

THE CHIEF JUSTICE FROM A HISTORICAL PERSPECTIVE

IN THE BEGINNING: THE FIRST THREE CHIEF JUSTICES

NATALIE WEXLER[†]

INTRODUCTION

It comes as a surprise to many—including a number of lawyers and law students—to learn that John Marshall was not in fact the country’s first Chief Justice, but rather its fourth (or, according to some recent scholarship, its fifth). Before there was Marshall, there were John Jay, John Rutledge (briefly), *possibly* William Cushing (even more briefly), and Oliver Ellsworth. While legal historians may be familiar with these nonhousehold names, all too often when these men, and the Court over which they presided from 1789 to 1800, do receive mention, it is only to be dismissed as inferior to what immediately followed. As Robert McCloskey aptly put it in *The American Supreme Court*, “[t]he great shadow of John Marshall . . . falls across our understanding of that first decade; and it has therefore the quality of a play’s opening moments with minor characters exchanging trivialities while they and the audience await the appearance of the star.”¹ In the last ten years, scholars have begun to focus more attention on the pre-Marshall Court,² but a certain derogatory attitude persists. One re-

[†] Associate Editor, *The Documentary History of the Supreme Court of the United States, 1789-1800*. A.B. 1976, Harvard University; M.A. 1977, University of Sussex; J.D. 1983, University of Pennsylvania. Much of this Article rests on research done over the last thirty years by the staff of the Documentary History Project, which is very much a collective effort. I would particularly like to thank my colleagues Maeva Marcus and Robert P. Frankel, Jr., for their perceptive comments and suggestions.

¹ ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 30 (1960); *see also* Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 123 [hereinafter Wheeler, *Extrajudicial Activities*] (“There is a widely held notion that until Marshall came to the Supreme Court, the Court did nothing.”).

² *See, e.g.*, WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* (Herbert A. Johnson ed., 1995) (presenting a general overview of the Supreme Court in the 1790s); STEWART

cent popular history of the Supreme Court, for example, describes the early Justices as “a thoroughly undistinguished lot.”³

While I have no wish to dislodge Marshall from his position in the pantheon of judicial heroes, I would suggest that we will obtain a clearer picture of the Supreme Court in its first decade if we bring it out, as best we can, from under Marshall’s “great shadow.” It must be remembered that the era during which Marshall was Chief Justice differed in significant ways from the decade of the 1790s. In this earlier period, despite the new American rhetoric about separation of powers, a British and colonial tradition of blurring the distinction between the executive, legislative, and judicial branches continued to form people’s assumptions about how the federal government would function. And that government was still so new and fragile that there was serious doubt, even among some of those at its helm, as to whether it would survive.⁴ The circumstances of the 1790s called not for bold strokes, but for judicial caution.

While much is still unknown, and most likely unknowable, about the internal workings of the Court in this period, much more documentary evidence is available now than in prior years, thanks in large part to the efforts of the project on which I work as an associate editor. Drawing on that evidence and other sources, I will attempt to

JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES (1997) (challenging the assumption that the early role of Justices was limited to adjudicating cases); SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL (Scott Douglas Gerber ed., 1998) [hereinafter SERIATIM] (collecting biographical sketches of early Justices). Much of this recent scholarship was made possible by the documents collected, annotated, and published in THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800 (vol. 1, Maeva Marcus & James R. Perry eds., 1985-1986; vols. 2-7, Maeva Marcus ed., 1989-2003) [hereinafter DHSC]. See also JULIUS GOEBEL, JR., ANTECEDENTS AND BEGINNINGS TO 1801 (The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, vol. 1, Paul A. Freund ed., 1971) (giving a comprehensive survey of early Supreme Court history).

³ PETER IRONS, A PEOPLE’S HISTORY OF THE SUPREME COURT 86 (1999); see also GEORGE LEE HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15, pt. 1, at 7 (The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, vol. 2, Paul A. Freund ed., 1981) (arguing that the pre-Marshall Court was “relatively feeble” and “too unimportant to interest the talents of two men who declined President Adams’s offer of the position of Chief Justice”). But see CASTO, *supra* note 2, at 56 (discussing how President Washington’s “initial selections . . . included a number of capable individuals”); SERIATIM, *supra* note 2, at 5 (noting that the first Court included “a number of impressive appointees”).

⁴ John Jay himself underscored the experimental nature of the whole endeavor in his first grand jury charge, delivered in April 1790, in which he exhorted his listeners to “patiently abide the Tryal” of the nation’s attempt at self-government. John Jay’s Charge to the Grand Jury of the Circuit Court for the District of New York (Apr. 12, 1790), in 2 DHSC, *supra* note 2, at 25, 27.

shed some light on the nature of the Chief Justice's role in the 1790s. I will first discuss the British and colonial origins of the office and the factors that were weighed in the selection of Chief Justices in order to gain insight into how the position was viewed by contemporaries. I will then turn to the extrajudicial duties and responsibilities shouldered by Chief Justices in the 1790s, and, lastly, attempt to assess the role and influence of the Chief Justice within the Court.

I. THE ORIGINS AND NATURE OF THE OFFICE

A. *Where Did the Idea of a Chief Justice Come From?*

Let us begin at the very beginning: why have a Chief Justice at all? The Constitution itself appears to be of two minds on the subject. While Article III makes no mention of a Chief Justice,⁵ in Article I the Framers seem to assume that such a position will indeed be created: the clause dealing with impeachments provides that “[w]hen the President of the United States is tried, the Chief Justice shall preside.”⁶ It was left to the first Federal Congress to resolve the issue, which it did without much debate. The original Senate bill that became the Judiciary Act of 1789 provided for a “Chief Justice and five associate Justices,” and that language emerged from the Senate debate unchanged.⁷ In the House, Congressman Aedanus Burke moved to strike out the phrase, “Chief Justice,” on the ground that it was “a concomitant of royalty.”⁸ But after being informed that the offending phrase appeared in the Constitution itself, Burke withdrew his motion.⁹

Perhaps the Constitution failed to specifically mandate the position of Chief Justice because the Framers simply assumed that one would be appointed. Nearly all contemporary models for a high court included a chief judge or justice. Most prominent among these models was the Court of King's Bench, the highest English common-law

⁵ See, e.g., U.S. CONST. art. III, § 1 (“The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

⁶ *Id.* art. I, § 3, cl. 6.

⁷ An Act To Establish the Judicial Courts of the United States, § 1, *in* 4 DHSC, *supra* note 2, at 38, 38-39.

⁸ 1 ANNALS OF CONG. 783 (Joseph Gales ed., 1834).

⁹ *Id.*; An Act To Establish the Judicial Courts of the United States, *supra* note 7, § 1, Original Senate Bill, at 39 n.2.

court.¹⁰ In the colonies—and then the states, under the Articles of Confederation—the majority of high courts also had a chief magistrate.¹¹

B. *The Nature of the Office*

Few of the statutes specifying the appointment of a chief judge or justice—including the Judiciary Act of 1789—provide any insight into the duties or significance of the position, as distinct from those of an associate, assistant, or “puisne” judge or justice. But in eighteenth-century Britain, there was a long-standing tradition of having the chief justice—and, to an even greater extent, the chief’s counterpart in equity, the chancellor—serve in the cabinet and provide extrajudicial advice to the king and the House of Lords.¹² Similarly, in America during the colonial period, judges of the high courts frequently advised the legislative and executive branches and held multiple offices.¹³ Under the unwritten British constitution, the concept of “balanced government” included no independent role for the judiciary. Rather than dividing governmental power by function, the British model “balanced” classes or orders: the monarchy, as represented by the Crown; the aristocracy, by the House of Lords; and the “people,” by the House of Commons. While theorists did assign different governmental functions to different political actors, the judicial function was usually seen as a component of the executive power that belonged

¹⁰ See ROSCOE POUND, ORGANIZATION OF COURTS 16 (1940) (discussing how, in terms of providing a model for American judicial organization, the Court of King’s Bench was “the most important tribunal” of general jurisdiction). Indeed, according to one account, it was William the Conqueror who had introduced the office of chief justice to England in the eleventh century, importing it from his native Normandy, “where it had long existed.” 1 LORD CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 1 (Jersey City, Fred D. Linn & Co. 1881).

¹¹ See POUND, *supra* note 10, at 64-72, 92-103 (summarizing the structure of various colonial and pre-1789 state courts). In a number of the colonies, the highest court of review was the legislature or the governor and/or council (the upper house of the legislature). In the three colonies where the highest court was composed of judges—Massachusetts, Rhode Island, and Pennsylvania—there was a chief justice. *Id.* at 64-67.

¹² See JAY, *supra* note 2, at 10-22 (discussing the role of eighteenth-century British judges in advising the House of Lords and the executive). The king might consult the lord chancellor, the chief justice, other individual judges, or groups of judges on matters ranging from postponing the opening of parliamentary session to the legality of certain royal actions. In 1614, for example, King James I ordered his attorney general, Sir Francis Bacon, to consult each of the judges of the King’s Bench about their feelings concerning a pending treason case. Although Chief Justice Coke initially resisted the request, all of the justices ultimately complied. *Id.* at 14-16.

¹³ *Id.* at 52.

to the monarch. And yet, given that the House of Lords was also the nation's highest court, at least a part of the judicial function belonged to the legislature.¹⁴

In this country, the concept of separation of powers—with governmental power divided between the executive, legislative, and judicial branches—had taken root in the formulation of state constitutions beginning in 1776, and it continued to exert a profound effect on the Framers of the Federal Constitution. The meaning of the phrase, however, was still ambiguous and developing;¹⁵ certainly it did not mean then what it does today. As Stewart Jay has detailed, the Framers were primarily concerned with encroachments by one branch on the proper preserve of another. With regard to the judiciary, this meant erecting safeguards against legislative domination of the courts—hence the provisions in Article III guaranteeing life tenure and prohibiting diminution in salary.¹⁶ But there is no evidence that the delegates to the Constitutional Convention saw any difficulty in having judges voluntarily furnish advisory opinions or perform extrajudicial service.¹⁷ Presumably, given long-standing British tradition,

¹⁴ See *id.* at 24-31 (discussing the concept of judicial independence within the context of the British theory of balanced government).

¹⁵ See *id.* at 53 (“Notwithstanding (or perhaps because of) the use of the term as a slogan in revolutionary writings and in early state constitutions, the doctrine itself was burdened by the ambiguities of a still emerging ideology.”); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 150-61 (1998) (discussing the notion of separation of powers during the Revolutionary era).

¹⁶ See U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”). These were the two safeguards on judicial independence advocated by Montesquieu and Sir William Blackstone, both of whom had a major influence on the theory behind the American Constitution. Russell Wheeler, *Extrajudicial Activities of United States Supreme Court Justices: The Constitutional Period, 1790-1809*, at 42-46 (Dec. 1970) (unpublished Ph.D. dissertation, University of Chicago) (on file with author) [hereinafter Wheeler Dissertation].

¹⁷ Neither Montesquieu nor Blackstone saw any need for a ban on plural office-holding, as long as it “fell short of a wholesale union of [governmental] branches.” Wheeler Dissertation, *supra* note 16, at 46. State constitutions drafted after the Revolution also followed a pattern of securing judicial independence through life tenure and adequate salaries, but allowing extrajudicial activity. *Id.* at 46-52. Although the delegates to the Constitutional Convention rejected a formal advisory role for the Chief Justice, Stewart Jay concludes that this only meant they disapproved of *requiring* him to respond to the President's requests for advice; the President might, however, ask, and the Chief Justice might choose to respond. JAY, *supra* note 2, at 73. Also, although the Constitution bars federal judges—or anyone else holding noncongressional federal office—from simultaneously serving in Congress, there is no prohibition against any

such advice and service would be expected primarily from the nation's highest judicial officer, the Chief Justice.

In any event, it is clear from contemporary commentary that the position of Chief Justice was seen to confer great importance on the man who held it. In August 1788, John Adams's daughter, Abigail Smith, noted the prediction of Colonel Henry Lee, a member of the Confederation Congress, that the office of Chief Justice would be "of more importance than [that of] the Vice President[.]" and expressed her hope that her father would choose the former.¹⁸ And to John Jay, the positions of Chief Justice and secretary of state appeared sufficiently fungible that, according to two separate commentators, he was waiting to see which salary would be higher before making his choice.¹⁹

Competition for the post of Chief Justice was intense. Despite Jay's emergence as an early front-runner,²⁰ other names were mentioned as well, including those of three men—William Cushing, John Rutledge, and James Wilson—who were ultimately chosen as Associate Justices.²¹ While Rutledge accepted the post of senior Associate Justice, he clearly felt slighted, resigning five months later to become chief justice of the South Carolina Court of Common Pleas.²²

other type of multiple officeholding or extrajudicial service. U.S. CONST. art. I, § 6; JAY, *supra* note 2, at 74.

¹⁸ Letter from Abigail Smith to John Quincy Adams (Aug. 20, 1788), *in* 1 DHSC, *supra* note 2, at 603, 603.

¹⁹ Letter from Samuel A. Otis to John Langdon (Sept. [16-22], 1789), *in* 1 DHSC, *supra* note 2, at 661, 661; Letter from Paine Wingate to Timothy Pickering (Sept. 14, 1789), *in* 1 DHSC, *supra* note 2, at 660, 660. As it turned out, Congress set the Chief Justice's salary at \$500 more than the salary of the secretary of state—\$4000 as opposed to \$3500, with the latter amount also constituting the salary of an Associate Justice. Act of Sept. 23, 1789, ch. 18, § 1, 1 Stat. 72, 72; Act of Sept. 11, 1789, ch. 13, § 1, 1 Stat. 67, 67.

²⁰ In July 1789, two months before the passage of the Judiciary Act and the appointment of Justices, John Adams remarked that the office of Chief Justice had been "reserv[ed] . . . for Mr. Jay." Letter from John Adams to Francis Dana (July 10, 1789), *in* 1 DHSC, *supra* note 2, at 630, 630.

²¹ See Letter from Abraham Baldwin to Joel Barlow (Sept. 13, 1789), *in* 1 DHSC, *supra* note 2, at 659, 659 (supposing Rutledge or Jay would be appointed); Letter from Samuel Barrett to William Cushing (June 20, 1789), *in* 1 DHSC, *supra* note 2, at 626, 626 (assuming Cushing would be appointed); Letter from Benjamin Rush to John Adams (Apr. 22, 1789), *in* 1 DHSC, *supra* note 2, at 613, 613 (expecting Wilson to be appointed).

²² See Letter from John Rutledge to George Washington (Mar. 5, 1791), *in* 1 DHSC, *supra* note 2, at 23, 23 (offering Rutledge's resignation); Letter from John Rutledge to George Washington (June 12, 1795), *in* 1 DHSC, *supra* note 2, at 94, 94-95 (indicating Rutledge's displeasure over the perceived slight); see also *infra* notes 29-30 and accompanying text.

The most intensive lobbying campaign for Chief Justice was on behalf of Wilson, a Pennsylvania lawyer and prominent legal thinker. In April 1789, Wilson wrote directly to Washington, declaring that “my Aim rises to the important Office of Chief Justice of the United States.”²³ Washington’s response was noncommittal,²⁴ as it was to most office-seekers at this point, but Wilson’s prominent friends continued to press for his appointment. Benjamin Rush—a Philadelphia physician who had joined Wilson in leading the campaign for ratification of the Constitution in Pennsylvania—urged John Adams to use his influence as president of the Senate to further Wilson’s nomination.²⁵ And Robert Morris—the “financier of the Revolution” and a senator from Pennsylvania, who was said to have “the ear of the President as much or more than any man”—was also working behind the scenes on Wilson’s behalf.²⁶ Although Adams, in declining to support Wilson for Chief Justice, but promising to support his nomination as one of the Associate Justices, remarked that “the difference is not great between the first and the other Judges,”²⁷ it is clear that the general perception was quite the opposite.

II. THE SELECTION OF A CHIEF JUSTICE

A. *The First Appointment: John Jay*

One way of assessing the eighteenth-century view of the Chief Justice’s role is by looking at the men chosen and rejected by President Washington and attempting to discern the reasons for his actions.

²³ Letter from James Wilson to George Washington (Apr. 21, 1789), *in* 1 DHSC, *supra* note 2, at 612, 613.

²⁴ See Letter from George Washington to James Wilson (May 9, 1789), *in* 1 DHSC, *supra* note 2, at 618, 618-19 (responding merely that Washington would be impartial and disinterested).

²⁵ Letter from Benjamin Rush to John Adams (Apr. 22, 1789), *in* 1 DHSC, *supra* note 2, at 613, 613; Letter from Benjamin Rush to John Adams (June 4, 1789), *in* 1 DHSC, *supra* note 2, at 622, 622-23. Rush’s letter of April 22 reflects an assumption that the Senate would do more than simply rubber-stamp Washington’s judicial nominations.

²⁶ Letter from Paine Wingate to Timothy Pickering (Sept. 14, 1789), *in* 1 DHSC, *supra* note 2, at 660, 660; see also Letter from Arthur Lee to [Francis Lightfoot Lee] (May 9, 1789), *in* 1 DHSC, *supra* note 2, at 617, 617 (mentioning that Morris was working for Wilson’s appointment); Letter from Robert Morris to Francis Hopkinson (Aug. 15, 1789), *in* 1 DHSC, *supra* note 2, at 650, 650 (“[W]ill not [Wilson] have some appointments to make should things go to our Wishes.”).

²⁷ Letter from John Adams to Benjamin Rush (May 17, 1789), *in* 1 DHSC, *supra* note 2, at 619, 619.

Generally, in selecting nominees for the Supreme Court, Washington considered a number of factors: character and reputation, health, legal (although not necessarily judicial) experience and ability, loyalty to the concept of a federal government, service during the Revolution and the constitutional ratification process, and—particularly important at a time when citizens’ loyalty to their individual states was often stronger than their attachment to the national government—geographic diversity.²⁸ But when it came to selecting a Chief Justice, it appears that Washington gave some of these factors more weight than others.

One thing is fairly clear: Washington was not looking primarily for legal scholarship and ability. While John Jay was a lawyer and had briefly served as chief justice of the New York Supreme Court of Judicature in the 1770s, he did so “erratically and without distinction.”²⁹ John Rutledge later wrote somewhat huffily to Washington, recalling the events of 1789:

Several of my Friends were displeas'd at my accepting the Office of an Associate Judge, (altho' the senior,) of the Supreme Court . . . conceiving, (as I thought, very justly,) that my Pretensions to the Office of Chief Justice were, at least, equal to Mr. Jay's, in point of Law-Knowledge, with the Additional Weight, of much longer Experience, & much greater Practice.³⁰

But even greater than Rutledge’s claim, in terms of a reputation for legal brilliance, was that of James Wilson. Although fairly obscure today, Wilson was a well-known figure in the 1790s. One of only six men who signed both the Declaration of Independence and the Constitution,³¹ he had been a leading spokesman for the ratification of the latter in Pennsylvania.³² Although he had never served as a judge, he was regarded as an erudite legal scholar and the principal theorist of the newly emerging American judicial system.³³ Many, including Wil-

²⁸ See CASTO, *supra* note 2, at 56, 66-68 (discussing Washington’s criteria).

²⁹ Sandra Frances VanBurkleo, “Honour, Justice, and Interest”: John Jay’s Republican Politics and Statesmanship on the Federal Bench, in SERIATIM, *supra* note 2, at 26, 31.

³⁰ Letter from John Rutledge to George Washington (June 12, 1795), in 1 DHSC, *supra* note 2, at 94, 94.

³¹ Mark D. Hall, *James Wilson: Democratic Theorist and Supreme Court Justice*, in SERIATIM, *supra* note 2, at 126, 126.

³² *Id.* at 135-36; CHARLES PAGE SMITH, JAMES WILSON: FOUNDING FATHER, 1742-1798, at 268-80, 297-304 (1956).

³³ SMITH, *supra* note 32, at 128, 308-10; GEOFFREY SEED, JAMES WILSON 150 (1978). In 1790 and 1791, Wilson delivered a series of law lectures at the College of Philadelphia that were attended by a distinguished audience and are considered to be the be-

son himself, assumed that he would be the nation's first Chief Justice.³⁴

Why, then, was Wilson nominated instead as an Associate Justice? One problem was that he had made a number of quite vocal enemies on both ends of the political spectrum.³⁵ Probably more important than Wilson's unpopularity, however, was the question of his character.³⁶ Wilson's extensive speculation in unsettled land on the western frontier, and his accumulating debt, had drawn some negative comment. In a letter to Vice President Adams pleading Wilson's cause, Benjamin Rush admitted, "Much will be said of the deranged state of his Affairs." He then added, "But where will you find an American landholder free from embarrassments?"³⁷ Adams, unconvinced, replied that "Services, Hazards, Abilities and Popularity, all properly weighed, the [balance], is in favour of Mr. Jay."³⁸

It is fairly clear, then, that Washington was *not* looking for a nominee for Chief Justice who, despite possessing a brilliant legal mind, in-

ginnings of the University of Pennsylvania Law School. Snippets of History: Part I (1790-1849), <http://www.law.upenn.edu/sesquicentennial/scrolling/part1.html> (last visited Apr. 14, 2006). Although the lectures were delivered after Wilson's appointment to the Supreme Court, the invitation to deliver them had been extended in August 1789, before Wilson's nomination. 20 *DICTIONARY OF AMERICAN BIOGRAPHY* 329 (Dumas Malone ed., 1936).

³⁴ See, e.g., *FED. GAZETTE*, Mar. 9, 1789, reprinted in 1 *DHSC*, *supra* note 2, at 609, 609; Letter from Frederick Muhlenberg to Benjamin Rush (Mar. 21, 1789), in 1 *DHSC*, *supra* note 2, at 610, 610; Letter from Anthony Wayne to James Wilson (May 20, 1789), in 1 *DHSC*, *supra* note 2, at 619, 619; see also Maeva Marcus, *Federal Judicial Selection: The First Decade*, 39 *U. RICH. L. REV.* 797, 802 (2005) ("In the eyes of many, Wilson's exceptional intellectual promise, so evident throughout his career, should have made him a natural leader for the fledgling Supreme Court.")

³⁵ See Hall, *supra* note 31, at 128 ("Wilson's principled stands in both state and national politics led him to offend just about every American."); Letter from Benjamin Rush to Tench Coxe (Feb. 26, 1789), in 1 *DHSC*, *supra* note 2, at 606, 606. Opposition to Wilson's nomination surfaced in the press. See, e.g., *N.Y.J.*, Apr. 16, 1789, reprinted in 1 *DHSC*, *supra* note 2, at 611, 611-12; Letter from an Anonymous Correspondent, *STATE GAZETTE N.C.*, June 5, 1789, reprinted in 1 *DHSC*, *supra* note 2, at 623, 623.

³⁶ See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 37 (1993) (discussing the eighteenth-century notion of "character")

³⁷ Letter from Benjamin Rush to John Adams (Apr. 22, 1789), in 1 *DHSC*, *supra* note 2, at 613, 613; see also Letter from Benjamin Rush to Tench Coxe (Jan. 31, 1789), in 1 *DHSC*, *supra* note 2, at 605, 605-06 (urging Coxe, then assistant secretary of the treasury, to "circulate" in New York the fact that Wilson had "60,000 acres of good land . . . paid for in [Pennsylvania]," along with the argument that "if none but men whose cash exceeds the *present* value of their estates, are to fill the appointments of the new [government], one half the Union cannot be represented").

³⁸ Letter from John Adams to Benjamin Rush (May 17, 1789), in 1 *DHSC*, *supra* note 2, at 619, 619.

spired animosity in some quarters and exhibited dubious character traits. But what *was* he looking for? What can we learn about his criteria from his selection of John Jay? To begin with, Jay suffered from neither of the two defects that burdened Wilson. Although Jay was an aristocrat who viewed “the people” with fairly unmitigated scorn,³⁹ he seems to have been generally popular. And no whiff of scandal ever sullied his reputation.⁴⁰

On a more positive note, Jay had—like Wilson and Rutledge—distinguished himself in service to his country, both as president of the Continental Congress and as one of the authors of *The Federalist Papers*.⁴¹ Unlike these other two candidates, however, much of Jay’s experience had been in the realm of foreign affairs: he had served as minister to Spain from 1779 to 1783, helped to negotiate the Treaty of Paris that ended the Revolutionary War, and held the post of secretary of foreign affairs under the Articles of Confederation.⁴² It was assumed by many, in fact, that Jay would hold the analogous post of secretary of state under the new federal government—and indeed, as noted earlier, he apparently seriously considered it.⁴³

While experience in foreign affairs is no longer considered important in a candidate for Chief Justice, in the circumstances of the 1790s it conferred certain advantages. The United States was still a fledgling nation, struggling to gain recognition from the established European powers—recognition that would be furthered by the appointment of a Chief Justice who was personally known to some of the leading European players. In addition, some of the most important questions expected to come before the Court—notably, the question of whether the 1783 peace treaty required Americans to repay debts to British creditors that had been contracted before the Revolution—implicated foreign interests, and might be better resolved by a Chief Justice with a diplomatic background. More generally, given the expectation that

³⁹ See VanBurkleo, *supra* note 29, at 29, 33 (characterizing Jay’s family’s position in New York society as “lofty” and remarking that he “frequently imputed bestial qualities” to “common folk”).

⁴⁰ See 1 POLITICAL CORRESPONDENCE AND PUBLIC PAPERS OF AARON BURR 105 n.1 (Mary-Jo Kline ed., 1983) (alluding to Jay’s “legendary reputation for integrity and probity”).

⁴¹ 1 DHSC, *supra* note 2, at 6. Although the authors of *The Federalist Papers*—James Madison, Alexander Hamilton, and Jay—wrote their essays anonymously, their identity would certainly have been known to Washington and other members of the Federalist inner circle.

⁴² *Id.*

⁴³ See *supra* text accompanying note 19.

Jay would function as at least an informal adviser to the President, Washington undoubtedly wanted to install someone as Chief Justice whom he knew well and whose judgment he trusted—two criteria met by Jay.⁴⁴

B. *Filling a Vacancy: “Dull Seniority” or Abilities?*

In choosing the first Chief Justice, as well as the first five Associate Justices, George Washington had a luxury that would generally be denied him in making subsequent appointments: time. He also did not yet have to contend with the expectation that a vacancy in the chief justiceship would be filled by the most senior Associate Justice.

1. Replacing Jay: The Rutledge Debacle

When Jay resigned as Chief Justice in June 1795—having been elected governor of New York—many observers anticipated that William Cushing, the senior Associate Justice, would be Washington’s choice to replace him.⁴⁵ William Bradford, Jr., Attorney General of the United States, believed that “the principle of Rotation”—by which he meant seniority—would best preserve the independence of the judiciary from the executive branch.⁴⁶ On the other hand, Tench Coxe, the commissioner of the revenue, believed that “[t]he man of the first abilities, that can be found should be induced into the Station [of Chief Justice]. . . . [D]ull seniority and length of service should be considered as nothing.”⁴⁷

Even Bradford realized that in certain circumstances—those in which “the succession of the eldest puisne judge would be wholly im-

⁴⁴ See JAY, *supra* note 2, at 97 (“Undoubtedly, the ease with which [Washington and Jay] related was a product of their long and cordial association.”).

⁴⁵ See, e.g., FED. ORRERY, June 27, 1795, *reprinted in* 1 DHSC, *supra* note 2, at 759, 759-60; Letter from Edmund T. Ellery to David L. Barnes (July 23, 1795), *in* 1 DHSC, *supra* note 2, at 770, 770; Letter from James Iredell to Hannah Iredell (July 24, 1795), *in* 1 DHSC, *supra* note 2, at 771, 771. A similar prediction had been made in 1792, when it was thought—mistakenly, as it turned out—that Jay had been elected governor. See Letter from Benjamin Bourne to [William Channing] (Feb. 21, 1792), *in* 1 DHSC, *supra* note 2, at 733, 733 (“Mr. [Cushing] however bids fairest to take [Jay’s] place.”).

⁴⁶ Letter from William Bradford, Jr., to Samuel Bayard (June 4, 1795), *in* 1 DHSC, *supra* note 2, at 755, 755.

⁴⁷ Letter from Tench Coxe to Richard Henry Lee ([Apr. 11, 1792?]), *in* 1 DHSC, *supra* note 2, at 735, 735. Coxe was writing in the spring of 1792, when it was thought that Jay would be elected governor of New York that year.

proper”—the seniority principle would be unworkable.⁴⁸ And indeed, Bradford believed that those very circumstances obtained in June 1795: the choice of Jay’s successor would be “an embarrassing business,” given that “[t]he public voice seems already to have excluded Mr. C[ushing].”⁴⁹ At the time, Cushing was being treated for cancer of the lip and as a result had missed several days of the Court’s February session.⁵⁰ More generally, some thought the sixty-three-year-old Cushing had seen better days: “between ourselves,” wrote one observer of the Court’s February session, “Cushing is superannuated & contemptible.”⁵¹ And even if, considering his age and health, Cushing could be expected to decline the nomination, next in line behind him was the even more problematic James Wilson, whose financial troubles had only worsened.⁵²

Possibly because of the particular individuals who would be appointed, then, Washington did not initially follow the principle of seniority in replacing Jay, although he soon had reason to think better of the choice he made instead. On the same day that he received Jay’s resignation, June 30, 1795, Washington also received a letter from John Rutledge.⁵³ In an indication of the greater esteem accorded to the role of Chief Justice, Rutledge explained that, although he had resigned as Associate Justice after only five months to become chief justice of the South Carolina Court of Common Pleas, “when the Office of Chief-Justice, of the United States, becomes vacant, I feel that the Duty which I owe to my Children should impel me, to accept it, if of-

⁴⁸ Letter from William Bradford, Jr., to Samuel Bayard (June 4, 1795), *in* 1 DHSC, *supra* note 2, at 755, 755.

⁴⁹ *Id.*

⁵⁰ Letter from John Adams to Abigail Adams (Feb. 9, 1795), *in* 1 DHSC, *supra* note 2, at 752, 752; Letter from Jeremiah Smith to William Plumer (Feb. 7, 1795), *in* 1 DHSC, *supra* note 2, at 752, 752; *see also* Supreme Court Fine Minutes, Feb. 17-20, 1795, *in* 1 DHSC, *supra* note 2, at 169, 238-39 (reflecting Cushing’s absence).

⁵¹ Letter from Jeremiah Smith to William Plumer (Feb. 24, 1795), *in* 1 DHSC, *supra* note 2, at 753, 753; *see also* Letter from William Plumer to Jeremiah Smith (Feb. 19, 1796), *in* 1 DHSC, *supra* note 2, at 838, 838 (writing that Cushing “once possessed abilities, firmness & other qualities requisite for [Chief Justice]; but *time*, the enemy of man, has much impaired his mental faculties”).

⁵² William Plumer, a New Hampshire Federalist, may have had Wilson in mind when he bemoaned Cushing’s apparent elevation to Chief Justice: “I fear that the promotion . . . will form a precedent for making Chief Justices from the eldest Judge, tho’ other candidates may be much better qualified.” Letter from William Plumer to Jeremiah Smith (Feb. 19, 1796), *in* 1 DHSC, *supra* note 2, at 838, 838.

⁵³ Letter from George Washington to John Rutledge (July 1, 1795), *in* 1 DHSC, *supra* note 2, at 96, 96.

fer'd: tho' more arduous & troublesome than my present Station, because, more respectable & honorable."⁵⁴

Washington, knowing Rutledge well and anxious to install a new Chief Justice before the Court met again in August, immediately gave him a recess appointment; a permanent appointment would be subject to confirmation by the Senate when it came back into session in December.⁵⁵ But on July 16, 1795—probably before he had received word of his appointment—Rutledge delivered a fiery speech opposing the controversial treaty recently negotiated with England by former Chief Justice Jay. Word of Rutledge's speech reached the nation's capital, Philadelphia, in late July, along with rumors that in recent years Rutledge had exhibited signs of insanity, financial difficulties, and alcoholism.⁵⁶ Despite the ensuing indignant criticism of the appointment, Rutledge received his temporary commission and presided over the latter half of the Supreme Court's August Term.⁵⁷ But in December, the Senate rejected Rutledge's nomination by a vote of fourteen to ten.⁵⁸ While Rutledge almost certainly would also have been

⁵⁴ Letter from John Rutledge to George Washington (June 12, 1795), *in* 1 DHSC, *supra* note 2, at 94, 94.

⁵⁵ At least one observer, Thomas Jefferson, saw the appointment of Rutledge as "intended merely to establish a precedent against the descent of that office by seniority." Letter from Thomas Jefferson to James Monroe (Mar. 2, 1796), *in* 1 DHSC, *supra* note 2, at 841, 841.

⁵⁶ See Letter from William Bradford, Jr., to Alexander Hamilton (Aug. 4, 1795), *in* 1 DHSC, *supra* note 2, at 775, 775 ("The crazy speech of Mr. Rutledge joined to certain information that he is daily sinking into debility of mind & body will probably prevent him to receiving the appointment [of Chief Justice]."); Letter from Edmund Randolph to George Washington (July 25, 1795), *in* 1 DHSC, *supra* note 2, at 772, 772 (reporting rumors that Rutledge was "deranged"); Letter from Edmund Randolph to George Washington (Aug. 5, 1795), *in* 1 DHSC, *supra* note 2, at 776, 776 (noting that "reports of [Rutledge's] attachment to his bottle, his puerility, and extravagances, together with a variety of indecorums and imprudencies multiply daily"); see also *John Rutledge, Vindicated: "A South Carolinian" to Benjamin Russell*, COLUMBIAN CENTINEL, Aug. 28, 1795, *reprinted in* 1 DHSC, *supra* note 2, at 789, 791, 792 n.4 (describing Rutledge's financial problems).

⁵⁷ Rutledge received official notice of his commission too late for him to arrive for the first nine days of the Court's eighteen-day Term. See Supreme Court Fine Minutes, Aug. 4-12, 1795, *in* 1 DHSC, *supra* note 2, at 169, 244-47 & n.191 (reflecting Rutledge's absence).

⁵⁸ Rejection by Senate (Dec. 15, 1795), *reprinted in* 1 DHSC, *supra* note 2, at 98, 98-99. Rutledge resigned as Chief Justice in a letter dated December 28, 1795, apparently before he knew of the Senate's rejection. Letter from John Rutledge to George Washington (Dec. 28, 1795), *in* 1 DHSC, *supra* note 2, at 100, 100. Shortly before he wrote the letter, Rutledge had attempted to commit suicide—an indication that rumors of his mental instability had some basis. Letter from William Read to Jacob Read (Dec. 29, 1795), *in* 1 DHSC, *supra* note 2, at 820, 820-21.

rejected had he been nominated as Associate Justice, outrage may have been stronger because the nomination was for the higher post. “C[hief] Justices must not go to illegal Meetings and become popular orators in favour of Sedition,” John Adams wrote to his wife, Abigail, “nor inflame the popular discontents which are ill founded, nor [propagate] Disunion, Division, Contention and delusion among the People.”⁵⁹

2. Replacing Rutledge: A Flirtation With Seniority

Washington was now faced with another vacancy for Chief Justice, and, as before, a certain amount of time pressure, since the Court’s next sitting was less than two months away. Surely not wanting to risk another embarrassment, such as might occur if Wilson were to be nominated, Washington again initially attempted to avoid a resort to seniority. Perhaps for political reasons, he put feelers out to Patrick Henry, the great firebrand of the Revolution, to see if he might be interested in the job.⁶⁰

Henry, however, was dilatory in responding.⁶¹ By early January, with still no word, Washington, who had been waiting for Henry’s answer before also filling vacancies for Associate Justice and secretary of war, was clearly exasperated.⁶² The Supreme Court would be meeting

⁵⁹ Letter from John Adams to Abigail Adams (Dec. 17, 1795), *in* 1 DHSC, *supra* note 2, at 813, 813. While some have maintained that Rutledge’s rejection was due solely to political considerations rather than to rumors of his mental instability, it is difficult to separate the two strands of opposition. The very fact that he had delivered such a speech, after putting his name forward for the office of Chief Justice, raised doubts about his state of mind. *See, e.g.*, Letter from Edmund Randolph to George Washington (July 29, 1795), *in* 1 DHSC, *supra* note 2, at 773, 773 (“The conduct of the intended Chief Justice is so extraordinary, that Mr. Wolcott and Col. Pickering conceive it to be a proof of the imputation of insanity.”).

⁶⁰ One historian of the early Court has suggested that the appointment of Henry—who, though at that point loyal to the federal government, had been a fierce opponent of the Constitution during the ratification debates—might have mollified Anti-Federalists who were disgruntled about Rutledge’s rejection. James R. Perry, *Supreme Court Appointments, 1789-1801: Criteria, Presidential Style, and the Press of Events*, 6 J. EARLY REPUBLIC 371, 394 (1986).

⁶¹ Letter from Henry Lee to George Washington (Dec. 9, 1795), *in* 1 DHSC, *supra* note 2, at 811, 811; Letter from Henry Lee to Patrick Henry (Dec. 17, 1795), *in* 1 DHSC, *supra* note 2, at 814, 814; Letter from Henry Lee to George Washington (Dec. 26, 1795), *in* 1 DHSC, *supra* note 2, at 819, 819.

⁶² Letter from George Washington to Henry Lee (Jan. 11, 1796), *in* 1 DHSC, *supra* note 2, at 829, 829.

in a few weeks, with a number of important cases on its docket, and its membership was down to four, a bare quorum.⁶³

Perhaps out of desperation, Washington at last resorted to seniority: the aged and unwell William Cushing may not have been the perfect candidate for the job, but at least Washington knew that he would be in town for the Supreme Court's impending session. And, given the lingering expectations that seniority would play a role in the selection of the next Chief Justice, his nomination would not come as a complete surprise—except, perhaps, to Cushing himself. According to what may be an apocryphal story, the first indication Cushing had of his nomination and confirmation as Chief Justice—which took place on January 26 and 27, 1796, respectively⁶⁴—was at a dinner party hosted by Washington shortly before the start of the Supreme Court's February session. “The Chief Justice of the United States will please take the seat on my right,” Washington supposedly said to a startled Cushing.⁶⁵

Regardless of the exact circumstances, it is clear that Cushing had serious doubts about accepting the nomination from the moment he first heard about it.⁶⁶ On February 2—the first scheduled day of the Supreme Court's Term, and possibly the very day Cushing arrived in the capital⁶⁷—he drafted a letter to Washington explaining that he had chosen to remain an Associate Justice, rather than become Chief, because of his “infirm & declining state of health.”⁶⁸ This decision was

⁶³ *Id.* The Court would be hearing arguments in, among other cases, *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), which raised the sensitive issue of British debts. See 7 DHSC, *supra* note 2, at 203-07 (discussing the case and its importance).

⁶⁴ Nomination by George Washington (Jan. 26, 1796), in 1 DHSC, *supra* note 2, at 101, 101; Confirmation by Senate (Jan. 27, 1796), in 1 DHSC, *supra* note 2, at 101, 101.

⁶⁵ GEORGE VAN SANTVOORD, SKETCHES OF THE LIVES AND JUDICIAL SERVICES OF THE CHIEF-JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 245 n.* (1854).

⁶⁶ See Letter from John Adams to Abigail Adams (Feb. 2, 1796), in 1 DHSC, *supra* note 2, at 834, 834 (“Judge Cushing declines the Place of Chief Justice on Account of his Age and declining Health.”); Letter from John Adams to Abigail Adams (Feb. 6, 1796), in 1 DHSC, *supra* note 2, at 835, 835 (“Judge Cushing has been wavering, sometimes he would and sometimes he would not be C[hief] J[ustice].”).

⁶⁷ On February 2, only Justices William Paterson and James Wilson were present, and the Court adjourned for lack of a quorum. Cushing made his first appearance the following day. Supreme Court Fine Minutes, Feb. 2-3, 1796, in 1 DHSC, *supra* note 2, at 169, 255. If one discounts the possibly apocryphal story about Cushing's dinner with Washington shortly before the opening of the Court's Term, see *supra* text accompanying note 65, it would seem likely that Cushing did not arrive in town until February 2.

⁶⁸ Letter from William Cushing to George Washington (Feb. 2, 1796), in 1 DHSC, *supra* note 2, at 103, 103. Ironically, despite concerns about his age and health, Cushing outlived all of the other Washington appointees, remaining on the bench until his death in 1810 at the age of 78. 1 DHSC, *supra* note 2, at 26.

greeted with general relief. “Mr. Cushing has been appointed Chief Justice,” one former congressman wrote, “but discovered great wisdom in refusing it.”⁶⁹

One recent commentator, relying largely on the fact that the rough version of the Supreme Court minutes originally identified Cushing as “Chief Justice” on February 3 and 4, has argued that Cushing should be considered the nation’s third Chief Justice.⁷⁰ But the notation “Chief Justice” could easily have been an error on the clerk’s part: as the most senior Associate Justice, Cushing was presiding over the Court and thus may have *looked* like a Chief Justice. News of his appointment was probably widely known,⁷¹ while news of his decision to decline the appointment may not yet have been disseminated.⁷² Another possibility is that, despite having drafted a letter declining the appointment, Cushing was still undecided. In any case, by February 5, the Court’s rough minutes were back to identifying Cushing as an Associate Justice,⁷³ and Washington was yet again faced with a vacancy in the nation’s highest judicial office.

Not only that, but, having once resorted to the principle of seniority, he was now faced with the awkward presence of an expectant

⁶⁹ Letter from Elias Boudinot to Samuel Bayard (Feb. 18, 1796), *in* 1 DHSC, *supra* note 2, at 838, 838; *see also* Letter from Henry Sherburne to Benjamin Bourne (Feb. 23, 1796), *in* 1 DHSC, *supra* note 2, at 840, 840 (“It is generally thought that Neighbour Cushing gave a Clear proof of his Understanding when he refused the Chief Justice-ship.”). *But see* Letter from Abigail Adams to John Adams (Feb. 21, 1796), *in* 1 DHSC, *supra* note 2, at 839, 839 (“I am very sorry that Judge Cushing has refused his appointment.”); Letter from Samuel Johnston to James Iredell (Feb. 27, 1796), *in* 1 DHSC, *supra* note 2, at 840, 840 (“I am sorry that Mr. Cushing refused the office of Chief Justice . . .”). These expressions of regret at Cushing’s refusal seem to stem from fears that his replacement might be worse.

⁷⁰ *See generally* Ross E. Davies, *William Cushing: Chief Justice of the United States*, 37 U. TOLEDO L. REV. (forthcoming Spring 2006) (manuscript at 5-10), <http://www.law.utoledo.edu/lawreview/daviesrev.pdf>. Davies argues that Cushing should be presumed to have taken his oath of office as Chief Justice, despite the lack of any evidence that he did so.

⁷¹ An announcement of Cushing’s appointment as Chief Justice appeared in a Philadelphia newspaper, *Claypoole’s American Daily Advertiser*, on January 28, 1796. Letter from Jeremiah Smith to William Plumer (Jan. 29, 1796), *in* 1 DHSC, *supra* note 2, at 833, 833 n.1.

⁷² In an indication of how slowly news traveled in the 1790s, even within the nation’s capital, on February 7, 1796—two days after the Supreme Court minutes began unequivocally to record Cushing as “Associate Justice”—James Madison, then in Philadelphia, wrote to Thomas Jefferson that “it is said [Cushing] will decline” the appointment as Chief Justice. Letter from James Madison to Thomas Jefferson (Feb. 7, 1796), *in* 1 DHSC, *supra* note 2, at 835, 835.

⁷³ Supreme Court Original Minutes, Feb. 5, 1796, *in* 1 DHSC, *supra* note 2, at 333, 408.

James Wilson. Wilson's business difficulties would soon be reaching a state of crisis: later in 1796, he would be caught in a general financial collapse, and thereafter would be on a calamitous downward trajectory that included imprisonment for debt, neglect of his judicial duties, and an ignominious death in North Carolina while hiding out from his creditors.⁷⁴ Although, of course, his contemporaries could not have predicted all of this in February 1796, there was clearly some alarm about the prospect of a Wilson chief justiceship.

3. After Cushing: A Return to the Criteria of Ability—and Reliability

After Cushing declined to serve, some speculated that Washington might pass over Wilson to select one of the more junior Justices; William Paterson of New Jersey, well regarded as a jurist but the second most junior Justice, was mentioned. "Some say Wilson will have the offer & some say the President will leap over his head to [Paterson] which G[od] of his infinite mercy grant," wrote the Federalist Congressman Jeremiah Smith.⁷⁵ But others thought such a move would appear blatantly improper. Associate Justice James Iredell dismissed his friends' predictions that he himself would be appointed in Cushing's place, explaining that, among other reasons, "there could have been no propriety in passing by Judge Wilson to come at me."⁷⁶

⁷⁴ 3 DHSC, *supra* note 2, at 151-52, 238-39.

⁷⁵ Letter from Jeremiah Smith to William Plumer (Feb. 17, 1796), *in* 1 DHSC, *supra* note 2, at 837, 838; *see also* Letter from Uriah Tracy to Oliver Wolcott, Sr. (Feb. 10, 1796), *in* 1 DHSC, *supra* note 2, at 836, 836 (speculating that Paterson was being "thought of" as a nominee for Chief Justice). Paterson had drawn favorable commentary from the time of his appointment in 1793. *See* Letter from William Richardson Davie to James Iredell (June 12, 1793), *in* 2 DHSC, *supra* note 2, at 406, 406 (describing Paterson as having a "fine understanding" and "affable manner"); DUNLAP'S AM. DAILY ADVERTISER, June 15, 1793, *reprinted in* 2 DHSC, *supra* note 2, at 406, 406-07 (writing approvingly of Paterson's conduct in the federal circuit court for North Carolina); Letter from Jeremiah Smith to William Plumer (Feb. 24, 1795), *in* 1 DHSC, *supra* note 2, at 753, 753 ("The rest of the Court [besides Paterson] were like molehills beside the Alps. I speak the general sentiment.").

⁷⁶ Letter from James Iredell to Helen Tredwell (Mar. 25, 1796), *in* 1 DHSC, *supra* note 2, at 846, 846; *see also* Letter from Samuel Johnston to James Iredell (Feb. 27, 1796), *in* 1 DHSC, *supra* note 2, at 840, 840 ("I am sorry that Mr. Cushing refused the office of Chief Justice, as I don[']t know whether a less exceptionable character can be obtained without passing over Mr. W[ilson] which would perhaps be a measure which could not be easily reconciled to strict propriety . . .").

Washington faced a difficult dilemma,⁷⁷ exacerbated by the negative reaction that had greeted his recent appointment of Samuel Chase as an Associate Justice.⁷⁸ Nevertheless, he managed to find someone who not only happened to be in town,⁷⁹ but was also highly regarded: Oliver Ellsworth, a Connecticut senator who had played an important role in the Constitutional Convention and had been a judge on Connecticut's highest judicial court. Perhaps more important, Ellsworth was the principal architect of the Judiciary Act of 1789, the statute governing the federal courts, and his interpretation of it as a Justice would therefore carry considerable weight.⁸⁰ Moreover, Ellsworth was a reliable Federalist whom Washington knew personally and no doubt felt he could turn to for advice.⁸¹ On March 3, 1796, Washington sent Ellsworth's name to the Senate, where his nomination was confirmed the following day with only one dissenting vote.⁸²

Ellsworth's appointment was greeted enthusiastically. On March 5, Jeremiah Smith—the Federalist congressman who had previously been hoping for a Paterson appointment⁸³—wrote to a friend that “no appointment in the U.S. has been more wise or judicious than this.”⁸⁴

⁷⁷ See Letter from John Adams to Abigail Adams (Feb. 6, 1796), in 1 DHSC, *supra* note 2, at 835, 835 (surmising that Cushing's wavering “will give the P[resident] some trouble”); Letter from Elias Boudinot to Samuel Bayard (Feb. 18, 1796), in 1 DHSC, *supra* note 2, at 838, 838 (writing that it was not known whom the President contemplated for the office of Chief Justice).

⁷⁸ See, e.g., Letter from John Adams to Abigail Adams (Mar. 5, 1796), in 1 DHSC, *supra* note 2, at 842, 842 (“The Nomination of Mr. Chase had given occasion to uncharitable Reflections . . .”). Washington had nominated Chase as Associate Justice on January 26, the same day he nominated Cushing as Chief Justice. The Senate confirmed the nomination the following day. Confirmation by Senate (Jan. 27, 1796), in 1 DHSC, *supra* note 2, at 101, 101.

⁷⁹ The Supreme Court's session was still ongoing, and would continue until March 14, making it the longest session the Court had yet had. Supreme Court Fine Minutes, in 1 DHSC, *supra* note 2, at 169, 272 n.217.

⁸⁰ See William R. Casto, *Oliver Ellsworth: “I Have Sought the Felicity and Glory of Your Administration,”* in SERIATIM, *supra* note 2, at 292, 297-300 (summarizing Ellsworth's career prior to his appointment as Chief Justice).

⁸¹ See *id.* at 292 (“As a senator and then as chief justice, he consciously sought to support the Federalist administrations of George Washington and John Adams.”). Ellsworth had been deputized by some of his fellow senators to suggest to Washington that he appoint a special envoy to Britain in 1794—an envoy that turned out to be Chief Justice Jay. *Id.* at 301. And, almost immediately after his confirmation as Chief Justice, Ellsworth provided the administration with an opinion on the implementation of the Jay Treaty. See *infra* text accompanying note 128.

⁸² Confirmation by Senate (Mar. 4, 1796), in 1 DHSC, *supra* note 2, at 120, 120-21.

⁸³ See *supra* text accompanying note 75.

⁸⁴ Letter from Jeremiah Smith to William Plumer (Mar. 5, 1796), in 1 DHSC, *supra* note 2, at 843, 843; see also Letter from Jonathan Trumbull to John Trumbull (Mar. 4,

Vice President John Adams, in expressing his approval of Ellsworth, seemed relieved that the President had not adhered to the principle of seniority: “Mr. Wilson[']s ardent Speculations had given offence to some, and his too frequent affectation of Popularity to others.”⁸⁵ As for Wilson himself, his friend and colleague James Iredell believed—mistakenly, as it turned out—that he would resign from the Court as a result of the snub.⁸⁶

4. Adams and the Seniority Principle

One might think that Washington’s selection of Ellsworth over Wilson had put to rest the idea that a vacancy in the position of Chief Justice would be filled according to seniority. But when Ellsworth resigned in 1800, for reasons of ill health, John Adams—who had now succeeded Washington as President—revealed that he was not quite ready to abandon the seniority principle entirely.

Adams’s first impulse was to turn once more to John Jay, who had recently declined renomination to a third term as governor of New York.⁸⁷ Many found the nomination surprising, since Jay had recently announced his intention to retire from public life on account of age and ill health.⁸⁸ Some of Adams’s detractors derided the nomination as a joke: Timothy Pickering expressed regret “that the P[resident] will so often *sport in serious things*.”⁸⁹ Others, including Thomas Jeffer-

1796), in 1 DHSC, *supra* note 2, at 842, 842 (postulating that Ellsworth will be “a great Loss . . . to the Senate . . . but a valuable acquisition to the Court”); Letter from John Adams to Abigail Adams (Mar. 5, 1796), in 1 DHSC, *supra* note 2, at 842, 842 (“It will give a Stability to the Government . . . to place a Man of his Courage Constancy fortitude and Capacity in that situation.”); Letter from Joshua Coit to Elias Perkins (Mar. 5, 1796), in 1 DHSC, *supra* note 2, at 843, 843 (“I think it will give you pleasure to be informed that Mr. Ellsworth is C[hief] Justice of the U.S.”); Letter from Oliver Wolcott, Sr., to Jonathan Trumbull (Mar. 14, 1796), in 1 DHSC, *supra* note 2, at 845, 846 (“[I]f our country shall be preserved from anarchy and confusion, it must be by men of [Ellsworth’s] Character.”).

⁸⁵ Letter from John Adams to Abigail Adams (Mar. 5, 1796), in 1 DHSC, *supra* note 2, at 842, 842.

⁸⁶ See Letter from James Iredell to Hannah Iredell (Mar. 3-4, 1796), in 1 DHSC, *supra* note 2, at 841, 841-42 (“I think it not unlikely that Wilson will resign.” (emphasis omitted)).

⁸⁷ 1 DHSC, *supra* note 2, at 7.

⁸⁸ See, e.g., Letter from Timothy Pickering to Rufus King (Jan. 5, 1801), in 1 DHSC, *supra* note 2, at 913, 913. Jay was fifty-five. In fact, Jay lived on for another twenty-eight years, which he spent in retirement on his estate in Bedford, New York. 1 DHSC, *supra* note 2, at 7.

⁸⁹ Letter from Timothy Pickering to Oliver Wolcott, Jr. (Jan. 3, 1801), in 1 DHSC, *supra* note 2, at 912, 912; see also Letter from James McHenry to Oliver Wolcott, Jr.

son, suspected that Jay's appointment was part of a Federalist plot to prevent the election of either Jefferson or Aaron Burr as President and instead put the government in the hands of the Chief Justice.⁹⁰ Jay declined the position, citing the failure of Congress to eliminate the Justices' burdensome circuit-riding duties.⁹¹ Adams was doubtless aware that Congress was about to pass a judiciary bill that would address that very problem,⁹² but he failed to mention the bill in his letter offering the chief justiceship to Jay.⁹³

In any event, virtually no one—including, apparently, Adams himself—seriously expected Jay to accept the nomination.⁹⁴ Even before

(Jan. 22, 1801), *in* 1 DHSC, *supra* note 2, at 919, 919 (stating that Jay's nomination "excited the idea, that Mr. Adams considered" declarations of retirement such as Jay's "were always made without sincerity, and meant to be disregarded"); Letter from Oliver Wolcott, Jr., to Timothy Pickering (Dec. 28, 1800), *in* 1 DHSC, *supra* note 2, at 911, 911 ("The nomination is here considered as having been made in one of those 'sportive' humours for which [Adams] is distinguished.")

⁹⁰ See AURORA (Phila.), Feb. 3, 1801, *reprinted in* 1 DHSC, *supra* note 2, at 926, 926 (mentioning a Federalist plot to overturn the election of the President); Letter from Thomas Jefferson to James Madison (Dec. 26, 1800), *in* 1 DHSC, *supra* note 2, at 908, 908 ("[T]he Feds appear determined to prevent an election . . ."); Letter from Richard D. Spaight to John G. Blount (Jan. 13, 1801), *in* 1 DHSC, *supra* note 2, at 915, 915 ("[I]t is [the Federalists'] wish if they Can to prevent either [Jefferson or Burr] from being President, & to provide by law . . . the Chief-Justice shall administer the Government . . ."); see also Thomas Rodney Diary Entry (Jan. 26, 1801), *in* 1 DHSC, *supra* note 2, at 922, 922 ("Adams probably made this appointment to affront the Democrats."). The presidential election of 1800, in which the two presidential candidates were Adams and Jefferson, unexpectedly ended in a tie in the electoral college between Jefferson and Aaron Burr. The tie threw the election into the House of Representatives. See generally ELKINS & MCKITRICK, *supra* note 36, at 746-50 (describing the events ultimately leading to a tiebreak in favor of Jefferson).

⁹¹ Letter from John Jay to John Adams (Jan. 2, 1801), *in* 1 DHSC, *supra* note 2, at 146, 146-47. The Judiciary Act of 1789 had created circuit courts but no circuit judges. Instead, circuit courts were to be held by the local district judge and one or two traveling Supreme Court Justices. See *infra* text accompanying notes 179-80. Although Jay's letter declining the nomination has been read as a general condemnation of the early Court as a weak institution, a careful reading of it in the context of the 1790s indicates that what Jay was condemning was not the Court itself but the failure of Congress to reform the circuit-riding system.

⁹² See *infra* note 181.

⁹³ Letter from John Adams to John Jay (Dec. 19, 1800), *in* 1 DHSC, *supra* note 2, at 145, 145-46.

⁹⁴ See Letter from John Adams to Thomas B. Adams (Dec. 23, 1800), *in* 1 DHSC, *supra* note 2, at 906, 906-07 ("I have appointed Mr. Jay Chief Justice. He may refuse."); Letter from Abigail Adams to Thomas B. Adams (Dec. 25, 1800), *in* 1 DHSC, *supra* note 2, at 907, 907 ("[I]f [Jay] refuses as I fear he will, [Mr.] Cushing will be offered it . . ."); Letter from Timothy Pickering to Rufus King (Jan. 5, 1801), *in* 1 DHSC, *supra* note 2, at 913, 913 ("The P[resident] as well as every body else must know that Mr. Jay will not accept the office."); Letter from Robert Troup to Rufus King (Dec. 31, 1800), *in* 1 DHSC, *supra* note 2, at 912, 912 ("[N]o one believes [Jay] will accept the

he received Jay's letter declining to serve, Adams had declared that he would probably "follow the Line of Judges"—in other words, fill the position according to seniority—if Jay refused.⁹⁵ Presumably Adams meant he would first make an offer to Cushing, who—now even more aged than he had been in 1796—seemed no more likely to accept the post than Jay.⁹⁶

One reason that seniority may have seemed a more attractive principle in 1800 than it had in 1796 was that James Wilson—who had died in 1798—was no longer next in line behind Cushing. Instead, there was William Paterson, whose reputation was unblemished and whose judicial abilities were still admired by many.⁹⁷ The ultimate appointment of Paterson as Chief Justice was widely viewed with satisfaction as nearly a foregone conclusion, and the speculation was about who would replace *him* as Associate Justice.⁹⁸ And yet, to the aston-

appointment.”); Letter from Oliver Wolcott, Jr., to Alexander Hamilton (Dec. 25, 1800), *in* 1 DHSC, *supra* note 2, at 908, 908 (“[T]he President has sported a nomination of Mr. Jay, who will n[ot] accept the appointment.”); Letter from Oliver Wolcott, Jr., to Timothy Pickering (Dec. 28, 1800), *in* 1 DHSC, *supra* note 2, at 911, 911 (“[W]e might suppose it impossible, that Mr. Jay should resume a station more arduous, than that which he has declined on account of advanced age.”). As with Cushing, Jay’s nomination had been sent to the Senate and confirmed before he was apprised of it. Confirmation by Senate (Dec. 19, 1800), *in* 1 DHSC, *supra* note 2, at 144, 144.

⁹⁵ Letter from John Adams to Thomas B. Adams (Dec. 23, 1800), *in* 1 DHSC, *supra* note 2, at 906, 906. Adams was already thinking about whom he would nominate to replace the Associate Justice who would ascend to the chief justiceship. *Id.*

⁹⁶ See Letter from Abigail Adams to Thomas B. Adams (Dec. 25, 1800), *in* 1 DHSC, *supra* note 2, at 907, 907 (expressing her belief that if Jay refused the chief justiceship, “[Mr.] Cushing will be offered it”). Years later, John Marshall wrote that Adams never had any intention of offering the chief justiceship to Cushing. See Letter from John Marshall to Joseph Story (1827), *in* 1 DHSC, *supra* note 2, at 928, 928 (indicating that Marshall was Adams’s choice after Jay). However, Marshall’s recollection appears less trustworthy than the contemporaneous writings of Adams himself and of his wife.

⁹⁷ See Letter from Edward Rutledge to Henry Middleton Rutledge (Nov. 1, 1796), *in* 3 DHSC, *supra* note 2, at 139, 139 (writing that Paterson “is a good Lawyer, & possesses sound Judgment”); Letter from Robert Troup to Rufus King (Sept. 2, 1799), *in* 3 DHSC, *supra* note 2, at 383, 383 (“Paterson is the most popular & respected of all the supreme Court Judges.”); see also *supra* note 75.

⁹⁸ See Letter from Abigail Adams to Thomas B. Adams (Dec. 25, 1800), *in* 1 DHSC, *supra* note 2, at 907, 907 (“[I]f [Cushing] declines, then [Mr. Paterson] will be appointed.”); Letter from Samuel A. Otis to John Adams (Jan. 13, 1801), *in* 1 DHSC, *supra* note 2, at 914-15 (suggesting replacements for Paterson as Associate Justice); Letter from Timothy Pickering to Rufus King (Jan. 5, 1801), *in* 1 DHSC, *supra* note 2, at 913, 913 (“As Mr. Jay will certainly refuse the Chief-Justiceship, I presume Judge [Paterson] will be appointed: and his vacancy, I am disposed to think, will be filled either from N[ew] York or Pennsylvania”); Letter from Samuel Sewall to Theodore Sedgwick (Dec. 29, 1800), *in* 1 DHSC, *supra* note 2, at 911, 911 (“I am pleased at the prospect of Mr. [Paterson] succeeding to the place of Chief Justice”).

ishment of some observers, on January 20, 1801, Adams nominated his secretary of state, John Marshall, to the vacant office of Chief Justice.⁹⁹ What happened?

Most likely, Adams turned to Marshall under the combined pressure of politics and time. On January 19—the day that Adams offered the chief justiceship to Marshall¹⁰⁰—he was notified by Secretary of the Navy Benjamin Stoddert that the House was about to pass what became the Judiciary Act of 1801.¹⁰¹ Among other things, this statute would reduce the number of Supreme Court Justices from six to five from the time of the next vacancy.¹⁰² If Adams elevated one of the existing Associate Justices to Chief Justice, he would create a vacancy which he might well not have time to fill before the Act took effect, and the Court would remain at five members. But if he chose someone from outside the Court, he would leave a six-member Federalist-appointed Court intact when his administration came to an end in two months, and his successor—his political rival Thomas Jefferson—would have to wait for two resignations before he could fill a vacancy with an appointee of his own. Given the delicacy of the situation, Stoddert advised that “there might be more difficulty in appointing a chief Justice without taking him from the present Judges, after the passage of this bill even by one Branch of the Legislature, than before.”¹⁰³ Since the bill was expected to pass in the House the next day, time was of the essence.¹⁰⁴

⁹⁹ Nomination by John Adams (Jan. 20, 1801), *in* 1 DHSC, *supra* note 2, at 152, 152; *see also* Letter from Jonathan Dayton to William Paterson (Jan. 20, 1801), *in* 1 DHSC, *supra* note 2, at 918, 918 (expressing “grief, astonishment & almost indignation” that Marshall had been nominated instead of Paterson); Letter from James McHenry to Oliver Wolcott, Jr. (Jan. 22, 1801), *in* 1 DHSC, *supra* note 2, at 919, 920 (“Here [in Baltimore] it was expected, by every body, that [Adams] would have named Mr. [Paterson] to the vacant seat on the bench . . .”).

¹⁰⁰ Marshall recalled that Adams offered him the chief justiceship the day before he sent Marshall’s name to the Senate. Letter from John Marshall to Joseph Story (1827), *in* 1 DHSC, *supra* note 2, at 928, 928. Since Adams sent the nomination to the Senate on January 20, the conversation would have taken place on January 19.

¹⁰¹ Letter from Benjamin Stoddert to John Adams (Jan. 19, 1801), *in* 1 DHSC, *supra* note 2, at 917, 917.

¹⁰² 4 DHSC, *supra* note 2, at 284, 291.

¹⁰³ Letter from Benjamin Stoddert to John Adams (Jan. 19, 1801), *in* 1 DHSC, *supra* note 2, at 917, 917.

¹⁰⁴ Marshall himself had a slightly different recollection of the events surrounding his nomination. *See* Letter from John Marshall to Joseph Story (1827), *in* 1 DHSC, *supra* note 2, at 928, 928 (recalling that his name came up while he discussed potential nominees with Adams). But at least one historian has cast doubt on his account. *See* Perry, *supra* note 60, at 405-07 (suggesting that Marshall incorrectly recalled the events).

While Marshall was highly respected and seen as well qualified to be an Associate Justice,¹⁰⁵ supporters of Paterson were shocked and dismayed at what they saw as an inexplicable snub. Jonathan Dayton, a senator from New Jersey—Paterson’s home state—saw Adams’s failure to nominate Paterson as one more manifestation of his general “debility or derangement of intellect.”¹⁰⁶ What most disturbed Paterson’s supporters, Dayton said, was the fear that Paterson would resign from the Court as a result of “the injury done to” him; Dayton was greatly relieved to receive a letter from Paterson in which he lightly brushed off the possibility that he would have accepted the chief justiceship, had it been offered to him, and graciously praised Marshall as a “man of genius.”¹⁰⁷

Thus, in choosing the nation’s first Chief Justices, legal ability, experience, and seniority were important, but not primary, factors. They could be trumped by considerations of character, trustworthiness, and political expediency. Had James Wilson been less reckless in conducting his financial affairs, he might well have been the nation’s first Chief Justice—or at least its second or third. And, in filling the vacancy for Chief Justice in 1801, President Adams might well have abided by his original intention to follow “the Line of Judges,” instead

In 1827, Marshall recalled that some suspected that Adams refused to appoint Paterson as Chief Justice because of Paterson’s association with Adams’s political enemy, Alexander Hamilton. But Marshall himself seemed to discount that theory. *See* Letter from John Marshall to Joseph Story (1827), *in* 1 DHSC, *supra* note 2, at 928, 928 (“I never heard him assign any other objection to Judge Paterson . . .”). In 1803, the Philadelphia newspaper *Aurora* alleged that Paterson was not appointed Chief Justice because a circuit court opinion he had written in 1795 had earned him the enmity of “all New England.” *Id.* at 929 n.2 (referring to *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795)). There is, however, no evidence to support this theory.

¹⁰⁵ Adams had in fact offered Marshall the position of Associate Justice in 1798, when the death of James Wilson created a vacancy. Marshall turned down the offer, and the seat went instead to Bushrod Washington. 1 DHSC, *supra* note 2, at 125-26.

¹⁰⁶ Letter from Jonathan Dayton to William Paterson (Jan. 20, 1801), *in* 1 DHSC, *supra* note 2, at 918, 918; *see also* Letter from Jonathan Dayton to William Paterson (Jan. 28, 1801), *in* 1 DHSC, *supra* note 2, at 923, 923 (calling Adams a “wild freak of a man”).

¹⁰⁷ Letter from William Paterson to Jonathan Dayton (Jan. 25, 1801), *in* 1 DHSC, *supra* note 2, at 920, 920; *see also* Letter from Jonathan Dayton to William Paterson (Feb. 1, 1801), *in* 1 DHSC, *supra* note 2, at 924, 924 (expressing relief that Paterson would remain on the Court). Paterson said he was surprised by Marshall’s nomination only because it was the first time the Court would have two Justices from the same state—Marshall and Bushrod Washington, who had replaced James Wilson, were both from Virginia. This is an indication that the jealousies of the individual states were becoming less of a factor in presidential appointments.

of turning to John Marshall, if the progress of the judiciary bill had not made a nomination from within the Court politically unwise.

III. THE EXTRAJUDICIAL ROLE OF THE CHIEF JUSTICE

The Chief Justices of the 1790s engaged in a number of extrajudicial activities that, to the modern eye, appear incompatible with their roles as the nation's chief magistrates. As always, however, these activities must be viewed in the context of their times, when governmental manpower was in short supply and the principles of separation of powers were still evolving. Moreover, as one commentator has observed, the early Court "faced a President and Congress anxious to adopt a basic assumption of the English constitution, the assumption that judges were obligated to serve the nation extrajudicially in various ex officio capacities in which their judicial skills would be of use."¹⁰⁸ What is remarkable, therefore, is not that the Justices of the 1790s sometimes complied with this expectation, but rather that they sometimes did not.

A. *Extrajudicial Duties Imposed by Statute*

As noted above, in eighteenth-century England and in colonial and early state governments in America, lines between judicial and nonjudicial functions were often blurred. And despite the new emphasis on separation of powers, this casual attitude towards extrajudicial service carried over to some extent under the Constitution.¹⁰⁹ While the Constitution prohibited members of Congress from holding multiple offices, for example, no such explicit bar applied to judges.¹¹⁰ Thus John Jay was able to serve simultaneously as Chief Justice *and* secretary of state for several months in 1789 and 1790, while awaiting Thomas Jefferson's arrival to take up the latter post.¹¹¹ As Jay himself said, in a letter he drafted to George Washington on behalf of the Court, there was an accepted distinction between a court and its

¹⁰⁸ Wheeler, *Extrajudicial Activities*, *supra* note 1, at 123-24.

¹⁰⁹ See *supra* text accompanying notes 15-17.

¹¹⁰ See U.S. CONST. art. 1, § 6 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."); JAY, *supra* note 2, at 74-75.

¹¹¹ 1 DHSC, *supra* note 2, at 6. Jefferson had been in Paris as minister to France until October 1789. He arrived home at Monticello in December, but did not arrive in New York to take up his post as secretary of state until March 22, 1790. See 10 DICTIONARY OF AMERICAN BIOGRAPHY 17, 23 (Dumas Malone ed., 1936) (giving Thomas Jefferson's biography).

judges, “and [we] are far from thinking it illegal or unconstitutional, however it may be inexpedient to employ them for other Purposes, provided the latter Purposes be consistent and compatible with the former.”¹¹²

A number of federal statutes enacted in the 1790s imposed administrative duties on federal judges, marshals, and clerks—only some of which could be characterized as judicial.¹¹³ Among these were two that imposed duties specifically on the Chief Justice. A 1790 act appointed the Chief Justice—along with the Vice President and three cabinet members—to the board of the Sinking Fund Commission, which was charged with using surplus revenues to liquidate the nation’s outstanding debts.¹¹⁴ Two years later, the statute establishing the United States Mint included a provision appointing the Chief Justice to a board charged with ensuring that coins had the proper content of gold or silver.¹¹⁵ In both instances, there was British precedent for service of a high judicial officer on a similar body. And the presence of the Chief Justice on the Sinking Fund Commission and the board of the Mint, it was thought, would ensure public confidence in their operation while allowing both bodies to benefit from the Chief Justice’s presumed legal expertise.¹¹⁶

These appointments provoked no negative comment, and both Jay and Ellsworth fulfilled their statutory duties without protest.¹¹⁷ But when a conflict arose between Jay’s judicial responsibilities and his service on the Sinking Fund Commission, he felt the need to set priorities: on March 21, 1792, Vice President John Adams—also a member of the Sinking Fund Commission, which was meeting in Philadelphia—wrote to Jay, who was at home in New York, to say that Jay’s presence was required to break a deadlock on a point of statutory in-

¹¹² Letter from Justices of the Supreme Court to George Washington (Sept. 13, 1790), *in* 2 DHSC, *supra* note 2, at 89, 90. The letter was written to protest the imposition of circuit-riding duties on the Justices. Jay’s point was that, while some extrajudicial duties might be imposed on the Justices, they could not simultaneously serve as judges on inferior courts.

¹¹³ See generally 4 DHSC, *supra* note 2, app. A at 723-29 (discussing the administrative duties of the judges).

¹¹⁴ Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186; CASTO, *supra* note 2, at 174.

¹¹⁵ Act of Apr. 2, 1792, ch. 16, § 18, 1 Stat. 246, 250; CASTO, *supra* note 2, at 174.

¹¹⁶ Wheeler, *Extrajudicial Activities*, *supra* note 1, at 139-41; JAY, *supra* note 2, at 92-93.

¹¹⁷ Wheeler, *Extrajudicial Activities*, *supra* note 1, at 142; JAY, *supra* note 2, at 92.

terpretation.¹¹⁸ Jay wrote back that he could not attend because of the impending opening of the circuit court in New York: he viewed his judicial duty “as being in point of legal Obligation *primary*, and to attend the Trustees as *secondary*.” He added, however, that he could conceive “that the Order would be sometimes inverted, if only the Importance of the occasion was considered.” Since the question at issue was “a [mere] law Question,” Jay sent a written opinion, which the commissioners accepted.¹¹⁹ Jay’s invocation of his judicial duty established a precedent that may have led to infrequent attendance by the Chief Justice at subsequent meetings of the Sinking Fund Commission.¹²⁰

¹¹⁸ Letter from John Adams to John Jay (Mar. 21, 1792), in 11 THE PAPERS OF ALEXANDER HAMILTON 159, 159-60 (Harold C. Syrett ed., 1966) [hereinafter HAMILTON PAPERS].

¹¹⁹ Letter from John Jay to Alexander Hamilton (Mar. 23, 1792), in HAMILTON PAPERS, *supra* note 118, at 172, 172-73; Meeting of the Commissioners of the Sinking Fund (Mar. 26, 1792), in HAMILTON PAPERS, *supra* note 118, at 193, 193-94. In declining to attend the meeting, Jay cited hazardous road conditions that might prevent his return to New York in time to attend Court. Letter from John Jay to John Adams (Mar. 23, 1792), *cited in* Wheeler, *Extrajudicial Activities*, *supra* note 1, at 142 n.91. In fact, it seems possible that Jay could have attended the meeting in Philadelphia in late March and returned in time to open the New York circuit court on April 5—Adams’s letter from Philadelphia had taken only two days to reach Jay in New York. Moreover, the court still could have been held in Jay’s absence, because a quorum would have been present. *See* Circuit Court for the District of New York, in 2 DHSC, *supra* note 2, at 253, 253 (recording the presence of three judges, including Jay, at New York circuit court in April 1792); Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74-75 (deeming the presence of two judges sufficient to constitute a quorum).

¹²⁰ *See* Wheeler, *Extrajudicial Activities*, *supra* note 1, at 143-44 (indicating that later Chief Justices may have attended meetings irregularly). Another statute, which imposed duties not just on the Chief Justice but on the Justices as a group, encountered some objections. The Invalid Pensions Act of 1792, ch. 10, § 2, 1 Stat. 243, 244, required the judges of circuit courts—which included Supreme Court Justices riding circuit—to make an initial determination on the pension applications of Revolutionary War veterans. That determination would then be subject to review by the secretary of war and Congress. *Id.* § 4. All of the Justices and judges who considered the statute found constitutional difficulties with it, although some—including Jay, while at the very circuit court that conflicted with the meeting of the Sinking Fund Commission—avoided the constitutional difficulty by construing the statute to appoint them as commissioners. Extract from the Minutes of the United States Circuit Court for the District of New York (Apr. 5, 1792), in 6 DHSC, *supra* note 2, at 370, 370-72. These judges were willing to entertain pension applications, in their capacity as commissioners, after the court had adjourned for the day. Thus, the imposition of duties that were straightforwardly extrajudicial—such as the Chief Justice’s service on the Sinking Fund Commission—posed no problem. It was only when duties were imposed on judges *as judges*, and did not conform to the requirements of the Constitution, that difficulties arose. *Id.*; Maeva Marcus & Robert Teir, *Hayburn’s Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527, 530.

B. *Advisory Opinions*

The idea that the Chief Justice would have a formal role as adviser to the President was proposed at the Constitutional Convention in a number of different forms.¹²¹ These proposals reflected British custom, although opposition to them may also have stemmed from that very model: Lord Mansfield, chief justice of the King's Bench, was notorious on this side of the Atlantic for his advice to George III that the colonists should be dealt with harshly, and was generally perceived as a pernicious and shadowy influence on the Crown.¹²² While none of the proposals for a formal advisory role for the Chief Justice were adopted, the Constitution as ratified contained no explicit prohibition against executive requests for advice from the Chief Justice—or from the Court as a whole, for that matter.¹²³ And, especially in the early months of his administration, President Washington routinely turned to Chief Justice Jay for advice.

Until the fall of 1790, when the capital moved from Jay's hometown of New York to Philadelphia, Jay functioned essentially as a cabinet official who was valued as much for his expertise in foreign policy as in law.¹²⁴ In the summer of 1790, for example, Washington anticipated an imminent foreign policy crisis: Spain had captured some British ships on Nootka Sound in the Pacific Northwest, and Washington feared that Britain would use the incident as an excuse to increase its military presence on the American continent. He sought advice from Jay, who unhesitatingly responded with a written opinion that blended considerations of international law and diplomacy.¹²⁵

¹²¹ JAY, *supra* note 2, at 65-74; Wheeler, *Extrajudicial Activities*, *supra* note 1, at 127-30. One of these proposals, which would have established an "advisory council to the President consisting of the President of the Senate, the Chief Justice, and the ministers in charge of the various executive departments," was originally proposed by the future Chief Justice Oliver Ellsworth. JAY, *supra* note 2, at 71-72.

¹²² JAY, *supra* note 2, at 34-42, 71, 150.

¹²³ Stewart Jay suggests that the rejection of proposals for advisory councils that included the Chief Justice indicates only that the Framers thought it inappropriate to *require* the judges to respond to presidential requests for advice. *Id.* at 73; *see also* Wheeler, *Extrajudicial Activities*, *supra* note 1, at 129-30 (stating that the Convention's rejection of a Council of Revision did not indicate that judges' roles should be limited to deciding cases and controversies).

¹²⁴ *See* JAY, *supra* note 2, at 94-99 (pointing out that, while much of Jay's involvement in foreign policy decisions at the beginning of the Washington administration could be attributed to his position as interim secretary of state, that involvement did not end when Jefferson arrived to take up the position in March 1790); Wheeler, *Extrajudicial Activities*, *supra* note 1, at 145-47.

¹²⁵ CASTO, *supra* note 2, at 71-72; JAY, *supra* note 2, at 95-96.

While Jay's role as an adviser later diminished because he was no longer living at the seat of government—and because his circuit-riding duties kept him on the road much of the time—he continued to supply advice when asked.¹²⁶ In April 1793, the President and his Cabinet viewed the spreading European war with alarm: a plan of action to ensure American neutrality needed to be drafted immediately. At the request of Alexander Hamilton, Secretary of the Treasury, Jay sent from New York a draft of a neutrality proclamation and advice on how to receive the new French ambassador.¹²⁷

Chief Justice Ellsworth also responded to requests for his opinions on various issues from the executive branch. Only a few days after he became Chief Justice, he wrote a nine-page advisory opinion on legislative issues surrounding the appropriation of funds to implement the Jay Treaty, recently negotiated by his predecessor in office. Although the opinion is in the form of a letter addressed to a Connecticut Senator, the document was preserved in Washington's own files—raising the possibility that it was written in response to an indirect presidential request.¹²⁸ In 1798, after the infamous Sedition Act had been passed by Congress, Ellsworth advised Secretary of State Timothy Pickering—the cabinet officer who, at the time, was responsible for supervising the various United States attorneys—that the Act was constitutional.¹²⁹ And the following year, Ellsworth, having heard that Federalist senators were planning to reject the man President Adams had nominated as special envoy to France, took it upon himself to suggest to Adams that he appoint three envoys instead. Adams not only agreed, but also appointed Ellsworth as one of the three.¹³⁰

Neither Jay nor Ellsworth showed any compunction about giving advice, individually, on issues that might come before them on the bench.¹³¹ Jay, in his draft neutrality proclamation, suggested that of-

¹²⁶ JAY, *supra* note 2, at 98-99.

¹²⁷ CASTO, *supra* note 2, at 74-75; JAY, *supra* note 2, at 117-20. The neutrality proclamation issued by Washington on April 22 was drafted by Attorney General Edmund Randolph. Although the two documents bear some similarities, it is not known whether Randolph saw Jay's draft.

¹²⁸ CASTO, *supra* note 2, at 97-98.

¹²⁹ *Id.* at 148-49.

¹³⁰ *Id.* at 118-19; *infra* text accompanying note 141.

¹³¹ A different attitude prevailed when advice was requested from the Court as a whole. In 1793, the Washington administration approached the Justices collectively for an extensive advisory opinion concerning the activities of French privateers in this country and their implications for American neutrality, and the Justices refused to give one. Although this refusal has historically been characterized as a definitive statement of principle against advisory opinions, Stewart Jay has argued for a more narrow inter-

fenders against neutrality be prosecuted, despite the fact that he himself might be presiding over such prosecutions.¹³² Similarly, Ellsworth advised Pickering about the constitutionality of the Sedition Act in full knowledge that cases involving that very question might come before him.¹³³

C. *Chief Justices Abroad*

The extrajudicial activity that was viewed with the most suspicion by contemporaries—and which had the greatest effect on the Court as an institution—was the service of both Chief Justices Jay and Ellsworth as presidential foreign envoys. But, while opposition to these appointments was based partly on constitutional principle—or, at least, on conceptions of good government—the ebb and flow of objection indicates that it stemmed primarily from pragmatic or political considerations.

In April 1794, Washington appointed Jay envoy extraordinary to the Court of His Britannic Majesty. Relations between Britain and the United States had deteriorated dangerously: each country accused the other of obstructing important provisions of the 1783 Treaty of Paris, and the British had recently begun seizing American ships trading with France and the French West Indies.¹³⁴ Washington's appointment of Jay as the person to resolve the dispute made a certain sense: not only did he have extensive diplomatic experience, he had been one of the negotiators of the Treaty of Paris. On the other hand, the mission to England would take him away from his judicial duties—both on the Supreme Court and on circuit—for over a year.

While much of the opposition to Jay's appointment arose from the suspicion that he was too favorably inclined towards the British,¹³⁵ some of it clearly rested on antipathy towards dual office-holding. Aaron Burr—then a senator from New York—introduced a motion in the Senate objecting to Jay's nomination on grounds of both policy

pretation. *See generally* JAY, *supra* note 2. In any event, it is clear that individual Justices, and particularly the Chief Justice, continued to give advice to the executive after the 1793 incident.

¹³² CASTO, *supra* note 2, at 74-75. Indeed, three months after Washington issued a neutrality proclamation, the United States prosecuted an American citizen, Gideon Henfield, for violating it by serving aboard a French-commissioned privateer. *See id.* at 130-35.

¹³³ *Id.* at 148-49.

¹³⁴ 2 DHSC, *supra* note 2, at 436.

¹³⁵ CASTO, *supra* note 2, at 89.

and constitutionality. To allow Supreme Court Justices simultaneously to hold other positions “emanating” from the executive branch would be “contrary to the spirit of the Constitution, and, as tending to expose them to the influence of the Executive, . . . mischievous and impolitic.”¹³⁶ And a correspondent writing in a Philadelphia newspaper found Jay’s nomination as envoy impossible to reconcile with “those principles which seem necessary in a republican government.” The principle of separation of powers would be violated and the Constitution would “become a dead letter,” the correspondent argued, if the Chief Justice were to decide cases involving the interpretation of a treaty he had negotiated himself.¹³⁷ But, while some senators spoke in support of Burr’s resolution, it was defeated seventeen to ten, and the Senate voted eighteen to eight to confirm Jay.¹³⁸ There may actually have been more sentiment against dual office-holding than is apparent from these votes: the Anti-Federalist newspaper *Aurora* suggested that Jay’s supporters had maintained during debate that, if appointed as envoy, Jay would resign as Chief Justice.¹³⁹ In any event, opposition to appointments such as Jay’s lingered: in 1795, for example, a resolution was introduced in the Virginia legislature proposing a constitutional amendment that would prevent federal judges from holding other appointments.¹⁴⁰

Such sentiments were revived after 1799, when Ellsworth was appointed as one of three presidential envoys to France, which by that time had replaced Britain as the nation that posed the greatest danger to the United States. Indeed, an undeclared war was raging—the “Quasi-War”—and, after a disastrous earlier American mission to France, President Adams decided the time had come for a further attempt at negotiating an end to hostilities. As noted above, Ellsworth himself had urged Adams to appoint a group of three special envoys after objections had arisen to a plan to appoint one man to the job, and he therefore may have seemed a logical choice.¹⁴¹ Moreover, although Ellsworth did not have the diplomatic background that Jay did, he was trusted by Federalists, many of whom opposed Adams’s in-

¹³⁶ 1 J. EXECUTIVE PROC. SENATE 152 (1828), *quoted in* CASTO, *supra* note 2, at 89.

¹³⁷ *From Correspondents*, GEN. ADVERTISER (Phila.), Apr. 19, 1794, at 1. Of course, this objection could have been addressed by requiring the Chief Justice to recuse himself in such cases.

¹³⁸ CASTO, *supra* note 2, at 89.

¹³⁹ Wheeler Dissertation, *supra* note 16, at 214.

¹⁴⁰ 4 DHSC, *supra* note 2, at 245.

¹⁴¹ CASTO, *supra* note 2, at 118-19; *supra* text accompanying note 130.

tention of making peace with France, and he would therefore stand a better chance of being politically acceptable to a crucial faction.¹⁴²

Although Federalist leaders remained hostile to the idea of the mission,¹⁴³ Ellsworth's nomination passed the Senate with even less opposition than Jay's nomination had confronted five years earlier.¹⁴⁴ Like Jay, Ellsworth would be gone from the bench for over a year.¹⁴⁵ The relative lack of opposition to Ellsworth's nomination was largely a function of politics: the Anti-Federalists, who had been most vocal in opposing Jay's mission to England, favored the idea of making peace with France and were therefore less inclined to raise objections of any kind. In addition, Anti-Federalists knew that Ellsworth himself was actually reluctant to undertake the mission, and that this assignment would win him enmity rather than favor among members of his own party. Therefore, one of the key arguments against judicial dual office-holding—that judges would compromise their independence because of the “lure of office”—was inapplicable to Ellsworth's situation.¹⁴⁶

While there is some evidence of doubts about dual office-holding among Federalists at the time of Ellsworth's appointment as envoy,¹⁴⁷

¹⁴² See JAY, *supra* note 2, at 153 (“Federalist Senators were anxious to have Ellsworth at the negotiations, given his strongly Federalist leanings.”).

¹⁴³ Despite Ellsworth's appointment, most of the leaders of the Federalist party continued to hope that the “mission would end in failure and disgrace.” JOHN C. MILLER, *THE FEDERALIST ERA: 1789-1801*, at 246 (1960).

¹⁴⁴ Ellsworth's nomination was approved by the Senate by a vote of twenty-three to six. CASTO, *supra* note 2, at 119. However, the six negative votes on Ellsworth's nomination apparently were “on account of his being Chief Justice.” Letter from James Iredell to Samuel Johnston (Feb. 28, 1799), *in* 3 DHSC, *supra* note 2, at 324, 324. Iredell himself took a dim view of the appointment: “I by no means like the practice of taking a Man from the exercise of one duty to perform another.” *Id.* His dismay most likely stemmed not from any constitutional objection, but from the greater burden of circuit riding that Ellsworth's absence would impose on the other Justices.

¹⁴⁵ Although Ellsworth's appointment was confirmed in February, he and his fellow commissioners did not actually depart for France until November 1799. ELKINS & MCKITRICK, *supra* note 36, at 618-20; MILLER, *supra* note 143, at 246. He did not return to the United States until 1801, by which time he had already resigned as Chief Justice. 3 DHSC, *supra* note 2, at 323. His letter of resignation, sent from France in October 1800, reached President Adams on December 15. Letter from Oliver Ellsworth to John Adams (Oct. 16, 1800), *in* 1 DHSC, *supra* note 2, at 123, 123.

¹⁴⁶ Wheeler Dissertation, *supra* note 16, at 222, 241-43.

¹⁴⁷ See 4 DHSC, *supra* note 2, at 245 (quoting a pro-Federalist newspaper expressing concern about loss of judicial independence). Secretary of State Timothy Pickering assumed that Ellsworth would resign as Chief Justice in order to take up his post as envoy. See *id.* (quoting Pickering's statement indicating that if Ellsworth went to France, he would “be called upon to quit” his position as Chief Justice).

it was not until a year later—when a presidential election was approaching—that true opposition surfaced. In February 1800, the Anti-Federalist Senator Charles Pinckney of South Carolina introduced a constitutional amendment that would have barred federal judges from holding any other federal or state office, on pain of removal from the bench. Ten days later, Edward Livingston of New York—also an Anti-Federalist—introduced a constitutional amendment in the House that was similar to Pinckney’s. The following month Pinckney withdrew his amendment, and instead introduced a bill that would have had the same effect as his proposed amendment.¹⁴⁸ In support of his bill, Pinckney made arguments similar to those that had been mounted against Jay’s appointment in 1794: the executive should not be able to compromise judicial independence by dangling the lure of “additional offices and emoluments,” nor should judges violate the principle of separation of powers by negotiating treaties which they might be called upon to interpret in their judicial capacities. Furthermore, Pinckney urged, judges—and particularly the Chief Justice—should not be absent from the United States for extended periods: not only would it impose an unfair share of duties on the remaining Justices, but it would also remove the one officer who was to preside in case of a presidential impeachment.¹⁴⁹ Pinckney’s bill was narrowly defeated by a vote of twelve to fourteen.¹⁵⁰

Negative commentary about the appointment of Chief Justices as presidential envoys continued to appear in the press, but—like the election-year grandstanding in Congress—the opposition had a partisan cast. In June 1800, the virulently Anti-Federalist Philadelphia *Aurora* complained that the “wasteful and extravagant—if not completely corrupt” appointments of Jay and Ellsworth had induced other federal judges to attempt to curry favor with the Adams administration by bringing in convictions under the Sedition Act.¹⁵¹ That August,

¹⁴⁸ *Id.* at 246-48. Livingston’s amendment differed from Pinckney’s in that it would have barred judges from holding other federal offices until six months after their resignations from the judiciary. *Id.*

¹⁴⁹ Charles Pinckney’s *Speech to the United States Senate*, AURORA (Phila.), Mar. 5, 1800, reprinted in 4 DHSC, *supra* note 2, at 630, 630-36.

¹⁵⁰ 4 DHSC, *supra* note 2, at 246. Members of the Senate committee that had reported the bill led the opposition, on the grounds that the bill was unconstitutional—apparently reasoning that it violated the Article III guarantee of life tenure during good behavior for judges. In addition, the Senators argued that the bill would “operate as a censure” on President Adams for having appointed Ellsworth, and on the Senate for having confirmed him. *In Senate*, AURORA (Phila.), Apr. 7, 1800.

¹⁵¹ *The Judiciary*, AURORA (Phila.), June 16, 1800, reprinted in 4 DHSC, *supra* note 2, at 653, 653-56.

when the opening of the Supreme Court was delayed for several days because of the lack of a quorum—caused partly by Ellsworth’s absence in France—the *Aurora* mocked the idea that “no man in the United States” could have negotiated a treaty with the French but Ellsworth, and criticized “[t]he suspension of the business of the highest court of judicature in the United States, to allow a *Chief Justice* to add NINE THOUSAND DOLLARS a year to his salary.”¹⁵² And in 1801, when the chief justiceship was again vacant, the *Aurora* dismissed the position as a “sinecure,” on the evidence “that in one case the duties were *discharged* by one person who resided at the same time in England; and by another during a year’s residence in France.”¹⁵³

As the other Justices themselves knew, however, the position of Chief Justice was far from a sinecure, and the absence of the Chief was sorely felt—if for no other reason than that the Justices who were left behind had to shoulder a greater share of the burden of circuit riding.¹⁵⁴ There was, as well, at least some symbolic value in the presence of the Chief Justice. “Much of the dignity of the Court is lost by the absence of the Chief Justice,” wrote one observer at the Court’s February 1795 session, when Jay was still in England.¹⁵⁵ And, as will be discussed below, there is the question of how much influence within the Court Jay and Ellsworth lost by their long absences.

It may seem inconsistent that, in 1792, Jay refused to attend a meeting of the Sinking Fund Commission in order to hold a circuit court term that lasted only five days, and which could have conducted its business without him,¹⁵⁶ and yet, two years later, he accepted an

¹⁵² AURORA (Phila.), Aug. 9, 1800, *reprinted in* 1 DHSC, *supra* note 2, at 895, 895; *Judges of the Courts of the United States*, AURORA (Phila.), Aug. 11, 1800, *reprinted in* 1 DHSC, *supra* note 2, at 896, 896. The *Aurora*’s comments in both June and August were premised on the idea that Jay and Ellsworth had drawn dual salaries while holding their dual offices. In May 1800, Congress had provided that any minister plenipotentiary should be allowed up to \$9000 a year for services and expenses. Act of May 10, 1800, ch. 56, § 1, 2 Stat. 78, 78. But Ellsworth’s request to receive two salaries was apparently refused by the Jefferson administration. 4 DHSC, *supra* note 2, at 245 n.8.

¹⁵³ AURORA (Phila.), Jan. 8, 1801, *reprinted in* 1 DHSC, *supra* note 2, at 913, 913-14.

¹⁵⁴ *See, e.g.*, Letter from John Jay to Sarah Jay (Apr. 19, 1794), *in* 2 DHSC, *supra* note 2, at 447, 447-48 (noting that because Jay was about to depart, Paterson would complete the circuit that Jay was riding); Letter from James Wilson to William Cushing (Apr. 27, 1794), *in* 2 DHSC, *supra* note 2, at 450, 450 (discussing the reassignment of the remainder of Jay’s circuit); Letter from William Cushing to William Paterson (July 20, 1794), *in* 2 DHSC, *supra* note 2, at 477, 477 (noting that while Jay was supposed to attend court for Cushing at New York, he would not be able to do so).

¹⁵⁵ Letter from Jeremiah Smith to William Plumer (Feb. 7, 1795), *in* 1 DHSC, *supra* note 2, at 752, 752.

¹⁵⁶ *See supra* note 119 and accompanying text.

appointment that took him away from his judicial duties for an entire year. But, in declining to attend the Sinking Fund meeting, Jay had noted that his priorities might be “inverted, if only the Importance of the occasion was considered.”¹⁵⁷ The question Jay was asked to resolve by the Sinking Fund commissioners was, as he said, “a [mere] law Question,” which he could address in a written opinion.¹⁵⁸ In contrast, Jay—and, presumably, Ellsworth as well—felt that the importance of the foreign missions which the President himself had asked them to undertake justified their extended absences from the bench.¹⁵⁹

In both cases—although for different reasons—those absences ultimately became permanent. Jay returned to the United States to discover that he had been elected governor of New York in absentia.¹⁶⁰ For Ellsworth, the strain of his mission to France had led to such ill health that he felt he could no longer continue in the position of Chief Justice.¹⁶¹

IV. THE ROLE OF THE CHIEF JUSTICE WITHIN THE COURT

The aspect of the Chief Justice’s role that appears most salient to the modern eye—as a spokesman for and unifying force on the Court itself, and the prime shaper of its jurisprudence—is perhaps the most difficult for the historian of the early Court to assess. Few documents remain (if, indeed, they ever existed) that shed light on the Court’s internal dynamics, and it is far from clear that contemporaries would have expected the Chief Justice to function as the leader of the Court in this way.

¹⁵⁷ Letter from John Jay to Alexander Hamilton (Mar. 23, 1792), in 11 HAMILTON PAPERS, *supra* note 118, at 172, 172-73.

¹⁵⁸ *Id.*

¹⁵⁹ As Chief Justice, John Marshall scrupulously avoided extrajudicial service. Well aware of the criticism of Jay’s and Ellsworth’s foreign missions, he did not want to provide those who were hostile to the federal judiciary with any ammunition against him or the Court. In addition, of course, the Jeffersonians were unlikely to call on Marshall—a Federalist—for extrajudicial advice. See Wheeler Dissertation, *supra* note 16, at 202-05, 224-27.

¹⁶⁰ 1 DHSC, *supra* note 2, at 7; Letter from John Jay to George Washington (June 29, 1795), in 1 DHSC, *supra* note 2, at 13, 13.

¹⁶¹ 1 DHSC, *supra* note 2, at 118; Letter from Oliver Ellsworth to John Adams (Oct. 16, 1800), in 1 DHSC, *supra* note 2, at 123, 123.

A. *Factors Limiting the Chief Justice's Influence*

The model of an influential Chief Justice—for a twenty-first-century observer—presupposes a number of conditions, including that the Justices spend a sufficient amount of time together to develop an atmosphere of collegiality and that the Chief Justice is a charismatic persuader who makes his presence strongly felt.

These conditions, for the most part, simply did not obtain in the 1790s. The Justices met only twice a year—in February and August—and usually for only a week or two at a time, although the sessions grew longer as the years progressed. During their stay in the nation's capital, the Justices apparently did not share a boarding house, as they did in later years—for some, in fact, the capital was their home.¹⁶²

While relations among the Justices were generally cordial and respectful,¹⁶³ there appears to have been only one genuine friendship, that between Justices Iredell and Wilson.¹⁶⁴ In the earliest years, when two Justices were required on each circuit, Justices who rode circuit together had a greater opportunity to form bonds—although, to their minds, the disadvantages of circuit riding greatly outweighed this putative advantage. In any event, after the enactment of the Judiciary Act of 1793,¹⁶⁵ which changed the quorum requirement so that only one Justice was needed at a circuit court, the Justices generally rode circuit alone.

As for the presence of the Chief at Court sessions, he was, in fact, often absent. In addition to the two Terms that Jay and Ellsworth each missed because of service abroad, there were absences for health

¹⁶² John Jay lived in New York, where the Court first met, and James Iredell had moved there from North Carolina. When the Court relocated to Philadelphia, Iredell followed, though he ultimately moved back to North Carolina in 1793. James Wilson also lived in Philadelphia.

¹⁶³ The only real source of conflict was the circuit-riding system, which weighed most heavily on Justice Iredell. *See, e.g.*, Letter from James Iredell to John Jay, William Cushing, & James Wilson (Feb. 11, 1791), *in* 2 DHSC, *supra* note 2, at 131, 131-35 (complaining that he was assigned the longest and most arduous circuit at a meeting of the Justices that he did not attend); *infra* text accompanying note 185.

¹⁶⁴ It is clear from their correspondence that Iredell and Wilson were friends. *See, e.g.*, Letter from James Iredell to James Wilson (Aug. 20, 1796), *in* 3 DHSC, *supra* note 2, at 133, 133-34 (“I never expect to hear in a letter from you how you or your Family are But I assure you I shall always be solicitous to know . . .”). In 1798, Wilson took refuge from his creditors in Edenton, North Carolina, where Iredell and his family lived. After Wilson's death, the Iredells took in his penniless widow, Hannah. *Id.* at 238-39; Letter from James Iredell to Bird Wilson (Sept. 1, 1798), *in* 3 DHSC, *supra* note 2, at 287, 287-88 & n.3.

¹⁶⁵ Ch. 22, § 1, 1 Stat. 333, 333-34; 4 DHSC, *supra* note 2, at 203.

or other reasons. Jay missed the February 1792 Term because of his wife's pregnancy and his own precarious state of health.¹⁶⁶ Rutledge missed the beginning of his first and only session as Chief Justice in August 1795 because he received his commission too late to allow him to arrive on time.¹⁶⁷ Ellsworth missed all but the last day of the February 1796 Term because he was not appointed as Chief Justice until the Term was half over,¹⁶⁸ and he missed all of the February Terms in 1797 and 1798 because of illness.¹⁶⁹

Even if the Chief Justices had attended every Court session, it is not clear that they would have become leaders of the Court in the modern sense. Both Jay and Ellsworth had a certain commanding presence, to judge from their portraits and the accounts of contemporaries, and both had experience in the art of persuasion—Jay as a diplomat and Ellsworth as a legislator. But neither was a hail-fellow-well-met, back-slapping type. Both men took a stern and bleakly religious view of life,¹⁷⁰ and it is hard to imagine either of them good-naturedly cajoling their brethren into adopting a particular position on a case in the manner of, say, a John Marshall or an Earl Warren.¹⁷¹ Rather, to the extent that they led, they most likely did so by sheer force of character and the prestige attached to their post.

B. *The Chief Justice as a Leader on Administrative Issues*

1. Rulemaking

In order for the Court to function, it was necessary to establish certain procedural rules that had been overlooked by Congress. At the Court's first Term, in February 1790, the Justices issued several

¹⁶⁶ 1 DHSC, *supra* note 2, at 196 n.108.

¹⁶⁷ *Id.* at 244 n.191.

¹⁶⁸ Ellsworth was confirmed by the Senate on March 4, 1796, but did not take his oath until March 8. *Id.* at 120-22. He did not attend Court for the remainder of the session because argument on some of the cases had preceded his appointment, but he was present on the last day, March 14, to adjourn the Court until the next session. *Id.* at 270 n.214.

¹⁶⁹ *Id.* at 283 n.248, 298 n.288. These absences—aside from those attributable to foreign service—were fairly typical. Virtually all the Associate Justices missed occasional Terms of the Court because of illness or difficulties in traveling.

¹⁷⁰ See VanBurkleo, *supra* note 29, at 32-35 (discussing how Jay approached religion and politics in his life); Casto, *supra* note 80, at 293-96 (“[H]e was a deeply religious individual who cleaved to his parents’ and teachers’ strict Calvinism throughout his life.”).

¹⁷¹ See CASTO, *supra* note 2, at 111-12 (describing Marshall and Warren as “personable leaders”).

such rules—including one that, following English practice, recognized a distinction between “Counsellors” and “Attornies”—with Chief Justice Jay presiding.¹⁷² Two years later, another significant, British-influenced rule was announced by the Chief Justice, speaking for the Court as a whole: from then on the practice of the courts of King’s Bench and Chancery would be adopted as “affording outlines for the practice of this Court.”¹⁷³

But the Chief Justice’s presence was clearly not seen as essential to an exercise of the Court’s rulemaking power. In February 1795, with Jay absent in England and Cushing presiding as senior Associate Justice, the Justices gave notice to “the Gentlemen of the Bar, that, hereafter, they will expect to be furnished with a statement, of the material points of the Case, from the Counsel on each side of a cause.”¹⁷⁴ This was apparently an attempt to require the filing of a document akin to a modern legal brief.

2. Communications to Other Branches on Administrative Matters

When difficulties arose in the judicial system during the 1790s that could be corrected only by the legislative or executive branch—a fairly frequent occurrence, given the experimental nature of the whole endeavor—the Chief Justice did not have an exclusive role as the person charged with seeking a remedy. While the Chief Justice did on occasion approach the executive or the legislative branch,¹⁷⁵ either for-

¹⁷² Supreme Court Fine Minutes, Feb. 5, 1790, *in* 1 DHSC, *supra* note 2, at 169, 177. Attorneys could file motions and handle paperwork, but counselors would do the actual pleading of cases. 6 DHSC, *supra* note 2, at 2-3. The Court also ordered, among other things, that process issuing out of the Court would run in the name of “the President of the United States.” *Id.* at 2. The issuance of these rules was, in addition to the presentation of letters patent by the Justices and the admission of lawyers to the Supreme Court bar, the only business conducted by the Court during its first Term.

¹⁷³ Supreme Court Fine Minutes, Aug. 8, 1792, *in* 1 DHSC, *supra* note 2, at 169, 203. Jay announced the rule in response to a motion by the attorney general, and it was apparently intended to confirm the Court’s power to make rules under a recently enacted statute. *See id.* at 203 n.129.

¹⁷⁴ Supreme Court Fine Minutes, Feb. 4, 1795, *in* 1 DHSC, *supra* note 2, at 169, 233.

¹⁷⁵ *See, e.g.*, Letter from the Justices of the Supreme Court to George Washington (Sept. 13, 1790), *in* 2 DHSC, *supra* note 2, at 89, 89-91 (regarding circuit riding); Letter from John Jay to Rufus King (Dec. 22, 1793), *in* 2 DHSC, *supra* note 2, at 434, 434-35 (suggesting that the Pennsylvania circuit court sit in only one location).

mally or informally, other Justices—and Justice Iredell in particular—sometimes took the initiative as well.¹⁷⁶

The President himself encouraged this sort of direct communication. In April 1790, shortly before the Justices were to embark on their first circuits, George Washington wrote to them as a group informing them that he would welcome “such Information and Remarks” on any imperfections in the new judicial system as might occur to them.¹⁷⁷ Two years later, Justice Iredell wrote to Washington concerning two procedural problems that had come to his attention and that had not yet been addressed by Congress. He introduced his remarks by alluding to the President’s letter of April 1790, and stating that he presumed it was “not only proper” for “a single Judge” to communicate such matters when he encountered them, but in fact “his express duty.”¹⁷⁸

From the Justices’ perspective, the most pressing matter requiring legislative attention was that of circuit riding. The Judiciary Act of 1789 had created circuit courts but no circuit judges: in another borrowing from British and colonial custom,¹⁷⁹ circuit courts were to be held by the local district judge and two—or, after 1793, one—

¹⁷⁶ Four Justices (Jay, Cushing, Wilson, and Blair) and two federal district judges (James Duane and Richard Peters) wrote to President Washington to protest the duties allotted to circuit judges under the Invalid Pensions Act of 1792. JAY, *supra* note 2, at 106-07; see also discussion *supra* note 120; 6 DHSC, *supra* note 2, at 33-35; Letter from Samuel Sewall to William Cushing (Feb. 25, 1800), in 4 DHSC, *supra* note 2, at 628, 628 (describing a consultation with three Justices on a pending judiciary bill). Communication with legislators was not limited to Supreme Court Justices; Rhode Island District Court Judge Henry Marchant “tirelessly badgered Congress, through his friends, to raise his salary.” Maeva Marcus & Emily Field Van Tassel, *Judges and Legislators in the New Federal System, 1789-1800*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 31, 46 (Robert A. Katzmann ed., 1988). Marcus and Van Tassel conclude that “the practice of informal lobbying or conferring between the two branches was, if not commonplace, then certainly not unusual during the formative decade of the U.S. constitutional system.” *Id.*

¹⁷⁷ Letter from George Washington to the Justices of the Supreme Court (Apr. 3, 1790), in 2 DHSC, *supra* note 2, at 21, 21. Washington apparently sent Jay the letter, and he forwarded copies to the Associate Justices. *Id.* at 21 note.

¹⁷⁸ Letter from James Iredell to George Washington (Feb. 23, 1792), in 2 DHSC, *supra* note 2, at 239, 239. While one of the problems described by Iredell had occurred at a circuit court where he was the only Justice present, the other had arisen in a case that reached the Supreme Court and was well known to the other Justices, including Jay. Washington circulated Iredell’s letter to three cabinet members and held a cabinet meeting to discuss it. Iredell’s letter was then forwarded to Attorney General Edmund Randolph. *Id.* at 242 note; Marcus & Van Tassel, *supra* note 176, at 44-45.

¹⁷⁹ GOEBEL, *supra* note 2, at 472; William E. Nelson, *The Historical Foundations of the American Judiciary*, in THE JUDICIAL BRANCH 3, 5 (Kermit L. Hall & Kevin T. McGuire eds., 2005).

traveling Supreme Court Justices. The states were divided into three circuits—Eastern, Middle, and Southern—and circuit courts were to be held in the spring and the fall. From the very beginning, Justices not only complained about having to spend months traveling over hazardous roads but also raised constitutional and jurisprudential objections to the system, and President Washington promised that it was only a temporary arrangement.¹⁸⁰ But reform was very slow in coming.¹⁸¹

Jay took the lead initially in seeking an end to circuit riding: pursuant to an agreement reached at the Court's second session in August 1790, the Chief Justice drafted and circulated a letter to George Washington suggesting the unconstitutionality of the Justices' sitting in review on cases they had decided as circuit judges.¹⁸² Nothing was done, however, and Jay—despite his own strong antipathy towards circuit-riding duty¹⁸³—felt the need to proceed cautiously in light of hostility towards the federal judiciary in some quarters: “The Federal Courts have Enemies in all who fear their Influence on State Objects,” he wrote to New York senator Rufus King. “[I]t is to be wished that their Defects should be corrected quietly.”¹⁸⁴

Into the breach stepped James Iredell, who not only suffered the most under the circuit-riding system, but also was fortunate in having

¹⁸⁰ For example, when one of Washington's original appointees to the Court, Robert H. Harrison, expressed reservations about accepting the appointment because of the duties of circuit riding, Washington assured him that “a change in the system is contemplated.” Letter from Robert H. Harrison to George Washington (Oct. 27, 1789), *in* 1 DHSC, *supra* note 2, at 36, 36-37; Letter from George Washington to Robert H. Harrison (Nov. 25, 1789), *in* 2 DHSC, *supra* note 2, at 10, 10. After setting out to attend the first meeting of the Supreme Court, but then turning back because he fell ill, Harrison resigned. Letter from Robert H. Harrison to George Washington (Jan. 21, 1790), *in* 1 DHSC, *supra* note 2, at 42, 42.

¹⁸¹ Circuit riding continued throughout the 1790s. It was temporarily abolished by the Judiciary Act of 1801, which was repealed in 1802, but not permanently abolished until 1891. 4 DHSC, *supra* note 2, at 127, 294-95.

¹⁸² Letter from the Justices of the Supreme Court to George Washington (Sept. 13, 1790), *in* 2 DHSC, *supra* note 2, at 89, 89-91. It is not known whether the letter was ever sent to Washington. *Id.* at 92 n.1.

¹⁸³ Circuit riding was responsible for Jay's willingness to allow his name to be put forward for the governorship of New York in 1792 and his acceptance of that office in 1795. JAY, *supra* note 2, at 161-62. It was also probably responsible for his refusal to serve again as Chief Justice in 1801. See Letter from John Jay to John Adams (Jan. 2, 1801), *in* 1 DHSC, *supra* note 2, at 146, 146-47 (complaining that expected reforms to the Judiciary Act of 1789 had not been made, despite “Remonstrances of the Judges on this important Subject”).

¹⁸⁴ Letter from John Jay to Rufus King (Dec. 22, 1793), *in* 2 DHSC, *supra* note 2, at 434, 434-35; see also JAY, *supra* note 2, at 161-62.

a brother-in-law who was a senator.¹⁸⁵ Iredell drafted at least two pieces of legislation modifying the circuit court system, both of which were introduced by his brother-in-law, Samuel Johnston.¹⁸⁶ He also drafted a second letter protesting the system, which was signed by all six Justices, sent to Washington, and forwarded to Congress.¹⁸⁷ Iredell's efforts were only partially successful, but had the matter been left entirely to Jay, it seems likely that even less would have been accomplished.

C. *From Seriatim Opinions to Opinions of the Court*

The Court of the early 1790s frequently delivered its opinions seriatim—with the Justices reading their opinions individually from the bench, beginning with the most junior Justice and ending with the Chief—rather than issuing an opinion of the Court. While some historians have traced this practice to English common-law custom,¹⁸⁸ in fact the Court of King's Bench had a somewhat different procedure under Lord Mansfield, who served as its chief justice from 1756 to

¹⁸⁵ At an August 1790 meeting of the Justices held when Iredell was not present, he was permanently assigned to the Southern Circuit, which was by far the longest and most arduous of the three. 2 DHSC, *supra* note 2, at 7.

¹⁸⁶ See Marcus & Van Tassel, *supra* note 176, at 47 n.51 (noting that Iredell drafted a bill, enacted in 1790, changing the times of southern circuit courts to make them more convenient for whoever rode the southern circuit); 2 DHSC, *supra* note 2, at 248 n.6 (noting that Iredell drafted the bill that became the Circuit Court Act of 1792, altering the times of holding some circuit courts and providing for a rotation of circuit assignments).

¹⁸⁷ Letter from the Justices of the Supreme Court to George Washington (Aug. 9, 1792), in 2 DHSC, *supra* note 2, at 288, 288-89; see also Letter from the Justices of the Supreme Court to the Congress of the United States (Aug. 9, 1792), in 2 DHSC, *supra* note 2, at 289, 289-90 & note (noting that two drafts in Iredell's handwriting survive). Iredell also proposed a plan whereby each Justice would give up \$500 of his salary in exchange for an end to circuit riding, but Jay used his influence as Chief Justice to dissuade Iredell from presenting the plan to Congress. Letter from John Jay to James Iredell (Mar. 19, 1792), in 2 DHSC, *supra* note 2, at 248, 248-49; Marcus & Van Tassel, *supra* note 176, at 48.

Yet a third letter protesting the circuit-riding system was sent to Washington by the Justices in February 1794. Letter from the Justices of the Supreme Court to George Washington (Feb. 18, 1794), in 2 DHSC, *supra* note 2, at 442. The Justice responsible for drafting this letter is unknown, but it could not have been Iredell, who was too ill to attend the Court's February 1794 session. Washington forwarded the letter to Congress, but there was no immediate legislative response. Letter from the Justices of the Supreme Court to the Congress of the United States (Feb. 18, 1794), in 2 DHSC, *supra* note 2, at 443, 443-44, note & nn.1-4.

¹⁸⁸ See, e.g., CASTO, *supra* note 2, at 110; HASKINS & JOHNSON, *supra* note 3, pt. 2, at 382.

1786. The court had no fixed rule governing the delivery of opinions, but in most cases Mansfield would deliver a unanimous “resolution” of the court. On occasion—especially if there was disagreement on the bench—the Justices would deliver their opinions seriatim. Unlike the practice on the American Supreme Court, however, Mansfield would generally deliver his opinion first, not last.¹⁸⁹

The actual origin of the Supreme Court’s seriatim practice is something of a mystery—perhaps the Court was following the model of some colonial or state courts—but in any event, it is obvious that the use of seriatim opinions limited the Chief Justice’s ability to take the Court in any particular direction. In addition, the Court’s holding was sometimes unclear because of variations in the reasoning of Justices who had reached the same result. Chief Justice Marshall is generally credited with introducing the system of resolving almost all cases by means of a unanimous “opinion of the Court,” thus greatly augmenting the Court’s influence.¹⁹⁰ But a study of the Supreme Court’s reported decisions in the 1790s reveals that Marshall only solidified the transition from seriatim opinions to opinions of the Court; he did not introduce the idea.

Any attempt to analyze the Supreme Court’s methods of issuing opinions in the 1790s must be tempered by the realization that Alexander James Dallas, who compiled reports of the Court’s decisions in this period, was not an official reporter of the Court. Dallas, who was also an active member of the Supreme Court bar at the time and was publishing reports of decisions of the Supreme Court and other courts in Pennsylvania more or less as a sideline, sometimes made mistakes, and did not always have access to written versions of the opinions the Justices delivered orally in Court.¹⁹¹ That having been said, it

¹⁸⁹ Telephone Interview with James Oldham, St. Thomas More Professor of Law and Legal History, Georgetown Univ. Law Ctr. (Nov. 9, 2005); *see, e.g.*, *Foxcroft v. Devonshire*, (1760) 97 Eng. Rep. 638, 639 (K.B.) (explaining the resolution of the court); *Goss v. Withers*, (1758) 97 Eng. Rep. 511, 517 (K.B.) (delivering the resolution of the court); *Bright v. Eynon*, (1757) 97 Eng. Rep. 365, 366-69 (K.B.) (transcribing Mansfield’s opinion, which concluded, “These are my sentiments: my brothers will judge whether I am right, or not,” and indicating that other justices delivered concurring opinions).

¹⁹⁰ *See, e.g.*, HASKINS & JOHNSON, *supra* note 3, pt. 2, at 382-83.

¹⁹¹ Dallas sometimes asked the Justices for copies of their opinions. In 1796, as he was preparing the second volume of his reports for publication (his first volume had included no Supreme Court reports), Dallas wrote to Justices Cushing and Paterson—and perhaps others as well—seeking copies of their opinions in five cases that had recently been decided, “[i]n order,” as he put it, “to render the work more perfect, than my own notes can possibly permit.” Letter from Alexander J. Dallas to William Cush-

is nevertheless possible to venture some conclusions. In the Supreme Court under Chief Justice Jay, more important cases were generally dealt with in seriatim opinions, and briefer, unattributed opinions or decrees were labeled by Dallas as being “by the Court.”¹⁹² Nevertheless, there were signs that the Chief Justice occupied a special role in regard to the delivery of opinions. In one case, the first two opinions given by Dallas are essentially dissents by individual Justices, and the third, although not labeled an “opinion of the Court,” is by Jay, speaking for a majority of the Court.¹⁹³ On another occasion—that of the first jury trial ever held in the Supreme Court—Jay delivered a charge to the jury, making it clear that he was speaking for the Court as a whole.¹⁹⁴ And in yet another case, when Jay was absent, the senior Associate Justice present, James Wilson, delivered the lone opinion—an

ing (Oct. 1, 1796), in 6 DHSC, *supra* note 2, at 647, 647-48 & n.7. But on other occasions Dallas merely summarized or even omitted opinions. In one case, *Olney v. Arnold*, he stated that the Chief Justice delivered an “opinion of the court,” but failed to print the opinion itself. 3 U.S. (3 Dall.) 308, 318 (1796). In another, *Del Col v. Arnold*, he reported, “The Court delivered, at different times, the following opinions,” and then summarized the Court’s holdings on four “points” without giving any Justices’ names or opinions. 3 U.S. (3 Dall.) 333, 334-35 (1796). But an opinion by Justice William Paterson survives among Paterson’s papers; presumably other Justices issued separate opinions in the case as well. See William Paterson’s Supreme Court Opinion (Aug. 11, 1796), in 7 DHSC, *supra* note 2, at 680, 680-82 (reproducing a draft of Justice Paterson’s opinion in *Del Col v. Arnold*, found in his private papers).

¹⁹² For seriatim opinions in more significant cases, see, for example, *Penhallow v. Doane*, 3 U.S. (3 Dall.) 54, 79 (1795); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 429 (1793); *Georgia v. Brailsford (Brailsford I)*, 2 U.S. (2 Dall.) 402, 405 (1792). In one case, Dallas said, “The Court delivered their opinion to the following effect,” and then published a series of seriatim opinions. *Bingham v. Cabot (Bingham I)*, 3 U.S. (3 Dall.) 19, 32 (1795). For brief opinions or orders in other cases, see, for example, *United States v. Lawrence*, 3 U.S. (3 Dall.) 42, 53 (1795) (“By the Court: We are clearly and unanimously of opinion . . .”); *Oswald v. New York*, 2 U.S. (2 Dall.) 402, 402 (1791) (“The Court granted the rule in the following terms . . .”); *West v. Barnes*, 2 U.S. (2 Dall.) 401, 401 (1791) (“The Court were unanimously of opinion . . .”); *Vanstophorst v. Maryland*, 2 U.S. (2 Dall.) 401, 401 (1791) (resolving the case “By the Court”). At least one opinion during this period, *Oswald v. New York*, is referred to as “per curiam” in the Court’s own rough minutes. Supreme Court Original Minutes, Feb. 14, 1792, in 1 DHSC, *supra* note 2, at 333, 355. The unsigned opinions or decrees were generally unanimous, but there were exceptions. In one ruling labeled as being “By the Court,” Dallas observed in a footnote that Justice Cushing “did not seem to coincide in this opinion, but the other three Judges [who were present] were decided.” *Bingham I*, 3 U.S. (3 Dall.) at 38 n.*.

¹⁹³ *Georgia v. Brailsford (Brailsford II)*, 2 U.S. (2 Dall.) 415, 418 (1793) .

¹⁹⁴ *Georgia v. Brailsford (Brailsford III)*, 3 U.S. (3 Dall.) 1, 3-5 (1794).

opinion that Dallas left unlabeled, but that was apparently on behalf of the entire Court.¹⁹⁵

There was, in addition, one important case in which Jay ensured that the Court would speak with one voice. In *Glass v. The Sloop Betsey*, a politically sensitive case involving French privateering, the Court issued a decree described by Dallas as the “unanimous opinion” of the Justices.¹⁹⁶ The manuscript copy of the decree shows that the wording was changed to underscore the certainty and finality of an opinion that was sure to provoke controversy: for example, the opening sentence of the decree originally began, “It appears [to us].” That language was crossed out and replaced with, “This Court being decidedly of opinion.” Although the manuscript is in the hand of the Supreme Court’s clerk, Samuel Bayard, he would not have made such changes on his own initiative; presumably the changes were ordered by Jay, who had written the draft of the decree himself.¹⁹⁷

While Jay was thus clearly capable of pushing the Court in a unified direction when he felt it was necessary, it was Oliver Ellsworth who began to institutionalize the use of “opinions of the Court”—a description that was never used by Dallas during Jay’s tenure, but which appears no fewer than eleven times in Dallas’s reports after Ellsworth became Chief Justice in 1796.¹⁹⁸ These opinions varied from short decrees containing little reasoning to fairly elaborate arguments extending over several pages, and were sometimes followed, as some of the seriatim opinions had been, by an order bearing the heading, “by the Court.” Opinions of the Court were usually unanimous, but

¹⁹⁵ *United States v. Hamilton*, 3 U.S. (3 Dall.) 17, 18 (1795). Jay was absent because he was serving as an envoy to France, and Cushing was absent because of illness, leaving Wilson as the senior Associate Justice present. 1 DHSC, *supra* note 2, at 238-40 & n.178.

¹⁹⁶ 3 U.S. (3 Dall.) 6, 16 (1794) (“Jay, *Chief Justice*, proceeded to deliver the following unanimous opinion.”).

¹⁹⁷ Decree of the Supreme Court (Feb. 18, 1794), in 6 DHSC, *supra* note 2, at 347, 347-49.

¹⁹⁸ The phrase appears in *Clarke v. Russel*, 3 U.S. (3 Dall.) 415, 424 (1799); *Sims v. Irvine*, 3 U.S. (3 Dall.) 425, 456 (1799); *New York v. Connecticut*, 4 U.S. (4 Dall.) 1, 2 (1799); *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 10 (1799); *Wilson v. Daniel*, 3 U.S. (3 Dall.) 401, 407 (1798); *Brown v. Van Braam*, 3 U.S. (3 Dall.) 344, 356 (1797) (noting that Wilson, as senior Associate Justice because of Ellsworth’s absence and Cushing’s apparent recusal, “delivered the opinion of the court”); *Brown v. Barry*, 3 U.S. (3 Dall.) 365, 366-67 (1797); *Hills v. Ross*, 3 U.S. (3 Dall.) 331, 332 (1796); *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) 321, 324, 330 (1796) (giving one unanimous “opinion of the court” and one nonunanimous, and on another issue, giving another “opinion of the court”); *Olney v. Arnold*, 3 U.S. (3 Dall.) 308, 318 (1796) (opinion not published); *Cotton v. Wallace*, 3 U.S. (3 Dall.) 302, 304 (1796).

on occasion other Justices delivered concurring or dissenting opinions.¹⁹⁹ William Casto has concluded that in issuing opinions of the Court, Ellsworth was drawing on his experience as a judge on the Connecticut Superior Court in the 1780s. A Connecticut statute in force at the time required that each judge give his opinion seriatim, but in fact the superior court “adopted an almost uniform practice of writing majority and dissenting opinions.”²⁰⁰ In any event, it is clearly inaccurate to say—as one of the leading historians of the Marshall Court has—that the use of an “opinion of the Court” under Ellsworth was only a “limited trend,” and that such opinions were “brief per curiam[s],” which were “never utilized in matters of complexity or of major substantive concern.”²⁰¹ In fact, this characterization aptly describes the use of “By the Court” opinions under Jay, but not “opinions of the Court” under Ellsworth.

True, the practice was not yet uniform: in at least one case, and possibly two, seriatim opinions were used when Ellsworth was present, for reasons that are not clear.²⁰² And in two instances in which Ellsworth was present but did not participate in the decision, the Justices delivered their opinions seriatim.²⁰³ But it was only when Ellsworth was absent from the bench that the “opinion of the Court” virtually disappeared: in February 1797, with Ellsworth absent because of illness, one case—*Brown v. Van Braam*—was resolved by an opinion of the Court, delivered by Justice Wilson,²⁰⁴ apparently because Justice

¹⁹⁹ In *Wiscart v. Dauchy*, Ellsworth delivered an opinion of the Court that was unanimous on one point but not unanimous on the second. 3 U.S. (3 Dall.) at 321. This was followed by a dissent on the second point by Justice Wilson, along with a lengthy response from Ellsworth. *Id.* at 324-30. In *Wilson v. Daniel*, there was an opinion of the Court by Ellsworth, a dissent by Justice Iredell, a concurrence by Justice Chase, and finally a response from Ellsworth. 3 U.S. (3 Dall.) at 404-08. In *Sims v. Irvine*, there was a concurrence by Iredell. 3 U.S. (3 Dall.) at 457.

²⁰⁰ CASTO, *supra* note 2, at 110.

²⁰¹ HASKINS & JOHNSON, *supra* note 3, pt. 2, at 383 (expressing Johnson’s views).

²⁰² In *Fenimore v. United States*, 3 U.S. (3 Dall.) 357, 364 (1797), the Justices delivered their opinions seriatim, with Ellsworth going last. The other possible case falling into this category is *Del Col v. Arnold*, in which Dallas did not specify whether opinions were given seriatim. 3 U.S. (3 Dall.) 333 (1796). The discovery of an unpublished opinion in the case by Justice Paterson suggests, however, that they were. *See supra* note 191.

²⁰³ *See* *Fowler v. Lindsey*, 3 U.S. (3 Dall.) 411, 412 (1799) (addressing a land dispute between New York and Connecticut, and noting that Ellsworth, a Connecticut citizen, recused himself “on account of the interest of *Connecticut*”); *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798) (using seriatim opinions where Ellsworth had been absent when the case was argued the previous Term).

²⁰⁴ 3 U.S. (3 Dall.) 344, 356 (1797).

Cushing recused himself on the grounds that he had decided the case in the circuit court.²⁰⁵ The other cases that Term were decided either seriatim or by unattributed decrees.²⁰⁶ In February 1798, when Ellsworth was again ill, Dallas's reports are sketchy, but, although the four cases he reported were all apparently decided unanimously, no opinions appear as "opinions of the Court."²⁰⁷ And in both the February and August Terms of 1800—when Ellsworth was away in France—the cases were either decided seriatim or else by a brief order headed "by the Court."²⁰⁸ In a case decided in August 1800, Justice Chase expressed surprise that the Justices were delivering their opinions seriatim: "[T]he Judges agreeing unanimously in their opinion," he said, "I presumed that the sense of the Court would have been delivered by the president."²⁰⁹ Leaving aside the fact that opinions of the Court delivered by "the president"—the Chief Justice or senior Associate—were not limited to those that were unanimous, and the fact that the Justices had decided a unanimous case by means of seriatim opinions the previous Term,²¹⁰ Chase's comment indicates that the practice of issuing opinions of the Court had become fairly well institutionalized by 1800.

Why did the Justices slide back to their old seriatim habits when Ellsworth was away? Were they resistant, perhaps, to this attempted innovation? Chase's remark would seem to indicate the opposite. Although it is impossible to arrive at a definitive answer, the problem

²⁰⁵ 7 DHSC, *supra* note 2, at 802 n.22.

²⁰⁶ *Jennings v. The Brig Perseverance*, 3 U.S. (3 Dall.) 336 (1797); *Huger v. South Carolina*, 3 U.S. (3 Dall.) 339 (1797); *Clerke v. Harwood*, 3 U.S. (3 Dall.) 342 (1797). In *Jennings*, Dallas reported what he called a "representation" by Justice Paterson, in which the Court "concur[red]"; in addition, Dallas reported a one-sentence statement by Justice Chase, which he referred to as an "opinion." 3 U.S. (3 Dall.) at 337. Neither, however, is characterized as an "opinion of the Court."

²⁰⁷ *Emory v. Grenough*, 3 U.S. (3 Dall.) 369 (1798) (Dallas giving the date of decision as 1797); *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798); *Bingham v. Cabot (Bingham II)*, 3 U.S. (3 Dall.) 382 (1798); *Jones v. Le Tombe*, 3 U.S. (3 Dall.) 384 (1798).

²⁰⁸ There are a few ambiguous reports in relatively insignificant cases. In *Rutherford v. Fisher*, the only opinion given is a one-paragraph statement by Justice Chase, followed by an order headed "by the Court." 4 U.S. (4 Dall.) 22, 22 (1800). In *Blaine v. Ship Charles Carter*, Dallas merely said, "the Court decided . . ." 4 U.S. (4 Dall.) 22, 22 (1800). And in *Priestman v. United States*, Dallas reported, "the Judges briefly delivered their opinions, *seriatim*, concurring in the following result." 4 U.S. (4 Dall.) 28, 34 (1800). Rather than publishing the opinions, he followed this statement with a conclusory paragraph headed "by the Court." *Id.*

²⁰⁹ *Bas v. Tingey*, 4 U.S. (4 Dall.) 37, 43 (1800).

²¹⁰ *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 18 (1800).

may have lain with the presence of William Cushing. As the senior Associate Justice, Cushing would have been the person charged with the responsibility of delivering an opinion of the Court in Ellsworth's absence. But it was generally agreed that Cushing's abilities as a judge had faded considerably.²¹¹ Perhaps he was either unwilling or unable to assume the task of writing for the Court as a whole—or perhaps his fellow Justices were reluctant to entrust him with this responsibility. And it would have been awkward to bypass Cushing in order to assign the opinion to the next most senior Associate Justice. This theory is borne out by the fact that on the one occasion that an opinion of the Court was delivered in Ellsworth's absence, Cushing had recused himself, leaving Wilson free to deliver an opinion on behalf of the Court.²¹² In any event, it seems likely that if Ellsworth had remained on the bench rather than accepting an appointment as presidential envoy to France, he, rather than Marshall, would have been seen as the father of the “opinion of the Court.”

CONCLUSION

The experience of the Supreme Court in the 1790s—like that of the rest of the nation—was “an extended encounter with firstness.”²¹³ Not only was virtually every case a case of first impression, but the very structure and role of the Court itself—and that of its Chief Justice—was evolving through a process of trial and error. Initially, the role of Chief Justice retained vestiges of the advisory role played by high magistrates in the British and colonial tradition; the Framers of the Constitution may have viewed the influence of a Chief Justice such as Lord Mansfield with suspicion, but the customs of centuries were not so easily abandoned. As it turned out—and perhaps partly for reasons of geography—the Chief Justice did not serve as important an advisory role as President Washington and others may have anticipated. And the experience of losing the services of two Chief Justices for a year each because of their appointments as foreign envoys may have discouraged the future appointment of Chief Justices to such offices.

²¹¹ See *supra* notes 50-53 and accompanying text.

²¹² *Brown v. Van Braam*, 3 U.S. (3 Dall.) 344, 356 (1797). It is possible that Wilson would also have introduced the use of an opinion of the Court, had he been in a position to do so. Even under Jay, Wilson—acting as the senior Associate Justice because Jay and Cushing were both absent—delivered an opinion in *United States v. Hamilton* that, while not labeled an “opinion of the Court” by Dallas, spoke for the Court as a whole. 3 U.S. (3 Dall.) 17 (1795).

²¹³ ELKINS & MCKITRICK, *supra* note 36, at 3.

But these were still practical rather than constitutional considerations. As the decade of the 1790s came to a close, there is no indication that contemporaries believed Chief Justices were prohibited from dispensing advice to other branches, when asked, or from holding extrajudicial office. Nor, despite Ellsworth's somewhat abortive introduction of the "opinion of the Court," had the Chief Justice yet come to be viewed as the spokesman for or jurisprudential leader of his brethren. Rather, the Chief Justice was still seen as a man who lent "dignity" to the Court when he was present,²¹⁴ but who could be plucked from it by the executive—as Ellsworth was in 1799—to lend dignity to some other governmental enterprise when it was deemed necessary. Americans had yet to come to the realization that it was best for the nation if the Chief Justice remained free to devote his time and energies, not to the welfare of the country as a whole, but specifically to the Supreme Court.

²¹⁴ Letter from Jeremiah Smith to William Plumer (Feb. 7, 1795), in 1 DHSC, *supra* note 2, at 752, 752.