BEVERIDGE ALBERT JEREMIAH

The Life of John Marshall, Volume 3: Conflict and construction, 1800-1815

Albert Beveridge

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Beveridge A.

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Содержание

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PREFACE

Marshall's great Constitutional opinions grew out of, or were addressed to, serious public conditions, national in extent. In these volumes the effort is made to relate the circumstances that required him to give to the country those marvelous state papers: for Marshall's opinions were nothing less than state papers and of the first rank. In order to understand the full meaning of his deliverances and to estimate the just value of his labors, it is necessary to know the historical sources of his foremost expositions of the Constitution, and the historical purposes they were intended to accomplish. Without such knowledge, Marshall's finest pronouncements become mere legal utterances, important, to be sure, but colorless and unattractive.

It is worthy of repetition, even in a preface, that the history of the times is a part of his greatest opinions; and that, in the treatment of them a résumé of the events that produced them must be given. For example, the decision of Marbury *vs.* Madison, at the time and in the manner it was rendered, was compelled by the political situation then existing, unless the principle of judicial supremacy over legislation was to be abandoned. The Judiciary Debate of 1802 in Congress – one of the most brilliant as well as most important legislative engagements in parliamentary history – can no more be overlooked by the student of American Constitutional development, than the opinion of Marshall in Marbury *vs.* Madison can be disregarded.

Again, in Cohens *vs.* Virginia, the Chief Justice rises to heights of exalted – almost emotional – eloquence. Yet the case itself was hardly more than a police court controversy. If the trivial fine of itinerant peddlars of lottery tickets were alone involved, Marshall's splendid passages become unnecessary and, indeed, pompous rhetoric. But when the curtains of history are raised, we see the heroic part that Marshall played and realize the meaning of his powerful language. While Marshall's opinion in M'Culloch *vs.* Maryland, even taken by itself, is a major treatise on constitutional government, it becomes a fascinating chapter in an engaging story, when read in connection with an account of the situation which compelled that outgiving.

The same thing is true of his other historic utterances. Indeed, it may be said that his weightiest opinions were interlocking parts of one great drama.

Much space has been given to the conspiracy and trials of Aaron Burr. The combined story of that adventure and of those prosecutions has not hitherto been told. In the conduct of the Burr trials, Marshall appears in a more intimate and personal fashion than in any other phase of his judicial career; the entire series of events that make up that page of our history is a striking example of the manipulation of public opinion by astute politicians, and is, therefore, useful for the self-guidance of American democracy. Most important of all, the culminating result of this dramatic episode was the definitive establishment of the American law of treason.

In narrating the work of a jurist, the temptation is very strong to engage in legal discussion, and to cite and comment upon the decisions of other courts and the opinions of other judges. This, however, would be the very negation of biography; nor would it add anything of interest or enlightenment to the reader. Such information and analysis are given fully in the various books on Constitutional law and history, in the annotated reports, and in the encyclopædias of law upon the shelves of every lawyer. Care, therefore, has been taken to avoid making any part of the *Life of John Marshall* a legal treatise.

The manuscript of these volumes has been read by Professor Edward Channing of Harvard; Professor Max Farrand of Yale; Professor Edward S. Corwin of Princeton; Professor William E. Dodd of Chicago University; Professor Clarence W. Alvord of the University of Illinois; Professor James A. Woodburn of Indiana University; Professor Charles H. Ambler of the University of West Virginia; Professor Archibald Henderson of the University of North Carolina; Professor D. R. Anderson of Richmond (Va.) College; and Dr. H. J. Eckenrode of Richmond, Virginia.

The manuscript of the third volume has been read by Professor Charles A. Beard of New York; Dr. Samuel Eliot Morison of Harvard; and Mr. Harold J. Laski of Harvard. The manuscript of both the third and fourth volumes has been read, from the lawyer's point of view, by Mr. Arthur Lord of Boston, President of the Massachusetts Bar Association, and by Mr. Charles Martindale of Indianapolis.

The chapters on the Burr conspiracy and trials have been read by Professor Walter Flavius McCaleb of New York; Professor Isaac Joslin Cox of the University of Cincinnati; and Mr. Samuel H. Wandell of New York. Chapter Three of Volume Three (Marbury *vs.* Madison) has been read by the Honorable Oliver Wendell Holmes, Associate Justice of the Supreme Court of the United States; by the Honorable Philander Chase Knox, United States Senator; and by Mr. James M. Beck of New York. Other special chapters have been read by the Honorable Henry Cabot Lodge, United States Senator; by Professor J. Franklin Jameson of the Department of Historical Research of the Carnegie Institution of Washington; by Professor Charles H. Haskins of Harvard; by Dr. William Draper Lewis of Philadelphia, former Dean of the Law School of the University of Pennsylvania; and by Mr. W. B. Bryan of Washington.

All of these gentlemen have made valuable suggestions of which I have availed myself, and I gratefully acknowledge my indebtedness to them. The responsibility for everything in these volumes, however, is, of course, exclusively mine; and, in stating my appreciation of the comment and criticism with which I have been favored, I do not wish to be relieved of my burden by allowing the inference that any part of it should be assigned to others.

I also owe it to myself again to express my heavy obligation to Mr. Worthington Chauncey Ford, Editor of the Massachusetts Historical Society. As was the case in the preparation of the first two volumes of this work, Mr. Ford has extended to me the resources of his ripe scholarship; while his wise counsel, steady encouragement, and unselfish assistance, have been invaluable in the prosecution of a long and exacting task.

I also again acknowledge my indebtedness to Mr. Lindsay Swift, Editor of the Boston Public Library, who has read with critical care not only the many drafts of the manuscript, but also the proofs of the entire work. Mr. Swift has given, unstintedly, his rare literary taste and critical accomplishment to the examination of these pages.

I also tender my hearty thanks to Dr. Gardner Weld Allen of Boston, who has generously directed the preparation of the bibliography and personally revised it.

Mr. David Maydole Matteson of Cambridge, Massachusetts, has made the index of these volumes as he made that of the first two volumes, and has combined both indexes into one. In rendering this service, Mr. Matteson has also searched for points where text and notes could be made more accurate; and I wish to express my appreciation of his kindness.

My thanks are also owing to the staff of The Riverside Press, and particularly to Mr. Lanius D. Evans, to whose keen interest and watchful care in the production of this work I am indebted for much of whatever exactitude it may possess.

The manuscript sources have been acknowledged, in all instances, in the footnotes where references to them have been made, except in the case of the letters of Marshall to his relatives, for which I again thank those descendants and connections of the Chief Justice named in the preface to Volumes One and Two. The Hopkinson manuscripts are in the possession of Mr. Edward Hopkinson

of Philadelphia, to whom I am indebted for the privilege of inspecting this valuable source and for furnishing me with copies of important letters.

In preparing these volumes, Mr. A. P. C. Griffin, Assistant Librarian, and Mr. John Clement Fitzpatrick, of the Manuscript Division of the Library of Congress, have been even more obliging, if possible, than they were in the preparation of the first part of this work. The officers and their assistants of the Boston Public Library, the Boston Athenæum, the Massachusetts State Library, the Massachusetts Historical Society, the Pennsylvania Historical Society, the Virginia State Library, the Indiana State Library, and the Indianapolis City Library, have assisted whole-heartedly in the performance of my labors; and I am glad of the opportunity to thank all of them for their interest and help.

Albert J. Beveridge

LIST OF ABBREVIATED TITLES MOST FREQUENTLY CITED

All references here are to the List of Authorities at the end of this volume

Adams: *U.S. See* Adams, Henry. History of the United States.

Ames. *See* Ames, Fisher. Works.

Channing: *Jeff. System. See* Channing, Edward. Jeffersonian System, 1801-11.

Channing: *U.S. See* Channing, Edward. History of the United States.

Chase Trial. See Chase, Samuel. Trial.

Corwin. *See* Corwin, Edward Samuel. Doctrine of Judicial Review.

Cutler. *See* Cutler, William Parker, and Julia Perkins. Life, Journals, and Correspondence of Manasseh Cutler.

Dillon. *See* Marshall, John. Life, Character, and Judicial Services. Edited by John Forrest Dillon.

Eaton: Prentiss. *See* Eaton, William. Life.

Jay: Johnston. *See* Jay, John. Correspondence and Public Papers.

Jefferson Writings: Washington. *See* Jefferson, Thomas, Writings. Edited by Henry Augustine Washington.

King. *See* King, Rufus. Life and Correspondence.

McCaleb. *See* McCaleb, Walter Flavius. Aaron Burr Conspiracy.

McMaster: *U.S. See* McMaster, John Bach. History of the People of the United States.

Marshall. *See* Marshall, John. Life of George Washington.

Memoirs, J. Q. A.: Adams. *See* Adams, John Quincy. Memoirs.

Morris. *See* Morris, Gouverneur. Diary and Letters.

N.E. Federalism: Adams. *See* New-England Federalism, 1800-1815, Documents relating to. Edited by Henry Adams.

Plumer. *See* Plumer, William. Life.

Priv. Corres.: Colton. *See* Clay, Henry. Private Correspondence. Edited by Calvin Colton.

Records Fed. Conv.: Farrand. *See* Records of the Federal Convention of 1787.

Story. *See* Story, Joseph. Life and Letters.

Trials of Smith and Ogden. See Smith, William Steuben, and Ogden, Samuel Gouverneur. Trials for Misdemeanors.

Wharton: *Social Life*. *See* Wharton, Anne Hollingsworth. Social Life in the Early Republic.

Wharton: *State Trials*. *See* Wharton, Francis. State Trials of the United States during the Administrations of Washington and Adams.

Wilkinson: *Memoirs*. *See* Wilkinson, James. Memoirs of My Own Times.

Works: Colton. *See* Clay, Henry. Works.

Works: Ford. *See* Jefferson, Thomas. Works. Federal Edition. Edited by Paul Leicester Ford.

Writings, J. Q. A.: Ford. *See* Adams, John Quincy. Writings. Edited by Worthington Chauncey Ford.

THE LIFE OF JOHN MARSHALL

CHAPTER I
DEMOCRACY: JUDICIARY

Rigorous law is often rigorous injustice. (Terence.)

The Federalists have retired into the Judiciary as a stronghold, and from that battery all the works of republicanism are to be battered down. (Jefferson.)

There will be neither justice nor stability in any system, if some material parts of it are not independent of popular control. (George Cabot.)

A strange sight met the eye of the traveler who, aboard one of the little river sailboats of the time, reached the stretches of the sleepy Potomac separating Alexandria and Georgetown. A wide swamp extended inland from a modest hill on the east to a still lower elevation of land about a mile to the west.[1] Between the river and morass a long flat tract bore clumps of great trees, mostly tulip poplars, giving, when seen from a distance, the appearance of "a fine park."[2]

Upon the hill stood a partly constructed white stone building, mammoth in plan. The slight elevation north of the wide slough was the site of an apparently finished edifice of the same material, noble in its dimensions and with beautiful, simple lines,[3] but "surrounded with a rough rail fence 5 or 6 feet high unfit for a decent barnyard."[4] From the river nothing could be seen beyond the groves near the banks of the stream except the two great buildings and the splendid trees which thickened into a seemingly dense forest upon the higher ground to the northward.[5]

On landing and making one's way through the underbrush to the foot of the eastern hill, and up the gullies that seamed its sides thick with trees and tangled wild grapevines,[6] one finally reached the immense unfinished structure that attracted attention from the river. Upon its walls laborers were languidly at work.

Clustered around it were fifteen or sixteen wooden houses. Seven or eight of these were boarding-houses, each having as many as ten or a dozen rooms all told. The others were little affairs of rough lumber, some of them hardly better than shanties. One was a tailor shop; in another a shoemaker plied his trade; a third contained a printer with his hand press and types, while a washerwoman occupied another; and in the others there was a grocery shop, a pamphlets-and-stationery shop, a little dry-goods shop, and an oyster shop. No other human habitation of any kind appeared for three quarters of a mile.[7]

A broad and perfectly straight clearing had been made across the swamp between the eastern hill and the big white house more than a mile away to the westward. In the middle of this long opening ran a roadway, full of stumps, broken by deep mud holes in the rainy season, and almost equally deep with dust when the days were dry. On either border was a path or "walk" made firm at places by pieces of stone; though even this "extended but a little way." Alder bushes grew in the unused spaces

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[1] Gallatin to his wife, Jan. 15, 1801, Adams: *Life of Albert Gallatin*, 252; also Bryan: *History of the National Capital*, i, 357-58.

[2] *First Forty Years of Washington Society*: Hunt, 11.

[3] *Ib.*; and see Wolcott to his wife, July 4, 1800, Gibbs: *Administrations of Washington and John Adams*, ii, 377.

[4] Plumer to Thompson, Jan. 1, 1803, Plumer MSS. Lib. Cong.

[5] Gallatin to his wife, Jan. 15, 1801, Adams: *Gallatin*, 252-53.

[6] Hunt, 10.

[7] Gallatin to his wife, *supra*.

of this thoroughfare, and in the depressions stagnant water stood in malarial pools, breeding myriads of mosquitoes. A sluggish stream meandered across this avenue and broadened into the marsh.[8]

A few small houses, some of brick and some of wood, stood on the edge of this long, broad embryo street. Near the large stone building at its western end were four or five structures of red brick, looking much like ungainly warehouses. Farther westward on the Potomac hills was a small but pretentious town with its many capacious brick and stone residences, some of them excellent in their architecture and erected solidly by skilled workmen.[9]

Other openings in the forest had been cut at various places in the wide area east of the main highway that connected the two principal structures already described. Along these forest avenues were scattered houses of various materials, some finished and some in the process of erection.[10] Here and there unsightly gravel pits and an occasional brick kiln added to the raw unloveliness of the whole.

Such was the City of Washington, with Georgetown near by, when Thomas Jefferson became President and John Marshall Chief Justice of the United States – the Capitol, Pennsylvania Avenue, the "Executive Mansion" or "President's Palace," the department buildings near it, the residences, shops, hostelries, and streets. It was a picture of sprawling aimlessness, confusion, inconvenience, and utter discomfort.

When considering the events that took place in the National Capital as narrated in these volumes, – the debates in Congress, the proclamations of Presidents, the opinions of judges, the intrigues of politicians, – when witnessing the scenes in which Marshall and Jefferson and Randolph and Burr and Pinckney and Webster were actors, we must think of Washington as a dismal place, where few and unattractive houses were scattered along muddy openings in the forests.

There was on paper a harmonious plan of a splendid city, but the realization of that plan had scarcely begun. As a situation for living, the Capital of the new Nation was, declared Gallatin, a "hateful place."[11] Most of the houses were "small miserable huts" which, as Wolcott informed his wife, "present an awful contrast to the public buildings."[12]

Aside from an increase in the number of residences and shops, the "Federal City" remained in this state for many years. "The *Chuck* holes were not *bad*," wrote Otis of a journey out of Washington in 1815; "that is to say they were none of them much deeper than the Hubs of the hinder wheels. They were however exceedingly frequent."[13] Pennsylvania Avenue was, at this time, merely a stretch of "yellow, tenacious mud,"[14] or dust so deep and fine that, when stirred by the wind, it made near-by objects invisible.[15] And so this street remained for decades. Long after the National Government was removed to Washington, the carriage of a diplomat became mired up to the axles in the sticky clay within four blocks of the President's residence and its occupant had to abandon the vehicle.

John Quincy Adams records in his diary, April 4, 1818, that on returning from a dinner the street was in such condition that "our carriage in coming for us … was overset, the harness broken.

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[8] Bryan, i, 357-58.

[9] A few of these are still standing and occupied.

[10] Gallatin to his wife, *supra*; also Wharton: *Social Life in the Early Republic*, 58-59.

[11] Gallatin to his wife, Aug. 17, 1802, Adams: *Gallatin*, 304.

[12] Wolcott to his wife, July 4, 1800, Gibbs, ii, 377.

[13] Otis to his wife, Feb. 28, 1815, Morison: *Life and Letters of Harrison Gray Otis*, ii, 170-71. This letter is accurately descriptive of travel from the National Capital to Baltimore as late as 1815 and many years afterward."The Bladensburg *run, before we came to the bridge*, was happily in no one place *above* the Horses bellies. – As we passed thro', the driver pointed out to us the spot, right under our wheels, where all the stage horses last year were drowned, but then he consoled us by shewing the tree, on which all the Passengers *but one*, were saved. Whether that one was gouty or not, I did not enquire…"We … arriv'd safe at our first stage, Ross's, having gone at a rate rather exceeding two miles & an half per hour… In case of a *break Down* or other accident, … I should be sorry to stick and freeze in over night (*as I have seen happen to twenty waggons*) for without an extraordinary thaw I could not be dug out in any reasonable dinner-time the next day."Of course conditions were much worse in all parts of the country, except the longest and most thickly settled sections.

[14] Parton: *Life of Thomas Jefferson*, 622.

[15] Plumer to his wife, Jan. 25, 1807, Plumer MSS. Lib. Cong.

We got home with difficulty, twice being on the point of oversetting, and at the Treasury Office corner we were both obliged to get out … in the mud… It was a mercy that we all got home with whole bones."[16]

Fever and other malarial ills were universal at certain seasons of the year.[17] "No one, from the North or from the high country of the South, can pass the months of August and September there without intermittent or bilious fever," records King in 1803.[18] Provisions were scarce and Alexandria, across the river, was the principal source of supplies.[19] "My God! What have I done to reside in such a city," exclaimed a French diplomat.[20] Some months after the Chase impeachment[21] Senator Plumer described Washington as "a little village in the midst of the woods."[22] "Here I am in the wilderness of Washington," wrote Joseph Story in 1808.[23]

Except a small Catholic chapel there was only one church building in the entire city, and this tiny wooden sanctuary was attended by a congregation which seldom exceeded twenty persons.[24] This absence of churches was entirely in keeping with the inclination of people of fashion. The first Republican administration came, testifies Winfield Scott, in "the spring tide of infidelity… At school and college, most bright boys, of that day, affected to regard religion as base superstition or gross hypocricy."[25]

Most of the Senators and Representatives of the early Congresses were crowded into the boarding-houses adjacent to the Capitol, two and sometimes more men sharing the same bedroom. At Conrad and McMunn's boarding-house, where Gallatin lived when he was in the House, and where Jefferson boarded up to the time of his inauguration, the charge was fifteen dollars a week, which included service, "wood, candles and liquors."[26] Board at the Indian Queen cost one dollar and fifty cents a day, "brandy and whisky being free."[27] In some such inn the new Chief Justice of the United States, John Marshall, at first, found lodging.

Everybody ate at one long table. At Conrad and McMunn's more than thirty men would sit down at the same time, and Jefferson, who lived there while he was Vice-President, had the coldest and lowest place at the table; nor was a better seat offered him on the day when he took the oath of office as Chief Magistrate of the Republic.[28] Those who had to rent houses and maintain establishments were in distressing case.[29] So lacking were the most ordinary conveniences of life that a proposal

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[16] *Memoirs of John Quincy Adams*: Adams, iv, 74; and see Quincy: *Life of Josiah Quincy*, 186.Bayard wrote to Rodney: "four months [in Washington] almost killed me." (Bayard to Rodney, Feb. 24, 1804, N. Y. Library Bulletin, iv, 230.)

[17] Margaret Smith to Susan Smith, Dec. 26, 1802, Hunt, 33; also Mrs. Smith to her husband, July 8, 1803, *ib.* 41; and Gallatin to his wife, Aug. 17, 1802, Adams: *Gallatin*, 304-05.

[18] King to Gore, Aug. 20, 1803, *Life and Correspondence of Rufus King*: King, iv, 294; and see Adams: *History of the United States*, iv, 31.

[19] Gallatin to his wife, Jan. 15, 1801, Adams: *Gallatin*, 253.

[20] Wharton: *Social Life*, 60.

[21] See *infra*, chap. iv.

[22] Plumer to Lowndes, Dec. 30, 1805, Plumer: *Life of William Plumer*, 244."The wilderness, alias the federal city." (Plumer to Tracy, May 2, 1805, Plumer MSS. Lib. Cong.)

[23] Story to Fay, Feb. 16, 1808, *Life and Letters of Joseph Story*: Story, i, 161.

[24] This was a little Presbyterian church building, which was abandoned after 1800. (Bryan, i, 232; and see Hunt, 13-14.)

[25] *Memoirs of Lieut. – General Scott*, 9-10. Among the masses of the people, however, a profound religious movement was beginning. (See Semple: *History of the Rise and Progress of the Baptists in Virginia*; and Cleveland: *Great Revival in the West.*)A year or two later, religious services were held every Sunday afternoon in the hall of the House of Representatives, which always was crowded on these occasions. The throng did not come to worship, it appears; seemingly, the legislative hall was considered to be a convenient meeting-place for gossip, flirtation, and social gayety. The plan was soon abandoned and the hall left entirely to profane usages. (Bryan, i, 606-07.)

[26] Gallatin to his wife, Jan. 15, 1801, Adams: *Gallatin*, 253.

[27] Wharton: *Social Life*, 72.

[28] Hunt, 12.

[29] See Merry to Hammond, Dec. 7, 1803, as quoted in Adams: *U.S.* ii, 362.Public men seldom brought their wives to Washington because of the absence of decent accommodations. (Mrs. Smith to Mrs. Kirkpatrick, Dec. 6, 1805, Hunt, 48.)"I do not perceive

was made in Congress, toward the close of Jefferson's first administration, to remove the Capital to Baltimore.[30] An alternative suggestion was that the White House should be occupied by Congress and a cheaper building erected for the Presidential residence.[31]

More than three thousand people drawn hither by the establishment of the seat of government managed to exist in "this desert city."[32] One fifth of these were negro slaves.[33] The population was made up of people from distant States and foreign countries[34]– the adventurous, the curious, the restless, the improvident. The "city" had more than the usual proportion of the poor and vagrant who, "so far as I can judge," said Wolcott, "live like fishes by eating each other."[35] The sight of Washington filled Thomas Moore, the British poet, with contempt.

> "This embryo capital, where Fancy sees
> Squares in morasses, obelisks in trees;
> Where second-sighted seers, even now, adorn
> With shrines unbuilt and heroes yet unborn,
> Though nought but woods and Jefferson they see,
> Where streets should run and sages *ought* to be."[36]

Yet some officials managed to distill pleasure from materials which one would not expect to find in so crude a situation. Champagne, it appears, was plentiful. When Jefferson became President, that connoisseur of liquid delights[37] took good care that the "Executive Mansion" was well supplied with the choicest brands of this and many other wines.[38] Senator Plumer testifies that, at one of Jefferson's dinners, "the wine was the best I ever drank, particularly the champagne which was indeed delicious."[39] In fact, repasts where champagne was served seem to have been a favorite source of enjoyment and relaxation.[40]

Scattered, unformed, uncouth as Washington was, and unhappy and intolerable as were the conditions of living there, the government of the city was torn by warring interests. One would have thought that the very difficulties of their situation would have compelled some harmony of action to bring about needed improvements. Instead of this, each little section of the city fought for itself and was antagonistic to the others. That part which lay near the White House[41] strove exclusively for its

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how the members of Congress can possibly secure lodgings, unless they will consent to live like scholars in a college or monks in a monastery, crowded ten or twenty in a house; and utterly excluded from society." (Wolcott to his wife, July 4, 1800, Gibbs, ii, 377.)

[30] Plumer to Thompson, March 19,1804, Plumer MSS. Lib. Cong. And see *Annals*, 8th Cong. 1st Sess. 282-88. The debate is instructive. The bill was lost by 9 yeas to 19 nays.

[31] Hildreth: *History of the United States*, v, 516-17.

[32] Plumer to Lowndes, Dec. 30, 1805, Plumer, 337.

[33] Channing: *History of the United States*, iv, 245.

[34] Bryan, i, 438.

[35] Wolcott to his wife, July 4, 1800, Gibbs, ii, 377."The workmen are the refuse of that class and, nevertheless very high in their demands." (La Rochefoucauld-Liancourt: *Travels Through the United States of North America*, iii, 650.)

[36] "To Thomas Hume, Esq., M.D.," Moore: *Poetical Works*, ii, 83.

[37] See Jefferson to Short, Sept. 6, 1790, *Works of Thomas Jefferson*: Ford, vi, 146; same to Mrs. Adams, July 7, 1785, *ib.* iv, 432-33; same to Peters, June 30,1791, *ib.* vi, 276; same to Short, April 24, 1792, *ib.* 483; same to Monroe, May 26, 1795, *ib.* viii, 179; same to Jay, Oct. 8, 1787, *Memoir, Correspondence, and Miscellanies, from the Papers of Thomas Jefferson*: Randolph, ii, 249; also see Chastellux: *Travels in North America in the Years 1780-81-82*, 299.

[38] See Singleton: *Story of the White House*, i, 42-43.

[39] Plumer to his wife, Dec. 25, 1802, Plumer, 246.

[40] "Mr. Granger [Jefferson's Postmaster-General] … after a few bottles of champagne were emptied, on the observation of Mr. Madison that it was the most delightful wine when drank in moderation, but that more than a few glasses always produced a headache the next day, remarked with point that this was the very time to try the experiment, as the next day being Sunday would allow time for a recovery from its effects. The point was not lost upon the host and bottle after bottle came in." (S. H. Smith to his wife, April 26, 1803. Hunt, 36.)

[41] At that time it was called "The Executive Mansion" or "The President's Palace."

own advantage. The same was true of those who lived or owned property about Capitol Hill. There was, too, an "Alexandria interest" and a "Georgetown interest." These were constantly quarreling and each was irreconcilable with the other.[42]

In all respects the Capital during the first decades of the nineteenth century was a representation in miniature of the embryo Nation itself. Physical conditions throughout the country were practically the same as at the time of the adoption of the Constitution; and popular knowledge and habits of thought had improved but slightly.[43]

A greater number of newspapers, however, had profoundly affected public sentiment, and democratic views and conduct had become riotously dominant. The defeated and despairing Federalists viewed the situation with anger and foreboding. Of all Federalists John Marshall and George Cabot were the calmest and wisest. Yet even they looked with gloom upon the future. "There are some appearances which surprize me," wrote Marshall on the morning of Jefferson's inauguration to his intimate friend, Charles Cotesworth Pinckney.

"I wish, however, more than I hope that the public prosperity & happiness will sustain no diminution under Democratic guidance. The Democrats are divided into speculative theorists & absolute terrorists. With the latter I am disposed to class Mr. Jefferson. If he ranges himself with them it is not difficult to foresee that much difficulty is in store for our country – if he does not, they will soon become his enemies and calumniators."[44]

After Jefferson had been President for four months, Cabot thus interpreted the Republican victory of 1800: "We are doomed to suffer all the evils of *excessive* democracy through the United States… Maratists and Robespierrians everywhere raise their heads… There will be neither justice nor stability in any system, if some material parts of it are not independent of popular control"[45]– an opinion which Marshall, speaking for the Supreme Court of the Nation, was soon to announce.

Joseph Hale wrote to King that Jefferson's election meant the triumph of "the wild principles of uproar & misrule" which would produce "anarchy."[46] Sedgwick advised our Minister at London: "The aristocracy of virtue is destroyed."[47] In the course of a characteristic Federalist speech Theodore Dwight exclaimed: "The great object of Jacobinism is … to force mankind back into a savage state… We have a country governed by blockheads and knaves; our wives and daughters are thrown into the stews… Can the imagination paint anything more dreadful this side of hell."[48]

The keen-eyed and thoughtful John Quincy Adams was of the opinion that "the basis of it all is democratic popularity… There never was a system of measures [Federalist] more completely and irrevocably abandoned and rejected by the popular voice… Its restoration would be as absurd as to undertake the resurrection of a carcass seven years in its grave."[49] A Federalist in the *Commercial Gazette* of Boston,[50] in an article entitled "Calm Reflections," mildly stated that "democracy teems with fanaticism." Democrats "love liberty … and, like other lovers, they try their utmost to debauch … their mistress."

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[42] Bryan, i, 44; also see La Rochefoucauld-Liancourt, iii, 642-51.

[43] See vol. i, chaps. vi and vii, of this work.

[44] Marshall to Pinckney, March 4, 1801, MS. furnished by Dr. W. S. Thayer of Baltimore.

[45] Cabot to Wolcott, Aug. 3, 1801, Lodge: *Life and Letters of George Cabot*, 322.George Cabot was the ablest, most moderate and far-seeing of the New England Federalists. He feared and detested what he called "excessive democracy" as much as did Ames, or Pickering, or Dwight, but, unlike his brother partisans, did not run to the opposite extreme himself and never failed to assert the indispensability of the democratic element in government. Cabot was utterly without personal ambition and was very indolent; otherwise he surely would have occupied a place in history equal to that of men like Madison, Gallatin, Hamilton, and Marshall.

[46] Hale to King, Dec. 19, 1801, King, iv, 39.

[47] Sedgwick to King, Dec. 14, 1801, *ib.* 34-35.

[48] Dwight's oration as quoted in Adams: U.S. i, 225.

[49] J. Q. Adams to King, Oct. 8,1802, *Writings of John Quincy Adams*: Ford, iii, 8-9. Within six years Adams abandoned a party which offered such feeble hope to aspiring ambition. (See *infra*, chap, ix.)

[50] J. Russell's *Gazette-Commercial and Political*, January 28, 1799.

There was among the people a sort of diffused egotism which appears to have been the one characteristic common to Americans of that period. The most ignorant and degraded American felt himself far superior to the most enlightened European. "Behold the universe," wrote the chronicler of Congress in 1802. "See its four quarters filled with savages or slaves. Out of nine hundred millions of human beings but four millions [Americans] are free."[51]

William Wirt describes the contrast of fact to pretension: "Here and there a stately aristocratick palace, with all its appurtenances, strikes the view: while all around for many miles, no other buildings are to be seen but the little smoky huts and log cabins of poor, laborious, ignorant tenants. And what is very ridiculous, these tenants, while they approach *the great house*, cap in hand, with all the fearful trembling submission of the lowest feudal vassals, boast in their court-yards, with obstreperous exultation, that they live in a land of freemen, a land of equal liberty and equal rights."[52]

Conservatives believed that the youthful Republic was doomed; they could see only confusion, destruction, and decline. Nor did any nation of the Old World at that particular time present an example of composure and constructive organization. All Europe was in a state of strained suspense during the interval of the artificial peace so soon to end. "I consider the whole civilized world as metal thrown back into the furnace to be melted over again," wrote Fisher Ames after the inevitable resumption of the war between France and Great Britain.[53] "Tremendous times in Europe!" exclaimed Jefferson when cannon again were thundering in every country of the Old World. "How mighty this battle of lions & tygers! With what sensations should the common herd of cattle look upon it? With no partialities, certainly!"[54]

Jefferson interpreted the black forebodings of the defeated conservatives as those of men who had been thwarted in the prosecution of evil designs: "The clergy, who have missed their union with the State, the Anglo men, who have missed their union with England, the political adventurers who have lost the chance of swindling & plunder in the waste of public money, will never cease to bawl, on the breaking up of their sanctuary."[55]

Of all the leading Federalists, John Marshall was the only one who refused to "bawl," at least in the public ear; and yet, as we have seen and shall again find, he entertained the gloomy views of his political associates. Also, he held more firmly than any prominent man in America to the old-time Federalist principle of Nationalism – a principle which with despair he watched his party abandon.[56] His whole being was fixed immovably upon the maintenance of order and constitutional authority. Except for his letter to Pinckney, Marshall was silent amidst the clamor. All that now went forward

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[51] *History of the Last Session of Congress Which Commenced 7th Dec. 1801* (taken from the *National Intelligencer*). Yet at that time in America manhood suffrage did not exist excepting in three States, a large part of the people could not read or write, imprisonment for debt was universal, convicted persons were sentenced to be whipped in public and subjected to other cruel and disgraceful punishments. Hardly a protest against slavery was made, and human rights as we now know them were in embryo, so far as the practice of them was concerned.

[52] Wirt: *Letters of the British Spy*, 10-11.These brilliant articles, written by Wirt when he was about thirty years old, were published in the Richmond *Argus* during 1803. So well did they deceive the people that many in Gloucester and Norfolk declared that they had seen the British Spy. (Kennedy: *Memoirs of the Life of William Wirt*, i, 111, 113.)

[53] Ames to Pickering, Feb. 4, 1807, Pickering MSS. Mass. Hist. Soc.

[54] Jefferson to Rush, Oct. 4, 1803, *Works*: Ford, x, 32.Immediately after his inauguration, Jefferson restated the American foreign policy announced by Washington. It was the only doctrine on which he agreed with Marshall."It ought to be the very first object of our pursuits to have nothing to do with European interests and politics. Let them be free or slaves at will, navigators or agricultural, swallowed into one government or divided into a thousand, we have nothing to fear from them in any form… To take part in their conflicts would be to divert our energies from creation to destruction." (Jefferson to Logan, March 21, 1801, *Works*: Ford, ix, 219-20.)

[55] Jefferson to Postmaster-General (Gideon Granger), May 3, 1801, *Works*: Ford, ix, 249.The democratic revolution that overthrew Federalism was the beginning of the movement that finally arrived at the abolition of imprisonment for debt, the bestowal of universal manhood suffrage, and, in general, the more direct participation in every way of the masses of the people in their own government. But in the first years of Republican power there was a pandering to the crudest popular tastes and passions which, to conservative men, argued a descent to the sansculottism of France.

[56] See *infra*, chaps. iii and vi; also vol. iv, chap. i.

passed before his regretful vision, and much of it he was making ready to meet and overcome with the affirmative opinions of constructive judicial statesmanship.

Meanwhile he discharged his duties – then very light – as Chief Justice. But in doing so, he quietly began to strengthen the Supreme Court. He did this by one of those acts of audacity that later marked the assumptions of power which rendered his career historic. For the first time the Chief Justice disregarded the custom of the delivery of opinions by the Justices *seriatim*, and, instead, calmly assumed the function of announcing, himself, the views of that tribunal. Thus Marshall took the first step in impressing the country with the unity of the highest court of the Nation. He began this practice in Talbot *vs.* Seeman, familiarly known as the case of the Amelia,[57] the first decided by the Supreme Court after he became Chief Justice.

During our naval war with France an armed merchant ship, the Amelia, owned by one Chapeau Rouge of Hamburg, while homeward bound from Calcutta, was taken by the French corvette, La Diligente. The Amelia's papers, officers, and crew were removed to the French vessel, a French crew placed in charge, and the captured ship was sent to St. Domingo as a prize. On the way to that French port, she was recaptured by the American frigate, Constitution, Captain Silas Talbot, and ordered to New York for adjudication. The owner demanded ship and cargo without payment of the salvage claimed by Talbot for his rescue. The case finally reached the Supreme Court.

In the course of a long and careful opinion the Chief Justice held that, although there had been no formal declaration of war on France, yet particular acts of Congress had authorized American warships to capture certain French vessels and had provided for the payment of salvage to the captors. Virtually, then, we were at war with France. While the Amelia was not a French craft, she was, when captured by Captain Talbot, "an armed vessel commanded and manned by Frenchmen," and there was "probable cause to believe" that she was French. So her capture was lawful.

Still, the Amelia was not, in fact, a French vessel, but the property of a neutral; and in taking her from the French, Talbot had, in reality, rescued the ship and rendered a benefit to her owners for which he was entitled to salvage. For a decree of the French Republic made it "extremely probable" that the Amelia would be condemned by the French courts in St. Domingo; and that decree, having been "promulgated" by the American Government, must be considered by American courts "as an authenticated copy of a public law of France interesting to all nations." This, said Marshall, was "the real and only question in the case." The first opinion delivered by Marshall as Chief Justice announced, therefore, an important rule of international law and is of permanent value.

Marshall's next case[58] involved complicated questions concerning lands in Kentucky. Like nearly all of his opinions, the one in this case is of no historical importance except that in it he announced for the second time the views of the court. In United States *vs.* Schooner Peggy,[59] Marshall declared that, since the Constitution makes a treaty a "supreme law of the land," courts are as much bound by it as by an act of Congress. This was the first time that principle was stated by the Supreme Court. Another case[60] concerned the law of practice and of evidence. This was the last case in which Marshall delivered an opinion before the Republican assault on the Judiciary was made – the causes of which assault we are now to examine.

At the time of his inauguration, Jefferson apparently meant to carry out the bargain[61] by which his election was made possible. "We are all Republicans, we are all Federalists," were the reassuring words with which he sought to quiet those who already were beginning to regret that they had yielded

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[57] 1 Cranch, 1 *et seq.*

[58] Wilson *vs.* Mason, 1 Cranch, 45-101.

[59] 1 Cranch, 102-10.

[60] Turner *vs.* Fendall, 1 Cranch, 115-30.

[61] See vol. ii, 531-47, of this work.

to his promises.[62] Even Marshall was almost favorably impressed by the inaugural address. "I have administered the oath to the Presdt.," he writes Pinckney immediately after Jefferson had been inducted into office. "His inauguration speech … is in general well judged and conciliatory. It is in direct terms giving the lie to the violent party declamation which has elected him, but it is strongly characteristic of the general cast of this political theory."[63]

It is likely that, for the moment, the President intended to keep faith with the Federalist leaders. But the Republican multitude demanded the spoils of victory; and the Republican leaders were not slow or soft-spoken in telling their chieftain that he must take those measures, the assurance of which had captivated the popular heart and given "the party of the people" a majority in both House and Senate.

Thus the Republican programme of demolition was begun. Federalist taxes were, of course, to be abolished; the Federalist mint dismantled; the Federalist army disbanded; the Federalist navy beached. Above all, the Federalist system of National courts was to be altered, the newly appointed Federalist National judges ousted and their places given to Republicans; and if this could not be accomplished, at least the National Judiciary must be humbled and cowed. Yet every step must be taken with circumspection – the cautious politician at the head of the Government would see to that. No atom of party popularity[64] must be jeopardized; on the contrary, Republican strength must be increased at any cost, even at the temporary sacrifice of principle.[65] Unless these facts are borne in mind, the curious blending of fury and moderation – of violent attack and sudden quiescence – in the Republican tactics during the first years of Jefferson's Administration are inexplicable.

Jefferson determined to strike first at the National Judiciary. He hated it more than any other of the "abominations" of Federalism. It was the only department of the Government not yet under his control. His early distrust of executive authority, his suspicion of legislative power when his political opponents held it, were now combined against the National courts which he did not control.

Impotent and little respected as the Supreme Court had been and still was, Jefferson nevertheless entertained an especial fear of it; and this feeling had been made personal by the thwarting of his cherished plan of appointing his lieutenant, Spencer Roane of Virginia, Chief Justice of the United States.[66] The elevation of his particular aversion, John Marshall, to that office, had, he felt, wickedly robbed him of the opportunity to make the new regime harmonious; and, what was far worse, it had placed in that station of potential, if as yet undeveloped, power, one who, as Jefferson had finally come to think, might make the high court of the Nation a mighty force in the Government, retard fundamental Republican reforms, and even bring to naught measures dear to the Republican heart.

It seems probable that, at this time, Jefferson was the only man who had taken Marshall's measure correctly. His gentle manner, his friendliness and conviviality, no longer concealed from Jefferson the courage and determination of his great relative; and Jefferson doubtless saw that Marshall, with his universally conceded ability, would find means to vitalize the National Judiciary, and with his fearlessness, would employ those means.

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[62] See Adams: *U.S.* i, chaps. ix and x, for account of the revolutionary measures which the Republicans proposed to take.

[63] Marshall to Pinckney, March 4, 1801, "four o'clock," MS.

[64] "It is the sole object of the Administration to acquire popularity." (Wolcott to Cabot, Aug. 28, 1802, Lodge: *Cabot*, 325.)"The President has … the itch for popularity." (J. Q. Adams to his father, November, 1804, *Writings, J. Q. A.*: Ford, iii, 81.)"The mischiefs of which his immoderate thirst for … popularity are laying the foundation, are not immediately perceived." (Adams to Quincy, Dec. 4, 1804, Quincy, 64.)"It seems to be a great primary object with him never to pursue a measure if it becomes unpopular." (Plumer's Diary, March 4, 1805, Plumer MSS. Lib. Cong.)"In dress, conversation, and demeanor he studiously sought and displayed the arts of a low demagogue seeking the gratification of the democracy on whose voices and votes he laid the foundation of his power." (Quincy's Diary, Jan. 1806, Quincy, 93.)

[65] Ames to Gore, Dec. 13, 1802, *Works of Fisher Ames*: Ames, i, 309.

[66] Dodd in *American Historical Review*, xii, 776; and see next chapter.

"The Federalists," wrote Jefferson, "have retired into the judiciary as a stronghold … and from that battery all the works of republicanism are to be beaten down and erased."[67] Therefore that stronghold must be taken. Never was a military plan more carefully devised than was the Republican method of capturing it. Jefferson would forthwith remove all Federalist United States marshals and attorneys;[68] he would get rid of the National judges whom Adams had appointed under the Judiciary Act of 1801.[69] If this did not make those who remained on the National Bench sufficiently tractable, the sword of impeachment would be held over their obstinate heads until terror of removal and disgrace should render them pliable to the dominant political will. Thus by progressive stages the Supreme Court would be brought beneath the blade of the executioner and the obnoxious Marshall decapitated or compelled to submit.

To this agreeable course, so well adapted to his purposes, the President was hotly urged by the foremost leaders of his party. Within two weeks after Jefferson's inauguration, the able and determined William Branch Giles of Virginia, faithfully interpreting the general Republican sentiment, demanded "the removal of all its [the Judiciary's] executive officers indiscriminately." This would get rid of the Federalist marshals and clerks of the National courts; they had been and were, avowed Giles, "the humble echoes" of the "vicious schemes" of the National judges, who had been "the most unblushing violators of constitutional restrictions."[70] Again Giles expressed the will of his party: "The revolution [Republican success in 1800] is incomplete so long as that strong fortress [the Judiciary] is in possession of the enemy." He therefore insisted upon "the absolute repeal of the whole judiciary system."[71]

The Federalist leaders quickly divined the first part of the Republican purpose: "There is nothing which the [Republican] party more anxiously wish than the destruction of the judicial arrangements made during the last session," wrote Sedgwick.[72] And Hale, with dreary sarcasm, observed that "the independence of our Judiciary is to be confirmed by being made wholly subservient to the will of the legislature & the caprice of Executive visions."[73]

The judges themselves had invited the attack so soon to be made upon them.[74] Immediately after the Government was established under the Constitution, they took a position which disturbed a large part of the general public, and also awakened apprehensions in many serious minds. Persons were haled before the National courts charged with offenses unknown to the National statutes and unnamed in the Constitution; nevertheless, the National judges held that these were indictable and punishable under the common law of England.[75]

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[67] Jefferson to Dickinson, Dec. 19, 1801, *Writings of Thomas Jefferson*: Washington, iv, 424.

[68] "The only shield for our Republican citizens against the federalism of the courts is to have the attorneys & Marshals republicans." (Jefferson to Stuart, April 8, 1801, *Works*: Ford, ix, 248.)

[69] "The judge of course stands until the law [Judiciary Act of 1801] shall be repealed which we trust will be at the next Congress." (Jefferson to Stuart, April 8, 1801, *Works*: Ford, ix, 247.) For two weeks Jefferson appears to have been confused as to the possibility of repealing the Judiciary Act of 1801. A fortnight before he informed Stuart that this course would be taken, he wrote Giles that "the courts being so decidedly federal and irremovable," it was "indispensably necessary" to appoint "republican attorneys and marshals." (Jefferson to Giles, March 23, 1801, MSS. Lib. Cong. as quoted by Carpenter in *American Political Science Review*, ix, 522.)But the repeal had been determined upon within six weeks after Jefferson's inauguration as his letter to Stuart shows.

[70] Giles to Jefferson, March 16, 1801, Anderson: *William Branch Giles – A Study in the Politics of Virginia 1790-1830*, 77.

[71] Same to same, June 1, 1801, *ib.* 80.

[72] Sedgwick to King, Dec. 14, 1801, King, iv, 36.

[73] Hale to King, Dec. 19, 1801, King, iv, 39.

[74] It must be carefully kept in mind that from the beginning of the Revolution most of the people were antagonistic to courts of any kind, and bitterly hostile to lawyers. (See vol. i, 297-99, of this work.)Braintree, Mass., in 1786, in a town meeting, denounced lawyers and demanded by formal resolution the enactment of "such laws … as may crush or, at least, put a proper check of restraint" upon them.Dedham, Mass., instructed its members of the Legislature to secure the passage of laws that would "check" attorneys; and if this were not practicable, then "you are to endeavor [to pass a bill declaring] that the order of Lawyers be totally abolished." (Warren: *History of the American Bar*, 215.) All this, of course, was the result of the bitter hardships of debtors.

[75] For an able defense of the adoption by the National courts of the British common law, see *Works of the Honourable James Wilson*: Wilson, iii, 384.

This was a substantial assumption of power. The Judiciary avowed its right to pick and choose among the myriad of precedents which made up the common law, and to enforce such of them as, in the opinion of the National judges, ought to govern American citizens. In a manner that touched directly the lives and liberties of the people, therefore, the judges became law-givers as well as law-expounders. Not without reason did the Republicans of Boston drink with loud cheers this toast: "The Common Law of England! May wholesome statutes soon root out this engine of oppression from America."[76]

The occasions that called forth this exercise of judicial authority were the violation of Washington's Neutrality Proclamation, the violation of the Treaty of Peace with Great Britain, and the numberless threats to disregard both. From a strictly legal point of view, these indeed furnished the National courts with plausible reasons for the position they took. Certainly the judges were earnestly patriotic and sincere in their belief that, although Congress had not authorized it, nevertheless, that accumulation of British decisions, usages, and customs called "the common law" was a part of American National jurisprudence; and that, of a surety, the assertion of it in the National tribunals was indispensable to the suppression of crimes against the United States. In charging the National grand jury at Richmond, May 22, 1793, Chief Justice John Jay first announced this doctrine, although not specifically naming the common law.[77] Two months later, Justice James Wilson claimed the same inclusive power in his address to the grand jury at Philadelphia.[78]

In 1793, Joseph Ravara, consul for Genoa, was indicted in the United States District Court of Pennsylvania for sending an anonymous and threatening letter to the British Minister and to other persons in order to extort money from them. There was not a word in any act of Congress that referred even indirectly to such a misdemeanor, yet Justices Wilson and Iredell of the Supreme Court, with Judge Peters of the District Court, held that the court had jurisdiction,[79] and at the trial Chief Justice Jay and District Judge Peters held that the rash Genoese could be tried and punished under the common law of England.[80]

Three months later Gideon Henfield was brought to trial for the violation of the Neutrality Proclamation. The accused, a sailor from Salem, Massachusetts, had enlisted at Charleston, South Carolina, on a French privateer and was given a commission as an officer of the French Republic. As such he preyed upon the vessels of the enemies of France. One morning in May, 1793, Captain Henfield sailed into the port of Philadelphia in charge of a British prize captured by the French privateer which he commanded.

Upon demand of the British Minister, Henfield was seized, indicted, and tried in the United States Circuit Court for the District of Pennsylvania.[81] In the absence of any National legislation covering the subject, Justice Wilson instructed the grand jury that Henfield could, and should, be indicted and punished under British precedents.[82] When the case was heard the charge of the court to the trial jury was to the same effect.[83]

The jury refused to convict.[84] The verdict was "celebrated with extravagant marks of joy and exultation," records Marshall in his account of this memorable trial. "It was universally asked," he

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[76] *Columbian Centinel*, July 11, 1801, as quoted in Warren, 225-27.

[77] *Correspondence and Public Papers of John Jay*: Johnston, iii, 478-85.

[78] Wharton: *State Trials of the U.S. during the Administrations of Washington and Adams*, 60 *et seq.*; and see Wilson's law lecture on the subject, Wilson, iii, 384.

[79] 2 Dallas, 297-99.

[80] *Ib.* Ravara was tried and convicted by the jury under the instructions of the bench, "but he was afterward pardoned on condition that he surrender his commission and Exequatur." (Wharton: *State Trials*, 90-92.)

[81] For the documents preceding the arrest and prosecution of Henfield, see Wharton: *State Trials*, footnotes to 49-52.

[82] See Wilson's charge, Wharton: *State Trials*, 59-66.

[83] See Wharton's summary of Wilson's second charge, *ib.* footnote to 85.

[84] *Ib.* 88.

says, "what law had been offended, and under what statute was the indictment supported? Were the American people already prepared to give to a proclamation the force of a legislative act, and to subject themselves to the will of the executive? But if they were already sunk to such a state of degradation, were they to be punished for violating a proclamation which had not been published when the offense was committed, if indeed it could be termed an offense to engage with France, combating for liberty against the combined despots of Europe?"[85]

In this wise, political passions were made to strengthen the general protest against riveting the common law of England upon the American people by judicial fiat and without authorization by the National Legislature.

Isaac Williams was indicted and tried in 1799, in the United States Circuit Court for the District of Connecticut, for violating our treaty with Great Britain by serving as a French naval officer. Williams proved that he had for years been a citizen of France, having been "duly naturalized" in France, "renouncing his allegiance to all other countries, particularly to America, and taking an oath of allegiance to the Republic of France." Although these facts were admitted by counsel for the Government, and although Congress had not passed any statute covering such cases, Chief Justice Oliver Ellsworth practically instructed the jury that under the British common law Williams must be found guilty.

No American could cease to be a citizen of his own country and become a citizen or subject of another country, he said, "without the consent … of the community."[86] The Chief Justice announced as American law the doctrine then enforced by European nations – "born a subject, always a subject."[87] So the defendant was convicted and sentenced "to pay a fine of a thousand dollars and to suffer four months imprisonment."[88]

These are examples of the application by the National courts of the common law of England in cases where Congress had failed or refused to act. Crime must be punished, said the judges; if Congress would not make the necessary laws, the courts would act without statutory authority. Until 1812, when the Supreme Court put an end to this doctrine,[89] the National courts, with one exception,[90] continued to apply the common law to crimes and offenses which Congress had refused to recognize as such, and for which American statutes made no provision.

Practically all of the National and many of the State judges were highly learned in the law, and, of course, drew their inspiration from British precedents and the British bench. Indeed, some of them were more British than they were American.[91] "Let a stranger go into our courts," wrote Tyler, "and he would almost believe himself in the Court of the King's Bench."[92]

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[85] Marshall: *Life of George Washington*, 2d ed. ii, 273-74. After the Henfield and Ravara cases, Congress passed a law applicable to such offenses. (See Wharton: *State Trials*, 93-101.)

[86] Wharton: *State Trials*, 653-54.

[87] This was the British defense for impressment of seamen on American ships. It was one of the chief points in dispute in the War of 1812. The adherence of Federalists to this doctrine was one of the many causes of the overthrow of that once great party. (See *infra*, vol. iv, chap. i, of this work.)

[88] Wharton: *State Trials*, 654. Upon another indictment for having captured a British ship and crew, Williams, with no other defense than that offered on his trial under the first indictment, pleaded guilty, and was sentenced to an additional fine of a thousand dollars, and to further imprisonment of four months. (*Ib.*; see also vol. ii, 495, of this work.)

[89] U.S. *vs.* Hudson, 7 Cranch, 32-34. "Although this question is brought up now for the first time to be decided by this court, we consider it as having been long since settled in public opinion… The legislative authority of the Union must first make an act a crime, affix a punishment to it and declare the court that shall have jurisdiction of the offense." (Justice William Johnson delivering the opinion of the majority of the court, *ib.*)Joseph Story was frantic because the National judges could not apply the common law during the War of 1812. (See his passionate letters on the subject, vol. iv, chap. i, of this work; and see his argument for the common law, Story, i, 297-300; see also Peters to Pickering, Dec. 5, 1807, March 30, and April 14, 1816, Pickering MSS. Mass. Hist. Soc.)

[90] The opinion of Justice Chase, of the Supreme Court of Philadelphia, sitting with Peters, District Judge, in the case of the United States *vs.* Robert Worral, indicted under the common law for attempting to bribe a United States officer. Justice Chase held that English common law was not a part of the jurisprudence of the United States as a Nation. (Wharton: *State Trials*, 189-99.)

[91] This was notably true of Justice James Wilson, of the Supreme Court, and Alexander Addison, President Judge of the Fifth Pennsylvania (State) Circuit, both of whom were born and educated in the United Kingdom. They were two of the ablest and most

This conduct of the National Judiciary furnished Jefferson with another of those "issues" of which that astute politician knew how to make such effective use. He quickly seized upon it, and with characteristic fervency of phrase used it as a powerful weapon against the Federalist Party. All the evil things accomplished by that organization of "monocrats," "aristocrats," and "monarchists" – the bank, the treaty, the Sedition Act, even the army and the navy – "have been solitary, inconsequential, timid things," avowed Jefferson, "in comparison with the audacious, barefaced and sweeping pretension to a system of law for the U.S. without the adoption of their legislature, and so infinitely beyond their power to adopt."[93]

But if the National judges had caused alarm by treating the common law as though it were a statute of the United States without waiting for an act of Congress to make it so, their manners and methods in the enforcement of the Sedition Act[94] aroused against them an ever-increasing hostility.

Stories of their performances on the bench in such cases – their tones when speaking to counsel, to accused persons, and even to witnesses, their immoderate language, their sympathy with one of the European nations then at war and their animosity toward the other, their partisanship in cases on trial before them – tales made up from such material flew from mouth to mouth, until finally the very name and sight of National judges became obnoxious to most Americans. In short, the assaults upon the National Judiciary were made possible chiefly by the conduct of the National judges themselves.[95]

The first man convicted under the Sedition Law was a Representative in Congress, the notorious Matthew Lyon of Vermont. He had charged President Adams with a "continual grasp for power … an unbounded thirst for ridiculous pomp, foolish adulation and selfish avarice." Also, Lyon had permitted the publication of a letter to him from Joel Barlow, in which the President's address to the Senate and the Senate's response[96] were referred to as "the bullying speech of your President" and "the stupid answer of your Senate"; and expressed wonder "that the answer of both Houses had not been an order to send him [Adams] to the mad house."[97]

Lyon was indicted under the accusation that he had tried "to stir up sedition and to bring the President and Government of the United States into contempt." He declared that the jury was selected from his enemies.[98] Under the charge of Justice Paterson of the Supreme Court he was convicted. The court sentenced him to four months in jail and the payment of a fine of one thousand dollars.[99]

In the execution of the sentence, United States Marshal Jabez G. Fitch used the prisoner cruelly. On the way to the jail at Vergennes, Vermont, he was repeatedly insulted. He was finally thrown into a filthy, stench-filled cell without a fireplace and with nothing "but the iron bars to keep the cold out." It was "the common receptacle for horse-thieves … runaway negroes, or any kind of felons." He was

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learned men on the bench at that period.

[92] Message of Governor John Tyler, Dec. 3, 1810, Tyler: *Letters and Times of the Tylers*, i, 261; and see Tyler to Monroe, Dec. 4, 1809, *ib.* 232.

[93] Jefferson to Randolph, Aug. 18, 1799, *Works*: Ford, ix, 73.

[94] See vol. ii, chaps. x and xi, of this work.

[95] The National judges, in their charges to grand juries, lectured and preached on religion, on morality, on partisan politics."On Monday last the Circuit Court of the United States was opened in this town. The Hon. Judge Patterson … delivered a most elegant and appropriate charge."The *Law* was laid down in a masterly manner: *Politics* were set in their true light by holding up the Jacobins [Republicans] as the disorganizers of our happy country, and the only instruments of introducing discontent and dissatisfaction among the well meaning part of the community. *Religion & Morality* were pleasingly inculcated and enforced as being necessary to good government, good order, and good laws; for 'when the righteous [Federalists] are in authority, the people rejoice.'…"After the charge was delivered the Rev. Mr. Alden addressed the Throne of Grace in an excellent and well adapted prayer." (*United States Oracle of the Day*, May 24, 1800, as quoted by Hackett, in *Green Bag*, ii, 264.)

[96] Adams's War Speech of 1798; see vol. ii, 351, of this work.

[97] Wharton: *State Trials*, 333-34.

[98] *Ib.* 339.

[99] *Ib.* 337. Paterson sat with District Judge Hitchcock and delivered the charge in this case. Luther Martin in the trial of Justice Chase (see *infra*, chap. iv) said that Paterson was "mild and amiable," and noted for his "suavity of manners." (*Trial of the Hon. Samuel Chase*: Evans, stenographer, 187-88.)

subjected to the same kind of treatment that was accorded in those days to the lowest criminals.[100] The people were deeply stirred by the fate of Matthew Lyon. Quick to realize and respond to public feeling, Jefferson wrote: "I know not which mortifies me most, that I should fear to write what I think, or my country bear such a state of things."[101]

One Anthony Haswell, editor of the *Vermont Gazette* published at Bennington, printed an advertisement of a lottery by which friends of Lyon, who was a poor man, hoped to raise enough money to pay his fine. This advertisement was addressed "to the enemies of political persecutions in the western district of Vermont." It was asserted that Lyon "is holden by the oppressive hand of usurped power in a loathsome prison, deprived almost of the right of reason, and suffering all the indignities which can be heaped upon him by a hard-hearted savage, who has, to the disgrace of Federalism, been elevated to a station where he can satiate his barbarity on the misery of his victims."[102] The "savage" referred to was United States Marshal Fitch. In the same paper an excerpt was reprinted from the *Aurora* which declared that "the administration publically notified that Tories … were worthy of the confidence of the government."[103]

Haswell was indicted for sedition. In defense he established the brutality with which Lyon had been treated and proposed to prove by two witnesses not then present (General James Drake of Virginia, and James McHenry, President Adams's Secretary of War) that the Government favored the occasional appointment of Tories to office. Justice Paterson ruled that such evidence was inadmissible, and charged the jury that if Haswell's intent was defamatory, he should be found guilty. Thereupon he was convicted and sentenced to two months' imprisonment and the payment of a fine of two hundred dollars.[104]

Dr. Thomas Cooper, editor of the *Sunbury and Northumberland Gazette* in Pennsylvania, in the course of a political controversy declared in his paper that when, in the beginning of Adams's Administration, he had asked the President for an office, Adams "was hardly in the infancy of political mistake; even those who doubted his capacity thought well of his intentions… Nor were we yet saddled with the expense of a permanent navy, or threatened … with the existence of a standing army… Mr. Adams … had not yet interfered … to influence the decisions of a court of justice."[105]

For this "attack" upon the President, Cooper was indicted under the Sedition Law. Conducting his own defense, he pointed out the issues that divided the two great parties, and insisted upon the propriety of such political criticism as that for which he had been indicted.

Cooper was himself learned in the law,[106] and during the trial he applied for a subpœna *duces tecum* to compel President Adams to attend as a witness, bringing with him certain documents which Cooper alleged to be necessary to his defense. In a rage Justice Samuel Chase of the Supreme Court, before whom, with Judge Richard Peters of the District Court, the case was tried, refused to issue the writ. For this he was denounced by the Republicans. In the trial of Aaron Burr, Marshall was to issue this very writ to President Thomas Jefferson and, for doing so, to be rebuked, denounced, and abused by the very partisans who now assailed Justice Chase for refusing to grant it.[107]

Justice Chase charged the jury at intolerable length: "If a man attempts to destroy the confidence of the people in their officers … he effectually saps the foundation of the government." It was plain that Cooper "intended to provoke" the Administration, for had he not admitted that, although he did not arraign the motives, he did mean "to censure the conduct of the President"? The

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[100] See Lyon to Mason, Oct. 14, 1798, Wharton: *State Trials*, 339-41.

[101] Jefferson to Taylor, Nov. 26, 1798, Jefferson MSS. Lib. Cong.

[102] Wharton: *State Trials*, 684.

[103] *Ib.* 685.

[104] *Ib.* 685-86.

[105] Wharton: *State Trials*, 661-62. Cooper was referring to the case of Jonathan Robins. (See vol. ii, 458-75, of this work.)

[106] Cooper afterward became a State judge.

[107] See *infra*, chap. viii.

offending editor's statement that "our credit is so low that we are obliged to borrow money at 8 per cent. in time of peace," especially irritated the Justice. "I cannot," he cried, "suppress my feelings at this gross attack upon the President." Chase then told the jury that the conduct of France had "rendered a loan necessary"; that undoubtedly Cooper had intended "to mislead the ignorant … and to influence their votes on the next election."

So Cooper was convicted and sentenced "to pay a fine of four hundred dollars, to be imprisoned for six months, and at the end of that period to find surety for his good behavior himself in a thousand, and two sureties in five hundred dollars each."[108]

"Almost every other country" had been "convulsed with … war," desolated by "every species of vice and disorder" which left innocence without protection and encouraged "the basest crimes." Only in America there was no "grievance to complain of." Yet our Government had been "as grossly abused as if it had been guilty of the vilest tyranny" – as if real "republicanism" could "only be found in the happy soil of France" where "Liberty, like the religion of Mahomet, is propagated by the sword." In the "bosom" of that nation "a dagger was concealed."[109] In these terms spoke James Iredell, Associate Justice of the Supreme Court, in addressing the grand jury for the District of Pennsylvania. He was delivering the charge that resulted in the indictment for treason of John Fries and others who had resisted the Federalist land tax.[110]

The triumph of France had, of course, nothing whatever to do with the forcible protest of the Pennsylvania farmers against what they felt to be Federalist extortion; nevertheless upon the charge of Justice Iredell as to the law of treason, they were indicted and convicted for that gravest of all offenses. A new trial was granted because one of the jury, John Rhoad, "had declared a prejudice against the prisoner after he was summoned as a juror."[111] On April 29, 1800, the second trial was held. This time Justice Chase presided. The facts were agreed to by counsel. Before the jury had been sworn, Chase threw on the table three papers in writing and announced that these contained the opinion of the judges upon the law of treason – one copy was for the counsel for the Government, one for the defendant's counsel, and one for the jury.

William Lewis, leading attorney for Fries, and one of the ablest members of the Philadelphia bar,[112] was enraged. He looked upon the paper, flung it from him, declaring that "his hand never should be polluted by a prejudicated opinion," and withdrew from the case, although Chase tried to persuade him to "go on in any manner he liked." Alexander J. Dallas, the other counsel for Fries, also withdrew, and the terrified prisoner was left to defend himself. The court told him that the judges, personally, would see that justice was done him. Again Fries and his accomplices were convicted under the charge of the court. "In an aweful and affecting manner"[113] Chase pronounced the sentence, which was that the condemned men should be "hanged by the neck *until dead*."[114]

The Republicans furiously assailed this conviction and sentence. President Adams pardoned Fries and his associates, to the disgust and resentment of the Federalist leaders.[115] On both sides the entire proceeding was made a political issue.

On the heels of this "repetition of outrage," as the Republicans promptly labeled the condemnation of Fries, trod the trial of James Thompson Callender for sedition, over which it was again the fate of the unlucky Chase to preside. *The Prospect Before Us*, written by Callender under

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[108] Wharton: *State Trials*, 679. Stephen Girard paid Cooper's fine. (McMaster: *Life and Times of Stephen Girard*, i, 397-98.)

[109] Wharton: *State Trials*, 466-69.

[110] See vol. ii, 429 *et seq.* of this work.

[111] Wharton: *State Trials*, 598-609.

[112] For sketch of Lewis see Wharton: *State Trials*, 32-33.

[113] *Independent Chronicle*, Boston, May 12, 1800.

[114] Wharton: *State Trials*, 641 et seq.

[115] See vol. ii, 429 *et seq.* of this work.

the encouragement of Jefferson,[116] contained a characteristically vicious screed against Adams. His Administration had been "a tempest of malignant passions"; his system had been "a French war, an American navy, a large standing army, an additional load of taxes." He "was a professed aristocrat and he had proved faithful and serviceable to the British interest" by sending Marshall and his associates to France. In the President's speech to Congress,[117] "this hoary headed incendiary … bawls to arms! then to arms!"

Callender was indicted for libel under the Sedition Law.

Before Judge Chase started for Virginia, Luther Martin had given him a copy of Callender's pamphlet, with the offensive passages underscored. During a session of the National court at Annapolis, Chase, in a "jocular conversation," had said that he would take Callender's book with him to Richmond, and that, "if Virginia was not too depraved" to furnish a jury of respectable men, he would certainly punish Callender. He would teach the lawyers of Virginia the difference between the liberty and the licentiousness of the press.[118] On the road to Richmond, James Triplett boarded the stage that carried the avenging Justice of the Supreme Court. He told Chase that Callender had once been arrested in Virginia as a vagrant. "It is a pity," replied Chase, "that they had not hanged the rascal."[119]

But the people of Virginia, because of their hatred of the Sedition Law, were ardent champions of Callender. Richmond lawyers were hostile to Chase and were the bitter enemies of the statute which they knew he would enforce. Jefferson was anxious that Callender "should be substantially defended, whether in the first stages by public interference or private contributors."[120]

One ambitious young attorney, George Hay, who seven years later was to act as prosecutor in the greatest trial at which John Marshall ever presided,[121] volunteered to defend Callender, animated to this course by devotion to "the cause of the Constitution," in spite of the fact that he "despised" his adopted client.[122] William Wirt was also inspired to offer his services in the interest of free speech. These Virginia attorneys would show this tyrant of the National Judiciary that the Virginia bar could not be borne down.[123] Of all this the hot-spirited Chase was advised; and he resolved to forestall the passionate young defenders of liberty. He was as witty as he was fearless, and throughout the trial brought down on Hay and Wirt the laughter of the spectators.

But in the court-room there was one spectator who did not laugh. John Marshall, then Secretary of State, witnessed the proceedings[124] with grave misgivings.

Chase frequently interrupted the defendant's counsel. "What," said he, "must there be a departure from common sense to find out a construction favorable" to Callender? The Justice declared

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[116] Jefferson to Mason, Oct. 11, 1798, *Works*: Ford, viii, 449-50; same to Callender, Sept. 6, 1799, *ib.* ix, 81-82; same to same, Oct. 6, 1799, *ib.* 83-84; Pickering to Higginson, Jan. 6, 1804, Pickering MSS. Mass. Hist. Soc.

[117] War speech of Adams to Congress in 1798, see vol. ii, 351, of this work.

[118] Testimony of James Winchester (*Annals*, 8th Cong. 2d Sess. 246-47); of Luther Martin (*ib.* 245-46); and of John T. Mason (*ib.* 216); see also *Chase Trial*, 63.

[119] Testimony of James Triplett, *Chase Trial*, 44-45, and see *Annals*, 8th Cong. 2d Sess. 217-19.

[120] Jefferson to Monroe, May 26, 1800, *Works*: Ford, ix, 136. By "public interference" Jefferson meant an appropriation by the Virginia Legislature. (*Ib.* 137.)

[121] The trial of Aaron Burr, see *infra*, chaps. vi, vii, viii, and ix.

[122] See testimony of George Hay, *Annals*, 8th Cong. 2d Sess. 203; and see especially Luther Martin's comments thereon, *infra*, chap. iv.

[123] The public mind was well prepared for just such appeals as those that Hay and Wirt planned to make. For instance, the citizens of Caroline County subscribed more than one hundred dollars for Callender's use.The subscription paper, probably drawn by Colonel John Taylor, in whose hands the money was placed, declared that Callender "has a cause closely allied to the preservation of the Constitution, and to the freedom of public opinion; and that he ought to be comforted in his bonds."Callender was "a sufferer for those principles." Therefore, and "because also he is poor and has three infant children who live by his daily labor" the contributors freely gave the money "to be applied to the use of James T. Callender, and if he should die in prison, to the use of his children." (*Independent Chronicle*, Boston, July 10, 1800.)

[124] See *infra*, chap. iv.

that a legal point which Hay attempted to make was "a wild notion."[125] When a juror said that he had never seen the indictment or heard it read, Chase declared that of course he could not have formed or delivered an opinion on the charges; and then denied the request that the indictment be read for the information of the juror. Chase would not permit that eminent patriot and publicist, Colonel John Taylor of Caroline, to testify that part of Callender's statement was true; "No evidence is admissible," said the Justice, "that does not … justify the whole charge."[126]

William Wirt, in addressing the jury, was arguing that if the jury believed the Sedition Act to be unconstitutional, and yet found Callender guilty, they "would violate their oath." Chase ordered him to sit down. The jury had no right to pass upon the constitutionality of the law – "such a power would be extremely dangerous. Hear my words, I wish the world to know them." The Justice then read a long and very able opinion which he had carefully prepared in anticipation that this point would be raised by the defense.[127] After another interruption, in which Chase referred to Wirt as "the *young gentleman*" in a manner that vastly amused the audience, the discomfited lawyer, covered with confusion, abandoned the case.

When Hay, in his turn, was addressing the jury, Chase twice interrupted him, asserting that the beardless attorney was not stating the law correctly. The reporter notes that thereupon "Mr. Hay folded up and put away his papers … and refused to proceed." The Justice begged him to go on, but Hay indignantly stalked from the room.

Acting under the instructions of Chase, Callender was convicted. The court sentenced him to imprisonment for nine months, and to pay a fine of two hundred dollars.[128]

The proceedings at this trial were widely published. The growing indignation of the people at the courts rose to a dangerous point. The force of popular wrath was increased by the alarm of the bar, which generally had been the stanch supporter of the bench.[129]

Hastening from Richmond to New Castle, Delaware, Justice Chase emphasized the opinion now current that he was an American Jeffreys and typical of the spirit of the whole National Judiciary. Upon opening court, he said that he had heard that there was a seditious newspaper in the State. He directed the United States Attorney to search the files of all the papers that could be found, and to report any abusive language discovered. It was the haying season, and the grand jury, most of whom were farmers, asked to be discharged, since there was no business for them to transact. Chase refused and held them until the next day, in order to have them return indictments against any printer that might have criticized the Administration.[130] But the prosecutor's investigation discovered nothing "treasonable" except a brief and unpleasant reference to Chase himself. So ended the Delaware visit of the ferret of the National Judiciary.

Thus a popular conviction grew up that no man was safe who assumed to criticize National officials. The persecution of Matthew Lyon was recalled, and the punishment of other citizens in cases less widely known[131] became the subject of common talk, – all adding to the growing popular

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[125] Wharton: *State Trials*, 692.

[126] *Ib.* 696-98; and see testimony of Taylor, *Chase Trial*, 38-39.

[127] Wharton: *State Trials*, 717-18. Chase's charge to the jury was an argument that the constitutionality of a law could not be determined by a jury, but belonged exclusively to the Judicial Department. For a brief *précis* of this opinion see chap. iii of this volume. Chase advanced most of the arguments used by Marshall in Marbury *vs.* Madison.

[128] *Ib.* 718. When Jefferson became President he immediately pardoned Callender. (See next chapter.)

[129] Wharton: *State Trials*, footnote to 718.

[130] See testimonies of Gunning Bedford, Nicholas Vandyke, Archibald Hamilton, John Hall, and Samuel P. Moore, *Chase Trial*, 98-101.

[131] For example, one Charles Holt, publisher of a newspaper, *The Bee*, of New London, Connecticut, had commented on the uselessness of enlisting in the army, and reflected upon the wisdom of the Administration's policy; for this he was indicted, convicted, and sentenced to three months' imprisonment, and the payment of a fine of two hundred dollars. (Randall: *Life of Thomas Jefferson*, ii, 418.)When President Adams passed through Newark, New Jersey, the local artillery company fired a salute. One of the observers, a man named Baldwin, idly remarked that "he wished the wadding from the cannon had been lodged in the President's backside." For this seditious remark Baldwin was fined one hundred dollars. (Hammond: *History of Political Parties in the State of New York*, i,

wrath against the whole National Judiciary. The people regarded those brought under the lash of justice as martyrs to the cause of free speech; and so, indeed, they were.

The method of securing indictments and convictions also met with public condemnation. In many States the United States Marshals selected what persons they pleased as members of the grand juries and trial juries. These officers of the National courts were, without exception, Federalists; in many cases Federalist politicians. When making up juries they selected only persons of the same manner of thinking as that of the marshals and judges themselves.[132] So it was that the juries were nothing more than machines that registered the will, opinion, or even inclination of the National judges and the United States District Attorneys. In short, in these prosecutions, trial by jury in any real sense was not to be had.[133]

Certain State judges of the rabid Federalist type, apostles of "the wise, the rich, and the good" political religion, were as insulting in their bearing, as immoderate in their speech, and as intolerant in their conduct as some of the National judges; and prosecutions in some State courts were as bad as the worst of those in the National tribunals.

In Boston, when the Legislature of Massachusetts was considering the Kentucky and Virginia Resolutions, John Bacon of Berkshire, a Republican State Senator, and Dr. Aaron Hill of Cambridge, the leader of the Republicans in the House, resisted the proposed answer of the Federalist majority. Both maintained the ground upon which Republicans everywhere now stood – that any State might disregard an act of Congress which it deemed unconstitutional.[134] Bacon and Hill were supported by the solid Republican membership of the Massachusetts Legislature, which the *Columbian Centinel* of Boston, a Federalist organ, called a "contemptible minority," every member of which was "worse than an infidel."[135]

The *Independent Chronicle*, the Republican newspaper of Boston, observed that "It is difficult for the common capacities to conceive of a sovereignty so situated that the *Sovereign shall have no right to decide on any invasion of his constitutional powers*." Bacon's speech, said the *Chronicle*, "has been read with delight by all true Republicans, and will always stand as a monument of his firmness, patriotism, and integrity… The name of an *American* Bacon will be handed down to the latest generations of freemen with high respect and gratitude, while the names of such as have aimed a *death wound* to the Constitution of the United States will rot *above ground* and be unsavoury to the nostrils of every lover of Republican freedom."[136]

The *Massachusetts Mercury* of February 22, 1799, reports that "On Tuesday last … Chief Justice Dana … commented on the contents of the *Independent Chronicle* of the preceding day. He properly stated to the Jury that though he was not a subscriber to the paper, he obtained *that one* by accident, that if he was, his conscience would charge him with assisting to support a traitorous enmity to the Government of his Country."

Thereupon Thomas Adams, the publisher, and Abijah Adams, a younger brother employed in the office, were indicted under the common law for attempting "to bring the government into

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130-31.)One Jedediah Peck, Assemblyman from Otsego County, N.Y., circulated among his neighbors a petition to Congress to repeal the Alien and Sedition Laws. This shocking act of sedition was taken up by the United States District Attorney for New York, who procured the indictment of Peck; and upon bench warrant, the offender was arrested and taken to New York for trial. It seems that such were the demonstrations of the people, wherever Peck appeared in custody of the officer, that the case was dropped. (Randall, ii, 420.)

[132] They were supposed to select juries according to the laws of the States where the courts were held. As a matter of fact they called the men they wished to serve.

[133] McMaster: *History of the People of the United States*, ii, 473; and see speech of Charles Pinckney in the Senate, March 5, 1800, *Annals*, 6th Cong. 1st and 2d Sess. 97.

[134] See speech of Bacon in the *Independent Chronicle*, Feb. 11-14, 1799; and of Hill, *ib.* Feb. 25, 1799.

[135] *Columbian Centinel*, Feb. 16, 1799; also see issue of Jan. 23, 1799. For condensed account of this incident see Anderson in *Am. Hist. Rev.* v, 60-62, quoting the *Centinel* as cited. A Federalist mob stoned the house of Dr. Hill the night after he made this speech. (*Ib.*) See also *infra*, chap. iii.

[136] *Independent Chronicle*, Feb. 18, 1799.

disrespect, hatred, and contempt," and for encouraging sedition. Thomas Adams was fatally ill and Abijah only was brought to trial. Under the instructions of the court he was convicted. In pronouncing sentence Chief Justice Dana delivered a political lecture.

The Virginia and Kentucky Resolutions, he said, had attempted "to establish the monstrous position" that the individual States had the right to pass upon the constitutionality of acts of Congress. He then gave a résumé of the reply of the majority of the Massachusetts Legislature to the Virginia Resolutions. This reply asserted that the decisions of all questions arising under the Constitution and laws of the United States "are exclusively vested in the Judicial Courts of the United States," and that the Sedition Act was "wise and necessary, as an audacious and unprincipled spirit of falsehood and abuse had been too long unremittingly exerted for the purpose of *perverting* public opinion, and threatened to undermine the whole fabric of government." The irate judge declared that the *Chronicle's* criticism of this action of the majority of the Legislature and its praise of the Republican minority of that body was an "indecent and outrageous calumny."

"Censurable as the libel may be in itself," Dana continued, the principles stated by Adams's counsel in conducting his defense were equally "dangerous to public tranquility." These daring lawyers had actually maintained the principle of the liberty of the press. They had denied that an American citizen could be punished under the common law of England. "Novel and disorganizing doctrines," exclaimed Dana in the midst of a long argument to prove that the common law was operative in the United States.[137]

In view of the fact that Abijah Adams was not the author of the libel, nor even the publisher or editor of the *Chronicle*, but was "the only person to whom the public can look for retribution," the court graciously sentenced him to only one month's imprisonment, but required him to find sureties for his good behavior for a year, and to pay the costs of the trial.[138]

Alexander Addison, the presiding judge of one of the Pennsylvania State courts, was another Federalist State judge whose judicial conduct and assaults from the bench upon democracy had helped to bring courts into disrepute. Some of his charges to grand juries were nothing but denunciations of Republican principles.[139]

His manner on the bench was imperious; he bullied counsel, browbeat witnesses, governed his associate judges, ruled juries. In one case,[140] Addison forbade the Associate Judge to address the jury, and prevented him from doing so.[141]

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[137] *Columbian Centinel*, March 30, 1799. The attorneys for Adams also advanced the doctrines of the Kentucky and Virginia Resolutions, so far, at least, as to assert that any State ought to protest against and resist any act of Congress that the Commonwealth believed to be in violation of the National Constitution. (Anderson, in *Am. Hist. Rev.* v, 226-27.)

[138] *Columbian Centinel*, March 27, 1799.Another instance of intolerant and partisan prosecutions in State courts was the case of Duane and others, indicted and tried for getting signatures to a petition in Congress against the Alien and Sedition Laws. They were acquitted, however. (Wharton: *State Trials*, 345-89.)

[139] These charges of Judge Addison were, in reality, political pamphlets. They had not the least reference to any business before the court, and were no more appropriate than sermons. They were, however, written with uncommon ability. It is doubtful whether any arguments more weighty have since been produced against what George Cabot called "excessive democracy." These grand jury charges of Addison were entitled: "Causes and Error of Complaints and Jealousy of the Administration of the Government"; "Charges to the Grand Juries of the County Court of the Fifth Circuit of the State of Pennsylvania, at December Session, 1798"; "The Liberty of Speech and of the Press"; "Charge to Grand Juries, 1798"; "Rise and Progress of Revolution," and "A Charge to the Grand Juries of the State of Pennsylvania, at December Session, 1800."

[140] Coulter *vs.* Moore, for defamation. Coulter, a justice of the peace, sued Moore for having declared, in effect, that Coulter "kept a house of ill fame." (*Trial of Alexander Addison, Esq.*: Lloyd, stenographer, 38; also Wharton: *State Trials*, 32 *et seq.*)

[141] This judge was John C. B. Lucas. He was a Frenchman speaking broken English, and, judging from the record, was a person of very inferior ability. There seems to be no doubt that he was the mere tool of another judge, Hugh H. Brackenridge, who hated Addison virulently. From a study of the case, one cannot be surprised that the able and erudite Addison held in greatest contempt the fussy and ignorant Lucas.

Nor did the judges stop with lecturing everybody from the bench. Carrying with them the authority of their exalted positions, more than one of them, notably Justice Chase and Judge Addison, took the stump in political campaigns and made partisan speeches.[142]

So it fell out that the manners, language, and conduct of the judges themselves, together with their use of the bench as a political rostrum, their partisanship as to the European belligerents, their merciless enforcement of the common law – aroused that public fear and hatred of the courts which gave Jefferson and the Republicans their opportunity. The questions which lay at the root of the Republican assault upon the Judiciary would not of themselves, and without the human and dramatic incidents of which the cases mentioned are examples, have wrought up among citizens that fighting spirit essential to a successful onslaught upon the National system of justice, which the Federalists had made so completely their own.[143]

Those basic questions thus brought theatrically before the people's eyes, had been created by the Alien and Sedition Laws, and by the Virginia and Kentucky Resolutions which those undemocratic statutes called forth. Freedom of speech on the one hand and Nationalism on the other hand, the crushing of "sedition" as against that license which Localism permitted – such were the issues which the imprudence and hot-headedness of the Federalist judges had brought up for settlement. Thus, unhappily, democracy marched arm in arm with State Rights, while Nationalism found itself the intimate companion of a narrow, bigoted, and retrograde conservatism.

Had not the Federalists, arrogant with power and frantic with hatred of France and fast becoming zealots in their championship of Great Britain, passed the drastic laws against liberty of the press and freedom of speech; had not the Republican protest against these statutes taken the form of the assertion that individual States might declare unconstitutional and disregard the acts of the National Legislature; and finally, had not National tribunals and some judges of State courts been so harsh and insolent, the Republican assault upon the National Judiciary,[144] the echoes of which loudly sound in our ears even to the present day, probably never would have been made.

But for these things, Marbury *vs.* Madison[145] might never have been written; the Supreme Court might have remained nothing more than the comparatively powerless institution that ultimate appellate judicial establishments are in other countries; and the career of John Marshall might have been no more notable and distinguished than that of the many ghostly figures in the shadowy procession of our judicial history. But the Republican condemnations of the severe punishment that the Federalists inflicted upon anybody who criticized the Government, raised fundamental issues and created conditions that forced action on those issues.

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[142] Wharton: *State Trials*, 45; Carson: *Supreme Court of the United States, Its History*, i, 193.

[143] The uprising against the Judiciary naturally began in Pennsylvania where the extravagance of the judges had been carried to the most picturesque as well as obnoxious extremes. For a faithful narrative of these see McMaster: *U.S.* iii, 153-55.On the other hand, wherever Republicans occupied judicial positions, the voice from the bench, while contrary to that of the Federalist judges, was no less harsh and absolute.For instance, the judges of the Supreme Court of New Hampshire refused to listen to the reading of British law reports, because they were from "musty, old, worm-eaten books." One of the judges declared that "not Common Law – not the quirks of Coke and Blackstone – but common sense" controlled American judges. (Warren, 227.)

[144] See next chapter.

[145] See *infra*, chap. iii, for a résumé of the conditions that forced Marshall to pronounce his famous opinion in the case of Marbury *vs.* Madison, as well as for a full discussion of that controversy.

CHAPTER II
THE ASSAULT ON THE JUDICIARY

> The angels of destruction are making haste. Our judges are to be as independent as spaniels. (Fisher Ames.)
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> The power which has the right of passing, without appeal, on the validity of your laws, is your sovereign. (John Randolph.)

On January 6, 1802, an atmosphere of intense but suppressed excitement pervaded the little semi-circular room where the Senate of the United States was in session.[146] The Republican assault upon the Judiciary was about to begin and the Federalists in Congress had nerved themselves for their last great fight. The impending debate was to prove one of the permanently notable engagements in American legislative history and was to create a situation which, in a few months, forced John Marshall to pronounce the first of those fundamental opinions which have helped to shape and which still influence the destiny of the American Nation.

The decision of Marbury *vs.* Madison was to be made inevitable by the great controversy to which we are now to listen. Marshall's course, and, indeed, his opinion in this famous case, cannot be understood without a thorough knowledge of the notable debate in Congress which immediately preceded it.[147]

Never was the effect of the long years of party training which Jefferson had given the Republicans better manifested than now. There was unsparing party discipline, perfect harmony of party plan. The President himself gave the signal for attack, but with such skill that while his lieutenants in House and Senate understood their orders and were eager to execute them, the rank and file of the Federalist voters, whom Jefferson hoped to win to the Republican cause in the years to come, were soothed rather than irritated by the seeming moderation and reasonableness of the President's words.

"The Judiciary system … and especially that portion of it recently enacted, will, of course, present itself to the contemplation of Congress," was the almost casual reference in the President's first Message to the Republican purpose to subjugate the National Judiciary. To assist Senators and Representatives in determining "the proportion which the institution bears to the business it has to perform" Jefferson had "procured from the several states … an exact statement of all the causes decided since the first establishment of the courts and of the causes which were pending when additional courts and judges were brought to their aid." This summary he transmitted to the law-making body.

In a seeming spirit of impartiality, almost of indifference, the President suggested Congressional inquiry as to whether jury trials had not been withheld in many cases, and advised the investigation of the manner of impaneling juries.[148]

Thus far and no farther went the comments on the National Judiciary which the President laid before Congress. The status of the courts – a question that filled the minds of all, both Federalists and Republicans – was not referred to. But the thought of it thrilled Jefferson, and only his caution restrained him from avowing it. Indeed, he had actually written into the message words as daring as those of his cherished Kentucky Resolutions; had boldly declared that the right existed in each department "to decide on the validity of an act according to its own judgment and uncontrolled by the opinions of any other department"; had asserted that he himself, as President, had the authority and

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[146] The Senate then met in the chamber now occupied by the Supreme Court.

[147] See *infra*, chap. iii.

[148] Jefferson to Congress, Dec. 8, 1801, *Works*: Ford, ix, 321 *et seq.*; also *Messages and Papers of the Presidents*: Richardson, i, 331.

power to decide the constitutionality of National laws; and had, as President, actually pronounced, in official form, the Sedition Act to be "in palpable and unqualified contradiction to the Constitution."[149]

This was not merely a part of a first rough draft of this Presidential document, nor was it lightly cast aside. It was the most important paragraph of the completed Message. Jefferson had signed it on December 8, 1801, and it was ready for transmission to the National Legislature. But just before sending the Message to the Capitol, he struck out this passage,[150] and thus notes on the margin of the draft his reason for doing so: "This whole paragraph was omitted as capable of being chicaned, and furnishing something to the opposition to make a handle of. It was thought better that the message should be clear of everything which the public might be made to misunderstand."

Although Jefferson's programme, as stated in the altered message which he finally sent to Congress, did not arouse the rank and file of Federalist voters, it did alarm and anger the Federalist chieftains, who saw the real purpose back of the President's colorless words. Fisher Ames, that delightful reactionary, thus interpreted it: "The message announces the downfall of the late revision of the Judiciary; economy, the patriotism of the shallow and the trick of the ambitious… The U. S. Gov't … is to be dismantled like an old ship… The state gov'ts are to be exhibited as alone safe and salutary."[151]

The Judiciary Law of 1801, which the Federalist majority enacted before their power over legislation passed forever from their hands, was one of the best considered and ablest measures ever devised by that constructive party.[152] Almost from the time of the organization of the National Judiciary the National judges had complained of the inadequacy and positive evils of the law under which they performed their duties. The famous Judiciary Act of 1789, which has received so much undeserved praise, did not entirely satisfy anybody except its author, Oliver Ellsworth. "It is a child of his and he defends it … with wrath and anger," wrote Maclay in his diary.[153]

In the first Congress opposition to the Ellsworth Act had been sharp and determined. Elbridge Gerry denounced the proposed National Judiciary as "a tyranny."[154] Samuel Livermore of New Hampshire called it "this new fangled system" which "would … swallow up the State Courts."[155] James Jackson of Georgia declared that National courts would cruelly harass "the poor man."[156] Thomas Sumter of South Carolina saw in the Judiciary Bill "the iron hand of power."[157] Maclay feared that it would be "the gunpowder plot of the Constitution."[158]

When the Ellsworth Bill had become a law, Senator William Grayson of Virginia advised Patrick Henry that it "wears so monstrous an appearance that I think it will be *felo-de-se* in the execution… Whenever the Federal Judiciary comes into operation, … the pride of the states … will in the end procure its destruction"[159]– a prediction that came near fulfillment and probably would have been realized but for the courage of John Marshall.

While Grayson's eager prophecy did not come to pass, the Judiciary Act of 1789 worked so badly that it was a source of discontent to bench, bar, and people. William R. Davie of North Carolina,

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[149] Jefferson, Jefferson MSS. Lib. Cong., partly quoted in Beard: *Economic Origins of Jeffersonian Democracy*, 454-55.

[150] For full text of this exposition of Constitutional law by Jefferson see Appendix A.

[151] Ames to King, Dec. 20, 1801, King, iv, 40.Like most eminent Federalists, except Marshall, Hamilton, and Cabot, Fisher Ames was soon to abandon his Nationalism and become one of the leaders of the secession movement in New England. (See vol. iv, chap. i, of this work.)

[152] See vol. ii, 531, 547-48, 550-52, of this work.

[153] *Journal of Samuel Maclay*: Meginness, 90.

[154] *Annals*, 1st Cong. 1st Sess. 862.

[155] *Ib.* 852.

[156] *Ib.* 833-34.

[157] *Ib.* 864-65.

[158] *Maclay's Journal*, 98.

[159] Grayson to Henry, Sept. 29, 1789, Tyler, i, 170-71.

a member of the Convention that framed the Constitution and one of the most eminent lawyers of his time, condemned the Ellsworth Act as "so defective … that … it would disgrace the composition of the meanest legislature of the States."[160]

It was, as we have seen,[161] because of the deficiencies of the original Judiciary Law that Jay refused reappointment as Chief Justice. "I left the bench," he wrote Adams, "perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which are 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."[162]

The six Justices of the Supreme Court were required to hold circuit courts in pairs, together with the judge of the district in which the court was held. Each circuit was to be thus served twice every year, and the Supreme Court was to hold two sessions annually in Washington.[163] So great were the distances between places where courts were held, so laborious, slow, and dangerous was all travel,[164] that the Justices – men of ripe age and studious habits – spent a large part of each year upon the road.[165] Sometimes a storm would delay them, and litigants with their assembled lawyers and witnesses would have to postpone the trial for another year or await, at the expense of time and money, the arrival of the belated Justices.[166]

A graver defect of the act was that the Justices, sitting together as the Supreme Court, heard on appeal the same causes which they had decided on the Circuit Bench. Thus, in effect, they were trial and appellate judges in identical controversies. Moreover, by the rotation in riding circuits different judges frequently heard the same causes in their various stages, so that uniformity of practice, and even of decisions, was made impossible.

The admirable Judiciary Act, passed by the Federalists in 1801, corrected these defects. The membership of the Supreme Court was reduced to five after the next vacancy, the Justices were relieved of the heavy burden of holding circuit courts, and their duties were confined exclusively to the Supreme Bench. The country was divided into sixteen circuits, and the office of circuit judge was created for each of these. The Circuit Judge, sitting with the District Judge, was to hold circuit court, as the Justices of the Supreme Court had formerly done. Thus the prompt and regular sessions of the circuit courts were assured. The appeal from decisions rendered by the Supreme Court Justices, sitting as circuit judges, to the same men sitting as appellate judges, was done away with.[167]

In establishing these new circuits and creating these circuit judges, this excellent Federalist law gave Adams the opportunity to fill the offices thus created with stanch Federalist partisans. Indeed,

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[160] Davie to Iredell, Aug. 2, 1791, *Life and Correspondence of James Iredell*: McRee, ii, 335.

[161] Vol. ii, 552-53, of this work.

[162] Jay to Adams, Jan. 2, 1801, *Jay*: Johnston, iv, 285.

[163] *Annals*, 1st Cong. 2d and 3d Sess. 2239.

[164] See vol. i, chap. vi, of this work. The conditions of travel are well illustrated by the experiences of six members of Congress, when journeying to Philadelphia in 1790. "Burke was shipwrecked off the Capes; Jackson and Mathews with great difficulty landed at Cape May and traveled one hundred and sixty miles in a wagon to the city; Burke got here in the same way. Gerry and Partridge were overset in the stage; the first had his head broke, … the other had his ribs sadly bruised… Tucker had a dreadful passage of sixteen days with perpetual storms." (Letter of William Smith, as quoted by Johnson: *Union and Democracy*, 105-06.)On his way to Washington from Amelia County in 1805, Senator Giles was thrown from a carriage, his leg fractured and his knee badly injured. (Anderson, 101.)

[165] This arrangement proved to be so difficult and vexatious that in 1792 Congress corrected it to the extent of requiring only one Justice of the Supreme Court to hold circuit court with the District Judge; but this slight relief did not reach the serious shortcomings of the law. (*Annals*, 2d Cong. 1st and 2d Sess. 1447.)See Adams: *U.S.* i, 274 *et seq.*, for good summary of the defects of the original Judiciary Act, and of the improvements made by the Federalist Law of 1801.

[166] See statement of Ogden, *Annals*, 7th Cong. 1st Sess. 172; of Chipman, *ib.* 123; of Tracy, *ib.* 52; of Griswold, *ib.* 768; of Huger, *ib.* 672.

[167] Of course, to some extent this evil still continued in the appeals to the Circuit Bench; but the ultimate appeal was before judges who had taken no part in the cause.The soundness of the Federalist Judiciary Act of 1801 was demonstrated almost a century later, in 1891-95, when Congress reënacted every essential feature of it. (See "Act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," March 3, 1891, chap. 517, amended Feb. 18, 1895, chap. 96.)

this was one motive for the enactment of the law. The salaries of the new circuit judges, together with other necessary expenses of the remodeled system, amounted to more than fifty thousand dollars every year – a sum which the Republicans exaggerated in their appeals to the people and even in their arguments in Congress.[168]

Chiefly on the pretext of this alleged extravagance, but in reality to oust the newly appointed Federalist judges and intimidate the entire National Judiciary, the Republicans, led by Jefferson, determined to repeal the Federalist Judiciary Act of 1801, upon the faith in the passage of which John Marshall, with misgiving, had accepted the office of Chief Justice.

On January 6, 1802, Senator John Breckenridge of Kentucky pulled the lanyard that fired the opening gun.[169] He was the personification of anti-Nationalism and aggressive democracy. He moved the repeal of the Federalist National Judiciary Act of 1801.[170] Every member of Senate and House – Republican and Federalist – was uplifted or depressed by the vital importance of the issue thus brought to a head; and in the debate which followed no words were too extreme to express their consciousness of the gravity of the occasion.[171]

In opening the debate, Senator Breckenridge confined himself closely to the point that the new Federalist judges were superfluous. "Could it be necessary," he challenged the Federalists, "to *increase* courts when suits were *decreasing*? … to multiply judges, when their duties were diminishing?" No! "The time never will arrive when America will stand in need of thirty-eight Federal Judges."[172] The Federalist Judiciary Law was "a wanton waste of the public treasure."[173] Moreover, the fathers never intended to commit to National judges "subjects of litigation which … could be left to State Courts." Answering the Federalist contention that the Constitution guaranteed to National judges tenure of office during "good behavior" and that, therefore, the offices once established could not be destroyed by Congress, the Kentucky Senator observed that "sinecure offices, … are not permitted by our laws or Constitution."[174]

James Monroe, then in Richmond, hastened to inform Breckenridge that "your argument … is highly approved here." But, anxiously inquired that foggy Republican, "Do you mean to admit that the legislature [Congress] has not a right to repeal the law organizing the supreme court for the express purpose of dismissing the judges when they cease to possess the public confidence?" If so, "the people have no check whatever on them … but impeachment." Monroe hoped that "the period is not distant" when any opposition to "the sovereignty of the people" by the courts, such as "the application of the principles of the English common law to our constitution," would be considered "good cause for impeachment."[175] Thus early was expressed the Republican plan to impeach and remove Marshall and the entire Federal membership of the Supreme Court so soon to be attempted.[176]

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[168] For example, Senator Cocke of Tennessee asserted the expense to be $137,000. (*Annals*, 7th Cong. 1st. Sess. 30.) See especially Prof. Farrand's conclusive article in *Am. Hist. Rev.* v, 682-86.

[169] It was to Breckenridge that Jefferson had entrusted the introduction of the Kentucky Resolutions of 1798 into the Legislature of that State. It was Breckenridge who had led the fight for them. At the time of the judiciary debate he was Jefferson's spokesman in the Senate; and later, at the President's earnest request, resigned as Senator to become Attorney-General.

[170] Breckenridge's constituents insisted that the law be repealed, because they feared that the newly established National courts would conflict with the system of State courts which the Legislature of Kentucky had just established. (See Carpenter, *Am. Pol. Sci. Rev.* ix, 523.)Although the repeal had been determined upon by Jefferson almost immediately after his inauguration (see Jefferson to Stuart, April 8, 1801; *Works*: Ford, ix, 247), Breckenridge relied upon that most fruitful of Republican intellects, John Taylor "of Caroline," the originator of the Kentucky Resolutions (see vol. ii, 397, of this work) for his arguments. See Taylor to Breckenridge, Dec. 22, 1801, *infra*, Appendix B.

[171] *Annals*, 7th Cong. 1st Sess. 31-46, 51-52, 58, 513, 530.

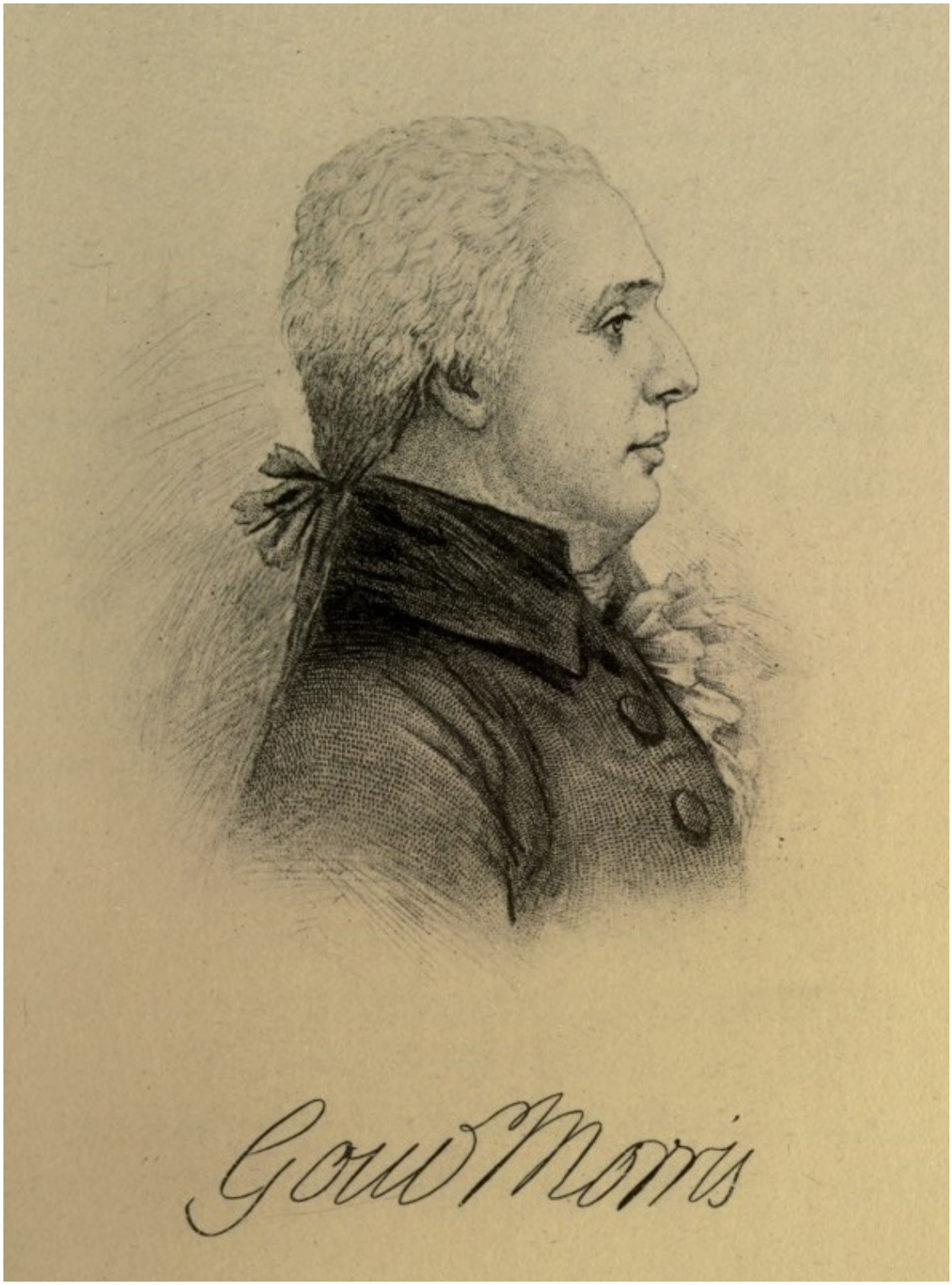
[172] *Annals*, 7th Cong. 1st Sess. 26.

[173] *Ib.* 25.

[174] *Ib.* 28.

[175] Monroe to Breckenridge, Jan. 15, 1802, Breckenridge MSS. Lib. Cong.

[176] See *infra*, chaps. iii and iv.



In reply to Breckenridge, Senator Jonathan Mason of Massachusetts, an accomplished Boston lawyer, promptly brought forward the question in the minds of Congress and the country. "This," said he, "was one of the most important questions that ever came before a Legislature." Why had the Judiciary been made "as independent of the Legislature as of the Executive?" Because it was their duty "to expound not only the laws, but the Constitution also; in which is involved the power of checking the Legislature in case it should pass any laws in violation of the Constitution."[177]

[177] *Annals*, 7th Cong. 1st Sess. 31-32.

The old system which the Republicans would now revive was intolerable, declared Senator Gouverneur Morris of New York. "Cast an eye over the extent of our country" and reflect that the President, "in selecting a character for the bench, must seek less the learning of a judge than the agility of a post boy." Moreover, to repeal the Federal Judiciary Law would be "a declaration to the remaining judges that they hold their offices subject to your [Congress's] will and pleasure." Thus "the check established by the Constitution is destroyed."

Morris expounded the conservative Federalist philosophy thus: "Governments are made to provide against the follies and vices of men… Hence, checks are required in the distribution of power among those who are to exercise it for the benefit of the people." The most efficient of these checks was the power given the National Judiciary – "a check of the first necessity, to prevent an invasion of the Constitution by unconstitutional laws – a check which might prevent any faction from intimidating or annihilating the tribunals themselves."[178]

Let the Republican Senators consider where their course would end, he warned. "What has been the ruin of every Republic? The vile love of popularity. *Why are we here? To save the people from their most dangerous enemy; to save them from themselves*."[179] Do not, he besought, "commit the fate of America to the mercy of time and chance."[180]

"Good God!" exclaimed Senator James Jackson of Georgia, "is it possible that I have heard such a sentiment in this body? Rather should I have expected to have heard it sounded from the despots of Turkey, or the deserts of Siberia.[181]… I am more afraid of an army of judges, … than of an army of soldiers… Have we not seen sedition laws?" The Georgia Senator "thanked God" that the terrorism of the National Judiciary was, at last, overthrown. "That we are not under dread of the patronage of judges, is manifest, from their attack on the Secretary of State."[182]

Senator Uriah Tracy of Connecticut was so concerned that he spoke in spite of serious illness. "What security is there to an individual," he asked, if the Legislature of the Union or any particular State, should pass an *ex post facto* law? "None in the world" but revolution or "an appeal to the Judiciary of the United States, where he will obtain a decision that the law itself is unconstitutional and void."[183]

That typical Virginian, Senator Stevens Thompson Mason, able, bold, and impetuous, now took up Gouverneur Morris's gage of battle. He was one of the most fearless and capable men in the Republican Party, and was as impressive in physical appearance as he was dominant in character. He was just under six feet in height, yet heavy with fat; he had extraordinarily large eyes, gray in color, a

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[178] *Annals*, 7th Cong. 1st Sess. 38.

[179] This unfortunate declaration of Morris gave the Republicans an opportunity of unlimited demagogic appeal. See *infra*. (Italics the author's.)

[180] *Annals*, 7th Cong. 1st Sess. 40-41.Morris spoke for an hour. There was a "large audience, which is not common for that House." He prepared his speech for the press. (*Diary and Letters of Gouverneur Morris*: Morris, ii, 417.)

[181] *Annals*, 7th Cong. 1st Sess. 49.

[182] *Ib.* 47-48. Senator Jackson here refers to the case of Marbury *vs.* Madison, then pending before the Supreme Court. (See *infra*, chap. iii.) This case was mentioned several times during the debate. It is plain that the Republicans expected Marshall to award the mandamus, and if he did, to charge this as another act of judicial aggression for which, if the plans already decided upon did not miscarry, they would make the new Chief Justice suffer removal from his office by impeachment. (See *infra*, chap. iv.)

[183] *Annals*, 7th Cong. 1st Sess. 58. Tracy's speech performed the miracle of making one convert. After he closed he was standing before the glowing fireplace, "half dead with his exertions." Senator Colhoun of South Carolina came to Tracy, and giving him his hand, said: "You are a stranger to me, sir, but by – you have made me your friend." Colhoun said that he "had been told a thousand lies" about the Federalist Judiciary Act, particularly the manner of passing it, and he had, therefore, been in favor of repealing it. But Tracy had convinced him, and Colhoun declared: "I shall be with you on the question." "May we depend upon you?" asked Tracy, wringing the South Carolina Senator's hand. "By – you may," was the response. (Morison: *Life of the Hon. Jeremiah Smith*, footnote to 147.) Colhoun kept his word and voted with the Federalists against his party's pet measure. (*Annals*, 7th Cong. 1st Sess. 185.)The correct spelling of this South Carolina Senator's name is *Colhoun*, and not C*a*lhoun, as given in so many biographical sketches of him. (See *South Carolina Magazine* for July, 1906.)

wide mouth with lips sternly compressed, high, broad forehead, and dark hair, thrown back from his brow. Mason had "wonderful powers of sarcasm" which he employed to the utmost in this debate.[184]

It was true, he said, in beginning his address, that the Judiciary should be independent, but not "independent of the nation itself." Certainly the Judiciary had not Constitutional authority "to control the other departments of the Government."[185] Mason hotly attacked the Federalist position that a National judge, once appointed, was in office permanently; and thus, for the second time, Marbury *vs.* Madison was brought into the debate. "Have we not heard this doctrine supported in the memorable case of the mandamus, lately[186] before the Supreme Court? Was it not there said [in argument of counsel] that, though the law had a right to establish the office of a justice of the peace, yet it had not a right to abridge its duration to five years?"[187]

The true principle, Mason declared, was that judicial offices like all others "are made for the good of the people and not for that of the individual who administers them." Even Judges of the Supreme Court should do something to earn their salaries; but under the Federalist Judiciary Act of 1801 "what have they got to do? To try ten suits, [annually] for such is the number now on their docket."

Mason now departed slightly from the Republican programme of ignoring the favorite Federalist theory that the Judiciary has the power to decide the constitutionality of statutes. He fears that the Justices of the Supreme Court "will be induced, from want of employment, to do that which they ought not to do… They may … hold the Constitution in one hand, and the law in the other, and say to the departments of Government, so far shall you go and no farther." He is alarmed lest "this independence of the Judiciary" shall become "something like supremacy."[188]

Seldom in parliamentary contests has sarcasm, always a doubtful weapon, been employed with finer art than it was by Mason against Morris at this time. The Federalists, in the enactment of the Judiciary Act of 1801, had abolished two district courts – the very thing for which the Republicans were now assailed by the Federalists as destroyers of the Constitution. Where was Morris, asked Mason, when his friends had committed that sacrilege? "Where was the *Ajax Telamon* of his party" at that hour of fate? "Where was the hero with his seven-fold shield – not of bull's hide, but of brass – prepared to prevent or to punish this Trojan rape?"[189]

Morris replied lamely. He had been criticized, he complained, for pointing out "the dangers to which popular governments are exposed, from the influence of designing demagogues upon popular passion." Yet "'tis for these purposes that all our Constitutional checks are devised." Otherwise "the Constitution is all nonsense." He enumerated the Constitutional limitations and exclaimed, "Why all these multiplied precautions, unless to check and control that impetuous spirit … which has swept away every popular Government that ever existed?"[190]

Should all else fail, "the Constitution has given us … an independent judiciary" which, if "you trench upon the rights of your fellow citizens, by passing an unconstitutional law … will stop

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[184] See Grigsby: *Virginia Convention of 1788*, ii, 260-262.This was the same Senator who, in violation of the rules of the Senate, gave to the press a copy of the Jay Treaty which the Senate was then considering. The publication of the treaty raised a storm of public wrath against that compact. (See vol. ii, 115, of this work.) Senator Mason's action was the first occurrence in our history of a treaty thus divulged.

[185] *Annals*, 7th Cong. 1st Sess. 59.

[186] In that case Marshall had issued a rule to the Secretary of State to show cause why a writ of mandamus should not be issued by the court ordering him to deliver to Marbury and his associates commissions as justices of the peace, to which offices President Adams had appointed them. (See *infra*, chap. iii.)

[187] *Annals*, 7th Cong. 1st Sess. 61.

[188] *Annals*, 7th Cong. 1st Sess. 63.

[189] *Annals*, 7th Cong. 1st Sess. 66. The eloquence of the Virginia Senator elicited the admiration of even the rabidly Federalist *Columbian Centinel* of Boston. See issue of February 6, 1802.

[190] *Ib.* 77.

you short." Preserve the Judiciary in its vigor, and in great controversies where the passions of the multitude are aroused, "instead of a resort to arms, there will be a happier appeal to argument."[191]

Answering Mason's fears that the Supreme Court, "having little else to do, would do mischief," Morris avowed that he should "rejoice in that mischief," if it checked "the Legislative or Executive departments in any wanton invasion of our rights… I know this doctrine is unpleasant; I know it is more popular to appeal to public opinion – that equivocal, transient being, which exists nowhere and everywhere. But if ever the occasion calls for it, I trust the Supreme Court will not neglect doing the great mischief of saving this Constitution."[192]

His emotions wrought to the point of oratorical ecstasy, Morris now made an appeal to "the good sense, patriotism, and … virtue" of the Republic, in the course of which he became badly entangled in his metaphors. "Do not," he pleaded, "rely on that popular will, which has brought us frail beings into political existence. That opinion is but a changeable thing. It will soon change. This very measure will change it. You will be deceived. Do not … commit the dignity, the harmony, the existence of our nation to the wild wind. Trust not your treasure to the waves. Throw not your compass and your charts into the ocean. Do not believe that its billows will waft you into port. Indeed, indeed, you will be deceived.

"Cast not away this only anchor of our safety. I have seen its progress. I know the difficulties through which it was obtained. I stand in the presence of Almighty God, and of the world; and I declare to you, that if you lose this charter, never, no, never will you get another! We are now, perhaps, arrived at the parting point. Here, even here, we stand on the brink of fate. Pause – Pause! For Heaven's sake, pause!"[193]

Senator Breckenridge would not "pause." The "progress" of Senator Morris's "anchor," indeed, dragged him again to "the brink of fate." The Senate had "wandered long enough" with the Federalist Senators "in those regions of fancy and of terror, to which they [have] led us." He now insisted that the Senate return to the real subject, and in a speech which is a model of compact reasoning, sharpened by sarcasm, discussed all the points raised by the Federalist Senators except their favorite one of the power of the National Judiciary to declare acts of Congress unconstitutional. This he carefully avoided.[194]

On January 15, 1802, the new Vice-President of the United States, Aaron Burr, first took the chair as presiding officer of the Senate.[195] Within two weeks[196] an incident happened which, though seemingly trivial, was powerfully and dramatically to affect the course of political events that finally encompassed the ruin of the reputation, career, and fortune of many men.

Senator Jonathan Dayton of New Jersey, in order, as he claimed, to make the measure less objectionable, moved that "the bill be referred to a select committee, with instructions to consider and report the alterations which may be proper in the judiciary system of the United States."[197] On this motion the Senate tied; and Vice-President Burr, by his deciding vote, referred the bill to the select committee. In doing this he explained that he believed the Federalists sincere in their wish "to ameliorate the provisions of the bill, that it might be rendered more acceptable to the Senate." But he was careful to warn them that he would "discountenance, by his vote, any attempt, if any such should be made, that might, in an indirect way, go to defeat the bill."[198]

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[191] *Ib.* 83.

[192] *Annals*, 7th Cong. 1st Sess. 89.

[193] *Ib.* 91-92.

[194] *Annals*, 7th Cong. 1st Sess. 99.

[195] Morris notes in his diary that, on the same day, the Senate resolved "to admit a short-hand writer to their floor. This is the beginning of mischief." (Morris, ii, 416-17.)

[196] January 27, 1802.

[197] *Annals*, 7th Cong. 1st Sess. 149.

[198] *Annals*, 7th Cong. 1st Sess. 150.Burr's action was perfectly correct. As an impartial presiding officer, he could not well have

Five days later, one more Republican Senator, being present, and one Federalist Senator, being absent, the committee was discharged on motion of Senator Breckenridge; and the debate continued, the Federalists constantly accusing the Republicans of a purpose to destroy the independence of the National Judiciary, and asserting that National judges must be kept beyond the reach of either Congress or President in order to decide fearlessly upon the constitutionality of laws.

At last the steady but spirited Breckenridge was so irritated that he broke away from the Republican plan to ignore this principal article of Federalist faith. He did not intend to rise again, he said, but "an argument had been so much pressed" that he felt it must be answered. "I did not expect, sir, to find the doctrine of the power of the courts to annul the laws of Congress as unconstitutional, so seriously insisted on… I would ask where they got that power, and who checks the courts when they violate the Constitution?"

The theory that courts may annul legislation would give them "the absolute direction of the Government." For, "to whom are they responsible?" He wished to have pointed out the clause which grants to the National Judiciary the power to overthrow legislation. "Is it not extraordinary," said he, "that if this high power was intended, it should nowhere appear?.. Never were such high and transcendant powers in any Government (much less in one like ours, composed of powers specially given and defined) claimed or exercised by construction only."[199]

Breckenridge frankly stated the Republican philosophy, repeating sometimes word for word the passage which Jefferson at the last moment had deleted from his Message to Congress.[200] "The Constitution," he declared, "intended a separation of the powers vested in the three great departments, giving to each exclusive authority on the subjects committed to it… Those who made the laws are presumed to have an equal attachment to, and interest in the Constitution; are equally bound by oath to support it, and have an equal right to give a construction to it… The construction of one department of the powers vested in it, is of higher authority than the construction of any other department.

"The Legislature," he continued, "have the exclusive right to interpret the Constitution, in what regards the law-making power, and the judges are bound to execute the laws they make. For the Legislature would have at least an equal right to annul the decisions of the courts, founded on their construction of the Constitution, as the courts would have to annul the acts of the Legislature, founded on their construction.[201]… In case the courts were to declare your revenue, impost and appropriation laws unconstitutional, would they thereby be blotted out of your statute book, and the operations of Government arrested?.. Let gentlemen consider well before they insist on a power in the Judiciary which places the Legislature at their feet."[202]

The candles[203] now dimly illuminating the little Senate Chamber shed scarcely more light than radiated from the broad, round, florid face of Gouverneur Morris. Getting to his feet as quickly as his wooden leg would permit, his features beaming with triumph, the New York Senator congratulated "this House, and all America, that we have at length got our adversaries upon the ground where we can fairly meet."[204]

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done anything else. Alexander J. Dallas, Republican Attorney-General of Pennsylvania, wrote the Vice-President a letter approving his action. (Dallas to Burr, Feb. 3, 1802, Davis: *Memoirs of Aaron Burr*, ii, 82.) Nathaniel Niles, a rampant Republican, sent Burr a letter thanking him for his vote. As a Republican, he wanted his party to be fair, he said. (Niles to Burr, Feb. 17, 1802, *ib.* 83-84.) Nevertheless, Burr's vote was seized upon by his enemies as the occasion for beginning those attacks upon him which led to his overthrow and disgrace. (See chaps. vi, vii, viii, and ix of this volume.)

[199] *Annals*, 7th Cong. 1st Sess. 178-79.

[200] See Appendix A to this volume.

[201] *Annals*, 7th Cong. 1st Sess. 179.

[202] *Ib.* 180.

[203] It was five o'clock (*ib.* 178) when Senator Breckenridge began to speak; it must have been well after six when Senator Morris rose to answer him.

[204] *Ib.* 180.

The power of courts to declare legislation invalid is derived from "authority higher than this Constitution … from the constitution of man, from the nature of things, from the necessary progress of human affairs,"[205] he asserted. In a cause on trial before them, it becomes necessary for the judges to "declare what the law is. They must, of course, determine whether that which is produced and relied on, has indeed the binding force of law."

Suppose, said Morris, that Congress should pass an act forbidden by the Constitution – for instance, one laying "a duty on exports," and "the citizen refuses to pay." If the Republicans were right, the courts would enforce a collection. In vain would the injured citizen appeal to the Supreme Court; for Congress would "defeat the appeal, and render final the judgment of inferior tribunals, subjected to their absolute control." According to the Republican doctrine, "the moment the Legislature … declare themselves supreme, they become so … and the Constitution is whatever they choose to make it."[206] This time Morris made a great impression. The Federalists were in high feather; even the Republicans were moved to admiration. Troup reported to King that "the democratical paper at Washington pronounced his speech to be the greatest display of eloquence ever exhibited in a deliberative assembly!"[207]

Nevertheless, the Federalist politicians were worried by the apparent indifference of the rank and file of their party. "I am surprized," wrote Bayard, "at the public apathy upon the subject. Why do not those who are opposed to the project, express in the public papers or by petitions their disapprobation?.. It is likely that a public movement would have great effect."[208] But, thanks to the former conduct of the judges themselves, no "public movement" developed. Conservative citizens were apprehensive; but, as usual, they were lethargic.

On February 3, 1802, the Senate, by a strictly party vote[209] of 16 to 15, passed the bill to repeal the Federalist Judiciary Act of 1801.[210]

When the bill came up in the House, the Federalist leader in that body, James A. Bayard of Delaware, moved to postpone its consideration to the third Monday in March, in order, as he said, to test public opinion, because "few occasions have occurred so important as this."[211] But in vain did the Federalists plead and threaten. Postponement was refused by a vote of 61 to 35.[212] Another plea for delay was denied by a vote of 58 to 34.[213] Thus the solid Republican majority, in rigid pursuance of the party plan, forced the consideration of the bill.

The Federalist organ in Washington, which Marshall two years earlier was supposed to influence and to which he probably contributed,[214] saw little hope of successful resistance. "What will eventually be the issue of the present high-handed, overbearing proceedings of Congress it is impossible to determine," but fear was expressed by this paper that conditions would be created "which impartial, unbiased and reflecting men consider as immediately preceding the total destruction of our government and the introduction of disunion, anarchy and civil war."[215]

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[205] *Ib.* 180.

[206] *Annals*, 7th Cong. 1st Sess. 181.

[207] Troup to King, April 9, 1802, King, iv, 103.

[208] Bayard to Bassett, Jan. 25, 1802, *Papers of James A. Bayard*: Donnan, 146-47.

[209] Except Colhoun of South Carolina, converted by Tracy. See *supra*, 62.

[210] *Annals*, 7th Cong. 1st Sess. 183.

[211] *Ib.* 510. A correspondent of the *Columbian Centinel*, reporting the event, declared that "the stand which the Federal Senators have made to preserve the Constitution, has been manly and glorious. They have immortalized their names, while those of their opposers will be execrated as the assassins of the Constitution." (*Columbian Centinel*, Feb. 17, 1802.)

[212] *Annals*, 7th Cong. 1st Sess. 518-19.

[213] *Ib.* 521-22.

[214] See vol. ii, 532, 541.

[215] *Washington Federalist*, Feb. 13, 1802.

This threat of secession and armed resistance, already made in the Senate, was to be repeated three times in the debate in the House which was opened for the Federalists by Archibald Henderson of North Carolina, whom Marshall pronounced to be "unquestionably among the ablest lawyers of his day" and "one of the great lawyers of the Nation."[216] "The monstrous and unheard of doctrine … lately advanced, that the judges have not the right of declaring unconstitutional laws void," was, declared Henderson, "the very definition of tyranny, and wherever you find it, the people are slaves, whether they call their Government a Monarchy, Republic, or Democracy." If the Republican theory of the Constitution should prevail, "better at once to bury it with all our hopes."[217]

Robert Williams of the same State, an extreme but unskillful Republican, now uncovered his party's scheme to oust Federalist judges, which thus far had carefully been concealed:[218] "Agreeably to our Constitution a judge may be impeached," said he, but this punishment would be minimized if judges could declare an act of Congress unconstitutional. "However he may err, he commits no crime; how, then, can he be impeached?"[219]

Philip R. Thompson of Virginia, a Republican, was moved to the depths of his being: "Give the Judiciary this check upon the Legislature, allow them the power to declare your laws null and void, … and in vain have the people placed you upon this floor to legislate.[220]… This is the tree where despotism lies concealed… Nurture it with your treasure, stop not its ramifications, and … your atmosphere will be contaminated with its poisonous effluvia, and your soaring eagle will fall dead at its root."[221]

Thomas T. Davis of Kentucky, deeply stirred by this picture, declared that the Federalists said to the people, you are "incapable" of protecting yourselves; "in the Judiciary alone you find a safe deposit for your liberties." The Kentucky Representative "trembled" at such ideas. "The sooner we put men out of power, who [*sic*] we find determined to act in this manner, the better; by doing so we preserve the power of the Legislature, and save our nation from the ravages of an uncontrolled Judiciary."[222] Thus again was revealed the Republican purpose of dragging from the National Bench all judges who dared assert the right, and to exercise the power to declare an act of Congress unconstitutional.[223]

The contending forces became ever more earnest as the struggle continued. All the cases then known in which courts directly or by inference had held legislative acts invalid were cited;[224] and all the arguments that ever had been advanced in favor of the principle of the judicial power to annul legislation were made over and over again.

All the reasons for the opinion which John Marshall, exactly one year later, pronounced in Marbury *vs.* Madison were given during this debate. Indeed, the legislative struggle now in progress and the result of it, created conditions which forced Marshall to execute that judicial *coup d'état*. It should be repeated that an understanding of Marbury *vs.* Madison is impossible without a thorough knowledge of the debate in Congress which preceded and largely caused that epochal decision.

The alarm that the repeal was but the beginning of Republican havoc was sounded by every Federalist member. "This measure," said John Stanley of North Carolina, "will be the first link in

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[216] Henderson in *North Carolina Booklet*, xvii, 66.

[217] *Annals*, 7th Cong. 1st Sess. 529-30.

[218] See *infra*, chap. iv.

[219] *Annals*, 7th Cong. 1st Sess. 531.

[220] *Annals*, 7th Cong. 1st Sess. 552-53.

[221] *Ib.* 554.

[222] *Ib.* 558.

[223] See *infra*, chap. iv.

[224] See, for example, the speeches of Thomas Morris of New York (*Annals*, 7th Cong. 1st Sess. 565-68); Calvin Goddard of Connecticut (*ib.* 727-34); John Stanley of North Carolina (*ib.* 569-78); Roger Griswold of Connecticut (*ib.* 768-69).

that chain of measures which will add the name of America to the melancholy catalogue of fallen Republics."[225]

William Branch Giles, who for the next five years bore so vital a part in the stirring events of Marshall's life, now took the floor and made one of the ablest addresses of his tempestuous career.[226] He was Jefferson's lieutenant in the House.[227] When the Federalists tried to postpone the consideration of the bill,[228] Giles admitted that it presented a question "more important than any that ever came before this house."[229] But there was no excuse for delay, because the press had been full of it for more than a year and the public was thoroughly informed upon it.[230]

Giles was a large, robust, "handsome" Virginian, whose lightest word always compelled the attention of the House. He had a very dark complexion, black hair worn long, and intense, "retreating" brown eyes. His dress was "remarkably plain, and in the style of Virginia carelessness." His voice was "clear and nervous," his language "powerfully condensed."[231]

This Republican gladiator came boldly to combat. How had the Federalists contrived to gain their ends? Chiefly by "the breaking out of a tremendous and unprecedented war in Europe," which had worked upon "the feelings and sympathies of the people of the United States" till they had neglected their own affairs. So it was, he said, that the Federalists had been able to load upon the people an expensive army, a powerful navy, intolerable taxes, and the despotic Alien and Sedition Laws. But at last, when, as the result of their maladministration, the Federalists saw their doom approaching, they began to "look out for some department of the government in which they could entrench themselves … and continue to support those favorite principles of irresponsibility which they could never consent to abandon."

For this purpose they had selected the Judiciary Department: "Not only because it was already filled" with rabid Federalists, "but because they held their offices by indefinite tenures, and of course were further removed from any responsibility to the people than either of the other departments." Thus came the Federalist Judiciary Act of 1801 which the Republicans were about to repeal.

Giles could not resist a sneer at Marshall. Referring to the European war, to which "the feelings and sympathies of the people of the United States were so strongly attracted … that they considered their own internal concerns in a secondary point of view," Giles swiftly portrayed those measures used by the Federalists as a pretext. They had, jeered the sharp-tongued Virginia Republican, "pushed forward the people to the X, Y, Z, of their political alphabet, before they had well learned … the A, B, C, of the principles of the [Federalist] Administration."[232]

But now, when blood was no longer flowing on European battle-fields, the interests of the American people in that "tremendous and unprecedented" combat of nations "no longer turn their attention from their internal concerns; arguments of the highest consideration for the safety of the Constitution and the liberty of the citizens, no longer receive the short reply, French partisans!

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[225] *Annals*, 7th Cong. 1st Sess. 579.

[226] Anderson, 83. Grigsby says that "Mr. Jefferson pronounced him (Giles) the ablest debater of the age." His speech on the Repeal Act, Grigsby declares to have been "by far his most brilliant display." (Grigsby: *Virginia Convention of 1829-30*, 23, 29.)

[227] Anderson, 76-82.

[228] See *supra*, 72.

[229] This statement, coming from the Virginia radical, reveals the profound concern of the Republicans, for Giles thus declared that the Judiciary debate was of greater consequence than those historic controversies over Assumption, the Whiskey Rebellion, the Bank, Neutrality, the Jay Treaty, the French complication, the army, and other vital subjects. In most of those encounters Giles had taken a leading and sometimes violent part.

[230] *Annals*, 7th Cong. 1st Sess. 512.

[231] Story's description of Giles six years later: Story to Fay, Feb. 13, 1808, Story, i, 158-59. Also see Anderson, frontispiece and 238.Giles was thirty-nine years of age. He had been elected to the House in 1790, and from the day he entered Congress had exasperated the Federalists. It is an interesting though trivial incident that Giles bore to Madison a letter of introduction from Marshall. Evidently the circumspect Richmond attorney was not well impressed with Giles, for the letter is cautious in the extreme. (See Anderson, 10; also *Annals*, 7th Cong. 1st Sess. 581.)

[232] *Annals*, 7th Cong. 1st Sess. 580-81.

Jacobins! Disorganizers!"[233] So "the American people and their Congress, in their real persons, and original American characters" were at last "engaged in the transaction of American concerns."[234]

Federalist despotism lay prostrate, thank Heaven, beneath the conquering Republican heel. Should it rise again? Never! Giles taunted the Federalists with the conduct of Federalist judges in the sedition cases,[235] and denounced the attempt to fasten British law on the American Nation – a law "unlimited in its object, and indefinite in its character," covering "every object of legislation."

Think, too, of what Marshall and the Supreme Court have done! "They have sent a … process leading to a mandamus, into the Executive cabinet, to examine its concerns."[236] The real issue between Federalists and Republicans, declared Giles, was "the doctrine of irresponsibility against the doctrine of responsibility… The doctrine of despotism in opposition to the representative system." The Federalist theory was "an express avowal that the people were incompetent to govern themselves."

A handsome, florid, fashionably attired man of thirty-five now took the floor and began his reply to the powerful speech of the tempestuous Virginian. His complexion and stoutness indicated the generous manner in which all public men of the time lived, and his polished elocution and lofty scorn for all things Republican marked him as the equal of Gouverneur Morris in oratorical finish and Federalist distrust of the people.[237] It was James A. Bayard, the Federalist leader of the House.

He asserted that the Republican "designs [were] hostile to the powers of this government"; that they flowed from "state pride [which] extinguishes a national sentiment"; that while the Federalists were in charge of the National Administration they struggled "to maintain the Constitutional powers of the Executive" because "the wild principles of French liberty were scattered through the country. We had our Jacobins and disorganizers, who saw no difference between a King and a President; and, as the people of France had put down their King, they thought the people of America ought to put down their President.

"They [Federalists] who considered the Constitution as securing all the principles of rational and practicable liberty, who were unwilling to embark upon the tempestuous sea of revolution, in pursuit of visionary schemes, were denounced as monarchists. A line was drawn between the Government and the people, and the friends of the Government [Federalists] were marked as the enemies of the people."[238] This was the spirit that was now triumphant; to what lengths was it to carry the Republicans? Did they include the downfall of the Judiciary in their plans of general destruction? Did they propose to make judges the mere creatures of Congress?[239]

Bayard skillfully turned the gibe at Marshall into a tribute to the Chief Justice. What did Giles mean by his cryptic X. Y. Z. reference? "Did he mean that the dispatches … were impostures?" Though Giles "felt no respect" for Marshall or Pinckney – "two characters as pure, as honorable, and exalted, as any the country can boast of" – yet, exclaimed Bayard, "I should have expected that he would have felt some tenderness for Mr. Gerry."[240]

The Republicans had contaminated the country with falsehoods against the Federalist Administrations; and now the target of their "poisoned arrows" was the National Judiciary. "If … they [the judges] have offended against the Constitution or laws of the country, why are they not

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[233] *Annals*, 7th Cong. 1st Sess. 582.

[234] *Ib.* 583.

[235] See *supra*, chap. i.

[236] Marbury *vs.* Madison (see *infra*, chap. iii). For Giles's great speech see *Annals*, 7th Cong. 1st Sess. 579-602.

[237] Bayard is "a fine, personable man … of strong mental powers… Nature has been liberal to him… He has, in himself, vast resources … a lawyer of high repute … and a man of integrity and honor… He is very fond of pleasure … a married man but fond of wine, women and cards. He drinks more than a bottle of wine each day… He lives too fast to live long… He is very attentive to dress and person." (Senator William Plumer's description of James A. Bayard, March 10, 1803, "Repository," Plumer MSS. Lib. Cong.)

[238] *Annals*, 7th Cong. 1st Sess. 605.

[239] *Ib.* 606.

[240] *Ib.* 609.

impeached? The gentleman now holds the sword of justice. The judges are not a privileged order; they have no shelter but their innocence."[241]

In detail Bayard explained the facts in the case of Marbury *vs.* Madison. That the Supreme Court had been "hardy enough to send their mandate into the Executive cabinet"[242] was, said he, "a strong proof of the value of that Constitutional provision which makes them independent. They are not terrified by the frowns of Executive power, and dare to judge between the rights of a citizen and the pretensions of a President."[243]

Contrast the defects of the Judiciary Act of 1789 with the perfection of the Federalist law supplanting it. Could any man deny the superiority of the latter?[244] The truth was that the Republicans were "to give notice to the judges of the Supreme Court of their fate, and to bid them to prepare for their end."[245] In these words Bayard charged the Republicans with their settled but unavowed purpose to unseat Marshall and his Federalist associates.[246]

Bayard hotly denied the Republican accusation that President Adams had appointed to the bench Federalist members of Congress as a reward for their party services; but, retorted he, Jefferson had done that very thing.[247] He then spoke at great length on the nature of the American Judiciary as distinguished from that of British courts, gave a vivid account of the passage of the Federalist Judiciary Act under attack, and finally swung back to the subject which more and more was coming to dominate the struggle – the power of the Supreme Court to annul acts of Congress.

Again and again Bayard restated, and with power and eloquence, all the arguments to support the supervisory power of courts over legislation.[248] At last he threatened armed resistance if the Republicans dared to carry out their plans against the National Judiciary. "There are many now willing to spill their blood to defend that Constitution. Are gentlemen disposed to risk the consequences?.. Let them consider their wives and children, their neighbors and their friends." Destroy the independence of the National Judiciary and "the moment is not far when this fair country is to be desolated by civil war."[249]

Bayard's speech aroused great enthusiasm among the leaders of his party. John Adams wrote: "Yours is the most comprehensive masterly and compleat argument that has been published in either house and will have, indeed … has already had more effect and influence on the public mind than all other publications on the subject."[250] The *Washington Federalist* pronounced Bayard's performance to be "far superior, not only to … the speeches of Mr. Morris and Mr. Tracy in the Senate, but to any speech of a Demosthenes, a Cicero, or a Chatham."[251]

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[241] *Ib.* 611.

[242] *Ib.* 614.

[243] *Annals*, 7th Cong. 1st Sess. 615.

[244] Bayard's summary of the shortcomings of the Ellsworth Act of 1789 and the excellence of the Judiciary Act of 1801 (*Annals*, 7th Cong. 1st Sess. 616-27) was the best made at that time or since.

[245] *Ib.* 632.

[246] See *infra*, chap. iv.

[247] Bayard pointed out that Charles Pinckney of South Carolina, whose "zeal and industry" decided the Presidential vote of his State, had been appointed Minister to Spain; that Claiborne of Tennessee held the vote of that State and cast it for Jefferson, and that Jefferson had conferred upon him "the high degree of Governor of the Mississippi Territory"; that Mr. Linn of New Jersey, upon whom both parties depended, finally cast his deciding vote in favor of Jefferson and "Mr. Linn has since had the profitable office of supervisor of his district conferred upon him"; and that Mr. Lyon of Vermont neutralized the vote of his State, but since "his character was low … Mr. Lyon's son has been handsomely provided for in one of the Executive offices." (*Annals*, 7th Cong. 1st Sess. 640.) Bayard named other men who had influenced the vote in the House and who had thereafter been rewarded by Jefferson.

[248] *Annals*, 7th Cong. 1st Sess. 645-48.

[249] *Ib.* 648-50. This was the second open expression in Congress of the spirit that led the New England Federalist leaders into their futile secession movement. (See *infra*, chaps. iii and vi; also vol. iv, chap. i, of this work.)

[250] Adams to Bayard, April 10, 1802; *Bayard Papers*: Donnan, 152.

[251] *Washington Federalist*, Feb. 20, 1802.

Hardly was Bayard's last word spoken when the man who at that time was the Republican master of the House, and, indeed, of the Senate also, was upon his feet. Of medium stature, thin as a sword, his straight black hair, in which gray already was beginning to appear, suggesting the Indian blood in his veins, his intense black eyes flaming with the passion of combat, his high and shrilling voice suggesting the scream of an eagle, John Randolph of Roanoke – that haughty, passionate, eccentric genius – personified the aggressive and ruthless Republicanism of the hour. He was clad in riding-coat and breeches, wore long riding-boots, and if the hat of the Virginia planter was not on his head, it was because in his nervousness he had removed it;[252] while, if his riding-whip was not in his hand, it was on his desk where he had cast it, the visible and fitting emblem of this strange man's mastery over his partisan followers.[253]

"He did not rise," he said, his voice quivering and body trembling,[254] "for the purpose of assuming the gauntlet which had been so proudly thrown by the Goliah of the adverse party; not but that he believed even his feeble powers, armed with the simple weapon of truth, a sling and a stone, capable of prostrating on the floor that gigantic boaster, armed cap-a-pie as he was." Randolph sneered, as only he could sneer, at the unctuous claims of the Federalists, that they had "nobly sacrificed their political existence on the altar of the general welfare"; he refused "to revere in them the self-immolated victims at the shrine of patriotism."[255]

As to the Federalist assertion that "the common law of England is the law of the United States in their confederate capacity," Randolph observed that the meaning of such terms as "court," "jury," and the like must, of course, be settled by reference to common-law definitions, but "does it follow that that indefinite and undefinable body of law is the irrepealable law of the land? The sense of a most important phrase, 'direct tax,' as used in the Constitution, has been … settled by the acceptation of Adam Smith; an acceptation, too, peculiar to himself. Does the Wealth of Nations, therefore, form a part of the Constitution of the United States?"

And would the Federalists inform the House what phase of the common law they proposed to adopt for the United States? Was it that "of the reign of Elizabeth and James the first; or … that of the time of George the Second?" Was it that "of Sir Walter Raleigh and Captain Smith, or that which was imported by Governor Oglethorpe?" Or was it that of some intermediate period? "I wish especially to know," asked Randolph, "whether the common law of libels which attaches to this Constitution, be the doctrine laid down by Lord Mansfield, or that which has immortalized Mr. Fox?" Let the Federalists reflect on the persecution for libel that had been made under the common law, as well as under the Sedition Act.[256]

Proper restraint upon Congress, said Randolph, was not found in a pretended power of the Judiciary to veto legislation, but in the people themselves, who at the ballot box could "apply the Constitutional corrective. That is the true check; every other is at variance with the principle that a free people are capable of self-government." Then the imperious Virginian boldly charged that the Federalists intended to have John Marshall and his associates on the Supreme Bench annul the Republican repeal of the Federalist Judiciary Act.

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[252] Members of Congress wore their hats during the sessions of House and Senate until 1828. For a description of Randolph in the House, see Tyler, I, 291. Senator Plumer pictured him as "a pale, meagre, ghostly man," with "more popular and effective talents than any other member of his party." (Plumer to Emery, Plumer, 248.) See also Plumer's letter to his son, Feb. 22, 1803, in which the New Hampshire Senator says that "Randolph goes to the House booted and spurred, with his whip in his hand, in imitation, it is said, of members of the British Parliament. He is a very slight man, but of the common stature." At a distance he looks young, but "upon a nearer approach you perceive his wrinkles and grey hairs. He is, I believe, about thirty." (*Ib.* 256.)

[253] The personal domination which John Randolph of Roanoke wielded over his party in Congress, until he broke with Jefferson (see *infra*, chaps. iv and x), is difficult to realize at the present day. Nothing like it has since been experienced, excepting only the merciless rule of Thaddeus Stevens of Pennsylvania from 1862 until 1868. (See Woodburn: *Life of Thaddeus Stevens*, 247 *et seq.*)

[254] *Washington Federalist*, Feb. 22, 1802.

[255] *Annals*, 7th Cong. 1st Sess. 650-51.

[256] *Annals*, 7th Cong. 1st Sess. 652.

"Sir," cried Randolph, "if you pass the law, the judges are to put their veto upon it by declaring it unconstitutional. Here is a new power of a dangerous and uncontrollable nature… The decision of a Constitutional question must rest somewhere. Shall it be confided to men immediately responsible to the people, or to those who are irresponsible?.. From whom is a corrupt decision most to be feared?.. The power which has the right of passing, without appeal, on the validity of your laws, is your sovereign… Are we not as deeply interested in the true exposition of the Constitution as the judges can be?" inquired Randolph. "Is not Congress as capable of forming a correct opinion as they are? Are not its members acting under a responsibility to public opinion which can and will check their aberrations from duty?"

Randolph referred to the case of Marbury *vs.* Madison and then recalled the prosecution of Thomas Cooper in which the National court refused "to a man under criminal prosecution … a subpœna to be served on the President, as a witness on the part of the prisoner.[257]… This court, which it seems, has lately become the guardian of the feeble and oppressed, against the strong arm of power, found itself destitute of all power to issue the writ…

"No, sir, you may invade the press; the courts will support you, will outstrip you in zeal to further this great object; your citizens may be imprisoned and amerced, the courts will take care to see it executed; the helpless foreigner may, contrary to the express letter of your Constitution, be deprived of compulsory process for obtaining witnesses in his defense; the courts in their extreme humility cannot find authority for granting it."

Again Marbury *vs.* Madison came into the debate:[258] "In their inquisitorial capacity," the Supreme Court, according to Marshall's ruling in that case, could force the President himself to discharge his executive functions "in what mode" the omnipotent judges might choose to direct. And Congress! "For the amusement of the public, we shall retain the right of debating but not of voting."[259] The judges could forestall legislation by "inflammatory pamphlets," as they had done.[260]

As the debate wore on, little that was new was adduced. Calvin Goddard of Connecticut reviewed the cases in which judges of various courts had asserted the Federalist doctrine of the judicial power to decide statutes unconstitutional,[261] and quoted from Marshall's speech on the Judiciary in the Virginia Convention of 1788.[262]

John Rutledge, Jr., of South Carolina, then delivered one of the most distinguished addresses of this notable discussion. Suppose, he said, that Congress were to pass any of the laws which the Constitution forbids, "who are to decide between the Constitution and the acts of Congress?.. If the people … [are] not shielded by some Constitutional checks" their liberties will be "destroyed … by demagogues, who filch the confidence of the people by pretending to be their friends; … demagogues who carry daggers in their hearts, and seductive smiles in their hypocritical faces."[263]

Rutledge was affected by the prevailing Federalist pessimism. "This bill," said he, "is an egg which will produce a brood of mortal consequences… It will soon prostrate public confidence; it will immediately depreciate the value of public property. Who will buy your lands? Who will open your Western forests? Who will build upon the hills and cultivate the valleys which here surround us?" The financial adventurer who would take such risks "must be a speculator indeed, and his

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[257] See *supra*, chap. i, 33; also *infra*, chap. ix, where Marshall, during the trial of Aaron Burr, actually issued such a subpœna. Randolph was now denouncing the National court before which Cooper was tried, because it refused to grant the very writ for the issuing of which Marshall in a few years was so rancorously assailed by Jefferson personally, and by nearly all Republicans as a party.

[258] At the time Marshall issued the rule against Madison he apparently had no idea that Section 13 of the Ellsworth Judiciary Act was unconstitutional. (See next chapter.)

[259] *Annals*, 7th Cong. 1st Sess. 662-63.

[260] The Federalist organ tried, by ridicule, to minimize Randolph's really strong speech. "The speech of Mr. Randolph was a jumble of disconnected declamation… He was horribly tiresome to the ear and disgusting to the taste." (*Washington Federalist*, Feb. 22, 1802.)

[261] *Annals*, 7th Cong. 1st Sess. 727.

[262] *Ib.* 737. See also vol. i, 452, of this work.

[263] *Annals*, 7th Cong. 1st Sess. 747-55.

purse must overflow … if there be no independent tribunals where the validity of your titles will be confirmed.[264]…

"Have we not seen a State [Georgia] sell its Western lands, and afterwards declare the law under which they were sold made null and void? Their nullifying law would have been declared void, had they had an independent Judiciary."[265] Here Rutledge anticipated by eight years the opinion delivered by Marshall in Fletcher *vs.* Peck.[266]

"Whenever in any country judges are dependent, property is insecure." What had happened in France? "Frenchmen received their constitution as the followers of Mahomet did their Koran, as though it came to them from Heaven. They swore on their standards and their sabres never to abandon it. But, sir, this constitution has vanished; the swords which were to have formed a rampart around it, are now worn by the Consular janissaries, and the Republican standards are among the trophies which decorate the vaulted roof of the Consul's palace.[267] Indeed … [the] subject," avowed Rutledge with passionate earnestness, "is perhaps as awful a one as any on this side of the grave. This attack upon our Constitution will form a great epoch in the history of our Government."[268]

Forcible resistance, if the Republican assault on the Judiciary succeeded, had twice been intimated during the debate. As yet, however, actual secession of the Northern and Eastern States had not been openly suggested, although it was common talk among the Federalists;[269] but now one of the boldest and frankest of their number broadly hinted it to be the Federalist purpose, should the Republicans persist in carrying out their purpose of demolishing the National courts.[270] In closing a long, intensely partisan and wearisome speech, Roger Griswold of Connecticut exclaimed: "There are states in this Union who will never consent and are not doomed to become the humble provinces of Virginia."

Joseph H. Nicholson of Maryland, Republican, was hardly less prolix than Griswold. He asked whether the people had ever approved the adoption of the common law by the Judiciary. "Have they ever sanctioned the principle that the judges should make laws for them instead of their Representatives?"[271] Tiresome as he was, he made a conclusive argument against the Federalist position that the National Judiciary might apply the common law in cases not provided for by acts of Congress.

The debate ran into the month of March.[272] Every possible phase of the subject was gone over time and again. All authorities which the ardent and tireless industry of the contending partisans could discover were brought to light. The pending case of Marbury *vs.* Madison was in the minds of all; and it was repeatedly dragged into the discussion. Samuel W. Dana of Connecticut examined it minutely, citing the action of the Supreme Court in the case of the application for a mandamus to the Secretary of War upon which the court acted February 14, 1794: "There does not appear to have been any question respecting the general power of the Supreme Court, to issue a mandamus to the Secretary of War, or any other subordinate officer." That was "a regular mode for obtaining a decision of the Supreme Court… When such has been the unquestioned usage heretofore, is it not

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[264] *Ib.* 759.

[265] *Ib.* 760.

[266] See *infra*, chap. x.

[267] *Annals*, 7th Cong. 1st Sess. 760.

[268] *Ib.* 760.

[269] See *infra*, chaps. iii and vi.

[270] *Annals*, 7th Cong. 1st Sess. 767-94.[271] *Ib.* 793.

[271] *Ib.* 805-06.

[272] In sour disgust Morris notes in his diary: "The House of Representatives have talked themselves out of self-respect, and at headquarters [White House] there is such an abandonment of manner and such a pruriency of conversation as would reduce even greatness to the level of vulgarity." (March 10, 1802, Morris, ii, 421.)

extraordinary that there has not been prudence enough to say less about the case of Marbury against the Secretary of State?"[273]

Dana then touched upon the general expectation that Marshall would declare void the Repeal Act. Because of this very apprehension, the Republicans, a few days later, suspended for more than a year the sessions of the Supreme Court. So Dana threatened that if the Republicans should pass the bill, the Supreme Court would annul it; for, said he, the Judiciary were sworn to support the Constitution, and when they find that instrument on one side and an act of Congress on the other, "what is their duty? Are they not to obey their oath, and judge accordingly? If so, they necessarily decide, that your act is of no force; for they are sworn to support the Constitution. This is a doctrine coeval with the existence of our Government, and has been the uniform principle of all the constituted authorities."[274] And he cited the position taken by National judges in 1792 in the matter of the pension commission.[275]

John Bacon, that stanch Massachusetts Republican,[276] asserted that "the Judiciary have no more right to prescribe, direct or control the acts of the other departments of the Government, than the other departments of the Government have to prescribe or direct those of the Judiciary."[277]

The Republicans determined to permit no further delay; for the first time in its history the House was kept in session until midnight.[278] At twelve o'clock, March 3, 1802, the vote was taken on the final passage of the bill, the thirty-two Federalists voting against and the fifty-nine Republicans for the measure.[279] "Thus ended this gigantic debate," chronicles the historian of that event.[280] No discussion in Congress had hitherto been so widely reported in the press or excited such general comment. By the great majority of the people the repeal was received with enthusiasm, although some Republicans believed that their party had gone too far.[281] Republican papers, however, hailed the repeal as the breaking of one of those judicial fetters which shackled the people, while Federalist journals bemoaned it as the beginning of the annihilation of all that was sane and worthy in American institutions.

"The fatal bill has passed; our Constitution is no more," exclaimed the *Washington Federalist* in an editorial entitled

"Farewell, a long Farewell, to all our Greatness."

The paper despaired of the Republic – nobody could tell "what other acts, urged by the intoxication of power and the fury of party rage" would be put through. But it announced that the Federalist judges would disregard the infamous Republican law: "The judges will continue to hold their courts as if the bill had not passed. 'Tis their solemn duty to do it; their country, all that is dear and valuable, call upon them to do it. By the judges this bill will be declared null and void… And we now ask the mighty victors, what is your triumph?.. What is the triumph of the President? He has

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[273] *Annals*, 7th Cong. 1st Sess. 904.Dana's statement is of first importance and should be carefully noted. It was at the time the universally accepted view of the power of the Supreme Court to issue writs of mandamus. Neither Federalists nor Republicans had ever questioned the Constitutional right of the Supreme Court to entertain original jurisdiction of mandamus proceedings in proper cases. Yet just this was what Marshall was so soon to deny in Marbury *vs.* Madison. (See *infra*, chap. iii.)

[274] *Annals*, 7th Cong. 1st Sess. 920.

[275] *Ib.* 923-26.

[276] See *supra*, chap, i, 43.

[277] *Annals*, 7th Cong. 1st Sess. 983.

[278] Hildreth, v, 441.

[279] Bayard to Bassett, March 3, 1802, *Bayard Papers*: Donnan, 150; and see *Annals*, 7th Cong. 1st Sess. 982. One Republican, Dr. William Eustis of Boston, voted with the Federalists.

[280] *Hist. Last Sess. Cong. Which Commenced 7th Dec. 1801* (taken from the *National Intelligencer*), 71.

[281] Tucker: *Life of Thomas Jefferson*, ii, 114.

gratified his malice towards the judges, but he has drawn a tear into the eye of every thoughtful patriot … and laid the foundation of infinite mischief." The Federalist organ declared that the Republican purpose was to force a "dissolution of the Union," and that this was likely to happen.

This significant editorial ended by a consideration of the Republican purpose to destroy the Supreme Court: "Should Mr. Breckenridge now bring forward a resolution to repeal the law establishing the Supreme Court of the United States, we should only consider it a part of the system to be pursued… We sincerely expect it will be done next session… Such is democracy."[282]

Senator Plumer declared, before the final vote, that the passage of the Republican Repeal Bill and of other Republican measures meant "anarchy."[283]

The ultra-Federalist *Palladium* of Boston lamented: "Our army is to be less and our navy nothing: Our Secretaries are to be aliens and our Judges as independent as spaniels. In this way we are to save everything, but our reputation and our rights[284]… Has Liberty any citadel or fortress, has mob despotism any impediments?"[285]

The *Independent Chronicle*, on the other hand, "congratulated the public on the final triumph of *Republicanism*, in the repeal of the late obnoxious judiciary law."[286] The Republicans of Boston and Cambridge celebrated the event with discharges of artillery.

Vans Murray reported to King that "the principle of … disorganizing … goes on with a destructive zeal. Internal Taxes – Judicial Sanctity – all are to be overset."[287] Sedgwick was sure that no defense was left against "legislative usurpation."[288] "The angels of destruction … are making haste," moaned Fisher Ames.[289]

"The angels of destruction" lost no time in striking their next blow. On March 18, two weeks after the threat of the *Washington Federalist* that the Supreme Court would declare unconstitutional the Republican Repeal Act, a Senate committee was appointed to examine further the National Judiciary establishment and report a bill for any improvements considered necessary.[290] Within a week the committee laid the measure before the Senate,[291] and on April 8 it was passed[292] without debate.

When it reached the House, however, the Federalists had taken alarm. The Federalist Judiciary Act of 1801 had fixed the terms of the Supreme Court in December and June instead of February and August. This new bill, plainly an afterthought, abolished the June session of the Supreme Court, directed that, thereafter, that tribunal should convene but once each year, and fixed the second Monday of February as the time of this annual session.

Thus did the Republicans plan to take away from the Supreme Court the opportunity to pass upon the repeal of the Federalist Judiciary Act of 1801 until the old and defective system of 1789, which it restored, was again in full operation. Meanwhile, the wrath of the new National judges, whom the repeal left without offices, would wear itself down, and they would accept the situation as an accomplished fact.[293] John Marshall should have no early opportunity to overturn the Repeal Act,

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[282] *Washington Federalist*, March 3, 1802. Too much importance cannot be attached to this editorial. It undoubtedly expressed accurately the views of Federalist public men in the Capital, including Marshall, whose partisan views and feelings were intense. It should not be forgotten that his relations with this newspaper were believed to be intimate. (See vol. ii, 532, 541, of this work.)

[283] Plumer to Upham, March 1, 1802, Plumer MSS. Lib. Cong.

[284] March 12, 1802.

[285] March 23, 1802.

[286] March 15, 1802.

[287] Vans Murray to King, April 5, 1802, King, iv, 95.

[288] Sedgwick to King, Feb. 20, 1802, *ib.* 73.

[289] Ames to Dwight, April 16, 1802, Ames, i, 297.

[290] *Annals*, 7th Cong. 1st Sess. 201.

[291] *Ib.* 205.

[292] *Ib.* 257.

[293] They never occupied the bench under the Federalist Act of 1801. They were appointed, but the swift action of Jefferson and

as the Republicans believed he would do if given the chance. Neither should he proceed further with the case of Marbury *vs.* Madison for many months to come.[294]

Bayard moved that the bill should not go into effect until July 1, thus permitting the Supreme Court to hold its June session; but, said Nicholson, that was just what the Republicans intended to prevent. Was a June session of the Supreme Court "a source of alarm?" asked Bayard. "The effect of the present bill will be, to have no court for fourteen months… Are gentlemen afraid of the judges? Are they afraid that they will pronounce the repealing law void?"[295]

Nicholson did not care whether the Supreme Court "pronounced the repealing law unconstitutional or not." The Republican postponement of the session for more than a year "does not arise from any design … to prevent the exercise of power by the judges." But what of the Federalists' solicitude for an early sitting of the court? "We have as good a right to suppose gentlemen on the other side are as anxious for a session in June, that this power may be exercised, as they have to suppose we wish to avoid it, to prevent the exercise."[296]

Griswold could not credit the Republicans with so base a purpose: "I know that it has been said, out of doors, that this is the great object of the bill. I know there have been slanders of this kind; but they are too disgraceful to ascribe to this body. The slander cannot, ought not to be admitted." So Griswold hoped that Republicans would permit the Supreme Court to hold its summer session. He frankly avowed a wish for an early decision that the Repeal Act was void. "I think the speedier it [usurpation] is checked the better."[297]

Bayard at last flatly charged the Republicans with the purpose of preventing the Supreme Court from holding the Repeal Act unconstitutional. "This act is not designed to amend the Judicial system," he asserted; "that is but pretense… It is to prevent that court from expressing their opinion upon the validity of the act lately passed … until the act has gone into full execution, and the excitement of the public mind is abated… Could a less motive induce gentlemen to agree to suspend the sessions of the Supreme Court for fourteen months?"[298]

But neither the pleading nor the denunciation of the Federalists moved the Republicans. On Friday, April 23, 1802, the bill passed and the Supreme Court of the United States was practically abolished for fourteen months.[299]

At that moment began the movement that finally developed into the plan for the secession of the New England States from the Union. It is, perhaps, more accurate to say that the idea of secession had never been entirely out of the minds of the extreme New England Federalist leaders from the time Theodore Sedgwick threatened it in the debate over the Assumption Bill.[300]

Hints of withdrawing from the Union if Virginia should become dominant crop out in their correspondence. The Republican repeal of the Judiciary Act immediately called forth many expressions in Federalist papers such as this from the Boston *Palladium* of March 2, 1802: "Whether the rights and interests of the Eastern States would be perfectly safe when Virginia rules the nation is a problem easy to solve but terrible to contemplate… As ambitious *Virginia* will not be just, let valiant *Massachusetts* be zealous."

Fisher Ames declared that "the federalists must entrench themselves in the State governments, and endeavor to make State justice and State power a shelter of the wise, and good, and rich, from

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the Republicans prevented them from entering upon the discharge of their duties.

[294] This case was before the Supreme Court in December, 1801, and, ordinarily, would have been decided at the next term, June, 1802.

[295] *Annals*, 7th Cong. 1st Sess. 1228-29.

[296] *Annals*, 7th Cong. 1st Sess. 1229.

[297] *Ib.* 1229-30.

[298] *Annals*, 7th Cong. 1st Sess. 1235-36.

[299] *Ib.* 1236. See also Channing, *U.S.* iv, 280-81.

[300] See vol. ii, 62, of this work.

the wild destroying rage of the southern Jacobins."[301] He thought the Federalists had neglected the press. "It is practicable," said he, "to rouse our sleeping patriotism – sleeping, like a drunkard in the snow… The newspapers have been left to the lazy or the ill-informed, or to those who undertook singly work enough for six."[302]

Pickering, the truculent, brave, and persistent, anticipated "a new confederacy… There will be – and our children at farthest will see it – a separation… The British Provinces, even with the assent of Britain, will become members of the Northern Confederacy."[303]

The more moderate George Cabot, on the contrary, thought that the strong defense made by the Federalists in Congress would induce the Republicans to cease their attacks on the National courts. "The very able discussions of the Judiciary Question," he wrote, "& great superiority of the Federalists in all the debates & public writings have manifestly checked the career of the *Revolutionists*."[304] But for once Cabot was wrong; the Republicans were jubilant and hastened to press their assault more vigorously than ever.

The Federalist newspapers teemed with long arguments against the repeal and laboriously strove, in dull and heavy fashion, to whip their readers into fighting humor. These articles were little more than turgid repetitions of the Federalist speeches in Congress, with a passage here and there of the usual Federalist denunciation. For instance, the *Columbian Centinel*, after restating the argument against the Repeal Act, thought that this "refutes all the absurd doctrines of the Jacobins upon that subject, … and it will be sooner or later declared by the people, in a tone terrible to the present disorganizing party, to be the true construction of their constitution, and the only one compatible with their safety and happiness."[305]

The *Independent Chronicle*, on the other hand, was exultant. After denouncing "the impudence and scurrility of the Federal faction," a correspondent of that paper proceeded in this fashion: "The Judiciary! The Judiciary! like a wreck on Cape Cod is dashing at every wave"; but, thank Heaven, "instead of the 'Essex Junto's' Judiciary we are sailing by the grace of God in the Washington *Frigate*– our judges are as at first and Mr. Jefferson has thought fit to practice the old navigation and steer with the same compass by which *Admiral Washington* regulated his log book. The Essex Junto may be afraid to trust themselves on board but every true Washington American will step on board in full confidence of a prosperous voyage. Huzza for the *Washington Judiciary*– no windows broke – no doors burst in – free from leak – tight and dry."[306]

Destiny was soon again to call John Marshall to the performance of an imperative duty.

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[301] Ames to Gore, Dec. 13, 1802, Ames, i, 310.

[302] *Ib.* Here is another characteristic passage from Ames, who accurately expressed New England Federalist sentiment: "The second French and first American Revolution is now commencing… The extinction of Federalism would be followed by the ruin of the wise, rich, and good." (Ames to Smith, Dec. 14, 1802, *ib.* 313-16.)

[303] Pickering to Peters, Dec. 24, 1803, *New-England Federalism*: Adams, 338.

[304] Cabot to King, March 27, 1802, King, iv, 94.

[305] *Columbian Centinel*, April 7, 1802.

[306] "Bowling" in the *Independent Chronicle* of April 26, 1802. An example of Jefferson's amazing skill in directing public opinion is found in the fact that the people were made to feel that the President was following in Washington's footsteps.

CHAPTER III
MARBURY VERSUS MADISON

To consider the judges as the ultimate arbiters of all constitutional questions would place us under the despotism of an oligarchy. (Jefferson.)

The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts alterable when the legislature shall please to alter it. It is emphatically the province and duty of the judicial department to say what the law is. This is the very essence of judicial duty. (Marshall.)

To have inscribed this vast truth of conservatism upon the public mind, so that no demagogue not in the last stages of intoxication denies it – this is an achievement of statesmanship which a thousand years may not exhaust or reveal all that is good. (Rufus Choate.)

"Rawleigh, Jan$^{y:}$ 2^{d} 1803

"My dearest Polly

"You will laugh at my vexation when you hear the various calamaties that have befallen me. In the first place when I came to review my funds, I had the mortification to discover that I had lost 15 silver dollars out of my waist coat pocket. They had worn through the various mendings the pocket had sustained & sought their liberty in the sands of Carolina.

"I determined not to vex myself with what coud not be remedied & orderd Peter to take out my cloaths that I might dress for court when to my astonishment & grief after fumbling several minutes in the portmanteau, staring at vacancy, & sweating most profusely he turned to me with the doleful tidings that I had no pair of breeches. You may be sure this piece of inteligence was not very graciously receivd; however, after a little scolding I determined to make the best of my situation & immediately set out to get a pair made.

"I thought I should be a sans culotte only one day & that for the residue of the term I might be well enough dressd for the appearance on the first day to be forgotten. But, the greatest of evils, I found, was followed by still greater! Not a taylor in town coud be prevaild on to work for me. They were all so busy that it was impossible to attend to my wants however pressing they might be, & I have the extreme mortification to pass the whole time without that important article of dress I have mentiond. I have no alleviation for this misfortune but the hope that I shall be enabled in four or five days to commence my journey homeward & that I shall have the pleasure of seeing you & our dear children in eight or nine days after this reaches you.

"In the meantime I flatter myself that you are well & happy.

"Adieu my dearest Polly
I am your ever affectionate
J Marshall."[307]

With the same unfailing light-heartedness which, nearly a quarter of a century before, had cheered his comrades at Valley Forge, John Marshall, Chief Justice of the United States, thus went about his duties and bore his troubles. Making his circuit in a battered gig or sulky, which he himself usually drove, absent-minded and laughing at himself for the mishaps that his forgetfulness and

[307] Marshall to his wife, Jan. 2, 1803, MS.

negligence continually brought upon him, he was seemingly unperturbed in the midst of the political upheaval.

Yet he was not at ease. Rufus King, still the American Minister to Great Britain, had finally settled the controversy over the British debts, upon the very basis laid down by Marshall when Secretary of State.[308] But Jefferson's Administration now did not hesitate to assert that this removal of one cause of conflict with Great Britain was the triumph of Republican diplomacy. Marshall, with unreserve so unlike him, reveals to King his disgust and sense of injury, and in doing so portrays the development of political conditions.

"The advocates of the present administration ascribe to it great praise," wrote Marshall to our Minister in London, "for having, with so much dexterity & so little loss, extricated our country from a debt of twenty-four million of dollars in which a former administration had involved it… The mortifying reflection obtrudes itself, that the reputation of the most wise & skilful conduct depends, in this our capricious world, so much on accident. Had Mr. Adams been reelected President of the United States, or had his successor been [a Federalist] … a very different reception … would have been given to the same measure.

"The payment of a specific sum would then have been pronounced, by those who now take merit to themselves for it, a humiliating national degradation, an abandonment of national interest, a free will offering of millions to Britain for her grace & favor, by those who sought to engage in a war with France, rather than repay, in part, by a small loan to that republic, the immense debt of gratitude we owe her."

So speaks with bitter sarcasm the new Chief Justice, and pessimistically continues: "Such is, & such I fear will ever be human justice!" He tells King that the Federalist "disposition to coalesce" with the Republicans, which seemed to be developing during the first few months after Jefferson's inauguration, had disappeared; "but," he adds, "the minority [Federalist Party] is only recovering its strength & firmness. It acquires nothing." Then, with the characteristic misgivings of a Federalist, he prophesies: "Our political tempests will long, very long, exist, after those who are now toss'd about by them shall be at rest."[309]

For more than five years[310] Marshall had foreseen the complicated and dangerous situation in which the country now found itself; and for more than a year[311] he had, in his ample, leisurely, simple manner of thinking, been framing the constructive answer which he was at last forced to give to the grave question: Who shall say with final authority what is and what is not law throughout the Republic? In his opinion in the case of Marbury *vs.* Madison, to which this chapter is devoted, we shall see how John Marshall answered this vital question.

The philosophy of the Virginia and Kentucky Resolutions had now become the ruling doctrine of the Republican Party. The writer of the creed of State Rights sat in the Executive chair, while in House and Senate Virginia and her daughter Kentucky ruled the Republican majority. The two States that had declared the right and power of any member of the Union to pronounce a National law unconstitutional, and that had actually asserted a National statute to be null and void, had become the dominant force in the National Government.

The Federalist majority in the legislatures of ten States,[312] it is true, had passed resolutions denouncing that anti-National theory, and had vigorously asserted that the National Judiciary alone had the power to invalidate acts of Congress.[313] *But in none of these States had the Republican minority*

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[308] See vol. ii, 502-05, of this work.

[309] Marshall to King, May 5, 1802, King, iv, 116-18.

[310] Since the adoption of the Kentucky and Virginia Resolutions in 1798. (See vol. ii, chaps. x, xi, xii, of this work.)

[311] Since the Republican repeal of the Federalist Judiciary Act was proposed. See *supra*, 51.

[312] Maryland, Pennsylvania, New Jersey, Delaware, New York, Vermont, New Hampshire, Massachusetts, Connecticut, Rhode Island.

[313] The Federalist majority in Vermont resolved that: "It belongs not to *State Legislatures* to decide on the constitutionality of laws

concurred. In all of them the Republicans had vigorously fought the Federalist denial of the right and power of the States to nullify National laws, and had especially resisted the Federalist assertion that this power was in the National Judiciary.

In the New York Legislature, forty-three Republicans voted solidly against the Federalist reply to Virginia and Kentucky, while the Federalists were able to muster but fifty votes in its favor. In Massachusetts, Pennsylvania, and Maryland, the Republican opposition was determined and outspoken.

The thirty-three Republicans of the Vermont Legislature cited, in their protest, the position which Marshall had taken on the Sedition Law in his campaign for Congress:[314] "We have ever been of an opinion, with that much and deservedly respected statesman, Mr. Marshall, (whose abilities and integrity have been doubted by no party, and whose spirited and patriotic defence of his country's rights, has been universally admired)[315] that 'it was calculated to create *unnecessarily*, discontents and jealousies, at a time, when our very existence as a nation may depend on our union.'"[316]

In Southern States, where the Federalists were dominant when Kentucky and Virginia adopted their famous Resolutions, the Republicans were, nevertheless, so strong that the Federalist majority in the Legislatures of those States dared not attempt to deny formally the new Republican gospel.[317]

So stood the formal record; but, since it had been written, the Jeffersonian propaganda had drawn scores of thousands of voters into the Republican ranks. The whole South had now decisively repudiated Federalism. Maryland had been captured; Pennsylvania had become as emphatically Republican as Virginia herself; New York had joined her forces to the Republican legions. The Federalists still held New England and the States of Delaware and New Jersey, but even there the incessant Republican assaults, delivered with ever-increasing strength, were weakening the Federalist power. Nothing was plainer than that, if the Kentucky and Virginia Resolutions had been submitted to the Legislatures of the various States in 1801-1803, most of them would have enthusiastically endorsed them.

Thus the one subject most discussed, from the campaign of 1800 to the time when Marshall delivered his opinion in Marbury *vs.* Madison, was the all-important question as to what power, if any, could annul acts of Congress.[318] During these years popular opinion became ever stronger that the Judiciary could not do so, that Congress had a free hand so far as courts were concerned, and that the

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made by the general government; this power being exclusively vested in the *Judiciary Courts of the Union*." (*Records of Governor and Council of Vermont*, iv, 529.)The Federalist majority in the Maryland Legislature asserted that "no state government … is competent to declare an act of the federal government unconstitutional, … that jurisdiction … is exclusively vested in the courts of the United States." (Anderson, in *Am. Hist. Rev.* v, 248.)The New York Federalists were slow to act, but finally resolved "that the right of deciding on the constitutionality of all laws passed by Congress … appertains to the judiciary department." (*Ib.* 248-49.)Connecticut Federalists declared that the Kentucky and Virginia plan was "hostile to the existence of our national Union." (*Ib.* 247.)In Delaware the then dominant party decided that the Kentucky and Virginia Resolutions were "not a fit subject" for their consideration. (*Ib.* 246.)The Pennsylvania Federalist majority resolved that the people "have committed to the supreme judiciary of the nation the high authority of ultimately and conclusively deciding the constitutionality of all legislative acts." (Anderson, in *Am. Hist. Rev.* v, 245.)On February 8, 1799, Massachusetts replied to the Virginia Resolutions that: "This legislature are persuaded that the decision of all cases in law or equity, arising under the Constitution of the United States, and the construction of all laws made in pursuance thereof, are exclusively vested by the people in the Judicial Courts of the U. States." (*Mass. Senate Journal, 1798-99*, xix, 238, MS. volume Mass. State Library.)Such was the general tenor of the Federalists' pronouncements upon this grave problem. But because the people believed the Sedition Law to be directed against free speech, the Federalist supremacy in many of the States that insisted upon these sound Nationalist principles was soon overthrown.The resolutions of the Republican minorities in the Legislatures of the Federalist States were emphatic assertions that any State might declare an act of Congress unconstitutional and disregard it, and *that the National Judiciary did not have supervisory power over legislation*.

[314] See vol. ii, 387-89, of this work.

[315] Referring to Marshall's conduct in the French Mission. (See vol. ii, chaps. vii, viii, ix, of this work.)

[316] Anderson, in *Am. Hist. Rev.* v, 249.

[317] *Ib.* 235-37.

[318] The questions raised by the Kentucky and Virginia Resolutions were principal themes of debate in State Legislatures, in the press, in Congressional campaigns, and in the Presidential contest of 1800. The Judiciary debate of 1802 was, in part, a continuance of these popular discussions.

individual States might ignore National laws whenever those States deemed them to be infractions of the Constitution. As we have seen, the Republican vote in Senate and House, by which the Judiciary Act of 1801 was repealed, was also a vote against the theory of the supervisory power of the National Judiciary over National legislation.

Should this conclusion go unchallenged? If so, it would have the sanction of acquiescence and soon acquire the strength of custom. What then would become the condition of the country? Congress might pass a law which some States would oppose and which they would refuse to obey, but which other States would favor and of which they would demand the enforcement. What would this entail? At the very least it would provoke a relapse into the chaos of the Confederation and more probably civil war. Or a President might take it upon himself to pronounce null and void a law of Congress, as Jefferson had already done in the matter of the Sedition Law,[319] and if House and Senate were of a hostile political party, Congress might insist upon the observance of its legislation; but such a course would seriously damage the whole machinery of the National Government.

The fundamental question as to what power could definitely pass upon the validity of legislation must be answered without delay. Some of Marshall's associates on the Supreme Bench were becoming old and feeble, and death, or resignation enforced by illness, was likely at any moment to break the Nationalist solidarity of the Supreme Court;[320] and the appointing power had fallen into the hands of the man who held the subjugation of the National Judiciary as one of his chief purposes.

Only second in importance to these reasons for Marshall's determination to meet the issue was the absolute necessity of asserting that there was one department of the Government that could not be influenced by temporary public opinion. The value to a democracy of a steadying force was not then so well understood as it is at present, but the Chief Justice fully appreciated it and determined at all hazards to make the National Judiciary the stabilizing power that it has since become. It should be said, however, that Marshall no longer "idolized democracy," as he declared he did when as a young man he addressed the Virginia Convention of 1788.[321] On the contrary, he had come to distrust popular rule as much as did most Federalists.

A case was then pending before the Supreme Court the decision of which might, by boldness and ingenuity, be made to serve as the occasion for that tribunal's assertion of its right and power to invalidate acts of Congress and also for the laying-down of rules for the guidance of all departments of the Government. This was the case of Marbury *vs.* Madison.

Just before his term expired,[322] President Adams had appointed forty-two persons to be justices of the peace for the Counties of Washington and Alexandria in the District of Columbia.[323] The Federalist Senate had confirmed these nominations,[324] and the commissions had been signed and sealed, but had not been delivered. When Jefferson was inaugurated he directed Madison, as Secretary of State, to issue commissions to twenty-five of the persons appointed by Adams, but to withhold the commissions from the other seventeen.[325]

Among the latter were William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper. These four men applied to the Supreme Court for a writ of mandamus compelling Madison to deliver their commissions. The other thirteen did not join in the suit, apparently considering the office of justice of the peace too insignificant to be worth the expense of litigation.

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[319] See *supra*, 52.

[320] Within a year after Marbury *vs.* Madison was decided, Albert Moore, one of the Federalist Associate Justices of the Supreme Court, resigned because of ill health and his place was filled by William Johnson, a Republican of South Carolina.

[321] See vol. i, 410, of this work.

[322] March 2, 1801.

[323] *Journal of the Executive Proceedings of the Senate*, i, 388.

[324] *Ib.* 390.

[325] *Ib.* 404. Jefferson did this because, as he said, the appointees of Adams were too numerous.

Indeed, these offices were deemed so trifling that one of Adams's appointees to whom Madison delivered a commission resigned, and five others refused to qualify.[326]

When the application of Marbury and his associates came before Marshall he assumed jurisdiction, and in December, 1801, issued the usual rule to Madison ordering him to show cause at the next term of the Supreme Court why the writ of mandamus should not be awarded against him. Soon afterward, as we have seen, Congress abolished the June session of the Supreme Court;[327] thus, when the court again convened in February, 1803, the case of Marbury *vs.* Madison was still pending.

Marshall resolved to make use of this unimportant litigation to assert, at the critical hour when such a pronouncement was essential, the power of the Supreme Court to declare invalid acts of Congress that violate the Constitution.

Considering the fact that Marshall was an experienced politician, was intimately familiar with the political methods of Jefferson and the Republican leaders, and was advised of their purposes, he could not have failed to realize the probable consequences to himself of the bold course he now determined to take. As the crawling months of 1802 wore on, no signs appeared that the Republican programme for overthrowing the independence of the Judiciary would be relinquished or modified. On the contrary, the coming of the new year (1803) found the second phase of the Republican assault determined upon.

At the beginning of the session of 1803 the House impeached John Pickering, Judge of the United States District Court for the District of New Hampshire. In Pennsylvania, the recently elected Republican House had impeached Judge Alexander Addison, and his conviction by a partisan vote was assured. Already the Republican determination to remove Samuel Chase from the Supreme Bench was frankly avowed.[328]

Moreover, the Republicans openly threatened to oust Marshall and his Federalist associates in case the court decided Marbury *vs.* Madison as the Republicans expected it would. They did not anticipate that Marshall would declare unconstitutional that section of the old Federalist Judiciary Act of 1789 under which the suit had been brought. Indeed, nobody imagined that the court would do that.

Everybody apparently, except Marshall and the Associate Justices, thought that the case would be decided in Marbury's favor and that Madison would be ordered to deliver the withheld commissions. It was upon this supposition that the Republican threats of impeachment were made. The Republicans considered Marbury's suit as a Federalist partisan maneuver and believed that the court's decision and Marshall's opinion would be inspired by motives of Federalist partisanship.[329]

There was a particular and powerful reason for Marshall to fear impeachment and removal from office; for, should he be deposed, it was certain that Jefferson would appoint Spencer Roane of Virginia to be Chief Justice of the United States. It was well known that Jefferson had intended

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[326] *Journal, Exec. Proc. Senate*, i, 417.

[327] See *supra*, 94-97.

[328] See *infra*, chap. iv.

[329] This belief is strikingly shown by the comment of the Republican press. For example, just before Marshall delivered his opinion, a correspondent of the *Independent Chronicle* of Boston sent from Washington this article:"The efforts of *federalism* to exalt the Judiciary over the Executive and Legislature, and to give that favorite department a political character & influence, may operate for a time to come, as it has already, to the promotion of one party and the depression of the other; but will probably terminate in the degradation and disgrace of the Judiciary."Politics are more improper and dangerous in a Court of Justice, if possible, than in the pulpit. Political charges, prosecutions, and similar modes of official influence, ought never to have been resorted to by any party. The fountains of justice should be unpolluted by party passions and prejudices."The *attempt* of the Supreme Court of the United States, by a mandamus, to control the Executive functions, is a new experiment. It seems to be no less than a commencement of war between the constituted departments."The Court must be defeated and retreat from the attack; or march on, till they incur an impeachment and removal from office. But our *Republican* frame of Government is so firm and solid, that there is reason to hope it will remain unshaken by the assaults of opposition, & the conflicts of interfering departments."The will of the nation, deliberately and constitutionally expressed, must and will prevail, the predictions and exertions of *federal* monarchists and aristocrats to the contrary notwithstanding." (*Independent Chronicle*, March 10, 1803.)Marshall's opinion was delivered February 24. It took two weeks of fast traveling to go from Washington to Boston. Ordinary mail required a few days longer. The article in the *Chronicle* was probably sent while Marbury *vs.* Madison was being argued.

to appoint Roane upon the death of Chief Justice Ellsworth.[330] But Ellsworth had resigned in time to permit Adams to appoint Marshall as his successor and thus thwart Jefferson's purpose. If now Marshall were removed, Roane would be given his place.

Should he be succeeded by Roane, Marshall knew that the great principles of Nationalism, to the carrying-out of which his life was devoted, would never be asserted by the National Judiciary. On the contrary, the Supreme Court would become an engine for the destruction of every theory of government which Marshall held dear; for a bolder, abler, and more persistent antagonist of those principles than Spencer Roane did not exist.[331] Had he become Chief Justice those cases in which Marshall delivered opinions that vitalized the Constitution would have been decided in direct opposition to Marshall's views.[332]

But despite the peril, Marshall resolved to act. Better to meet the issue now, come what might, than to evade it. If he succeeded, orderly government would be assured, the National Judiciary lifted to its high and true place, and one element of National disintegration suppressed, perhaps destroyed. If he failed, the country would be in no worse case than that to which it was rapidly tending.

No words in the Constitution gave the Judiciary the power to annul legislation. The subject had been discussed in the Convention, but the brief and scattering debate had arisen upon the proposition to make the President and Justices of the Supreme Court members of a Council of Revision with power to negative acts of Congress. No direct resolution was ever offered to the effect that the Judiciary should be given power to declare acts of Congress unconstitutional. In the discussion of the proposed Council of Revision there were sharp differences of opinion on the collateral question of the right and wisdom of judicial control of legislative acts.[333] But, in the end, nothing was done and the whole subject was dropped.

Such was the record of the Constitutional Convention when, by his opinion in Marbury *vs.* Madison, Marshall made the principle of judicial supremacy over legislation as much a part of our fundamental law as if the Constitution contained these specific words: the Supreme Court shall have the power to declare invalid any act of Congress which, in the opinion of the court, is unconstitutional.

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[330] Dodd, in *Am. Hist. Rev.* xii, 776. Under the law Marshall's successor must come from Virginia or North Carolina.

[331] As President of the Court of Appeals of Virginia he later challenged Marshall and brought about the first serious conflict between the courts of a State and the supreme tribunal of the Nation; and as a pamphleteer he assailed Marshall and his principles of Nationalism with unsparing rigor. (See vol. iv, chaps. iii, and vi, of this work.)

[332] For example, in Fletcher *vs.* Peck, Roane would have held that the National Courts could not annul a State statute; in Martin *vs.* Hunter's Lessees and in Cohen *vs.* Virginia, that the Supreme Court could not review the judgment of a State court; in McCulloch *vs.* Maryland, that Congress could not exercise implied powers, but only those expressly granted by the specific terms of the Constitution, etc. All this we know positively from Roane's own writings. (See vol. iv, chaps. iii, vi, and vii, of this work.)

[333] It seems probable, however, that it was generally understood by the leading men of the Convention that the Judiciary was to exercise the power of invalidating unconstitutional acts of Congress. (See Corwin: *Doctrine of Judicial Review*, 10-11; Beard: *Supreme Court and the Constitution*, 16-18; McLaughlin: *The Courts, the Constitution and Parties*, 32-35.)In the Constitutional Convention, Elbridge Gerry of Massachusetts asserted that the judicial function of expounding statutes "involved a power of deciding on their Constitutionality." (*Records of the Federal Convention of 1787*: Farrand, i, 97.) Rufus King of Massachusetts – later of New York – was of the same opinion. (*Ib.* 109.)On the other hand, Franklin declared that "it would be improper to put it in the power of any Man to negative a Law passed by the Legislature because it would give him the controul of the Legislature." (*Ib.*)Madison felt "that no Man would be so daring as to place a veto on a Law that had passed with the assent of the Legislature." (*Ib.*) Later in the debate, Madison modified his first opinion and declared that "a law violating a constitution established by the people themselves, would be considered by the Judges null & void." (*Ib.* ii, 93.)George Mason of Virginia said that the Judiciary "could declare an unconstitutional law void… He wished the further use to be made of the Judges of giving aid in preventing every improper law." (*Ib.* 78.)Gouverneur Morris of Pennsylvania – afterwards of New York – dreaded "legislative usurpations" and felt that "encroachments of the popular branch … ought to be guarded agst." (*Ib.* 299.)Gunning Bedford, Jr., of Delaware was against any "check on the Legislative" with two branches. (*Ib.* i, 100-01.)James Wilson of Pennsylvania insisted that power in the Judiciary to declare laws unconstitutional "did not go far enough" – the judges should also have "Revisionary power" to pass on bills in the process of enactment. (*Ib.* ii, 73.)Luther Martin of Maryland had no doubt that the Judiciary had "a negative" on unconstitutional laws. (*Ib.* 76.)John Francis Mercer of Maryland "disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void." (*Records, Fed. Conv.*: Farrand, 298.)John Dickinson of Delaware "thought no such power ought to exist," but was "at a loss what expedient to substitute." (*Ib.* 299.)Charles Pinckney of South Carolina "opposed the interference of the Judges in the Legislative business." (*Ib.* 298.)The above is a condensed *précis* of all that was said in the Constitutional Convention on this vital matter.

In establishing this principle Marshall was to contribute nothing new to the thought upon the subject. All the arguments on both sides of the question had been made over and over again since the Kentucky and Virginia Resolutions had startled the land, and had been freshly stated in the Judiciary debate in the preceding Congress. Members of the Federalist majority in most of the State Legislatures had expressed, in highly colored partisan rhetoric, every sound reason for the theory that the National Judiciary should be the ultimate interpreter of the Constitution. Both Federalist and Republican newspapers had printed scores of essays for and against that doctrine.

In the Virginia Convention of 1788 Marshall had announced as a fundamental principle that if Congress should pass an unconstitutional law the courts would declare it void,[334] and in his reply to the address of the majority of the Virginia Legislature[335] he had elaborately, though with much caution and some mistiness, set forth his views.[336] Chief Justice Jay and his associates had complained that the Judiciary Act of 1789 was unconstitutional, but they had not had the courage to announce that opinion from the Bench.[337] Justices Iredell and Paterson, sitting as circuit judges, had claimed for the National Judiciary the exclusive right to determine the constitutionality of laws. Chief Justice Jay in charging a grand jury, and Associate Justice Wilson in a carefully prepared law lecture, had announced the same conclusion.

Various State judges of the Federalist faith, among them Dana of Massachusetts and Addison of Pennsylvania, had spoken to like effect. At the trial of Callender[338] Marshall had heard Chase deliver the opinion that the National Judiciary had the exclusive power to declare acts of Congress unconstitutional.[339] Jefferson himself had written Meusnier, the year before the National Constitution was framed, that the Virginia Legislature had passed unconstitutional laws,[340] adding: "I have not heard that in the other states they have ever infringed their constitution; … *as the judges would consider any law as void* which was contrary to the constitution."[341]

Just as Jefferson, in writing the Declaration of Independence, put on paper not a single new or original idea, but merely set down in clear and compact form what had been said many times before,[342] so Marshall, in his opinion in Marbury *vs.* Madison, did nothing more than restate that which had previously been declared by hundreds of men. Thomas Jefferson and John Marshall as private citizens in Charlottesville and Richmond might have written Declarations and Opinions all their lives, and to-day none but the curious student would know that such men had ever lived. It was the authoritative position which these two great Americans happened to occupy and the compelling emergency for the announcement of the principles they expressed, as well as the soundness of those principles, that have given immortality to their enunciations.

Learned men have made exhaustive research for legal decisions by which Marshall's footsteps may have been guided, or which, at least, would justify his conclusion in Marbury *vs.* Madison.[343] The cases thus discovered are curious and interesting, but it is probable that Marshall had not heard of many of them. At any rate, he does not cite one of them in the course of this opinion, although no case ever was decided in which a judge needed so much the support of judicial precedents. Neither

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[334] See vol. i, 452, of this work.

[335] The Virginia Resolutions.

[336] Address of the Minority, Jan. 22, 1799, *Journal of the House of Delegates of Virginia, 1798-99*, 90-95.

[337] Jay to Iredell, Sept. 15, 1790, enclosing statement to President Washington, *Iredell*: McRee, 293-96; and see letter of Jay to Washington, Aug. 8, 1793, *Jay*: Johnston, iii, 488-89.

[338] See *supra*, 40, footnote 1.

[339] Wharton: *State Trials*, 715-18.

[340] Jefferson to Meusnier, Jan. 24, 1786, *Works*: Ford, v, 31-32.

[341] Jefferson to Meusnier, Jan. 24, 1786, *Works*: Ford, v, 14-15. (Italics the author's.)

[342] For instance, the Legislature of Rhode Island formally declared Independence almost two months before Congress adopted the pronouncement penned by Jefferson, and Jefferson used many of the very words of the tiny colony's defiance. In her Declaration of Independence in May, 1776, Virginia set forth most of the reasons stated by Jefferson a few weeks later in similar language.

[343] For these cases and references to studies of the question of judicial supremacy over legislation, see Appendix C.

did he know anything whatever of what was said on the subject in the Constitutional Convention, unless by hearsay, for its sessions were secret[344] and the Journals were not made public until 1819 – thirty years after the Government was established, and sixteen years after Marbury *vs.* Madison was decided.[345] Nor was Marshall informed of the discussions of the subject in the State Conventions that ratified the Constitution, except of those that took place in the Virginia Convention.[346]

On the other hand, he surely had read the Judiciary debate in Congress, for he was in the Capital when that controversy took place and the speeches were fully reported in the Washington press. Marshall probably was present in the Senate and the House when the most notable arguments were made.[347] More important, however, than written decisions or printed debates in influencing Marshall's mind was *The Federalist*, which we know he read carefully. In number seventy-eight of that work, Hamilton stated the principle of judicial supremacy which Marshall whole-heartedly adopted in Marbury *vs.* Madison.

"The interpretation of the laws," wrote Hamilton, "is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, … the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."[348]

In this passage Hamilton merely stated the general understanding of nearly all the important framers of the Constitution. Beyond question, Marshall considered that principle to have been woven into the very fiber of the Nation's fundamental law.

In executing his carefully determined purpose to have the Supreme Court formally announce the exclusive power of that tribunal as the authority of last resort to interpret the Constitution and determine the validity of laws by the test of that instrument, Marshall faced two practical and baffling difficulties, in addition to those larger and more forbidding ones which we have already considered.

The first of these was the condition of the Supreme Court itself and the low place it held in the public esteem; from the beginning it had not, as a body, impressed the public mind with its wisdom, dignity, or force.[349] The second obstacle was technical and immediate. Just how should Marshall declare the Supreme Court to be the ultimate arbiter of conflicts between statutes and the

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[344] See vol. i, 323, of this work.

[345] See *Records Fed. Conv.*: Farrand, i, Introduction, xii.

[346] Elliot's *Debates* were not published until 1827-30.

[347] Until very recently Justices of the Supreme Court often came to the Senate to listen to debates in which they were particularly interested.

[348] *The Federalist*: Lodge, 485-86. Madison also upheld the same doctrine. Later he opposed it, but toward the end of his life returned to his first position. (See vol. iv, chap. x, of this work.)

[349] John Jay had declined reappointment as Chief Justice because among other things, he was "perfectly convinced" that the National Judiciary was hopelessly weak. (See *supra*, 55.) The first Chief Justice of the United States at no moment, during his occupancy of that office, felt sure of himself or of the powers of the court. (See Jay to his wife, *Jay*: Johnston, iii, 420.) Jay had hesitated to accept the office as Chief Justice when Washington tendered it to him in 1789, and he had resigned it gladly in 1795 to become the Federalist candidate for Governor of New York.Washington offered the place to Patrick Henry, who refused it. (See Henry: *Patrick Henry – Life, Correspondence and Speeches*, ii, 562-63; also Tyler, i, 183.) The office was submitted to William Cushing, an Associate Justice of the Supreme Court, and he also refused to consider it. (Wharton: *State Trials*, 33.) So little was a place on the Supreme Bench esteemed that John Rutledge resigned as Associate Justice to accept the office of Chief Justice of the Supreme Court of South Carolina. (*Ib.* 35.)Jefferson considered that the government of New Orleans was "the second office in the United States in importance." (Randal, iii, 202.) For that matter, no National office in Washington, except the Presidency, was prized at this period. Senator Bailey of New York actually resigned his seat in the Senate in order to accept the office of Postmaster at New York City. (*Memoirs, J. Q. A.*: Adams, i, 290.) Edmund Randolph, when Attorney-General, deplored the weakening of the Supreme Court, and looked forward to the time when it should be strengthened. (Randolph to Washington, Aug. 5, 1792, *Writings of George Washington*: Sparks, x, 513.)The weakness of the Supreme Court, before Marshall became Chief Justice, is forcibly illustrated by the fact that in designing and building the National Capitol that tribunal was entirely forgotten and no chamber provided for it. (See Hosea Morrill Knowlton in *John Marshall – Life, Character and Judicial Services*: Dillon, i, 198-99.) When the seat of government was transferred to Washington, the court crept into an humble apartment in the basement beneath the Senate Chamber.

Constitution? What occasion could he find to justify, and seemingly to require, the pronouncement as the judgment of the Supreme Court of that opinion now imperatively demanded, and which he had resolved at all hazards to deliver?

When the Republicans repealed the Federalist Judiciary Act of 1801, Marshall had actually proposed to his associates upon the Supreme Bench that they refuse to sit as circuit judges, and "risk the consequences." By the Constitution, he said, they were Judges of the Supreme Court only; their commissions proved that they were appointed solely to those offices; the section requiring them to sit in inferior courts was unconstitutional. The other members of the Supreme Court, however, had not the courage to adopt the heroic course Marshall recommended. They agreed that his views were sound, but insisted that, because the Ellsworth Judiciary Act had been acquiesced in since the adoption of the Constitution, the validity of that act must now be considered as established.[350] So Marshall reluctantly abandoned his bold plan, and in the autumn of 1802 held court at Richmond as circuit judge. To the end of his life, however, he held firmly to the opinion that in so far as the Republican Judiciary Repeal Act of 1802 deprived National judges of their offices and salaries, that legislation was unconstitutional.[351]

Had the circuit judges, whose offices had just been taken from them, resisted in the courts, Marshall might, and probably would, have seized upon the issue thus presented to declare invalid the act by which the Republicans had overturned the new Federalist Judiciary system. Just this, as we have seen, the Republicans had expected him to do, and therefore had so changed the sessions of the Supreme Court that it could not render any decision for more than a year after the new Federalist courts were abolished.

Certain of the deposed National judges had, indeed, taken steps to bring the "revolutionary" Republican measure before the Supreme Court,[352] but their energies flagged, their hearts failed, and their only action was a futile and foolish protest to the very Congress that had wrested their judicial seats from under them.[353] Marshall was thus deprived of that opportunity at the only time he could have availed himself of it.

A year afterward, when Marbury *vs.* Madison came up for decision, the entire National Judiciary had submitted to the Republican repeal and was holding court under the Act of 1789.[354] This case, then, alone remained as the only possible occasion for announcing, at that critical time, the supervisory power of the Judiciary over legislation.

Marshall was Secretary of State when President Adams tardily appointed, and the Federalist Senate confirmed, the forty-two justices of the peace for the District of Columbia,[355] and it was Marshall who had failed to deliver the commissions to the appointees. Instead, he had, with his customary negligence of details, left them on his desk. Scarcely had he arrived at Richmond, after Jefferson's inauguration, when his brother, James M. Marshall, wrote him of the plight in which the newly appointed justices of the peace found themselves as the result of Marshall's oversight.

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[350] *New York Review*, iii, 347. The article on Chief Justice Marshall in this periodical was written by Chancellor James Kent, although his name does not appear.

[351] See vol. iv, chap. ix.

[352] See Tilghman to Smith, May 22, 1802, Morison: *Smith*, 148-49."A general arrangement [for action on behalf of the deposed judges] will be attempted before we separate. It is not descrete to say more at present." (Bayard to Bassett, April 19, 1802, *Bayard Papers*: Donnan, 153.)

[353] See "Protest of Judges," *American State Papers, Miscellaneous*, i, 340.Writing to Wolcott, now one of the displaced National circuit judges (Wolcott's appointment was secured by Marshall; see vol. ii, 559, of this work), concerning "the outrage committed by Congress on the Constitution" (Cabot to Wolcott, Dec. 20, 1802, Lodge: *Cabot*, 328), Cabot said: "I cannot but approve the intention of your judicial corps to unite in a memorial or remonstrance to Congress." He considered this to be "a manifest duty" of the judges, and gave Wolcott the arguments for their action. (Cabot to Wolcott, Oct. 21, 1802, *ib.* 327-28.)A proposition to submit to the Supreme Court the constitutionality of the Repeal Act was rejected January 27, 1803. (*Annals*, 7th Cong. 2d Sess. 439.)

[354] See *infra*, 130, 131.

[355] See *supra*, 110.

The Chief Justice replied: "I learn with infinite chagrin the 'development of principle' mentioned in yours of the 12th," – sarcastically referring to the Administration's conduct toward the Judiciary, – "& I cannot help regreting it the more as I fear some blame may be imputed to me…

"I did not send out the commissions because I apprehended such as were for a fixed time to be completed when signed & sealed & such as depended on the will of the President might at any time be revoked. 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 commissions of the Justices is an act of which I entertaind no suspicion. I should however have sent out the commissions which had been signed & sealed but for the extreme hurry of the time & the absence of Mr. Wagner [Clerk of the State Department] who had been called on by the President to act as his private secretary."[356]

Marshall, it thus appears, was thoroughly familiar with the matter when the application of Marbury and his three associates came before the Supreme Court, and took in it a keen and personal interest. By the time[357] the case came on for final disposition the term had almost half expired for which Marbury and his associates had been appointed. The other justices of the peace to whom Madison had delivered commissions were then transacting all the business that required the attention of such officials. It was certain, moreover, that the Administration would not recognize Marbury and his associates, no matter what Marshall might decide. In fact, these appointees must have lost all interest in the contest for offices of such slight dignity and such insignificant emoluments.

So far, then, as practical results were concerned, the case of Marbury *vs.* Madison had now come to the point where it was of no consequence whatever to any one. It presented only theoretical questions, and, on the face of the record, even these were as simple as they were unimportant. This controversy, in fact, had degenerated into little more than "a moot case," as Jefferson termed it twenty years later.[358]

At the hearing it was proved that the commissions had been signed and sealed. One witness was Marshall's brother, James M. Marshall. Jefferson's Attorney-General, Levi Lincoln, was excused from testifying as to what finally became of them. Madison refused to show cause and denied, by utterly ignoring, the jurisdiction of the Supreme Court to direct or control him in his administration of the office of Secretary of State.[359]

Charles Lee, former Attorney-General, counsel for the applicants, argued the questions which he and everybody else thought were involved. He maintained that a mandamus was the proper remedy, made so not only by the nature of the relation of the Supreme Court to inferior courts and ministerial officers, but by positive enactment of Congress in the Judiciary Law of 1789. Lee pointed out that the Supreme Court had acted on this authority in two previous cases.

Apparently the court could do one or the other of two things: it could disavow its power over any branch of the Executive Department and dismiss the application, or it could assert this power in cases like the one before it and command Madison to deliver the withheld commissions. It was the latter course that the Republicans expected Marshall to take.

If the Chief Justice should do this, Madison undoubtedly would ignore the writ and decline to obey the court's mandate. Thus the Executive and Judicial Departments would have been brought into direct conflict, with every practical advantage in the hands of the Administration. The court had no physical means to compel the execution of its order. Jefferson would have denounced the illegality of such a decision and laughed at the court's predicament. In short, had the writ to Madison been issued, the court would have been powerless to enforce obedience to its own mandate.

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[356] Marshall to James M. Marshall, March 18, 1801, MS.

[357] February, 1803.

[358] Jefferson to Johnson, June 12, 1823, *Works*: Ford, xii, footnote to 256.

[359] See 1 Cranch, 137-80.

If, on the contrary, the court dismissed the case, the Republican doctrines that the National courts could not direct executives to obey the laws, and that the Judiciary could not invalidate acts of Congress, would by acquiescence have been admitted.

No matter which horn of the dilemma Marshall selected, it was hard to see how his views could escape impalement. He chose neither. Instead of allowing his cherished purpose of establishing the principle of supervisory power of the Judiciary over legislation to be thus wounded and perhaps fatally injured, he made the decision of this insignificant case – about which the applicants themselves no longer cared – the occasion for asserting that principle. And he did assert that principle – asserted it so impressively that for more than a century his conclusion has easily withstood repeated assaults upon it, which still continue.

Marshall accomplished his purpose by convincing the Associate Justices of the unconstitutionality of that section of the Ellsworth Judiciary Act of 1789[360] which expressly conferred upon the Supreme Court the power to issue writs of mandamus and prohibition, and in persuading them to allow him to announce that conclusion as the opinion of the court. When we consider that, while all the Justices agreed with Marshall that the provision of the Ellsworth Judiciary Law requiring them to sit as circuit judges was unconstitutional, and yet refused to act upon that belief as Marshall wanted them to act, we can realize the measure of his triumph in inducing the same men to hold unconstitutional another provision of the same act – a provision, too, even less open to objection than the one they had sustained.

The theory of the Chief Justice that Section 13 of the old Judiciary Law was unconstitutional was absolutely new, and it was as daring as it was novel. It was the only original idea that Marshall contributed to the entire controversy. Nobody ever had questioned the validity of that section of the statute which Marshall now challenged. Ellsworth, who preceded Marshall as Chief Justice, had drawn the act when he was Senator in the First Congress;[361] he was one of the greatest lawyers of his time and an influential member of the Constitutional Convention.

One of Marshall's associates on the Supreme Bench at that very moment, William Paterson, had also been, with Ellsworth, a member of the Senate Committee that reported the Judiciary Act of 1789, and he, too, had been a member of the Constitutional Convention. Senators Gouverneur Morris of New York, William S. Johnson of Connecticut, Robert Morris of Pennsylvania, William Few of Georgia, George Read and Richard Bassett of Delaware, and Caleb Strong of Massachusetts supported the Ellsworth Law when the Senate passed it; and in the House James Madison and George Wythe of Virginia, Abraham Baldwin of Georgia, and Roger Sherman of Connecticut heartily favored and voted for the act. Most of these men were thorough lawyers, and every one of them had also helped to draft the National Constitution. Here were twelve men, many of them highly learned in the law, makers of the Constitution, draftsmen or advocates and supporters of the Ellsworth Judiciary Act of 1789, not one of whom had ever dreamed that an important section of that law was unconstitutional.[362]

Furthermore, from the organization of the Supreme Court to that moment, the bench and bar had accepted it, and the Justices of the Supreme Court, sitting with National district judges, had recognized its authority when called upon to take action in a particular controversy brought directly under it.[363] The Supreme Court itself had held that it had jurisdiction, under Section 13, to issue a mandamus in a proper case,[364] and had granted a writ of prohibition by authority of the same

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[360] Section 13 provided, among other things, that "the Supreme Court … shall have power to issue writs of prohibition to the district courts … and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." (*U.S. Statutes at Large*, i, 73; *Annals*, 1st Cong. 2d Sess. 2245.)

[361] See *supra*, 53-54.

[362] See Dougherty: *Power of the Federal Judiciary over Legislation*, 82.Professor Corwin says that not many years later Marshall concurred in an opinion of the Supreme Court which, by analogy, recognized the validity of it. (Corwin, 8-9.)

[363] U.S. *vs.* Ravara, 2 Dallas, 297.

[364] U.S. *vs.* Lawrence, 3 Dallas, 42.

section.[365] In two other cases this section had come before the Supreme Court, and no one had even intimated that it was unconstitutional.[366]

When, to his great disgust, Marshall was forced to sit as a circuit judge at Richmond in the winter of 1802, a case came before him that involved both the validity of the Republican Repeal Act and also the constitutionality of that provision of the Ellsworth Judiciary Law requiring justices of the Supreme Court to sit as circuit judges. This was the case of Stuart *vs.* Laird. Marshall held merely that the plea which raised these questions was insufficient, and the case was taken to the Supreme Court on a writ of error. After extended argument Justice Paterson delivered the opinion of the court, Marshall declining to participate in the decision because he had "tried the cause in the court below."[367]

At the same term, then, at which Marbury *vs.* Madison was decided, and immediately after Marshall's opinion in that case was delivered, all the justices of the Supreme Court except the Chief Justice, held "that practice and acquiescence under it [the Judiciary Act of 1789] for a period of several years, commencing with the organization of the judicial system … has fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed."[368]

But the exigency disclosed in this chapter required immediate action, notwithstanding the obstacles above set forth. The issue raised by the Republicans – the free hand of Congress, unrestrained by courts – must be settled at that time or be abandoned perhaps forever. The fundamental consideration involved must have a prompt, firm, and, if possible, final answer. Were such an answer not then given, it was not certain that it could ever be made. As it turned out, but for Marbury *vs.* Madison, the power of the Supreme Court to annul acts of Congress probably would not have been insisted upon thereafter. For, during the thirty-two years that Marshall remained on the Supreme Bench after the decision of that case, and for twenty years after his death, no case came before the court where an act of Congress was overthrown; and none had been invalidated from the adoption of the Constitution to the day when Marshall delivered his epochal opinion. So that, as a matter of historical significance, had he not then taken this stand, nearly seventy years would have passed without any question arising as to the omnipotence of Congress.[369] After so long a period of judicial acquiescence in Congressional supremacy it seems likely that opposition to it would have been futile.

For the reasons stated, Marshall resolved to take that step which, for courage, statesmanlike foresight, and, indeed, for perfectly calculated audacity, has few parallels in judicial history. In order to assert that in the Judiciary rested the exclusive power[370] to declare any statute unconstitutional, and to announce that the Supreme Court was the ultimate arbiter as to what is and what is not law under the Constitution, Marshall determined to annul Section 13 of the Ellsworth Judiciary Act of 1789. In

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[365] U.S. *vs.* Peters, *ib.* 121.

[366] In the argument of Marbury *vs.* Madison, Charles Lee called Marshall's attention to the case of U.S. *vs.* Hopkins, in the February term, 1794, in which a motion was made for a mandamus to Hopkins as loan officer for the District of Virginia, and to the case of one John Chandler of Connecticut, also in February, 1794, in which a motion was made in behalf of Chandler for a mandamus to the Secretary of War. These cases do not seem to have been reported, and Lee must have referred to manuscript records of them. (See 1 Cranch, 148-49.)Samuel W. Dana of Connecticut also referred to the Chandler case during the Judiciary debate in the House, March, 1802. (See *Annals*, 7th Cong. 1st Sess. 903-04.)

[367] 1 Cranch, 308.

[368] Stuart *vs.* Laird, 1 Cranch, 309.

[369] The next case in which the Supreme Court overthrew an act of Congress was that of Scott *vs.* Sandford – the famous Dred Scott case, decided in 1857. In this case the Supreme Court held that Congress had no power to prohibit slavery in the territory purchased from France in 1803 (the Louisiana Purchase), and that the Act of March 6, 1820, known as the Missouri Compromise, was unconstitutional, null, and void. (See Scott *vs.* Sandford, 19 Howard, 393 *et seq.*)

[370] The President can veto a bill, of course, on the ground of unconstitutionally; but, by a two thirds vote, Congress can pass it over the Executive's disapproval.

taking such a step the Chief Justice made up his mind that he would sum up in final and conclusive form the reasoning that sustained that principle.

Marshall resolved to go still further. He would announce from the Supreme Bench rules of procedure which the Executive branch of the Government must observe. This was indispensable, he correctly thought, if the departments were to be harmonious branches of a single and National Government, rather than warring factions whose dissensions must in the end paralyze the administration of the Nation's affairs.[371]

It was not, then, Marshall's declaring an act of Congress to be unconstitutional that was innovating or revolutionary. The extraordinary thing was the pretext he devised for rendering that opinion – a pretext which, it cannot be too often recalled, had been unheard of and unsuspected hitherto. Nothing but the emergency compelling the insistence, at this particular time, that the Supreme Court has such a power, can fully and satisfactorily explain the action of Marshall in holding this section void.

In his opinion the Chief Justice spoke of "the peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it."[372] He would follow, he said, the points of counsel in the order in which they had been made.[373] Did the applicants have a right to the commissions? This depended, he said, on whether Marbury had been appointed to office. If so, he was entitled to the commission which was merely the formal evidence of the appointment. The President had nominated him to the Senate, the Senate had confirmed the nomination, the President had signed the commission, and, in the manner directed by act of Congress, the Secretary of State had affixed to it the seal of the United States.[374]

The President could not recall his appointment if "the officer is not removable." Delivery of the commission was not necessary to the consummation of the appointment which had already been effected; otherwise "negligence, … fraud, fire or theft, might deprive an individual of his office." But the truth was that "a copy from the record … would be, to every intent and purpose, equal to the original."[375] The appointment of Marbury "vested in the officer legal rights … of his country," and "to withhold his commission is an act … not warranted by law, but violative of a vested legal right…[376]

"The very essence of civil liberty," continues Marshall, "certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." Ours has been "emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right…[377]

"The act of delivering or withholding a commission" is not "a mere political act, belonging to the executive department alone," but a ministerial act, the performance of which is directed by statute. Congress had ordered the Secretary of War to place the names of certain persons on the pension rolls; suppose that he should refuse to do so? "Would the wounded veteran be without remedy?.. Is it to be contended that the heads of departments are not amenable to the laws of their country?"[378]

Would any person whatever attempt to maintain that a purchaser of public lands could be deprived of his property because a Secretary of State withheld his patent?[379] To be sure, the President had certain political powers and could appoint agents to aid him in the exercise of them. The courts

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[371] Carson, i, 203; and see especially Adams: *U.S.* i, 192.

[372] 1 Cranch, 154.

[373] This seems to have been inaccurate. Compare Lee's argument with Marshall's opinion.

[374] 1 Cranch, 158.

[375] 1 Cranch, 160.

[376] *Ib.* 162.

[377] *Ib.* 163.

[378] *Ib.* 164.

[379] *Ib.* 165.

had no authority to interfere in this sphere of Executive action. For example, the conduct of foreign affairs by the Secretary of State, as the representative of the President, can never be examinable by the courts. But the delivery of a commission to an office or a patent to land was a different matter.

When Congress by statute peremptorily directs the Secretary of State or any other officer to perform specific duties on which "the rights of individuals are dependent … he cannot at his discretion sport away the vested rights of others." If he attempts to do so he is answerable to the courts. "The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority." The court therefore was empowered to decide the point; and held that Madison's refusal to deliver Marbury's commission was "a plain violation of that right, for which the laws of his country afford him a remedy."[380]

But was this remedy the writ of mandamus for which Marbury had applied? It was, said Marshall; but could such an order be directed to the Secretary of State? This was a task "peculiarly irksome, as well as delicate,"[381] for, he observed, there were those who would at first consider it "as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive." Far be it from John Marshall to do such a thing. He need hardly "disclaim all pretensions to such jurisdiction." Not "for a moment" would he entertain "an extravagance so absurd and excessive… Questions in their nature political, … can never be made in this court." But if the case before him presented only questions concerning legal rights of an individual, "what is there in the exalted station" of the Secretary of State which "exempts him from … being compelled to obey the judgment of the law"? The only remaining question, therefore, was whether a mandamus could issue from the Supreme Court.[382]

In such manner Marshall finally arrived at the examination of the constitutionality of Section 13, which, he said, fitted the present case "precisely"; and "if this court is not authorized to issue a writ of mandamus" to Madison, "it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority."[383] In reaching this point Marshall employs almost seven thousand words. Fifteen hundred more words are used before he takes up the principle of judicial supremacy over legislation.

The fundamental law of the Nation, Marshall explained, expressly defined the original jurisdiction of the Supreme Court and carefully limited its authority. It could take original cognizance only of specific cases. In all others, the court was given nothing but "appellate jurisdiction." But he omitted the words that immediately follow in the same sentence – "with such exceptions … as the Congress shall make." Yet this language had, for fourteen years, apparently been considered by the whole bench and bar as meaning, among other things, that while Congress could *not take from* the Supreme Court original jurisdiction in the cases specifically named in Article Three of the Constitution, Congress *could add* other cases to the original jurisdiction of the Supreme Court.

Marshall was quite conscious of all this, it would seem. In the argument, counsel had insisted that since "the clause, assigning original jurisdiction to the Supreme Court, contains no negative or restrictive words, the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified."[384] But, reasons Marshall, in answer to this contention, if Congress could thus enlarge the original jurisdiction of the Supreme Court, "the subsequent part of the section[385] is mere surplusage, is entirely without meaning, … is form without substance…

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[380] 1 Cranch, 166-68.

[381] *Ib.* 169.

[382] 1 Cranch, 170.

[383] *Ib.* 173.

[384] 1 Cranch, 174.

[385] In all "other cases … the Supreme Court shall have appellate jurisdiction … with such exceptions … as the Congress shall make."

Affirmative words are often … negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, *or they have no operation at all*."[386]

That is to say, when the Constitution conferred upon the Supreme Court original jurisdiction in specified cases, it thereby excluded all others – denied to Congress the power to add to the jurisdiction thus affirmatively granted. And yet, let it be repeated, by giving original jurisdiction in cases specifically named, the Constitution put it beyond the power of Congress to interfere with the Supreme Court in those cases; but Marshall asserted that the specific grant of jurisdiction has "*no operation at all*" unless "a negative or exclusive sense" be given it.[387]

Marshall boldly held, therefore, that Section 13 of the Ellsworth Judiciary Act was "not warranted by the Constitution." Such being the case, ought the Supreme Court to act under this unconstitutional section? As the Chief Justice stated the question, could "an act, repugnant to the constitution … become the law of the land"? After writing nearly nine thousand words, he now reached the commanding question: Can the Supreme Court of the United States invalidate an act which Congress has passed and the President has approved?

Marshall avowed that the Supreme Court can and must do that very thing, and in so doing made Marbury *vs.* Madison historic. In this, the vital part of his opinion, the Chief Justice is direct, clear, simple, and convincing. The people, he said, have an elemental right to establish such principles for "their future government, as … shall most conduce to their own happiness." This was "the basis on which the whole American fabric had been erected." These "permanent" and "fundamental" principles, in the instance of the American Government, were those limiting the powers of the various departments: "That those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited … if these limits may, at any time, be passed by those intended to be restrained?"[388]

If Congress or any other department of the Government can ignore the limitations of the Constitution, all distinction between government of "limited and unlimited powers" is done away with. To say that "acts prohibited and acts allowed are of equal obligation" is to deny the very purpose for which our fundamental law was adopted. "The constitution controls any legislative act repugnant to it." Congress cannot alter it by legislation.[389] All this, said Marshall, was too clear to admit of discussion, but he proceeded, nevertheless, to discuss the subject at great length.

There is "no middle ground." The Constitution is either "a superior paramount law" not to be changed by legislative enactment, or else "it is on a level with the ordinary legislative acts" and, as such, "alterable" at the will of Congress. If the Constitution is supreme, then an act of Congress violative of it is not law; if the Constitution is not supreme, then "written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable." Three times in a short space Marshall insists that, for Congress to ignore the limitations which the Constitution places upon it, is to deny the whole theory of government under written constitutions.

Although the contention that the Judiciary must consider unconstitutional legislation to be valid was "an absurdity too gross to be insisted on," Marshall would, nevertheless, patiently examine it.[390] This he did by reasoning so simple and so logical that the dullest citizen could not fail to understand it nor the most astute intellect escape it. But in the process he was tiresomely repetitious, though not to so irritating an extent as he at times became.

If two laws conflict, the courts must decide between them. Where the Constitution and an act of Congress apply to a case, "the court must determine which … governs [it]. This is of the very essence

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[386] *Ib.* 174. (Italics the author's.)

[387] 1 Cranch, 176. This particular part of the text adopts Professor Edward S. Corwin's careful and accurate analysis of Marshall's opinion on this point. (See Corwin, 4-10.)

[388] 1 Cranch, 176.

[389] *Ib.* 176-77.

[390] 1 Cranch, 177.

of judicial duty… If, then, … the constitution is superior to any ordinary act of the legislature," the Judiciary must prefer it to a mere statute. Otherwise "courts must close their eyes on the constitution," and see only the legislative enactment.[391]

But to do this "would subvert the very foundation of all written constitutions." It would be to "declare that an act which … is entirely void, is yet … completely obligatory," and that Congress may do "what is expressly forbidden." This would give to the legislature "a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits." It would be "prescribing limits, and declaring that those limits may be passed at pleasure." This "reduces to nothing" both the letter and the theory of the Constitution.

That instrument expressly extends the judicial power to cases "arising under the constitution." Must the courts decide such a case "without examining the instrument under which it arises?" If the courts must look into the Constitution at all, as assuredly they must do in some cases, "what part of it are they forbidden to read or to obey?"

Marshall cites hypothetical examples of legislation in direct conflict with the fundamental law. Suppose that Congress should place an export duty on cotton, tobacco, flour, and that the Government should bring suit to recover the tax. "Ought judgment to be rendered in such a case?" Or if a bill of attainder should be passed and citizens prosecuted under it, "must the court condemn to death those victims whom the constitution endeavors to preserve?"

Take, for example, the crime of treason: the Constitution emphatically prescribes that nobody can be convicted of this offense "unless on the testimony of two witnesses to the same overt act, or on confession in open court." The Judiciary particularly are addressed – "it prescribes, directly for them, a rule of evidence not to be departed from." Suppose that Congress should enact a law providing that a citizen might be convicted of treason upon the testimony of one witness or by a confession out of court? Which must the court obey – the Constitution or the act altering that instrument?

Did not these illustrations and many others that might be given prove that the Constitution must govern courts as well as Congress? If not, why does the Constitution require judges "to take an oath to support it"? That solemn obligation "applies in an especial manner to their conduct in their official character." How "immoral" to direct them to take this oath "if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!" Such contradictions and confusions would make the ceremony of taking the oath of judicial office "a solemn mockery" and even "a crime."

There is, then, said Marshall, no escape from the conclusion "that a law repugnant to the constitution is void," and that the judicial as well as other departments are bound by the Constitution.[392] The application of Marbury and others must therefore be dismissed.

Thus, by a coup as bold in design and as daring in execution as that by which the Constitution had been framed,[393] John Marshall set up a landmark in American history so high that all the future could take bearings from it, so enduring that all the shocks the Nation was to endure could not overturn it. Such a decision was a great event in American history. State courts, as well as National tribunals, thereafter fearlessly applied the principle that Marshall announced, and the supremacy of written constitutions over legislative acts was firmly established.

This principle is wholly and exclusively American. It is America's original contribution to the science of law.[394] The assertion of it, under the conditions related in this chapter, was the deed of a great man. One of narrower vision and smaller courage never would have done what Marshall did. In

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[391] *Ib.* 178.

[392] 1 Cranch, 178-80.

[393] See vol. i, 323, of this work.

[394] It must be borne in mind that the American Constitution declares that, in and of itself, it is law – the supreme law of the land; and that no other written constitution makes any such assertion.

his management and decision of this case, at the time and under the circumstances, Marshall's acts and words were those of a statesman of the first rank.

His opinion gave fresh strength to the purpose of the Republican leaders to subdue the Federalist Judiciary. It furnished Jefferson and his radical followers a new and concrete reason for ousting from the National Bench, and especially from the Supreme Court, all judges who would thus override the will of Congress. Against himself, in particular, Marshall had newly whetted the edge of Republican wrath, already over-keen.

The trial of John Pickering, Judge of the United States Court for the District of New Hampshire, brought by the House before the bar of the Senate, was now pushed with cold venomousness to what Henry Adams calls "an infamous and certainly an illegal conviction"; and then Marshall's associate on the Supreme Bench, Justice Samuel Chase, was quickly impeached for high crimes and misdemeanors. If the Republican organization could force from its partisans in the Senate a verdict of "guilty" in Chase's case also, Marshall's official head would be the next to fall.[395]

Concerning Marshall's assertion of the power of the National Judiciary to annul acts of Congress and to direct administrative officers in the discharge of their legal duties, Jefferson himself said nothing at the time. But the opinion of the Chief Justice was another ingredient thrown into the caldron of Jefferson's heart, where a hatred was brewed that poisoned the great politician to his latest day.

Many months after the decision in the Marbury case, Jefferson first broke his silence. "Nothing in the Constitution has given them [the Supreme Court] a right to decide for the Executive, more than to the Executive to decide for them," he wrote. "The opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislature & Executive also, in their spheres, would make the judiciary a despotic branch."[396]

Again, during the trial of Aaron Burr,[397] Jefferson denounced Marshall for his opinion in Marbury *vs.* Madison; and toward the close of his life he returned again and again with corroding words to the subject regarding which, at the moment it arose, he concealed, so far as written words were concerned, his virulent resentment. For instance, seventeen years later Jefferson wrote that "to consider the judges as the ultimate arbiters of all constitutional questions … would place us under the despotism of an oligarchy."[398]

But for the time being, Jefferson was quiescent. His subtle mind knew how, in political controversies, to control his tongue and pen. It could do no good for him, personally, to make an outcry now; and it might do harm. The doctrine which Marshall announced had, Jefferson knew, a strong hold on all Federalists, and, indeed, on many Northern Republicans; the bar, especially, upheld it generally.

The Presidential campaign was drawing near, and for the President openly to attack Marshall's position would create a political issue which could win none to the Republican cause not already fighting for it, and might keep recruits from joining the Republican colors. Jefferson was infinitely concerned about his reëlection and was giving practical attention to the strengthening of his party for the approaching contest.

"I am decidedly in favor of making all the banks Republican, by sharing deposits among them in proportion to the [political] dispositions they show," he wrote to his Secretary of the Treasury three months after Marshall's bold assertion of the dignity and power of the National courts. "It is,"

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[395] See *infra*, chap. iv.

[396] Jefferson to Mrs. Adams, Sept. 11, 1804, *Works*: Ford, x, footnote to 89.

[397] See *infra*, chap. viii.

[398] Jefferson to Jarvis, Sept. 28, 1820, *Works*: Ford, xii, 162. Yet, at the time when he was founding the Republican Party, Jefferson had written to a friend that "the laws of the land, administered by upright judges, would protect you from any exercise of power unauthorized by the Constitution of the United States." (Jefferson to Rowan, Sept. 26, 1798, *ib.* viii, 448.)

he continued, "material to the safety of Republicanism to detach the mercantile interests from its enemies and incorporate them into the body of its friends."[399]

Furthermore, Jefferson was, at that particular moment, profoundly troubled by intimate personal matters and vast National complications. He had been trying, unsuccessfully, to adjust our dispute with France; the radical West was becoming clamorous for a forward and even a militant policy concerning the control of the Mississippi River, and especially of New Orleans, which commanded the mouth of that commercial waterway; while the Federalists, insisting upon bold measures, had a fair prospect of winning from Jefferson's support those aggressive and predatory frontiersmen who, until now, had stanchly upheld the Republican standard.

Spain had ceded Louisiana to France upon the condition that the territory never should be transferred to any other government; but neither New Orleans nor any part of Louisiana had actually been surrendered by the Spanish authorities. Great Britain informed the American Government that she would not consent to the occupation by the French of any part of Spain's possessions on the American continent.

Hating and distrusting the British, but also in terror of Napoleon, Jefferson, who was as weak in the conduct of foreign affairs as he was dexterous in the management of political parties, thought to escape the predicament by purchasing the island of Orleans and perhaps a strip on the east side of the Mississippi River.[400]

A series of events swiftly followed the decision of Marbury *vs.* Madison which enthralled the eager attention of the whole people and changed the destiny of the Republic. Three months after Marshall delivered his opinion, Napoleon, yielding to "the empire of circumstances," as Talleyrand phrased it,[401] offered, and Livingston and Monroe accepted, the whole of Louisiana for less than fifteen million dollars. Of course France had no title to sell – Louisiana was still legally owned and actually occupied by Spain. The United States bought nothing more than a pretension; and, by force of propinquity and power, made it a fact.[402]

The President was amazed when the news reached him. He did not want Louisiana[403]– nothing was further from his mind than the purchase of it.[404] The immorality of the acquisition affected him not at all; but the inconvenience did. He did not know what to do with Louisiana. Worse still, the treaty of cession required that the people living in that territory should be admitted into the Union, "according to the principles of the Federal Constitution."

So, to his infinite disgust, Jefferson was forced to deal with the Louisiana Purchase by methods as vigorous as any ever advocated by the abhorred Hamilton – methods more autocratic than those which, when done by others, he had savagely denounced as unconstitutional and destructive of liberty.[405] The President doubted whether, under the Constitution, we could acquire, and was sure that we could not govern, Louisiana, and he actually prepared amendments authorizing the incorporation into the Republic of the purchased territory.[406] No such legal mistiness dimmed the eyes of John Marshall who, in time, was to announce as the decision of the Supreme Court that the Republic could acquire territory with as much right as any monarchical government.[407]

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[399] Jefferson to Gallatin, July 12, 1803, *Works*: Ford, x, 15-16. It should be remembered that most of the banks and the financial and commercial interests generally were determined opponents of Jefferson and Republicanism. As a sheer matter of "practical politics," the President cannot be fairly criticized for thus trying to weaken his remorseless foes.

[400] See Channing: *U.S.* iv, 313-14.

[401] Talleyrand to Decrès, May 24, 1803, as quoted in Adams: *U.S.* ii, 55.

[402] Morison: *Otis*, i, 262; see also Adams: *U.S.* ii, 56.

[403] See instructions to Livingston and Monroe, *Am. State Papers, Foreign Relations*, ii, 540.

[404] Adams: *U.S.* i, 442-43.

[405] *Ib.* ii, 120-28.

[406] *Works*: Ford, x, 3-12.

[407] American Insurance Company *et al. vs.* Canter, 1 Peters, 511-46, and see vol. iv, chap. iii, of this work.

To add to his perturbations, the high priest of popular rights found himself compelled to abandon his adored phrase, "the consent of the governed," upon which he had so carefully erected the structure of his popularity, and to drive through Congress a form of government over the people of Louisiana without consulting their wishes in the least.[408]

The Jeffersonian doctrine had been that the Union was merely a compact between sovereign States, and that new territory and alien peoples could not be added to it without the consent of all the partners. The Federalists now took their stand upon this indefensible ground,[409] and openly threatened the secession at which they had hinted when the Federalist Judiciary Act was repealed.

Jefferson was alive to the danger: "Whatever Congress shall think it necessary to do [about Louisiana]," he cautioned one of the Republican House leaders, "should be done with as little debate as possible."[410] A month earlier he wrote: "The Constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union. The Executive … have done an act beyond the Constitution."[411]

Therefore, he declared, "the less we say about constitutional difficulties respecting Louisiana the better … What is necessary for surmounting them must be done sub-silentio."[412] The great radical favored publicity in affairs of state only when such a course was helpful to his political plans. On other occasions no autocrat was ever more secretive than Thomas Jefferson.[413] Seemingly, however, the President was concerned only with his influence on the destiny of the world.[414]

At first the Federalist leaders were too dazed to do more than grumble. "The cession of Louisiana … is like selling us a Ship after she is surrounded by a British Fleet," shrewdly observed George Cabot, when the news was published in Boston.[415] Fisher Ames, of course, thought that "the acquiring of territory by money is mean and despicable," especially when done by Republicans. "The less of it [territory] the better… By adding an unmeasured world beyond that river [Mississippi], we rush like a comet into infinite space."[416]

Soon, however, their dissatisfaction blew into flame the embers of secession which never had become cold in their bosoms. "I am convinced," wrote Uriah Tracy, "that the accession of Louisiana will accelerate a division of these States; whose whenabouts is uncertain, but somewhen is inevitable."[417] Senator Plumer thought that the Eastern States should form a new nation: "Adopt this western world into the Union," he said, "and you destroy at once the weight and importance of the Eastern States, and compel them to establish a separate and independent empire."[418] A few days' reflection brought Ames to the conclusion that "our country is too big for union, too sordid for

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[408] See *U.S. Statutes at Large*, ii, 283; and *Annals*, 8th Cong. 2d Sess. 1597.

[409] For instance, Senator Plumer, two years later, thus stated the old Republican doctrine which the Federalists, in defiance of their party's creed and traditions, had now adopted as their own: "We cannot admit a new partner into the Union, from without the original limits of the United States, without the consent, first obtained, of each of the partners composing the firm." (Plumer to Smith, Feb. 7, 1805, Plumer, 328.)

[410] Jefferson to Nicholas, Sept. 7, 1803, *Works*: Ford, x, 10.

[411] Jefferson to Breckenridge, Aug. 12, 1803, *ib.* 7.

[412] Jefferson to Madison, Aug. 18, 1803, *ib.* 8.

[413] "The medicine for that State [North Carolina] must be very mild & secretly administered." (Jefferson to Nicholas, April 7, 1800, *ib.* ix, 129; and see Adams: *U.S.* iii, 147.)

[414] "The millenium was to usher in upon us as the irresistible consequence of the goodness of heart, integrity of mind, and correctness of disposition of Mr. Jefferson. All nations, even pirates and savages, were to be moved by the influence of his persuasive virtue and masterly skill in diplomacy." (Eaton's account of a call on President Jefferson, 1803, *Life of the Late Gen. William Eaton*: Prentiss, 263; also quoted in Adams: *U.S.* ii, 431.)

[415] Cabot to King, July 1, 1803, King, iv, 279. The Louisiana Purchase was first publicly announced through the press by the *Independent Chronicle* of Boston, June 30, 1803. (Adams: *U.S.* ii, 82-83.)

[416] Ames to Gore, Oct. 3, 1803, Ames, i, 323-24.

[417] Tracy to McHenry, Oct. 19, 1803, Steiner: *Life and Correspondence of James McHenry*, 522.

[418] Oct. 20, 1803, Plumer, 285.

patriotism, too democratic for liberty."[419] Tapping Reeve of Connecticut made careful inquiry among the Federalists in his vicinity and informed Tracy that "all … believe that we must separate, and that this is the most favorable moment."[420]

Louisiana, however, was not the only motive of the foremost New England Federalists for their scheme of breaking up the Republic. As we have seen, the threat of secession was repeatedly made during the Republican assault on the Judiciary; and now, as a fundamental cause for disunion, the Northern Federalists speedily harked back to Jefferson's purpose of subverting the National courts. The Republicans were ruling the Nation, Virginia was ruling the Republicans, Jefferson was ruling all. Louisiana would permanently turn the balance against the Northern and Eastern States, already outweighed in the National scales; and the conquest of the National Judiciary would remove from that section its last protection against the pillaging hands of the Huns and Vandals of Republicanism. So reasoned the Federalists.

What could be done to save the rights and the property of "the wise, the rich and the good"? By what pathway could the chosen escape their doom? "The principles of our Revolution point to the remedy," declared the soured and flint-hearted Pickering. "The independence of the judges is now directly assailed… I am not willing to be sacrificed by such popular tyrants… I do not believe in the practicability of a long-continued union."[421]

For the same reasons, Roger Griswold of Connecticut avowed that "there can be no safety to the Northern States *without a separation from the confederacy*."[422] The Reverend Jedediah Morse of New Hampshire wrote Senator Plumer that "our empire … must … break in pieces. Some think the sooner the better."[423] And the New Hampshire Senator replied: "I hope the time is not far distant when … the sound part will separate from the corrupt."[424]

With the exception of John Adams, only one eminent New England Federalist kept his head steady and his patriotism undefiled: George Cabot, while sympathizing with his ancient party friends, frankly opposed their mad project. Holding that secession was impracticable, he declared: "I am not satisfied that the thing itself is to be desired. My habitual opinions have been always strongly against it."[425]

But the expressions of such men as Pickering, Ames, and Griswold indicated the current of New England Federalist thought and comment. Their secession sentiment, however, did not appeal to the young men, who hailed with joy the opportunity to occupy these new, strange lands which accident, or Providence, or Jefferson had opened to them. Knowledge of this was indeed one cause of the anger of some Federalist managers who owned immense tracts in New England and in the Ohio Valley and wanted them purchased and settled by those now turning their eyes to the alluring farther western country.[426] They saw with something like fury the shifting of political power to the South and West.

The management of the unwelcome Louisiana windfall, the conduct of the National campaign, the alarming reports from New England, left Jefferson no time to rail at Marshall or to attack that "subtle corps of sappers and miners" who were then beginning "to undermine … our confederated

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[419] Ames to Dwight, Oct. 26, 1803, Ames, i, 328.

[420] Reeve to Tracy, Feb. 7, 1804, *N.E. Federalism*: Adams, 342; and see Adams: *U.S.* ii, 160.Members of Congress among the Federalists and Republicans became so estranged that they boarded in different houses and refused to associate with one another. (Plumer, 245, 336.)

[421] Pickering to Cabot, Jan. 29, 1804, Lodge: *Cabot*, 338.

[422] Griswold to Wolcott, March 11, 1804, *N.E. Federalism*: Adams, 356.

[423] Morse to Plumer, Feb. 3, 1804, Plumer, 289.

[424] Plumer to Morse, March 10, 1804, *ib.*

[425] Cabot to King, March 17, 1804, Lodge: *Cabot*, 345.

[426] See Morison: *Otis*, i, 262.

fabric," as Jefferson declared seventeen years later.[427] For the present the great public duty of exposing Marshall's decision in Marbury *vs.* Madison must be deferred.

But the mills of democracy were grinding, and after he was reëlected certain impeachments would be found in the grist that would make all right. The defiant Marshall would at least be humbled, perhaps – probably – removed from office. But all in good time! For the present Jefferson had other work to do. He himself must now exercise powers which, according to his philosophy and declarations, were far beyond those conferred upon him by the Constitution.

So it came about that the first of Marshall's great Constitutional opinions received scant notice at the time of its delivery. The newspapers had little to say about it. Even the bench and the bar of the country, at least in the sections remote from Washington, appear not to have heard of it,[428] or, if they had, to have forgotten it amid the thrilling events that filled the times.

Because popular interest had veered toward and was concentrated upon the Louisiana Purchase and the renewal of war in Europe, Republican newspapers, until then so alert to discover and eager to attack every judicial "usurpation," had almost nothing to say of Marshall's daring assertion of judicial supremacy which later was execrated as the very parent of Constitutional evil. An empire had been won under Jefferson; therefore Jefferson had won it – another proof of the far-seeing statesmanship of "The Man of the People." Of consequence he must be reëlected. Such was the popular logic; and reëlected Jefferson was – triumphantly, almost unanimously.

Circumstances which had shackled his hands now suddenly freed them. Henceforth the President could do as he liked, both personally and politically. No longer should John Marshall, the abominated head of the National Judiciary, rest easy on the bench which his audacity had elevated above President and Congress. The opinion of the "usurping" Chief Justice in Marbury *vs.* Madison should have answer at last. So on with the impeachment trial of Samuel Chase! Let him be deposed, and then, if Marshall would not bend the knee, that obdurate judicial defender of Nationalism should follow Chase into desuetude and disgrace.

The incessant clamor of the Federalist past-statesmen, unheard by the popular ear, had nevertheless done some good – all the good it ought to have done. It had aroused misgivings in the minds of certain Northern Republican Senators as to the expediency, wisdom, and justice of the Republican plan to shackle or overthrow the National Judiciary. This hesitation was, however, unknown to the masters of the Republican organization in Congress. The Federalists themselves were totally unaware of it. Only Jefferson, with his abnormal sensibility, had an indistinct impression that somewhere, in the apparently perfect alignment of the Republican forces, there was potential weakness.

Marshall was gifted with no such divination. He knew only the fate that had been prepared for him. A crisis was reached in his career and a determinative phase of American history entered upon.

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[427] Jefferson to Ritchie, Dec. 25, 1820, *Works*: Ford, xii, 177.

[428] For instance, in 1808, the United States District Court of Massachusetts, in the decision of a case requiring all possible precedents like that of Marbury *vs.* Madison, did not so much as refer to Marshall's opinion, although every other case that could be found was cited. Marbury *vs.* Madison, long afterwards, was added in a footnote to the printed report. (McLaughlin, 30, citing *Am. Law Journal*, old series, ii, 255-64.)Marshall's opinion in Marbury *vs.* Madison was first referred to by counsel in a legal controversy in *Ex Parte* Burford, 1806 (3 Cranch, 448). Robert Goodloe Harper next cited it in his argument for Bollmann (4 Cranch, 86; and see *infra*, chap. vii). Marshall referred to it in his opinion in that case, and Justice William Johnson commented upon it at some length.A year later Marshall's opinion in Marbury *vs.* Madison was cited by Jefferson's Attorney-General, Cæsar A. Rodney. In the case *Ex Parte* Gilchrist *et al. vs.* The Collector of the Port of Charleston, S.C. (5 Hughes, 1), the United States Court for that circuit, consisting of Johnson, Associate Justice of the Supreme Court, and the Judge of the District Court, granted a mandamus under the section of the Judiciary Act which Marshall and the entire court had, five years before, declared to be unconstitutional, so far as it conferred original jurisdiction upon the Supreme Court in applications for mandamus.Rodney wrote to the President a letter of earnest protest, pointing out the fact that the court's action in the Gilchrist case was in direct antagonism to the opinion in Marbury *vs.* Madison. But Jefferson was then so savagely attacking Marshall's rulings in the Burr trial (see *infra*, chaps. vii, viii, ix) that he was, at last, giving public expression of his disapproval of the opinion of the Chief Justice in Marbury *vs.* Madison. He did not even answer Rodney's letter.

His place as Chief Justice was to be made secure and the stability of American institutions saved by as narrow a margin as that by which the National Constitution had been established.

CHAPTER IV
IMPEACHMENT

> The judges of the Supreme Court must fall. Our affairs approach an important crisis. (William Plumer.)
>
> These articles contained in themselves a virtual impeachment of not only Mr. Chase but of all the Judges of the Supreme Court. (John Quincy Adams.)
>
> We shall bring forward such a specimen of judicial tyranny, as, I trust in God, will never be again exhibited in our country. (John Randolph.)
>
> We appear for an ancient and infirm man whose better days have been worn out in the service of that country which now degrades him. (Joseph Hopkinson.)
>
> Our property, our liberty, our lives can only be protected by independent judges. (Luther Martin.)

"We *want your offices*, for the purpose of giving them to men who will fill them better." In these frank words, Senator William Branch Giles[429] of Virginia stated one of the purposes of the Republicans in their determined attack on the National Judiciary. He was speaking to the recently elected young Federalist Senator from Massachusetts, John Quincy Adams.[430]

They were sitting before the blazing logs in the wide fireplace that warmed the Senate Chamber. John Randolph, the Republican leader of the House, and Israel Smith, a Republican Senator from Vermont, were also in the group. The talk was of the approaching trial of Samuel Chase, Associate Justice of the Supreme Court of the United States, whom the House had impeached for high crimes and misdemeanors. Giles and Randolph were, "with excessive earnestness," trying to convince the doubting Vermont Senator of the wisdom and justice of the Republican method of ousting from the National Bench those judges who did not agree with the views of the Republican Party.

Giles scorned the idea of "an *independent* judiciary!" The independence claimed by the National judges was "nothing more nor less than an attempt to establish an aristocratic despotism in themselves." The power of the House to impeach, and of the Senate to try, any public officer was unlimited.

"If," continued Giles, "the Judges of the Supreme Court should dare, *as they had done*, to declare acts of Congress unconstitutional, or to send a mandamus to the Secretary of State, *as they had done*, it was the undoubted right of the House to impeach them, and of the Senate to remove them for giving such opinions, however honest or sincere they may have been in entertaining them." He held that the Senate, when trying an impeached officer, did not act as a court. "Removal by impeachment was nothing more than a declaration by Congress to this effect: You hold dangerous opinions, and if you are suffered to carry them into effect you will work the destruction of the Nation."[431]

Thus Giles made plain the Republican objective. Judges were to be removed for any cause that a dominant political party considered to be sufficient.[432] The National Judiciary was, in this manner, to be made responsive to the popular will and responsible to the representatives of the people in the House and of the States in the Senate.[433]

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[429] Giles was appointed Senator August 11, 1804, by the Governor to fill the unexpired term of Abraham Venable who resigned in order that Giles might be sent to the Senate. In December the Legislature elected him for the full term. Upon taking his seat Giles immediately became the Republican leader of the Senate. (See Anderson, 93.)

[430] Dec. 21, 1804, *Memoirs, J. Q. A.*: Adams, i, 322-23.

[431] Dec. 21, 1804. *Memoirs, J. Q. A.*: Adams, i, 322-23.

[432] Plumer, 274-75; and see especially Plumer, Jan. 5, 1804, "Congress," Plumer MSS. Lib. Cong.

[433] The powerful Republican organ, the *Aurora*, of Philadelphia, thus indicted the National Judiciary: Because judges could not be removed, "many wrongs are daily done by the courts to humble, obscure, or poor suitors… It is a prodigeous monster in a free

Giles, who was now Jefferson's personal representative in the Senate,[434] as he had been in the House, bore down upon his mild but reluctant fellow partisan from Vermont in a "manner dogmatical and peremptory." Not only must the aggressive and irritating Chase be stripped of his robes, but the same fate must fall upon "all other Judges of the Supreme Court except the one last appointed,"[435] who, being a Republican, was secure.[436] Adams rightly concluded that the plan was to "have swept the supreme judicial bench clean at a stroke."[437]

For a long time everybody had understood that the impeachment of Chase was only the first step in the execution of the Republican plan to replace with Republicans Marshall and the four Federalist Associate Justices. "The judges of the Supreme Court are all Federalists," wrote Pickering six weeks before Johnson's appointment. "They stand in the way of the ruling power… The Judges therefore, are, if possible, to be removed," by impeachment.[438]

Nearly two years before, Senator William Plumer of New Hampshire had accurately divined the Republican plan: "The judges of the Supreme Court must fall," he informed Jeremiah Mason. "They are *denounced* by the Executive, as well as the House. They must be removed; they are obnoxious unyielding men; & why should they remain to awe & embarrass the administration? Men of more flexible nerves can be found to succeed them. Our affairs seem to approach an important crisis."[439] The Federalists rightly believed that Jefferson was the directing mind in planning and effecting the subjugation of the National Judiciary. That, said Bayard, "has been an object on which Mr. Jefferson has long been resolved, at least ever since he has been in office."[440]

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government to see a class of men set apart, not simply to administer the laws, but who exercise a legislative and even an executive power, directly in defiance and contempt of the Constitution." (*Aurora*, Jan. 28, 1805, as quoted in Corwin, 41.) Professor Corwin says that this utterance was approved by Jefferson.

[434] "Mr. Giles from Virginia … is the Ministerial leader in the Senate." (Plumer to Thompson, Dec. 23, 1804, Plumer MSS. Lib. Cong.)"I considered M$^{r.}$ Giles as the ablest *practical* politician of the whole party enlisted under M$^{r.}$ Jefferson's banners." (Pickering to Marshall, Jan. 24, 1826, Pickering MSS. Mass. Hist. Soc.)

[435] William Johnson of South Carolina, appointed March 26, 1804, vice William Moore, resigned. Johnson was a stanch Jeffersonian when appointed. He was thirty-three years old at the time he was made Associate Justice.

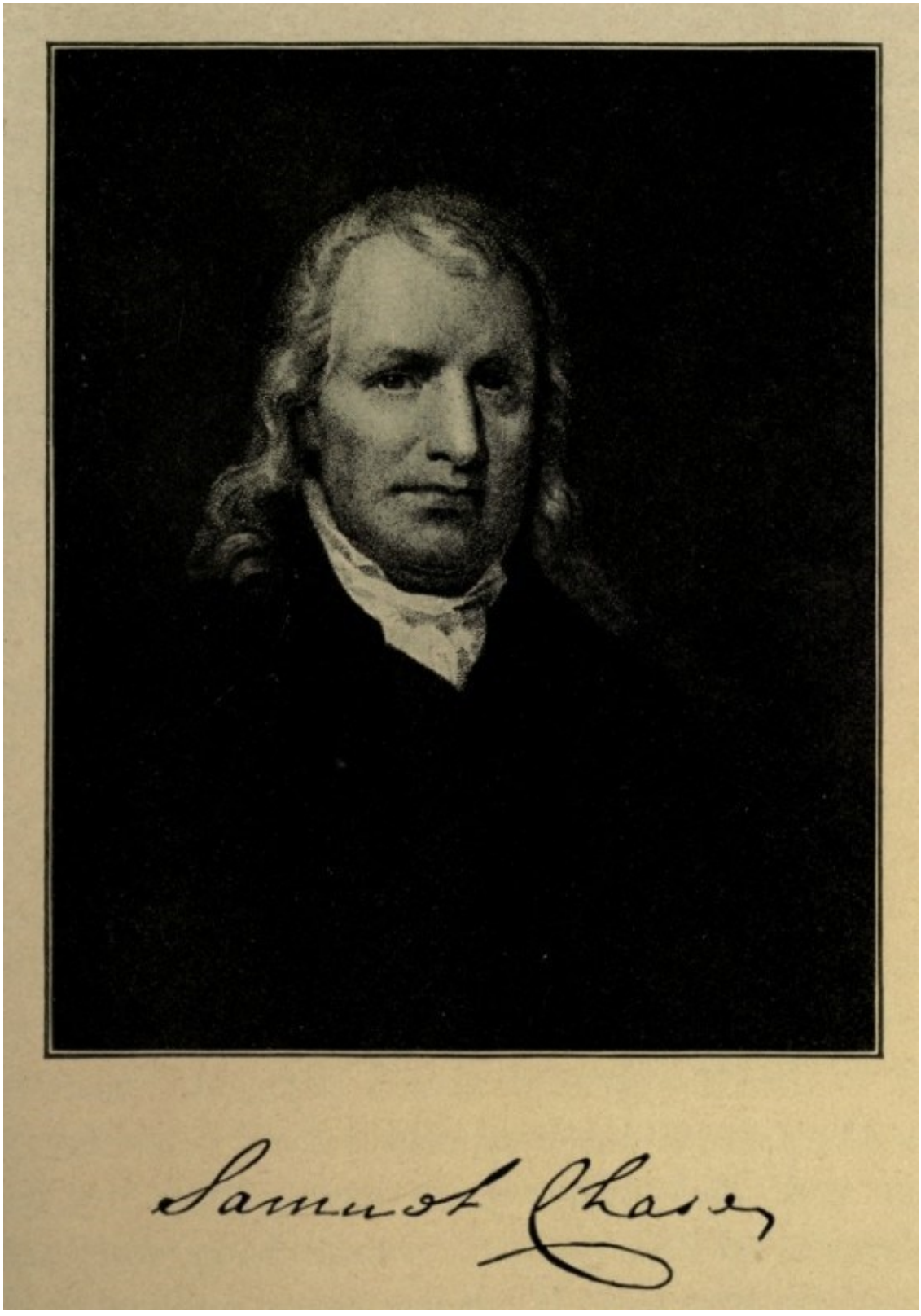
[436] It is impossible to put too much emphasis on Giles's avowal. His statement is the key to the Chase impeachment.

[437] Adams to his father, March 8, 1805, *Writings, J. Q. A.*: Ford, iii, 108.

[438] Pickering to Lyman, Feb. 11, 1804, *N.E. Federalism*: Adams, 344; Lodge: *Cabot*, 444; also see Plumer, 275.

[439] Plumer to Mason, Jan. 14, 1803, Plumer MSS. Lib. Cong.

[440] Bayard to Bassett, Feb. 12, 1802, *Bayard Papers*: Donnan, 148.



John Marshall especially must be overthrown.[441] He had done all the things of which Giles and the Republicans complained. He had "dared to declare an act of Congress unconstitutional," had "dared" to order Madison to show cause why he should not be compelled to do his legal duty.

[441] Channing: *Jeffersonian System*, 119-20; Adams: *U.S.* ii, 225-27, 235; Anderson, 93, 95.

Everybody was at last awake to the fact that Marshall had become the controlling spirit of the Supreme Court and of the whole National Judiciary.

Every one knew, too, that he was the most determined Nationalist in the entire country, and that Jefferson and the Republican Party had no more unyielding enemy than the Chief Justice. And he had shown by his management of the Supreme Court and by his opinion in Marbury *vs.* Madison, how powerful that tribunal could be made. The downfall of Samuel Chase was a matter of small importance compared with the removal of John Marshall.

"They hate Marshall, Paterson, etc. worse than they hate Chase because they are men of better character," asserted Judge Jeremiah Smith of New Hampshire. "To be safe in these times good men must not only resign their offices but they must resign their good names… They will be obnoxious as long as they retain *either*. If they will neither die nor resign they give Mr J the trouble of correcting the *procedure*… Tell me what the judges say – are they frightened?" he anxiously inquired of Plumer.[442] Frightened they were – and very badly frightened. Even John Marshall, hitherto imperturbable and dauntless, was shaken.[443]

In addition to his "heretical" opinion in Marbury *vs.* Madison, Marshall had given the Republicans, and Jefferson especially, another cause for complaint. A year after the decision of that case, he had again gone out of his way to announce from the Supreme Bench the fallacy of Jefferson's Constitutional views and the soundness of the Nationalist theory. During the February term of the Supreme Court for the year 1804, that tribunal, in the case of the United States *vs.* Fisher,[444] was called upon to decide whether the United States was a preferred creditor of an insolvent, under the Bankruptcy Act of 1800, which Marshall had helped to draw.[445] Among other objections, it was suggested by counsel for Fisher, the insolvent, that the Bankruptcy Law was unconstitutional and that the priority which that act gave the Nation over other creditors of the bankrupt would prevent the States from making similar laws for their own protection.

But, said Marshall, this is "the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of the United States extends… The Constitution did not prohibit Congress" from enacting a bankruptcy law and giving the Nation preference as a creditor. On the contrary, Congress was expressly authorized "to make all laws which shall be necessary and proper to carry into execution the powers vested by the Constitution in the National Government." To say that "no law was authorized which was not indispensably necessary … would produce endless difficulties… Congress must possess the choice of means and must be empowered to use any means which are, in fact, conducive to the exercise of a power granted by the Constitution."

This was an emphatic denial of Jefferson's famous opinion on the power of Congress to charter a bank, and an outright assertion of the views of Hamilton on that celebrated question.[446] The case could have been decided without such an expression from the court, but it presented an opportunity for a judicial statement of liberal construction which might not soon come again,[447] and Marshall availed himself of it.

For two years no part of the Republican plans against the Judiciary had miscarried. Close upon the very day when John Breckenridge in the Senate had moved to repeal the National Judiciary Act of 1801, a petition signed by the enraged Republicans of Alleghany County, Pennsylvania, had been

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[442] Smith to Plumer, Feb. 11, 1804, Plumer MSS. Lib. Cong.

[443] See *infra*, 176-77, 196.

[444] 2 Cranch, 358-405.

[445] See vol. ii, 481-82, of this work.

[446] See vol. ii, 71-74, of this work.

[447] Fifteen years passed before a critical occasion called for another assertion by Marshall of the doctrine of implied powers; and that occasion produced one of Marshall's greatest opinions – in the judgment of many, the greatest of all his writings. (See McCulloch *vs.* Maryland, vol. iv, chap. vi, of this work.)

sent to the Legislature of that State, demanding the impeachment of Alexander Addison; and almost simultaneously with the passage of the Judiciary Repeal Act of Congress, the Pennsylvania House of Representatives transmitted to the State Senate articles charging the able but arrogant Federalist judge with high crimes and misdemeanors.

Addison's trial speedily followed; and while the evidence against him, viewed through the perspective of history, seems trivial, the Republican Pennsylvania Senate pronounced judgment against him and deposed him from the bench. With notable ability, Addison conducted his own defense. He made a powerful speech which is a classic of conservative philosophy.[448] But his argument was unavailing. The Republican theory, that a judge might be deposed from office for any conduct or opinion of which the Legislature disapproved, was ruthlessly carried out.[449]

Almost as soon as Congress convened after the overthrow of the obnoxious Pennsylvania Federalist judge, the Republicans in the National House, upon representations from Jefferson, took steps to impeach John Pickering, Judge of the United States Court for the District of New Hampshire.[450] This judge had been hopelessly insane for at least three years and, as one result of his mental and nervous malady, had become an incurable drunkard.[451] In this condition he had refused to hear witnesses for the Government in the case of the ship Eliza, seized for violation of the revenue laws. He peremptorily ordered the vessel returned to its captain, and finally declined to allow an appeal from his decree. All this had been done with ravings, cursings, and crazed incoherences.[452]

That he was wholly incapacitated for office and unable to perform any act requiring intelligence was conceded by all. But the Constitution provided no method of removing an officer who had become insane.[453] This defect, however, gave the Republicans an ideal opportunity to put into practice their theory that impeachment was unrestricted and might be applied to any officer whom, for any reason, two thirds of the Senate deemed undesirable. "If the facts of his denying an appeal & of his intoxication, as stated in the impeachment, are proven, that will be sufficient cause for removal without further enquiry," asserted Jefferson when assured that Pickering was insane, and when asked "whether insanity was good cause for impeachment & removal from office."[454]

The demented judge did not, of course, appear at his trial. Instead, a petition by his son was presented, alleging the madness of his father, and praying that evidence to that effect be received by the Senate.[455] This plea was stoutly resisted, and for two days the question was debated. "The most persevering and determined opposition is made against having evidence and counsel to prove the man insane," records John Quincy Adams, "only from the fear, that if insanity should be proved, he cannot

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[448] Addison's address is historically important; it perfectly shows the distrust of democracy which all Federalist leaders then felt. Among other things, he pleaded for the independence of the Judiciary, asserted that it was their exclusive province to decide upon the constitutionality of laws, and stoutly maintained that no judge could be impeached except for an offense for which he also could be indicted. (*Addison Trial*, 101-43.)

[449] The petition praying for the impeachment of Addison was sent to the Pennsylvania House of Representatives on January 11, 1802. On March 23, 1802, that body transmitted articles of impeachment to the State Senate. The trial was held in early January, 1803. Addison was convicted January 26, 1803. (*Ib.*)

[450] Jefferson's Message was transmitted to the House, February 4, 1803, nine days after the conviction of Addison. It enclosed a "letter and affidavits" setting forth Pickering's conduct on the bench in the case of the ship Eliza, and suggested that "the Constitution has confided [to the House] a power of instituting proceedings of redress." (*Annals*, 7th Cong. 2d Sess. 460.)On March 2 the committee reported a resolution for Pickering's impeachment because of the commission by him of "high crimes and misdemeanors," and, though a few Federalists tried to postpone a vote, the resolution was adopted immediately.

[451] Depositions of Samuel Tenney, Ammi R. Cutter, Joshua Brackett, Edward St. Loe Livermore. (*Annals*, 8th Cong. 1st Sess. 334-42.)

[452] Testimony of John S. Sherburne, Thomas Chadbourne, and Jonathan Steele. (*Ib.* 351-56.)

[453] The wise and comprehensive Federalist Judiciary Act of 1801 covered just such cases. It provided that when a National judge was unable to discharge the duties of his office, the circuit judges should name one of their members to fill his place. (See *Annals*, 6th Cong. 2d Sess. 1545.) This very thing had been done in the case of Judge Pickering (see McMaster: *U.S.* iii, 166). It is curious that, in the debate, the Republicans did not denounce this as unconstitutional.

[454] Plumer, Jan. 5, 1804, "Congress," Plumer MSS. Lib. Cong.

[455] *Annals*, 8th Cong. 1st Sess. 328-30.

be convicted of *high crimes and misdemeanors* by acts of decisive madness."[456] Finally the determined Republicans proceeded to the trial of the insane judge for high crimes and misdemeanors, evidence of his dethroned reason to be received "in mitigation."[457] In immense disgust the House managers withdrew, because "the Senate had determined *to hear evidence*" that the accused person was insane. Before they returned, they publicly denounced the Senators for their leniency; and thus Republican discipline was restored.[458]

Jefferson was impatient. "It will take two years to try this impeachment," he complained to Senator Plumer. "The Constitution ought to be altered," he continued, "so that the President should be authorized to remove a Judge from office, on the address of the two Houses."[459] But the exasperated Republicans hastened the proceedings; and the trial did not consume two weeks all told.

If an insane man should be condemned, "it will not hereafter be necessary," declared Senator Samuel Smith of Maryland, "that a man should be guilty of high crimes and misdemeanors," the commission of which was the only Constitutional ground for impeachment. Senator Jonathan Dayton of New Jersey denounced the whole proceeding as "a mere mockery of a trial."[460] Senator John Quincy Adams, in the flurry of debate, asserted that he should "speak until [his] mouth was stopped by force."[461] Senator Nicholas of Virginia shouted "Order! order! order!" when Samuel White of Delaware was speaking. So furious became the altercation that a duel seemed possible.[462] No delay was permitted and, on March 12, 1804, the demented Pickering was, by a strictly partisan vote of 19 to 7,[463] adjudged guilty of high crimes and misdemeanors.

An incident happened which was prophetic of a decline in the marvelous party discipline that had kept the Republicans in Senate and House in solid support of the plans of the leaders. Three Republican Senators left the Chamber in order to avoid the balloting.[464] They would not adjudge an insane man to be guilty of high crimes and misdemeanors, but they were not yet independent enough to vote against their party.[465] This, however, did not alarm the Republican managers. They instantly

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[456] *Memoirs, J. Q. A.*: Adams, i, 299-300.

[457] "This," records Adams, "had evidently been settled … out of court. And this is the way in which these men administer justice." (*Ib.*)

[458] "In the House … speeches are making every day to dictate to the Senate how they are to proceed; and the next morning they proceed accordingly." (*Ib.* 301-02.)

[459] Feb. 18, 1803, Plumer, 253.

[460] *Annals*, 8th Cong. 1st Sess. 365.

[461] See *Memoirs, J. Q. A.*; Adams, i, 302-04, for a vivid account of the whole incident.

[462] Plumer, March 10, 1804, "Congress," Plumer MSS. Lib. Cong.

[463] *Annals*, 8th Cong. 1st Sess. 367. "The independence of our judiciary is no more … I hope the time is not far distant when the people east of the North river *will manage their own affairs in their own way*; … and that the *sound* part will separate from the *corrupt*." (Plumer to Morse, March 10, 1804, Plumer MSS. Lib. Cong.) On the unconstitutional and revolutionary conduct of the Republicans in the Pickering impeachment trial see Adams: *U.S.* ii, 158.

[464] Senators John Armstrong of New York, Stephen R. Bradley of Vermont, and David Stone of North Carolina. Jonathan Dayton of New Jersey and Samuel White of Delaware, Federalists, also withdrew. (*Annals*, 8th Cong. 1st Sess. 366.) And see *Memoirs, J. Q. A.*: Adams, i, 308-09; J. Q. Adams to his father, March 8, 1805, *Writings, J. Q. A.*: Ford, iii, 110; Plumer to Park, March 13, 1804, Plumer MSS. Lib. Cong.Senator John Brown of Kentucky, a Republican, "could not be induced to join the majority, but, unwilling to offend them, he obtained & has taken a leave of absence." (Plumer to Morse, March 10, 1804, Plumer MSS. Lib. Cong.) Senator Brown had been elected President *pro tem.* of the Senate, January 23, 1804.Burr "abruptly left the Senate" to attend to his candidacy for the governorship of New York. (Plumer, March 10, 1804, "Congress," Plumer MSS. Lib. Cong.) Senator Franklin of North Carolina was then chosen President *pro tem.* and presided during the trial of Pickering. But Burr returned in time to arrange for, and preside over, the trial of Justice Chase.

[465] The Republicans even refused to allow the report of the proceedings to be "printed in the Appendix to the Journals of the Session." (*Memoirs, J. Q. A.*: Adams, I, 311.)The conviction and removal of Pickering alarmed the older Federalists almost as much as did the repeal of the Judiciary Act. "The *demon* of party governed the decision. All who condemned were Jeffersonians, and all who pronounced the accused not guilty were Federalists." (Pickering to Lyman, March 4, 1804, *N.E. Federalism*: Adams, 358-59; Lodge: *Cabot*, 450.)"I really wish those in New England who are boasting of the independence of our Judiciary would reflect on what a slender tenure Judges hold their offices whose political sentiments are at variance with the dominant party." (Plumer to Park, March 13, 1804, Plumer MSS. Lib. Cong.)

struck the next blow upon which they had determined more than two years before. Within an hour after John Pickering was convicted the House voted to impeach Samuel Chase.

Marshall's irascible associate on the Supreme Bench had given the Republicans a new and serious cause for hostilities against him. In less than two months after Marshall had delivered the unanimous opinion of the Supreme Court in Marbury *vs.* Madison, Justice Chase, in charging the grand jury at Baltimore, denounced Republican principles and mercilessly assailed Republican acts and purposes.

This judicial critic of democracy told the grand jury that "the bulk of mankind are governed by their passions, and not by reason… The late alteration of the federal judiciary … and the recent change in our state constitution, by the establishing of universal suffrage, … will … take away all security for property and personal liberty … and our republican constitution will sink into a mobocracy, the worst of all popular governments."

Chase condemned "the modern doctrines by our late reformers, that all men, in a state of society, are entitled to enjoy equal liberty and equal rights, [which] have brought this mighty mischief upon us"; – a mischief which he feared "will rapidly progress, until peace and order, freedom and property, shall be destroyed… Will justice be impartially administered by judges dependent on the legislature for their … suport? Will liberty or property be protected or secured, by laws made by representatives chosen by electors, who have no property in, or a common interest with, or attachment to, the community?"[466]

Burning with anger, a young Republican member of the Maryland Legislature, John Montgomery, who had listened to this judicial tirade, forthwith savagely denounced Chase in the *Baltimore American*.[467] He demanded that the Justice be impeached and removed from the bench.[468] Montgomery hastened to send to the President[469] a copy of the paper.

Jefferson promptly wrote Nicholson: "Ought this seditious and official attack on the principles of our Constitution, and on the proceedings of a State, go unpunished? And, to whom so pointedly as yourself will the public look for the necessary measures?"

But Jefferson was not willing to appear openly. With that uncanny power of divining political currents to which coarser or simpler minds were oblivious, he was conscious of the uneasiness of Northern Republicans over ruthless impeachment and decided not to become personally responsible. "For myself," he cautioned Nicholson, "it is better that I should not interfere."[470]

Upon the advice of Nathaniel Macon,[471] Republican Speaker of the House, Nicholson concluded that it would be more prudent for another to take the lead. It was well understood that he was to have Chase's place on the Supreme Bench,[472] and this fact would put him at a disadvantage if he became the central figure in the fight against the aged Justice. The procurement of the impeachment was, therefore, placed in the eager hands of John Randolph, that "unusual Phenomenon," as John Adams called him,[473] whose lust for conspicuous leadership was insatiable.

The Republican managers had carefully moulded public opinion into the belief that Chase was guilty of some monstrous crime. Months before articles of impeachment were presented to the House, *ex parte* statements against him were collected, published in pamphlet form, and scattered throughout the country. To assure wider publicity all this "evidence" was printed in the Republican organ at

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[466] Exhibit viii, *Chase Trial*, Appendix, 61-62; also see *Annals*, 8th Cong. 2d Sess. 675-76.

[467] June 13, 1803.

[468] See *Chase Trial*, 101 *et seq.*

[469] See McMaster: *U.S.* iii, 162-70.

[470] Jefferson to Nicholson, May 13, 1803, *Jefferson Writings*: Washington, iv, 484.

[471] Macon to Nicholson, Aug. 6, 1803, Dodd: *Life of Nathaniel Macon*, 187-88. Macon seriously doubted the expediency and legality of the impeachment of Chase. However, he voted with his party.

[472] Dodd, 187-88.

[473] Adams to Rush, June 22, 1806, *Old Family Letters*, 100.

Washington. The accused Justice had, therefore, been tried and convicted by the people before the charges against him were even offered in the House.[474]

This preparation of the popular mind accomplished, Chase was finally impeached. Eight articles setting forth the Republican accusations were laid before the Senate. Chase was accused of everything of which anybody had complained since his appointment to the Supreme Bench. His conduct at the trials of Fries and Callender was set forth with tedious particularity: in Delaware he had stooped "to the level of an informer"; his charge to the grand jury at Baltimore was an "intemperate and inflamatory political harangue"; he had prostituted his "high judicial character … to the low purpose of an electioneering partizan"; his purpose was "to excite … odium … against the government."[475]

This curious scramble of fault-finding, which was to turn out so fatally for the prosecution, was the work of Randolph. When the conglomerate indictment was drawn, no one, except perhaps Jefferson, had the faintest idea that the Republican plan would miscarry; Randolph's multifarious charges pleased those in Virginia, Pennsylvania, Delaware, and Maryland who had first made them; they were so drawn as to lay a foundation for the assault which was to follow immediately. "These articles," wrote John Quincy Adams, "contained in themselves a virtual impeachment not only of Mr. Chase, but of all the Judges of the Supreme Court from the first establishment of the national judiciary."[476]

In an extended and carefully prepared speech, Senator Giles, who had drawn the rules governing the conduct of the trial in the Senate, announced the Republican view of impeachment which, he said, "is nothing more than an enquiry, by the two Houses of Congress, whether the office of any public man might not be better filled by another." Adams was convinced that "this is undoubtedly the source and object of Mr. Chase's impeachment, and on the same principle any officer may easily be removed at any time."[477]

From the time the House took action against Chase, the Federalists were in despair. "I think the Judge will be removed from Office," was Senator Plumer's opinion.[478] "The event of the impeachment is already determined," wrote Bayard before the trial began.[479] Pickering was certain that Chase would be condemned – so would any man that the House might impeach; such "measures … are made questions of *party*, and therefore at all events to be carried into effect according to the wishes of the prime mover [Jefferson]."[480]

As the day of the arraignment of the impeached Justice approached, his friends were not comforted by their estimate of the public temper. "Our public … will be as tame as Mr. Randolph can desire," lamented Ames. "You may broil Judge Chase and eat him, or eat him raw; it shall stir

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[474] Chase "is very obnoxious to the *powers that be* & must be *denounced*, but articles will not be exhibited agt him this session. The Accusers have collected a volume of exparte evidence against him, printed & published it in pamphlets, & now it is publishing in the Court gazette to be diffused in every direction… If a party to a suit at law, … was to practice in this manner he would merit punishment." (Plumer to Smith, March 11, 1804, Plumer MSS. Lib. Cong.)

[475] See *supra*, chap. i. For the articles of impeachment see *Annals*, 8th Cong. 2d Sess. 85-88; *Chase Trial*, 10-11.The Republicans, for a time, contemplated the impeachment of Richard Peters, Judge of the United States Court for the District of Pennsylvania, who sat with Chase during the trial of Fries. (*Annals*, 8th Cong. 1st Sess. 823-24, 850, 873-74.) But his name was dropped because he had not "so acted in his judiciary capacity as to require the interposition of the Constitutional powers of this House." (*Ib.* 1171.)Peters was terrified and turned upon his fellow judge. He showered Pickering and other friends with letters, complaining of the conduct of his judicial associate. "If I am to be immolated let it be with some other Victim – or for my own Sins." (Peters to Pickering, Jan. 26, 1804, Pickering MSS. Mass. Hist. Soc.)

[476] J. Q. Adams to his father, March 14, 1805, *Writings, J. Q. A.*: Ford, iii, 116.

[477] Dec. 20, 1804, *Memoirs, J. Q. A.*: Adams, i, 321.

[478] Plumer to Cogswell, Jan. 4, 1805, Plumer MSS. Lib. Cong.; and see Plumer to Sheafe, Jan. 9, 1805, Plumer MSS. *loc. cit.*

[479] Bayard to Harper, Jan. 30, 1804, *Bayard Papers*: Donnan, 160.

[480] Pickering to Lyman, March 14, 1804, Lodge: *Cabot*, 450; also *N.E. Federalism*: Adams, 359.

up less anger or pity, than the Six Nations would show, if Cornplanter or Red Jacket were refused a belt of wampum."[481]

When finally Chase appeared before the bar of the Senate, he begged that the trial should be postponed until next session, in order that he might have time to prepare his defense. His appeal fell on remorseless ears; the Republicans gave him only a month. But this scant four weeks proved fatal to their purpose. Jefferson's wise adjustment of the greatest financial scandal in American history[482] came before the House during this interval; and fearless, honest, but impolitic John Randolph attacked the Administration's compromise of the Yazoo fraud with a ferocity all but insane in its violence. Literally screaming with rage, he assailed Jefferson's Postmaster-General who was lobbying on the floor of the House for the passage of the President's Yazoo plan, and delivered continuous philippics against that polluted transaction out of which later came the third of John Marshall's most notable opinions.[483]

In this frame of mind, nervously exhausted, physically overwrought and troubled, the most brilliant and effective Congressional partisan leader of our early history came to the trial. Moreover, Randolph had broken with the Administration and challenged Jefferson's hitherto undisputed partisan autocracy. This was the first public manifestation of that schism in the Republican Party which was never entirely healed.

Such was the situation on the 4th of February, 1805, when the Senate convened to hear and determine the case of Samuel Chase, impeached by the House for high crimes and misdemeanors, to settle by the judgment it should render the fate of John Marshall as Chief Justice of the United States, and to fix forever the place of the National Judiciary in the scheme of American government.

"Oyez! Oyez! Oyez! – All persons are commanded to keep silence on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States, sitting as a Court of Impeachments, articles of impeachment against Samuel Chase, Associate Justice of the Supreme Court of the United States."[484]

So cried the Sergeant-at-Arms of the National Senate when, in the Chase trial, John Marshall, the Supreme Court, and the whole National Judiciary were called to judgment by Thomas Jefferson, on the bleak winter day in dismal, scattered, and quarreling Washington. An audience crowded the Senate Chamber almost to the point of suffocation. There were present not only the members of Senate and House, the officers of the Executive departments, and the men and women of the Capital's limited society, but also scores of eminent persons from distant parts of the country.[485]

LETTER TO SAMUEL CHASE (*Facsimile*)

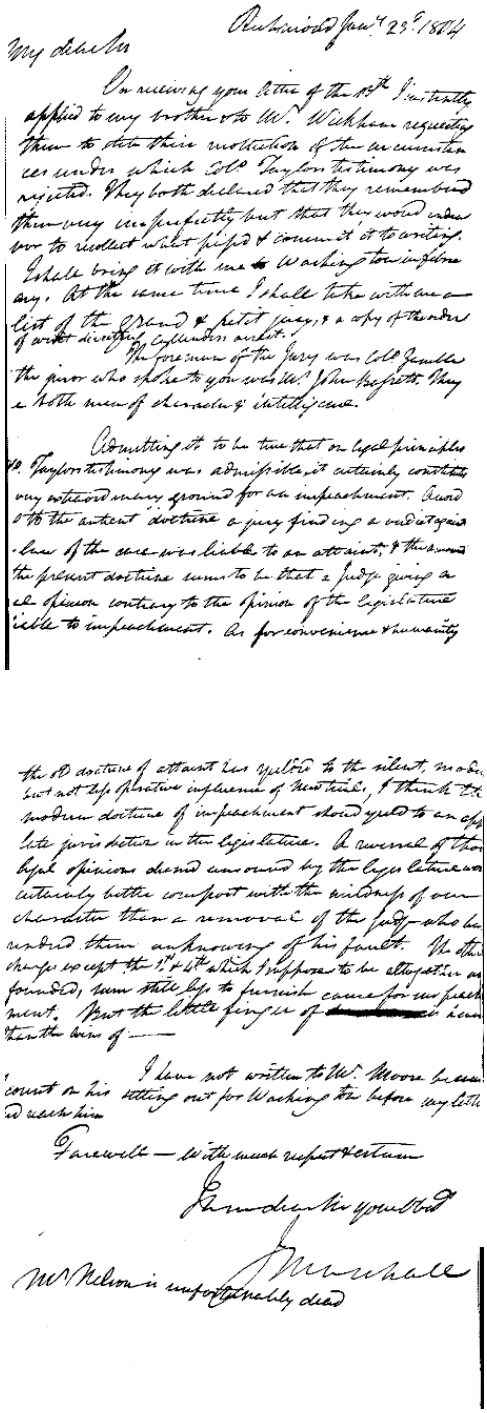
[481] Ames to Dwight, Jan. 20, 1805, Ames, i, 338.

[482] The Yazoo fraud. No other financial scandal in our history equaled this, if one considers the comparative wealth and population of the country at the times other various great frauds were perpetrated. For an account of it, see *infra*, chap. x.

[483] For Randolph's frantic speech on the Yazoo fraud and Marshall's opinion in Fletcher *vs*. Peck, see *infra*, chap. x.

[484] This form was adopted in the trial of Judge Pickering. See *Annals*, 8th Cong. 1st Sess. 319.

[485] See Plumer, 323.



Among the spectators were John Marshall and the Associate Justices of the Supreme Court, thoroughly conscious that they, and the institution of which they were the highest representatives, were on trial almost as much as their imprudent, rough, and outspoken fellow member of the Bench. It is not improbable that they were helping to direct the defense of Chase,[486] in which, as officials, they were personally interested, and in which, too, all their convictions as citizens and jurists were involved.

Marshall, aroused, angered, and frightened by the articles of the impeachment, had written his brother a year before the Chase trial that they are "sufficient to alarm the friends of a pure, and, of course, an independent Judiciary, if, among those who rule our land there be any of that

[486] Channing: *U.S.* iv, 287.

description."[487] At the beginning of the proceedings Chase had asked Marshall, who was then in Richmond, to write an account of what occurred at the trial of Callender, and Marshall promptly responded: "I instantly applied to my brother[488] & to Mr. Wickham[489] to state their recollection of the circumstances under which Colo. Taylors testimony was rejected.[490] They both declared that they remembred them very imperfectly but that they woud endeavor to recollect what passed & commit it to writing. I shall bring it with me to Washington in february." Marshall also promised to bring other documents.

"Admitting it to be true," continues Marshall, "that on legal principles Colo. Taylors testimony was admissible, it certainly constitutes a very extraordinary ground for an impeachment. According to the antient doctrine a jury finding a verdict against the law of the case was liable to an attaint; & the amount of the present doctrine seems to be that a Judge giving a legal opinion contrary to the opinion of the legislature is liable to impeachment.

"As, for convenience & humanity the old doctrine of attaint has yielded to the silent, moderate but not less operative influence of new trials, I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than [would] a removal of the Judge who has rendered them unknowing of his fault.

"The other charges except the 1st & 4th which I suppose to be altogether unfounded, seem still less to furnish cause for impeachment. But the little finger of [blotted out – probably "democracy"] is heavier than the loins of – .[491]

"Farewell – With much respect and esteem…

"J. Marshall."[492]

Marshall thus suggested the most radical method for correcting judicial decisions ever advanced, before or since, by any man of the first class. Appeals from the Supreme Court to Congress! Senators and Representatives to be the final judges of any judicial decision with which a majority of the House was dissatisfied! Had we not the evidence of Marshall's signature to a letter written in his well-known hand, it could not be credited that he ever entertained such sentiments. They were in direct contradiction to his reasoning in Marbury *vs.* Madison, utterly destructive of the Federalist philosophy of judicial control of legislation.

The explanation is that Marshall was seriously alarmed. By his own pen he reveals to us his state of mind before and on that dismal February day when he beheld Samuel Chase arraigned at the bar of the Senate of the United States. During the trial Marshall's bearing as a witness[493] again exhibited his trepidation. And, as we have seen, he had good cause for sharp anxiety.[494]

The avowed Republican purpose to remove him and his Federalist associates from the Supreme Bench, the settled and well-known intention of Jefferson to appoint Spencer Roane as Chief Justice when Marshall was ousted, and the certainty that this would be fatal to the execution of those fundamental principles of government to which Marshall was so passionately devoted – these important considerations fully warranted the apprehension which the Chief Justice felt and now displayed.

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[487] Marshall to James M. Marshall, April 1, 1804, MS.

[488] William Marshall. See *infra*, 191-92.

[489] John Wickham, leader of the Richmond bar and one of Marshall's intimate friends.

[490] See *supra*, chap. i; and *infra*.

[491] See 1 Kings, xii, 10.

[492] Marshall to Chase, Jan. 23, 1804, Etting MSS. Pa. Hist. Soc.

[493] See *infra*, 192-96.

[494] See *supra*, chap. iii, 113.

Had he been indifferent to the peril that confronted him and the whole National Judiciary, he would have exhibited a woeful lack of sense and feeling. He was more than justified in resorting to any honorable expedient to save the great office he held from occupancy by a resolute and resourceful foe of those Constitutional theories, the application of which, Marshall firmly believed, was indispensable to the sound development of the American Nation.

The arrangements for the trial were as dramatic as the event itself was momentous.[495] The scenes of the impeachment prosecution of Warren Hastings were still vivid in the minds of all, and in imitation of that spectacle, the Senate Chamber was now bedecked with impressive splendor. It was aglow with theatrical color, and the placing of the various seats was as if a tragic play were to be performed.

To the right and left of the President's chair were two rows of benches with desks, the whole covered with crimson cloth. Here sat the thirty-four Senators of the United States. Three rows of benches, arranged in tiers, extended from the wall toward the center of the room; these were covered with green cloth and were occupied by the members of the House of Representatives. Upon their right an enclosure had been constructed, and in it were the members of Jefferson's Cabinet.

Beneath the permanent gallery to which the general public was admitted, a temporary gallery, supported by pillars, ran along the wall, and faced the crimson-covered places of the Senators. At either end of it were boxes. Comfortable seats had been provided in this enclosure; and these were covered with green cloth, which also was draped over the balustrade.

This sub-gallery and the boxes were filled with ladies dressed in the height of fashion. A passageway was left from the President's chair to the doorway. On either side of this aisle were two stalls covered with blue cloth, as were also the chairs within them. They were occupied by the managers of the House of Representatives and by the lawyers who conducted the defense.[496]

A short, slender, elegantly formed man, with pallid face and steady black eyes, presided over this Senatorial Court. He was carefully dressed, and his manners and deportment were meticulously correct. Aaron Burr, fresh from his duel with Hamilton, and under indictment in two States, had resumed his duties as Vice-President. Nothing in the bearing of this playwright character indicated in the smallest degree that anything out of the ordinary had happened to him. The circumstance of his presence, however, dismayed even the most liberal of the New England Federalists. "We are indeed fallen on evil times," wrote Senator Plumer. "The high office of President is filled by an *infidel*, that of Vice-President by a *murderer*."[497]

For the first time since the Republican victory of 1800, which, but for his skill, courage, and energy in New York, would not have been achieved,[498] Burr now found himself in favor with the Administration and the Republican chieftains.[499] Jefferson determined that Aaron Burr must be captured – at least conciliated. He could not be displaced as the presiding officer at the Chase impeachment trial; his rulings would be influential, perhaps decisive; the personal friendship and admiration of several Senators for him were well known; the emergency of the Republican Party was acute. Chase must be convicted at all hazards; and while nobody but Jefferson then doubted that this would be the result, no chances were to be taken, no precaution overlooked.

The President had rewarded the three principal witnesses against Pickering with important and lucrative offices[500] after the insane judge had been removed from the bench. Indeed he had given the

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[495] "M^{r} Burr had the sole power of making the arrangements … for the trial." (Plumer to Sheafe, Jan. 9, 1805, Plumer MSS. Lib. Cong.)

[496] *Annals*, 8th Cong. 2d Sess. 100; *Chase Trial*, 2-5.

[497] Plumer to Norris, Nov. 7, 1804, Plumer, 329.

[498] See *infra*, chap. vi.

[499] See J. Q. Adams to his father, Jan. 5, 1805, *Writings, J. Q. A.*: Ford, iii, 104.

[500] Plumer, 274. "John S. Sherburne, Jonathan Steele, Michael McCleary and Richard Cutts Shannon were the principal witnesses against Pickering. Sherburne was appointed Judge [in Pickering's place]; Steele, District Attorney; McCleary, Marshal; and Shannon,

vacated judgeship to one of these witnesses. But such an example Jefferson well knew would have no effect upon Burr; even promises would avail nothing with the man who for nearly three years had suffered indignity and opposition from an Administration which he, more than any one man except Jefferson himself, had placed in power.

So it came about that Vice-President Aaron Burr, with only four weeks of official life left him, with the whole North clamorous against him because of his killing of Hamilton and an indictment of murder hanging over him in New Jersey, now found himself showered with favors by those who owed him so much and who, for nearly four years, had so grossly insulted him.

Burr's stepson, his brother-in-law, his most intimate friend, were forthwith appointed to the three most valuable and commanding offices in the new government of the Louisiana Territory, at the attractive city of New Orleans.[501] The members of the Cabinet became attentive to Burr. The President himself exercised his personal charm upon the fallen politician. Time after time Burr was now invited to dine with Jefferson at the Executive Mansion.

Nor were Presidential dinners, the bestowal of patronage hitherto offensively refused, and attentions of the Cabinet, the limit of the efforts to win the coöperation of the man who was to preside over the trial of Samuel Chase. Senator Giles drew a petition to the Governor of New Jersey begging that the prosecution of Burr for murder be dropped, and to this paper he secured the signature of nearly all the Republican Senators.[502]

Burr accepted these advances with grave and reserved dignity; but he understood the purpose that inspired them, did not commit himself, and remained uninfluenced and impartial. Throughout the momentous trial the Vice-President was a model presiding officer. "He conducted with the dignity and impartiality of an angel, but with the rigor of a devil," records a Washington newspaper that was bitterly hostile to Burr personally and politically.[503]

When Chase took his place in the box, the Sergeant-at-Arms brought him a chair; but Burr, adhering to the English custom, which required prisoners to stand when on trial in court, ordered it to be taken away.[504] Upon the request of the elderly Justice, however, Burr quickly relented and the desired seat was provided.[505]

Chase was, in appearance, the opposite of the diminutive and graceful Vice-President. More than six feet tall, with thick, broad, burly shoulders, he was a picture of rugged and powerful physical manhood, marred by an accumulation of fat which his generous manner of living had produced. Also he was afflicted with an agonizing gout, with which it seems so many of "the fathers" were cursed.

Clerk of the Court… Steele, expecting to have been Judge refused to accept his appointment, assigning as the reason his agency in the removal of Pickering."

[501] Plumer, 329-30; and see Adams: *U.S.* ii, 220.

[502] Nov. 26, 1804, *Memoirs, J. Q. A.*: Adams, i, 317-18; and Adams, *U.S.* ii, 220-22."Burr is flattered and feared by the administration." (Plumer to Thompson, Dec. 23, 1804, Plumer MSS. Lib. Cong.; and Plumer to Wilson, Dec. 7, 1804, Plumer MSS. *loc. cit.*)

[503] Davis, ii, 360; also Adams: *U.S.* 218-44."It must be acknowledged that Burr has displayed much ability, and since the first day I have seen nothing of partiality." (Cutler to Torrey, March 1, 1805, Cutler: *Life, Journals and Correspondence of Manasseh Cutler*, ii, 193.)At the beginning of the trial, however, Burr's rigor irritated the Senate: "Mr. Burr is remarkably testy – he acts more of the tyrant – is impatient, passionate – scolds – he is in a rage because we do not sit longer." (Plumer, Feb. 8, 1805, "Diary," Plumer MSS. Lib. Cong.)"Just as the time for adjourning to morrow was to be put … Mr. Burr said he wished to inform the Senate of some irregularities that he had observed in the Court."Some of the Senators as he said during the trial & while a witness was under examination walked between him & the Managers – others eat apples – & some eat cake in their seats."Mr. Pickering said he eat an apple – but it was at a time when the President had retired from the chair. Burr replied he did not mean him – he did not see him."Mr. Wright said he eat cake – he had a just right to do so – he was faint – but he disturbed nobody – He never would submit to be schooled & catechised in this manner."At this instance a motion was made by Bradley, who also had eaten cake, for an adjournment. Burr told Wright he was not in order – sit down. The Senate adjourned – & I left Burr and Wright scolding."Really, *Master Burr*, you need a ferule, or birch to enforce your lectures on polite behavior!" (*Ib.* Feb. 12, 1805; also *ib.* Jan. 2, 1805.) Burr was sharply criticized by the *Washington Federalist*, January 8, for his rude conduct at the beginning of the trial.

[504] Plumer to Sheafe, Jan. 1805, Plumer, 330-31.

[505] *Annals*, 8th Cong. 2d Sess. 92; *Chase Trial*, 4.

His face was broad and massive, his complexion a brownish red.[506] "Bacon face" was a nickname applied to him by the Maryland bar.[507] His head was large, his brow wide, and his hair was thick and white with the snows of his sixty-four winters.[508]

The counsel that surrounded the impeached Justice were brilliant and learned.[509] They were Joseph Hopkinson, who six years before, upon Marshall's return from France, had written "Hail Columbia; or, The President's March"; Philip Barton Key, brother of the author of "The Star-Spangled Banner";[510] Robert Goodloe Harper, one of the Federalist leaders in Congress during the ascendancy of that party; and Charles Lee, Attorney-General under President Adams when Marshall was Secretary of State, and one of Marshall's most devoted friends.[511]

But in the chair next to Chase sat a man who, single-handed and alone, was more than a match for all the managers of the House put together. Luther Martin of Maryland – of medium height, broad-shouldered, near-sighted, absent-minded, shabbily attired, harsh of voice, now sixty-one years old, with gray hair beginning to grow thin and a face crimsoned by the brandy which he continually imbibed – was the dominating figure of this historic contest.[512]

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[506] Dwight: *Signers of the Declaration of Independence*, 245-52.

[507] Hudson: *Journalism in the United States, 1690-1872*, 214; and see Story to Bramble, June 10, 1807, Story, i, 154.

[508] "In person, in manners, in unwieldy strength, in severity of reproof, in real tenderness of heart; and above all in intellect," he was "the living, I had almost said the exact, image of Samuel Johnson." (Story to Fay, Feb. 25, 1808, Story, i, 168.)Chase's career had been stirring and important. Carefully educated by his father, an Episcopal clergyman, and thoroughly grounded in the law, he became eminent at the Maryland bar at a very early age. From the first his aggressive character asserted itself. He was rudely independent and, as a member of the Maryland House of Burgesses, treated the royal governor and his Tory partisans with contemptuous defiance. When the British attempted to enforce the Stamp Act, he joined a band of high-spirited young patriots who called themselves "The Sons of Liberty," and led them in their raids upon public offices, which they broke open, seizing and destroying the stamps and burning in effigy the stamp distributor.His violent and fearless opposition to British rule and officials made young Chase so popular that he was elected as one of the five Maryland delegates to the first Continental Congress that assembled during the winter of 1774. He was reëlected the following year, and was foremost in urging the measures of armed defense that ended in the appointment of Washington as Commander-in-Chief of the American forces. Disregarding the instructions of his State, Chase hotly championed the adoption of the Declaration of Independence, and was one of the signers of that document.On the floor of Congress he denounced a member as a traitor – one Zubly, a Georgia parson – who in terror fled the country. Chase continued in the Continental Congress until 1778 and was appointed a member of almost every important committee of that body. He became the leader of his profession in Maryland, was appointed Chief Justice of the Criminal Court of Baltimore, and elected a member of the Maryland Convention, called to ratify the National Constitution. Thereafter, he was made Chief Justice of the Supreme Court of the State. In 1796, President Washington appointed Chase as Associate Justice of the National Supreme Court of which he was conceded to be one of the ablest members. (Dwight, 245-52.)

[509] See Plumer to his brother, Feb. 25, 1805, Plumer MSS. Lib. Cong.

[510] *Maryland Historical Society Fund-Publication No. 24*, p. 20. Burr told Key that "he must not appear as counsel with his loose coat on." (Plumer, Feb. 11, 1805, "Diary," Plumer MSS. Lib. Cong.)

[511] Adams: *U.S.* ii, 227-28. Bayard strongly urged Chase to have no counsel, but to defend himself. (Bayard to Harper, Jan. 30, 1804, *Bayard Papers*: Donnan, 159-60.)

[512] See Story's description of Martin three years later, Story to Fay, Feb. 16, 1808, Story, i, 163-64.Luther Martin well illustrates the fleeting nature of the fame of even the greatest lawyers. For two generations he was "an acknowledged leader of the American bar," and his preëminence in that noble profession was brightened by fine public service. Yet within a few years after his death, he was totally forgotten, and to-day few except historical students know that such a man ever lived.Martin began his practice of the law when twenty-three years of age and his success was immediate and tremendous. His legal learning was prodigious – his memory phenomenal.Apparently, Martin was the heaviest drinker of that period of heavy drinking men. The inexplicable feature of his continuous excesses was that his mighty drinking seldom appeared to affect his professional efficiency. Only once in his long and active career did intoxication interfere with his work in court. (See *infra*, 586.)Passionate in his loves and hates, he abhorred Jefferson with all the ardor of his violent nature; and his favorite denunciation of any bad man was, "Sir! he is as great a scoundrel as Thomas Jefferson."For thirty years Martin was the Attorney-General of Maryland. He was the most powerful member of his State in the Convention that framed the National Constitution which he refused to sign, opposing the ratification of it in arguments of such signal ability that forty years afterward John C. Calhoun quarried from them the material for his famous Nullification speeches.When, however, the Constitution was ratified and became the supreme law of the land, Martin, with characteristic wholeheartedness, supported it loyally and championed the Administrations of Washington and Adams.He was the lifelong friend of the impeached justice, to whom he owed his first appointment as Attorney-General of Maryland as well as great assistance and encouragement in the beginning of his career. Chase and he were also boon companions, each filled with admiration for the talents and attainments of the other, and strikingly similar in their courage and fidelity to friends and principles. So the lawyer threw himself into the fight for the persecuted judge with all his astonishing strength.When, in his old age, he was stricken with paralysis, the Maryland Legislature placed a tax of five dollars annually on all lawyers for his support. After Martin's death the bench and bar of Baltimore passed a resolution that "we

Weary and harried as he was, Randolph opened the trial with a speech of some skill. He contrasted the conduct of Chase in the trial of Callender with that of Marshall in a trial in Richmond in 1804 at which Marshall had presided. "Sir," said Randolph, "in the famous case of Logwood,[513] whereat the Chief Justice of the United States presided, I was present, being one of the grand jury who found a true bill against him… The government was as deeply interested in arresting the career of this dangerous and atrocious criminal, who had aimed his blow against the property of every man in society, as it could be in bringing to punishment a weak and worthless scribbler [Callender]."

But how had Marshall acted in the conduct of that trial? "Although," continued Randolph, "much testimony was offered by the prisoner, which did by no means go to his entire exculpation, although much of that testimony was of a very questionable nature, none of it was declared *inadmissable*." Marshall suffered it "to go to the jury, who were left to judge of its weight and credibility"; nor had he required "any interrogatories to the witnesses … to be reduced to writing," – such a thing never had been done in Virginia before the tyrannical ruling of Chase in the trial of Callender.

"No, Sir!" he cried. "The enlightened man who presided in Logwood's case knew that, although the basest and vilest of criminals, he was entitled to *justice*, equally with the most honorable member of society." Marshall "did not avail himself of the previous and great discoveries in criminal law, of this respondent [Chase]"; Marshall "admitted the prisoner's testimony to go to the jury"; Marshall "never thought it *his right* or *his duty* to require questions to be reduced to writing"; Marshall "gave the accused *a fair trial* according to law and usage, without any innovation or departure from the established rules of criminal jurisprudence in his country."

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will wear mourning for the space of thirty days." (*American Law Review*, i, 279.)No biography of Martin has ever been written; but there are two excellent sketches of his life, one by Ashley M. Gould in *Great American Lawyers*: Lewis, ii, 3-46; and the other by Henry P. Goddard in the *Md. Hist. Soc. Fund. Pub. No. 24.*

[513] *Annals*, 8th Cong. 2d Sess. 160-61. The case to which Randolph refers was that of the United States *vs.* Thomas Logwood, indicted in April, 1801, for counterfeiting. Logwood was tried in the United States Circuit Court at Richmond during June, 1804. Marshall, sitting with District Judge Cyrus Griffin, presided. Notwithstanding Marshall's liberality, Logwood was convicted and Marshall sentenced him to ten years' imprisonment at hard labor. (Order Book No. 4, 464, Records, U.S. Circuit Court, Richmond.)

JOHN RANDOLPH

Marshall's gentle manner and large-minded, soft-spoken rulings as a trial judge were thus adroitly made to serve as an argument for the condemnation of his associate, and for his own undoing if Chase should be convicted. Randolph denounced "the monstrous pretension that an act to be impeachable must be indictable. Where? In the Federal Courts? There, not even robbery and murder are indictable."

A judge could not, under the National law, be indicted for conducting a National court while drunk, and perhaps not in all State courts. "It is indictable nowhere for him to omit to do his duty, to refuse to hold a court. But who can doubt that both are impeachable offenses, and ought to subject the offender to removal from office?"

The autocrat of Congress then boldly announced to the Republican Senators that the House managers "confidently expect on his [Chase's] conviction… We shall bring forward … such a specimen of judicial tyranny, as, I trust in God, will never be again exhibited in our country."[514]

Fifty-two witnesses were examined. It was established that, in the trial of Fries, Chase had written the opinion of the court upon the law before the jury was sworn, solely in order to save time; had withdrawn the paper and destroyed it when he found Fries's counsel resented the court's precipitate action; and, finally, had repeatedly urged them to proceed with the defense without restriction. Chase's inquisitorial conduct in Delaware was proved, and several witnesses testified to the matter and manner of his charge to the Baltimore grand jury.[515]

Every incident in the trial of Callender[516] was described by numerous witnesses.[517] George Hay, who had been the most aggressive of Callender's counsel, was so anxious to help the managers that he made a bad impression on the Senate by his eagerness.[518] It developed that the whole attitude of Chase had been one of sarcastic contempt; and that Callender's counsel were more piqued by the laughter of the spectators which the witty sallies and humorous manner of the Justice excited, than they were outraged by any violence on Chase's part, or even by what they considered the illegal and oppressive nature of his rulings.

When, in defending Callender, Hay had insisted upon "a literal recital of the parts [of *The Prospect Before Us*] charged as libellous," Chase, looking around the court-room, said with an ironical smile: "It is contended … that the book ought to be copied *verbatim et literatim*, I wonder, … that *they* do not contend for *punctuatim* too."[519] The audience laughed. Chase's interruption of Wirt[520] by calling the young lawyer's "syllogistical" conclusion a "*non sequitur*, sir," was accompanied by an inimitable "bow" that greatly amused the listeners.

In short, the interruptions of the sardonic old Justice were, as John Taylor of Caroline testified, in "a very high degree imperative, satirical, and witty … [and] extremely well calculated to abash and disconcert counsel."[521]

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[514] *Annals*, 8th Cong. 2d Sess. 163-65; *Chase Trial*, 18. Randolph disgusted the Federalists. "This speech is the most feeble – the most incorrect that I ever heard him make." (Plumer, Feb. 9, 1805, "Diary," Plumer MSS. Lib. Cong.)

[515] Two witnesses to the Baltimore incident, George Reed and John Montgomery, committed their testimony to memory as much "as ever a Presbyterian clergyman did his sermon – or an Episcopalian his prayer." (Plumer, Feb. 14, 1805, "Diary," Plumer MSS. Lib. Cong.)

[516] See *supra*, chap. i.

[517] *Annals*, 8th Cong. 2d Sess. 203-05; *Chase Trial*, 36-37.

[518] Plumer, Feb. 11, 1805, "Diary," Plumer MSS. Lib. Cong.

[519] *Annals*, 8th Cong. 2d Sess. 200; *Chase Trial*, 35.

[520] See *supra*, chap. i.

[521] *Annals*, 8th Cong. 2d Sess. 207. John Quincy Adams's description of all of the evidence is important and entertaining:"Not only the casual expressions dropped in private conversations among friends and intimates, as well as strangers and adversaries, in the recess of a bed-chamber as well as at public taverns and in stage coaches, had been carefully and malignantly laid up and preserved for testimony on this prosecution; not only more witnesses examined to points of *opinion*, and called upon for discrimination to such a degree as to say whether the deportment of the Judge was *imperative* or *imperious*, but hours of interrogation and answer were consumed in evidence to *looks*, to *bows*, to tones of voice and modes of speech – to prove the insufferable grievance that Mr. Chase had more than once raised a laugh at the expense of Callender's counsel, and to ascertain the tremendous fact that he had accosted the Attorney General *of Virginia* by the appellation of *Young Gentleman*!!"If by thumbscrews, the memory of a witness trace back for a period of five years the features of the Judge's face, it could be darkened with a frown, it was to be construed into rude and contumelious treatment of the Virginia bar; if it was found lightened with a smile, 'tyrants in all ages had been notorious for their pleasantry.'"In short, sir, Gravity himself could not keep his countenance at the nauseating littlenesses which were resorted to for proof of atrocious criminality, and indignation melted into ridicule at the puerile perseverance with which *nothings* were accumulated, with the hope of making *something* by their multitude."All this, however, was received because Judge Chase would not suffer his counsel to object against it. He indulged his accusers with the utmost licence of investigation which they ever derived [*sic*], and contented himself

Among the witnesses was Marshall's brother William, whom President Adams had appointed clerk of the United States Court at Richmond.[522] His testimony was important on one point. One John Heath, a Richmond attorney and a perfect stranger to Chase, had sworn that Chase, in his presence, had asked the United States Marshal, David M. Randolph, "if he had any of those creatures or people called democrats on the panel of the jury to try Callender"; that when the Marshal replied that he had "made no discrimination," the Judge told him "to look over the panel and if there were any of that description, strike them off."

William Marshall, on the contrary, made oath that Chase told him that he hoped even Giles would serve on the jury – "Nay, he wished that Callender might be tried by a jury of his own politics." David M. Randolph then testified that he had never seen Heath in the Judge's chambers, that Chase "never at any time or place" said anything to him about striking any names from the jury panel, and that he never received "any instructions, verbal, or by letter, from Judge Chase in relation to the grand jury."[523]

John Marshall himself was then called to the stand and sworn. Friendly eye-witnesses record that the Chief Justice appeared to be frightened. He testified that Colonel Harvie, with whom he "was intimately acquainted,"[524] had asked him to get the Marshal to excuse Harvie from serving on the jury because "his mind was completely made up … and whatever the evidence might be, he should find the traverser not guilty." When Marshall told this to the court official, the latter said that Harvie must apply to the Judge, because he "was watched," and "to prevent any charge of improper conduct" he would not discharge any of the jury whom he had summoned. Marshall then induced Chase to release Harvie "upon the ground of his being sheriff of Henrico County and that his attendance was necessary" at the county court then in session.

Marshall said that he was in court during a part of the Callender trial and that "there were several circumstances that took place … on the part both of the bar and the bench which do not always occur at trials… The counsel appeared … to wish to argue to the jury that the Sedition Law was unconstitutional. Mr. Chase said that that was not a proper question to go to the jury"; and that whenever Callender's attorneys began to argue to the contrary the court stopped them.

The Chief Justice further testified that George Hay had addressed the court to the effect that in this ruling Chase was "not correct in point of law," and again the Judge "stopped him"; that "Mr. Hay still went on and made some political observations; Judge Chase stopped him again and the collision ended by Mr. Hay sitting down and folding up his papers as if he meant to retire."

Marshall did not recollect "precisely," although it appeared to him that "whenever Judge Chase thought the counsel incorrect in their points, he immediately told them so and stopped them short." This "began early in the proceedings and increased. On the part of the judge it seemed to be a disgust with regard to the mode adopted by the traverser's counsel, at least … as to the part which Mr. Hay took in the trial."

Randolph asked Marshall whether it was the practice for courts to hear counsel argue against the correctness of rulings; and Marshall replied that "if counsel have not been already heard, it is usual to hear them in order that they may change or confirm the opinion of the court, when there is any doubt entertained." But there was "no positive rule on the subject and the course pursued by the

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with observing to the court that he expected to be judged upon the *legal* evidence in the case." (J. Q. Adams to his father, March 8, 1805, *Writings, J. Q. A.*: Ford, iii, 112-13.)

[522] This was the fourth member of the Marshall family upon whom offices were bestowed while Marshall was Secretary of State. (See vol. ii, 560, of this work.)

[523] *Annals*, 8th Cong. 2d Sess. 251-62; *Chase Trial*, 65-69. "I was unable to give credence to his [Heath's] testimony." (Plumer, Feb. 12, 1805, "Diary," Plumer MSS. Lib. Cong.) Although Heath's story was entirely false, it has, nevertheless, found a place in serious history.Marshall's brother made an excellent impression on the Senate. "His answers were both prompt & lucid – There was a frankness, a fairness & I will add a firmness that did him much credit. His testimony was [on certain points] … a complete defense of the accused." (*Ib.* Feb. 15, 1805.)

[524] Harvie's son, Jacquelin B. Harvie, married Marshall's daughter Mary. (Paxton: *Marshall Family*, 100.)

court will depend upon circumstances: Where the judge believes that the point is perfectly clear and settled he will scarcely permit the question to be agitated. However, it is considered as decorous on the part of the judge to listen while the counsel abstain from urging unimportant arguments."

Marshall was questioned closely as to points of practice. His answers were not favorable to his Associate Justice. Did it appear to him that "the conduct of Judge Chase was mild and conciliatory" during the trial of Callender? Marshall replied that he ought to be asked what Chase's conduct was and not what he thought of it. Senator William Cocke of Tennessee said the question was improper, and Randolph offered to withdraw it. "No!" exclaimed Chase's counsel, "we are willing to abide in this trial by the opinion of the Chief Justice." Marshall declared that, except in the Callender trial, he never heard a court refuse to admit the testimony of a witness because it went only to a part and not to the whole of a charge.

Burr asked Marshall: "Do you recollect whether the conduct of the judge at this trial was tyrannical, overbearing and oppressive?" "I will state the facts," cautiously answered the Chief Justice. "Callender's counsel persisted in arguing the question of the constitutionality of the Sedition Law, in which they were constantly repressed by Judge Chase. Judge Chase checked Mr. Hay whenever he came to that point, and after having resisted repeated checks, Mr. Hay appeared to be determined to abandon the cause, when he was desired by the judge to proceed with his argument and informed that he should not be interrupted thereafter.

"If," continued Marshall, "this is not considered tyrannical, oppressive and overbearing, I know nothing else that was so." It was usual for courts to hear counsel upon the validity of rulings "not solemnly pronounced," and "by no means usual in Virginia to try a man for an offense at the same term at which he is presented"; although, said Marshall, "my practice, while I was at the bar was very limited in criminal cases."

"Did you ever hear Judge Chase apply any unusual epithets – such as '*young men*' or '*young gentlemen*' – to counsel?" inquired Randolph. "I have heard it so frequently spoken of since the trial that I cannot possibly tell whether my recollection of the term is derived from expressions used in court, or from the frequent mention since made of them." But, remarked Marshall, having thus adroitly placed the burden on the irresponsible shoulders of gossip, "I am rather inclined to think that I did hear them from the judge." Randolph then drew from Marshall the startling and important fact that William Wirt was "about thirty years of age and a widower."[525]

Senator Plumer, with evident reluctance, sets down in his diary a description from which it would appear that Marshall's manner affected the Senate most unfavorably. "John Marshall is the Chief Justice of the Supreme Court of the United States. I was much better pleased with the manner in which his brother testified than with him.

"The Chief Justice really discovered too much caution – too much fear – too much cunning – He ought to have been more bold – frank & explicit than he was.

"There was in his manner an evident disposition to accommodate the Managers. That dignified frankness which his high office required did not appear. A cunning man ought never to discover the arts of the *trimmer* in his testimony."[526]

Plainly Marshall was still fearful of the outcome of the Republican impeachment plans, not only as to Chase, but as to the entire Federalist membership of the Supreme Court. His understanding of the Republican purpose, his letter to Chase, and his manner on the stand at the trial leave no doubt as to his state of mind. A Republican Supreme Court, with Spencer Roane as Chief Justice, loomed forbiddingly before him.

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[525] *Annals*, 8th Cong. 2d Sess. 262-67; *Chase Trial*, 71.

[526] Plumer, Feb. 16, 1805, "Diary," Plumer MSS. Lib. Cong.

Chase was suffering such agony from the gout that, when the testimony was all in, he asked to be released from further attendance.[527] Six days before the evidence was closed, the election returns were read and counted, and Aaron Burr "declared Thomas Jefferson and George Clinton to be duly elected to the respective offices of President and Vice-President of the United States."[528] For the first time in our history this was done publicly; on former occasions the galleries were cleared and the doors closed.[529]

Throughout the trial Randolph and Giles were in frequent conference – judge and prosecutor working together for the success of the party plan.[530] On February 20 the arguments began. Peter Early of Georgia spoke first. His remarks were "chiefly declamatory."[531] He said that the conduct of Chase exhibited that species of oppression which puts accused citizens "at the mercy of *arbitrary and overbearing judges*." For an hour and a half he reviewed the charges,[532] but he spoke so badly that "most of the members of the other House left the chamber & a large portion of the spectators the gallery."[533]

George Washington Campbell of Tennessee argued "long and tedious[ly]"[534] for the Jeffersonian idea of impeachment which he held to be "a kind of an inquest into the conduct of an officer … and the effects that his conduct … may have on society." He analyzed the official deeds of Chase by which "the whole community seemed shocked… Future generations are interested in the event."[535] He spoke for parts of two days, having to suspend midway in the argument because of exhaustion.[536] Like Early, Campbell emptied the galleries and drove the members of the House, in disgust, from the floor.[537]

Joseph Hopkinson then opened for the defense. Although but thirty-four years old, his argument was not surpassed,[538] even by that of Martin – in fact, it was far more orderly and logical than that of Maryland's great attorney-general. "We appear," began Hopkinson, "for an ancient and infirm man, whose better days have been worn out in the service of that country which now degrades him." The case was "of infinite importance," truly declared the youthful attorney. "The faithful, the scrutinizing historian, … without fear or favor" will render the final judgment. The House managers were following the British precedent in the impeachment of Warren Hastings; but that celebrated prosecution had not been instituted, as had that of Chase, on "a petty catalogue of frivolous occurrences, more calculated to excite ridicule than apprehension, but for the alleged murder of princes and plunder of empires"; yet Hastings had been acquitted.

In England only two judges had been impeached in half a century, while in the United States "seven judges have been prosecuted criminally in about two years." Could a National judge be impeached merely for "error, mistake, or indiscretion"? Absurd! Such action could be taken only for "an indictable offense." Thus Hopkinson stated the master question of the case. In a clear, closely woven argument, the youthful advocate maintained his ground.

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[527] Feb. 19, 1805, *Memoirs, J. Q. A.*: Adams, i, 354.Chase did not leave Washington, and was in court when some of the arguments were made. (See Chase to Hopkinson, March 10, 1805; Hopkinson MSS. in possession of Edward P. Hopkinson, Phila.)

[528] Feb. 13, 1805, *Memoirs, J. Q. A.*: Adams, i, 351.

[529] *Ib.* The motion to admit the public was carried by one vote only. (Plumer, Feb. 13, 1805, "Diary," Plumer MSS. Lib. Cong.)

[530] Feb. 13, 1805, *Memoirs, J. Q. A.*: Adams, i, 353.

[531] Feb. 20, 1805, *ib.* 355.

[532] Cutler, ii, 183; also *Annals*, 8th Cong. 2d Sess. 313-29; *Chase Trial*, 101-07.

[533] Plumer, Feb. 20, 1805, "Diary," Plumer MSS. Lib. Cong.

[534] Cutler, ii, 183.

[535] *Annals*, 8th Cong. 2d Sess. 329-53; *Chase Trial*, 107 *et seq.*

[536] *Memoirs, J. Q. A.*: Adams, i, 355-56.

[537] Plumer, Feb. 21, 1805, "Diary," Plumer MSS. Lib. Cong.

[538] Adams: *U.S.* ii, 231. Even Randolph praised him. (*Annals*, 8th Cong. 2d Sess. 640.)

The power of impeachment by the House was not left entirely to the "opinion, whim, or caprice" of its members, but was limited by other provisions of the fundamental law. Chase was not charged with treason, bribery, or corruption. Had any other "high crimes and misdemeanors" been proved or even stated against him? He could not be impeached for ordinary offenses, but only for "high crimes and high misdemeanors." Those were legal and technical terms, "well understood and defined in law… A misdemeanor or a crime … is an act committed or omitted, in violation of a *public* law either forbidding or commanding it. By this test, let the respondent … stand justified or condemned."

The very nature of the Senatorial Court indicated "the grade of offenses intended for its jurisdiction… Was such a court created … to scan and punish paltry errors and indiscretions, too insignificant to have a name in the penal code, too paltry for the notice of a court of quarter sessions? This is indeed employing an elephant to remove an atom too minute for the grasp of an insect."

Had Chase transgressed any State or National statute? Had he violated the common law? Nobody claimed that he had. Could any judge be firm, unbiased, and independent if he might at any time be impeached "on the mere suggestions of caprice … condemned by the mere voice of prejudice"? No! "If his nerves are of iron, they must tremble in so perilous a situation."

Hopkinson dwelt upon the true function of the Judiciary under free institutions. "All governments require, in order to give them firmness, stability, and character, some permanent principle, some settled establishment. The want of this is the great deficiency in republican institutions." In the American Government an independent, permanent Judiciary supplied this vital need. Without it "nothing can be relied on; no faith can be given either at home or abroad." It was also "a security from oppression."

All history proved that republics could be as tyrannical as despotisms; not systematically, it was true, but as the result of "sudden gust of passion or prejudice… If we have read of the death of a Seneca under the ferocity of a Nero, we have read too of the murder of a Socrates under the delusion of a Republic. An independent and firm Judiciary, protected and protecting by the laws, would have snatched the one from the fury of a despot, and preserved the other from the madness of a people."[539] So spoke Joseph Hopkinson for three hours,[540] made brief and brilliant by his eloquence, logic, and learning.

Philip Barton Key of Washington, younger even than Hopkinson, next addressed the Senatorial Court. He had been ill the day before[541] and was still indisposed, but made an able speech. He analyzed, with painstaking minuteness, the complaints against his client, and cleverly turned to Chase's advantage the conduct of Marshall in the Logwood case.[542] Charles Lee then spoke for the defense; but what he said was so technical, applying merely to Virginia legal practice of the time, that it is of no historical moment.[543]

When, on the next day, February 23, Luther Martin rose, the Senate Chamber could not contain even a small part of the throng that sought the Capitol to hear the celebrated lawyer. If he "*only* appeared in defense of a friend," said Martin, he would not be so gravely concerned; but the case was plainly of highest possible importance, not only to all Americans then living, but to "posterity." It would "establish a most important precedent as to future cases of impeachment." An error now would be fatal.

For what did the Constitution authorize the House to impeach and the Senate to try an officer of the National Government? asked Martin. Only for "an indictable offense." Treason and bribery, specifically named in the Constitution as impeachable offenses, were also indictable. It was the same

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[539] *Annals*, 8th Cong. 2d Sess. 354-94; *Chase Trial*, 116-49.

[540] Feb. 21, 1805, *Memoirs, J. Q. A.*: Adams, i, 356."The effect on the auditory [was] prodigiously great." (Cutler, ii, 184.)"His argument … was one of the most able … I ever heard." (Plumer, Feb. 21, 1805, "Diary," Plumer MSS. Lib. Cong.)

[541] Feb. 22, 1805, *Memoirs, J. Q. A.*: Adams, i, 356.

[542] *Annals*, 8th Cong. 2d Sess. 394-413; see also *Chase Trial*, 149-62; and Cutler, ii, 184.

[543] *Annals*, 8th Cong. 2d Sess. 413-29; *Chase Trial*, 162-72.

with "other high crimes and misdemeanors," the only additional acts for which impeachment was provided. To be sure, a judge might do deeds for which he could be indicted that would not justify his impeachment, as, for instance, physical assault "provoked by insolence." But let the House managers name one act for which a judge could be impeached that did not also subject him to indictment.

Congress could pass a law making an act criminal which had not been so before; but such a law applied only to deeds committed after, and not to those done before, its passage. Yet if an officer might, years after the event, be impeached, convicted, and punished for conduct perfectly legal at the time, "could the officers of Government ever know how to proceed?" Establish such a principle and "you leave your judges, and all your other officers, at the mercy of the prevailing party."

Had Chase "used *unusual*, rude and *contemptuous* expressions towards the prisoner's counsel" in the Callender case, as the articles of impeachment charged? Even so, this was "rather a violation of the principles of politeness, than the principles of law; rather the want of decorum, than the commission of a *high crime and misdemeanor*." Was a judge to be impeached and removed from office because his deportment was not elegant?

The truth was that Callender's counsel had not acted in his interest and had cared nothing about him; they had wished only "to hold up the prosecution as oppressive" in order to "excite public indignation against the court and the Government." Had not Hay just testified that he entertained "no hopes of convincing the court, and scarcely the faintest expectation of inducing the jury to believe that the sedition law was unconstitutional"; but that he had wished to make an "impression upon the public mind… What barefaced, what unequalled hypocrisy doth he admit that he practiced on that occasion! What egregious trifling with the court!" exclaimed Martin.

When Chase had observed that Wirt's syllogism was a "*non sequitur*," the Judge, it seems, had "bowed." Monstrous! But "as *bows*, sir, according to the manner they are *made*, may … convey very different meanings," why had not the witness who told of it, "given us a *fac simile* of it?" The Senate then could have judged of "the propriety" of the bow. "But it seems this *bow*, together with the '*non sequitur*' entirely discomfitted poor Mr. Wirt, and down he sat 'and never word spake more!'" By all means let Chase be convicted and removed from the bench – it would never do to permit National judges to make bows in any such manner!

But alas for Chase! He had committed another grave offense – he had called William Wirt "*young* gentleman" in spite of the fact that Wirt was actually thirty years old and a widower. Perhaps Chase did not know "of these circumstances"; still, "if he had, considering that Mr. Wirt was a widower, he certainly erred on the right side … in calling *him* a *young* gentleman."[544]

When the laughter of the Senate had subsided, Martin, dropping his sarcasm, once more emphasized the vital necessity of the independence of the Judiciary. "We boast" that ours is a "government of laws. But how can it be such, unless the laws, while they exist, are sacredly and impartially, without regard to popularity, carried into execution?" Only independent judges can do this. "Our property, our liberty, our lives, can only be protected and secured by such judges. With this honorable Court it remains, whether we shall have such judges!"[545]

Martin spoke until five o'clock without food or any sustenance, "except two glasses of wine and water"; he said he had not even breakfasted that morning, and asked permission to finish his argument next day.

When he resumed, he dwelt on the liberty of the press which Chase's application of the Sedition Law to Callender's libel was said to have violated. "My honorable client with many other respectable characters … considered it [that law] as a wholesome and necessary restraint" upon the licentiousness of the press.[546] Martin then quoted with telling effect from Franklin's denunciation of newspapers.[547]

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[544] *Annals*, 8th Cong. 2d Sess. 429-82; *Chase Trial*, 173 *et seq.*

[545] *Annals*, 8th Cong. 2d Sess. 483.

[546] *Ib.* 484-87.

"Franklin, himself a printer," had been "as great an advocate for the liberty of the press, as any reasonable man ought to be"; yet he had "declared that unless the slander and calumny of the press is restrained by some other law, it will be restrained by club law." Was not that true?

If men cannot be protected by the courts against "base calumniators, they will become their own avengers. And to the bludgeon, the sword or the pistol, they will resort for that purpose." Yet Chase stood impeached for having, as a judge, enforced the law against the author of "one of the most flagitious libels ever published in America."[548]

Throughout his address Martin mingled humor with logic, eloquence with learning.[549] Granted, he said, that Chase had used the word "damned" in his desultory conversation with Triplett during their journey in a stage. "However it may sound elsewhere in the United States, I cannot apprehend it will be considered *very* offensive, *even* from the mouth of a judge on this side of the Susquehanna; – to the southward of that river it is in familiar use … supplying frequently the place of the word 'very' … connected with subjects the most pleasing; thus we say indiscriminately a very good or a damned good bottle of wine, a damned good dinner, or a damned clever fellow."[550]

Martin's great speech deeply impressed the Senate with the ideas that Chase was a wronged man, that the integrity of the whole National Judicial establishment was in peril, and that impeachment was being used as a partisan method of placing the National Bench under the rod of a political party. And all this was true.

Robert Goodloe Harper closed for the defense. He was intolerably verbose, but made a good argument, well supported by precedents. In citing the example which Randolph had given as a good cause for impeachment – the refusal of a judge to hold court – Harper came near, however, making a fatal admission. This, said Harper, would justify impeachment, although perhaps not an indictment. Most of his speech was a repetition of points already made by Hopkinson, Key, and Martin. But Harper's remarks on Chase's charge to the Baltimore grand jury were new, that article having been left to him.

"Is it not lawful," he asked, "for an aged patriot of the Revolution to warn his fellow-citizens of dangers, by which he supposes their liberties and happiness to be threatened?" That was all that Chase's speech from the bench in Baltimore amounted to. Did his office take from a judge "the liberty of speech which belongs to every citizen"? Judges often made political speeches on the stump – "What law forbids [them] to exercise these rights by a charge from the bench?" That practice had "been sanctioned by the custom of this country from the beginning of the Revolution to this day."

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[547] See résumé of Franklin's indictment of the press in vol. i, 268-69, of this work.

[548] *Annals*, 8th Cong. 2d Sess. 488; *Chase Trial*, *223.

[549] "Mr. Martin really possesses much legal information & a great fund of good humour, keen satire & poignant wit … he certainly has talents." (Plumer, Feb. 23, 1805, "Diary," Plumer MSS. Lib. Cong.)

[550] *Annals*, 8th Cong. 2d Sess. 489; *Chase Trial*, *224.

Конец ознакомительного фрагмента.