

The Trial of a Young Nation

by Charles F. Hobson

February marks the bicentennial of Chief Justice John Marshall's precedent-setting decision that established the power of the Supreme Court to declare an act of Congress unconstitutional.

Marbury v. Madison enjoys the status of a landmark, perhaps the most prominent, of American constitutional law. In deciding this case, the Supreme Court for the first time declared an act of Congress void as contrary to the Constitution. Chief Justice John Marshall's decision became the leading precedent for "judicial review," the court's power to pass upon the constitutionality of legislative acts.

Marbury can scarcely be understood without anchoring it in the political context of Thomas Jefferson's first administration. Jefferson's victory in 1800--his "bloodless revolution"--was the new nation's first transfer of power from a dominant regime to an opposition party. When the Federalists were ousted, neither they nor the Jeffersonian Democrats could anticipate what would occur. Party conflict had yet to be considered legitimate; during the volatile presidential campaign, the Federalist press had called Jefferson a pagan, an atheist, and a traitor to George Washington and John Adams. There was speculation about whether or not Adams would step down. It was in this uncertain climate that the judicial branch would attempt to establish its authority to judge other branches of government.

Marshall's opinion, delivered just two years into the new administration, was interpreted by contemporaries in partisan terms. Even today, critics find fault with Marshall for using the case to lecture the president, while admirers praise him for striking a blow for judicial independence in the face of an assault by the Jeffersonian political majority. Yet to read the opinion solely in the light of the raging party battles of the day, or to read it only as a landmark that established the doctrine of judicial review, is to miss its full significance.

Marshall considered this case to be among the most important decided during his tenure as chief justice. The part of his opinion that is most read and remembered today is the concluding and comparatively brief section setting forth the doctrine of judicial review, which reads, "It is also not entirely unworthy of observation, that in declaring what shall be the *Supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank.

"Thus the particular phraseology of the constitution of the United States confirms & strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument."

In December 1801 the court had received an application from a man named

William Marbury for a writ of mandamus that would command the secretary of state to deliver Marbury's commission as justice of the peace for the District of Columbia.

Charles Lee, Marbury's attorney, moved to require Secretary of State James Madison to commission Marbury and two others, Robert T. Hooe, and Dennis Ramsay. Marbury and his fellow plaintiffs were among forty-two persons who had been nominated justices of the peace by President Adams on 2 March 1801, his last day in office. The senate confirmed these appointments the same day, signed the commissions, and transmitted them to Secretary of State Marshall, whom Jefferson had asked to stay on.

The commissions languished for two days as the new president took power. Assuming that he had discretion to revoke the judicial appointments because the commissions had not been delivered, Jefferson made appointments of his own, reducing the number of justices to thirty. Although Jefferson reappointed many nominated by his predecessor, Marbury, Hooe, and Ramsay were not among them.

After a series of delays, *Marbury v. Madison* began in February 1803. Marshall, now chief justice, and three of his associate justices were in attendance. Lee tried to show that his clients had been nominated and confirmed as justices of the peace and that their commissions had been signed, sealed, and recorded. Rebuffed in his efforts to obtain from the Senate a certified record of the confirmation of the appointments, he summoned several State Department clerks to give their testimony. Ordered by the court to be sworn, the reluctant witnesses accordingly testified.

A singular circumstance of this case is that the chief justice himself, as President Adams's secretary of state, was the official responsible for sending out the commissions of Marbury and the other appointees. Had the case arisen from Marshall's inattention to duty? Writing to his brother two weeks after Jefferson's inauguration, Marshall had defended his conduct: "I did not send out the commissions because I apprehended such as were for a fixd time to be completed when signd & sealed & such as depended on the will of the President might at any time be revokd. To withhold the commission of the Marshal is equal to displacing him which the President I presume has the power to do, but to withhold the commission of the Justices is an act of which I entertaind no suspicion." At the time, then, Marshall believed the process of commissioning justices of the peace was complete without actual delivery, a position he was to maintain two years later in the opinion. Whatever the merits of his position on this technical point, Marshall's failure to deliver the commissions provided President Jefferson the opportunity to withhold them.

Marbury's application to the Supreme Court for a mandamus was more than a private legal dispute. It arose from resentment at the outgoing administration's eleventh-hour appointments to a host of new judicial offices created by the Judiciary Act of 1801 and an act concerning the District of Columbia. The lame-duck Federalist Congress had enacted both laws during the waning days of Adams's presidency. The very bringing of the action, which coincided with the meeting of the first session of the new Congress

under a Republican majority, hastened the repeal of the recent judiciary act. Given the unavoidable connection between Marbury's claim to his commission and the political defeat of the Federalists, the court faced the task of writing an opinion that breathed disinterested judicial statesmanship.

The first part of the opinion affirmed that Marbury had a legal right and remedy--but the entire opinion centered on the issue of jurisdiction. Before deciding whether a mandamus could issue in this particular case, the court had to consider the more general question of whether there were any cases in which a high officer of the executive department could be made answerable in court for his conduct.

The denial of the mandamus turned on a fine point regarding section 13 of the Judiciary Act of 1789. The act empowered the Supreme Court to issue that writ, and Marshall determined that it was an unconstitutional enlargement of the court's original jurisdiction. No part of the opinion has provoked more commentary by legal scholars than this holding. Why did the court resort to judicial review, seemingly going out of its way to contrive a constitutional conflict?

The chief justice wanted to declare the authority of the court to bring certain acts of the executive under judicial cognizance and to draw a line that would separate political from legal questions. Given the vulnerable situation of the federal judiciary, he avoided direct confrontation with the administration. Instead, he broadened the court's jurisdiction to include the legislative as well as the executive branch.

Seen in this light, the *Marbury* opinion has been acclaimed as a brilliant political coup, at once bold and cautious, a masterpiece of judicial statesmanship in which the court yielded the immediate point--whether or not Marbury should receive his commission--while achieving its more important long-range aim of establishing its authority. The seeming willful disregard of past practice and precedents pale into insignificance when viewed against the larger purposes accomplished by the chief justice.

In retrospect, *Marbury* has the appearance of an ingenious act of judicial politics, the handiwork largely of John Marshall. Yet hindsight may obscure what to the chief justice and his associates was a tentative, makeshift, and unsatisfactory resolution of the case. Was the author of the opinion as calculating as has been assumed? Did he have it in mind, as part of his agenda, to establish a precedent for judicial review? The almost matter-of-fact exposition of judicial review was perhaps a clever tactic to win acceptance of a highly controversial view. On the other hand, this language may have been nothing more than a straightforward expression of Marshall's belief that judicial review was a settled question, that the court was not boldly asserting a claim to a new power but merely restating a power it already possessed.

Charles F. Hobson is editor of the Marshall Papers. The Omohundro Institute of Early American History and Culture in Williamsburg, VA, has received \$993,165 in NEH support since 1976 for a twelve-volume edition of the Papers

of John Marshall. *Volume eleven was published in 2002. The project's website can be found at <http://www.wm.edu/JMP>.*

Humanities, January/February 2003, Volume 24/Number 1