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## Justice Under Law

William F. Swindler

*William & Mary Law School*

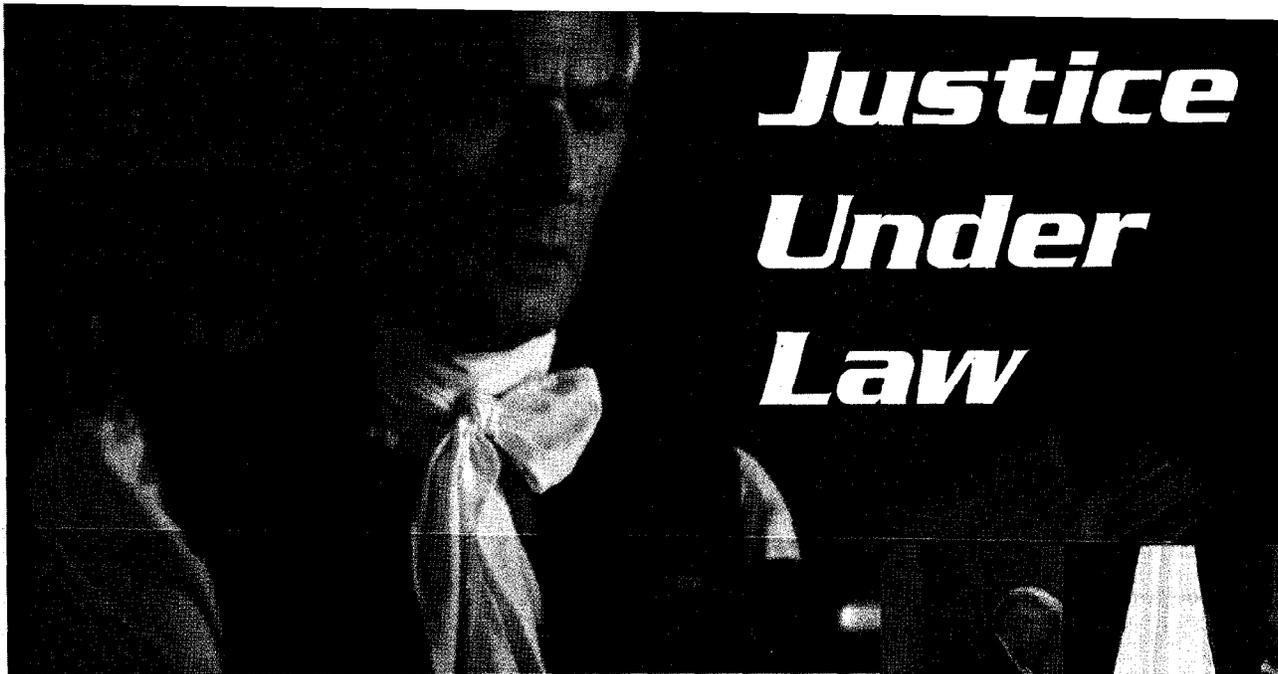
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Photography courtesy of WQED, Pittsburgh



Chief Justice John Marshall, portrayed by Edward Holmes, is the star of the P.B.S. "Equal Justice under Law" series.



By William F. Swindler

**T**HE MOTTO on the façade of the Supreme Court Building—"Equal Justice under Law"—is also the title of a series of five films that will have their premieres next month on the Public Broadcasting Service network.

Commissioned by the Bicentennial Committee of the Judicial Conference of the United States and produced for public television by the P.B.S. national production center at WQED, Pittsburgh, the films are intended to inform the general public, as well as educational and professional audiences, on the American constitutional heritage as exemplified in the major decisions of the Supreme Court under Chief Justice John Marshall.

Four constitutional cases are dramatized in the series—including the renowned judicial review issue in *Marbury v. Madison* in 1803, the definition of "necessary and proper" powers of national government in the "bank case" (*McCulloch v. Maryland*) in 1819, and the commerce clause doctrine expressed in the "steamboat case" (*Gibbons v. Ogden*) in 1824. These three Supreme Court cases are complemented by two films on the treason trial of Aaron Burr in the old circuit court in Richmond, Virginia, in 1807—one of these illustrating the ultimate answerability of the executive department



ABOVE: Marshall confers with Justice Joseph Story (left) and Justice Bushrod Washington (right). BELOW: Aaron Burr is escorted to jail.

to judicial process and the other the judiciary's basic responsibility to ensure a fair trial to unpopular defendants.

E.G. Marshall, well-known for his judicial role in the popular TV series, "The Defenders," introduces and concludes each of the films and also provides off-camera commentary as the issues are dramatized. Every

effort has been made to ensure that the story of each case is authentic, even while recognizing that there must be simplification for dramatization purposes. The drama department of the Carnegie-Mellon University at Pittsburgh worked with WQED to design sets and costume actors for the final production of the films after scripts and story lines were reviewed by a subcommittee of the judicial group for accuracy and authenticity.

A 1975 congressional appropriation to enable the judicial branch of the federal government to prepare appropriate anniversary projects is funding production of the film series as well as a biographical directory of the federal judiciary and a popular book on the American judicial system. Because many of the projects are directed to bicentennial dates yet to come, the Judicial Conference recently renamed the group the Committee on the Bicentennial of Independence and the Constitution, looking to a succession of undertakings between now and the two hundredth anniversary of the Philadelphia convention in 1987.

The committee is made up of judges from the eleven judicial circuits and the special courts in the federal system, with Chief Judge Clement F. Haynsworth, Jr., of the Fourth Circuit and District Judge Edward J. Devitt of Minnesota as cochairmen. Chief Judge Howard T. Markey of the Court of Customs and Patent Appeals serves as co-ordinator of the committee program, and Associate Justice Byron R. White of the Supreme Court is chairman of the film subcommittee. Other members of the film subcommittee are Circuit Judge Roger Robb of the District of Columbia and Senior Circuit Judge Bailey Aldrich of the First Circuit.

The five films will be broadcast in a series from Monday, September 12, through Friday, September 16, at 11:30 A.M. Eastern Time over the P.B.S. facilities. A



Thomas Jefferson discusses the Burr trial with William Giles (left) and George Hay (right).

### Equal Justice under Law

A production of the Judicial Conference of the United States in association with WQED, Pittsburgh, in five thirty-minute segments. Produced by Matt von Brauchitsch and Bill Donovan. Written and directed by Matt von Brauchitsch. Associate producer, Lisa Cantini-Seguín. Executive producer, Thomas Skinner.

#### Cast

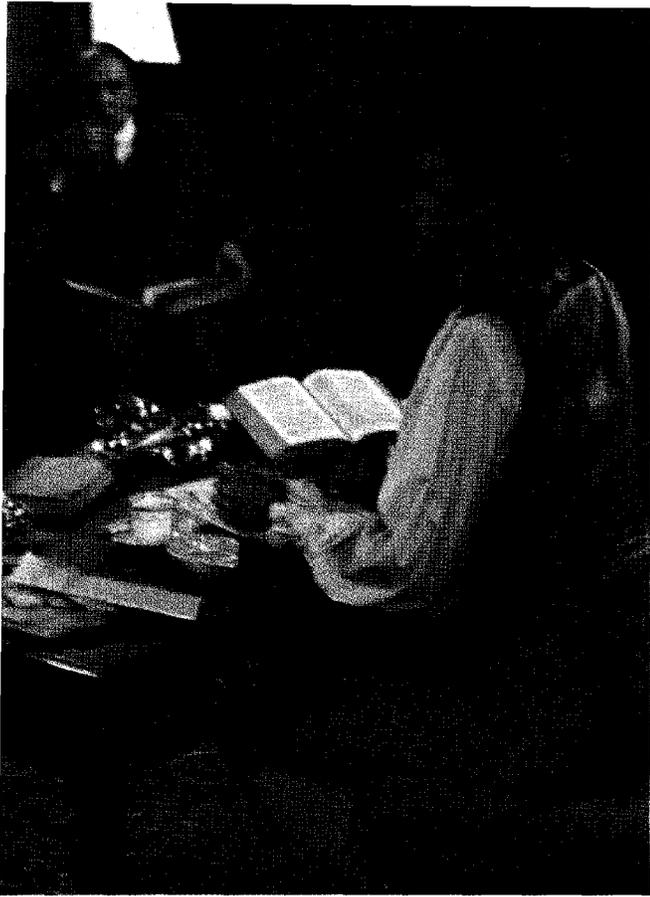
Host	E.G. Marshall
John Marshall	Edward Holmes
Thomas Jefferson	James Noble
George Hay	Frank Latimore
Bushrod Washington	Reid Shelton
Aaron Burr	Nicholas Repros
Judge Cyrus Griffin	Leon B. Stevens
John Wickham	Peter C. Messer
Gabriel Duvall	Ed Fuller
William Giles	Roy Cooper
William Johnson	Vince Carroll
William Cushing	Robert Schilling
Joseph Story	Ken Costigan
John Randolph	Barry Snider

special ninety-minute presentation of the *Marbury*, *McCulloch*, and *Gibbons* cases will be fed to the P.B.S. network on Saturday, September 24, at 6:00 P.M. Eastern Time; and on Saturday, October 1, at the same time, the two Burr films will be shown with linking materials. The five films will be repeated in series at 10:00 A.M. Eastern Time on Mondays beginning November 21. Unlimited videotape recording of the films is being permitted.

In addition, schools and colleges will have access to the films for classroom discussion, as well as teachers' guides prepared by WQED in co-operation with the Judicial Conference. The United States Information Agency also has expressed an interest in exhibiting some or all of the films world-wide.

Complementing the film series will be a documentary book, *The Constitution and Chief Justice Marshall*, to be published by Dodd, Mead, and Company in the early fall. Although an independent project, the volume will serve as a background reference, since it provides a narrative account of each of the cases dramatized in the series followed by a selection of relevant documents for each of the cases. The volume will have an introduction written by Chief Justice Warren E. Burger.

The "third branch" of government has always been the least understood branch, partly because of the professional reticence of jurists to "go public" concerning



ABOVE: Marshall. BELOW: The Marshall Court of (from the left) Cushing, Story, Washington, Marshall, Johnson, and Duvall.

their functions or the issues brought before the bench. Believing that a dignified presentation of the judicial story ought to be made available to the general public, Chief Justice Burger has encouraged various efforts to accomplish this objective. Finding that the "marble palace" did not make a first impression of warmth and humanity on visitors (about 700,000 a year), the chief justice at the beginning of his administration arranged for portraits to be brought out of storage and placed on the walls, and interpretative exhibits have been prepared and displayed in the ground floor hall. (See 59 A.B.A.J. 746 (1973) and "Clio and the Third Branch," 61 A.B.A.J. 1096 (1975).)

The Supreme Court Historical Society—a belated creation to join the White House Historical Association and the United States Capitol Historical Society—has been operating for three years, following a careful preparatory study for two years before that. Headed by Elizabeth Gossett, daughter of Chief Justice Charles Evans Hughes and wife of a former president of the American Bar Association, the society has had a rapid growth in its program of acquisitions of items associated with the Court, its co-operation with the curator's office in planning of exhibits, and its expanding publications series. A major contribution to professional scholarship will be the society's five-year project to collect, edit, and publish the documentary materials

for the first decade of the Court, 1789–1800. Maeva Marcus, a history graduate of Columbia University, is directing the project under a grant from the National Historical Publications and Records Commission.

The work of the Judicial Conference Committee on the Bicentennial of Independence and the Constitution thus complements that of the historical society, although in the case of the film series it is intended to reach a much broader audience. At the outset it was recognized that, so far as 1976 was concerned, there was no judicial bicentennial to be observed in a literal sense. While a special court of appeals to hear prize cases was established by the Continental Congress, the federal judicial system itself did not come into being until the Constitution of 1787. On the other hand, the definition of constitutional values derived from the written document, appearing in the renowned constitutional decisions of John Marshall, were believed to offer the most logical means of portraying the principles for which the War of Independence itself was begun in 1776.

Reducing the issues in the four major cases in the film series to terms that could be translated into personalities and conflicts was a demanding task that required the close co-operation of legal scholars and film makers. Two members of the University of Pittsburgh law faculty—Robert Potter and Richard H. Seeburger—acted as consultants to the WQED staff



Burr (center) and his attorney, John Wickham (left), and a clerk.



Aaron Burr is burned in effigy in Virginia.

headed by Mathias von Brauchitsch, who has directed a number of P.B.S. film documentaries, including the bicentennial series, "Decades of Decision," for the National Geographic Society. The result, by general committee agreement, is a group of films that tell the story of the Supreme Court and the Constitution in more dramatic and accurate form than has ever been available before.

The synopses for the films—for which the accompanying photographs are literal illustrations—are given below, to encourage readers of this *Journal* to become part of the viewing audience this fall.

**Marbury v. Madison.** William Marbury and three others were among forty-two persons issued justice of the peace commissions among the "midnight judges" of the outgoing administration of President John Adams. As of 9:00 P.M. on March 3, 1801, the secretary of state, John Marshall, had affixed the great seal of the United States to all these commissions, but a number were left undelivered. The next day Thomas Jefferson became president and, among other events, the undelivered commissions disappeared. Marbury and his associates, perhaps at the instigation of Federalists looking for a case to embarrass the new administration, petitioned the Supreme Court for a writ of mandamus to compel the new secretary of state, James Madison, to deliver the commissions.

Madison, on instructions from Jefferson, ignored the show cause order that Marshall, now chief justice, issued. It was clear that the State Department also would ignore any mandamus that might issue, and the Supreme Court would be caught on the horns of a dilemma, unable to enforce its own mandate or forced to confess a lack of jurisdiction over actions by other branches of government. As every law student knows, Marshall met the challenge by finding that Section 13

of the Judiciary Act of 1789, which had given original jurisdiction to the Court in these cases, was invalid because (as Marshall chose to construe it) the provision was in conflict with Article III of the Constitution defining and limiting original jurisdiction. By reaching the jurisdictional question last, Marshall was able to use the case to assert, relatively gratuitously, that the judiciary had a lawful obligation to protect any individual whose claims against government are lawful, and that process can issue against any official of government whose action is essential to accommodating the claim.

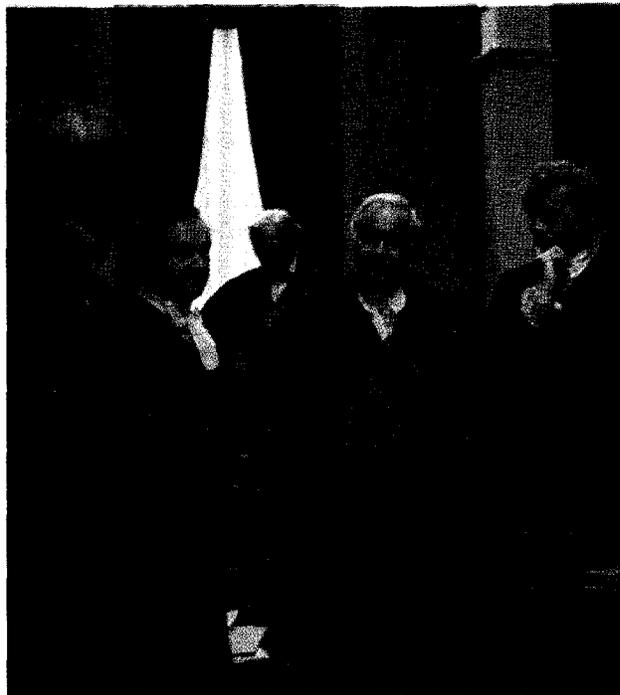
**United States v. Burr.** The former vice president of the United States, Aaron Burr, was arrested in the wilds of Mississippi Territory in the winter of 1807 and marched to Richmond, Virginia, to face charges of treason and high misdemeanor. No one has ever demonstrated conclusively what Burr was doing or intended to do in the western wilderness between Blennerhasset's Island on the Ohio River (near present-day Parkersburg, West Virginia) and the mouth of the Mis-



Marshall, with Story (left) and Washington (right).

issippi at New Orleans. But there were restless European powers that preyed on the weak American nation, hinted at taking over the vast territory recently acquired from France beyond the Mississippi, and periodically intrigued with various American officials about possible separation of the trans-Allegheny area from the rest of the United States. So Jefferson's alarm at Burr's mysterious behavior was not altogether irrational.

The Burr trial was a criminal proceeding in the old circuit court in Richmond, which had jurisdiction over Blennerhasset's Island, the scene of the alleged treasonable acts. Evidence of Burr's acts was in the form of a series of affidavits submitted by Gen. James Wilkinson, commander of American armed forces at New Orleans, and a renowned "cipher letter" in which Burr supposedly revealed his plans to Wilkinson. Burr, like the astute lawyer he was, suddenly moved to have a subpoena duces tecum issued to the president of the United States to obtain the original copies of these documents. While Jefferson never wholly complied with the subpoena (he turned the documents over to Attorney General Caesar Rodney and United States



The Marshall Court.



ABOVE: John Randolph debates with a crowd. RIGHT: Justice Washington and Chief Justice Marshall play chess.

Attorney George Hay to delete matters relating to "national security"). Marshall was satisfied that he had made a fundamental constitutional point, supplemental to *Marbury*—the answerability of any officer of government, up to and including the president, when the judicial branch of the government requires information from them.

In 1974 the principle enunciated in the Burr trial was cited by the modern Court in the renowned Watergate tapes case (*United States v. Nixon*, 418 U.S. 683).

The trial of Burr for treason enabled John Marshall, sitting as circuit justice with District Judge Cyrus Griffin, to define the crime of treason in terms set out in the Constitution: an actual levying of war against the United States, or giving aid and comfort to its enemies,

as established by testimony of two witnesses to the same overt act. With this precise definition, as against traditional common law definitions, Marshall required the most complete protection of the defendant against general allegations by the government. As a consequence, Burr was acquitted both of the charge of treason and the charge of high misdemeanor (a military effort against a friendly neighboring nation). No one was particularly enthusiastic about the former vice president's getting off altogether. Everyone, including both Jefferson and Marshall, believed that Burr had been up to no good, but the principle that in a capital case the proof must be beyond all reasonable doubt was more important.



**McCulloch v. Maryland.** The Bank of the United States was almost anathema to the small farmers and tradesmen who made up the Jeffersonian majorities in many states of the early nineteenth century. In its early years the bank did little to overcome its bad image, and a number of states took legislative steps either to lay burdensome taxes on its circulating paper or to forbid its operation within their borders. James McCulloch, cashier of the Baltimore branch of the bank, seemed a choice target for an attempt by Maryland to cite the bank in the state courts for failing to use state-taxed paper for the printing of its notes.



In the trial and state appellate stages of this litigation, Maryland won virtually on a stipulation of the facts, so that when the case came on for review in the Supreme Court the only question on the record was the constitutional one: Can a state lay a burden on an agency of the federal government or in any way qualify its right to do business within the scope of its own authority? Marshall had been waiting for a case like this. As early as 1805, in *United States v. Fisher* (2 Cr. 358), he had declared that the "necessary and proper" clause gave the government a necessary freedom to choose appropriate (even though not indispensably necessary) means of implementing its powers. Now, in the great "bank case," he was able to declare, first, that a congressionally chartered bank was an appropriate means for implementing the monetary and tax powers of the government, and second, that when Congress had a constitutional authority to act, its actions could not be qualified or limited by state action.

William F. Swindler is John Marshall Professor of Law at the College of William and Mary and consultant to the Committee on the Bicentennial of Independence and the Constitution of the Judicial Conference of the United States. He assisted with the planning and development of the film series described in this article and is the author of a companion documentary book, *The Constitution and Chief Justice Marshall*, to appear this fall.



LEFT: The Marshall Court. ABOVE: Justice Johnson presides in his chambers.

The implications of the case were horrendous, as far as the anti-Federalists were concerned, and the *McCulloch* opinion provoked such violent attacks in the partisan press that Marshall felt compelled to depart from judicial tradition and publish some pseudonymous rebuttals. With the *McCulloch* case, Marshall's constitutional rationale certainly approached its zenith: the Constitution and the laws and treaties enacted under it are the supreme law of the land, and all state and national officials are to be bound by them.

**Gibbons v. Ogden.** Robert Fulton's invention of the practical steamboat led to a lucrative monopoly for a company, Livingston and Fulton, on the waters in and around New York State. A number of licensees enjoyed the benefits of the monopoly, including a former governor of New Jersey, Aaron Ogden, and a former Georgia lawyer and jurist, Thomas Gibbons. Gibbons, however, was joined to the monopoly by a license for New Jersey waters issued under authority of a congressional coasting and navigation law, and eventually he broke with Ogden and challenged the legality of the New York license with reference to interstate transportation.

While the monopoly had been upheld in a long list of state challenges in the New York courts, Marshall recognized this case, which came on appeal from New York, as the means of fashioning an instrument for carrying into effect the sweeping federal power asserted in 1819 in the bank case. By making an equally broad assertion of the power of Congress over interstate commerce in general, he expanded the *McCulloch* doctrine into a paramount federal power. It rounded out the basic constitutional principles the Court had been developing for more than a quarter of a century. It also ensured that the United States would become a common market—a free-trade economic unit that could expand from coast to coast. ▲