

South Dakota Newspapers, #47
Dave Bordewyk, Ann Volin
"We the People"
July 26, 2023

John Jay: First Chief Justice, Diplomat, Founding
Era Giant

David Adler

When the newly elected President George Washington turned his attention to the historic opportunity of nominating citizens to fill seats on the first U.S. Supreme Court in 1789, he knew exactly whom he wanted to name the nation's first Chief Justice: John Jay.

Jay enjoyed Washington's confidence in a way few of his contemporaries did. Apart from Chief Justice William Howard Taft, who was elected as the United States 27th president before ascending to the High Bench, nobody has come to the Court with Jay's resume.

Jay was a leading New York lawyer by the time he was 30 years old. He was a principal drafter of New York's constitution in 1777 and served as the state's first chief justice. In 1778, amid a crumbling national economy, military disarray and a precipitous decline of public confidence in the national government, Jay was elected president of the Continental Congress, the nation's highest office. A year later, Jay was sent to Spain as minister plenipotentiary, the first of several stints as a diplomatic representative, which led to his appointment as Secretary of Foreign Affairs. He negotiated the Treaty of Paris, which formally ended the Revolutionary War. By most measures, Jay was viewed as the country's leading expert on foreign affairs.

Although partisan politics in New York prevented Jay from serving as a delegate to the Constitutional Convention, he authored numerous influential essays urging the importance of creating a stronger national government. When Alexander Hamilton conceived of the Federalist Papers, he turned first to Jay to join him in the project. Illness prevented Jay from contributing more than five essays to the project, but his writings—prosaic, cogent and reflective of a diplomatic mindset—focused on the need for America to create a respectable government at home so that it might earn respect abroad.

In Federalist No. 64, drawing on his vast experience as the nation's expert in international relations and international law, Jay wrote about the important constitutional role of the Senate in treaty-making and the formulation of American foreign policy.

Jay's many contributions to state, federal and international affairs led Washington to invite him to "name" the position that he wanted to hold in the new federal government. Jay selected the Supreme Court, although for a short time he simultaneously served as Secretary of State until Thomas Jefferson agreed to accept that cabinet post.

Jay's tenure on the Supreme Court did not meet his expectations. He resigned from the Court in 1795, having written only a handful of opinions, which was a function of the paucity of cases brought before the Court. He doubted that the federal judiciary would enjoy the "energy, weight and dignity" necessary to support the national government.

As Chief Justice, Jay advanced a series of fundamental constitutional principles. The Constitution, he wrote, was a compact among the people, not the states, a principle that echoed the Preamble to the Constitution, which began with the words, "We the

people ordain and establish this Constitution." His rejection of the assertion of state sovereignty was invoked again and again in landmark Supreme Court cases.

Jay's most notable opinion, *Chisholm v. Georgia* (1793), held that states could be sued in federal courts for debts owed to citizens of other states. He rejected Georgia's claim of sovereign immunity and observed that repudiating debts undercut economic recovery and stained the reputation of the nation. Jay was disappointed when *Chisholm* was overturned by the 11th Amendment.

In *Hayburn's Case* (1792), Jay reinforced the Constitution's Article III requirement that the Court's jurisdiction is limited to hearing genuine "cases or controversies," which prohibits the Court from rendering advisory opinions. The Court refused to permit federal courts to pass judgment, as a federal statute mandated, on the claims of invalid pensioners since congressional discretion to overturn judicial rulings would impair judicial independence and render them advisory.

The prohibition prevented the Court, in 1793, from answering questions from President Washington about laws pertaining to the official recognition of the French ambassador, Citizen Genet. Genet was an obnoxious foreign guest, whipping up American support for France in its war against England, despite our official policy of neutrality in the war between the two great European powers.

Jay, however, answered the questions in a personal letter to his friend, Secretary of Treasury of Alexander Hamilton. There was at the time no convention that prohibited Justices from lending advice to the president.

In 1794, Jay, at the request of President Washington, sailed to London to negotiate what became known as the Jay Treaty, which averted war between the United States and England by resolving issues that had lingered since the Revolutionary War. Jay believed that the agreement assured America's commercial prosperity, although Jeffersonian Republicans accused Jay of sacrificing national honor to British insolence.

Jay's reputation remained intact. After his retirement from the Court, he was elected Governor of New York. In 1800, as Jay's term was expiring, President John Adams nominated Jay to become Chief Justice of the Supreme Court for a second time. Although he was approved by the Senate, Jay declined and retired to upstate New York to farm his property. Adams proceeded to appoint John Marshall, who went on to become the most famous member of the Court in the nation's history.

#####