MR. CHISHOLM AND THE ELEVENTH AMENDMENT

William F. Swindler

From Yearbook 1981 Supreme Court Historical Society

One of the touchiest questions raised in the Constitutional Convention of 1787, and one of the most sensitive issues in the ratification debates of 1787-88, had to do with the sovereignty of the states within the proposed Federal system. Immunity from suit by an individual was firmly held to be a fundamental attribute of sovereignty--"the sovereign may not be sued without his consent" was a legal maxim rooted in feudal law and universally proclaimed by each state. This was all well and good within the borders of each state, where its own courts had exclusive jurisdiction; but what of a suit brought in another forum, e.g., a Federal court?

The Convention had been at pains to allay the fears of the state sovereignty defenders, but the jurisdictional clause in the judicial article of the Constitution, as finally drafted, was hardly reassuring. It gave the Federal courts jurisdiction in cases where there was a suit between a state and a resident of another state, and in such cases, where the state was a party, the Supreme Court was to have original jurisdiction. The theory behind the language was pragmatic enough: it assured a national, uniform forum for issues which before then had had to be litigated in distant and unfamiliar courts where--even if consent to suit was granted--the chance for an objective determination of the matter was dubious. The problem was that the constitutional language clearly inferred that a state was suable without its consent; and while supporters of ratification tried to minimize the liability of sovereign states under these provisions, they simply were blinking at the obvious and plain meaning of the words.

It was, accordingly, only a matter of time before the discrepancy between the language of the Constitution and the apologetic commentary on this language would be tested in the courts. Indeed, it cropped up in the dockets of some of the earliest terms of the Supreme Court. In February 1791 a group of Dutch bankers brought a debt action against the state of Maryland; the following year a Pennsylvania executor, Eleazar Oswald, sued the state of New York in the process of gathering in the assets of an estate, while a private land corporation in Indiana (Northwest) Territory brought a contract action against the Commonwealth of Virginia.

In all three instances, outraged screams rent the air, not only in the affected states but in all the others. The Maryland action provoked a grim prediction that if the case were pursued to judgment (it was not), "each State in the Union may be sued by the possessors of their public securities and by all their creditors." The Virginia legislature formally rejected the assumption that it could be made to answer in a Federal court to any individual or private corporation. In New York, although the Oswald suit gave Governor George Clinton and his anti-Federalist cohorts the satisfaction of being able to say, "I told you so," Oswald's suit was answered by a state officer. Maryland, at least tacitly, appeared to acknowledge the constitutionality of the action against it, for its attorney general appeared and answered the Dutch complaint; but the issue there, as well as in the case of Virginia, then was settled out of court.

Finally, in the August term of 1792, the question was presented in a case which became the first major constitutional decision in the history of the new government, and this was only part of the story of *Chisholm v. Georgia*. For in upholding the right of South Carolina citizens to sue the sovereign state of

Georgia, the decision provoked Congress in drafting the Eleventh Amendment which, when eventually adopted, overturned the rule in the case and made the first substantial alteration in the original language of the Constitution of 1787.

James Wilson, a delegate to the Philadelphia Convention and subsequently a Justice of the Supreme Court, in 1787 had made the analogy between an individual, "naturally a sovereign over himself," who would not be thought of as retaining all of that sovereignty when he "became a member of a civil Government," and a state, which logically should accept a limitation upon its own sovereignty when it "becomes a member of a federal Government." This proposition was now to be submitted to a judicial test: Did the right of *both* the individual and the state in a federal constitutional order undergo such changes that the sovereign immunity of that state no longer was absolute?

In the ratification debates in New York and Virginia, Alexander Hamilton and James Madison respectively had argued that the order of the words, "cases . . . between a state and citizens of another state," confirmed rather than curtailed state immunity. The states could sue the individual, according to this argument, but not vice versa. It was fundamentally a strained argument; in the *Chisholm* case, Chief Justice Jay would specifically reject it--but in the Eleventh Amendment, Congress would substantially rehabilitate it.

The jurisdictional question--did the Constitution make states answerable to action by a private party in a federal court--was the sole issue argued in the *Chisholm* case. As so often has been true of major constitutional litigation, the factual basis for the contest had to be gleaned from the preliminary papers and from other sources. Alexander Chisholm, as it turned out, was an executor in South Carolina for the estate of one Captain Robert Farquhar, who on October 31, 1777, had sold goods "brought into Georgia" by two agents of the state of Georgia, Thomas Stone and Edward Davis. The agreed price of the goods was $169,613.33, payable either in Georgia currency or in South Carolina money pegged to the market value of indigo, that state's predominant cash crop. Farquhar's day book, itemizing the sale, was offered in evidence and authenticated as in his hand by his "trading partners," Colin and Laurens Campbell of South Carolina. After Farquhar's death his executor sought to collect the amount allegedly due the estate from the state of Georgia, presumably to satisfy a settlement made between Farquhar and his partners before his departure for England.

Meantime, Georgia, like most of the rebelling states, had by statute sequestered or extinguished claims of loyalist subjects and thus in effect expropriated the goods which Farquhar had sold to Stone and Davis. Chisholm, the executor, in his petition argued that the sequestering statute had been enacted after the contract of sale and thus should not have retroactive effect. The Attorney General of the United States, Edmund Randolph, as was customary in these early days, took over Chisholm's private suit and sought a writ (*distringas*) which would compel the federal marshal to enforce any judgment rendered against Georgia by the Supreme Court. Georgia chose not to respond to the suit, but did make a special appearance through two Philadelphia lawyers, Alexander Dallas and Jared Ingersoll, denying jurisdiction. Randolph then submitted Chisholm's case and the Court entered a default judgment against the state of Georgia.

As was also true in these early days of the Court, before Chief Justice John Marshall introduced the institutional "opinion of the Court," each Justice submitted his independent opinion on the issue. Of the five jurists present (Thomas Johnson of Maryland was absent, and would resign two months later), only James Iredell declined to find jurisdiction; and even in his case, his opinion rested on the proposition that Congress had the power explicitly to vest such jurisdiction, an early example of what

the twentieth century would call "judicial restraint." James Blair's opinion limited sovereign immunity of the states to their own state courts, declaring that "when a state, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty." Justice Wilson stressed the moral argument that a state government should not evade an obligation by attempting to make state sovereignty a means of reneging on a promise for which federal sovereignty provided a remedy. William Cushing addressed, and rejected, the argument that states should not be liable to private suit when the United States was not, with the statement, ominous to states' rightists, that the sovereignty of the nation was superior to that of the states. Chief Justice Jay then summed up the opinions by declaring that the Constitution had in essence transferred certain elements of sovereignty from the states to the nation, and that one of the objectives of Article III of the document was to insure equal justice for all by making all states and all citizens equally subject to federal jurisdiction on federal questions.

The decision sent a shock wave through the young nation. It meant the end of the states, wailed some; through the "craft and subtlety of lawyers," the national power would now sweep over dividing lines and consolidate all local governments into units of the federal power. A Boston paper declared that the decision confirmed that "the absorption of state governments has long been a matter determined on by certain influential characters in this country who are aiming gradually at monarchy." Others, however, admitted the real reason for alarm: the pre-Revolutionary claims of refugees and Tories would now flood the courts, and this ruling would "give the key to our treasury to the agents of . . . men who were inimical to our Revolution, to distribute the hard money now deposited in that office to persons of this description."

In Massachusetts, Governor John Hancock called a special session of the state legislature, which adopted a resolution praying Congress to draft "such Amendments to the Constitution as will remove any clause or Article . . . which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any Court of the United States." Similar action from other states would lead Congress in that precise direction; but meantime, in the next term of the Supreme Court, Georgia was initiating action in the same tribunal to establish its right to answer a creditor's claim against it. The suit on the claim, in fact, had already been litigated in the Federal Circuit Court in Georgia before the Chisholm suit had been brought in the Supreme Court: A British creditor, Samuel Brailsford, sued a Georgia private citizen on a prewar debt which had been sequestered by the same state law affecting the assets in the Chisholm suit. The questions were distinguishable but fundamentally related: In the Chisholm action against Georgia in the Supreme Court, the issue was state sovereign immunity; in the Brailsford suit against one James Spalding, the issue was whether Georgia should be entitled to join a party defendant in order to protect its public policy, which otherwise would be put in hazard by litigation between private parties.

Circuit Justice James Iredell had denied Georgia's petition to be joined as a party defendant in the circuit court suit, primarily because he had ruled that the Georgia law was nullified by the treaty of peace between the United States and Great Britain. Georgia had then sued for an original bill in equity in the Supreme Court to compel the circuit court to allow its joinder; and the Supreme Court had added to the confusion by issuing a temporary injunction to the lower court. In disgust, the Attorney General wrote to James Madison that the injunction issued because of the "premier or prime minister" (Chief Justice Jay) seeking for "cultivation of Southern popularity," the general ignorance of equity jurisprudence on the part of the "professor" (Justice James Wilson) and the readiness of Iredell to reverse his own circuit ruling upon pressure applied to his North Carolina interests by Georgia. Everyone by now was quite testy; an order to the federal marshal to execute the judgment in favor of Chisholm would almost certainly have been unenforceable--so no order was issued.

The Eleventh Amendment was the states' specific response to the *Chisholm* decision, and it was drafted by Congress, submitted to the states and, as Justice Felix Frankfurter was to put it in 1949, adopted with "vehement speed." The opinions were handed down on February 18, 1793; two days later, a resolution for such an amendment was introduced into the Senate of the Second Congress. This failed to pass both Houses in the brief remaining period of the session; but in the first session of the Third Congress the bill had passed both Houses by March 4, 1794. Within the same month, New York became the first state to ratify, and less than ten months later the necessary three-fourths of the states completed the process with North Carolina's action of January 5, 1795. Rather ironically, in view of what the states manifestly considered to be a matter of greatest urgency, three more years would pass before President John Adams, on January 8, 1798, formally announced that the Amendment had been ratified. There was, as one historian of the Court has stated, an "extremely informal and careless" procedure for announcing such adoptions of amendments. (The Court itself, in 1922, held that such amendments become part of the Constitution, regardless of formal announcement by the Executive Department, upon the approval of the last state to make up the required three-quarters majority.)

One month after Adams' announcement, Chief Justice Oliver Ellsworth's Court held that in consequence it had no jurisdiction "in any case past or future in which a State was sued by citizens of another State." By this decision (*Hollingsworth v. Virginia*), the Court not only appeared to acknowledge the nullifying of the *Chisholm* decision but the limiting of its own jurisdiction by the amendment. Twice again in national history the amending of the Constitution would serve to reverse a constitutional decision, although hundreds of proposed amendments in reaction to an unpopular Court decision would be introduced over the years. The fateful opinion in *Dred Scott v. Sanford* was at least rendered moot by the Thirteenth Amendment's abolition of slavery; while the Income Tax decision (*Pollock v. Farmers Loan & Trust Co.*) of 1895 was eventually overturned by the Sixteenth Amendment in 1912.

However, the Pandora's box opened by Alexander Chisholm was still pouring out related constitutional issues for the fledgling nation and Court. Shortly after his Court's opinion in the cases against Georgia, Chief Justice Jay had been sent to London to negotiate a supplemental treaty disposing of British prewar claims against American debtors, while fresh suits on these claims simmered in the state and lower federal courts. By 1795, when the treaty had been negotiated, Jay had resigned his judicial post, convinced that the office would never amount to much. President Washington thereupon named the brilliant South Carolina jurist, John Rutledge, to become the second Chief Justice.

Rutledge had never doubted his own abilities, or the mistake the President had made in selecting Jay over him as the first choice to head the Supreme Court in 1789. His brief tenure as Associate Justice had not included any time on the bench itself, although he did ride circuit as did the other Justices. Now he did not hesitate to remind Washington of the opportunity to correct his earlier mistake, and the President gave him the interim appointment, which by provision of the Constitution would expire at the end of the next term of Congress if the Senate failed to confirm.

But the albatross of the *Chisholm* case, and its relation to the underlying question of British debts, now hung around Rutledge's neck. Jay's treaty was politically unpopular, particularly with Southern plantation owners whose economy in colonial times had revolved about a continual indebtedness to British merchants, and in a violently critical speech at Charleston that summer, Rutledge had attacked Jay and his treaty with such vigor that fellow Federalists were aghast. After all, it was going to be hard enough to answer to constituents for the Senate confirmation of the treaty without an intra-party quarrel to add a further handicap.

Rutledge proceeded to assume the duties of Chief Justice and preside at the fall term of the Supreme Court; but when Congress met in December, there was strong sentiment for rejecting his nomination. On December 19, 1795, Rutledge was rejected, 10-14, by the Senate.

Still the issue of the prewar debts would not subside. Daniel L. Hylton, a Virginia merchant who would also figure in another major constitutional case of this era (*Hylton v. United States*, or the "carriage tax" case which would later lead to the *Pollock* case of 1895 and thence to the Sixteenth Amendment in 1912), and found himself in the position of Messrs. Spalding, Stone and Davis and the state of Georgia--defendants in suits on pre-Revolutionary debts. John L. Ware, like Chisholm the administrator for a deceased British creditor, Williams Jones, brought a suit in the Circuit Court in Richmond to recover on a note of Hylton's dated July 7, 1774, in the amount of nearly 3,000 pounds sterling.

Hylton and a codefendant, Francis Eppes, offered as a plea in bar the sequestration statute in Virginia which, like Georgia's, purported to extinguish debts of citizens of the state which were settled in the state office created for the purpose. The Circuit Court, made up of Jay and Iredell and District Court judge Cyrus Griffin, found for Hylton and Eppes, two to one, with the Chief Justice dissenting, and the appeal to the Supreme Court eventually found its way there by the winter of 1796, where the underlying question was whether Jay's treaty, just ratified by both countries, had become the "supreme law of the land," in the language of the Constitution and by retrospectively validating preexisting debts to British creditors operated to nullify any state law to the contrary. Despite the elaborate argument of Hylton's attorney, a Virginia lawyer named John Marshall, the five-man Court (Rutledge having failed confirmation as Chief Justice and his successor not having taken office) by a vote of four to one in effect affirmed the treaty's supremacy and reversed the Circuit Court.

On February 29, George Washington proclaimed that the treaty was in effect, both the United States and Great Britain having ratified.

On March 4, the judgment in *Ware v. Hylton* was handed down.

On March 8, Oliver Ellsworth of Connecticut, chief draftsman of the Judiciary Act, became third Chief Justice of the United States.

Although the Eleventh Amendment, as has been described above, had actually been ratified by the requisite number of states nearly fourteen months earlier, it would be almost two years more before John Adams as President would finally notify Congress that the amendment was part of the Constitution. Thus, almost six years after Alexander Chisholm had begun his litigation on the prewar debts allegedly owing Robert Farquhar, the question was finally laid to rest.

Back to 1981 *Yearbook* Table of Contents