Sec. 1—Judicial Power, Courts, Judges

Attorney General Randolph, upon the refusal of the circuit courts to act under the new statute, filed a motion for mandamus in the Supreme Court to direct the Circuit Court in Pennsylvania to proceed on a petition filed by one Hayburn seeking a pension. Although the Court heard argument, it put off decision until the next term, presumably because Congress was already acting to delete the objectionable features of the act. Upon enactment of the new law, the Court dismissed the action.[154] Although the Court's opinion contained little analysis, *Hayburn's Case* has since been cited by the Court to reject efforts to give it and the lower federal courts jurisdiction over cases in which judgment would be subject to executive or legislative revision.[155] Thus, in a 1948 case, the Court held that an order of the Civil Aeronautics Board denying to a citizen air carrier a certificate of convenience and necessity for an overseas and foreign air route was, despite statutory language to the contrary, not reviewable by the courts. Because Congress had also deemed such an order subject to discretionary review and revision by the President, the lower court found, and the Supreme Court affirmed, that the courts did not have the authority to review the President's decision. While the lower Court had then attempted to reconcile the statutory scheme by permitting presidential review of the order after judicial review, the Court rejected this interpretation. "[I]f the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render. Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Gov-

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Justices declared their willingness to perform under the act as commissioners rather than as judges. *Cf.* United States v. Ferreira, 54 U.S. (13 How.) 40, 52–53 (1852). The assumption by judges that they could act in some positions as individuals while remaining judges, an assumption many times acted upon, was approved in Mistretta v. United States, 488 U.S. 361, 397–408 (1989).

[154] *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). The new pension law was the Act of February 28, 1793, 1 Stat. 324. The reason for the Court's inaction may, on the other hand, have been doubt about the proper role of the Attorney General in the matter, an issue raised in the opinion. *See* Marcus & Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 4; Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There was Pragmatism*, 1989 DUKE L. J. 561, 590–618. Notice the Court's discussion in Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218, 225–26 (1995).

[155] *See* United States v. Ferreira, 54 U.S. (13 How.) 40 (1852); Gordon v. United States, 69 U.S. (2 Wall.) 561 (1865); *In re* Sanborn, 148 U.S. 222 (1893); *cf.* McGrath v. Kritensen, 340 U.S. 162, 167–168 (1950).