Courtwatchers
To my husband and children, without whom I would have finished this book much sooner.
Foreword

Each year, hundreds of thousands of Americans visit the Supreme Court of the United States. They are justly proud of this great institution, yet most are struck by the anonymity of the seventeen Chief Justices and one hundred Associate Justices who have served on the Court over the past two centuries. Some of the portraits that line the Court’s halls are readily recognizable: Oliver Wendell Holmes is sternly majestic; Hugo Black is captured in radiant color; while Felix Frankfurter appears in a modernistic pastel sketch. But even history buffs steeped in the lore of the Court are likely to be stumped by the names beneath some of the other portraits. Just who are these people?

Clare Cushman’s latest work, Courtwatchers, helps to answer this question. She has written an informative survey, drawn from firsthand accounts, that brings the Justices to life. Drawing on recollections and recorded observations from a wide sweep of sources, the book provides what a good anecdote conveys—the sense of personality. Ms. Cushman has organized her book around topics that capture the human element of the jurists. She places them in the context of their times by examining the Court’s early history and forgotten hardships, like circuit riding. She explores both the process of becoming a judge—including appointment, confirmation, and “learning the ropes”—and the poignant process of stepping down from the Court. But she also sets aside the black robes and delves into the private side of life on the Court, capturing vignettes of relations among friends, family, and one another.

Art critics tell us that good portraiture engages the viewer in two dimensions by commingling the subject’s objective appearance with the artist’s subjective impressions. Ms. Cushman’s collection of firsthand observations—many of which, by virtue of resting on recollection, are open to historical debate—add depth to the Court in both those dimensions. Her book will delight all those who want to look beyond the portraits and gain an intimate view of the individuals who have quietly contributed so much to the work of the Court and the advancement of justice.

Chief Justice John G. Roberts, Jr.
Introduction

In the early nineteenth century, the Supreme Court sessions were considered the best show in town. One now-forgotten case argued over the span of ten days by an all-star lineup of orators, including the thrilling Daniel Webster, drew overflow crowds in 1844. A spectator reported:

Daniel Webster is speaking. . . . There is a tremendous squeeze, you can scarcely get a case knife in edgeway. . . . Hundreds and hundreds went away, unable to obtain admittance. There never were so many persons in the Court-room since it was built. Over 200 ladies were there; crowded, squeezed and almost jammed in that little room; in front of the Judges and behind the Judges; in front of Mr. Webster and behind him and on each side of him were rows and rows of beautiful women dressed “to the highest.” Senators, Members of the House, Whigs and Locos, foreign Ministers, Cabinet officers, old and young—all kinds of people were there. Both the President’s sons, with a cluster of handsome girls, were present. . . . The body of the room, the sides, the aisles, the entrances, all were blocked up with people. And it was curious to see on the bench a row of beautiful women, seated and filling up the spaces between the chairs of the Judges, so as to look like a second and a female Bench of beautiful Judges.

During a more routine day in the Supreme Court, the same reporter compared the scene to a “ballroom,” musing that if old English judges were to witness the sight, “each particular whalebone in their wigs would stand on end at this mixture of men and women, law and politeness, ogling and flirtation, bowing and curtsying, going on in the highest tribunal in America.”

Watching a Supreme Court session today is still awe-inspiring. The line of would-be Courtwatchers waiting to take their turns in the seats reserved for the general public can often stretch down the steep white steps of the Marble Palace. The Supreme Court does, however, operate in a less theatrical manner than it did in 1844. It is definitely not a place to flirt.

Indeed, if Webster were to visit today’s majestic Courtroom in session, he would be startled to see that women are no longer decorative spectators. One-third of the Justices occupying the bench are female, and the attorney standing at the podium may well be too. Webster would also be surprised that instead of enjoying the leisurely pace of oral argument that characterized his era—with no time restrictions and orators declaiming flowery rhetoric for days on end—advocates are now permitted only half an hour to make their case. And instead of listening deferentially, the Justices barrage them with questions,
trying to get to the crux of the legal issues as quickly as possible.

Webster would probably be equally dismayed to watch oral arguments end abruptly, with the Chief Justice unceremoniously stopping counsel from going beyond the allotted time, even to wrap up a point. A current member of the Supreme Court bar, with more than twenty oral arguments under her belt, Maureen Mahoney has described the contemporary experience of being cut off in mid-sentence—something Webster and his peers at the Supreme Court bar did not even begin to contemplate until 1849, when time limits for each side began to be imposed. A former clerk to Chief Justice William H. Rehnquist, Mahoney was granted no special consideration in the Courtroom by her mentor, a strict stickler for time limits:

The way the light system works in the courtroom is that it will tell you, when a light goes on, that you have five minutes remaining, and when your time is expired a red light goes on. In the Supreme Court, when the red light goes on, you are supposed to stop. When Chief Justice Rehnquist was presiding, you were really supposed to stop. I remember one time where Justice [Antonin] Scalia had asked me a question, and the red light went on just as he was finishing his question. I hadn’t had a chance to say a word. I looked up at the Chief Justice, and he said “Counsel, I think you can consider that a rhetorical question.” And so I just sat down. In fact, the press didn’t know that the red light was on, so they reported that I was speechless in response to Justice Scalia’s question.

The firsthand accounts related above are snapshots taken from two very different eras in the Supreme Court’s development. Together, they give a sense of how the experience of being inside the Courtroom has changed, and are a preview of the lively eyewitness accounts featured in this book. Who better to narrate the Court’s history than those who were on the scene: journalists, oral advocates, Justices, their spouses and children, clerks, Supreme Court staff, friends, and Courtroom spectators? Collectively, these accounts illuminate how the Supreme Court and its players have functioned as an institution. They reveal the workaday experience of life behind the marble pillars.

A few of these eyewitness accounts have been plucked from obscure sources. Many are old chestnuts, well known to scholars. Although efforts have been made to track down and verify the original sources, a few legends with uncertain origins are included simply because they are such a beloved part of Supreme Court lore.

And, admittedly, counterexamples to Courtwatchers’ one-sided observations are not always supplied. For example, the loose-limbed Chief Justice John Marshall is amusingly depicted in these pages as a sloppy dresser who gave off an unfavorable first impression, belying his greatness. But there do exist
accounts that mention his neat attire and his insistence that circuit court judges dress properly. Similarly, a journalist reported in 1824 that oral advocates were listened to “in silence for hours, without being stopped or interrupted” by the Justices, when in fact Court records shows that there was some interchange between bench and bar during the Marshall Court era.

Anecdotes in this book were selected for their educational or entertainment value, but readers should enjoy them with this, quite obvious, caveat. Although firsthand accounts may seem to represent the historical truth because they were recorded by an observer on the spot, eyewitnesses almost always have self-serving motives, if unwittingly. In this regard, skepticism is advised, for example in reading a clerk’s description of his or her Justice’s character, role, and work habits, because clerks tend to be so ferociously loyal to, and admiring of, the Justice they serve. A few Justices have even been known to chronicle events as much with an eye on posterity as to record the facts.

Memory is tricky. Sometimes eyewitnesses just plain get their facts wrong. For example, Malvina Harlan talks about how her husband Justice John Marshall Harlan’s historic dissent in Plessy v. Ferguson (1896) “cost him several months of absorbing labor,” when in fact the case was argued in April and handed down in May. No doubt it did feel like a long time. When an eyewitness is obviously mistaken or shows flagrant bias, it is so noted. But for the most part readers are left to evaluate these accounts on their own.

Another warning to readers: each chapter examines aspects of one thematic topic at different time periods in the Court’s history. This enables one to compare, for example, how the Justices viewed their salaries or their workload at different junctures. But the norms of the Supreme Court—the institutional values and ways of conducting business—have of course evolved enormously over time (and from chamber to chamber). While historical context is usually supplied, sometimes it necessarily takes a backseat to the narrative. In comparing eyewitness accounts from two different eras, bear in mind that experiences which might seem similar may in fact be very different given societal and cultural norms both inside and outside the Court at the time.
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Sink or Swim

The First Decade

In February 1800, Justice Samuel Chase was on his way to attend a session of the Supreme Court in Philadelphia (then the nation’s capital) from his home in Maryland, a journey that necessitated crossing the very broad Susquehanna River. Because the river was frozen, no ferry was operating, and the only alternative was to cross it on foot. Chase, a large man, fell through the ice and narrowly escaped drowning. As he reported to his wife, Hannah:

on Sunday before Day light one of the Negroes came into my Room. and desired me to get up, that the passengers were going over, that the Ice had been tried and would bear a Waggon and horses . . . two Negroes went before Me with the Baggage on a sleigh. I followed directly on the Track . . . Myself and Son carried a long Boat-Hook. about 150 Yards from the shore, (in about fifteen feet Water) one of my feet broke in, I stepped forward with the other foot, and both broke in. I sent the Boat-Hook, & across, which prevented my sinking. Sammy immediately ran up, and caught hold of my Cloaths, and fell in.— he got out and lay on the Side of the Hole, and held Me and broke in twice afterwards.— I was heavily cloathed. my Fur Coat was very heavy when it got wet. . . . I must inform You of our Circumstance. I had just offered up a prayer to god to protect Me from the Danger, when I instantly fell in.

Chase was an unpopular figure in some quarters, and the anti-Federalist press made the most of this incident, with one paper reporting that fish in the Susquehanna were leaping into fishermens’ nets “in preference to existing in an [element] become putrid by cleansing such a mass of aristocracy!”

Serving as a Justice in the first decade of the Supreme Court was indeed a chancy proposition. Wintry conditions made traveling to February sessions hazardous. Outbreaks of yellow fever during August sessions sent the Justices fleeing home. And the business the Justices managed to conduct in these first few sessions hardly made the trip worthwhile.

When Congress created the Supreme Court with the Judiciary Act of 1789, it did not provide a permanent chamber for the Justices to hold session. The first meeting was convened on February 1, 1790—in an upstairs room at the
Exchange Building in New York (briefly the nation’s capital)—but only three Justices appeared. Lacking a quorum, they immediately adjourned. A fourth Justice did turn up the next day, but there were no cases to hear. After six days of focusing on such administrative matters as hiring a clerk and admitting attorneys to practice before it, the Court ended its first term. The Court’s second session took place in August and was even less eventful, lasting only two days.

Legend has it that Justice William Cushing arrived in New York from Massachusetts for the Court’s first session wearing the big, white-powdered English judicial wig in vogue in state courts. After being followed up Broadway by a mob of boys who gawked at his extraordinary attire, Cushing dodged into a shop to buy a short, pony-tailed wig that would relieve him of the unwanted scrutiny. But even the more modest wig was controversial. Thomas Jefferson, then Secretary of State, thought that judicial robes should be the only official apparel: “For Heaven’s sake, discard the monstrous wig which makes the English judges look like rats peeping through bunches of oakum [wadding used for stuffing timbers of ships]!” The Justices decided to go bareheaded. Some continued the tradition of English courts of wearing robes with a red facing; others donned their own academic gowns of varying colors.
Associate Justice William Cushing of Massachusetts wore a horsehair wig and a black robe trimmed with red facing, the style for early colonial and English judges, to the first meeting of the Supreme Court in 1789. The Justices would decide to go bareheaded and don simple black robes. (Collection of the Supreme Court of the United States, painting by C. Gregory Stapko)
The New York Daily Advertiser reported that the scene at the Supreme Court’s opening day was “uncommonly crouded.” Spectators had to return the following day to see the Court hold session, however, because not enough Justices had shown up to constitute a quorum. (Library of Congress, Rare Book Collection)

When the nation’s capital moved to Philadelphia in 1791, the Court found suitable space in the new City Hall, but was obliged to share it with the mayor’s court. Although cases were beginning to percolate up through the judicial system, the Court continued to maintain a relatively low profile. When Chief Justice John Jay gave the President advance notice that he would be absent in 1792 due to his wife’s difficult pregnancy, his letter also glumly noted a lack of business:

As I shall be absent from the next [Supreme] Court, obvious Considerations urge me to mention to You the Reasons of it: Early in the next month I expect an
addition to my Family __ Mrs Jay’s delicate Health (she having for more than three weeks past been confined to her Chamber) renders that Event so interesting, that although she is now much better, I cannot prevail on myself to be then at a Distance from her; especially as no Business of particular Importance either to the public, or to Individuals, makes it necessary.

One Justice, John Rutledge, resigned in 1791 to become Chief Justice of South Carolina—a job considered more prestigious. It took three tries before the President could fill his seat, as George Washington’s first two nominees preferred to remain state legislators. The candidate who finally, if reluctantly, accepted the Associate Justiceship would resign months later. In 1792 the Chief Justice tried to quit the Court by campaigning to be governor of New York. He lost. In the first decade of the Court’s existence, twelve different men served in six seats.

In selecting his nominees for the Court, President Washington based his decisions on potential candidates’ character, experience, education, health, age, Revolutionary War record, and support for the Constitution. And, in an era when many people still owed their primary allegiance to their states rather than to the nation as a whole, he also strove for geographical diversity, attempting to ensure that as many states as possible were represented in his new administration. But it was not always easy to persuade good candidates to accept government commissions. He confided to Secretary of the Treasury Alexander Hamilton:

What with the non-acceptance of some, the known dereliction of those who are most fit; the exceptionable drawbacks from others; and a wish (if it were practicable) to make a geographical distribution of the great offices of the Administration, I find the selection of proper characters an arduous duty.

In one instance, Washington’s selection of a nominee was a little too hasty. In 1795, John Rutledge—the same man who had resigned from his position as an Associate Justice in order to become Chief Justice of South Carolina—heard that John Jay was soon to resign as Chief Justice. By now the Supreme Court had a somewhat higher profile—and in any event, Rutledge coveted the position of Chief Justice over that of Associate Justice. Rutledge immediately wrote to President Washington, informing him that he had “no Objection to take the place which [Jay] holds, if you think me as fit as any other person.” Washington apparently did: the day after he received Rutledge’s letter he wrote to him offering him the Chief Justiceship. Because the Senate was out of session, however, it was a recess appointment, subject to the Senate’s later approval.

Rutledge did preside over the Supreme Court’s August session that year, but around the same time reports began to circulate of an extremely intemperate
speech Rutledge had made in South Carolina, denouncing the controversial Jay Treaty that his predecessor had just negotiated with the British. Beyond that, there were rumors that Rutledge was “daily sinking into debility of mind & body,” and of his “attachment to his bottle, his puerility, and extravagances.” When the Senate finally met in December, they rejected Rutledge’s nomination by a vote of fourteen to ten. A few weeks later Rutledge made an unsuccessful attempt to drown himself in the waters off Charleston, rebuffing his rescuers (passing sailors) with the claim that “he had long been a Judge & he knew no Law that forbid a man to take away his own Life.”

Perhaps, like Rutledge, one had to be a bit reckless to desire to serve on the Supreme Court. In addition to traveling from their hometowns to the capital twice a year to attend Court sessions, the Justices were saddled with an extra, often grueling, duty: circuit riding. The Judiciary Act had created circuit courts but Congress had not provided salaries for separate circuit court judges. The country was divided into three circuits—Eastern, Middle, and Southern—and each fall and spring two Supreme Court Justices (later reduced to one) were required to preside over these circuit courts. They traveled by horse and buggy, stagecoach, or boat. Roads were muddy, rocky, snowy, or icy—if they existed at all. Hazards, including highway robbers, were abundant. Justice James Iredell once reported that his horse had bolted when the rein got under his tail:

[T]he chair [a kind of carriage] struck against a tree, and overset, throwing me out, and one of the wheels went over my leg. I was able to proceed however (as the chair was not broken) about ten miles, but then was in so much pain, I was under the necessity of staying very inconveniently at a house on the road.

Inns and taverns were generally uncomfortable, noisy, and crowded. Sharing a room at an inn with strangers was not uncommon; a Justice might even find himself having to share a bed. Justice Iredell complained to his wife, Hannah, on one such occasion: “It has been this time very much crowded indeed. I suffered very much the first night, having to sleep in a room with five People and a bed fellow of the wrong sort, which I did not expect.” But, Iredell added, the bed-fellow happened to be an acquaintance—“Col. Dudley”—“so that I suffered as little as I could do in such a situation.”

Riding circuit did have its occasional compensations. It gave the Justices an opportunity to see the country and to represent the national government in remote places. Most inns lacked comfort, but a few proved a nice respite. Wherever possible, the Justices dined with social acquaintances, providing for some merry evenings in the company of local dignitaries. Despite his anxieties about leaving Hannah alone with the children at their home in North
Carolina, Iredell reveled in the social opportunities that circuit riding often presented. In 1795 he wrote from Richmond:

I receive great civilities and distinction here. I dined the other day with Mr. Hylton, and in the evening went with his wife and daughter to the play (“As you like it”), which was very indifferently performed, except by a Mrs. West, formally Mrs. Bignall, who is really a pleasing actress. . . . They have a neat little theatre.

Riding circuit paid off handsomely for Justice James Wilson, a widower. While presiding over a court in Boston, he met and wooed the young woman who would (very quickly) become his second wife. Hannah Gray was nineteen; Wilson was fifty-one and had six children ranging in age from eight to twenty-one. Although bespectacled and stodgy, Wilson did have the advantage of being wealthy and—as a leading legal scholar and one of only six men who had signed both the Declaration of Independence and the Constitution—exceedingly distinguished. By the time Wilson left town ten days after meeting young Miss Gray, he had already proposed marriage. “I long for an Answer,” Wilson pleaded from Newport, Rhode Island, the next stop on his circuit. “Do let that Answer be speedy and favorable: Let it authorize me to think and call you mine.”

The Justice’s infatuation with a local beauty was remarked upon by several Bostonians, including future president John Quincy Adams. Like some other observers, Adams concluded that Hannah was marrying the Justice for mercenary rather than romantic reasons. He wrote to his brother in Philadelphia:

The most extraordinary intelligence, which I have to convey is that the wise and learned Judge & Professor Wilson, has fallen most lamentably in love with a young Lady in this town, under twenty, by the name of Gray. He came, he saw, he was overcome. The gentle [Scotsman] was smitten at a meeting with a first sight love—unable to contain his amorous pain, he breathed his sighs about the Streets; and even when seated on the bench of Justice, he seemed as if teeming with some woeful ballad to his mistress eye brow. He obtained an introduction to the Lady, and at the second interview proposed his lovely person and his agreeable family to her acceptance; a circumstance very favorable to the success of his pretensions, is that he came in a very handsome chariot and four.

In short his attractions were so powerful, that the Lady actually has the subject under consideration, and unless the Judge should prove as fickle as he is amorous and repent his precipitate impetuosity so far as to withdraw his proposal, you will no doubt soon behold in the persons of those well assorted lovers a new edition of January and May. . . .

Cupid himself must laugh at his own absurdity, in producing such a Union; but he must sigh to reflect that without the soft persuasion of a deity who has supplanted him in the breast of modern beauty, he could not have succeeded to render the man ridiculous & the woman contemptible.
Unfortunately for Hannah Gray, her new husband was a real estate speculator on a massive scale. Justice Wilson’s hunger for wealth had driven him to borrow heavily in order to buy into risky land schemes in undeveloped wilderness on the western frontier of Pennsylvania and elsewhere. For a while the profits enabled him to live in luxury, but in 1796 a general downturn in the economy prompted a number of his creditors to call in their loans, and Wilson was either unable or unwilling to repay them. As a result, he found himself thrown into debtor’s prison—thus becoming the first and only sitting Supreme Court Justice to be jailed.

After his son Bird bailed him out, Wilson decided that Philadelphia—his hometown—was no longer safe and looked for some out-of-the-way place to hide from his creditors. Eventually he settled on Edenton, North Carolina, where his friend and colleague James Iredell lived. Wilson remained in Edenton for almost a year, living in a modest but expensive tavern, and was eventually joined there by his young wife. Hanna Wilson told Bird that the man she found in Edenton was quite changed from the grandee she had married. And, since Wilson had been flagrantly neglecting his judicial duties and missing Supreme Court sessions, Hannah knew that back in Philadelphia there was inevitably talk of impeachment:

Mr Iredell has by this, told you what will surprise you, as much as it did me, that your Papa has requested the Southern Circuit, what he means to do with me, (as I cannot . . . go with him, as I have no cloaths, if it was otherwise convenient), I know not, a single Chair & horses will cost three hundred dollars. He certainly never could think of buying a Carriage, his cloaths are all going to pieces, he has not had any thing since he left home, which is fifteen months, it would take 60 dollars at least to furnish him with what would be necessary to go so long a Circuit. Besides the expences of the journey, your papa has never got a new hat, which was very shabby when you saw it, you may think what tis now. He intended to write you fully, and Mr. Iredell if he had been well enough. He will open his mind to you but not to me, but it is a subject that I have done speaking upon, as we think so differently. Write me what people say to our not coming home, you need not be afraid of distressing me, as I can hear nothing worse than I expect.

Despite the fact that Wilson had proved to be far from an ideal husband, Hannah appears to have remained devoted to him. When he contracted malaria in the summer of 1798, she selflessly nursed him through what proved to be his final illness. A few days after Wilson’s death, she wrote to Bird from the Iredells’ house, where she would spend several months recuperating from her ordeal:

I never should have forgiven myself if I had left him, when he was sensible he took so much pleasure in seeing me by him, and requested me not to leave him, but that
was not five minutes at a time, I had not my cloaths off for three days and nights, nor left him till the evening of his death, when I could not bear the scene any longer, I am astonished at myself when I think of what I have gone through.

Painful as Wilson’s death was to his wife, it must have come as a relief to the fledgling federal government, ending as it did a scandalous situation and relieving the pressure to launch impeachment proceedings.

More detrimental to the development of the Supreme Court as an institution, however, were the prolonged absences of two of its Chief Justices during this period. In 1794 President Washington sent Jay, while still Chief Justice, on a diplomatic mission to Britain to ease lingering hostilities between the two nations. A good deal of opposition greeted this appointment—partly because of policy concerns about dual office-holding, and partly because anti-Federalists feared that Jay was too sympathetic to the British. These fears were confirmed when Jay returned the following year with a treaty that many felt had not extracted enough concessions from England. Protests were so violent that Jay himself is said to have remarked that he could find his way across the country by the light of his burning effigies. Meanwhile, Jay’s year-long absence from the Court had increased the workload on the Associate Justices, who had to shoulder Jay’s portion of the circuit-riding duties.

But Jay had been reluctant to undertake the mission, in part because, as he explained to his wife, Sarah, the work of the Court was now taxing enough:

It was expected that the Senate would yesterday have decided on the nomination of an envoy to the court of London, but measures respecting the embargo occupied them through the day. To-day that business is to be resumed, and you shall have the earliest notice of the result. So far as I am personally concerned, my feelings are very, very far from exciting wishes for its taking place. No appointment ever operated more unpleasantly upon me; but the public considerations which were urged, and the manner in which it was pressed, strongly impressed me with a conviction that to refuse it would be to desert my duty for the sake of my ease and domestic concerns and comforts. I derive some consolation from the prospect that my absence will not be of long continuance, and that the same Providence which has hitherto preserved me will still be pleased to accompany and restore me to you and our dear little family.

The court has unceasingly engrossed my time. We did not adjourn until nine last night. I feel fatigued in body and mind. But reflections of this kind are not to be indulged. I must endeavour to sustain with propriety the part assigned me, and meet with composure and fortitude whatever disagreeable events may occur to counteract my wishes or increase my task. I shall have rest in time, and for that rest I will not cease to prepare. I am very anxious to be with you; and the moment the preparatory measures here will permit, I shall set out.

Jay’s absence from the Court was a strain. Congressman Jeremiah Smith of
New Hampshire even worried about the potential lack of a quorum:

The Supreme Court commenced their session on Monday. ___ Much of the dignity of the Court is lost by the absence of the Chief Justice ___ Judge [William] Cushing has not attended every day ___ He is under the Care of a Physician for a Cancer on his Lip ___ He attends part of the Time & in those Causes where they cannot make a quorum without him.

Upon his return home, Jay found he had been elected governor of New York in absenta. He resigned his Court post immediately. Fortunately, his resignation prevented the negative repercussions of the treaty from undermining the Court’s fragile authority. Despite the President’s popularity both with the people and the Senate, George Washington had a hard time finding someone to succeed Jay as Chief Justice. Both Alexander Hamilton and Patrick Henry turned him down. He also tried to elevate Associate Justices John Rutledge and William Cushing. Rutledge was not confirmed by the Senate after the political blunder he made in denouncing the Jay Treaty, which angered the Federalists who dominated the Senate. Cushing simply declined because he was old and sick.

Finally, Washington turned to the well-qualified Senator from Connecticut, Oliver Ellsworth. Vice President John Adams described him as having “the Stiffness of Connecticut; though his Air and Gait are not elegant; yet his Understanding is as sound, his Information as good and his heart as Steady as any Man can boast.” After serving for nearly four years, Ellsworth was tapped by Adams—since elected President—to be part of a three-man delegation to resolve differences with France and try to head off war. For political reasons, there was less opposition to Ellsworth’s appointment as foreign envoy than there had been to Jay’s, but the effect on the Court was similar: once again, the Chief Justice was absent for over a year. In addition to burdening the other Justices with more circuit courts to hold, these absences made it difficult for the Court to cohere as a group of colleagues led by a strong Chief Justice.

Chief Justice Ellsworth’s health was so broken by his sojourn abroad that he felt he could no longer continue in office. His resignation in 1800 caused an important vacancy shortly before Adams’s term as President expired. Adams’s first impulse was to turn to former Chief Justice John Jay, despite Jay’s recently announced intention to retire from public life. Jay, as many expected, declined the appointment, citing Congress’s failure to eliminate the system of circuit-riding:

[T]he Efforts repeatedly made to place the judicial Department on a proper Footing have proved fruitless—I left the bench perfectly convinced that under a System so defective, it would not obtain the Energy, Weight, and Dignity which are essential to its affording due support to the national Government; nor acquire the public