

GEORGE MASON UNIVERSITY SCHOOL OF LAW

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CHIEF JUSTICE OF THE UNITED STATES**

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06-11

Published in *University of Toledo Law Review*, Vol. 37, No. 3, Spring 2006

**GEORGE MASON UNIVERSITY LAW AND
ECONOMICS RESEARCH PAPER SERIES**

This paper can be downloaded without charge from the Social Science
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WILLIAM CUSHING CHIEF JUSTICE OF THE UNITED STATES

*Ross E. Davies**

INTRODUCTION

ON its *Court Roster* of current and former members, the Supreme Court does not list William Cushing as the third Chief Justice of the United States.¹ It should.

By the Court's own standards, and by most indications from contemporary authorities, Cushing, an Associate Justice from 1790 to 1810, was Chief Justice for at least a day or two in early February of 1796. He held that office during part of the hiatus between John Rutledge, the second Chief Justice, and Oliver Ellsworth, widely regarded as Rutledge's immediate successor. After his short stint in the center chair, Cushing returned to his seat as an Associate Justice, where he served until his death. The longest-serving member of the original Supreme Court, Cushing was a dedicated, low-key public servant, "desirous to be useful rather than to be known."²

This article is not a Founders' Chic paean to an underappreciated or misunderstood Great Man.³ Rather, it is an argument for giving a good public servant his due. The story of Cushing's short tenure as Chief Justice in February 1796 makes clear that he deserves a place between Rutledge and Ellsworth. His intermittent but, in total, lengthy service as acting Chief Justice in the absence of

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1. Members of the Supreme Court of the United States, *available at* www.supremecourtus.gov/about/members.pdf [hereinafter *Court Roster*].

2. Josiah Quincy of Massachusetts, *quoted in* 2 HENRY FLANDERS, *THE LIVES AND TIMES OF THE CHIEF JUSTICES OF THE SUPREME COURT OF THE UNITED STATES* 51 (1858). Quincy served in the House of Representatives during Cushing's last years on the Supreme Court. 5 APPLETON'S *CYCLOPAEDIA OF AMERICAN BIOGRAPHY* 151-52 (James Grant Wilson & John Fiske eds., 1888).

3. H.W. Brands, *Founders Chic: Our Reverence for the Fathers has Gotten Out of Hand*, *ATLANTIC MONTHLY*, Sept. 2003, at 101.

the other Chief Justices with whom he served between 1790 and 1800 provides further evidence that his lack of recognition is undeserved.

Part I summarizes the constitutional and statutory qualifications for service on the Supreme Court, and then explains how Cushing met all of them for the position of Chief Justice. In addition, Part I explains why the practical and equitable factors that weigh in favor of including such “oathless” Justices as Joseph Story and Bushrod Washington on the *Court Roster* also weigh in favor of including Cushing as a Chief Justice. Part II addresses the two strongest objections to Cushing’s claim to the Chief-Justiceship: first, a letter dated February 2, 1796 (immediately before the two days for which there is a record of his service as Chief Justice), in which he seeks to avoid the job, and second, his return to his Associate-Justiceship after his abbreviated service as Chief Justice, without the nomination, confirmation, appointment, commissioning, and oath-taking required of any new appointee to the Court. Part III addresses the likely reasons for the long obscurity of Cushing’s Chief-Justiceship. The Conclusion offers three possible modifications of the Supreme Court’s *Court Roster* that would account for Cushing’s varied service on the Court.

I. BEING CHIEF JUSTICE

The minimum standards to be Chief Justice are, well, minimal. Unlike the biggest jobs in the other branches of the federal government—President, Vice President, Member of the House Representatives, Senator—that come with, for example, age, citizenship, and residency⁴ requirements, the Chief Justice is not required to have any particular personal attributes.⁵ There is, in fact, nothing in the Constitution that disqualifies a space alien or a computer program⁶ from being Chief Justice, except, perhaps, a lack of capacity to take the oaths of office discussed below.⁷ There are, however, a few procedural hoops that a President and Senate seeking to place a person in the office of Chief Justice must jump through, and then there are a couple of additional hoops through which the appointee must pass before taking the final step of entering the office and performing the duties associated with it. With respect to William Cushing’s Chief-Justiceship, the available contemporary documents explicitly report that the President and the Senate did their parts. Cushing the appointee did his part as well, although that will only become clear once the documentary record and relevant context are organized below.

4. U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3; U.S. CONST. art. II, § 1, cl. 5.

5. History of Appointments to the Supreme Court, 4B Op. Off. Legal Counsel 457, 457 (1980).

6. See Robert C. Berring, *A Few Parting Words*, 1 GREEN BAG 2D 227, 228-30 (1998).

7. See Appointment of an Indian as Postmaster, 18 Op. Att’y. Gen. 181, 181-82 (1885). Or maybe the due process clauses, whose reach is limitless, but unpredictable.

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A. *What It Takes To Be Chief Justice*

The absence of specific minimum qualifications for Chief Justice in the Constitution means that the question of who should be a Chief Justice rests entirely in the discretion of the President and the Senate.⁸ The steps that the President and the Senate must follow in the exercise of that discretion are as follows:

- (1) Nomination by the President.
- (2) Confirmation by the Senate.
- (3) Appointment by the President,⁹ of which the commission is evidence.¹⁰

In Cushing's day (like today) anyone blessed with the satisfaction of these requirements was entitled to the Chief-Justiceship.¹¹

President George Washington and the Senate undoubtedly bestowed the right to the Chief-Justiceship on Cushing. There is a complete and clear documentary record—reproduced in *Documentary History of the Supreme Court of the United States, 1789-1800*—of their satisfaction of all three requirements:

- (1) Nomination: Washington nominated Cushing to be Chief Justice on January 26, 1796.¹²
- (2) Confirmation: The Senate confirmed Cushing on January 27, 1796.¹³
- (3) Appointment and commissioning: Washington appointed and commissioned Cushing, also on January 27, 1796.¹⁴

The Constitution also imposes on the nominated, confirmed, appointed, and commissioned Chief Justice one “prerequisite to holding Federal judicial office”—the taking of an oath:¹⁵

“[A]ll . . . judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution. . . .”¹⁶

In addition, Congress imposed another requirement on the appointee by the Judiciary Act of 1789—the taking of a second oath:

8. Under some circumstances, a President can take the matter entirely into his or her hands by making a recess appointment. U.S. CONST. art. II, § 2, cl. 2. This was irrelevant to Cushing's Chief-Justiceship.

9. *Id.*

10. U.S. CONST. art. II, § 3.

11. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 158 (1803).

12. 1 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, PART ONE, at 101 (Maeva Marcus et al. eds., 1985) [hereinafter 1 DOCUMENTARY HISTORY, PART ONE].

13. *Id.*

14. *Id.* at 102.

15. Presidential Appointees—Resignation Subject to the Appointment and Qualification of a Successor, 3 Op. Off. Legal Counsel 152, 169 n.2 (1979). See also *Bond v. Floyd*, 385 U.S. 116, 130-33 (1966).

16. U.S. CONST. art. VI, cl. 3.

“[To] administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform all the duties incumbent upon me as [title of office], according to the best of my abilities and understanding, agreeable to the constitution and laws of the United States.”¹⁷

The Judiciary Act did not formulate the oath as a command, but rather as a condition on the performance of the duties for which a Chief Justice (or other federal judge) had been commissioned:

*And be it further enacted, That the justices of the Supreme Court . . . before they proceed to execute the duties of their respective offices, shall take the following oath or affirmation . . .*¹⁸

So, until a commissioned Chief Justice took these oaths, he could not occupy his office and perform his duties—or, to use the current formulation, become “vested with the prerogatives of the office”—and was therefore useless until he did so. Small wonder, then, that the modern Supreme Court includes on its *Court Roster* only those who have “taken the prescribed oaths.”¹⁹

That was it for Cushing and the Chief-Justiceship: if he was nominated, confirmed, appointed, and commissioned, and if he took the constitutional and statutory oaths, he was Chief Justice.

B. *Cushing’s Oaths*

The weakest link in the chain connecting Cushing to the Chief-Justiceship is the oaths. There is no explicit statement in the record that he took his oaths of office. There are, however, several reasons to presume that he did take them. First, the Deputy Clerk of the Court—the official recordkeeper for the Court at the time—treated him that way. Second, the treatment of Cushing’s replacement as Chief Justice (Oliver Ellsworth) by the President and the Senate was consistent with the way they treated replacements for people who had lawfully occupied offices and then resigned, and not with the way they treated people who had merely declined offices (that is, refused to serve at all). Third, under conditions similar to those surrounding Cushing and the Chief-Justiceship, the current Supreme Court presumes the taking of the oaths.

1. *Chief Justice in the Eyes of the Deputy Clerk*

The rough minutes taken by the Deputy Clerk of the Supreme Court on February 3 and 4, 1796, record that “William Cushing, Esq.” was “Chief Justice”

17. Judiciary Act of 1789, 28 U.S.C. § 453 (2000).

18. *Id.* (second emphasis added). See also *Laird v. Tatum*, 409 U.S. 824, 838-39 (1972) (Rehnquist, J., in chambers).

19. *Court Roster*, *supra* note 1. See also discussion *infra* Part II.D.3.

on those days.²⁰ Granted, the words “Chief Justice” were later struck through and partially erased (a matter addressed below), but the mere fact that the Deputy Clerk put them on paper in the first place should be enough to show that Cushing had taken his oaths of office as Chief Justice by then. This is the case because, as the editors of the *Documentary History of the Supreme Court of the United States, 1789-1800* explain:

In the minutes of the Supreme Court, justices were not listed as present by the clerk until after they had taken their oaths. William Cushing and John Blair, who first sat as associate justices when the Supreme Court opened on February 2, 1790, are listed as present on their first day in attendance; *thus they had to have taken their oaths prior to the Court’s convening.*²¹

Thus, according to the *Documentary History*, Justices John Blair and William Cushing in 1790, and Justice Bushrod Washington in 1798 or 1799, took their oaths as Associate Justices because the Clerk listed them as present, even though “[t]here is no extant record of [any one of these Justices] taking his oaths,” and “no mention . . . in the Court’s minutes of [their] taking the oaths in Court that day.”²²

In other words, the Clerk never entered a Justice’s name in the Court’s minute book until that person had either presented documentation of oath-taking or taken his oaths of office before the Court. Jacob Wagner, the Deputy Clerk who was responsible for minute-taking from the February 1795 Term through the August 1797 Term,²³ consistently followed this practice in his rough minutes. Thus, when Cushing’s predecessor as Chief Justice (John Rutledge) appeared at the Court on August 12, 1795, with his commission as Chief Justice in hand, and “took the oath of office and the oath to support the constitution of the United States; after which he took his seat on the bench,” Wagner’s rough minutes for that day do not list Rutledge as Chief Justice.²⁴ Rather, Rutledge was recorded as Chief Justice beginning the next day the Court sat, August 13, 1795.²⁵ Samuel Chase received the same treatment on February 4, 1796 (the day he appeared

20. The “rough” minutes are the original version—the first draft, if you will, probably recorded as proceedings unfolded in the courtroom—of the minutes of the Supreme Court. The rough minutes were later cleaned up and transcribed to create the “fine” or “engrossed” minutes of the Court. 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 158, 169-70, 333-34.

21. *Id.* at 2 (emphasis added). The editors of the DOCUMENTARY HISTORY series are not alone in this supposition. *See, e.g.*, 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY: 1789-1835, at 45 & n.2 (rev. ed. 1926); SOL BLOOM, HISTORY OF THE FORMATION OF THE UNION UNDER THE CONSTITUTION 370-71 (1941).

22. 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 30 (Cushing), 58-59 (Blair), 136 (Washington).

23. Samuel Bayard, the Clerk of the Court, served the United States in England from late 1794 until early 1798. *Id.* at 162. During most of Bayard’s absence, Wagner performed the duties of the Clerk. *Id.* Wagner began signing documents as Clerk in August 1796, even though he was never appointed to the position. *Id.* at 162, 333.

24. *Id.* at 401.

25. *Id.*

with his commission and took his oaths), and February 5, 1796 (the day he was first recorded as a member of the Court).²⁶ And Oliver Ellsworth (Cushing's successor as Chief Justice), who presented his commission, took his oaths, and "took his seat upon the bench" on March 8, 1796, was not recorded in the minutes as "The hnble Oliver Ellsworth, Esq^r Chief Justice" until March 14, 1796, the next sitting of the Court in which he participated.²⁷ By this standard and consistent practice, the fact that Cushing is listed in the original minutes of the Court as Chief Justice means that at the time the Deputy Clerk was recording the minutes, he understood that Cushing was Chief Justice. And the only acceptable indicators of that status were the commission signed by the President and sealed by the Secretary of State, supplemented by evidence of, or taking of, the oaths of office.

So, according to the Deputy Clerk of the Court, Cushing took his oaths and was Chief Justice on February 3 and 4, 1796.

The later strike-throughs and partial erasure of the two-day designation of Cushing as Chief Justice do not take away from this conclusion. The rough minutes of the Court for February 3, taken by Deputy Clerk Wagner, record "William Cushing Esq^r-Chief Justice" above the names of Wilson, Iredell, and Paterson, "Associate Judges."²⁸ And on February 4, again Wagner recorded Cushing as "Chief Justice," although this time only "Esqr." is stricken through, while the words "Chief Justice" are partially erased.²⁹

First, the strike-throughs. The available evidence—the original, hand-written version of the rough minutes themselves, held at the National Archives—suggests that the strike-throughs occurred sometime in mid-1796, well after Cushing's brief tenure as Chief Justice. During the February 1796 Term, the rough minutes are recorded in at least two hands,³⁰ and in several shades of ink. Yet many of the strike-throughs—including those relating to Cushing's Chief-Justiceship on February 3 and 4³¹—are in a distinctive and consistent curlicue style, and in the same shade of ink.³² In addition, the curlicued strike-throughs in the body of the minutes are often accompanied by interlineated additions marked by carets—the kinds of edits that would be made at a later date, rather than in the course of minute-taking.³³ In all likelihood, then, while the rough minutes were recorded on a day-to-day basis by the Deputy Clerk, the curlicued strike-throughs and associated insertions were all made at the same time, probably sometime between the end of the February 1796 Term on March 14, 1796, and the

26. *Id.* at 407-08.

27. *Id.* at 420, 423.

28. *Id.* at 407.

29. *Id.* at 407 & n.133.

30. Compare, e.g., Rough Minutes of the Supreme Court of the United States, Feb. 3, 1796 [hereinafter *Rough Minutes*], with *Rough Minutes*, Mar. 1, 1796. Citations to the *Rough Minutes* are to the original, hand-written rough minutes held at the National Archives and Records Administration. See 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 333.

31. *Rough Minutes*, *supra* note 30, Feb. 3, 1796.

32. Compare, e.g., *id.*, with *Rough Minutes*, Feb. 26, 1796.

33. *Rough Minutes*, Mar. 1, 1796.

beginning of the August 1796 Term, when the transcriber of the fine minutes for the February 1796 Term (identified in the *Documentary History* as “Hand C”) completed his or her work.³⁴ It is also possible that the strike-throughs were made on the fly, as the original minutes were being taken down. Perhaps, while he was waiting for the Court to open for business on February 3, Deputy Clerk Wagner took the opportunity to get a head start on the minutes by preparing what he thought would be the correct listing of sitting Justices, including the anticipated Chief Justice, William Cushing. Then, when Cushing failed to deliver the requisite papers and oaths, Wagner immediately marked-up the rough minutes to reflect that disappointed expectation. That might plausibly explain the strike-throughs on February 3.³⁵ But, even if that were the case, it seems highly unlikely that Wagner would make the same mistake the very next day.³⁶ To the contrary, while the immediate-strike-through theory might make sense of the February 3 rough minutes standing alone, it makes nonsense of the strike-throughs on February 4. For if Wagner already knew that he had erred in assuming Cushing would become Chief Justice on February 3, why on earth would he start his minutes with the same error on February 4?

Second, the partial erasure of the words “Chief Justice” next to Cushing’s name in the rough minutes for February 4, 1796. The erasure is more difficult to date, but it probably occurred even later than the strike-throughs. That it occurred long after the rough minutes were originally recorded is obvious from the fact that the friction from the erasure has rubbed away most of the surface aging of the paper.³⁷ Additionally, there is just one other, similar erasure in the rough minutes—in the record of February 7, 1805, almost a decade after the events surrounding the Cushing Chief-Justiceship.³⁸

Thus, it appears that at some later date—a few weeks after the fact for the strike-throughs, and perhaps years for the erasure—the Clerk or some other official with access to the rough minutes concluded that Cushing’s brief and inconsequential tenure as Chief Justice did not justify perpetuating that status in

34. 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 169. “Hand C” also transcribed the fine minutes for the February 1798 Term, but the work of “Hand D” on the intervening August 1796, February 1797, and August 1797 Terms makes it unlikely that “Hand C” did all of his or her transcription work during that later period. *Id.*

35. The DOCUMENTARY HISTORY takes this position. In a note to the rough minutes of February 3, it states that “[w]hen the clerk realized that Cushing was not chief justice, the braces [encompassing the Associate Justices] were extended to enclose Cushing’s name.” *Id.* at 407 n.132.

36. And the DOCUMENTARY HISTORY does not suggest that he did. Instead, it merely notes that “[b]races drawn around the names of Wilson, Iredell, and Paterson were extended to enclose Cushing’s name”—without offering an explanation for why he would have done so, and without making what would be the implausible suggestion that Wagner had forgotten the events of the previous day, somehow recovered a mistaken impression that Cushing was Chief Justice, and then re-realized that Cushing was not Chief Justice. *Id.* at 407 n.133. The DOCUMENTARY HISTORY’s silence about Day 2 of the Cushing Chief-Justiceship suggests that knowledgeable people cannot reconcile Deputy Clerk Wagner’s second reference to Chief Justice Cushing with the consensus that Cushing was not a Chief Justice.

37. *Rough Minutes*, *supra* note 30, Feb. 4, 1796.

38. *Compare id.*, with *Rough Minutes*, Feb. 7, 1805.

the spruced-up fine minutes of the Court. And so the two identifications of Cushing as Chief Justice were simply edited out of the rough minutes and left out of the fine minutes. A perfectly understandable editorial decision in light of practical realities, especially Cushing's continuing occupancy of an Associate-Justiceship.³⁹ But not as an accurate report of the fact that Cushing was, in truth, the Chief Justice for two days in February 1796.

There is another possibility. It may be that Cushing, who was well aware of the oaths requirement,⁴⁰ did not take the oaths because neither he nor the Deputy Clerk, nor anyone else on hand, believed that he was obliged to do so. Perhaps they thought that the oaths he had taken as an Associate Justice were sufficient for his new judicial office. After all, William Blackstone had said as much about repetitive oath-taking by justices of the peace in his *Commentaries*,⁴¹ and the oaths of the Associate Justices were exactly the same as those taken by the Chief Justice.⁴² And there is evidence that others in the federal government acted on similar assumptions. For example, although Secretary of State James Monroe added the Department of War (and with it the office of Secretary of War) to his portfolio in 1814,⁴³ there is no record of his taking an additional oath to accompany his additional office.⁴⁴

The bottom line is this: On February 3 and 4 Cushing appeared to the Deputy Clerk to be the Chief Justice—an appearance that could only be achieved by the presentation of his commission, combined with either the taking or proof of the taking of the required oaths of office.

2. *Chief Justice in the Eyes of the President & Senate*

Just as the rough minutes of the Court reveal the Deputy Clerk's understanding that Cushing satisfied all of the requirements for entering into the office of Chief Justice, so the nominating language used by Presidents Washington and Adams for Associate Justices and Chief Justices (and all other federal judges, for that matter)—and the advice-and-consent language used by the corresponding Senates—during the period covered here show that they understood that Cushing fully and lawfully occupied the office of Chief Justice for a few days before giving it up in February 1796. The key is the consistent use of the word “decline” to describe the actions of individuals who refused to accept offices to

39. See discussion *infra* Part II.B.

40. Letter from William Cushing to John Jay (Nov. 18, 1789), reprinted in 1 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, PART TWO, at 678-79 (Maeva Marcus et al. eds., 1985) [hereinafter 1 DOCUMENTARY HISTORY, PART TWO].

41. See 2 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES, AND OF THE COMMONWEALTH OF VIRGINIA 353 (photo. reprint 1965) (St. George Tucker ed. 1803).

42. See Judiciary Act of 1789, 28 U.S.C. § 453 (2000).

43. HARRY AMMON, JAMES MONROE: THE QUEST FOR NATIONAL IDENTITY 336-37, 346 (1971).

44. The Department of Defense, the Department of State, the Library of Congress, and the National Archives have no publicly available record of any oath taken by Monroe in connection with his tenure as Secretary of War.

which they were appointed, and the word “resign” to describe the actions of individuals who chose to leave offices that they already held. According to President Washington, and to the Senate that confirmed Oliver Ellsworth as Cushing’s successor in the office of Chief Justice, Cushing “resigned” the Chief Justiceship. Thus, in the eyes of the President and the Senate, Cushing held the office of Chief Justice, and then elected to leave it.

The difference between “declining” and “resigning” was as well-understood—generally and in the three branches of the federal government—then as it is now. As a lexicographical matter, officeholders “resign” their positions;⁴⁵ appointees “decline” theirs.⁴⁶ The dictionary game is dangerously slick and unreliable, however, because “[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”⁴⁷ And so the better course is to look beneath the skin of “resign” and “decline” to determine what those words meant at the relevant times, to the relevant parties, in the relevant contexts. The relevant under-the-skin usages of “resign” and “decline”—in this case by Cushing’s contemporaries in the Presidency, the Senate, and the Supreme Court and other federal courts, in the course of the filling and vacating of federal judicial offices—reveal that there and then, all of them agreed with the definitions above. This consensus is reflected in the language of *Marbury v. Madison*, in which the Court distinguishes between a person who resigns an office and one who declines, equating the former with “the person who had been previously in office, and had created the original vacancy,” and the latter with “a person, appointed to any office, [who] refuses to accept that office.”⁴⁸

When President Washington nominated Oliver Ellsworth on March 3, 1796, to be the next Chief Justice, he did so in the following words:

Gentlemen of the Senate.

I nominate Oliver Ellsworth, of Connecticut, to be Chief Justice of the Supreme Court of the United States; *vice William Cushing, resigned.* —

45. See, e.g., 2 SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 2546 (5th ed. 2002) (“resign . . . Give up one’s employment, an official position etc.; retire.”); 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 1640-41 (photo reprint, Librarie du Liban 1978) (4th ed. 1773) (“Resign . . . To give up a claim or possession. . . . To yield up.”); NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 256 (1806) (“Resign . . . to give or yield up”).

46. See, e.g., 1 SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 617 (5th ed. 2002) (“decline . . . not consent to engage in or practice, not agree to doing; refuse, esp. politely . . .”); 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 492 (photo reprint, Librarie du Liban 1978) (4th ed. 1773) (“Decline . . . To shun; to avoid; to refuse; to be cautious of.”); WEBSTER, *supra* note 45, at 78 (“Decline . . . to . . . shun”).

47. *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

48. 5 U.S. (1 Cranch) 137, 161-62 (1803). See also *id.* at 161 (“As he may resign, so may he refuse to accept: but neither the one, nor the other is capable of rendering the appointment a nonentity.”).

G^oWashington.⁴⁹

Symmetrically, when the Senate voted its consent to Ellsworth's appointment, it was recorded as a vote for:

Oliver Ellsworth, to be Chief Justice of the Supreme Court of the United States, *vice William Cushing, resigned*.⁵⁰

Thus, in 1796, both the President and the Senate viewed Cushing as a Chief Justice who had resigned—who “had been previously in office, and had created the original vacancy.”⁵¹ The same definitional understanding held true in 1795, when Washington's nomination of John Rutledge to replace John Jay read as follows:

I nominate . . . John Rutledge, of South Carolina, to be Chief Justice of the Supreme Court of the United States; *vice John Jay, resigned*.⁵²

Because the Senate did not consent to the appointment of Rutledge, there is no record of a confirmation with which to pair Washington's nomination message.

Again, when Ellsworth resigned in late 1800, President Adams nominated John Jay to return as Chief Justice using almost the same phrasing that Washington had when he nominated Rutledge to replace Jay, and Ellsworth to replace Cushing, including the critical term for the purposes of this article—*resigned*:

Gentlemen of the Senate

I nominate John Jay Esqr Governor of the State of New York to be Chief Justice of the United States in place of Oliver Elsworth [sic] who has *resigned* that office⁵³

Jay was promptly confirmed and commissioned. When the commission reached him in New York, however, he refused it.⁵⁴ The result was a different nomination formulation when Adams eventually settled on John Marshall for Chief Justice:

49. 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 120 (emphasis added). In this context, the word “vice” means “in the place of.”

50. *Id.* (emphasis added).

51. *Marbury*, 5 U.S. (1 Cranch) at 161-62.

52. 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 98 (emphasis added).

53. *Id.* at 144 (emphasis added).

54. *Id.* at 144-47.

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Gentlemen of the Senate.

I nominate John Marshall Secretary of States to be a Chief Justice of the United States in place of John Jay who has *declined* his appointment⁵⁵

The Senate's confirmation of Marshall does not mention Jay.⁵⁶

This pattern in nominations and confirmations of describing appointees who refused proffered offices as having “declined” them, and describing individuals who actually occupied offices and then left them as having “resigned,” also held true at the Associate Justice and lower court levels.⁵⁷ For example:

1789: “I nominate . . . For Judge in the Western Territory, in place of William Barton, who *declines* his appointment, George Turner.”⁵⁸ William Barton never served as judge in the Western Territory.⁵⁹

1790: “I nominate . . . John Stokes, to be Judge of the North Carolina district, in place of William R. Davie, who has *declined* his appointment.”⁶⁰ “The Senate . . . do advise and consent to the appointment of John Stokes, to be Judge of the North Carolina district, in place of William R. Davie, who has *declined* his appointment.”⁶¹ Davie never served as a judge of the North Carolina district.⁶²

1791: “I nominate Joseph Anderson, of the State of Delaware, to be one of the Judges in the Territory of the United States south of the Ohio, in place of William Peery, who has *declined* his appointment.”⁶³ “The Senate proceeded to the consideration of the . . . nomination[] of Joseph Anderson, of the State of Delaware, to be one of the Judges of the Territory of the United States south of the Ohio, in

55. *Id.* at 152 (emphasis added).

56. *Id.*

57. The pattern held across the full range of appointments—from soldiers to tax collectors to surveyors to district attorneys to cabinet officers—but the focus here is on judicial matters, which makes for a convenient limitation on what would be an overwhelmingly long and boring list of examples of the consistent use of “decline” and “resign” in the appointments process.

58. 1 Sen. Exec. J. 25 (Sept. 11, 1789) (emphasis added). *See also* Letter from Thomas Pinckney to George Washington, Oct. 22, 1789, in National Archives (RG59, General Records of the Department of State, Acceptances and Orders for Commissions, 1789-1893, Box 1, 1789-1829) (“expressing the extreme regret with which I am constrained to *decline* [appointment as district judge for South Carolina] this flattering testimony of your approbation”).

59. THE BICENTENNIAL COMMISSION OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, JUDGES OF THE UNITED STATES 25 (2d ed. 1983); Federal Judicial Center, *Biographies of Federal Judges Since 1789*, www.fjc.gov/public/home.nsf/hisj (last visited Mar. 21, 2006).

60. 1 Sen. Exec. J. 53 (Aug. 2, 1790) (emphasis added).

61. 1 Sen. Exec. J. 54 (Aug. 3, 1790) (emphasis added).

62. BICENTENNIAL COMMISSION, *supra* note 59, at 119; Federal Judicial Center, *supra* note 59.

63. 1 Sen. Exec. J. 77 (Feb. 25, 1791) (emphasis added).

place of William Peery, who has *declined* his appointment.”⁶⁴ Peery never served as a judge in the Territory of the United States south of the Ohio.⁶⁵

1791: “Thomas Johnson, . . . vice John Rutledge, *resigned*.”⁶⁶ Rutledge was an Associate Justice from February 15, 1790, to March 5, 1791.⁶⁷

1792: “I nominate Richard Peters to be District Judge of the Pennsylvania District, vice William Lewis, who has *resigned* his appointment.”⁶⁸ “The Senate proceeded to the consideration of the message of the President of the United States, of the 12th instant, nominating Richard Peters to be District Judge of the Pennsylvania District, vice William Lewis, who has *resigned* his appointment.”⁶⁹ William Lewis was a district judge of the Pennsylvania district from 1791 to 1792.⁷⁰

1793: “I nominate William Paterson, . . . vice, Thomas Johnson, *resigned*.”⁷¹ Johnson served on the Court from August 6, 1792, to January 16, 1793.⁷²

1793: “I nominate . . . Samuel Hitchcock, of Vermont, to be Judge of the District Court in and for Vermont district, vice Nathaniel Chipman, *resigned*.”⁷³ Chipman was a district judge in Vermont from 1791 to 1793.⁷⁴

1794: “I nominate Richard Harrison, Attorney for the District of New York, to be Judge of the District of New York, vice James Duane, who has *resigned*.”⁷⁵ “The Senate took into consideration . . . the nomination of Richard Harrison, Attorney for the District of New York, to be Judge of the District of New York, vice James Duane, who has *resigned*.”⁷⁶ Duane was a district judge in New York from 1789 to 1794.⁷⁷

1796: “Samuel Chase, . . . vice John Blair *resigned*.”⁷⁸ Blair was an Associate Justice from February 2, 1790, to October 25, 1795.⁷⁹

64. 1 Sen. Exec. J. 78 (Feb. 26, 1791) (emphasis added).

65. BICENTENNIAL COMMISSION, *supra* note 59, at 386; Federal Judicial Center, *supra* note 59.

66. 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 77 (emphasis added).

67. *Court Roster*, *supra* note 1; Federal Judicial Center, *supra* note 59.

68. 1 Sen. Exec. J. 97 (Jan. 12, 1792) (emphasis added).

69. 1 Sen. Exec. J. 97 (Jan. 13, 1792) (emphasis added).

70. BICENTENNIAL COMMISSION, *supra* note 59, at 294-95; Federal Judicial Center, *supra* note 59.

71. 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 90 (emphasis added).

72. *Court Roster*, *supra* note 1. *See also* Federal Judicial Center, *supra* note 59.

73. 1 Sen. Exec. J. 142-43 (Dec. 27, 1793) (emphasis added).

74. BICENTENNIAL COMMISSION, *supra* note 59, at 87; Federal Judicial Center, *supra* note 59.

75. 1 Sen. Exec. J. 150 (Apr. 16, 1794) (emphasis added). *See also* 1 Sen. Exec. J. 153 (May 7, 1794).

76. 1 Sen. Exec. J. 152 (Apr. 19, 1794) (emphasis added).

77. BICENTENNIAL COMMISSION, *supra* note 59, at 138-39; Federal Judicial Center, *supra* note 59.

78. 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 101 (emphasis added).

1796: "I nominate Robert Troup, of New York, to be District Judge for the United States, in the District of New York, vice John Lawrance, who has *resigned*."⁸⁰ "The Senate proceeded to consider . . . the nomination . . . of Robert Troup, of New York, to be District Judge for the United States in the District of New York, vice John Lawrance, who has *resigned*."⁸¹ Lawrance (or Laurance) was a district judge in New York from 1794 to 1796.⁸²

1796: "I nominate . . . Joseph Clay, junior, of Georgia, to be District Judge of Georgia, vice Nathaniel Pendleton, *resigned*."⁸³ The Senate resumed the consideration of the . . . nomination[] . . . of Joseph Clay, Jr., of Georgia, to be District Judge of Georgia, vice Nathaniel Pendleton, *resigned*."⁸⁴ Pendleton was a district judge in Georgia from 1789 to 1796.⁸⁵

1798: "Return Jonathan Meigs, Jr., of Marietta, Esq., to be one of the Judges of the Territory of the United States northwest of the river Ohio, in the place of George Turner, Esq., *resigned*."⁸⁶ Turner was a territorial judge in the Northwest Territory from 1789 to 1798.⁸⁷

1798: "I nominate the Hon. John Sloss Hobart, Esq., to be Judge of the district of New York, in the place of Robert Troup, Esq., *resigned*."⁸⁸ Troup was a district judge in New York from 1796 to 1798.⁸⁹

1801: "I nominate the Honorable Philip Barton Key, of Maryland, to be Chief Judge of the Fourth Circuit, in place of the Honorable Charles Lee, who has *declined* his appointment."⁹⁰ Charles Lee never served as Chief Judge of the Fourth Circuit.⁹¹

No complete body of facts lines up perfectly. At the earliest stages of his first administration, President Washington did muddy the waters a bit by using both "decline" and "resign" to describe the actions of several of his first appointees, when he submitted the names of replacements en masse in February 1790. Robert Harrison, who had declined to serve as an Associate Justice, was included

79. *Court Roster*, *supra* note 1; Federal Judicial Center, *supra* note 59.

80. 1 Sen. Exec. J. 215 (Dec. 9, 1796) (emphasis added).

81. 1 Sen. Exec. J. 215 (Dec. 10, 1796) (emphasis added).

82. BICENTENNIAL COMMISSION, *supra* note 59, at 285-86; Federal Judicial Center, *supra* note 59.

83. 1 Sen. Exec. J. 216-17 (Dec. 21, 1796) (emphasis added).

84. 1 Sen. Exec. J. 218 (Dec. 27, 1796) (emphasis added).

85. BICENTENNIAL COMMISSION, *supra* note 59, at 387; Federal Judicial Center, *supra* note 59.

86. 1 Sen. Exec. J. 261 (Feb. 9, 1798) (emphasis added).

87. BICENTENNIAL COMMISSION, *supra* note 59, at 501.

88. 1 Sen. Exec. J. 269 (Apr. 11, 1798) (emphasis added).

89. BICENTENNIAL COMMISSION, *supra* note 59, at 499; Federal Judicial Center, *supra* note 59.

90. 1 Sen. Exec. J. 385 (Feb. 25, 1801) (emphasis added).

91. BICENTENNIAL COMMISSION, *supra* note 59, at 290; Federal Judicial Center, *supra* note 59.

in a tabular presentation of appointees whom the President described as “persons appointed . . . who declined serving,”⁹² and the Senate described as “certain persons who declined the acceptance of offices.”⁹³ Yet the table itself lists Harrison and the other declining appointees in a column labeled “Resignations,”⁹⁴ and in his diary Washington referred to “[t]he resignation of Mr. Harrison as an Associate Judge.”⁹⁵ It is an inconvenient but unavoidable anomaly, for which I have no explanation. Five subsequent years of consistent use of “resign” and “decline” in the manner described above leading up to Cushing’s “resignation” of the Chief-Justiceship in 1796, and at least five more years of similarly consistent usage thereafter, should be enough to outweigh an isolated mislabeling in 1790. One other bit of evidence from the executive branch weighs against a Cushing Chief-Justiceship. He was not paid a Chief Justice’s salary for his two days in office.⁹⁶ This might reflect an official Treasury view that he had not been the Chief Justice, or something else—perhaps a reluctance on Cushing’s part to claim compensation for a job held briefly and abandoned quickly (especially when the prorated difference in compensation would have amounted to just \$2.74), or a recognition by the controversy-shy Justice that a demand for payment might prick partisan sensibilities that would be unoffended by his quiet double transition from Associate to Chief to Associate.⁹⁷

The parallels between office-holding on the one hand and the nomination and confirmation language chosen by the President and the Senate on the other are critical here. The traditionally recognized holders of the office of Chief Justice—Jay and Ellsworth—“resigned” their offices, while the traditionally recognized non-holder—Jay, the second time around—“declined” the office of Chief Justice. Cushing, too, “resigned,” putting him in the company of Chief Justices Jay and Ellsworth.

3. *Chief Justice by Modern Standards*

Today’s Supreme Court is clear about the standard for including on its *Court Roster* an individual who has been nominated, confirmed, appointed, and commissioned:

The acceptance of the appointment and commission by the appointee, *as evidenced by the taking of the prescribed oaths*, is here implied; otherwise the individual is not carried on this list of the Members of the Court. Examples: Robert Hanson Harrison is not carried, as a letter from President Washington of February 9, 1790

92. 1 Sen. Exec. J. 38 (Feb. 9, 1790).

93. 1 Sen. Exec. J. 38-39 (Feb. 9, 1790).

94. 1 Sen. Exec. J. 38 (Feb. 9, 1790).

95. GEORGE WASHINGTON, 6 THE DIARIES OF GEORGE WASHINGTON, JAN. 1790–DEC. 1799, at 28 (Donald Jackson & Dorothy Twohig eds., 1979).

96. See U.S. TREASURY DEPARTMENT, AN ACCOUNT OF THE RECEIPTS AND EXPENDITURES OF THE UNITED STATES FOR THE YEAR 1796, at 19 (1797).

97. See *infra* Part II.B.1.

states Harrison declined to serve. Neither is Edwin M. Stanton who died before he could take the necessary steps toward becoming a Member of the Court. Chief Justice Rutledge is included [even though he was Chief Justice only by recess appointment under a temporary commission] *because he took his oaths*, presided over the August Term of 1795, and his name appears on two opinions of the Court for that Term.⁹⁸

From this statement it might seem obvious that completing the constitutional and statutory formalities of oath-taking is a prerequisite both to serving on the Court and to appearing on its *Court Roster*. This is not a new rule. As Attorney General Caleb Cushing wrote 150 years ago:

The salaries of all judges of all courts of the United States are due from the date of appointment; but the party does not become entitled to draw pay until he has entered upon the duties of his office, or at least taken his official oath; for, until then, though under commission, he is not actually in office. . . .⁹⁹

But the Court does not apply the oath requirement to everyone on its *Roster*. This is likely the result of an evidentiary problem: too many Justices, including a couple of prominent and productive ones, failed to record (and perhaps take) their oaths of office. As the Court explains, the dates in the “Judicial Oath Taken” column on the *Roster* are “taken from the Minutes of the Court or from the original oath which is in the Curator’s collection,” except for those dates that are accompanied by a small letter “a” “b” or “c” in parentheses:

The small letter (a) denotes the date is from the Minutes of some other court; (b) from some other unquestionable authority; (c) *from authority that is questionable, and better authority would be appreciated*.¹⁰⁰

It turns out that the “authority that is questionable” associated with “c” is the quite reasonable supposition that the editors of the *Documentary History* applied to the appearance of Cushing and Blair in the Supreme Court’s earliest minutes without any indication that they had ever taken their oaths of office as Associate Justices:

In the minutes of the Supreme Court, justices were not listed as present by the clerk until after they had taken their oaths. William Cushing and John Blair, who first sat as associate justices when the Supreme Court opened on February 2, 1790, are listed as present on their first day in attendance; *thus they had to have taken their oaths prior to the Court’s convening*.¹⁰¹

98. *Court Roster*, *supra* note 1 (emphasis added).

99. Terms of Judicial Salaries, 7 Op. Att’y Gen. 303, 303 (1855).

100. *Court Roster*, *supra* note 1 (emphasis added).

101. 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 2.

Or, to put it more succinctly, “questionable authority” means no authority at all, supplemented by reasonable inferences from the available record. That is the main point of this article—to apply reasonable inferences from the available record to show that William Cushing was a Chief Justice.

Cushing (in his capacities as Associate Justice and Chief Justice) and Associate Justice Blair, are not alone in their oathless limbo. The Associate Justices listed on the *Court Roster* whose “Judicial Oath Taken” dates are accompanied by a “(c)” are in the same spot. According to the *Court Roster*, the “oathless” Justices are:

“Oathless” Justices of the Supreme Court

<u>Associate Justices</u>	<u>Dates of Oaths</u>
William Cushing	Feb. 2, 1790
John Blair	Feb. 2, 1790
Bushrod Washington	Feb. 4, 1799
Joseph Story	Feb. 3, 1812
John McLean	Jan. 11, 1830 ¹⁰²
John McKinley	Jan. 8, 1838
Peter Vivian Daniel	Jan. 10, 1842
John Archibald Campbell	Apr. 11, 1853

Imagine today’s Supreme Court announcing that Joseph Story was not an Associate Justice on the ground that there is no record that he took the required oaths. Story—with his large contributions to the work and reputation of the Court and to our legal culture more generally—provides a safe harbor of sorts for the lesser lights whose official status suffers from the same defect. Moreover, Story’s status is among the shakiest of this group because of the circumstances surrounding his missing oaths. At the same time, his status is one of the greatest props to a Cushing Chief-Justiceship because of the similarly inconsistent treatment that Story’s and Cushing’s oaths received in the Court’s rough minutes and later fine minutes.

On February 3, 1812, two newly-appointed and commissioned Associate Justices—Gabriel Duvall and Joseph Story—appeared for the opening of the Court’s February 1812 Term. Duvall presented his credentials first, and the Court Minutes report:

102. It turns out that John McLean was not oathless: “The Honorable John McLean produced Letters patent from the President of the United States *Also a certificate of his having taken the oath of office required by law* and published in Court and took his Seat accordingly.” United States Supreme Court, Minutes of the Supreme Court of the United States, at 1208-09 (Jan. 11, 1830), *microformed on* Minutes of the Supreme Court of the United States (National Archives Microfilm Publications) (emphasis added). In light of this evidence, the discussion of “oathless” Justices that follows does not include McLean.

Letters patent [*i.e.*, commission papers] from the President of the United States dated the 18th day of November A.D. 1811 with the oath of office thereto annexed appointing the Honble Gabriel Duvall one of the associate Justices of the Supreme Court of the U. States were presented to the Court.¹⁰³

The reference to “oath” rather than “oaths” in the report of Duvall’s qualification for his Associate-Justiceship is probably no cause for concern. It was not uncommon for the two oaths—the constitutional and the statutory—to be rolled into one.¹⁰⁴ The report of Story’s presentation is another matter:

Letters patent of the same tenor and date appointing the Honble Joseph Story one of the associate Justices of the Supreme Court of the U. States were likewise presented.¹⁰⁵

No mention of an “oath of office thereto annexed,” as there had been with Duvall.

However, if it is permissible to rely on the original, hand-written rough minutes of the Court, as this article seeks to do in support of Cushing’s Chief-Justiceship, then Story’s place on the *Court Roster* is more nearly secure. The rough minutes of the Supreme Court for the February 1812 Term include information that was not included in the fine minutes for that Term quoted above. Specifically, the rough minutes for February 3, 1812, include the following:

Letters patent [*i.e.*, commission papers] from the President of the United States dated the 18th day of November A.D. 1811 *with the oath of office thereto annexed* appointing the Honble Joseph Story one of the associate Justices of the Supreme Court of the U. States were presented to the Court.¹⁰⁶

If evidence from the rough minutes is entirely superseded by the later, refined, fine minutes of the Court, then the case for a Cushing Chief-Justiceship is surely weakened. But Joseph Story’s Associate-Justiceship is even more surely destroyed because the fine minutes contradict the rough minutes on the question of Story’s oath-taking.¹⁰⁷ On the other hand, if the evidence from the rough minutes of Story’s oath-taking is sufficient to trump the doubly-damning appearance in the fine minutes of clear evidence of Duvall’s oath-taking side by side with no evidence of Story’s oath-taking, then surely the evidence from the

103. United States Supreme Court, Minutes of the Supreme Court of the United States, at 167 (Feb. 3, 1812), *microformed on* Minutes of the Supreme Court of the United States (National Archives Microfilm Publications).

104. *See generally* General Records of the Department of State, Oaths of Office of Misc. Federal Appointees, 1799-1860, *in* National Archives (RG59, Stack Area 250, Row 48, Compartment 6, Box 1).

105. *Minutes of the Supreme Court*, *supra* note 103, at 167.

106. *Rough Minutes*, *supra* note 30, Feb. 3, 1812 (emphasis added).

107. The reference to “of the same tenor” might be interpreted to mean “with the same oaths attached,” but that would be straining the word “tenor” beyond any definition I can find; rather, it is a strained reading that is plausible only when aided by the rough minutes.

rough minutes of Cushing's Chief-Justiceship should at least carry as much weight.

Oathless Justice John McKinley is in a situation as untenable as Story's based on the fine minutes, and without the rough minutes to fall back on. At the Supreme Court on January 8, 1838:

The Honorable John Catron produced Letters patent from the President of the United States dated the eighth day of March in the year of our Lord one thousand eight hundred and thirty seven and of the Independence of the United States of America the sixty first, appointing him appeared in Court to present letters patent appointing him an Associate Justice of the Supreme Court of the United States. . . .¹⁰⁸

Catron's letters patent were accompanied by a lengthy certification of oaths, "which were read in open court" and then transcribed into the Court's Minutes.¹⁰⁹ And yet despite all the rigmarole over Catron's oaths on January 8, when McKinley appeared in Court on January 9 to present his credentials as an Associate Justice, not a single word was recorded about any oaths he might have taken.¹¹⁰

If it were not for the presence of Duvall in 1812 and Catron in 1838, equipped with their proofs of oath-taking, Story and McKinley would be in the same situation as the other oathless Justices of the Supreme Court—Associate Justices Cushing, Blair, Washington, Daniel, and Campbell, and Chief Justice Cushing. For all of those others, there is some wiggle room. Because there are no explicit references to others' oaths on the days when they joined the Court, there is room to consider reasons for the absence of their own. Perhaps there were other facts indicating that the oaths had been taken (as in, for example, the Deputy Clerk's record of Cushing's sittings as Chief Justice) or perhaps there was a procedural or recordkeeping defect,¹¹¹ or perhaps there had been a misunderstanding about the need for the oaths or for a record of them. Or perhaps the oaths had been taken and the records made, but they were later destroyed.¹¹² And so on. But for Story there is the evidence of Duvall, and for McKinley there is Catron. Duvall and Catron brought evidence of their oath-taking, and the Clerk recorded it. The absence of anything of the sort for Story or McKinley at a time when the Court was so obviously aware of the need to take and record the required oaths strongly

108. United States Supreme Court, Minutes of the Supreme Court of the United States at 3544 (Jan. 8, 1838), *microformed on* Minutes of the Supreme Court of the United States (National Archives Microfilm Publications).

109. *Id.* at 3545-46.

110. *Id.* at 3547-49.

111. 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 255 n.203 (suggesting such an explanation for the absence of a record of a reading of Attorney General Charles Lee's letters patent in the Court's minutes on February 3, 1796—the same day from which a record of Cushing's oaths as Chief Justice is missing).

112. *Id.* at xlii ("Some early Supreme Court papers have been destroyed by fire, many in 1898 when a gas explosion occurred in the sub-basement of the Capitol.")

suggests that there was none: *expressio unius exclusio alterius*.¹¹³ Oaths and oath records for Duvall and Catron most likely mean no oaths for Story and McLean—except, of course, that Story, like Chief Justice Cushing, has the rough minutes working in his favor.

In addition, there are the equities. There is nothing unreasonable about arguing that the oathless Associate Justices, including Cushing in that capacity, worked long years on the Court, and that it would be an outrage to deny them on a technicality the recognition they deserve after years of service. Cushing, in fact, was the most senior and the most reliable member of a core group of Justices—himself, James Wilson, James Iredell, and William Paterson—who showed up for work at the Supreme Court during its first decade more often than not. No Justice, including those four stalwarts, achieved perfect attendance at sittings of the Supreme Court, but under contemporary conditions their dedication was impressive, and Cushing's especially so. He was the old man of the group by more than a decade.¹¹⁴ As the Court moved south from New York to Philadelphia in 1792 (and thus farther from his home in Massachusetts), the burdens of traveling to attend Supreme Court sittings (and of the circuit-riding that was a major part of the Justices' work during that period) grew on him as it lessened on his younger fellows. Nevertheless, he was the Court's most constant attending member, and he was the only one of the original panel of Justices to endure the Court's entire first decade and survive to welcome John Marshall to the Court in 1801. Cushing was, as an aspiring biographer observed:

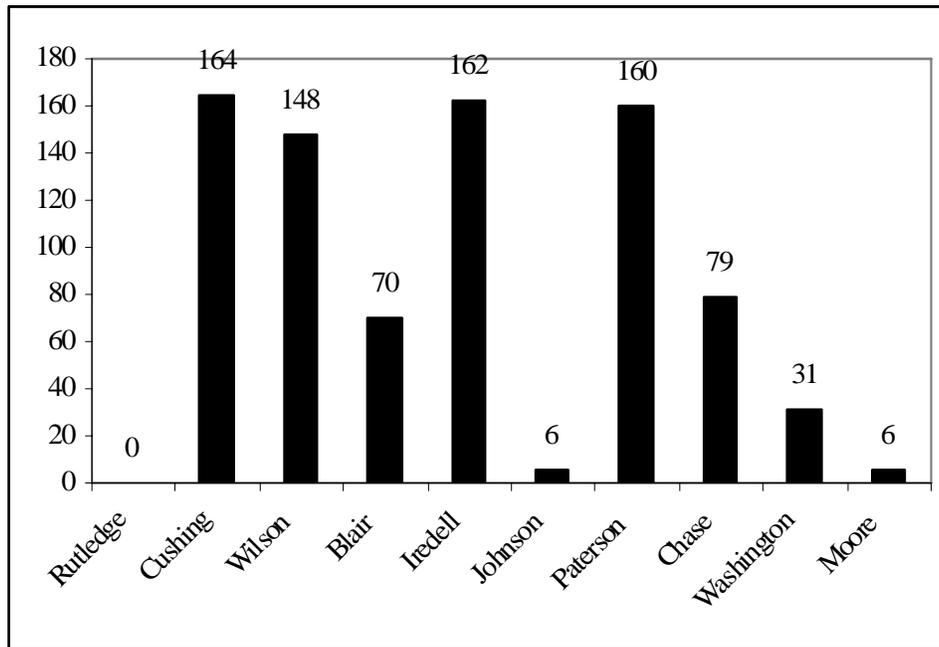
[T]he only human bridge between the weak judicial institution of the Jay Court and the firm and respected structure of the Marshall era. He alone was on hand in the spring and in the fall, planting principles in little known cases, which by 1810 had matured and fructified in several celebrated cases.¹¹⁵

113. *See, e.g.*, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793 (1995) (“It would seem but fair reasoning upon the plainest principles of interpretation, that . . . the affirmation of these qualifications would seem to imply a negative of all others.”) (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 625 (3d ed. 1858)).

114. *See* Lee Epstein et al., *Supreme Court Compendium* 229, at tbl. 4-2 (2d ed. 1996).

115. F. William O'Brien, *Justice William Cushing and the Treaty-Making Power*, 10 VAND. L. REV. 351, 351 (1957).

Associate Justices of the Supreme Court, 1790-1800
by number of days of service at sittings of the Court¹¹⁶



But to embrace this argument wholeheartedly with respect to Cushing and his fellow oathless Associate Justices, and then to ignore it entirely with respect to Cushing's Chief-Justiceship, would be inconsistent and unfair. Because Cushing actually did the work of Chief Justice—the work of presiding over the Supreme Court—for a longer period of time than John Jay, John Rutledge, or Oliver Ellsworth.¹¹⁷

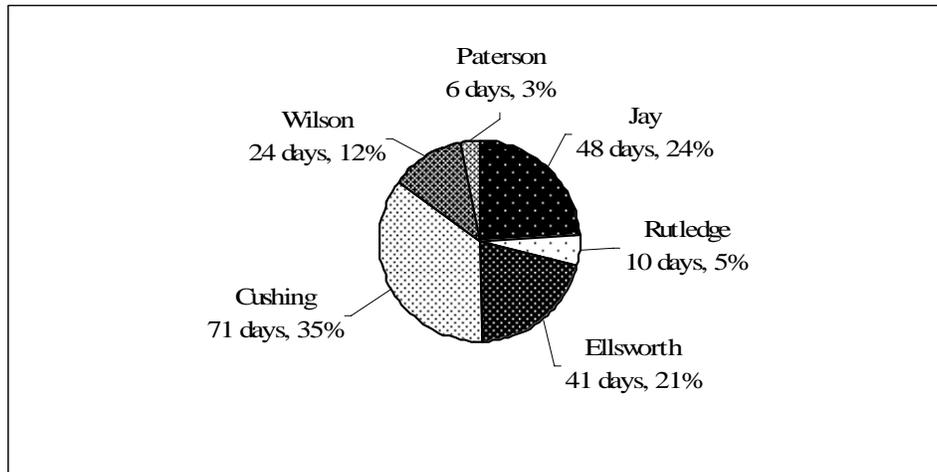
This underappreciated feature of Cushing's service on the Court was a product of his own willingness to show up for work, and the frequent and sometimes extended absences of the Chief Justices with whom he served. The combination of Jay's absences for personal reasons and on diplomatic service during the early 1790s, Ellsworth's similar absences later in the decade, and Rutledge's late arrival for the August 1795 Term—during which Cushing, as the senior

116. The numbers in this chart are based on the Fine Minutes of the Supreme Court of the United States, reproduced in 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 171-331.

117. Or, for that matter, Harlan Fiske Stone, at least by one measure. Cushing presided over more Terms of his Court, while Stone, who was Chief Justice from July 3, 1941, to April 22, 1946, presided over more days of sittings. *Court Roster*, *supra* note 1.

Associate Justice, almost always presided as acting Chief Justice¹¹⁸—plus Cushing's own brief tenure as Chief Justice between Rutledge and Ellsworth, placed on Cushing the responsibility of presiding over more of the Supreme Court's business than any other member of the Court during its first decade. Of the 200 days that the Supreme Court was in session between the opening of the Court's first Term on February 2, 1790, and John Marshall's assumption of the Chief-Justiceship on February 4, 1801, Cushing presided over seventy-one days of the Court's public work, while Chief Justices Jay, Rutledge, and Ellsworth actually performed the work associated with the office they held for only forty-eight, ten, and forty-one days, respectively. Justices Wilson and Paterson covered the remaining thirty days.

Presiding Justices of the Supreme Court, 1790-1800
by number of days presiding and percentage of total days
of Court sittings¹¹⁹



Nor was this a matter of Cushing minding the store during relatively inconsequential sittings of the Court. For example, during the four years of Ellsworth's Chief-Justiceship, he and Cushing divided the presiding duties pretty evenly. Ellsworth presided over the August Terms of 1796, 1797, 1798, and 1799, as well as February Term 1799.¹²⁰ Cushing covered most of the rest of the February 1796 Term following his own resignation as Chief Justice, plus the

118. As the senior Associate Justice, it was his duty to preside in the absence of the Chief Justice. See, e.g., GEORGE LEE HASKINS & HERBERT A. JOHNSON, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15*, at 87 (1981); 3 *DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800*, at 1 (Maeva Marcus et al. eds., 1990).

119. The numbers in this chart are based on the *Fine Minutes of the Supreme Court of the United States*. 1 *DOCUMENTARY HISTORY, PART ONE*, *supra* note 12, at 171-331.

120. *Id.* at 273-83, 290-97, 307-20.

February 1797, 1798, and 1800 Terms.¹²¹ Neither man attended the August 1800 Term, over which Justice Paterson presided.¹²²

Cushing got the better of the deal when it came to the Court's most interesting cases. During the February 1796 Term, for example, he presided over *Ware v. Hylton*, in which the Court first asserted its power to judge the constitutionality of state laws,¹²³ and *Calder v. Bull*.¹²⁴ Similarly, during the February 1795 Term, while Chief Justice Jay was in England negotiating what would become the Jay Treaty, Cushing presided over another long and interesting session. Early in the Term, the Court took the first step toward modern briefing, "giv[ing] notice to the Gentlemen of the Bar, that, hereafter, they [the Justices] will expect to be furnished with a statement, of the material points of the Case, from the Counsel on each side of a cause."¹²⁵ On February 6, Cushing presided over the conclusion of *Oswald v. New York*,¹²⁶ one of only three jury trials ever conducted in the Supreme Court.¹²⁷ Much of the rest of the term was devoted to *Penhallow v. Doane's Administrators*¹²⁸ (a "case of significant interest" because of its early stand on Supreme Court review of state judgments¹²⁹) and *Bingham v. Cabot*,¹³⁰ an action in assumpsit (decided below by Cushing on circuit¹³¹) of little consequence except for its foreshadowing of the Court's modern broadmindedness about the extent of the record in a case and about tardy jurisdictional challenges.¹³² And Cushing presided as Chief Justice, rather than senior Associate Justice and acting Chief Justice, for a short time during the February 1796 Term. If fairness and time in harness are factors in placement on the *Court Roster*, then Cushing's claim to an entry among the Chief Justices is as good as any recognized oathless claim to a place among the Associate Justices.

Taken together, the evidence in (1) the Court's own minutes, (2) the presidential nomination and senatorial confirmation of Cushing, and (3) the

121. *Id.* at 266-73, 283-90, 298-307, 321-25.

122. *Id.* at 325-31.

123. 3 U.S. (3 Dall.) 199, 282 (1796). *See also* David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789-1888*, at 37-41 (1985).

124. 3 U.S. (3 Dall.) 386 (1798). *See also* Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1176 n.219 (1987). Ellsworth presided when the Court handed down its decision, but he had not been present when the case was argued, and so he did not participate. *See* 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 309.

125. 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 233.

126. (U.S., Feb. 6, 1795), *reported in* 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 234.

127. *See* Robert A. James, *Instructions in Supreme Court Jury Trials*, 1 GREEN BAG 2D 377, 378 n.7 (1998) (describing *Oswald*, *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794), and *Cutting v. South Carolina* (U.S. Aug. 8, 1797), *reported in* 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 443).

128. 3 U.S. (3 Dall.) 54 (1795). *See also* 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 235-41.

129. CURRIE, *supra* note 123, at 51.

130. 3 U.S. (3 Dall.) 18 (1795); 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 241-43.

131. *See, e.g.*, JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS & BEGINNINGS TO 1801*, at 676-77 (1974).

132. *Id.* at 689-90.

presidential nominations and senatorial confirmations of contemporary federal judges, Justices, and Chief Justices is enough to show that he was Chief Justice for a day or two, at least—especially under the flexible and forgiving standards applied by the modern Supreme Court to such oathless Associate Justices as Joseph Story, John McKinley, Bushrod Washington, John Blair, John Campbell, Peter Daniel, and William Cushing himself. What is sauce for Justice Story et al. should be sauce for Chief Justice Cushing.

II. RESIGNATION & ASSOCIATE JUSTICE AGAIN

But there are still two problems with a Cushing Chief-Justiceship. First, his letter to George Washington dated February 2, 1796. Second, his return to his seat as an Associate Justice the following February 5, without renomination, reconfirmation, reappointment, recommissioning, and a new round of oath-taking. In addition, there is the obvious question: with all the evidence developed in Parts I and II, and with the resolution of the problems treated in this Part, why has the federal government failed for so long to notice that William Cushing held one of its highest offices?

A. *An Unsent Letter*

On February 2, 1796, less than one week after accepting his commission as Chief Justice, William Cushing drafted a letter to President Washington in which he sought to “retain the place [as Associate Justice] I have hitherto held,” and return “the Commission for the office of chief-Justice.”¹³³ The significance—or, more accurately, the insignificance—of this letter can only be appreciated in the context in which it was written, beginning with John Jay’s resignation of the Chief Justiceship on June 29, 1795. When read within that context, the letter and its surroundings support rather than undermine the case for Cushing’s Chief-Justiceship.

Washington quickly appointed John Rutledge, the former Associate Justice, to replace Jay.¹³⁴ It took Rutledge several weeks to make his way from his home in Charleston, South Carolina, to the temporary capital city of Philadelphia. The Court’s August 1795 Term began with Cushing, once again presiding, from the opening of the Term on August 5 until beginning of Rutledge’s service as Chief Justice on August 13.¹³⁵

133. Letter from William Cushing to George Washington (Feb. 2, 1796), *reprinted in* 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 103.

134. *See* Letter from John Jay to George Washington (June 29, 1795), *reprinted in* 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 13; Letter from George Washington to John Rutledge (July 1, 1795), *reprinted in* 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 96-97; Letter from Edmund Randolph to John Rutledge (July 1, 1795), *reprinted in* 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 95. *See also* Temporary Commission (July 1, 1795), *reprinted in* 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 96.

135. 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 96, 247-53.

When the Senate convened in December 1795, Washington sent Rutledge's name to the Senate, along with those of several other nominees.¹³⁶ On December 15, the Senate resolved to:

advise and consent to the appointments respectively, agreeable to the nominations; except to that of John Rutledge, postponed.¹³⁷

Later that day, it refused by a vote of fourteen to ten to consent to Rutledge's appointment.¹³⁸ The grounds for rejection were controversial, and played out against the warming friction between the nascent Federalist and Jeffersonian-Republican political parties. The most common and most plausible explanation was that Rutledge's own impolitic attacks on the Jay Treaty, which many partisans saw as an unacceptable display of disloyalty to the Federalist cause at a time when Washington and his Federalist followers were pressing for its ratification by the Senate, doomed Rutledge's nomination among the still-dominant Federalist majority in the Senate.¹³⁹ Opponents of the nomination also circulated allegations that Rutledge was mentally unstable, and harped on his financial difficulties at home.¹⁴⁰ The former charge was probably baseless at the time (although the subsequent precipitous decline in Rutledge's mental health¹⁴¹ has given it some *ex post* credibility), but the latter might have given some Senators pause, especially in light of what were almost certainly rising concerns about the financial morass into which Justice Wilson was already sinking.¹⁴² In any event, Rutledge was gone and Washington, who had become accustomed early in his presidency to near-perfect senatorial support for his nominees, had been embarrassed not only by the defeat of Rutledge's nomination in the Senate, but also by the nominee's own politically divisive behavior.

In the wake of what Professor William Casto has accurately described as "the Rutledge Fiasco,"¹⁴³ which was itself the culmination of almost a year of turbulence and uncertainty at the Supreme Court—from the sudden resignation of Jay in May, to the equally unexpected resignation of Justice Blair in October, to the rejection of Rutledge—Washington turned to what must have seemed like the one sure safe harbor. On January 26, 1796, he nominated the indisputably experienced and qualified, politically low-key yet reliable Cushing to be Chief Justice.¹⁴⁴ The Senate, perhaps relieved to be presented with a well-qualified and

136. *Id.* at 98.

137. *Id.*

138. *Id.* at 98-99.

139. WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* 90-95 (Herbert A. Johnson ed., 1995).

140. *Id.*

141. JAMES HAW, *JOHN AND EDWARD RUTLEDGE OF SOUTH CAROLINA* 245-58 (1997).

142. See Robert G. McCloskey, *James Wilson*, in 1 *THE JUSTICES OF THE UNITED STATES SUPREME COURT* 72 (Leon Friedman & Fred L. Israel eds., 1997).

143. CASTO, *supra* note 139, at 90.

144. 1 *DOCUMENTARY HISTORY, PART ONE*, *supra* note 12, at 101; John D. Cushing, *A Revolutionary Conservative: The Public Life of William Cushing, 1732-1810*, at 334-36 (1960) (unpublished Ph.D. dissertation, Clark University) (on file with author). Washington may well

inoffensive nominee, or perhaps merely impatient to fill an open seat on the Supreme Court before the opening of the Court's impending Term on the first Monday of February, unanimously confirmed Cushing on January 27.¹⁴⁵ Washington, perhaps not wanting to tempt fate with delay when the Supreme Court had been without a confirmed Chief for nearly a year, also acted promptly. He signed the commission the same day and Secretary of State Timothy Pickering immediately issued it.¹⁴⁶

The description of Cushing's receipt of the office on which all later scholars rely comes from George Van Santvoord's 1854 biography of Oliver Ellsworth:

The first intimation Judge Cushing received of his appointment was at a diplomatic dinner given by the President. In seating the guests, Washington, with the stately etiquette of the day, bowed to Judge C., and pointing to a vacant place near him, said, "The Chief-Justice of the United States will please take the seat on my right." The next day he received his commission. This anecdote, I am informed by the friend who communicates it, has been preserved on the relation of Judge Cushing himself.¹⁴⁷

What followed was a week or two of dithering and confusion. Cushing—on the one hand dutiful and honored, and on the other hand old, in uncertain health (he had been suffering from lip cancer),¹⁴⁸ exhausted by circuit riding, and averse to the kinds of controversy that the office of Chief Justice seemed to attract—was of two minds about the job.¹⁴⁹ Nevertheless, in the days immediately following Cushing's speedy nomination, confirmation, and appointment, the consensus appears to have been that he would in fact take up the office, as well as the role, of Chief Justice. Public and political attention had quickly moved from speculation and maneuvering over who would replace Rutledge to commentary on the prospects for the Court under Cushing and the likely candidates for his old seat as Associate Justice.¹⁵⁰ The commentary did not last long because Chief Justice Cushing did not. Practically, if not formally, his tenure in that office ended on February 5, 1796, barely more than a week after it started.

have settled on Cushing somewhat earlier. See Letter from Abigail Adams to John Adams (Jan. 15, 1796), *reprinted in Adams Family Papers, An Electronic Archive*, <http://www.masshist.org/digitaladams/aea/cfm/doc.cfm?L17960115aa> ("I pray you would give Judge Cushing a Hint, for in the minds of some of the southern Gentry, his Wig will be a greater objection to his perferment, than all the Madness and folly, to say no worse, of a Rutledge.").

145. 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 101-02; WESTEL W. WILLOUGHBY, *THE SUPREME COURT OF THE UNITED STATES: ITS HISTORY AND INFLUENCE IN OUR CONSTITUTIONAL SYSTEM* 85-86 (Herbert B. Adams ed., 1890).

146. 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 102-03.

147. GEORGE VAN SANTVOORD, *SKETCHES OF THE LIVES AND JUDICIAL SERVICES OF THE CHIEF JUSTICES OF THE SUPREME COURT OF THE UNITED STATES* 245 (1854). See also 2 FLANDERS, *supra* note 2, at 46.

148. 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 232.

149. Letter from John Adams to Abigail Adams (Feb. 6, 1796), *reprinted in 1 DOCUMENTARY HISTORY, PART TWO*, *supra* note 40, at 835.

150. See generally 1 DOCUMENTARY HISTORY, PART TWO, *supra* note 40, at 812-35.

For the first two days of the February 1796 Term, Monday the 1st and Tuesday the 2nd, the Court could not muster a quorum, and so the opening of the Term was held over until February 3, when Cushing, Wilson, Iredell, and Paterson were present.¹⁵¹ At the same time, Cushing was drafting a letter to Washington in which he wrote pessimistically about the Chief-Justiceship. On February 2, 1796, Cushing wrote:

[Dea]r Sir,

After the most respectful & grateful acknowledgment of my obligations to you for the appointment you have been pleased to make of me to the office of chief Justice of the United States, and to the hon. the Senate for their advice & consent to the Same; And after Considering the additional Care & duties attending on that important Office, [& ?] which, I apprehend my infirm & declining state of health unequal to ^{the weight of}, I must beg leave to retain the place I have hitherto held, ^{on} ^{bench} during the little time I may be able, in some measure, to perform the duties of it__ And pray that the return of the Commission for the office of chief-Justice ^{and} ^{inclosed} may be accepted__ and ~~that~~ another person be appointed thereto [__?]

I have the honor to be, with the greatest respect, Sir, your most Obedient Servant¹⁵²

John Adams, who was in Philadelphia at the seat of government, and was as well-positioned as anyone to know what both Washington and Cushing were doing and thinking—being Vice President to the former and a long-time friend, fellow Bay-Stater, and collaborator in private practice and politics of the latter¹⁵³—also wrote a letter on February 2. He informed his wife Abigail that “Judge Cushing declines the Place of Chief-Justice on Account of his Age and declining Health.”¹⁵⁴

But for the next two days, the rough minutes of the Court record William Cushing as “Chief Justice.”¹⁵⁵ In addition, John Adams, notwithstanding his earlier report that Cushing had refused the office, reported to Abigail on February 6 that Cushing’s decision about the Chief-Justiceship was still up in the air:

Judge Cushing has been wavering, sometimes he would and sometimes he would not be C.J.__ This will give the P[resident] some trouble.¹⁵⁶

151. 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 253-54.

152. Letter from William Cushing to George Washington (Feb. 2, 1796), *reprinted in* 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 103.

153. JOHN ADAMS, DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS (L.H. Butterfield ed., 1961) (writing in 1773-74: “I had a real respect for the judges. Three of them Trowbridge, Cushing and Brown I could call my Friends.”).

154. Letter from John Adams to Abigail Adams (Feb. 2, 1796), *reprinted in* 1 DOCUMENTARY HISTORY, PART TWO, *supra* note 40, at 834.

155. 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 407 & n.133.

156. Letter from John Adams to Abigail Adams (Feb. 6, 1796), *reprinted in* 1 DOCUMENTARY HISTORY, PART TWO, *supra* note 40, at 835.

Also, on February 7, James Madison—also in Philadelphia and as member of Congress representing Virginia also deep in the business of the federal government—reported to Thomas Jefferson the rumor of Cushing’s refusal as a future possibility, not a present fact:

Cushing has been put at the head of the Bench, but it is said will decline the pre-eminence.¹⁵⁷

Apparently, Cushing’s status as Chief Justice had not been settled as of the February 2 date on his draft letter to Washington. This uncertainty might have been due in part to Washington’s awareness of Cushing’s reluctance, and the President’s efforts to prevail upon him to keep the job.¹⁵⁸

By February 5, Wagner’s rough minutes were back to recording Cushing as one of the “Associate Judges.”¹⁵⁹ And by February 10 at the latest, the matter was settled. Leading figures in the nation’s capital of Philadelphia were sending letters home reporting that Cushing had finally and certainly refused to serve as Chief Justice, and moving on to the topic of who would replace him as Chief Justice.¹⁶⁰ There is no record of Cushing’s resignation, or what it said.

If it had carried any weight in the ‘real world’ of 1796, Cushing’s February 2 letter to George Washington would undermine the argument that Cushing was a Chief Justice. The letter is dated February 2—the day before the Court opened its February 1796 Term. If the letter was delivered to Washington, and the apparent resignation contained in it accepted by him, then Cushing and Washington would have done everything necessary to deprive Cushing of the office of Chief Justice before he sat on February 3 and 4. He still might have taken the oaths of office before sending the letter (how else, for example, to explain the use by the President and the Senate of “resign” rather than “decline” to describe Cushing’s departure from the Chief-Justiceship?), but the reed from which the case for a Cushing Chief-Justiceship hangs would certainly be weakened.

Fortunately for the case for Cushing’s Chief-Justiceship, the letter, while probably genuine, was almost certainly a draft that was never delivered. Even if it was delivered, the surrounding circumstances, combined with President Washington’s pattern of refusing to bow to efforts by Supreme Court appointees to avoid service, make it unlikely that any attempted resignation by Cushing would have taken effect on, or even immediately after, February 2.

In fact, the resignation letter is a red herring, because there is nothing about the document to indicate that Washington ever saw it, or even that it was ever sent. According to the *Documentary History*, the letter (in photostatic form) is in the

157. Letter from James Madison to Thomas Jefferson (Feb. 7, 1796), *reprinted in* 1 DOCUMENTARY HISTORY, PART TWO, *supra* note 40, at 835-36.

158. VAN SANTVOORD, *supra* note 147, at 246. *See also* 2 FLANDERS, *supra* note 2, at 46.

159. 2 FLANDERS, *supra* note 2, at 408.

160. *See, e.g.*, Letter from James Iredell to Hannah Iredell (Feb. 10, 1796), *reprinted in* 1 DOCUMENTARY HISTORY, PART TWO, *supra* note 40, at 836; Letter from Elias Boudinot to Samuel Bayard (Feb. 18, 1796), *reprinted in* 1 DOCUMENTARY HISTORY, PART TWO, *supra* note 40, at 838.

archives of the Scituate Historical Society in Cushing's hometown of Scituate, Massachusetts.¹⁶¹ The Historical Society maintains a formidable array of documentary, cultural, and architectural artifacts drawn from nearly 400 years of local history,¹⁶² but it is not a repository of government correspondence from the early Republic, and there is nothing to indicate that any official communications among the participants in Cushing's receipt and resignation of the Chief-Justiceship have come to rest there. Instead, the February 2 document appears to be a heavily edited draft, not a more polished, finished document of the sort that we know Cushing actually sent to the President.¹⁶³ There are none of the usual marks or other indicators that a document had been received by the President or anyone in his administration—a "received" date, or a mention in a diary belonging to Cushing or Washington, or a reply by the recipient. In contrast, all transmitted correspondence and documentary records of the Cushing Chief-Justiceship are held by the federal government, in the Library of Congress or the National Archives. The conspicuous absence of Cushing's draft letter from those records—which *do* include the resignation letters sent to Washington by Rutledge and Blair only a few weeks earlier, as well as the resignation letters of Rutledge (1791) and Johnson (1793)¹⁶⁴—also suggests that the Cushing letter was never sent. The only Justices from whom there are no resignation letters during this period are those who declined to serve (Harrison), those who died in office (Wilson and Iredell), and those whose service extended beyond the turn of the century (Cushing, Paterson, Chase, Washington, and Moore).¹⁶⁵

An unsent draft letter of the sort suggested in the preceding paragraph is entirely consistent with—indeed, it helps to make sense of—the letters John Adams wrote to Abigail Adams on February 2 and February 6, 1796. Recall that

161. 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 103.

162. It is an impressive organization focusing on local history and its connection to national, international, and maritime affairs. Scituate Historical Society, www.scituatehistoricalsociety.org (last visited Mar. 2, 2006).

163. See, e.g., Letter from William Cushing to George Washington (Nov. 18, 1789), *reprinted in* 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 29-30 (sent version in the National Archives (RG59, General Records of the Department of State, Acceptances and Orders for Commissions, 1789-1893, Box 1, 1789-1829); draft version at the Massachusetts Historical Society); Letter from William Cushing to George Washington (Feb. 2, 1792), *reprinted in* 1 DOCUMENTARY HISTORY, PART TWO, *supra* note 40, at 731 (in the George Washington Papers at the Library of Congress). See also 44 MASS. HIST. SOC. PROCEEDINGS 527 (1910/11) (expressing doubt about whether the February 2, 1796 letter was sent to Washington).

164. Letter from John Rutledge to George Washington (Dec. 28, 1795), *reprinted in* 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 100 (National Archives); Letter from John Blair to George Washington (Oct. 25, 1795), *reprinted in* 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 59 (National Archives); Letter from John Rutledge to George Washington, Mar. 5, 1791, *reprinted in* 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 23 (National Archives); Letter from Thomas Johnson to George Washington (Jan. 16, 1793), *reprinted in* 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 80 (National Archives).

165. Letter from Robert H. Harrison to George Washington (Jan. 21, 1790), *reprinted in* 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 42; Letter from James Iredell to Timothy Pickering (Aug. 25, 1798), *reprinted in* 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 52 (reporting death of Wilson); 1 DOCUMENTARY HISTORY, PART TWO, *supra* note 40, at 877-78 (newspaper report of death of Iredell); *Court Roster*, *supra* note 1.

on February 2, at the same time that his friend Cushing was drafting a resignation letter to Washington, John was reporting to Abigail that Cushing was going to refuse the office. But then it seems that Cushing's draft never turned into a final version to be delivered to Washington, because, as John reported to Abigail on February 6, Cushing was wavering about whether to retain the office of Chief Justice. Where the available record so strongly suggests that Cushing never sent the February 2 draft letter, the most reasonable conclusion is that Washington never received it.

Even if Washington did receive a version of the February 2 letter from Cushing, it is unlikely that the letter's arrival marked the end of Cushing's tenure as Chief Justice. First, it is important to bear in mind that under the English common law precedents that still dominated American law at the time, the resignation of a public officer did not take effect until it was accepted by the entity with authority to replace the resigning officer.¹⁶⁶ Cushing's draft is phrased as a request for permission to retain and resume his Associate-Justiceship, not as a rejection of office.¹⁶⁷ This suggests that Cushing was abiding by the English common-law tradition, even if he was not bound by it. Second, Washington had a consistently successful track record of resisting the demurrers of his Supreme Court appointees. Consider, for example, the protestations of Robert Hanson Harrison in 1789, and of Thomas Johnson in 1791,¹⁶⁸ and their eventual acquiescence to service.¹⁶⁹

Washington's efforts to persuade Cushing to be the Chief Justice surely would have benefited from the legislative climate with respect to circuit-riding. Congress had formed a committee to consider changes to the circuit-riding system—the part of the Court's work that most bothered and burdened Cushing—and it appeared to some observers that the time had finally come to relieve the Justices of circuit duties.¹⁷⁰ It is easy to imagine Washington encouraging Cushing, as he had encouraged Thomas Johnson (who shared Cushing's distaste for riding circuit) in 1791, to weigh the “probability of future

166. *Edwards v. United States*, 103 U.S. 471, 473-76 (1881).

167. Unlike, for example, John Jay's outright rejection of John Adams's offer of the Chief-Justiceship a few years later. *See supra* note 54 and accompanying text.

168. Letter from Robert H. Harrison to George Washington (Oct. 27, 1789), *reprinted in* 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 37-38; Letter from Thomas Johnson to George Washington (July 30, 1791), *reprinted in* 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 73-74.

169. Washington was accustomed to dithering by nominees who were, or who posed as being, reluctant to serve. *See, e.g.*, RON CHERNOW, *ALEXANDER HAMILTON* 310 (2004) (describing Thomas Jefferson's “dither[ing] through the winter about taking the State Department job” and not “accept[ing] until mid-February 1790”).

170. DWIGHT F. HENDERSON, *COURTS FOR A NEW NATION* 44 (1971).

relief from these disagreeable tours”¹⁷¹ when deciding whether to accept the office. But to no avail.¹⁷²

In summary, under the existing record—(1) the absence of any indication that Cushing’s February 2 draft letter ever left his hands or reached the President’s; (2) President Washington’s persistent and effective tendency to resist resignations; and (3) the Adams family correspondence (as well as reactions and letters of other cognoscenti) that meshes perfectly with the first two factors—it seems more likely than not that Cushing did not resign on February 2, leaving him free to preside as Chief Justice (as Deputy Clerk Wagner would duly note) the next day, and the day after.

B. Associate Justice After the Fact

Then there is the inconvenient fact that William Cushing remained on the Court as an Associate Justice for many years after the events of February 1796—without renomination, reconfirmation, reappointment, recommissioning, and a new round of oath-taking. Having thereby failed to requalify for the office of Associate Justice after his tenure as Chief Justice ended, Cushing must have either: (1) lawfully retained his Associate-Justiceship while briefly serving as Chief Justice, and therefore had no need for requalification, or (2) given up his Associate-Justiceship when he became Chief Justice, and then, having resigned the Chief-Justiceship, acted without lawful authority as an Associate Justice for almost fifteen years.¹⁷³ Within the first category there are two possibilities: (1a) he was Chief Justice and Associate Justice at the same time, or (1b) he never held the office of Chief Justice and the period in question—February 3 and 4, 1796—was just another one in which he served as acting Chief Justice.¹⁷⁴ Possibility 1b is the accepted status quo. If the arguments in this article fail to persuade, then 1b persists. That leaves possibilities 1a and 2, both of which are consistent with the arguments made in this article for a Cushing Chief-Justiceship.

Possibilities 1a and 2 will strike the modern reader as outrageous. With respect to possibility 1a, no one today would accept the idea of an Associate Justice retaining that office after ascending to the office Chief Justice, even for just a few days.¹⁷⁵ But under the law of incompatible offices (discussed more fully below) there was, and there remains, nothing illegal or improper about multiple office-holding under some circumstances. And in light of the

171. Letter from George Washington to Thomas Johnson (July 14, 1791), *reprinted in* 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 76.

172. 2 FLANDERS, *supra* note 2, at 46 (“Washington, for whom he entertained a profound veneration, endeavored to dissuade him from his purpose; but without avail.”). *See also* Francis R. Jones, *William Cushing*, 13 GREEN BAG 415, 416 (1901).

173. Recall that after his flirtation with the Chief-Justiceship in early 1796, he served as an Associate Justice until his death on September 13, 1810. *See Court Roster, supra* note 1.

174. Or perhaps he served for this brief period as a *de facto* Chief Justice. *See infra* notes 252-284 and accompanying text.

175. *Cf.* Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1047-48 & n.7 (1994) (discussing joint office holding by members of the federal government).

circumstances of the federal government and federal law in general and the Supreme Court in particular in early 1796, Cushing's brief combination of the Associate-Justiceship and the Chief-Justiceship was not only legal at the time, but perhaps even a good idea as a matter of public policy. Similarly, with respect to possibility 2, it is hard to believe that a defect in a Supreme Court Justice's credentials could go undetected for a decade-and-a-half. Also, the disruption generated by such a disclosure about a sitting Justice today could be substantial. But such things did happen—consider the examples of the “oathless” Justices described in Part II.C.3 above—and there remains some unmeasurable chance that they are happening now but will not be detected until sometime in the future. It is this sort of inconvenient circumstance that the *de facto* office doctrine (also discussed more fully below) evolved to address: even if Cushing's reoccupation of the office of Associate Justice was unlawful, the *de facto* officer doctrine permits his work in that capacity—and thus the reasonable reliance of those affected by his work and of society in general on the propriety and finality of that work—to remain undisturbed.

Part II.B.1 below treats possibility 1a and the question of incompatible offices. It explains how and why Cushing's retention of both his Associate-Justiceship and his Chief-Justiceship for a few days was legal and reasonable at that time, and under the prevailing circumstances. Part II.B.2 below treats possibility 2 and the question of *de facto* office-holding. It explains how Cushing's *acts* as an Associate Justice after he resigned the Chief-Justiceship remain valid, even if his *office-holding* as an Associate Justice does not. In short, the incompatibility analysis in Part II.B.1 is conducted from the perspective of Cushing and his contemporaries: if his occupation of two seats on the Court did not create objectionable incompatibilities under the facts, circumstances, and law of that time, then he was a lawful Associate Justice after he resigned the Chief-Justiceship. If his offices were incompatible, and as a result he lost his Associate-Justiceship, then it is necessary to proceed to the *de facto* officer analysis in Part II.B.2, which is conducted from today's perspective. Then the question becomes whether the circumstances of Cushing's re-occupation of the Associate-Justiceship in 1796, combined with the passage of time down to the present, justify reliance on his apparent occupation of the office of Associate Justice and thus the validation of his work as Associate Justice, but not his office.

1. *A Compatible Officer*

Did Cushing's simultaneous occupation of the Chief-Justiceship and an Associate-Justiceship on the Supreme Court violate some law—constitutional, statutory, or common—governing the holding of multiple offices? If it did, then his entry into the office of Chief Justice would have automatically terminated his Associate-Justiceship. However, while the answer today would almost certainly be yes, the answer in 1796 was probably no, and thus Cushing would have been free to hold both offices. Five factors point toward this conclusion: (1) a dearth of constitutional and statutory prohibitions on multiple office-holding by the Justices, accompanied by a viable constitutional remedy for any abuse of multiple offices; (2) numerous instances of statutory commands to, and

appointments of, the Justices to engage in multiple office-holding during the early years of the Republic, especially the Judiciary Act of 1789; (3) the more general “flexibility in staffing national offices than we have come to think appropriate”;¹⁷⁶ (4) the swirl of events buffeting the Supreme Court in early 1796; and (5) Cushing’s own reputation and experience. The essential point, though, is that in 1796 it would have looked like just another in a long and continuing line of odd but lawful expedients imposed on a compliant and reliable Supreme Court by the President and Congress.

In January 1796, George Washington was in a bind over the Supreme Court.¹⁷⁷ Two important cases presenting pressing questions about the constitutionality of a federal tax scheme¹⁷⁸ and the payment of debts owed to British creditors¹⁷⁹ would be on the docket at the February Term. The Court had a great deal of other work to do as well (at thirty-five days of sittings during February and March, it would turn out to be by far the longest Term held by the Court during its first decade¹⁸⁰). But in January it looked as though the Court might well fail to reach a quorum (four of the six members of the Court¹⁸¹), thus precluding the conduct of any Court business. At that moment, the Court had only four members—Cushing, Wilson, Iredell, and Paterson—and given that the unreliability of transportation and the vicissitudes of weather and health almost always prevented at least one member of the Court from attending a Term or sitting on any particular day, there was good cause for concern.

Washington’s predicament was not entirely of his own making. He had tried to fill one of the two openings, the Chief-Justiceship, with John Rutledge, but the Senate would not consent. Seeing the writing on the wall, the President had begun work on a replacement for Rutledge even before the Senate voted. Seeking a more reliably confirmable nominee, Washington used Henry Lee, the former governor of Virginia, to sound out Patrick Henry. Quite naturally, after the Rutledge fiasco and the attention being paid more generally to “the embarrassments experienced by the Executive in filling the high offices of ye Government,”¹⁸² Washington wanted assurances that the volatile Henry would accept the nomination.¹⁸³ But Henry was mum, and as January wore on, Washington wrote to Lee that the situation was becoming “embarrassing in the

176. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 541 n.67 (2004).

177. James R. Perry, *Supreme Court Appointments, 1789-1801: Criteria, Presidential Style, and the Press of Events*, 6 J. EARLY REPUBLIC 371, 384-97 (1986). See also 7 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789-1800, CASES: 1796-1797, at 1-2 (Maeva Marcus et al. eds., 2003).

178. *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796).

179. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

180. See 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 255-73.

181. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

182. Letter from Henry Tazewell to James Monroe (Dec. 26, 1795), *quoted in* Perry, *supra* note 177, at 393.

183. Perry, *supra* note 177, at 393.

extreme.”¹⁸⁴ By late January, with the February Term due to open on the first Monday of the month, Washington was still in search of a confirmable nominee. Now, however, he had no choice but to narrow his search to candidates who were already in or near Philadelphia and could be counted on to show up at or near the beginning of the Term.¹⁸⁵

All of which made Cushing a natural, if not ideal, choice for Chief Justice.¹⁸⁶ He was available and uncontroversial, as his eventual unanimous confirmation would show. Equally important, he was a known and reliable quantity to an extent never to be repeated in the history of the Court: at the time Washington nominated him to be Chief Justice, Cushing already had a substantial track record as acting Chief Justice, having presided over the Court for almost as long as Jay, and substantially longer than Rutledge. On the other hand, Washington had good reason to fear that Cushing would turn down the job. After Jay resigned as Chief Justice in 1795 and speculation arose regarding the possibility that Washington would promote an Associate Justice to Chief Justice, a rumor circulated in the capital (courtesy of Washington’s own Attorney General at the time, William Bradford) that “it is even supposed by some that neither [Cushing] nor his friends for him would desire it.”¹⁸⁷ In addition, recall that Cushing was old, sick, and tired.

And so, weighing the urgency of the situation and the competence, convenience, and certainty a Cushing nomination promised, “perhaps in

184. Washington also had enough unavoidable battles with Congress brewing or boiling—the continuing struggle over the Jay Treaty, for example—to make minimizing conflict an unusually important factor in his selection of nominees.

185. The presidential concerns described here also explain Washington’s nomination of Samuel Chase of Baltimore to fill the other open seat on the Court (from which Associate Justice John Blair had resigned in October 1795), on the same day that he nominated Cushing to be Chief Justice. 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 59, 101, 112. That seat had to remain open until Washington had worked out his arrangements for the Chief-Justiceship, if for no other reason than his need to preserve some geographical balance on the Court, and that could not be determined until he settled on someone as Chief Justice.

186. He was not the only person for the job, as Washington’s successful nomination of Oliver Ellsworth to replace Cushing as Chief Justice shows. On the other hand, it took Washington some considerable time to place Ellsworth in the job (time that the President did not feel he could afford from the perspective of late January 1796), and even when he did, Ellsworth showed less willingness to actually do the work of presiding over the Court than Cushing did. This was yet another instance of the lifelong pattern of substitute leadership by Cushing that had begun with his service in Massachusetts in the absence of Chief Justice John Adams and ratifying convention president John Hancock. Cushing, *Revolutionary Conservative*, *supra* note 144, at 101, 105, 116-17, 310 n.1; 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 2, 180 (Jonathan Elliot ed., 2d ed. 1888) (1836) [hereinafter 2 THE DEBATES]; William O’Brien, *Justice Cushing’s Undelivered Speech on the Federal Constitution*, 15 WM. & MARY Q. (3d ser.) 74, 74-75 (1958). Ellsworth was commissioned as Chief Justice on March 4, 1796, took his oaths and appeared in Court to take his seat on March 8, and then did not return to work until the last day of the Term. 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 121-22, 269, 272. Cushing and, for one day, Wilson presided in Ellsworth’s absence. *Id.* at 269-71.

187. Letter from William Bradford to Alexander Hamilton (July 2, 1795), *quoted in* Perry, *supra* note 177, at 385.

desperation he nominated William Cushing.”¹⁸⁸ The President, who could be a very effective manipulator of men and their sentiments when circumstances called for it,¹⁸⁹ engineered Cushing’s appointment in a way that made it all but impossible for Cushing to turn him down. Recall the scene from Van Santvoord’s 1854 biography of Oliver Ellsworth:

The first intimation Judge Cushing received of his appointment was at a diplomatic dinner given by the President. In seating the guests, Washington, with the stately etiquette of the day, bowed to Judge C., and pointing to a vacant place near him, said, “The Chief-Justice of the United States will please take the seat on my right.”¹⁹⁰

Cushing could easily have demurred on grounds of age or health or even lack of interest if the invitation had come in private or by mail, as his Associate-Justiceship had. But how could he humiliate his President, especially in front of foreign dignitaries, by rejecting such a great honor? Impossible. As described above, the result was almost everything Washington had hoped. Cushing, having taken the seat on the President’s right, did not reject the office of Chief Justice. He even served for a couple of days before resigning.

Washington, surely aware that the factors described above might move Cushing to eventually bail out on the Chief-Justiceship notwithstanding his public acquiescence in the staged appointment at the diplomatic dinner,¹⁹¹ appears to have taken at least one step to insure that he would not lose yet another member of the Court. He did not nominate a replacement to fill Cushing’s seat as an Associate Justice. By 1796, Washington had already settled into a pattern of moving as quickly as he could to fill vacant offices, including combining nominations promoting current officeholders with nominations for those officeholders’ successors.¹⁹² But, when he nominated Cushing to be Chief Justice, he did no such thing.¹⁹³ Nor did he nominate a replacement once Cushing had accepted the post, or even when Cushing began sitting as Chief

188. CASTO, *supra* note 139, at 107.

189. *See, e.g.*, RICHARD BROOKHISER, *FOUNDING FATHER: REDISCOVERING GEORGE WASHINGTON* 43-45 (1996) (describing his 1783 speech to the Continental Army).

190. VAN SANTVOORD, *supra* note 147, at 245.

191. Supreme Court nominees surprise their presidential sponsors far less frequently than the “myth of the surprised President” might suggest. *See* LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* 50-92 (1986).

192. *See, e.g.*, 1 Sen. Exec. J. 180 (June 12, 1795); *id.* at 173-74 (Feb. 25, 1795); *id.* at 172-73 (Feb. 24, 1795); *id.* at 166-67 (Dec. 29, 1794); *id.* at 164 (Dec. 10, 1794); *id.* at 156 (May 12, 1794); *id.* at 153-55 (May 9, 1794); *id.* at 147 (Jan. 24, 1794); *id.* at 140 (Dec. 9, 1793); *id.* at 132-33 (Feb. 22, 1793); *id.* at 126 (Nov. 20, 1792); *id.* at 123-24 (May 8, 1792); *id.* at 117 (Apr. 9, 1792); *id.* at 111 (Mar. 12, 1792); *id.* at 90 (Nov. 28, 1791); *id.* at 90 (Nov. 29, 1791); *id.* at 89 (Nov. 14, 1791); *id.* at 88 (Nov. 7, 1791); *id.* at 86-87 (Nov. 1, 1791). *See also* John M. Harmon, *Presidential Appointees—Resignation Subject to the Appointment and Qualification of a Successor*, in 3 *Op. Off. Legal Counsel* 152, 158, 167-69 (Leon Ulman ed., 1982).

193. 1 Sen. Exec. J. 198 (Jan. 26, 1796).

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Justice on February 3.¹⁹⁴ In all likelihood, Washington was as aware as John Adams that in early February:

Judge Cushing [was] wavering, sometimes he would and sometimes he would not be C.J. This will give the P[resident] some trouble.¹⁹⁵

By quietly neglecting to simultaneously nominate an Associate Justice to replace Cushing, Washington ensured that whether Cushing settled in the Chief-Justiceship or not, he would be able to remain on the Court.¹⁹⁶

Cushing must have resigned late on February 4 or early the next day, because both the rough minutes and the later fine minutes of the Court record him as an Associate Justice on February 5.¹⁹⁷ It is clear from his February 2 draft resignation letter, in which he “beg[s] leave to retain the place I have hitherto held [the Associate-Justiceship], on bench during the little time I may be able, in some measure, to perform the duties of it,”¹⁹⁸ that Cushing believed that he still held (and hence could “retain”) his seat as an Associate Justice. He acted on that belief, and served undisturbed as an Associate Justice for another fourteen years.

From a twenty-first-century perspective, this business of one person holding two seats on the Supreme Court, even for a few days, seems quite wrong. Why was it not so in 1796? Why did anyone in the Senate fail to object when Cushing retained his Associate-Justiceship? After all, the Senators were well-aware that he had occupied and then resigned the Chief-Justiceship.

First, as a constitutional matter, it may have been unorthodox, but it was not out of bounds. The Constitution addresses the subject of incompatible offices explicitly when it comes to federal legislators and presidential electors. Beyond that, it has nothing to say about multiple office-holding in the federal government. It bars members of Congress from holding other federal jobs: “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”¹⁹⁹ It also bars all federal officials from serving as members of the presidential Electoral College.²⁰⁰ Then and now the

194. See generally 1 Sen. Exec. J. 198-203 (Jan. 26–Mar. 4, 1796).

195. See Letter from John Adams to Abigail Adams (Feb. 6, 1796), available at <http://www.masshist.org/digitaladams/aea/cfm/doc.cfm?id=L17960206ja>.

196. Although it is true that if Cushing was in possession of the Associate-Justiceship, Washington lacked the power under the Constitution to take it away, see *infra* note 243, it is likely that simultaneous acceptances by Cushing as Chief Justice and some other person as Associate Justice in his place would have foreclosed a return by Cushing to his old seat. Reasonable observers then and now would have inferred from Cushing’s acceptance of the Chief-Justiceship with full knowledge that someone else was simultaneously moving into his old seat that Cushing was relinquishing his old position in favor of the new one. Conversely, Washington’s decision not to follow such a course permits an inference, albeit perhaps a weaker one, that he and Cushing understood the opposite to be true.

197. 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 256, 408.

198. *Id.* at 103.

199. U.S. CONST. art. I, § 6, cl. 2.

200. U.S. CONST. art. II, § 1, cl. 2. A third incompatibility clause prevents any federal officer from accepting any “present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State” with the consent of Congress. U.S. CONST. art. I, § 9.

view that has prevailed is that the expression of these prohibitions implies that they are the only such limitations mandated by the Constitution.²⁰¹ And so the only federal jobs from which the Constitution barred members of the Supreme Court were Elector, Representative, and Senator.

Moreover, the constitutional argument against extra-judicial office-holding by members of the Supreme Court (such as it was) had been fully ventilated less than two years before Cushing's ascension to the Chief-Justiceship. President Washington's nomination of Chief Justice John Jay to the post of Envoy Extraordinary to Great Britain on April 16, 1794, sparked a sharp debate in the Senate and in the press over the propriety of appointing a sitting member of the Supreme Court to another federal post.²⁰² After a couple of days of deliberation, however, the Senate rejected the following motion:

That to permit Judges of the Supreme Court to hold at the same time any other office or employment, emanating from and holden at the pleasure of the Executive, is contrary to the spirit of the Constitution, and, as tending to expose them to the influence of the Executive, is mischievous and impolitic.²⁰³

Then, the Senate immediately consented to Jay's appointment as "Envoy Extraordinary of the United States to his Britannic Majesty" by a vote of 18 to 8.²⁰⁴

While the outcome may have frustrated critics of the Washington Administration and its stance on relations with Great Britain,²⁰⁵ it should have come as no surprise to them or anyone else familiar with the fate of proposals to constitutionalize restrictions on multiple office-holding by federal judges in general, and Supreme Court Justices in particular. Similar proposals had been made and ignored at the Constitutional Convention of 1787,²⁰⁶ and unsuccessfully proposed by several of the state conventions called to ratify the

201. See, e.g., 1 WARREN, *supra* note 21, at 167-68 & n.1 (in the wake of appointment of Chief Justices Jay and Ellsworth as envoys to Great Britain and France respectively, several unsuccessful proposals are made to amend the Constitution to in effect extend the Article I, Section 6 incompatibility rule to Supreme Court Justices); *Mistretta v. United States*, 488 U.S. 361, 397-98 & n.21 (1989) ("[W]e find it at least inferentially meaningful that at the Constitutional Convention two prohibitions against plural officeholding by members of the Judiciary were proposed, but did not reach the floor of the Convention for a vote."). See also Mark Tushnet, *Dual Office Holding and the Constitution: A View from Hayburn's Case*, in ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, at 206-07 (Maeva Marcus ed., 1992).

202. 1 Sen. Exec. J. 150 (Apr. 16, 1794); 1 WARREN, *supra* note 21, at 118-21.

203. 1 Sen. Exec. J. 152 (Apr. 19, 1794).

204. *Id.*

205. See, e.g., 1 WARREN, *supra* note 21, at 120-21.

206. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 244 (Max Farrand ed., 1937) ("[N]one of the Judiciary during the time they remain in Office be capable of receiving or holding any other office or appointment during their time of service, or for—thereafter."); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 335, 341-42 (Max Farrand ed., 1937) ("No person holding the office of President of the U.S., a Judge of the Supreme Court, Secretary of the Department of Foreign Affairs, of Finance, of Marine, or of—, shall be capable of holding at the same time any other office of Trust or Emolument under the U.S. or an individual State . . .").

Constitution.²⁰⁷ Furthermore, no one at the time (or since, for that matter) presented even a single instance of any sort of bad behavior by any of the Justices who had held additional offices.²⁰⁸ These developments or, rather, non-developments, reflected not so much a reasoned conclusion that there was nothing to fear from corrupt or tyrannical judges, but rather a preoccupation on the part of the Framers with avoiding (at the national level) the kinds of abuses that the post-Revolutionary states had suffered at the hands of their own over-powerful legislatures.²⁰⁹

The President and the Senate could have had second thoughts about the constitutional propriety of placing too many offices in the hands of a member of the Supreme Court. After Jay's confirmation as envoy to Great Britain, James Madison expressed just such a hope. Writing to Thomas Jefferson, he suggested that Jay's fate might have been different if the Senate had known in advance that he would retain the Chief-Justiceship after he occupied the office of Envoy Extraordinary:

The appointment of [Jay] would have been difficult in the Senate, but for some adventitious causes. . . . As a resignation of his Judiciary character might, for anything known to the Senate, have been intended to follow his acceptance of the Ex[ecutive] trust, the ground of incompatibility could not support the objections, which, since it has appeared that such a resignation was no part of the arrangement, are beginning to be pressed in the newspapers. If animadversions are undertaken by skillful hands, there is no measure of the Ex[ecutive] administration, perhaps, that will be found more severely vulnerable.²¹⁰

207. For example, the Maryland convention proposed an amendment to the Constitution providing, "[t]hat the federal judges do not hold any other office or profit, or receive the profits of any other office under Congress, during the time they hold their commission." 2 DEBATES, *supra* note 186, at 550-51. The purpose of this amendment being, "to secure the independence of the federal judges, to whom the happiness of the people of this continent will be so greatly committed by the extensive powers assigned to them." *Id.* The Virginia convention proposed that "[t]he Judges of the federal Court shall be incapable of holding any other Office, or receiving the Profits of any other Office, or Emolument under the United States or any of them." 3 THE PAPERS OF GEORGE MASON 1725-1792, at 1057 (Robert A. Rutland ed., 1970). A similar proposal, limited to the Supreme Court was proposed but not adopted at the New York ratifying convention. *Id.* at 409 ("Resolved, as the opinion of this committee, that no judge of the Supreme Court of the United States shall, during his continuance in office, hold any other office under the United States, or any of them.").

208. Which is not to say that the Justices enjoyed universal praise for their work on these extra-judicial projects. For example, John Rutledge's criticism of the Jay Treaty was so harsh that it moved Federalist Senators to vote against his nomination as Chief Justice. See *supra* notes 136-137 and accompanying text.

209. See Victoria Nourse, *Toward a "Due Foundation" for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447, 456-63 (1996); Gerhard Casper, *The Judiciary Act of 1789 and Judicial Independence*, in ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, at 286 (Maeva Marcus ed., 1992); Calabresi & Larsen, *supra* note 175, at 1052-77, 1121-46.

210. 1 WARREN, *supra* note 21, at 119 (quoting James Madison).

But Madison was wrong. If the Senate felt a change of mind, or felt that it had been disappointed by Jay on the question of resignation of the old office upon his occupation of the new, it had opportunities to show a new point of view with the Cushing nomination to be Chief Justice in 1796 and with the Ellsworth nomination to be Envoy Extraordinary and Minister Plenipotentiary to France in 1799.²¹¹ Faced with the prospect of an Associate Justice and Chief Justice Cushing or a Chief Justice and Envoy Extraordinary Ellsworth, Senators following Madison's thinking surely would have demanded some sort of assurance that the nominee would relinquish his previous post upon taking up his new one. No one sought such a guarantee, or even raised the issue, and both Cushing and Ellsworth were confirmed to their new offices without making any commitments about the disposal of their pre-existing offices. Still, not everyone was happy, and new proposals for statutes and constitutional amendments to restrict multiple office-holding by judges and Justices cropped up occasionally from 1800 and 1828. This suggests a consensus even among critics of multiple office-holding that the Constitution and laws as they stood did not bar the practice, and their uniform failure suggests with equal force that there was no strong felt need to forbid it.²¹²

Thus, neither "the spirit of the Constitution"²¹³ nor the Constitution's specific restrictions on multiple office-holding placed obstacles in the way of Cushing's simultaneous occupation of the offices of Associate Justice and Chief Justice, or in the way of official recognition of his Chief-Justiceship today.²¹⁴

211. 1 Sen. Exec. J. 318 (Feb. 27, 1799).

212. 1 WARREN, *supra* note 21, at 167-68 & n.1.

213. 1 Sen. Exec. J. 152 (Apr. 19, 1794).

214. In addition, the perfect harmlessness of the Supreme Court during Cushing's Chief-Justiceship makes it extremely unlikely that anyone, then or now, could allege an "injury . . . [to] a concrete and particularized legally protected interest" of the sort necessary to satisfy the Court's standing requirements. *McCconnell v. Fed. Election Comm'n*, 540 U.S. 93, 227 (2003). *See also* Calabresi & Larsen, *supra* note 175, at 1049 & n.12 (standing for Incompatibility Clause challenges after *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974)); 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 124-26 (3d ed. 2000); *Ex parte Levitt*, 302 U.S. 633 (1937). The explanation of the *Levitt* decision in *United States v. Richardson*, 418 U.S. 166, 177 (1974), also strongly suggests that no one would have standing, especially at this late date, to challenge the validity of Cushing's Associate-Justiceship, let alone the validity of treating that Associate-Justiceship as *de facto*:

Ex parte Levitt, supra, is especially instructive. There Levitt sought to challenge the validity of the commission of a Supreme Court Justice who had been nominated and confirmed as such while he was a member of the Senate. Levitt alleged that the appointee had voted for an increase in the emoluments provided by Congress for Justices of the Supreme Court during the term for which he was last elected to the United States Senate. The claim was that the appointment violated the explicit prohibition of Art. I, § 6, cl. 2. of the Constitution. The Court disposed of Levitt's claim, stating:

It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he *has sustained or is immediately in danger of sustaining a direct injury* as a result of that action

Nor was Cushing's multiple office-holding barred by statute. In fact, during the years preceding Cushing's confirmation as Chief Justice, Congress and the President had been busy generating substantial precedent for multiple office-holding by Supreme Court Justices. So much so that it is plausible to suppose that Cushing's brief retention of his Associate-Justiceship while he served in and wavered over the office of Chief Justice would have been viewed as just another oddity of business as usual for the multi-tasking Justices of the early Court.

Most prominently, the Judiciary Act of 1789 required the Justices to serve in more than one judicial capacity. Section 4 of the 1789 Act created three judicial circuits (eastern, middle, and southern) and provided:

that there shall be held annually in each district of said circuits, two courts, which shall be called Circuit Courts, and shall consist of *any two justices of the Supreme Court*, and the district judge of such districts, any two of whom shall constitute a quorum.²¹⁵

The same section barred district judges from "vot[ing] in any case of appeal or error from his decision."²¹⁶ But no provision of the 1789 Act (Act) prevented Justices sitting on the Supreme Court from voting on appeals from their own decisions made on circuit. And they did.

The Justices promptly protested, raising in 1790 the same sort of concern about Section 4 of the Act that Madison would share with Jefferson in 1794 in response to the addition of a diplomatic office to Chief Justice Jay's portfolio of duties. In a draft of a "proposed Letter from us to the President," circulated by Jay to the Associate Justices in September 1790, he wrote:

The Circuit Courts established by the Act, are Courts inferior and subordinate to the Supreme Court. They are vested with original Jurisdiction in the Cases from which the Supreme Court is excluded; and, to us, it would appear very singular, if the Constitution was capable of being so construed, as to exclude the Court, but yet admit the Judges of the Court. We, for our Parts, consider the Constitution as plainly opposed to the Appointment of the same Persons to both Offices nor have we any Doubts of their legal incompatibility.²¹⁷

and it is not sufficient that he has merely a general interest common to all members of the public.

302 U.S. at 634 (emphasis added). Of course, if Levitt's allegations were true, they made out an arguable violation of an explicit prohibition of the Constitution. Yet even this was held insufficient to support standing because, whatever Levitt's injury, it was one he shared with "all members of the public." *Id.* at 177-78 (footnotes omitted).

215. Act of Sept. 24, 1789, ch. 20, 1 Stat. 74-75 (emphasis added).

216. *Id.* See also *id.* at 79 (providing that "the circuit courts shall also have appellate jurisdiction from the district courts. . .").

217. 2 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1900, at 90-91 (Maeva Marcus et al. eds., 1988).

The letter went on to argue that Section 4 also violated the common law incompatibility doctrine.²¹⁸

Traditionally, this doctrine is understood to consist of two fairly broad prohibitions, plus one catch-all. Incompatibility results from an “inconsistency” in the functions of two offices in which (a) one office is subordinate to another (and thus an official would be reviewing his or her own decisions); (b) the two offices have conflicting responsibilities (and thus an official would be hamstrung by institutional, not personal, conflicts of interest); and, the catch-all, (c) “public policy would make it improper for one person to perform both functions.”²¹⁹ Given the vagueness of these terms, “[m]ost courts . . . content themselves with a discussion of particular situations that have been considered as creating incompatibility.”²²⁰ And so did Jay. Quoting extensively from Matthew Bacon, one of the great early treatise-writers, Jay invoked Bacon’s formulation of the prohibitions summarized above, and then continued with selections from Bacon’s litany of particular situations that had created incompatibility. Most telling was the example involving two incompatible judicial offices: “a Judge of the Common Pleas, made a Judge of the King’s Bench.”²²¹ Jay and his colleagues had the common law on their side. The incompatibility doctrine barred them from holding two judicial offices, one of which reviewed decisions of the other.

Under the incompatibility doctrine, the implication of this argument was obvious: occupation of their positions on the Supreme Court automatically deprived the Justices of their authority to sit on circuit. This was the case because the well-settled remedy for the holding of incompatible offices was the automatic forfeiture of the prior (and presumably inferior) office: “if the offices are incompatible, acceptance of the second vacates the first.”²²² Of equal importance to Cushing’s situation, “an officer’s resignation of the second after, by its acceptance, he has vacated the first, cannot restore him or otherwise affect the first.”²²³ But Congress and the President refused to accept the Justices’

218. *Id.* at 91. See also 1 HAMPTON L. CARSON, *THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 157-58 (2d ed. 1902). Cushing was familiar with the doctrine, having addressed it when he and other Massachusetts jurists served simultaneously as judges and presidential electors in 1789. See Cushing, *supra* note 144, at 323-24.

219. Memorandum from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, to Arnold Intrater, Gen. Counsel, Office of White House Admin., 3-4 (Mar. 1, 1988). See also, e.g., FLOYD R. MECHEM, *THE LAW OF PUBLIC OFFICES AND OFFICERS* 269-70 (1890); 63C AM. JUR. 2D § 62 et seq., *Public Officers and Employees* (1997 & Supp. 2004).

220. Frank W.R. Hubert, Jr., *Constitutional Restraints on Dual Office-Holding and Dual Employment in Texas—A Proposed Amendment*, 43 TEX. L. REV. 943, 943 (1965).

221. 2 DOCUMENTARY HISTORY, *supra* note 217, at 91. As the editors of 2 DOCUMENTARY HISTORY suggest, this passage is a lightly edited version of Matthew Bacon’s commentary on “Offices and Officers . . . Of the Manner of executing them; and herein the Offices that are incompatible.” See 3 MATTHEW BACON, *A NEW ABRIDGMENT OF THE LAW* 736-37 (4th ed. 1778).

222. See John C. Bacon, *The Serviceman’s Right to Retain His State Office*, 13 GEO. WASH. L. REV. 453, 465-66 (1945) (collecting cases); Joseph F. Barbano, *Dual Office Holding—Federal, State and Municipal*, 10 ST. JOHN’S L. REV. 83, 83 (1935) (“The common law rule . . . is that acceptance by a public office of a second incompatible office terminates *per se* the ability of the acceptor to hold the first office as effectively as would a resignation therefrom.”) (collecting cases).

223. 3 BACON, *supra* note 221, at 466.

invocation of incompatibility, and thus they were stuck with their circuit duties. Likewise, because Cushing's two offices were compatible, he did not resign his Associate-Justiceship by operation of law, nor did his sojourn in the chair of the Chief Justice bar his return to his seat as Associate Justice.

Whether a final draft of this letter reached Washington, or perhaps Attorney General Edmund Randolph,²²⁴ is an open question. But the essential point about the incompatibility of the offices of Justice and circuit judge was made repeatedly in the early 1790s. Randolph addressed the issue in his December 27, 1790, report to the House of Representatives on the new judiciary system established by the 1789 Act, and the Justices raised it again in an August 9, 1792 letter to Washington that the President forwarded to Congress in November of that year.²²⁵ Individual members of the Court also continued to campaign off and on for the elimination of what they believed to be the incompatible (and knew to be inconvenient and uncomfortable) duties as circuit judges.²²⁶ What is clear is that no version of this incompatibility argument made by any of the Justices or the executive branch in any forum had any meaningful effect.²²⁷ When Cushing became Chief Justice in 1796, the Justices were still riding circuit, and they were still riding circuit when he died in 1810.

It probably is no exaggeration to say that the Judiciary Act of 1789 was the single most sweeping rejection of the incompatibility doctrine in the history of American law. But it was only the most extreme example of what had become, by 1796, a common practice of imposing additional duties on Supreme Court Justices. Congress and the President assigned numerous other offices to members of the Court during the 1790s, and while there were complaints in Congress and in the press from time to time about incompatible offices and improper concentrations of power, nothing came of them.

Thus, federal law placed no obstacles in the way of Cushing's simultaneous occupation of the offices of Associate Justice and Chief Justice. Equally significant was the aggressive willingness of the President and Congress to override traditional concerns about incompatible offices in order to allocate a wide range of judicial and other tasks to the Justices created an environment in which Cushing's Chief-and-Associate-Justiceship verged on unexceptional.

But only verged. No doubt Cushing's occupation of the offices of Chief Justice and Associate Justice strained the concept of compatible office-holding even further than many of the other combinations in which members of the early Court engaged. There was the other-judicial service under the 1789 Act, and

224. 4 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800: ORGANIZING THE FEDERAL JUDICIARY: LEGISLATION AND COMMENTARIES 123 (Maeva Marcus ed., 1992).

225. 1 AMERICAN STATE PAPERS 21, 24, 77-78 (1790).

226. The Justices enjoyed a hiatus from circuit duty during the short-lived operation of the "Midnight Judges" Judiciary Act of Feb. 13, 1801, 2 Stat. 89, *repealed by* Act of Mar. 8, 1802, 2 Stat. 132.

227. See FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 14-23 (1927); 4 DOCUMENTARY HISTORY, *supra* note 224, at 124-27, 200-03. See also *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803).

there was the extra-judicial service under a variety of statutes and appointments, but there was no other instance of one judge holding two seats on the same court.

It is against this backdrop that Cushing's dual office-holding must be evaluated under the only remaining measures of incompatible offices—the three prongs of the common law doctrine. The fact-bound murkiness of the doctrine makes it harder to be sure of any judgment, but it seems more likely than not that the offices of Chief and Associate Justice were not incompatible at that time and under those circumstances.

With respect to the first prong of the incompatibility doctrine—whether one office is subordinate to another, and thus an official would be reviewing his or her own decisions—Cushing's two offices passed muster. The Chief Justice had no power to review the decisions of Associate Justices, and vice versa.²²⁸ With respect to the second prong—whether the two offices have conflicting responsibilities, and thus an official would be hamstrung by institutional, not personal, conflicts of interest—the Chief- and Associate-Justiceships could not be more compatible. Being a good judge is no different when one is a Chief Justice than it is when one is an Associate Justice. A decision in one capacity would invariably be identical in the other. It is this extreme absence of conflict, however, that makes the third prong more troubling—the question being whether “public policy would make it improper for one person to perform both functions.”²²⁹ During a 1789 controversy over Cushing's own simultaneous service as Chief Justice of the Supreme Judicial Court of Massachusetts and as a presidential elector in the first national election under the new federal constitution, Cushing himself had opined that the law of incompatible offices was in part “designed to prevent one man from holding several offices to the exclusion of others.”²³⁰

At first blush, holding two seats on the Supreme Court seems like a perfect example of that forbidden practice, but not so in context. In general terms and in particular, Cushing's odd combination of offices fit into a small but important category of public service in the early Republic.

In general, the times permitted, even called for, more flexibility about the allocation of scarce human resources to their highest and best uses. As a result, stranger and more plainly unconstitutional office-holders worked in the same federal government as Cushing. These expedients—which would surely be rejected out of hand today—were in no small part due to the fact that the federal government in the late eighteenth and early nineteenth centuries was a shoestring

228. A single exception, apparently a creature of the twentieth century, involves the power of any member of the Court sitting in chambers to grant certain types of relief even when another Justice has already denied it. *Compare, e.g.,* *Spenkelink v. Wainwright*, 442 U.S. 1301 (1979) (Rehnquist, J., in chambers), *with* *Spenkelink v. Wainwright*, 442 U.S. 1308 (1979) (Marshall, J., in chambers). *See also* Cynthia Rapp, *Introduction*, in 1 *A COLLECTION OF IN CHAMBERS OPINIONS BY THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES* v, vi (Cynthia Rapp ed., 2004).

229. *See supra* note 217 and accompanying text.

230. Cushing, *supra* note 144, at 323-24. The other generally accepted policy grounds for the incompatibility doctrine—preventing corruption and preserving separation of powers—are not relevant to Cushing's situation.

operation that was, of necessity, sometimes and in some respects looser and looser than our modern government tends to be.²³¹ As Professor Mark Tushnet aptly explained John Marshall's retention of the office of Secretary of State for a short period of time after he became Chief Justice in early 1801: "the rudimentary structure of the national government required more flexibility in staffing national offices than we have come to think appropriate."²³² The early Presidents, Congresses, and Courts had little choice, then, but to work out at the same time both the long-term, high-falutin' questions of law, policy, and the structure of the federal government and the day-to-day, down-and-dirty questions about how to keep the ship not only true, but afloat. This was as true for office-holding as it was for any other aspect of the new government. The results, in addition to the diplomatic Chief Justices and the 1789 Act, included the following:

In 1797, the House of Representatives seated William C.C. Claiborne of Tennessee despite the fact that he was only 22 years old at the time—three years under the Constitutional minimum.²³³

In 1801, Representative Samuel Smith of Maryland served as Secretary of the Navy under President Thomas Jefferson, in the face of the Constitutional prohibition on such legislative dual office-holding.²³⁴

In 1801, John Marshall served simultaneously as Secretary of State under Jefferson, and as Chief Justice.²³⁵

231. It might be more fair to say that the early federal government was flexible in areas where modern government has become relatively rigid—qualifications and technicalities of office-holding, for example—and relatively rigid in areas where modern government has become quite relaxed—the extent of federal power over the states, for example. *Compare, e.g.*, 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 386-87 & n.5 (3d ed. 1858), with Susan M. Davies, *Congressional Encroachment on Executive Branch Communications*, 57 U. CHI. L. REV. 1297 (1990).

232. Tushnet, *supra* note 176, at 541 n.67.

233. JOSEPH T. HATFIELD, WILLIAM CLAIBORNE: JEFFERSONIAN CENTURION IN THE AMERICAN SOUTHWEST 21 (1976); U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years.").

234. 5 APPLETON'S CYCLOPAEDIA OF AMERICAN BIOGRAPHY 588-89 (James Grant Wilson & John Fiske eds., 1888); Montgomery N. Kosma, *Our First Real War*, 2 GREEN BAG 2D 169, 171 & n.10 (1999); U.S. CONST. art. I, § 6, cl. 2 ("[N]o Person holding an Office under the United States, shall be a Member of either House during his Continuance in Office."). *But see* 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 90-91 (nullification of February 27, 1793 nomination of William Paterson to be an Associate Justice because "he was a member of the Senate when the law creating that Office was passed, and . . . the time for which he was elected is not yet expired," and renomination on March 3, after his term expired).

235. 1 CARSON, *supra* note 218, at 192 ("discharging . . . the duties of the two offices concurrently, on the same day issuing reports in the one capacity, and listening to arguments in the other"). Of lesser consequence but even greater oddity was the indication that Marshall and President Adams recognized the impropriety of Marshall's dual office-holding: Adams ordered Secretary of War Samuel Dexter to serve as Secretary of State (even though Marshall still held the

In 1806, the Senate seated Henry Clay of Kentucky even though he was only 29 years old at the time—younger than the 30 years of age required by the Constitution.²³⁶

From September 27, 1814, to March 2, 1815, James Monroe served President James Madison simultaneously as Secretary of State and Secretary of War.²³⁷

At a time when these blatant unconstitutionality and extreme concentrations of government power were countenanced, Cushing's brief combination of offices on the Supreme Court while he decided which job he wanted to keep for the long haul would have seemed like small potatoes.

Perhaps the best way to understand the President's, the Senate's, and apparently all of federal officialdom's complaisance about Cushing's dual office-holding is to consider it in light of the explanations offered by Professors Tushnet and Currie respectively for the equally puzzling lack of controversy over the 1801 episodes of dual office-holding by John Marshall and Samuel Smith. Tushnet suggests that Marshall's concurrent service as Secretary of State and Chief Justice was acceptable because it did not appear to be a case of what Tushnet has labeled "constitutional hardball"—political behavior that is "without much question within the bounds of existing constitutional doctrine and practice but . . . nonetheless in some tension with existing pre-constitutional understandings."²³⁸ The month-and-a-half during which Chief Justice Marshall was also Secretary of State went over peacefully at least in part because Marshall, a Federalist who had been placed on the Supreme Court by a Federalist Senate and a Federalist President, was serving as Secretary of State at the invitation of Thomas Jefferson, the leader of the Democratic-Republicans. The connivance of both major parties was powerful evidence of a political consensus about his double duty, and thus of the compatibility of the two offices, at least under those circumstances.²³⁹ There was, in other words, little danger that "public policy would make it improper for one person to perform both functions." Similarly, Cushing enjoyed the support of every Senator—regardless of partisan affiliation and despite the heated political atmosphere of the day in which John Rutledge had been rejected²⁴⁰—for his Chief-Justiceship, and he suffered no criticism when he returned to his seat as an Associate Justice.

office!) for the commissioning of Marshall as Chief Justice, presumably so that Marshall would not be signing his own commission. 1 WARREN, *supra* note 21, at 178.

236. 1 APPLETON'S CYCLOPAEDIA OF AMERICAN BIOGRAPHY 640 (James Grant Wilson & John Fiske eds., 1888); U.S. CONST. art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years.").

237. WILLIAM GARDNER BELL, SECRETARIES OF WAR AND SECRETARIES OF THE ARMY: PORTRAITS AND BIOGRAPHICAL SKETCHES 34 (1992).

238. Tushnet, *supra* note 176, at 523.

239. *Id.* at 541 & n.67.

240. WILLOUGHBY, *supra* note 145, at 85-86.

Congressman and Secretary Smith's two offices were, unlike Marshall's or Cushing's, irretrievably constitutionally incompatible.²⁴¹ "Yet not a peep of protest was heard, . . . and when Smith went back to the House [from his tour as Secretary of the Navy] in the fall the incident was forgotten."²⁴² There was more than one possible explanation, as Currie points out. Perhaps no one was paying attention (Congress was not in session at the time). Or, more significantly for present purposes, "[p]erhaps the fact that Smith never actually *sat* in Congress while he was running the Navy" and "took no action in his capacity as a member of Congress during the time he served in the executive branch" made his dual office-holding so inoffensive that it could be ignored.²⁴³ Similarly, Cushing never *sat* as Associate Justice while he served as Chief Justice, and he took no action in his capacity as an Associate Justice during that time. Again, with Smith as with Marshall as with Cushing, there was little danger that "public policy would make it improper for one person to perform both functions."

One aspect of Cushing's behavior during early February 1796 is remarkably consistent with this explanation for the compatibility of his offices. The Supreme Court's February 1796 Term was set to open on the first Monday of the month, February 1. Cushing was already in the nation's capital, Philadelphia, as his attendance at the diplomatic dinner where the Chief-Justiceship was sprung on him and the heading on his draft resignation letter to Washington show. On February 1, James Wilson appeared but Cushing did not, and on February 2, Wilson and William Paterson appeared but still Cushing did not. Cushing did not appear until February 3, when Wilson, Paterson, and James Iredell also appeared. Thus, Cushing did not appear *until there were enough other Justices in attendance to make a quorum without raising the issue of his two offices*, and thus he avoided the first and, due to his early resignation, only opportunity to exercise both of his offices at the same time.²⁴⁴

At the same time, the Constitution did provide for congressional recourse against Cushing had he attempted to abuse the power afforded by multiple offices: impeachment. In 1796, the first exercise of the congressional impeachment power to remove a federal official was still seven years in the future, but when it came it would be exercised against a federal judge who had behaved badly.²⁴⁵ This was generally consistent with the original understanding of the impeachment power as a tool for removing from office not only criminals, but also federal officials who, as Joseph Story described them, "injure the

241. U.S. CONST. art. I, § 6, cl. 2.

242. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829*, at 129 (2001).

243. *Id.* at 129-30.

244. Cushing might have had opportunities to engage in two forms of abuse of his two seats on the Court. First, he could have simply exercised the powers of both seats at the same time—by voting twice on decisions, by creating a quorum on the Court with only two other Justices present, or by creating a quorum on circuit while sitting by himself. Second, he could have exercised the powers of just one office, but excluded anyone else from exercising the powers of the other one, thereby proportionately increasing the importance any Justice's single vote.

245. See MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 50-51 (2d ed. 2000).

commonwealth by the abuse of high offices of trust.”²⁴⁶ In retrospect, the Framers’ trust in the integrity of federal judges (and, by implication, in the integrity with which legislators and executives performed the task of selecting those judges) was well-placed. There have been remarkably few bad apples on the federal bench, and Cushing was not one of them.²⁴⁷

For George Washington and the Senate in early 1796, it was not bad public policy—and not a violation of the Constitution or a federal statute or the common law—to stretch the limits of the incompatibility doctrine so as to permit William Cushing to add the Chief-Justiceship to his Associate-Justiceship, but only just long enough to make a fairly quick decision about which office he wanted to keep. It was the safest way to place an acceptable Chief Justice at the head of the Court by the start of the impending February Term without risking the loss of that person from the Court, and with him the Court’s quorum. While excessive multiple office-holding by judges would be bad, there are times when it is handy for the rest of the federal government to be able to draw on the credibility of the Court and its members to deal creatively with political Gordian knots.²⁴⁸

We moderns should be circumspect in our skepticism about the propriety of Founding-generation expedients involving the combination of offices in the hands of judges such as Cushing and Marshall, or Jay and Ellsworth. After all, they were merely the first few in a long line of judges to wear more than one hat. The entanglement of judges in office-combining unorthodoxies perpetrated in the name of pressing political and policy exigencies has persisted through the centuries.²⁴⁹ In recent years, for example, the Supreme Court has approved

246. 2 STORY, *supra* note 231, at 256.

247. GERHARDT, *supra* note 245, at 37. I have uncovered one other instance of a judge holding two Article III judgeships at the same time. In 1903, Justice William R. Day retained his seat on the United States Court of Appeals for a few days after joining the Supreme Court. During that time, Day voted in a couple of cases, and may have written an opinion or two as well. He recognized the incompatibility problem. Writing to the Clerk of the Sixth Circuit, Day said:

I note that these cases [In re Muhlhauser and Shatto v. Erie R. Co] were decided on March third last. I was sworn in here on the second and it might be well to make some note of that fact at the foot of the opinions. Strictly speaking, I suppose I had no right to render an opinion on the third of March. In Judge [William Howard] Taft’s case, where we delivered opinions after his retirement, we made a note that the case was tried and decided while he was a member of the court. Perhaps it would be well to call Judge Lurton’s attention to the fact.

Letter from William R. Day to Frank O. Loveland (Mar. 9, 1903) (on file with Library of Congress, Manuscript Division under William R. Day Papers, Box 19). *See also In re Muhlhauser*, 121 F. 669, 674 (6th Cir. 1903) (noting that “Judge Day participated in the decision of this case, although not now a member of the court” without disclosing that he was already a member of the Supreme Court); *Shatto v. Erie R. Co.*, 121 F. 678, 682 (6th Cir. 1903) (Day, J.) (same). *Cf. United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 688-89 (1960).

248. *See* G. Edward White, *Justices and “Electoral College” Elections*, 7 GREEN BAG 2D 387, 395-96 (2004) (reviewing WILLIAM H. REHNQUIST, *CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876* (2004)).

249. *See generally* Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123. *See also* Calabresi & Larsen, *supra* note 175, at 1121-41; Alpheus Thomas Mason, *Extra-Judicial Work for Judges: The Views of Chief Justice Stone*, 67 HARV. L. REV. 193,

judicial involvement in the United States Sentencing Commission²⁵⁰ and the Independent Counsel scheme,²⁵¹ and at least one Article III judge has added another federal, but not Article III, judgeship to his portfolio.²⁵² With this legacy, and with these current practices, who are we to be squeamish about William Cushing's brief, harmless, and at the time uncontroversial, universally accepted, and contextually reasonable move from Associate Justice to Associate-and-Chief Justice and then back to Associate Justice?

Even if, in retrospect, Washington's January 1796 crisis was not so pressing that it justified the temporary allocation of two seats on the Supreme Court to one person, it is also true, in retrospect, that Cushing was not inclined to take advantage of the situation in some way that would have justified invocation of the incompatibility doctrine to deny him the opportunity to return to his Associate-Justiceship. In this context, if a President, or Senator, or Justice, or citizen had been asked at the time whether Cushing's two offices were incompatible or not, he or she probably would have answered with either a "no," or, at most, as James Madison would a few years later to the reconciliation of the Establishment Clause of the First Amendment with the existence of a congressional chaplain: "rather than let this step beyond the landmarks of power and have the effect of a legitimate precedent, it will be better to apply to it the legal aphorism *de minimis non curat lex*."²⁵³

2. *A De Facto Associate Justice*

Even if Cushing's tenure as Chief Justice was incompatible with his retention of his office as Associate Justice, and as a result his subsequent occupation of the office of Associate Justice was invalid, that invalidation would have no legal consequences for anyone living today. Granted, his fourteen years of service in the seat of an Associate Justice from February 6, 1796, to September 13, 1810, would have been unlawful—he would not have truly been an Associate Justice because the President, the Senate, and Cushing failed to complete the constitutional appointments process (described in Parts II.A and B) necessary to return him to a seat as an Associate Justice.²⁵⁴ But that type of situation is what the *de facto* officer doctrine is for. The *de facto* officer doctrine legitimates the acts, but not the office-holding, of individuals in situations like Cushing's.²⁵⁵

193-94 (1953); 4 DOCUMENTARY HISTORY, *supra* note 224, at 723-29; Brief for the United States, *Mistretta v. United States*, 488 U.S. 361 (1989) (No. 87-7028); *Shoemaker v. United States*, 147 U.S. 282 (1893); Charles Lane, *Shanghaied*, 7 GREEN BAG 2D 247, 254 (2004).

250. *Mistretta*, 488 U.S. at 412.

251. *Morrison v. Olson*, 487 U.S. 654, 696-97 (1988).

252. *See United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. for Berlin 1979); HERBERT J. STERN, *JUDGMENT IN BERLIN* 45 (1984).

253. Elizabeth Fleet, *Madison's "Detached Memoranda,"* 3 WM. & MARY Q. (3d ser.) 534, 559 (1946), *quoted in* *Lee v. Weisman*, 505 U.S. 577, 631 (1992) (Souter, J., concurring).

254. *See, e.g., United States v. Corson*, 114 U.S. 619 (1885).

255. *See, e.g., Olympic Fed. Sav. & Loan Ass'n v. Dir. Office of Thrift Supervision*, 732 F. Supp. 1183, 1196 n.12 (D.D.C. 1990) ("The *de facto* officer doctrine validates the *acts* upon which the public has reasonably relied. It does not change the fundamental nature of the act or transform

Relatedly, it is highly unlikely at this late date that anyone would have standing to challenge any of the decisions in which Cushing participated from 1796 to 1810, or even his occupation of the office of Associate Justice during that time.

“The *de facto* officer doctrine confers validity upon acts performed by a person acting under color of official title even though it is later discovered that the legality of that person’s appointment or election to office is deficient.”²⁵⁶ Under this doctrine, the acts of a *de facto* officer are invariably proof against challenge by members of the public.²⁵⁷ In Cushing’s day, and well into the nineteenth century, the acts of *de facto* officers were also secure from challenge even by an individual who was directly affected by those acts and challenged them in court.²⁵⁸ Only the government itself or an individual with a superior claim to the office held by the *de facto* officer, via a *quo warranto* action,²⁵⁹ or perhaps Congress, via impeachment in the House and trial and conviction in the Senate,²⁶⁰ could challenge the *de facto* officer, and then only for purposes of removing him or her from office, not to overturn any act performed while the individual held office.²⁶¹

As the doctrine has evolved to the present day, however, the courts have shown a somewhat increased willingness to invalidate official acts on the ground that an actor’s office-holding was invalid. This willingness has extended to challenges based on failures to comply with the Appointments Clause of the Constitution—the very defect from which Cushing’s post-Chief-Justice Associateship would suffer if his Chief-Justiceship and Associate-Justiceship were incompatible. But even in that context the Supreme Court has limited its review to challenges that arise promptly out of an individual’s lawsuit directly challenging his own treatment at the hands of the officer or officers of questionable pedigree. “We think one who makes a *timely* challenge to the constitutional validity of the appointment of an officer who adjudicates his case

the actor into something he is not.”). See also 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 381 (O.W. Holmes, Jr. ed., 12th ed. 1873) (“In the case of public officers, who are such *de facto* acting under color of office by an election or appointment not strictly legal, or without having qualified themselves by the requisite tests, or by holding over after the period prescribed for a new appointment, as in the case of sheriffs, constables, &c.; their acts are held valid as respects the rights of third persons who have an interest in them, and as concerns the public, in order to prevent a failure of justice.”).

256. *Ryder v. United States*, 515 U.S. 177, 180 (1995) (citing *Norton v. Shelby County*, 118 U.S. 425, 440 (1886)).

257. See, e.g., *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (plurality opinion) (“[T]his Court has described it as well settled ‘that where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public.’”) (quoting *McDowell v. United States*, 159 U.S. 596, 602 (1895)); *Nofire v. United States*, 164 U.S. 657, 661 (1897).

258. ALBERT CONSTANTINEAU, PUBLIC OFFICERS AND THE DE FACTO DOCTRINE 589-634 (1910) (providing an explanation of the principles governing removal of *de facto* officers with a description of “the proceedings in or by which official title cannot generally be tried”).

259. *Id.* at 634-72. See also *Andrade v. Lauer*, 729 F.2d 1475, 1497-98 (D.C. Cir. 1984).

260. *Reuss v. Balles*, 584 F.2d 461, 468 n.21 (D.C. Cir. 1978).

261. Kathryn A. Clokey, *The De Facto Officer Doctrine: The Case for Continued Application*, 85 COLUM. L. REV. 1121, 1124-25 (1985).

is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred. Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments.”²⁶² In contrast, the Court has consistently declined to engage in retrospective invalidation of the acts of officers whose office-holding the Court judges to be invalid.²⁶³

Thus, even under the more flexible modern scope of judicial review of acts by *de facto* officers, Cushing’s work as Associate Justice would be inviolate. If Cushing was a merely *de facto* Associate Justice beginning on February 5, 1796, then his acts on the Supreme Court and on circuit in a *de facto* capacity occurred between 208 and 194 years ago. There is no way that anyone could make the requisite modern “timely challenge” to any of them. And Cushing is dead, so there would be no point in bringing a *quo warranto* action.

The only question is whether Cushing qualifies as a *de facto* Associate Justice whose acts were, and remain, valid under the *de facto* officer doctrine. Assuming for the moment that Cushing did in fact lose his Associate-Justiceship when he entered into the office of Chief Justice,²⁶⁴ he would have satisfied all of the requirements for *de facto* officer status, with the result outlined above: all of his acts while serving as *de facto* Associate Justice would enjoy an irrebuttable presumption of validity against a challenge based on a defect in his appointment to the office.²⁶⁵

To qualify as a *de facto* officer, Cushing must have: (1) occupied a lawfully established office;²⁶⁶ (2) occupied it in good faith and “under color of authority”—that is, with some appearance, albeit later determined to be defective, of having been properly appointed, rather than having been engaged in a fraud on the public;²⁶⁷ and (3) done the work of the office, engaging “in the unobstructed possession of [the] office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the

262. *Ryder*, 515 U.S. at 182-83 (emphasis added). See also *Nguyen v. United States*, 539 U.S. 69, 78 (2004) (“[W]e have agreed to correct, at least on direct review, violations of a statutory provision that ‘embodies a strong policy concerning the proper administration of judicial business’ even though the defect was not raised in a timely manner.”) (quoting *Glidden Co.*, 370 U.S. at 536) (emphasis added).

263. See, e.g., *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-89 (1982); *Buckley v. Valeo*, 424 U.S. 1, 142-43 (1976) (citing *Schaefer v. Thomson*, 251 F. Supp. 450, 453 (D. Wyo. 1965), *aff’d sub nom. Harrison v. Schaefer*, 383 U.S. 269 (1966)); *Fed. Election Comm’n v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993).

264. An assumption that Part III.B.1 shows to be incorrect, because the two offices were not incompatible at that time and under those circumstances, but which we hold for the moment in order to cover all the bases.

265. The *de facto* officer doctrine does not insulate a *de facto* officer’s acts from other sorts of challenges—those to which a *de jure* officer’s acts would also be subject. See, e.g., *Ex parte Ward*, 173 U.S. 452, 454 (1899).

266. *United States v. Royer*, 268 U.S. 394, 397 (1925) (“Of course, there can be no incumbent *de facto* of an office if there be no office to fill.”); *Tulare Irrigation Dist. v. Shepard*, 185 U.S. 1, 14 (1902) (same).

267. *Glidden Co. v. Zolanok*, 370 U.S. 530, 535 (1962) (plurality opinion). See also *CONSTANTINEAU*, *supra* note 258, at 126-35.

appearance of being an intruder or usurper.”²⁶⁸ Or, in more straightforward terms: (1) holding a real public job; (2) apparently satisfying the technical requirements for holding it; and (3) acting as though he believed he held the job—by doing it.

With respect to the first requirement, the office of Associate Justice that Cushing occupied was lawfully established by the Judiciary Act of 1789.²⁶⁹ The seat he occupied was available to him—that is, it was not occupied or claimed by anyone else.²⁷⁰ With respect to the second requirement, Cushing served under the commission as an Associate Justice issued to him by George Washington on September 30, 1789,²⁷¹ and under the presumption of proper oath-taking implicit in his appearance on the bench of the Supreme Court beginning on February 1, 1790, and continuing through the August 1795 Term preceding his move to the Chief Justice’s chair at the beginning of the February 1796 Term²⁷²—more than five full years of *de jure* service as an Associate Justice before his *de facto* service began. His good faith belief in his continuing qualification for service as Associate Justice is reflected in the perfect absence in the historical record of any indication of any doubt on his part—or on the part of any other member of the Court or any observer of the Court—during his *de facto* service regarding the propriety of his continuing work as an Associate Justice. Especially telling is the fact that during Cushing’s long *de facto* service no President attempted to nominate anyone to fill the seat in which Cushing sat—not those who shared his views (George Washington and John Adams) and not those who opposed them (Thomas Jefferson and James Madison). Nor did any Senator advise a President to do so.

With respect to the third requirement, Cushing’s work as Associate Justice was the same after his tour of duty as Chief Justice as it had been before, with the exception that as he aged he slowed. He continued to tour the country on circuit, and to participate in the semi-annual meetings of the Supreme Court in the capital. It is difficult to imagine a more perfect method by which a *de facto* officer could engage “in the unobstructed possession of [the] office[,] . . . discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper.”²⁷³ William Cushing was the very model of a *de facto* officer.

268. *Waite v. Santa Cruz*, 184 U.S. 302, 323 (1902). *See also Norton v. Shelby County*, 118 U.S. 425, 441 (1886) (“clothed with the evidence of such office[] and in apparent possession of [its] powers and functions”).

269. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

270. If another Associate Justice had been appointed in Cushing’s place, then Cushing’s acts as well as his office would almost certainly have been invalid. *See United States v. Alexander*, 46 F. 728, 731 (D. Idaho 1891) (invalidating order issued by judge after “it was well known by all, including the judge who made it, that another judge had been appointed”).

271. 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at 29.

272. *Id.* at 171-253.

273. *Waite*, 184 U.S. at 323. *See also Norton*, 118 U.S. at 441 (“clothed with the evidence of such office[] and in apparent possession of [its] powers and functions”).

In addition, from the perspective of the early twenty-first century, almost 200 years after Cushing's last acts as an Associate Justice, his situation is perfectly suited as a policy matter for application of the *de facto* officer doctrine. Courts state and federal have justified the doctrine on three public policy grounds, all of which would be well-served by leaving undisturbed Cushing's work on the Court and on circuit from 1796 to 1810. First, the doctrine provides retrospective stability to the rule of law, enabling citizens to rely on the past acts of officers without having to worry about whether those acts might be swept into invalidity along with an officer's official status if his or her occupancy of an office should someday turn out to have been defective.²⁷⁴ Second, it makes current compliance with and administration of the laws more efficient and reliable by relieving citizens of the burden of continually verifying the technical validity of the positions of every official with whom they deal.²⁷⁵ Third, it reduces strategic behavior by litigants who either: (a) attempt to slow the wheels of justice with spurious challenges to office-holders;²⁷⁶ or (b) "abid[e] the outcome of a lawsuit and then overturn[] it if adverse upon a technicality of which they were previously aware."²⁷⁷

With respect to the first policy, consider its impact on the decisions of the Supreme Court from 1796 through 1810. If the Court were to abandon its "timely challenge" limitation on attempts to invalidate the past acts of otherwise *de facto* officers (a move that might well also entail a substantial loosening of standing doctrine as well), and invalidate Cushing's post-1795 work at the Supreme Court and on circuit, it would expose *all* of the Court's decisions during that period to invalidation. The Court has recently noted that it "has never doubted its power to vacate the judgment entered by an improperly constituted court of appeals, even when there was a quorum of judges competent to consider the appeal."²⁷⁸ Presumably, the Court would enjoy the same latitude with respect to an improperly constituted Court, especially if such a Court suffered from the same defect as the court of appeals in the *Nguyen* case—the presence on the panel of a judge "who does not enjoy the protections set out in Article III."²⁷⁹ Taking such a position on the Supreme Court decisions (and the many lower

274. *Norton*, 118 U.S. at 441 ("For the good order and peace of society[,] authority is to be respected and obeyed until[,] in some regular mode prescribed by law[,] their title is investigated and determined."); *Olympic Fed. Sav. & Loan Ass'n v. Dir., Office of Thrift Supervision*, 732 F. Supp. 1183, 1196 n.12 (D.D.C. 1990). *See also, e.g.*, *N. Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 87-89 (1982); *Buckley v. Valeo*, 424 U.S. 1, 142-43 (1976); *Fed. Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.D.C. 1993).

275. *Alexander*, 46 F. at 729 ("It would be a disastrously inconvenient requirement that all who have business with an official person must, before it can be transacted, inquire into the validity of the officer's claim to the office, and that the acts of those who have not [the] legal right, although the semblance thereof, must in all cases be held void.").

276. *Norton*, 118 U.S. at 442 ("It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in[to] question.").

277. *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962).

278. *Nguyen v. United States*, 539 U.S. 69, 82 (2003).

279. *Id.* at 80. *See also* *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 139 (1947); *Am. Constr. Co. v. Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 387 (1893).

federal court decisions) handed down while Cushing sat from 1796 through 1810 would undermine many important official acts—including *Ware v. Hylton*,²⁸⁰ *Calder v. Bull*,²⁸¹ *Marbury v. Madison*,²⁸² and *Fletcher v. Peck*²⁸³—“upon which the public has reasonably relied,”²⁸⁴ as have the many successors to the Justices who decided those cases.²⁸⁵

With respect to the second policy justifying the *de facto* officer doctrine, consider its impact on everyone who deals with public officials in the modern world. If the Court were to determine that 200-year-old precedent can be invalidated based on a newly-discovered defect in the qualifications of a Justice whose performance was not questioned at the time he worked or for generations thereafter, then everyone who deals with public officials possibly subject to the jurisdiction of the Supreme Court would be well-justified to assume that there is no such thing as reasonable reliance on an official’s external appearance of lawful office-holding. The implications are tragicomic. For example, would everyone need to buy the equivalent of title insurance for every official act on which they relied? With perpetual uncertainty created by a period of repose of at least 208 years, and the varied and numerous dealings that all of us have with (and as) public officials, the costs would probably be a bit higher than they are for homebuyers. Perhaps whole new industries would spring up, based on judicially-created uncertainty about the reliability of the rule of law. Avoiding this sort of expensive and wasteful silliness is just what the *de facto* officer doctrine was made for.

With respect to the third policy behind the doctrine, consider the effect on governance and public service at all levels of society. If the validity of Cushing’s official acts from 1796 to 1810—regardless of their merits—are subject to invalidation at this late date, it will be very difficult to resist the facially reasonable desires of those subject to official action for some assurance that they are being acted upon by genuine, not just *bona fide*, officials. If the qualifications of officers can be called into question 200 years after the fact, how can it be unreasonable to challenge in traffic court the qualifications of the trooper who issued a speeding ticket last month?²⁸⁶

At the end of the day, and more importantly at the end of two centuries, there is nothing that can be said in favor of invalidating any of William Cushing’s work on the Court from 1796 to 1810 on the ground of doubt about the validity of his position on the Court. As explained in Part II.B.1, Cushing was a full

280. 3 U.S. (3 Dall.) 199 (1796).

281. 3 U.S. (3 Dall.) 386 (1798).

282. 5 U.S. (1 Cranch) 137 (1803).

283. 10 U.S. (6 Cranch) 87 (1810).

284. *Olympic Fed. Sav. & Loan Ass’n v. Dir., Office of Thrift Supervision*, 732 F. Supp. 1183, 1196 n.12 (D.D.C. 1990).

285. If this approach were extended to all “oathless” Justices, it would cast a shadow over the Court’s output from 1790 to 1861 because there was at least one “oathless” Justice sitting throughout those years.

286. *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 896-901 (1991) (Scalia, J., concurring).

member of the Court during that period, and even if he was not, he was most certainly a *de facto* officer whose acts remain valid even if his office-holding does not. In either case, recognition of Cushing's service as Chief Justice would do nothing to upset the past, present, or future work of the Supreme Court.

C. *Why Now?*

Finally, there is the obvious question: if William Cushing was a Chief Justice, why has the government failed for so long to notice the existence of one of its own highest-ranking officeholders? There is a simple answer: it was of little consequence as a practical matter, and besides, no one could make a strong case for Cushing's Chief-Justiceship because much of the relevant information was not available in an accessible form.

Government does not know all and see all, much less remember all, even about its own doings. It has limited resources, and those are mostly focused on the here and now, on the business of governing. Moreover, priorities and sensitivities change over time. Under these conditions, it is understandable that the government has essentially forgotten about the Chief-Justiceship of William Cushing. As Chief Justice, he did little or nothing that mattered to the operation of government (he did far more as a state-court judge, acting Chief Justice, and Associate Justice), and as a result there was not much to report, much less to celebrate, about his very short tenure in that office. In any event, he left behind nearly nothing in the way of papers relating to his Chief-Justiceship with which scholars might work. Moreover, Cushing contributed to his own anonymity by neglecting to follow the lead of his contemporaries who kept diaries and preserved correspondence with the understanding that while history is written by the victors, the starring roles tend to go to those who leave behind material for the victors' historians to work with.²⁸⁷

Cushing is not the only short-time Chief Justice to suffer so. John Rutledge's Chief-Justiceship was as obscure as Cushing's for several decades. Like Cushing, Rutledge did nearly nothing while Chief Justice, and left as little in the way of papers that might have marked a place for his Chief-Justiceship in the history books.²⁸⁸

The official neglect began in the early 1830s.²⁸⁹ After appropriating \$400 for "a bust of John Jay for the Supreme Court room" on March 2, 1831,²⁹⁰ Congress

287. See Cushing, *supra* note 144, at v; 2 FLANDERS, *supra* note 2, at v; Letter from John Adams to Abigail Adams (July 2, 1774), reprinted in Adams Family Papers, An Electronic Archive, <http://www.masshist.org/digitaladams/aea/cfm/doc.cfm?id=L17740702ja> ("I write you this Tittle Tatle, my Dear, in Confidence. You must keep these Letters chiefly to yourself, and communicate them with great Caution and Reserve. I should advise you to put them up safe, and preserve them. They may exhibit to our Posterity a kind of Picture of the Manners, Opinions, and Principles of these Times . . .").

288. HAW, *supra* note 141, at vii.

289. Semi-official neglect began even earlier. In the front matter of volume 5 of the *United States Reports*, a list of "Judges of the Supreme Court of the United States from the time of its first establishment" identifies Jay, Rutledge, Ellsworth, and Marshall as Chief Justices, but not Cushing. 5 U.S. (1 Cranch) xviii (1804).

skipped over Rutledge and Cushing and on June 30, 1834, appropriated \$800 “for the execution, in marble, and delivery in the room of the Supreme Court of the United States, a bust of the late Chief Justice Ellsworth.”²⁹¹ And on May 9, 1836, Congress authorized “for a marble bust of the late Chief Justice Marshall, five hundred dollars.”²⁹²

The first effort to provide recognition for Rutledge came in 1846, when Senator James Westcott of Florida submitted a resolution that:

[T]he Committee on the Judiciary be instructed to report a bill making an appropriation for a marble bust of John Rutledge, of South Carolina, formerly chief justice of the United States . . . , similar to those heretofore made by authority of Congress of every deceased chief justice of the United States. . . .²⁹³

The Senate agreed to the resolution, and its Committee on the Judiciary reported a bill.²⁹⁴ The bill never became law, and “remain[ed] in abeyance, to be called up at some future opportunity.”²⁹⁵

That opportunity did not arise until two Rutledge biographers made the case for his Chief-Justiceship in the mid-1850s. In his 1854 *Sketches of the Lives and Judicial Services of the Chief-Justices of the Supreme Court of the United States*, George Van Santvoord bemoaned the fact that “so little is now known of one of the earliest, ablest, and firmest friends of American independence,”²⁹⁶ and then made his pitch for public recognition of Chief Justice Rutledge:

In the hall of the Supreme Court at the Capitol in Washington may be seen, upon their marble pedestals, the busts of Jay, of Ellsworth, and of Marshall. The eye of the stranger naturally seeks the bust of the distinguished Carolinian also, in that august tribunal over which he too, though for a brief period, presided;—but it seeks in vain. No product of the sculptor’s chisel, amid that silent but impressive marble group, recalls the memory of John Rutledge. And the thought naturally arises in the mind, why is it that his place is vacant? Surely there might be found at least some niche in the judicial temple by the side of his predecessor, and his successors, on the bench, for the second Chief-Justice of the United States.²⁹⁷

In the first volume of his *The Lives and Times of the Chief Justices of the Supreme Court of the United States*, published in 1855,²⁹⁸ Henry Flanders was

290. Appropriations for the Public Buildings, ch. 70, 4 Stat. 474 (1831).

291. Bust of Chief Justice Ellsworth, ch. 138, 4 Stat. 717 (1834).

292. Appropriations for the Support of the Government, ch. 59, 5 Stat. 25 (1836).

293. Sen. J. 335, 29th Cong., 1st Sess. 411 (1846).

294. *Id.* at 415, 420; S. 235, 29th Cong. (1846).

295. *A Sketch of the Life and Public Services of John Rutledge of South Carolina*, 6 AM. WHIG REV. 125, 125 (1847) [hereinafter *Sketch of Rutledge*].

296. VAN SANTVOORD, *supra* note 147, at 91.

297. *Id.* at 190.

298. 1 HENRY FLANDERS, *THE LIVES AND TIMES OF THE CHIEF JUSTICES OF THE SUPREME COURT OF THE UNITED STATES* (1858). This volume has a publication date of 1858, but it is clear from the book’s Preface and copyright date (1855), and from contemporary media coverage, that it was

not as explicit in his support of Rutledge's Chief-Justiceship as Van Santvoord had been. Nevertheless, Flanders's treatment of Rutledge—consistently referring to him as “Chief Justice Rutledge,”²⁹⁹ and devoting equal attention (roughly 200 pages' worth) to his life and times and to Oliver Ellsworth's³⁰⁰—left no doubt about Rutledge's proper place among the Chief Justices. Earlier profiles of Rutledge had treated him almost exclusively as a hero of the days before the ratification of the Constitution, focusing on his service in South Carolina during and after the Revolution, and on his role at the constitutional convention of 1787, and noting only briefly what was apparently viewed as his merely passing connection to the Chief-Justiceship. For example: “[h]e was afterwards appointed chief justice of the United States,”³⁰¹ or “Rutledge, nominated Chief Justice in the place of Jay, never took his seat.”³⁰²

More significant than their manifest enthusiasm for the bestowal of full honors on Chief Justice Rutledge were Van Santvoord and Flanders's full-fledged presentations of the factual basis for recognition of the Rutledge Chief-Justiceship—his recess appointment, his presiding role at the Court's August 1795 Term, and his participation in the work of the Court—making clear that he had both satisfied the legal requirements for recognition as a Chief Justice (he and Washington had executed the constitutional and statutory steps for a recess appointment) and manifested his and the Court's understanding that he had done so (he did the work, although only briefly).³⁰³

Contemporaries had little doubt about the intentions of Van Santvoord and Flanders with respect to Rutledge and the Chief-Justiceship. Reviewing *Appleton's Cyclopædia of Biography*³⁰⁴ in 1856, the editors of the *North American Review* offered the following critique of the “Rutledge, John” entry:

The public life of John Rutledge of South Carolina is crowned, says the sketch, with his being “promoted to the high function of chief justice of the U.S.” Not exactly, Mr. Biographer. Promoted to a station he cannot be called who is emphatically negated with the first opportunity. . . . Very true it is, that within scarcely three years, and in strangely close succession, we have seen two series of “Lives of Chief Justices of the United States” (so styled), in both of which this rejected aspirant not only finds a place, but in one of them the amplest in the whole series. The suspicion cannot well be stifled, that it was believed (truly, we hope) public sentiment needed

available by 1855, at the latest. See *id.* at v; *The Lives and Times of the Chief Justices of the Supreme Court of the United States*, 81 N. AM. REV. 346 (1855).

299. See generally 1 FLANDERS, *supra* note 298, at 632-42.

300. Compare *id.* at 430-645 (Rutledge), with 2 FLANDERS, *supra* note 2, at 53-276 (Ellsworth).

301. 4 JAMES B. LONGACRE & JAMES HERRING, 4 THE NATIONAL PORTRAIT GALLERY OF DISTINGUISHED AMERICANS 72 (1839).

302. *The Supreme Court of the United States: Its Judges and Jurisdiction*, 1 U.S. MAG. & DEMOCRATIC REV. 143, 150 (1838).

303. See generally VAN SANTVOORD, *supra* note 147, at 179-87; 1 FLANDERS, *supra* note 298, at 632-42.

304. ELIHU RICH, APPLETON'S CYCLOPAEDIA OF BIOGRAPHY: EMBRACING A SERIES OF ORIGINAL MEMOIRS OF THE MOST DISTINGUISHED PERSONS OF ALL TIMES (Francis Hawks ed., American ed., 1856).

their help to set it right, though it were mainly by dint of reiteration, and that this was the chief inducing motive of both publications.³⁰⁵

In short order, the *North American Review* was proved correct. On February 6, 1856, the Senate unanimously consented to Senator Andrew Butler's proposed resolution to the same effect as Senator Westcott's 1846 proposal for a bust of Rutledge.³⁰⁶ And on July 8 Senator James Pearce of the Committee on the Library, "submitted a report, (No. 205,) accompanied by a bill (S. 363) to procure a bust, in marble, of the late Chief Justice John Rutledge."³⁰⁷ Report No. 205 reads as though it was written by Van Santvoord, devoting considerable space to Rutledge's long public service and many personal qualities, but attending most assiduously to briefing his abbreviated Chief Justiceship.³⁰⁸ After Senator Pearce's July 8 presentation, the Rutledge bill moved quickly. In the Senate it was passed the same day and was transmitted to the House,³⁰⁹ where it was passed on January 19, 1857.³¹⁰ President Franklin Pierce signed the bill into law on January 21,³¹¹ and today the bust of Chief Justice Rutledge rests in the first niche on the left, facing Chief Justice Jay on the right, as you enter the Great Hall of the Supreme Court building in Washington, D.C.³¹²

The next day, January 22, 1857, Senator Henry Wilson of Massachusetts gave notice that he would seek similar treatment for Cushing:³¹³

I now, Mr. President, introduce a bill to procure a bust in marble of the late Chief Justice William Cushing, of Massachusetts In the spring of 1794 Chief Justice Jay was sent to England to negotiate if possible a treaty with the Court of St. James. At the August term of the Supreme Court in 1794, and at the February term in 1795, Judge Cushing presided over the sittings of the court. On Mr. Jay's return from England he resigned the office of Chief Justice, and Mr. Rutledge was nominated early in July, 1795, his successor. The court met early in August, and Judge Cushing presided until Mr. Rutledge arrived and took the oath of office, which was on the twelfth of the month. Judge Cushing had thus presided over the court at the August term, 1794, the February term, 1795, and nearly half of the August term of the same year.

. . . On the 3d of February the Supreme Court met at Philadelphia, the then seat of Government. Judge Cushing had been nominated and unanimously confirmed as

305. Archibald Alison et al., *Biographical Dictionaries*, 83 N. AM. REV. 317, 325-26 (1856).

306. Sen. J., 34th Cong., 1st Sess. 93 (1856).

307. Sen. J., 34th Cong., 1st Sess. 423 (1856). See also Charles E. Fairman, *Art and Artists of the Capitol of the United States of America* 161, 174 (1927).

308. S. REP. NO. 205, 34-205, at 2 (1856).

309. Sen. J., 34th Cong., 1st Sess. 423 (1856).

310. H.R. J., 34th Cong., 3rd Sess. 256 (1857); Sen. J., 34th Cong., 3rd Sess. 101 (1857).

311. Sen. J., 34th Cong., 3rd Sess. 117 (1857); H.R. J., 34th Cong., 3rd Sess. 304 (1857). See also FAIRMAN, *supra* note 307, at 174.

312. The saga of the Chief Justice busts is told in part in a lengthy "Note by Reporter" attached to *Ex parte Ward*, 173 U.S. 452 (1899).

313. CONG. GLOBE, 34th Cong., 3rd Sess. 414 (1857).

Chief Justice the preceding week. He presided over the sittings of the court excepting a few days when he was confined to his rooms by illness, until the 7th of March, when Mr. Ellsworth was sworn into office, to which he had been appointed on the 3d of March, on the declination of Judge Cushing to accept the office of Chief Justice. Judge Cushing, during the month of February, continued to preside over the court, holding the question of the acceptance of the office of Chief Justice, which the President, with the unanimous sanction of the Senate, had conferred upon him, under advisement. Owing to the state of his health, which was so poor as to keep him from presiding over the court during a portion of the latter part of February, he declined to qualify as Chief Justice. The office was conferred upon him by the President and Senate. He had performed its duties most of the time for two years. He held the question of acceptance under advisement for more than a month, continuing, at the same time, to discharge its duties, and he then declined to accept it, owing to the apprehension that his health would not permit him to discharge its duties. He continued on the bench, however, until 1810, often presiding over the court as the oldest associate justice.³¹⁴

Leave was granted, and “the bill (S. No. 605) to procure a bust, in marble, of the late Chief Justice William Cushing, was read twice by its title, and referred to the Committee on the Library.”³¹⁵

But in the 1850s the argument for recognition of a Cushing Chief-Justiceship suffered from the same sort of tepid and incomplete support that had plagued Rutledge before the Van Santvoord and Flanders biographies. Wilson himself, while making a nice pitch on the equitable issue of Cushing’s long service as acting Chief Justice, fell down on the legal issue of office-holding by conceding (erroneously) that Cushing had declined the position.³¹⁶ Van Santvoord, too, damned Cushing’s candidacy with faint support. Having argued vigorously against the injustice of neglecting Rutledge, he limited his treatment of Cushing to a footnote. Confessing that he had done no research of his own, Van Santvoord observed:

The fact that Judge C. actually presided in the Supreme Court, and was also tendered the commission of Chief-Justice, would have authorized me perhaps to assign him a more prominent place, and to introduce a more extended notice of him and his work. For the present, however, I must confine myself to the limits of the following brief [two-page], but interesting sketch, which has been kindly furnished me by Charles C. Paine, Esq., of Boston, a family connexion of Judge Cushing, and who has come into possession of his papers.³¹⁷

The Paine sketch, in turn, merely reported that:

314. *Id.* at 735.

315. *Id.*

316. *See also* WILLIAM HICKEY, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, WITH AN ALPHABETICAL ANALYSIS, ETC. 389 (6th ed. 1853).

317. VAN SANTVOORD, *supra* note 147, at 245 n.*.

[U]pon Jay's resignation, he was nominated by Washington as Chief-Justice, and at a time of great party exasperation was unanimously confirmed by the Senate. The appointment was made without his knowledge, and was an entire surprise to him.

After holding the commission for about a week he returned it, though Washington solicited him to keep it, and was never willing to appoint [*i.e.*, promote any other Associate Justice to Chief Justice] over him.³¹⁸

Flanders served Cushing little better. He devoted a section of volume two of *Lives and Times of the Chief Justices* to Cushing, but it was a mere forty-one pages long³¹⁹—less than one-fifth the length of the Rutledge biography—and no more convincing, or convinced, on the question of Cushing's Chief-Justiceship than Van Santvoord's long footnote:

As Cushing never actually presided as Chief Justice, the reader may doubt, whether, *stricti juris*, he ever held the office. If, however, he accepted the appointment, it is not material to the question, whether he discharged its duties. If, in taking his commission, he intimated his purpose to hold it; that is sufficient. Indeed, the mere act of receiving it, might, under the circumstances, manifest such a purpose; and from that moment, he would be, *de jure*, Chief Justice. At any rate, all the obvious steps of the process were complete; he was nominated, confirmed, and commissioned. Hence, in a work of this character, we should hardly feel justified in omitting a sketch of his life.³²⁰

Even Cushing's hometown historian, Samuel Deane, failed to present a strong case for his Chief-Justiceship.³²¹

In light of these limp, equivocal, and in some respects, inaccurate presentations of the case for Chief Justice Cushing, Senator Wilson probably was not surprised that his bill never made it out of committee. He certainly never raised the subject again. Thus, in the absence of a complete argument for a Cushing Chief-Justiceship, Wilson's resolution, like the original Rutledge bust bill of 1846,³²² "remains in abeyance, to be called up at some future opportunity."³²³

This article presents that opportunity. It draws on evidentiary resources that were practically inaccessible in the 1850s. The *Documentary History of the Supreme Court of the United States* is the best example.³²⁴ Other sources include

318. *Id.* at 246.

319. 2 FLANDERS, *supra* note 2, at 11-51.

320. *Id.* at 46-47 (footnote omitted).

321. SAMUEL DEANE, HISTORY OF SCITUATE, MASSACHUSETTS, FROM ITS FIRST SETTLEMENT TO 1831, at 257, 405 (1831).

322. Sen. J., 29th Cong., 1st Sess. 411 (1846).

323. *Sketch of Rutledge*, *supra* note 295, at 125. More recently, the U.S. Constitution Sesquicentennial Commission included Cushing on its list of Chief Justices, but described him as having "declined" the office. BLOOM, *supra* note 21, at 754.

324. See 1 DOCUMENTARY HISTORY, PART ONE, *supra* note 12, at xxxvii-xlv.

Cushing's papers,³²⁵ the *Oliver Wendell Holmes Devise History of the Supreme Court of the United States*,³²⁶ the State Historical Society of Wisconsin's *Documentary History of the Ratification of the Constitution*,³²⁷ and databases of legislative, executive, and judicial records,³²⁸ papers of historical figures,³²⁹ and period journalism and scholarship.³³⁰ And it harnesses those resources to make a case for recognition of the Cushing Chief-Justiceship that is comparable—as a matter of law and as a matter of equity—to the case that the Committee on the Library made for the Rutledge Chief-Justiceship in 1856.

CONCLUSION

The evidence weighs in favor of Chief Justice William Cushing.

First, there is the evidence from all three branches of the federal government that Cushing's Chief-Justiceship was acknowledged at the time by those who were in the best positions to establish his qualifications and take action on that basis. Then there is the completion by the President and the Senate of all the steps necessary to place Cushing in the Chief Justice's seat. There is Cushing's acceptance of the commission. There is the strong circumstantial evidence of Cushing's taking of the oaths of office, namely, the Deputy Clerk's identification of Cushing in the rough minutes of the Court as "Chief Justice" on February 3 and 4, 1796; and the correspondence among key players in the nomination process that points toward an understanding among the cognoscenti that Cushing entered into and then resigned from the office of Chief Justice. In addition, there is the modern Court's treatment of "oathless" Justices in a manner that should, if applied consistently and in light of the evidence presented in this article, either expand to include Chief Justice William Cushing or contract to exclude Associate Justices Joseph Story, Bushrod Washington, John Blair, John McKinley, Peter Daniel, John Campbell, and William Cushing himself. The radical implausibility of the latter approach strongly suggests the advisability of the former.

Second, there is the likely insignificance of (1) a draft resignation letter that was almost certainly never sent and even more certainly never received, and (2) Cushing's occupation of the office of Associate Justice after his Chief-Justiceship without re-navigating the constitutionally-mandated appointments

325. 66 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 530 & n.1 (1942) (reporting on acquisition of some of Cushing's papers: "It is an interesting fact . . . that these papers were purchased from a descendant of William Cushing's daughter, who married Thomas Aylwin, a Loyalist who went to Canada; and that the collection has now for the first time been made available for research."). Cushing had no offspring, so the papers must have passed through someone else.

326. See generally GOEBEL, JR. *supra* note 131; HASKINS & JOHNSON, *supra* note 118.

327. E.g., IV DOCUMENTARY HISTORY OF THE RATIFICATION (Merrill Jensen ed., State Historical Society of Wis., 2004) (1976).

328. E.g., American Memory—A Century of Lawmaking For a New Nation, <http://memory.loc.gov/ammem/amlaw/lawhome.html> (last visited Jan. 19, 2006); LexisNexis, <http://www.lexisnexis.com>; Westlaw, <http://www.westlaw.com>.

329. E.g., ABIGAIL, <http://www.masshist.org> (last visited Mar. 21, 2006).

330. E.g., Making of America, <http://www.hti.umich.edu/m/moagr/> (last visited Jan. 19, 2006).

process—either he held both offices briefly without violating the law of incompatible offices, or his later service was as a *de facto* Associate Justice and thus his work is now beyond legal challenge under the *de facto* officer doctrine.

Third, there is his role as the busiest and most reliable presiding member of the Court, acting or otherwise, during its first decade. His lengthy and all-but-thankless service goes not to the technical requirements for occupying the office; rather, it goes to the unfairness of denying him recognition for his very short term as Chief Justice when he served so long as acting Chief Justice. Moreover, Cushing's public service before joining the Supreme Court reflects his willingness to serve without undue attention to who got the credit for the good works to which he quietly contributed.

And there is even a good reason why Cushing's Chief-Justiceship has slipped under the radar: the evidence was not available, at least not in a form that would lend itself to making the case for Chief Justice Cushing.

Now, consider four responses to the evidence presented in this article. First, and, in light of the evidence presented here, least satisfyingly, the Court could leave things be. Yes, the United States has managed to get along just fine without recognizing Chief Justice Cushing, and it would undoubtedly continue to do so. But Cushing deserves—and, based on the evidence assembled here, is entitled to—some recognition of his service as Chief Justice, especially against the background of his unmatched service as acting Chief Justice and the favorable treatment of other “oathless” Justices.

Second and most appealingly, the Court should amend the list of Chief Justices in its *Court Roster* to reflect Cushing's tenure in that office February 3 and 4, 1796. At the same time it could refrain from doing anything to its list of Associate Justices, on the grounds presented in Part II.B.1 for concluding that Cushing's very brief simultaneous occupation of the offices of Chief and Associate Justice did not violate the law of incompatible offices. The result would be a *Court Roster* amended as follows (with the emendations in bold):

Chief Justices of the Supreme Court

<u>Chief Justices</u>	<u>Dates of Oaths and Terminations of Service</u>
John Jay	Oct. 19, 1789 – June 29, 1795
John Rutledge.....	Aug. 12, 1795 – Dec. 15, 1795
William Cushing	Feb. 3, 1796 – Feb. 4, 1796
Oliver Ellsworth	Mar. 8, 1796 – Dec. 15, 1800
	* * *
John G. Roberts, Jr.	Sept. 29, 2005 – Sept. 3, 2005

Third, if the arguments for a Cushing Chief-Justiceship are convincing but the incompatibility argument in Part II.B.1 is not, the Court should amend the list of Chief Justices as suggested above, and also amend its list of Associate Justices to give Cushing a *de facto* officer asterisk and accompanying note. The revised list of Associate Justices would read as follows (emendations in bold):

 Associate Justices of the Supreme Court

<u>Associate Justices</u>	<u>Dates of Oaths and Terminations of Service</u>
John Rutledge.....	Feb. 15, 1790 – Mar. 5, 1791
William Cushing*	Feb. 2, 1790 – Feb. 3, 1796
James Wilson.....	Oct. 5, 1789 – Aug. 21, 1798
	* * *
Samuel A. Alito, Jr.....	Jan. 31, 2006 – present

*** After holding the office of Chief Justice briefly in February 1796, Cushing resigned that office but continued to sit on the Court until his death. Having given up the office of Associate Justice by operation of law when he took up the Chief-Justiceship, he was no longer a member of the Court. Thus, he was no more than a *de facto* Associate Justice after he resigned the Chief-Justiceship, whose acts were valid but whose occupation of the office of Associate Justice was not.**

Fourth and finally, if the evidence presented here fails to demonstrate the legal propriety and equitable rightness of adding Cushing to the list of Chief Justices, then the least the Court should do is to amend the *Court Roster* to acknowledge his service as acting Chief Justice. The *Roster* would read as follows (emendations in bold):

 Associate Justices of the Supreme Court

<u>Associate Justices</u>	<u>Dates of Oaths and Terminations of Service</u>
John Rutledge.....	Feb. 15, 1790 – Mar. 5, 1791
William Cushing*	Feb. 2, 1790 – Sept. 13, 1810
James Wilson.....	Oct. 5, 1789 – Aug. 21, 1798
	* * *
Samuel A. Alito, Jr.....	Jan. 31, 2006 – present

*** As senior Associate Justice during the absences of Chief Justices Jay, Rutledge, and Ellsworth, William Cushing presided over more of the Supreme Court's work during its first decade than any other member of the Court. Evidence for and against Cushing's own brief tenure as Chief Justice in early February of 1796 is mixed.**

If the Supreme Court accepts the reasoning of this article and chooses to follow the second or third courses of action suggested here, the Court's decision would not upset the established order of things. It would not undermine the

validity of any decision of the Court or disappoint reasonable reliance on those decisions by the public. Nor would it raise questions about the right of any long-dead Associate Justice or Chief Justice to the office he once held.

Recognizing Chief Justice William Cushing would, however, do some good. It would correct a defect in the Supreme Court's official historical record. It would do right by a dedicated public servant who deserves some credit for his good work. And in today's celebrity culture that pervades many institutions and intrudes from time to time even into the judiciary, it is worthwhile for the Court to affirm in this small way the worthy aspiration of a life-long judge who was "desirous to be useful rather than to be known."³³¹

331. See 2 FLANDERS, *supra* note 2, at 51.