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# Federal Judicial Selection: The First Decade

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# SYMPOSIUM ARTICLES

## FEDERAL JUDICIAL SELECTION: THE FIRST DECADE \*

*Maeva Marcus* \*\*

When a Supreme Court vacancy is announced nowadays, we know that the competition for that spot will be keen. We all have different expectations as to who the next Justice will be and what criteria should be critical in the choice: judicial philosophy, political persuasion, intellectual prowess, previous judicial experience, diversity with regard to race, gender, and religion, or geographical distribution. Every president lucky enough to have the opportunity to nominate a Justice will invest a good deal of time and energy in making his choice in the hope that that person will leave his or her mark on our most respected political institution.

With the ubiquity of the media in the early twenty-first century, we seem to be very much involved with the appointment process from start to finish. But put yourself back into the last decade of the eighteenth century when there was no radio or television and when a news story could take two months to travel from one end of the country to the other. Even more problematic, imagine what it would be like to contemplate making appointments to an institution as yet unformed. When President Washington took up the reins of government in 1789, all he knew was that the Constitution mandated the creation of a Supreme Court,

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\* Portions of this Article have appeared previously in my earlier article, Maeva Marcus, *George Washington's Appointments to the Supreme Court*, 24 JOURNAL OF SUPREME COURT HISTORY 243 (1999).

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and that the judges of that court, however many there might be, would have life tenure and a salary, as yet unspecified, that could not be diminished.<sup>1</sup>

Because the Constitution mentioned only the Supreme Court, it was left to the new Congress to create a federal judicial system.<sup>2</sup> Even before President Washington was inaugurated, the Senate took up as its initial task the organization of the judiciary.<sup>3</sup> Within a few months, the basic features of what would become the nation's judicial system emerged. The Supreme Court would consist of a Chief Justice and five Associate Justices.<sup>4</sup> Besides the Supreme Court, there would be two levels of inferior courts.<sup>5</sup> Federal district courts were created for each of the states; each court would have its own judge who lived in the district and each would have jurisdiction over admiralty and maritime causes, as well as minor federal crimes.<sup>6</sup> At the next level were the circuit courts, which, unlike the circuit courts of appeals today, were mainly courts of original jurisdiction—trial courts—for major federal crimes and civil cases of higher monetary value.<sup>7</sup> Appeals made up a very small part of their dockets. The judiciary bill established a circuit court in each state and grouped the states into three circuits: the eastern, the middle, and the southern.<sup>8</sup> The bill provided for no judges to be appointed to these courts. Instead, each circuit court would be presided over by two Supreme Court Justices and the district judge for the state in which the court

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1. U. S. CONST. art. III, § 1.

2. *Id.*

3. 1 JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA, 1st Cong., 1st Sess. 9–10 (Apr. 6–7, 1789), available at <http://memory.loc.gov/ammem/amlaw/lwsjlink.html> (last visited Jan. 6, 2005) [hereinafter JOURNAL OF THE SENATE]; see also Judiciary Act of 1789, ch. 20, 1 Stat. 73. On April 6, 1789, the United States Senate met for the first time and counted the electoral votes for the first President and Vice President of the United States. 1 JOURNAL OF THE SENATE, *supra*, at 9. The very next day the Senate organized a committee to “bring in a bill for organizing the Judiciary of the United States.” *Id.* at 10.

4. Judiciary Act of 1789, 1 Stat. at 73.

5. *Id.* at 73–75.

6. *Id.* at 73–74, 76–77.

7. *Id.* at 78–79.

8. *Id.* at 74; see also Letter from James Iredell to Thomas Iredell (Mar. 8, 1790), in 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 700–01 (Maeva Marcus & James R. Perry eds., 1985) [hereinafter 1 DOCUMENTARY HISTORY].

met, and each circuit court would convene twice a year—once in the spring and once in the fall.<sup>9</sup>

The Supreme Court Justices detested their circuit duties and spent much time lobbying Congress to change the system.<sup>10</sup> Required to attend circuit courts twice a year in several states, as well as two sessions of the Supreme Court at the seat of government, the Justices were kept away from home for the better part of the year. Nor was the glamour of the job enhanced by traveling to the Supreme Court in two of the worst months—February and August—or by additional long journeys in the spring and fall over bumpy, muddy roads and trails.<sup>11</sup>

What did make the job attractive, however, was the salary. Next to the president and vice president, the Justices received the highest salaries of all new federal officials—\$4,000 for the Chief Justice and \$3,500 for his brethren.<sup>12</sup> What went unstated in the Compensation Act, however, was that these salaries had to cover the Justices' expenses in traveling to and from the Supreme Court and while on circuit. The Justices soon found that when the year ended, they had little money left.

None of this was known before the President signed the Judiciary Act on September 24, 1789, but the competition to be nominated to the Supreme Court had started well before. Aspiring

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9. Judiciary Act of 1789, 1 Stat. at 74–75; see also Letter from James Iredell to Thomas Iredell (Mar. 8, 1790), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 700–01.

10. See Letter from James Iredell to Thomas Iredell (Mar. 8, 1790), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 700–01; Letter from John Jay to Catharine Ridley (Feb. 1, 1791), in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 126 (Maeva Marcus ed., 1988) [hereinafter 2 DOCUMENTARY HISTORY]; Letter from the Justices of the Supreme Court to the Congress of the United States (Aug. 9, 1792), in 2 DOCUMENTARY HISTORY, *supra*, at 289–90; Letter from the Justices of the Supreme Court to George Washington (Aug. 9, 1792), in 2 DOCUMENTARY HISTORY, *supra*, at 288–89; Letter from Thomas Johnson to George Washington (Jan. 16, 1793), in 2 DOCUMENTARY HISTORY, *supra*, at 344–45. See generally JULIUS GOEBEL, JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 554–60, 564–69 (1971) (discussing the disdain the Justices had for their circuit responsibilities and their various attempts to persuade Congress to alter the structure of their circuit responsibilities).

11. See, e.g., Letter from John Jay to Catharine Ridley (Feb. 1, 1791), in 2 DOCUMENTARY HISTORY, *supra* note 10, at 126; Letter from Thomas Johnson to George Washington (Jan. 16, 1793), in 2 DOCUMENTARY HISTORY, *supra* note 10, at 344; Letter from the Justices of the Supreme Court to the Congress of the United States (Aug. 9, 1792), in 2 DOCUMENTARY HISTORY, *supra* note 10, at 290.

12. Act of Sept. 23, 1789, ch. 18, 1 Stat. 72 (1789). The secretaries of state and treasury also received \$3,500 per year. Act of Sept. 11, 1789, ch. 13, 1 Stat. 67 (1789).

candidates and their friends wrote to President Washington, Vice President John Adams, and senators seeking appointments.<sup>13</sup> Before his home state of North Carolina had even joined the Union, James Iredell let it be known that he would not be averse to becoming a federal judge, provided that the salary was sufficient.<sup>14</sup> James Wilson and his friends also began an intense campaign to win his appointment as Chief Justice.<sup>15</sup>

How did President Washington choose his nominees? With almost six months to think about possible candidates and under political pressure, Washington perfected a way to deal with this sensitive issue. First, he decided on the qualities he wanted. For Supreme Court Justices, he took into account character, training, experience, health, and public renown. Second, he concluded that geographical distribution was of the utmost importance, not only because of the necessity of circuit-riding, but also because he wished to avoid arousing jealousy among the states. Third, Washington believed a candidate's activities during the war for independence should be weighed—the greater the sacrifice, the better the chance to obtain federal office. Lastly, he chose only those men who had supported the Constitution.<sup>16</sup>

Granted, more than six men in the new nation fulfilled these qualifications, so how did Washington hit upon his particular nominees? By encouraging those interested in appointment to write to him—though his answers were always noncommittal—and by consulting with senators and congressmen about qualified

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13. See, e.g., Letter from Thomas McKean to George Washington (Apr. 27, 1789), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 614–16; Letter from Arthur Lee to George Washington (May 21, 1789), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 620; Letter from Francis Dana to John Adams (June 26, 1789), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 627–28.

14. Letter from Hugh Williamson to James Iredell (Aug. 12, 1789), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 648; Letter from James Iredell to Hugh Williamson (Aug. 29, 1789), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 654; Letter from Hugh Williamson to George Washington (Sept. 19, 1789), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 662.

15. See Letter from Benjamin Rush to Tench Coxe (Jan. 31, 1789), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 605–06; Letter from Frederick Muhlenberg to Benjamin Rush (Mar. 21, 1789), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 610; Letter from James Wilson to George Washington (Apr. 21, 1789), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 612–13; Letter from Benjamin Rush to John Adams (Apr. 22, 1789), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 613–14; Letter from Benjamin Rush to John Adams (June 4, 1789), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 622–23.

16. See James R. Perry, *Supreme Court Appointments, 1789–1801: Criteria, Presidential Style, and the Press of Events*, 6 J. EARLY REPUBLIC 371, 372–73, 397 (1986).

candidates in their states, Washington determined the pool from which he would choose. He also tried to make certain that a possible nominee would accept an appointment if offered, for, in the President's mind, the Republic would be harmed if too many candidates refused federal positions. Although Washington discussed specific individuals with his closest friends and advisors, the final decision was his and his alone.<sup>17</sup>

The criterion that apparently winnowed down the field, however, was service on a state judiciary. Vice President Adams stressed the desirability of such experience:

It would have an happy effect if all the judges of the national supreme Court, could be taken from the chief Justices of the several states. The superiority of the national government would in this way be decidedly acknowledged. All the judges of the states would look up to the national bench as their ultimate object. As there is great danger of collisions between the national and state judiciaries, if the state judges are men possessed of larger portions of the people's confidence than the national judges, the latter will become unpopular.<sup>18</sup>

Washington took his advice; five of his first six nominees to the Supreme Court had held high judicial positions in their states.

On the very day he signed the Judiciary Act of 1789, the President sent his Supreme Court nominations to the Senate: John Jay of New York as Chief Justice, and John Rutledge of South Carolina, James Wilson of Pennsylvania, William Cushing of Massachusetts, Robert H. Harrison of Maryland,<sup>19</sup> and John Blair of Virginia as Associate Justices. Two days later, the Senate confirmed all of them—no questions asked.<sup>20</sup> This should come as no surprise, however, because Washington had taken great care in choosing his Justices. As he wrote to one of them, "Regarding the

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17. *Id.* at 373–74, 397.

18. Letter from John Adams to Stephen Higginson (Sept. 21, 1789), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 663.

19. Robert Harrison, however, never sat on the Supreme Court bench. See Letter from Robert H. Harrison to George Washington (Jan. 21, 1790), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 42. On his way to New York in January 1790, he became ill and sent his commission back to President Washington, saying he was not well enough to fulfill his duties. *Id.* The President then nominated James Iredell of North Carolina to replace Robert Harrison. Nomination by George Washington (Feb. 8, 1790), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 64–65. Iredell was confirmed on February 10, 1789. Confirmation by Senate (Feb. 10, 1790), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 65–66.

20. Confirmation by Senate (Sept. 26, 1789), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 9–10.

due administration of Justice as the strongest cement of good government, I have considered the first organization of the Judicial Department as essential to the happiness of our Citizens, and to the stability of our political system."<sup>21</sup> To his Chief Justice, John Jay, he confided:

In nominating you for the important station which you now fill, I not only acted in conformity to my best judgement; but, I trust, I did a grateful thing to the good citizens of these united States: And I have a full confidence that the love which you bear our Country, and a desire to promote general happiness, will not suffer you to hesitate a moment to bring into action the talents, knowledge and integrity which are so necessary to be exercised at the head of that department which must be considered as the Key-stone of our political fabric.<sup>22</sup>

In conferring this honor on Jay, Washington chose a statesman rather than a renowned legal scholar to be his first Chief Justice—a choice that came as a great disappointment to James Wilson, who had lobbied fiercely for the nomination.<sup>23</sup> 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.<sup>24</sup> But Washington, from the first, seemed to believe that other qualities were more important, and Wilson's career as an Associate Justice validates the President's criteria. Wilson's preoccupation with his financial problems during the later years of his eight-year tenure on the bench—including a short time in debtors' jail in 1797—robbed him of the time and the stature to put his imprimatur on the Court's jurisprudence.<sup>25</sup>

Washington made thirteen nominations of eleven different men during the course of his two terms. Perhaps the most interesting appointment was of John Rutledge to replace John Jay.<sup>26</sup> During Jay's absence in England—he had been sent in 1794 to negotiate a treaty with Great Britain—the Federalists nominated him to be

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21. Letter from George Washington to John Rutledge (Sept. 29, 1789), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 20.

22. Letter from George Washington to John Jay (Oct. 5, 1789), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 11.

23. See 1 DOCUMENTARY HISTORY, *supra* note 8, at 47.

24. See *id.* at 44–47.

25. See *id.* at 48.

26. See *id.* at 17.

the governor of New York, and, on June 5, 1795, a few days after Jay's return from his mission, his election was announced. John Rutledge wasted no time writing to Washington that he, Rutledge, would be happy to serve as Chief Justice.<sup>27</sup> Jay resigned on June 29.<sup>28</sup> On July 1, the President, not following his usual course of consultations before tendering a nomination—probably because he wanted a Chief Justice to preside at the August 1795 Term of the Supreme Court—answered Rutledge with the news that he had decided to offer him a recess appointment. Washington wrote to Rutledge that his commission would be dated July 1, but instead of sending it to him, the President would hold on to it pending Rutledge's arrival in Philadelphia.<sup>29</sup> On July 16, 1795, Rutledge, while in Charleston, gave an intemperate speech about the treaty negotiated by Jay, which had become a contentious issue immediately upon its publication.<sup>30</sup> Whether Rutledge had already received the letter from the President is not known for certain, but it is possible that he had.<sup>31</sup> Meanwhile, before word of Rutledge's speech had even reached Philadelphia, Washington had been told that there were rumors circulating that Rutledge was mentally unstable and in some financial difficulty. The President went ahead with the recess appointment nonetheless.

*The Documentary History of the Supreme Court of the United States, 1789–1800* has published a wealth of material concerning Washington's nomination of Rutledge as Chief Justice and the Senate's subsequent rejection of a permanent appointment.<sup>32</sup> We will never know exactly what happened, but certainly a good many senators were appalled at Rutledge's speech and concerned about the imputations of mental instability. I personally think that Washington himself had decided that he did not want Rutledge, even though he sent the nomination to the Senate

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27. Letter from John Rutledge to George Washington (June 12, 1795), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 94–95; see also 1 DOCUMENTARY HISTORY, *supra* note 8, at 17.

28. Letter from John Jay to George Washington (June 29, 1795), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 13.

29. Letter from George Washington to John Rutledge (July 1, 1795), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 96–97.

30. See 1 DOCUMENTARY HISTORY, *supra* note 8, at 17.

31. Compare 1 DOCUMENTARY HISTORY, *supra* note 8, at 17 (stating that Rutledge gave his speech “probably before” receiving word of appointment), with Perry, *supra* note 16, at 386 (stating that Rutledge gave his speech “likely” after receiving word of appointment).

32. See generally 1 DOCUMENTARY HISTORY, *supra* note 8, at 94–100, 765–835, 841.



when it reconvened in December 1795.<sup>33</sup> Had the President wished Rutledge to be confirmed, a majority of senators would have complied. As it was, Washington made no effort to change any senator's mind, and the final vote was ten in favor of a permanent appointment and fourteen against.<sup>34</sup> The doubts about Rutledge proved true, for after presiding at the August Term of the Supreme Court on a temporary commission, he was unable to hold all the circuit courts in the fall and, on December 26, attempted to take his own life by drowning.<sup>35</sup> Two days later, perhaps with no knowledge of the Senate's rejection of him, Rutledge wrote to the President to resign because of illness.<sup>36</sup>

President Adams had many fewer nominations to make to the Supreme Court—two Associate Justices and one Chief Justice—but two are memorable. When James Wilson died in August 1798, Justice James Iredell wrote to the Secretary of State, Timothy Pickering, urging haste in nominating a replacement because Wilson was supposed to ride the southern circuit in the fall.<sup>37</sup> Adams took the advice to heart and signed a blank commission, instructing Pickering to write to John Marshall to offer the appointment to him.<sup>38</sup> If he turned it down, Pickering was to ask Marshall's opinion of Bushrod Washington, George Washington's nephew, and if the report was favorable, to send the commission for a recess appointment to Washington.<sup>39</sup> Marshall did indeed decline the nomination<sup>40</sup>—he did not want to give up a very lucra-

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33. Nomination by George Washington (Dec. 10, 1795), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 98.

34. Rejection by Senate (Dec. 15, 1795), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 98–99.

35. See Letter from John Adams to Abigail Adams (Dec. 21, 1795), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 816; Letter from William Read to Jacob Read (Dec. 29, 1795), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 820–21; see also Letter from an Anonymous Correspondent, FED. GAZETTE (Baltimore), Jan. 8, 1796, *reprinted in*, 1 DOCUMENTARY HISTORY, *supra* note 8, at 822.

36. Letter from John Rutledge to George Washington (Dec. 28, 1795), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 100.

37. See Letter from John Adams to Timothy Pickering (Sept. 13, 1798), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 126–27.

38. Letter from John Adams to Timothy Pickering (Sept. 14, 1798), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 127–28.

39. See Letter from John Adams to Timothy Pickering (Sept. 29, 1798), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 131.

40. Letter from John Marshall to Timothy Pickering (Sept. 28, 1798), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 131; see also Letter from Timothy Pickering to John Adams (Oct. 5, 1798), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 132.

tive law practice in Richmond—and Bushrod Washington began a long (thirty-two years) and prestigious tenure on the Supreme Court.<sup>41</sup> But Marshall, as we now know, would have another chance.

Perhaps the least remembered Justice in the first decade, Alfred Moore, was Adams's second court appointment.<sup>42</sup> The President nominated Moore to replace James Iredell, who died in October 1799.<sup>43</sup> A North Carolinian like Iredell, Moore had had a distinguished career in public service since the Revolutionary War.<sup>44</sup> His tenure on the Supreme Court, however, was short, for he resigned in 1804 because of ill health.<sup>45</sup> He left no notable opinions behind.

When Adams was given the opportunity to name a new Chief Justice, John Marshall got his second chance, though it was a close call.<sup>46</sup> The appointment of the Chief Justice was politically intertwined with the passage of a new judiciary act, which itself was caught up in the politics of the election of 1800. Oliver Ellsworth resigned as Chief Justice in October 1800, but his resignation letter was sent from Paris and did not reach the United States until the middle of December.<sup>47</sup> Without consulting anyone, President Adams decided to give John Jay another opportunity to serve and on December 18 asked him to assume the position he had previously held.<sup>48</sup> Although confirmed by the Senate the next day, Jay refused the commission but took more than two

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41. Temporary Commission (Sept. 29, 1798), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 132–33; *see also* 1 DOCUMENTARY HISTORY, *supra* note 8, at 125–26.

42. 1 DOCUMENTARY HISTORY, *supra* note 8, at 139.

43. Nomination by John Adams (Dec. 4, 1799), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 140.

44. 1 DOCUMENTARY HISTORY, *supra* note 8, at 137–39.

45. *Id.* at 139.

46. *See id.* at 151.

47. Letter from Oliver Ellsworth to John Adams (Oct. 16, 1800), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 123; *see also* Letter from James Hillhouse to Stephen Twining (Dec. 16, 1800), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 902.

48. Nomination by John Adams (Dec. 18, 1800), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 144.

weeks to do so.<sup>49</sup> His letter declining to serve as Chief Justice did not reach Washington, D.C. until the middle of January.<sup>50</sup>

That same week, the House of Representatives was in the final stages of consideration of a new judiciary bill. Section three of that bill provided, with reference to the Supreme Court, that "after the next vacancy that shall happen in the said court, it shall consist of five justices only; that is to say, of one chief justice, and four associate justices."<sup>51</sup> As the outcome of the election of 1800 was still in doubt, it appeared that the Federalists could be assured of a sixth seat on the Supreme Court only by confirming a Chief Justice before the bill became law.<sup>52</sup> When it was determined that January 20th would be the day that the judiciary bill came up for a vote in the House, it dawned on some Federalists in Congress that it would look much better if an appointment was made before the bill passed even one house of Congress.<sup>53</sup> In order to encourage Adams to nominate someone quickly, Secretary of the Navy Benjamin Stoddert was deputized to bring this message to him.<sup>54</sup>

With time running out on the Federalist administration, President Adams again turned to Marshall, who was serving as secretary of state at the time.<sup>55</sup> In a later letter to Justice Joseph Story, Marshall described the scene as he was told of his appointment:

When I waited on the President with Mr. Jays letter declining the appointment he said thoughtfully "Who shall I nominate now?" I replied that I could not tell . . . After a moments hesitation he said "I believe I must nominate you." I had never before heard my self

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49. Confirmation by Senate (Dec. 19, 1800), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 144; Letter from John Jay to John Adams (Jan. 2, 1801), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 146-47.

50. Letter from Thomas B. Adams to John Quincy Adams (Jan. 15, 1801), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 915; see also Letter from Uriah Tracy to James McHenry (Jan. 15, 1801), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 916.

51. See Judiciary Bill of 1800, § 3, in 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 333 (Maeva Marcus ed., 1992) [hereinafter 4 DOCUMENTARY HISTORY]. Section three of the Judiciary Bill of 1800 later became law in February of 1801. Act of Feb. 13, 1801, ch. 4, 2 Stat. 89.

52. See 1 DOCUMENTARY HISTORY, *supra* note 8, at 151.

53. 4 DOCUMENTARY HISTORY, *supra* note 51, at 291-92.

54. Letter from Benjamin Stoddert to John Adams (Jan. 19, 1801), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 917.

55. See 4 DOCUMENTARY HISTORY, *supra* note 51, at 291-92.

named for the office and had not even thought of it. I was pleased as well as surprised [sic], and bowed in silence.<sup>56</sup>

Although Adams never revealed publicly how he had decided on Marshall, the President surely had many reasons, other than proximity, for the choice: Adams had experience working with Marshall, probably knew of Marshall's professional reputation, and approved of his political convictions.<sup>57</sup> Adams sent the nomination to the Senate on January 20, 1801.<sup>58</sup> After some initial unhappiness among Federalists who had expected Justice William Paterson to be nominated, the Senate confirmed the appointment on January 27th,<sup>59</sup> and, on January 31st, John Marshall was commissioned as the fourth Chief Justice.<sup>60</sup>

What can we say in conclusion about Supreme Court appointments in the 1790s? On the topics of greatest interest today, the Senate's duty to advise and consent and the legitimacy of recess appointments, I think history gives us some guidance. The Senate's rejection of John Rutledge's nomination as Chief Justice demonstrates that from the first, the Senate took its role seriously and chose to judge the President's nominations independently. As to recess appointments, and there were several in the 1790s,<sup>61</sup> it seems clear that Presidents Washington and Adams used them for one reason only: to fill a vacancy to ensure the efficient functioning of the judicial branch at a time when Congress was out of session for much longer periods—up to nine months in some years—than it is now.

One other aspect of the appointment process in the 1790s should be noticed. I believe that Washington and Adams deserve

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56. Letter from John Marshall to Joseph Story (1827), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 928.

57. R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 142–43 (2001).

58. Nomination by John Adams (Jan. 20, 1801), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 152.

59. Confirmation by Senate (Jan. 27, 1801), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 152–53.

60. Commission (Jan. 31, 1801), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 153.

61. Thomas Johnson received a temporary commission on August 5, 1791. See 1 DOCUMENTARY HISTORY, *supra* note 8, at 71, 74–75. John Rutledge received a temporary commission on July 1, 1795. See 1 DOCUMENTARY HISTORY, *supra* note 8, at 17, 96–97. Bushrod Washington received a temporary commission on September 29, 1798. See 1 DOCUMENTARY HISTORY, *supra* note 8, at 125–26, 132–34. Rutledge was the only one who did not receive a permanent appointment. Rejection by Senate (Dec. 15, 1795), in 1 DOCUMENTARY HISTORY, *supra* note 8, at 98–99.

more credit than they usually get for their nominees. While most Americans think the Supreme Court began with Chief Justice John Marshall and *Marbury v. Madison*,<sup>62</sup> the Court in the 1790s actually made significant contributions to the development and success of the new government.<sup>63</sup> Washington, and Adams after him, chose men with wide experience of the world and firm commitments to the principles of the Constitution that they had been active in establishing. Difficult as the job was, the early Justices performed their duties with devotion. The two presidents' emphasis on the importance of the institution and on the character and integrity of those who would serve it was not misplaced. Alexander Hamilton may have called the judiciary "the weakest" branch,<sup>64</sup> but Washington and Adams were not fooled. And we should be grateful for that.

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62. 5 U.S. (1 Cranch) 137 (1803) (invalidating section 13 of the Judiciary Act of 1789).

63. See generally 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800 (Maeva Marcus ed., 1998) (documenting the major Supreme Court cases from 1790 to 1795); 7 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800 (Maeva Marcus ed., 2003) (documenting the major Supreme Court cases from 1796 to 1797).

64. THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("[T]he judiciary is beyond comparison the weakest of the three departments of power.")