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SEPARATION OF POWERS IN THE EARLY NATIONAL PERIOD

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Professor Casper did not consider what role the judiciary played in working out the separation of powers guidelines found in the Constitution. No discussion of separation of powers in the early Republic would be complete, however, without reference to the judiciary. Because that has been the focus of my work for many years, I expect that I was invited to participate in this symposium to fill in the blanks, so to speak. I would therefore like to describe the judiciary's contributions to the evolution of the separation of powers doctrine during the initial years of the establishment of the American government under the Constitution. In so short an essay I can provide only the barest outline of the incidents that have led me to the thesis I propound, but at least I can convey some idea of its basis in fact.¹

Before I begin, I would like to indicate my complete agreement with the manner in which Professor Casper approached the problem of understanding the development of separation of powers doctrine. With a knowledge of the general ideas prevailing among the founding generation, he examined a number of "practical problems of governmental organization and the conduct of government"² and concluded that the primary concern of the participants in the new government was not to adhere blindly to separation of powers notions, but rather to find "an effectual mode of adminis-

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1. For a longer, more detailed version of this thesis and its proofs, see Marcus & Van Tassel, *Judges and Legislators in the New Federal System, 1789-1800*, in *JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 1* (R. Katzmann ed. 1988). The documents on which that essay and this Comment are based were gathered by James M. Buchanan, Christine Jordan, Maeva Marcus, James R. Perry, and Stephen Tull, members of the staff of the Documentary History Project at the Supreme Court of the United States. Many of the documents will be published in 2 *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800* (1988) and 3 *id.* (forthcoming 1989-90).

2. Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 *WM. & MARY L. REV.* 211 (1989).

tering' the powers of the federal government."³ I, too, came to that conclusion as I studied the actions of the first members of the judicial branch and realized that these actions basically were *ad hoc*. They were not rooted in preconceived ideas about the role of the judiciary vis-a-vis the executive and legislative branches, but were reactions to circumstances that arose during the early years of the nation's existence.

Chief Justice John Jay, in the first charge that he gave to the grand jury of the Circuit Court for the District of New York on April 12, 1790, indicated what everyone's approach should be: "[W]ise and virtuous men," he declared,

have thought and reasoned very differently respecting Government, but in this they have at Length very unanimously agreed vizt. that its Powers should be divided into three, distinct, independent Departments—the Executive, legislative and judicial. But how to constitute and ballance them in such a Manner as best to guard against Abuse and Fluctuation, & preserve the constitution from Encroachments, are Points on which there continues to be a great Diversity of opinions, and on which we have all as yet much to learn.⁴

Jay pointed out that the Constitution had established three separate branches and had taken care to provide checks "one on the other,"⁵ in order to "keep each within its proper Limits,"⁶ but it would rest with the men who wielded these governmental powers to carry them out satisfactorily. The Chief Justice urged:

If then so much depends on our rightly improving the before mentioned opportunities—if the most discerning and enlightened Minds may be mistaken relative to Theories unconfirmed by Practice—if on such difficult Questions men may differ in opinion and yet be Patriots—and if the merits of our opinions can only be ascertained by Experience, let us patiently abide the Tryal, and unite our Endeavors to render it a fair and an impartial one.⁷

3. *Id.* at 261.

4. John Jay's Charge to the Grand Jury of the Circuit Court for the District of New York (Apr. 12, 1790) (John Jay Papers, Columbia University).

5. *Id.*

6. *Id.*

7. *Id.*

With only the ambiguity of the Constitution to guide them, the American executive and legislature in the early years of the Republic made demands on the judiciary not entirely consistent with a strict separation of powers. Most important, Congress imposed on the Supreme Court Justices, in the Judiciary Act of 1789, the duty to ride circuit as lower federal court judges. This assignment, more than anything else, affected the behavior of the judges throughout the first decade of the government's existence. Circuit riding thrust the Justices into a nonjudicial role.⁸ Charged with explicating the laws and structure of the new government to grand juries at circuit courts throughout the country, the Justices could not help but think of themselves in political terms. The charge that usually was given at the opening of each circuit court took them outside the limits of a case or controversy, and the Justices frequently took advantage of this opportunity to address issues of the day. Once established as participants in the political life of the nation, the Justices had to find some way of reconciling the independence of the judiciary, a goal the Constitution clearly intended, with the assignment by Congress and the executive of a great assortment of extrajudicial tasks. Among these tasks was responding to requests for advice from both of those branches, requests that the Constitution arguably did not forbid.

The imposition of circuit duty in the very first legislation dealing with the judiciary indicated Congress' tacit understanding that the Justices of the Supreme Court sometimes could be dealt with as individuals rather than in their institutional capacity as a Court. In turn, the earliest Justices adopted immediately that same distinction when dealing with requests by the President and Congress for advice on a variety of matters. As an institution, the Supreme Court would adhere scrupulously to the separation of powers doctrine to insure that nothing would interfere with its constitutional duty to be the final impartial arbiter in cases and controversies properly presented to it. As individuals, however, the Justices freely participated in a range of activities that might have compromised their independence as an institution.

8. See Lerner, *The Supreme Court as Republican Schoolmaster*, in 1967 SUP. CT. REV. 127.

The earliest and most highly publicized episode in which the Justices distinguished between their institutional role and their behavior as individuals occurred when they responded to the task imposed upon them under the Invalid Pensions Act of 1792.⁹ It is impossible to summarize adequately the events flowing from the passage of that Act, especially because interpretations of those events differ markedly. For our purposes today, however, the Act required the circuit courts to certify the veracity of wounded Revolutionary War veterans' claims to pensions and to recommend to the Secretary of War whether an applicant should receive a pension and if so, in what amount.¹⁰ If the Secretary, upon reviewing a court's recommendation, suspected no "imposition or mistake," he was to add the invalid's name to the pension list of the United States, but if he had any such suspicions, the Secretary could withhold the applicant's name from the list and report his action to Congress.¹¹

During the first terms of the circuit courts following passage of the Invalid Pensions Act of 1792, the judges refused to carry out the duties assigned by that Act. The judges of the different circuits all agreed that the duties imposed were not of a judicial nature because the circuit courts' decisions pursuant to those duties could be revised by the Secretary of War and eventually by Congress. According to the judges, this sort of executive and legislative review was inconsistent with the constitutionally mandated independence of the judiciary; therefore, the circuit courts, *as institutions*, could not perform the duties imposed by the Act.¹² The judges gave evidence of their conception of a dichotomy between the court as an institution and judges as individuals, however, by de-

9. Invalid Pensions Act, ch. 11, 1 Stat. 243 (1792).

10. *Id.* § 2.

11. *Id.* § 4.

12. See Extract of the Minutes of the Circuit Court for the District of New York, April 5, 1791, in a Letter from John Jay, William Cushing, and James Duane to George Washington (Apr. 10, 1792), printed in 1 AMERICAN STATE PAPERS, MISCELLANEOUS 49-50 (1834); Letter from James Wilson, John Blair and Richard Peters to George Washington (Apr. 18, 1792), printed in *id.* at 53; Letter from James Iredell and John Sitgreaves to George Washington (June 8, 1792), printed in *id.*

ceding to conduct the business assigned by the Act as commissioners out of court.¹³

Although the judges as individuals acquiesced in performing the extrajudicial tasks assigned by the Invalid Pensions Act and by many other acts during the first decade of the government's existence, they did not acquiesce because of a firmly enunciated policy of carrying out these extrajudicial duties as individuals. Most of their actions were *ad hoc*. Even in the invalid pensions case, the judges responded not as a united judiciary, but as individual judges on particular circuits.

The Justices maintained this institutional/individual division when asked for an advisory opinion by the executive branch.¹⁴ Again, the Justices declared that, as an institution, the Court could not advise the President on legal questions presented by the interpretation of treaties of the United States and by the nation's involvement in foreign affairs. Giving such opinions might compromise the Justices' duty as a court of last resort, they told the President.¹⁵ This did not stop them, however, from giving advice as individuals to the President and to members and committees of Congress when requested. That this advice might later come up in a case presented to the Court did not seem to matter. Nor did this concern seem important to either Chief Justice Jay or Chief Justice Ellsworth when he was appointed an envoy extraordinary to negotiate a treaty with a foreign power. Although separation of powers issues were raised during the Senate debates over confirmation of these appointments, they were dismissed.¹⁶ In these partic-

13. See Extract of the Minutes of the Circuit Court for the District of New York, April 5, 1791, in a Letter from John Jay, William Cushing, and James Duane to George Washington (Apr. 10, 1792), printed in 2 U.S. (2 Dall.) *410 n.(a).

14. Letter from Thomas Jefferson to Chief Justice John Jay and Associate Justices (July 18, 1793) (John Jay Papers, Columbia University), quoted in Marcus & Van Tassel, *supra* note 1, at 41 n.31.

15. Letter from John Jay, James Wilson, John Blair, James Iredell, and William Paterson to George Washington (Aug. 8, 1793) (Record Group 59, National Archives), quoted in *id.* at 42.

16. Aaron Burr, for example, made the following motion during the debate on the Jay nomination: "That to permit Judges of the Supreme Court to hold at the same time any other office or 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 mischievous and impolitic." 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 152 (1828) (Mr. Burr's Motion (Apr. 19,

ular cases effective administration went by the wayside as well, for the Supreme Court was left without a Chief Justice for prolonged periods of time.

In a number of instances during the 1790s, congressional committees asked the Justices to submit bills that would improve the Process Acts or the Judiciary Act, and the Justices cooperated.¹⁷ Congressmen and Senators sent draft bills to the individual Justices for their comments, and they responded when possible. It seems that the Justices showed little hesitation to involve themselves in political matters as long as it was understood that they did so as individuals, and not as a Court.

The Justices also found the institutional/individual dichotomy persuasive as they considered the more mundane question of how the judicial branch should communicate with the other branches. Here again, I echo Professor Casper, who noted the importance attached to the methods of interaction between the executive and legislative branches.¹⁸ Undoubtedly, separation of powers considerations played a significant role in the Justices' determination of how they should approach Congress. I have no evidence of an explicit decision by the Supreme Court to route its institutional requests for legislative change through the President, for him to lay before Congress, but in every instance the Court did exactly that. When, for example, the Court concluded that Congress required official notice of the Justices' dislike of the circuit-riding system and their desire for some relief from the burdensome duties it imposed on them, the Court routed its remonstrance through President Washington, explaining:

Your official connection with the Legislature and the consideration that applications from us to them, cannot be made in any manner so respectful to Government as through the President,

1794)). Jay's nomination as envoy extraordinary to Great Britain was confirmed on April 19, 1794. *Id.* The Senate agreed to Ellsworth's nomination as one of three ministers to France on February 27, 1799. *Id.* at 318.

17. See, e.g., Letter from Congressman Samuel Sewall to William Cushing (Feb. 25, 1800) (William Cushing Papers, Massachusetts Historical Society), *quoted in* Marcus & Van Tassel, *supra* note 1, at 43; Letter from Representative Robert Goodloe Harper to William Paterson (May 10, 1800) (William Paterson Papers, Rutgers University), *quoted in id.*

18. Casper, *supra* note 2, *passim*.

induce us to request your attention to the enclosed representation and that you will be pleased to lay it before the Congress.¹⁹

Similarly, when an individual Justice in an institutional capacity wished to make a formal representation to Congress, he did it through the President. Justice James Iredell informed Congress in this manner of a problem created by a Supreme Court interpretation of the congressional mandate for time limits for filing writs of error if they were to operate as a *supersedeas*—a problem that caused undue hardship to litigants. In his letter to President Washington requesting Congress' attention in this matter, Iredell noted that the Justices "were persuaded that if the mischief had been foreseen [by Congress] as resulting from the law in question, it would never have existed."²⁰ He also specifically defended his action in writing to the President:

[I]t is not only proper for a single Judge, but his express duty when he deems it of importance to the public service, to state any particular circumstances that occur to him in the course of his personal experience which occasion unexpected difficulties or inconveniences in the execution of a system so new and in many respects unaided by any former examples.²¹

Iredell's comments were communicated to Congress through the Attorney General, and Congress amended the offending provision.²²

In all instances of making a formal institutional request to Congress, the Justices made it through the President. When a single Justice or judge wished to lobby Congress for legislative changes in which he had a personal interest, however, he approached individual Congressmen directly. These actions were not seen as raising separation of powers concerns. Much evidence points to a sustained relationship between Justice James Iredell and his brother-

19. Letter from the Justices of the Supreme Court to George Washington (Aug. 9, 1792) (Record Group 46, National Archives), *quoted in* Marcus & Van Tassel, *supra* note 1, at 49.

20. Letter from James Iredell to George Washington (Feb. 23, 1792), *printed in* 11 THE PAPERS OF ALEXANDER HAMILTON 47 (H. Syrett ed. 1966).

21. *Id.* at 46.

22. Letter of Tobias Lear to the Attorney General of the United States (Feb. 24, 1792) (Record Group 59 M179, National Archives), *noted in* Marcus & Van Tassel, *supra* note 1, at 45 n.45; Act of May 8, 1792, ch. 36, § 9, 1 Stat. 275-79 (1792).

in-law Senator Samuel Johnston that resulted in a bill requiring rotation of circuits among the Supreme Court Justices.²³ United States District Judge Henry Marchant maintained a steady correspondence with various members of Congress in the hope of getting an increase in his salary.²⁴ Other correspondence—between Chief Justice Jay and Senator Rufus King, for example—suggests that the practice of informal lobbying or contact between the judicial and legislative branches certainly was not unusual during the formative years of our constitutional system.²⁵

In one instance, however, separation of powers considerations did prevent the Justices from presenting Congress with a proposal that was most important to them. The story is complicated, so I offer merely a brief sketch. Because the Justices detested circuit riding, in early 1792 they formulated a plan to suggest informally to Congress that each Justice forfeit \$500 of his salary in return for being relieved of the duty to ride circuit.²⁶ Chief Justice Jay, who had misgivings about making such a proposal, wrote Justice Iredell that “[t]o me it appears doubtful whether it would be recd. [by Congress] with pleasure—If they should regard it as conveying an Implication not flattering to their Ideas of their own Dignity, it

23. See, e.g., Letter from Samuel Johnston to James Iredell (Nov. 13, 1791), *printed in 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL* 335-36 (G. McRee ed. 1949); Letter from Samuel Johnston to James Iredell (Nov. 26, 1794), *printed in id.* at 430-31; Act of April 13, 1792, ch. 21, 1 Stat. 252-53 (1792). Chief Justice Jay had made permanent assignments to the Justices who lived in the particular circuits, thus forcing Iredell always to ride the southern circuit, which was far more arduous an undertaking than riding the eastern or middle circuits. See Letter from James Iredell to Justices Jay, Cushing and Wilson (Feb. 11, 1791), *printed in id.* at 322-25.

24. See, e.g., Letter from Henry Marchant to Theodore Foster (Nov. 12, 1791) (Theodore Foster Papers, Rhode Island Historical Society), *noted in* Marcus & Van Tassel, *supra* note 1, at 46 n.48; Letter from Henry Marchant to Benjamin Bourne (Dec. 24, 1791) (Benjamin Bourne Papers, Rhode Island Historical Society), *noted in id.*

25. See, e.g., Letter from John Jay to Rufus King (Dec. 22, 1793) (Rufus King Papers, New York Historical Society), *noted in id.*

26. Letter from Thomas Johnson to James Iredell (Mar. 9, 1792) (Charles E. Johnson Collection, North Carolina State Department of Archives and History), *quoted in id.* at 48; Letter from James Iredell to Thomas Johnson (Mar. 15, 1792) (C. Burr Artz Public Library, Frederick, Maryland), *quoted in id.*

would produce disagreeable Strictures."²⁷ The plan was abandoned.²⁸

During the first decade of the government's existence, many awkward moments in the congressional administration of the federal courts occurred.²⁹ The Supreme Court Justices tried to make things work as smoothly as possible. In doing this, they followed Congress' lead by thinking of themselves and acting in two ways: as an institution and as individuals. Although this division appeared to work well in connection with the judiciary's relationship to the other branches of government, the Justices deplored the application of this dichotomy to their primary judicial task as a court of last resort. As the Justices informed Congress when they wished to put an end to their service as circuit judges:

The distinction made between the Supreme Court and its Judges, and appointing the same men finally to correct in one capacity, the errors which they themselves may have committed in another, is a distinction unfriendly to impartial justice, and to that confidence in the Supreme Court, which it is so essential to the public Interest should be reposed in it.³⁰

It took Congress almost one hundred years to respond to the Justices' complaint.³¹

27. Letter from John Jay to James Iredell (Mar. 19, 1792) (enclosed in letter from John Jay to William Cushing (Mar. 19, 1792) (Robert Treat Paine Papers, Massachusetts Historical Society)), *quoted in id.*

28. See Letter from Thomas Johnson to James Iredell (Mar. 31, 1792) (Charles E. Johnson Collection, North Carolina State Department of Archives and History), *quoted in id.* at 49 n.59.

29. Examples of Congress' uneven administration of federal courts include the absence, until 1794, of an adjournment act and an initial delay in the passage of the Crimes Act.

30. Letter from Justices of the Supreme Court to Congress (Aug. 9, 1792) (Record Group 46, National Archives), *quoted in* Marcus & Van Tassel, *supra* note 1, at 52.

31. On March 3, 1891, Congress passed the act that relieved Supreme Court Justices of circuit duties. F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 97-101 (1928).