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JUSTICE WILLIAM CUSHING AND THE TREATY-MAKING POWER

F. WILLIAM O'BRIEN, S.J.*

Washington's First Appointees

Although the work of the Supreme Court during the first few years was not great if measured in the number of cases handled, it would be a mistake to conclude that the six men who sat on the Bench during this formative period made no significant contribution to the development of American constitutional law. The Justices had few if any precedents to use as guides, and therefore their judicial work, limited though it was in volume, must be considered as stamped with the significance which attaches to all pioneer activity. Moreover, most of this work was done while on circuit duty in the different districts, and therefore from Vermont to Georgia the Supreme Court Justices were emissaries of good will for the new Constitution and the recently established general government. In every charge to a jury and in every opinion written they had an opportunity to clarify ambiguous clauses in the Constitution, to dispel popular suspicion and to mold public thought relative to the great experiment with Federalism. Most of these opinions and charges to the juries have never been officially recorded, but a canvass of contemporary newspapers reveals that they were widely reported and generally accorded popular support and enthusiasm.

A survey of some vital statistics might justify the conclusion that of all the early Justices who participated in this significant work, none deserves a serious study more than William Cushing, Washington's second appointee to the high tribunal. Several of those who sat on the Bench with Cushing surpassed him in native ability, it is true, but none gave such long and continuous service as did the Justice from Massachusetts. John Jay, the Chief Justice, retired after five years, as did John Blair, the appointee from Virginia. James Wilson died in 1798, and James Iredell passed away one year later. Thomas Johnson, appointed in 1791, resigned in two years. His successor, William Paterson, served until 1806.

Cushing, on the other hand, was a member of the Nation's highest tribunal from 1789 to 1810, and thus was the only human bridge between the weak judicial institution of the Jay Court and the firm and respected structure of the Marshall era. He alone was on hand in the spring and in the fall, planting principles in little known cases, which by 1810 had matured and fructified in several celebrated cases. A

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promising reward, therefore, would seem to await a study of this Justice of the Supreme Court.

Because of the timeliness of the subject, Cushing and the Treaty-making Power of the Constitution has been selected as the topic for treatment in the following pages.

Pre-Constitution Treaties

During the first decade following the adoption of the Constitution, few questions caused so much anguish for the infant nation as did that which concerned the extent of the treaty-making powers of the central government. Actually, differences on the subject began to emerge almost immediately after 1776, and there is reason to believe that William Cushing as Chief Justice of Massachusetts' highest court found himself in the midst of the controversy early in his long judicial career.¹

In May, 1778, the Continental Congress ratified a treaty with France which had been concluded in the previous February.² In 1782, a case came before the Supreme Judicial Court of Massachusetts which involved the State's taxing power over two citizens of France residing in Boston.³ The defendants pleaded that as subjects of the king of France, they could not "be subjected to any taxes, imposition, or duties, other than those which respect real property, by the orders, laws, or directions of the Supreme power of any of the United States of America."

One author, writing in 1892, asserted that "the treaty, somehow was the consideration which turned the scales of justice, and that the judges had no doubt of their authority to disregard any statute of the State in conflict thereof."⁴ Although this writer admitted that many substantial objections could be made to his conclusions, he nonetheless clung to his surmise that "the court considered the treaty operating *proprio vigore* without the intermediate sanction of any State," and that the judges applied it in the instant case as "a supererogatory

1. William Cushing of Massachusetts was Washington's second appointee to the Supreme Court, where he served as an Associate Justice for twenty-one years, 1789-1810. He was a leading Federalist in his home State and was the vice-president and, for most of the sessions, presiding officer of the Massachusetts Convention which ratified the Constitution in February, 1788. He was Chief Justice of the State's Supreme Judicial Court from 1777 to 1789.

2. Treaty of Alliance with France, Feb. 6, 1778, 8 STAT. 6, T.S. No. 82.

3. *Thompson v. De St. Pry*. This case and a companion case, *Thompson v. De France*, are to be found in the archives of the Clerk's office of the Massachusetts Supreme Judicial Court, Boston. The documents, all handwritten, contain no opinions but only the Court's judgment. See folio 135 for the docket dated 1781-1782, especially No. 102781, at 23. Besides Cushing, Nathaniel Sargeant and David Sewall were judges for the February session.

4. Goodell, *An Early Law Case in Massachusetts*, 7 HARV. L. REV. 415, 421 (1894).

manifestation of good faith . . . towards our Gallic friend and ally.”⁵

On March 1, 1781, the last of the States ratified the Articles of Confederation, which vested in Congress “the sole and exclusive right and power . . . of entering into treaties and alliances,”⁶ and which enjoined the States from laying “imposts and duties, which may interfere with any stipulations in treaties.”⁷ In 1783, the treaty of peace with Great Britain was concluded, Article 4 of which provided that British creditors would meet with no obstacles in the collection of bona fide debts.⁸

It was not clear what effect these provisions were to have upon the operation of certain State laws, and therefore the Massachusetts Legislature instructed Cushing and the other judges of the Commonwealth that they should continue to abide by the Act of the State, which had suspended interest on British debts during the period of the War.⁹ Greatly chagrined by such laws, John Jay, Secretary of Foreign Affairs, prepared a report for the Continental Congress on October 18, 1786,¹⁰ and Cushing’s home State was the first one to receive his words of rebuke.¹¹ It was on March 21, 1787, that the Congress voted unanimously for Jay’s resolutions one of which contained this significant passage:

[T]he several states cannot of right pass any act or acts for interpreting, explaining or construing a national treaty . . . for . . . on being constitutionally made, ratified and published, they become, in virtue of the confederation, part of the law of the land, and are not only independent of the will and power of such legislatures, but also binding and obligatory on them.¹²

Peter Yates, a delegate from New York, objected to wording “which declares the treaty to be a law of the land. . . . The States, or at least his state, did not admit it to be such until clothed with legal sanction.” But he finally yielded, since “the words ‘constitutionally made,’ as applied to the treaty, seemed . . . on consideration to qualify sufficiently the doctrine on which the resolution was founded.”¹³ Accordingly the legislatures of the States were advised to repeal in general terms all

5. *Id.* at 422. Goodell professed himself to be at a loss to see exactly in what respect the law conflicted with the treaty. My own study of the documents in Boston has produced additional difficulties relative to Goodell’s conjectures on the *Thompson* cases.

6. ARTICLES OF CONFEDERATION, art. VI (1781).

7. *Id.* art. VII.

8. Treaty of Peace with Great Britain, Sept. 3, 1783, art. IV, 8 STAT. 80, T.S. No. 104.

9. ACTS AND RESOLVES OF THE COMMONWEALTH OF MASSACHUSETTS, c. 77, at 300 (Mourse 1886).

10. JOURNALS OF THE CONTINENTAL CONGRESS xxxi 781 (Hill ed. 1934).

11. *Id.* at 784-85.

12. *Id.* at xxxii, 124-25.

13. The remarks of Yates may be found in 5 DEBATES ON THE ADOPTION OF THE CONSTITUTION AND DEBATES OF THE CONGRESS OF THE CONFEDERATION 98 (2d ed., Elliot 1861) (hereinafter cited as Elliot, DEBATES).

acts repugnant to national treaties and to leave the particular interpretation and application to the judges of the State courts.¹⁴

Massachusetts responded with surprising dispatch. On April 30, 1787, its Assembly passed a law which read as follows:

Be it enacted . . . that such of the Acts . . . of the Legislature of this Commonwealth, as may be repugnant to the Treaty of Peace, shall be, and hereby are repealed: and further, that the Courts . . . are directed and required, in all Causes and questions . . . arising from, or touching the said Treaty, to decide and adjudge according to the tenor, true intent and meaning of the same . . .¹⁵

There is some evidence that Cushing's court did not wait for this repeal¹⁶ or even for the resolution of Congress, but prior to either acted in disregard of the Massachusetts Act of 1784 in the case of *Brattle v. Hinckley* and the companion case, *Brattle v. Putnam*. The relevant facts are the following: Thomas Brattle of Boston had inherited the estate of William Brattle, who in April of 1776 had joined the British forces.¹⁷ In a suit to collect his debt from citizens of Massachusetts, Thomas received a favorable decision from the court,¹⁸ and although no opinions are extant to indicate the precise line of reasoning of the judges, the brief judgment of the court furnishes material for speculation. It reads thus:

After a full hearing of said parties upon said pleas, the Court are of the opinion that the appellees' plea is insufficient to bar the appellant of the interest during the war. It is therefore considered by the Court that the said Thomas Brattle Administrator . . . recover against the said Rufus Putnam the sum of eighteen pounds, three shillings & three pence . . .¹⁹

It is not improbable that John Brown Cutting of Boston had the *Brattle* case in mind when he wrote to Jefferson in Paris on July 11, 1788. After referring to a recent Virginia case in which the court de-

14. JOURNALS OF THE CONTINENTAL CONGRESS xxxii, 177-84 (Hill ed. 1934).

15. ACTS AND RESOLVES OF THE COMMONWEALTH OF MASSACHUSETTS, c. 86, at 259 (Mourse 1886). Soon afterwards, similar action was taken by all the other States. See CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 39 (1916).

16. Hamilton had argued that even without any act of the State legislatures, the judges were bound to enforce the treaty. WORKS 508 (Lodge ed.)

That the public in Boston was well aware of the asserted conflict is apparent from a long article in the Boston Gazette, July 17, 1786, p. 3, col. 2, which listed the Acts in the various States forbidding the payment of interest to British creditors and stated they were contrary to the Treaty of 1783.

17. For these facts, see Goodell, *supra* note 4, at 416.

18. For the court's judgment, see docket dated June-Nov. 1786, folio 363, 364, in archives of the Massachusetts Supreme Judicial Court Clerk's Office, Boston.

19. *Ibid.* In the *Hinckley* case, judgment was for 91 pounds, 8 shillings and 3 pence.

clared an Act of the Virginia legislature void as being against the State constitution. Cutting wrote as follows:

A similar instance has occurred in Massachusetts, when where the legislature unintentionally trespassed upon a barrier of the Constitution, the judges of the Supreme Court solemnly determined that the particular statute was unconstitutional. In the very next session there was a formal and unanimous repeal of the law, which perhaps was not necessary.²⁰

A. C. Goodell, Jr., who as editor of the *Acts and Resolves of the Province of Massachusetts Bay* was qualified to speak, wrote in 1892 that after an exhaustive research, he had discovered no instance in which the court had struck down a law as contrary to the Massachusetts Constitution, followed by a repeal such as mentioned in Cutting's letter. He concluded, however, that there was a high probability that Cutting was referring to the *Brattle* case of late 1786 and to the legislative act of April 30, 1787, which repealed the anti-interest resolve of 1784. The word "constitution," he maintained with persuasive arguments, was often used to refer to the system of government provided by the Articles of Confederation.²¹

Militating against Goodell's conjecture is the fact that at the very same September term, the court decided the case of a certain Rev. Henry Caner of London, formerly rector of Christ's Chapel in Boston, and ruled as follows:

It is . . . considered by the Court that the said Henry Caner recover against the said Abijah Houghton, Samuel Joslin & Abijah Houghton Junr., the sum of one hundred and forty nine pounds & fifteen shillings lawful money debt (exclusive of interest during the War viz. from the 19th of April 1775 to the 20th of Janry. 1783) . . .²²

Goodall recognized the difficulty in trying to reconcile these two decisions, but he speculated that after deciding the *Caner* case in conformity with the Act of 1784, the Court reconsidered and came to the conclusion that a treaty as interpreted by the National Congress, was the paramount law and more binding on judges than acts of their own legislatures.

Even if the surmise of Goodell be accepted, it would not be a definitive answer to what was Cushing's opinion in 1786 on the controversial subject of national treaties vis-a-vis State laws. The judges listed for the September term of 1786 for the County of Worcester were Nathaniel Sargeant, David Sewall, Increase Sumner, and the

20. 1 BANCROFT, HISTORY OF THE CONSTITUTION 473 (1882).

21. Goodell, *supra* note 4, at 423-34. For another author who thought the conclusion of Goodell highly probable, see Turner, *Four Fugitive Cases from the Realm of American Constitutional Law*, 49 AM. L. REV. 818, 828 (1915).

22. *Caner v. Houghton*, *supra* note 18.

Chief Justice William Cushing.²³ Since the official records show no written opinions, but only a judgment of the Court, it is not possible to state for a certainty whether the *Brattle* decision was unanimous. As will be pointed out below, there is irrefutable evidence that by 1792 Cushing was an ardent promoter of the theory of the supremacy of treaties over state laws. However, the following passage from a charge to the jury delivered at Concord in April, 1783, might cast some doubt on the conjecture that in 1786 he would have acted with such deliberate speed and magnanimous instancy to comply with Congress' request that British creditors be assisted in the collection of their debts. The pertinent passage reads as follows:

It is left in our own breasts and the rest of the good people of these states, i.e. by their representatives, whom they see fit to chuse, to say whether those who have deserted their country in the hour of danger, and have been the great instigating cause of all its trouble and miseries, . . . shall now be restored to all the privileges of good citizens . . . [and] to say whether we shall now tax ourselves to refund the estates of . . . those, who were foremost to plot and conspire our ruin.²⁴

It would seem, then, that no conclusive evidence exists that Cushing, previous to the adoption of the Constitution, was a proponent of strong national powers in the area of treaty-making. There is, however, every reason to believe that arguments for the two sides must have come into his purview and that therefore he was prepared for the gathering storm which would soon break in all its fury upon the infant nation.

The Constitution and the Ratifying Conventions

The Constitution drafted at Philadelphia in 1787 contained three principle references to treaties. Article II, section 2 provided that, "He [The President] shall have power by and with the consent of the Senate to make treaties, provided two-thirds of the Senators present concur. . . ." Article III, section 2 states that, "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. . . ." Article VI, section 2 reads thus:

This Constitution, and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the Contrary notwithstanding.

23. *Ibid.*

24. Hand-written MSS. in Cushing Papers, Massachusetts Historical Society, Boston.

These provisions apparently produced no deep cleavages amongst the Founding Fathers at Philadelphia. Few if any denied that treaties were to be the law of the land, although several leading delegates argued that both Houses ought to participate in treaty-making,²⁵ or that a concurrence of two-thirds of all the Senators should be required for ratification.²⁶

When the conventions in the several States met to ratify or reject the drafted Constitution, the treaty clauses were subjected to a most agonizing reappraisal and the discussions which ensued demonstrate that the delegates fully understood the vast reservoir of national power which might be tapped by means of the relevant provisions. Prominent amongst those who opposed any diminution of this potential were Iredell, Ellsworth, Wilson²⁷—all of whom would soon be colleagues of William Cushing on the Supreme Court.

The opposition polarized around two main points. First, although treaties were to be laws of the nation, only one branch of the legislature was to have a hand in making them, and furthermore, only two-thirds of those present—theoretically, as few as ten Senators. Second, the rights of the people guaranteed by their State Constitutions as well as by the national Constitution were imperiled by the supremacy clause of Article VI. These objections were given animated expression by delegates to the Pennsylvania, New York, South Carolina, North Carolina, Maryland, and Virginia Conventions.

The greater part of the discussion in the South Carolina Convention centered around these objections and, in the vehement debates which they provoked, tempers flared and feelings were bruised. Rawlins Lowndes, the most implacable critic, opened his attack with a rhetorical exaggeration: "Now, in the history of the known world, was there an instance of rulers of a republic being allowed to go so far? Even the most arbitrary kings possessed nothing like it."²⁸ Charles Cotesworth Pinckney chided the speaker for his emotional outburst, reminding him that "if . . . [an] individual state possessed a right to disregard a treaty made by Congress, no nation would have entered into a treaty with us."²⁹ This argument was reenforced by David Ramsay, who asked Lowndes if he "meant us ever to have any treaties at all. If not superior to local laws, who will trust them?"³⁰ Unmoved, Lowndes

25. PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION 457-60 (1941).

26. *Id.* at 462-65.

27. 4 *Elliot, DEBATES* 125 (Iredell); 2 *id.* 189 (Ellsworth); 2 *id.* 505-07 (Wilson). Paterson and Jay, who subsequently became colleagues of Cushing on the Court, had already shown themselves to be of like mind with Wilson and Ellsworth. 5 *id.* 192 (Resolution 6 of Paterson's plan for a revision of the Articles of Confederation). See also text and note 10 *supra*, for Jay's Report on the Treaty of 1783.

28. 4 *Elliot, DEBATES* 265-66.

29. *Ibid.*

30. 4 *id.* at 270.

retorted that his "antagonists . . . were capable of giving ingenious explanations," whereas all he meant was that "no treaty concluded contrary to the express laws of the land could be valid." Then recalling that some had remarked that "this new government was to be considered an experiment," he acidly commented: "An experiment! What, risk the loss of political existence on experiment! No, sir."³¹

In the first North Carolina Convention, Mr. Porter counselled care in adopting a proposal "which might sacrifice the most valuable interests of the community," and "give a power to the general government to drag inhabitants to any part of the world as long as they pleased." He concluded that, "as treaties were the supreme law of the land, the House of Representatives ought to have a vote in making them . . ."³² Mr. J. M'Dowall observed that ten Senators—two-thirds of a quorum—could make treaties, which "may involve us in any difficulties, and dispose us in any manner, they please."³³ Mr. Spencer commented that treaties "ought at least to have the sanction of the whole Senate."³⁴ Even the masterful Iredell could not assuage the critics, and the Convention proposed an amendment to the Constitution that treaties be ratified only with "the concurrence of three-fourths of the whole number of the members of both houses respectively."³⁵

Wilson was a tower of strength in the Pennsylvania Convention and defended with his celebrated brilliance the treaty-making provisions of the Constitution.³⁶ Nonetheless, in September 1788, a special conference met and proposed several amendments, one of which read that, no treaty should be "deemed or construed to alter or affect any law of the United States, or of any particular State, until . . . assented to by the House of Representatives in Congress."³⁷

Maryland proposed but rejected an amendment stating that treaties would not "be effectual to repeal or abrogate the constitutions or bills of rights of the States, or any part of them."³⁸

In the Virginia Convention, Patrick Henry employed all his imaginative eloquence to depict the fearsome dangers that lurked in the treaty-making clauses.

The power of making treaties, by this Constitution, ill-guarded as it is, extended farther than it did in any other country in the world. Treaties were to have more force here than in any part of Christendom.³⁹

....

31. 4 *id.* at 271.
32. 4 *id.* at 118-19.
33. 4 *id.* at 119.
34. 4 *id.* at 131.
35. 4 *id.* at 245.
36. 2 *id.* at 505-07.
37. 2 *id.* at 546.
38. 2 *id.* at 553.
39. 3 *id.* at 500.

Suppose you be arraigned as offenders and violators of a treaty made by this government. Will you have that fair trial which offenders are entitled to in your own government?⁴⁰

....

You prostrate your rights to the President and Senate. The power is therefore dangerous and destructive.⁴¹

Other similar critics were set aflame by such eloquence and gave warm expression to their own apprehensions.⁴² George Nichols attempted to minimize the dangers envisioned:

The provision of the 6th article is, that this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all the treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. They can by this make no treaty which shall be repugnant to the spirit of the Constitution, or inconsistent with the delegated power. . . . It [the treaty power] is sufficiently secured, because it only declares that, in pursuance of the powers given, they shall be the supreme law of the land. . . .⁴³

Governor Randolph offered his opponents the consoling observation that "neither the life nor property of any citizen, nor the particular right of any state, can be effected by a treaty" because "the Constitution marks out the powers to be exercised by particular departments," and therefore "no innovation can take place."⁴⁴ Madison also tried to dissipate suspicion by asserting that the President and the Senate could not "alienate any great, essential right" since "the exercise of the power must be consistent with the object of the delegation."⁴⁵ But the cool logic of Madison could not extinguish the fires ignited by Henry's pyrotechnics, and the Convention was forced to adopt an amendment that commercial treaties should be ratified by two-thirds of the whole Senate, and treaties touching territorial and navigation rights by three-fourths of both Houses.⁴⁶

No evidence is presented that the treaty-making clauses touched off such explosive debates in the New York Convention. However, John Lansing, a leading and highly articulate delegate, revealed his own disquietude—and probably that of others—when he proposed an amendment "that no treaty ought to operate so as to alter the constitution of any state; nor ought any commercial treaty to operate so as to abrogate any law of the United States."⁴⁷

40. 3 *id.* at 503.

41. 3 *id.* at 504.

42. 3 *id.* at 499, 516, 610.

43. 3 *id.* at 507.

44. 3 *id.* at 504.

45. 3 *id.* at 514.

46. Amendment 7, 3 *id.* at 660.

47. 2 *id.* at 409. It is not clear what action was taken on the proposal.

When one turns to the Massachusetts Convention, he notices with some surprise that apparently little if any attention was given to the treaty-making clauses. Cushing, the vice-president and presiding officer for most of the sessions, prepared a long address for delivery on one of the final days in order to answer the many objections pressed by the delegates, but his speech makes no mention of those provisions which produced such polemics in other States.⁴⁸ However, one of his longest and most eloquent passages did refer to the necessity of investing the central government with strong powers for national purposes in order to relieve unemployment amongst the mechanics and the merchants in Boston and to allow Americans to compete with foreign nations on equal grounds. Undoubtedly he had in mind tariff laws and commercial treaties. Moreover, on January 31, 1788, Sam Adams, the leader of the powerful faction which for a long time held out against ratification, finally swung his support to the Constitution, and one of his stated reasons was the need of a strong central government to make treaties.⁴⁹ This section of his address is similar to the speech Cushing intended to deliver about the same day.

Therefore, it seems certain that the momentous question must have come to the attention of Cushing during the period of ratification and prepared him for the impending controversy of the next seven years.

Cushing and the Circuit Courts

It is extremely interesting, in view of the above-discussed controversy, that the first time federal judges declared any State law unconstitutional should have involved the treaty powers of the new government. On April 28, 1791, Cushing and Jay, while in the Eastern Circuit, ruled that "the state law enabling the State Courts to deduct interest" from British debts for the period of the war "was an infringement of the treaty of peace."⁵⁰ A Hartford newspaper reports the same case in the form of a "death" notice for the relevant State law:

Died last Thursday, much lamented by those who wish to defraud their creditors, an act or law of Connecticut, entitled "An act relating to persons who have been and remained within the enemies power, or lines, during the late war". The statute had received its death wound by the adoption of the new Constitution, and hath languished in extreme anguish ever since. On Thursday, the 28th, the two-sword of justice gave its last fatal stroke and it expired without a groan.⁵¹

48. This hand-written manuscript is among the documents in the Cushing Papers in the Massachusetts Historical Society, Boston. Since none of the historians mention this speech, it seems rather certain that Cushing did not deliver it at the Convention.

49. 2 Elliot, DEBATES 124.

50. Massachusetts Spy, May 12, 1791. Note that by the Act of September 24, 1789, 1 STAT. 74, three circuits were established and two Justices assigned to each. The Supreme Court as a whole transacted little business of consequence during the first three or four years of its existence.

51. Connecticut Courant, May 12, 1791, p. 3.

Since this was the first time that the new federal Courts ever used its power to nullify a law of a State, it is unfortunate that no written opinion of either Cushing or Jay has been preserved, and that newspaper accounts must be relied on to gather the meagre facts. Sufficient information, however, is supplied to indicate that this case was probably identical with the *Brattle* case, discussed above, and therefore weight is added to the conjecture that as early as 1786 Cushing may have ruled that a Massachusetts law was against the British Treaty.

In 1793, Cushing was involved in another case of even greater magnitude. At that time, the United States Government was making supreme efforts to maintain its neutrality between England and France, only to be continuously harassed by the boldness of the French Minister Genet and by certain adventurous American citizens, who relying on the strong pro-French sentiment existing in many of the States, were fitting out privateers in this country and bringing back captured vessels into our ports.⁵² No Federal criminal statutes existed under which American citizens could be punished for such actions, although our treaty with England demanded that nothing be done by our subjects to breach the peace. Moreover, on April 22, 1793, Washington had issued his famous Proclamation of Neutrality.⁵³ Since anti-federalist State judges and State officials sympathized with the French cause, the violation of our ports and territorial waters could not be stopped unless the Federal Courts would presume to apply the Proclamation as a legislative act or invoke the Treaty of 1783.

In November of 1793, Cushing, on circuit duty in Georgia, opened the court in Atlanta by delivering "a judicious and animating charge" to the grand jury, dwelling "much on the principles of our Constitution and the excellence of the laws founded on the Constitution."⁵⁴ The attorney general of the United States then preferred a bill of indictment against Joseph Rivers, Richard Seymour, Jesse Hunt, and Benjamin Hunt, for fitting out a privateer in the port of Savannah, under a French Commission, "contrary to the existing treaties between the United States and foreign powers, and also to the President's Proclamation." The opinions given by Cushing and District Judge Pendleton were substantially the same. The Constitution, they insisted, declares that treaties existing at the time of its adoption as well as those yet to be adopted were the Supreme law of the land, and judges were bound by them, notwithstanding State laws or State Constitution.⁵⁵

52. I WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 105-14 (1937).

53. The press was stirred by the prospect of having the proclamation applied as a legislative act. I Warren, *op. cit. supra* at 113.

54. *American Mercury* (New York), Dec. 12, 1793, p. 3. The case has not been officially reported so that newspaper accounts must be relied upon for the facts.

55. *Id.*, Dec. 13, 1793, p. 2.

In the present case, it was declared, the jury, being judges both of law and of fact, were bound in the same way.

The two judges then pointed to the 7th Article of the Treaty with Great Britain which declared that there should be perpetual peace and amity between the respective governments and the citizens and subjects of each. This provision was a rule of law,—“by way of pre-eminence, a supreme law,”—and it clearly demanded peaceful conduct on the part of the citizens of the respective nations towards each other.

In defense it had been pleaded that the 22nd Article of the French Treaty had authorized the fitting out of privateers: but Cushing and Pendleton rebutted this, first, by declaring that such extensive power could be claimed only by implication, and secondly, that it certainly could not be claimed for any but French citizens at the very most. As for the status of the defendants, the judges admitted that the citizenship of two might be open to question, but there was no doubt that the other two were residents and citizens of Georgia. Nor would the mere entrance of the service of a belligerent be sufficient to cancel their allegiance to the United States and put them beyond the jurisdiction of the courts of this country.

It seemed perfectly clear to the two judges that the men were guilty of a criminal act. The jury retired late at night to deliberate, but did not require much time to come to a decision. At ten o'clock the twelve men filed back into court, and the foreman read the verdict: Not guilty. Such a decision was a blow to the national-minded Cushing and indicates how jealously Georgia guarded her sovereignty against any possible infringement from the recently established general government.⁵⁶

The Full Court Speaks

In February 1794, in the case of *Georgia v. Brailsford*,⁵⁷ the full Supreme Court finally concluded a long drawn out case that involved the question of the validity of a State law in conflict with a national treaty. Early in 1792, Iredell had judged in the circuit court that the British Treaty had repealed the Georgia State law sequestering British debts.⁵⁸ He therefore ruled that Brailsford, a British creditor, could recover debts from Spalding, his Georgia debtor. Accordingly, the marshal of the circuit court had collected part of the debt from Spald-

56. Georgia had been so aroused by the Court's ruling in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (permitting a citizen of another state to sue Georgia), that her House of Representatives passed a bill five days after the *Rivers* decision which declared that any federal marshal attempting to execute the process should be hanged without benefit of clergy. 1 WARREN, *op. cit. supra* note 52, at 101-02.

57. 3 U.S. (3 Dall.) 1 (1794).

58. See *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402, 405-06 (1792), for reference to the circuit court decision. See also *Gazette of the United States*, May 16, 1792.

ing, but at this juncture Georgia filed a bill in equity against the latter, praying that an injunction issue from the Supreme Court staying this money in the hands of the marshal.

The case came before the Supreme Court initially in 1792, and it is interesting that in the very first case in which opinions of the Justices were reported, Cushing filed a relatively long dissent.⁵⁹ Three of the majority opinions reveal curious mixtures of doubts, misgivings, and confusion. Iredell, who had already ruled so emphatically against Georgia in his circuit opinion, now voted for issuing the injunction in order that "justice will be done to Georgia."⁶⁰ Wilson made an honest confession that he had "not been able to form an opinion which is perfectly satisfactory to my own mind."⁶¹ Jay admitted that his "first ideas were unfavorable to the motion," but that the presentation of many facts had operated "to produce a change of opinion."⁶² Only Blair was at peace with himself in supporting the decision.⁶³ Johnson dissented merely because he believed the facts alleged in the bill did not state sufficient grounds for asking for an injunction.⁶⁴

Cushing dissented in an opinion which gives fresh evidence of the strictly judicial mind, but which also demonstrates how his rigid legalism forced him to depart from a realistic view of the concrete problems involved. One can see also a certain disconcert for state rights and an over-tenderness for the creditor class of society. Cushing stated that he opposed granting the injunction because one of the provisions of the Judiciary Act of 1789 expressly forbade the Court to exercise its equitable jurisdiction where a "plain, adequate, and complete remedy may be had at law."⁶⁵ But his suggested remedies would seem to be extremely illusory if Georgia were not here and now granted an injunction against execution of the order of the lower court until the Supreme Court had time to decide upon the merits of the case. Georgia, he maintained, would have its claim presented when Spalding had sued out a writ of error and then the Supreme Court would review the circuit court's decision and "decide it as a question of law." But, as the bill of equity charged, there were good grounds for suspecting that there had been "a confederacy between the parties"

59. *Id.* at 407.

60. *Id.* at 406.

61. *Id.* at 407.

62. *Id.* at 408. These three opinions evoked a biting letter from Edmund Randolph, who argued the case for Georgia. Thus he wrote to Madison: "[Jay] aimed at the cultivation of Southern popularity; . . . the Professor [Wilson] knows not an iota of equity; . . . the North Carolinian [Iredell] repented of the first ebullitions of a warm temper; . . . it will take a score of years to settle, with such a mixture of Judges, a regular course of chancery." Letter quoted in 1 WARREN, *op. cit. supra* note 52, at 104.

63. 2 U.S. (2 Dall.) at 406.

64. *Id.* at 406.

65. *Id.* at 407.

and that Spalding now was perfectly willing to terminate all litigation by paying Brailsford rather than Georgia. Certainly he had nothing to gain by asking the Court to review the decision, for win or lose, he was still bound to pay one of the parties the whole debt. Consequently, it was scarcely realistic to say that Georgia had a "plain, adequate, and complete remedy" if that depended on Spalding's willingness to bring a writ of error.

The second remedy suggested by Cushing was for Georgia to sue Brailsford after he had recovered his debt. But there was reason to suspect that Brailsford, a British subject, might very likely collect his money and return to England, thus putting him beyond the reach of the law.

This appears to be the serious weakness in the rigid legalism of Cushing's opinion. On the other hand, he seems to have been technically correct, a fact that caused the other justices so much misgivings and tergiversation. As a matter of fact, when the case came up again in February 1793, Jay and Wilson had been converted by Cushing, and decided that they could not render judgment while sitting as a court of equity but that Georgia would have to institute her action at common law.⁶⁶ However, the injunction was not dissolved, so that the State was given one more year to bring its action in the proper form. This she did in February, 1794, and the Justices then decided unanimously against Georgia.⁶⁷

On the face of it, it may not appear that in this case of *Georgia v. Brailsford* in 1794 the State law was invalidated as being in conflict with a provision of a treaty, for the Court interpreted the word "sequestration" in the Georgia statute to mean not confiscation but merely the arrest of payment until the restoration of peace. This, said the unanimous opinion, Georgia had every right to do and this was all her legislature had intended to do. However, such was evidently not the interpretation being given to the statute in 1794 by Georgia's governor and her attorney general, who argued the case.⁶⁸ Thus, although by this expedient the Justices may have avoided precipitating a constitutional crisis in the trying year of 1794, they could not conceal their intolerance for State laws conflicting with national treaties.

Early in 1794, Cushing had been drafted by the Federalists in Massachusetts to run for the governorship against Sam Adams and the campaign was in full swing at the very time that the Court handed down its ruling in the *Brailsford* decision. Although the antifederalist press pilloried Cushing as "an officer in a foreign country . . . who

66. *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 415, at 419 (1793).

67. *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794).

68. See also 1 BUTLER, *THE TREATY-MAKING POWER OF THE UNITED STATES* 11, n.1 (1902).

has forsaken Massachusetts and plead in the Federal Court against her independence," an importation "from another government" and "the leader of a party, who have pledged themselves to overflow the Sovereignty of the State Government,"⁶⁹ no mention was made of the *Brailsford* or *Rivers* cases or the 1791 Connecticut case, all of which involved the treaty-making power. It is probable that Cushing's critics were wholly consumed with anger over the *Chisholm* decision of 1793,⁷⁰ which impinged more immediately upon their interest, and that they failed to appraise the implications of the far more reaching principles being laid down by Cushing and his colleagues in the treaty cases.

A clear-cut answer to the provoking question could not be eternally forestalled, and in early 1796 the Court was called upon for an unequivocal ruling. The demand came in the case of *Ware v. Hylton*⁷¹ where the issue was the validity of Virginia's law of 1777, which confiscated debts due to British creditors. No matter what the decision might be, for several reasons the traumatic consequences were bound to produce deep anguish throughout the entire nation. The pain most immediately apprehended was by those who, having already paid their debts into the State treasury in compliance with Virginia's law, now feared a judgment ordering them to satisfy their British creditors. Others, strongly pro-French in their sympathies, were emotionally disturbed by the prospect of a decision which might give any aid and comfort to the English. Finally, the case opened up once again all the wounds suffered in the old constitutional battle over the treaty powers and the powers reserved to the States.

In May 1793, the redoubtable Patrick Henry had pleaded successfully in the circuit court for the debtors, convincing Iredell of the validity of Virginia's law. Three years later when the case came before the Supreme Court, in February 1796, it is surprising to behold John Marshall—soon to be the celebrated spokesman for national supremacy—arguing against "those who would impair the sovereignty of Virginia."⁷² But Iredell alone accepted the position that the Act of 1777 could not be invalidated by a subsequent treaty.⁷³

Cushing's opinion contains the following unambiguous language:

A state may make what rules it pleases; and those rules must necessarily have place within itself.

But here is a treaty, the supreme law, which overrules all State laws upon the subject, to all intents and purposes; and that makes the difference. . . .

69. Boston Gazette, April 7, 1794; Independent Chronicle, March 6, 1794. In the election of April 8, Cushing was decisively beaten.

70. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

71. 3 U.S. (3 Dall.) 199 (1796). See also 1 WARREN, *op. cit. supra* note 52, at 144-45.

72. 3 U.S. (3 Dall.) at 210-15. For Iredell's opinion, see *id.* at 256.

73. See *id.* at 220, 245, 281, for the opinions of Chase, Paterson, and Wilson.

To effect the object intended, there is no want of proper and strong language [in the treaty]; there is no want of power, the treaty being sanctioned as the supreme law, by the constitution of the United States, which nobody pretends to deny to be paramount and controlling to all state laws, and even state constitutions, wheresoever they interfere or disagree.

the treaty, then, as to the point in question, is of equal force with the constitution itself; and certainly, with any law whatsoever. . . .

I am, therefore, of the opinion, that the judgment of the Circuit Court ought to be reversed.⁷⁴

Cushing's opinion would seem to place an unreasonable burden upon those debtors who believed that they had satisfied their obligations by payment to the treasury of the State. However, it is well to point out that Cushing prefaced his ruling with the observations that Virginia was bound in "justice and honor" to indemnify citizens who had complied with the law of 1777.⁷⁵

The prestige of Cushing with the Federalist Administration was at its very highest when he penned his opinion in the *Ware* case. In January, 1796, ten days prior to the decision, President Washington had nominated Cushing to the Chief Justiceship to replace Jay, who had retired on June 29, 1795, and the Senate promptly confirmed him.⁷⁶ Although he felt constrained to decline the honor—the only instance of its kind in the history of the Court—the action of the President and the Senate afford conclusive evidence that the Federalists were completely satisfied with his "orthodoxy"—especially on the controversial subject of the treaty-making powers of the central government. This conclusion is underscored by recalling that one month previously, John Rutledge had been rejected by the Senate for the Chief Justiceship because of his unrestrained public attacks on Jay's treaty of 1794.⁷⁷

The decision in the case of *Ware v. Hylton* may surely be looked upon as a vindication of the views Cushing had been expressing for five years from Connecticut to Georgia. Controversy over the perplexing treaty-making powers of the national government did not, of course, automatically cease. As a matter of fact, on the very day that the Justices handed down their opinions, the House of Representatives was in the throes of bitter debate over Jay's treaty—the first

74. *Id.* at 282-84.

75. *Id.* at 283.

76. 1 WARREN, *op. cit. supra* note 52, at 124, 139 n.1.

77. 1 WARREN, *op. cit. supra* note 52, at 137-38. Cushing revealed his bitterness towards critics of the treaty in a letter of June 18, 1795, written to Jay upon the latter's arrival from England. "What the treaty is has not come to us with authenticity; but whatever it be, in its beginning, middle or end, you must expect to be mauled by the sons of bluntness—one of the kinds of reward which good men have for their patriotism. Peace and American interests are not the objects with some." Letter quoted in 1 WARREN, *op. cit. supra* note 52, at 124.

ever concluded under the new government—and the whole constitutional basis for such agreements was once more being subjected to an exhaustive review.⁷⁸ Although in the end, the Administration was triumphant, there is no denying the force of the opposing arguments nor the stature of the men who moved them.⁷⁹

The fundamental principles of the *Ware* opinions have been adhered to by the Judiciary ever since.⁸⁰ It may thus be considered a leading case and a climactic event for William Cushing and the Washington Court.

78. The debates began March 2, and were not concluded until April 30. See *ANNALS OF CONG.*, 4th Cong., 1st Sess., 426, 430, 437, 444, 524, 763, 772, 940, 946, 969, 979, 1114, 1280, 1295 (1796).

79. In the debates above Madison veered far away from his earlier views on the treaty powers.

The all-absorbing subject was discussed not only by the high and the mighty. In Cushing's home state, an unlearned farmer penned a penetrating essay on government, which contained the following perceptive passages on the treaty-making clauses of the Constitution:

"The treaty-making power which has caused so much rout was as well guarded as any part of it [the Constitution], but as it has bin exercised, destroys the hole foundation & end the peopel had in makeing of it. . . .

"The letter of the Constitution as it respects the treaty stands thus. In part 1 Sect 1 it saith—All legeslative powers herein granted shall be vested in a Congress of the United States . . . & it declares that all powers & soverantyes not expressly given to Congress, is reserved to the State Governments, & all the express powers . . . are enumerated in part 1 Sect 8th without the least exception for any legeslative athority aniwheir else . . .

"Much has bin said about tretys being the Supreem Law of the Land, which if admitted would finely inlarge the power of the Juditial & innabel them by constructions to destroy all our laws. But I cant se a word of it in the Constitution. In part 6th their is a clause that plainly declares that the Federal Constitution, the federal laws, & all treetys shall be supreme to the state laws & constitutions but nothing deterning which of the three is supreem, excepting that it appears reasonable to take them as they stand, viz:—It the Constitution. 2dly, the Laws. 3dly, tretys.

"By such an explanation the Judge is bound by his oath not to give judgment against either of them in favour of a treaty. I would not be understoot that I think tretys are less binding than laws when they are constitutionally made, for it is the duty of the federal Legeslature to see that the Constitution, tretyes and laws do not clash with each other, & as their objects of legeslation are few they are to blame if their is any clash.

". . . The plain truth is that the British treaty was unconstitutionaly & treasonably made & those that made it aught to have bin impeached & brought to tryal immediately. . . ." See *MANNING, THE KEY OF LIBERTY* 40-42 (1922). The Manning tract on government was never published until 1922 when Samuel E. Morison edited the original manuscript with notes and a foreword.

80. *Missouri v. Holland*, 252 U.S. 416 (1920); *Hauenstein v. Lynham*, 100 U.S. 483 (1879); *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817); *Fairfax v. Hunter*, 11 U.S. (7 Cranch) 602 (1813).

