The Appointment of Chief Justice Marshall

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At the port of Le Havre in October 1800, wearied after the labors of negotiating the Convention with France,¹ and stricken with that "excruciating malady," the gravel, Oliver Ellsworth abruptly altered his plans for the future. He was too feeble, in the opinion of his physician, to attempt the long voyage home over stormy autumn seas. Consequently, Ellsworth sent by his returning son his resignation as chief justice of the Supreme Court to President John Adams and left France for England hoping to improve his health at the mineral waters of Bath.² Sympathetic though his personal feelings toward the ailing Ellsworth may have been, the President might well have regarded a resignation from the highest judicial office at this particular time a regrettably inopportune occurrence.

By mid-December, 1800, when the resignation was received, it was apparent that the Federalist President was not to have a second term and that the Federalists were reduced to the minority party in the Congress which would convene the following year.³ A peaceable, but nonetheless

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¹ The Convention had been signed at Paris on Sept. 30, 1800.
² Oct. 16, 1800, Letters Received and Other Loose Papers, Adams Papers, Massachusetts Historical Society, Boston; hereafter cited as Letters Received, Adams Papers (available on microfilm). Permission to quote from this and all subsequent references to the Adams Papers has been granted by the Adams Manuscript Trust at the Massachusetts Historical Society. The author wishes to express her gratitude to Mr. Lyman Butterfield, the editor of the Adams Papers, for his generous assistance while this study was in preparation. See also, the Memoir of Ellsworth by his son-in-law Joseph Wood, Bancroft Transcripts, New York Public Library, N. Y. C. This memoir was drawn from the journal of Oliver Ellsworth, Jr., who served as private secretary to his father during the period Ellsworth was in France.

³ Ellsworth's letter of resignation to Adams is endorsed at the head of the text by John Adams, "Red. Dec. 15, 1800"; Letters Received, Adams Papers. The defeat of Adams and the tie between Burr and Jefferson for the presidency was known by Dec. 12, 1800; Thomas Jefferson to Henry Knox, Mar. 27, 1801, The Writings of
feared, "revolution" had removed the Federalists from power in two of the three branches of government. Meanwhile, the proposed judiciary bill for strengthening the power of that branch immune from the popular will, the federal court system, was still before Congress. Convinced that now only in "a solid judiciary" was security to be found against "visionary schemes or fluctuating theories," Adams lost no time in attempting to fill the vacancy in the high court with a trusted and therefore suitable Federalist. The President at once nominated John Jay, then completing his term as governor of New York, to the very office Jay had resigned in 1795.

This decision was apparently reached by Adams without consultation with either his cabinet or party leaders in Congress. Indeed, he did not even learn Jay's sentiments before sending the nomination to the Senate. It is not difficult to understand why Adams exercised his power of appointment without seeking advice or suggestions from others. By the end of 1800 the tensions within Federalist ranks had developed into an open and public split, leaving the President alienated politically from many in his party and personally suspicious and hostile toward many others whom he now considered enemies. Neither is it difficult to understand why Adams, faced with the necessity of making a speedy decision to fill the chief justiceship, should have selected John Jay as his first choice. Jay, who had served as chief justice from 1789 to 1795, was qualified by experience. Since he was planning to retire as governor of New York in


5 Ibid. "... nobody but Mr. A would have made the nomination without consulting Mr. Jay," commented Timothy Pickering testily; Pickering to Rufus King, Jan. 5, 1801, The Life and Correspondence of Rufus King . . . , ed. Charles R. King, III (New York, 1896), 367.

1801,\(^7\) he was also qualified by availability for an office providing tenure for life. Probably of equal importance in the mind of the President was the fact that Jay had not aligned himself with the Hamiltonian faction of the party, and, hence, Adams felt no sense of having been "betrayed" by him. In fact, the attacks of Hamilton upon Jay may well have served to bind more tightly Adams's affections for his old friend.\(^8\) Judicially, politically, and personally, the reappointment of Jay was a move which seemed pleasing to Adams, and he strongly urged Jay to accept the opportunity to return to the Court: "Nothing will cheer the hopes of the best men so much as your acceptance of this appointment," Adams wrote. He added that "it appeared to me that Providence had thrown in my way an opportunity, not only of marking to the public where, in my opinion, the greatest mass of worth remained collected in one individual, but of furnishing my country with the best security its inhabitants afforded against the increasing dissolution of morals."\(^9\)

Some surprise was indicated at the appointment. Oliver Wolcott, commenting that it was unlikely Jay would accept, wrote that "The nomination is here considered as having been made in one of those 'sportive' humors for which our Chief is distinguished."\(^10\) Timothy Pickering felt sure that Jay would refuse the nomination and that Judge William Paterson of the Supreme Court would then be appointed.\(^11\) Thomas Boylston Adams, unaware that his father had acted to fill the vacancy created by Ellsworth's resignation, wrote his mother that he presumed Paterson would be promoted to the chief justiceship.\(^12\) Jefferson damned the nomination with faint praise. "We were afraid of something worse," he wrote to Madison.\(^13\) The outspoken *Aurora* sneered: "John Jay, after having through decay of age, become incompetent to discharge the duties of

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\(^8\) Adams wrote Jay that among the few truths in Alexander Hamilton's pamphlet of 1800 were the remarks regarding the merits of Jay in the negotiations for peace, which Adams said he would "ever acknowledge with pleasure." Adams to Jay, Nov. 24, 1800, Adams, *Works of Adams*, IX, 90-91.


\(^11\) Pickering to King, Jan. 5, 1801, King, *Life and Correspondence*, III, 367.

\(^12\) To Abigail Adams, Dec. 20, 1800, Letters Received, Adams Papers.

Governor, has been appointed to the *sinecure* of *Chief Justice* of the United States."\(^1^4\)

Although the nomination of Jay was approved by the Senate without delay, considerable doubt existed in the inner circles of the Adams administration that Jay would choose to forego his plans for retirement in favor of returning to the Court. On the day the nomination was presented to the Senate, Secretary of State John Marshall wrote that Jay would probably decline the office.\(^1^5\) Only four days after writing Jay of his nomination, the President himself indicated to his son, Thomas, the possibility of a refusal.\(^1^6\) In a Christmas Day letter to Thomas, Abigail Adams also expressed in confidence the fear that Jay would refuse the appointment.\(^1^7\) Should the awaited reply from Jay bring a refusal early in the new year, Adams would again be faced with the problem of selecting a suitable Federalist for the position, a decision made more pressing and more complicated as each remaining week of his presidency slipped away.

Since the President had failed to insure acceptance before making the nomination, time would have been lost, when there was no time to lose, if Jay decided to decline the post. During the interval in which President Adams awaited a reply from Jay\(^1^8\) it is clear that consideration was given to the problems which would arise in such an eventuality. Either from cautious foresight or, despite his hopes, from a conviction that Jay would refuse his commission, Adams without waiting for the reply from Albany to reach Washington began to work out a possible alternative to be followed if it became necessary.

\(^1^4\) *Aurora* (Philadelphia, Pa.), Jan. 8, 1801. The *Aurora* also circulated the Republican charge that Jay had been recommended in connection with a Federalist plan to prevent the election and place the Chief Justice in the presidency instead. Later, James Callender, writing in the *Examiner* (Richmond, Va.), Feb. 6, 1801, was to assert that Adams had nominated Jay with "the previous certainty" that Jay would refuse, thus facilitating the introduction of John Marshall to the office.

\(^1^5\) To Charles Cotesworth Pinckney, Dec. 18, 1800, Pinckney Family Papers, Box 1, Library of Congress, Washington, D. C.

\(^1^6\) Dec. 23, 1800, Letters Received, Adams Papers.

\(^1^7\) Dec. 25, 1800, *ibid*.

With the chief justiceship vacant, the Supreme Court at this time consisted of, in order of seniority, William Cushing of Massachusetts, William Paterson of New Jersey, Samuel Chase of Maryland, Bushrod Washington of Virginia, and Alfred Moore of North Carolina. Two obvious courses lay open to the President: he could fill the vacancy by a promotion from among the associate justices or from outside the ranks of the Court. It may possibly be that Adams felt that through the selection of Jay, who had the prestige of having been Washington’s own choice as the first chief justice, he had avoided any party antagonism over the appointment. In addition, he had avoided wounding the sensibilities of any of the associate justices who might have looked less favorably upon the elevation of some other outsider to the highest rank.\(^\text{19}\) In the event that Jay did not choose to return to the judiciary, the same choices for action would await the presidential decision, but as easy a solution was by no means evident. It seems quite clear that Adams fully intended at this time to select one of the associate justices to be chief justice should Jay refuse the nomination. As early as December 23, in fact, he was actively attempting to fill the subsequent vacancy in the Court which such a move would create.

While the outcome of the election had hung in the balance, officeholders under Federalist appointments had considered their future; some concluded that under a change of administration, they would not wish to continue service even if the Republicans permitted them to retain their offices. Among these was Jared Ingersoll, the noted leader of the Philadelphia bar and the United States district attorney for Pennsylvania.\(^\text{20}\) Ingersoll had earlier requested Thomas Adams, then a young lawyer in Philadelphia, to tell the President of his intention to resign as district attorney as soon as it was clear that the Federalists would lose the election.\(^\text{21}\) This news had brought an immediate response from the President that his son request Ingersoll not to resign at least until March 3, 1801. He added a hint that he might have a message to send to Ingersoll before that

\(^{19}\) I am not convinced that the question of prestige of being chief justice weighed this heavily with the judges. I have taken the possibility into account because John Adams was subsequently to use it as a reason for action.

\(^{20}\) The district attorneys held their appointments at the pleasure of the president. As Federal district attorney, Ingersoll had been responsible for initiating proceedings against William Duane, editor of the Aurora, in Oct. 1800, under the Sedition Act. See James M. Smith, Freedom's Fetters (Ithaca, 1956), pp. 301-302.

\(^{21}\) Thomas Adams to John Adams, Dec. 14, 1800, Letters Received, Adams Papers.
time.\textsuperscript{22} Apparently, even before nominating Jay, Adams had considered that Ingersoll might be persuaded to take a seat on the Court should a vacancy occur.\textsuperscript{23} On December 23 the President, then awaiting word from Jay, wrote again to his son. "I have appointed Mr. Jay chief Justice. He may refuse, if he should I shall follow the line of judges most probably & then there will be a vacancy I wish to know if Mr. Ingersoll would accept an appointment as one of the assistant Judges of the superior court. . . . I hope Mr. Ingersoll will not resign till the 3rd March at any rate unless he should do it a little sooner in order to fill the place with a thoroughly good man."\textsuperscript{24} Replying to his father that he had "ventured in confidence" to show the letter to Ingersoll, young Adams reported that the Philadelphia lawyer requested more time to consider the subject, adding his own opinion that Ingersoll would not refuse to be considered. "Should this gentleman . . . consent to accept the contingent proposal, which has been made to him, \textit{at this time}, I shall view it as no common sacrifice of private feeling, domestic & retired habits and pecuniary benefit, to an imperious conviction, that an upright judiciary is the only bulwark that can oppose & restrain the impetuous torrent of division & disorganization with which this Continent is threatened. He has a stake in the common weal, and cannot be indifferent as to its protection from wild theories, and no less extravagant practise. I hope he may come in."\textsuperscript{25}

Writing to his mother two days later, Thomas again mentioned the negotiations to secure a favorable reply from Ingersoll and the latter's desire to delay giving the President a decisive answer. "It is confidential business, but I presume you are in the secret . . . . He has not fully formed a resolution, what answer to give, and his greatest difficulty arises from the uncertainty whether any change will take place in the Judiciary system, during this session. If that were certain he would not scruple to give an affirmative answer, but said he, 'with my habits of life to be six months in the year absent from my family, I know of nothing scarcely

\textsuperscript{22} Adams to Thomas Adams, Dec. 17, 1800, \textit{ibid.}
\textsuperscript{23} Before he learned of the appointment of Jay, Thomas B. Adams had suggested Ingersoll or Edward Tilghman, two noted Philadelphia lawyers, or Samuel Dexter, then Secretary of War, to fill the place left at Ellsworth's resignation, though he believed Ingersoll would not accept the position; Thomas Adams to Abigail Adams, Dec. 20, 1800, \textit{ibid.}
\textsuperscript{24} Dec. 23, 1800, \textit{ibid.}
\textsuperscript{25} Dec. 28, 1800, \textit{ibid.}
that could induce the sacrifice."  

It was also the understanding of Abigail Adams, her husband's political confidante, that if Jay declined, William Cushing would be named chief justice; if he should refuse, William Paterson, next in seniority, would be offered the highest office, with Ingersoll brought to the Court as associate justice. Although Thomas Adams stated that his father would disregard the rule of geographical locality, "the narrow principle which has heretofore prevailed with regard to such appointments & which I know was never approved by him," the choice of a reputable legal figure who was outside the bitter intraparty war and was from the important state of Pennsylvania seemed wise. However, an affirmative reply from Ingersoll apparently would have to await, not only the refusal from Jay which would make a place available to him, but also the enactment of the judiciary bill, which would end the peregrinations to the circuits endured for a decade by the judges of the Supreme Court. Until Jay's answer was received, the President could officially do nothing further; until the judiciary bill was passed, he could not feel sure that his persuasions would be great enough to bring Ingersoll to the Court.

Quite apart from its provision to free the Supreme Court justices from circuit duties, the judiciary bill had an important bearing on the appointment to be made at this time. The legislation included a provision to reduce the Supreme Court after the next vacancy from six members to five. This bill, postponed by the House at the first session of the Sixth Congress, was due to be brought to the floors of Congress for de-

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26 Dec. 30, 1800, ibid. For Adams to have used his youngest son as his emissary in sounding out Jared Ingersoll does not seem unusual in view of the personal and political situation at the time. By this time, Adams trusted very few persons outside the family circle. Abigail had always been his political confidante as well as his "dear friend." Now, with John Quincy abroad, and with the promising Charles so recently dead, the ties of affection between John Adams and Thomas B. Adams seem to have grown even closer. "Indeed every letter I receive from you increases my esteem for your character, for an understanding discretion & benevolence . . . . The melancholy decease of your brother is an affliction of a more serious nature to this family than any other. Oh! that I had died for him if that would have relieved him of his faults as well as his disease." John Adams to Thomas Adams, Dec. 17, 1800, ibid.

27 Abigail Adams to Thomas Adams, Dec. 25, 1800, ibid.

28 To Abigail Adams, Dec. 20, 1800, ibid.

29 I have found nothing to indicate that John Adams thought of any other figure for the vacancy.

30 2 Statute 89, sec. 3 (Feb. 13, 1801), Annals, 6th Cong., 2d sess., Appendix, p. 1534.
bate and vote in January 1801. It became imperative that the membership of the Court be assured, with nominations made, approved, and accepted, before debate in Congress began. Although the reduction in the number of judges has been defended in terms of a means to prevent a tie vote on the Court, only the most avid Federalist partisan could fail to attribute a political motivation to the proposed change. Certainly the provision was not intended to limit the Federalist power of placement. Should Jay refuse the commission tendered to him, and should the President follow his plan to elevate the new chief justice from among the membership of the Court, this would leave an associate justice to be appointed. Were the President to delay this decision until the judiciary bill came up for debate, it was likely that the Republicans would willingly accede to the reduction of membership, thereby preventing Adams from adding another Federalist member to the Court. With a crowded calendar for action in the weeks remaining to the Federalist majority, it was imperative that the judiciary bill be not delayed. It thus became urgent that the question of the appointment, whether to the office of chief justice or associate justice, be clarified as quickly as possible so that the Federalist leaders in Congress could carry the bill for reorganizing the federal courts without suffering from their own provision to cut the membership of the Supreme Court.

Of additional concern in this matter was the position of the elderly senior judge, William Cushing, now sixty-eight, whose infirmities had frequently prevented his attendance upon judicial duties, and whose voluntary retirement was not without the realm of possibility. Indeed, the wish was expressed that a successor might be appointed for Cushing as well as Ellsworth before the administration changed hands. John Marshall "feared" that the President would nominate the senior judge as chief justice if Jay declined, and clearly this is what the President had in mind. There were, indeed, to the Federalists, grounds for concern.

81 For example, William W. Crosskey, Politics and the Constitution in the History of the United States (Chicago, 1953), II, 759.
82 Duties on licenses, the resolution to continue the Sedition Act, the election of Burr or Jefferson as president, the engrossment and recommittal of the Bankruptcy Act, and ratification of the Convention with France, were measures in addition to the Judiciary Act which were acted upon by the lame duck session of the Sixth Congress.
84 Marshall to C. C. Pinckney, Dec. 18, 1800, Pinckney Family Papers, Box 1.
Should Cushing be appointed to the high post with the membership of the Court reduced, upon his death or retirement (either of which could reasonably be considered imminent) the path would then be open for the incoming president to appoint to the highest judicial post in the nation. Nevertheless, President Adams seems to have regarded it as awkward to plan to by-pass Cushing by offering the chief justiceship directly to William Paterson of New Jersey, next in order of seniority, fifty-six years old, and in good health. No other objection to Paterson for the office appeared at this time. Although Samuel Otis, secretary of the Senate and father of Harrison Gray Otis, relayed to the President the request for a place on the Supreme Court for Jacob Read, the recently defeated senator from South Carolina, “sacrificed for his support of Government,” there is no evidence that John Adams heeded the suggestion. Making his decisions alone, he had acted to reappoint Jay as chief justice. If this proved unsuccessful, Cushing would be offered the post and the vacancy on the Court would be filled by Ingersoll, if he could be persuaded to accept. But these were plans of the President, not achievements. By the end of December 1800, the chief justiceship was still vacant, the judiciary bill was still unassured of passage, and Ingersoll as yet withheld an affirmative answer because of the arduous duties assigned the Supreme Court judges by the Judiciary Act of 1789. Only Jay’s reply could determine the next course of action.

By January 3, 1801, no answer had yet come from Jay. On January 9, Thomas Adams wrote again that he still had no definite answer from Ingersoll. The young emissary reminded his father that Ingersoll would be in Washington early in February for the Supreme Court session; presumably the President could speak with his friend directly at that time.

Whether the next president would be Jefferson or Burr was not known at this point, but it was generally assumed that Jefferson, if elected, hoped to name Spencer Roane, chief justice of the Virginia Court of Appeals, to the Supreme Court; David Mays, “Judge Spencer Roane,” Virginia State Bar Association, Reports, XL (1928), 446-464.

John Marshall recalled that he had suggested Paterson at the time of Ellsworth’s resignation in 1800, but the President objected then that Judge Cushing’s feelings would be wounded at being by-passed. For this reason, Jay had been selected instead; An Autobiographical Sketch by John Marshall, Written at the Request of Joseph Story, ed. John Stokes Adams (Ann Arbor, 1937), pp. 29-30.

Jan. 13, 1801, Letters Received, Adams Papers.

Abigail Adams to Thomas Adams, Jan. 3, 1801, ibid.

Thomas Adams to John Adams, Jan. 9, 1801, and Thomas Adams to Abigail Adams, Dec. 30, 1800, ibid.
However, to prolong such an uncertainty until February was simply to complicate the situation further. If Ingersoll decided to accept the nomination, well and good. If he did not, then it would be necessary to select another figure, assure his willingness to accept, and have the nomination approved by Congress. If the judiciary bill should have passed by that time, as the President hoped it would, then ironically he might be spared by law the problem of appointing another associate justice. This would in turn create the probability that the next appointment would be that of a Republican justice. Amid such tangled eventualities, John Adams continued to wait for the answer from Jay to arrive.

Jay's reply, written from Albany on January 2, was finally received by the President. As is well known, it brought a refusal to return as chief justice. The reasons Jay presented to the President are illuminating. Commenting upon the original federal court system which had seemed so defective to him when he had resigned the office in 1795, he wrote:

Such was the temper of the times, that the Act to establish the Judicial Courts of the United States was in some respects more accommodated to

40 The date when Adams actually received Jay's reply is difficult to determine. Contrary to his usual custom, Adams marked no date of receipt on the original. Newspapers reported the fact on various dates, but it is impossible to separate the publication here of rumor and/or wishful thinking from known or announced fact. The Palladium (Boston, Mass.), Jan. 29, 1801, printed a report dated Phila., Jan. 9, stating that "We hear that Mr. Jay has declined the acceptance of the office of Chief Justice." The Philadelphia Gazette and Daily Advertiser (Pa.), Jan. 16, 1801, printed the information from Washington over the date of Jan. 12. The Gazette of the United States (Philadelphia, Pa.), Jan. 13, 1801, reported that Jay had declined, but on Jan. 17, 1801, stated "The President has received (italics mine) Jay's declension." The Aurora, Jan. 13, 1801, included a notice that Jay had refused. The National Intelligencer (Washington), Jan. 14, 1801, stated that "The President has received (italics mine) Jay's declension." The Washington Museum, Jan. 16, 1801, reported the fact also under the date Jan. 14. On Jan. 19, 1801, Poulson's American Daily Advertiser (Philadelphia, Pa.), announced the news, and in other papers more distant the report naturally appeared at later dates. Although the National Intelligencer was an opposition paper, the wording of its report, together with its location at the seat of the government, together with the identical information in the Washington Museum also on the identical date, is reason enough to presume, I think, that this date (Jan. 14) is approximately correct. Marshall's reminiscences 27 years later of the sequence of events give the impression that Jay's refusal was received on Jan. 19, the day before his own appointment was made, but memory of detail of this sort may well not be precise; Adams, Autobiographical Sketch by Marshall, p. 30.
certain prejudices and sensibilities, than to the great and obvious principles of sound policy. Expectations were nevertheless entertained that it would be amended as the public mind became more composed and better informed; but those expectations have not been realized, nor have we hitherto seen convincing indications of a disposition in Congress to realize them. On the contrary, the efforts repeatedly made to place the judicial department on a proper footing have proved fruitless. . . . I am induced to doubt both the propriety and the expediency of my returning to the bench under the present system; especially as it would give some countenance to the neglect and indifference with which the opinions and remonstrances of the judges on this important subject have been treated.41

Evidently, Jay took with little seriousness the effort to pass the judiciary bill for reforming the court system which had been introduced in 1800—touched with more seriousness, indeed, the fact that the bill was still not acted upon as the Sixth Congress drew to a swift conclusion.42

Adams now was faced with the necessity of choosing a chief justice who would accept the office. He could hardly afford the delay in time that a new nomination and possibly another rejection would entail. To carry out his initial plan of following the line of current members of the Court and bringing Ingersoll in as an associate judge had a double disadvantage. Cushing’s age and ill health made it likely that his years were numbered. He might again refuse to take the chief justiceship although wishing to remain on the Court as he had done in 1796.43 In that case, Paterson would be selected. In either event, Ingersoll had not given assurance that he would accept a nomination as associate if it were made, and apparently, Adams had no other choice in mind.

Meanwhile, since the Federalist leaders in Congress were not in the confidence of the President on the court appointment, there was no way for the party to know Adams’s plans. Their sentiments, nonetheless, for securing a firm composition for the supreme bench were equal to those

42 When Jay wrote his reply on Jan. 2, 1801, the judiciary bill, postponed at the first session of the Sixth Congress, had not even been brought again from committee. Debate in the second session began in the House on Jan. 5; Annals, 6th Cong., 2d sess., p. 878.
43 Cushing had rejected the chief justiceship at that time, after the Senate had refused to confirm the appointment of John Rutledge, assigning ill-health as his reason for refusal. Henry Flanders, The Lives and Times of the Chief Justices of the Supreme Court of the United States (Philadelphia, 1855-58), II, 46.
of the President, and they were acutely aware that an immediate decision on this point was essential. If the President was thinking in terms of adding a new member to the Court, thus preserving the membership at six, any delay was a risk to be avoided. Benjamin Stoddert, the Secretary of the Navy, was at this point enlisted by some members of Congress to call upon the President and mention to him that the judiciary bill would be brought to a vote in the House on January 20, 1801. Prevented by bad weather from paying a personal visit with the news, Stoddert dispatched a note to this effect on January 19 and somewhat gingerly added a reminder of the importance of an immediate presidential decision regarding the Supreme Court before the House should act the next day: "As the bill proposes a reduction of the Judges to five—and as there are already five Judges in commission, it is suggested that there might be more difficulty in appointing a chief Justice without taking him from the present Judges, after the passage of this bill even by one Branch of the Legislature, than before."44

The sequence of this combination of circumstances makes clear that the action of the House of Representatives on the judiciary bill had direct bearing on the appointment which the President did make to the vacant seat on the bench. It also clarifies the reason why John Adams failed to follow his plan of selecting the chief justice from the membership of the Court. Indeed, it seems likely that it was the timing of the House action alone which forced him at this point to select a figure from outside the Court as the new chief justice. When Jay's refusal was received, the judiciary bill was still before the House in debate. Under the circumstances, even if Jared Ingersoll could be reached in Philadelphia, he could not be pressed for his final answer, since he had made clear that this was contingent upon the passage of the bill. This made it unwise to risk sending his nomination as associate justice to the Senate (together with that of Cushing as chief justice) only to have Ingersoll later decline.45 On January 19, the President received Stoddert's reminder from the members of Congress who urged an immediate decision before the vote on the judiciary bill should be taken the next day. A change of plans had to be made and made at once.

44 To Adams, Jan. 19, 1801, Letters Received, Adams Papers (italics added).
45 I have found no evidence that Adams discussed his plans with Cushing or other members of the Court, and there would have been no vital necessity for his doing so. However, an assurance from Ingersoll that he would accept a nomination was necessary to ensure that six members could be kept on the Court.
Late in his life, in an autobiographical letter to Justice Joseph Story, John Marshall recalled the details of his appointment to the highest judicial office as follows: "When I waited on the President with Mr. Jay's letter declining the appointment he said thoughtfully 'Who shall I nominate now'? I replied that I could not tell, as I supposed that his objection to Judge Patteson [sic] remained. He said in a decided tone 'I shall not nominate him.' After a moments hesitation he said 'I believe I must nominate you.' I had never before heard myself named for the office and had not even thought of it. I was pleased as well as surprized, and bowed in silence. Next day I was nominated, . . ." Marshall's reference to his nomination "next day," if his memory is to be trusted, would point to the conclusion that following Jay's refusal, the pressure from Congress relayed by Stoddert, the impossibility of getting an immediate commitment from Ingersoll, and the physical presence of his Secretary of State all confronted John Adams on January 19, 1801. "Next day," the 20th, in the House of Representatives, the judiciary bill was brought to a vote and passed fifty-one to forty-three; in the Senate, the astonished gentlemen received the nomination of John Marshall as chief justice of the Supreme Court.

There is no evidence to indicate that President Adams had, in the interval between Ellsworth's resignation and the moment he appointed Marshall, given any careful thought to filling the judicial vacancy with the Virginian who served him as Secretary of State. On the contrary, it is clear that in December 1800, at the time the nomination of Jay was made, Adams had thought of Cushing, and then Paterson, if Jay should decline. By January 1801, however, desiring to preserve the court membership at six before the passage of the judiciary bill should reduce this to five, Adams took no chance that a new appointee might refuse a nomination, thereby possibly forcing him into the position of selecting the chief justice from the five commissioned judges already on the Court. Under these circumstances, he appointed Marshall, since he could be sure, when Marshall "bowed in silence," that the office would be accepted. In this way, the aim of preventing a Republican nomination to the Court was achieved. Thus Marshall, who had in 1798 refused an

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47 Annals, 6th Cong., 2d sess., p. 915.
opportunity to become an associate judge to fill the vacancy left at James Wilson's death,49 was started on the path in which he was to achieve enduring fame. His selection can hardly be attributed to much deliberation or forethought on the part of the President; it seems clearly more the accidental result of a decision forced upon Adams by the cumulating necessities of the moment.

The Federalists, however, were somewhat less than pleased with the appointment. In 1799, during his campaign for a Congressional seat, John Marshall had publicly opposed the Alien and Sedition Acts.50 Throughout the turbulent period prior to the election of 1800, he had walked as cool and independent a line between the two factions within the Federalist party as he had between the Federalists and Republicans. During his six months in Congress from December 1799 to May 1800 Marshall had supported the Federalists against Republican attempts to reduce the army, had served on the committee to revise the judiciary system, and was influential in drafting the National Bankruptcy Act, but had voted against his party for repeal of the Sedition Law and also joined the opposition in killing the disputed elections bill. Furthermore, against much of his party, he had supported the decision of John Adams to send a second mission to France and had vigorously defended the President's conduct in the return of Thomas Nash-Jonathan Robins to British jurisdiction in that heated cause célèbre,51 action which did not go unnoticed by the President.

Federalist leaders of the Hamiltonian wing of the party held distinctly ambivalent views toward the man now nominated as chief justice. "In Congress, you see Gen. M. is a leader," wrote George Cabot to Rufus King. "He is I think a virtuous & certainly an able man; but you see in

49 Marshall to Pickering, Sept. 28, 1798, Adams, Works of Adams, VIII, 598n. Marshall said that he was offered the office left vacant at the death of James Iredell; Adams, Autobiographical Sketch by Marshall, p. 26. However, here memory was at fault. Iredell did not die until 1799, and this vacancy was filled by Alfred Moore of North Carolina. Adams wanted either Marshall or Bushrod Washington to succeed James Wilson in 1798 and stated that "As Virginia has no judge at present, she is as much entitled as Pennsylvania to attention." Adams to Pickering, Sept. 14, 1798, Adams, Works of Adams, VIII, 596. This tends to discount the claims made by Thomas Adams that rules of locality were not approved by his father; Thomas Adams to Abigail Adams, Dec. 20, 1800, Letters Received, Adams Papers.


51 See ibid., chap. 11, for a full account of Marshall's activity in Congress.
him the faults of a Virginian. He thinks too much of that State & he expects the world will be governed according to the Rules of Logic. I have seen such men often become excellent legislators after experience has cured their errors."

Theodore Sedgwick, the Speaker of the House, although he acknowledged the importance of Marshall in that body, blamed him for the restrictions written into the Bankruptcy Act and related that some members “thought him temporizing, while others deemed him foolish.” “He is attached to pleasures, with convivial habits strongly fixed. He is indolent, therefore, and indisposed to take part in the common business of the house. He has a strong attachment to popularity but indisposed to sacrifice to it his integrity; hence it is that he is disposed on all popular subjects to feel the public pulse and hence results indecision and an expression of doubt. Doubts suggested by him create in more feeble minds those which are irremovable.”

At the time Marshall was chosen to replace the ousted Timothy Pickering as Secretary of State in May 1800, Charles Cotesworth Pinckney had felt it necessary to assure James McHenry, recently dismissed as Secretary of War, of Marshall’s political soundness: “you may rely on his federalism,” he wrote, “& be certain that he will not unite with Jefferson & the Jacobins.” In that office from May 1800 to March 1801, Marshall served the harried President well. Adams, outraged over the disloyalty of his cabinet, and distraught because of the illness of his beloved Abigail, had hurried to his Quincy home where he remained until November 1800. In the absence of his chief, Marshall took no part in the machinations of the Hamiltonian Federalists to substitute Pinckney for Adams as the Federalist candidate in the election of 1800 nor was he a party to the diatribe against Adams which Hamilton wrote before the election. At no time was Marshall’s

52 Cabot to King, Jan. 20, 1800, King, Life and Correspondence, III, 184.
53 Sedgwick to Rufus King, May 11, 1800, ibid., p. 237. See also Cabot to King, Apr. 26, 1799, ibid., p. 9; Sedgwick to King, Dec. 29, 1799, and Feb. 6, 1800, ibid., pp. 163, 189-190.
55 After his approval as chief justice, Marshall continued, at Adams’s request, to hold the office of secretary of state until “another appointment can be made.” Adams to Marshall, Feb. 4, 1801, Adams, Works of Adams, IX, 96. No other appointment was made, and Marshall served in this capacity until the end of the administration.
56 Details for this part of Marshall’s career will be found in Beveridge, Life of Marshall, II, 485-547. In Oct. 1800, Hamilton wrote an extravagant attack on Adams
personal loyalty to the President questioned. The objections from within Federalist ranks in the Senate to his appointment to the Supreme Court, however, arose not on this score, nor even from suspicions regarding his political orthodoxy, but primarily from the fact that John Adams had failed to appoint Justice Paterson to the highest office.

There had been wide expectation among the Federalists that William Paterson would be named chief justice if Jay refused the office. "As Mr. Jay will certainly refuse the Chief Justiceship, I presume Judge Paterson will be appointed," wrote Pickering to Rufus King.\(^5^7\) James Gunn wrote Hamilton that either Paterson or Pinckney should have received the appointment; "but both those worthies were your friends."\(^5^8\) Samuel Sewall wrote to Theodore Sedgwick his pleasure at the prospect of Paterson’s succession as chief justice, adding, "The Judiciary is now almost the only security left us—and it is at all times the most important branch of the federal government."\(^5^9\) McHenry commented, "Here it was expected by everybody, that he [Adams] would have named Mr. Patterson to the vacant seat on the bench," facetiously adding, "except by Mr. ——, who thought he should have been appointed, and by me, who thought the President should have appointed himself . . . ."\(^6^0\) In outraged tones Senator Jonathan Dayton of New Jersey relayed the news of Marshall’s appointment to Paterson, "with grief, astonishment & almost indignation . . . contrary to the hopes and expectation of us all." Continuing, Dayton assured Paterson that he was consulting with other Federalists as to the propriety of making a stand against the President’s nomination of Marshall, fearful though they were that a Senate rejection at this juncture would only induce Adams to nominate "some other character more im-

which was to be privately circulated among Federalist leaders in the states in order to persuade them against supporting Adams for re-election. After Aaron Burr secured a copy and published portions of it, Hamilton made public the entire pamphlet. This, of course, lent more virulence to the campaign and weakened even further the possibility of a Federalist victory over the Republicans in the election of 1800. See "The Public Conduct and Character of John Adams," *The Works of Alexander Hamilton*, ed. Henry Cabot Lodge, Federal ed. (New York and London, 1904), VII, 309-365.

\(^5^7\) Jan. 5, 1801, King, *Life and Correspondence*, III, 367.
\(^5^9\) Dec. 29, 1800, Sedgwick Papers, Box D, p. 144.
\(^6^0\) McHenry to Wolcott, Jan. 22, 1801, Steiner, *Life and Correspondence of McHenry*, p. 491.
proper & more disgusting." The bitterness of feeling toward Adams had reached, in this move, the breaking point. The appointment of Marshall, in what must have seemed a deliberate defiance of the known sentiments of the party favoring Paterson, led Dayton to castigate the retiring President. "The nominations and whole conduct of Mr. Adams during the present session have manifested such debility or derangement of intellect, that I am convinced, in common with the most of our Federal members that another four years of administration in his hands would have exposed us to destruction." 61

For a full week the Senate delayed in approving Marshall's nomination while Federalist leaders tried unsuccessfully to persuade Adams to choose Paterson instead. The reason for the President's adamantine attitude is difficult to understand for, earlier, he had indicated that, if necessary, Paterson would have been offered the post. 62 According to Marshall, some suspected that Adams's objections rested on his belief that Paterson was connected with the Hamiltonians who opposed the second attempt at negotiation with France. However, Marshall himself never heard the President express any objection to Paterson other than that his elevation would have wounded the feelings of Judge Cushing. 63 The Aurora explained that Paterson failed to secure the nomination because certain Federalists resented his decision in 1795 in holding unconstitutional a Pennsylvania statute enacted in favor of Connecticut settlers. 64 Had either of these reasons been significant in the President's mind, it

62 Adams to Thomas Adams, Dec. 23, 1800, Letters Received, Adams Papers; Abigail Adams to Thomas Adams, Dec. 25, 1800, ibid. Charles Warren recounts this opposition of the Federalists who delayed the confirmation of Marshall, if by such action they could have brought about the elevation of Paterson, but he does not explain the inflexibility of Adams. Both Warren and Beveridge recount the story of the appointment as one totally unexpected by Marshall but probably neither was aware of the earlier negotiations with Ingersoll, the evidence for which lies in the Adams Papers, only recently available. Nor does either draw a connection between Marshall's appointment and the passage of the judiciary bill. See Beveridge, Life of Marshall, II, 553; Charles Warren, The Supreme Court in United States History (Boston, 1924), I, 171-178.
64 Aurora, Jan. 24, 1801, Jan. 22, Sept. 20, 28, 1803, quoted in Warren, Supreme Court, I, 176n. The case was John Dorrance v. Cornelius Van Horne's Lessees, 2 Dallas (Pa.), 304, which was tried in the circuit court for Pennsylvania district before Paterson and Richard Peters, the district judge. The case reached the Supreme
would have been so earlier at the time when Adams expressed no serious objection to Paterson as a possible chief justice. It seems more probable that the President, confronted now by a request that he alter the nomination, and resenting this as an unwarranted intrusion upon his authority, flew into one of the tempers for which he was noted at the implied criticism of his judgment and refused any suggested compromise.

When the hopelessness of their persuasion could not be ignored, the Senators had reason to take second thought at their delay in approving Marshall's nomination. The judiciary bill had been received in the Senate, after its passage by the House on January 21, the day after Marshall's nomination, and had been sent to committee. Federalist leaders may very likely have seen the advantages of approving the nomination before bringing the bill to the floor for debate for the same reasons that leaders in the House had desired that the appointment be made before that body voted on the bill. If the mind of the President could not be altered in favor of Paterson, was it not better to approve the nomination at hand rather than continue such a stalemate with the inflexible Adams? With little more than a month left to the administration, there seemed no point to be gained by continuing to oppose the appointment. The conclusion agreed upon, the Senate, on January 27, 1801, gave unanimous approval to the nomination of Marshall to be chief justice. On January 29 the judiciary bill was reported out of committee to the floor of the Senate for the consideration of the upper house. The Supreme Court was composed of six Federalist members; contingent upon the passage of the bill, the proposed reduction to five members after the next vacancy would definitely apply to the incoming Republican president, and no Republican could be appointed to that bench until the death or retirement of two members.\(^65\)

\(^{65}\) The bill was passed by the House on Jan. 20 and by the Senate on Feb. 7, 1801; *Annals, 6th Cong., 2d sess.*, pp. 915, 742. After receiving the signature of President Adams, An Act for the More Convenient Organization of the Courts of the U. S. became law on Feb. 13, 1801; *United States Statutes at Large*, II (Boston, 1845), 89.
The previous day Dayton had written again to Paterson to explain the reasons for the Senate action in approving Marshall:

The delay which has taken place was upon my motion for postponement, and was intended to afford an opportunity for ascertaining whether the President could be induced under any circumstances whatever to nominate you. If we could have been satisfied of this, we should have taken measures to prevail upon Mr. Marshall to have himself declined the highest, for a lower seat, upon the bench, or in case of his refusal, have negativd him. This would have been a course of proceeding, painful indeed to the Federalists on account of their esteem for that gentleman & their respect for his talents, & to which nothing could have brought them but their very strong attachment to you, & their very high sense of your superior title & pretensions. It must be gratifying to you to learn that all voices, with the exception of one only, were united in favor of the conferring of this appointment upon you. The President alone was inflexible, & declared that he would never nominate you. Under these circumstances we thought it adviseable to confirm Mr. Marshall lest another not so well qualified, & more disgusting to the Bench, should be substituted, & because it appeared that this gentleman was not privy to his own nomination, but had previously exerted his influence with the President in your behalf.66

Despite the activity of his friends on his behalf, Paterson himself seemed to have been neither hurt nor angered by the appointment of Marshall. Nor did he resign from the bench as some feared he might.67 Quite the contrary. He reproved Dayton for the strong terms in which he had referred to both Marshall and the President68 and warmly congratulated Marshall on receiving the honor.69

There was some speculation that although his nomination had been approved, Marshall would not take his seat on the bench until after the

68 Ibid.
administration changed on March 4, 1801. But on February 4 the new appointee wrote his official acceptance to President Adams and immediately entered upon the office, authorized by the President to continue to discharge the duties of the Secretary of State.

Despite a few subsequent mutterings of disappointment over the failure to secure Paterson's appointment to the high bench, there was little sentiment expressed regarding the new Chief Justice. Most newspapers simply stated the fact of his appointment. The Aurora merely noted that the Senate had confirmed the nomination, adding petulantly: "It is not said who is to be the Secretary of State in the room of Mr. Marshall for 34 days! Nor who is to receive the salary of Chief Justice from the time of Mr. Ellsworth's mission to France, until the appointment of his successor." James Callender, that archfoe of the Federalists, then cooling his heels in the Richmond jail, snarled, "we are to have that precious acquisition, John Marshall as Chief Justice . . . . The very sound of this man's name is an insult upon truth and justice."

With seeming pleasure John Adams wrote that he had nominated "a gentleman in the full vigor of middle age, and whose reading in the science is fresh in his head." There were others who were pleased. Richard Stockton, a leading Federalist from New Jersey, assured the President that the appointment of Marshall as chief justice "merits the certain approbation of all impartial men here who know what high qualifications are required in him who shall execute this office with dignity and advantage to the nation." From Savannah, Charles Cotesworth Pinckney wrote Theodore Sedgwick, "I hope nothing will prevent his acceptance of that office at a time when attempts are making to con-

71 Marshall to Adams, Feb. 4, 1801, Adams, Works of Adams, IX, 96. On this date John Marshall took the oath of office and the first term of the Supreme Court to be held in Washington began. See Warren, Supreme Court, I, 184-185.
73 H. van Schaak to Sedgwick, Feb. 17, 1801, Sedgwick Papers, Box D, p. 171.
74 Aurora, Feb. 3, 1801. Marshall drew only his salary as chief justice during this time; Beveridge, Life of Marshall, II, 559.
75 Scots correspondent in the Examiner (Richmond), Feb. 6, 1801.
76 To Elias Boudinot, Jan. 26, 1801, Adams, Works of Adams, IX, 94. This comment was made in Adams's reply denying a prevailing report that he himself would become chief justice after leaving office on Mar. 4. Boudinot to Adams, Jan. 20, 1801, ibid., p. 93n.
77 Feb. 2, 1801, Letters Received, Adams Papers.
strue away the energy of our constitution, to unnerve our Government, &
to overthrow that system by which we have risen to our present prosperity,
it is all important that our supreme Judiciary should be filled by men of
elevated talents, sound federal principles & unshaken firmness.”

In after years Marshall was to be described as “A man born to be the Chief
Justice of any country into which Providence should have cast him.” Toward the end of his life, John Adams would reflect that it was the
pride of his life to have given the nation a chief justice “equal to Coke or
Hale, Holt or Mansfield.” But the sentiments of Marshall himself as
the Federalist administration drew to a close were of different kind.
Shortly before Christmas, 1800, he had written to a good friend his plans
to return to Richmond and the practice of law. “If my present wish can
succeed so far as respects myself I shall never again fill any political sta-
tion whatever.” A few weeks later, having accepted an office the power
of which was necessarily political as well as legal, John Marshall began
his work as chief justice of the Supreme Court of the United States.

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78 Feb. 12, 1801, Sedgwick Papers, Box D, p. 160.
79 William Pinkney of Maryland, quoted in Charles Warren, *A History of the
American Bar* (Boston, 1911), p. 252.
81 To Charles Cotesworth Pinckney, Dec. 18, 1800, Pinckney Family Papers,
Box 1. Permission to quote here and on page 150 has been kindly granted by Dr.
Morton Morris Pinckney of Richmond, Va.