

Sec. 2—Judicial Power and Jurisdiction

Cl. 1—Cases and Controversies

the judicial power.”⁵⁰⁰ And in *Ashwander v. TVA*,⁵⁰¹ the Court refused to decide any issue save that of the validity of the contracts between the Authority and the Company. “The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the person complaining.”⁵⁰²

Concepts of real interest and abstract questions appeared prominently in *United Public Workers v. Mitchell*,⁵⁰³ an omnibus attack on the constitutionality of the Hatch Act prohibitions on political activities by governmental employees. With one exception, none of the plaintiffs had violated the Act, though they stated they desired to engage in forbidden political actions. The Court found no justiciable controversy except in regard to the one, calling for “concrete legal issues, presented in actual cases, not abstractions,” and seeing the suit as really an attack on the political expediency of the Act.⁵⁰⁴

Advisory Opinions.—In 1793, the Court unanimously refused to grant the request of President Washington and Secretary of State Jefferson to construe the treaties and laws of the United States pertaining to questions of international law arising out of the wars of the French Revolution.⁵⁰⁵ Noting the constitutional separation of powers and functions in his reply, Chief Justice Jay said: “These being in certain respects checks upon each other, and our being Judges of a Court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for

⁵⁰⁰ 258 U.S. at 162.

⁵⁰¹ 297 U.S. 288 (1936).

⁵⁰² 297 U.S. at 324. Chief Justice Hughes cited *New York v. Illinois*, 274 U.S. 488 (1927), in which the Court dismissed as presenting abstract questions a suit about the possible effects of the diversion of water from Lake Michigan upon hypothetical water power developments in the indefinite future, and *Arizona v. California*, 283 U.S. 423 (1931), in which it was held that claims based merely upon assumed potential invasions of rights were insufficient to warrant judicial intervention. See also *Massachusetts v. Mellon*, 262 U.S. 447, 484–485 (1923); *New Jersey v. Sargent*, 269 U.S. 328, 338–340 (1926); *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 76 (1867).

⁵⁰³ 330 U.S. 75 (1947).

⁵⁰⁴ 330 U.S. at 89–91. Justices Black and Douglas dissented, contending that the controversy was justiciable. Justice Douglas could not agree that the plaintiffs should have to violate the act and lose their jobs in order to test their rights. In *CSC v. National Ass’n of Letter Carriers*, 413 U.S. 548 (1973), the concerns expressed in *Mitchell* were largely ignored as the Court reached the merits in an anticipatory attack on the Act. Compare *Epperson v. Arkansas*, 393 U.S. 97 (1968).

⁵⁰⁵ 1 C. Warren, *supra* at 108–111. The full text of the exchange appears in 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486–489 (H. Johnston ed., 1893).