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Washington's original appointees to the Supreme Court were all staunch Federalists and demonstrated little reluctance to lend their judicial powers to promote the cause of the new nationalism. Of the six who sat on the first Court, none was more devoted to the Federalists' principles than was William Cushing, the distinguished Justice from Massachusetts, and Washington's second nominee for the high tribunal. On several occasions while on circuit duty, he had nullified State laws, which he deemed to stand in the path of national policies, and — surprisingly enough — he ignited little indignation. But in 1793, when the full Court handed down judgment in the case of *Chisholm v. Georgia*,[1] the proponents of state sovereignty were suddenly aroused from their quiescence and expressed their anguish with loud cries of defiance.

Plaintiff in the *Chisholm* case, a citizen of South Carolina and executor for a British creditor, had sued Georgia for payment of a debt owed him by two Georgia citizens, whose property had been confiscated for unpatriotic activities in the late war. It was Georgia's contention that a State could not be sued in a federal court by a citizen of another State. Therefore, the Court's first task was to establish its jurisdiction before giving ear to Chisholm's complaints. This entailed a close analysis of Article 3, Section 2 of the Constitution, which reads in part:

*This is one chapter from an unpublished work on William Cushing of Massachusetts, Associate Justice of the Supreme Court of the United States for the years 1789 to 1810. Previous chapters in this work treated of Cushing's judicial opinions in several cases touching the Contract and the Treaty-Making clauses of the Constitution. Born in 1732, Cushing belonged to a distinguished family in the Massachusetts Bay Colony. Soon after the Declaration of Independence was signed he was named Chief Justice of the State's Supreme Judicial Court, a post he held until 1789. Of the original six appointees to the United States Supreme Court, he alone remained on the Bench to participate in the important early cases of the Marshall era. In 1796 Washington appointed him as Chief Justice, an office he declined to accept.

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1. 1 U. S. (2 Dallas) 440 (1793). For additional details see an account of the case in the Salem Gazette, March 6, 1793.

> The Judicial Power shall extend . . . to Controversies between two or more States; between a State and citizens of another State; between Citizens of different States, between Citizens of the same State claiming Lands under Grants of different States, and between a State, or Citizens thereof, and foreign States, Citizens or Subjects.

All five opinions of the Court's members are highly instructive for they provide the first lengthy discussion of the question of state sovereignty and the nature of the union — a subject which would be debated with increasing vehemence during the next sixty years, until it finally catapulted the nation into bloody conflict. It is worth while to juxtapose the five opinions to see how differently the justices approached constitutional and judicial questions.

If the opinion of William Cushing be laid alongside of the others, a striking contrast will be seen. It is a strict judicial utterance devoid of any exuberance of thought or expression. More than half of James Iredell's long opinion was devoted to a discussion of the law and practice in England, since the substance of his dissent was that the Court was bound by the common law relative to suits against sovereigns. James Wilson's opinion was a brilliant philosophic disquisition that ranged far and wide over history and the basic concepts of sovereignty, the State, and man's relation to it. He referred to Reid, Bacon, Cicero, William the Conqueror, the Ephori of Sparta, Homer, Demosthenes, Louis XIV, Bracton, and the author of the Mirror of Justice. It was a splendid *tour de force*, expressed in beautiful English.[2] Having established that the people of the whole nation were the sovereign, he quite easily concluded that Georgia could be sued. Only a few lines were devoted to a consideration of the judicial clause of the Constitution itself.

The ingenious argument of John Jay was built on the proposition that prior to the Revolution the colonists were all "fellow subjects" of the King of England "and in a variety of respects, one People"; that "from the Crown of Great Britain, the sovereignty of their country passed to the people of it."[3]

2. *Id.* at 455. A critic has written that "Wilson's opinion is a very learned dissertation of various abstract questions on government, but considered simply as a judicial opinion it is certainly the most absurd to be found in the reports of the United States. Wilson's opinions show that he had not a judicial mind." W. D. Coles, "Politics and the Supreme Court of the United States," 27 AM. L. REV. 189 (1893).

3. 1 U. S. (2 Dallas) 440, 462 (1793).

Thus, he concluded, though subjects cannot sue their sovereign, in America there are no subjects, and thus, one part of a sovereign or free people may sue another part, just as one free citizen may sue another free citizen.

Cushing's opinion suggests a certain impatience with the arguments of Iredell, Wilson and Jay. In addition it indicates that he had not a philosophic mind and that he distrusted analogies drawn from history. His one instrument was logic, and by applying it to the relevant judicial clause of the Constitution he presented a concise and persuasive case in favor of suability.

He begins bluntly by saying that "the point turns not upon the law or practise of England, . . . nor upon the law of any other country whatever."[4] Thus does he seem to administer a rebuff to Wilson and Iredell and, to a certain extent, to the Chief Justice himself. For Cushing only one thing was really involved, and that was the Second Section of the Third Article of the "Constitution established by the people of the United States." In this clause the judicial power is "expressly extended to controversies between a State and citizens of another State." If it be contended that this must be read so as to exclude suits in which the State is defendant, Cushing retorts by pointing to the clause immediately preceding — "controversies between two States" — in which one of the States must of necessity be a defendant."

Cushing presses home this point by taking up the language and the evident purpose of the clause extending the judicial power to "controversies between a State, or citizens thereof, and foreign States or citizens." The "sovereignty argument" is surely of no avail here, he insists, unless one contends that the clause means "we may touch foreign sovereigns but not our own." Moreover, continued Cushing, it is evident that the framers of the Constitution desired to establish a national tribunal, — as far as possible, an impartial one, — so that foreign powers might take their grievances against States to it rather than be forced to make "an appeal to the sword." The same argument is equally valid for justifying "a disinterested civil tribunal" for settling controversies between a State and another State or its citizens, regardless of who may be the defendant.[5] But there is an additional reason, and in

4. *Id.* at 460.
5. *Id.* at 461.

urging it Cushing makes a short but eloquent argument from the "great end of government." He says:[6]

> If a state is entitled to justice in the federal court against a citizen of another state, why not such a citizen against the state, when the same language equally comprehends both? The rights of individuals and the justice due to them are as dear and precious as those of states. Indeed the latter are founded upon the former; and the great end and object of them must be to secure and support the rights of individuals, or else vain is government.

It had been contended that such arguments would "reduce the States to mere corporations, and take away all sovereignty", and Iredell had spent some time in his dissent distinguishing between States and corporations.[7] Cushing did not bother about these distinctions, asserting that "all states whatever, are corporations or bodies politic. The only question is, what are their powers?" All the individual States had surrendered some of their powers by adopting the Constitution, and hence "no argument of force can be taken from the sovereignty of States."

There was, however, one serious objection to the interpretation of Article 3, Section 2 as given by the majority of the Court, and Cushing alone seems to supply any satisfactory answer.[8] The objection was this: if a State may be sued by a citizen of another State, then it should follow that the United States may be sued by any citizen of any of the States. Cushing's initial answer is characteristic of his cold logical approach: "If this be a necessary consequence, it must be so." However, Cushing did not believe it was necessary to admit such a conclusion. First of all, the wording used by the Constitution when speaking of the United States was different: it says the judicial power shall extend to "controversies to which the United States shall be a party", whereas, when referring to the States, it speaks of "controversies between two or more States; between a State and citizens of another state." But his most acceptable refutation is made by referring to the clear purpose of allowing suits against States, that is, the avoidance of war between them, a reason which does not hold "equally good for suing the United States."

6. *Ibid.*
7. *Id.* at 448-453. For Iredell's dissenting opinion see *Id.* at 444.
8. *Id.* at 461, 462.

So much for the opinion of Cushing, which, while it in no wise matches those of Iredell, Wilson or Jay in subtlety, eloquence, or profundity, is nonetheless a direct, clear, and highly effective argument.[9] Such a frank discussion, unadorned with elegance of expression and without a single reference to authorities remote or near, shows the effect of twelve years of judicial apprenticeship on the frontier of Maine before being elevated to the Supreme Judicial Court of Massachusetts.

Most constitutional lawyers today agree that the majority erred in judging that a State could be sued without its consent, and in 1889 Justice Bradley publicly praised Iredell's dissent.[10] However, at least one preeminent scholar agrees emphatically with the majority, saying that "the language of the Constitution was perfectly explicit in favor of the jurisdiction" and that "the adoption of the 11th Amendment, . . . far from impairing the logic of that decision, seems rather to confirm it."[11]

It appears that one of the big weaknesses in all five opinions is that there was not a single canvass made of the views of the framers of the Constitution and of the State conventions to discover the contemporary construction of the disputed clause. Iredell missed a capital opportunity to buttress his case by not making an appeal to these views, and had Cushing done so he might have presented his exegisis with less confidence.

In the Virginia Convention, Madison discussed the very

9. Justice Blair's approach is similar to that of Cushing's. He begins by saying he will pass over the "various European confederations . . . The Constitution of the United States is the only fountain from which I shall draw." *Id.* at 453, 454.

10. Hans v. Louisiana, 134 U. S. 1, 12 (1890). In this case the Court ruled that the Eleventh Amendment protected the State from suits brought either by the State's own citizens or by a foreign government. See also COLES, POLITICS AND THE SUPREME COURT 188, 189; HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835, at 137-39 (1944). On the other hand, Justice Harlan, while concurring with the conclusion reached in the *Hans* case, gently chided Bradley for his remarks on the *Chisholm* case. "The comments made upon the decision in *Chisholm v. Georgia* do not meet with my approval. They are not necessary to the determination of the present case. Besides, I am of the opinion that the decision in that case was based upon a sound interpretation of the Constitution as that instrument was then understood."

11. Corwin, *Establishment of Judicial Review*, 9 MICH. LAW REV. 294-295 (1910-1911). The majority view in the *Chisholm* case is also supported in Pierce, *James Wilson as a Jurist*, 38 AM. LAW REV. 44, 47 (1904); Carson, *James Wilson and James Iredell: A Parallel and a Contrast*, 7 A. B. A. J. 123, 129 (1921).

points at issue in the *Chisholm* case, and he denied that a state could be sued by citizens or foreigners without its consent. The Constitution simply named the tribunal that must be used in suits involving states.[12]

Later on, John Marshall again took up the question, saying that "with respect to disputes between a state and the citizens of another state, its jurisdiction has been decried with unusual vehemence", but he then assured the Convention by adding that he hoped "no gentleman will think a state will be called at the bar of the federal court."[13]

Finally, it should be noticed that in the amendments which the Virginia Convention proposed to Congress, the 14th, dealing with the judiciary, restricted the judicial power to "controversies between two or more states, and between parties claiming lands under grants of different states."[14]

The Fourth Amendment adopted by the New York Convention affirmed "that nothing in the Constitution . . . is to be construed to authorize any suit to be brought against any state, in any manner whatever." And, as if to nail this down securely, the delegates added an amendment to forbid enlarging the judicial power.[15]

Even the ardent nationalist Alexander Hamilton had denied in *Federalist* 81 that a State could be made amenable to suits of an individual without its consent.

Attacks from the New England Press

To bring the discussion closer to Cushing, it should be noted that in his own state of Massachusetts many complaints were printed in newspapers against the *Chisholm* decision precisely because, in the ratifying convention of 1788, the advocates of the Constitution, so it was maintained, had given assurances that the power of the new federal courts was not meant to embrace forced suits of States by citizens. No state had dissenters with such prolific pens. One public letter two and a half columns long by "A Republican" asserted that in the Convention "*all* the members *expressly* declared

12. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 532, 533 (Elliott ed. 1861) (hereinafter cited as DEBATES).
13. *Id.* at 555.
14. *Id.* at 660.
15. The Ninth Amendment recommended read: "The jurisdiction of the Supreme Court of the United States . . . ought not, in any case, to be increased, enlarged or extended, by any fiction, collusion, or mere suggestion." 3 DEBATES 409.

themselves against the principle" of suability.[16] This same author then frankly stated that the Constitution, as now explained, is not the Constitution adopted by the people of this Commonwealth. He continues thus:

> Every person that attended the debates, knows that this question was agitated in the Convention, and that it was treated as a visionary, antifederal idea; and that both parties mutually and cordially consented, that the 'suability' of the States was not contemplated by the framers of the Constitution; that it never could be exercised, and in fact could never bear that construction.

It was also urged by "A Republican" that his point could be established from the fact that, since the Convention proposed no amendment on the article in question, all doubts must have been dissipated as to its intent.

"Brutus", in his letter, likewise asserted that it could never be believed "that the people intended to give such a power to the Federal Government," but he claimed that the clause had evidently been "designed to be ambiguous."[17]

A much more moderate and reasonable letter appeared two weeks later in which "Hampden" asserted that, at the time of ratification, it was objected that this obnoxious interpretation might later be given to the clause, "but the great lawyers in the Convention declared that no such construction could ever be made; though some of them are now the warm advocates of the power claimed by the Supreme Judiciary."[18]

A study of the debates in the Massachusetts Ratifying Convention alone certainly does not substantiate the complaints of these various correspondents. Although many objections were made on the floor to the judicial power of the new courts, the question of State suability would not seem to have been discussed.[19] However, that the people of Massachusetts were not unaware of the "dangers to state sover-

16. The Independent Chronicle, July 25, 1793. Emphases are in the original.
17. The Independent Chronicle, July 18, 1793, Sept. 16, 1793.
18. The Independent Chronicle, August 1, 1793.
19. 2 DEBATES 109-114. It appears, however, that much of the discussion which took place on January 28, 29 and 30, when the Article on the Judiciary was before the Massachusetts Convention, has not been included in the recorded debates. At page 109 the authors say, "We can only say that, with the utmost attention, every objection, however trifling, was answered, and that the unremitted endeavors of gentlemen who advocated the Constitution, to convince those who were in error, were not without effect."

eignty" which lurked in the Third Article of the Constitution is evident from the number of anonymous letters written in contemporaneous papers just prior to calling the Convention, several of them advocating an amendment to forbid State suits by citizens of the States.[20]

Moreover, a limited amount of hitherto undiscovered material leads one to conclude that the question of "state suability" was discussed by the delegates during the eventful month of January, 1788, at least outside the convention walls, and that Cushing was fully informed of the fact.

Amongst the unpublished Cushing papers there is the following interesting document in the Justice's hand:[21]

> That the Convention ratify the Constitution upon the following Condition, That the First Congress, Shall, before they proceed to exercise any powers derived from the Constitution (except those of organizing themselves, examining their returns and establishing rules for their procedure) take into consideration and decide upon all amendments proposed by the convention of this, or any other state; *And* all such amendments as seven of the states shall agree to, shall be considered as a part of the Constitution. That the Senators and Representatives shall sit in one body on this business and vote by States, as has been practised in Congress; the president and vice president being excluded a seat.

On the next sheet there is a line roughly drawn down the center, on the right side of which appears proposed amendments with a brief commentary opposite in the left hand column. Amendment number 4 reads as follows:

> In the sect of judiciary power, strike out the words 'between a state and citizens of another state, between citizens of different states.'

And a succinct comment on this proposal follows:

> Saying a *State* liable to be sued robs it of all its sovereignty and in this case may lay the several States liable to be sued for their public *Securities*.

20. Harding, THE FEDERAL CONSTITUTION IN MASSACHUSETTS 31-33 (1896). Harding inclined to the opinion that the letters signed "Hampden" were written by the influential Anti-Federalist James Sullivan.

21. MS. in Cushing Papers in Massachusetts Historical Society, Boston.

These may be the notes of an official debate or only of a private discussion on the subject which Cushing heard, or they may be a digest of the above-mentioned "Hampden" letters which they resemble in such a remarkable way. It would be going far beyond the available evidence to affirm that Cushing himself entertained such sentiments in January, 1788. However, from such evidence it can be stated positively that five years before the *Chisholm* case Cushing was completely aware that many of his fellow citizens of Massachusetts were suspicious of Article Three of the Constitution and that perhaps a majority of the delegates to the Convention would have voted to defeat the whole document had their suspicions not been allayed. There is, therefore, good reason to give credence to the assertions made in 1793 by "Brutus", "Republican", "Hampden", and the many other critics of the *Chisholm* decision.

There were, indeed, many defenders of the opinions of the four justices who supported Chisholm's claims against Georgia, but none have been found who challenged the accuracy of the above-mentioned contentions as to what transpired at the Convention relative to this disturbing question. Most of these federalist-inspired writings argued from the nature of government or merely from the wording of the Constitution, as Cushing had himself. One very restrained newspaper account reports that "Judge Cushing confined himself to a narrow compass, to the Constitution and laws of the United States; his argument was short but solid and judicious. He saw no room for doubt, but sanctioned by his opinion that of his two brothers who had immediately preceded him."[22]

Amongst the more vigorous defenders of Cushing and his three associates on the bench none appears to have been more prolific than "Critic". In a piece to the *Salem Gazette*, he excoriated any person "so devoid of principle as to come forward and say, that any man or body of men ought to have an exclusive legal privilege of defrauding with impunity."[23] He concludes his letter by answering the objection that the decision meant a loss of our independence with these words:

> It is said, if a State can be sued 'tis a mere corporation and its independence is lost.—If by losing independence is meant losing the power of doing wrong—at setting

22. Columbia Centinel, March 12, 1793.
23. Salem Gazette, July 30, 1793; Columbia Centinel, August 10, 1793.

> justice and common honesty at defiance—or oppressing the individual with the insulting reply that the State is above law—lawsuits—then God be praised that such independence no longer exists.

Another writer calling himself "Solon" was given the first column on page one of the Anti-Federalist *Independent Chronicle* to present a defense of the decision.[24] The writer asserted that the disputed jurisdiction was so "expressly" given by the Constitution as to forbid any dispute. He did not intend to investigate the question "whether the power granted in this particular, was minutely considered, or the best mode adopted." He then launched out on a defense of the power based on "natural rights and the rights of society". "Each citizen under a government of laws and a social compact, ought to be as certain in his remedy against the whole people, as the whole people are against each citizen."

Hancock Retaliates

This hot debate reached its climax by mid-summer when William Vassal, an alien, brought a suit in the federal courts against the State of Massachusetts. Governor Hancock acted with the greatest dispatch. Immediately he called for a special session of the Legislature, the proclamation reading, "Whereas the Governor of this Commonwealth has this day been served with a writ of William Vassal to appear before the Supreme Courts . . . . the Governor summons a special session of the General Court to determine what action should be taken."[25] Although people had undoubtedly been impressed by the abstract arguments on "Sovereignty" and the "Nature of the Union", it was this concrete "impudent" action of an alien that literally propelled officials to the action of adopting measures to arrest the "frightening" effects of the *Chisholm* decision. Newspapers cried out in bitter anguish. "Nothing remains but to give the key of our treasury to the agents of the Refugees, Tories, and men who were inimical to our Revolution, to distribute the hard money now deposited in that office to persons of that description."[26]

Another story lamented that the Court "had aimed a blow at the sovereignty of the individual States, and the late de-

24. Independent Chronicle, September 19, 1793.
25. The Proclamation of Governor John Hancock was printed in full in the Boston Gazette, July 15, 1793.
26. Independent Chronicle, July 25, 1793.

cision of the Supreme tribunal of the Union has placed the ridgepole on the wide-extended fabric of consolidation."[27] The writer of this article then suggested remedial action for the States. "The representatives of the free citizens of the independent States, will no doubt, cherish the spirit of investigation and remonstrate on the subject with wisdom and firmness."

The special session of the Legislature was held in September, and by the overwhelming vote of 107 to 19 a resolution was passed which declared that the power to compel a State to become a defendant in a suit before a United States Court was repugnant to the first principles of a federal government."[28] The State's Senators and Representatives were accordingly instructed to endeavor to obtain an amendment to repeal the recent decision of the Court.[29]

The Virginia Legislature adopted a similar resolution, which characterized the *Chisholm* decision as "incompatible with and dangerous to the sovereignty and independence of the individual States, as the same tends to a general consolidation of these federated republics."[30] On December 14, 1793, two months prior to the Court's ruling in the *Chisholm* case, a resolution was introduced in the Georgia Legislature, which declared that the State would not be bound by an "unconstitutional and extra-judicial" decision.[31] This particular resolution was not adopted.

Justifying the action taken by his own State of Massachusetts, the historian Alden Bradford,—29 years old in 1793—wrote as follows in his 1835 *History of Massachusetts*:[32]

> This was a singular proceeding of an individual state in opposition to the federal government, or in interfering with a branch of that government, as to its power, or the meaning of the constitution whence that power was claimed. It was, in effect, a refusal to obey the authority of that government, until the voice of the people could be obtained on the subject. It was a single state undertak-

27. Boston Gazette, August 5, 1793.
28. BRADFORD, HISTORY OF MASSACHUSETTS 345 (1835).
29. *Ibid.*
30. 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 100 (1937).
31. *Ibid.*
32. BRADFORD, *op. cit. supra* note 28, at 345. Bradford (1765-1843) was an Anti-Federalist, a Harvard professor, a clergyman, and a former Secretary of the Commonwealth.

> ing to say, that the constitution had been misconstrued, and the judiciary had exceeded the power given to it by the constitution; and a resolution not to submit to the authority which it assumed, until it was ascertained, by an appeal to the states that the authority was given by that instrument.

In a footnote, Bradford added a clarification. "If the general government is not a federal, but a national or consolidated government, the conduct of Massachusetts would have been condemned as altogether improper and dangerous."

It is difficult to ascertain whether or not Cushing knew of the tempest in his home state stirred up by the *Chisholm* decision. In a letter written from Augusta, Georgia, November 17, 1793, he indicated that he had been away on circuit duty for several months.[33] There can be no doubt, however, that he was painfully aware of the violent reaction to the decision in the State of Georgia, for, while he was holding court in the Georgia District, the House of Representatives passed a bill which declared that any federal marshall attempting to execute the process issued by the Supreme Court in the preceding February should be guilty of felony and hanged without benefit of clergy.[34] This extreme measure, coming just five days after he had been rebuffed in the *Rivers* case,[35] must have left the great nationalist profoundly shaken as he made his way back to Philadelphia in December, 1793. Cushing may have returned to his home in Massachusetts for a short visit after his long absence, but it appears that he was not there the following January and February when Federalists and Anti-Federalists continued the long drawn-out battle over state suability. However, his Boston friends kept him informed with letters to Philadelphia.

33. William Cushing to Mrs. Scarborough, Atlanta, Georgia, Nov. 17, 1793. Letter printed in 29 NEW ENGLAND HISTORICAL AND GENEALOGICAL REGISTER 138.

34. 1 WARREN, *op. cit. supra* note 30, at 100-101.

35. Joseph Rivers and three others—citizens of Georgia—were accused of fitting out privateers in the port of Savannah and sailing against British shipping. Cushing had maintained that such action offended the 7th Article of the Treaty with Great Britain, which declared that there should be perpetual peace and amity between the United States and England and their subjects. He spoke of this treaty as a "supreme law" which bound judges "notwithstanding State laws or State Constitutions". He made this argument in charging a jury in the *Rivers* case in Georgia. The jury, however, found the accused not guilty. The case is nowhere reported, but accounts appeared in contemporary newspapers. The American Minerva (New York), Dec. 12, 1793; and Dec. 13, 1793, which carried a dispatch from Atlanta dated Nov. 21, 1793.

Increase Sumner wrote from Roxbury, Massachusetts on February 14, and made several observations on the articles in the Boston papers which had been attacking his opinion in the *Chisholm* case. He said:[36]

> I suppose you have seen the Boston Chronicle for January and February. If you have not, you must procure them for your amusement. You will find the pieces stiled the true Federalist to Mr. Randolph (wrote by you know who) in which you will find the opinion of your honors Court treated with a little more than republican freedom in the Question of State Suability—among other curious passages the writer has the following remark. "Judge Cushing observes that all States, whatever are bodies politic or corporations, but he does not on the other hand say that all bodies politic and corporations *are States.* There are many observations on the merits of your motion which have much astonished the People of America, and the one recited is amongst the number." I believe the people would have been more astonished if you had said what this writer accuses you of not saying — it amounts I think, to this, if a Judge arguendo, had occasion to say, that all Towns are Bodies politic or Corporations, and because he could not maintain the reverse of the proposition, that all bodies or Corporations *are Towns* (which, with the writer's leave, would be sheer nonsense) that therefore, the people of America were affrighted and astonished.

Cushing answered Sumner ten days later with a letter touched with a cynicism which indicated that the newspaper articles did not entirely amuse him.[37]

> The Chronicles you speak of, I have not seen, but I suppose Brother Charles has them all folded up for me together with the Centinel for the whole time I have been absent; and which, when I get home, I can if leisure permit cull out . . . some of those precious and regaling flowers. Some people have an admirable facility in acting and talking against light; and trying to make people stare at simple propositions which they . . . dare not . . .

36. Sumner to Cushing, February 14, 1794, in Cushing Papers, Massachusetts Historical Society, Boston.
37. Cushing to Sumner, February 24, 1794, in Cushing Papers, Massachusetts Historical Society.

deny. And this, you see, will make men noble champions for State aristocracy, heroically miscalled the liberties of the people, pave the way for what may be aimed at, and prevent the interference of others.

The certain lack of coherence here may indicate that Cushing was really disturbed and upset by the sharpness of the attacks from his own State. A few weeks later he unbosoms himself to another fellow citizen from Massachusetts, lamenting the necessity of running the continual gauntlet of newspapers and regretting "that private passions of one kind and another should be making perpetual war upon the peace and good order of society, and attempting to shake fundamental barriers of liberty and equality."[38]

Political Repercussions

The tumult might have entirely subsided long before this time had not the Federalists decided in late 1793 or early 1794 to draft Cushing for the Governorship to succeed John Hancock, who had died soon after the above-mentioned special session of the General Court. It was not the first time that Cushing had been mentioned for this high position in the Commonwealth of Massachusetts. In 1789 the electors of the State were urged to choose Cushing in the interests of peace and harmony and "by thus doing, put a stop to that caballing which has so long disturbed our State."[39] The draft did not materialize and Hancock was re-elected, while six months later Cushing was appointed to the Supreme Court by Washington.[40]

38. Cushing to Theophilus Parson, March 20, 1794, in Cushing Papers, Massachusetts Historical Society.

39. Massachusetts Centinel, March 1, 21, 1789. The "caballing" and the lack of "peace and harmony" resulted from the illwill existing between Governor Hancock and his own Lieutenant Governor Lincoln. BRADFORD, HISTORY OF MASSACHUSETTS 332-333 (1835).

40. Even some of the Federalists had misgivings about the appointment of Cushing. They feared that, upon leaving the bench of the Massachusetts Supreme Judicial Court, Hancock would appoint an Anti-Federalist in his place. This is the tenor of a letter from Stephen Higginson to John Adams, August 8, 1789. "I shall now take the liberty of stating to you the consequences, should Mr. Cushing, our present Chief Justice, be removed to the Federal Bench. . . . You know, and everyone acknowledges, his abilities and many good qualities, which render him a proper person for the office referred to, and which make him one of the highest of importance to the Commonwealth in his present station. Our present bench form the greatest barrier we have, by much, against popular frenzy, and the influence of popular demagogues. Should the Bench be broken up, or much changed, it would probably give rise to more mischief . . . The certain consequence would be the appointment of

Late in 1793 Gore wrote to Rufus King: "The Federalists talk of running Judge Cushing for Governor, and there is some probability that he may be elected. Such an event is very desirable. It would make Massachusetts completely federal."[41]

Two months later he was being publicly mentioned as a candidate. Interestingly enough, one of the main reasons advanced for this election was the same as that urged in 1789. "The people of the Commonwealth cannot wish to elect the leader of any party. The exigencies of the times demand a man, whose qualities are calculated to unite all parties."[42] His judicial qualities were extolled by other supporters, and at least one campaigner was bold enough to write that "his independence of mind, exhibited in the question of State Suability, must endear him with his fellow citizens."[43]

Another correspondent, "Truth", urged Cushing's election because, amongst other things, he had "never descended to low arts to get into any branch of Congress, . . . never violated the Sabbath by disturbing the domestic felicity of a fellow citizen."[44]

John Adams is reported to have endorsed him over his opponent, Sam Adams. "I shall be happier if Cushing succeeds, and the state will be more prudently conducted."[45]

In short, it appears that he was the unanimous choice of the federalist caucus which met in Boston in March of the election year.[46]

The Anti-Federalists were by no means idle in urging the voters to reject Cushing and to elect their candidate, Sam Adams. Their arguments were presented in a multitude of

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a man, [—under (?)] whom some, if not all the others, would refuse to sit . . . It is an event which the popular party here would much rejoice at, and which they have been labouring to bring about . . . . Great injury is considered as inevitable from the removal of Mr. Cushing . . . ." American Historical Association Report 767-772 (1896); 1 AMORY, LIFE OF JAMES SULLIVAN 259 (1859).

41. Gore to King, August 6, 1789. 1 RUFUS KING: LIFE AND CORRESPONDENCE 511 (King ed. 1894-1896). Both King and Christopher Gore were prominent Federalists in Massachusetts.

42. Columbia Centinel, March 6, 1794.

43. Open letter from "A Citizen", Columbia Centinel, March 28, 1794.

44. Columbia Centinel, March 8, 1794. Possibly "Truth" feared that people may have deemed William Cushing "tainted" by Cousin Nathan Cushing, a State Judge, who in 1792 had been arrested for travelling on a Sunday, a Sabbath violation necessitated by his duty to open a session of the court on Monday morning. See the account in 2 MASS. L. Q. 485-487, 19 MASSACHUSETTS HISTORICAL PROCEEDINGS 252.

45. 7 NEW ENGLAND HISTORICAL AND GENEALOGICAL REGISTER 44.

46. Columbia Centinel, March 29, 1794.

letters printed in the Republican papers of the State. Several letters written in the Anti-Federalist *Independent Chronicle* voiced the opinion that Cushing had no intention of accepting the position even if he were chosen at the election; that he was too wise a man to give up a lucrative and secure office for an uncertain one; and finally that the Federalists' real reason for offering his name to the people was to split the vote between him and Sam Adams, and make it possible for one of the other Federalist candidates to slip into the office. Thus "Whisper" wrote that he had heard a young lawyer say "I hope the Judge C. will be chosen governor, and then my father will be appointed in his place."[47] "Tuba" said he was convinced that votes were being solicited for Cushing, not with the idea of electing him but with the hope of diverting votes from Adams, and he concluded with a public warning; "Beware then my countrymen: Do not suffer yourselves to be duped, by the mean artifices of your pretended friends."[48]

"A Plain Countryman" from the County of Hampshire discussed the question more at length. Admitting that Cushing was a good Judge, the writer questioned whether he would be a good Governor, since, in "Countryman's" opinion, he was not very successful as Vice-President of the state ratifying convention.[49] Moreover, "we do not like the men who support him in Boston; they from all accounts are of the same kidney, as those who voted against our Hancock." But the strongest argument pressed against Cushing was his opinion in the *Chisholm* case. Thus he expressed himself:

> Another mighty objection against Mr. Cushing is that the question about Suing the State is now coming from Congress to be laid before the legislatures. As the people are so generally against this, and as it has cost the state so much to settle this business so far, it would be the highest folly to put a man in the chair whose influence would undoubtedly operate against us. His being in favor of the States being sued works against him in the country, though we suppose it is the greatest commendation of him among the caucus men in Boston, as they were so many speculators, negotiators, and British agents among them.

On the eve of the election, the strongly Anti-Federalist *Boston Gazette*, after referring to the defeat of Chief Justice

47. Independent Chronicle, April 3, 1794.
48. *Ibid.*
49. *Ibid.*

Jay when he ran for governor of New York in 1792, wrote as follows:[50]

> The citizens of Massachusetts will follow the example of their brethren and show to the world that an officer in a foreign country who has warmly plead against the interest of this Commonwealth has no claim or pretention to the suffrage of its citizens, for Judge Cushing has forsaken Massachusetts and plead in this Federal Court against her independence.

Another attack of equal bitterness was written by "Consistent", who asked, "Is it likely that the Citizens . . . will prefer a man who has endeavored to deprive the Commonwealth of Massachusetts of its sovereignty, by a decision of the Supreme Court, rendering it amenable in all cases to the jurisdiction of that Court?"[51] The critic continued with an attack on Cushing's supporters, — "a few lawyers who think they will stand a better chance for public appointments under a certain law character, than under a man whom the people have hitherto delighted to honor." Cushing is called an importation "from another government", and the people are urged to reject "the leader of a party, who have pledged themselves to overthrow the Sovereignty of the State Government."

The Federalists attempted to counter this capital charge by accusing their foes of bringing up a dead issue. "Honorius" wrote that "the bug bear of State Suability is dead. The Congress of the United States have passed a law, by a very great majority, to annihilate it. Let that tale not deceive you."[52] Another correspondent, after extolling Cushing's integrity and independence for his *Chisholm* opinion, — "the Constitution gave the power and he declared it", — reminds his readers that "that part of the Constitution will now be repealed and the warmest advocates of State Sovereignty cannot now make an objection to Mr. Cushing's election."[53]

In the midst of this political battle, Cushing was more like an Achilles moping in his tent than an ardent warrior trying to lead his party on to victory. As a matter of fact, he positively rejected the idea of being a candidate, and even after

50. Boston Gazette, April 7, 1794.
51. Independent Chronicle, March 6, 1794.
52. Columbia Centinel, March 22, 1794.
53. *Ibid.*, March 28, 1794.

the party drafted him in spite of his frank disavowal, he does not appear to have lifted a finger to enhance his chances at the polls. On February 24, 1794, he wrote to Sumner from Philadelphia as follows:[54]

> Entre nous, some gentlemen have proposed to me to stand for the first magistracy of our state; but many weighty reasons prompt me to decline the too high and arduous task. There is our good Lieutenant Governor (Sam Adams), who stands in the direct line of promotion, and who has waded through a sea of political troubles for the good of his country; why not he? Were I permitted to dictate for a whole people, I believe I could name one of suitable age, situation and circumstances, who would serve their real interests, without regard to name or nicknames.

In his answer to a letter from Theophilus Parsons, who had pushed his candidacy, Cushing states unequivocally that "I must be excused in continuing to decline the honor proposed."[55] He then detailed his reasons for refusing the nomination. His private fortune was insufficient, the salary would be less than his present one, there was the uncertainty of annual elections, a distaste for "political bustle", and a reluctance to sacrifice his judicial profession. And finally, he had no stomach for the "continual gauntlet of newspapers to run; which latter, however, I do not much regard being easily consoled with the consciousness of views and motives that are not bad." It seems certain that he had in mind the barrage of criticism being directed his way as a result of his opinion in the *Chisholm* case.

The people went to the polls on April 8th and there rejected the national-minded justice of the Supreme Court in favor of the state-righter Sam Adams. There was no doubt of the lingering indignation of the people of Massachusetts over the question of "the bug bear of state suability". — They crushed Cushing by a better than two-to-one vote.[56]

54. Cushing to Sumner, Phila., February, 1794, in Cushing Papers, Massachusetts Historical Society.

55. Cushing to Parsons, Phila., March 20, 1794, in Cushing Papers, Massachusetts Historical Society.

56. For an excellent analysis of the election results and a breakdown of the votes according to the various sections of the state, see MORSE, THE FEDERALIST PARTY IN MASSACHUSETTS TO THE YEAR 1800 at 140-145 (1909). Even in Boston, where the lawyer and merchant classes were strong, Cushing was overwhelmed. Strangely, however, Berkshire County

But, weeks before, it was certain that the ruling in the *Chisholm* case was practically overthrown, for both the Senate and the House had agreed to the Eleventh Amendment by a most lop-sided vote.[57] Finally, on January 8th, 1798, the necessary three-fourths of the States ratified, and one month later the Court bowed to this expression of the will of the majority by declaring that it no longer had jurisdiction in any case "in which a state was sued by citizens of another state, or by citizens, or subjects, or any foreign state."[58]

Thus ended in defeat one of the bitterest battles waged by the nationalists against the adamant advocates of State sovereignty.

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in the west, inhabited by people who had rejected the Constitution in 1788, and who were Anti-Federalists and traditionally out-spoken against lawyers and the courts, gave Cushing 696 votes to 429 for his opponent. Morse attributes this to the fact that Sam Adams had shown unnecessary severity to the Shay rebels in 1786-1787, whereas Cushing's "humanity" as chief justice of the Supreme Judicial Court was well known. MORSE at 144.

57. 1 WARREN, *op. cit. supra* note 30, at 101.

58. Hollingsworth v. Virginia, 1 U. S. (3 Dallas) 644 (1798).