THE FIRST DECADE OF THE SUPREME COURT OF THE UNITED STATES*

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FOR eleven months after the United States of America came into existence on March 4, 1789, it possessed only two branches of government, a legislative and an executive. For eleven months it lacked the third branch—the judicial; and this in spite of the fact that on the very next day after the new Senate organized with a quorum, the first bill to be introduced was the Judiciary Bill—Senate No. 1. It was six months before the bill became law and before President Washington could appoint the members of the first Supreme Court. What caused this delay?

As is well known, while the Constitution provided that there should be “one Supreme Court” and “such inferior Courts as Congress may from time to time ordain and establish,” the composition of the Supreme Court and the existence or non-existence of any inferior courts and the extent of their jurisdiction were left entirely to Congress to decide. Many who favored the Constitution, as well as many who were opposed, both in the Federal Convention and in the State ratifying conventions had expressed the view that it would be better for Congress to leave to the State courts the execution of Federal rights and powers, with an appeal to the Supreme Court; and from April 7, the date when the Senate appointed its committee to organize the judicial system, this was the great controversial question. On June 12, 1789, the committee reported a bill, chiefly drafted by Oliver Ellsworth and William Paterson, providing for a Supreme Court of six Judges and for Federal district and circuit courts to try criminal and admiralty cases and suits between citizens of different States. Over this bill, the debate raged in the Senate and in the House for three months. The crucial point was whether there should be any inferior Federal courts (except possibly in admiralty), and if there were to be any such courts, whether the Constitution required that they be vested with the full jurisdiction which the Constitution permitted, including cases arising under the laws and Constitution of the United States

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(as Judge Story and many other judges later maintained). The final result of the bill was a compromise. On the one hand, the extreme Federalists were obliged to yield in their contention that the Federal courts must be granted full jurisdiction. On the other hand, their opponents were unsuccessful in attempting to confine Federal cases to the State courts, subject to appeal, and were compelled to accept Federal courts possessing a very limited jurisdiction. It is interesting to note that the party which in later years bitterly opposed appeals from State courts to the Supreme Court, was the very party which at the outset advocated this form of appeals exclusively.

It was not until September 24, 1789, that the Judiciary Act finally became law, nearly six months after its introduction in the Senate.¹

Since there was no controversy over the provision for six Justices of the Supreme Court, as provided in an early draft by Ellsworth in April, President Washington had plenty of time to consider the qualifications of candidates and possible nominees for that Court. Having the advantage of being able to consult in New York with fourteen members of the Congress who had been delegates to the Federal Constitutional Convention of 1787, and with twenty-five members of Congress who had served in the State ratifying conventions, Washington became well-informed as to the men who would be most likely to enforce the Constitution in sympathy with its theory and objectives. Though great pressure was brought to bear on the President with reference to his appointments on the Court, Vice President Adams accurately pictured the man in a letter to Silvanus Bourne, August 30, 1789: "I must caution you, my dear Sir, against having any dependence on *my* influence or that of any other person. No man, I believe, has influence with the President. He seeks information from all quarters and judges more independently than any man I ever knew. It is of so much importance to the public that he should preserve this superiority, that I hope I shall never see the time that any man will have influence with him beyond the powers of reason and argument." On the day of the passage of the Judiciary Act, Washington sent to the Senate the names of those whom he had chosen for the first Court.

At the very outset, Washington showed how fully he recognized the importance of the Court, for in his letter to John Jay nominating him as Chief Justice, he stated that the Court "must be recognized as the key-

¹ The Senate debate began on June 22, 1789, and the Senate passed the bill July 17; it was taken up by the House on July 20. Since proposed constitutional amendments, including one pertaining to the scope of the Federal judiciary, were then pending in the House, it was not until August 24 that the House began its debate on the Judiciary Bill; on September 21, the House passed it.

stone of our political fabric"; and writing to his future Attorney General, Edmund Randolph, he said: "Impressed with a conviction that the true administration of justice is the firmest pillar of good government, I have considered the first arrangement of the judicial department as essential to the happiness of our country and the stability of its political system." The choice of Jay was a notable one; for he had not only had judicial experience (as Chief Justice of New York for two years), but he had also been President of the Continental Congress, Minister to Spain and to France, and Secretary of Foreign Affairs. In 1789, his prestige as a lawyer and statesman was greater than that of Madison, Hamilton, Livingston or Jefferson; so that John Adams, in speaking later of the early Federalists, said that Jay was "of more importance than any of the rest, indeed of almost as much weight as all the rest."

In his choice of Associate Justices, Washington evidently gave heavy weight to previous judicial experience and also to geographical distribution. William Cushing of Massachusetts had been for twelve years Chief Justice of the Supreme Judicial Court of that State; Robert H. Harrison of Maryland (who declined the appointment) had been Chief Judge of its General Court; John Blair of Virginia had been Chief Justice of its General Court, and for nine years Judge of Chancery; John Rutledge of South Carolina had been Judge of Chancery. James Wilson of Pennsylvania and James Iredell of North Carolina were the only men who had held no judicial posts; but Wilson was generally recognized as the most profound jurist in the country, and Iredell was the ablest lawyer in his State.²

Washington, moreover, had had an eye to the especial familiarity of the Justices with the Constitution which they were to interpret; Wilson (next to Gouverneur Morris) had been the most active speaker in the Federal Convention of 1787; Rutledge had been Chairman of the Committee of Detail which framed the Constitution after its general outline had been decided on, and had had especial connection with the Judiciary Article; Blair had been a delegate from Virginia; Paterson had drafted the plan put forward by the small States; Cushing, Johnson, and Iredell had been prominent in the State conventions which adopted the Constitution.

² Of the men later appointed by Washington on the Court, William Paterson of New Jersey had been Chancellor; Thomas Johnson and Samuel Chase had each been a Chief Judge of the General Court of Maryland; and Oliver Ellsworth (Jay's successor as Chief Justice) had been a judge of the Superior Court of Connecticut for three years. Ellsworth was 51 years of age when appointed Chief Justice in 1796 (just the age of Mr. Justice Black, when appointed); Paterson was 48, and Chase was 55.

The era was peculiarly one of young men—Madison was at this time 38, Hamilton 32, Rufus King 34, Gouverneur Morris 37, Charles Pinckney 31, Marshall 31, Edmund Randolph (the Attorney General of the United States) 36. In this respect, the composition of the Supreme Court was no exception. Jay was 43 when appointed (only three years older than the youngest member of the present Court on his appointment, Mr. Justice Douglas); Harrison was only 44; Wilson was 47 (the age of Mr. Justice Murphy); Rutledge was 50; Iredell was only 38 (two years younger than Mr. Justice Douglas); Cushing and Blair were 57 (just the age of Mr. Justice Frankfurter, when appointed); Johnson, the oldest member, was 59 (the age of Mr. Justice Brandeis when appointed).

Between September and December, 1789, the President had the task of completing the judicial establishment of the United States by appointing the judges of the district courts—thirteen in number—a task rendered more arduous by the frequent declinations to serve in these new courts with their unknown duties. In this difficult undertaking, the President was greatly assisted by the intimacy of his acquaintance with the new Chief Justice, who, it will be recalled, remained also Washington's Secretary of State until Jefferson assumed that office on March 22, 1790. Of these close personal relations, I cannot refrain from giving an example in an exchange of correspondence which took place in the autumn of 1789. On November 30, Washington wrote to the Chief Justice, enclosing theatre tickets and saying: "As this is the last night the President proposes visiting the theatre for the season, he cannot deny himself the gratification of requesting the company of the Chief Justice and his Lady; although he begs at the same time that they will consider this invitation in such a point of view as not to feel themselves embarrassed in the smallest degree upon the occasion, if they have any reluctance to visiting the theatre; for the President presents the tickets to his friends who will act as most agreeable to their feelings, knowing thereby that they will meet the wishes of the person who invites them." Jay in his acceptance of this invitation thanked the President for "his delicate attention to their embarrassment," which, however, he said, "ceased with all question between government and the theatre." Two weeks later (December 13, 1789), the President wrote to the Chief Justice "and informs him that the harness of the President's carriage was so much injured in coming from Jersey that he will not be able to use it today. If Mr. Jay should propose going to Church this morning, the President would be obliged to him for a seat in his carriage."

The first district courts of the United States were held in the fall of

1789; but it was not until February 1, 1790—just one hundred and fifty years ago—that the Supreme Court of the United States held its first session for organization. It met in New York at the Exchange, a building located across the foot of Broad Street at the junction of Water Street, practically on the bank of the East River. It may be noted that never again in its history did the Court meet so far away from the legislative branch of the government; for the Congress was then sitting at the corner of Broad and Wall Streets, six blocks away and just opposite where another “exchange” was later established—the New York Stock Exchange. The Water Street Exchange of 1790 had been built as a market hall in 1752, and was constructed like similar halls in Europe and like Faneuil Hall in Boston, with arcades for stalls on the street level and a large high-vaulted hall, sixty feet long, in the second story. This hall had at various times been used for theatrical entertainments and other exhibitions, a coffee room, society meetings, and for sale of imported goods. For several years the State Legislature had met there; and in this building the old Federal Court of Appeals under the Articles of Confederation had sat, and the District Court for New York had met there on the preceding third of November.³

When the Supreme Court of the United States convened there for the first time, it was probably at one o'clock in the afternoon, since the New York Assembly sat in the hall in the mornings. As is well known, only three Justices were present—Jay, Cushing and Wilson. Adjournment, therefore, was made until one o'clock of the next day. As no debates are reported in Congress on this date, it is probable that members were attending the opening of the Court. With the arrival in New York of Mr. Justice Blair of Virginia, the formal organization was made possible on February 2. The Court, however, again at once adjourned; for there were, of course, no cases ready, since no writs of error (the only method of appeal) could have issued to State or Federal courts and no subpoenas in cases of original jurisdiction, by reason of the fact that there was no Clerk of the Court to issue them. On February 3, the Clerk was

³ See full description in Reeder, *The First Homes of the Supreme Court of the United States*, 76 *Proc. Amer. Phil. Soc.* (1936).

Cushing wrote to Jay, Nov. 18, 1789: “Having the honor of an appointment as one of your associates on the Supreme federal bench, I must beg the favor of a line from you respecting the time it will be necessary or convenient for me to attend at New York. If not inconvenient, I propose to delay going till some time in January. . . . I observe the law has prescribed the form of oath for us, but has not said who shall administer it. I shall be glad of your opinion relative to any of those matters, or any others respecting the business we are about to be engaged in, that you may think proper to mention.” 44 *Mass. Hist. Soc. Proc.* (1911).

appointed—John Tucker of Massachusetts—and an official seal was adopted; and on the next day, President Washington recorded in his diary that he had at dinner a company consisting of the Vice President, the Chief Justice, Justices Cushing, Wilson and Blair, the Attorney General of the United States, Edmund Randolph, and Secretary of the Treasury Hamilton and Secretary of War Knox and others.

On Friday, February 5, the Court ordered that for admission to practice before it, counsellors and attorneys should have practiced in the Supreme Courts of the respective States for three years and "that their private and professional character shall appear to be fair"—a not excessive requirement.⁴ On the remaining days of the term, the only business was the admission of seven attorneys and nineteen counsellors, of whom eleven were members of Congress. A Boston newspaper found it "alarming to find so many Members of Congress sworn into the Federal Court" and asked whether it was proper or "prudent to trust men to enact laws who are practicing on them in another Department?" On the evening of adjournment on February 10, the Court, with the Attorney General and the district judges, were the guests of the grand jury at dinner in the old Fraunces Tavern located just a block away; and the newspapers commented on the "liberality, good order and harmony of the occasion."⁵

The records of the first session of the Supreme Court are found in the minutes prepared by the Clerk—minutes which, curiously enough, began with a misstatement; for the first line reads: "In the Supreme Judicial Court of the United States"—the Clerk having apparently been obsessed with the title of his own State court, which was the Supreme Judicial Court of the Commonwealth of Massachusetts. It is a singular fact that apparently no docket was kept for the first ten years—at least none is now extant; and there are only a few papers in any of the early cases now extant.⁶ Hence it is not possible now to learn the exact number of cases

⁴ The Judiciary Act provided that both the Attorney General and the District Attorney should be "a meet person, learned in the law." The Act of June 22, 1789, establishing the office of Solicitor General, prescribes that he "shall be an officer learned in the Law."

⁵ Two months later, on April 3, 1790, the Justices entered upon their "unexplored field," the holding of circuit courts in each State in the three circuits—an unenviable and exhausting task. And Washington, as they set out to ride from one end of the country to the other, addressed a letter to them, expressing the hope that they would inform him as to their progress, since, he said, he had "always been persuaded that the stability and success of the National Government . . . would depend in a considerable degree on the interpretation and execution of the law."

⁶ In the Clerk's office, there exists a volume of about twenty pages which contains the proceedings in a few important cases prior to 1800, but these seem to have been compiled and bound later.

or when they were filed, nor (as to most of them) the proceedings taken, except so far as the cases were acted on in open court as shown by the minutes. During the first decade, there was no official reporter; but, as is well known, Alexander J. Dallas, a young Philadelphia lawyer, thirty-one years old, compiled a series of cases, partly from his personal knowledge in the courtroom, partly from briefs and notes of counsel, and partly from the written opinions furnished to him by the Justices. It must be borne in mind, however, that Dallas Reports were not published until many years after the cases were decided; and since not more than four or five cases were reported in the newspapers of the day during the first decade, the public knew practically nothing, at the time, about the work or decisions of the Court, and a member of the bar knew the decisions only if he happened to secure a written copy. Volumes two and three of Dallas Reports were not published until 1798 and 1799, and volume four (which covers the 1799 and 1800 terms) was not published until the year 1807. In these three volumes, Dallas included about sixty-five cases; but upon a survey of the written minutes which I have made, it appears that between 1791 and 1801, there were at least forty-nine additional cases upon which the Court took action. Some of these might well have been reported by Dallas, if not for their legal authority, then at least for their historical interest, especially since a few of these omitted cases were very important suits against States.

Some general facts as to customs of the Court may be of interest. First, as to the costume of the Justices. At the first session, the Chief Justice wore a black gown with salmon colored facings, probably his gown of Doctor of Laws in the University of Dublin. A recent careful investigator, however, believes that the other Justices first wore gowns at the February 1792 term.⁷ After 1790, it appears from the minutes that the Court usually began its sessions at ten or eleven o'clock in the morning (or occasionally at noon); there is no note of the hour when they adjourned in the afternoon. At one session, Saturday, August 22, 1795, the Court sat for its usual time and adjourned until seven o'clock in the evening, when, after further hearing of the case, it adjourned until Monday morning at nine o'clock at which time it rendered its decision. This is probably the only instance of an evening session in the history of the Court.

The Justices delivered the opinions from the bench *seriatim*, beginning with the latest appointee and ending with the senior appointee. This is

⁷ See Reeder, *op. cit. supra* note 3, at 591. Frank Monaghan, in his biography of John Jay (1935), states that this robe is now preserved in the Smithsonian Institution.

the reason why the first reported opinion is a dissenting opinion by Johnson, he being the newest Justice on the bench.⁸ There were no printed briefs of counsel to consider; but the minutes of the Court show that on February 4, 1795, "the Court 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 counsel on each side of a cause."

A marked variation from present day procedure was the extreme length of time allowed to counsel for argument and the shortness of time taken in writing opinions. Thus in February, 1793, the case of *Kingsley v. Jenkins* (unreported by Dallas) was argued for four days and decided five days later, and that of *Georgia v. Brailsford*⁹ argued for four days and decided eleven days later; in February, 1794, the great admiralty case of *Glass v. Sloop Betsey*¹⁰ was argued for four days and decided seven days later; in February, 1795, *Penhallow v. Doane's Adm'rs*¹¹ was argued for nine days and decided eight days later; in August, 1795, *Talbot v. Jansen*¹² consumed eleven days in argument (one lawyer alone taking three days) and was decided three days later. In February, 1796, the great British debts case of *Ware v. Hylton*¹³ took six days for argument, but in this instance, the Court took twenty-four days to write its opinions. The present Attorney General, in his address to the Court on February 1, 1940, has well and wittily characterized the situation:

The duration of an argument was then measured in days instead of hours. All questions were open ones, and neither the statesmanship of the Justices nor the imagination of the advocate was confined by the ruling case. Some philosophers have so feared the weight of tradition as to assert that happy are a people who have no history. We, however, may at least believe that there was some happiness in belonging to a bar that had little occasion to distinguish precedents or in sitting upon a Court that could not be invited to overrule itself.

During the whole decade, the February terms were of rather short duration, the Court sitting on an average less than two weeks (the longest February term being in 1796—thirty-seven days). At the August terms, the Justices rarely sat more than two or three days (the longest being seventeen days in 1795). It is peculiar that Ellsworth and Paterson, who drafted the Judiciary Act, should have provided for any August term, since they had sat in Philadelphia through the very hot summer of 1787 in the Federal Convention, and realized fully the extreme heat of that

⁸ *Georgia v. Brailsford*, 2 Dall. (U.S.) *402, *405 (1792).

⁹ 2 Dall. (U.S.) *402 (1792).

¹⁰ 3 Dall. (U.S.) *6 (1794).

¹¹ 3 Dall. (U.S.) *54 (1795).

¹² 3 Dall. (U.S.) *133 (1795).

¹³ 3 Dall. (U.S.) *199 (1796).

city as well as of New York. One fact other than the heat shortened the August sessions—yellow fever, which was seriously prevalent in Philadelphia in five summers (1793, 1794, 1795, 1798 and 1799).

It is a curious fact that in the eleven years between 1790 and 1801, the Court had five Chief Justices. Jay, after being absent as Special Envoy to Great Britain during the August term of 1794 and the February term of 1795, resigned June 29, 1795. In his place, John Rutledge of South Carolina was appointed July 1, 1795, and attended at the August term on August 12. The Senate refusing to confirm Rutledge, President Washington appointed Cushing, who was confirmed by the Senate on January 27, 1796, but declined the office on February 2. Oliver Ellsworth was then appointed on March 4, 1796, and took his seat on March 8. He sat for only five terms as he was appointed as Special Envoy to France on February 25, 1799; and on his resignation, September 30, 1800, John Marshall was appointed on January 31, 1801.

Let us now consider a little more in detail some of the more notable of the proceedings of the Court.

The second session of the Supreme Court was held for only two days in New York, August 2 and 3, 1790, and again no business was done except admission of counsellors to practice. For the February term of 1791, the Court moved to Philadelphia which had been established as the temporary seat of government—a “dissipated metropolis,” wrote a lawyer in a Boston paper.⁴⁴ It is interesting to note that when the Court left its hall in the Exchange in New York, the use of the hall was granted to the Society of St. Tammany which maintained headquarters and a museum there for several years—a use somewhat far removed from judicial. In Philadelphia, since the new City Hall then under construction for the Court was not finished, the Supreme Court sat in Independence Hall. On the opening day, the Justices were attended at their lodgings by the Philadelphia bar and escorted to their temporary courtroom—a chamber just across the passageway from the room in which the Declaration of Independence had been signed and the Constitution framed. As this chamber was the courtroom in which the Supreme Court of Pennsylvania had sat for many years, it would be interesting to know whether Chief Justice Jay followed the habit of the Chief Justice of the State, as described by Manasseh Cutler who visited the Court in July, 1787: “The Chief Judge, Mr. McKean, was sitting with his hat on, which is the custom but struck me as very odd and seemed to derogate from the dignity of a Judge.”

⁴⁴ *Independent Chronicle*, June 5, 1794.

The United States Supreme Court sat at this February term in 1791 for only two days, most of its time being occupied in admitting to practice members of the Philadelphia bar. There was, however, one notable (and, as it turned out, ominous) action taken. For the first time in American history, a court entertained a suit by an individual against a State, when in *Vanstophorst v. Maryland*,¹⁵ a suit involving foreign creditors, the Attorney General of the State, Luther Martin, entered an appearance and the Court ordered that the State plead within two months. As the suit was later discontinued by consent of counsel (August 6, 1792), the great constitutional question involved was not presented to the Court in this first case.

In the August term of 1791, the Court sat for three days. At the February term in 1792, the Chief Justice and Mrs. Jay stayed with the Vice President in Philadelphia, in response to Adams' invitation of January 4 to visit him "in South Street, the corner of 4th St., where your old bed is ready for you in as good a chamber and much more conveniently situated for your attendance in your Court and intercourse with your friends." No quorum appearing for five days, the Court sat on February 11 and 13, heard two motions, admitted counsellors to practice, and adjourned. Thus, during the first five terms, the Court had decided no cases, rendered no opinions, and had passed only on motions.

It was at the August term of 1792 that the Court was confronted with the grave question as to the constitutional right of a State to be free from suit by a citizen of another State. Three cases were in its files involving this issue—*Vanstophorst v. Maryland*,¹⁶ *Oswald v. New York*,¹⁷ and *Chisholm v. Georgia*¹⁸ (all of them involving debts claimed to be due to foreign creditors); and at the close of the term, a fourth case was filed—*Grayson v. Virginia*¹⁹ (later amended to *Hollingsworth v. Virginia*).²⁰ This case, unlike the others, did not involve any British or other debts but was brought by the members of the Indiana Company, owning several million acres in western Virginia, to obtain specific performance of a land grant made by the State.²¹ The question of the Court's jurisdiction was regarded as of vital importance to the States; for definite statements had been made by John Marshall, James Madison, and others in the State

¹⁵ 2 Dall. (U.S.) *401 (1791).

¹⁶ Ibid.

¹⁸ 2 Dall. (U.S.) *419 (1793).

¹⁷ 2 Dall. (U.S.) *401 (1791).

¹⁹ 3 Dall. (U.S.) *320 (1796).

²⁰ 3 Dall. (U.S.) *378 (1798). Bill filed, December 4, 1792; leave to amend and new process awarded, February 20, 1793; process issued July 3, 16, 1793 (see minutes).

²¹ See letter of George Morgan, Feb. 1793, 41 Pickering Papers MSS. 114, Massachusetts Historical Society Collections.

conventions in 1788, and by Hamilton in *The Federalist*, that it was unthinkable that by ratifying the Constitution, the States would render themselves subject to such suits. The suit against Georgia had been filed by Chisholm, a South Carolina citizen and administrator of a British creditor, to recover monies confiscated by the State. As Georgia had failed to appear in response to a subpoena, Edmund Randolph, counsel for the creditor, moved on August 11, 1792, that judgment be entered against it and that a writ of enquiry of damages be awarded; and the question of the Court's jurisdiction was argued exhaustively by Randolph at the next term (February 5, 1793). Since counsel for Georgia, under positive instructions, refused to argue the question, though presenting a protest to the Court against the Court's jurisdiction, the Justices took a rather unusual action, described by Dallas in his Reports, but more picturesquely in a letter from George Morgan (the counsel who had just filed suit against Virginia): "The Bench expressed a desire to the Gentlemen of the Bar that, if any of them held the negative of the question they would speak and that the Bench would be glad to hear them upon it. None offering, the Chief Justice, after a proper pause, expressed a wish and offer of whatever time should be required by any gentleman to prepare himself; but this was also declined."²² Rather rightly, the bar was not inclined to argue against Attorney General Randolph a great constitutional issue without preparation or compensation.²³

The Court took the *Chisholm* case under advisement for thirteen days, and on February 18 delivered its momentous decision, holding that a State might be sued by a citizen of another State—Justice Iredell dissenting. A year later, as Georgia still failed to appear, the Court, on motion of Randolph (February 13, 1794), directed that judgment by default be entered for the plaintiff against the State of Georgia;²⁴ and on August 5,

²² Dallas reported that "regarding the question involved in this suit as highly important," the Court "suggested to the Counsellors of the Court that if any are disposed to offer their sentiments on the subject now under consideration, the Court are ready to hear them."

²³ A noteworthy instance of a similar action by the Court occurred ten years later when in *Marbury v. Madison*, 1 Cranch (U.S.) *137 (1803), after the conclusion of Charles Lee's argument in behalf of the petitioner, the Court (according to the newspapers of the day), through Chief Justice Marshall, "observed that they would attend to the observations of any person who was disposed to offer his sentiments, since the Attorney General declined to argue in behalf of Madison, but no one responded to the Chief Justice's invitation."

²⁴ On February 19, 1793, the Court ordered that "judgment by default be entered against the State of Georgia unless she appear or show cause to the contrary by the first day of next Term"; but on August 5, 1793, Dallas and Ingersoll (according to the minutes of the Court) "appeared by virtue of an authority from the State of Georgia and moved to postpone argument until the next Term on the motion to show cause why judgment by default should not be entered."

1794, it ordered "that the General Jury to be summoned at the next Court do enquire upon their oaths and affirmation what damages the plaintiff has sustained by reason of the promises and the non-performance of the promises and assumptions in the declaration of the plaintiff contained" (the Governor and Attorney General to be given three months' notice).

Meanwhile, at the February term of 1794, the State of Georgia had become a party plaintiff before the Court in a suit at law brought at the suggestion of the Court in place of a previous suit in equity—*Georgia v. Brailsford*²⁵—and this suit was now tried before a jury on February 3, 5, and 7, 1794. As jury trials have rarely occurred in the Supreme Court, it may be of interest to describe the procedure in this and subsequent trials as set forth in the minutes. Beginning with this 1794 term, it appears that the custom was for the Court at each term to direct the Marshal of the District Court of Pennsylvania to issue a venire for the summoning of a jury. These jurymen (to the number of forty-eight in August 1796, thirty-two in February 1794, and forty in August 1797) were called and sworn (or affirmed), generally on the first or second day of the term. In *Georgia v. Brailsford*,²⁶ the jury, after hearing counsel argue for four days, found a verdict for the defendant. Thus, the State of Georgia, in two cases in two years, was defeated both as a defendant and as a plaintiff in the Court.

The *Chisholm* case aroused tremendous excitement among the States and resulted in the immediate introduction of resolutions in Congress for a constitutional amendment to reverse the decision. Meanwhile, during the pendency of this amendment over a period of five years, suits against States continued to be instituted and pressed. In June 1793, William Vassal, a British citizen whose property had been confiscated, sued the Commonwealth of Massachusetts.²⁷ And in 1795, in *Oswald v. New York*,²⁸ the State having failed to appear and judgment by default having been entered, a jury was called on February 5, and on the next day

²⁵ The original bill in equity in *Georgia v. Brailsford*, 2 Dall. (U.S.) *415, had been filed June 30, 1792; argued on August 8, 9, 1792; injunction issued August 11, 1792; argued on February 6, 7, 8, 9, 1793; order for continuance of the injunction and for the State to bring action at law, February 20, 1793 (see minutes). The Court had held on February 20, 1793 (two days after the decision of the *Chisholm* case) that Georgia should bring a suit at law, to be tried by a jury.

²⁶ 2 Dall. (U.S.) *415 (1793).

²⁷ Subpoenas issued January 4, 1793; writ returned by the marshal, August 5, 1793; suit dismissed with costs, February 13, 1797 (see minutes).

²⁸ 2 Dall. (U.S.) *401 (1792).

rendered a verdict for \$5,415 in damages against the State and six cents costs.

A grave question whether the Court could compel a State to appear was presented on March 14, 1796, when counsel in *Hollingsworth v. Virginia*²⁹ moved that the Court issue a distringas writ to compel the appearance of the State. The Court postponed decision in consequence, as it said, of a doubt whether the remedy should be furnished by the Court itself or by the legislature. This very question was raised by the State of New Jersey and by Congress itself thirty-five years later. The Court held in the *Virginia* case, on August 12, 1796, that it had the power under its general equity powers to issue an alias subpoena, with permission to the plaintiff to proceed ex parte if the State did not appear within three months after service of process on the Governor and Attorney General. As Virginia did not appear, the Court on February 13, 1797, issued rules for commissioners to take testimony in Pennsylvania, Virginia, and Kentucky.

On August 8, 1797, a sixth State having failed to appear and having been defaulted, a jury was summoned and rendered a verdict for the plaintiff in the sum of \$55,002.84. This was the suit (unreported by Dallas) brought on a debt against the State of South Carolina by John Brown Cutting, administrator of a gentleman bearing the formidable name of "Ann Paul Emanuel Sigismund de Montmorency Luxembourg"—the Prince of Luxembourg.³⁰ A week after this verdict, a curious and

²⁹ 3 Dall. (U.S.) *378 (1798).

³⁰ Rule to marshal to return the writ of summons, August 6, 1795; on the same day alias summons issued and rule to plaintiff to file declaration before September 10 next, and service of declaration on Governor and Attorney General before November 1 next, and if State failed to appear judgment to be entered by default; rule that judgment by default be entered, February 8, 1797; rule that a writ of enquiry of damage be awarded (three months notice to Governor and Attorney General to be given), February 10, 1797.

The case involved a striking and little known episode in American history. In 1776, the American commissioners sent to France by the Continental Congress had contracted in Holland for the construction of a frigate, the *Indien*; but owing to English suspicions and charges of breach of Dutch neutrality, the vessel had been sold to the King of France, and its use had been granted by him to the Prince of Luxembourg. Meanwhile, Commodore Alexander Gillon of South Carolina had been authorized by that State to purchase vessels and supplies. On May 30, 1780, in Paris, he entered into a contract or treaty with the Prince on behalf of South Carolina to lease the ship for three years, agreeing to pay the Prince 300,000 livres and one quarter of the proceeds of any prizes taken by it, pledging the public faith and property of the State for performance of the contract. After many delays, the frigate, then named the *South Carolina*, put to sea in August, 1781, captured prizes worth \$100,000, and finally was itself captured by the British in December, 1782. The Prince of Luxembourg presented his claim for breach of contract and damages against South Carolina in 1784, through his agent, the British spy, Dr. Edward Bancroft. After an unsuccessful attempt at arbitration in 1784,

hitherto unknown sequel to this case appeared, when (on August 15, 1797) the State of South Carolina itself filed a bill in equity as a plaintiff against Cutting as administrator of the Prince of Luxembourg and the French Republic, asking for an injunction to stay all further proceedings on the judgment rendered against it. The Court ordered a temporary injunction on condition that the State bring into Court \$46,523.24 with interest from March 13, 1789, deducting therefrom a small sum acknowledged by the State to be due and offered for deposit. This suit is unique in our judicial history; for it does not appear that there has been any other instance of a suit by a State against a foreign nation, though there have been two suits by a foreign nation against a State—viz., *Cuba v. North Carolina*³¹ and *Monaco v. Mississippi*.³² The claim involved in the bill filed by South Carolina was not finally settled until 1855. (The facts constitute a striking and little known episode in American history and are given in footnote thirty, since they do not appear of record in any papers in the Court files).

Still another suit against a State was that of *Huger v. South Carolina*³³ in which the State having been served and defaulted, the Court, on February 10, 1797, issued an order for commissioners to take testimony in Georgia, South Carolina and Pennsylvania. The case involved specific performance of contracts by the State to convey lands in the Yazoo territory under an Act of 1789. On February 7, 1798, summons were served and declaration filed in another suit by Brailsford against Georgia.³⁴ Thus, between the years 1791 and 1798, eight suits against States had been on the Court's docket.

Meanwhile, Congress had adopted the Eleventh Amendment forbidding the Court to take jurisdiction of such suits; and proclamation of the

the State in 1789 finally agreed to fund the claim and interest and to issue seven per cent stock therefor. The Prince died in 1790 and John Brown Cutting (who had also a personal interest of three per cent in the claim) was appointed the Prince's administrator in Charleston in 1794, and he attempted to compel the State to carry out this settlement by suit in 1797 in the Supreme Court of the United States. Finally, the South Carolina Legislature in 1807 ordered \$45,226.66 to be paid to France, and a further amount to the Prince. Complications again arose, and in 1814 the State ordered the issue to the Prince of \$28,894 in State stock; but the claim of the French Government was not settled until the Act of 1855, which directed payment to France of \$27,635 in final settlement of the claim of that nation. See Huger, *Commodore Alexander Gillon and the Frigate South Carolina*, 9 S.C. Historical & Genealogical Magazine 188 ff. (1908); Huger, *The Luxembourg Claims*, 10 S.C. Historical & Genealogical Magazine 92 ff. (1909).

³¹ 242 U.S. 665 (1916).

³² 292 U.S. 313 (1934).

³³ 3 Dall. (U.S.) *339 (1797).

³⁴ Previous suits were *Georgia v. Brailsford*, 2 Dall. (U.S.) *402 (1792), re-aff'd 2 Dall. (U.S.) *415 (1793); *Georgia v. Brailsford*, 3 Dall. (U.S.) *1 (1794).

ratification of the amendment by the necessary number of States was made on January 8, 1798. A month later, in *Hollingsworth v. Virginia*,³⁵ the Court heard arguments of counsel as to its right to act further on pending cases; and on the same day (February 14, 1798) it held that it had no further power and ordered the bill dismissed. Thus, all these cases were swept from files of the Court, and today no papers respecting them can be found in the files, other than the entries in the minutes of the Court.

In the following term, after a jury had been summoned and called on August 5, 1798, it was discharged five days later; and thereafter juries seem to have disappeared from the courtroom. The practice since then, when facts have had to be ascertained in cases involving the original jurisdiction of the Court, has been for the Court to appoint a commissioner, as was done in *Pennsylvania v. Wheeling & Belmont Bridge Co.*³⁶ or to appoint a special master.

I have described in some detail these suits against States since none of the histories has adequately covered the subject. The extensiveness of the subject will not permit me to describe in similar detail the other cases of interest. I will confine myself, therefore, to three or four other notable features of the Court's first decade.

To begin with, it is to be noted that from the outset, the Court insisted on the preservation of the functions of the judicial branch of the Government as separate from those of the executive and the legislative. In his charge to the grand jury of the first Circuit Court held in New York, April 4, 1790, Chief Justice Jay stated that it is "of the last importance to a free people that they who are vested with Executive, Legislative and Judicial power should rest satisfied with their respective portions of power and neither encroach on the provinces of each other, nor suffer themselves nor the others to intermeddle with the rights reserved by the Constitution to the people." Five months later, when the Secretary of the Treasury, Hamilton, wrote suggesting that "the collective weight of the Government ought to be employed in exploding the principle" contained in certain resolutions of the Virginia Legislature denouncing the assumption of State debts by the Federal government, Jay declined to have the Court take any action, realizing that judicial opinions ought to be rendered only in litigated cases. On April 5, 1792, when Congress had sought to impose on the Justices certain duties with reference to the Invalid Pensioners Act, Jay and Cushing, sitting on circuit in *Hayburn's*

³⁵ 3 Dall. (U.S.) *378 (1798).

³⁶ 9 How. (U.S.) *647 (1850).

Case,³⁷ held that the government was divided into three "distinct and independent branches and that it is the duty of each to abstain from and to oppose encroachments on either; that neither the Legislative nor the Executive branch can constitutionally assign to the Judicial any duties but such as are properly judicial and to be performed in a judicial manner"; and Justices Wilson, Blair and Iredell took the same view, in other cases on circuit.

This judicial independence was further maintained in the notable instance of the refusal of the Court in 1793 to render an advisory opinion to the President—thus setting a precedent of vast importance to our governmental system, which precedent has never been departed from. The incident arose out of the complicated condition of our foreign relations. In previous years, the French Revolution had aroused in this country rather general enthusiasm and sympathy; but when in the spring of 1793 news arrived of the execution of Louis XVI, the organization of the French Republic, and its declaration of war against Great Britain, serious divisions of sentiment arose here. On April 8, 1793, the new French Minister arrived at Charleston, and it soon became evident that unless some action was taken by our government, the United States might become involved in the war. While hitherto avoiding any call upon the Court itself, President Washington had consulted the Chief Justice individually on several matters. As early as August 27, 1790, he had submitted to Jay and to his Cabinet a question as to Spanish control of the Mississippi River; and on September 4, 1791, he had written to Jay: "Will you permit me, my dear Sir, to make a similar request to the one I did last year, and to pray that your ideas may not be confined to matters merely judicial but extended to all other topics which have or may occur to you—as fit subjects for general or private animadversions." And in September, 1792, Hamilton had been directed to consult with Jay as to the advisability of the issue by the President of a proclamation in the so-called Whiskey Insurrection.³⁸ Jay had also advised Hamilton as to the reception of the new French Minister (April 9, 1793), and had also prepared for the President (through Hamilton, April 11, 1793) a draft of a neutrality proclamation. After the issuance of this proclamation on April 22, 1793, Washington found that the questions arising as to its enforcement and other war problems were so great that he decided to call on the Supreme Court for its advice as a Court. Accordingly, Thomas Jefferson, Secretary of State, was directed to write to Jay and the Associ-

³⁷ 2 Dall. (U.S.) *409 (1792).

³⁸ Hamilton to Jay, September 3, 1792; Jay to Hamilton, September 8, 1792.

ate Justices, July 18, 1793, a letter as follows, presenting a list of twenty-nine questions (twenty-one of which were proposed by Hamilton) to which the President desired, if possible, an answer:

These questions depend for their solution on the construction of our treaties, on the laws of nature and nations, and on the laws of the land, and are often presented under circumstances which do not give a cognizance of them to the tribunals of the country. Yet their decision is so little analogous to the ordinary functions of the Executive as to occasion much embarrassment and difficulty to them. The President therefore would be much relieved if he found himself free to refer questions of this description to the opinion of the Judges of the Supreme Court of the United States whose knowledge of the subject would secure us against errors dangerous to the peace of the United States, and their authority insure the respect of all parties. He has, therefore, asked the attendance of such Judges as could be collected in time for the occasion, to know, in the first place, their opinions whether the public may, with propriety, be availed of their advice on these questions. And if they may, to present for their advice the abstract questions which have already occurred, or may soon occur, from which they will themselves strike out such as any circumstances might, in their opinion, forbid them to pronounce on.

As the Court was not then in session, Jay, on July 20, asked and the President acceded, that answer might be postponed until the arrival of all the Justices in Philadelphia—only Jay, Wilson, Paterson, and Iredell being then in the city. Finally, on August 8, 1793, the Court replied as follows:

We have considered the previous question . . . regarding the lines of separation drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being Judges of a Court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions seems to have been *purposely* as well as *expressly* united to the executive departments.

This reply constituted, perhaps, the most notable action of the Court during its first decade.³⁹

In view of the fact that the whole country was divided politically into heated partisans of the French on the one hand and of the British on

³⁹ Incidentally, it is to be noted that in the Federal Convention of 1787, Charles Pinckney, on August 20, proposed for consideration of the Committee of Detail, a provision (taken from the constitution of Massachusetts, which provision Nathaniel Gorham had previously proposed on July 21) that: "Each branch of the Legislature, as well as the Supreme Executive, shall have authority to require the opinions of the Supreme Judicial Court upon important questions of law, and upon solemn occasions." This clause was never accepted by the committee; but in substitution for it, the Convention adopted on September 7 a provision that the President "may require the opinion in writing of the principal officer of each of the Executive Departments, upon any subject relating to the duties of their respective offices."

the other, and that feelings on both sides were very bitter, the Court, if it had decided to give an advisory opinion, would have found itself plunged into politics. And the wisdom of its declination to answer a question of law *ex parte* and without full argument of counsel was further strikingly shown by the fact that one of the precise questions presented to it by the President was involved in the case of *Glass v. Sloop Betsey* at the very next term in 1794.⁴⁰ As the point was a very doubtful one, the case was fully and vigorously argued for four days (February 8, 10, 11 and 12). The issue was of the highest importance, because on it depended in large measure the success of the government's efforts to preserve our neutrality against repeated violations by both French and British privateers. The Court's decision, holding that prizes captured by a vessel which had infringed our neutrality proclamation and laws should be restored to their owners, settled a highly controversial point and established our powerful position as a neutral nation and a principle for the basis of action in all future years. In fact, it was on the authority of this case that the Court, 123 years later, acted in ordering the restoration to its owners of the British steamship *Appam*,⁴¹ captured by a German cruiser and sent as a prize into our port of Norfolk in violation of our neutrality in the World War.⁴²

Of other notable cases in this first decade, a few deserve especial mention—first, *Hylton v. United States*,⁴³ the case in which the constitutionality of a Federal statute was argued for the first time. Attorney General Charles Lee and Alexander Hamilton opposed Jared Ingersoll and Alexander Campbell as counsel in the litigation. The suit was a singular one by reason of the fact that in order to provide the required jurisdictional amount, the plaintiff had to aver that he kept 125 chariots "exclusively for his own private use and not to let out to hire," taxable at \$2000 or \$16 per chariot. As the census shows that in all Virginia there were only 709 such vehicles, the declaration and agreed statement of facts

⁴⁰ 3 Dall. (U.S.) *6 (1794). Question nineteen submitted to the Court was: If any armed vessel of a Power at war with another with whom the United States are at peace, shall make prize of the property of subjects of its enemy within the territory or jurisdiction of the United States, have not the United States a right to cause restitution of such prize? Are they bound or not by the principles of neutrality so to do, if such prize be within their power?

⁴¹ The Steamship *Appam*, 243 U.S. 124 (1917).

⁴² The Court in the *Sloop Betsey* case not only answered the question at issue, but somewhat unwarrantably (since the point was not involved) adjudged "that the Admiralty jurisdiction which has been exercised in the United States by the Consuls of France, not being so warranted, is not of right," thus answering two of the questions propounded by President Washington.

⁴³ 3 Dall. (U.S.) *171 (1796).

were plainly fictitious; and this became even more clear when it later appeared that the government paid the counsel on both sides of the suit. In modern times, it is doubtful whether the Court would render a decision in a case of so doubtful a controversial nature. The case was of interest for another reason. Those who attack the power of the Court to hold a Federal statute unconstitutional and term its exercise a usurpation initiated by Chief Justice Marshall in *Marbury v. Madison*,⁴⁴ always avoid mention of the *Hylton* case. While the Court in the *Hylton* case upheld the Federal statute on the ground that the tax on carriages was not a direct tax, it is plain that had the Court decided that the tax was direct, it must have also held that the tax was levied in a manner violative of the Constitution, and hence that the statute imposing the tax was invalid. Similarly, opponents of the right of judicial review urge, as supporting the idea of usurpation, the fact that between 1803 and the *Dred Scott Case*⁴⁵ in 1857, the Court never held any Federal statute unconstitutional. This, they say, implies a doubt on the part of the Court as to its power. They entirely overlook the fact that the Court decided at least thirty cases prior to 1857 in which the constitutionality of an act of Congress was challenged; and certainly if the Court had any doubt as to its power to pass on the question of constitutionality, it would not have listened to exhaustive arguments on the point without expressing this doubt, even though in the end it sustained the validity of the acts involved.

One other case, *United States v. Hopkins* (not reported by Dallas), is of interest because the exact point on which *Marbury v. Madison*⁴⁶ was later decided by Marshall was involved, but apparently not argued. The *Hopkins* case was concerned with a motion for issuance of a mandamus by the Court, in its original jurisdiction, against a Federal Commissioner of Loans. Filed on February 13, 1794, and argued February 14, the case was decided on the next day, the Court being "of opinion that the right claimed by the petitioner does not appear sufficiently clear to authorize the Court to issue the mandamus moved for." Had it so desired, the Court could undoubtedly have decided, as did Marshall, that irrespective of any right of the petitioner to a mandamus, the Court had no constitutional power to issue such a writ to a Federal official as a matter of original jurisdiction; and thus Marshall's great decision on the right to hold a Federal statute invalid might have been anticipated by seven years.

In view of the fact that, twenty-five years later, the Court's right to

⁴⁴ 1 Cranch (U.S.) *137 (1803).

⁴⁵ 19 How. (U.S.) 393 (1857).

⁴⁶ 1 Cranch (U.S.) *137 (1803).

hold State statutes invalid was violently challenged and attacked by Jefferson and the Republican party generally, it is interesting to note that as early as 1796 in the famous British debts case of *Ware v. Hylton*,⁴⁷ argued on February 6, 8, 9, 10, 11 and 12, 1796, with John Marshall on the losing side, the Court held (March 7, 1796) a statute of Virginia to be invalid as violative of the treaty with Great Britain. While this case came from the Circuit Court in Virginia, similar decisions were rendered by the Supreme Court in four cases coming from the State court of Maryland (three of which are not reported by Dallas)⁴⁸ and there is no evidence that there was any public opposition to the Court's exercise of power. So, too, in at least five cases, Justices in the circuit courts held State statutes unconstitutional as violative of the Federal Constitution, and no voice was raised in challenge.⁴⁹ One of these circuit court cases, *Vanhorne's Lessee v. Dorrance*,⁵⁰ was taken to the Supreme Court, but after several continuances was dismissed on February 18, 1799, for failure to prosecute the writ of error. In *Calder v. Bull*,⁵¹ decided during August, 1798, the Court upheld the constitutionality of a Connecticut statute, Justice Iredell expressly sustaining the power of the Court to decide upon the validity of the State law, and the other Justices impliedly endorsing this power.

The *Calder* case had come to the Supreme Court on writ of error from the State court; and it is a noteworthy fact that, though, thirty years later, the 25th Section of the Judiciary Act which allowed such writs of error to State courts was seriously and violently challenged as unconstitutional, no such challenge was made in 1798. Nor had it been made in 1793, in the very first case which came to the Court on a writ of error to a State court—the Supreme Judicial Court of Massachusetts. This was the case of *Pagan v. Hooper* (not reported in Dallas) which arose under peculiar circumstances. The State court had rendered judgment against Pagan, a British subject; and the British Minister, Hammond, had made violent protests to the legislature of Massachusetts and to the Secretary of State of the United States that the State court had violated

⁴⁷ 3 Dall. (U.S.) *199 (1796).

⁴⁸ *Clerke v. Harwood*, 3 Dall. (U.S.) *342 (1797), and the unreported cases of *Court v. Van Bibber*, *Court v. Wells* and *Court v. Robinson*, all in 1797.

⁴⁹ See case in Connecticut in May, 1791; *Chapion v. Dickason* and case in June, 1792, in Rhode Island; case in Connecticut in October, 1793; *Vanhorne's Lessee v. Dorrance*, in Pennsylvania in 1795, 2 Dall. (U.S.) *304 (C.C. Pa. 1795); case in Vermont in 1799. See 1 Warren, *The Supreme Court in United States History* 65-9 (1922).

⁵⁰ 2 Dall. (U.S.) *304 (C.C. Pa. 1795).

⁵¹ 3 Dall. (U.S.) *386 (1798).

international law in failing to accept a decree of the highest prize court in Great Britain. The Secretary of State, Thomas Jefferson, had declined to entertain the protest until Pagan should have pursued all remedies in the courts of this country. Therefore, Pagan had very unwillingly sought for a writ of error in the United States Supreme Court during the August 1792 term.⁵² Owing to informality in the writ, it had failed; and at the February term in 1793, he moved for a second writ, but his counsel stated to the Court that he proposed to argue *against* its being granted, whereupon (as Edward Tilghman wrote to Attorney General Randolph): "One of the Justices expressed his surprise that a gentleman should argue against his own motion; and was answered by the counsel that he hoped to satisfy the Court that under the extraordinary circumstances of the case, he was free to do so." To this, the same Justice said that "the circumstances must be extraordinary indeed which would warrant such a procedure." After the argument, however, since the record exhibited by counsel in the case did not disclose the facts on which the jurisdiction of the Court was founded, the writ was refused.

On August 5, 1799, there appeared in the Court the case of *New York v. Connecticut*,⁵³ the first of that class of cases which, beginning with the year 1838, became increasingly important in our history—a suit between two States of the Union. It is interesting to note that while suits by individuals against States aroused violent indignation and opposition, there was no such feeling as to the jurisdiction of the Court over "controversies between two or more States," as provided for in Article III, Section 2 of the Constitution. The experience of the colonies and States prior to 1787 had convinced all of the need for some judicial determination of disputes between States. And President Stiles of Yale University records that Abraham Baldwin, a delegate from Georgia to the Federal Convention, told him only three months after the adjournment of that Convention that the delegates "had been unanimous in the expediency and necessity of a Supreme Judiciary Tribunal of universal jurisdiction in controversies of a legal nature between States. . . ." This, in fact, was one of the very few subjects of importance on which unanimity had prevailed.

In recent years, there has been so much discussion, so much fume and fury over the powers of the National government under the commerce clause and the due process clause, that we are apt to lose our sense of

⁵² See Letters and Opinions of the Attorney-General 1792-1810 in H.R. Doc. 123, 26th Cong. 2d Sess. (1841); American State Papers; letters of: Hammond to Jefferson, Nov. 26, 1791; Jefferson to Hammond (1832-61), Dec. 28, 1791, Feb. 18, 1792, April 18, 1793; Randolph to Jefferson, April 12 and Sept. 5, 1793.

⁵³ 4 Dall. (U.S.) *1 (1799).

proportion and to believe that cases involving these clauses of the Constitution have formed the chief part of the Court's work. We forget that it is only within the last forty years that the Court has dealt to any great extent with the conflict of State and National powers in economic and social fields, and that it is only within the last thirty years that Congress has exercised its powers under the commerce clause on any subject other than railroads, liquor and monopoly. But for one hundred years, the Court has exercised its highly important function of deciding disputes between States involving vital interests of great communities. It will probably surprise most Americans to learn that in our history there have been at least seventy-seven reported suits brought by one State against another, requiring at least 124 reported decisions; and that at one time or another during the past one hundred years, every single State of the Union (with the exception of Maine) has been either a plaintiff or a defendant in such a suit.

The last term at which the Court sat in Philadelphia was in August, 1800; no quorum was present for five days and arguments in four cases were heard on only four days. The other two branches of the government had already in the preceding June moved to the new permanent seat of government in the city of Washington; but peculiarly enough, no provision had been made by Congress for either a separate building for the Court, or indeed for any court room in the Capitol. It was not until January 23, 1801, that a small committee room on the first floor of the Senate wing, twenty-four feet wide by thirty feet long—less than half the size of its courtroom in either New York or Philadelphia—was assigned for use of the Court.⁵⁴ And it was in these meagre quarters that on February 2, 1801, the Court held its first session in the "Federal City"—Cushing being the only Justice present for the first two days of the term. On February 4, the new Chief Justice, John Marshall, took his seat on the bench, and during the remaining four days when he sat only

⁵⁴ I stated that this first room occupied by the Court was the room known as the Senate's Clerk's office, and later occupied by the Marshal of the Court. Earlier historians had stated that the Court first sat in the room later (and now) occupied by the law library. This was a mistake and I corrected them. Now I must apparently correct my own statement as to the location of the first courtroom, for a Washington lawyer, Robert P. Reeder, only four years ago discovered in the Library of Congress a ground plan of the Capitol which was given to B. H. Latrobe, the new architect, in May, 1803; and according to pencilled notations on that plan, the Court was then (in 1803) using a room on the western side of the ground floor (that being apparently the name then given to the floor now called the basement floor); and the room so noted was located just under the entrance room used by the Clerk of the Court up to the time when he moved to the new Supreme Court Building. See Reeder, *op. cit. supra* note 3, at 544 n. 1.

one case was argued and decided. On the day after the adjournment of the Court on February 10, the great contest over the Presidential election began in the House of Representatives in session in a room on the floor above the courtroom; and on February 17, on the 37th ballot, Thomas Jefferson was elected President of the United States. On March 3, Marshall, who was still serving also as Secretary of State *ad interim*, signed the commissions of the "midnight judges." On March 4, Marshall, as Chief Justice of the United States, administered the oath to President Jefferson. On March 5, Marshall served as Secretary of State *ad interim* for one day under appointment by President Jefferson.

With this episode, the sketch of the first decade of the Supreme Court may appropriately be closed. The year 1801 began a new era in the history of the Court. Prior to 1801, the only conflicts between the branches of the government had been those of the executive and the legislative. After 1801, there began a long series of differences between the judicial and the other branches. If any man is inclined to be pessimistic as to occurrences of recent years, he should be cheered by the thought that for seventy years after 1801, conflicts with the judiciary were much more serious and more intense than any which have occurred in the seventy years last past.

In 1935, at the conclusion of the *Gold Clause Cases*,⁵⁵ a Justice of the present Supreme Court remarked bitterly and dolefully from the bench: "The Constitution is gone." He and others who shared in this view might well have recalled that almost exactly one hundred years before, at a time when the Constitution and the Court had been in existence for over forty years, Chief Justice Marshall wrote to Mr. Justice Story: "I yield slowly and reluctantly to the conviction that our Constitution cannot last." And Story himself wrote to Justice McLean: "The old Constitutional doctrines are fast fading away, and a change has come over the public mind, from which I augur little good"; and Ex-Chancellor James Kent wrote of an interview with Story in which the Justice had said: "Everything is sinking into despotism under the disguise of a democratic government. The Supreme Court is sinking, and so is the judiciary in every State." And Kent himself wrote: "I have lost my confidence and hope in the Constitutional guardianship and protection of the Supreme Court."

In spite of these gloomy predictions, the Supreme Court has continued to exist for over one hundred years since they were uttered. It has con-

⁵⁵ *Norman v. Baltimore & O. R. Co.*, 294 U.S. 240 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); *Perry v. United States*, 294 U.S. 330 (1935).

tinued to be what Washington termed it—"the keystone of our National fabric." Like all other human institutions, it makes its mistakes. At times it disappoints litigants as well as Presidents. But it would be impossible to say by what other means the Bill of Rights could be enforced for the protection of the citizens, or the relations between the Nation and the States could be kept in balance for the preservation of the rights of each.

To modern prophets of gloom and disaster, I commend the sturdy words of Thomas Jefferson, written in his seventy-third year: "I steer my bark with Hope in the head, leaving Fear astern. My hopes sometimes fail—but not oftener than the forebodings of the gloomy. . . . How much pain have cost us, the evils which never happened!"