

Jay's actions sometimes ran against his firm espousal of strict separation. In 1792, he campaigned for the governorship of New York and lost to Republican George Clinton in a palpably fraudulent election. Future justices, like Charles Evans Hughes, who ran for president in 1916, would resign from the bench if nominated for elective office. But other justices would remain on the bench while seeking nomination to higher office. In the nineteenth century, Justice John McLean actively sought the presidential nomination while on the bench, and in the 1850s, his name was put forward at a number of political conventions. Similarly, Chief Justice Salmon P. Chase hungered for a presidential nomination from the bench, and David Davis was sitting on the Court when the Illinois legislature chose him for the U.S. Senate in 1876.

Two years after Jay lost the New York gubernatorial race, and while still on the Court, the Chief Justice acceded to Washington's request to undertake a diplomatic mission to Great Britain in an effort to resolve the outstanding issues between the two countries. No doubt existed that whatever terms he secured would stir up a political controversy bound to affect the Court. Yet neither Washington nor Jay evidently viewed the assignment as other than a patriotic duty; as Jay wrote to his wife, "the public consideration...and the manner in which it was pressed, strongly impressed me with a conviction that to refuse it would be to desert my duty."

By his lights, Jay did what he saw to be right, and after giving so much private counsel to Washington, he probably wanted to resume his former political activism. Shortly after returning from England, he resigned from the Court, and in 1794, he ran successfully for governor of New York. But his diplomatic involvement exposed him to much criticism which, in terms of a rigorous separation of powers, he deserved. In the future, other Justices would occasionally take on extrajudicial assignments. In 1877, five Supreme Court Justices served on a commission to decide the disputed presidential election of 1876. After World War II, Robert Jackson served as a prosecutor at the Nuremberg Trials. Similarly, Chief Justice Earl Warren headed the commission investigating President Kennedy's assassination. In these instances, critics charged that the integrity of the Court had been compromised. The general rule to which most judges have adhered is that whatever their private involvement in political matters, members of the Court should avoid nonjudicial assignments or public political activity.