Chronicling the Early Court: A Look Back at Project's End

Robert P. Frankel Jr.
Eleanor Roosevelt Papers

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As I speak here today, the end is definitely near for *The Documentary History of the Supreme Court*. We have sent back the page proofs for the eighth and final volume and are now scurrying to complete the index. On 31 December, the project will officially go out of business. Of course, it would be difficult to claim that we have rushed these volumes into print. The project began in 1977. People invariably will say: “You are telling me that it has taken thirty years for you to do a history of just the first ten years of the Court.” I always mumble something about having been personally involved for only the last fifteen years and try to change the subject. But the project has indeed taken nearly three decades, and perhaps only other documentary editors could understand how that might happen.

The impetus behind launching this project was to illuminate the formative period of the Supreme Court’s life, which had largely remained in the shadows. The tendency had always been—and to some degree still is—to mark the beginning of the Supreme Court’s history with the appointment of John Marshall as chief justice in 1801. But there were three chief justices before him—namely John Jay, John Rutledge, and Oliver Ellsworth. When this project commenced, the only modern scholarly work that dealt with the first decade of the Court to any significant extent was Julius Goebel’s volume in *The Oliver Wendell Holmes Devise History of the Supreme Court*. Although informative, this 1971 book, the final product of a Columbia Law School professor, makes for dense, difficult reading. There was surely a need for a work like *The Documentary History of the Supreme Court*.

The sponsor of the project from the outset has been the Supreme Court Historical Society, and most of the funding has emanated from the NHPRC. The project was for many years housed in the Supreme Court, which also picked up part of the tab. The Court has remained involved in *The Documentary History* by arranging for our present space in the Thurgood Marshall Federal Judiciary Building, and we have continued to be well served by the Supreme Court library. The justices themselves, four of whom...
sit on our editorial advisory board, have been ardent supporters of the project and on occasion have even cited our volumes in their opinions.

In the early years of The Documentary History, Maeva Marcus, who has served as the director of the project over its entire lifespan, and her colleagues traveled all over the country collecting documents. The records of the Supreme Court are, of course, housed in the National Archives in Washington, but materials from the lower courts had to be retrieved from branches of the National Archives up and down the East Coast and from state-court repositories. Furthermore, dozens of libraries had to be scoured for letters and notes relative to the Supreme Court and its cases. This was no easy task, for a nugget about the Court’s business could easily pop up in the middle of a long letter from one correspondent to another, one of whom might have been a justice, a lawyer who appeared before the Court, or a litigant.

I would like to concentrate today on the final four volumes of the project, all of which I have worked on and which deal with the cases themselves. But let me tell you a little about the first four volumes. Volume 1 concerns the appointments to the Court and includes extensive correspondence—both official communications between the presidents and the nominees, as well as letters by others seeking to be put on the Court or commenting on those who would—or they thought should—be given places. Appointments were not as politically charged in those days as they are now, but the process could yield controversy. Most notably, when John Jay stepped down as chief justice in 1795, President Washington named John Rutledge of South Carolina to take his seat. Rutledge received a recess appointment, but because of an intemperate speech he made against the Jay Treaty and rumors of mental instability, the Senate failed to confirm him. Washington instead turned to Senator Oliver Ellsworth of Connecticut. I should note that Volume 1 also contains the minutes and docket book of the Court for the first ten years, which are both invaluable sources.

Volumes 2 and 3 of The Documentary History concern the justices on circuit. In these years the justices not only sat on the Supreme Court for their semiannual sessions—in February and August—but, much to their dissatisfaction, in the spring and fall they served on the circuit courts. They presided over these courts, which were primarily trial courts, with the district judges. It was impossible in our volumes to give more than a cursory treatment to the many cases that the justices heard while riding circuit, but the grand jury charges that the justices delivered to open the sessions are published, as well
as the replies and presentments that the grand juries offered in response. These statements by both the justices and the grand juries were as much political, speaking to the issues of the day, as they were legal. Above all, the two volumes are filled with correspondence regarding the justices' experiences while undertaking their arduous circuit-riding duties—with much commentary on the horrible roads over which they had to travel, the crude accommodations they confronted in the various towns, and the manifold ailments that plagued them on their journeys.

Volume 4 in the series is devoted to the Judiciary Act of 1789 and the legislation that was introduced in Congress over the course of the next decade to shape the judicial branch. Not all of these bills were passed into law. For example, after President John Adams sent Chief Justice Ellsworth to France in 1799 to work out a treaty, just as Washington had dispatched Jay to England five years before on a diplomatic mission, measures were proposed to rein in these extrajudicial activities. Two constitutional amendments were introduced to guarantee that a justice, or any federal judge, could not accept an appointment from the executive branch while still on the bench. But these amendments, and a similar statutory scheme, failed to muster the necessary support.

Volumes 5 through 8 all deal with the cases that the Court heard over the course of the 1790s. The fifth volume is devoted to a select group of cases—that is, suits against states. The most famous of these is Chisholm v. Georgia, in which the Court ruled that it could in fact hear a suit brought by a citizen of one state against another state, or by an alien against a state. Despite language in the Constitution and the Judiciary Act that appeared to allow such suits, the widespread assumption in the country was that these actions violated the sovereign immunity of the states. As a result, the Eleventh Amendment was introduced and ratified to bar such suits. Because the subject of state suability is a hot topic among legal scholars and the Supreme Court regularly entertains so-called Eleventh Amendment cases, it was decided to treat Chisholm and the related suits in their own volume.

The rest of the cases we deal with in chronological order in volumes 6 through 8. I might add that there is an appendix to Volume 6 that contains all of the documents we could find relevant to an interesting episode that unfolded in the summer of 1793 in which the Supreme Court refused to provide an advisory opinion to the Washington administration. The French ambassador to the United States, Citizen Genet, had been transforming American ports into bases for privateering activity, and President
Washington sought the advice of the Supreme Court to determine which of these activities were legal and which were not. Although Chief Justice Jay had informally advised the president on a variety of matters, the Court refused to accommodate the administration and supply an advisory opinion. The Court believed that to do so would violate the separation of powers and signaled that it would express itself only through the disposition of cases that came before it.

In documenting the cases that the Court heard in its first decade, the project had to confront Alexander James Dallas’s write-ups of these same cases in his published *Reports*. Dallas was a prominent member of the Philadelphia bar who, along with such men as Jared Ingersoll, William Lewis, and Edward Tilghman, regularly appeared before the Supreme Court during the 1790s. Although lawyers from outside the capital sometimes came to town to argue before the Court—John Marshall and Alexander Hamilton each did so once—Philadelphia lawyers, not surprisingly, dominated the Supreme Court practice. Dallas was not only an active advocate, but he also took it upon himself to become the unofficial Court reporter. His *Reports* contain the opinions, and sometimes the arguments of counsel, for many—but not all—the cases that appear on the Court’s docket in this period.

During the 1790s the justices delivered their opinions in most of the important cases seriatim—that is, with each justice speaking in turn. Under the leadership of Ellsworth, the justices began the practice of agreeing to a single opinion of the Court, delivered by the chief justice—a trend that would continue in the Marshall period. But in most of the key cases, because they were heard either before Ellsworth was appointed or while he was absent from the bench, the justices delivered seriatim opinions. It is not clear whether the justices spoke from notes, or whether they read their opinions, but we have evidence that even when Dallas was present in the courtroom, he did not attempt to record what they said. Instead, he asked the justices to give him written opinions for inclusion in his *Reports*. Not only do we not know if the opinions the justices submitted to Dallas reflect, precisely, what they said in court, but Dallas then took editorial liberties. We can assert that because we found a handful of manuscript opinions, and it is possible to see how Dallas revised the wording. Apart from these few holographs, *The Documentary History* does not include Supreme Court opinions. We decided not to republish the opinions, and reports of arguments, that appear in Dallas’s *Reports*. Aside from the fact that this material would have overwhelmed our volumes, Dallas’s *Reports*, which now form the first four vol-
umes of the *United States Reports*, are readily available. *The Documentary History* does not supersede Dallas's *Reports*; rather, it adds to—and in certain cases corrects—what Dallas published. Anyone interested in researching the early cases should consult both sources.

What we offer in our accounts of the cases, which cannot be found in Dallas’s *Reports*, is letters written by the parties, by the lawyers, and by interested observers. We also publish newspaper accounts of the cases. Furthermore, Dallas was not the only individual taking notes on the proceedings in the Supreme Court. Justice James Iredell often took notes on the arguments, as did Justice William Paterson. (Suffice it to say that Paterson's notes are not as copious as Iredell’s, but far easier to transcribe.) Furthermore, one of Dallas's fellow members of the Supreme Court bar, William Tilghman, cousin of the aforementioned Edward Tilghman, took extensive notes on the arguments and on the justices' opinions. In fact, in more than one instance, when Dallas was absent from the courtroom, he borrowed Tilghman's notes. Tilghman's papers are housed at the Historical Society of Pennsylvania, but nobody knew the notes were there until a member of our staff discovered them in the early days of the project.

For most of the cases we address in Volumes 6 through 8 of the series, the problem has not been a paucity of documents. The challenge has been to limit the documents we publish to a select number. Although the Court had original jurisdiction over several of the cases it heard, such as the suits against states, most of the cases came up from the lower federal courts or state courts. And even when the Supreme Court ruled on a case, the dispute typically did not end. Cases often went back to the court below for further adjudication and sometimes reappeared in the Supreme Court years later. Consequently, the decision was made to publish—with a few exceptions—only those documents related to the actions of the Supreme Court in the 1790s. The background, and ultimate fate, of each case is dealt with in a headnote introducing the documents.

Another reason we wrote these fairly extensive headnotes is that readers, frankly, would be lost without them. In a documentary history, the idea is to let the documents tell the story as much as possible. But these cases tend to be difficult—or downright baffling—and there was no way we could simply lay out the documents, even with ample annotation, and assume readers would understand the cases. So, this project turned out to be more of a hybrid than most other documentary histories. The heart of the volumes is, of course, the documents, but these scholarly introductions also form a vital

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part of the series. We tried to stay away from interpretation and simply present a straight narrative of each case, but inevitably some analysis and speculation were involved.

In regard to the difficulty of these cases, the question could be asked whether it is necessary to be trained in the law to undertake a documentary project in legal history. My answer is that possessing a legal education would certainly be helpful, but I do not believe it is required. My only advanced degree is a Ph.D. in history; in fact, in graduate school, my specialty was modern American cultural history. Maeva Marcus, the editor of *The Documentary History*, has a Ph.D. as well, not a J.D. At least, however, she did her dissertation in Supreme Court history—a thesis that became the book, *Truman and the Steel Seizure Case*. To be honest, in working on *The Documentary History*, I have often felt at a disadvantage because of my lack of legal training. Fortunately, however, since I have been with the project there has always been at least one lawyer on staff—invariably someone interested in pursuing the law as a scholarly endeavor but not in practicing law. These lawyers have kept us laymen from committing too many blunders, and Maeva has also called on a stable of law professors and practitioners for advice. But I think there have actually been some advantages to my not being a lawyer. I believe non-lawyers are less likely to write in legalese, and I have always tried to explain cases so that they can be understood by people like me—students of American history with no background in the law. Furthermore, I would add that having a J.D. has not always proven to be that useful in working on this project. Despite certain similarities in the way cases were handled in the 1790s and now, often the procedures followed two centuries ago were vastly different from what a lawyer today expects.

I would like to talk a little about one case that we treated to give you a better idea of the approach we took in the case volumes. That case, *Penhallow v. Doane’s Administrators*, was decided in 1795, but the underlying dispute dated back nearly two decades, to the revolutionary war. In 1777 a privateering vessel owned by John Penhallow and other New Hampshire merchants captured a brigantine, laden with valuable cargo, that belonged to Elisha Doane, one of the richest men in Massachusetts. The New Hampshirites charged that Doane’s brig was actually a British vessel in service to the British war effort. Even with John Adams serving as counsel to Doane, a New Hampshire admiralty court ruled that the seizure had been legal. The state’s superior court subsequently affirmed that decision. Doane then took the case to the Court of Appeals in Cases of Capture, a national
prize court set up by the Continental Congress. The Court of Appeals reversed the New Hampshire superior court and ruled that Doane should receive restitution. The problem was that New Hampshire did not recognize the jurisdiction of the Court of Appeals, and there the matter essentially stood for almost a decade. When the new federal judicial system was established under the Constitution, the administrators of Elisha Doane, who had died some years before, sought to have the order of the defunct Court of Appeals enforced. The United States Circuit Court for the district of New Hampshire did rule that the decision of the Court of Appeals overrode the decree of the New Hampshire state court, and so Penhallow and his fellow New Hampshire merchants appealed the matter to the Supreme Court. The justices did not review all of the details of the original dispute. Rather, the Court looked at a larger question: during the revolutionary war, did the Continental Congress (of which the Court of Appeals was a creature) possess the authority to reverse a state court? The justices unanimously decided that the war had been a national effort, prosecuted by the Congress, and that the national prize court had been within its rights to overturn the state court’s decision.

In the office of the Documentary History Project, we have enough files on Penhallow to fill its own volume. With all of the proceedings in the various courts, with the concomitant pleadings, and all of the evidence relative to the original dispute, there is a huge mass of documentation. Clearly we could not publish this all, even if we wanted to. So we essentially cover the background in our headnote and start to publish documents with the decision of the federal circuit court. We then publish the writ of error—the vehicle that was used in this period to bring a case up to the Supreme Court—as well as the assignment of errors, in which the party appealing to the Supreme Court would stipulate why the lower court decision was wrong. Though we do not publish the record and proceedings sent up to the Supreme Court, we do publish the notes that Justice Iredell took on that record. In this period there were no briefs in the sense that we know them: the lawyers had to make their cases through oral argument. In Penhallow argument stretched out over a period of eight days. (Now cases are heard in one hour.) Dallas’s Reports sums up these arguments, but we publish the notes that Justice Paterson and William Tilghman took each day as the teams of lawyers argued for each side. Of course, counsel cited dozens of legal authorities, from Blackstone to Vattel, various English cases, and the proceedings of the Continental Congress—all of which, unfortunately, had to be annotated. We
also publish Tilghman's notes of the justices' opinions, which can be compared to the opinions as presented in Dallas's Reports. While the New Hampshire merchants were fighting in court, the legislature, on their behalf, submitted remonstrances to Congress protesting the violation of the state's sovereignty. We publish these remonstrances, as well as portions of a pamphlet that the New Hampshirites circulated to advance their cause. We publish newspaper stories on the court proceedings, as well as various letters regarding the case. Most of those letters were written by New Hampshire congressman Jeremiah Smith in Philadelphia to his friend William Plumer back in the "Granite State." Smith and Plumer were two exceptionally literate high Federalists, and they had no sympathy for their fellow New Hampshirites in the Penhallow case. When the Court ruled unanimously in favor of Doane's administrators, Smith was pleased but heaped special praise on the opinion of Justice Patterson. Smith wrote to Plumer, "Patterson delivered one of the most elegant correct perspicuous & convincing Arguments I ever heard delivered in a Court of law...You would have been delighted...The rest of the Court were like mole hills beside the Alps."

Penhallow was an important case, not only because of the large amount of money that was at stake, but because the Court weighed in on the power of the states within the republic. In other cases, such as Chisholm and Ware v. Hylton, the Court played a role in setting the federal-state balance. And while the Court did not strike down a congressional statute until Marbury v. Madison in 1803, there are several examples of the justices' exercising the authority of judicial review in the 1790s—such as in Hylton v. United States. In a number of other cases the Court resolved important procedural matters. In essence, what we hope we have displayed through the eight volumes of The Documentary History is that there was life, even true vitality, in the Supreme Court before John Marshall.