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## John Marshall: Remarks of October 6, 2000

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## JOHN MARSHALL

REMARKS OF OCTOBER 6, 2000

WILLIAM H. REHNQUIST\*

Thank you, Dean Reveley, for the kind introduction. It is a great pleasure to be here. Next January will be the two hundredth anniversary of the appointment of John Marshall as Chief Justice of the United States Supreme Court. I am quite convinced that Marshall deserves to be recognized along with George Washington, Alexander Hamilton, James Madison, and Thomas Jefferson as one of the “Founding Fathers” of this country. Admittedly, he does not have the name recognition of Washington, Hamilton, or Jefferson, but a strong case can be made for the proposition that his contribution to our system of government ranks with any of theirs. I shall try to make that case this evening.

Of these Founders, *Washington* had the experience as a military commander and the reputation for public rectitude that were essential in our first President. *Jefferson* was a philosopher, championing lofty political ideals which could catch the public imagination. *Hamilton* was a hardheaded master of finance whose vision of the economic future of the nation—manufacturing—proved far truer than Jefferson’s idealization of a nation of yeoman farmers and artisans. *Marshall* derived from the Constitution—a document largely authored by James Madison—a roadmap of how its checks and balances should be enforced in practice.

Today, the federal judiciary, headed by the Supreme Court, is regarded as a coequal branch of the federal government, along with Congress and the Executive Branch. But in the first decade of the new republic—from 1790 to 1800—it was very much a junior partner. The Court’s present-day status is due in large part to John

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\* Chief Justice, United States Supreme Court.

Marshall, who served as Chief Justice for thirty-four years—from 1801 until 1835.

During the first decade of the new republic, the Supreme Court got off to a very slow start. It decided a total of sixty cases in this ten-year period—not *sixty* cases per year, but about *six* per year, because there was so little business to do. The Justices met in the national capital for only a few weeks each year. They spent the rest of their time riding circuit and sitting as trial judges in their respective circuits—from Portsmouth, New Hampshire to Savannah, Georgia.

John Jay, the first Chief Justice, was appointed by George Washington in 1789. Jay was a rather elegant New Yorker. In two conference rooms of the Supreme Court, there are portraits of each of the early Chief Justices, and only Jay is shown as wearing a red robe. He had held most of the important positions in the state government of New York, and was half English and half Dutch—just the right combination for political success in New York at that time.

In 1794, Washington decided that he needed a special ambassador to go to the Court of St. James and negotiate with Great Britain various disputes that had come up as a result of the Treaty of Paris which had ended the Revolutionary War. He picked John Jay, and Jay sailed for England in the spring of 1794, and did not return until the summer of 1795. There is no indication that he was greatly missed in the work of the Supreme Court during this time. When he returned, he found that he had been elected Governor of New York *in absentia*—can you imagine that sort of thing happening today? Jay resigned the Chief Justice post to assume what he regarded as the more important job—Governor of New York.

The next Chief Justice who actually served was Oliver Ellsworth of Connecticut. He had been a delegate to the Constitutional Convention and the chairman of the House Judiciary Committee in the First Congress. But Ellsworth, too, was selected for a special ambassador mission—this time to France—by President John Adams, who succeeded George Washington. Ellsworth left for France in the fall of 1799, and fell ill while there. He submitted his resignation to President John Adams in December of 1800. Though

Thomas Jefferson had defeated John Adams in the presidential election of 1800, Adams remained a "lame duck" President until March 1801. In January of 1801, he appointed John Marshall to succeed Oliver Ellsworth as Chief Justice.

To illustrate the low estate of the Supreme Court at this time, the federal government was in the process of moving from Philadelphia, which had been the capital for ten years, to the new capital of Washington in the District of Columbia. The White House—then called the President's House, was finished, and John Adams was the first President to occupy it. The Capitol building had been constructed on Capitol Hill, and was ready for Congress, though it was not nearly the building we know today as the Capitol. But no provision whatever had been made for housing the Supreme Court. Finally, at the last minute, a room in the basement of the Capitol was set aside for the third branch, and in that rather undistinguished environment it would sit for eight years.

John Marshall was born in the Blue Ridge foothills of Virginia, about fifty miles west of present-day Washington. He had very little formal education. But by the time he reached twenty-five years of age, he had served as a Captain commanding a line company of artillery in the Battles of Brandywine and Monmouth during the Revolutionary War. He had also suffered through the terrible winter at Valley Forge with George Washington and the rest of the Continental troops. This experience led him to remark that he looked upon "America as [his] country, and congress as [his] government."<sup>1</sup> Not an unusual sentiment today, to be sure, but quite an unusual sentiment for a Virginian at that time.

After mustering out of the service, Marshall studied law briefly, attending the lectures of George Wythe here in Williamsburg, and was admitted to the Virginia Bar. He was elected a member of Congress from Virginia, and at the time of his appointment as Chief Justice, he was serving as Adams's Secretary of State. He was much better known as a politician than as a legal scholar.

Marshall's principal claim to fame as Chief Justice—though by no means his only one—is his authoring the Court's opinion in the

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1. CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 20 (1996) (quoting JOHN MARSHALL, *AN AUTOBIOGRAPHICAL SKETCH* BY JOHN MARSHALL 9-10 (John Stokes Adams ed., 1937)).

famous case of *Marbury v. Madison*.<sup>2</sup> Decided in 1803—two years after he became Chief Justice—he turned what otherwise would have been an obscure case into the fountainhead of all of our present-day constitutional law.

The case arose out of a suit by William Marbury, who had been nominated and confirmed as a Justice of the Peace in the District of Columbia, against James Madison, whom Thomas Jefferson had appointed as his Secretary of State. Although Marbury had been nominated and confirmed, his commission had not been issued by the time of the change in administration, and Madison refused to issue it.<sup>3</sup>

Marbury contended that once he had been nominated by the President, and confirmed by the Senate, the issuance of his commission was simply a ministerial task for the Secretary of State—who had no choice but to issue it. He brought an original action in the Supreme Court, relying on a provision of the Judiciary Act of 1789 which said that the Supreme Court could issue writs of mandamus to any federal official where appropriate. Marbury claimed that James Madison was a public official—which no one denied—and that a writ of mandamus—a recognized judicial writ available to require public officials to perform their duty—was appropriate in his case.

Marshall's opinion for the Court is divided into several parts. He first addresses the question of whether one nominated and confirmed by the Senate is entitled to receive his commission without further ado, so to speak.<sup>4</sup> He concludes quite reasonably that Marbury is entitled to his commission, and goes on to say that if Marbury has this right, surely the law must afford him a remedy.<sup>5</sup> And, explains Marshall, that remedy is a writ of mandamus, which exists for just this purpose.<sup>6</sup>

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2. 5 U.S. (1 Cranch) 137 (1803).

3. *Id.* at 138. Marbury had been appointed by the outgoing John Adams. The Republican Jefferson administration desired to limit Federalist influence by appointing Republicans to every possible government position, including Marbury's. *See generally* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 185-209 (1923) (detailing the Federalist-Republican transition).

4. *Marbury*, 5 U.S. at 155-62.

5. *Id.* at 168.

6. *Id.* at 172-73.

But now comes the hidden ball play. The next question Marshall asks in his opinion is whether it is proper for the Supreme Court to issue a writ of mandamus in this case. He agrees with Marbury that Congress in the Judiciary Act of 1789 authorized the Supreme Court to issue writs in such a case.<sup>7</sup> But wait a minute, he says, look at Article III of the Constitution. It says that the original jurisdiction of the Supreme Court—that is, cases which may be brought in the Supreme Court in the first instance, without ever having gone to another court—is limited to lawsuits between the states, and lawsuits involving ambassadors and other foreign ministers. Clearly this suit is not within the original jurisdiction provided by Article III of the Constitution.<sup>8</sup>

So, Marshall goes on to say, we have an act of Congress authorizing the Supreme Court to do a particular thing, and the Constitution saying the Court may not. What is a court then to do under a system like ours? Marshall says that, unlike the British Parliament, which is supreme, no branch of the federal government—whether it is the Legislative, the Executive, or the Judiciary—is supreme. The Constitution is supreme, because it has been adopted by the people in the various states, and it delegates particular powers to each of the three branches. If any of these three branches may exceed their delegated authority with impunity, the whole idea of a written constitution is meaningless. So the Constitution must prevail over an act of Congress which is inconsistent with the Constitution.<sup>9</sup>

But who will have the final say as to what the Constitution means in a situation like this? Marshall says that the Constitution is a written agreement among the several states and the people in those states, and the courts have always had the final say in interpreting the provisions of a written agreement. Therefore, it is the federal courts, and particularly the Supreme Court, which are the ultimate arbiters of the meaning of the Constitution.

The opinion in *Marbury v. Madison* is a remarkable example of judicial statesmanship. The Court says that Marbury is entitled to his commission, and Madison is wrong to withhold it. It holds that

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7. *Id.* at 173.

8. *Id.* at 175-76.

9. *Id.* at 176-77.

this is the sort of ministerial duty of a public official, such as Madison, that can be enforced by a writ of mandamus. But it concludes by saying that Congress—in granting the Supreme Court the power to issue a writ of mandamus in a case like this—has run afoul of the original jurisdiction provision of the Supreme Court contained in Article III of the Constitution. Madison and Jefferson are verbally chastised, but it turns out that there is nothing that the Supreme Court can do about it because Congress tried to give the Supreme Court more authority than the Constitution would permit. The doctrine of judicial review—the authority of federal courts to declare legislative acts unconstitutional—is established, but in such a self-denying way that it is the *Court's* authority which is cut back.

During the thirty-four years he served as Chief Justice, Marshall wrote most of the important opinions that the Court decided. In *Gibbons v. Ogden*,<sup>10</sup> decided in 1824, he wrote an opinion adopting a broad construction of the power of Congress under its authority to regulate interstate commerce contained in Article I of the Constitution.<sup>11</sup> In the *Dartmouth College* case,<sup>12</sup> he gave a generous interpretation to the prohibition in the Constitution against state impairment of the obligation of contract.<sup>13</sup> One could name several other opinions authored by Marshall of nearly equal importance. Suffice it to say that, by the time of John Marshall's death in 1835, the Supreme Court was a full partner in the federal government. Perhaps symbolizing this fact, when the Liberty Bell in Philadelphia tolled to announce his death, it cracked.

What was the secret of John Marshall's success? It was not that he was "present at the creation" because he was not; he was not the first Chief Justice, but the fourth Chief Justice. John Jay and Oliver Ellsworth were both able jurists by the standards of their time, but neither of them had the vision of constitutional government that Marshall did.

Marshall was certainly no more "learned in the law" than his colleagues on the Court—there were probably several of them who

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10. 22 U.S. (9 Wheat.) 1 (1824).

11. *Id.*

12. *Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

13. *Id.*

would have been thought more learned than he. Marshall also faced a built-in headwind against his views for the first twenty-four years of his tenure as Chief Justice: During this period the “Virginia Dynasty” of Presidents—Thomas Jefferson, James Madison, and James Monroe—were in office. These Presidents had quite a different view of the relationship between the federal and state governments than Marshall did. But the justices they appointed tended eventually to side with Marshall, rather than to express the views of the Virginia Dynasty. Surely exhibit A in this category is Joseph Story of Massachusetts, who was appointed by James Madison in 1811 but became Marshall’s right bower during a tenure on the Court lasting until 1845.

I think Marshall’s success arose from several sources. He had a remarkable ability to reason from general principles, such as those set forth in the Constitution, to conclusions based on those principles. In a day when legal writing was obscured and befogged with technical jargon, he was able to write clearly and cogently.

But every bit as important, I think Marshall probably had an outgoing personality and was very well-liked by those he moved among. His service in the military probably made him a more engaging personality than someone who had simply drafted writs of replevin for his entire adult career. The familiar story of the dinner ritual when the Justices were in Washington perhaps illustrates this point. The Justices all stayed at the same boarding house and had their meals together during their few weeks in Washington. If it were raining, they would have a glass of wine with dinner. They looked forward to this ritual, and one day were expressing regret that the weather outside was fair and sunny. But Marshall said “our jurisdiction extends over so large a territory that ... it must be raining somewhere,” and from then on they had a glass of wine with dinner every day.<sup>14</sup>

One occasionally hears the expression that an *institution* is the lengthened shadow of an *individual*. It may be risky to suggest that any institution which has endured for two hundred ten years the way the Supreme Court of the United States has could be the

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14. HOBSON, *supra* note 1, at 15 (quoting JOSIAH QUINCY, FIGURES OF THE PAST FROM THE LEAVES OF OLD JOURNALS 37 (1888)).



lengthened shadow of any one individual; but surely there is only one individual who could possibly qualify for this distinction, and that individual is John Marshall. John Adams, after his retirement from the Presidency, said, "his gift of John Marshall to people of the United States was the proudest act of his life."<sup>15</sup> What a splendid gift.

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15. ALLAN B. MACGRUDER, *AMERICAN STATESMEN: JOHN MARSHALL* 162 (1899) (quoting a letter written by Chief Justice Marshall's son, Edward C. Marshall, describing his visit with Adams).