

INTRODUCTION

A New Nation

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William Paterson was appointed to the Supreme Court at the beginning of George Washington's second term as President in 1793. Measured from 1776, the Nation was then seventeen years old. The Government created under the Constitution of 1787, however, was only four years old. The new Government had succeeded the loose arrangement under the Articles of Confederation, which from 1781 to 1789 had provided not a national government, but a sort of treaty among petty territorial states. Indeed, the central feature of the Articles of Confederation was found in article II, which provided that "[e]ach state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."¹

The 1787 Constitution, while preserving the roles of these sovereign states, for the first time recognized that there was national sovereignty as well as state sovereignty. In the late eighteenth century, the conception of dual sovereignty—two political organizations occupying the same geographic territory—was radical and untested. It remained to be seen whether the experiment of relegating some aspects of the human situation to regulation by a national political organization, while other aspects were to be regulated by local political organizations, could succeed. Hobbes, the leading political scientist of the seventeenth century, had opined that only one sovereign could occupy a given territory.² This was the accepted wisdom in the eighteenth century.³

Washington's first term as President of this new political organization involving dual sovereignty was relatively uneventful. The principal accomplishments of that administration were put-

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¹ U.S. ARTICLES OF CONFEDERATION of 1781, art. II.

² See T. HOBBS, *LEVIATHAN* (Everyman's Library ed. 1914, reprint 1975).

³ See generally *THE FEDERALIST* No. 16, at 99-105 (A. Hamilton) (J. Cooke ed. 1961); *THE FEDERALIST* No. 18, at 110-17 (J. Madison) (J. Cooke ed. 1961) (both discussing defects in prior attempts at federal systems of government).

ting in place the new National Government's fiscal arrangements⁴ and creating a national judiciary for the first time.⁵ Although the Judiciary Act of 1789 erected a national judiciary,⁶ the Supreme Court did not have any business of significance for several years. Indeed, it was not until the last month of Washington's first term that the Court handed down its first important case. The case was *Chisholm v. Georgia*,⁷ decided in February of 1793. The reaction to that case was so adverse that it was overruled by the eleventh amendment.⁸

Paterson was appointed shortly after that momentous case was decided. Thus, it can fairly be said that he came to the Court before it had established what role it would play in the new National Government. The Court had not yet firmly established that it would treat the Constitution as a form of higher law and thus exercise the power of judicial review over Federal or state legislation. The supremacy clause said rather plainly that "[t]his constitution . . . shall be the supreme law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."⁹ It was far from clear in 1793 that the Supreme Court would read the supremacy clause literally so as to place the constitutional law announced by it beyond the reach of popularly elected branches of government at the local or national level. Therefore, Paterson, although not a member of the first Court, truly came to it at the beginning of the Court's emergence as a

⁴ See Act of Aug. 5, 1790, ch. 38, 1 Stat. 178 (settling accounts between the Federal Government and the states) (expired); Act of Aug. 4, 1790, ch. 35, 1 Stat. 145 (taxing imported goods and tonnage) (repealed 1799); Act of July 20, 1790, ch. 30, 1 Stat. 135 (taxing tonnage) (repealed 1799); Act of Aug. 5, 1789, ch. 6, 1 Stat. 49 (settling accounts between the Federal Government and the states) (expired); Act of July 31, 1789, ch. 5, 1 Stat. 29 (regulating taxation on tonnage) (repealed 1790); Act of July 20, 1789, ch. 3, 1 Stat. 27 (taxing tonnage) (repealed 1790); Act of July 4, 1789, ch. 2, 1 Stat. 24 (taxing imported goods) (repealed 1790).

⁵ See Judiciary Act of 1789, ch. 20, 1 Stat. 73 (establishing Federal courts) (obsolete); see also Act of Sept. 29, 1789, ch. 21, 1 Stat. 93 (regulating processes in the Federal courts) (obsolete).

⁶ See Judiciary Act of 1789, ch. 20, 1 Stat. 73 (obsolete).

⁷ 2 U.S. (2 Dall.) 419 (1793). The *Chisholm* Court held that the Supreme Court has jurisdiction over disputes between a state and a citizen of another state. *Id.* at 420.

⁸ See U.S. CONST. amend. XI. The amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." *Id.*

⁹ U.S. CONST. art. VI.

significant national institution. For the judicial branch especially, he was a Founding Father.