Norman W. Provizer

tenure as one of a trio of commissioners sent to France by President John Adams. Marshall had earlier refused to be appointed the American Minister to France, though he later had second thoughts about that decision. This time the mission would be a temporary one and it would afford him the chance to be exposed to Paris.

He was 42 years old when he (along with a fellow Federalist, Charles Pinckney, and a Republican, Elbridge Gerry) became directly embroiled in the French connection to American partisan politics. The French (like the Jeffersonian Republicans) were angry over the Jay Treaty, and the purpose of the commission was to normalize relations between the United States and revolutionary France. The negotiations, however, never got very far. The commission soon became embroiled in the XYZ Affair. Three agents of Talleyrand, the French foreign minister, had suggested that amity between the United States and France could be purchased by a loan and bribes. The Americans refused, and only Gerry remained in Paris.

At home, the XYZ Affair produced outrage among Americans who believed the nation's honor had been offended. The outrage turned into war fever among the extreme Federalists who saw an opportunity to tar their Republican opponents with the brush of anti-French sentiment. Marshall, who had been involved in the affair, maintained a moderate stance and counseled against an avoidable war. Reason, not passion nor extreme partisanship, was Marshall's guiding light.

A similar approach was also evident when Marshall finally consented, at the urging of George Washington, to run for Congress in 1799. He was elected to the Sixth Congress by a narrow margin and during the campaign he had to square his Federalist affiliation with the unpopular Alien and Sedition Acts that had been passed by the Federalists to control the criticisms of their Republican opponents. He did this by expressing his opposition to the acts, while, at the same time, downplaying their significance. In reality, Marshall distanced himself from extremist Federalist thought without abandoning a fundamentally Federalist perspective.

In Congress, Marshall voted against his "party" on changes in the Sedition Act. He also rose to defend Adams when the

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president was under attack from extreme elements within the Federalist camp. In 1800, the president appointed Marshall the Secretary of War. He was confirmed for that post, but never served in that capacity. For three days after the confirmation, Marshall was nominated to be Secretary of State. While Marshall had asked Adams to withdraw his nomination as Secretary of War, he accepted the appointment as Secretary of State.

He served in that position for less than a year—until the end of the Adams administration. During that brief period, he was also nominated and confirmed as Chief Justice. Thus, for several weeks, Marshall was both a cabinet official and Chief Justice (though he did not draw his cabinet salary during that time). During his first 45 years, Marshall had established himself as an actor of some significance on the still-young American political scene. If his career had ended with the Republican victory over the Federalists in the election of 1800, Marshall would have been, at least, a footnote in American political history. That, however, did not happen. He went on for more than 34 years as Chief Justice, establishing the independent judicial power of the Supreme Court and thereby shaping the course of American politics and securing a prominent position in the nation's history.

As Chief Justice, Marshall quickly capitalized on the potential of his position. Recognizing, for example, that the Court's place in the American system of government would be enhanced if it spoke as an institution, he ended the practice of issuing opinions *seriatim*. In other words, instead of the Justices individually offering their views on a case, there would now be an opinion of the Court written by one of its members. Institutional identity was needed if the Court as an institution was to capture its rightful, proper and independent role in the still new system of constitutional government.

Though in no way an advocate of unlimited centralization, Marshall was convinced of the need for federal supremacy in order to have an effective state and an orderly society based on the rule of law. As a soldier at Valley Forge, he had witnessed first hand the costs that accompanied the absence of central authority. As a Federalist, he saw in the Constitution a solid

foundation for the establishment of such authority, but that foundation would have to be protected from erosion and reinforced to withstand attacks. A guardian was required to insure the survival of the Constitution and the rule of law. And logically, that guardian should be the federal judiciary.

The challenge facing Marshall was to translate this vision into a concrete reality. For this task, he was uncommonly well suited. Marshall combined an attractive and engaging persona—reflecting modesty as well as self-confidence—with an incisive mind and astute political judgment. This combination enabled him to become the dominant voice on a Court that was not without other prominent members. Of the 1,006 individually written opinions produced by the Court during Marshall's tenure, the Chief Justice authored 519—and he was in the position of a dissenter in a constitutional matter only once in 1827. There would be dissents from Marshall's holdings (notably by Justice William Johnson). Still, the Chief Justice's ability to transform his vision of the Court into a standard to be followed by all of its members was remarkable. While Marshall was not alone on the Court, he was then as he still is today (in the words of James Bradley Thayer's 1901 essay on Marshall) "first with no one second."

The list of Marshall decisions that occupy a critical place in the development of America's constitutional system is extensive, including the classic quartet of: *Marbury v. Madison* (clearly establishing the principle of judicial review in 1803); *McCulloch v. Maryland* (emphasizing national supremacy and a broad perspective on congressional power in 1819); *Dartmouth College v. Woodward* (protecting property rights against state actions through the Constitution's contract clause in 1819); and *Gibbons v. Ogden* (providing a comprehensive view of interstate commerce and the primary role of the national government as the regulator of that activity in 1824).

In his portrait of Marshall for *The Justices of the United States*, Herbert Johnson refers to *McCulloch* as the Chief Justice's most significant decision (a perspective that is widely shared), while *Marbury* appropriately is labeled his "most artful in terms of political acumen" and *Gibbons* as his most "encyclopedic statement of the law." In addition to the classic quartet, there was

also *Barron v. Baltimore* (which limited the application of the Bill of Rights to the federal government in 1833), *Cohens v. Virginia* (reaffirming the Supreme Court's power to review judgments by state courts in 1821), *Fletcher v. Peck* (combining the contract clause with the theme of natural rights in 1810) and a host of lesser known but nevertheless important decisions.

This is not to say that Marshall or his judicial opinions are beyond criticism. The surface logic of *Marbury*, for example, covers a leap of faith regarding the role of the judiciary in governing, and its specific conclusion relative to the facts of the case (dicta aside) is unnecessary. Yet the power of Marshall's often repeated words—"It is emphatically the province and duty of the judicial department to say what the law is"—defines a core value in a system operating under rules, rather than whim. In *McCulloch*, the Chief Justice reminds us that ". . . courts are the mere instrument of the law, and can will nothing" and then proceeds to will an expansive view of national power. ("Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.") The seeming contradiction reconciled, quite properly, by Marshall's insistence that, "we must never forget it is a Constitution we are expounding." To expound is to interpret, and to perform that function the Court, by necessity, must occupy that grey area which is less than pure will, but more than a mechanical instrumentality of the law.

Only by understanding both the imperatives of judicial activism and the requirements of judicial restraint, could Marshall firmly establish the foundations of judicial power. In this sense, Marshall was a master blender, mixing together often conflicting principles with practical considerations—and presenting the results with compelling, if not always impeccable logic.

In *Marbury*, he hit Jefferson's weak flank while avoiding a no win and therefore potentially disastrous confrontation. Marshall not only picked his battles carefully, he also compre-

hended the importance of distinguishing law from politics if the rule of law were to survive. Right after *Marbury*, Marshall's Court would allow the Jeffersonians to eliminate the separate Court of Appeals judgeships created by the 1801 Judiciary Act. In 1805, Marshall, himself, was a very restrained defense witness during the Senate trial of impeached Justice Samuel Chase. The ardent Federalist Chase was not removed from the Court and another cautious step toward a truly independent judiciary was taken. Two years later, Marshall (as part of his circuit duties) presided over the treason trial of Aaron Burr in Richmond. Again, the Chief Justice exhibited skills so crucial in developing the supremacy of law doctrine. While exercising care in dealing with presidential claims of executive privilege, Marshall did not shy away from issuing rulings and excluding evidence that moved the jury toward its not guilty verdict. Jefferson's response, not surprisingly, was anger aimed at Marshall. Yet, in looking at the Burr trial, it is Marshall's standards linked to the rule of law—and not Jefferson's passion and pursuit of Burr—that are most compelling.

George Haskins, a coauthor of the second volume in the *History of the Supreme Court of the United States* series, points out that, "One reason for the success of the early Marshall Court in proclaiming a rule of law free from the intrusion of politics . . . was that by attending to its business in a lawyer-like fashion the Court began to win the respect of important people in the Republican camp." Marshall was thus the critical architect of the constitutional system not only because of his proclamation of principles, but also due to his abilities in putting those principles into practice. The result of his vision and his talents has been aptly summarized by the concluding comment found in an essay by Charles Curtis in *Supreme Court and Supreme Law*: "What we owe to Marshall is the opportunity he gave us of combining a reign of conscience with a republic."

This is not to deify Marshall. By contemporary standards, the fact that he sat on the *Marbury* case would raise more than a few eyebrows since it was the failure of Secretary of State John Marshall to insure the delivery of Marbury's commission that set the scene for the historic opinion. Even more questionable was Marshall's secretive publication, under pseudonyms, of third-person defenses of his *McCulloch* decision.

Later in his career, Marshall's holding in the Cherokee Nation case of *Worcester v. Georgia* (1832) produced the remark attributed to President Andrew Jackson by Horace Greeley, "John Marshall has made his decision. Let him enforce it." Whatever the ethical merits of the decision, this was the kind of direct confrontation Marshall traditionally tried to avoid. Here he failed. In fact, during his last years in the Court (1831-1835), Marshall's influence declined in general. He began anticipating retirement in 1828, but stayed on convinced that President Jackson (who represented more popular democratic, rather than republican principles) would undermine the grand edifice of the Court and the supremacy of law with Marshall's replacement. In 1831, Marshall underwent surgery in Philadelphia to remove kidney stones. While he apparently recovered from that problem, within three years he developed an enlarged liver that led to his death in 1835.

Marshall's fear that his vision of the rule of law would not survive was unfounded. For just as the Court had captured its Republican members (rather than the other way around) even after they had become the majority in 1811, so too would the firm foundation Marshall established continue to support the ongoing development of an independent judiciary after his passing. What he had created would not die with him.

Though Marshall was a man who enjoyed his leisure time and his annual vacations in the mountains of Virginia, he did manage a few added activities beyond his duties as Chief Justice. From 1805 to 1807, he published a five-volume biography of George Washington that enjoyed some commercial success. This aided Marshall in meeting payments on his Fairfax land speculation. Overall he was unhappy with his effort at biography and the practical problems encountered. Later, Marshall served as a member of the Committee of Vigilance to defend Richmond. In 1823, he became president of the Richmond auxiliary of the American Colonization Society (an organization that dealt with the slavery problem by encouraging a black return to and colonization of Africa). Like his

opposition to reforms for increased religious freedom and church-state separation in Virginia and his disinterest in broad universal suffrage, Marshall's ability to live with slavery is a fact that does not add to his reputation for greatness. In the context of the times, however, his were understandable sins. And to Marshall's credit, he did, at least, see the dangers contained within the practice of slavery for the South and the nation.

In 1829, he was elected to serve in the convention convened to revise the Virginia Constitution. A fellow delegate writing on that convention noted Marshall's talent for distilling "an argument down to its essence." Throughout his career, on and off the bench, this talent characterized Marshall's analysis of issues, and helped the cogent and compelling statements for which he was (and still is) known.

The scope of Marshall's abilities led Justice Oliver Wendell Holmes to say "that if American law were to be represented by a single figure, sceptic and worshipper alike would agree without dispute that the figure could only be but one alone, and that one John Marshall." In his extensive, four-volume biography of Marshall published during the second decade of the 20th century, Albert Beveridge found Marshall "so surpassingly great and good" that he almost seemed divorced from mankind. Yet, as Holmes pointed out, admiration for Marshall is not limited to his worshippers. For even the most sceptical of his critics have tended to concede that Marshall, during his tenure (one of the longest in Court history), earned the title of "the great Chief Justice."

Marshall may have lost the only case he argued before the Supreme Court as a lawyer (*Ware v. Hylton* in 1796), but he won a world after he joined that Court. He was a Federalist with an interest in the protection of private-property rights. Yet to concentrate on such labels is to simplify Marshall's contribution, and by so doing distort it beyond recognition. Marshall's vision would never have taken hold, if such simple labels truly captured its essence. John Randolph, who admired Marshall's mind much more than he did the Chief Justice's opinions, once said in frustration over Marshall's reasoning,

"wrong, all wrong, but no man in the United States can tell why or wherein." Such was the towering presence of this man who, through principles and practice, carved out a tradition that has endured for the ages. Little wonder, ex-president John Adams, called Marshall's appointment "The proudest act of his life."

- "John Marshall failed to uphold the ideals of the Federalists during his tenure as Chief Justice."
- Evaluate the validity of this quote.

- Write a reaction paragraph to Provizer's article. (You may use I + me)

#. ANSWER Qs ON SEPARATE SHEET OF PAPER