three branches of the Federal government – but solely in relation to institutions, as such. The following description of the separation of powers doctrine given by Madison in his famous Federalist No. 47 aptly sums up the restricted nature of the doctrine:

> [Montesquieu's] meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted. This would have been the case in the constitution examined by him if the king, who is the sole executive magistrate, had possessed also the complete legislative power, or the supreme administration of justice; or if the entire legislative body had possessed the supreme judiciary, or the supreme executive authority.[50]

It follows from this that an individual in one department of government who belongs to, or exercises the powers of a different department does not thereby violate the principle of the separation of powers. Only the members of the legislature are bound in this manner, and this, not out of consideration for the doctrine of the separation of powers, but in order to ensure the probity of the legislative body.

In the light of the foregoing, the apparent inconsistency in Jay's approach to extrajudicial activities can be satisfac-

[50] Emphasis in original. Joseph Story, in his COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, Book III, 197 (1833) defines the doctrine in these terms: "The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principle of a free constitution."

torily explained. The request for an advisory opinion Jay and his associate justices regarded as a matter addressed to the judiciary, as an institution, and therefore precluded by the principle of the separation of powers. Clearly enough, Washington and Jefferson were not content to receive the advice or counsel of a single judge, be he even the Chief Justice. They sought an institutional answer and it is for this reason that they addressed the questions to the members of the Court. Quite simply, the Cabinet wanted a formal authoritative pronouncement from the judicial branch of the government to guide the actions of the executive.[51] And it was to this "institutional" role which Jay and his brethren took exception. Furnishing advisory opinions, they decided, would not be consistent with the constitutional arrangement of three separate departments of government, "these being in certain respects checks upon each other, and our being judges of a court in the last resort."[52] The rendering of legal advice, as requested, was not meet for the judiciary, "especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united with the *executive* departments."[53] On the other hand, nothing in the Constitution barred the Chief Justice, or any of the individual justices for that matter, from assuming such extrajudicial tasks as Commissioner of the Sinking Fund, inspector of the United States Mint, or ambassador extraordinary to Great Britain. The Court, as such, was not engaged in such enterprises. The same consideration underlay the willingness of certain members of the Court to regard themselves as commissioners in reviewing war pensions.

It is noteworthy that the foregoing distinction was explicitly drawn by Jay in a letter he drafted (and possibly

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[51] Thus Jefferson in his requesting letter emphasized that the "authority" "of the opinions of the judges of the Supreme Court" would "insure the respect of all parties." HART AND WECHSLER, *supra* note 2, at 75.

[52] *Id.* at 76.

[53] *Id.* at 76-77. Emphasis in original.

sent)[54] to President Washington. The matter related to the circuit duties of Supreme Court justices, and in his letter Jay wrote: "We are aware of the distinction between a Court and its Judges, and are far from thinking it illegal or unconstitutional, however it may be inexpedient, to employ them for other purposes, provided the latter purposes be consistent and compatible with the former."[55] Thus in Jay's eyes it was clear that individual judges might be able to engage in certain extrajudicial activities even though the Court, as an institution, would be barred from doing so.

Having said all this, it could hardly be maintained that it is a salutary practice for judges to be engaged in extrajudicial activities. Serious questions of propriety, or even conflict of interest, are too often present. These, however, are matters for the statutory or ethical codes; they do not impinge on the constitutional principle which seeks to ensure the separation of the three functions of government, as this principle was instituted in the Federal Constitution, interpreted by the courts, and applied in practice.[56]

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[54] *Cf.* HART AND WECHSLER, *supra* note 13, at 79 with the comment of WHEELER, *Extrajudicial Activities of the Early Supreme Court, supra* note 2, at 148 n. 117.

[55] MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL, vol. II, p. 294 (1878); reprinted 1949.

[56] This conclusion raises the question whether the Ervin bill (see footnote 15 above), since it seeks to prohibit nonjudicial activities by individual judges, might not have been better based on something other than "the principle of separation of powers".