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**REMARKS OF
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THE COURTS AND THE CONSTITUTION

With the advantage of hindsight it is easy to believe that the kind of constitutional republic we have today, in which the majority rules, subject to certain limitations in the Constitution, was inevitable once the Constitution was proposed and adopted two hundred years ago. A moment's reflection, however, will tell us that such is not the case. No matter how skillfully written or beautifully phrased, paper charters do not create a system of government. Men and women must interpret the terms of those charters and operate under them to breathe life into them and make them effective in our daily lives.

Countless people have participated in this endeavor, and all deserve credit for making our country what it is today. If we were to single out one person who should be at the head of the procession in receiving this credit, however, it would have to be John Marshall, who served as Chief Justice of the Supreme Court of the United States from 1801 until 1835. John Marshall deserves primary credit for two related accomplishments in the development of American constitutional history. He found the judicial branch of the federal government anemic and lightly regarded; he left it as a truly equal partner with Congress and the President. He found the new national government still uncertain as to its powers, and openly challenged by the more powerful states; he left it supreme in the sphere that the Constitution had assigned to it.

The earliest description of John Marshall I have found dates from when he was a nineteen-year-old lieutenant of militia gathered in a field with his men about ten miles from Oak Hill, Virginia in May, 1775. Here is how he looked:

Assuming command in the absence of the Captain, Marshall made a lasting impression on the assembled Minutemen. His uniform of a pale blue hunting shirt and leggings, "fringed with white," accentuated his lean, six foot frame. Beneath a round, black hat with a bucktail cockade beamed a round face, "nearly a circle," a heavy head of thick "raven-black" hair, and, most striking, black eyes "strong and pene-

trating, beaming with intelligence and good nature." After drilling the company for one hour and addressing them for another, Marshall spent the remainder of the day pitching quoites (round stone discs) and running races with his men.

His looks changed as he grew older of course, but the dark and penetrating eyes remained a distinct characteristic. Andrew Oliver, in his book "The Portraits of John Marshall," makes this observation:

There is no difficulty in discovering in Inman's aged Chief Justice the young and handsome envoy to France as he appeared in 1797. Jefferson and the two Adams grew old, old and tired, tired and wearied looking. Marshall, aged 80, in the face of the dreaded operation for the stone only a day or two later, looks down on us from Inman's canvas as serene, as gentle, and yet as firm, as he appeared before his elevation to the Court thirty years before. And as he looked while on the bench throughout his career as Chief Justice.

John Marshall was a remarkable looking man. He also had a remarkable career. He was the eldest of fifteen children born to Thomas Marshall and Mary Randolph Marshall in the shadow of the Blue Ridge in northern Virginia. His early education was scanty, consisting of a year of the classics and a few months' study under a private clergyman. He was commissioned an officer in the Continental Army in 1776, and ordered to active duty in January, 1777. He saw action in the battles of Brandywine, Germantown, and Monmouth, and spent the winter at Valley Forge near Philadelphia with the rest of Washington's army. These experiences made a deep impression upon John Marshall; he later recounted that they confirmed in him "the habit of considering America as my country, and Congress as my government." One may imagine that this was by no means a common sentiment in "states' rights" conscious Virginia.

John Marshall studied law under George Wythe at William and Mary for a brief period of time, approximately three months, and was admitted to the Virginia bar in August, 1780. He married Polly Ambler in 1783, and for the rest of his life resided in Richmond. He practiced law in the capital of Virginia for fifteen years, espousing the views of an ardent Federalist admirer of George Washington.

He achieved increasing prominence in Richmond political circles because of his ability in defending the Federalist cause against the more numerous partisans of Jefferson and Madison. In 1797, newly elected President John Adams appointed Marshall, along with Charles Cotesworth Pinckney of South Carolina and Elbridge Gerry of Massachusetts, as envoys to deal with the insolent directory then ruling France. The threesome reached Europe in the early fall of 1797, and were left cooling their heels in the reception room of the French Minister Talleyrand for a long period of time before he would see them. Thereafter, Talleyrand would deal with them only through intermediaries who, in order to protect their reputations, were referred to as X, Y, and Z in the dispatches of the American envoy. Hence, the whole episode came to be known as the X, Y, Z Affair. The intermediaries informed the American envoys that before dealing with them it would be necessary to give Talleyrand a bribe of \$250,000—a good deal more money then, of course, than it is now.

The Americans steadfastly refused to respond to this sort of overture and eventually left France without having accomplished their mission of conciliation. When, in response to the demands of Jefferson's party in Congress, all of the correspondence was published, the nation was outraged by the French machinations, and Marshall became a national hero. He was elected to the National House of Representatives in 1799, and the following year President John Adams named him Secretary of State. In February, 1801, Adams nominated Marshall to succeed Oliver Ellsworth as Chief Justice of the Supreme Court of the United States.

John Marshall served in that office for thirty-four years, far longer than any other Chief Justice. During his tenure as Chief Justice six different men served as President of the United States. During this period of time under Marshall's leadership the Court established its own position as a full-fledged and independent branch of the tripartite federal government and established the power of the federal government, and Congress in particular, to exercise extensive authority in the new nation.

In the case of *Marbury v. Madison* decided in 1803, Marshall wrote the opinion for the Court which held that, under article III of the Constitution, the federal courts had the authority to declare invalid an act of Congress that they found to be in conflict with the Constitution. In the case of *McCulloch v. Maryland* in 1819, Marshall wrote the opinion for the Court holding that although the federal government was one of delegated powers, its actions within the scope of those powers were supreme over conflicting acts of state legislatures. In 1824, John Marshall wrote the opinion for the Court in the case of *Gibbons v. Ogden*, holding that the authority to regulate commerce among the several states conferred upon Congress by the Constitution was to be broadly construed and that the Constitution meant to "prescribe the rule by which commerce should be governed."

It would be possible to add other case names and holdings to these three, but it is unnecessary to do so. Marshall does not merely stand head and shoulders above his successors, he *towers* over them. Oliver Wendell Holmes, Jr., himself a giant figure in the history of American law, said:

If American law were to be represented by a single figure, skeptic and worshiper alike would agree without dispute that the figure could be one alone, and that one John Marshall.

What, then, was the reason for Marshall's extraordinary success in molding the Supreme Court and indeed the national government to his own constitutional views? Obviously it was not legal learning; his few months of legal education at William and Mary under George Wythe were more than matched by the legal education of several of his colleagues on the Court during the time he served.

It has sometimes been suggested that he succeeded because he was "present at the creation," and that anyone who assumed the office of Chief Justice so close to the beginning of the new government was bound to have a vital role in the shaping of the Supreme Court. But John Marshall was not the first Chief Justice. He was either the third or the fourth, depending upon whether one counts John Rutledge of South Carolina, who received a recess appointment

from President Washington but was denied confirmation by the Senate. Marshall's two predecessors were probably better known men in the young republic's legal community at the time of their appointments than Marshall was in 1801.

The first was John Jay, a New Yorker who was born to an aristocratic English family and married into a wealthy Dutch family—a surefire recipe for success in colonial New York. He had attended Columbia College, was admitted to the bar, and held virtually every conceivable office, first under New York State and then under the Continental Congress. In the Supreme Court building today are portraits of all the Chief Justices, and the portrait of John Jay is the only one showing this official wearing a traditional English red robe, as opposed to what was to become the customary American black robe.

For all his learning and prominence, however, John Jay apparently found very little to interest him in the office of Chief Justice. He did not bother to attend the sessions of Court in 1794 or 1795 because George Washington appointed him emissary to England to settle differences arising over enforcement of the treaty that had ended the Revolutionary War. He returned to the United States in July, 1795. Finding that his friends had made him a candidate for Governor of New York and that he had been elected to that office *in absentia*, he resigned as Chief Justice and took the oath as Governor of New York.

Jay was succeeded by Oliver Ellsworth of Connecticut, who was much less of an aristocrat than John Jay. He graduated from Princeton and was admitted to the Connecticut bar in 1771. One of his biographers says he was not immediately successful—something of an understatement, since his earnings for the first three years of his practice totaled three pounds. Nevertheless, he soon gained a reputation. He was one of Connecticut's three delegates to the Constitutional Convention; he was one of Connecticut's first two Senators; and he was the principle drafter of the Judiciary Act of 1789, one of the most important laws ever enacted by Congress.

His short tenure as Chief Justice, however, was as uneventful as that of John Jay's. In 1799 John Adams sent him to France as an emissary to resolve difficulties which had led to an undeclared war with that country. He sailed in November, 1799, but the rigors of the trip broke his health. He resigned as Chief Justice in December, 1800.

When President John Adams received word of Ellsworth's resignation, he once again offered the position to John Jay. John Jay responded in a letter which read in part as follows:

I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which was essential to its affording due support to the national government; nor acquire the public confidence and respect which, as the last resort of the Justice of the nation, it should possess. Hence I am induced to doubt both the propriety and the expediency of my returning to the bench under the present system.

So low was the estate of the Supreme Court at the time the government moved to Washington in 1800, after one year in New York and ten years here in

Philadelphia, that no provision had been made for housing the "third branch" of the national government. The President's house, later called the White House, had been completed, and the north wing of the Capitol building had been built. In January, 1801, the district commissioners recommended that Congress provide the Court with "a room in the Capitol to hold its sessions." Congress responded to this suggestion by designating a committee room on the first floor of the Capitol building as a "courtroom," and in this small and undignified chamber, twenty-four feet wide, thirty feet long, and twenty-one feet high, the Court sat for seven years until more spacious quarters were provided.

This, then, was the institution bequeathed to John Marshall by John Jay, the first Chief Justice who was indeed "present at the creation," and by Oliver Ellsworth, who was the second Chief Justice. At the time John Adams appointed Marshall Chief Justice in 1801, the Court had existed for twelve years, and amounted to very little. Not only was Marshall *not* "present at the creation" of the Supreme Court, but his predecessors who *were* apparently found the institution both uninteresting and unchallenging. The "present at the creation" argument therefore disappears upon more careful examination.

The key to Marshall's success, as with the success of many other people in every walk of life, was a matter of character and temperament. Marshall had a vision of a new national government adequate to perform the tasks that any national government must perform; his vision he quite readily reconciled with, if he did not derive it from, the views of those who adopted the Constitution. He never yielded that vision during the thirty-four years he served as Chief Justice. This view of the nation animated the opinions he wrote for the Supreme Court in important cases, opinions that were usually written with magisterial clarity. Marshall's colleague on the Court, Joseph Story, once said that "in the law the power of clear statement is everything." Marshall possessed this quality in abundance, and to this day passages from his important opinions are quoted rather than paraphrased because they are so beautifully written.

Marshall also possessed in strong measure the ability to influence and persuade his colleagues. Perhaps his experience in dealing with his fellow human beings in such positions as the command of the artillery company during the winter of Valley Forge proved more important in this regard than a thorough legal education. The conviviality of the boardinghouse life to which he and his colleagues submitted themselves during the short time each year they were in Washington seems to have been made for someone who could capitalize on a combination of good temper, gregariousness, and clear-sightedness.

Even in his own day, Marshall's work as Chief Justice made such a public impression that John Adams in his retirement would say, "John Marshall was my gift to the American people." Now, nearly two centuries later, succeeding generations of Americans are the beneficiaries of this singular gift by the second President. Marshall was not one of the fifty-five delegates to the Constitutional Convention who met here in Philadelphia in the summer of 1787. His labors on behalf of constitutional government for the new republic came at a later time, and lasted throughout the thirty-four years in which he held the office of Chief Justice. If James Madison is to be thought of as the father of the Constitution—

its designer, so to speak—John Marshall surely qualifies as its builder, the craftsman who translates the design from specifications on paper to a structure in the real world of government.