2003

Edmund Pendleton

William Hamilton Bryson
University of Richmond, hbryson@richmond.edu

Great American Judges

AN ENCYCLOPEDIA

VOLUME TWO L – Z

John R. Vile

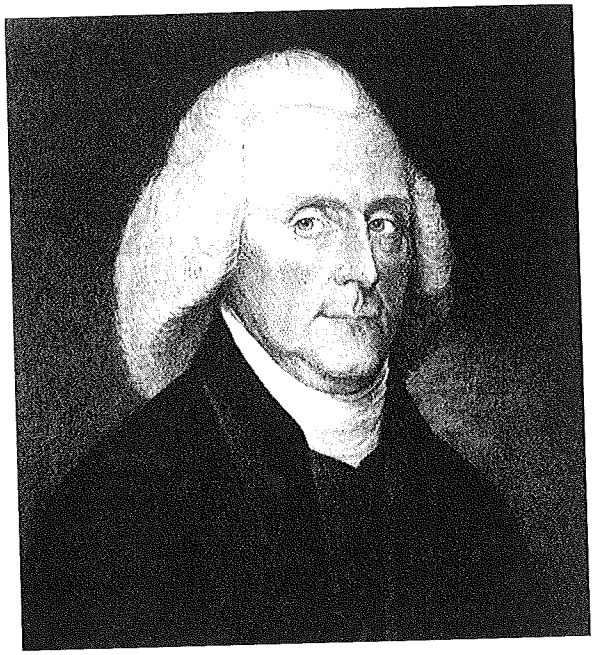
Foreword by Kermit L. Hall

ABC CLIO

Santa Barbara, California Denver, Colorado Oxford, England

PENDLETON, EDMUND

(1721–1803)



EDMUND PENDLETON
Library of Congress

JUDGE EDMUND PENDLETON was the head of the Virginia judiciary from its professionalization upon independence from Great Britain until his death. It was in his court and under his eye that John Marshall, Bushrod Washington, St. George Tucker, Spencer Roane, and the other lawyers of the first period of republican Virginia refined their legal skills. His steady example influenced in one way or another a remarkable generation of lawyers and judges.

Edmund Pendleton was born on 9 September 1721 in Caroline County, Virginia. His parents, Henry Pendleton (1684–1721) and Mary Taylor (1688–1770), were both members of the gentry; they were educated and solvent but not wealthy. Edmund learned the law as an articled, or apprentice, clerk to Benjamin Robinson (1689–1761), the clerk of Caroline County. The clerk of the county was a lawyer who attended to the procedure of the county court and kept the lay justices of the peace on the proper procedural course during litigation in their court. Thus, an apprenticeship to a clerk of court was equivalent to that to a practicing lawyer.

After being "strictly" examined by Edward Barradall (1704–1743), attorney general of Virginia, Pendleton was licensed to practice law in the county courts of Virginia on 25 April 1741. He began his practice in the County Court of Caroline County and in the neighboring counties and was

soon appointed king's attorney (the public prosecutor) of nearby Essex County. In 1746, he moved his practice to the General Court in Williamsburg and rapidly distinguished himself in competition with a talented and well-educated bar. From 1751 until the end of the colonial era, Pendleton also sat regularly and faithfully on the County Court of Caroline County.

After becoming established at the bar, Pendleton taught law to a succession of local boys who were apprenticed to him. The two most famous of these were two of his own cousins, John Penn (1740–1788) and John Taylor of Caroline (1753–1824). Penn moved to North Carolina to practice law and was a signer of the Declaration of Independence. Taylor practiced law in Caroline County and Richmond but is better known for his writings on agricultural and political theory.

Pendleton was also active in politics, serving continuously in the Virginia House of Burgesses, the lower house of the General Assembly, from 1752 until the end of the colonial period. He was then elected to the newly formed House of Delegates in 1776 and was made its first speaker. He also represented Virginia in the Continental Congress in 1774 and 1775. He, George Wythe (1726–1806), and Thomas Jefferson (1743–1826) were appointed a committee of the General Assembly, upon independence, to revise the statute law of Virginia in the light of the new Constitution. He was chosen to preside over the Virginia Constitutional Convention of 1788. Though politically conservative, Pendleton actively supported independence from Great Britain and the adoption of the federal Constitution.

After independence, the county courts were retained, but a new system of high courts at the capital was needed. These new high courts were to be filled by professionally trained lawyers, rather than by laymen, as the colonial courts had been.

In 1778, the new Court of Chancery and the new General Court were created. The initial judges on the Court of Chancery were Pendleton, the presiding judge; George Wythe, who sat there until his death in 1806; and Robert Carter Nicholas, who died in office in 1780. Pendleton's next judicial post was president of the Court of Appeals. Thus he served as the head of the Virginia judiciary from 1778 until his death in 1803.

As the spokesman of the court, he must have had a permanent effect on the new Virginia bench and bar not only in terms of legal philosophy but also as to judicial demeanor and public example. He was a learned lawyer and a skillful advocate. He was a modest person, however, who never felt any need for ostentation. He sought public service but never public honors. He was highly intelligent but never intellectually arrogant. He was always approachable and never haughty. The result was that, after his first election to public office, he was never opposed for reelection, and his positions of

public trust were given him without any solicitation on his part because it was well known that he would act in them to the general satisfaction of the general public and not for his personal self-interest.

During his twenty-five years on the appellate bench in Virginia, he sat with several colleagues who also distinguished themselves as jurists. George Wythe (1726–1806) was undoubtedly the best. Spencer Roane (1762–1822) overlapped Pendleton on the Court of Appeals from 1795 to 1803. John Blair (1732–1800) sat with Pendleton from 1780 to 1789, when he resigned to become one of the original justices on the Supreme Court of the United States.

Many of the lawyers who practiced in Pendleton's court and learned from his legal insights and judicial opinions went on to distinguish themselves in their own times. John Marshall (1755–1835) and Bushrod Washington (1762–1829) went on to sit on the Supreme Court on the United States. Edmund Randolph (1753–1813), the attorney general of Virginia, and Charles Lee (1758–1815) were appointed the first and second attorneys general of the United States. St. George Tucker (1752–1827) succeeded Pendleton on the Court of Appeals; he also was the second professor of law at the College of William and Mary, an editor of Blackstone's *Commentaries*, and later the federal judge for the District of Virginia. John Taylor of Caroline (1753–1824) had a very lucrative practice in the Court of Appeals before retiring to devote his time to political philosophy. There were many others who are now no longer remembered outside of Virginia, except perhaps for John Wickham (1763–1839) and George Hay (1765–1830), who argued in the trial of Aaron Burr, which was reported nationally.

Pendleton's judicial opinions were reported by Bushrod Washington (1762–1829) and by Daniel Call (1765–1840), two of the lawyers who regularly practiced in his court, and by John Brown (1750–1810), who was the clerk of his court. John Marshall also reported some of Pendleton's decisions, sixteen of which were printed by Call (sadly, Marshall's manuscript has been lost).

Although no individual case in Pendleton's court stands out as a radical milestone of jurisprudence, an act of the legislature that was signed into law by the governor was declared to be unconstitutional by the Court of Appeals in 1788. Even though it was not a matter of formal litigation between a plaintiff and a defendant, the *Remonstrance* or *Cases of the Judges* was reported in Call's *Reports* at volume 4, page 135. In early 1788, the General Assembly attempted to reorganize the high courts in such a way that it happened that the judges' workload would have been substantially increased (with no increase in pay). The judges on the Court of Appeals declared the act unconstitutional because it interfered with the independence of the judiciary and violated the constitutional provision for the separation of pow-

ers within the state government. In response, the governor called the General Assembly into special session to respond to the problem. The result was an amicable compromise. The courts were reorganized in a different way so that no sitting judge would be required to accept additional judicial duties, and the judges voluntarily resigned their commissions in the old courts and accepted new commissions in the new Court of Appeals. Thus, it was established that an act of assembly could neither increase the judicial workload of sitting judges nor remove them from their judicial offices and that this was a matter of constitutional law.

Generally, the Court of Appeals of Virginia, under the guidance of Pendleton, found the locus of sovereignty in republican Virginia to be in the people as a whole. The people of Virginia expressed their political will in the written constitution of 1776. This constitution divided the government of Virginia into three independent branches: the legislature, the executive, and the judiciary. Thus, the constitution was above the government. Interpreting the constitution, a legal document, was a matter of law, and the law, as well as its interpretation, was the function of the judiciary. Thus, the Court of Appeals was to review the acts of the other branches of the government as a matter of constitutional law. One aspect of Virginia constitutional law was the separation of powers among the branches of government, and this required that the judiciary give great deference to the legislature when construing a statute. For the judiciary to legislate would be for the court unconstitutionally to usurp the legislative function of the General Assembly. A corollary to this principle is that when confronted by a constitutional issue in a legislative act, the court should, if it can, resolve the issue without declaring an act of assembly unconstitutional. A good example of this is the case of *Commonwealth v. Caton*, 4 Call 5 (1782). Pendleton and the majority of the court, with impressive legal skill, avoided the constitutional issue (where George Wythe was willing to indulge in an unseemly confrontation with the legislature).

Led by Pendleton, the courts of Virginia applied the common law of England to resolve the cases brought before them for resolution. Although there was some flirtation at the time with abolishing all British institutions, including the common law, and starting all over from first principles, this nonsense was never seriously considered by the Virginia lawyers and judges of Pendleton's generation. In fact, in 1776, an act was passed by the General Assembly stating that the common law of England was the common law of Virginia. Many believed that the war was fought to preserve English law and institutions because they guaranteed the general principle of the rule of law. The common law of England was the guarantee of property rights, which is the foundation of liberty, being a check on the government. To tax or confiscate a private person's property without consent or author-

ity, that is, without representation, is against the law. Thus, the common law was to be preserved as the basis of legal judgments. The English common law had to be applied in republican Virginia in an intelligent way, however, in order to suit the new political order without upsetting settled expectations of property and contract rights. This was accomplished under the firm guidance of Edmund Pendleton in Virginia and passed on to the federal judiciary by Blair, Washington, Marshall, Tucker, and Hay.

Edmund Pendleton was married twice but had no surviving children. He died in Richmond on 26 October 1803 and was buried in his native Caroline County, Virginia.

W. Hamilton Bryson

References and Further Reading:

Hilldrup, Robert Leroy. 1939. *The Life and Times of Edmund Pendleton*. Chapel Hill: University of North Carolina Press.

Mays, David John. 1952. *Edmund Pendleton 1721–1803: A Biography*. 2 vols. Cambridge: Harvard University Press.

Mays, David John, ed. 1967. *The Letters and Papers of Edmund Pendleton 1734–1803*. 2 vols. Charlottesville: University Press of Virginia.

Morris, Thomas Robbins. 1975. *The Virginia Supreme Court: An Institutional and Political Analysis*. Charlottesville: University Press of Virginia.

Nelson, Margaret Virginia. 1947. *A Study of Judicial Review in Virginia: 1789–1928*. New York: Columbia University Press.

Wren, John Thomas. 1988. "Republican Jurisprudence: Virginia Law and the New Order, 1776–1830." Ph.D. diss., College of William and Mary.