

John Jay and the Judicial Power

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During recent years, the Supreme Court has handed down a number of decisions which have centralized the power of the national government at the expense of state power. This action has caused critics to accuse the court of being unduly "activist" and creating a dangerous centralization of power. What these critics have failed to realize is that the activism of recent history is not a departure from the original tradition of judicial power. From the beginning of American constitutional government, those governmental leaders who framed the Constitution and worked out its meaning saw the Court not as a mere technical clarifier of the law, but as a major political force, sharing the basic powers of government with the congressional and executive branches. Those men who first held office under the Constitution were nationalists, seeking deliberately to strengthen the national government at the expense of state power. John Jay, first chief justice of the United States Supreme Court, was one of these nationalists, and his activity on the Court reflects his philosophy of government.

Jay himself underestimated the importance and influence of his work as chief justice. In 1801, on being tendered the appointment as chief justice a second time, he wrote as governor of New York to John Adams, president of the United States:

I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which was essential to its affording due support to the national government; nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess. Hence I am induced to doubt both the propriety and expedience of my returning to the bench under the present system.¹

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¹Henry P. Johnston, ed., *The Correspondence and Public Papers of John Jay*, 4 vols. (New York: G. P. Putnam's Sons, 1890), 4:285. Hereafter cited as *CPP*. Page Smith, *John Adams*, 2 vols. (New York: Doubleday, 1962), 2:1063-64, describes Adams' actions in extending the appointment to Jay.

Even though Jay did not realize it at the time, his career laid the foundation by which the Court obtained "energy, weight, and dignity." The scope and methods with which the first chief justice applied the "judicial power" gave the Court political qualities, impetus, and directions that have never been reversed. Under Jay, the Court was involved in all the major political issues of its time, both domestic and foreign. The Eleventh Amendment, restricting the judicial power, was added to the Constitution in reaction to his decision in *Chisholm v. Georgia*. (He was burned in effigy for that same decision.) Too many have forgotten these facts, and too few have known of their existence. Hence this attempt at a further exposition of Jay's career.

DEVELOPMENT OF JAY'S NATIONALISM

John Jay was a founder of the school of national power which included Alexander Hamilton, John Marshall, and Abraham Lincoln. Entering actively into New York politics at the period of revolutionary crisis when it appeared that leadership would be captured by a previously unenfranchised group, Jay, from membership in the New York Committees of Correspondence, became a member of the Continental Congress in 1774. He was also a member of the New York Convention which on 9 July 1776 ratified the Declaration of Independence and which later drafted the state constitution. Later, he served as chief justice of New York, 1776-78; president of the Continental Congress, 1779; minister to Spain, 1779-82; peace commissioner at Paris, 1782-83; and secretary of foreign affairs, 1784-89. In the latter office he was, in effect, a principal "executive" officer of the Confederation, a position he carried into the early days of Washington's administration in 1789. He was first chief justice of the Supreme Court, 1789-95. During this time, he also served as envoy to Great Britain, 1794-95, resigning to serve as governor of New York, 1795-1801. In 1801 he was again tendered the commission as chief justice by President Adams. Refusing, he spent the next twenty-eight years as a retired gentleman, dying in 1829.²

Jay's nationalistic doctrines developed from his experience as president of the Continental Congress, from his involvement in foreign affairs, and from his life under the Articles of Confederation.

²See Frank Monaghan, *John Jay: Defender of Liberty* (New York: Bobbs-Merrill, 1935), for a full-length biography. See also the recent sketch by R. D. Burns and R. D. Yerty, "John Jay: Political Jurist," *Journal of Public Law* 13 (1964): 222-31.

As president of the Continental Congress, Jay wrote Governor Clinton, on 27 August 1779, pleading that New York (and New Hampshire) sacrifice states' rights in the national interest and empower Congress to settle the Vermont boundary dispute.³ Although Jay favored a separation of powers,⁴ he also favored a strong national government rather than strongly sovereign state governments, as indicated in a letter he had written to Elbridge Gerry from Spain on 9 January 1781 after scrutinizing John Adams' Massachusetts Constitution of 1780:

Your constitution gives me much satisfaction. It appears to be, upon the whole, wisely formed and well-digested. I find that it describes your State as being in New England as well as America. Perhaps it would be better if these distinctions were permitted to die away.⁵

Thus developed in Jay the nationalistic doctrines which also found expression in the Federal Convention of 1787. The idea of the Constitution establishing a "mixed central government," but with these national organs drawing force from a national community and the people, rather from the states, characterized Jay's judicial decisions.

JOHN JAY'S SERVICE AS CHIEF JUSTICE

The Judiciary Act of 1789 provided for a Supreme Court presided over by a chief justice and five associate justices, and for three circuit courts—Eastern, Middle, and Southern. Each circuit court was to be presided over by two Supreme Court justices and one district judge. Jay thus saw judicial service in the new circuit courts as well as in the Supreme Court.

The Supreme Court had practically no cases to decide during its first three years of existence, the circuit courts constituting the functional judicial element in the new federal scheme. Charles Haines has observed that there was a decided trend towards the strengthening of the state courts at the expense of federal authority after the adoption of the Constitution.⁶ In the meantime, wrote Charles Warren:

³CPP, 1:214.

⁴As seen, for instance, in this interesting view expressed to Jefferson on 18 August 1786: "I have long thought, and become daily more convinced, that the constitution of our federal government is fundamentally wrong. To vest legislative, judicial, and executive powers in one and the same body of men . . . can never be wise." CPP, 2:212.

⁵CCP, 1:458.

⁶Charles Grove Haines, *The American Doctrine of Judicial Supremacy*, 2nd ed. (Berkeley: University of California Press, 1932), p. 172.

It was almost entirely through their contact with the Judges sitting in these circuit courts that the people of the country became acquainted with this new institution, the Federal judiciary; and it was largely through the charges to the Grand Jury made by these judges that the fundamental principles of the new Constitution and government . . . became known to the people.⁷

Jay began circuit duty in New York on 4 April 1790, proceeding to Connecticut on 22 April, to Massachusetts on 4 May, and to New Hampshire on 20 May. He delivered the same "charge" at each point. The charge was enthusiastically received and printed by admirers of the new order. He said, in part:

It cannot be too strongly impressed on the minds of us all how greatly our individual prosperity depends on our national prosperity, and how greatly our national prosperity depends on a well organized, vigorous government; . . . nor is such a government unfriendly, to liberty. . . .⁸

Jay's circuit rulings introduced many distinctive features of the infant judiciary. In May 1791 a Connecticut statute was voided as conflicting with a United States treaty.⁹ In June 1792, the case of *Alexander Champion and Thomas Dickason v. Silas Casey* came before Jay, William Cushing, and Henry Marchant (district judge). A statute of the state of Rhode Island was invalidated on the basis of the contract clause.¹⁰ Thus the Constitution prevailed against a state statute. A judiciary in hands which would have upheld state statutes in the face of treaties and contrary constitutional provisions would have failed to extend federal jurisdiction (or at least so endeavor as in *U. S. v. Ravara*) and could have launched something different from the subsequent American practices of judicial review and supremacy. Yet, as early as 1792, Jay found circuit duty so intolerable that he was ready to accept "any other office of suitable rank," and consented to be a candidate for governor of New York.¹¹ His active term of office, therefore, extends roughly from September 1789 to April 1794. During that time not more than a dozen cases appeared before the Supreme Court. Of these, four never reached the state of actual decision.¹²

⁷Charles Warren, *The Supreme Court in United States History*, 3 vols. (Boston: Little, Brown, 1922), 1:58.

⁸CPP, 3:394-95.

⁹Warren, *The Supreme Court*, pp. 65-66.

¹⁰Ibid. See also Monaghan, *John Jay*, pp. 314-17.

¹¹Monaghan, *John Jay*, p. 319.

¹²*West v. Barnes* (August 1791); *Vanstophorst v. Maryland* (August 1791); *Oswald v. New York* (1792-93); *Indiana Co. v. Virginia* (February 1792).

Intermingled with these seven sessions of the Supreme Court were Jay's circuit duties. Behind these judicial duties moved the events of the new nation—the revolution in France, and the commercial difficulties with England. These international and domestic political problems, colliding on the Supreme Bench with the character and public experience of John Jay, influenced the foundations of our political system.

In May 1791 and June 1792, John Jay, sitting as a federal court judge, voided acts of the Connecticut and Rhode Island legislatures. On 23 March 1792, the Congress of the United States enacted a measure that was destined to the same fate. This was the Pensions Act of 1792, providing benefits for soldiers of the revolution. The statute provided that the justices of the Supreme Court should adjudicate the various claims in their circuits, subject to review by both Congress and the secretary of war!

On 5 April 1792, Jay, sitting with William Cushing and James Duane (district judge) agreed that ". . . neither the *Legislative* nor the *Executive* branches can constitutionally assign to the *Judicial* any duties, but such as are properly judicial, and to be performed in a judicial manner." Further, "Neither the Secretary of War, nor any other Executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court." The chief justice and his colleagues then set forth the proposition that:

As therefore, the business assigned to this court, by the act, is not judicial, nor directed to be performed judicially, the act can only be considered as appointing commissioners for the purposes mentioned in it, by *official* instead of *personal* description.¹³

Max Farrand has stated "there would seem no reasonable doubt that on April 11, 1792, James Wilson, John Blair, and Richard Peters declared the Invalid Pensions Act of 1792 unconstitutional" in the "First Hayburn Case." Two days later, 13 April 1792, William Hayburn presented a memorial to the House of Representatives "setting forth the refusal of the circuit court to take cognizance of his case and asking for relief." In debate a Congressman remarked, "This being the first instance in which a court of justice had declared a law of Congress to be unconstitutional, the novelty

¹³2 Dallas *Reports*, footnote, p. 410. Dallas lists this date as April 5, 1791, clearly an error for April 5, 1792.

of the case produced a variety of opinions with respect to the measures to be taken on the subject."¹⁴

In August 1792 the Supreme Court heard two separate motions in *Hayburn's Case* and postponed final action until the following term. In the meantime, Congress provided other procedures.¹⁵ Later, in the famous *Marbury* case, John Marshall dealt with political friends and foes in a mixed situation. In *Hayburn's* case, we see John Jay moving cautiously so as not to unduly embarrass the Congress or jeopardize the Court's fragile place in the government. By adopting the "commissioner" interpretation, and by Congress' *noblesse oblige* in repealing the act on 28 February 1793, the situation was saved. The action, taken by the Court after repeal of the original act, demonstrates the nicety with which effort was made to preserve, maintain, and elevate the prestige of the new federal regime.

Similar delicacy is portrayed in the two cases, *Chandler v. Secretary of War*, and *United States v. Yale Todd*,¹⁶ decided at the February 1794 session of the Court, Jay's last. In the first of these, the Supreme Court refused to embarrass the Executive department by utilizing *mandamus* against the secretary of war.¹⁷ Chandler's name did not appear on a list of pensioners in the possession of the secretary, despite action to the contrary taken by Justice James Iredell and District Judge Richard Law sitting as "commissioners" before the repeal of the original act. Then the repeal of the original statute had come. Now the motion came for *mandamus* proceedings against Henry Knox, secretary of war. The court refused, as Marshall did later in *Marbury v. Madison*, deciding that *mandamus* could not be issued. In the Todd case, the pensioner's name was on the list, the result of action taken by Jay, Cushing, and Law as commissioners! Before the decision, agreement appears to have been made that Todd's plea to draw benefits vested through act of the "commissioners" (question: Could he now draw them in view of the accepted illegality of their action?) would fail and result in judgment for the United States if Jay, Cushing, and Law, acting as commissioners, had not the authority to do so. Judgment was entered for the United

¹⁴Max Farrand, "The First Hayburn Case, 1792," *American Historical Review* 13 (1908):281-85.

¹⁵See Warren, *The Supreme Court*, pp. 71-76; and Monaghan, *John Jay*, p. 317, for discussions of this point.

¹⁶Haines, *Judicial Supremacy*, pp. 173-78 contains full reference to both cases in connected form, and in relation to *Hayburn's* case.

¹⁷Haines and others suggest this as a precedent for Marshall in *Marbury v. Madison*, also a *mandamus* case.

States, indicating that the act was considered void by the court.¹⁸ Use of the phrase "judgment for the United States" may have served to soften the general effect upon the new federal government of having one of its early and important statutes invalidated. The effect of all three cases—Hayburn's, Chandler's, and Todd's—on the Supreme Court itself, was to leave that body in a stronger position than before, both in relation to the other branches of government and perhaps with respect to political feeling.

Jay's doctrines of 5 April 1792 were supported by a letter of 18 April 1792 from Justices Wilson, Blair, and Peters to President Washington. Referring to the provision of the act which made judgments of the court open to revision or control by Congress or "an officer in the Executive Department," the letter said: "Such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and consequently with that important principle which is so strictly observed in the Constitution of the United States."¹⁹

In *Chisholm's Executor v. Georgia*, the Supreme Court (especially Jay's argument) gave major impetus to the function of the judicial power in American government. As an instrumentality of the national power, established by the Constitution of 1787, the court demonstrated a nationalism not later exceeded by Marshall. The pattern of the case is significant, particularly in the light of Justice James Iredell's dissent. Iredell argued that the article in the Constitution under which the court took jurisdiction was clearly intended to be the subject of a legislative act, and not a matter for judicial discretion. But by assuming jurisdiction over the state of Georgia, and justifying it, by interpreting thereby the nature of the Federal Union, and by pushing the court along its own path to "justice," Jay provided an extraordinary demonstration of Chief Justice Hughes' later aphorism that the Constitution is what the judges declare it to be. Said Mr. Justice Iredell in part of his eighteen-page dissent:

The Constitution intended this article . . . to be the subject of a legislative act. . . . Subject to this restriction (fundamental law), the whole business of organizing the courts, and directing the methods of their proceeding where necessary, I conceive to be in the discretion of Congress. . . . We must receive our directions from the Legislature in this particular, and have no right to constitute ourselves an *officiria brevium*.

¹⁸See Haines, *Judicial Supremacy*, p. 176.

¹⁹2 Dallas, notes, pp. 410-12.

Referring to the Judiciary Act of 1789, he continued, "It is plain that the Legislature did not choose to leave to our own discretion the path to justice, but has prescribed one of its own."²⁰ Iredell was upholding the doctrine of the "reserved powers" of the states to the new national government.

The theme of Jay's argument, like that of Lincoln's first inaugural, was that the states had never possessed an independent sovereignty. Pellew says of this opinion: "It laid down the lines, indeed, that Marshall followed in his famous series of federal decisions, culminating especially in *McCulloch v. Maryland*."²¹

William Whitelock described the case as "being novel in character and had to be determined, not by precedent and legal authorities, but by the great principles of justice and constitutional law."²²

Jay's opinion proceeded from the assumption that Georgia (or any of the states) was never sovereign. He posed three questions: Was Georgia a sovereign state? Was a suit incompatible with said status? Does the Constitution authorize such a suit? Jay made the broad assumption that "sovereignty" descended from Great Britain directly to the American *people*, rather than to the states. Interpreting the Revolution, Jay announced that the Declaration of Independence "found *the people already united for general purposes*, and at the same time providing for their more domestic concerns by State conventions and other temporary arrangements," including the idea of Union, if not the "more perfect union" of 1787. "Experience disappointed expectations they had formed; . . . and then the people, in their collective and national capacity, established the present constitution."²³

James Brown Scott viewed Marshall's opinion in *McCulloch v. Maryland* 1819 (4 Wheaton 316) as a restatement of Jay's argument in the Chisholm case.

This one careful opinion, notwithstanding the press and stress of business and hasty composition, placed Jay in the category of great judges. Constitutional amendments are not usually required to check inferior minds or patent error.²⁴

²⁰2 Dallas, pp. 433-51. Quoted material on pp. 433 and 434.

²¹George Pellew, *Life of John Jay* (New York: Houghton-Mifflin, 1890), p. 283.

²²William Whitelock, *The Life and Times of John Jay* (New York: Dodd-Mead, 1887), p. 231.

²³Extracted from 2 Dallas Reports (*Chisholm v. Georgia*), p. 470.

²⁴James Brown Scott, "John Jay, First Chief Justice of the United States," *Columbia Law Review* 6 (May 1906):314.

Chisholm v. Georgia was the momentous case to be decided by the Jay Court. Jay's views in this case (called by Frank Monaghan "more advanced than the 'immortal Nationalist opinions' of Marshall") completely reversed the position expressed by James Madison in the constitutional convention, that "it is not in the power of individuals to call any State into court."²⁵ On 5 February 1793, Jared Ingersoll and Alexander Dallas presented a written remonstrance and protestation on behalf of Georgia asserting that the Court could not take jurisdiction of this suit by an executor, of *assumpsit*; a "sovereign state" not being suable. On 18 February 1793, Jay and his colleagues, guided by the simple language of Article III of the Constitution and urged forward by their nationalistic sentiments, issued their decision. It was a frontal attack upon the sovereignty of the states. The anti-Federalists denounced it as "an Aristocratic plot,"²⁶ and on 19 February 1793, the day following the decision (Court and Congress both convening in Philadelphia), what was to become the Eleventh Amendment was introduced in the House of Representatives. By 2 January 1794 it had passed both houses (23-2 in the Senate, 81-9 in the House) and on 8 January 1798 came into effect.²⁷ The immediate effect of the actual decision was nullified. But new gears had been added to the judicial machinery of American government. And in the nationalist theory of the American Constitution, Jay's judicial arguments stand with the views of Hamilton, Marshall, Webster, and Lincoln.

THE JUDICIAL POWER AND INTERNATIONAL AFFAIRS

In 1890 Jay's biographer, George Pellew, summarized contributions made by Jay as chief justice:

Three great facts were determined once for all: the dignity of the court was vindicated from encroachment by the federal executive and legislative departments; its jurisdiction was established over the state governments; and, incidentally, Jay announced and determined that foreign policy of the United States which has been accepted and followed from that day to this.²⁸

²⁵Monaghan, *John Jay*, p. 302.

²⁶Ibid., p. 308. This writer also contends that Jay's opinion was based on "the republican principles introduced by the Revolution" despite the anti-Federalists' denunciation of it as "an Aristocratic plot."

²⁷Warren, *The Supreme Court*, p. 101. In an interesting footnote, Warren points out that the records of the State Department show only the ratifications of six states. It is evident that the nationalistic doctrines announced by Jay with regard to the Union were out of joint with the times. Accordingly it is all the more interesting that he uttered them via the Bench.

²⁸Pellew, *Life of John Jay*, p. 264.

The French Treaty of 1778 bound the United States to a more or less active neutrality in any wars France should engage in. Our ports were to be open to French privateers for prize purposes, to come and go "at pleasure." On 22 May at Richmond, Jay delivered a charge to the Grand Jury sitting there, pointing out that:

Of national violations of neutrality our government can only take cognizance. Questions of peace and war and reprisals and the like do not belong to courts of justice . . . because the people of the United States have been pleased to commit them to Congress.²⁹

On 22 April 1793, Washington issued the Neutrality Proclamation. It included views Jay had supplied Hamilton eleven days earlier as well as the contributions of others.³⁰ Said the president:

I have given instructions to those officers to whom it belongs to cause prosecutions to be instituted against all persons who shall, within the cognizance of the courts of the United States, violate the law of nations with respect to the powers at war. . . .³¹

Pellew felt that Washington's Neutrality Proclamation could have no practical effect unless supported by the courts.³² Jay's charge at Richmond stated that the people of the United States had been pleased to commit such questions to Congress.³³ *Henfield's Case*, the *William*, the *Fanny*, and other cases³⁴ had come before such judges as Justices Wilson and Peters. Either juries refused to convict, or the courts held that they had no power to question the legality of prizes.³⁵

In July 1793, less than three months after his Neutrality Proclamation had been issued, Washington questioned the situation. On 18 July, Jefferson presented the inquiry to the "Chief Justice and Associate Justices"³⁶ for an advisory opinion relative to the situation, involving some twenty-nine questions of international

²⁹CPP, 3:483-84.

³⁰Charles Marion Thomas, *American Neutrality 1793* (New York: Columbia University Press, 1931), pp. 44-45 expresses an opinion that Randolph rather than Jay was author of the final draft and in his preface avers that the policy was peculiarly a cabinet contribution.

³¹*A Compilation of the Messages and Papers of the Presidents*, [ed. James D. Richardson], Prepared Under the Direction of the Joint Committee on Printing, of the House and the Senate, Pursuant to an Act of the Fifty-Second Congress of the United States, 20 vols. (New York: Bureau of National Literature, 1897), 1:149.

³²Pellew, *Life of John Jay*, p. 290.

³³CPP, 3:483-84.

³⁴Warren, *The Supreme Court*, pp. 105-09, provides a connected exposition of the problem and the cases which arose.

³⁵Pellew, *Life of John Jay*, p. 290; Monaghan, *John Jay*, p. 312.

³⁶CPP, 3:486.

law.³⁷ Jay answered on 8 August 1793 to the effect that to respond with an advisory opinion would be improper. That same month, irritated by the French practices, Washington revoked the *exequatur* of Duplaine, the French agent at Boston, only to receive an insulting letter from Edmond Charles Genêt, first minister of the French Republic, to the effect that "the President had overstepped his authority," and indicating that he (Genêt) would "appeal to the sovereign state of Massachusetts."³⁸ About this time a rumor circulated that Genêt had threatened to appeal from the president to the people.³⁹ Subsequently, Jay and Rufus King issued a card stating that they were authority for the rumor and believed it.⁴⁰ In this climate of domestic and foreign political considerations came the *Glass* case to the February 1794 term of the Court.

Glass's libel, filed in the district court of Maryland, asked restitution of the sloop, *Betsey*, to its original Swedish-American proprietors. This was refused on the grounds that the court could not take jurisdiction, grounds which appeared in the arguments at bar February 8-12: "The act of Congress limits the power of the District Court to civil cases of admiralty and maritime jurisdiction; and the court can have no other, or greater power, than the act has given."⁴¹

Counsel made much of Article 17 of the 1778 Franco-American treaty which expressly stated that the "validity of prizes shall not be questioned," which allowed French privateers to travel in and out of American ports "at pleasure."⁴²

For five days the Court heard argument; then on 18 February,

... informed counsel, that *besides the question of jurisdiction* as to the District Court, another question fairly arose upon the record—whether any foreign nation had a right, without the positive stipulation of a treaty, to establish in this country, an admiralty jurisdiction for taking cognizance of prizes captured on the high seas. . . . Though this question had not been agitated, the Court deemed it of great public importance to be decided; and *meaning to decide it*, they declared a desire to hear it discussed.⁴³

³⁷Warren, *The Supreme Court*, p. 109. Jay and the Court's first reply was dated 20 July 1793, postponing their answer in deference to "absent brethren."

³⁸Henry Cabot Lodge, *George Washington*, American Statesman Series, vol. 5 (Cambridge, Mass.: Riverside Press, 1900), p. 159. Genêt evidently knew how to make good use of his political possibilities in bringing in the "sovereign state" idea, dear to the democratic localisms of the times.

³⁹See Monaghan, "The Federalists Scotch Genêt," *John Jay*, pp. 342-60.

⁴⁰Lodge, *George Washington*, p. 159.

⁴¹3 Dallas, p. 7.

⁴²Ibid., p. 11.

⁴³Ibid., pp. 15-16. Italics added.

It would appear that Mr. Jay and his colleagues were anxious to settle several difficulties. Peter S. Duponceau, French advocate at bar, observed "that the parties to the appeal did not consider themselves interested in the point" (that is, on the additional question raised by the Court and not by the parties). But whether the parties wished the additional question decided or not, the Supreme Court of the United States answered. Chief Justice Jay delivered the following unanimous opinion:

BY THE COURT: The judges being decidedly of opinion, that every District Court in the United States possesses all the powers of Admiralty, whether considered as an instance, or as a prize court. . . . Therefore it is . . . finally decreed and adjudged . . . that the said plea . . . is hereby overruled and dismissed.

Thus the district court, declared competent, was ordered to determine restitution of the *Betsey* on the merits involved.

And the said Supreme Court being further of opinion, that, no foreign power can of right institute, or erect, any court of judicature of any kind, within the jurisdiction of the United States, but such only as may be warranted by, and be in pursuance of treaties, **IT IS THEREFORE DECREED AND 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.⁴⁴

The *Prize Cases Decided in the United States Supreme Court 1789-1918* contains the comment:

The famous case of the Sloop *Betsey* (3 Dallas 6), decided in 1794, held that the district courts of the United States were courts of prize *without being specifically constituted as such*. (By the Judiciary Act of 1789.) From this date the inferior courts of the United States have passed upon questions of prize in first instance, and in appropriate cases, the Supreme Court in final instance.⁴⁵

Thus did this decision extend the jurisdiction of the lower courts (promptly recognized by congressional enactment in section six of the 1794 Neutrality Act which followed). A weighty political problem was decided, indicating the nature and potential of the new national judiciary. Charles Warren wrote: "No decision . . . ever did more to vindicate our international rights, to establish respect amongst other nations for the sovereignty of this country, and to keep the United States out of international complications."⁴⁶

⁴⁴Ibid., p. 16.

⁴⁵*Prize Cases Decided in the United States Supreme Court 1789-1918*, 3 vols. (New York: Carnegie Endowment for International Peace, 1918), 1:1-2.

⁴⁶Warren, *The Supreme Court*, p. 117.

The discretion of the bench was exercised, despite a treaty, lower decisions, and an act of Congress. And the Court did not strictly confine itself to the legal niceties of the case at bar.

The new national legislature followed the lead of the Court in enacting the 1794 neutrality laws. Undoubtedly the national executive was not saddened by the action of Mr. Jay and his colleagues. Undoubtedly the chief justice "judged" in line with the personal counsel he had lent Hamilton and Washington before the case arose. In short, John Jay utilized the chief justiceship as an instrument for carrying forward what he thought was best for the United States of America. He was the first chief justice to do so, but not the last. The judicial power of the United States, vested in a Supreme Court and exercised by the justices thereof, has continued to be exercised, with discretion, with due regard to the position of the judiciary, and with a keen understanding for the necessity for decision-making in a complicated, self-governing, federal scheme.

Jay was evidently unaware of his influential molding of the mightiest judicial tribunal of modern times. Nevertheless, the maxim that Americans live under a constitution, but that the Supreme Court determines what that constitution is, began to have its meaning with Jay's court. The Supreme Court of the United States is a political as well as a legal instrument. It is one of the triumphs of man's quest to use political power with reason and intelligence. The judgments of Chief Justice Jay, developed from his political experience and expressed in judicial capacity, had critical significance in launching and in shaping such an instrument. The Court flourishes *sans* purse, *sans* sword. On decisions days it functions *sans* press conferences in the era of managed news.

Students of the judicial process and its historic influence on American national life should never assume that the truly formative years began with John Marshall or Roger Taney. Nor did the Court for a role in policy matters have to wait the development of the "due process" clause. The contributions began with John Jay, first chief justice. The contributions will continue so long as the unique and ever-growing conception of the framers, in placing the Court on an equal basis (Article III) with Congress (Article I) and the Presidency (Article II), continues to live.