QUARRELS THAT HAVE SHAPED THE CONSTITUTION

Edited by John A. Garraty

SIXTEEN DISTINGUISHED HISTORIANS RE-CREATE THE HUMAN DRAMAS WHICH GAVE RISE TO EPOCHAL COURT DECISIONS

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Introduction

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." So begins Article III of the United States Constitution. This simple sentence provides the authorization for the entire structure of the federal judiciary. The Supreme Court, unique, prestigious, but controversial, is the crown of the system. Beyond question it is the best-known and most powerful judicial body in the world. Designed chiefly as a court to settle arguments between the states, matters involving foreign ambassadors, and other quarrels beyond the scope of state courts, it has from the time of John Marshall to that of Earl Warren added to its power by slow accretion, until today its influence affects every aspect of American life. Troops deploy, great corporations dissolve, little children march past jeering mobs to school because nine black-robed justices in Washington have discovered new meanings in an old and hallowed document.

The Constitution has endured because of its flexibility. The Founding Fathers knew better than to pin down their descendants too closely. Basic principles rather than petty details were what they sought to establish at the Philadelphia Convention in 1789. Even so, anticipating future growth, they provided (Article V) an orderly process for amending the Constitution, and, of course, this process has been frequently put to use.

In 1791 the ten amendments that make up the Bill of Rights were added, and over the years other important changes and additions have been made, such as the Thirteenth Amendment abolishing slavery, the Sixteenth giving Congress the right to levy taxes on incomes, the Nineteenth providing for women's suffrage, and the Twenty-second limiting Presidents to two terms in office.

The amendment process was wisely made complicated and time-consuming in order to discourage ill-considered changes and petty alterations of the nation's fundamental law. To allow for necessary minor adjustments, the Founding Fathers counted upon the Supreme Court, which, they reasoned, could interpret the Constitution and

thus clarify doubtful points when important cases came before it.

However, the Fathers really expected the Supreme Court to preserve, rather than to change, the Constitution. For partisan or other reasons, Congress might be tempted to exceed the powers granted it, but the Court, magisterial, conservative, and aloof, could be counted upon to cleave to first principles. Although nowhere does the Constitution state explicitly that the Court has the right to void unconstitutional laws, this power was clearly understood to exist. Alexander Hamilton put it most plainly in the 78th *Federalist*:

> The courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. . . . Whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

In practice it has not worked out entirely as the Constitution-makers expected. The Court has many times protected the Constitution against the illegal acts of Congress and the state legislatures, but it has also repeatedly altered the document itself by its decisions, modifying the fundamental frame of government more extensively in this manner than have all the amendments taken together. The very broadness and generality of the Constitution have permitted —indeed required—that the justices expand, explain, and elaborate upon its terse phraseology. The famous "necessary and proper" clause, the due process of law provision of the Fourteenth Amendment, and many other parts of the Constitution have been time and again explicated in decisions of immense importance. To try to understand the modern Constitution without a knowledge of these judicial landmarks would be like trying to comprehend Christianity without reading the Bible.

The elaboration of the Constitution by judicial interpretation has added greatly to its flexibility and durability, but it has left its evolution partly in the hands of chance. Amendments have always been carefully considered and debated before passage. The nature of the process, requiring, in addition to initial approval by either two-thirds of both houses of Congress or of two-thirds of the states, final ratification by three-quarters of the states, has made this inevitable. Only one amendment, the Eighteenth, prohibiting the manufacture and sale of alcoholic beverages, has ever been repealed,

and few of the others have been seriously criticized after ratification by thoughtful students of government.[1]

However, constitutional changes resulting from judicial interpretation have come about in far more casual and unplanned fashion. The Supreme Court can only explain what the Constitution says and thus reshape its meaning when specific cases are brought to it for settlement. The Constitution declares that Congress can "regulate Commerce . . . among the several States," but only when Aaron Ogden sued Thomas Gibbons because he was operating a ferry between New York and New Jersey did Chief Justice John Marshall have the opportunity to explain that this phrase meant every kind of "intercourse" and not merely the movement of goods across state lines. Even legislative acts plainly in violation of the Constitution remain in force until some actual suit comes before the courts for decision. If Congress should abolish trial by jury, for example, nothing could be done about it until someone convicted without a jury trial appealed to the judiciary to obtain his rights.

Thus, constitutional questions of tremendous significance often depend upon the actions of individuals totally unconcerned with broad legal issues. In the hypothetical case just mentioned, the man convicted without a jury trial might be a great reformer unjustly persecuted, but he might just as well be a tramp convicted of stealing a chicken. Constitutionally, it would not matter.

In the following pages, a number of historians examine the personal conflicts, many of them extremely petty, that have led the Supreme Court to hand down some of its most important decisions. In each instance, attention has been focused on the actual controversies and the men whose antagonisms gave the justices the opportunity to act. The cast of characters in these dramas include men of every sort: smugglers and black slaves, bankers and butchers, ferryboat captains, rebels, sweated workers, and great tycoons. Yet in every case the authors have also pointed out the significance of the controversy.

William Marbury wanted to get back his commission as a justice of the peace for the District of Columbia, snatched almost literally from his hand by Thomas Jefferson, but by making the effort he

[1] The Twenty-second Amendment (1951) is the major exception to this generalization.

established once and for all the right of the Supreme Court to declare acts of Congress unconstitutional. The trustees of Dartmouth College were trying to prevent New Hampshire from making the college a state university, but their suit resulted in the Court severely restricting the power of all the states to control corporations. When William McCulloch refused to pay a state tax he was hoping to save his bank from destruction, but in effect he was broadly expanding the power of the federal government vis-à-vis the states. Such trivial arguments begun by men concerned only with their own interests have often resulted in decisions that have shaken the foundations of American society. No doubt this is illogical and perhaps even against the national interest. Nevertheless, it is part of American history, and a particularly absorbing part because its basic elements are conflict, surprise, and human passions.

I wish to thank the authors of the following chapters for their cooperation and understanding in dealing with their subjects from the particular point of view required by the approach outlined above. With minor editing the pieces in this book by John A. Garraty, Richard N. Current, George Dangerfield, Bruce Catton, C. Peter Magrath, Alan F. Westin and C. Vann Woodward first appeared in *American Heritage,* The Magazine of History. *Heritage* editors Oliver Jensen and Robert L. Reynolds have been especially helpful both in working out the general scheme of this book and in editing some of the chapters. Margaret Butterfield of Harper & Row has also made many important editorial suggestions. My son, John A. Garraty, Jr., provided valuable assistance in preparing the manuscript for publication.

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January, 1964

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The Case of the Missing Commissions

I

BY JOHN A. GARRATY

(*Marbury* v. *Madison*, 1 Cranch 137)

Paradoxically, the first of our controversies and in some respects the most important rose from by far the least significant of causes and the meanest of motives. It is a tale of narrow partisanship, clashing ambitions, and a man seeking the humble office of justice of the peace for the District of Columbia.

It was the evening of March 3, 1801, his last day in office, and President John Adams was in a black and bitter mood. Assailed by his enemies, betrayed by some of his most trusted friends, he and his Federalist party had gone down to defeat the previous November before the forces of Thomas Jefferson. His world seemed to have crumbled about his doughty shoulders.

Conservatives of Adams' persuasion were deeply convinced that Thomas Jefferson was a dangerous radical. He would, they thought, in the name of individual liberty and states' rights, import the worst excesses of the French Revolution, undermine the very foundations of American society, and bring the proud edifice of the national government, so laboriously erected under Washington and Adams, tumbling to the ground. Jefferson was a "visionary," Chief Justice Oliver Ellsworth had said. With him as President, "there would be no national energy." Ardent believers in a powerful central government like Secretary of State John Marshall feared that Jefferson would "sap the fundamental principles of government." Others went so far as to call him a "howling atheist."

Adams himself was not quite so disturbed as some, but he was deeply troubled. "What course is it we steer?" he had written despairingly to an old friend after the election. "To what harbor are we bound?" Now on the morrow Jefferson was to be inaugurated,

and Adams was so disgruntled that he was unwilling to remain for the ceremonies, the first to be held in the new capital on the Potomac. At the moment, however, John Adams was still President of the United States, and not yet ready to abandon what he called "all virtuous exertion" in the pursuit of his duty. Sitting at his desk in the damp, drafty, still unfinished sandstone "palace" soon to be known as the White House, he was writing his name on official papers in his large, quavering hand.

The documents he was signing were mostly commissions formally appointing various staunch Federalists to positions in the national judiciary, but the President did not consider his actions routine. On the contrary: he believed he was saving the Republic itself. Jefferson was to be President and his Democratic Republicans would control Congress, but the courts, thank goodness, would be beyond his control. As soon as the extent of Jefferson's triumph was known, Adams had determined to make the judiciary a stronghold of Federalism. Responding enthusiastically to his request for expansion of the courts, the lame-duck Congress had established sixteen new circuit judgeships (and a host of marshals, attorneys, and clerks as well). It had also given Adams blanket authority to create as many justices of the peace for the new District of Columbia as he saw fit, and—to postpone the evil day when Jefferson would be able to put one of his sympathizers on the Supreme Court—it provided that when the next vacancy occurred it should not be filled, thus reducing the Court from six justices to five.[1]

In this same period between the election and Jefferson's inauguration, Chief Justice Ellsworth, who was old and feeble, had resigned, and Adams had replaced him with Secretary of State Marshall. John Marshall was primarily a soldier and politician; he knew relatively little of the law. But he had a powerful mind, and, as Adams reflected, his "reading of the science" was "fresh in his head." He was also but forty-five years of age, and vigorous. Clearly a long life lay ahead of him, and a more forceful opponent of Jeffersonian principles would have been hard to find.

Marshall had been confirmed by the Senate on January 27, and

[1] The Constitution says nothing about the number of justices on the Court; its size is left to Congress. Originally six, the membership was enlarged to seven in 1807, and to nine in 1837. Briefly during the Civil War the bench held ten; the number was set at seven again in 1867 and in 1869 returned to nine, where it has remained.

without resigning as Secretary of State he had begun at once to help Adams strengthen the judicial branch of the government. Perforce they had worked rapidly, for time was short. The new courts were authorized by Congress on February 13; within two weeks Adams had submitted a full slate of officials for confirmation by the Senate. The new justices of the peace for the District of Columbia were authorized on February 27; within three days Adams had submitted for confirmation the names of no less than forty-two justices for that sparsely populated region. The Federalist Senate had done its part nobly too, pushing through the necessary confirmations with great dispatch. Now, in the lamplight of his last night in Washington, John Adams was affixing his signature to the commissions appointing these "midnight justices" to office.

Working with his customary puritanical diligence, Adams completed his work by nine o'clock, and went off to bed for the last time as President of the United States, presumably with a clear conscience. The papers were carried to the State Department, where Secretary Marshall was to affix the Great Seal of the United States to each, and see to it that the documents were then dispatched to the new appointees. But Marshall, a Virginian with something of the Southerner's easygoing carelessness about detail, failed to complete this routine task. All the important new circuit judgeships were taken care of, and most of the other appointments as well. But in the bustle of last-minute arrangements, the commissions of the new District of Columbia justices of the peace went astray. As a result of this trivial slip-up, and entirely without anyone's having planned it, a fundamental principle of the Constitution—affecting the lives of countless millions of future Americans—was to be forever established. Because *Secretary of State* Marshall made his last mistake, *Chief Justice* Marshall was soon to make his first—and in some respects the greatest—of his decisions.

It is still not entirely clear what happened to the missing commissions on the night of March 3. To help with the rush of work, Adams had borrowed two State Department clerks, Jacob Wagner and Daniel Brent. Among his other tasks that fateful night, Brent prepared a list of the forty-two new justices and gave it to another clerk, who "filled up" the appropriate blank commissions. As fast as batches of these were made ready, Brent took them to Adams' office, where he turned them over to William Smith Shaw, the

President's private secretary. After they were signed, Brent brought them back to the State Department, where Marshall was supposed to attach the Great Seal. Evidently he did seal these documents, but he did not trouble to make sure that they were delivered to the appointees. As he later said: "I did not send out the commissions because I apprehended such . . . to be completed when signed & sealed." Actually, he admitted, he would have sent them out in any case "but for the extreme hurry of the time & the absence of Mr. Wagner who had been called on by the President to act as his private secretary."

March 4 dawned and Jefferson, who does not seem to have digested the significance of Adams' partisan appointments at this time, prepared to take the oath of office and deliver his brilliant inaugural address. His mood, as the speech indicated, was friendly and conciliatory. He even asked Chief Justice Marshall, who administered the inaugural oath, to stay on briefly as Secretary of State while the new administration was getting established.

That morning it would still have been possible to deliver the commissions. As a matter of fact, a few actually were delivered, although quite by chance. Marshall's brother James (whom Adams had just made Circuit Judge for the District of Columbia) was disturbed by rumors that there was going to be a riot in Alexandria in connection with the inaugural festivities. Feeling the need of some justices of the peace in case trouble developed, he went to the State Department and personally picked up a batch of the undelivered commissions. He signed a receipt for them, but "finding that he could not conveniently carry the whole," he returned several, crossing out the names of these from the receipt. Among the ones returned were those appointing William Harper and Robert Townshend Hooe. By failing to deliver these commissions, Judge James M. Marshall unknowingly enabled Harper and Hooe, obscure men, to win for themselves a small claim to legal immortality.

The new President was eager to mollify the Federalists, but when he realized the extent to which Adams had packed the judiciary with his "most ardent political enemies," he was justly indignant. Adams' behavior, he said at the time, was an "outrage on decency," and some years later, when passions had cooled a little, he wrote sorrowfully: "I can say with truth that one act of Mr. Adams' life, and only one, ever gave me a moment's personal displeasure. I did

consider his last appointments to office as personally unkind." When he discovered the J.P. commissions in the State Department, he decided at once not to allow them to be delivered.

James Madison, the new Secretary of State, was not yet in Washington. So Jefferson called in his Attorney General, a Massachusetts lawyer named Levi Lincoln, whom he had designated Acting Secretary. Giving Lincoln a new list of justices of the peace, he told him to put them "into a general commission" and notify the men of their selection.

In truth, Jefferson acted with remarkable forbearance. He reduced the number of justices to thirty, fifteen each for Washington and Alexandria Counties. But only seven of his appointees were new men; the rest he chose from among the forty-two names originally submitted by Adams. (One of Jefferson's choices was Thomas Corcoran, father of W. W. Corcoran, the banker and philanthropist who founded the Corcoran Gallery of Art.) Lincoln prepared the general commissions, one for each county, and notified the appointees. Then, almost certainly, he destroyed the original commissions signed by Adams.

For some time thereafter Jefferson did very little about the way Adams had packed the judiciary. Indeed, despite his much criticized remark that officeholders seldom die and never resign, he dismissed relatively few persons from the government service. For example, the State Department clerks, Wagner and Brent, were permitted to keep their jobs. The new President learned quickly how hard it was to institute basic changes in a going organization. "The great machine of society" could not easily be moved, he admitted, adding that it was impossible "to advance the notions of a whole people suddenly to ideal right." Soon some of his more impatient supporters, like John Randolph of Roanoke, were grumbling about the President's moderation.

But Jefferson was merely biding his time. Within a month of the inauguration he conferred with Madison at Monticello and made the basic decision to try to abolish the new system of circuit courts. Aside from removing the newly appointed marshals and attorneys, who served at the pleasure of the Chief Executive, little could be done until the new Congress met in December. Then, however, he struck. In his annual message he urged the "contemplation" by Congress of the Judiciary Act of 1801. To direct the lawmakers'

thinking, he submitted a statistical report showing how few cases the federal courts had been called upon to deal with since 1789. In January, 1802, a Repeal Bill was introduced; after long debate it passed early in March, thus abolishing the jobs of the new circuit judges.

Some of the deposed jurists petitioned Congress for "relief," but their plea was coldly rejected. Since these men had been appointed for life, the Federalists claimed that the Repeal Act was unconstitutional, but to prevent the Supreme Court from quickly so declaring, Congress passed another bill abolishing the June term of the Court and setting the second Monday of February, 1803, for its next session. By that time, the Jeffersonians reasoned, the old system would be dead beyond resurrection.

This powerful assault on the courts thoroughly alarmed the conservative Federalists; to them the foundations of stable government seemed threatened if the "independence" of the judiciary could be thus destroyed. No one was more disturbed than the new Chief Justice, John Marshall, nor was anyone better equipped by temperament and intellect to resist it. Headstrong but shrewd, contemptuous of detail and of abstractions but a powerful logician, he detested Jefferson, to whom he was distantly related, and the President fully returned his dislike.

In the developing conflict Marshall operated at a disadvantage that a modern Chief Justice would not have to face. The Supreme Court had none of the prestige and little of the accepted authority it now possesses. Few cases had come before it, and none of these were of any great importance. Before appointing Marshall, Adams had offered the chief justiceship to John Jay, the first man to hold the post, as an appointee of President Washington. Jay had resigned from the Court in 1795 to become Governor of New York. He refused the appointment, saying the Court lacked "energy, weight, and dignity." A prominent newspaper of the day referred to the chief justiceship, with considerable truth, as a "sinecure." One of the reasons Marshall had accepted the post was his belief that it would afford him ample leisure for writing the biography of his hero, George Washington. Indeed, in the grandiose plans for the new capital, no thought had been given to housing the Supreme Court, so that when Marshall took office in 1801 the judges had to

meet in the office of the Clerk of the Senate, a small room on the first floor of what is now the North Wing of the Capitol.

Nevertheless, Marshall struck out at every opportunity against the power and authority of the new President; but the opportunities were pitifully few. In one case, he refused to allow a Presidential message to be read into the record on the ground that this would bring the President into the Court in violation of the principle of separation of powers. In another, he ruled that Jefferson's action in a ship seizure case was illegal. But these were matters of small importance. When he tried to move more boldly, his colleagues would not sustain him. He was ready to declare the Judicial Repeal Act unconstitutional, but none of the deposed circuit court judges would bring a case to court. Marshall also tried to persuade his associates that it was unconstitutional for Supreme Court justices to ride the circuit, as they must again do since the lower courts had been abolished. But although they agreed with his legal reasoning, they refused to go along because, they said, years of acquiescence in the practice lent sanction to the old law requiring it. Thus frustrated, Marshall was eager for any chance to attack his enemy, and when a case that was to be known as *Marbury v. Madison* came before the Court in December, 1801, he took it up with gusto.

William Marbury, a forty-one-year-old Washingtonian, was one of the justices of the peace for the District of Columbia whose commissions Jefferson had held up. Originally from Annapolis, he had moved to Washington to work as an aide to the first Secretary of the Navy, Benjamin Stoddert. It was probably his service to this staunch Federalist that earned him the appointment by Adams. Together with one Dennis Ramsay and Messrs. Harper and Hooe, whose commissions James Marshall had *almost* delivered, Marbury was asking the Court to issue an order (a writ of mandamus) requiring Secretary of State Madison to hand over their "missing" commissions. Marshall willingly assumed jurisdiction and issued a rule calling upon Madison to show cause at the next term of the Supreme Court why such a writ should not be drawn. Here clearly was an opportunity to get at the President through one of his chief agents, to assert the authority of the Court over the executive branch of the government.

This small controversy quickly became a matter of great moment