

to assume state debts. The treasury secretary heatedly wrote to the Chief Justice calling upon all branches of the national government to assert their opposition to the principle of states' rights embodied in Henry's resolution: "This is the first symptom," Hamilton fumed, "of a spirit which must either be killed, or will kill the Constitution." Jay supported the Bank and despised Henry's states' rights ideology as much as Hamilton did. But, despite the intensity of Hamilton's plea, Jay replied calmly, deeming it inadvisable for the Court or its members to engage openly in political disputes.

Jay was certainly not indifferent, as his previous struggles on behalf of the Constitution attested, but he considered it important for the Court to be untouched by partisanship. His close association with Washington, Hamilton, and other members of the administration left no doubt of his true feelings. We now also know that he gave advice quietly to the administration when asked. But he set the example that practically all justices have since followed. No matter how intense their feelings or extensive their involvement with other branches of the government, the appearance of total nonpartisanship must be maintained. When this has not happened, as it did in such cases as *Dred Scott v. Sandford* (1857) and *Bush v. Gore* (2001), the Court has lost prestige and public support.

The first Chief Justice and his Court bolstered the separation of powers more openly, again setting the precedent for their successors on at least two other occasions. In one provision of the Pension law of 1792, Congress required that circuit courts should pass on the claims of invalid veterans seeking pensions from the government, with review by the secretary of war and Congress. Chief Justice Jay and Justice Cushing, sitting in the Circuit Court for New York, ruled in *Hayburn's Case* (1792) that "neither the Legislative nor the Executive branch can constitutionally assign to the Judicial any duties but such as are properly judicial, and to be performed in a judicial manner." Although this is the first instance involving the unconstitutionality of an act of Congress, neither Jay nor Cushing wanted a direct collision between the legislature and judiciary. In a compromise move, they construed the act as in effect naming judges as commissioners to carry out nonjudicial responsibilities. They accepted the task but maintained the principle, as did Justices James Wilson and John Blair sitting in the Pennsylvania circuit. Their decisions, however, went even further, and in effect they ruled the Pension law unconstitutional not only because it imposed nonjudicial duties on the courts, but also because it made their decisions reviewable by the other branches of the government. However, this issue did not reach the Supreme Court, so there was no final ruling on the constitutionality of the law or on the power of the Supreme Court to strike down an act of Congress. That would come later.

If any doubt remained on the determination of the Court to stay out of the business of the other parts of government, Jay put it to rest, yet in a manner that indicates the bifurcation that has always seemed to attach to the Justices in political matters. Jay had secretly written the first draft of Washington's 1793 Neutrality Proclamation, a clearly political act. (See Chapter 7) The president, however, wanted to be sure he had the necessary constitutional authority to implement the program since, following its issuance in April, a number of questions regarding neutrality and its effect upon commercial treaties had come to the government's attention. On July 18, at Washington's direction, the secretary of state sought the Court's opinion. The Neutrality Proclamation and its executive regulations, Jefferson wrote to Jay, involved delicate matters of treaty